

LORD CHEDWORTH.

TWO ACTIONS

BROUGHT BY

JOHN HOWE, Esq.

(Afterwards BARON CHEDWORTH,)

AGAINST

GEORGE LEWIS DIVE, Esq.

TRIED BY A SPECIAL JURY BEFORE

LORD MANSFIELD,

At the Assizes holden at Croydon, on Monday, Aug. 16, 1781.

As Published by Mr. Howe, at the Request of his Friends.

LONDON:

PRINTED BY AND FOR BARKER AND SON,
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no. 18(13)
Trials

LORD CHEDWORTH

TWO ACTIONS

BROUGHT BY

JOHN HOWE, Esq.

VS. GEORGE LEWIS DIVE, Esq.

AGAINST

GEORGE LEWIS DIVE, Esq.

TRIED BY A GRAND JURY BEFORE

LORD MANSFIELD

At the House of Commons, on Monday, Aug. 10, 1781.

As reported by Mr. Howe, at the request of the House.

LONDON:

PRINTED BY AND FOR BAKER AND SON,
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AS a partial and mutilated Account of these Trials appeared in the News-Papers, the Friends of Mr. **HOWE** have requested him to publish the whole of both Causes faithfully taken in Short-Hand; that the Publick may be enabled to judge of those Verdicts which have done Justice to his injured Character.

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THE SPECIAL JURY.

JOHN THORNTON, Esq.

SAMUEL SWABEY, Esq.

JAMES BOURDIEU, Esq.

JOHN RUSS, Esq.

ATWOOD WIECHSELL, Esq.

JAMES EVELYN, Esq.

WILLIAM HAMMOND, Esq.

RICHARD LADBROOKE, Esq.

ROBERT HUDSON, Esq.

SIR JOSEPH MAWBEE, Bart.

JAMES BULCOCK, Esq.

GEORGE SUMNER, Esq.

Mr. BOND.

MAY it please your Lordship and you Gentlemen of the Jury,

JOHN HOWE, Esq. is the Plaintiff, and
GEORGE LEWIS DIVE, Esq. is the Defendant.

The Declaration states, that the Defendant, upon the 24th of May last, at Epsom, in this County, assaulted, beat, and ill-treated, the Plaintiff, for which he lays his damage at 500*l*. The Defendant, has pleaded that he is not guilty, and thereupon the issue is joined.

Mr. PECKHAM.

Gentlemen of the Jury,—The pleadings have explained to you the nature of this action, which is for an assault : and I am ready to admit, that it has not been attended with great personal violence. You therefore will probably ask, why Mr. Howe has presumed to summon you here, to determine on a question in itself so plain, and so simple, that men of the most ordinary understanding would be fully

competent to decide? Permit me Gentlemen in answer to that question to observe, that the situation of the parties, and the consequence of your verdict, make this cause of such real importance, that it requires your most serious attention, and unbiaſſed judgment; for this is not a cause between two country fellows, who have got drunk and fought in an alehouse; it is not a dispute between two gamblers, one of whom has been whipped off the course for cheating the other; but it is a question between two Gentlemen, in every sense of the word Gentlemen.

Mr. Howe is a young man, of a liberal education, high rank, and great expectations.

Mr. Dive has been Officer, and is now a country Gentleman, blessed with an ample fortune and respectable character.

Those Gentlemen were both at the races at Epsom, and by accident were at the same time in the same stand. Mr. Howe, by accident, trod on the toe of Mr. Dive; an accident, for which politeness requires an apology, and which is all that Gentlemen demand. Mr. Howe, the moment he perceived what he had done, turned round to make that apology, intending to vary the phrase of it, according to the knowledge he had of the person whom he had thus innocently trodden on. I am sorry to say, Mr. Dive would not permit him to do it; but from the natural irritability of his temper, or from a too quick sense of honour which he had acquired by a military education, or from a sharp sense of pain, he did very precipitately strike Mr. Howe, and immediately repeated his blow. Mr. Howe saw that he could not cope with him in personal strength, and therefore prudently retired from the Defendant, who seemed to be actuated by no other influence than drunkenness or phrenzy. For this assault, thus circumstanced, Mr. Howe has dared in defiance of the

ridicule and scoffing of the unthinking, in defiance of modern honour, to apply to the laws of his country; and thinks himself bound, as a Christian and a citizen, to demand satisfaction of you: for notwithstanding Mr. Dive had struck him without reason, he did not wish to kill him without mercy: and Mr. Howe's good sense told him, that if Mr. Dive had taken an opportunity to beat him, it was not necessary that he should give him an opportunity to shoot him. I am well aware that if he had been an officer, he would have been broke by a Court Martial; even you and I, Gentlemen, in the moment of unthinking merriment might condemn Mr. Howe for his prudence; but neither you nor I can condemn him in a Court of Justice. I stand here as an Advocate doing my duty, and demand justice for my Client of you, who are bound by your duty to do justice to this injured gentleman and the insulted laws. In respect to the assault itself, the evidence will be decisive; for Mr. Dive has only said upon the record, that he is not guilty. The fact will be proved, and cannot be contraverted: the only question therefore for your inquiry will be, what damages you ought to give for such an injury.

Gentlemen, I do most seriously and solemnly conjure you to consider the important consequence of your Verdict. This is now a question between the laws of your country, and the laws of modern honour. You are publicly called on to determine, whether those laws framed by the wisdom of our ancestors, and ratified by the experience of ages, are to be protected; or whether we are in future to obey those laws which have originated in anger, in folly, and in fashion? You, as a Jury, must divest yourselves of all prejudice. I know you are susceptible of those opinions, which influence the minds of other men; but you must not bring those sentiments

into a Court of Justice ; you are bound by every religious and political tie to do your duty. Your verdict will determine, whether young men may fly to the laws of their country for protection and redress, or whether they must wash off the stain of a blow, by the blood of the person who has given it. If you give small damages, you tell Mr. Howe, that you disapprove of his conduct in applying to the laws; you declare that a Jury will give him no satisfaction; but that if he is injured, he must in defiance of the laws of God and man carve out his own satisfaction, by plunging his sword into the heart of the offender. Gentlemen, I could not say less on a question of this nature: more I do not mean to say, because I flatter myself, that the precedent which must this day be established by your verdict, will induce his Lordship to lend his experience to guide your judgment, that you may be enabled to give such damages, as at once will operate as a retribution to the injured, as a punishment to the delinquent, and as an example to the world.

The Reverend Mr. GREEN sworn.

Examined by Mr. ERSKINE.

Q. Was you, Sir, upon Epsom course the 24th of May last, at the races?

A. I was at the last Epsom races; I forget the day, Sir; it was the last spring Epsom races.

Q. Do you know the person of the Defendant, Mr. Dive?

A. Very well, Sir.

Q. Do you know the person of the Plaintiff, Mr. Howe?

A. I now do.

Q. Did you see those Gentlemen upon the course?

A. Not upon the course; upon the stand I did.

Q. At what time was that?

A. I think it was in the afternoon.

Q. Will you be so good as to state to my Lord and the Jury what you saw, whether any thing happened between these parties.

A. I was talking with Mr. Dive, when he all at once turned to Mr. Howe, and struck him with a stick he had in his hand.

Q. On a sudden?

A. On a sudden he gave him two or three severe blows.

Q. Did you see Mr. Howe assault Mr. Dive, or do any thing that could shew you the meaning of Mr. Dive's behaviour?

A. No, I did not.

Q. How near was you to Mr. Dive?

A. I believe at his elbow, or very near.

Q. Did you observe how near Mr. Howe was?

A. Not till he struck him.

Q. You did not hear Mr. Howe say any thing, did you?

A. No.

Q. Nor do any thing to him?

A. I did not.

Q. You saw him turn round, and strike Howe the Plaintiff?

A. I did.

Q. With a stick?

A. I did.

Q. What sort of blows?

A. They were very sharp blows for the instrument; but it was not a large stick.

Q. Was it repeated?

A. It was several times.

Q. Was it near the stairs?

A. It was not a large room; the steps must be within three or four yards.

Q. When Mr. Dive struck at Mr. Howe, did you hear Mr. Howe say any thing?

A. No, not a word: he said, Oh! or What! but nothing plain.

Q. He seemed surprised?

A. He seemed very much surprised.

Cross Examined by Mr. ROUS.

Q. Pray, Sir, did any language pass at this time?

A. Yes, Sir.

Q. What was it, Sir?

A. I suppose I must speak the words.

Q. Yes speak the whole.

A. *Damn the rascal! did you ever see such a fellow? The damn'd scoundrel! turn him out of the stand.*

Q. I would ask you this question: did Mr. Dive, from what passed, strike him merely from the accident of treading upon his toe; or did he impute to him any thing else?

A. Sir, he insinuated a great deal more.

Mr. PECKHAM.

Q. Was Mr. Howe present at that time?

A. I believe at that time, Sir: but it was not long; for, as soon as he could get away, he did; he retreated two or three steps instantly.

Q. While Mr. Howe was present, you say, some other cause of offence was insinuated?

A. I cannot say what the cause was; it appeared to me that there was something else besides.

Q. You, as a spectator, suspected there was some other cause subsisted between them?

A. I did.

Q. When that was done which you have expressed, did Mr. Howe demand any explanation?

A. He did not in my hearing.

Q. Did he fly?

A. He run, Sir.

Q. What was that cause of offence?

A. I asked Mr. Dive what was the matter.

Mr. Peckham.—Did you ask it while Mr. Howe was present?

A. I think it was not.

Mr. Rous.—You say while Mr. Howe was present, you understood some other cause of offence to be exprefs'd.

A. I did.

Q. What offence did you understand it was?

Mr. Peckham.---I must object to the question: we are to hear facts, not Mr. Green's opinion.

Q. What did Mr. Dive say while Mr. Howe was present?

A. *Damn the Scoundrel! or Rascal! Did you ever see such a fellow! God damn him! turn him out of the stand.*

Mr. Peckham.---My Lord, that is our case.

