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TRIAL OF COL. AARON BURR.

TUESDAY, JUNE 16.
(Continued.)

Mr. *Hay* then begged leave to call the attention of the court to a subject, which had been agitated yesterday. He observed that Dr. Bollman had gone up before the grand jury; what his answers were, he knew not; but he presumed that the same instructions were as necessary for him, as for Willie; that when they were brought before the grand jury, Mr. Willie might substantiate and Dr. Bollman might interpret the cyphered letter; that hence arose the necessity of the proposition, which he had already supported, that Dr. Bollman *was* a pardoned man, however humiliating the situation to which he might thus be reduced; and hence the necessity of submitting a second question to the court; how far a man in Willie's situation pretending to be an accomplice, might stand with his mouth shut, and refuse to answer every question which might be proposed.

Mr. Burr stated, that he had understood the question respecting Dr. B. to have been disposed of the other day, by Mr. Hay's acquiescence. Dr. B. has been sent up before the grand jury, and according to Mr. H's own confession, he knows not but he has disclosed all his information without reserve: "We will go on with yesterday's motion."

Here a desultory conversation ensued, when Mr. Burr observed, that perhaps it would satisfy the attorney for the U. S. if he consented (which he would now do) that it be certified to the grand jury, that Dr. B. had received a voluntary and unsolicited pardon from the President of the U. S. which he had refused. For these were facts.

Mr. Hay. An immense distance, sir, from the object of my wishes! I insist upon it, that Dr. B is a pardoned man; and under that character I wish him to appear before the grand jury. There is one reason, sir, why I desire an immediate decision on this question. His evidence is now required before the grand jury, and I wish him to go up under such qualifications, as may entitle them to the benefit of all his knowledge.

Chief Justice. The question is, whether Dr. Bollman is a pardoned man, though he refuses the President's pardon.

Dr. Bollman (addressing the court.) I have answered every question that was put to me by the grand jury.

Mr. Hay. That is not the point—the G. J. may have waved a great number of questions.

Mr. Wirt. I will make one enquiry of the witness. Can he decypher this letter?

Mr. Martin. You must seek for another interpreter, sir. You must do it yourself.

Mr. Hay. I have an interpreter at this moment under my eye.

Mr. McRae. I ask Dr. Bollman, to look at the German of this letter, and not at the cypher.

Mr. Martin. Let the court say whether that is a proper question.

The *Chief Justice* decided that col. B's counsel should go on with the other point: How far a witness may refuse to answer a question, which he thinks would criminate himself?

Mr. Botts. It has been again strongly insinuated, that Wyllie's claim to the privilege of not answering, presupposes his guilt.

Has Wyllie no reason to seek exemption from the examination, but such as may grow out of a consciousness of guilt?

The attorney for the U. S. sees every object connected with col. Burr through a jaundiced medium; with him, "trifles as light as air are confirmations as strong as holy writ."

How far he might be disposed to involve this young man upon a confession of copying a paper in cypher, though of harmless import, I am not prepared to say. But let Wyllie only commit himself so far, and then be carried by his business to that poor, unfortunate, outlaw'd, enslaved province of Louisiana, and abundant cause will be furnished for throwing him into a ship's hold, where he may be heard of no more;—or he may have the better fortune of transportation to Washington for trial.

The danger apprehended grows out of no visionary estimates. We have not arrived at that point of our enquiry which will make the occasion of arousing the indignation of our country apt.—We shall very soon, sir, give you an awful impression of the miseries of that ill-fated territory, under the total surrender of the civil authority to military guidance. I am driven prematurely to glance at one outrage, which may serve as a sample of the wretched state in which that section of our dependencies is. A citizen of the U. S. now within the hearing of my voice, in a time of profound peace, was seized in New Orleans, and, without being charged with any offence, but merely on suspicion that he could give evidence against col. Burr in this court, to which place he was willing to come, he was committed to prison without bail or main-prize;—[illegible] stinking room with the common felons and negroes confined there, and only taken out at last to be transported to Richmond in custody. He was not even permitted to go to his lodgings to get a shirt, but like a malefactor he was forced to yield, in the humbleness of submission, to the will of his masters. Our revolutionary heroes were provoked to independence in part, by the wrongs of transporting American criminals for trial to England; but at this time, we are content with such a transportation, under circumstances of enormity of one guilty of nothing but of a suspected capacity to be a witness! Shall we not be wary how we furnish a pretext against this stranger now called to implicate himself, in what are called the treasons and misdemeanors of col. Burr, when without this he has suffered, though in a less degree, than the abused individual from Orleans.

But it has been remarked, that my client and his counsel had taken much interest in this privilege. We all feel interested in saving this inoffensive foreigner from the vengeance of illegal power. Col. Burr, particularly from the circumstance of having him in his service, is solicitous that he alone should feel the pressure of unjust suspicion and prosecution.

