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FROM THE LITCHFIELD WITNESS OF September 10.

State of Connecticut, vs. Selleck Osborn and Timothy Ashley.

[CONCLUDED.]

On Thursday the 2d week of said term, by previous assignment by the court; it came before the jury for trial; which jury was composed of the following persons, viz.

Jabez Gillet
Norman Griswold
Stephen Filer
Ashbel Spencer
Josiah Upson
Levi Watson
Medad Munson
William Taylor
Luke Loomis
Benjamin Hale
Titus Darrow
Platt Starr.

Evidence in support of the prosecution.

The publication above recited on which this prosecution was grounded, was first read.

Joseph Adams swore, that at the time votes were taking for Assistants, he and Deming sat in the same pew, at what particular stage he did not recollect, but while the freemen were voting for Assistants, Deming asked him if he had seen captain Simmons at meeting; and said that he wanted to see him to learn if Russell Hunt had drawn a Crowbar for him, which he had engaged. Soon after, he (Adams) discovered Simmons, and informed Deming where he sat. After this, Deming left the pew, whether immediately or not, he did not recollect. When questioned—he said that he did not recollect that any persons were standing for the purpose of voting, at the time he discovered Simmons—he did not see Deming point at all.

Julius Deming, *the person claimed to have been libelled*, was then offered as a witness, and objected to, by the defendant's council—because interested in the prosecution; not only in the question (which till very lately in Connecticut had uniformly excluded) but also in the event, which always disqualified—that though this was not a pecuniary interest, yet it was much stronger; it was the interest of character. It was asked if on a prosecution for a libel charging another with perjury, the person charged would be the proper witness to prove that he himself did not commit perjury?—that the present case was the same in principle; that Deming of all persons was the most improper to swear himself innocent of the misconduct with which he had been charged; that the great principle upon which witnesses were excluded, was a presumed bias on the mind which might induce to perjury; that the bias arising from a character at stake must be much stronger than that which could arise from a mere question of property. It was further objected, that the witness could not be improved by the state, because he could only be called upon to testify to the falsity of the publication, but never by the PROSECUTED to prove its TRUTH: for no one is required to criminate himself; and as the claim could not be reciprocal, it therefore could not be legal on the part of the state; which objection was over-ruled by the court; and Mr. Deming admitted.

Mr. Deming then swore, that the day of the freemen's meeting he was seated west of the pulpit; that he continued there till three or four votes had been taken for assistants; that he then left the pew to make room for the Rev. Mr. Champion and other gentlemen Clergy, and took a seat on the east side of the alley; that he made some enquiry respecting Simmons; that gen. Skinner, being in the same pew, appeared anxious to point him out to him; that Joseph Adams, shortly after informed him where sat; that he went to him and enquired of him if he knew whether Russel Hunt had made a *Crowbar* for him? Simmons replied that he rather thought he had. Deming further stated that Simmons being indebted to him, and having previously promised payment in August, of which he had failed; on this account he called on him, and required him to see him at his store before he went out of town; Simmons said he would call; that he then left him; that he did not see Simmons vote that day; that he did not know his political sentiments; nor did he know on what side he voted, though if enquiry had been made he should have said he was a democrat; that he did not see him till he was shewn by Adams, and that he (Deming) did not point at him at all.

Question, by the defendant's counsel. Did you when you looked at capt. Simmons, catch his eye?

Answer. I looked at him, and believe he looked at me at the same time.

Question, by the same. While you continued to look at him, did he not rise and vote for a republican?

Ans. I did not perceive it. Mr. Deming then said, he had no desire to influence Capt. Simmons in his vote; that he had no suspicion that he was a democrat till after the meeting; when a laughable story was told at his store by Oliver Wollcott about southern elections. Simmons was present and appeared pleased, and joined in the laugh. From which he concluded him to be a democrat.

Question by defendant's counsel.—"You say, Mr. Deming, that you had no suspicion that capt. Simmons was a democrat till the ludicrous story was told by O. Wolcott? In a former part of your testimony you said, if enquiry had been made, you should have answered that he was a democrat; why, having no suspicion of his politics, should you have made this answer?"

Ans. "I cannot tell, unless because he lived in *Milton*."

Charles Deming (son of Julius) swore that capt. Simmons called on his father after Freemen's meeting was over, and told his father that he had the money but could not conveniently pay it at that time; he said the money was at home. On being questioned he said he was not present all the time captain Simmons was with his father.

Frederick Wollcott, Esq. swore that after the meeting he went to Deming's store with his brother Oliver; that he found Capt. Simmons and Mr. Deming together; that they appeared to be composed; and that there was a conversation on the subject of elections in other states, especially the southern, that they constrasted the electioneering arts and intrigues used in those states, with Connecticut elections, and had considerable laughter on the occasion; and that captain Simmons seemed to enjoy it.

