

THE KING v. JOSEPH HOWE: PROSECUTION FOR LIBEL

One hundred years ago, on March 3, 1835, Joseph Howe, then a young journalist about 30 years of age, stood in the dock to take his trial on an Indictment for criminal libel; and he put himself upon his country to decide whether or not he was guilty of the serious crime with which he was charged. To understand the situation in which he found himself placed, the position he enjoyed in the community, and the manner of man he was, it is necessary to go back a few years and explain the causes which led to the prosecution.

Howe was born on December 13, 1804. He was of Loyalist descent, his father having come from New England before the revolutionary war. Joseph Howe never had any training in the schools or colleges of his day, and in one of his speeches he said he deplored his lack of schooling and knew the value of education by the lack of it. He had, however, an enlightened father to whose wise counsel he owed his fondness for books and familiarity with good literature. At the age of 13 he went to the Royal Gazette office to learn printing, and worked at it for ten years. On January 1, 1828, he became the editor and proprietor of the *Nova Scotian* newspaper, and he immediately attracted notice as a shrewd and able commentator on public questions of the day. He traversed the province on horseback to get subscribers for his paper, and to acquaint himself with the various districts and the inhabitants. He thus developed his publication into an influential and well circulated organ of opinion. Among other things, he advocated the formation of Mechanics' Institutes as a forum for public discussion, the equivalents of which, in our day, carry on under other names. It was in January, 1832, that the Mechanics' Institute of Halifax was established, and Howe delivered the inaugural address. This may be considered his debut as a public speaker.

At this period, the administration of provincial affairs was entirely in the hands of the Executive Council, an appointed body, and although the various counties and larger townships returned members to the House of Assembly, the members of the lower house had little or no influence or direction in public administration. The agitation for responsible government in provincial affairs had not yet begun, although the time was becoming ripe for it. The people were beginning to feel that as they provided the money, it was about time that they should

have a say in the spending of it. This feeling gathered its momentum out of smaller matters. The same irresponsibility to the taxpayers marked the administration of their municipal concerns. The counties and towns were not incorporated: for example, the town of Halifax was not incorporated until 1841. The affairs which are now managed by city and county councils were in the hands of the magistrates, appointed by the government, who were known as the court of sessions. We can well understand how subservient they were likely to be. The appointment of municipal officials, the upkeep of public institutions, the making of contracts for public supplies and the like, were entirely in their hands. As may be expected abuses crept in. The people paid large amounts in taxes; the magistrates spent the money. They had their favourites. The only body—outside of the press, of course—through whom popular grievances could be aired was the grand jury, which was selected periodically from among the principal taxpayers. It was the duty of the grand jury among other things to inspect the public institutions and to audit the accounts of the appointed officials.

The business of the sessions in Halifax was not satisfactorily conducted and for months before the publication of the libellous letter which formed the basis of Howe's prosecution, considerable friction arose between the grand jury and the magistrates. The grand jury book of November 14, 1834, contains a minute stating that on November 4th the grand jury had sent a memorial to His Excellency the Lieutenant-Governor, Sir Colin Campbell, saying that very general dissatisfaction prevailed with regard to the municipal affairs of the town and county of Halifax; that the confusion and obscurity of the accounts made the yearly examination of these accounts by the grand jury a mere mockery and was utterly unsatisfactory; and that a thorough reform was necessary. No attention, apparently, was paid to this remonstrance. The grand jury met again and adjourned on November 17, and there was still no answer to the memorial. They next met on December 7, and passed a resolution that the memorial should be published in the *Nova Scotian* newspaper, which I assume was done. This, no doubt, inflamed public feeling. The grand jury again met on December 12 and December 16, and adopted resolutions at each meeting to the effect that a change of system was necessary. There was no word from His Excellency. That was the position of affairs on January 1, 1835, when a letter appeared in the *Nova Scotian*, signed "The People", charging the magistrates of Halifax, in unmistakable terms, with misconduct. Howe says that the letter was

written by a friend of his, one George Thompson, and that he (Howe) knew nothing of it until it was delivered to him at his office. We may accept that as true; but the diction of the letter suggests the suspicion, although it does not prove it, that the literary art of Howe may have been exercised in putting it in the compelling style which it shows in its printed form.

