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SUPREME COURT, Charlottetown, June 30.

TRIAL FOR LIBEL.

THE QUEEN V. MACLEAN.

This was an action brought at the suit of the Crown, against Duncan Maclean, Esq., a Member of the House of Assembly, upon a criminal information filed against him by the Attorney General, for the publication of a libel upon the Government of this Colony. The libel complained of formed one of a series of Resolutions passed at a public meeting held on the 28th February last, at New London, which District Mr. Maclean represents in the House of Assembly. The Resolutions were forwarded to Mr. Maclean, who was in Charlottetown at the time, the Legislature being then in Session, with a request that he would furnish a copy to each of the printers, for insertion in their respective newspapers. Mr. Maclean accordingly called upon two of the printers with them, both of whom refused to print the Resolution referred to, giving as their reason, that they considered it contained a libel upon the government. Thus it appears that the libel was not actually printed, but as Mr. Maclean took it to two different printing offices for that purpose, the Crown officers, deeming that to amount to an act of publication, instituted the present proceedings against him, upon which he put in a plea of not guilty. A Special Jury, at the instance of the Crown, was summoned to try the case. The prosecution was conducted by the Attorney and the Solicitor Generals, with whom was Mr. E. Palmer. The defence was conducted by the Defendant himself, assisted by Mr. Young. The following gentlemen composed the Jury:—

Joseph Holroyd; John T. Thomas; Edward Roberson, Newtown; Donald Mackinlay, York River; Roderick Mackinnon; John Roper; Thomas Foster, Stanhope; Henry Stamper; William Inman, Sable; William White, Shipbuilder; John Thornton, Princetown Road; John Stewart, Harbour's-mouth.

Mr. Palmer read the information, consisting of five different counts, which it is unnecessary to enumerate, as the gist of the charge will appear in the course of the proceedings.

The Solicitor-General rose to address the Jury. Never, he said, since he came to this Island, had a Jury been called upon to decide upon a case of greater importance than the present. The charge is, that the Defendant has published a libel on the Government of this Colony, than which nothing could have a more pernicious tendency. From the days of ancient Rome to the present time, all civilized Governments had been protected against libellers. While the law allows you to point out the evils which exist, and the way in which they may be remedied, it prevents the artful and seditious from spreading disaffection among the people, by charging the Government with being actuated by corrupt motives. So far from wishing to suppress free discussion, Government not only permits—it courts inquiry. You may point out its faults and its follies, but the law says, you shall not attribute wicked and sordid motives to the Officers of Government. If a charge is brought against the Government of being so actuated, it is not by the mass of the people that the subject is to be discussed; individuals are not to constitute themselves both accusers and judges. The proper place for the discussion of such subjects is the House of Representatives; there the most unlimited freedom of speech may be indulged in, and it is for that body to prefer an impeachment, if they see cause for so doing. Individuals are not to judge in such a case. Suppose a person injures you, the law does not permit you to right yourselves There is the proper tribunal for that purpose, and to it you must apply for redress: and so with the Government, when its conduct is arraigned. He wished to call the attention of the Jury to the line of distinction which the Law draws between a free and fair discussion of public men and measures, of the acts and proceedings of Government, and an improper and criminal use of that privilege. So long as the Government is not brought into contempt, it is all well enough, but endeavour, by your publications, to make the people believe that the Government is actuated by base and sordid motives, and you overstep the bounds within which we are required to confine ourselves. Even the truth is no justification of a libel in the eye of the law—but he would ask, is there a man in the Island who can conscientiously say that he believes this libel to be true? He did not believe there was one. Still we all know how credulous mankind are, and how prone to lend a willing ear to charges of this description—could you persuade any number of persons to believe that such charges were well founded, would not such persons be desirous, on the first fitting occasion, to do all in their power to subvert such a Government? He did not wish to say one word to excite their feelings—he only wished for a cool and candid inquiry into the merits of the case—and if he failed to make it appear as clear as the sun at noonday, that this was a libel of the grossest kind, let them acquit the defendant; but if proved, and that it was published by him, then, whatever reluctance you may feel, you cannot do otherwise than find him guilty.

