

Rec^d June 2^d 1841 by J. B. West, Esq.

Correspondence between the Rev. S. Marsden & Judge Adv. Wyld

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(A Copy)

(Act^d Dec^r 14/18 by the Hon^{ble} Com^r James G. B. G. G.)

Sydney April 23^d 1841

Sir,

It has been the custom, since my residence in this Colony, and I believe from its first establishment, in all criminal cases for the party aggrieved to furnish the Judge Advocate with depositions stating the grounds of the Complaint; Upon these depositions, the Judge Advocate either drew up an information, or allowed the Plaintiff to draw one up, in his name, against the offending party, which information was exhibited by the Judge Advocate before the Criminal Court. In the present case I furnished you with satisfactory depositions charging Mr Geo. Howe with printing and publishing in the Sydney Gazette, an anonymous letter signed, "Philo Free", containing a libel on my Character, — You declined drawing up an Information upon these depositions, but allowed me to have one prepared myself, and drawn up in your name, which I have now done. I beg also to furnish you with depositions charging Mr Thomas Campbell Esq. with being the Author and publisher of the said letter, signed "Philo Free". — And have drawn up an information upon these depositions in your name against the said John Thomas Campbell Esq. — These informations I now present to you, and request you to exhibit them before the present Criminal Court, in order that they may be filed. — Your answer will very much oblige —

Honored Sir —

Your most Obedient
humble Servant

(Signed) Sam^l. Marsden

The Honorable
Mr Judge Advocate Wyld

(A Copy)

Judge Advocate's Office Sydney
Wednesday Evening 23^d April 1841

Dear Sir,

I have to acknowledge the receipt of your letter dated the 23^d Inst. delivered personally by yourself this morning, as I was going into the Court of Criminal Jurisdiction

After the personal communications that then, and which has so frequently, and at large taken place between ourselves, as also between myself and your Solicitor Mr Moore upon the subject of the Indictment for a libel against Mr Geo. Howe, as the printer and publisher of the Sydney Gazette, in which it is alleged to be contained, — I cannot help observing that the letter upon the subject now acknowledged, might perhaps, have been, not without cause, considered unnecessary, or at least in liberality and just consideration, should have been free from in any way or degree seeming to import any unwillingness or backwardness on my part from filing and exhibiting any charge or information you might think fit to draw up in that respect; As I have so repeatedly, on so many various occasions, and at every possible opportunity, indeed avowed the most ready acquiescence with your request, of exhibiting and assisting you in any proper way to exhibit any criminal charge, you might prefer, on proper and sufficient Affidavits — what one so however it seems to me — is a consideration vested by the legal Charter solely in my discretion, which alone is to determine on what Evidence as "satisfactory" the Charge preferred can be duly exhibited to the Court for enquiry and determination.

With respect to the information against Mr Geo Howe, as the printer and publisher of the Sydney Gazette, in a paper of which the alleged libel on your Character is supposed to be contained — I find that there are filed with the Clerk of the Peace three affidavits, Two of them containing depositions as to the applicability of the alleged libel, and one by yourself deposing to the publication of the libel, and denying the truth of the allegations contained in it — although it is the customary practice in such Charges to attach the Newspaper itself, containing the alleged libel, to the Deposition, I will not on this account delay to file with the Clerk of the Peace, the Indictment you have prepared against Mr Geo Howe.

With respect to that part of your letter in which "you beg also to furnish me with depositions, charging John Thomas Campbell Esq. with being the author and publisher of the said letter "Philo Free", and that you have drawn up an information upon those depositions in my name against the said John Thomas Campbell Esq. — As no depositions whatever had been furnished in

in fact to myself. I have referred to the Clerk of the Peace and received an answer, of which I enclose a Copy, as by some Mistake the information only, and not the depositions have been furnished, I am unable to express any determination until I have had an opportunity of perusing such depositions, as you may think fit to have filed in support of that charge.

I have the Honor to be
 Rev^d Sir

Your most Obedt^t Slave
 (signed) Th^o Wylde
 Judge Adv^t NSW

To The Rev^d Saml Marsden
 Principal Chaplain
 &c &c &c

(Copy)

Wednesday 23^d April 1817

Dear Sir,

In answer to your enquiry as to what Affidavits have been filed with or in support of the prosecution of the King, against John Thomas Campbell Esq. for a libel - I beg leave to inform you, that no affidavits have as yet been filed in support of the same.

