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TRIAL OF COL. AARON BURR.

WEDNESDAY, JUNE 24.

About two o'clock the grand jury entered and Mr. Randolph addressed the Court: May it please the court! We have agreed upon several indictments—which he handed in at the clerk's table. The clerk read the endorsements upon them in the following terms:—

An indictment against Aaron Burr for treason.

"*A true bill.*"

An indictment against Aaron Burr for a misdemeanor.

"*A true bill.*"

An indictment against Herman Blannerhasset for treason.

"*A true bill.*"

An indictment against Herman Blannerhasset for a misdemeanor.

"*A true bill.*"

Mr. Randolph then continued: May it please the court! Although the grand jury have returned the bills, they have still other subjects for their consideration, and have adjourned themselves to meet tomorrow at ten o'clock.

A short time elapsed, when Mr. *Burr* addressed the court: As bills had been found against him, it was probable, the public prosecutor would move for his commitment: he would however suggest two ideas for the consideration of the court: the one was that it was within their discretion to bail in certain cases even when the punishment was death: and the other was that it was expedient for the court to exercise their discretion in this instance, as he should prove that the indictment against him had been obtained by perjury.

Mr. Hay moved for the commitment of Aaron Burr: he stated that if the court had the power to bail, by the 3d section of the judicial act, it was only to be exercised according to their sound discretion; and that the prisoner was not to demand bail, because the court was authorised to grant it, but from the prisoner's making out an adequate case. He quoted 4 Black. p. 298, to prove that this discretion ought to be deliberately exercised.

Mr. Martin. The counsel for the prosecution have then admitted the right in the court to give bail, according to its discretion.

Mr. M'Rae did not understand from the judicial act that the discretion was to be exercised at this stage of the business, but only at the time of making the arrest.

Mr. Martin. I can hardly suppose that this court has less power than the court of king's bench in England, which certainly possesses this authority, according to 2 Hale, p. 139.

Mr. Wirt was extremely solicitous to do any thing compatible with his duties, which might soften the situation of the prisoner. He did not perceive the analogy which had been drawn between this court and the court of king's bench. The powers of that court grew out of the common law of England, whereas the powers of this court were defined by a statute of our own country. What says the 33d sec. of the judicial act? "Upon all arrests in criminal cases, bail shall be admitted; except where the punishment may be death; in which case it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence and the usages of law." Is not this enquiry by the court stopped; is not the evidence and testimony stopped, when it is now locked up by the finding of the grand jury? Would it be right for this court to go into all the merits of the case, which this clause evidently requires, before the court can exercise this discretion? Will the court go into the investigation of the evidence, and thus throw itself into collision with the grand jury? It is obvious from these considerations as well as from the other words of the law, that such a discretion does not exist at this stage of the business, but only at the time of arrest.

Mr. Wickham. If the court of king's bench possesses this authority, shall it be contended that this court is without it? Shall it be said that the liberties of the people of this country are not so well secured as those of Great Britain? That a British subject has greater privileges than an American citizen? It is said, however, that this court grows not out of the common law, but out of our statutes; but will it be said that when this court has once been constituted, it does not proceed according to the established jurisprudence; that is, the common law? There can be no question that a state district court can bail, even in capital cases. "Will this court, however, place itself in opposition to the grand jury?" No, sir, it will not—and Mr. Wirt certainly forgets that this court is to hear both sides of the evidence;—whereas the grand jury heard one side only; and indeed a part only of that side; for had the U. S. attorney sent up all the witnesses, whose names appear at the foot of the indictment, very different would have been the result of their enquiries. The ground which we take is this: that the grand jury have found their bill upon the testimony of a perjured witness; and if the court were to bail Col. Burr, would it not be justly inferred that they not had set themselves up in opposition to the grand jury, but that they had been furnished with lights which had been denied to that jury.

Chief Justice. Mr. Martin, have you any precedent, where a court has bailed for treason, after the finding of a grand jury on this ground, that the testimony laid before the grand jury had been impeached for perjury, or that other testimony had been laid before the court, which had not been in the possession of the jury?

Mr. Martin had not anticipated this case, and had not, therefore, prepared his authorities; but he had no doubt, that such existed.

Mr. Burr. Two distinct questions have been blended in this discussion, which ought to have been kept separate: 1st. Whether this court had the right to bail according to its discretion; and 2ndly. Whether it was expedient to exercise its right in the present instance. If the court had no discretion, it was unnecessary to produce evidence. That question, ought, therefore, to be previously settled.