The fat was now in the fire. The letter caused a profound stir. The magistrates were indignant. They had been accused as a body of gross misconduct, and while some of them were no doubt innocent of any direct misdoing, they were not without responsibility. Howe's father was a magistrate, but he was probably too old to attend the sessions, as he died in December of 1834 at the advanced age of eighty-three. Howe's brother, John, was also a magistrate, but it is not shown that he took any active part in the business of the magistrates. I have before me a document which was given to me several years ago by the granddaughter of the Honourable S. G. W. Archibald, the Attorney-General in 1835. It is as follows :

Sessions Room, County Court House,
Halifax, 8th January, 1835.

Sir,—

We beg leave very respectfully to call Your Excellency's attention to a communication signed "The People" in the accompanying newspaper printed in this Town: The charges it contains against the Magistrates in this District are at once serious and disgraceful—if they are true, Your Excellency owes it to the public to dismiss them from the situation they hold; if false, to protect them against the gross attacks which have been made against them as a Body.

We feel that we have received our appointments from the Executive and are at all times entitled to the protection of the Government, while faithfully discharging the duties assigned to us. Being conscious that the charges are in every respect unfounded and malicious we have to request that Your Excellency will be pleased to direct the Crown Officers to take immediately the necessary steps for prosecuting the party who has made them.

We have the honour to be

With great respect,

Your Excellency's Obt. Servants,

James Foreman, Samuel Head, John Liddell, Richd. S. Tremaine,
J. A. Wood, G. W. Russell, J. L. Albro, Wm. H. Roach, J. Howe, Jr.,
J. N. Shannon, Jas. H. Tidmarsh, Joseph Starr.

It is of interest to note that Joseph Howe's brother, John Howe, was one of the signatories. He was then connected with the office of King's Printer, and may have felt on that account

compelled to join with the other magistrates in their demand. This letter from the magistrates is endorsed as follows :

“Referred to His Majesty’s Attorney General, who will forthwith take the proper steps for prosecuting the party complained of, as herein requested.

By His Majesty’s command,

Rupert George.”

14th January, 1835.

On February 4, 1835, Mr. Archibald, the Attorney-General, wrote Mr. Howe, notifying him of his intention to prosecute. From then on until the trial was over the *Nova Scotian* made no reference whatever to the subject-matter of the letter or to the proceedings against its editor. It preserved, very properly, a dignified silence. The *Acadian Recorder* of Saturday, February 28,—a paper in sympathy with Mr. Howe—had a news item to the effect that the body of magistrates had entered the court house and demanded an interview with the Chief Justice. After the Chief Justice decided to hear them, he ascended the bench and the senior magistrate, Richard Tremaine, read a resolution asking the court to grant Joseph Howe in his defence at the approaching trial every facility for substantiating and proving the charges made on January 1st. The Chief Justice replied that such interference was out of the usual course and extra-judicial and he would take no notice of it. He, however, referred them to the Attorney General. What the ulterior purpose of this approach was I will not attempt to determine. Howe, in his address to the jury, derided the resolution.

The Attorney-General in due course took the necessary steps to prosecute Howe. He did not proceed by information *ex officio*, but placed the complaint before the grand jury in the usual manner. The Bill of Indictment was presented to them: the publication was proved. Then they had to determine whether they should return a *True Bill* or *No Bill*. They returned a *True Bill*. No other course was reasonably open to them. Howe was indicted and had to stand trial on the indictment.