The information charges the defendant with the publication of a libel, in delivering to Mr. Cooper and Mr. Ings the following Resolution, for insertion in their respective newspapers:

Resolved, That the government of this Colony, unlike that of any other Colony, did not govern for the benefit of the majority of the people, but for the benefit of a couple of dozen of land speculators, their connexions, dependents and parasites.

This is the libel complained of. Now, in trying it, the test is this—Does it impute base and unworthy motives, and is its tendency such as to excite distrust and disaffection towards the Government? If so, it is quite immaterial whether it be believed or not. If it is calculated to produce the effects named, the law pronounces it a libel, and the Jury, by virtue of their oaths, must find a verdict accordingly. And is it possible to say that it is not a libel? Put it to yourselves and say, would you be inclined to submit to such a Government? Here the Solicitor-General quoted from Starkie on libel, who says, the test of illegality must depend on the answer to the question, "Has the publication a plain tendency to produce public mischief, by perverting the mind of the subject, and creating a general dissatisfaction towards government?"

In another case, referred to in Starkie, p. 526—

"A person delivered a ticket up to the minister after a sermon, wherein he desired him to take notice, that offences passed now without control from the civil magistrate, and to quicken the civil magistrate to his duty, &c. This was held to be a libel, though no magistrates in particular were mentioned, and though it was not averred that the magistrate suffered these vices knowingly. And the ground of the conviction has been stated to be, that the general misrepresentation of the government or state of the nation, or mutinous hints, tend to excite discontent and sedition in the people, and that the generality of the reflection made it the more dangerous, since it had a bad effect on the whole frame of government."

The Resolution charges the Government with governing, not for the benefit of the majority, "but for the interest of a couple of dozen of land speculators, their connexions, dependents, and parasites." This was a case ten thousand times stronger than the one he had cited; for that case only imputed negligence to the Government; buthere Government was charged with a crime of no ordinary magnitude. You, gentlemen, cannot help seeing, how dangerous it must be to the good order and well being of society, were the artful and seditious allowed with impunity to poison the minds of others by the dissemination of such assertions as these. If charges of this kind are to be preferred against the government, it is on the floor of this house, when the Representatives of the people are here assembled in their Legislative capacity, it ought to be done. Here the most ample freedom of speech is then allowed; our free constitution guarantees this. This then is the place to bring such charges forward, because in the House of Assembly there are always members ready to explain matters, and to vindicate government when unjustly assailed. If not true, the explanation goes abroad with the charge, and we have the bane and the antidote both before us. He would now cite another case, that of John Tuchin. This was the pole star for the guidance of both judge and jury in cases of libel. Judge Holt, in summing up, observed—

"To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If persons should not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government than to endeavour to produce animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe unless it be punished. Now, you are to consider whether these words I have read to you do not tend to beget an ill opinion of the administration of the government."—*Starkie, p.* 528.

He (the Solicitor-General) would again read the Resolution, (reads)—and he would say to the jury, in the words of Lord Holt, "Now, you are to consider, whether these words I have read to you do not tend to beget an ill opinion of the administration of the government." The celebrated Cobbett was tried upon an information for publishing a libel in the Weekly Register, entitled "Juverna." Lord Ellenborough, in summing up to the jury, observed,

"It is no new doctrine, that if a publication be calculated to alienate the affections of the people by bringing the government into disesteem, whether the expedient be by ridicule or obloquy, the person, so conducting himself, is exposed to the inflictions of the law."

If this Resolution now before us (said the Solicitor-General) be not a libel, then every man who has been convicted of libel, has been wrongfully and unlawfully convicted. Let it go forth to the world that such calumnies may be written and published with impunity—and it was very easy to mislead the multitude with such statements as that contained in the Resolution, when there was no one present either ready or willing to refute them—and who would answer for the wide spreading effects of such a line of conduct? He called upon them, then, for the protection of order, and for the well-being of society, to show by their verdict that they were determined to maintain the supremacy of the laws.

