

to compel the attendance of witnesses, does not extend to their bringing with them such papers as may be material in the defence. The literal distinction which exists between the cases, is too much attenuated to be countenanced in the tribunals of a just and humane nation. If then, the subpoena be used without enquiry into the manner of its application, it would seem to trench on the privileges which the constitution extends to the accused; it would seem to reduce his means of defence, within narrower limits than is designed by the fundamental law of our country, if a overstrained rigor should be used with respect to his right, to apply for papers deemed by himself to be material. In the one case the accused is made the absolute judge of the testimony to be summoned; if in the other, he is not to judge absolutely for himself, his judgment ought to be controlled only so far as it is apparent that he means to exercise his privileges, not really in his own defence, but for purposes which the court ought to discountenance. The court would not lend its aid to motions obviously designed to manifest disrespect to the government, but the court has no right to refuse its aid to motions for papers to which the accused may be entitled and which may be material in his defence.

These observations are made to show the nature of the discretion which may be exercised. If it is apparent that the papers are irrelevant to the case, or that for state reasons, they cannot be introduced into the defence; the subpoena *duces tecum* would be useless; but if this is not apparent; if they may be safely read at the trial; would it not be a blot in the page which records the judicial proceedings of this country, if in a case of such serious import as this, the accused should be denied the use of them?

The counsel for the United States, take a very different view of this subject, and insist that a motion for process to obtain testimony, should be supported by the same full and explicit proof of the nature and application of that testimony, which would be required on a motion which would delay public justice; which would arrest the ordinary course of proceeding, or which would in any other manner affect the rights of the opposite party. In favor of this position, has been urged the opinion of one, whose loss as a friend and a judge, I sincerely deplore;—whose worth I feel, and whose authority I shall at all times greatly respect. If his opinion was really opposed to mine, I should certainly revise, deliberately I revise the judgment I had formed:—But I perceive no such opposition.

In the trials of Smith and Ogden, the court which Judge Patterson presided, required a special affidavit in support of a motion made by the counsel for the accused for a continuance and for an attachment against witnesses who had been summoned and had failed to attend. Had this requisition of a special affidavit been made as well a foundation for an attachment, as for a continuance, the cases would not have been parallel; because the attachment was considered by the counsel for the prosecution merely as a mean of punishing the contempt, and a court might certainly require stronger testimony to induce them to punish a contempt than would be required to lend its aid to a party in order to procure evidence in a cause. But the proof furnished by the case is not conclusive, that the special statements of the affidavit were required solely on account of the continuance.

Although the counsel for the United States considered the motion for an attachment merely as a mode of punishing for contempt, the counsel for Smith and Ogden considered it as a compulsory process to bring in a witness, and a continuance until they could have the benefit of his process. The continuance was to avoid the ordinary course of justice, and therefore the court required a special affidavit, showing the materiality of the testimony before this continuance could be granted. Prima facie evidence could not apply to the case, and there is an additional reason for a special affidavit. The object of this special statement was expressly to be for a continuance.

It has proceeded. The present application is for the purpose of procuring the attendance of witnesses, whose testimony the defence alleges is material for his defence, and who have failed to appear at the ordinary process of the court. In compliance with the intention of the law, the defendant has disclosed, by the affidavit which I have just read, the points to which he expects the witnesses who have been summoned will testify.

If the court cannot or will not issue compulsory process to bring in witnesses, who are the objects of this application, then the case will not be postponed. If it appears to the court that the matter in dispute is such that it might not be given in evidence if the witnesses were not here, then we are of opinion that our motion will be successful. It is not to be supposed that the court will postpone the trial on account of the absence of witnesses whom they cannot compel to attend, or on account of whose voluntary attendance the court has no power to enforce. If the witnesses are not here, the case will not be postponed, but the court will proceed to the trial, and the witnesses who have been summoned will testify.