Mr. ROUS.

May it please your Lordship and Gentlemen of the Jury to favour me on the part of the Defendant. And I confess this is a cause arising out of a subject on which I should be happy if I could, consistently with my duty, observe the same silence which my learned friend's discretion has taught him to use.---

Two actions are brought: the assault is first tried; yet the whole cause of the offence has been studiously suppressed. A witness has been called, who could not speak with the precision the other witnesses could; which my learned friend, with his usual art has thought prudent to keep back: but I trust you see enough of the present case to induce you to weigh with attention the honour of the gentleman that you

have in your hands, whose character my learned friend has been instructed not to impeach.---In that he has acted with the same wisdom as in suppressing the real merits of the cause; because if he had attempted to impeach it, he would have revolted against the feelings, and opposed the understanding and knowledge of those whom I address. Gentlemen, my learned friend thinks to obtain satisfaction from you, by suppressing the real motives and the real cause of the action; and he hopes that men of honour will for a blow give such damages as may convey to the world their opinion upon another subject, or which, at least may be made use of by those who dare not meet the truth. I say, dare not meet the truth; because I have Mr. Howe's authority for saying that he has not only fled from the spot upon which the act was done, but he has fled from the means which his own understanding suggested, and which his own reason approved, which he proposed, and which Mr. Dive assented to, as the one that could vindicate his character from the vilest and foulest reproach. You will not take along with you what my learned friend stated, that it was only a tread upon the toe: there was a vast deal passed which impressed a thorough conviction upon the mind of Mr. Dive, from which he acted, and which you, as men of understanding and honour, must feel.—Gentlemen, though my learned friend has suppressed the cause of offence, you will be able sufficiently to collect it from the witnesses: he says, that a cause of offence was insinuated of a very different kind. A word expressive of the crime imputed certainly was not used in the presence of Mr. Howe; but the language was such, that Mr. Howe must have been in a phrenzy if he did not understand it: his conduct has marked that he did understand it; and it is in vain for him to affect a surprise, it is in vain for my learned friend to affect a

surprise of the real cause of this action. Mr. Dive certainly suspected from the previous conduct in various instances of Mr. Howe, that he meant to solicit his concurrence in an unnatural crime. The language proved by the witness, leaves not a doubt upon the mind of any man that hears me, that that was sufficiently understood at the time. Could it be a slight accidental offence that induced Mr. Dive to use the language, "Turn the fellow from the stand, " a scoundrel! a wretch! that ought not to be suffered to remain in the presence of gentlemen, or " of any man?" He instantly turns him out: Mr. Howe flies; Mr. Howe acknowledges he was not fit company for gentlemen. Yet you are now called upon to give damages that should express your approbation of Mr. Howe. When a man demands your verdict in vindication of his character, but instructs his advocate to suppress the fact, I find it my duty to call it forth and to inform you, that the next record is for words which charge the Plaintiff with the crime of Sodomy; and by charging him in the second person, it is impossible but that Mr. Howe must have known the charge at the time. His Counsel however is instructed to attempt the suppression of it. I shall therefore consider this action as it really is; an action brought to vindicate Mr. Howe's character from that imputation: and I shall demand of you what damages you ought to give under that impression. I should ill discharge my duty to my Client, and I should feel that he did not act the part of a man of honour, if he did attempt to conceal his conduct. Gentlemen, the injury my learned friend has opened to you is not an injury to the person; for he confesses that the blow was slight; that no mischief followed. From the state of the Advocate therefore you find that it is not an injury to the person you are to redress, but an injury to his character. What

that injury is, under all the circumstances, is the subject for your deliberation. I feel that it is impossible for you as men of honour and gentlemen, to suffer yourselves to form a judgment upon so delicate a subject, where the honour of a gentleman is at stake, without a full investigation, minute information, and perfect conviction upon your minds. Yet, whence is the cloud? Where is the difficulty? It is thrown upon the cause by the man who in the character of Plaintiff, demands your verdict, and demands it upon a ground which he instructs his advocate to suppress, and dares not state in a Court of Justice. I shall state therefore the real case. You are not to inquire into the conduct of a man who was actuated by any motives of malice or personal resentment; for it is confessed that the parties were strangers to each other. Mr. Howe being a gentleman, Mr. Dive must know that what he did was at the hazard of life: and nothing less than the strongest suspicions could direct the conduct that he has held. You will lay aside those cases, where wanton insult has been offered by men who were not necessary actors in the scene; Mr. Dive was a necessary actor; but he has been too hasty it seems. Mr. Dive was certainly a necessary actor in the scene; but, if his conduct had been such as my learned friend thinks he ought to have observed, what would have been the effect? Would you have had him wait till the eyes of others had caught the transaction? Till the opinion of those around had involved him in the suspicion? If, instead of damages against him, you could inflict the rack and tortures by your verdict, he would not risque the hazard of the suspicion to avoid it. But wealth and honours, it is said, have raised Mr. Howe to a rank that demands your attention! Rank and honours give pre-eminence—engage the attention

of others. The man of rank, conscious that he acts in the view of his fellow citizens, naturally assumes a superior propriety and dignity of conduct; he is ambitious of applause, and zealous to deserve it; until a desire of well-grounded fame becomes the ruling principle of his life; the settled habit of his soul. This is the temper which our law recognizes as hereditary in the peerage, when it regards the honour of a Peer as equivalent to the sanction of an oath.

But apply this doctrine to Mr. Howe, how does he stand? How does he appear? Self-degraded, self-debased, avowing himself a wretch who has no feeling for the opinion of others, who has no sense of honour, who has none of the elevated sentiments becoming his rank, yet claims from you a verdict founded upon that high rank.

Wealth too is urged; the fortune of Mr. Howe. — We disturb, I suppose, the voluptuous enjoyments which that fortune affords! — The fortune of Mr. Howe! Is that a ground for demanding damages? Such reasoning, by attempting to raise the individual, degrades humanity. Are men to be estimated like the beasts of the field? Is the value of man to be estimated like that of an ox by the pasture on which he feeds? Injuries like this must be judged from the feelings of Mr. Howe's mind; and then the slightest coin will be an abundant compensation for any injury he has sustained.

But it is my duty to warn you that you are not trying the conduct of Mr. Howe; that you are not forming an estimate of his character; you are not deciding whether Mr. Howe be innocent or guilty. If you were, his own conduct is sufficient to direct your decision.

You are not, however, forming a judgment upon him; but you are to pronounce whether the conduct

of Mr. Dive was criminal. This action is not founded upon an injury to property, that can be estimated or measured: but is of a vindictive nature, it is of the nature of a punishment; and the object of it is, to inflict a punishment upon Mr. Dive. What is the conduct you would have him observe? Would you have him stand patient after advances have been made, until the eyes of others caught him, until he was involved in the same suspicion, and till he was treated as Mr. Howe, driven from the society of mankind?

Mr. Peckham. I am extremely sorry to interrupt you; but it is not the practice to state things which you cannot, and which you will not attempt to prove.

Mr. Rous. Am I to take this action to be brought merely for the blows; and that it has no connection with the words?

Mr. Peckham. You know how I stated it.

Mr. Rous. I am not to take it from the Plaintiff's Counsel, but from the testimony of the witness; and I conceive from the testimony of that witness, that Mr. Dive expressed, at the time, an offence of a very different nature; that Mr. Howe did not inquire into the nature of that offence, nor speak to any body, but fled. It is not possible that he should not know the cause: he did know the cause before the bringing of this action; for he applied to the party for redress, as appears by his letters.

Mr. Peckham. You will produce the letters, if you open them.

Mr. Mingay. He will open what he likes: if it is not proved, it stands for nothing.

Mr. Peckham. I say, if he does open them, it is but fair to give them in evidence.

Lord Mansfield. You know nothing of what he will prove till it is opened. I think there is nothing in the objection: he has a right to open his cause

as he pleases ; but if he opens that which he cannot prove, a much inferior Jury to this would reject the whole of it.——What is the next cause ?

Mr. Mingay. The next is an action for calling him a B-gg-r-r.

Lord Mansfield. Is it to be tried by the same Jury ?

Mr. Mingay. Yes, my Lord.

Lord Mansfield. Then you may try both actions together, if it is agreed to try them by the same Jury.

Mr. Mingay. It is in writing agreed, that the same Jury shall try both actions ; and it is for the honour of Mr. Howe that it should be so.

Mr. Rous. If I am not to enter into this subject, the case is very short.

Lord Mansfield. I don't preclude you : go on according to your own judgment. If you open what you cannot prove, you are very wrong ; for you ought not to catch the Jury in one cause by opening another ; but, if it is the same Jury, it may vary the case.

Mr. Rous. Gentlemen, I feel myself not a little embarrassed ; because I apprehended the real question Mr. Howe meant to have your judgment on, was to vindicate his character. The ground upon which I should have submitted, that no damages ought to be given against my Client, would have been, that you are not to try the conduct of Mr. Howe, but the conduct of Mr. Dive, upon whom there is no imputation. You can now consider this only as a trivial assault, and merely an assault : therefore I shall reserve what I have to say for the other cause, and shall only submit to you, that where the Plaintiff himself suppresses the real cause upon which you are brought here, where he proves merely a blow, and that he fled upon the imputation of an offence very different from that insinuated by his Counsel, and

when no explanation has ensued, you will not, you cannot express an opinion, especially as all light and all evidence are with-held from you, that shall condemn Mr. Dive, or affect his honour. I trust therefore your verdict will be for nominal damages in this cause; and that you will call upon them to enter upon the other, which is the real question between the parties.

Lord Mansfield. Have you any evidence?

Mr. Rous. No, my Lord; I shall call no evidence.

Lord Mansfield. Then there is no colour for all your opening about any cause whatsoever. The next thing is, Whether the Counsel for the Plaintiff chuse (the Jury being the same) to take both causes together; or do they chuse to have a verdict first for the assault, and then to go into the other cause? It is a matter of judgment and discretion. I cannot do it without consent: you cannot have both causes before you, before you determine one, but by consent of both the parties.

