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THURSDAY, MARCH 28 1805

(BY PERMISSION.)

HIGH COURT OF IMPEACHMENT

Evidence on the part of the Respondent.

[CONTINUED]

The profecutor then proceeded to prove the charges in the indictment, ſtated to be, a ſcandalous and malicious libel. I ſhall not attempt, gentlemen of the jury, to excite your paſſions or inflame your feelings. I ſhall endeavor to be cautious, and avoid uttering what ought not to be ſaid, which may in any manner influence your judgment, upon your oaths; for in that office which I hold, which is that of the people of United America, it is more than a common duty, to take care not to ſtep beyond that line which leads to juſtice. To that ſtate in which your paſſions ſhall be; to ſuch feelings as you ſhall poſſeſs, after hearing the charge contained in the indictment, the evidence in ſupport of it, and a fair ſtatement and repreſentation of the caſe, I ſhall leave and entruſt the caſe. In the preſent ſtate of the buſineſs, it will be proper for me to call your attention to the ſtatute or act of Congreſs, which relates to this caſe.

Here he read the ſecond and third ſections of the law commonly called the ſedition law. The ſecond ſection is in theſe words:—"That if any perſon ſhall write, print, utter or publiſh, or ſhall cauſe or procure to be written, printed, uttered or publiſhed; or ſhall knowingly and wilfully aſſiſt or aid in writing, printing, uttering or publiſhing any falſe, ſcandalous and malicious writing or writings, againſt the government of the United States, or either houſe of congreſs of the United States, or the preſident of the United States, with intent to defame the ſaid government, or either houſe of the ſaid congreſs, or the ſaid preſident, or to bring them or either of them into contempt or diſrepute, or to excite againſt them, or either or any of them, the hatred of the good people of the United States, or to ſtir up ſedition within the United States, or to excite any unlawful combinations therein, or oppoſing or reſiſting any law of the United States, or any act of the preſident of the United States, done in purſuance of any ſuch laws or of the powers in him veſted by the conſtitution of the United States; or to reſiſt, oppoſe or defeat any ſuch law or act; or to aid, encourage or abet any hoſtile deſigns of any foreign nation againſt the United States, their people or government; then ſuch perſon, being thereof convicted before any court of the United States, having juriſdiction thereof, ſhall be puniſhed by a fine not exceeding two thouſand dollars, and by impriſonment not exceeding two years."—Upon this ſtatute James Thompſon Callender is now indicted, and the indictment charges, that maliciouſly deſigning and intending to defame the preſident, he, James Thompſon Callender, did publiſh the libel ſet forth therein, with intent to bring him into contempt and diſrepute, and to excite the hatred of the good people of the United States towards him. It will be for you, gentlemen of the jury, in this caſe to determine whether the traverſer has or has not been the publiſher of this paper.—This point being aſcertained, it will be for you to conſider with what view and for what purpoſe, a paper like this has been compoſed and publiſhed.

If you believe it to be a candid and fair diſcuſſion of conſtitutional ſubjects, of real grievances or of political opinions and principles generally, you will not conſider it to be a libel within the ſtatute. If you believe the facts and allegations averred in the paper are true, you will conſider that the traverſer hath defended himſelf according to the ſtatute, but if, from internal evidence in the paper itſelf, you do not think ſo, you do not believe it to be a candid evidence and fair diſcuſſion of conſtitutional ſubjects, real grievances or political opinions and principles, and that it does not contain the truth in all parts, you muſt find the traverſer guilty.

Mr. Nelſon was about to introduce evidence on the part of the United States, when Mr. Hay obſerved, that he underſtood, that ſome of the witneſſes who were to be examined to prove the guilt of the accuſed, were themſelves in the eſtimation of the law, equally guilty; that they had printed, though they had not written the libel in queſtion; he would therefore beg leave to make it known to thoſe who were in any degree implicated, that they were not bound to accuſe themſelves, and might withhold if they thought proper, ſuch part of their evidence as had a tendency to criminate themſelves. The judge replied, that he was correct in his ſtatement—that every perſon concerned in the publication was protected by law, from compulſion to criminate himſelf, but he added, I ſuppoſe if any of them give his evidence, the government of the United States is pledged not to inſtitute a proſecution againſt him—of this he may be aſſured.

The ſubſtance of the evidence was nearly as follows:

The firſt witneſs called upon, was Mr. Wm. Duval—he ſaid that he ſaw Mr. Henry Banks have the book called "The Proſpect Before Us"—that Mr. Banks gave him the book to read—that the next day he ſaw Mr. Callender, who told him that he muſt pay him a dollar for the book given him by Mr. Banks—that he did then pay the dollar for it to Mr. Callender, and that the book, he believes, contained ſome of the charges in the indictment.

