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RICHMOND, June 17.

TRIAL OF AARON BURR.

Circuit Court of the U. States for the fifth circuit and District of Virginia.

Present JOHN MARSHALL, *Chief Justice of the U. States,*

And CYRUS GRIFFIN, *Judge of the District of Virginia.*

SATURDAY, June 13th.

Mr. Burr thought it proper to mention, that his cousel had understood, that a supplemental charge had been written by the court: that it had been put into the hands of the attorney of the United States, and that it was to be shewn to his own counsel, before it was delivered. From the want of time however, or some other cause, it had not yet been submitted to his counsel. The court had yesterday requested a copy of his propositions, that they might judge of their application; and it is satisfied on that point, that they might give additional instructions to the jury. His counsel had complied with the request; and though it was not possible for the court at first to have perceived whether a supplemental charge was necessary, yet it had now appeared from the whole course of the argument, that each of his propositions would come before the grand jury. If the court was satisfied on the law, they would of certainty instruct the jury on such points as seemed inevitably to come before them: but if they had any doubts on the law, they would certainly require an argument; and that he was then ready to demonstrate the truth of each of the propositions which he had submitted. He should make no remarks on the consumption of time, of which gentlemen made so many complaints: he should only observe, that three weeks ago he was ready to argue these points. But he was even willing to limit the time to be employed upon the present argument; even to a certain number of minutes; he was even willing to argue the points in the way of notes submitted to the court.

Chief Justice stated that he had drawn up a supplemental charge, which he had submitted to the attorney for the U. S. with a request that it should also be put into the hands of col. B's counsel: that Mr. Hay had however, informed him, in the conversation which he had just had with him, that he had been too much occupied himself, to inspect the charge with attention, and deliver it to the opposite counsel; but another reason was, that there was one point in the charge which he did not fully approve. He should not therefore deliver his charge at present; and should reserve it until Monday. In the mean time col. B's counsel would have an opportunity of inspecting it; and an argument might be held on the points which had produced an objection from the attorney for the U. S.

Mr. E. Randolph. It is the wish of the court that the argument should be carried on orally or in writing.

Chief Justice. I am willing to hear the remarks on both sides in writing.

Mr. Hay objected to this method from the excessive labor which it would impose upon them either way. The chief justice declared that it was perfectly indifferent to him. Mr. Martin assured the court that it was perfectly convenient to him to argue the point either orally or in writing. Mr. Wickham stated, that the attorney for the U. S. wished to object to certain propositions which col. B. had submitted to the court; that he was ready to go into this discussion immediately; that the attorney for the U. S. preferred an argument orally before the court to one in writing; and that this was in fact, the very course which col. B's counsel had first recommended. Mr. W. hoped that this supplemental charge would be given to the jury, before the witnesses were sent up; that the counsel for the prosecution preferred the contrary, but certainly the most improper course.

The chief justice observed that the court would also have wished that the charge should have been delivered before the witnesses were sent up: but that it was almost indifferent to him, whether the testimony was submitted to the grand jury before or after the delivery of the charge; that it was often the custom for the petit jury itself to hear the testimony before the law was expounded; and the same practice might extend to the grand jury; for it was extremely easy for them, after they had heard the testimony, to apply the instructions of the court and distinguish those parts which were admissible from those that were not so. It was not for instance, absolutely necessary for them to know, previous to the delivery of the charge, that two witnesses were necessary to prove the overt act even before a grand jury. When the charge had been delivered, the principle would apply to the testimony which they had actually heard; and though it was desirable that the charge should precede the testimony, yet it was not so essential as to interrupt the proceedings.

Mr. Randolph conceived it far more important to give the supplemental charge before than after the exhibition of the testimony; that with one set of principles on their mind, the grand jury would frequently ask questions in one point of view, which they would not under other oppressions; and that the supplemental, like the original charge, ought to precede the evidence.—Mr. Martin observed, that there was this considerable diffetenee between a grand and a petit jury, that when any doubt arose about the propriety of testimony before the jury, the court would be present and ready to decide; but the grand jury has not the same aid of the judgment of the court in selecting the testimony.

