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FRIDAY, JUNE 5, 1807.

TRIAL OF AARON BURR.

[Continued from yesterday's American.]

Circuit Court of the United States,
VIRGINIA DISTRICT.
Richmond, May 25, 1807.

The *Chief Justice* enquired whether the counsel for the prosecution intended to open the case more fully.

Mr. Hay had not intended to have opened it more fully. He could not himself entertain a doubt that if there was sufficient evidence produced to commit Aaron Burr, the court had completely the right to do it. Mr. Botts himself had not pretended to deny it; for his whole argument had turned upon the question, not whether the court had the right, but whether it was expedient for them *now* to exercise it. It is certainly proper to do it, upon the evidence only. If *that* be sufficient, the court could surely entertain no doubts on the subject.—Let the court once admit as an exception to this general power, that the grand jury was in session, and they will establish a precedent that is fraught with the most dangerous consequences. It is easy to see through the object of the opposite counsel when they press this principle.

Mr. Wickham. It would certainly have been an accommodation to us, to have had this motion put off until to-morrow. We come into this discussion completely off our guard, completely unprepared, and certainly it could have been nothing but forgetfulness, which has prevented the opposite counsel from giving us timely notice of the motion they intended to bring forward. There was an agreement made between us in the very hearing of the court, that if any motion was to be brought forward on either side, they were to give timely notice to the opposite party of the object of their proposition. I am sorry that they have departed from this agreement in the present instance; but if I have not forgotten every principle of law, that I ever learnt, or every principle of common justice, this motion cannot be supported

Mr. Hay. The gentleman will permit me to set him right. He might have relied upon my candor, that when I was about to lay my indictments before the grand jury, I would have given him timely notice of my intention. They might then have moved for the instructions to the jury, which they are so anxious to obtain. This was the only understanding between us on the subject; and our agreement extended no farther; much less to the particular case before the court: on the other hand there was a very strong reason against our making this communication. I feel no hesitation, sir, in assigning this reason; and I hope that it will wound neither the feelings of the prisoner, nor of his counsel. I did not intend to have laid it before the court; but I now conceive myself called upon to be thus explicit.—The fact is this, Mr. Wilkinson is known to be a material witness in this prosecution. His arrival in Virginia might be announced in this city, before he reached it. I do not pretend to say what effect it might produce upon col. Burr's mind; but certainly col. B. would be able to effect his escape, merely upon paying the recognisance of his present bail.—My only object then, sir, was to keep his person safe, until we could have investigated the charge of treason; and I really did not know, but that if col. Burr had been previously apprized of my motion, he might have attempted to avoid it. But I did not promise to make this communication to the opposite counsel, because it might have defeated the very end for which it was intended. I have said the only pledge I gave, merely related to the indictments to be sent up to the grand jury.

Mr. Wickham observed that he knew the gentleman too well not to doubt that he had misapprehended him. But what could he think of the motion he had made? It was a strange Episode which he weaved into his tale. It may be good poetry indeed, but it was not certainly proper matter of argument. Every man who hears me; every man who has ever read on the subject, must know what are the feelings which dictate these suspicions of col. Burr. Some mortification was felt by his enemies (not that the attorney for the U. S. himself ever felt it) that he did return here for trial. But here col. Burr is, and will always be, to meet every kind of charge that may be brought against him.—The gentleman will not open his case; and why? because when he has heard our arguments against his motion, he may come out with the adverse arguments against us. If they do not chose to open their case, we hope the court will grant us the right to make a conclusive reply.

Mr. Hay. Then, sir, we will produce the evidence.

Here a desultory conversation ensued upon the order of proceeding.

After some conversation the chief justice determined that col. Burr's counsel should proceed with the argument.

Mr. Wickham read from the act of Virginia, page 108 of the revised code, sect. 8, as bearing upon this case—He observed that the present motion was also unprecedented in a system of criminal jurisprudence which was upwards of 100 years old. If the motion be a proper one, there must be some precedents in this country or in England—But if there be none such, and the gentlemen have not produced them, it is but fair to infer that there are none such. It is therefore obvious that the present motion is contrary to the acts of Virginia, as well as to the common law.