But how did this letter come here? There is an exceeding foulness betrayed by that post mark in the mode of its acquisition. [Mr. Hay said that there was no post mark.] The "25" on the back is the only post mark of many of the country post offices. How came that mark there? Will the gentlemen say how the paper was acquired? If the post office was robbed, the possession of the paper was gained feloniously. The constitution has provided against the seizure of papers, and the act of Congress has fixed the offence of stealing from the post offices. It is impossible that this most detestable vice of the most infamous of European courts can have been patronized by the government. By a familiarity of our rulers with such hateful practices, the habits of the people would be demoralized. I beg the opposite counsel to join me in arraigning an act which will disgrace all who had an agency in it. It must be a dreadful state of society in which such an offence should be made the means of assisting to prove another. The principal of this government, if here, would join in the denunciation. If it behoves the government to suppress a paper thus unconstitutional, clandestinely and illegally obtained—if they cannot use the end without sanctifying the means—if they in the noble, generous spirit of a Chatham ministry, would disclaim every impure expedient, their able representatives here would do well not to disgrace their fingers with its touch.

Now for the abstract question of law. The question put to Willie is "do you understand that the original of this letter was written by Col. Burr." (Mr. M'Rae. No: that is not the question last put. The present question is "do you understand that part of the letter which is in cypher?") Very well. The gentlemen charge that this letter contains treasonable matter. (Mr. Hay. No such thing.) Then they must admit that it contains no treasonable matter. Hence the letter is irrelevant and forms no subject for discussion.

The rule is, that you shall not make the witness answer any question which may *tend* to implicate him in moral or legal turpitude. The witness himself must be the judge how far his answer may affect him—otherwise if he were obliged to answer for the court to judge of its tendency, he would be surrendering his protection in the means of securing it. If the answer should tend to make up a single link in the chain of testimony necessary to involve him in suspicion, he has a right to decline the answer. The link cannot be perceived by the judge to belong to the chain without an exposure of every other part of it. The question culled from the state trials was "what profession are you of?" The witness was a Roman Catholic Priest and the answer would have subjected him to penalties. The court could not know what the answer would be or that it would affect the witness; but the witness knew that it would. His right therefore to decline the answer, if *he thought* it would implicate him, was sustained. What question could be on its face, more harmless than the one resisted by that witness?

If the present question is answered others must be put, which the witness cannot answer. His reason, or how he came to understand that part of the letter which is in cypher, ought to be put, if the one announced is, Gilb. L. of Ev. 134. Could he answer the 2d. question and shall he tell half the truth and have his lips closed as to the other half? It were better that he should the tell the whole though it were to involve him in the prosecution with Col. Burr.

I know nothing of the contents of this letter. It may have been written for aught I know, by some young amorous intriguer to his mistress.

Before I set down, I will beg leave of the gentlemen, when they offer a paper for any purpose, to lodge it with the clerk. We do not wish again to press upon the court to rule such a measure without necessity, but heretofore we have been prevented from getting a sight of any paper until the moment of discussion, and then not without difficulty.

Mr. Williams (counsel for Mr. Willie) went at considerable length into this subject. He supported two principal propositions. 1st. That a man is not bound to criminate himself—and 2d. That he is from necessity the best judge of the tendency of his answers: which two propositions he applied to the case before the court. We regret that from the great variety of authorities which he introduced, we cannot detail this gentleman's train of reasoning.

Mr. *Martin.* Mr. Willie appears here under the character of Col. B's. secretary. If he confesses that he knew the contents of this letter, and these contents should prove to be treasonable, his continuing in the service of col. Burr, will make him a principal in the treason. Mr. Willie may have written to others. The post offices have been placed under requisition.

Mr. *Hay.* Is it proper, sir, to charge the government so roundly with felony? I am willing to communicate all that I know about that letter. It was transmitted by general Wilkinson through the hands of Mr. Minnikin, who accompanied Mr. Willie to this place; and it was attached to an affidavit from Judge Toulmin.

Mr. *Martin.* I do not charge general W. with plundering this letter. But we will hereafter prove that they have laid violent hands upon the Post office at N. Orleans. Sir, let Dr. Bollman decypher this letter; if other letters are hereafter found in the same cypher, his acknowledgment that he can decypher this one, will make him responsible for the rest. Do gentlemen produce this letter to criminate Dr. B.? If a witness refuses to be sworn, he is liable to be committed for a contempt of the court, Salked 270: but there is no instance to be found, where the court has committed for contempt, if he refuses to answer any question, that he supposes may criminate himself.

Mr. *Botts* expatiated upon the plunder of the post office.

Mr. *Martin* contended that it was necessary to be known, *how* this letter came here: that others may have come in the same way; and that the foulness of the means would contaminate the whole.

