Supplement to the American... June 5, 1807.

TRIAL OF AARON BURR.

[Continued from this day's American.]

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

THURSDAY, May 28.

Same Judge preſent as yeſterday.

The proceedings of yeſterday, were read. The Grand Jury appeared in court, and their names being called over, they were adjourned till to-morrow 10 o'clock.

William Duane, Eſq. appeared as a witneſs for the U. S.

Luther Martin, Eſq. appeared as Counſel for Mr. Burr. He enquired of the court, whether he ſhould qualify?

Chief Juſtice. It is the uſual form; but, it is not abſolutely material. It may be diſpenſed with.

Mr. Martin. I did not ſuppoſe ſo; and as I am unwilling to take up the time of the court—

The court then proceeded to the conſideration of the point made yeſterday, relative to Dubas' affidavit. A deſultory converſation enſued between the counſel and the Bar, on the proceedings before the Supreme Court of the U. S. and on a caſe quoted from Waſhington's Reports.

Mr. Martin obſerved, that in fact this point had not been made before the Supreme Court in Waſhington.

Mr. Hay. It ſeems that the able and intelligent counſel who were employed for the U. S. did not deem it neceſſary to ſtate this objection. It paſſed *ſub ſilentio.* It was not once noticed, even in the material caſe of Gen. Wilkinſon's affidavit. Why was it neglected? or why did the able and zealous counſel, who certainly ſpared no exertions in the cauſe of their clients, omit to raiſe this very objection to the form of authentication?

Mr. Martin. Although I was counſel in theſe caſes before the Supreme Court of the U. S. I am confident that this objection was never raiſed. Gen. Wilkinſon was known to be at New-Orleans, and the magiſtrate who certified his depoſition, was known to have been duly commiſſioned. In fact the other objections to that affidavit were ſo material, that they were thought to be amply ſufficient. This one eſcaped our notice.—

The Chief Juſtice then pronounced the opinion of the court, in the following words:

On the part of the U. S. a paper purporting to be an affidavit has been offered in evidence, to the reading of which two exceptions are taken:

1ſt. That an affidavit ought not to be admitted where the perſonal attendance of the witneſs could have been obtained;

2dly. That this paper is not ſo authenticated, as to entitle itſelf to be conſidered as an affidavit.

That a magiſtrate may commit upon affidavits, has been decided in the Supreme Court of the United States, though not without heſitation. The preſence of the witneſs to be examined by the committing juſtice confronted with the accuſed, is certainly to be deſired; and ought to be obtained, unleſs conſiderable inconvenience and difficulty exiſts in procuring his attendance. An ex-parte affidavit ſhaped, perhaps, by the perſon preſſing the proſecution will always be viewed with ſome ſuſpicion and acted upon with ſome caution, but the court thought it would be going too far to reject it altogether. If it was obvious that the attendance of the witneſs was eaſy attainable, but that he was intentionally kept out of the way, the queſtion might be otherwiſe decided.

But the particular caſe before the court does not appear to be of this deſcription. The witneſs reſides at a great diſtance; and there is no evidence that the materiality of his teſtimony was known to the proſecutors or to the executive in time to have directed his attendance. It is true that general inſtructions, which would apply to any individual, might have been ſent, and the attendance of this or any other material witneſs obtained under thoſe inſtructions; but it would be requiring too much to ſay, that the omiſſion to do this ought to exclude an affidavit. This exception, therefore, will not prevail.

The 2d is, that the paper is not ſo authenticated, as to be introduced as teſtimony on a queſtion, which concerns the liberty of a citizen.

This objection is founded on two omiſſions in the certificate.

The firſt is, that the place at which the affidavit was taken does not appear;

The ſecond, that the certificate of the governor does not ſtate the perſon who adminiſtered the oath to be a magiſtrate, but goes no further than to ſay, that a perſon of that name was a magiſtrate.

