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Vol. 12.] RALEIGH, (N. C.) TUESDAY, JUNE 23, 1807. [No. 585.

TRIAL OF Col. Aaron Burr.

CONTINUED.

FROM RICHMOND, JUNE 13.

FEDERAL COURT.

Debate on the motion for a Subpœna Duces Tecum.

WEDNESDAY, June 10.

An affidavit was drawn up by Mr. Burr, stating that certain papers in the poſſeſſion of the Preſident might be material to his defence; which affidavit is in the following terms:

AARON BURR, vs. UNITED STATES. } *Court of the U. S. 5th Circuit and District of Virginia.*

AARON BURR maketh oath, that he hath great reaſon to believe that a letter from Gen. Wilkinſon to the Preſident of the U. States, dated 21ſt October, 1806, as mentioned in the Preſident's Meſſage of the 22nd January, 1807, to both Houſes of Congreſs, together with the documents accompanying the ſame letter, and a copy of the anſwer of ſaid Thomas Jefferſon, or of any one by his authority to the ſaid letter, are or may be material in his defence in the proſecution againſt him—and further, that he hath reaſon to believe the military and naval orders given by the Preſident of the United States, through the departments of war and of the navy, to the officers of the army and navy, at or near the New Orleans ſtations, touching or concerning the ſaid Burr, or his property, will alſo be material in his defence.

AARON BURR.

Sworn to in open Court the 10th June 1807.

W. MARSHALL, *Clk.*

This affidavit being read,

Mr. Hay begged leave to notice to the court and the oppoſite counſel, that in conformity to the intimation which he had yeſterday given, he had addreſſed a letter to the Preſident; mentioning the motion which was to be made this day, and ſuggeſting the propriety of ſending on the papers required, but reſerving to himſelf the right of keeping theſe papers by him, until the court ſhould ſee and determine their materiality. He hoped that in 5 days at leaſt the papers would be in his poſſeſſion: he ſhould however object to the affidavit produced, and even to the right of Col. Burr to make any ſuch motions at the preſent time. That this was a preliminary queſtion, which he would wiſh to be firſt determined; whether any man ſtanding in Col. B's ſituation had a right to make ſuch a motion. — The fact was, if theſe papers ſhould ever come to hand, they would never go out of the hands of the court; for he was ſatisfied that they could not be material in the preſent caſe, from the ſubſtance of one of theſe very papers, which was already in his poſſeſſion. He wiſhed not to waſte the time of the court: there were however ſeveral preliminary points which he ſhould be obliged to ſubmit to their conſideration; and before this diſcuſſion could be ended, the papers would be here. He confeſſed that he was extremely unwilling to enter into any diſcuſſion on theſe papers. Gentlemen might take it for granted, if they pleaſed, that he felt a diſinclination to furniſh them with theſe papers; there was none ſuch: Theſe gentlemen ought themſelves to have applied for them; for he was ſatisfied from the character of the government, that every neceſſary paper would have been cheerfully ſupplied; he had no doubt the court and even the oppoſite counſel, would individually acquieſce in the ſame opinion. He truſted that the preſent motion was not made to ſhow the talents of gentlemen; he aſſured them, that if general W. ſhould come, they would enjoy ſuch a ſplendid opportunity to their heart's content: he intended to caſt no reflections upon the counſel perſonally; but requeſted them once more to deliberate upon his propoſitions.

Mr. Martin would aſſure the gentleman that there was no need for further deliberation. It is ſtrange that this gentleman ſhould ſo much complain of the conſumption of time, at the very moment when he ſpeaks of the long period which he ſhould require for this diſcuſſion, and the great many preliminary points which he ſhould have to ſettle. The gentleman ſaid Mr M. has warmly ſpoken too of certain impreſſions; and even of our own: But I truſt that he will leave it to ourſelves to declare our own impreſſions: It is impoſſible for that gentleman to ſearch our hearts; and ſure I am that nothing has ever yet fallen from us to juſtify the elevated eulogies upon the government, which he has been kind enough to attribute to us.