Testimony on the part of the defendant.

Captain Simmons swore that he had been indebted to Mr. Deming on note and book. About the first of August he was at Deming's store; that Deming dunned him; that he told Deming he would pay him as soon as he got the iron ready; that Deming had previously agreed to take iron in payment; that about the middle of August he again saw Deming, near Tryon's bridge; that he then told him that he had not got the iron ready, but should have it soon; and asked him if it was material whether he delivered it at his store, or at the slitting mill; Deming said it was not, he might leave it at the mill if he chose. About three weeks after at the freemen's meeting, while voting for assistants, he observed Deming looking sternly at him several times, that he paid particular attention to this because he had observed it at former freemen's meetings; that he soon after perceived him take Adams (the constable) by the shoulder, and while standing, point directly at him; that several times they caught each others eye, and looked very determinedly at each other. That just before the nomination of a republican was made, he observed Deming look at him with peculiar sternness; that he rose and voted; that after he sat down, Deming continued to eye him in the same manner till another republican was named, and he rose and voted for him; that soon after, Deming came round to him and asked him if Russel Hunt lived with him? Simmons answed, yes. Deming then asked, if Hunt had drawn a *crowbar* for him? He answered, he did not know—that Deming then abruptly quitted the subject of the crowbar and told him, that before he went out of town he (Simmons) must call on him; that he replied he would if he wished it: that Deming again said, and in a stern manner that he had better call on him before he went out of town; that while Deming was in the pew a republican candidate was nominated; that he rose to vote and Deming hurried away, he supposed for fear he should be counted with the republicans; that after the meeting he called on Deming; that he took him into his counting room, that he told him he must be paid what he owed him; that he asked Deming why he crowded him so, when he had agreed to take iron; that Deming replied that was no matter he must have the money, and would have it; and that if it were not paid by Saturday night, he would send an officer after him with two writs on Monday morning.

Question, by the state's attorney: Do you know there was a vote taken while Deming was looking and pointing at you?

Ans. Yes; and a republican, for whom I stood up and voted.

Question by the same. Did you tell Mr. Deming you was not to be frightened out of your principles?

Answ. I told him, I thought he had crowded upon me, and that because I was poor, I was not to be frightened out of my principles.

Russel Hunt (the person of whom Deming had engaged a crowbar) swore that he was at the last freemen's meeting; that while there, about the time of voting for the second representative, he met Deming in the broad alley, who asked him if he had made the crowbar for him, that he told him he had; that Deming then asked him if captain Simmons was at the meeting? he told him he was.

[It may be proper to remark in this place, that Representatives are always chosen before assistants are voted for; that if Hunt testified truly, Deming already knew that the crowbar was ready for him, before he made the enquiry of Captain Simmons; of course the enquiry must have been a mere pretence.]

John Welch, esq. swore, that at the time votes for O. Elsworth were called for, the mode of voting was objected to; that Deming was then in the pew east of the broad alley; that Ellsworth was the first candidate named—that several observations were made, respecting the "*stand-up-law*;" that Deming observed that it was true some people might be ashamed that it should be seen for whom they voted. He soon after enquired if capt. Simmons was in the meeting, and said he wished to see him about a *crowbar*; that soon after, he saw Deming looking at capt. Simmons, and Simmons at him; they continued thus to look at each other, for some time; during which, Simmons rose and voted at least once; that from the manner of Deming's enquiry, he suspected that he had some other object in view than the *crowbar*; and for that reason was attentive; that while Deming was looking at Simmons, he observed the latter to wink at him (Welch) in such a manner that he (Welch) was convinced that Simmons supposed Deming was endeavoring to deter him from voting as he did—that he saw Deming take Adams the constable by the shoulder, and point at Simmons; and that soon after, Deming left the pew and went round to Simmons.

Seth Griswold, swore, that he saw Deming's hand on the constable's shoulder, both having risen and turned towards Simmons; that Deming then pointed at Simmons, and afterwards went round to him and made the observations testified to by captain Simmons.

Moses Seymour, jun. testified, that he was certain, that before any vote was given for Assistants, Mr. Deming was sitting in the pew *east* of the Broad Alley; because when the first vote was about to be taken, he objected to the *mode*, as not being conformable to the statute; which statute he held in his hand, and immediately shewed the same to Mr. Deming, who was then sitting in the aforesaid pew, and who assented to the correctness of the objection; and informed the Moderator that it was persisted in; and then the vote was taken according to law.

Deacon Ozias Lewis, testified substantially the same as John Welch, esq.

