TRIAL OF
Col. Aaron Burr.

CONTINUED.

FROM RICHMOND, MAY 28.

FEDERAL COURT.

Saturday, May 23.

The Court sat at 11 — A. Burr was not present. The proceedings of yesterday being read and the names of the Grand Jury called, Mr. Hay moved, to recognise the witnesses who were not present yesterday. Those who appeared were, Erick Bollman, Samuel Swartwout, Thomas Morgan, and Robert Spence.

Some conversation ensued on the motion to instruct the Grand Jury: and it was understood that Mr. Burr's counsel was to give timely notice to the U. S. attornies, of the points they intended to submit to the court.

The question was suggested, whether the Grand Jury could be adjourned to some *future* day, without being adjourned *from day to day*. The Chief Justice declared he was not prepared to give an opinion on the subject.

Monday, May 25.

Mr. Hay declared that he should not for several days send up his indictment to the Grand Jury, unless Gen. Wilkinson made his appearance; and that in case he did not appear, he should then determine on the course he ought to pursue.—The Grand Jury was adjourned till Tuesday 12 o'clock.

Mr. Hay moved the court, to commit Aaron Burr on a charge of High Treason against the United States. He declared that the reason of this motion was founded on a probability of Mr. B's flying from the law, in case he should be positively informed that Gen. Wilkinson was on his way to Richmond, unless he was committed for treason, and detained by higher bail; and that he believed the evidence he was now to bring forward, *in addition* to what had been adduced on the Examination of Aaron Burr, was sufficient to induce the judge to grant the commitment. He therefore moved, that evidence should be heard on behalf of this motion—

Mr. Burr's counsel opposed this motion, principally on the ground, that the Grand Jury and the court possessing concurrent powers in this case, it was inexpedient for the court to exercise this power, while the Grand Jury was in session; that a more particular reason against the court's exercising this power, was, that they would have to deliver opinions on the evidence and thus commit themselves on the ulterior stages of the prosecution, and forestal the [illegible] and that as another mode of producing this last effect, depositions or written papers which could not go before the Grand Jury, would be brought before the court as a foundation for the motion of commitment. These affidavits would be known to the Grand jury, and might contribute to prejudice their mind. The counsel for the prosecution contested all these arguments.

The court postponed giving any opinion, till this day.

Mr. Hay avowed his expectation that Gen. Wilkinson would appear in a few days. The Government had employed every possible exertion to that effect.

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1 O'CLOCK.—The court has just decided that, "if it is the choice of the prosecutor on the part of the U. S. to proceed with his motion, it is the opinion of the court, that he may open his testimony."

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Question postponed till to-morrow. The difficulty is, to make some arrangement * which may prevent an anticipated impression on the public mind, by the exhibition of evidence.—The Counsel for the prosecution and the prisoners cannot yet agree upon any arrangement.

* *Suggested by the Attorney of the U. S.*

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OPINION

Of the Federal Court delivered by Chief Justice Marshall, on the motion of the Attorney of the United States, to commit Aaron Burr for High Treason against the U. States.

In considering the question which was argued yesterday, it appears to be necessary to decide:

1st: Whether a court sitting as a court, possesses the power to commit any person charged with an offence against the U. S.

2ndly: If this power be possessed, whether circumstances exist in this case which ought to restrain its exercise.

The first point was not made in the argument and would, if decided against the attorney for the United States, only change the mode of proceeding. If a doubt can exist respecting it, that doubt arises from the omission in the laws of the U. States to invest their courts, sitting as courts, with the power in question. It is expressly given to every justice and judge, but not to a court.

This objection was not made on the part of Col. Burr, and is now mentioned, not because it is believed to present any intrinsic difficulty, but to show that it has been considered.

This power is necessarily exercised by courts in discharge of their functions, and seems not to have been expressly given, because it is implied in the duties which a court must perform, and the judicial act contemplates it in this light. They have cognizance of all crimes against the United States; they are composed of the persons who can commit for those crimes; and it is obviously understood by the legislature, that the judges may exercise collectively the power which they possess individually, so far as is necessary to enable them to retain a person charged with an offence in order to receive the judgment which may finally be rendered in his case. The very fact this is obviously understood by the legislature, because there is no clause expressly giving to the court the power to bail or to commit a person, who appears in discharge of his recognizance, and against whom the attorney for the United States did not chuse to proceed, and yet the 33d sect. of the judicial act, evinces a clear understanding in the legislature, that the power to take bail is in possession of the court.

