# NATIONAL INTELLIGENCER,

AND

# WASHINGTON ADVERTISER.

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*From the Richmond Examiner of Dec. 29.*

The following sketch from the pen of a gentleman of the law, of the proceedings which took place on Thursday and Friday last, in relation to the binding of George Hay, to keep the peace, and J. T. Callender to his good behaviour, is believed to be a faithful account of the subject, and a well condensed view of the arguments of the counsel for the plaintiff and the defendants. It is almost impossible upon such occasions, to recollect and report *all* that may be advanced by either party to a cause; the very words in which gentlemen, animated and fluent in declamation conveyed their ideas, and arguments, cannot be supposed to be precisely remembered. This will be our apology for any omission. But we believe at the same time, that no argument materially bearing on the point of law, has been omitted; and we are satisfied that *nothing* on either side has been added. If, however, after every attention any error has crept in, we shall look for correction, from the candour and sense of propriety of the gentlemen who were respectively engaged as advocates for or against Mr. Hay or J. T. Callender.

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On Thursday and Friday last, discussions took place at the Court House, in this city, which excited considerable interest, and attracted considerable attention. It is well known that in consequence of a publication in the Recorder of some weeks past, Mr. George Hay gave Mr. Callender a beating. This took place on Monday the 20th. inst. On the next day in the evening, Mr. Callender applied to Mr. John Foster, mayor of the city, for a warrant to bring Mr. Hay before him, for the purpose of binding him over to keep the peace. On Thursday, (that being the day appointed) M. Callender and his counsel appeared before the mayor, as also did Mr. Hay and his counsel Mr. Wickham, and Mr. M'Rea. Mr. Callender swore that he apprehended personal danger from Mr. Hay, and it was contended on his part, that he had sworn he had such fears, and as Mr. Hay had already given evidence of a disposition to break the peace, he ought to be bound over to keep it. Mr. Hay on his part made a solemn declaration, which by him was twice repeated, that he would not touch Callender, unless Callender again provoked him by his nefarious libels against him. That if Callender would let him alone, he would also let Callender alone. That Callender's security was in his own hands. That the beating which had been inflicted on Callender was provoked by him. He called on the magistrate and every other person to say whether Callender was in any danger from him after the solemn declaration thus made, unless he himself should provoke it.—Evidence was also introduced to prove that Callender was unworthy of credit, and it was contended by Hay's counsel, that from the evidence which was introduced, no reliance ought to be placed on his oath by any magistrate, or court of justice. They therefore concluded that Mr. Hay ought not to be bound to keep the peace. The mayor immediately decided against Mr. Hay, and he was accordingly bound in a recognizance, himself in 500 dollars, and his security in the same sum, to appear before the court of hustings for this city on the second Monday in next month, and to keep the peace in the mean time towards all the citizens of the commonwealth, and particularly towards James Thompson Callender.

On the day on which the warrant was served on Mr. Hay, he applied to the mayor for a warrant against Pace and Callender, publishers and editors of the Recorder, for the purpose of binding them over to their good behaviour. The mayor refused the warrant. Application was then made to a justice of the peace for the county of Henrico for the warrant, who granted it. After Mr. Hay had been bound over, 4 of the magistrates of Henrico commenced their session on the warrant, which had been issued against Pace and Callender, who appeared before them. And at the request of Mr. Rind it was postponed until the next day. The principle contended for on that day by Rind was, that Callender had a right to select his judge, and he did select Mr. William Mayo.

On Friday the parties appeared before the same justices. Mr. Rind and Mr. William Marshall objected in the first place to the jurisdiction of the magistrates. They said that Mr. Hay, and Messrs. Pace and Callender were all citizens of Richmond. That the magistrates of Richmond had an exclusive jurisdiction in all criminal cases, and in cases of breaches of penal laws within their city. That the judges of the superior courts were conservators of the peace throughout the commonwealth, but that justices of the peace had jurisdiction only within their counties, and corporations respectively. They admitted that the court of Henrico could take cognizance of civil pleas between citizens of Richmond, but denied that the law gave them jurisdiction in the cases before mentioned. On the other side it was urged that the city of Richmond was in the county of Henrico, that the law gave to the county court a concurrent jurisdiction with the city court as well in criminal cases, and breaches of penal laws, as in civil cases; that the justices of Henrico were conservators of the peace throughout the county of Henrico, and that there was no absurdity in supposing such concurrent jurisdiction. That the district & county courts had in many instances such concurrent jurisdiction, from which benefits, and not evils result.—The justices decided that they had jurisdiction within the city, and that such had been exercised for many years.

