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HIGH COURT OF IMPEACHMENT.

JUDGE CHASE's PLEA.

(Continued from our last.)

The second question, it is manifest, had nothing to do with the twelfth charge; for Mr Adams's approbation or disapprobation of the funding system, could not have the most remote tendency to prove that he was an aristocrat, or had proved faithful and serviceable to the British interest. In that part of the publication which furnishes the matter of the thirteenth charge in the indictment, it is indeed stated, that Mr. Adams, "when but in a secondary station censured the funding system," but these words are in themselves wholly immaterial; and no attempt was made, nor any evidence offered or spoken of to prove the truth of the other matter contained in the thirteenth charge It was from their connection with that other matter, that these words could alone derive any importance; and consequently their truth or falsehood was altogether immaterial, while that other matter remained unproved. This question, therefore, which went solely to those immaterial words, was clearly inadmissible. The third question was in reality, as far as the second from any connection with the matter in issue, although its irrelevancy is not quite so apparent. Mr Adams's having voted against the two measures alluded to in that question, if he did in fact vote against them, could by no means prove that he was "faithful and serviceable to the British interest," in any sense, much less with those improper and criminal views, with which the publication in question certainly meant to charge him. He might, in the honest and prudent performance of his duty towards his government and his country, incidentally promote the interests of another country; but it was by no means competent for a jury to infer from thence, that he was "faithful" to that other country, or, in other words, that he held the interests of that other country chiefly in view, and was actuated in giving his vote by a desire to promote them, independently of, or without regard to the interests of his own country. Such an inference could not be made from the fact, admitting it to be true. The fact, if true, was *no* evidence to support such an inference therefore the fact was immaterial; and as it is the province and duty of the court, in such circumstances, to decide on the materiality of facts offered in evidence, it follows clearly, that it was the right and duty of the court, in this instance, to reject the third question; an affirmative answer to which could have proved nothing in support of the defence.

The first question, therefore, and the only remaining one proposed to be put to this witness, stood alone; and an affirmative answer to it if it could have proved any thing, could have proved only a part of the charge; namely, that Mr. Adams was an aristocrat. But evidence to prove a part only of an entire and indivisible charge, was inadmissible for the reasons stated above.

If, on the other hand, the phrases in question, "that Mr. Adams was an aristocrat," that "he had proved faithful and serviceable to the British interest," were distinct and divisible, and constituted two distinct charges, which may perhaps be the proper way of considering them, still the above mentioned questions were improper and inadmissible, in that point of view.

The first charge in that case is, that Mr. Adams "was an aristocrat." To be an aristocrat, even if any precise and definite meaning could be affixed to the term, is not an offence either legal or moral; consequently, to charge a man with being an aristocrat is not a libel; and such a charge in an indictment for a libel, is wholly immaterial. Nothing is more clear, than that immaterial matters in legal proceedings ought not to be proved, and need not be disproved. In the next place, the term "aristocrat" is one of those vague indefinite terms, which admit not of precise meaning, and are not susceptible of proof. What one person might consider as aristocracy, another would consider as republicanism, and a third as democracy. If indictments could be supported on such grounds, the guilt or innocence of the party accused, must be measured, not by any fixed or known rule, but by the opinions which the jurors appointed to try him might happen to entertain, concerning the nature of aristocracy, democracy, or republicanism. And, lastly, the question itself was as vague, and as void of precise meaning, as the charge of which it was intended to furnish the proof. The witness was called upon to declare "whether he had heard Mr. Adams express any and what opinions, favorable to aristocracy or monarchy?" How was it to be determined, whether an opinion was favorable to aristocracy or monarchy? One man would think it favorable and another not so, according to the opinions which they might respectively entertain, on political subjects. The first question, therefore, was inconclusive, immaterial and inadmissible.

The second, as has already been remarked, was wholly and manifestly foreign from the matter in issue. Mr. Adams's dislike of the funding system, if he did in fact dislike it, had nothing to do with his aristocracy or his faithfulness to the British interest. There is no pretence for saying, that such a question ought to have been admitted.