Having thus clearly shown that the paper was of a libellous character, he would proceed to consider the second point, namely, whether the defendant had been guilty of publishing it? He was not charged with being the author of it; but in the eye of the law, the man who publishes a libel is just as guilty as he who wrote it. Mr. Maclean first took the paper alluded to to Mr. Cooper, and desired to have it inserted in his paper. He afterwards took it to the printing office of Mr. Ings, another publisher, and made a similar request. If it was not actually printed—if it did not obtain a wider circulation—it was more owing to the good sense of the printers than to any want of zeal on the part of the defendant. He had shot his arrow, and it was not his fault if it did not hit the mark; he had at least made the attempt. The delivery to the printers was a publication, as far as the defendant was concerned, just as much as if it had been inserted in a thousand newspapers. From the authorities he had to quote, he felt quite satisfied that he would be able to bring the charge home to the defendant, not only to the satisfaction of the jury, but he thought he would be able to convince the defendant himself of it; although he was aware that

"A man convinced against his will,
Is of the same opinion still."

The Solicitor-General then cited several cases as to the act of publishing. If a libel were stolen, it is not considered a publication, but if a single copy reach a single person with intent to publish, it is enough. Starkie mentions a case where a slander was contained in a letter addressed to the plaintiff himself. The plaintiff"s clerk was in the habit of opening such of the plaintiff"s letters as were not marked "private," and the clerk swore that the defendant was aware of this circumstance. This was held to be a publication. On the trial of Sir Francis Burdett, who, great and powerful as he was, was convicted and punished for publishing a libel on the government, Mr. Justice Best said, the mere transmission of a letter by post was, in his opinion, a publication. Publication is nothing more than the last act of doing a mischief; the offence is then complete; and has not Mr. Maclean done every thing in his power to give publicity to this libel, just as much as if it had been bruited abroad in a thousand newspapers?

He would cite but one case more; it was that of Watton v. Gore, in *Harrison's Digest, p.* 919; and if any thing would exonerate a person from the charge of publishing a libel, this might be supposed to be such a case—It was this. The Governor of a Province delivered a paper of a libellous tendency to his Attorney General—not, it would appear, for the purpose of taking a legal opinion upon it; he merely lent it to him as a friend, that he might peruse it. This simple circumstance was held to be a publication of the libel. Suppose our Lieutenant Governor were to hand a document of a similar character to his learned friend the Attorney General, or to any other person, that he might amuse himself by its perusal, His Excellency, for so doing, would render himself amenable to the law. The information charges the defendant with having published the libel with a malicious intent. Now the intention must be gathered from the paper itself. What is termed malice is a mere inference of law, from the proof of publication, unless when privileged; such as a person being compelled to give a character to a servant, or give evidence in a Court of Justice.

Having now shown the jury that this is a libel, and that the act done by the defendant amounts to a publication, he had little more to do. He was not unaware that this case has caused considerable excitement out of doors; but with that they had nothing to do. The moment they entered that box, they must consider themselves, as it were, cut off from the world around them—from that moment, by the most solemn of all obligations (an oath), they were bound to discharge their breasts of every feeling of bias, prejudice and partiality; to forget all out-door clamour, all party feelings, all popular excitement, and with calm, reflecting and dispassionate minds, look to the evidence alone; and, if, after viewing it in this way, and applying to it the tests and authorities he had referred to, there was a man among them who could think that the defendant was not guilty, he would tell them to acquit him—but if, on the other hand, his guilt was proved to be so clear that no man could doubt it—if there was no pretext for his acquittal—then he called upon them to remember the oath they had taken, and by a verdict of "guilty," at once to vindicate the law, chastise the libeller, and prevent the reproach of conscience which must ever accompany those who permit popular clamour to induce them to violate the sanctity of an oath—and so he left it to them, and would proceed to call the evidence.