Mr. M'Rea introduced the case. He said that yesterday Mr. Hay had been bound over to keep the peace in consequence of a beating which he had inflicted on Callender, and which every man would say had been deservedly inflicted: Mr. Hay's hands had been bound up, and he would be prevented from avenging himself, although Callender should continue to publish the most atrocious calumnies against his character, although he again should attempt to stab his reputation, and should again issue against him libels, which have a natural tendency to stir up men's blood. He said it was well known that Pace and Calender, published the vilest falsehoods against Mr. Hay, and he only asked that the same measure of justice which had been yesterday assigned to Callender, should now be given to him; he asked that while he was restrained, his adversary should not be free to injure him. He produced a bundle of the Recorders; he would not read them; he said the justices all knew that the most infamous falsehoods, the most abominable libels, the most malignant attacks against the wisest and most virtuous of our citizens, that were issued from any press, had appeared in those papers.

Mr. M'Rae then proceeded to read the law under which Mr. Hay applied to them for justice. In the revised code of the Virginia laws, page 100, the judges and justices who are thereby made conservators of the peace, are authorised to demand surety and mainprize of their good behaviour from such persons as be "not of good fame." To understand properly the meaning of those words and to ascertain whether surety of their good behaviour ought to be required of Callender and Pace, under the act of assembly which had been read, Mr. M'Rea said, it was necessary to refer to British authorities, which would shew the construction put by their courts upon the same words which were also used in the statute of          , which construction he contended it would be proper for the magistrates to adopt in this case, in conformity to the practice of the court of appeals. In 4th Bacon's Abridgment p. 697, it is said, "a good deal is meant by the words *them that be not of good fame*;" which are words of great latitude, left to the discretion of the justices. Amongst other examples it is there said, the author of an obscene book, and also one who calls another a liar before a large concourse of people, may be bound to their good behaviour, as persons of bad fame. In 4th Blackstone, page 256, it is said a man may be bound over to his good behaviour for causes of scandal against good manners, as well as against the peace. In 15th Viner, page 87, a writing full of obscene ribaldry, which does not reflect upon any person in particular, is not a libel, but the author may be bound to his good behaviour. He also referred to 1st Hawkins, page 132, where it is said that the words "of bad fame," apply to those persons who are of scandalous behaviour generally; that the magistrate has a discretionary power of taking security of these whom he has just cause to suspect as dangerous, quarrelsome, or scandalous, and amongst others, from common drunkards, &c. In Burn's Justice, page 683, and Dalton, page 294, libellers are shewn to be persons of bad fame from whom surety may be demanded. Mr. M'Rae made the application of each of these cases to Callender and Pace in a very forcible manner. He asked whether any man present could say that Callender was a person of good fame: he paused for a considerable time. An universal silence prevailed. No one can with truth affirm that James T. Callender is a man of good fame. He considered Mr. Pace as equally a person of bad fame, and that the only difference between him and Callender was, that Pace was more insignificant. They were jointly editors of the Recorder which teemed with defamation and libels. He concluded by hoping that the justices would require security from Pace and Callender for their good behaviour.