As to the third, "whether Mr. Adams had not voted against the sequestration of British property, and the suspension of commercial intercourse with Great Britain," it has already been shewn to be altogether improper; on the ground that such votes, if given by Mr. Adams, were no evidence whatever of his having been "faithful and serviceable to the British interest." If he had been so, provided it were, in his opinion, at the same time useful to the interests of his own country, which it well might be, and the contrary of which is not alledged by this part of the publication, taken separately, it was no offence of any kind; and to charge him with it was not a libel. The charge was, therefore, immaterial and futile, and no evidence for or against it could properly be received. And, finally, if the charge had been material, and the giving of these votes had been legal evidence to prove it, that fact was on record in the journals of the Senate, and might have been proved by that record, or an official copy of it. As this evidence was the highest of which the case admitted, no inferior evidence of it, such as oral proof is well known to be, could be admitted.

For these reasons this respondent did concur with his colleague, the said Cyrus Griffin, in rejecting the three above mentioned questions; but not any other testimony that the said John Taylor might have been able to give. In this he insists that he acted legally and properly, according to the best of his ability. If he erred, it is impossible for the reasons stated by him in the beginning of his answer to this article, to suppose that he erred wilfully; since he could have had no possible motive for a piece of misconduct so shameful, and at the same time so well calculated to give offence. In a point so liable to misapprehension and misrepresentation, and so likely to be used as a means of exciting public odium against him, it is far more probable, that had he been capable of bending his opinion of the law to other motives, he would have admitted illegal testimony; which, taken in its utmost effect, could have had no tendency to thwart those plans of vengeance against the traverser, under the influence of which he is supposed to have acted.

If his error was an honest one which as his colleague also fell into it, might in charity be supposed; and as there is not a shadow of evidence to the contrary, must in law be presumed; he cannot, for committing it, be convicted of any offence, much less a high crime and misdemeanor for which he must, on conviction, be deprived of his office.

And for plea to the said third article of impeachment, the said Samuel Chase saith, that he is not guilty of any high crime or misdemeanor, as in and by the said third article as alledged against him; and this he prays may be enquired of by this honorable court, in such manner as law and justice shall seem to them to require

The fourth article of impeachment alledges, that during the whole course of the trial of James Thompson Callender, above mentioned, the conduct of this respondent was marked by "manifest injustice, partiality and intemperance;" and five particular instances of the "injustice, partiality and intemperance" are adduced.

The first consists "in compelling the prisoner's counsel to reduce to writing and submit to the inspection of the court for their admission or rejection, all questions which the said counsel meant to propound to the abovementioned John Taylor, the witness."

This respondent, in answer to this part of the article now under consideration, admits that the court, consisting of himself and the above mentioned Cyrus Griffin, did require the counsel for the traverser, on the trial of James Thompson Callender above mentioned, to reduce to writing the questions which they intended to put to the said witness. But he denies that it is more his act than the act of his colleague, who fully concurred in this measure. The measure as he apprehends and insists, was strictly legal and proper: his reason for adopting it, and he presumes those of his colleague, he will submit to this honorble court, in order to shew that if he, in common with his colleague, committed an error it was an error into which the best and the wisest men might have honestly fallen.

It will not be denied, and cannot be doubted, that according to our laws, evidence, whether oral or written, may be rejected and prevented from going before the jury, on various grounds—1st. For incompetency; where the source from which the evidence is attempted to be drawn, is an improper source; as if a witness were to be called who was infamous, or interested in the event of the suit; or a paper should be offered in evidence, which was not between the same parties, or was not executed in the forms prescribed by law. 2d For irrelevancy; when the evidence offered is not such, as in law will warrant the jury to infer the fact intended to be proved; or where that fact, if proved, is immaterial to the issue. For these reasons, and perhaps for others which might be specified, evidence may properly be rejected, in trials before our courts.