The counsel for the U. S. considered the subject in the same light. After exhibiting an affidavit for the purpose of showing that the witnesses could not probably produce any material information, Mr. Sandford said: "It was decided by the court yesterday that it was incumbent on the defendant in order to entitle himself to a postponement of the trial, on account of the absence of these witnesses, to show in what respect they are material for his defence. It was the opinion of the court that the general affidavit in common form would not be sufficient for this purpose; but that the particular facts expected from the witnesses must be disclosed, in order that the court might, upon those facts, judge of the propriety of granting the postponement." (Page 27.)

The court frequently treated the subject so as to show the opinion that the special affidavit was required only on account of the continuance; but was conclusive on this point is, that after deciding the testimony of the witnesses to be such as could not be offered to the jury, Judge Patterson was of opinion, that a rule to show cause why an attachment should not issue ought to be granted. He could not have required the materiality of the witnesses to be shown on a motion, the success of which did not in his opinion, in any degree depend on that materiality; and which he granted after deciding to the testimony to be such as the jury ought not to hear. It is then most apparent that the opinion of Judge Patterson has been misunderstood, and that no inference can possibly be drawn from it, opposed to the principle which has been laid down by the court. That principle will therefore be applied to the present motion.

The first paper required, is the letter of Gen. Wilkinson, which was referred to in the message of the President to Congress. The application of that letter to the case, is shown by the terms in which the communication was made. It is a statement of the conduct of the accused, made by the person who is declared to be the essential witness against him. The order for producing this letter is opposed.

It is because it is not material to the defence. It is a principle universally acknowledged, that a party has a right to oppose to the testimony of any witness against him, the declarations which that witness has made at other times on the same subject. If he possesses this right, he must bring forward proof of those declarations. This proof must be obtained before he knows positively what the witness will say, for if he waits until the witness has been heard at the trial, it is too late to meet him with his former declarations. Those former declarations, therefore, constitute a mass of testimony which a party has a right to obtain by way of precaution, and the positive necessity of which, can only be decided at the trial.

It is with some surprise an argument was heard from the bar, insinuating that the award of a subpoena on this ground, gave the countenance of the court to suspicious, affecting the veracity of a witness who is to appear on the part of the United States. This observation could not have been considered. In conflicts of this description the court takes no part; the court has no right to take a part. Every person may give in evidence, testimony such as is stated in this case. What would be the feelings of the prosecutor, if in this case the accused should produce a witness completely exculpating himself, and the attorney for the U. States should be arrested in his attempt to prove what the same witness had said upon a former occasion, by a declaration from the bench, that such an attempt could not be permitted, because it would imply a suspicion on the court that the witness had not spoken the truth? Respecting so unjustifiable an interposition but one opinion would be formed.

The 2d objection is, that the letter contains matter which ought not to be disclosed. That there may be matter, the production of which the court would not require, is certain; but that in a capital case, the accused ought not, in some form, to have the benefit of it, if it is really essential to his defence, is a position which the court would very reluctantly deny. It ought not to be believed, that the department which superintends prosecutions in criminal cases, would be inclined to withhold it. What ought to be done under such circumstances presents a delicate question, the discussion of which, it is hoped will never be rendered necessary in this country. At present it need only be said, that the question does not occur at this time. There is certainly nothing before the court which shows, that the letter in question contains any matter, the disclosure of which, would endanger the public safety. If it does contain such matter, the fact may appear before the disclosure is made. If it does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed. It is not easy to conceive, that so much of the letter as relates to the conduct of the accused, can be a subject of delicacy with the President. Every thing of this kind, however, will have its due consideration on the return of the subpoena.

It has been alleged that a copy may be received instead of the original, and the act of Congress has been cited in support of this proposition. This argument presupposes that the letter required is a document filed in the department of state, the reverse of which may be and most probably is the fact. Letters addressed to the President are most usually retained by himself. They do not belong to any of the departments. But were the fact otherwise, a copy might not answer the purpose. The copy would not be superior to the original, and the original itself would not be admitted, if denied, without proof that it was in the handwriting of the witness. Suppose the case put at the bar, of an indictment on this letter for a libel, and on its production it should appear not to be in the handwriting of the person indicted; would its being deposited in the department of state make it his writing or subject him to the consequence of having written it? Certainly not. For the purpose then of showing the letter to have been written by a particular person, the original must be produced and a copy could not be admitted.