Mr. Rind said that he considered this as a case of great moment. If the magistrates should decide against Pace and Callender, he would say, that the liberty of the press was gone, and with it, that the liberty of Virginia was trodden under foot.—Should they so decide, he would farther say, that the right to a trial by jury was entirely destroyed.—He quoted the article in the bill of rights which declares, that the freedom of the press was one of the greatest bulwarks of liberty, and that it could never be restrained but by despotic governments. He said that if the magistrates bound over the defendants, or if the defendants should not be able to obtain security for their good behaviour, and in consequence of it they should be imprisoned, their press would be effectually stopped; the press would no longer be free. He asked them whether they would be instrumental in destroying that palladium of our rights, that bulwark of our liberty. He quoted the bill of rights which secures to the citizens the trial by jury. He said that if the magistrates were to do that which had been asked of them, they would usurp the power of juries. Callender and Pace required to be tried by a jury. If it was denied to them, the bill of rights would be in another instance violated. Are the magistrates to try facts? Mr. Rind said that if Callender and Pace had been tried by a jury for a libel on an information or indictment, and had been convicted, that then it would be proper to require surety of them, for their good behaviour; but that until such trial and conviction, no court, nor any set of magistrates could have a power to try whether they were guilty of a libel or not, and therefore it was highly illegal for the justices in the present instance to punish them by imprisonment, for the imprisonment would inevitably ensue. He said that not only the press of these men would be stopt, but their livelihood would be taken away. He declared that he had been, and still was opposed to the late sedition law enacted by Congress; but, he considered that that law did not so effectually abridge the freedom of the press as the attempt now made. The gentlemen on the other side had resorted to the common law to prove what libels were, and had considered that law as the law of the land. But does not every body recollect how that law has been abused by every good democrat in the United States; has it not been denied to be the law; has it not been considered as a system of absurdity and tyranny? He said that the gentleman himself who conducted this prosecution had ably supported this very doctrine, and written a most eloquent treatise on the freedom of the press. He asked why they should now be called on, to act upon that law. He concluded by observing that every press in the United States has teemed with libels, and that if the present doctrine were to prevail, every press would be fettered.

Mr. Marshall considered the present prosecution as an attempt to fetter the press more effectually than it had ever been done in this country. He denied the quotations from Viner and Bacon to be law. He said that a great deal had been said to shew that Callender was a man of bad fame, and that many other circumstances besides his writings in the Recorder, had been adduced as proofs. But he should strip the question of every thing except the conduct of Callender as editor of the Recorder, because the present application was made on the ground of the libels which had issued from that press. He read from Blackstone the legal definition of the freedom of the press, and said that there could be no freedom of the press, where a previous restraint was laid upon it, nor can any country be free where such previous restraints were laid. He said that if any individual had been libelled by Callender, the courts and the law were open to afford him redress; he might prosecute him by indictment or information, or he might institute a suit against him. But to compel him to give surety that he would not publish libels, was to impose a previous restraint upon the press which would be attended with the worst consequences. He remarked that it was the province of the jury to find facts, and the court to expound the law; but the present magistrates were asked to do both, and in what a ridiculous situation would they find themselves, if to day they determined to bind over Pace and Callender, and consequently declare them guilty of publishing libels, and at the next quarterly court an information should be filed against them for these libels, and the grand jury, or the petit jury should find them to be not libels. He concluded with hoping that this step would not be adopted.

Mr. Hay conceiving himself called upon by one of the gentlemen who had spoken of his treatise on the freedom of the press, delivered an animated, and an eloquent address in which he spoke of his peculiar situation, with his hands bound up while his enemy was at full liberty to abuse him. He read an extract from Hortensius in which is contained an admirable definition of the absolute freedom of the press, and proceeded to shew that there was no inconsistency between the sentiments contained in that essay, and his conduct on the present occasion.

Mr. Wickham replied to Messrs. Rind and Marshall in a speech ingenious and argumentative. He observed that an attempt had been made to impress it on the mind of the justices that this was a cause of vast importance, in which the freedom of the press was involved, and that they were treading on delicate ground. On the contrary he considered this as a cause between two individuals which did not carry with it any great importance except as it regarded the parties concerned; and that although the ground should be delicate, yet if the path of duty led over it, they were bound to proceed. All the observations which had been made relative to the freedom of the press, he considered as without meaning.