Mr. Peckham. I must beg leave to mention, that, though in this action we are entitled to recover, yet in the other we may fail in our proof; we must not therefore be bound by the event of the next cause.

Lord Mansfield. Though they suspend their verdict upon one, till they give their verdict on the other, they will give their verdict just as they ought to do in bot .

The Jury were then re-sworn in the next cause.

Mr. BOND.

MAY it please your Lordship and you Gentlemen of the Jury, the declaration states, that the Plaintiff John Howe, Esq. was a man of good credit and reputation; and upon the 24th of May last, the Defendant, George Lewis Dive, publicly, in the presence of many persons, said of him, that "he attempted to b-gg-r me." There are other words of

the same import, laid different ways. The damages are laid at 5000*l.* to which the Defendant has said he is not guilty : thereupon the issue is joined.

Mr. PECKHAM.

Gentlemen, I have so firm a reliance on your justice and good sense, that I am not alarmed at the censure which has been thrown both on Mr. Howe and myself. And I am certain that you will not suffer any imputations to affect him for error in judgment in me.

It has been imputed to Mr. Howe, that he has brought two actions — He has brought two actions, because Mr. Dive has added injury to insult, by a cruel attack on his character, as an apology for a wanton assault on his person.

It has been imputed to me, that I brought forward the action for the assault, yet cautiously suppressed the evidence which might have tended to exculpate Mr. Dive, or at least to mitigate the damages.

I confess, Gentlemen; my conduct was actuated by very different motives, and I shall be indeed unfortunate if it does not meet with your approbation. I considered that Mr. Dive had without provocation assaulted Mr. Howe. I was conscious that an action between two gentlemen for a blow was uncommon. I considered the verdict was of real importance to society. I pressed for large damages, that it might be a precedent to follow, or an example to avoid, if any young man should meet with the same insult. But I did not think myself justified as an Advocate even to allude to this action while we were trying the assault. It would have been uncandid to mislead your judgment by inflaming your resentment against Mr. Dive, by stating the double injury he had done Mr. Howe. I knew the attack upon the Plaintiff's cha-

rafter was not the question you ought then to determine; and it was out of tendernefs to Mr. Dive, that I did not mention it, becaufe I was not willing to enhance the damage more than they ought to be for the affault.

But it is faid, that I fuppreffed, and Mr. Howe dared not tell the truth. The affertion was rather inadvertent, as this caufe was to be tried the moment after the other was finifhed. Did not Mr. Howe dare to meet the truth? Does he wifh to fuppreff that which gave rife to the affault, when he comes boldly into a Court of Juftice, and defies Mr. Dive to juftify the words he has fpoken?

Gentlemen, I will now refer as little to what paffed in the laft action, as I then cautiously avoided faying any thing relative to this: but it is neceffary for me to ftate, that after Mr. Dive had beat Mr. Howe out of the ftand, Mr. Dive, in answer to fome gentlemen who naturally enquired into, and who were amazed at his extraordinary conduct, told him that Mr. Howe had made an attempt on him, in the words which my learned friend has opened, but which I do not wifh to repeat. You will naturally enquire what could lead him fo very precipitately to make fo dreadful a charge againft a gentleman? Mr. Dive could not do it wantonly; becaufe he is too worthy a man to afperfe fo cruelly any individual: he could not do it maliciously, for Mr. Howe was a perfect ft ranger. I fuppose he did it from miftake: but whatever was the reafon, or whatever operated upon the mind of Mr. Dive, the charge being once made was equally fatal to Mr. Howe. I am forry to mention, that about that time the crime imputed to him was become the fubject of general converfation, I mention it with reluctance; but I do it for the fake of introducing this obfervation, that, when a fubject is frequently talked of, it makes a greater

impression on the imagination than it otherwise would. When a man's suspicion becomes awake, then trifles light as air are confirmation strong. The vigilance of Mr. Dive's suspicions arising from frequently conversing on the subject, probably induced him inadvertently and precipitately to conclude that Mr. Howe must intend that, which in the cooler moment of reflection Mr. Dive's better judgment would revolt at —Gentlemen, this is a question of character—a question of honour—a question of what is more dear to a man than life. I kept it back in the last action, because it was irrelative; but I will now bring every thing forward, and let Mr. Howe stand or fall as he is innocent or guilty.

I have heard, and I will state the reasons that induced Mr. Dive to make the charge upon Mr. Howe. I will even call a witness for the sole purpose of relating Mr. Dive's own story, while the impression was fresh upon his mind. His apology was, that he had seen Mr. Howe upon the course in the morning; that he had met him upon another part of the course in the afternoon; that necessity impelled him, and decency induced to retire to a corner below the stand; that Mr. Howe retired to the same spot; that he returned to the stand, and soon after perceived Mr. Howe close by him, and that he trod upon his toe. This is all the ground that Mr. Dive had to found this cruel imputation upon. Let me ask, whether these circumstances, thus stated, (and they cannot be more strongly stated) are sufficient to induce Mr. Dive, or any man living, to throw such an imputation upon a perfect stranger. They met twice upon the race-ground. Might not the same accident that carried Mr. Dive to a particular spot, have carried Mr. Howe there likewise? Without an accident, might not the same reason draw the one as well as the other, to the same place? When he withdrew

from the stand, he did it from necessity. Mr. Dive does not mean to say, but that his conduct was perfectly innocent. Charity should have induced him to suppose Mr. Howe's was equally so. But he trod upon his toe.—Is it possible for a man to tread upon another's toe without being guilty of Sodomy?

If such trifling accidents are to justify such charges, if such causes are supposed to produce such effects, no man's character is safe. Where is the criminality arising from Howe's conduct in the stand, jostled by a number of people, who were more attentive to the race than to each other? Is it very wonderful that one man should run against another, or press against another, or tread upon another's toe? Would it not be much more extraordinary, that Mr. Howe, without any knowledge of Mr. Dive, without any acquaintance with him, in a public stand, before so many witnesses, should make an attempt upon his chastity? You cannot suppose him to be so weak, if so infamous, as to make an attempt upon a person whose appearance shewed him to be a gentleman, and whose appearance must shew that he had no predilection for so detestable a crime.

Gentlemen, Mr. Howe stayed that day at the races; he appeared publicly at the coffee-house; he went the next morning to the races, and from thence to Ipswich; but he had not the most distant idea or intimation of a charge of this nature, till he had been some days at his country seat in Suffolk, when he was told by a very respectable friend of mine, captain Stilead, who went purposely to acquaint him with the report, that he was very sorry to hear the world spoke rather freely of him, and it was necessary for him to vindicate his character. Mr. Howe thought they only spoke freely of his courage, because he was not anxious to seek for that gentleman-like satisfaction which many men would have de-

manded : but he was infinitely astonished when captain Stinstead mentioned the report which is the cause of this action. Mr. Howe immediately went to London, and wrote to Mr. Dive. I will not suppress evidence ; but those letters which my learned friend wished to open in the last cause, yet would not produce, I myself will read to you. He proposed to refer the investigation of his conduct, and Mr. Dive's charge, to some gentlemen of character. This was acceded to in Mr. Dive's answer, but was afterwards rejected by Mr. Howe, because he says, " As I am well assured that you are not at all inclined to retract your ill-grounded suspicions, but persist in asserting the justice of the charge you have brought against me, I think it absolutely necessary the matter should undergo, in a Court of Judicature, an investigation more solemn than that I at first proposed."

A word will explain to you the reason of Mr. Howe's altering his conduct. Mr. Smith, who, I believe, saw the blows given, and heard the words spoken, told Mr. Howe, that he had had a conversation with a brother of Mr. Dive, and that he understood from him that Mr. Dive persisted in what he said, and did not intend to make any acknowledgement or apology whatever. Mr. Howe must have been worse than a madman to have submitted to a reference, when Mr. Dive himself had asserted, that, be the reference what it would, he should still persist in the charge he had made ; for, by the reference, Mr. Howe would have been precluded from a more public vindication of his character. What has been the conduct of this *self-debased man* ? I could have wished my learned friend would have spared the reflection till the charge had been proved. I have thrown no reflection upon Mr. Dive ; I scorn it—because I believe he was

actuated by error, not malice. I wish, in this instance, my learned friend had done me the honour to follow my example, and to have supposed Mr. Howe innocent till such time as it was proved that he was guilty. But what has been done by this self-degraded man, who suppresses evidence, and is afraid to meet his accuser? He brings an action against his accuser: he says, sir, you have injured me—you have robbed me of my honour—my peace of mind is destroyed—I am outcast among the people—I dare to call upon you, in the face of the public, for having thus traduced me—I call upon you to justify what you have said, or give me back my character unspotted, as you found it.

Has Mr. Dive justified what he has said? Has he not had an opportunity to enquire? Was it not his bounden duty, either to make good his charge, or publicly to acknowledge that he was wrong? Should not he have enquired the character of Mr. Howe, and traced him from his infancy, even up to manhood, at school, at the university, in London, in the country?—Should he not have made enquiry of every man acquainted with Mr. Howe?—Has he made that enquiry of any man?—It would have been becoming and honourable for Mr. Dive to have pursued that conduct. It would be presuming, perhaps, in me to chalk out a line of conduct for him; but I will tell you what I would have done: I would have enquired his character among his school fellows—I would have traced his conduct through the university—I would have pursued my enquiry in Suffolk—I would have searched all his haunts in London—I would have sifted all his friends and acquaintances, his neighbours and his servants; and, if I had found any imputation upon his character, I would have branded him as a villain—I would have justified the charge in a court of justice; and, though it should not

turn out to be a complete justification in law, it would be sufficient to convince the world that I had not wantonly, wickedly, inadvertently, or precipitately accused him; and I would then have trusted to a jury for the damages they would, under those circumstances have given against me. But, on the other hand, if I had found that Mr. Howe's character was unblemished, and his conduct above reproach, I would have gone boldly to him, and said, Sir, I have insulted you—I have cruelly injured you—I have blasted your fair fame—I cannot make you a compensation—I confess I was too hasty—I have since examined your character—I find it will not support my suspicions—I will make you the satisfaction of a gentleman, if you require it; but my death will be no atonement:—Malice will insinuate you have killed your accuser to conceal your guilt—I will publicly declare, for Justice demands it of me, that I have cruelly injured you—that it proceeded not from malice, but mistake—that, on a strict enquiry into your character, I find my suspicion ill-founded—and I am infinitely more happy in acknowledging my mistake, than I should have been in the confirmation of the charge.