As little can it be doubted, that according to our laws, the court and not the jury, is the proper tribunal for deciding all questions relative to the admissibility of evidence. The effect of the evidence when received, is to be judged of by the jury; but whether it ought to be received, must be determined by the court. This arises from the very constitution of the trial by jury; one fundamental principle which is, that the jury must decide the case, not according to vague notions secret impressions or general belief, but according to legal and proper evidence, delivered in court. So strictly is this rule observed, that if one juror have any knowledge of the matter in dispute, it may influence his own judgement but not that of his fellow jurors, unless he state it to them on oath in open court; and nothing is more common than for our courts, after all the evidence which the party can produce has been offered and received, to tell the jury that there is no evidence to support the claim, or the defence; or when proof is offered of a certain fact, to determine that such fact is not proper to be given in evidence

Hence it results, and is every day's practice, that when a witness is produced, or a writing is offered in evidence, the opposite party having a right to object to the evidence if he should think it improper, requires to be informed what the witness is to prove, or to see the writing, before the first is examined or the second is read to the jury The court has the same right resulting necessarily from its power to decide all questions relative to the admissibility of evidence. This right our courts are in the constant habit of exercising: not only when objections are made by the parties, but when there being no objection, the court itself has reason to suspect that the testimony is improper. In most cases, but not in all, consent by the opposite party removes all objections to the admissibility of evidence. and courts sometimes infer consent from silence; but as it is their duty to take care, that no improper or illegal evidence goes to the jury, unless the objection to it be removed by consent of parties; it is consequently their duty, in all cases where they see reason to suspect that the evidence offered is improper to ascertain whether consent has been given, or whether the seeming acquiescence of the opposite party has proceeded from inattention. This is more particularly their duty in *criminal* cases, where they are bound to be counsel for the government, as well as for the party accused

It being thus the right and duty of a court before which a trial takes place, to inform itself of the nature of the evidence offered, so as to be able to judge whether such evidence be proper, it results necessarily that they have a right to require, that any question intended to be put to a witness, should be reduced to writing; for that is the form in which their deliberation upon it may be most perfect, and their judgment will be most likely to be correct. In the case now under consideration, the court did exercise this right When the testimony of John Taylor was offered, the court enquired of the traverser's counsel, what that witness was to prove. The statement of his testimony given in answer, induced the court to suspect that it was irrelevant and inadmissible. They therefore, that they might have an opportunity for more careful and accurate consideration, called upon the counsel to state in writing the questions intended to be put to the witness

This is the act done by the court, but concurred in by the respondent which has been selected and adduced, as one of the proofs and instances of "manifest injustice, partiality, and intemperance" on his part. He owes an apology to this honorable court, for having occupied so much of its time with the refutation of a charge which has no claim to serious consideration, except what it derives from the respect due to the honorable body by which it was made and the high character of the court where it is preferred.

The next circumstance stated by the article now under consideration, as an instance and proof of "manifest injustice, partiality, and intemperance" in this respondent, is his refusal to postpone the trial of the said James Thompson Callender, "although an affidavit was regularly filed, stating the absence of material witnesses on behalf of the accused, and although it was manifest that with the utmost diligence, the attendance of such witnesses could not have been procured at that term."

This respondent, in answer to this part of the charge, admits, that in the above mentioned trial, the traverser's counsel did move the court, while this respondent sat in it alone, for a continuance of the case until the next term; not merely a postponement of the trial, as the expressions used in this part of the article would seem to import; and did file as the ground work of their motion, an affidavit of the traverser, a true and official copy of which, marked exhibit No. 5, this respondent herewith exhibits, and begs leave to make part of this answer; but he denies that any sufficient ground for a continuance until the next term, was disclosed by this affidavit: as he trusts will clearly appear from the following facts and observations.

The trial of an indictment at the term when it is found by the grand jury, is a matter of course, which the prosecutor can claim as a right unless legal cause can be shewn for a continuance The prosecutor may consent to a continuance, but if he withholds his consent, the court cannot grant a continuance without legal cause. Of the sufficiency and legality of this cause, as of every other question of law, the court must judge; but it must decide on this as on every other point, according to the fixed and known rules of law.

