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FROM THE VIRGINIA GAZETTE.

RICHMOND, January 8.

The Case of Callender and Pace, before the Court of Henrico County.

(Continued from our laſt.)

After the Court met on Tueſday at ten o'clock, Mr. Marſhall addreſſed them as counſel for Meſſrs. Callender and Pace He ſaid that Mr. Hay, in the commencement of his ſpeech of yeſterday, had ſtated two queſtions or points of law which remained to be diſcuſſed. Theſe were —1ſt. Can editors of newſpapers be bound to good behaviour in conſequence of their public actions? And, 2d. Wherein the true expoſition of the preſs conſiſted? But that Mr. Hay had ſo ſoon departed from the conſideration of the firſt point, that it might be ſaid to have been afterwards loſt in the memory of thoſe preſent, and therefore merited hardly any reply from him.

Callender and Pace, he ſaid, were called by Mr. Hay men of bad fame; but, abſtracting on the preſent occaſion the idea of the Recorder, wherein, he aſked the court, did the bad fame of Callender and Pace conſiſt? "Callender and Pace are not men of bad fame. None of theſe acts which conſtitute bad fame can be aplied to them. They are not loiterers or gamblers; they neither ſleep in the day or prowl at night; they employ themſelves as induſtrous members of ſociety. Not a ſingle allegation can be brought againſt their characters, independent of the Recorder. Callender is a citizen of the U. States, and I truſt he is entitled to receive the ſame juſtice in this court, or any other court, to which other citizens are entitled. With reſpect to the Recorder, it is a paper which has one of the largeſt circulations of any in the Union. Perhaps there was never an inſtance of a paper having ſuch an extenſive patronage in as ſhort a period. The ſubſcribers to the Recorder exceed in number thoſe of any other paper in Virginia. The moſt reſpectable characters in the U. States receive the Recorder. This does not appear to me to argue, that Callender and Pace are men of bad fame. We ought rather to conclude, that from the extenſive circulation of the Recorder, and the reſpectability of the ſubſcribers to that paper, that the editors are men of good fame. This is certainly a more natural concluſion. But how have the editors of the Recorder been proved to be libellers? The mere aſſertion of Mr. Hay does not make them libellers. Becauſe ſome ſentiments have appeared in the Recorder which have wounded the feelings of Mr. Hay, it does not hence follow that Callender and Pace are libellers.—No man can be ſaid to be a libeller, unleſs he has been found by a jury of twelve of his peers to be ſuch.

Mr. Marſhall then ſaid he would confine his arguments in the preſent caſe to three points:—1ſt. The proper interpretation of the ſtatute 34th of Edward III. 2d. The right of trial by jury. And 3d. The ſecurity given to the liberty of the preſs by the bill of rights.

"The ſtatute 34th of Edward IIId. (ſaid Mr. Marſhall) was enacted at a period the moſt unfriendly to freedom. It was enacted at the inſtigation of a Prince, afrer returning to his country loaded with the laurels of victory and at the head of a numerous army flushed with ſucceſs, and who had been diſuſed for years to the ordinary habits of life. In a period ſuch as that, there might have been a neceſſity for ſuch a ſtatute. What could be expected in an age of barbariſm, from troops who knew no controul but that of military diſcipline, and who were accuſtomed to acknowledge no authority but the voice of their commander? Licentiouſneſs, diſorder, and every ſpecies of profligacy, might be expected to ariſe at the diſmiſſal of ſuch an army, unleſs the laws of the land impoſed ſome ſalutary reſtraint on their habits. This ſtatute was therefore enacted, for the expreſs purpoſe of reſtraining the licentious manners of Barbarian ſoldiers turned looſe on ſociety. It was not framed in an age ſuch as the preſent; nor by a people civiliſed as either Britons or Americans now are. The intention of it was not to reſtrain the preſs;—the preſs at that period was in a manner unknown. It was intended to guard the peaceful and induſtrous citizen from the violence and rapine of the ruffian and wandering idler,—I truſt there is not a ſingle individual who will compare the age of Edward the IIId. with the preſent, or the diſſolute habits of a Barbarian army, only accuſtomed to rapine and pillage, with the civilized and domeſtic manners of the citizens of this country. The ſtatute of the ſtate of Virginia cannot therefore bear the ſame interpretation with that of the 34th of Edward the IIId. even upon the ſuppoſition that it was intended to reſtrain the freedom of the preſs, the circumſtances under which theſe two ſtatutes were enacted being ſo different and diſſimilar to each other. But the ſtatute 34th of Edward the IIId. I maintain, and hope will be able to prove to the ſatisfaction of this court, was never intended to act as a reſtraint upon the liberty of the preſs, or to give authority to magiſtrates or juſtices to bind over libellers to keep the peace before conviction, after a trial by a jury of twelve of their peers."