This is the conduct I should have pursued; and I should have gloried in my humiliation as the most honourable act of my life. But, what is the conduct of Mr. Dive? He has not deigned to follow that line of conduct, but he has barely contented himself with denying that he spoke the words. When I say this, I do not mean to throw any imputation upon Mr. Dive; for, I am sure, in private company, or even here, in court, (if I could be at liberty to ask him) he would not deny that he had spoke those words, but would still persist in saying, “I spoke the words because I believed the fact.” His legal advisers, however, have put this issue only upon re-

cord; and now the defence of Mr. Dive is not a justification of his conduct, for he does not attempt to justify the words, but endeavours to screen himself from damages, by asserting that he did not speak such words.

Is this the conduct that ought to be pursued? Is it intended that we should be bound down by the rigid forms of law, as you must be in actions for words—and, if there is only a word changed or omitted, or if the recollection of the witness should not fully come up to the words as stated in the declaration, is it now to be contended that Mr. Howe is to be burthened with the enormous guilt of this accusation, and that Mr. Dive should stand acquitted, if the witnesses should not prove the identical words? I trust Mr. Dive is, and his counsel, I hope, are, far more candid, and will say—If you really prove that I have spoken words which conveyed that meaning to those who heard me, I am above taking shelter under the words themselves. Let me stand or fall upon the truth of the imputation I have thrown upon you; for I will not rely on your not being able to prove the words as stated in your declaration.—That is the conduct Mr. Dive ought to have pursued. Though it has been said that Mr. Howe dares not meet the truth, yet Mr. Dive is now at liberty, though he is precluded by the record from a justification: for I will wave that advantage; and I dare him to bring any one man living, who shall insinuate, or even whisper, any thing against the character of Mr. Howe.

Gentlemen, if Mr. Dive cannot throw any imputation upon the character of Mr. Howe, consider the nature of the crime imputed to him, and estimate your damages accordingly. Mr. Howe is charged with a crime of so detestable a nature, that

the fairest character must receive some stain from it. Is there a man whom I now address, clear as your characters deservedly stand in the county in which you live—is there I say a man among you, that could support the shock of such an accusation, when made by a gentleman known and respected as Mr. Dive? Bad men will affect to credit the report, for the purpose of having the world believe there are worse men than themselves; weak men will believe it, for they will believe any thing; and even good men might be inclined to believe it, since they will not conceive it possible that any man should throw such an imputation upon another without the strongest proof of guilt. Is there such proof in this cause? Ought not Mr. Howe's damages to be great, when the circumstances are of so trivial a nature, that, taken separately, they amount to nothing; connect them together—they are undeserving of notice? If it is possible that you should be inclined to give small damages, from that moment you devote Mr. Howe to irremediable destruction. I vow to God, I would sooner be the most miserable felon that is now to be tried in the other court, than be that injured, innocent, young man! In one case, death would put an early period to his misery and his shame: but Mr. Howe is not yet in the prime of life, and must look forward, not with pleasure, to a good old age; not with hope, to the honours he is to receive, but with detestation, horror, and dismay, to that life which God may be pleased to curse him with. How will he dare to walk into the house of honour, covered with shame! How will he bear the opprobrium of being a disgrace to manhood, and the outcast of society! Conscious innocence is a wretched comforter. In my opinion, the consciousness of innocence renders a man's sufferings more insupportable. What

torture so dreadful as to be looked upon with horror, and avoided as a pestilence, for a crime he has never committed!

I conjure you, gentlemen, to give ample damages; not for the purpose of enriching Mr Howe, but for the purpose of vindicating his character, which knew no stain till this wild accusation was made by Mr. Dive. You shall have the most honourable testimony of his character, from those who have known him from his infancy—who have respected him, and ever will: but, if you find small damages, he must be cut off from the society of those worthy friends; for, however great their respect—however certain of his innocence, no man would dare to hazard his character by being in his company, after twelve gentleman, upon their oaths, had said that he deserves the imputation by the smallness of the damages they have given.

EVIDENCE *for the* PLAINTIFF.

WILLIAM SMITH, Esq. *sworn.*

Examined by Mr. ERSKINE.

Q. Were you, sir, at the last Epfom races?

A. I was, sir.

Q. When was it?

A. It was in May.

Q. Do you know Mr. Dive, sir?

A. Perfectly well, sir.

Q. Did you see him at the races?

A. I did, sir.

Q. Did you hear Mr. Dive say any thing of the plaintiff, Mr. Howe?

A. Yes, sir.

Q. Will you be so good, sir, as to repeat the words to my Lord, and speak what you heard Mr. Dive say of Mr. Howe?

A. Upon my going upon the leads of the stand, I found the people there in a great deal of confusion. As soon as I came in, Mr. Dive saw me, and said—"Oh, here is Smith: he will tell us who that damn'd odd-looking fellow is." After describing Mr. Howe, I said, "I know him perfectly well; he is as inoffensive a man as lives in the world, I believe; and, if he has offended you, I believe it must be by mistake. He is Mr. Howe, and will be lord Chedworth, if he survives the present lord. Upon which Dive said, "Damn him! if he was Lord Chedworth, or Lord Devil, he shall not behave ill to me." I cannot tell what his exact words were, but they implied a full charge of a sodomitical purpose; but I cannot recollect the words.

Mr. Peckham. What were the words, to the best of your recollection?

A. I rather think, he said, "He wanted to b-gg-r me:" I am inclined to think so; but, whether they were the words or not, the words he used implied the full sense of that.

Mr. Erskine. To the best of your remembrance, he made use of the words you last mentioned?

A. I believe he did.

Q. You swear you believe he said those words?

A. I swear I believe he said them, but I cannot be positive.

Q. But you are positive what he said amounted to it?

A. It implied a full charge.

Q. But you rather believe those were his expressions?

A. I rather think they were.

Q. Do you remember speaking to Mr. Howe upon the subject of an accommodation, or an explanation of the matter?

A. Yes, sir; Mr. Howe came to my house in Beaufort Buildings, with Mr. White, Mr. Howe's uncle, and told me they proposed having a meeting with Mr. Dive. I said, I rather think Mr. Dive will scoff at it: I think you will not get him to an accommodation. They then told me they proposed to have two or three friends to meet Mr. Dive with Mr. Howe, and asked if I would attend. I said I was too inconsiderable myself to attend in the affair; but, if they could get two gentlemen of consequence to attend, I should wish to be of the party, in hopes of bringing things to an accommodation or explanation. They then proposed sir Charles Bunbury and sir Charles Davers. I do not know whether this is evidence or not.

Mr. Peckham. We wish to hear the whole.

Mr. Smith. Sir Charles Bunbury came to me, I believe, that very day, and told me that Mr. Howe and Mr. White had been with him upon the same occasion; that he had consented to go; and that sir Charles Davers was to be the other. I was still apprehensive Mr. Dive would not consent; and I went in search of Mr. Dive: I found his brother in George's coffee-house, and told him what was intended by Mr. Howe, and his uncle, Mr. White. He said, "Smith, my brother will come into no sort of concession, or any thing of that sort; but will say, if he was mistaken, he is very sorry Mr. Howe was so unfortunate as to get a licking." Then I met sir John Dyer, equerry to the Prince of Wales: I told him our intentions, but he said he thought it would be useless. I went to sir Charles Bunbury, and told him our meeting would be needless upon such an affair, as I found Mr. Dive would not retract in the

least, or make any kind of concession. Both sir Charles Bunbury and sir Charles Davers, when I told them this, were very much disinclined to the meeting, in consequence of which it was broken off. I then called upon Mr. White, and told him we declined being of the party.

Mr. Erskine. You said Mr. Dive said to you, Who is this fellow? Upon which you mentioned to Mr. Dive, he was a very inoffensive man. I take it for granted, upon your saying that, you had reason for saying so, that you had some acquaintance with Mr. Howe?

A. Sir, I have not been intimately acquainted with him, but I have known him some years: for this last year I have been rather intimate with him, and have introduced him to a very respectable society of gentlemen, Dr. Frampton, for instance, and others, when I found Mr. Howe in public, where he was but little known.

Cross Examination.

Mr. Rous. What kind of man is he in character? Mr. Dive, I mean.

A. Oh! I believe the most peaceable man living.

Q. You say that you then told Mr. Dive who Mr. Howe was?

A. Yes.

Q. How happened it you knew Mr. Howe had been there?

A. Sir, upon going into the stand, I met Mr. Howe upon the stairs, who seemed particularly pale; I thought he was ill: I said something about the race to him, some trifling thing about the race; to which he made me no answer, but passed by me without saying a word.

Q. When you had learned what had passed above stairs, did not you think it strange Mr. Howe should not make you any answer?

A. I did observe it, I believe, to Mr. Dive, when he laid this charge against Mr. Howe. I think I said, This accounts for his passing me in that strange manner.

Q. Were any motives for declining the meeting communicated to Mr. Dive?

A. Not as I know of.

Q. *Lord Mansfield.* There was very fair reason for the meeting being declined, given by sir John Dyer, and the brother, and all of them.

Mr. Rous. I think that it will be the best way for the plaintiff to end the whole business now by a reference.

Mr. Peckham. We must vindicate Mr. Howe's character, which cannot be done without a verdict with sufficient damages.

Lord Mansfield. The only way of doing it is to hear Mr. Dive's story,

Mr. Peckham.—which you shall hear from a clergyman, whom I shall expressly call for that purpose.