Mr. Wickham obſerved, that Mr. Hay had promiſed the appearance of theſe papers: and for what is this ſubpœna *Duces Tecum* required? not to bring the Preſident here; he is not wanting, but to obtain certain papers, which he has in his poſſeſſion. What then is the effect of this proceſs, but to produce the very reſult which Mr. Hay promiſes? As to the objection that a part of theſe papers is confidential, would it not be eaſy to make an endorſement on ſuch, as the Preſident would not wiſh to go out of the court? Mr. H's promiſes, however may be unavailing; at Waſhington they may entertain views very different from his own —As to the opportunity of diſplaying talents, nothing would be better calculated to defeat that object, than for the attorney for the U. S. to give his conſent, that proceſs ſhould iſſue.

Mr Hay obſerved, that he had not diſtinctly heard the gentleman: He thought, however, that he had heard the word "conſent:" but he would aſſure that gentleman that he had not conſented, and never would conſent to ſuch a propoſition

Mr Martin then roſe to open the motion; when ſome deſultory diſcuſſion enſued upon the order of proceeding. Mr. Hay contended that this queſtion was premature; that the preliminary queſtion ought firſt to be ſettled, whether Col Burr did ſtand in ſuch a ſituation, as to entitle him to make this motion. If the court pleaſed, he would ſtate the grounds on which he himſelf denied the exiſtence of ſuch a right.

The Chief Juſtice decided that Mr. Hay might ſtate his objections. Mr. H. then proceeded,

The motion now made by Mr. Burr, as far as he could underſtand it, was to obtain a ſubpœna from the court (or rather from the Judges ſitting there) to the Preſident of the U. States, to attend this court with an original letter from General W. to the Preſident of the U. States, and afterwards referred to by him in his communication to Congreſs of January 27th. He contended that this motion was premature.—Col Burr was not authoriſed by any legal precedents or by the ſtatutes of this or any other country, to demand legal proceſs for obtaining witneſſes, whilſt he remained in his preſent ſituation. What was that ſituation? He had been committed for a miſdemeanor, and recognized to appear before this court: And in conſequence of this recognizance he is now preſent. The court would recollect, that no bill had been found; that no bill had been ſent up to the Grand Jury. And all that can be ſaid, is, that Col. B. is preſent from a previous recognizance for a miſdemeanor. In ſuch a ſituation, Col Burr applies to the court for compulſory proceſs or rather a ſubpœna *Duces Tecum* to the Preſident of the U. States commanding him to attend with certain papers: that if he does not attend; or the papers are not produced, the court may then iſſue an attachment againſt him. Now I contend, ſaid Mr. Hay that no individual charged with a crime, has any right to legal proceſs, until the exiſtence of his trial, that is, until the Grand Jury have found a bill, and the proſecutor has announced his intention to proceed. Gentlemen will pleaſe to point out in the conſtitution, in the laws of Congreſs, or in the common law, the ſmalleſt right for making this motion. They will in vain ſearch for a precedent in the complicated and various materials of the common law. The acts of Congreſs ſupply them with no authority; and there is nothing in the conſtitution, which in the leaſt relates to this ſubject; except the 8th amendment, which moſt obviouſly refers to a very different ſtage of the proſecution from this: "In all criminal proſecutions, the accuſed ſhall enjoy the right to a ſpeedy and public trial, &c. &c &c. to have compulſory proceſs for obtaining witneſſes in his favor, and to have the aſſiſtance of counſel for his defence"—Will gentlemen contend, that this clauſe relates to any of the preliminary ſteps of the proſecution, before the proſecution is itſelf commenced by the finding of a bill? This clauſe was never intended for any of the preliminary ſteps; for the arreſt, the tranſportation, or the examination of the accuſed. Its object was to ſecure to every man the benefits of a "fair and impartial trial:" not on the examination before the examining magiſtrate, but on the trial, and the trial itſelf is always held before the Petit Jury When the trial commences, it is then that the accuſed is to be confronted with the witneſſes againſt him; it is then that he is entitled to compulſory proceſs for obtaining witneſſes in his favor; it is then that he is to have counſel for his defence. It *is* true, Sir, that in this firſt ſtage (this incipient ſtage as it is called in faſhionable phraſe) it *is* true, that A. Burr has already not one counſel but four; and not only counſel in this diſtrict, but celebrated counſel from other ſtates. It *is* true that the clerk of this court has already iſſued ſubpœnas: but theſe ſubpœnas were gratuitous; and had they been refuſed, there would have been no law to compel him to grant them: But what do all theſe circumſtances prove? That A. Burr has any authority at this ſtage of the buſineſs to make his preſent application to the court? And even let us ſuppoſe that they have obtained what they require. Let us ſuppoſe that this ſubpœna *has* been iſſued; that the Preſident himſelf is here; that he is to be called before this court from Waſhington, where national concerns of ſuch deep weight and importance are entruſted to his guidance.