The beſt and ſoundeſt interpretation of this ſtatute, is to be obtained from Coke. He wrote in the reign of Elizabeth, and is therefore the earlieſt lawyer who has given an opinion on this ſubject at leaſt I have been able to find no interpretation given of it previous to Lord Chief Juſtice Coke. The judgment and talents of this man are too well known. His opinions have always been, and probably will ever continue to be, regarded as the firſt authority. They are eſteemed as ſuch in the Engliſh courts, and in the courts of America. His opinion, therefore, on the proper interpretation of the ſtatute 34th of Edward the IIId. ought to carry much more weight with it than the ſentiments of latter writers. Living in an age, the manners and habits of which were nearly the ſame with thoſe in the reign of Edward the IIId. he was much better fitted to judge of the true ſpirit of the ſtatute, and of the real intention of the framers of it, than men living centuries after; when the modes of life were ſo very different, and the cauſes which gave riſe to it were unknown or no longer exiſted." Mr. Marſhall then read Coke on the interpretation which ought to be given to this ſtatute, which went to prove that libellers were not included in the deſcription of thoſe characters that be not of good fame. He alſo read thoſe paſſages of Blackſtone, which have already been tranſcribed into the Virginia Gazette, from which he contended that perſons not of good fame and whom juſtices are authoriſed to bind over to keep the peace, are men who are ſuſpected will do ſome act that may be a breach of the peace, ſuch as aſſault and battery, or injury to property. Blackſtone, (Mr. Marſhall ſaid) expreſsly declares, that no previous reſtraint can be laid upon the liberty of the preſs, in any ſhape or manner whatever.

Mr. Marſhall next requeſted the attention of the court to the ſentiments which Burn expreſſed on this ſubject. Burn, Mr. Hay had remarked, ought not to be advanced as authority from the reſpectability which he held as a writer, but ſolely from the ſeveral authorities which were quoted in his juſtice. The correctneſs of this obſervation, Mr. Marſhall denied.—Burn, he ſaid, was quoted as authority by the firſt lawyers. He inſtanced Hawkins and ſeveral others. Burn's opinions on this point ought, therefore, and are juſtly entitled to the ſame credit as Blackſtone. He read ſeveral paſſages from Burn, which condemned the large latitude that was ſometimes given to the interpretation of this ſtatute; and from which it appeared that Burn's own ſentiments were, that libellers could not be ſupjected to the authority of the ſtatute 34th of Edward the IIId.

Mr. Marſhall then proceed to the conſideration of the 2d. point, the right of a trial by jury, which he mentioned would be invaded, if the doctrine advanced by Mr. Hay were ſuſtained.

To prove this he called the attention of the court to the celebrated caſe of Mr. Wilkes related in Wilſon's Reborts. Mr. Wilkes it is well known, was arreſted for the publication of an infamous libel called the North-Briton and another termed an Eſſay on Women. Although the caſe was not preciſely ſimilar to the preſent, yet Mr. Marſhall inſiſted the arguments of the judge on that occaſion expreſsly contradicted the doctrine which Mr. Hay and his counſel pretended to ſupport. The judge before whom the legality of the warrant upon which Wilkes was arreſted came to be tried, declared, that no member of the Houſe of Commons could be arreſted except for ſome felonious act or a breach of the peace, that a libel was no breach of the peace, and that none could be either arreſted bound over, or even compelled to give bail for a libel until after conviction by a jury. Mr. Marſhall ſaid, that this caſe muſt therefore be deciſive evidence in favour of thoſe opinions for which he was now contending. That the doctrine which Mr. Hay ſupported, was a complete invaſion of the trial by jury; and would act as the ſevereſt of reſtraints upon the liberty of the preſs. He told the court there were only two ways in which libels could be puniſhed. Theſe were by indictment and information. Thoſe were the methods to which Mr. Hay ought to have reſorted, and not to have claimed the ſupport of the court, in an act which was a total violation of the rights of juries, and of the bill of rights.