The Chief Justice said, that the necessity of giving a supplementary charge at this time, was not so manifest; as in his original charge he had expressed his ideas on the nature of treason: That he stated this crime to consist in an actual 'levying of war,' and that of course, the Grand Jury would have to enquire into the existence of overt acts; that from this statement, it would readily occur to the Jury, that no matter what suspicions were entertained, what plans had been formed, what enterprizes had been projected, there could be no treason without an overt act; and without some overt act, no crime of treason had been committed.

The discussion of this question was at length waved; when the Chief Justice delivered the following opinion on the motion to issue a subpoena *Duces Tecum* directed to the P. U. S.

The object of the motion now to be decided is to obtain copies of certain orders understood to have been issued to the land and naval officers of the U. S. for the apprehension of the accused; and an original letter from Gen. Wilkinson to the President in relation to the accused, with the answer of the President to that letter, which papers are supposed to be material to the defence. As the legal mode of effecting this object, a motion is made for a subpoena duces tecum to be directed to the President of the U. States.

In opposition to this motion a preliminary point has been made by the counsel for the prosecution. It has been insisted by them that, until the Grand Jury shall have found a true bill, the party accused is not entitled to suppoenas or to the aid of the court to obtain his testimony.

It will not be said that this opinion is now for the first time, advanced in the United States; but certainly, it is now for the first time advanced in Virginia.—So far back as any knowledge of our jurisprudence is possessed, the uniform practice of this country has been to permit any individual who was charged with any crime, to prepare for his defence, and to obtain the process of the court, for the purpose of enabling him so to do.—This practice is as convenient, and is as consonant to justice as it is to humanity. It prevents in a great measure, those delays which are never desirable, which frequently occasion the loss of testimony, and which are often oppressive, that would be the inevitable consequence of withholding from a prisoner the process of the court, until the indictment against him was found by a Grand Jury. The right of an accused person to the process of the court, to compel the attendance of witnesses seems to follow necessarily from the right to examine those witnesses, and wherever the right exists, it would be reasonable that it should be accompanied with the means of rendering it effectual. It is not doubted, that a person who appears before a court, under a recognizance, must expect that a bill will be preferred against him, or that a question concerning the continuance of the recognizance, will be brought before the court. In the first event, he has the right, and it is perhaps his duty to prepare for his defence at the trial. In the second event, it will not be denied that he possesses the right to examine witnesses on the question of continuing his recognizance. In either case, it would seem reasonable that he should be entitled to the process of the court, to procure the attendance of his witnesses.

The genius and character of our laws and usages, are friendly, not to condemnation at all events, but to a fair and impartial trial; and they consequently allow to the accused the right of preparing the means to secure such a trial.—The objection that the attorney may refuse to proceed at this time, and that no day is fixed for the trial, if he should proceed, presents no real difficulty. It would be a very insufficient excuse to a prisoner who had failed to prepare for his trial, to say that he was not certain the attorney would proceed against him. Had the indictment been found at the last term it would have been in some measure uncertain whether there would have been a trial at this, and still more uncertain on what day that trial would take place; yet subpoenas would have issued returnable to the first day of the term, and if, after its commencement, other subpoenas had been required, they would have issued returnable as the court might direct. In fact all process to which the law has affixed no certain return day, is made returnable at the discretion of the court.

General principles then, and general practice, are in favor of every accused person, so soon as his case is in court, to prepare for his defence, and to receive the aid of the process of the court to compel the attendance of his witnesses.

The constitution and laws of the U. States will now be considered for the purpose of ascertaining how they bear upon the question.

The 8th amendment to the constitution gives to the accused in all criminal prosecutions, a right to a speedy and public trial, and to compulsory process for obtaining witnesses in his favor. The right given by this article must be deemed sacred by the courts, and the article should be so construed as to be something more than a dead letter.—What can more effectually elude the right to a speedy trial than the declaration that the accused shall be disabled from preparing for it, until an indictment shall be found aginst him? It is certainly much more in the true spirit of the provision which secures to the accused a speedy trial, that he should have the benefit of the provision which entitles him to compulsory process as soon as he is brought into court.