The trial began on March 3, 1835. It was not a trial before a single judge with a jury, but a trial at bar before the bench of judges and a jury. A later and noted instance of such a trial was the prosecution of Dr. Jameson, of South African fame, for his raid about the beginning of the present century. The judges of the Supreme Court at that time were Chief Justice Halliburton, Peleg Wiswell, associate Judge, and Richard John Uniacke,

William Blowers Bliss, William Hill, and Lewis Morris Wilkins, puisne judges. In the absence of the original record I am unable to ascertain whether all the judges, or a majority of them, were present. The petit jury were selected and sworn. We have their names; one of them was still living when I came to live in Halifax; he was then quite an aged man. The indictment, quite a formidable document, was then read, and Howe pleaded Not Guilty. Mr. James F. Gray opened the case for the prosecution to the jury. He explained the nature of the proceeding, and the law of libel. He pointed out that the magistrates were charged with having dishonestly pocketed public money, and he made this remark: "It is impossible for the jury to say there is not sufficient defamatory malicious matter in this letter to constitute a libel." It is significant as showing the state of public feeling in the community that Mr. Gray felt impelled to admit in his address that the prosecution were contending against the popular side of the question. It was necessary for the prosecution to prove publication, and they called Mr. Hugh Blackadar, publisher of the *Acadian Recorder* and he did not answer. Howe then admitted publication of the letter. The Crown's evidence was then complete and Howe had to begin his defence.

Howe had no professional assistance. He tells us in one of his letters that when he received Mr. Archibald's letter of February 4th, he went to two or three lawyers in succession, showed them Mr. Archibald's notice, and asked if the case could be defended. The answers were emphatically in the negative; there was no doubt the letter was a libel. They advised him to make his peace; otherwise he would have to submit to fine and imprisonment. Howe was convinced that he could make a successful defence. He got a number of books dealing with the law of libel and stayed home for a week to study them. He spent another week in arranging his facts and documents, and only finished at a late hour the night before the trial. He wrote out and committed to memory the two opening paragraphs of his speech; the rest was to be improvised as he went along. He admitted in a private letter that he was nervous as he went to the court. The lawyers, he said, were civil to him, but laughed at him a great deal. It is probably because he was a layman and not versed in court procedure that he was given so much latitude, and allowed to discuss as evidence, matters which had not been proved in evidence.

The law at this time did not permit an indicted person to give evidence on his own behalf as it does now. It was useless

for him to call witnesses to prove the truth of the statements complained of, because in criminal cases, the truth of the libel is not, at common law, a defence. No evidence could be received of the truth of the matters charged, not even in mitigation of punishment. The law of libel was modified in England in 1843, by Lord Campbell's Libel Act, 6 & 7 Vict. c. 96, sec. 6, which enacted that the truth of the libel may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the matter charged should be published. Our present law is embodied in the Criminal Code of Canada, section 331, which provides that truth may be a defence if publication is for the public benefit at the time it was published. That, however, was not the law in 1835. You may well ask what was the function of the petit jury, if the letter which was the subject of the prosecution was admittedly libellous? It was this: the jury had authority to pronounce on the question whether the libel complained of was a breach of the peace or tended to cause a breach of the peace. That issue of fact lay with them. If they thought it did, then they had only one thing to do, namely, to find Howe guilty. If, on the other hand, they were of the opinion that it did not, they were within their rights in saying that it did not, and consequently there was no actionable libel and a verdict of not guilty was justified. Howe's only hope was to persuade the jury that the letter had no tendency to provoke disorder and a breach of the peace. This he did with consummate skill and persuasiveness. His great opportunity had come. It must be borne in mind that at this date, Howe, although established as a vigorous and independent editor, was not yet known for the regal gift of oratory which was his in such great abundance. His speech to the jury may be regarded, therefore, as his maiden public speech. I do not intend to give a close analysis of that remarkable speech. I shall touch only on a few points.

He opened artfully. A display of this nature was foreign to his nature. He was a mere layman and he hoped his fate depended on no technicality or nice doctrine of law but upon the simple principles of truth and justice to which he, an unpractised speaker, might appeal, and which an impartial jury could clearly comprehend. The notoriety of the proceeding was distasteful to him. He would rather give his small leisure to his books and his fireside—to the literature that ennobles, and to the social intercourse that makes society dear. He then thanked Heaven and his ancestors that he did not stand before a corrupt and venal court and a packed jury. Having thus put himself at

ease with the bench and jury, and won the sympathy of the latter, he picked up the indictment and made most effective use of it. He quoted :

“The jurors of our Lord the King upon their oaths present that Joseph Howe, being a wicked seditious and ill-disposed person, and being a person of wicked and malicious temper and disposition and being such a person as aforesaid and greatly disaffected to the administration of His Majesty’s Government in this Province, and wickedly maliciously and seditiously desiring and intending to stir up and excite discontent among His Majesty’s subjects”, and so on.