The attorney for the U. S. has said that he can take no final measures until gen. Wilkinson is present. His deposition is greatly relied upon. Now, sir, I refer to you as well as the S. court of the U. S. where you presided, that the facts contained in that deposition (if facts they were) did not amount to treason; but to a probable proof of the misdemeanor only. As to gen. Eaton's, it is not relied on. The sole reliance of the prosecution is upon Wilkinson's: of course, if Wilkinson himself were present, he could prove nothing new. But if gen. W. is so material a witness, why are they not prepared to go with him before the grand jury?—why is not gen. Wilkinson here? He is a military officer, bound implicitly to obey the head of the government. In the wars of Europe a general has been known to march the same distance at the head of his army in a shorter time than gen. Wilkinson has had to pass from N. Orleans to this place. He is bound to go whenever the government directs him: to march to Mexico; to invade the Floridas; or to come to this city. Perhaps there are other reasons for his not coming. But let us not press this subject.

What, sir, is the tendency of this application? what is the motive? I have no doubt that the gentlemen mean to act correctly. I wish to cast no imputations. But the counsel and the court will know that there are a set of busy people (not I hope employed by the government) who think to do right, are laboring to ruin the reputation of my client. I do not charge the government with this attempt. But the thing is already done. Attempts have been made. The press from one end of the continent to the other has been enlisted on their side; to enlist prejudices against col. Burr. Prejudices? yes; they have influenced public opinion; but such representations, and by persons not passing between the prisoner and his country, but by exparte evidence and mutilated statements.—Ought not this court to bar the door as far as possible against such misrepresentations? to shut every effort to excite further prejudices, until the case is decided by a sworn jury, not by the floating rumours of the day, but by the evidence of sworn witnesses?—The attorney for the U. S. offers to produce his testimony; no doubt the most violent; no doubt the least impartial which he can select; testimony which is perhaps to be met and overthrown by superior evidence.—Do they, besides these things, wish that the multitude around us should be prejudiced by garbled evidences? Do precedents justify such a course as this?—"Produce your witnesses," they may say. No, sir. Colonel Burr is ready for a trial; but he wishes for that trial to come before a jury.—I do not pretend to understand the motives which led to those things: it is enough that they produce the same mischievous effects upon ourselves. Should government hereafter wish to oppress any individual; to drag him from one end of the country to the other by a military force; to enlist the prejudices of the community against him; they will pursue the very same course which has now been taken.

Col. Burr is here ready for his trial. They admit that their testimony is not sufficient to bring him before a grand jury; and of course found an indictment against him before a grand jury. Why then is this partial evidence to be exhibited on a motion for commitment? it is to nourish the prejudices against him.—Will they then press a motion like this? be it so sir, I trust the court will not be influenced between the prisoner and his pursuers; for every man is presumed to be innocent before he is found guilty.

Mr. Wirt.

May it please your honors. The attorney for the United States believing himself possessed of sufficient evidence to justify the commitment of A. Burr for High Treason, has moved the court to that effect. In making this motion he has merely done his duty; it would have been unpardonable in him to omit it. Yet the counsel in the defence complain of the motion and of the want of notice. As to the latter objection, it must be palpable that the nature and object of the motion rendered notice improper. The gentlemen would have had the attorney to announce to the party concerned, that he was, at length, in possession of sufficient evidence to justify his commitment for High Treason:—and that being apprehensive he might not be disposed to stand this charge, he intended, as soon as the accused came into court next morning, to move his commitment. This would really be carrying politeness beyond the ordinary pitch: it would not have deserved the name of candor, sir; it would in fact, have been an invitation to the accused to make his escape. But as gentlemen seem to doubt, with an air at least of earnestness, the propriety of this motion at this time, and express their regret that they have not had time to examine its legality, the attorney has offered to wave the motion until to-morrow, to give gentlemen the opportunity which they profess to desire; but no, sir; they will not even have what they say they want, when offered by the attorney. Another gentleman, after having demanded why this motion was made, and by that demand drawn from the attorney an explanation of his motives, has been pleased to speak of the attorney's statement of his apprehensions as "an episode:" which "although good poetry," had better have been let alone, when such serious matters of fact, were in discussion." It may be an episode, sir, if the gentleman pleases; he is at liberty to consider the whole trial as a piece of epic action, and to look forward to the appropriate catastrophe. But it does not appear to me to be very fair sir, after having drawn from the attorney an explanation of his motives, to complain of that explanation: if a wound has been inflicted by the explanation, the gentlemen who produced it, should blame only themselves. But, sir, where is the crime of considering Aaron Burr as subject to the ordinary operation of the human passions? Towards any other man, it seems, the attorney would have been justifiable in using precautions against alarm and escape; it is only improper when applied to this man—Really, sir, I recollect nothing in the history of his deportment which renders it so very incredible that Aaron Burr would fly from a prosecution.—But at all events, the attorney is bound to act on general principles, and to take care that justice be had against every one accused, by whatever name he may be called or by whatever previous reputation he may be distinguished.