Mr. Wickham begged leave to interrupt the gentleman. This was not in fact a ſubpœna for the Preſident himſelf, but only for certain papers.

Mr. Hay. Even that ſuppoſition does not remove the prematurity of the preſent motion. —I was about to aſk, Sir, what is to be done with theſe papers, if the Preſident himſelf ſhould be here with theſe papers in his pocket. I will ſay nothing of the manifeſt and many inconveniences which would attend his abſence from the ſeat of government. What would be done with theſe papers? The gentlemen cannot anſwer this queſtion. I only am competent to anſwer it. And why? Becauſe no kind of uſe can be made of this evidence, until the Grand Jury have found their Indictment; until I have laid my bills before them.—Will gentlemen however, go on upon ſuch calculations; that the bills *will* be ſent up; and that they will be certainly found true Bills? If gen. W. comes, and that he will, I can entertain no doubt from the intelligence which I have heard this morning the proſecution will certainly progreſs; and in that caſe only, can theſe papers be wanted.

There is another little difficulty in this caſe. —*When* is this proceſs to be made returnable? Some day muſt be named But can the court poſſibly name any day, when the witneſſes or the papers ſhall be wanted? Do the records of this court indicate any particular day, when the trial is to commence? Sir, ſuch a nomination would be completely arbitrary. Let an indictment be firſt found; let a day be firſt ſet for the trial; and on that day might this proceſs be returnable. But, Sir, even if a day could be fixed on, it does not appear, that this teſtimony would be wanted during this term. It depends upon the arrival of gen. Wilkiſon: It literally depends upon the winds and the waves. The very language of the proceſs confirms this argument. How could the evidence be heard, before the accuſed is put upon his trial?—Perhaps it may be ſaid that this evidence may be wanted in caſe we repeat the motion for committing Aaron Burr for High Treaſon; and which we ſhall certainly attempt if gen. Wilkinſon does not make his appearance. On this point, two remarks only are neceſſary to be made. The firſt is, that no ſuch motion is actually befor the court; and further, if any ſuch motion was made, the court would have no right to iſſue Proceſs, before the commencement of the trial. The court has no more right for this purpoſe, than an individual magiſtrate would have; and in fact it was only a few days paſt, that the court did actually conſider themſelves placed in this very ſituation. Now if ſuch an application had been made to your honour out of doors; is there any law in America or in any part of the civilized world, to poſtpone the examination, until a ſubpœna has been granted? It is true that evidence on both ſides has been ſome times produced; but this took place when the evidence happened to be preſent; and there exiſts not a ſimple pecedent in all the annals of juriſprudence, where the courſe of an examination has been ſuſpended, by an application for ſubpœna, and the waiting for witneſſes.—The preſent motion therefore is manifeſtly premature.—Mr. Hay confeſſed that his object was to ſave time; he had no doubt that the documents would be forwarded in a much ſhorter time than they could poſſibly obtain them by this proceſs. Why were they not ſooner applyed for? True it is that there has been ſome correſpondence between Mr. Randolph and Mr. Smith, about an order from the navy department: but never before yeſterday, was the materiality of gen. Wilkinſon's letter ſuggeſted, altho' that letter had beed publicly known to exiſt, as long ago as the 27th of January. The accuſed knew this; his counſel knew it; and yet have they made no attempts to obtain it; nor have they ever ſtated its materiality.