This obsetvation derives additional force from a consideration of the manner in which this subject has been contemplated by Congress. It is obvious by the intention of the national legislature, that in all capital cases, the accused shall be entitled to process before indictment found. The words of the law are, "and every *such* person or persons accused or indicted of the crimes aforesaid (that is of treason or any other capital offence) shall be allowed and admitted in his said defence to make any proof that he or they can produce, by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them."

This provision is made for persons accused or indicted. From the imperfection of human language it frequently happens that sentences which ought to be the most explicit are of doubtful construction, and in this case the words "accused or indicted" may be construed to be synonimous, to describe a person in the same situation or to apply to different stages of the prosecution.—The word or may be taken in a conjuncture or a disjuncture sense. A reason for understanding them in the latter sense is furnished by the Sect. itself. It commences with declaring that any person who shall be accused and indicted of treason, shall have a copy of the indictment, and at least three days before his trial. This right is obviously to be enjoyed after an indictment, and therefore the words are "accused and indicted." So with respect to the subsequent clause which authorises a party to make his defence and directs the court on his application to assign him counsel. The words relate to any person accused and indicted. But when the section proceeds to authorize the compulsory process for witnesses, the phraseology is changed. The words are, "and every such person or persons accused or indicted" &c. thereby adapting the expression to the situation of an accused person both before and after indictment. It is to be remarked too, that the person so accused or indicted is to have "the like process to compel his or their witnesses to appear at his or their trial, as is usually granted, to compel witnesses to appear on the prosecution against them." The fair construction of this clause would seem to be that with respect to the means of compelling the attendance of witnesses to be furnished by the court, the prosecution and defence are placed by the law on equal ground. The right of the prosecutor to take out subpoenas, or to avail himself of the aid of the court in any stage of the proceedings previous to the indictment, is not controverted. This act of congress it is true, applies only to capital cases; but persons charged with offences not capital have a constitutional and legal right to examine their testimony, and this act ought to be considered as declaratory of the common law in cases where this constitutional right exists.

Upon the immemorial usage then, and upon what is deemed a sound construction of the constitution and law of the land, the court is of opinion that any person charged with a crime in the courts of the U. S. has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses. Much delay and much inconvenience may be avoided by this construction; no mischief which is perceived can be produced by it. The process would only issue, when according to the ordinary course of proceeding, the indictment would be tried at the term to which the subpœna is made returnable, so that it becomes incumbent on the accused to be ready for his trial at that term.

This point being disposed of, it remains to enquire whether *subpœna Duces Tecum* can be directed to the president of the United States, and whether it ought to be directed in this case.

This question originally consisted of two parts. It was at first doubted whether a supœna could issue in any case to the chief magistrate of the nation; and if it could, whether that subpœna could do more than direct his personal attendance; whether it could direct him to bring with him a paper which was to constitute the gift of his testimony.

While the argument was opening the attorney for the United States avowed his opinion that a general subpœna might issue to the president, but not a *subpœna Duces Tecum*. This terminated the argument on *that* part of the question. The court, however, has thought it necessary to state briefly the foundation of its opinion that such a subpœna may issue.

In the provisions of the constitution and of the statute which give to the accused a right to the compulsory process of the court there is no exception whatever. The obligation, therefore, of those provisions is general, and it would seem that no person could claim an exemptation from them but one who would not be a witness. At any rate if an exception to the general principle exists, it must be looked for in the law of evidence. The exceptions furnished by the law of evidence (with one only reservation) so far as they are personal, are of those only whose testimony could not be received. The single reservation alluded to in the case of the king. Although he may perhaps give testimony, it is said to be incompatible with his dignity to appear under the process of the court. Of the many points of difference which exist between the first magistrate in England and the first magistrate of the United States, in respect of the personal dignity conferred on them by the constitution of their respective nations, the court will only select and mention two. It is a principle of the English constitution that the king can do no wrong, that no blame can be imputed to him, that he connot be named in debate.

By the constitution of the United States, the president, as well as every other officer of the government, may be impeached, and may be removed from office on conviction of high crimes and misdemeanors.

By the constitution of Great-Britain the crown is hereditary and the monarch can never become a subject.