One of the legal grounds, and the principal one on which such a continuance may be granted, is the absence of competent and *material* witnesses, whom the party cannot produce at the present term, but has a *reasonable ground* for expecting to be able to produce at the next term. Analagous to this, is the inability to procure at the present term, legal and *material* written testimony, which the party has a *reasonable expectation* of being able to procure at the next term.

These rules are as reasonable and just in themselves, as they are essential to the due administration of justice, to the punishment of offences on the one hand, and to the protection of innocence on the other. If the continuance of a cause, on the application of the party accused, were a matter of right, it is manifest that no indictment would be brought to trial until after a delay of many months. If, on the other hand, the granting of a continuance depended not on fixed rules, but on the arbitrary will of the court, it would follow that weakness or partiality might induce a court, on some occasions, to extend a very improper indulgence to the party accused; while on others, passion or prejudice might deprive him of the necessary means of making his defence. Hence the necessity of fixed rules, which the judges are bound to expond and apply, under the solemn sanction of their oath of office.

The true and only reason for granting a continuance is, that the party accused may have the best opportunity that the law can afford to him, of making his defence. But incompetent or immaterial witnesses, could not be examined if they were present; and consequently, their absence can deprive the party of no opportunity which the laws afford to him, of making his defence. Hence the rule, that the witnesses must be competent and material.

Public justice will not permit the trial of offenders to be delayed, on light or unfounded pretences. To wait for testimony, which the party really wished for, but did not expect to be able to produce within some definite period, would certainly be a very light pretence; and to make him the judge, how far there was reasonable expectation of obtaining the testimony within the proper time, would put it in his power to delay the trial, on the most unfounded pretences. Hence the rule, that there must be reasonable ground of expectation, in the judgement of the court, that the testimony may be obtained within the proper time.

It is therefore a settled and most necessary rule, that every application for a continuance, on the ground of obtaining testimony, must be supported by an affidavit, disclosing sufficient matter to satisfy the court, that the testimony wanted "is competent and material," and that there is "reasonable expectation of procuring it within the time prescribed" From a comparison of the affidavit in question with the indictment, it will soon appear how far the traverser in this case, brought himself within this rule.

The absent witnesses, mentioned in the affidavit, are William Gardner, of Portsmouth, in New Hampshire; Tench Coxe, of Philadelphia, in Pennsylvania; Judge Bee, of some place in South Carolina; Timothy Pickering, lately of Philadelphia, in Pennsylvania, but of what place at that, the deponent did not know; William B Giles, of Amelia county, in the state of Virginia; Stephens Thompson Mason, whose place of residence is not mentioned in the affidavit, but was known to be in Loudon county, in the state of Virginia; and General Blackburn, of Bath county in said state The affidavit also states, that the traverser wished to procure, as material to his defence, authentic copies of certain answers made by the President of the United States, Mr. Adams, to addresses from various persons; and also, a book entitled "an Essay on Canon and Feudal Law," or entitled in words *to that purport*, which was ascribed to the President, and which the traverser believed to have been written by him; & also, evidence to prove that the President was in fact, the author of that book.

It is not stated, that the traverser had any reasonable ground to expect, or did expect, to procure this book or evidence, or these authentic copies, or the attendance of any one of these witnesses, at the *next* term. Nor does he attempt to shew in what manner the book, or the copies of answers to addresses, were material, so as to enable the court to form a judgment on that point. Here then, the affidavit was clearly defective. His believing the book and copies to be material, was of no weight, unless he shewed to the court, sufficient grounds for entertaining the same opinion. Moreover he does not state, where he supposes that this book, and those authentic copies may be found: so as to enable the court to judge, how far a reasonable expectation of obtaining them, might be entertained. On the ground of this book and these copies, therefore, there was no presence for a continuance. As to the witnesses, it is manifest, that, from their very distant and dispersed situation, there existed no ground of reasonable expectation, that their attendance could be procured at the *next* term, or at any subsequent time. Indeed, the idea of postponing the trial of an indictment, till witnesses could be convened at Richmond, from South Carolina, New Hampshire, and the western extremities of Virginia, is too chimerical to be seriously entertained. Accordingly, the traverser, though in his affidavit he stated them to be material, and declared that he could not procure their attendance at that term, could not venture to declare on oath, that he expected to procure it at the next, or at any other time; much less that he had any reasonable ground for such expectation. On this ground, therefore, the affidavit was clearly insufficient; and it was consequently the duty of the court to reject such application.