I have &c &c &c
 (signed) Th^o Wylde
 Clerk of the Peace

To the Honourable
 The Judge Advocate
 &c &c &c

(Copy)

Parramatta April 24th 1817

Sir,

I had the honor to receive your letter under date the 23^d Inst. in answer to which I beg to observe that I do not see the necessity of transmitting the depositions in Criminal Actions to the Clerk of the Peace, that this is entirely a new proceeding, which has never been known or practised in the Colony, and which I do not understand, I cannot comprehend, what the Clerk of the Peace has to do officially with Criminal Causes

causes. — Since I have been in the Colony, I have acted nearly the whole time as a magistrate, and in all criminal causes have transmitted the depositions direct to the Judge Advocate, who has drawn the informations in his own proper character as Judge Advocate, or allowed the parties to draw them in his name which informations have been exhibited by him before the Criminal Court. If in any instance he employed his Clerk to write the informations, this was done merely to relieve himself from the fatigue of writing. The informations were always drawn under his own immediate directions without any reference whatever to his Clerk nor were any depositions ever laid before the Judge Advocate's Clerk, but through the medium of the Judge Advocate, — For these well known reasons I could have no Idea that the Clerk of the Peace was the proper Officer before whom the depositions should be laid, As I never conceived that the Clerk of the Peace should have any thing officially to do with them. No officer of this nature having ever existed in the Colony. I would further remark, that I have heard the late Honble Judge Advocate Mr Ellis vent speak his sentiments on the authority committed by the Charter to the Judge Advocate of this Colony. And he always gave it as his opinion that it would be extremely dangerous to the Administration of Public Justice, if the same Authority was vested in the Judge Advocate for the time being, as that possessed by the Grand Jury in England, and I may venture to say, that he never acted upon this principle while he had the honor to preside as Judge Advocate in our Criminal Courts. He considered that it was a matter of too great importance to every Member of the Community to be left at the sole discretion of one Man to determine, whether a cause should or should not be heard before a legal Tribunal, And that it was the sole province of the Criminal Court and not of the Judge Advocate alone, to decide upon the Evidence in such cases, I believe that this opinion has always been held and maintained to the present time, by all who have had the Administration of the Criminal law, as well as by other persons who have given this subject any Consideration. In the present instance I am satisfied that the Affidavits furnished by me to you, contain sufficient Evidence in both Cases, for my Complaint being heard before a Criminal Court. — But if the Evidence should appear in a different light to you as Judge

Advocate

Advocate, and you should conceive that you have in that Capacity a Discretionary power, vested in you by the legal Charter, to stop all further proceedings, I am left without redress on the opinion of the Judge Advocate alone. Whatever opinion or construction, the Judge Advocate for the time being, may put upon the Words of the Patent which relate to the matter in question, I cannot believe that it was ever intended by the Legislature that such a meaning should be applied to them. A meaning so directly contrary to the Spirit of the British Constitution, and so dangerous to the ends of Public Justice - I am persuaded, every reflecting Man in the Colony would regret with me, if such a discretionary power was vested by the Charter in any Individual which you seem to think is vested in the Judge Advocate - Flawless, Wise, and just and upright, a Judge Advocate might be, yet he could only exercise the judgment of one Man, and would be as liable, at all times as other Men to the influence of human Passions, Errors and Ignorance. - It was this Consideration that induced the wise Men to say, "In the Multitude of Counsellors there is safety" - and the British Law. to allow every Man to be tried by his Peers. -

I have the honor to be
Sir.

Your most Obedt^l & Able Servant
(signed) J Marsden

The Honorable
Judge Advocate Mylde

(Copy)

Rev^d Sir,

Judge Advocate's Office
Friday Evg 25th April 1809

In consideration of the public Rank, and in respect of the sacred Office you are in possession of in this Colony, I am influenced so far, to acknowledge the receipt of your letter dated the 24th Inst. and delivered by your servant at 8 o'clock this Evening. - Under the same influence I refrain from taking further notice of the opinions, sentiments and personal insinuations at least; if not aspersions, you have thought proper

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proper to express, or rather, from my knowledge of circumstances
I should say to adapt, and appropriate the expression of
them.

I have the honor to be
Rev^d Sir

Your very Obedt Hble Servant
(signed) Ju^s Mylde
Judge Adv^t N. S. W.

To The Rev^d Sam^l Marsden
Principal Chaplain of
the Territory N. S. W.

(Copy)

Paramatta April 28th 1809

Sir,

Yesterday I received your letter in reply
to mine on the 24th Inst. and was concerned to find that my
intention in writing that letter had been misunderstood. From
the observations contained in your letter to me under date of the
23rd Inst. I was apprehensive that I had through Ignorance
of the present mode in drawing up criminal cases, committed some
error. Under this impression my letter was written, and it was
from this Idea I stated what I have always understood to have
been the practice in this Colony in criminal Cases, and also
what I have heard the late Honble Mr Bent say on the
subject. I had no intention in the smallest degree to offend
you either personally or officially, and am very sorry if any
part of my letter should appear to you in that light.

I have the honor to be
Your most Obedient
Humble Servant -

To the Honorable
Judge Advocate Mylde

(signed) Sam^l Marsden