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Crimes--Federal Criminal Common Law

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the sole arbiter. In only fifteen of the sixty cases examined did the publication involve pending litigation. The remainder were punished as reflecting upon the court.

The conclusion is almost inevitable that the courts employ this weapon more often as a means of self-vindication than as a shield to protect jurors and prospective jurors from that bias and prejudice which prevent an impartial verdict. When used to this end “summary power” has its usefulness. For this reason alone the wisdom of the statutes of Pennsylvania, New York, South Carolina and Kentucky is to be doubted. As a means of self-vindication its necessity permits of grave doubts. It is difficult to see why our judiciary should be more zealously guarded from the searchlight of criticism than the two other branches of our government. But assuming the necessity of such protection, why not allow the contemnor the right to be tried by a court other than the one offended. Are judges not human and subject to human weaknesses?

The principal case seems to suggest that justice would be better served were another judge to pass on the contemptuous nature of the publication.

ROBERT E. HATTON, JR.

CRIMES—FEDERAL CRIMINAL COMMON LAW.—The doctrine of a federal criminal common law is inseparably linked with the rise and fall of the Federalist party. The establishment of the Supreme Court by the Judiciary Act of 1789 was looked upon with misgivings and even alarm by the people at large, because of the potentiality of the powers as yet undefined which the enactment granted to it, and the possibility of its being used as an effective instrument to increase the centralization of the national government to the detriment of states' rights in the hands of the party then in power which was bent upon accomplishing this very thing. Every move of this body in the first years of its existence was watched with jealous eye; every decision was greeted with a deluge of acrimonious criticism by the Anti-Federalist leaders and press in their eagerness to protect undiminished the rights of the individual states. It was unfortunate that at this time one of the chief sources of litigation was the subject of a federal criminal common law.

The inclination of authority is that the Federal courts have no common law jurisdiction whatever in criminal cases. U. S. v. Eaton, 144 U. S. 677 (1892); In Re Greene, 52 Fed. 104 (1892); U. S. v. Martin, 176 Fed. 110 (1910); U. S. v. Gladwell, 243 U. S. 476 (1917). U. S. v. Smith, 6 Dana Abr. 718 (1792), is the earliest case which arose on the subject. It answered the question in the affirmative. In the second case in which the controversy was mooted U. S. v. Ravara, 2 Dallas 297 (1793), it was argued that the offence committed was not an offence at common law, nor made so by any positive law of the United States, but it was not urged that unless defined by statute, it could not
be punished; and the court found the defendant guilty, the offense being held indictable at common law. The defendant, a consul, was afterwards pardoned due to popular pressure being brought to bear by the newspapers for his release upon condition that he surrender his commission. Another decision of the same year was *Henfield's Case*, Wharton's Trials, 49 (1793), in which the court charged the jury that the participation by the citizens of a neutral state in an attack by one belligerent power upon another is an offense against the law of nations and may be punished as such by such neutral state. The court further decreed that although there may have been no exercise of the power conferred upon Congress by the Constitution "to define and punish offences against the law of nations" the federal judiciary has jurisdiction of an offense against the law of nations, and may proceed to punish the offender according to the forms of the common law; and the federal courts have common law sovereignty of the United States. Despite this bold and clear-cut charge the jury after a lengthy deliberation cleared Henfield of the crime. The verdict in his favor was celebrated with extravagant marks of joy and exultation throughout the entire nation. It is interesting to note at this point that Congress soon after passed statutes covering the offenses in both the Ravara and Henfield Cases.

In spite of the result in the Henfield Case, the federal courts continued to indict for violations of neutrality, the indictments being based on the common law and the law of nations chiefly because there were no statutes on the books by which this fundamental principle of government could be adequately upheld. *U. S. v. Meyer*, Wharton's Pree. 955 (1798).

Another wide field where federal indictments were uniformly sustained upon the principle of a common law was that of sedition. The judges drew their inspiration from British precedents which had grown up before the Revolution in the exercise of government of the colonies. Convictions for sedition were easy under the common-law rule, since "it made the test blame of the government and its officials, because to bring them into disrepute tended to overthrow the state." Chafee, Freedom of Speech, at p. 25. Despite the freedom of speech clause of the First Amendment to the Constitution of the United States convictions continued in the absence of statute until 1798 when the Alien and Sedition Act was passed. Among the most interesting of the reported cases are *Respublica v. Oswald*, 1 Dallas 319, (1788), and *Cobbett's Case*, Wharton's State Trials 322 (1797).

In a case arising shortly afterward, *U. S. v. Worrall*, 2 Dallas 384 (1798), the court divided on the question whether the United States courts had power to punish a man for an act not expressly declared by a law of the United States to be criminal. Judge Chase held to the negative view. "He based his position on two propositions. The first was that while before the Revolution there was a body of law enforceable in each colony which continued in force after the Revolu-
tion, there was no such body of law applicable throughout the United States which could be said to remain in force after severance from England. The second was that the Constitution is the source of all powers belonging to each branch of the national government, and the Constitution does not adopt the common law of crimes for the United States.” Burdick, American Constitution at p. 379. But the oddest part of the case is that though Judge Chase expressly denied that there was jurisdiction, and though there must have been at best a divided bench, the court after a “short consultation” imposed a sentence of unequivocal common law stamp. The most rational interpretation is, that Judge Chase had used this “short consultation” to acquaint himself with the views of his brethren about which, after Henfield Case, there could then have been no doubt.

