IN RE DANA.

Case No. 3,554.
{7 Ben. 1.}[1]

District Court, S. D. New York. July Term, 1873.

CONSTITUTIONAL LAW—RIGHT TO JURY TRIAL—POLICE COURT OF DISTRICT OF COLUMBIA.

By the act of June 17, 1870 (16 Stat. 153), a police court was established in the District of Columbia, having jurisdiction over certain offences committed in the District. Trial in that court was to be without a jury, but any party aggrieved might appeal to the criminal court of the District, and the appeal was to be there tried by jury. An information was filed in the police court, charging D. with libel committed in the District, and a warrant was issued against him, but he could not be found, being in the city of New York. Thereupon, on complaint before a United States commissioner in the city of New York, a warrant was issued by him for the arrest of D., and he was committed, and an

application was made to the district judge for a warrant to remove him to the District of Columbia for trial on the information: *Held,* that so much of the act of 1870, above referred to, as provided for the trial of the information in this case by the court without a jury, was repugnant to the provisions of the 3d subdivision of the 2d section of the 3d article of the constitution of the United States, and of the 6th amendment to that constitution, and was, therefore, void; that the application for the warrant, therefore, must be denied.

{Cited in Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1306; Re Palliser, 136 U. S. 267, 10 Sup. Ct. 1034; U. S. v. Horner, 44 Fed. 677.}

This was an application to the district judge to issue a warrant to the marshal of this district to remove Charles A. Dana to the District of Columbia for trial, for an alleged criminal offence. The application was made under the 33d section of the act of September 24, 1789 (1 Stat. 91), which provides, "that, for any crime or offence against the United States, the offender may * * * be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offence. * * * And, if such commitment of the offender * * * shall be in a district other than that in which the offence is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender * * * to the district in which the trial is to be had." The defendant was the editor and publisher of a daily newspaper printed and published in the city of New York, called the Sun. A complaint, on oath, had been made before the police court of the District of Columbia, alleging that the defendant had published a libel in the District of Columbia, the publication consisting in the uttering, in said District, of a copy of the said newspaper, containing an article wherein the alleged libel was charged to have been contained. Upon such complaint, an information, in the name of the United States, was filed in said court, against the defendant, for the offence, and a warrant was issued thereon, by said court, to the marshal of the District of Columbia, for the arrest of the defendant. He could not be found, being in the city of New York. Thereupon, on complaint before a United States commissioner in the city of New York, a warrant was issued by him for the arrest of the defendant, the proceedings whereon resulted in the commitment of the defendant, by said commissioner, to await the issuing of the warrant now applied for. The act of June 17, 1870 (16 Stat. 153), provided (section 1), that there should be established, in the District of Columbia, a court, to be called the "Police Court of the District of Columbia," which should have "original and exclusive jurisdiction of all offences against the United States, committed in the District of Columbia, not deemed capital or otherwise infamous crimes, that is to say, of all simple assaults and batteries, and, all other misdemeanors not punishable by imprisonment in the penitentiary," the court to be composed of one judge, appointed by the president and senate, for six years. The 3d section of said act provided, "that prosecutions in said police court shall be by information under oath, without indictment by grand jury or trial by petit jury, but any party deeming himself aggrieved by the judgment of said court may appeal

to the criminal court held by a justice of the supreme court of the District of Columbia, and, in such case, the appeal shall be tried on the information filed in the court below, certified to said criminal court, by a jury in attendance thereat, as though the case had originated therein." The 4th section of said act provided, that the court might enforce, any of its judgments or sentences by fine or imprisonment, or by both.

George Bliss, Jr., Dist. Arty., for the United States, contended, that the offence of publishing a libel in the District of Columbia was an offence against the United States, and was a misdemeanor not punishable by imprisonment in the penitentiary (Act March 2, 1831; 4 Stat. 448), and was, therefore, an offence of which the police court of the District of Columbia had jurisdiction.

William D. Shipman and William O. Bartlett, for defendant.

BLATCHFORD, District Judge, in refusing to grant the application, said, in substance: The 3d subdivision of the 2d section of the 3d article of the constitution of the United States is in these words: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial, shall be at such place or places as the congress may by law have directed." The 6th amendment to the constitution, is as follows: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an, impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence." The application for the granting of the warrant of removal is resisted on the part of the defendant, on the ground that so much of the act of June 17, 1870, as provides for a trial of the information in this case by the court without a jury, is repugnant to the foregoing provisions of the constitution, and, therefore, void. It seems to me impossible to doubt the correctness of this proposition with reference to the offence of libel, charged in this case. Even if it were to be conceded, that, notwithstanding

the provision in the constitution, "the trial of all crimes, except in cases of impeachment, shall be by jury," congress has the right to provide for the trial, in the District of Columbia, by a court without a jury, of such offences as were, by the laws and usages in force at the time of the adoption of the constitution, triable without a jury, it is a matter of history, that the offence of libel was always triable, and tried, by a jury. It is, therefore, one of the crimes which must, under the constitution, be tried by a jury. The act of 1870 provides that the information in this case shall not be tried by a jury, but shall be tried by the court. It is true, that it gives to the defendant, after judgment, if he deems himself aggrieved thereby, the right to appeal to another court, where the information must be tried by a jury. But this does not remove the objection. If congress has the power to deprive the defendant of his right to a trial by jury, for one trial, and to put him, if convicted, to an appeal to another court, to secure a trial by jury, it is difficult to see why it may not also have the power to provide for several trials by a court, without a jury, on several successive convictions, before allowing a trial by a jury. In my judgment, the accused is entitled, not to be first convicted by a court, and then to be acquitted by a jury, but to be convicted or acquitted in the first instance by a jury. As, therefore, the defendant, if removed to the District of Columbia, will be tried in a manner forbidden by the constitution, I must decline to grant the warrant.