Mr. Banks was then called—he declared, that ſome time ago, he had become a ſubſcriber to the book entitled, "The Proſpect Before Us." and paid the money at the time of ſubſcription—that he lent the book to major Duval and ſent to inform Mr. Callender that he might get the money for it of major Duval, and that he could get another copy for himſelf, another time—that he got from Mr. Callender the copy he delivered to major Duval—that he never heard the traverſer acknowledge that he was the author, but that his opinion upon the ſubject was clear. The judge told him that his opinion was no evidence againſt the traverſer.

William Burton was next called—He ſaid that he purchaſed ſuch a book from Mr. Pleaſants (who is a bookſeller as well as a printer)—that he paid the money to Mr. Pleaſants and Mr. Callender was preſent.

William A. Rind was next called---His teſtimony ſubſtantially was, that a copy of the book in queſtion, then in court, belonged to him---That a conſiderable time ago, Mr. Lyon applied to them to print the National Magazine --that they entered into contract for the purpoſe of printing 22 ſheets of that, or an equivalent in other work---that after a great part of the Magazine had been printed, it ſtopped, either for the want of paper or ſome other cauſe---That Mr. L. then brought "The Proſpect before Us"---that they printed 4 or 5 half ſheets of it---that the proof ſheets were ſent to Mr. Callender for correction, and returned corrected in his hand writing---that Mr. Callender once corrected a proof ſheet in a large room at the office---that Mr. Callender came once to hurry the work, and ſaid he would pay: but that he conſidered Mr. L. as pay-maſter---that at Mr. Dixon's office, Mr. Callender ſaid he would give him 20 copies if he read one through, as he was ſure it would convert him---that a ſmall part of the manuſcript remained in his poſſeſſion, which he produced, then in court, and which he believed to be the hand writing of Mr. Callender---Being aſked if he had ever ſeen Mr. Callender write, he ſaid he had---that Mr. Callender once took the debates in the houſe of aſſembly for them. The book and manuſcript ſheets were then compared and found to correſpond---this occupied ſome time, and the judge took ſome pains in examining and comparing them.

Mr. Meriwether Jones was next called upon-- The ſubſtance of whoſe evidence was, that he had never read the book till after the preſentment was made, except a few paſſages, and perhaps about 33 pages, that not a word of it was printed at his office, though he ſold ſome copies for the benefit of Mr. Caliender, that he only poſſeſſed one copy (which he then ſhewed) and which he declared he found where Mr. Callender generally kept his papers---that whenever he ſold any of the books, Mr. Callender received the money---that he kept a memorandum of the money he received, that he might know how much he owed him---that he could not poſitively ſay whether Mr. Callender was the author of the book or not---that he had never told him he was---though he had his opinion and belief on the ſubject---that he had publiſhed propoſals to print the book, and afterwards, that he had them for ſale---but he did not recollect whether he publiſhed that he had them for ſale for the benefit of Mr. Caliender, though the fact was ſo;---that the ſtrongeſt proof he had of Mr. Callender being the author, was a converſation he had with him, reſpecting that part of the book, where ſpeaking of Waſhington and Adams it uſes the term *paltroons*---Mr. Callender ſaid he alluded to ſome who had received appointments from them, and not to themſelves.

The next witneſs called was Thomas Nicholſon, who is alſo a printer;---His evidence was, that Mr. Callender had called at his houſe, to engage him to publiſh a part of the book---that he could not do it then---that he called on him the next day, accompanied by Mr. Meriwether Jones, for whom he was then engaged to print---that Mr. Jones told him, that he might ſuſpend his work, which he was then engaged in, to do Mr. Callender's --that he printed ſeven pages of the book, that Mr. Callender paid him for it; and he underſtood it was for his emolument.

Then Mr. John Dixon, alſo a printer, was called. He ſaid that he printed the greateſt part of the book, (about 120 pages) at the requeſt of Mr. Lyon, and that Mr. Callender corrected the proof-ſheets.

Mr. James Lyon's evidence was in ſubſtance, that he did not know that Mr. Callender was the author of the book, but that he knew him to be the publiſher of it, jointly with himſelf---and that he probably (but he did not recollect certainly) had furniſhed Mr. Rind with the copy of the book---that Mr. Callender corrected the ſheets from the preſs---that he never ſaw Mr. Callender writing, but ſuppoſed from having ſeen the manuſcript, and ſome writing which was (ſaid to be) written by him, that he wrote it.