In the following year at a circuit court in Connecticut, the defendant was indicted for accepting a commission from the French Republic and cruising against and capturing British property. No question of jurisdiction was raised, it being held that he could not expatriate himself, William’s Case, Wharton’s State Trials 652 (1799), but Chief Justice Ellsworth voiced the prevailing view of the court at the time when he prefaced his opinion with the remark, “The common law of this country remains the same as it was before the Revolution.” And since no such right existed under the common law and the common law was binding upon the United States, a citizen had no right of expatriation. The doctrine so upheld at once elicited a flood of political abuse from the partisans of the French cause. Peter S. Duponceau, a noted jurist of the time, wrote in, “A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States,” at page 83, the following criticism: “This was, in respect of its application, a most unfortunate decision, and may be compared in its effects to the Sedition Law. It wounded the feelings and opinions of the American people, by denying the right of expatriation and setting up a claim of perpetual allegiance. Thus a sound doctrine by being mixed with a doubtful, and, at any rate, an unpopular principle, made the nation afraid of the common law, which they thought turned their country into a prison and preventing them from migrating whithersoever they pleased.”

Then came the great political revolution of 1800 which destroyed the Federalist party and with it went the theory of a federal criminal common law although the last vestiges of it were not completely destroyed until nearly two decades later. The process of a change of opinion on the bench was slow but gradual with the dying out of the Federalist appointees, who advocated a strong central government, and the filling in of their places with men expounding the Jeffersonian principles of states rights. However the doctrine was still affirmed in U. S. v. Willing, Wharton’s State Trials 652 (1804), and U. S. v. McGill, 4 Dallas 428 (1806), where Mr. Justice Washington says in part, “There are, undoubtedly, in my opinion, many crimes and of-
fences against the authority of the United States, which have not
been specially defined by law; for I have often decided that the
federal courts have a common law jurisdiction in criminal cases.”
U. S. v. Bevans, 3 Wheaton 336 (1818), and U. S. v. Wiltberger, 5
Wheaton 76 (1820), however, seem to hint the contrary, but the ques-
tion is not directly decided.

In 1812 an indictment based on the common law was found in
the United States Circuit Court for the District of Connecticut against
the “Connecticut Currant,” a Federalist newspaper, for libelous
attacks on President Jefferson, U. S. v. Hudson and Goodwin, 7
Cranch 32 (1812). Inasmuch as both political parties now opposed the doc-
trine, both the Attorney-General and the counsel for the defendants
decided to argue the case. Consequently this far-reaching question
as to the jurisdiction of the Federal Judiciary was decided by the
court in a summary manner without any assistance from the bar and
Judge Johnson stated in a short and loosely reasoned opinion that
the court considered the question “as having been long since settled
in public opinion. . . . . . The legislative authority of the
Union must first make an act a crime, affix a punishment to it, and
declare the court that shall have jurisdiction of the offence.” 1 War-
ren, Supreme Court at p. 437.

One year later the controversy again arose in the Circuit Court
of Massachusetts, U. S. v. Coolidge, 1 Gallison 488 (1813), on an in-
dictment for an offence committed on the high seas. Judge Story in
a learned and elaborate opinion said, “The result of my opinion is:
(1) that the circuit court has cognizance of all offences against the
United States. (2) That what those offences are, depends upon the
common law applied to the sovereignty and authorities confided to the
United States. (3) That the circuit court, having cognizance of all
offences against the United States, may punish them by fine and im-
prisonment where no punishment is specially provided by statute.
I have considered the point, as one open to be discussed notwithstanding
the decision in U. S. v. Hudson, supra, which certainly is entitled
to the most respectful consideration, but having been made without argument and by a majority only of the court, I hope that it is not an improper course to bring the subject again in review for a more solemn decision, as it is not a question of mere ordinary import, but vitally affects the jurisdiction of the courts of the United States; a jurisdiction which they cannot lawfully enlarge or diminish.” The
district judge dissenting, the case came before the Supreme Court of the
United States; and it is evident from the reported case, U. S. v.
Coolidge, 1 Wheaton 415 (1816), that a strong desire existed in the
minds of the judges to hear the whole question of the extent of jur-
sidiction reargued. The attorney-general however declining to do so, being unwilling to attempt to shake U. S. v. Hudson, supra, by the
authority of that case the Court felt themselves bound, and so certified
to the circuit court. “Hence, in this unsatisfactory manner and without any argument before the Court, this highly important and funda-
mental question in the history of American law was settled." 1 Warren, Supreme Court at p. 440.

It is submitted that the law is as it should be in view of the fundamental principle of constitutional law that the only jurisdiction that the federal courts have is that which has been granted by the states, expressly or impliedly. Taking cognizance of offences committed under the common law is not one of them. Therefore a statute is necessary before a conviction can be secured in the federal courts. With the advent of a considerable body of statute law, covering crimes against the national government, which has grown up and accumulated through the years, the doctrine of a federal criminal common law is no longer necessary.

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