On the confidential nature of this letter, much has been said at the bar, and authorities have been produced, which appear to be conclusive. Had its contents been orally communicated, the person to whom the communications were made could not have excused himself from detailing them so far as they might be deemed essential in the defence. Their being in writing gives no additional sanctity, the only difference produced by that circumstance is, that the contents of the paper must be proved by the paper itself, not by the recollection of the witness.

Much has been said about the disrespect to the chief magistrate, which is implied by this motion, and by such a decision of it as the law is believed to require. These observations will be very truly answered by the declaration that this court feels many, perhaps peculiar motives, for manifesting as guarded a respect for the chief magistrate of the union as is compatible with its official duties. To go beyond these would exhibit a conduct

which would derive some other appellation than the term respect.

It is not for the court to anticipate the extent of the present prosecution. Should it terminate as is expected on the part of the United States, all those who are concerned in it should certainly regret that a paper which the accused believed to be essential to his defence, essential, had been withheld from him. I will not say that this circumstance would in any degree tarnish the reputation of the government, but I will say that it would justly tarnish the reputation of the court which had given its sanction to its being withheld. Might I be permitted to utter one sentiment with respect to myself, it would be to deplore most earnestly, the occasion which should compel me to look back on any part of my official conduct with so much self-reproach as I should feel, could I declare on the information now possessed, that the accused is not entitled to the letter in question, if it should be really important to him.

The propriety of requiring the answer to this letter is more questionable. It is alleged that it most probably communicates or discloses the situation of this country with Spain which will be important on the misdeemeanor. If it contains matter not essential to the defence and the disclosure is unpleasant to the Executive, it certainly ought not to be disclosed. This is a point which will appear on the return.

The demand of the orders which have been issued, and which have been, as is alleged, published in the Natchez Gazette, is by no means unusual. Such documents have often been produced in the courts of the U. States and the courts of England. If they contain matter interesting to the nation, the concealment of which is required by the public safety, that matter will appear upon the return. If they do not and are material, they may be exhibited.

It is said they cannot be material because they cannot justify any unlawful resistance which may have been employed or meditated by the accused.

Were this admitted, and were it also admitted that such resistance would amount to treason, the orders might still be material because they might tend to weaken the endeavor to connect such overt act with any overt act of which this court may take cognizance.

The court, however, is rather inclined to the opinion that the subpoena in such case ought to be directed to the head of the department in whose custody the orders are, and the court must suppose that the letter of the secretary of the navy, which has been stated by the attorney for the U. States to refer the counsel for the prisoner to his legal remedy for the copies he desired, alluded to such a motion as is now made.

The affidavit on which the motion is grounded has not been noticed. It is believed that such a subpoena as is asked ought to issue if there exist any reason for supposing that the testimony may be material and ought to be admitted. It is only because the subpoena is addressed to those who administer the government of this country, that such an affidavit was required as would furnish probable cause to believe that the testimony was desired for the real purpose of defence, and not for such as this court will forever discountenance.

When the Chief Justice had concluded his opinion, Mr. Hays addressed the court to the following effect: I hope, sir, that I have misunderstood an expression, which has just fallen from your honor; but the opinions of these gentlemen, who are near me, completely confirm my own conceptions. Your honor has declared, if I mistake not, that "if the present prosecution terminates as is with, on the part of the United States" I hope, sir, that nothing has appeared in the conduct of the case which is associated with me on the present occasion, or anything in the conduct of the government, to produce such a conviction in the breast of the court. Permit me, sir, to assure the court if I feel any sentiment at all that it is one of a very different description. The impression which has been thus conveyed by the court, that we not only wished to have A. Burr accused, but that we wished to convict him, is completely abhorrent to our feelings. We trust that it has rather accidentally fallen from the pen of your honor, than that it is your deliberate opinion. We wish for nothing, sir, but a fair and competent investigation of this case.