Mr. *McRae.* The question proposed to the witness is, do you understand the contents of this letter? But before we proceed to demand the answer, I hope we may congratulate ourselves upon the situation in which we are placed. It is not our desire to withhold from the accused, any of the slightest means for defending himself; and yet most certainly the present is such a spectacle as is very rarely exhibited in courts of justice. Not satisfied with Mr. Williams's exertions for the defence of Willie, they have even thought proper to superadd their own efforts. I am pleased, sir, that not only the counsel for the accused but also the counsel for the witnesses, is heard in his defence. I have attempted to discover, sir, whether any thing which they have advanced, bears upon the point before the court: but in vain. These gentlemen have widely wandered from the point, and I cannot forbear most deeply to regret that they have always resorted to this unfair expedient. Henceforth I hope, sir, that they will abandon this species of warfare and confine themselves to the point, instead of addressing the multitude around the court.

Mr. Botts, instead of reasoning on the subject, has expatiated on the effects which may possibly hereafter affect the witness, if he confesses any knowledge of this paper: that even if the letter itself be a very innocent production, the mere copying of it may at some future day expose him to persecution in some distant territory, or perhaps doom him to a confinement in some ship hold. Can this declamation be called argument? Does it bear at all upon the question? And yet irrelevant as it is, it is pretty much of the same tenor with most of the other statements which he has made on this subject. What connection has this subject with Louisiana, or with the manner in which this paper has been obtained? As to the robbing of the post office, it is all pointless conjecture. Why has he not specified the name of the post office or the name of the officer? And surely the custom that prevails in those offices of affixing upon a letter, the written or printed name of the office, would have been sufficient to have led to this discovery. But no such impression as that appears on the back of that letter. As to these figures, they may mean something more than the mere postage of the letter. The very same cyphers are used in the body of the letter. And their mysterious characters may have had no other use than to give some caution respecting the conveyance of the letter.

Mr. Botts states, that this letter must be either fraught with treason or it is not: if not it is perfectly irrelevant to the present case. Suppose such to be the truth, ought not the fact, however, to be ascertained? Is it not so far material to the present enquiry? But says Mr. Botts, if he confesses that he copied the letter, he will make himself infamous, and odium or punishment will await him. That is not the fact, sir. The man must not only have copied the letter, but understood its contents. If he did not know them, the worst that could be said, would be, that he has ignorantly done an injury to the public, intending to benefit an individual. They have quoted too the case of a Popish priest, who was permitted to elude a question without answering it. Why, sir, the ground was precisely this. "According to the English law, the witness, if he had confessed that he was a Roman Catholic, was liable to certain disabilities. The court itself knew this fact as well as the witness; and therefore did not press upon him for an answer. There was one discretion in that case, very different indeed from the present, in which agreeably to their doctrine the witness is to judge both on the law and the fact.

Mr. *M'Rae* expatiated at some length upon Mr. Martin's principle, that courts had punished a witness for a contempt in not taking the oath, but never where he refused to answer, in cases where he might criminate himself: he stated that a court had always the right to understand the ground on which a witness refused to answer; that every man was liable to give testimony, unless he came within certain exceptions; and in those cases he must shew to the satisfaction of the court that there was some law or authority to justify his repugnance; that in the case of an attorney who refused to deliver his evidence, the court would not be satisfied with the discretion which he might assume, but would compel him to declare whether the confidence on which he rested his exemption, was that of a professional character or of a private man. This witness declares that he may criminate himself—but the court is to determine on the tendency of the question. The question is "do you understand the part of the letter that is in cypher?" Suppose he answers no? Could he be possibly criminated? And suppose he answered yes: some other answer would still be necessary to convict him. Cyphers may be understood by men, who were not in the least connected with the contents of that letter. This very man might have had the key imparted to him, for the purpose of carrying on a purely innocent correspondence. Or he might have acquired a knowledge of that cypher long after the composition of that letter. On the whole, sir, said Mr. M'Rae; it is admitted on both sides that a witness cannot be made to criminate himself. The only difference of opinion is, as to the effect of this answer. But let the answer to this question be in the affirmative or the negative, I am satisfied that it cannot criminate Mr. Willie. The court may only determine from this answer, whether he should be forced to answer further interrogatories?

Wednesday, June 17.

Chief Justice. Is there any other question before the court?

Mr. *McRae* requested a decision on Dr. Bollman's case; as he wished to interrogate him about the cyphered letter.

Mr. *Williams* was ready to go into the point.

Mr. *Burr.* There will arise some very important questions, affecting the very sources of the jurisprudence of this country. I have several affidavits to produce, to shew that improper means have been used to contaminate the public justice. When these proofs have been duly exhibited, it will be the province of the court to decide, whether they will not lay their hands upon such evidence.