That, for aught appearing to the court, this oath may or may not in point of fact have been legally adminiſtered, muſt be conceded.

The place, where the oath was adminiſtered, not having been ſtated; it may have been adminiſtered where the magiſtrate had no juriſdiction, and yet the certificate be perfectly true. Of conſequence there is no evidence before the court, that the magiſtrate had power to adminiſter the oath and was acting in his judicial capacity.

The effect of teſtimony may often be doubtful; and courts muſt exerciſe their beſt judgment in the caſe, but of the verity of the paper, there ought never to be a doubt. No paper writing ought to gain admittance into a court of juſtice as teſtimony, unleſs it poſſeſſes thoſe ſolemnities which the law requires — Its authentication muſt not reſt upon probability, but muſt be as complete as the nature of the caſe admits of. This is believed to be a clear, legal principle. In conformity with it, is, as the court conceives, the practice of England and of this country, as is atteſted by the books of forms; and no caſe is recollected, in which a contrary principle has been recognized. This principle is in ſome degree illuſtrated by the doctrine with reſpect to all courts of a limited juriſdiction. Their proceedings are erroneous, if their juriſdiction be not concluſively ſhewn. They derive no validity from the ſtrongeſt probability that they had juriſdiction in the caſe; none certainly from the preſumption that being a court, an uſurpation of juriſdiction will not be preſumed. The reaſoning applies in full force to the actings of a magiſtrate whoſe juriſdiction is local. Thus in the caſe of a warrant, it is expreſsly declared, that the place where it was made ought to appear.

The attempt to remedy this defect by comparing the date of the certificate given by the magiſtrate, with that given by the governor cannot ſucceed.—The anſwer given at bar to this argument is concluſive. The certificate wants thoſe circumſtances which would make it teſtimony, and without them no part of it can be regarded.

The ſecond objection is equally fatal. The governor has certified that a man of the ſame name with the perſon who has adminiſtered the oath is a magiſtrate, but not that the perſon who has adminiſtered it, is a magiſtrate.

It is too obvious to be controverted, that there may be two or more perſons of the ſame name, and, conſequently to produce that certainty which the caſe readily admits of, the certificate of the governor ought to have applied to the individual who adminiſtered the oath. The propriety of this certainty and precision in a certificate, which is to authenticate any affidavit to be introduced into a court of juſtice, is ſo generally admitted, that I do not recollect a ſingle inſtance in which the principle has been departed from.

It has been ſaid, that it ought to appear, that there are two perſons of the ſame name, or the court will not preſume ſuch to be the fact. The court preſumes nothing. It may or may not be the fact, and the court cannot preſume that it is not. The argument proceeds upon the idea that an inſtrument is to be diſproved by him who objects to it, not that it is to be proved by him who offers it. Nothing can be more repugnant to the eſtabliſhed uſage of courts.

How is it to be proved that there are two perſons of the name of Cenas in the territory of Orleans? If with a knowledge of ſeveral weeks, perhaps months, that this proſecution was to be carried on, the executive ought not to be required to produce this witneſs, ought the priſoner to be required, with the notice of a few hours to prove that two perſons of the ſame name reſide in N. Orleans?

It has been repeatedly urged that a difference exiſts between the ſtrictneſs of laws which would be applicable to a trial in chief and that which is applicable to a motion to commit for trial.

Of the reality of this diſtinction, the preſent controverſy affords concluſive proof. At a trial in chief, the accuſed poſſeſſes the invaluable privilege of being confronted with his accuſer. But there muſt be ſome limit to this relaxation, and it appears not to have extended ſo far as to the admiſſion of a paper, not purporting to be an affidavit and not ſhewn to be one.