John Ings was the first called. Examined by the Solicitor General. Is the publisher of the *Islander*, newspaper. The defendant handed him some Resolutions to publish; he seemed to be aware of their nature. Defendant pointed out two of the Resolutions to witness; thinks they were the 8th and 9th. Defendant said that he had been at Mr. Cooper's with them, who refused to insert them; and that if he (witness) had any objection to publish them, it was unnecessary to leave them with him; and he said something to him about acting independently. Witness told him he thought those two resolutions were libellous; that he considered one of them was a libel on the government. Defendant smiled, and said there was no such thing. He did not leave them in the office. Several of his subscribers having complained that the Resolutions were not published, witness called on Mr. Maclean, and told him that he ought to leave them with him, that he might be able to explain why he had not published them. Some time after, he called and left them at the office. (Here he handed in the Resolutions.) Mr. Montgomery, a member of the Assembly, was with Mr. Maclean one of the times he called with the Resolutions; is not certain whether the first or second time. Does not recollect whether any other person was in the office or not at the time. Thinks it was about the 13th of March. The papers have been in his (witness's) possession ever since.

Cross examined by Mr. Young.

Is not sure whether the defendant read the Resolutions when he first brought them, or whether he witness read them himself. Defendant put his finger on the two. When asked if he had taken the opinion of Counsel on the subject, witness said he did not think he was bound to answer that question. The Solicitor General said he would make no objection to his answering the question, if he thought proper; but the question was not pressed. Two or three days elapsed before he went to Mr. Maclean's lodgings. Is certain he brought them to the office—two or three days from the time witness first saw them. Was informed by Mr. Maclean, when he called at his lodgings, that the Resolutions were at Mr. Cooper's, but that he would get them for him. The other Resolutions were published.

James B. Cooper was the next witness called. Is printer of the *Colonial Herald*, newspaper. Mr. Maclean brought a number of Resolutions to his office, and wished him to publish them. Refused to do so, conceiving he would be subject to an action for libel if he did. Thinks Mr. Maclean took them away from the office then. Is not quite sure whether they were ever brought back to the office again or not. Being asked if the Resolutions were in the same state now as when he first saw them—witness answered that that question brought to his recollection that the Resolutions had been taken away from the office, and again brought back by Mr. Maclean, from the circumstance, that the signature to a letter prefixed to the Resolutions when he first read them, had been obliterated in the interim—John Mackenzie was the name that was obliterated. Mr. Maclean seemed to be aware of the nature of the Resolutions. Had some conversation with him on the subject.

Mr. Maclean, addressing the Court, said—Deeming this prosecution a violation of my privilege as a member of the Colonial Parliament, I have to move the Court that the Attorney General be directed to enter a *nolli prosequi* in this action. I am aware that privilege will not, and ought not to protect a member of parliament maliciously to revile private character, as in the case of Wilkes, who was prosecuted for writing and publishing an obscene and blasphemous pamphlet upon a spiritual peer, for which he was prosecuted, whether before or after his expulsion from Parliament, I do not recollect. In Wilkes's famous No. 45, of a periodical called the North Britain, however, in which he had the audacity to libel not only the Ministry, but the King himself, and for which he was committed, after the claim of privilege had been argued by some of the ablest lawyers in England; and after three days deliberation, Lord Chief Justice Pratt and all the Judges unanimously found, that Wilkes's committal was illegal, because he was a member of Parliament —"*that his privilege could not be infringed, except by treason,* "*felony, or breach of the peace; and that a libel, even though* "*proved, has only a tendency to disturb the peace, without amount-*"*ing to a breach of it;*" and this decision was acquiesced in by the Crown lawyer. When Parliament assembled, the Commons voted, in the heat of party debate, that privilege did not protect a member for *writing and* publishing seditious libels. Upon this I would remark, that as my prosecution is confined to the publishing only, the resolution of the Commons does not preclude the benefit of privilege in my case. Moreover, the Parliamentary proceedings with regard to Wilkes were expunged from the records; and in every view of the matter, I maintain, that a member of Parliament in my position is entitled to his privilege, if he chooses to demand it, which I now do at the hands of the Court. I would further remark, that Mr. Wilkes's offence was a very aggravated one, and committed out of Session; whereas I merely served my constituents during session; and if the point of privilege be effective in one respect it must hold in all.