I am charged with sedition, he said. My answer will be found in my paper. He was allowed to read a fine patriotic editorial from his paper published some years before. Was that sedition? He contrasted the archaic language of the indictment with the language of the editorial which breathed patriotic sentiment. He observed that the proceedings were brought in the name of the King; he only wished His Majesty were present when he was reading the loyal opinions of the editorial.

Recounting the misconduct of the magistrates, he stated that their Lordships’ classic minds would recall the punishment Dante assigns in his *Inferno* to public peculators; he casts them into a lake of burning pitch. And so he went on with his magnificent periods. Toward the end of his speech he said :

“If for a moment I could fancy that your verdict would stain me with crime, cramp my resources by fines, and cast my body into prison, even then I would endeavour to seek elsewhere for consolation and support. Even then I would not desert my principles, nor abandon the path that the generous impulses of youth selected, and which my riper judgment sanctions and approves. I would toil on and hope for better times—till the principles of British liberty and British law had become more generally diffused and had forced their way into the hearts of my countrymen. In the meantime I would endeavour to guard their interests—to protect their liberties; and while Providence lent me health and strength, the independence of the press should never be violated in my hands. Nor is there a living thing beneath my roof that would not aid me in the struggle: the wife who sits by my fireside; the children who play around my hearth; the orphan boys in my office, whom it is my pride and pleasure to instruct from day to day in the obligations they owe to their profession and their country, would never suffer the press to be wounded through my side. We would wear the coarsest raiment; we would eat the poorest food; and crawl at night into the veriest hovel in the land to rest our weary limbs, but cheerful and undaunted hearts; and these jobbing justices should feel that one frugal and united family could withstand their persecution, defy their power, and maintain the freedom of the press. Yes, gentlemen, come what will, while I live, Nova Scotia shall have the blessing of an open and unshackled press. But you will not put me to such straits

as these; you will send me home to the bosom of my family, with my conduct sanctioned and approved; your verdict will engraft upon our soil these invaluable principles that are our best security and defence."

He wound up his speech with great eloquence. He paid a compliment to the Attorney General, warned the jury not to be carried away by Mr. Archibald's eloquence, and turning his wide knowledge of Shakespeare to account he quoted from Julius Caesar the well-known passage not then so much worn by frequent use as now :

. . . . were I Brutus,
And Brutus Antony, there were an Antony
. . . . that should move
The stones of Rome to rise and mutiny.

The speech took six and a quarter hours to deliver. We are told that it was frequently applauded. The hour was late when Howe concluded, and a question arose as to an adjournment. Howe apparently desired to finish the trial that day, but as it was difficult to maintain order, the court adjourned to the next morning. Howe in a private letter says that in the course of his speech he noticed that one of the jurors was so affected that the tears began to roll down his cheeks. There can be little doubt that Howe felt that he controlled the sympathy of the jury. That evening he received from Mr. Alexander Stewart, a leading lawyer who afterwards became Master of the Rolls and opponent of Mr. Howe's party, the following letter :

Dear Howe:

I congratulate you on your splendid defence. I hope ere to-morrow at this time the jury will have done their duty as you did yours. On the whole it was performed admirably except that it was as regards the law too deferential; however *nil desperandum*, You have a jury of Nova Scotians. . . .

A. STEWART.

Next morning the Attorney General, the Honourable S. G. W. Archibald, a fine lawyer, a fine speaker and a fine gentleman in every respect, made the closing address to the jury on behalf of the Crown. It is a model forensic speech—lucid, moderate, dignified and firm. Mr. Archibald took notice of the popular feeling manifested in Howe's favour, remarked that the accused was his personal friend, and that there was nothing novel in the case—as was the fact from the legal point of view. He remarked that nothing but the cool operations of the mind, influenced only by the evidence and the plain principles of the common law, can be effectual in keeping the peace of society. He pointed out

also that Howe had stated a great variety of things which could not be evidence, which were merely hearsay and which the Court would not have permitted counsel to use. They were mere assertion without proof. He mentioned too that Howe's father was a magistrate.

