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(BY PERMISSION.)

HIGH COURT OF IMPEACHMENT

Evidence on the part of the Respondent.

[CONTINUED]

John Marshall sworn—examined by Mr. Harper.

Q. Did you not, at the trial of Callender, make an application to the court in behalf of Colonel John Harvie, who was summoned on the jury and wished to be excused?

A. At the trial of Callender I was a member of the bar. Colonel Harvie, with whom I was very intimate, informed me, that he had been summoned as a juror to try Callender, and expressed great unwillingness to serve; he informed, that he was an improper person to serve, because he had made up his mind that the sedition law was unconstitutional, and should therefore find the traverser not guilty, let the evidence be what it might. He requested me to interfere with the marshal, and obtain his discharge. I spoke to the marshal and informed him of Col. Harvie's having made up his mind, and that of course he was an improper person to serve on the jury. The marshal replied, that Col. Harvie must apply to the court, because he had determined to conduct himself in such a manner as to prevent suspicion of prejudice against Callender. I applied to the court for Col. Harvie's discharge, on the ground of his being high sheriff of Henrico county, whose court was then sitting; upon this ground he was discharged.

Q. Did you state any other reason to the court, why he ought to be discharged?

A. I stated none other.

John Marshall cross-examined by Mr. Randolph.

Q. Was you present at the trial of Callender?

A. I was.

Q. Did you see any thing unusual in the mode of conducting that trial?

A. There were several circumstances which do not always occur in trials, both on the part of the bench and bar.

Q. Were the interruptions of counsel more frequent than usual?

A. The counsel for Callender wished to bring before the jury the question of the constitutionality of the law. This the court determined to be improper, and whenever the counsel attempted to argue it before the jury, they were stopped. After being stopped on that point, an argument was commenced on the part of Mr. Hay, to prove to the judge, that he was not correct in the opinion which he had given. Immediately on his commencement the judge stopped him, and told him that what he said was not law. Some conversation ensued between them, and Mr. Hay left the bar.

Q. Did those interruptions take place only when the counsel attempted to argue the constitutionality of the law, or did they also take place on the other questions?

A. I have a general impression on the subject, which is, that throughout the course of the trial, when any thing was stated which the judge did not think correct, he immediately stated his opinion; but this is also his practice in civil cases.

Q. Do you recollect the cause of the misunderstanding between the judge and the counsel?

A. It began early and progressed with the case, but I do not recollect the cause of it.

Q. Is it usual for judges to hear counsel on a point which they have decided?

A. It is usual for a judge, if he believes a case clear, to shorten the argument; but if the counsel express a desire to be heard, it is a piece of decorum to hear them.

Q. Is it the practice in the circuit courts for the judges to adjourn the court for a length of time, and hold a court at a different place, then come back and re-open the court?

A. I only know the practice in those courts where I have been, and I have never known it to be the case.

Q. Has it ever been the practice to compel the counsel to reduce questions to writing, and submit them to the court?

A. It depends on the circumstances of the case. If doubts are suggested as to the propriety of the question, the judges will do right to have it reduced to writing—But unless there is some particular reason for it, I have never known counsel compelled to reduce their questions to writing. I have never known questions reduced to writing in the first instance.

Q. Did you ever, in a criminal prosecution, know the testimony of a witness to be rejected, because he was unable to prove all the defence?

A. I never have.

Question by Mr. Harper.

Did not judge Chase make an offer to postpone the trial?

A. I recollect that some question was made before the trial. The counsel for Callender were of opinion that they ought to have had until the succeeding term, as they had filed an affidavit stating the absence of a number of witnesses. At that time a postponement took place for a few days, which appeared sufficient to obtain the attendance of the witnesses that lived in Virginia. There was an observation on the part of the judge that the counsel should have time to prepare for trial. I think he said they might have a month.

Q. You have been asked whether it is the practice for courts to adjourn—have not the courts the power to do it?

A. I have never turned my attention to the act of Congress on the subject.

Question by the President.