After a few words from the Attorney-General, the Chief Justice said he would allow the case to go to the jury, and in the event of a verdict being returned against the defendant, the question as to privilege could be reserved for future argument.

Mr. Maclean then proceeded to address the Jury—

I have little to remark upon the speech of the Solicitor General; but would observe that his assertion that I was just as guilty as if the Resolution had been bruted through 10,000 papers, is about as wise as if he had said that a person who might purchase poison at a druggist's, with intention to cut off some individuals, but who did not make the attempt, would be as guilty in the eye of the law as if he had carried his intention into effect—a deduction equally illogical and absurd, and which I feel confident, no jury will support. The Solicitor General has further admitted that before you can return a verdict against me, you must be satisfied that the alleged libel tended to create a general dissatisfaction. Now, setting aside the fact that it could not by any means create what already existed in full vigour, it is clear that, even supposing the matter of the Resolution to have that tendency, a general dissatisfaction could not be produced without a general circulation, and it is not pretended that it was ever printed, or had any circulation at all—in short you are requested to find me guilty of *an intention*!

Upon the evidence of Mr. Cooper, I have no remark to offer; but I beg to say that Mr. Ings is wholly incorrect in stating that I remarked to him that there could be no such thing as a libel upon Government. I never said anything so absurd to him or any other person, but I may have stated the fact that the Resolution in question was no such thing as a libel upon Government. His testimony is in some other respects incorrect. Instead of his objecting to the Resolution in question as libellous, I pointed out to him Mr. Cooper's objection upon that score; and instead of calling upon him a second time in company with Donald Montgomery Esq. he called upon me at the Hotel where Mr. Montgomery and I lodged, and requested me to furnish him with the Resolutions to print, which he received, with permission to omit any that he might not approve of; and the one for which this action is now brought was omitted accordingly. However, without detaining the Jury longer with a criticism upon Mr. Ings's evidence, I freely declare that I presented the resolution in question to both papers; and I must confess that I felt amazed to perceive the slavery of the press to be so complete, and the thraldom of the people so perfect, that the papers did not dare to publish an opinion expressive of dissatisfaction with the conduct of the existing Government of this colony, which I certainly would have done had I been in possession of a press.

This, Gentlemen, is what is called an *ex officio* prosecution, or information, as the term is generally softened into; which, by the bye, is somewhat of a bull, because the peculiarity and oppressiveness of such measures consist in the Attorney General assuming the power without any information whatever, and arbitrarily committing a British subject for trial, upon a criminal charge, without the intervention of a grand-jury, that guardian of our personal freedom and liberty. These *ex officios* may be traced to the dark ages of feudal slavery, when men in England were sold like the beasts of the field, the sovereign and his courtiers being frequently the only judges of the alleged offence. They were instruments of tyranny which were understood to have been wrung from that ill fated Prince, Charles the First, on the abolition of the court of Star Chamber; and they were revived after the restoration of his son, although at that time that great judge, Sir Mathew Hale, declared "they were unlawful, and could not stand." Upon the abdication of James the Second, one of the articles of the Bill of Rights by which the crown was tendered to William of Orange, was "Informations in the crown office shall cease." Strange to say, however, they were renewed by Lord Chief Justice Holt not long afterwards, who perhaps deemed a departure from the constitution at that time to be a necessary evil, in order to counteract the machinations of a powerful party to replace the exiled family of the Stewarts upon the throne. Since that time they have been occasionally acted upon by government in cases of alleged libel; but their legality and constitutionality have been severely questioned in England itself, and their use declared to be incompatible with the existence of free institutions. The only defence ever set up for them has been their possible public necessity in seasons of extreme hazard; but, if I be rightly informed, during the long administration of William Pitt, a period so dangerous, that even our national existence was at stake, that great statesman, satisfied of the unconstitutionality of those *ex officio* prosecutions, never in a single instance had recourse to them. They were revived in considerable vigour during Lord Liverpool's administration; but as might be expected, were not attended with the desired results; and I am not aware that the British Government has put one in force for alleged political libel for the last twenty years. It is far too wise not to know that *ex officio* prosecutions may produce discontent, but cannot support its power, and therefore treats poljtical libels with disregard and contempt. Their nature is well described in a late Novascotian, which says "an *ex officio* infor-"mation is an engine of oppression and tyranny, instrumen-"tally wielded by the Attorney General—the *ex officio* mode "of prosecution is never resorted to, except when the min-"ions of power are afraid of the independence and integrity of a Grand Jury." Were this case determined against me, the rights and privileges of British subjects in this colony would be at an end; and the Government has been involuntarily compelled to pay the Grand and Petit Juries of this Island the high compliment of supposing them incapable of returning a verdict subversive of all freedom; and I confidently trust, gentlemen of the Special Jury, that the rights of your fellow subjects will be equally safe in your hands.