So zealous were the citizens of Virginia, ſaid Mr. Marſhall, of preſerving the rights of juries, that an act was made by the legiſlature for veſting the power of adjudging the amount of fines with the jury, and not with the court, which lay with the latter previous to the Rivolution. Were the doctrine now contended for, found to be law, the pecuniary puniſhment for libels would be veſted in a ſingle magiſtrate, and of whatever extent the nature of the libel might be, from the moſt trivial to the moſt heinous, the amount of the fine would remain the ſame. For the recognizance in which the ſuſpected libeller was bound, would be forfeited, however trifling a falſehood he might propagate, with regard to private characters; nothing could be more unfair or unjuſt than this, ſaid Mr. Marſhall, ſuppoſing Callender and Pace were to publiſh the moſt inſignificant expreſſion that would wound the feelings of Mr. Hay; a jury might find it libellous, but in place of Callender and Pace paying the trifling ſum that would probably be impoſed upon them by the jury, they would be compelled to pay the whole amount of the recognizance in which Pace was now bound. This was entirely transferring the power of juries to that of magiſtrates, & conſequently was an invaſion of the rights of juries. Mr. Hay had obſerved, that the adminiſtration of juſtice was too tardy in the caſe of libels; but ſurely this was no reaſon why Mr. Hay ſhould reſort to illegal meaſures, which thoſe certainly were, which he now was contending for. Mr. Marſhall ſaid that Mr. Hay had not produced a ſingle caſe applicable to the preſent queſtion, except the ſolitary one from Forteſcue, and that it had never come to be fairly tried, nor was the cognizance ever paid; but ſuppoſing it had, and that the Britiſh ſtatute of Edward the IIId. even authoriſed libellers to be bound over, that it could be of no force in this country, as being totally incompatable with the bill of rights, which ſecured to Virginians, in the completeſt manner, the freedom of the preſs.

Mr. Marſhall alſo read to the court ſeveral paragraphs from De Lolme page 282, on the liberty of the preſs, to prove that by the law of England, no previous reſtraint could be put upon the preſs. Mr. Marſhall obſerved, that Mr. Hay argued that no reſtraint would be laid upon the preſs; and that its liberty would not in the ſmalleſt degree be affected, although Callender and Pace were bound over; for that they were not prevented from publiſhing what they pleaſed more than before: that they had no licenſer ſet upon their preſs; nor would any perſon have the power of dictating to them, what they ſhould or what they ſhould not publiſh.—Mr. Marſhall ably expoſed the ſophiſtry of their reaſoning, for in whatever ſhape it could be viewed, he proved that it would act as a reſtraint upon the Editors of the Recorder. He diſagreed from Mr. Hay in the definition which was given of the freedom of the preſs by him in Hortentius. He ſaid that according to Mr. Hay's definition, private characters were ſacred, nor would there be any poſſibility of knowing until it was too late, the merits of Candidates for the ſeveral public offices in the Union. He ſaid that it was neceſſary for the preſervation of morals, that a ſcrutiny into private character ſhould be allowed, for otherwiſe the moſt unprincipled men might be elected to the moſt importatnt truſts in the ſtate. That by Mr. Hay's definiton, their vices could not be expoſed until it was too late, and when it was unneceſſary. He contended if ever the private conduct of individuals ſhould be made public, it ought to be when they are private citizens of the ſtate. By this means the good, the moral, and the religious might be ſeparated from the wicked, and the unprincipled, and it would not then ſo probably happen that worthleſs characters could be elected, which of Mr. Hay's propoſition was agreed to might frequently happen. I therefore hope ſaid Mr. Marſhall, the court will ſee the ſophiſtry and dangerous tendency of Mr. Hay's doctrine, and diſcharge the priſoners, Callender and Pace.

Mr. Rind roſe after Mr. Marſhall had finiſhed, and delivered himſelf in a ſtrain of the moſt impreſſive language which we ever heard. Altho' we ſhall endeavor to give the words of the principal argument which he advanced as nearly as our memory ſerves us, yet we can but convey a very faint idea of the eloquence which he diſplayed on this moſt important occaſion.

"after the very able reply which the court have heard, in oppoſition to the doctrine advanced by Mr. Hay