This motion, however, it seems, is not legal at this time, because there is a Grand Jury in session. The amount of the position is, that although it be generally true, that the court possesses the power to hear and commit, yet if there be a Grand Jury, this power of the court is suspended; and the commitment cannot be had unless, in consequence of a presentment or bill of indictment, found by that body. The general power of the court being admitted, those who rely on this exception should support it by authority, and, therefore, the loud call for precedents which we have heard from the other side, comes improperly from that quarter. We ground this motion on the general power of the court to commit: let those who say that this power is destroyed by the presence of a Grand Jury, shew one precedent to countenance this original and extraordinary motion. I believe, sir, I may safely affirm, that not a single reported case or *dictum* can be found, which has the most distant bearing toward such an idea. Sir, no such dictum or case *ought* to exist; it would be unreasonable and destructive of the purposes of justice. For if the doctrine be true at all, that the presence of a Grand Jury suspends the power to hear and commit by any other authority, it must be uniformly and universally true; in every other case as well as this, and in every case which can be proposed while a Grand Jury is sitting. Now, sir, let us suppose, that immediately on the swearing of this Grand Jury and their retiring to their chamber, Aaron Burr had been for the first time brought to this town; the members of the evidence scattered over the continent; the attorney, however, in possession of enough to justify the arrest and commitment of the accused for High Treason, but not enough to authorise a Grand Jury to find a true bill. What is to be done? The court disclaims any power to hear and commit, because there is a Grand Jury:—The Grand Jury cannot find a true bill, because the evidence is not sufficient to warrant such a finding; the natural and unavoidable consequence would be, that the man must be discharged. And then, according to Mr. Wickham's principle of ethics, that every man is supposed to intend the natural consequences of his own acts, the gentlemen who advocate this doctrine intend that Aaron Burr shall be discharged without a trial.

I beg you, sir, to recollect what was said by gentlemen the other day, when you were called upon to give an additional charge to the Grand Jury. You were told, that a Grand Jury should require the same evidence to find a true bill, which a Petit Jury would require to convict the prisoner:—Connect this principle with the doctrine in question: the sitting of the grand jury suspends all power to commit by any other body—and the grand jury cannot find a bill, unless on evidence, on which they would convict as petty jury: connect these two principles and consider the immaturity of evidence which always exists at the period of arrest and commitment: and the sitting of the grand jury, instead of being a season of admonition and alarm, becomes a perfect jubilee to the guilty.

But it is said, that this motion is 'an attempt to divest the constitutional organ of its just and proper power:' I believe, sir, it was never before heard, that an application to commit for safe keeping was an encroachment on the power of the grand jury. Would the gentleman have us to address this motion to the grand jury? They might as well propose that we should submit the bill of indictment to the court and desire them to say, whether it is a true bill or not. This would indeed be the 'shifting of powers' of which the gentleman complains. As it is, sir, there is no manner of collision between the power which we call upon the court to exercise and the proper power of the grand jury. The justices arrest and commit for safe-keeping; then comes the function of the grand jury to decide on the truth of the indictment exhibited against the prisoner. The two offices are distinct in point of time and totally different in their nature and objects.

But it is said that "there is great inconvenience in submitting a great law officer to the necessity of expressing an opinion on the crime on a motion like this;"—"that the judge, like the juror, should come to the trial with his mind pure and unbiassed." This argument does not apply to *the legality* of the power which we call upon the court to exercise: it goes merely to the expediency of exercising this power: and if the argument be true, the court ought never to commit; whether the grand jury be sitting or not.—This, however, sir, is a matter of legislation, not for judicial consideration. Whenever the legislature shall decide, by the force of this argument, that the court which commits shall not sit on the trial in chief, a motion like this will become improper; at present, however, the legislature has left this power with the court; and we claim its exercise for considerations of the most serious importance to truth and justice.