It is far from our wishes that A. B. should be convicted but upon the most satisfactory evidence. And let me assure this court, that nothing would more severely wound my feelings, than if you or any other man should suppose it possible that I myself or the gentleman with whom I am associated, or the government which we have the honor to represent, should at all events desire the conviction of the prisoner.

The Chief Justice replied, that it was not his intention to insinuate that the attorneys for the prosecution or that the administration, had ever wished the conviction of col. B. whether he was guilty or innocent; that his assertion was this: gentlemen had so often and so uniformly asserted that col. B. was guilty, and they had so often repeated it before the testimony was perceived on which that guilt could alone be substantiated, that it appeared to him probable, that they were not indifferent on the subject.

Mr. M' Rae begged leave to point out to the court a considerable difference between the opinions and wishes of the counsel for the prosecution: that from the testimony which they had examined, they thought it extremely probable that A. B. was really guilty; but that this was very different from wishing to find him guilty or to convict him at all events.

Mr. Hays observed that his own conscience was satisfied with the course which he had pursued in this business; that he should attempt to secure the same sentiment by his future department; and provided he enjoyed that satisfaction, he was completely indifferent to the opinion of others; and he should certainly pursue his own judgment. He asked whether he might not fend up the witnesses to the G. jury? Mr. Burr then pressed upon the court the necessity of giving the supplemental charge; that it would be of considerable benefit in instructing the jury to separate what was proper in the evidence from what was improper; that if the charge was not delivered for several days, the jury might in the mean time be receiving very false impressions; and that their mind might be completely involved in these impressions, that it would be impossible for them to separate them from their decisions, even after the delivery of the charge. He conceived that the court ought either to prevent the witnesses from going to the grand jury or to deliver its supplemental charge. The Chief Justice replied that on Monday morning he would deliver the charge; if all the necessary preliminary points could be settled.

Mr. Hays then requested the clerk to swear four of the witnesses: Thomas Traxton, William Eaton, Benjamin Stoddert, and Stephen Decatur were accordingly sworn and concluded to the jury room.

Mr. Burr hoped that the court would immediately take up the supplemental charge to the jury. What was the objection which the attorney for the U. S. has submitted to your honor, and on which you seemed to entertain some doubts?

Chief Justice: It is, whether the statute of Edward VI. was now in force in this country. Mr. Randolph. We are ready on that point sir.

The clerk then proceeded to call for other witnesses to the book; but when Erick Bollman appeared, Mr. Hays addressed the court to the following effect:

Before Mr. Bollman is sworn, I must inform the court of a particular, and not immaterial circumstance. He, sir, has made a full communication to the government, of the plans, the designs, and views of A. Burr. As these communications might criminate Dr. Bollman before the grand jury, the President of the U. S. has communicated to me this pardon (holding it in his hand) which I have already offered to Dr. B. He received it in a very hesitating manner; and I think informed me that he knew not whether he should or should not accept it. He took it from me however, as he informed me for the purpose of taking the advice of counsel. He returned it in the same hesitating manner; he would neither positively accept nor refuse it. My own opinion is that Dr. B. cannot under these circumstances possibly criminate himself. This pardon will completely exonerate him from all the penalties of the law. I believe his evidence to be extremely material. In the presence of this court I offer this pardon to him, and if he refuses, I shall deposit it with the clerk for his use. Will you, sir, (addressing himself to Mr. Bollman) accept this pardon?

Mr. Bollman. No I will not, sir. Mr. Hays then observed that Dr. Bollman must be carried up to the grand jury with an intimation, that he had been pardoned.

Mr. Martin. It has always been Dr. B's intention to refuse this pardon; but he has not positively refused it before, because he wished to have this opportunity of publicly rejecting it.

Erick Bollman, William Duane, Peter Taylor and \*\*\*\*\* All right were then sworn by the clerk.

Mr. Martin did not suppose that Dr. B's pardon was a real or effectual one; if he made any confessions before the grand jury they might find a indictment, which would hold against him; nor could his be an effectual one, before it was read to an indictment in open court.