But the testimony of these witnesses, as stated in the affidavit, was wholly immaterial; and therefore, their absence was no ground for a continuance, had there been reasonable ground for expecting their attendance at the next term.

William Gardner and Tench Coxe, were to prove, that Mr. Adams had turned them out of office, for their political opinions or conduct. This applied to that part of the publication, which constituted the matter of the third charge in the indictment, in these words, "the same system of persecution extended all over the continent. Every person holding an office, must either quit it or think and vote exactly with Mr. Adams."—Judge Bee, was to prove, that Mr. Adams had advised and requested him by letter, in the year 1799, to deliver Thomas Nash, otherwise called Jonathan Robins, to the British consul, in Charleston. This might have had some application to the matter of the seventh charge; which alledged that "the hands of Mr. Adams, were reeking with the blood of the poor, friendless, Connecticut sailor," Timothy Pickering was to prove, that Mr. Adams, and while Congress was in session was many weeks in possession of important dispatches, from the American minister in France, without communicating them to Congress. This testimony was utterly immaterial, because, admitting the fact to be so, Mr. Adams was not bound, in any respect, to communicate those dispatches to Congress, unless in his discretion, he should think it necessary; and also, because, if true, had no relation to any part of the indictment. There are, indeed, three charges, on which it might at first sight seem to have some slight bearing. These are the eighth, the words furnishing the matter of which are, "every feature in the administration of Mr Adams, forms a distinct and additional evidence, that he was determined at all events, to embroil this country with France;" the fourteenth, the words stated in which, alledges, that "by sending these ambassadors to Paris, Mr. Adams and his British faction, designed to do nothing but mischief," and the eighteenth, the matter of which states, "that in the midst of such a scene of profligacy and usury, the President persisted as long as he durst, in making his utmost efforts, for provoking a French war." To no other charge in the indictment, had the evidence of Timothy Pickering, as stated in the affidavit, the remotest affinity. And surely, it will not be pretended by any man, who shall compare this evidence, with the three charges above mentioned; that the fact intended to be proved by it, furnished any evidence proper to go to a jury, in support of either of those charges, that "every feature of his administration, formed a distinct and additional evidence, of a determination at all events, to embroil this country with France," that "in sending ambassadors to Paris, he intended nothing but mischief," that "in the midst of a scene of profligacy and usury, he persisted, as long as he durst, in making his utmost efforts for provoking a French war," are charges, which surely cannot be supported or justified by the circumstances of his "keeping in his possession, for several weeks, while Congress was in session, dispatches from the American minister in France, without communicating them to Congress," which he was not bound to do, and which it was his duty not to do, if he supposed that the communication, at an earlier period, would be injurious to the public interest. The testimony of William B. Giles and Stephens Thompson Mason, was to prove, that Mr. Adams had uttered in their hearing, certain sentiments, favorable to aristocratic or monarchical principles of government.

This has no reference except to a part of the twelfth charge; which has been already shewn to be wholly immaterial if taken separately, and wholly incapable of a separate justification, if considered as part of an entire charge. And, lastly, it was to be proved by gen. Blackburn, that in his answer to an address, Mr. Adams avowed, "that there was a party in Virginia, which deserved to be humbled into dust and ashes, before the indignant frowns of their injured, insulted and offended country." There were but two charges in the indictment to which this fact, if true, had the most distant resemblance.—These are the fifteenth and sixteenth, the words forming the matter of which, call Mr. Adams "an hoary-headed libeller of the governor of Virginia, who with all the fury, but without the propriety or sublimity of Homer's Achilles, bawled