UNITED STATES v. LYNN.

Case No. 15,649.

[2 Cranch, C. C. 309.][1]

Circuit Court, District of Columbia. May Term, 1822.

WITNESS—PRIVILEGE—INCRIMINATING TESTIMONY A—SECONDARY EVIDENCE.

1. A witness is not bound to answer a question, if it shall appear to the court that the answer would have a probable tendency to criminate the witness.

2. The contents of a written paper cannot be proved by parol, unless the paper be lost or destroyed.

The defendant [Adam Lynn] was indicted for sending a challenge to James McGuire to fight a duel. James McGuire, who stood in-dicted for accepting the challenge, was produced as a witness for the United States, and was asked whether such a written challenge is in existence.

Mr. Hewitt and Mr. Taylor, for the witness, objected, that the answer might tend directly to prove a fact necessary to convict Mr. McGuire.

Mr. Swann, for the United States, mentioned the Case of Kearney, at the last term in Washington [7 Wheat. (20 U. S.) 39], when a majority of this court determined that a similar question must be answered by the witness. The chief justice of the United States, in Burr's Case [Case No. 14,692e], went too far in saying that the witness was not "bound to answer the question, if the answer might tend to prove a fact which would be a necessary link in the chain of evidence to support a prosecution against the witness.

Mr. Taylor, in reply. There is a difference "between Kearney's Case [supra] and this. There, Kearney was not indicted for being concerned in the duel; and the court did not know whether he was present as a party, or only as an accidental witness.

THE COURT (THRUSTON, Circuit Judge, absent) said, that as there is a prosecution against the witness for accepting the challenge and as the existence of the challenge would be a material fact in the evidence against him upon the trial, and as he stated that he could not answer the question without implicating himself, he was not bound to answer.

MORSELL, Circuit Judge, stated his opinion to be, that as in the present case there was a prosecution against the witness for accepting the challenge, the witness was not hound to answer the question, if he had in fact accepted the challenge, (which he himself best knew,) because it appeared to the court that the answer would have a probable tendency to criminate the witness.

Evidence having been given that the challenge, if any, was in writing, and in the possession of a witness residing in Washington, THE COURT refused to permit parol evidence to be given of its contents, and refused to adjourn the jury over, to give the United States time to send for that witness.

Verdict for the defendant

[1] {Reported by Hon. William Cranch, Chief Judge.}