When it is aſked whether every man does not believe that this affidavit was really taken before a magiſtrate, it is at once anſwered that this cannot affect the caſe. Should a man of probity declare a certain fact within his own knowledge, he would be credited by all who knew him, but his declaration could not be received as teſtimony by the judge who firmly believed him. So a man might be believed to be guilty of a crime, but a jury could not convict him, unleſs the teſtimony proved him to be guilty of it. This judicial diſbelief of a probable circumſtance does not eſtabliſh a wide interval between common law and common ſenſe. It is believed in this reſpect to ſhew their intimate union.

The argument goes to this, that the paper ſhall be received and acted upon as an affidavit, not becauſe the oath appears to have been adminiſtered according to law, but becauſe it is probable that it was ſo adminiſtered.

This point ſeems to have been decided by the conſtitution.

"The right of the people (ſays that inſtrument) to be ſecure in their perſons, houſes, papers and effects, againſt unreaſonable ſearches and ſeizures, ſhall not be violated; and no warrants ſhall iſſue but upon probable cauſe ſupported by oath or affirmation, and particularly deſcribing the places to be ſearched and the perſons or things to be ſeized."

The cauſe of ſeizure is not to be ſupported by a probable oath, or an oath that was probably taken, but by oath abſolutely taken. This oath muſt be a legal oath; and if it muſt be a legal oath, it muſt legally appear to the court to be ſo. This proviſion is not made for a final trial; it is made for the very caſe now under conſideration. In the cool and temperate moments of reflection, undiſturbed by that whirlwind of paſſion with which in thoſe party conflicts which moſt generally produce acts or accuſations of treaſon, the human judgment is ſometimes overthrown; the people of America have believed the power even of commitment to be capable of too much oppreſſion in its execution to be placed without reſtriction even in the hands of the national legiſlature. Shall a judge diſregard thoſe barriers which a nation has deemed it proper to erect?

The intereſt, which the people have in this proſecution, has been ſtated; but it is firmly believed, that the beſt & true intereſt of the people is to be found in a rigid adherence to thoſe rules, which preſerve the fairneſs of criminal proſecutions in every ſtage.

If this was a caſe to be decided by principle alone, the court would certainly not receive this paper. But if the point is ſettled by decisions, they muſt be conformed to.

It has been ſaid to have been ſettled in the ſupreme court of the U. States by admitting the affidavit of Wilkinſon, to which an exception was taken, becauſe it did not appear that the magiſtrate had taken the oaths preſcribed by law. It was ſaid, that as by law he could not act, until he had taken the oaths, and he was found acting, it muſt be preſumed that this pre-requiſite was complied with; that is, that his acting as a magiſtrate under his commiſſion was evidence that he was authoriſed ſo to act.

It will not be denied that there is much ſtrength in the argument: but the caſes do not appear to be preciſely parallel.

The certificate that he is a magiſtrate and that full faith is due to his acts, implies, that he has qualified, if his qualification is neceſſary to his being a complete magiſtrate, whoſe acts are entitled to full faith and credit.

It is not uſual for a particular certificate that a magiſtrate has qualified to accompany his official acts.

There is no record of his qualification and no particular teſtimonial of it could be obtained.

These obſervations do not apply to the objections which exiſt.

But it is ſaid that the certificate is the ſame with that in Wilkinſon's affidavit.

If this objection had been taken and overruled, it would have ended the queſtion. But it was not taken ſo far as is now recollected, and does not appear to have been noticed by the court. It is not recollected by the judge who ſat on that occaſion to have been noticed. A defect, if it be one, which was not obſerved cannot be cured by being paſſed over in ſilence.

The caſe in Waſhington was a civil caſe and turned upon the point; that no form of the commiſſion was preſcribed, and conſequently that it was not neceſſary to appear on the face of it, that it was directed to magiſtrates.

That it was the duty of the clerk to direct it to magiſtrates, and he ſhould not be preſumed to have neglected his duty, in a caſe in which his performance of it need not appear on the face of the inſtrument.

That the perſon intending to take this exception, ought to have taken it ſooner and not ſurpriſe the oppoſite party when it was too late to correct it.