Do you recollect any instance where the conduct of judge Chase was tyrannical and oppressive, during the trial of Callender?

A. I have stated the conduct of the judge, and the court will be able to judge whether it was tyrannical or oppressive.—When Mr. Hay was about to retire, the judge desired him to go on and assured him that he would not be again interrupted.

Question by Mr. Worthington.

Is it usual in Virginia to try cases similar to that of Callender at the same term the presentment is made?

A. My practice was never extensive in criminal cases; I believe, however, it is not usual.

Question by Mr. Randolph.

Did you hear the judge apply the epithet of "young gentleman"! to either of the counsel?

A. I think I heard him apply it to Mr. Wirt.

Q. How old do you suppose Mr. Wirt was at that time?

A. I suppose he was about thirty.

Q. Was he a married man or a widower?

A. He was a widower.

Edmund I. Lee sworn—examined by Mr. Harper.

Q. Was you present at the trial of Callender?

A. I was not in court when Callender was brought there. I was present when an application was made for a continuance and overruled.

Q. Do you recollect an offer made by judge Chase to postpone the trial?

A. Judge Chase informed the counsel that he could not continue the cause, but that if they would fix any time, when they supposed they would be ready, he would postpone the trial until that time. He observed that he would postpone it for a fortnight, for a month, and I am not certain but he added that he would postpone it for six weeks.

Edmund I. Lee—cross examined by Mr. Randolph.

Q. At what stage of the trial was this offer made?

A. It was on the application for a continuance I believe.

Q. Did the trial proceed immediately afterwards.

A. It did.

Q. Were Messrs. Hay and Nicholas present at that time?

A. I believe they were, but I do not recollect any particular reply that they made?

John A. Chevalier sworn—examined by Mr. Harper.

Q. Was you present at the trial of Callender?

A. I was in court during a part of the trial.

Q. Did you hear a motion made by the counsel for a continuance of the cause?

A. I did not.

Q. Did you hear an offer on the part of the court to postpone the cause.

A. I do not recollect.

John A. Chevalier—cross examined by Mr. Randolph.

Q. How long have you been in America?

A. About twenty years.

Q. Have you been much in the habit of attending courts of justice?

A. I have not.

Q. Did you observe any thing unusual at the trial of Callender?

A. I did not.

Robert Gamble sworn—examined by Mr. Harper.

Q. Was you present at the trial of Callender?

A. I was present when the motion was made for a continuance. The judge observed that the cause could not be continued, but that he would postpone it for a month or even six weeks, or as long as the term would admit.

Q. Did you hear the conversation between the court and Mr. Basset, relative to Basset's serving on the jury, and what was it?

A. Mr. Basset said that he had seen extracts in a newspaper which were said to be taken from the "Prospect Before Us," and that he had formed an opinion that whoever was the author, he came under the sedition law. Judge Chase asked whether he had made up his mind on the charges in the indictment, to which Mr. Basset replied that he had not, and he was directed to be sworn on the jury. I did not know what the charges were myself, but I did suppose that they were for a violation of the sedition law, and that was the general opinion.

Q. Did Mr. Basset mention to the court that he wished to be excused from serving on the jury?

A. He merely suggested the impressions made on his mind as a scruple of delicacy.

Robert Gamble—cross examined by Mr. Randolph.

Q. At the time when you informed the court that you had not "formed and delivered an opinion upon the charges in the indictment," had you ever heard it read?

A. I had never seen the indictment, nor heard it read.

Q. Had you made up your mind as to the book called the Prospect Before Us?

A. I had never seen the Prospect.

Q. You were present when the court offered to postpone the trial; upon what day was this offer made?

A. I do not recollect.

Q. Was not an objection made to your serving on the jury?

A. On the day of the trial Mr. Nicholas observed that he would make an objection to me, and I was asked by the court "whether I had formed and delivered an opinion on the charges in the indictment"—to which I replied, that I had never seen the indictment or heard it read, and the court directed me to be sworn.