Lord Mansfield. Is there any indictment?

Mr. Rous. There is not : but it should be understood, that, before he had notice of the action, it was impossible to consult upon it ; when we we had notice of the action, we met at Mr. Dunning's chambers, and he advised not to indict until the action was tried, as it would look like resentment.

Lord Mansfield. I would have said thus : that the suspicions are such as no man knows but myself ; therefore I cannot justify in an action of words : I cannot give evidence of it in an action of battery ; and there is no way of doing it but by indictment, *valeat quantum valere potest.*

Mr. Rous. He was advised to abide the event of

an action : that being decided first, he could not be suspected of swearing to avoid the consequences : if he has been directed wrong, it was our fault ; and, my ground of defence to the jury will be, that the cause cannot come in issue here.

Lord Mansfield. Go on with the examination.

Mr. CORNELIUS LANDER *sworn.*

Examined by Mr. BOND.

Q. You was at Epfom races, I believe, upon the 23d of last May ?

A. I was.

Q. Did you hear Mr. Dive use any scandalous words there ?

A. I did.

Q. Repeat them.

A. They were both strangers to me. One gentleman assaulted the other very much. With that I said to the gentleman, " You have beat him enough ! What has he done ? " I then clapped hold of him by the arm " Has he picked your pocket ? " He said, " No ; but he has trod upon my toe ; and, God damn him, he takes me for an Onslow ! "

Q. Did he say any thing after that ?

A. Not as I heard ; nothing more than that ; that was all I heard.

Q. This was at the time Mr. Howe first went out of the room, sir ?

A. Yes, sir ; I never saw Mr. Howe afterwards.

Q. Did you hear no further conversation ?

A. No, I did not. That is all I know of the matter. I did not know one person upon the stand. I believe nobody knew me.

E

Cross Examination.

Mr. Mingay. Did you know Mr. Dive?

A. No, I did not know either party; neither Mr. Howe, nor Mr. Dive.

Q. Did you afterwards have the person of Mr. Howe described to you, so that you might know he was the person?

A. No, I never saw him after, from that day to this.

Q. How many days was this after the races began?

A. This was the Thursday: I was only there one day.

Q. You don't know whether he was any more at the races?

A. No, I do not.

Q. Did you see Mr. Dive at the races next day?

A. I did not go.

Reverend Mr. GREEN called again.

Mr. Peckham. Be so obliging as to tell his lordship and the jury what words passed between Mr. Dive and any other persons, after Mr. Howe had left the stand, and Mr. Smith came up; *for I now will make Mr. Dive's own story evidence.*

A. After Mr. Dive had done, and left off beating Mr. Howe. I said, "For God's sake! what is the matter? What has he done to you?" And he described what he had done to him in this manner—But I must first tell your Lordship, that the leads are above a room at a stand at Epsom; and below, there is another room, where they make coffee, and give refreshments that may be wanted. Close to that is a little corner where people make water—

“ I went,” said Mr. Dive, “ down to the room under the leads, and I found Mr. Howe at my elbow, looking in a very odd and particular manner up in my face : I thought he was an odd fellow. I went from that room, which is under the leads, into the corner, to make water ; and I found him there when I thought him a still odder fellow. However, I went into the first room : he descended too from the leads.”

Q. What room had he gone to ?

A. The first room. I went on to the leads, from from that room, up to the leads again.

Mr. Rous. Did you say Mr. Howe followed him ?

A. I have not been asked for that.

Mr. Mingay. He understands he is only to give evidence upon one side. *Mr. Rous* asked, whether *Mr. Dive* said *Mr. Howe* followed him down stairs ? He says, “ I don’t give any account of that, because I am not asked.”

Lord Mansfield. You must give an account of all you heard *Dive* say.

Mr. Green. I am now giving an account of all *Dive* said. “ I went up to the leads again : *Mr. Howe* was still at my elbow ; he looked me in the face, and stroked my foot.” It was then that I heard *Mr. Dive* say, *You damn’d scoundrel ! this is too much ; you mistake your man.* And then he struck him.

Lord Mansfield. Then he called him a scoundrel, and struck him ?

A. And struck him, and said, *You mistake your man.*

Mr. Peckham. Did *Mr. Dive* say any thing of *Mr. Howe* afterwards ?

A. He only said he was a damn’d scoundrel.

Q. Did he say any thing else ?

A. I did not hear him.

Q. Do you know Mr. Howe?

A. I never saw him till the day this affray happened, and to-day in the court.

Q. Have you made any enquiry as to Mr. Howe's character?

A. I have, Sir, and it was a very good one.

Mr. Mingay. I don't mean to object to the evidence as to character, because half the county of Suffolk are attending; but it takes up time unnecessarily.

Mr. Peckham. Too much time cannot be engrossed when such a young man's character is at stake: therefore, Mr. Green, I shall again presume to ask you, whether you have made any enquiry respecting the character of Mr. Howe? whether you have been strict in that enquiry, and what was the result of it?

A. I have made enquiries of people whom I knew, that knew him at Oxford and in Suffolk, who all gave him the best of characters; but some of them said he was an odd fox, an odd kind of creature.

Q. But no men made any imputation of this sort?

A. No.

Q. Did Mr. Dive describe what passed in the room under the leads?

A. Exactly as I have told you; and when he had done making water, he turned round, and Mr. Howe was at his elbow.

Q. Did he say any thing of what farther passed when he was making water?

A. No; only the odd manner that he was at his elbow in all these places.

The Honourable Mr. FOLEY, sworn.

Mr. Erskine. Was you at the course at Epsom?

A. I was.

Q. Did you see Mr. Dive there?

A. I don't know him.

Q. You don't know his person?

A. I do not.

Q. Did you see one person beating another there upon the course?

A. I did.

Q. Upon the stand?

A. Upon the stand. I saw one person beating another.

Q. Did you know who it was?

A. I did not till afterwards.

Q. But now do you think you should know the person that had been beat there?

A. No, I should not; but I have been shewn the person since I have been here.

Q. That calls to your memory the person?

A. I should not have known him. I was on the outside; and the crowd got round, and I avoided it as much as possible.

Q. Did you observe any thing else;

A. I did not; I went away as soon as possibly I could.

Captain HEAD sworn.

Mr. Bond. You belong to the Horse Guards?

A. Yes.

Q. You have been lately at the University?

A. I was at the University at the same time Mr. Howe was.

Q. What character had he there?

A. I was not so particularly acquainted with him as a great number of others that were there; but every body thought him a very worthy man, a very inoffensive man, but a man who was singular and negligent in his dress.

Q. There was no imputation of any guilt whatsoever upon him of this kind ?

A. Never, I am very sure.—I was intimate with ten or twelve people who were intimate with him ; and if any thing of that kind had happened, they would have known it.

Q. You have no reason to believe he would be guilty of any such thing ?

A. Certainly not.

Reverend Mr. CLARK sworn.

Mr. Peckham. I believe you was at Oxford at the same time with Mr. Howe ?

A. I was, Sir.

Q. Did you live on terms of intimacy with him ?

A. Yes, Sir, I was very intimate with him.

Q. After the answer you have given me, I must beg pardon for the question I am now going to ask ; What was his character ?

A. I believe, as good a character as any man can have : and I believe him to have as rooted an abhorrence of the crime charged to him, as any man can.

Q. You say this from a perfect knowledge of him ?

A. I think so, Sir.

Q. What sort of a man was he at Oxford in other respects ?

A. Mr. Howe had some singularities ; he was very studious, reserved, and reclusive.

Q. Not given to vice of any kind ?

A. By no means.

Captain HALLUM sworn.

Mr. Peckham. You are a Captain in the Navy, I believe, Sir ?

A. I am.

Q. Do you know Mr. Howe, the Plaintiff in this action?

A. Very well.

Q. How long have you been acquainted with him?

A. About eleven or twelve years.

Q. Where have you been with him?

A. At Ipswich most part of the time.

Q. You live there?

A. I live there; it is my native place.

Q. Has Mr. Howe lived there since he left the University?

A. He has lived there about six years: he used to come up at the vacation, to see his mother. I had but little acquaintance with him, except for these last six years.

Q. What has been his character at Ipswich?

A. In general, exceeding good.

Q. Do you think that character was justified by your knowledge of him?

A. I certainly know it is.

Q. And you believe it to be very just?

A. Very just indeed.

Q. Did you ever hear any imputation of any criminal kind cast upon him?

A. No, never at all.

Mr. PRENTICE *sworn.*

Mr. Peckham. You are a gentleman that lives in Suffolk?

A. Yes, Sir, I am.

Q. Are you acquainted with Mr. Howe?

A. I live, Sir, almost next door to him.

Q. How long have you known him?

A. About two years and a half, or three years.

Q. What is the character he bears in Suffolk?

A. He has as good and respectable a character as any man in the town and neighbourhood.

Q. Did you ever hear the most distant imputation thrown upon him of the sort you have now heard?

A. Not the least in the world. I always esteemed him as an acquaintance, and I value him as a friend.

Q. Is he a good deal in company, or studious?

A. He is very studious, he is a very reserved man: There is scarce a day in the week but I see him: I have been very happy in his acquaintance; and I never saw any thing like what is imputed to him: I believe it be as foreign to him as can be.

Mr. Peckham. Now read the letters.

No. I.

Letter written by the Plaintiff to the Defendant on the 7th of June.