The charge of the Chief Justice calls for no further notice than this. He said :

"The King is the prosecutor here, and all you have to determine is whether these charges are libellous and whether they are calculated to disturb the public peace. In my opinion the paper charged is a libel, and your duty is to state by your verdict that it is libellous. You are not bound by my opinion. You are not to be influenced by feelings but to pronounce upon the case before you according to the sober convictions of your own minds. If you think this is not a libel, as a consequence you must think that it bears no reflections injurious to the complaining parties. If that is your opinion, say so. I leave the case in your hands."

The jury did say so: they retired, and after ten minutes they returned with a verdict of "Not Guilty". There was great rejoicing in the court house and in the town.

Mr. Howe felt that he no longer need preserve his silence. In the *Nova Scotian* the day after the trial—on March 5th—appeared a short editorial, no doubt from his own facile pen, in which the writer said :

"The Press of Nova Scotia is free. Its independence has been established by the firmness and intelligence of twelve impartial men, on those rational and indestructible principles of reason and English law, that our ancestors tried out and determined—and which, while they are amply sufficient to guard society against its abuse, are essential to the protection of this invaluable Institution."

In May following—May 18th—the Nova Scotians resident in New York sent a silver pitcher to Mr. Howe in testimony (as they put it) among other things, of his "eloquent and triumphant defence in support of the freedom of the Press".

Now a few concluding observations as to the results of this noted trial. First, as to the law. The trial did not in any reasonable view of it add anything whatever to the law as it pertains to libel. The exultant expressions of Mr. Howe and his friends to the contrary, the law after the trial as to the freedom of the press, remained what it had been before. No new rule of law was established. The law is not changed by the verdicts of juries; it is sometimes disregarded by juries in their verdicts. I do not suggest that the jury in the particular case acted wrongly. The jury had the right of determining a question of fact, namely, whether the libel published in Mr. Howe's newspaper had a tendency to cause public disorder, and in the circum-

stances they came, I think, to a sound decision. The Chief Justice, while entertaining a strong opinion of his own, and stating it to the jury, told them in explicit terms that it was for them to decide the question.

Secondly, as to the value of the trial to Mr. Howe. It turned out to be a great occasion. He ran risks, but fortune turned in his favour. It demonstrated that a young man of thirty, an ordinary working journalist by occupation, without the advantage of school training, without family influence or prestige had courageously grasped a great opportunity, and by force of native genius, broken through adverse barriers and proved himself to have the qualities of a great leader of the people. He made so profound an impression that the reform party insisted upon his candidature and secured his return at the next election in 1836. Thus he was started upon the great career in politics with which all readers are familiar. The trial was the most dramatic episode of that career.

Thirdly, the trial gave an impetus to the cause of reform. The smouldering embers of discontent over the irresponsibility of officialdom were fanned into a living flame; the fight for a change was transferred from the arena of local affairs to the wider field of provincial politics. Howe became the acknowledged leader of the agitation, and after some years of strenuous struggle he was able to achieve his high purpose without sedition or an appeal to armed conflict, as happened in the two larger provinces to the west.

And lastly, a word of Mr. Howe as an orator. The late Sir Joseph Pope, than whom there could not be a better judge in the matter, fixed Howe's place in a pregnant phrase (which I have quoted more than once and shall probably do so again) when he said that Howe was the greatest natural-born orator that Canada has produced. The prime of his life was spent in provincial politics. When he entered the House of Commons at Ottawa, or within a short time afterwards, he was a broken man—broken in health, and broken in spirit, by the strong animosity of a large number of his former friends and followers which came after he had accepted the scheme of "better terms" for Nova Scotia. Comparisons, we are told, are unpleasant things, but I venture to tell what was told me by persons who knew Joseph Howe in the hey-day of his vigour and who knew all the great parliamentary gladiators at Ottawa in the in two decades after Confederation. Their judgment was that the best of these Dominion worthies were not in the same class with Howe.

JOSEPH A. CHISHOLM.