Mr. Hay, when he first addressed the court, was of opinion, that the circuit court had this power; having been misled by a very transient conversation with the Chief Justice on the first examination of Mr. Burr: he had however considered this subject more maturely, and the more he thought of it the more was he convinced that A. Burr was not privileged to demand bail. This question was to be decided by the common law, by the acts of Congress, or by the acts of Virginia.

It could not derive the authority from that common law, because this court is of a recent origin; deriving its power not only from a late law, but a late government; and it has no authority but from an established law. Does then the law which established it, expressly convey this power? (Here Mr. H. read the law:) Now, how are the court to attend to the nature and circumstances of the case? Will they require all the evidence before them, which has just occupied the attention of the grand jury for 7 or 8 days? Mr. Wirt's argument on this point was conclusive. The law too was applicable to a prisoner only at the time of his arrest, and not of his indictment: in the last case, the situation of the accused becomes still more precarious: the danger which he apprehends, comes nearer and nearer, and the temptation to violate his recognizance, becomes much greater than at the earlier steps of the prosecution.

No man will contend that the common law is in force in the courts of the U. S. As soon might you assert the validity of the laws of the Cape of Good Hope or of Turkey. It was therefore ridiculous to compare the organization of the court of King's Bench with that of the present court: as to the complaint of Mr. Wickham that by this doctrine an American citizen would stand on worse ground than a British subject, it was unavailing. Perhaps courts of justice would even be more disposed to bail for treason under such a government as that of Great Britain, than in our own, where the power of the government falls so rarely and so lightly upon the people. Were even the common law in force in the U. S. it would have no relation to the organization of our courts.

The power of bailing is not then derived from the common law nor the act of Congress; nor is it deducible from the laws of Virginia. In cases affecting life, the prisoner is not entitled to bail by our laws,

Mr. Wirt. I have stated that the powers of the court of King's Bench are not applicable to this case, because that court is the creature of the common law, whose powers have been growing up from time to time; whereas this court is fixed and defined by law. There is another great difference. The powers of the court of King's Bench take their origin in a fiction. It is supposed to be held *coram ipso rege!* In its origin, the king himself sat there, and he is still supposed to sit. Treason was a crime against his dignity: he might bail for it; and the same power belongs to the judges who represent his person. But how is it with us? Treason is an offence against the people of this country. And have the people ever sat here for the administration of justice? and are the judges of this court invested with the powers of the people?—But on the supposition that this fiction does exist, is not the power of bailing removed by a positive law? Does not the act of Congress expressly take it from the court?

Mr. Wickham. Two indictments have been found for treason; one against Colonel Burr, and the other against Blannerhasset. If the latter was now to come into court, he would be bailed according to Mr. Wirt's distinction, because not previously arrested; whereas col. B. would be divested of the very same privilege, though he was indicted for the very same crime.

Mr. Randolph expatiated on this subject at considerable length and with great ingenuity.

Mr. Martin protested against the ingenious *fiction* of Mr. Wirt. He challenged him to name any king from the days of king Arthur to the present time who did or could set in the court of King's Bench.

After a long and elaborate argument on this point, the Chief Justice decided that the court had the power to bail a prisoner indicted for treason; according to its sound discretion; and that this discretion was to be exercised according to the nature and circumstances of the evidence, and the usages of law.

Mr. Burr stated that the court had then decided that they possessed the discretionary right to bail, it would next be necessary to shew, that they ought to exercise their discretion in this instance; that the indictment had been founded on the testimony of a perjured witness; that general Tupper would prove there had been no such resistance to his authority as had been stated by that witness; and that although gen. T. had mentioned this circumstance to the prosecutor, he had not been sent up to the grand jury.

Mr. McRae. Gen. Tupper has made no such communication to me.

Mr. *Hay.* Though I have had a conversation with gen. T. I do not exactly recollect what it was. The truth is, I have carefully avoided conversing with the witnesses of the U. S. Gen. T. has made an application to me for permission to go away; but I said that not for worlds would I submit to the imputation of consenting to the departure of any of the witnesses. General T. was not sent up to the grand jury because he was not considered as a very material witness.

Mr. Wirt. He has made no such communication to me; but I take upon me to assert, that the resistance to gen. T. was not the treason on which this indictment has been founded.

Mr. *Wickham.* Suppose a man was indicted for a murder committed at some distance from the city; and every man in the city said that he was at that moment walking the streets, would such an indictment preclude a court from bailing him? This *constructive* murder is of the very same stamp as the constructive treason of col. Burr, who was indicted for an act said to be done in Blannerhassett's island, where he was said to be present, although he was at a considerable distance from the place.