Gen. Skinner, swore, that when the nomination for Assistants was called up in the meeting, the federalists and republicans, as usual, separated; the federalists took the *west*, and the republicans the *east* half of the meeting-house, with the exception of a few influential federalists, who, as usual, took a stand with the republicans; and that Mr. Deming was one; that he took his seat in a pew with him before any vote was taken for Assistants; that he heard Mr. Deming make some enquiry about capt. Simmons, but paid no particular attention to it, as his mind was fixed on the business of the meeting; that noticing several republicans out of the house, he remarked to Mr. Deming that the "stand up law" was very unequal in its operation, that there were at that time several freemen whom he knew to be republicans, but who dare not vote for Assistants, because dependent on the civil authority, and merchants to whom they were indebted; for this reason they could not act according to the dictates of their *consciences*. Mr. Deming replied, "*consciences!* they have no consciences!"

Ebenezer Picket and Aaron Page, agreed with capt. Simmons, as to what took place in the pew at the time Deming came round to him; that both of them recollected Simmons rising to vote, and Deming hurrying from the pew; and that Deming appeared particularly earnest and significant in his demand that capt. Simmons should call on him before he went home.

Mr. Deming was then again called upon by the prosecutor: He denied that he had agreed to take iron of Simmons instead of money; and denied the conversation at Tryon's bridge, stated by Simmons. The following question was then put by the prosecutor to Mr. Deming; "Should you think, Mr. Deming, that you would have consented to receive ten dollars* and not to have sued, provided capt. Simmons had made the remarks respecting his principles in your counting room, to which he testifies?"

Answer. *I presume, may it please your honors and you gentlemen to the jury, I should not.*"

Hicks Smith and Job Simmons, both testified, that they were present at the conversation at Tryon's bridge between Simmons and Deming; that Simmons told Deming that he should have the iron before long; and enquired of him (Deming) if it would make any difference whether he delivered it at the slitting mill or at his store; that Deming told him it would not; but if he left it at the mill he must take a receipt therefor in his (Deming's) name; if he brought it to his store, he wished it to be in drafts; and that this conversation was in August, a short time before freemen's meeting.

Asahel Wilcox testified, that before the meeting referred to, he was indebted to Mr. Deming, and that a little time before freemen's meeting he was at Mr. Deming's store when Mr. Deming introduced the subject of politics, and among other things asked him if he should dare to come down and vote for democrats at the next meeting? He told him if he was well he should come down, and if he came down he *should dare to vote*, and that too for democrats; soon after Deming told him he must pay him what he owed him; he (Wilcox) replied, he would attend to it as soon as possible; that he was soon after again at Mr. Deming's store, where was a deputy sheriff. Mr. Deming said that Mr. Holmes the attorney wished to see him (Wilcox) & that the deputy sheriff would wait on him to Mr. Holmes's; he accordingly accompanied him to Mr. Holmes's and found his notes there for collection; and to save expences, Mr. Holmes took judgments by confession; that he requested indulgence; that Mr. Holmes observed, if he was as good natured to Mr. Deming as he was to him, (Holmes) Mr. Deming would wait on him; that he so well understood the business, that before freemen's meeting he borrowed the money of a republican, and satisfied the judgments.

Norman Buell testified, that Mr. Wilcox stated the same facts to him at the time, as he had testified to in court: and that he (Buell) lent him the money to pay the demand.

The testimony being closed, the cause was fully argued by the counsel on each side. The statute of this state which is in the following words, was read and relied on by the counsel in behalf of the defendants.

"*An Act to secure the Freedom of the Press.*"

"BE *it enacted by the governor and council and house of Representatives in general court assembled*, That if any person shall be prosecuted for the writing or publishing any libel, it shall be lawful for the defendant upon the trial of the cause, to give in evidence in his defence, the truth of the matters contained in the publication charged as a libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court as in other cases.

TIMOTHY PITKIN, jun.
Speaker of the House of Representatives.
JONATHAN TRUMBULL,
Governor.
Attest,
SAMUEL WILLIS, Sec'y."