Mr. *Botts.* I rise to apprize the opposite counsel that there are three or four questions of considerable importance, which we shall bring forward as soon as possible. Two or three days ago I commented upon the plunder of the post offices; and assure the counsel for the prosecution that I shall probe that subject to the bottom; as no man can be more anxious than myself that the odium which this transaction attaches to the inferior or the superior officers of the government, should be wiped off. As a private citizen, or as counsel for my client, I shall be sincerely pleased with a fit opportunity of retracting the expressions which I have employed. The court will at once perceive the necessity of going into this enquiry at a very early period; for if the officers of government have hitherto broken open letters from C. Burr, they may hereafter resort to the very same expedient; and by thus obstructing the very medium of communication, may prevent him from summoning witnesses and preparing for his defence. One more remark! Yesterday I understood Mr. Hay to charge us with having made certain insinuations against persons not actually named. He demanded why he had not forborne these charges, until we were prepared to support them. That remark, sir, struck me with peculiar force. I was of the same opinion, that some proof ought to be produced; I immediately rose and professed my wishes to go into an investigation of the case. But, sir, little did I expect that the gentleman would have proceeded to have justified these crimes. Little did I expect that such felonious transactions should have been blazoned into mighty virtues, or that it would have ever been maintained in this court that the person who had failed to plunder the post offices, would have been guilty of a dereliction of their duty. I wish, sir, to explore the post office laws to see whether they do not contain some provision, prohibiting the introduction of testimony, thus illegally obtained.

Chief Justice. Unless these allegations affected some testimony that was about to be delivered; how can you introduce this subject?

At this time the marshal entered; and soon after Mr. Hay informed the court that col. Morgan was at that time before the G. J. & they had sent for a letter from A. Burr to him. Should the letter (holding it in his hand) be sent to the Grand Jury.

Mr. *Botts* requested to see it. Here, said he, is a small piece of newspaper attached to it which ought not to accompany it before the Grand Jury.

Mr. *Burr.* I have no objection that any of my letters should be sent up; but I trust, sir, it will be separated from this bit of newspaper, and this comment which Mr. Morgan has attached to it. The letter was handed to the Chief Justice; who observed that the only use of the newspaper was to show that at that time col. Burr was at Pittsburg.

Mr. *Hay* said it is was nothing more than to refresh his memory.

The *Chief Justice* decided it was right to dissever it from the letter: The newspaper itself was no evidence; but if col. Morgan would wish it to refresh his memory, there could be no objection.

They were accordingly separated, & then both of them were delivered into the hands of the marshal.

Mr. *Burr.* The court have very properly demanded some proof of the relevancy of our proposition. Sir, we are ready to prove it; we are ready to prove it upon people on this very ground; and we are ready to name the post offices, if the court requires it, which have been thus plundered. When it comes out, that evidence has been thus improperly obtained, we shall say, Sir, that it is contaminated by fraud—I will name three persons who have been guilty of improper conduct in procuring evidence against me. These are Judge Toulmain of the Mississippi territory, John G. Jackson, a member of Congress, and general Wilkinson. Two of these persons are within the reach of this court; as well as the improper manner in which they have procured affidavits and witnesses against me—I mention these circumstances for two reasons—1st, that the court may take whatever steps they think fit to arrest this proceeding; and 2d, that they may understand the way, in which some of this evidence has been contaminated.

Chief Justice. Let the consequences be as they may, this court cannot take cognizance of any act, which has not been committed within this district.

Mr. *Hay.* Let some specific motion be made and the evidence produced; and if there has been any crime committed, let the offenders be prosecuted according to law—These gentlemen know the course; and I most solemnly promise to discharge the duties of my office, whether they bear hard against gen. Wilkinson himself, or the man at the bar. If the crime had been committed, it is not the province of the court to notice it, till after an indictment has been found.

Some desultory conversation here ensued, when Mr. Burr observed, that he was afraid he was not sufficiently understood, from mingling two distinct questions together; as to the subject of the Post Offices, it might rest for the present; but as to the improper means employed in obtaining testimony, they were at this moment in actual operation; some witnesses had been brought here by this practice; and it was one which ought immediately to be checked: He did not particularly level his observations against gen. W. He did not say, that the attorney for the U. S. ought to indict or that such a crime if committed out of this district was cognizable by the court, unless it was going on while the court, itself was in session. In that case, an attachment would certainly lay.

Mr. Wirt. I do not yet understand the gentlemen. What is the object of their motion.

Mr. Botts. There is no motion. We shall hereafter make it; we have no other object by the present annunciation, than to give gentlemen a timely notice of our intentions.

Mr. Burr. We have sufficient evidence on which to found our motion.

What motion; demanded *Mr. Wirt.*