By that of the United States, the president is elected from the mass of the people, and on the expiration of the time for which he is elected, returns to the mass of the people again.

How essentially this difference of circumstances must vary the policy of the laws of the two countries in reference to the personal dignity of the executive chief, will be perceived by every person. In this respect the first magistrate of the union may more properly be likened to the first magistrate of a state—at any rate under the former confederation; and it is not known ever to have been doubted, that the chief magistrate of a state might be served with a subpœna ad testisicandum.

If in any court of the United States, it has ever been decided, that a subpœna cannot issue to the president, that decision is unknown to this court.

If upon any principle, the president could be construed to stand exempt from the general provisions of the constitution, it would be because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting, and if it should exist at the time when his attendance on a court is required, it would be thrown on the return of the subpœna, and would rather constitute a reason for not obeying the process of the court, than a reason against its being issued. In point of fact it cannot be doubted, that the people of England have the same interest in the sevice of the executive government, that is, of the cabinet council, that the American people have in the service of the executive of the United States, and that their duties are as arduous and as unremitting. Yet it has never been alledged that a subpœna might not be directed to them.

It cannot be denied, that to issue a subpœna to a person filling the exalted station of the chief magistrate, is a duty which would be dispensed with much more cheerfully than it would be performed; but if it be a duty the court can have no choice in the case.

If then, as is admitted by the counsel for the United States, a subpœna may issue to the president, the accused is entitled to it of course; and whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it. Th guard furnished to this high officer o protect him from being harrassed by vexatious and unnecessary subpœnas, is to be looked for in the conduct of a court after those subpœnas have issued, not in any circumstance which is to precede their being issued.

If in being summoned to give his personal attendance to testify, the law does not discriminate between the president and a private citizen, what foundation is there for the opinion, that this difference is created by the circumstance that his testimony depends on a paper in his possession, not on facts which have come to his knowledge otherwise than by writing? The court can perceive no foundation for such an opinion. The propriety of introducing any paper into a case as testimony, must depend on the character of the paper, not on the character of the person who holds it. A subpoena *Decus Tecum* then may issue to any person to whom an ordinary subpoena may issue directing him to bring any paper of which the party praying it has a right to avail himself, as testimony, if indeed, that be the necessary process for obtaining the view of such paper.

When this subject was suddenly introduced, the court felt some doubt concerning the propriety of directing a subpoena to the chief magistrate, and some doubt also concerning the propriety of directing any paper in his possession, not public in its nature, to be exhibited in court. The impression, that the questions which might arise in consequence of such process, were more proper for discussion on the return of the process than on its issuing, was then strong on the mind of the judges, but the circumspection with which they would take any step which would in any manner relate to that high personage, prevented their yielding readily to those impressions, and induced the request that those points, if not admitted, might be argued. The result of that argument is a confirmation of the impression originally entertained. The court can perceive no legal objection to issuing a subpœna duces tecum, to any person whatever, provided, the case be such as to justify the process.

This is said to be a motion to the discretion of the court. This is true. But a motion to its discretion, is a motion not to its inclination, but to its judgment, and its judgment is to be guided by sound legal principles.

A subpœna duces tecum, varies from an ordinary subpœna only in this, that a witness is summoned for the purpose of bringing with him a paper in his custody. In som of our sister states whose system of jurisprudence is erected on the same foundation with our own, the process, we learn, issues of course. In this state it issues not absolutely of course, but with leave of the court. No case, however, exists as is believed, in which the motion has been founded, on an affidavit, in which it has been denied, or in which it has been opposed. It has been truly observed, that the opposite party can regularly take no more interest in the awarding a subpœna decus tecum, than in the awarding an ordinary subpœna. In either case he may object to any delay, the grant of which may be implied in granting the subpœna, but he can no more object regularly to the legal means of obtaining testimony, which exists in the mind, than in the papers of the person who may be summoned. If no inconvenience can be sustained by the opposite party, he can only oppose the motion in the character of an amicus curiæ, to prevent the court from making an improper order; or from burdening some officer by compelling an unnecessary attendance. This court would certainly be very unwilling to say that upon fair construction the constitutional and legal right to obtain the process