Mr. Wickham would not enquire, whether it was the object of the gentlemen to ſave or to obtain time; though probably the laſt; as gentlemen ſeemed very ſolicitous to ſend on a meſſenger to Waſhington to obtain inſtructions directing them *how* to act: but if the ſaving of time was an object with the court, the courſe which he recommended was beſt calculated to obtain it. It was the ſhorter way to reſort at once to that expedient, which muſt be at laſt employed, if the expectations of the attorney for the United States, ſhould turn out to be fallacious, and his application at Waſhington ſhould prove to be unavailing —The clerk himſelf, if called upon for ſubpœnas, muſt iſſue them abſolutely. It was the practice; and it was the law; but inſtead of applying to the clerk, they deemed it neceſſary in a caſe of ſuch importance, to make their application directly to the court. They were more willing too to prefer this courſe; as they did not wiſh the preſence of the Preſident? but only of certain papers; and it was not therefore their wiſh to obtain a common ſubpœna for his perſon, but a ſubpœna *Duces Tecum* for thoſe papers.

This is the firſt time I have heard, ſince the Declaration of American Independence, that an accuſed man is not to obtain witneſſes in his behalf. What has the gentleman himſelf done? Are there not witneſſes preſent, whom he has ſummoned; under the authority of this court and at his own ſpecial inſtance? And will he at laſt admit, that there is to be no kind of equality betweenn the accuſed and the proſecution: and that we are to remain here peſectly mute and bound hand and foot, to wate the deciſion of his own witneſſes?

But at what time are we to be entitled to theſe privileges? At the period of Col. B's tranſportation? That is a moſt unwarrantable proceeding; there is no ſuch caſe recognized by the conſtitution: and therefore there could be nothing in that conſtitution to give us the right of founding any judicial proceeding on ſuch a ſtep. But, ſir, ſuch an illegal tranſaction entitles us to ſtill more, it entitles to the protection of every citizen in the county; as well as of this court.—Suppoſe that Col. Burr was now put on his examination; would he not have a right to examine any witneſſes, who were beyond the bar; and of courſe to ſubpœna every man, who would be brought before you during the term of examination? This practice is every day purſued by magiſtrates. Why not in the preſent caſe?

It has been ſaid, that there is nothing in this country to juſtify ſuch an application. that there are no Precedents. But I will quote, ſir, another trial, which was ſimilar, in its proceedings, and ſimilar, I truſt, in its reſults — I refer to the caſes of Smith and Ogden before the Circuit Court of New-York. Subpœnas were actually taken out, before the Trial, for Meſſrs. Madiſon and Dayborn: and even the expences of their travelling were tendered to them. But the preceedings did not even ſtop here. For a motion for an attachment was made before the court, founded upon the proof of ſerving theſe Subpœnas; and the proof of offered compenſation. The argument at length cloſed on this motion for attachment. But no man doubted the right of the court to iſſue Subpœnas. The only queſtion was, whether at that time an attachment ought to iſſue — The court was unanimous about the right of Subpœnas; but on the attachment, they were divided: Judge Patterſon being for it; and Judge Talmage againſt it.

We are however aſked, Sir, for what purpoſe do we wiſh to procure this evidence? It is at their opinion to ſay, whether bills ſhall be laid before the G. Jury or not." Granted, Sir. It *is* in the power of the attorney for the United States to ſend up his bills or not. But ſhould theſe bills be found true, and the trial come on, may we not be ruled to trial, *inſtanter*; and without the aid of our witneſſes? But what was done the other day, may be hereafter repeated. Witneſſes were introduced on behalf of the United States, and others perhaps would have been; on the motion for a commitment. This motion is for the preſent only ſuſpended. But if that be the caſe; may not the teſtimony now required be, relevant to our defence?—The attorney for the United States triumphantly declares, that he muſt do as he pleaſes; and that we know not what he intends to do. That is true, Sir; but may not we too do ſomething? May not