But the great difference is, that the privy examination was a mere miniſterial act—the adminiſtration on oath is a judicial act.

The court is of opinion that the paper purporting to be an affidavit made by Dunbaugh, cannot be read, because it does not appear to be an oath.

Mr. Hay then addreſſed the court. It is extremely uncertain how long this examination will continue; whether it may occupy ten hours or ten days. And if gentlemen continue to make the ſame captious objections, which they have already done in every ſtage of the enquiry, it is impoſſible to foreſee any termination to it. All this time, however, Aaron Burr is at liberty, and he may depart from this city at any moment that he pleaſes. On the very firſt day that I made this motion, he ought to have been held to bail or in cuſtody, and day after day until the court ſhould have given their deciſion. I expect general Wilkinſon here this day or to-morrow; as I have received a letter from the ſecretary of war ſtating that he would probably be here on the 28th or 30th. As to colonel Burr's counſel they may have that confidence in his innocence, which diſmiſſes all apprehenſions of his intention to eſcape. For my own part I freely confeſs that my confidence is much leſs and my fears infinitely greater. I riſe therefore to give notice, that unleſs this examination is finally ſettled this day, unleſs all the evidence and argument be concluded and the opinion of the court finally delivered, I ſhall move that he be bound to appear here to-morrow, to anſwer the charge of treaſon.

After ſome deſultory converſation between oppoſite counſels, Mr. Hay proceeded: I know not, ſirs, whether this motion can be conſidered as regularly before the court. I certainly intended it as a mere notification of a motion, which I intended to make under certain circumſtances. Is there any poſſible impropriety in ſuch a motion? I conſider Aaron Burr as ſtanding here as if he were formally brought by a warrant before your honor; as ſtanding preciſely in the ſame ſituation as he did before you on a former examination. At *that* time, ſir, after having the evidence before you, tho' without hearing the argument of counſel, you bound him to bail from day to day.

Mr. Wickham obſerved, that this was a moſt extraordinary motion; it was however, ingenious; as it had the very effect they had contemplated by the motion for commitment. It was ſtated, that col. Burr is placed in the ſame ſituation, as he was on a former examination; and that the court ought, therefore, to bind him over from day to day as they did then. But the analogy is falſe. At that time, colonel Burr was not bound at all, and it might have been neceſſary to have demanded ſome pledge for his perſonal attendance. But *now* colonel Burr comes into court actually bound; himſelf in the ſum of 10,000 dollars, and his ſecurities in 10,000 dollars more. And this ſum is preciſely double of that, which was exacted from him on his former examination, to ſecure his attendance from day to day.

Mr. Martin. The recognizance which already bound colonel Burr compels him to be in court; why bind him up in a greater ſum? Is there any reaſon to ſuſpect him guilty of treaſon? Has any thing like an oath come from Wilkinſon that colonel Burr was engaged in treaſon? There is not a ſingle ſentiment, not a ſingle expreſſion in Wilkinſon's depoſition which implicates any high treaſon perpetrated by him? The preſent application is contrary to every principle of juſtice, but if the court thinks that he ought to be bound for this charge, we ſhall ſubmit with deference to its deciſion.

Mr. Randolph. The queſtion is, whether there exiſts probable evidence of High Treaſon, againſt Col. Burr. But this is a novel and moſt extraordinary proceeding. Why does not the proſecution ſhow that there does exiſt ſufficient cauſe? Why do they not produce their evidence? If it be ſufficiently ſtrong, the court will no doubt purſue the neceſſary meaſures.