And then Mr. Samuel Pleaſants, another printer, was called—He depoſed, that he had ſold copies of this book---he underſtood that the books were ſent to him from the book-binder, for Mr. Callender ---that he received both the money and the ſubſcription papers for him, and paid him the money he received—that he ſold perhaps an hundred copies.

The oral teſtimony of the United States being finiſhed, the attorney for the United States was about to point to the jury, the paſſages in "The Proſpect Before Us,"---correſponding with the charges in the indictment, when Mr. Hay objected to the introduction of that book.

I conceive, ſaid Mr. Hay, that this book cannot be adduced in evidence, in ſupport of the charges, ſtated in the indictment. Perhaps my ſtating to the court, the reaſons which have led me to this concluſion, may ſubject me to the imputation which has more than once fallen from the bench. It has been the pleaſure of the court to obſerve, that the defence had been conceived and continued in error. What I am about to ſay will not perhaps induce the court to change that opinion. It is with great diffidence I addreſs the court on a ſubject which I have not had ſufficient leiſure to inveſtigate. If unfortunately my conception of this law be miſtaken, I hope I ſhall be excuſed, and that the reprimand will not be ſevere, when it is recollected, that I have had not ſufficient time for a full examination of the caſe. The poſition for which I contend is, that the book entitled, "The Proſpect Before Us," cannot be given in evidence in ſupport of the indictment. The title of the book is not mentioned in the indictment. It ſtates, that "on the firſt day of February, one thouſand eight hundred, the traverſer did write, print, utter and publiſh a falſe, ſcandalous and malicious writing againſt the preſident of the United States, of the tenor and effect following: "The reign of Mr. Adams, &c."—In proſecutions for libels in the Engliſh courts, great ſtrictneſs is obſerved; the difference of a ſingle letter between the words of the indictment and thoſe in the written or printed paper adduced in evidence, is fatal; and when "*tenor and effect*" are inſerted, all the authorities concur in declaring, that they impoſe on the proſecutor the neceſſity of proving the very words in the indictment. The firſt charge in the indictment is for a libellous writing of the following tenor: 'The reign of Mr. Adams has been one continued reign of malignant paſſions." The book which is introduced in ſupport of this charge, begins differently, and contains an hundred other pages, and many pages beſides, and is not named in the indictment. The poſition for which I therefore mean to contend is, that when libellous paſſages are extracted from a book, which has a name by which it can be deſcribed, it is the duty of the proſecutor to deſcribe the book by that name; for inſtance, he ought in this caſe to have ſtated, that the party accuſed had publiſhed a falſe, ſcandalous and malicious writing, entitled "The Proſpect Before Us," containing among other things, the paſſages complained of. There are two ſtrong reaſons to ſupport this doctrine. The firſt ground on which I reſt the validity of this obſervation, is, that the practice has been invariably ſo, I have taken the trouble of examining 15 or 20 caſes, in all of which, the books from which libellous paſſages were taken, had a name or title, and the proſecutor deſcribed every of them, by the name which the author had choſen to give it. From theſe I will ſelect three caſes, to ſhew that the deſcription of the libellous writing, by the title given it by the author, has been deemed eſſentially neceſſary, the firſt of which was remarkable for the length of the title; the ſecond, where the paper contained the libel, had a number as well as a title, and both the number and the title were recited. [Here Mr. Hay ſhewed from a book concerning libels, that the title in thoſe two caſes, and the number in the latter of them were recited] and the third, where the libel was publiſhed in the French language, in which caſe the title, though lengthy, was recited in that language, and then in Engliſh. In page 87 of the ſame book, there is a hiſtory given of a proſecution by information againſt the Chevalier Deon, for publiſhing a libel againſt the count de Guerchy, ambaſſador from France. The proſecution was commenced in the court of King's Bench. The information ſtates the title, the name of the libel fully and literally, as it was publiſhed in French, and then ſtates the tranſlation in Engliſh at full length. I bring forward theſe caſes to prove, what the practice is---and it is an obſervation of one of the beſt judges that ever ſat in the King's Bench, *Lord Holt*, that the form of pleading is evidence of what the law is.