Mr. *Wirt.* Why produce evidence to prove the perjury of a witness; why look to the indictment itself for a proof of its own fallacy; when the requisitions of the court have not yet been satisfied? The court wanted authorities to prove that it was in such a case as this that it had a discretionary right to bail according to the usages of law.

The *Chief Justice* had never known of a case, similar to the present.

Mr. *Martin* would produce authorities, if he had time allowed to him.

Mr. *Randolph* drew an analogy between this and the case of a coroner's inquest.

Mr. *Wirt* said there was no apposite analogy between them.

Chief Justice insisted upon the necessity of producing adjudged cases.

Mr. *Burr* did not wish to protract the session of the court to suit his own personal convenience. There was no time at present to look out for authorities.

The *Chief Justice* observed, that he was then under the necessity of committing col. Burr.

Mr. *Burr* stated, that he was willing to be committed, but hoped that the court had not forestalled its opinion.

Chief Justice. I have only stated my present impressions. This subject is open for argument hereafter. Mr. Burr stands committed to the custody of the marshal.

He was accordingly conducted to the jail of this city.

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Thursday, June 25.

About 1 o'clock the Grand Jury entered, and their foreman, Mr. *Randolph,* addressed the court to the following effect:

"May it please the court!

"The Grand Jury have been informed, that there is in the possession of Aaron Burr a certain letter with the post mark of May the 13th, from James Wilkinson in cyphers, which they deem to be material to certain enquiries now pending before them. The Grand Jury are perfectly aware that they have no right to demand any evidence from the prisoner under prosecution, which may go to criminate himself. But the Grand Jury have thought proper to appear in court, to ask its assistance, if it thinks proper to grant it, in making such a requisition in their behalf."

Mr. *Burr* rose, and asked whether the court was about to give an opinion?

The *Chief Justice* stated, that the court was about to say that the Grand Jury were perfectly right in the opinion that no man can be forced to furnish evidence against himself: he presumed that the Grand Jury wished also to know, whether the person under prosecution, could be examined on other questions, not criminating himself.

Mr. *Burr* declared, that it would be impossible for him under certain circumstances, to expose any letter which had been communicated to him confidentially; how far the extremity of circumstances would impel him to such a conduct, he was not prepared to decide; but it was impossible for him even to deliberate on the proposition to deliver up any thing which had been confided to his honor—unless it was extorted from him by the law.

Mr. *Randolph.* We will withdraw to our chamber, and when the court have decided upon the question, they will announce it to the Grand Jury.

The *Chief Justice* knew not that there was any objection to the Grand Jury's summoning any man as a witness, who lays under an indictment.

Mr. *Martin* said there could be no objection.

Mr. *Randolph* said he was afraid that the object of the Grand Jury had been misunderstood by the court. The Grand Jury had not appeared before them to apply for the person of Aaron Burr, but for a certain paper, which may or may not be in his possession; and upon that paper's being or not being in his possession, and upon its being possible or not possible to identify that paper, it might depend, whether Aaron Burr himself was or was not a material evidence before them. And then the Grand Jury withdrew.

When Mr. Hay had concluded his argument;

Mr. *McRae* addressed the court: he was solicitous, he said, to lay a communication before them on a circumstance which had lately transpired.—The Grand Jury had asked for a certain letter in cyphers, which was supposed to have been addressed by gen. Wilkinson to the accused. The court had understood the ground on which the accused had refused to put it in their possession: which ground was an apprehension lest his honor should be wounded by his thus betraying matters of confidence. "I have seen general Wilkinson, sir, since this declaration was offered; I have informed him of the communication which has thus been made; and the general has expressed his wishes, that the whole of the correspondence between A. Burr and himself may be exhibited. The accused has now therefore a fair opportunity of producing this letter—he is absolved of all possible imputation; his honor is perfectly safe.

Mr. *Burr.* The court will probably expect from me some reply. The communication I made to the court has led, it seems, to the present invitation. I have only to say, sir, that this letter will not be produced. The letter is not at this time, in my possession—& gen. Wilkinson knows it.

Mr. *McRae* hoped that notice of his communication would be sent to the G. Jury.

Mr. *Martin* hoped that col. Burr's communication also would go along with it.

The *Chief Justice* was unwilling to make the court the medium of such communications.

Mr. *McRae* hoped that the court would notify his communication to the Grand Jury, and for an obvious reason—When the Grand Jury came into court to ask for the paper, what did the accused say? Did he declare that it was not in his possession? No: he merely said that honor forbad him to disclose it. The inference undoubtedly was, that he had the paper, but could not persuade himself to disclose it. And what then must have been the impression on the mind of the Grand Jury? A cloud of suspicions must have fastened themselves upon their mind—suspicions unjustly injurious to the character of gen. Wilkinson; and which the present communication may at once disperse. It is but justice, therefore, to general Wilkinson, to whom the enquiries of the G. Jury may at present relate, to give them the benefit of this information.