Philip Gooch, sworn——examined by Mr. Harper.

Q. Was you present at the trial of Callender in Richmond?

A. I was present a part of the time.—I did not hear what was going forward until the jury were called.

Q. Did you go there for the purpose of hearing the trial?

A. I had never seen a circuit in session, and I was anxious to hear the trial of Callender, and for those purposes I went to court.

Q. What did you observe on the trial?

A. When Mr. Basset suggested to the court some question whether he was a fit person to serve on the jury, the court decided, that he must not only have formed, but delivered his opinion also, and judge Chase proceeded to give some reasons for it, but at the same time he consulted with the associate judge. I sat near them and could hear their consultation. Basset was then sworn on the jury. Mr. Nelson the prosecutor, then opened the case, and informed the jury that he should be able to prove the publication; he then went on and examined the testimony. After this the counsel for the traverser called colonel John Taylor as a witness. After he was sworn an objection was made to his testimony, and judge Chase declared it inadmissible. When he made this determination he consulted with judge Griffin, who declared himself to be of the same opinion. Judge Chase then observed that the counsel were men of talents and knew the evidence to be inadmissible, and they wished to alarm the people. He then turned to Mr. Nelson and said, "I wish you would suffer the evidence to go to the jury. Mr. Nelson replied that he could not. Judge Chase asked him a second time, and he said he wished he could, but that it was contrary to law. Mr. Wirt opened the case on the part of the traverser, and said something about the court's prohibiting them. Judge Chase interrupted him and told him that he must not reflect on the court, and he made an apology. Mr. Wirt endeavored to shew the jury that the sedition law was unconstitutional, but the court told him that he had no right to argue that question before the jury. Mr. Wirt went on and the judge stopped him. Mr. Wirt said "I am going on." Judge Chase said, "No sir, I am going on," and told him to sit down. The judge then delivered a long opinion, and said that the jury were to judge of the law as well as the fact, but not of the constitutionality of the law. Mr. Wirt said that if the jury had a right to judge of the law, and the constitution was the supreme law, it followed that the jury had a right to decide on the constitutionality of the law.—Judge Chase replied that it was a non sequitur, and made a bow, and Mr. Wirt sat down. This produced a considerable degree of merriment. Mr. Nicholas then rose and spoke, and I believe he was not interrupted by the judge. Mr. Hay then followed and was interrupted two or three times by the judge. Mr. Hay then folded up his papers to retire, when judge Chase said, "since you are so captious, go on and say what you please;" but Mr. Hay declined going on and retired from the Bar.

Q. Did Mr. Wirt appear hurt when he sat down?

A. I thought he did.

Q. Was the manner of judge Chase to the counsel rude?

A. When he told them that they knew the law to be contrary to what they said, I thought the expression rude, because it implied a breach of duty.

Q. Did not judge Griffin concur in all the opinions delivered by judge Chase?

A. I thought he did.

Q. What were the words which judge Chase made use of when he told Mr. Wirt to sit down?

A. They were "please to sit down, Sir."

David Robertson sworn—examined by Mr. Harper.

Q. Was you in court at the trial of Callender?

A. I came into court when Mr. Hay made his last motion for a continuance. I took down, for my own amusement, the proceedings in short hand. I have compared the short hand notes with the printed statement, which was published at the request of some of my friends, and to which I will refer.

[*Here Mr. Robertson read his statement as follows:*]

The substance of Mr. Hay's conclusion was—

That a postponement of the trial till the witnesses were present, and counsel prepared to defend the traverser, was essential to justice—that this delay was of great importance to the traverser, as not only his little property, but his liberty, was at stake; that as to the United States, an immediate trial could be of no consequence—that the government of the U. States must forever *rest* on the affections and opinions of a virtuous and enlightened people:—That, standing on this basis, those who administered it, could never be affected by the abuse and declamation of an insignificant and friendless foreigner.