If then it be the practice to recite in the indictment the name, to describe the title of the book, or libel published; if this has been the invariable practice ever ſince the unhappy proſecution for libels took place in that country—I believe there is no doubt but the title of this book ought to have been ſtated in the indictment. I have learned to think with diffidence, but I am firmly perſuaded, that the attorney for the United States cannot give a ſingle caſe from the Engliſh books of a contrary practice; and with reſpect to proſecutions in the United States, I know not what the practice may be in the few inſtances that may have occurred.—It appears too that ſubſtantial reaſons, founded on principles of ſound law, and ſound juſtice, can be adduced in ſupport of this practice. A principle on which I rely to explain this practice to be correct, is, that it is an univerſal rule of law, that if a man's words, ſpoken or written, be made the foundation of a charge againſt him, the whole ſhould be taken together. If the whole writing charged to be libellous, be ſtated in the indictment, it will be in the power of the defendant to reſort to other paſſages of the ſame book to explain it—If the defendant were indicted for publiſhing "The Proſpect Before Us," he could reſort to other parts of the book for an explanation. It was the duty of the attorney of the United States to have done ſo; as he has omitted it, he ought to be precluded from producing it in evidence.—I will now ſtate the other reaſon, in ſupport of my objection to the admiſſibility of this book as evidence. It is founded on this principle, which hath always prevailed, or was ſuppoſed to prevail, in criminal law, that in all criminal caſes, the offence ſhould be deſcribed, with all poſſible accuracy and preciſion. In felony, it is neceſſary to inſert in the indictment the goods and chattels alledged to be ſtolen, as well as the name of the perſon to whom they belong. The reaſons are furniſhed by the books, why this preciſion is deemed neceſſary; the firſt, that the defendant may know the charge againſt him, and be able to defend himſelf; the other, that he may plead the conviction or acquittal in bar of a ſubſequent proſecution for the ſame offence. [Here he referred to Hawkins's Pleas of the Crown, page 322, as authority.] The defendant is charged with writing and publiſhing a libel of *the following tenor and effect*; and but very few paſſages are ſelected from the books, which bear but a very little proportion to the extent of the whole of it. I aſk how is the defendant to know whether theſe few paſſages were taken from "The Proſpect Before Us," or from ſome newſpaper, in which they have been republiſhed, by ſome perſon, for whoſe conduct he was not reſponsible? Unleſs the charge be accurately ſpecified, it is impoſſible for him to defend himſelf. In ſupport of this indictment, evidence as to either caſe might be brought forward.—If in the indictment he had been charged with publiſhing a book, entitled "The Proſpect Before Us," he would have known with an abſolute certainty and demonſtration (by the copy with which he had been furniſhed) what was meant to be proved againſt him, and what was neceſſary for him to prove in his own vindication? as this is not the caſe, and as he was not bound to know whether the paſſages were taken from the book or a newſpaper, containing extracts from it, in the publication of which he had no concern, and for which he is under no reſponſibility, he ought to be ſheltered by law from the evidence, which is attempted to be introduced againſt him. The ſecond reaſon has made a great impreſſion on my mind, and yet retains its influence. I conceive, that one writing againſt the preſident, containing fifty libellous paſſages, if publiſhed at the ſame time, can be but one act, and if there be but one act, there can be but one proſecution; if the preſent indictment had mentioned the title of the book, and the very paſſages relied on, as parts of this book, and the deciſion of this jury and this court which is about to be pronounced in this caſe, might be pleaded in bar to any ſubſequent indictment, for the ſame or any other paſſages in the ſame book. It is no argument to ſay, that there will be no ſubſequent proſecution; in times like theſe, it is impoſſible to predict what may be attempted, and if ſuch a proſecution were to take place, I ſhould not be more ſurprized than I am at preſent. If the title of the book had been inſerted in this indictment, and a ſubſequent indictment were to be brought forward, I know that the defendant would plead in bar, that he had been formerly convicted or formerly acquitted; and the production of the record alone, would protect him: but if the title of the book is not to be recited, the record will not be concluſive, and a ſecond proſecution may take place: for the ſecond indictment, compared with the preſent record, will contain no internal evidence, that the traverſer had been formerly tried for the ſame offence, but he muſt reſort to oral teſtimony, to prove that this both had been given in evidence againſt him at a former trial; and he might not be able to procure witneſſes, whoſe teſtimony would be ſufficient to eſtabliſh this point. These are the reaſons which induce me to think, that this book ought not to be admitted to go in evidence to ſupport the charges in the indictment. This principle has a conſiderable operation in queſtions of a private property. In an action of a debt, if a bond or writing be the ground of the action; if there be the moſt minute variance between the bond or writing ſtated in the declaration, and that which is adduced in evidence in ſupport of it, the party muſt ſuffer a non-ſuit. If this preciſion and minute attention to accuracy be required in actions of property between man and man, is it not infinitely more important that the ſame principles ſhould govern in criminal caſes? If the argument be good in one caſe, it appears to be irreſiſtible and omnipotent in the other.