Mr. Hay did not apply to them to punish Pace and Callender for libels which they had already written, but he applied for preventive justice: the libels which it was admitted they had already published, and their threat to continue the publications, he considered as evidence of their future intentions; he wished to prevent these threats from being carried into execution; and if they should be bound over to their good behaviour, they might still publish every thing which it was important for them to publish; they might still publish libels, and it would be the province of a jury hereafter to determine whether or not they had forfeited their recognizance. A great deal had been said to prove that the trial by jury was taken away from Pace and Callender. Was not Mr. Hay bound in a recognizance yesterday without the intervention of a jury? and yet there were no complaints made of his being deprived of that mode of trial. No one had ever heard of a jury impanelled, on an application to bind a person over to keep the peace, or to his good behaviour. But it was said that if Pace and Callender had been tried and convicted of publishing libels that then surety might be demanded of them for their good behaviour. The gentlemen, said Mr. Wickham, by this concession have given up their cause. Their doctrine is, that no previous restraint shall be laid on the freedom of the press. But if surety may be demanded after conviction, the previous restraint is as great in that case, as if it is demanded before conviction. The surety is only to operate on future cases, and if after conviction they may be bound over to their good behaviour without abridging the freedom of the press, undoubtedly that freedom will not be abridged by demanding security before conviction. But the livelihood of these men will be taken away. Mr. Wickham said he would mention a fact which had taken place in some country in Europe, and leave the gentlemen on the other side to make the application. A man who had defamed and libelled every virtuous character in his neighborhood was carried before a judge; amongst other reasons which were given by the libeller why he should not be prevented from publishing, one was, that he *must* live; really, said the judge with great coolness, I see no *necessity* for it. And if said Mr. Wickham, of the millions who are every day swept from the stage of life, those who are unable to obtain their bread by any other than unworthy means should be amongst the number, surely society would have no great reason to regret the loss. Mr. Wickham contended that the requiring surety of Pace and Callender for their good behaviour, was not a previous restraint. He read from Blackstone the meaning of the terms "*previous restraint.*" In every country of Europe at the present day, and in England before the revolution in 1688, the press was subjected to the power of a licenser, an officer appointed by the crown, whose duty it was to examine every publication before it was put to press; if the writing or book was agreeable, he affixed the latin word "*imprimatur,*" (*let it be printed*) to it, and the work was then published; but if it was displeasing to the licenser, it was not printed. Such was the previous restraint which the law guarded against, and he hoped never to see such a restraint on the press in this country. It had been asked in what a situation the magistrates would be placed if they were now to bind over the persons in court, and on an information filed at the next court they should be found not guilty by the jury. Mr. Wickham did not think that the situation would be embarrassing. It was the duty of the magistrates to whom the present application was made to judge for themselves; if they had reason to believe that the persons before them were "of bad fame" they were bound to require surety of them.

*(To be continued.)*

## National Intelligencer.

### MESSAGE

*From the President of the United States, transmitting Plans and Estimates of a Dry Dock, for the preservation of our Ships of War.*

*Read in the House of Representatives, Dec. 28. 1802.*

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*Gentlemen of the Senate, and of the House of Representatives.*

IN my Message of the 15th instant, I mentioned that plans and estimates of a Dry Dock, for the preservation of our ships of war, prepared by a person of skill and experience, should be laid before you without delay, these are now transmitted; the report and estimate by duplicates, but the plans being single only; I must request an intercommunication of them between the houses, and their return when they shall no longer be wanting for their consideration.

TH: JEFFERSON.

*December 27, 1802.*

### LETTER

*From the Secretary of the Navy, inclosing to the President of the United States, two copies of a Report made by B. Henry Latrobe, on the subject of a Dry Dock.*

*Navy Department, 8th Dec. 1802.*

Sir,

I have the honor to enclose two copies of a Report made to me by *B. H. Latrobe*, Esq. on the subject of a dry dock, at this place, of a size sufficient to contain twelve frigates of 44 guns, in which report he mentions the site that would, in his opinion, be the best; the works necessary to be erected, accompanied by drawings, the means of supplying the dock with water, and the probable period it would take to complete the works, to which he has subjoined the necessary estimates, exhibiting the probable cost.

I also enclose two copies of a report made to me by captain Tingey, in pursuance of instructions to examine the streams of water in the neighborhood.

I have the honor to be,
With the greatest respect and
Esteem, Sir,
Your most obedient servant,
ROBERT SMITH.

*President United States.*

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*To ROBERT SMITH, Esq. Secretary of the Navy.*

Sir,

In conformity to your instructions, I repaired to the City of Washington, and have since my arrival devoted my best attention to the several objects committed by you to my consideration—I now beg leave to submit to you the result.

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I. *Site of a Dry Dock or Naval Arsenal.*

The principle of a dry dock or naval arsenal in which twelve frigates of 44 guns could be laid up, had been already so far matured by the President of the United States before my arrival, that I have only to lay before you a description of the situation in which it can most advantageously be erected, and designs and estimates of the works which are necessary to carry it into effect.

The harbor of the eastern branch of the Potomac has, in almost every part, a bottom of mud, into which the wharves which have been erected, sink to a great depth and which affords in very few places a prospect of a good building foundation at a moderate depth and expense.—But at the end of the street marked 9 east of the capitol, which bounds