Mr. Hays enquired whether Dr. B. might not pass on to the grand jury.—The Chief Justice asked, what would be the difference between sending him now and sometime hence, when the question about his pardon shall have been settled.—Mr. Hays replied, that he was anxious to introduce his evidence before the grand jury in a chronological order, and that if Dr. B's was suspended, it would make a chasm in his arrangement; however it was of very little consequence to him, whether he was sent now or some time hence.—Chief Justice. What is the particular point before the court? Mr. Martin. Dr. B. is not pardoned, and no man is bound to criminate himself.—Chief Justice. What precedents have you? Mr. Martin. I am prepared to show, that a party even possessed of a pardon, is still indictable by the grand jury, unless he has pleaded it in court.

Mr. Hays. Sir, may we send the other witnesses to the jury? Chief Justice. Certainly.—Mr. Bollman may sit in the mean time be suspended.

Four other witnesses were then sworn. Mr. Hays. I now propose to send Dr. Bollman to the grand jury. At this time the marshal entered, and Mr. Hays informed the court, that the grand jury had sent for the article of the constitution and the laws of congress relating to treason and the misdeemeanor. Jacob DuBar was sworn, and sent to the grand jury.

Some desultory conversation here ensued between the bar and the court respecting Dr. B. when Mr. Hays addressed the opposite counsel. Are you then willing to hear Dr. B. indicted? Take care in what an awful condition you are placing this gentleman.

Mr. Martin. Dr. Bollman, Sir, has lived too long to be alarmed by such menaces. He is a man of too much honor to trust his reputation to the course which you prescribe for him.—The Chief Justice. There can be no question but Dr. B. can go up to the jury;—but the question is, whether he is pardoned or not. If the Executive should refuse to pardon, he is certainly not pardoned.—Mr. Martin. But there can be no doubt, if he chooses to decline his pardon, that he stands in the same situation with every other witness, who cannot be forced to criminate themselves.

Some desultory conversation here ensued; when Mr. Hays observed that he should extremely regret the loss of Dr. B's testimony; he believed it to be material; he trusted he should obtain it, however reluctantly given: the court would perceive that Dr. Bollman now possessed so much zeal, as even to encounter the risk of an indictment for treason.—Whether he should appear before the grand jury under the circumstance of a pardon being annexed to his name, might hereafter become the object of a distinct arrangement. In the mean time he might go up without any such notification.—Counsel for Mr. Burr acquiesced.—Chief Justice. Whether he is really pardoned or not, I cannot at present declare.—I must take time to deliberate.—Mr. Hays. Categorically then I ask you, Mr. Bollman, do you accept your pardon.—I have already answered that question several times. I say no; and I repeat that I would have refused it before, but that I wished the opportunity of publicly declaring it. Mr. Hays. If the grand jury have any doubts about the questions that they put to Dr. B. they can apply to the court for instructions. I assert, sir, that Dr. Bollman is a pardoned man. I wish the opposite counsel to prove that he is not. I therefore move, Sir, that he be sent to the grand jury, certified by you that he is pardoned. I make this motion, that gentlemen who wish to discuss the question, may have an opportunity of producing their arguments.

Mr. Williams counsel for Mr. Bollman.—There are 3 questions to be decided. 1. Whether a witness is bound to answer any question which tends to criminate himself, or afford a clue to evidence for that purpose? The operation of a pardon, whether it changes the question, but in this case it having been refused, the court cannot notice it.—Who is to be the judge, the witness or the court, as to the propriety of answering the question?—On the first question, Mr. W. laid down the following propositions.—1. The rule of law is that no man shall be bound to answer any question which shall accuse himself (1 Mc Nally's case: 256. 2 Hag. c. 46.—2. He shall not be bound to answer any question which shall accuse himself of a misdeemeanor.—1 Mc Nally's case.—3. He shall not be called upon to criminate himself.—1 Mc Nally's case: 256. 2 Hag. c. 46.—4. He is not to be bound to answer any question which shall accuse himself of a crime.—1 Mc Nally's case: 256. 2 Hag. c. 46.—5. 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