After a trial which lasted two days and a half, the cause was on Saturday noon committed to the jury: the chief justice having first, in the usual form, directed them to keep their own counsel, to say nothing to any one respecting the same till they were agreed on a verdict, and had delivered the same in court. Twice in the afternoon of the same day the jury were called upon by the court for their *verdict*; and each time informed the court they were not agreed. On Monday they were once or twice called on, but still were not agreed. On Tuesday being again called on, the foreman informed the court, "*That the jury had a verdict but were not* ALL *agreed in it.*" The court, after some conversation, agreed they would *take the verdict*. The counsel for the defendants then enquired of the court if they understood the foreman to say (as was the fact) that though they "*had a verdict they were not* ALL *agreed in it?*" The court replied, *they did.* The said counsel then objected to a verdict of this kind being received; which objection was instantly over-ruled by the court; and the foreman then pronounced a verdict of *Guilty*. To this verdict one of the jurors (captain Stephen Filer) objected; and informed the court that it was given without his consent, and that he could not agree to it. The court then after a short consultation, ordered the clerk *not to record the verdict*; and enquired of the jury if they were willing to return the papers? To which they all assented except the aforesaid Filer, who after some hesitation, informed the court that he believed it was not proper; and of course he could not consent. The court then observed, "you say you are not agreed, do you, Mr. Filer? The defendant's counsel replied that Mr. Filer said he "*could not consent to give up the papers.*" The court commanded silence, and said that it was an improper time for counsel to be heard; and the judge, turning to Mr. Filer, again enquired, "What did you say, sir?" Upon which Mr. Filer, in a very audible voice, informed them that he could not consent to give up the papers. The court then sent the jury out for further deliberation.

Thursday (all the jury business being finished) the jury informed the court that they were still disagreed, precisely as on Tuesday; the papers were again called for; the same dissenting juror, (captain Filer) could not consent to give them up. The counsel for the defendants then stated, that on this jury the accused had put themselves for trial; that on this jury they relied for a true deliverance according to law and evidence; and that they never would consent that the papers should be delivered up; that it was their right, and by this jury they would stand or fall.—The court again ordered silence, and enquired of captain Filer, what reasons he had for refusing to give up the papers? He replied, that he was not versed in legal proceedings, but he believed it was not usual for courts to enquire of jurors the reasons for their opinions; that though he conceived he had no right to give up the papers, yet he supposed them subject to the order of the court. The question was then put by the chief judge to his associates whether the papers should be taken back? They unanimously decided in the affirmative—and the jury were dismissed.

It is worthy of remark, and will certainly excite deep attention in the minds of all who read the statement of this trial, that the fact was immediately known after the jury had taken the case into consideration, that eleven of them were for a verdict of guilty, and one opposed to it: this had leaked out to the people of the town thro' some of the smaller fry of lawyers who swarm around the court; and who had already found out a case exactly in point, reported in Hale's pleas of the crown; where, on a prosecution for a libel, the jury, as in the present case, stood eleven and one; and the eleven who were for bringing in the accused guilty, gave in a verdict to that effect, without the knowledge or consent of the twelfth. This verdict was recorded, the court not knowing but that the jury were all agreed; and on motion stating these facts, judgment was arrested & a new *venire* awarded. Soon after, the cited case became matter of public conversation thro' the same channel that developed the situation of the jury.—The false verdict was exhibited to the court in the manner already stated.—Here was a strange, and perhaps to some, *an unaccountable coincidence.*

This case however in one important particular did not compare with that in Hale's Pleas of the Crown. The court here were not imposed upon; they took in the verdict knowing the jury were not agreed; and then seeming instantly to change their opinions, ordered the clerk not to record it, and afterwards returned the jury to a further consideration of the cause.

It ought to be remembered, that to Phinehas Emmons, a violent federal constable, was committed the care of the jury; and that he was sometimes a witness to the deliberations and discussions in the jury room.

At the next term (March, 1806) contrary to the expectations of almost every person, the court again called up the same prosecution. The defendants then stated substantially the foregoing facts by way of exception to the jurisdiction of the court, praying the said court to take no further cognizance of said cause, but to dismiss the same.

The defendants in support of their objection adduced the second vol. of Swift's System of the laws of Connecticut, in page 259, to shew that the practice in Connecticut in civil suits, is where the jury cannot agree, for the court by agreement of parties, to take back the papers. Same book page 403, shewing that when in a criminal case the cause is committed to the jury they cannot be discharged till they have agreed on a verdict; 4th Black. Com. p. 360. Foster's Crown Laws p. 29. &c. to shew that the jury cannot be discharged after the cause is committed to them, except in cases of absolute necessity.

Coke on Littleton, 227, shewing that in a case which concerns life or member, the jury cannot be discharged though all present consent.

Carthew's Reports 465; 3d Bacon's Abridgement, 269; 2 Hawkin's P. Crown 622; and Wood's Institute 529—3; shewing that in capital cases the jury cannot be discharged though all parties consent; and in cases not capital without the consent of the accused; and many other cases were read in support of the last position.

All these cases appear to be governed by the general principle that no man shall be twice put in jeopardy on the same charge.

The court overruled the objection, and ordered a second trial. The jury being dismissed, the publication was again read to the court when the defendants informed the court, that they had been at the expence and trouble of one defence, and that therefore they

* After the first side was wrought, we discovered the omission of a part of capt. Simmons's testimony, viz. that Mr. Deming finally agreed that he would not sue him if he would pay 10 dollars by Saturday, which was paid.