Mr. M'Rae. Gentlemen ſeem to conſider the preſent recognizance as amply ſufficient under any poſſible circumſtances, to detain Aaron Burr here to anſwer to the charge of Treaſon I am of a very different opinion. I think with the Attorney for the U. S. that nothing is more probable than that certain circumſtances may induce him to effect his eſcape; nor have I the ſame confidence which his counſel ſeem to entertain, in the poſſibility of his remaining for trial.—On the former examination, he was bound over; but even then it was evidently for a very ſmall ſum; and why? Becauſe the Chief Juſtice himſelf obſerved that as Col. Burr was withdrawn from the circle of his friends, it would increaſe the difficulty of his obtaining even a ſmall bail even for this ſmaller offence; and becauſe he completely excluded from his view the preſent charge. As then he decided, that this ſum in which Col. Burr is now bound is a ſmaller one than the charge of high Treaſon would have warranted; it ſeems to me that too great reliance is placed upon the preſent recognizance.

Mr. Wirt begged leave to make a few remarks on this ſubject, though he had not ſo fully prepared himſelf as he would have wiſhed, becauſe he had not expected that it would provoke ſuch diſcuſſion:—Mr. Wickham appears not to have underſtood this ſubject with his uſual correctneſs, when he declares that the granting of this motion would have the very ſame effect as granting the motion for commitment. What is the object of this laſt motion? To commit A. Burr for High Treaſon. But the object of this preſent motion is merely to keep his perſon here to abide the opinion of the court. The other will to keep him for trial. The effect therefore is widely different; and we ſhould not, as Mr. Wickham contended, thus gain our point.—He ſuppoſes too that the preſent recognizance will hold A. Burr to anſwer the charge of Treaſon. But if he looks at the terms of the bond, it will at once appear that it is a recognizance only for miſdemeanor, and not as the cuſtomary form is, to appear to anſwer for that or any other crime which may be brought againſt him. This recognizance may therefore be ſufficient as to the miſdemeanor; but not on the charge of Treaſon. It is preſeſſly immaterial that the preſent motion is brought before the court; It is preciſely the ſame thing as if it were brought before the ſame judge in his own chambers—But if in that caſe if the examination were to continue for more than one day, what would the judge decide? Would he let the accuſed go at large? or would he not rather at the cloſe of each evening bind him over to his appearance on the ſubſequent day? In fact, the court has already taken this very ſtep. On the former examination, the Chief Juſtice demanded and took bail; and ſurely what was proper then, is proper now. I apprehend that the preſent recognizance is to be forfeited only in the caſe of the miſdemeanor; but if Col. Burr is to be brought up for High Treaſon, ought he not to forfeit ſomething more conſiderable?—The motion in fact reſolves itſelf into this ſimple queſtion: If A. Burr be bro't before the court on the charge of Treaſon and ſupported by probable cauſe, will not the court bind him to his appearance on this diſtinct original motion?

Mr. Botts obſerved that the ſtrange principle adv cated by the proſecution was, that the former examination did not at all preclude the preſent motion. But if this be true, what would be the conſequence? That every edition of the volume of evidence might juſtify a new enquiry—No warrant has been iſſued for the apprehenſion of Col. Burr; and of courſe he did not ſtand in the ſame predicament, as on the former occaſion.—The counſel for the proſecution ſeemed to have profited by one of the faſhion of old times: when they wanted to try a witch. If ſhe ſwam, ſhe was of courſe condemned to death; if ſhe was drowned, ſhe was to be acquitted; And thus in the very experiment of deciding whether ſhe was guilty of a crime, they inflicted upon her the very puniſhment, which belonged to that crime. In the ſame manner Col Burr is to ſuſtain the ſame puniſhment, while enquiring whether he deſerves it, as would only have reſulted from the unfavorable deciſion.—Let us ſuppoſe a caſe; were I to ſuggeſt to this court, that ſome perſon preſent has been guilty of a crime, as the Attorney for the U. S. has done; would the court think itſelf juſtified upon the credit of my bare word to bind over that perſon for his examination? I preſume not. Col. Burr is already bound by his recognizance: This recognizance is ſufficient to keep him here, until the court may diſcharge him. If he departs, the penalty is of courſe eſtreated.