“ S I R,

“ Being informed that you are the person who
 “ assaulted me at Epsom Races on Thursday the
 “ 24th of May last, and that you are the author
 “ of a most cruel report by which you justified that
 “ assault, I take the earliest opportunity of address-
 “ ing you, in hopes of obtaining some reparation for
 “ this very injurious treatment. I remained igno-
 “ rant of this charge till last Sunday evening, when
 “ I was informed of it in the Park at Ipswich, by
 “ a Gentleman then just come from London. This
 “ ignorance will not appear very wonderful when
 “ you recollect, that at the time of committing the
 “ outrage, you assigned no such reason for it within
 “ my hearing. It was therefore with no less sur-
 “ prise than horror that I heard of it. My con-
 “ science being perfectly clear of the imputed crime,
 “ my reason tells me, that the most efficacious me-

“ thod of rescuing my character from infamy would
 “ be by a dispassionate examination of the affair,
 “ which I earnestly desire should take place before
 “ any set of gentlemen that you shall propose; and
 “ the more severe and public the test is, the more
 “ willingly I shall abide it. If you should resist
 “ this application, I must then have recourse to such
 “ other means as shall be left me, as it is impossible
 “ for me willingly to acquiesce, as I have hitherto
 “ unknowingly, under so grievous and ill-founded
 “ an aspersiion; for I trust that you yourself, upon
 “ recollection, will think you have been too hasty,
 “ and have drawn conclusions which were by no
 “ means warranted by the circumstances which you
 “ hold out as the ground of your opinion. In ex-
 “ pectation of full satisfaction from your justice and
 “ cooler reflexion, I remain,

“ SIR,

“ Your obedient Servant,

“ JOHN HOWE.”

No. II.

The Defendant's Answer.

“ SIR,

“ I have this moment received your letter, and
 “ am obliged to go down to Leatherhead this eve;
 “ but any day you will fix for an investigation into
 “ this affair, by your appointing two gentlemen, and
 “ I as many, will be at any place you think proper,
 “ letting me know before at Leatherhead; and
 “ I am,

“ Your humble Servant,

“ GEORGE LEWIS DIVE.”

No. III.

Letter written by the Plaintiff 10th of June.

“ SIR,

“ Being well assured, since I received your favour
 “ of the 8th instant, that you are not at all in-
 “ clined to retract your ill-grounded suspicions,
 “ but persist in asserting the justice of the charge
 “ you have brought against me; I think it abso-
 “ lutely necessary that the matter should undergo,
 “ in a Court of Judicature, an investigation more
 “ public and solemn than that which I at first pro-
 “ posed. I am,

“ SIR,

“ Your humble Servant,

“ JOHN HOWE.”

Mr. ROUS.

May it please your Lordship, and you gentlemen of the Jury, to favour me on the part of the Defendant: and before I enter upon the case that has been proved to you in evidence, I feel myself under a necessity of exculpating my Client for pursuing a conduct which I advised, and exculpating myself for the language I have held. It is imputed to my Client, that he has not preferred an indictment.

Lord Mansfield. We have the whole of the case now before us; and I am clear that I know the reason why an indictment was not brought. I am very glad the Jury will now have the whole matter before them—I never heard evidence more accurately given than by Mr. Green.

Mr. Rous. I must still take the blame upon myself—all the blame, if any is due, for not having pre-

ferred the indictment.—The advice was first given by Mr. Dunning, a man as eminent in the profession, of as great knowledge, and of as accurate judgment, as any man existing in this country.—I am proud to say I approved that advice. I did not think it became Mr. Dive, after a proposal made to refer the whole to indifferent gentlemen, after his acceptance of that proposal, when Mr. Howe declined the mode of investigation proposed by himself, and resorted to an action—I did not think it became Mr. Dive to give his evidence before a Grand Jury on so delicate a subject, while a subject might arise that his testimony could possibly be influenced by his interest in a cause depending. Whether this opinion be just, or not, Mr. Dive's conduct was correctly proper:—he would not allow himself to form a judgment; but in a matter affecting the honour and character of another, in which himself was a party, chose rather to act under the direction of others, who advised according to the best of their understandings, than follow perhaps his own inclination.

Before these Affizes there was no possible means of preferring an indictment. The transaction passed in May, and upon the 8th of June the letter was written, containing an offer to refer the whole to indifferent gentlemen; an offer which was instantly accepted. Within two days a second letter was received from Mr. Howe, in which he declared, that he should seek redress in a Court of Justice. When the cause was depending, instead of endeavouring to preoccupy your minds in the character of Grand Jurymen by evidence which in your present capacity you could not receive, he advised with those, who from their habits of life, and from experience in this kind of business, he thought best able to direct his judgment. Whether they have erred or not, I care not, because I trust your justice will not impute as

a crime to Mr. Dive what in truth was our act. As far as concerns myself, I feel no apprehension, whatever authority may deliver a contrary opinion. I do not suspect my reputation will suffer by concurring in opinion with Mr. Dunning. Under the shelter of his name I shall repose in perfect security. But, whatever judgment you may form of me, surely Mr. Dive would have acted a very indecent, unbecoming part, if he had set up his own opinion, and acted upon his own judgment, against such advice. You will therefore dismiss this imputation out of the case.

Another part of the case I trust you will likewise dismiss. We have heard Witnesses respecting the character of Mr. Howe. Whatever that character might have been, men who have been since proved guilty have born the like. I do not however wish you wholly to reject the testimony you have heard, in the opinion you may, individually form of Mr. Howe's character; but your justice will induce you always to recollect, Mr. Dive was a perfect stranger to Mr. Howe; that, as he knew nothing of Mr. Howe's character, he could not therefore act upon that character. What is imputed to him, was done in the instant, under the impressions of a moment. You will therefore try Mr. Dive, who is a Defendant, not by the character Mr. Howe bears in the opinion of his friends, but upon the circumstances of the case, and the conduct Mr. Dive has himself observed. You will likewise carry in your minds, that though Mr. Howe might possibly have just reason, from the opinion and advice of others, to decline the reference first proposed by himself (in which, in my own judgment, he is greatly mistaken) yet Mr. Dive acceded to it as the only part becoming a man of honour. He could not go against the sentiments of his own mind, he could not debase his own character; he could not vilify himself: he could

not make an acknowledgment which would have been condemned by the feelings of his own breast: but he was willing to do that which every man of honour ought to do; if it were a mistake, to leave it to the judgment of indifferent persons, to let them decide. Their opinion would be a protection to Mr. Howe's character; but Mr. Dive recanting his opinion without conviction, could have been none; it could only have degraded himself from the rank of a man of honour.

I am reproached likewise for the language I have held, as if Mr. Howe was self-degraded and self-debased. I own, in a question that is not a question of property, in which it is impossible to measure the damages a man has sustained, but where the whole depends upon feeling and sentiment, it is fair and just to observe that the feelings of the man who applies in that action for redress, have not been such as to call loudly for your attention. The observation was that of an Advocate—you will judge of its weight. But it is supposed by my learned friend, that by this observation I meant to encourage duelling, in a Court of Justice.—The professed Duellist is an odious character; and I agree with my learned friend, that a manly resistance to the opinion of the world, may upon some occasions justly place a man upon higher ground, in the estimation of others, than following the dictates of false honour, and calling another to an account. This was not the effect of my argument. The cause did not require an apology for duelling. If it did, I should not want a very high authority for my support.—*Fecerunt alii & multi & boni*, was the language of a very able and upright magistrate, passing sentence upon a criminal convicted of a challenge. Had Mr. Howe yielded to the indignant feelings of a man of honour who cannot bear reproach, who would

prefer death and even a violation of the laws to the slightest dishonour; the sentiment is so congenial to every generous breast, he could scarcely have been condemned. This, however, was not my reasoning. I did not propose Mr. Howe should have recourse to the sword for the vindication of his character: but I said, there is inherent in every generous spirit an indignant feeling, at the imputation of disgrace, that disdains all bounds that shews in an instant he is incapable of submitting to dishonour, and prefers death to ignominy; and that this is the character which alone deserves attention, when the cause respects the feelings of a man of honour, and when you are called upon as a Court of Honour to decide. This question is not a question of property. Mr. Howe's fortune, his expectation, his rank, his situation in life are such, that if he wished for pecuniary damages, he would degrade himself, he would deserve the epithet I bestowed of self-degraded, and self-debased. He can only seek for reparation of his honour, for vindication of his fame, from the opinion of twelve gentlemen of the county. But how does he seek this redress? My learned friend says, that he puts upon record the charge, he dares Mr. Dive to a justification, he calls upon him to prove the truth of what he has declared. But, gentlemen, can you be so deceived? Can you be cheated of your understandings? Will you suffer your judgments to be so insulted, as to consider this as a mode of vindication, when he precludes the only possible evidence respecting the fact? Mr. Dive is the only person, who from the nature of the transaction could relate the circumstances. Mr. Dive is made a party upon the record: he would therefore have been very ill-advised, if, upon a loose opinion abroad, he had ventured to have brought that as a question to trial, though Mr. Howe had at Ipswich,

(under the first impression) dropped an expression which would have strengthened suspicion. Capt. Stisted is not called by them, because I know what he must say; that Mr. Howe had dropped an expression which confirmed the suspicion, and proved that when he pretended to have no knowledge of the imputation, first communicated (as we are now told) by captain Stisted, he must have had a previous knowledge from the question he asked. But Mr. Dive could not bring forward this evidence; he could not attempt a justification, because he had no witnesses, because the nature of the transaction prevented all possibility of his having any other testimony than his own. You will not therefore venture to decide, where the only possible evidence is withheld, by the conduct of that person, who in the character of Plaintiff demands your verdict; who requires you to hold forth to the county your opinion of the transaction, yet will not allow your judgment to be informed; for I trust you have a stronger sense of honour, than to rest your verdict upon the loose recollection of a witness relating what Mr. Dive is supposed to have said. The true question which you are to try is, whether Mr. Dive has acted a becoming part: and I trust there is no man who thinks, that when these attempts are frequent, when they have been made in our theatres, and in public places, in the presence of numbers, of all ranks and denominations, that any man, much less a gentleman, is to stand patient, and bear that which will involve him in the same imputation. Should he wait until the eyes of others caught the transaction, he would be deemed equally criminal: the spectators would feel the same indignation against him; they would act towards him as they acted towards the other; he would become the outcast of society, if he did not instantly resent it. You will therefore take along

with you what is admitted, and what is proved. It is admitted by my learned friend, that Mr. Dive acted not from malice,—not from resentment—not from wanton or idle levity.—His was not the conduct of a man who might be silent, or might speak, who chose his part and took upon himself lightly to traduce the character of another. Mr. Dive was an involuntary party, compelled to act in the instant. Under the impression of the moment he acted, and with a view to that impression your judgment must be formed.