In the next place, gentlemen, I shall show you that those criminal ex officio prosecutions for alleged political libel, do not, and never did apply to the Colonies. Sedition may consist in disseminating bad opinions of the Queen and her Government, but finding fault with the public conduct of subordinate public servants, such as the Governor of a Colony, or his Executive Council, by no manner of means amounts to sedition; if it do, I call upon the Crown lawyers to prove that it does, and also that the most arbitrary portion of the royal prerogative—that portion most dangerous to the rights and liberties of the subject—in modern times which has been so sparingly wielded by Royal hands, through the instrumentality of the Attorney General of England, has ever been delegated to the Governor of a Colony, and his Attorney General. But let the Attorney General beware—in England, about 70 years ago, it was declared by the mouthpiece of Government in the House of Commons, that the law officers of the Crown were responsible to Parliament and the laws for an abuse of that prerogative power, which this prosecution would there be, while here, I fearlessly contend, it is not only abusive but wholly illegal.

These *ex officio* prosecutions were founded principally upon an act of Richard the 2nd. (whom, however, they did not protect), which enumerates the persons whom it shall be criminal "to tell lies upon," and the Act specifies those persons to be the King, certain peers and officers of state about the Throne; but does not even include secretaries of State, who have the appointment of Colonial Governors, and of course, still less does it allude to them, among other reasons which might be adduced, for this most substantial one, that England had not a Colony for 200 years after the act was made. Indeed, the New England Colonies were settled for the purpose of the emigrants being beyond the reach of those arbitrary stretches of regal power, in which juries were frequently set aside. They have sometimes, like double edged weapons, been productive of very untoward consequences to those who wielded them, but never more so than in the memorable case of Charles the First. In that monarch's reign, seven ships with emigrants were about to sail for the New England Colonies, in order to be beyond the power of the star chamber *ex officios*; but Charles, in a moment fatal to himself, and as if providence had determined that oppression should be its own scourge, ordered the emigrants ashore, among whom were the celebrated Oliver Cromwell and John Hampden, who landed, abolished the Court of Star Chamber and its *ex officios*, overturned his throne and cut off his head; and thus perished, in many respects, one of the most virtuous princes that ever graced the English Throne.

In some of the old proprietary Colonies the appointment of Governors was vested in the Grantees; and even had the forest not been too stubborn to submit to feudal chains, an assumption, by the Governors appointed by those Grantees, of the most arbitrary prerogative of the Sovereign, as His Excellency Sir Henry Vere Huntley is now doing, would have been equally absurd and fatal.

Blackstone, however admirable in many respects, was but an indifferent judge of constitutional law, as may be seen from the castigations which he received from Junius and other eminent men of his day, because he, lawyer-like, leaned far too much to the precedents of ancient times; yet even Blackstone says, those *ex officio* prosecutions were meant "to "apply to offences so high and dangerous, in the prevention "and punishment of which a moment's delay might be fatal." (4 com. 308). Now, supposing the Attorney General of this Colony to have the power—which I contend he has not—in the name of all that's stupid, where was the mischief of that harmless squib of a resolution, even had it been printed and published; and where the danger to the community, had the crown lawyers allowed it to slumber quietly on the shelves of the Islander office, without having themselves become the publishers, by this prosecution? Blackstone further says, they are only practised for libels against "the "Christian religion, blasphemy, or against the *King* and *his*