If a person shall appear in conformity with his recognizance, and the court passes away without taking any order respecting him, he is discharged. A new recognizance, therefore, or a commitment on the failure to enter into one, is in the nature of an original commitment, and this power has been uniformly exercised.

It is believed to be a correct position, that the power to commit for offences of which it has cognizance, is exercised by every court of criminal jurisdiction, and that courts as well as individual magistrates are conservators of the peace.

Were it otherwise the consequence would only be that it would become the duty of the judge to descend from the bench, and in his character as an individual magistrate, to do that which the court is asked to do.

If the court possesses the power, it is certainly its duty to hear the motion which has been made on the part of the U. S. for in cases of the character of that under consideration, its duty and its power are coextensive with each other. It was observed, when the motion was made, and the observation may now be repeated, that the arguments urged on the part of the accused rather prove the motion on the part of the U. S. unnecessary, or that inconveniences may result from it, than the want of a legal right to make it.

The first is, that the Grand Jury being now in session ready to receive an indictment, the attorney for the United States ought to proceed by bill instead of applying to the court since the only purpose of a commitment is to bring the accused before a Grand Jury. This statement contains an intrinsic error which destroys its operation. The commitment is not made for the sole purpose of bringing the accused before a Grand Jury; it is made for the purpose of subjecting him personally to the judgement of the law, and the grand jury is only the first step towards that judgment.

If, as has been argued, the commitment was simply to detain the person until a Grand Jury could be obtained; then its operation would cease on the assembling of a Grand Jury; but such is not the fact. The order of commitment retains its force while the Jury is in session, and if the prosecutor does not proceed the court is accustomed to retain a prisoner in confinement, or to renew his recognizance to a subsequent term.

The arguments drawn from the general policy of our laws, from the attention which should be bestowed on prosecutions, instituted by special order of the Executive, from the peculiar inconveniences and hardships of this particular case, from the improper effects which inevitably result from this examination, are some of them subjects for the consideration of those who make the motion, rather than of the court, and others go to the circumspection with which the testimony in support of the motion ought to be weighed, rather than to the duty of hearing it.

It has been said that Col. Burr already stands charged with treason, and that, therefore, a motion to commit him for the same offence is improper. But the fact is not so understood by the court. The application to charge him with treason was rejected by the Judge to whom it was made, because the testimony offered in support of the charge did not furnish probable cause for the opinion, that the crime had been committed. After this rejection, Col. Burr stood so far as respected his legal liability to have the charge repeated, in precisely the same situation as if it had never been made. He appears in court now as if the crime of treason had never before been alledged against him. That it has been alledged, that the government had had time to collect testimony for the establishment of the fact, that an immense crowd of witnesses are attending for the purpose, that the prosecutor in his own judgment has testimony to support the indictment are circumstances which may have their influence on the motion for commitment, or on a continuance, but which cannot deprive the Attorney for the U. S. of the right to make his motion. If he was about to send up a bill to the Grand Jury, he might move that the person who designed to accuse should be ordered into custody, and it would be in the discretion of the court to grant or to reject the motion.

The court perceives and regrets that the result of this motion, may be publications unfavorable to the justice, and to the right decision of the case; but if this consequence is to be prevented, it must be by other means than by refusing to hear the motion. No man feeling a correct sense of the importance which ought to be attached by all to a fair and impartial administration of justice; especially in criminal prosecutions, can view without extreme solicitude, any attempt which may be made, to prejudice the public judgment, and to try any person, not by the laws of his country and the testimony exhibited against him—but by the public feelings, which may be and often are artificially excited against the innocent, as well as the guilty. But the remedy, for a practice not less dangerous than it is criminal, is not to be obtained by suppressing motions, which either party may have a legal right to make.

If it is the choice of the prosecutor on the part of the U. S. to proceed with this motion, it is the opinion of the court that he may open his testimony.

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WEDNESDAY, May 27.