Here judge Chaſe requeſted Mr. Hay, to point out theſe parts of the authorities referred to, on which he relied to eſtabliſh his doctrine.

Mr. Hay.—If the court will have a little patience I will find the places.

Judge Chaſe.—I will have a great deal.

Mr. Hay.—The authorities I rely on are, Hawkins's plea of the crown, page and Salkeld's reports, page 660. —In this laſt book it is adjudged, that when an indictment uſes the words "*ſecundum tenorem et effectum*," it binds the proſecutor to a literal recital; and any the leaſt variance between the charge in the indictment and evidence offered to ſupport it, is fatal. The caſe I here refer to was an information for a libel: "In which libel were contained divers libellous matters *ſecundum tenorem et effectum*, and in ſetting forth a ſentence of the libel, it was recited with the word "nor," inſtead of the word "not," but the ſenſe was not altered thereby; the defendant pleaded not guilty, and this appearing upon evidence, a ſpecial verdict was found, and the court held, that the word *tenor*, imports a *true copy*, and that the variance was fatal; for, not," and "nor," are different; different grammar, and different in ſenſe; and Powy's Juſtice held as to the point where literal omiſſions, &c. would be fatal; that where a letter omitted or changed, makes another word, it is a fatal variance; otherwiſe, where the word continues the ſame; and in the principal caſe, no man would ſwear this to be a literal copy."

It appears from well eſtabliſhed authorities, that the words "in manner and form following," do not bind the proſecutor to recite exactly, but the word "*tenor*," both ſo ſtrict a technical meaning, that it binds him to a *literal copy*.

Theſe principles certainly apply to the caſe before the court. The words "tenor and effect following," are ſtated, and the evidence is variant.

Here judge Chaſe interrupted Mr. Hay, and ſpoke to this effect: You are certainly miſtaken in your ſtatement of the law, as applied to the caſe now before the court. In the caſes you mention, there is really a variance between the indictment and the evidence. Your objection is, that there is a variance between the thing charged in the indictment and the writing offered in evidence.—But this caſe is very different; there is no variance: To aſcertain this point, I will ſtate the indictment, and compare it with the law on which the proſecution is founded. The indictment charges, that the traverſer, "maliciouſly intending to defame the preſident of the United States, and to bring him into contempt and diſrepute, and to excite the hatred of the good people of the United States againſt him, did wickedly and maliciouſly write, print, utter and publiſh a falſe, ſcandalous and malicious writing, againſt the preſident of the United States, of the tenor and effect following, that is to ſay: "The reign of Mr. Adams has hitherto been one continued tempeſt, &c." Now what is the law? The act of congreſs provides among other things that, "if any perſon ſhall write, print, utter or publiſh, or ſhall cauſe or procure to be written, printed, uttered or publiſhed, any falſe, ſcandalous and malicious writing or writings, againſt the government; or either houſe of the congreſs, or the preſident of the United States, with intent to defame the ſaid government, or either houſe of congreſs, or the ſaid preſident, or to bring them, or either or any of them, into contempt or diſrepute, or to excite againſt them, the hatred of the good people of the United States, &c." The indictment charges the defendant with publiſhing a falſe, ſcandalous and malicious writing againſt the preſident, and the law provides againſt the publication of falſe, ſcandalous and malicious writings againſt the preſident. —The offences ſtated in the indictment correſpond with thoſe expreſſed in the law; the queſtion then is, whether the name of the book in which ſuch falſe, ſcandalous and malicious writings are publiſhed, muſt be recited in an indictment againſt an offender? It brings it to this point—Is it neceſſary that the title of the publication ſhould be examined, before it can be aſcertained that it comes within the law. *Any* falſe, ſcandalous and malicious writing publiſhed, with intent to defame, is provided againſt by law, whatever may be its title or name, or whether it have any name or not. I know that caſes can be produced, where the title of the libel is recited in the indictment. I remember one caſe where a man was indicted for publiſhing a libel called "*The Nun in her ſmock*;" but it was not neceſſary to mention the title of the libel in that caſe, nor is it eſſential in any. Why is it neceſſary that every charge againſt a defendant ſhould be explicit? It is that he may clearly comprehend it, and be prepared to make his defence: It is not neceſſary for this purpoſe to recite the name of the libel. The charge againſt the traverſer is very explicit, and he well underſtands, and is prepared to defend it; but it is no cenſure on his counſel, that they urge this argument in his favor. You argue further, on a ſuppoſition, that if a ſubſequent proſecution were to be inſtituted for the ſame offence, the verdict and judgment now to be rendered, could not be pleaded in bar.