Mr. Nicholas then made a few observations—We conceive that the testimony of Mr. Giles is extremely important; he will prove, as Mr. Callender has stated in his affidavit, that Mr. Adams, the President, wished that the executive had power to control the public will.

This testimony, when compared with the books of the president, will substantiate the charges in the book written by Mr. Callender. It will go strongly to a confirmation of the charges in dispute; it goes directly to that part of the indictment, where he is charged with having said, that the president is *a professed aristocrat*. It has been stated, that as there are nineteen charges in the indictment against the traverser, though we prove eighteen of them to be true, yet he must be found guilty, because we do not prove the truth of the nineteenth—but how is it possible for us to defend ourselves, or how can we be prepared for trial, if the witness, by whom we can prove that particular charge, be absent?—If the court think, that, in order to justify ourselves, we must prove the whole libel to be true, and it shall appear, that testimony to prove a particular charge is wanting, the court will afford us an opportunity of adducing it. I conceive, with submission, that the former judgment of the court, in particularly postponing the trial, admitted the evidence of Mr. Giles to be material, and that his personal attendance would be essential to justice.

Here judge Chase informed Mr. Nicholas, that he had not apprehended the opinion of the court rightly, and that although on the application of the counsel for the traverser, the court had given them the choice of postponement of the trial till to-day instead of a few hours; yet it was not meant by that indulgence either to declare the testimony of Mr. Giles material, or to postpone the trial till another term, on account of his absence.

Mr. Nicholas then urged once more the necessity of postponing the trial till Mr. Giles could attend: the question, said he, on a motion for a continuance is, can the testimony of the absent witness substantiate the defence, or the point in issue? How can it be done, if the witness be not present? When a witness, to prove the truth of a particular charge, is absent, I trust the court will give us time to avail ourselves of his evidence, and will not precipitate a trial, when a trial will not demonstrate that the decision is right: for if the defendant be found guilty when his witnesses are absent, and counsel unprepared, the verdict will not satisfy the public mind of his guilt.

Here judge Chase stopped Mr. Nicholas, and addressed the counsel for Mr. Callender thus:—

"It is wholly improper to go back to the former motion—Gentlemen, you misapprehend the intention of the court, in postponing the cause till to-day—you ought to confine yourselves to the present motion. Two reasons are assigned for postponing the trial: the first, that Mr. Giles is absent, and it is inferred that the court, by not ruling a trial before, admitted his evidence to be material—the court did not enter into the question whether it be material or not. It appeared that he was within a little distance of this place, and the cause was suspended till Monday, that Mr. Giles might be summoned before that day to attend. On Monday you asked for a postponement of the trial for a few hours, and it was stated that perhaps he might come in the course of the day. Instead of a few hours, you had choice of continuing it till to-day. Mr. Giles has been summoned, and does not attend—regularly you ought to take out an attachment against him for not attending, after having been served with the subpœna, and apprised, that his evidence was required by the traverser: there is no reason to believe he will be here during the term of the court—you do not expect him. If such excuses as these authorise a postponement of the trial, it must be evident that this cause will never be tried. It is not necessary to say whether Mr. Giles, if *present*, could be sworn or not, because the traverser is not entitled, on general principles, to a continuance. Another reason assigned is, that as the jury are to assess the fine, it is essential that the traverser should have the privilege of adducing testimony to mitigate it. This may be the practice in *your own state courts*—your *own court* will be governed by your *own laws*; but it does not apply to the *federal courts*—the jury are *not* to regulate the fine. It is a mistaken idea: they have nothing to do with it. But it is stated that the counsel are unprepared to defend the traverser: you shew yourselves to be men of ability, and there is no difficulty in the cause; but you say that you are not ready to discuss the difference between fact and opinion: that the charges in the indictment are merely opinion, and not facts falsely asserted. Must there be a departure from common sense, to find out a construction favorable to the traverser?—This construction admits the *publication* but denies its *criminality*. If the traverser certainly published that defamatory paper, read it and consider it. Can any man of you say, that the *president* is a detestable and criminal man? The traverser charges him with being a murdererer and a thief, a despot and a tyrant!—will you call a man a murderer and a thief, and excuse yourself by saying it is but mere opinion, or that you heard so? Any falsehood, however palpable and wicked, may be justified by this species of argument. The question here is, with what intent the traverser published these charges? Are they false, scandalous and malicious, and published with intent to defame? It is for the jury to say what was the intent of such imputations, and this is sufficiently obvious—the cause *must* be tried—I am sworn to do justice between the United States and the prisoner at the bar. I do not dictate to you how you are to defend him, but you must defend every man according to the law; and without intending any *disrespect* to either of you, I must confine you to *what I think* the law."