Now, gentlemen, Mr. Green relates the circumstances as well as he recollects them from the declaration of Mr. Dive: but you will observe, that throughout, the expressions of Mr. Dive cover the particular circumstances, as became a man of feeling for his nature. It is impossible for a man, who has the feeling of a man, when it was not necessary, where he was not called upon by his duty to the community, where he did not appear as a witness—it was impossible for any man to relate minutely the circumstances; and therefore Mr. Dive, as his conversation is related by Mr. Green, uses this language: “ I went into the room, I found Mr. Howe at my
“ elbow; I went to make water, I found Mr. Howe
“ at my elbow.” He does not relate minutely what there passed. And it would be unbecoming me to do it, because the party who alone could prove it, being Mr. Dive, it is impossible for me to produce the evidence; but Mr. Dive covers, under the general language of a *very odd behaviour*, what was a gross violation of decency and decorum. At that time Mr. Dive viewed Mr. Howe, as his dress bespoke him, a man not of rank, not of estimation, not of fortune, not of education. It was possible that, however gross, however beastly, however vulgar, his conduct might be, Mr. Dive, judging of Mr. Howe

from his then appearance, thought it possible, that it might only proceed from an ignorance or contempt of decorum and the decencies of life:—but when Mr. Howe is represented as a man of character, as a man of letters, as a man of liberal mind, as one raised above the vulgar by the pursuits of his life, as a man of family, keeping the best company, early habituated to and falling mechanically into an observance of the decencies of behaviour;—what Mr. Dive observed and spoke of as a vulgar breach of decorum, becomes too monstrous to admit of explanation. He followed Mr. Dive into the room above; he was then at his elbow: a singular accident, that the same man in a croud should be first at his elbow in the first room, then behaving indecently below, then following him up into the room above, still at his elbow. When Mr. Dive, desirous of avoiding him, desirous of avoiding the disagreeable necessity to which he was at last reduced, moved into the room above, went to the leads, Mr. Howe is again at his elbow. Perfectly unacquainted with each other, no conversation between them, nothing that could draw them together, no common acquaintance upon the spot: for it appears in evidence, Mr. Dive did not know him, there was not a person who knew him in the room, and it was the accidental coming of Mr. Smith afterwards that informed them who he was. It is beyond all calculation this should happen by accident. It exceeds all the power of arithmetic to calculate the chances, that Mr. Howe should be so often, in such various places, at the elbow of Mr. Dive by accident. Mr. Green dropped one fact. —Mr. Dive, still desirous of avoiding the disagreeable necessity to which at last he was driven, removed to another part of the leads: he then found Mr. Howe again at his elbow. What was forbearance, what was moderation, what was a

desire to avoid involving his own name in a transaction that fixes disgrace upon all who are named (and Mr. Dive is a severe sufferer in mind, and I had almost said in character, but you know him too well to permit his character to suffer) seemed no longer possible. Yet Mr. Dive still avoided Mr. Howe — What then passed? As it should seem, for I speak only of seeming: I don't mean you should condemn Mr. Howe, but acquit Mr. Dive.—What would any body have thought? and how could Mr. Dive act? Mr. Dive then finds not a tread upon the toe, as my learned friend described it, not that which might accidentally happen in a room from jostling of the company, (though still extraordinary, five successive times, Mr. Howe should be so near) yet at this time he finds him stroking his foot, not treading, but stroking, and repeatedly stroking his foot—Why, Gentlemen, I profess I feel myself incapable to argue upon the subject; but in speaking of what we know not, I suppose some reasoning from analogy may be admitted from what we do know. Suppose the case of a woman who is followed from spot to spot, while in company, often looked in the face by the same person; is it possible that hands or feet can be used, without her knowing what is meant?—The human countenance is moreover so expressive of the passions, that, though one cannot describe it by language, it is impossible to mistake. In the instant under that impression, with that picture before him, Mr. Dive resents the insult—If it were possible he should mistake, it was surely a pardonable error; an error which the subsequent conduct of Mr. Howe, must rivet in his mind.—Mr. Dive, as became him, resented it in the instant.—Good God! I am reasoning upon this subject! Nature has not left to reason the vindication of her rights. She has implanted an instinctive horror of the crime, which acts inde-

pendently of thought—which reason was not intended to controul.—Under this instinctive feeling Mr. Dive acted, and you must adopt the impression to do justice to his conduct.

Mr. Dive, then feeling the insult, makes the imputation from the expression that he uses: “Do you take me for an Onslow!” Was that an expression that Mr. Howe could misunderstand, when the transaction alluded to was so notorious?

Lord Mansfield. It is not said in evidence that Mr. Howe was present; it was after he was gone. It was no part of the conversation between them.

Mr. Rous. Gentlemen, Mr. Howe’s mind was not in a state to feel resentment in the instant. Instead of saying, Mr. Dive, are you mad? are you in a phrenzy? instead of applying for an explanation—What is his conduct? He fled—fled in an instant; at the same time that expressions were used to him, that, if not incapable of being misunderstood, were certainly very capable of being understood: *You damn’d scoundrel!—this is too much; you mistake your man.* Mr. Howe meets Mr. Smith upon the stairs—Smith addresses him as an acquaintance. Was not he at that time recovered? Could not he go back for an explanation, under the protection of his friend, Mr. Smith? What had he to fear? If Mr. Dive was a madman, and struck him without provocation, there was no disgrace in being struck by a mad-man. If Mr. Dive was a gentleman, as he had reason to believe from his appearance, and the company he kept, the error was easily corrected. This done, Mr. Dive would have been the first man to have acknowledged the error, and to have redressed the injury as far as in his power; but Mr. Howe does not go back, though meeting Mr. Smith he must have known his name could no longer be concealed; which is the alleged reason of his flight. Mr. Smith, under the

impression of the moment, says, “ Then that accounts for his looking pale and making no answer, and his strange manner of passing me.” The impression upon Mr. Smith’s mind, and the impression upon the bye-standers, from Mr. Howe’s conduct was, it had the appearance of guilt. Mr. Dive, then, under this impression, confirmed by the concurring sentiments of those to whom it was related upon the spot, expressed his opinion of Mr. Howe’s conduct: and that is the offence which you are to try.—Now do you mean by your verdict to tell mankind, that under the circumstances stated at this time, when the crime goes abroad and stalks in open day-light; when the suspicion is so rife, that my learned friend, whose honour, whose character, whose high spirit, are as universally known as his person, has fears of suspicion, and would sooner have his pocket picked than put his hands down, lest accidentally he should touch the breeches of another: will not you allow Mr. Dive alarmed and agitated by the same apprehension to vindicate his own character, to free himself from reproach, to express the resentment natural to an honest mind, to express his abhorrence of the crime, when a moment’s further patience might have involved him in the same imputation with Mr. Howe? Whether Mr. Howe be guilty, or innocent, God only knows. I know that I do not form my opinion from the judgment of Mr. Dive. I am not in the habit of taking opinions from the judgments of others; but I think, that if Mr. Howe had been guilty, the conduct he would have observed, is the conduct we have seen.

Mr. Howe retires to the country. When he is informed of the report which prevailed, his language is this: “ Being informed that you are the person
“ who assaulted me at Epsom, on Thursday the 24th
“ of May last, and that you are the author of a most

“cruel report, by which you justify that assault; I
 “take the earliest opportunity of addressing you, in
 “hopes of obtaining some satisfaction for this inju-
 “rious treatment.”—What is the satisfaction he re-
 quires? Feeling that, if Mr. Dive had erred, it was
 an error incident to the weakness of humanity, not
 to be punished as a crime, or followed vindictively
 in a Court of Justice—Mr. Howe, feeling this, sug-
 gests his own remedy: “My conscience being per-
 “fectly clear from the imputed crime, my reason
 “tells me the most efficacious method of rescuing
 “my character from the injury, will be a dispassi-
 “onate enquiry into the affair.”—Here, then, is
 the satisfaction which he himself demands as the
 most efficacious to vindicate his character. It is not
 a judgment hastily taken up, but formed upon the
 deliberate advice of his friends. The letter is dated
 in June, near a month after the transaction, a con-
 siderable time after he heard of the imputation at
 Ipswich; for this letter is written on his return to
 London. Deliberately, and with the advice of
 friends, he selects this mode, as the most efficacious
 to vindicate his character.

I will tell you why this judgment was right. If
 the cause be tried here, the first difficulty that occurs
 is, that those who alone can relate the circumstances
 to which your judgment is to be applied, which are
 to be explained by evidence, and done away by cha-
 racter, are parties, and as parties cannot be heard,
 —It was more proper therefore that the investigation
 should be by indifferent gentlemen, chosen by them-
 selves, not bound by the technical rules of legal
 evidence. Those Gentlemen could have taken the
 whole of the circumstances: they could not have
 been surprised, as we sometimes are at *Nisi Prius*, by
 unexpected evidence: they could have adjourned
 from time to time: they could have minutely inves-

tigated the subject: they could examine the character and conduct of the party through life. A judgment thus deliberately formed would have been a shield to protect Mr. Howe from the disgrace that he has incurred; but the disgrace which he has incurred cannot be done away by that which he has since demanded, an acknowledgment from Mr. Dive. What would any of you, or any man of honour, think of Mr. Dive, if under the strong impression he had at the time, confirmed by the circumstances which afterwards happened, he could have been base or abject enough, in the situation in which he stands, to have abdicated his own honour, and disgraced himself by acknowledging that he had declared a falsehood? Unless he admitted himself to have spoken a falsehood, an acknowledgment of error could have no effect. If he had insisted his judgment formed at the time was strong, it would be no relief to the character of Mr. Howe. Had he said, that subsequent information had corrected that judgment, such a declaration would have been imputed to other motives, and disgraced the Defendant, but have given no protection to the character of the Plaintiff. Mr. Dive thought the opinion of persons formed in the manner I have described, would have been a vindication of him for making any acknowledgment which their judgment might enjoin. He behaved throughout as became a gentleman, who had acted under the impression of a moment *with perfect sincerity*, who saw no reason to disavow his opinion, because he had no subsequent knowledge, no information, no means to correct his judgment: yet he deemed, that, as a man of honour, it became him to submit to the tribunal that Mr. Howe had erected; to their sentence, whatever it might be, he was willing to submit.