Mr. Hay. A few remarks only, ſir! This is a diſcuſſion which at the time I certainly could not have expected. Mr. Burr ſtands here charged with high treaſon. The evidence will take a conſiderable time to be unfolded, even without the unnecessary interruptions, which we have ſo often experienced. This charge is of immenſe importance: It involves no leſs than the liberty and life of the accuſed: it is a ſubject which has excited the deepeſt and an univerſal attention throughout this country. It is not poſſibly to be decided in one, two, perhaps ſeveral days.—Suppoſe, then, the doctrine of the oppoſite counſel to be correct, and ſuppoſe, what is certainly true, that there can be no ſecrecy thrown over the evidence againſt him; then, ſir, after we had exhibited all this evidence; after you had determined that there was probable evidence of guilt, the accuſed equally perceiving the force of that teſtimony, only marches off and leaves the court to pronounce its deciſion. Would not this be a ridiculous ſituation? Would it not be a farce, ſir? And would it not expoſe us to the ſcorn of the United States?

Can our propoſition be deemed an unreaſonable one? We aſk, merely, that Col. Burr ſhould be kept here to anſwer the deciſion of the court. This is no common caſe. It is one of immenſe importance; it has already impoſed a great expence upon the public. I am informed by the ſecretary of war, that we may expect General Wilkinſon between the 28th and 30th of this month. If he comes, the bills both for a miſdemeanor and treaſon will certainly be laid before the grand jury.—Will the court then poſitively decide, that Col. Burr may in the mean time effect his eſcape?—But if Wilkinſon does arrive and if Aaron Burr does apprehend that we have ſufficient evidence of the crime of treaſon; will he heſitate to fly to ſave his life? ſir, it is diſagreeable for me to expreſs ſuch conjectures; but they obviouſly ariſe from the very nature of the caſe. I repeat that from the commencement of the criminal code to the preſent day, no inſtance has ever occurred where the miniſters of the law have ever ſaid to the criminal: "You are charged with a capital crime. There is reaſon to believe you guilty. But we leave you at liberty to diſpoſe of yourſelf as you pleaſe, till we decide upon your caſe."—Whatever be the univerſal uſage, let us apply it to this very caſe, and this very man. Gentlemen will excuſe me, if I ſay, they ſeem to ſuppoſe that all the laws and precedents which have ever been eſtabliſhed muſt be accommodated to their own convenience in this particular caſe. Why more to Aaron Burr, ſir, than to any other man? Why more to him, than to thoſe humble and deluded beings, who have been the inſtruments and may be the victims of his ambition?—Mr. Wickham excuſes him from the preſent application, by ſaying that he is already bound. But what kind of an excuſe is this? Becauſe a man has been guilty of one crime, he muſt not be bound for another; becauſe he has done one wrong, that therefore we muſt not ſuſpect him of another? This is a violation of that fundamental rule of the law, that no man is to profit by his own wrong.—Mr. Botts contends that he has already given bail for one crime: But how inferior is that to the one which is now brought againſt him? The higheſt puniſhment which can be inflicted againſt this miſdemeanor is 3 years imprisonment and a fine of 3000 dollars; and even theſe are not fixed by the law; but depend upon the diſcretion of the court and the jury. The criminal may therefore be condemned to no more than an imprisonment for 3 months and a fine of 100 dollars. Shall then a recognizance for ſuch an inferior crime afford him protection againſt another, where life itſelf is concerned? Mr. Botts ſtated that there was a difference between this and the former examination; that in the latter caſe Col. Burr was brought before you by a warrant; but that he is not really at this time before the court. But why was this warrant iſſued on a former examination? Becauſe col. Burr was not before the judge—It was neceſſary. But when that warrant was diſcharged it was void; it was *functus officio.* Col. Burr was in cuſtody until he gave bail. It was immaterial how the accuſed man comes before the magiſtrate; whether by warrant, by voluntary delivery or by the compulſion of others. But when he is there, charged with an offence, which involves both liberty and life—he certainly ſhould not