But, sir, we are told that this investigation is calculated to keep alive the public prejudices—and we hear great complaints about these public prejudices—the country is represented as being filled with misrepresentations and calumnies against Aaron Burr—the public indignation it is said is already sufficiently excited: This argument, also, sir, has no application to our right to make this motion: it does not affect the legality of our procedure.—But if the motion is likely to have this effect, we cannot help it—no human institution is free from inconveniences—the course we hold is a legal one—without it a necessary one—we think it a duty. It is no answer to us then to say that it may produce inconveniences to the prisoner. But let us consider this mournful tale of prejudices and the likelihood of their being excited by this motion. Sir, if Aaron Burr be innocent, instead of resisting this motion, he ought to hail it with triumph and exultation. What is it that we propose to introduce? Not the rumors which are floating through the world;—not the talk of the multitude,—nor the speculations of newspapers—but *the evidence of facts*; we propose that the whole evidence exculpatory as well as accusative shall come before you,—instead of exciting, this is the true mode of correcting prejudices—the world which it is said has been misled and inflamed by falsehood, will now hear the truth—let the case come out—let us know how much of what we have heard is false, how much of it true—how much of what we feel is prejudice; how much of it is justified by fact: who ever before heard of such an apprehension as that which is professed on the other side? *Prejudice excited by evidence!* Evidence, sir, is the great corrector of prejudice. Why then does Aaron Burr shrink from it? It is strange to me that a man who complains so much of being without cause illegally seized and transported by a military officer, should be afraid to confront this evidence. Evidence can be promotive only of truth—I repeat it then, sir—why does he shrink—why does he shrink from the evidence? The gentlemen on the other side can give the answer. On our part we are ready to introduce that evidence.

Permit me now, sir, to turn to the act of assembly which has been read by Mr. Wickham. Into what embarrassment must the ingenious and vigorous mind of that gentleman have been driven, before he would have taken refuge under this act of assembly? It is but to read it, to see that it has no manner of application whatever to this motion: that it applies to the case of a person *already committed*—declaring that *such person* shall be bailed if not indicted at the first term after his commitment;—and discharged if not indicted at the second term. [Revised Code by Pleasants and Pace. 103—Sec. X.]

"When any person committed for treason."—Now, Sir, is Aaron Burr committed for treason? if not it is obvious that the clause has no manner of application to him. Why, Sir, the object of this motion is to commit him. Gentlemen must have been in strange confusion when they resorted to this law.

Mr. Wickham asks if general Wilkinson be a material witness, why he is not here? "Who is general Wilkinson," says that gentleman? is he not the instrument of the government bound to a blind obedience?"—I am sorry for this and many other declamatory remarks which have been unnecessarily and improperly introduced—but the gentleman assures us that no imputation is meant against the government—Oh no sir, col. Burr, indeed, has been oppressed—has been persecuted—but far be it from the gentleman to charge the government with it—Col. Burr, indeed, has been harassed by a military tyrant who is "the instrument of the government, bound to a blind obedience"—but the gentleman could not by any means be understood as intending to insinuate aught to the prejudice of the government—The gentleman *is* understood, sir: his object is correctly understood. He would direct the public mind from A. Burr, and point it to another quarter. He would too, if he could, shift the popular displeasure which he has spoken of from A Burr to another quarter. These remarks were not intended for your ear, sir: they were intended for the people who surround us—they can have no effect upon the mind of the court—I am too well acquainted with the dignity, the firmness, the illumination of this bench to apprehend any such consequence. But the gentlemen would balance the account of popular prejudices—they would convert this judicial enquiry into a political question——they would make it a question between Thomas Jefferson and A. Burr.—The purpose is well understood, sir, but it shall not be served. I will not degrade the administration of this country by entering upon their defence. Besides, sir, this is not our business—at present we have an account to settle (not between A. Burr and Thomas Jefferson—but) between A. Burr and *the laws of his country*. Let us finish his trial first.—The administration too will be tried before their country—before the world—they sir, I believe, will never shrink either from the evidence or the verdict—Let us return to A. Burr:—"Why is not general Wilkinson here?" Because, sir, it was impossible in the nature of things for him to be here by this time. It was on the first of April, sir, that you decided on the commitment of A. Burr, for the misdemeanor; until that decision was known, the necessity of summoning witnesses could not be ascertained; gen. Wilkinson is the commander in chief of the American troops in a quarter where his presence is rendered important by the temper of the neighborhood; to summon him on the mere possibility of commitment, would have afforded a ground of clamor, perhaps a just one, against the administration. The certainty that A. Burr would be put upon his trial, could not have been known at Washington till the 5th or 6th of April. Now, sir, let the gentlemen on the other side make a slight calculation: Orleans is said to be 15 or 1600 miles from this place—Suppose the U. S. mail travelling by a frequent change of horses and riders, a hundred miles per day, should reach Orleans in seventeen days from