Mr. Howe proposed any persons Mr. Dive would name: Mr. Dive refers the nomination of half the judges to Mr. Howe. Here likewise Mr. Dive acted consistently with the feelings of a man of honour, and I vow, if I thought, in a case like this, he was capable of departing from that character, I would renounce his cause. Under the sanction of such an opinion, Mr. Dive could, consistently with the feelings of a man of honour, make every satisfaction and acknowledgment that the judgment of those indifferent persons dictated. As he had committed his cause to their determination, he had submitted to make them his Court of Honour: under their authority, and by their direction, he would have been perfectly justified, in the opinion of the world, to have made Mr. Howe every apology, had they pronounced him mistaken, and deemed an apology proper. Why did Mr. Howe decline it? Causes have been suggested, which, being unknowne to Mr. Dive, apply not to his conduct.

But I offer it at this instant, as the most efficacious, as the only possible mode of vindicating the character of Mr. Howe—and I will give up my client, if like Mr. Howe he departs from that which his sense of honour and judgment once approved; if he refuses to adopt that tribunal, and submit his cause to the decision of those who have been proposed. Some men of high rank and character, and severe honour, who have been named by Mr. Howe, shall be the judges on the occasion. Mr. Dive will follow their directions: he will abdicate his own judgment.

Gentlemen, you are not to consider whether Mr. Howe had any reason for withdrawing this reference, but whether Mr. Dive has acted improperly. The reason given is, that there was some conversation with the brother, what led them to believe Mr. Dive persisted in his opinion. Mr. Dive assures me, and I

have no reason to doubt the assurance of such a man as you know Mr. Dive to be, that he had no communication with his brother: he could not have had any communication at the time alluded to, because that was the time at which they had agreed to submit the whole reference: and, while that was depending it was impossible Mr. Dive could communicate any sentiments that had the appearance of prejudging the case. The truth is, Mr. Dive never has mentioned his opinion to his brother, while the reference was thought of.

Gentlemen, you are called upon by my learned friend to vindicate the character of Mr. Howe. It is a singular mode of vindication, when men are to judge in the dark, when they are not to investigate the subject by the examination of the only parties who can give them information; and yet this is the vindication which Mr. Howe requires and expects at your hands. Your verdict decides nothing; your verdict cannot vindicate Mr. Howe in the opinion of mankind. But you have in your hands the honour of Mr. Dive; and I trust that it is a sacred deposit, which gentlemen of your character, rank, and figure in the county, will not violate. You may condemn Mr. Dive, may pronounce upon his conduct without evidence, and preclude, as far as your authority can operate, the future investigation of this subject in a Court of Justice; but you cannot vindicate the character of Mr. Howe. You can establish nothing in his favour, because you must decide without knowledge.—Gentlemen, I trust your verdict will be such as will not condemn a man for protecting himself from reproach, will not punish a man for yielding to those instinctive feelings which the God of nature has given to vindicate the rights of nature—feelings—which he who condemns, libels his Creator, and degrades his species.

EARL of MANSFIELD.

Gentlemen of the Jury, You attend on a question that must be very disagreeable both to you and to me; and it has become more entangled by the great latitude that has been taken on both sides at the bar; for a great many things were opened, a great many things were stated, and a great many things have been gone into, that you must forget as fast as you can, for you must try the cause upon the evidence.

Gentlemen, there are two causes before you, and I am very glad they are both before you at the same time. I think it was judicious in the Counsel to agree that the verdicts in each of them should be at the same time determined: they are absolutely of course. The first is for the assault and battery. There is no justification pleaded; and yet, if the fact was true, that the Plaintiff made an assault with an intent to commit Sodomy, it might have been pleaded, and would have been a justification for his repelling that assault: but there is no justification pleaded. Well; but, supposing it could have been pleaded, yet it might have been given in mitigation of damages; but there is no evidence offered of any such assault, even in mitigation of damages, therefore, as it stands before you upon evidence here is a gross assault without any provocation, without any defence, without a word of evidence in mitigation of damages. But a vast deal was thrown out, and the world has heard a great deal of what passed at Epsom. I did therefore, in tenderness to both parties, and to get at the real truth if possible, wish to have both causes tried before the first verdict was

given. I could have given that short direction upon the action for the assault; but there was an application to have the other cause tried, to shew the colour of the matter, and to have your opinion as to who was in the wrong, for the purpose of increasing damages upon the one side, and diminishing them upon the other. There was no evidence for diminishing; none at all; and, as I said before, no justification, no extenuation of damages—no step taken towards a prosecution—nothing done; and I had a great mind the other action should come on, that you might see the whole of it. The other action is an action for words; and the words that are proved by the witness are very strong words indeed; for they are these; “He wanted to b-gg-r me.” Now, if that is true, he might have justified. That is not justified: but still an address is made to you, desiring you to consider, as if he really had attempted to commit Sodomy with him; and then his saying the truth, or striking him for it, would not have intitled the Plaintiff to any damages. We had no evidence of what it was that induced him to think he wanted to commit Sodomy with him—no evidence at all of it: and under that impression, I own I thought you was under vast difficulty how to get a proper line of conduct; and I wished there could have been a way of putting it, so that the evidence of the Defendant might be received: but in the progress of the last cause, the whole case came before you: and I think it comes very clearly before you, and the whole truth is before you, and you will do that which in your discretion is right and just. When I say the whole truth, you will judge from the evidence of the Reverend Mr. Green, who saw the blows given, who heard what was said when the blows were given; and when the blows were given, there was no cause assigned of any attempt to com-

mit Sodomy, or any particular act, by name leading to it, but " You scoundrel ! you Rascal ! you ought to be turned out." It might have been thought to proceed from that ; but the witness Mr. Green, with great accuracy, when the Counsel interrupted him, said, I am telling all that Mr. Dive said to me. The account that Dive gives of it to Green, is this ; " I went down to the room under the leads ; I found Mr. Howe at my elbow, looking me in the face in a very odd manner : I went from that room under the leads to make water ; I found Mr. Howe at my elbow : I returned into the first room I had gone into from the leads ; and I went up to the leads, and Mr. Howe was at my elbow : he looked me in the face, and stroked my foot, and then I called him scoundrel, and struck him." Now here is the whole account of what Dive says in his own justification : he tells his own story ; he tells all the particulars ; and the Counsel for Mr. Howe has made that evidence, for otherwise it would be no evidence at all : but they have permitted that evidence to be given. What does he say were the grounds for his speaking of him in this manner, and for his striking him ?—Why, these are all the grounds. Now, as these grounds stand, the Counsel, in answer to it, have supplied the conversation ; they have told you a great many other things were said and done, and introduced fiction into the cause : for every thing is fiction that is not proved : but this is the state of the evidence. Upon this state of the evidence, as it stands, there is no colour to support an indictment for an assault with intent to commit Sodomy. What ground is there to support such an indictment ? The looking oddly in his face.—All the witnesses say he is a very odd-looking man : some say he was a very odd fellow ; others say he is an odd fox ; others say he is awkward, ungainly ; and other expressions of

that kind. But looking oddly in Mr. Dive's face, and treading on his foot, without something or other besides to induce him to think so, is not a sufficient ground for such an imputation: the Defendant took it wrong; he mistook appearances. This is a cruel injury done to the Plaintiff: and what ought to have been done immediately should have been this;—to have examined into all the particular circumstances, and afterwards to have adapted them to the nature and character of the man, and to have made a reparation. That is the idea in the letter from the Plaintiff: but that goes for nothing; because, though the idea was right, yet there was a sufficient ground for dropping it, without affecting the Defendant: but the Plaintiff was no way to blame, because he was told by the Defendant's relations and brother, that he would not retract; and you have heard now his Counsel say, he could not possibly retract. What ground then was there to go before two gentlemen on a side, (as it appears upon the evidence, was the offer made) for their opinion, when it was contrary to his own feelings? He says he cannot retract, because it was his judgment at the time. That justifies the ground upon which the Plaintiff proceeded in his last letter; for it was to no purpose to go to any reference to any particular gentlemen: it would signify nothing what any other person should think of it. But you have now, which I am exceedingly glad of, you have the whole of the grounds, as given by Mr. Dive himself, why he said he attempted to commit Sodomy, and why he struck him in that manner: and with those grounds, of course, you must find a verdict for the Plaintiff in both actions; and the damages are in every case, but most emphatically so in these causes where they are both put together, to be determined

by your found discretion : you therefore will give what damages you think proper ; but you must give damages in each.

The Jury brought in a verdict for the Plaintiff in the first Cause ; Damages 50l. and Costs of Suit.

In the second Cause, 500l. and Costs of Suit.

Mr. Howe addressed his Lordship in the following words : “ I did not, my Lord, commence these actions for the sake of pecuniary satisfaction. No money can make me amends for the feelings I have undergone. These verdicts will, I hope, convince even the malevolent of my innocence. The damages therefore I wish to give to any public Charity which your Lordship will please to direct.”

Earl of Mansfield. You do very right ; but the application shall be for the Jury's consideration — Gentlemen of the Jury, you have heard what Mr. Howe has said, That no pecuniary satisfaction was an object, nor could be a compensation to him : therefore, whatever might be the damages, he wished they might go to such charity as the Court should direct. You are the properest branch to direct to what charity it should go.

The Jury then desired that the damages might be divided between the Dispensatory for the County of Surry, and the Marine Society ; which Mr. Howe promised should be done.

FINIS.