The proceedings on this day were extremely interesting; but of too great a length to be detailed at present. Indeed that part of it which embraces the evidence given in, are for obvious reasons improper to be published in this stage of the prosecution.

Mr. Hay commenced with stating, that all hopes of an arrangement with Col. B's counsel to secure his person and to avoid the impropriety of a public examination, was at an end. Col. Burr would not consent to give bail on the charge of treason; and Mr. H. read a letter from his counsel to that effect. He should, therefore, proceed to an examination of the testimony. In doing, he would observe a chronological order: take the conspiracy at its earliest crisis, and introduce the events as they subsequently arose.

An interesting discussion took place upon the propriety of this arrangement. Mr. B's counsel protested against it. They contended that there were two things to be proved; 1st. An Overt Act of Treason: 2d. That Col. B. was connected with it. If the first wanted proof, the last was nugatory. They contended, therefore, that the Overt Act ought first to be proved; before any other evidence was exhibited as to the *intention* of the *plan*.

The Chief Justice left the order of the evidence to the judgment of the attorney of the U. S.

Mr. Hay then offered Gen. Wilkinson's affidavit to be read: When a long discussion was entered into on the principles of evidence.

The Chief Justice said that the most proper course was first to introduce the evidence as to the overt act, and that Gen. Wilkinson's affidavit was *not* at that time to be read.

Mr. Hay then called Peter Taylor and ——— Ambright, the first was Blannerhas's gardener, the other had worked on his island. Of their testimony it is for the present improper to make any statement. They were succeeded by a letter partly in cypher and partly in German addressed to a person in New-Orleans; which Mr. John Brown, (formerly secretary to Gen. Marshall on his embassy to France) and Mr. Herbert, a respectable German merchant of this city, were sworn to interpret to the best of their abilities, this interpretation to be presented to the Court tomorrow.

Mr. Hay then brought forward an affidavit of one Dubas, a serjeant in the army of the United States. This affidavit was represented by the prosecution to be of the greatest importance; but was objected by Mr. B's counsel on the ground of informality: The affidavit appeared on its face to be taken before one *Lewis*, who signed himself a Magistrate of the Town of Orleans. This signature was succeeded by gov. Claiborne's verification of the fact, on *one* day after the date of the certificate. But there was no caption to the affidavit, as "New-Orleans, *ss.*" nor any mention made at the head of it of the place where it was taken.

A long argument ensued upon its admissibility; and the Court adjourned without giving any opinion.

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THURSDAY, May 28.

Same Judges present as yesterday.

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

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

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

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

Mr. Martin, I did suppose so; and as I am unwilling to take up the time of the court—

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

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

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

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

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

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

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

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

Mr. Martin. The recognizance which already binds Col. Burr, compels him to be in court: why bind him over in a greater sum? Is there any reason to suspect him guilty of treason? Has any thing, like an oath, come from Wilkinson, that Col. Burr was engaged in treason? There is not a single sentiment, nor a single expression in Wilkinson's deposition which indicates any high treason perpetrated by him? The present application is contrary to every principle of justice, but if the court thinks that he ought to be bound over for this charge, we shall submit with deference to its decision.

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

Mr. M'Rea. Gentlemen seem to consider the present recognizance as simply sufficient under any possible circumstance, to detain Aaron Burr here to answer the charge of Treason. I am of a very different opinion. I think with the Attorney for the U. S. that nothing is more probable than the certain circumstances may influence him to effect his escape; for have I the same confidence that his counsel seem to entertain, in the possibility of his appearing for trial. On the former examination, he was bound over; but even then it was evidently for a very small sum; and why? Because the Chief Justice himself observed that as Col. Burr was withdrawn from the circle of his friends, it would increase the difficulty of his obtaining even a small bail even for this misdemeanor; and because he is completely excluded from his view to prevent the charge. As then he decided, that the sum in which Col. Burr is now bound is a smaller one than the charge of High Treason would have warranted; it seems to me that too great reliance is placed upon the present recognizance.

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We learn verbally that the recognizance of Col. Burr has been increased to forty thousand dollars. He has given the same securities before, with the addition of Luther Martin, esq. What further progress has been made in the trial we cannot ascertain. The Enquirer from which we have extracted the proceedings breaks off in the manner we have been obliged to do.