Mr. Burr. General Wilkinson, sir, is extremely welcome to all the eclat which he may expect to derive from this challenge; but as it is a challenge from him, it is a sufficient reason why I should not accept it. But as the remarks of the last gentleman, seem to convey some reproach against me (which no man who knows me can believe me to deserve) it may be proper to say, that I did voluntarily and in the presence of a witness, put the letter out of my possession for a certain purpose. I wished, sir, to disable any other person, even myself, from laying such a paper before the grand jury. General Wilkinson knows this fact.

The Chief Justice then reduced these communications to writing, which message being read to the court, and afterwards corrected, was transmitted to the grand jury.

Mr. Burr. Let it be understood that I did not put this letter out of my possession, because I expected the grand jury would take up this subject, but from a supposition that they might do so.

Mr. Wickham was interrupted by the entrance of the grand jury; when Mr. Randolph informed the court that they had agreed upon some presentments; which he then delivered into the hands of the clerk. The clerk read as follows:

The Grand Inquest of the U. S. for the district of Virginia, upon its oath presents, that Jonathan Dayton, late a senator in the Congress of the U. S. from the state of New-Jersey, John Smith, a senator in the Congress of the U. S. from the state of Ohio, Comfort Tyler, late of the state of New York, Israel Smith, late of the state of New York, and David Floyd, late of the territory of Indiana, are guilty of treason against the U. S. in levying war against the same, to wit: at Blannerhassett's island, in the county of Wood and state of Virginia, on the 13th day of December, 1806.

Upon the information of

William Eaton,
Erick Bollman,
Peter Taylor,
Jacob Allbright,
Charles Willie,
John Graham,
Samuel Swartwout,
George Morgan,
John Morgan,
Thomas Morgan,
Elias Glover,
D. Woodbridge, jun.
David C. Wallace,
Edmund B. Dana,
John G. Henderson,
Alexander Henderson,
James Wilkinson,
Hugh Phelps,
Jacob Dunbaugh,
John Monholland,
Chandler Lindsley,
James Knox,
William Love,
Thomas Hartly,
Stephen Welch,
James Kinney,
Samuel Moxley,
David Fisk, and
Benjamin H. Latrobe.

John Randolph.

The Grand Jury, continued Mr. R. have no further presentments to make.—He then delivered two papers which they had received from the court: the one was a cyphered letter addressed to H. Windbourn; the other was the letter to Col. Morgan.

The Chief Justice. Mr. Attorney, have you any thing more for the grand jury?

Mr. Hay. I can have all the indictments ready to be laid before them tomorrow.

Mr. Taylor (from Norfolk). Is it not customary for the attorney to file information upon these presentments? Is there any necessity for detaining the jury? Some objection was made.

Mr. Randolph. May not the bills be laid before another grand jury, as the parties presented are not now in custody?

Mr. Hay. That course would be productive of great inconvenience. All the witnesses are now here; and they will not, perhaps, appear before another grand jury, and the present jury is already in possession of all the evidence.

Mr. *Randolph* had hoped they would be discharged; he was not anxious on his own account, but there was one of the jury peculiarly situated, who wished to return to his family.

Mr. *Taylor* observed to the court, that a circumstance of a very afflicting domestic nature made him peculiarly anxious to return home.

Mr. *Hay* was extremely sorry that he could not gratify the wishes of the grand jury; but the interests of the U. S. forbad him. He would have the indictments ready at any hour in the morning, that the grand jury would name.

Nine o'clock was mentioned and the grand jury were then adjourned to that hour.

FRIDAY, JUNE 26.

The court met at 9 o'clock. About 10 the grand jury entered and Mr. Randolph presented to the clerk, ten different indictments; five of them for treason, against Jonathan Dayton, John Smith, Comfort Tyler, Israel Smith, and David Floyd—and five for a misdemeanor against the same individuals respectively.

The *Chief Justice* then addressed the jury and in fervid and elegant terms complimented them upon the patience and attention with which they had performed their duties; and concluded by discharging them from all further attendance.

The court then adjourned till 12 o'clock. When it had re-assembled, Mr. Botts requested the court to remove Mr. Burr from the public jail, to some comfortable and convenient place of confinement. The grounds of this motion are to be found in the following affidavit made by some of Mr. Burr's counsel, and laid before the court.

WE, who are counsel in the defence of col. Aaron Burr, at the suit of the U.