The marshal was then ordered to call the jury.

Mr. Nicholas.—We mean to challenge the array, and take every advantage which the laws of the country give us. In support of this doctrine, I will read a passage from "trials per pais"—(here he read the passage.) I believe there is testimony in court to prove that one of the jurors returned by the marshal, has expressed sentiments hostile to the traverser. It is like a case stated in the books, where a verdict was set aside, because a juryman had previously said, that the man accused ought to be hanged; and in that case, on the second trial, every juryman was called to say, whether he had formed any opinion on the subject or not?

Judge Chase.—My construction of the law is quite the *contrary*. I have always seen *triors* sworn to decide these questions—How is this done in your country?—Challenges for favor *must* be decided by triors—I suppose there must be triors sworn.

Mr. Nicholas.—I believe the *books* lay down this distinction.—Challenges to the array are either principal challenges, or challenges for favor—causes for principal challenges are always tried by the court; challenges for favor are always tried by triors.

Judge Chase.—Well Sir, your challenge is for *favor*, because you state the juror to be *unfavorable* to the traverser.

Mr. Nicholas.—This book states it as a cause of *principal* challenge.

Judge Chase.—Shew me that book, it is not the best authority—have you Coke upon Littleton in the house. If I had it we would see the whole of the doctrine at once. I am persuaded, that Coke upon Littleton states, that challenges for favor, must be decided by triors. The oath of the triors is laid down there. Challenges to the array are for partiality in the sheriff.

Coke upon Littleton being produced and the judge having examined it, observed the case is clear. Principal challenges to the array, or the whole jury at once, is always for partiality in the sheriff, and not in the jurors.

Mr. Nicholas admitted it, but suggested that the law might perhaps consider the return of a *partial* juror, as sufficient to ground a challenge to the array, on the principle of partiality in the sheriff, and wished to know if he was correct in this idea of the law.

Judge Chase answered, "No Sir, the law is not so. You must proceed regularly—You may bring in proof if you can, that any juror has delivered his opinion upon that case heretofore, or you may examine the juror himself upon oath to this effect. You may do either, but not both—and this alternative offered, you must consider not as a strict right."—The counsel chose to rely on the jurors themselves. The first juror was sworn, and the judge put the following question to him: "Have you ever formed and delivered an opinion upon the charges contained in the indictment?" The juror answered that he had never seen the indictment, nor heard it read. The judge then said, he must be sworn in chief. Mr. Hay solicited permission to put a question to the juror before he was sworn in chief. The judge desired to know what sort of a question he meant to put, and told him *he* must first hear the question, and if he thought it a proper one, it might be put.—Mr. Hay. The question which, with the permission of the court, I meant to have asked, is this, "Have you ever formed and delivered an opinion on the book entitled, The Prospect before Us, from which the charges in the indictment are extracted?"

Judge Chase. That question is improper and you shall not ask it—The only proper question is, "Have you ever formed and delivered an opinion upon this charge." He must have *delivered* as well as formed the opinion. Such a question