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TRIAL OF Col. Aaron Burr.

CONTINUED.

Saturday, June 13.

Judge Marshall's Opinion on the motion to subpœna the President, concluded.

If in being summoned to give his personal attendance to testify, the law does not discriminate between the President and a private citizen, what foundation is there for the opinion that this difference is created by the circumstance that this testimony depends on a paper in his possession, not on facts which have come to his knowledge otherwise than by writing? The court cannot perceive no foundation for such an opinion. The propriety of introducing any paper into a case as testimony must depend on the character of the paper, not on the character of the person who holds it. A subpœna *duces tecum* then may issue to any person to whom an ordinary subpœna may issue, directing him to bring any paper of which the party praying it has a right to avail himself as testimony, if indeed that be the necessary process for obtaining the view of such paper.

When this subject was suddenly introduced, the court felt some doubt concerning the propriety of directing a subpœna to the Chief Magistrate, and some doubt also concerning the propriety of directing any officer in his possession, not public in its nature, to be exhibited in court. The impression that the questions which might arise in consequence of such process were more proper for discussion on the return of the process than on its issuing, was then strong on the mind of the judges, but the circumspection with which they would take any step which could in any manner relate to that high personage, prevented their yielding readily to those impressions, and induced the request that those points if not admitted might be argued. The result of that argument is a confirmation of the impression originally entertained. The court can perceive no legal objection to issuing a subpœna *duces tecum* to any person whatever, provided the case be such as to justify the process.

This is said to be a motion to the discretion of the court. This is true. But a motion to its discretion, is a motion not to its inclination, but to its judgment, and its judgment is to be guided by sound legal principles.

A subpœna *duces tecum* varies from an ordinary subpœna only in this, that a witness is summoned for the purpose of bringing with him a paper in his custody. In some of our sister states whose system of jurisprudence is erected on the same foundation with our own, this process we learn issues of course. In this state it issues not absolutely of course, but with leave of the court. No case however exists, as is believed, in which the motion has been founded on an affidavit, in which it has been denied, or in which it has been opposed. It has been truly observed that the opposite party can regularly take no more interest in the awarding a subpœna *duces tecum*, than in the awarding an ordinary subpœna.—In either case he may object to any delay, the grant of which may be implied in granting the subpœna, but he can no more object regularly to the legal means of obtaining testimony which exists in the papers, than testimony which exists in the mind of the person who may be summoned. If no inconvenience can be sustained by the opposite party he can only oppose the motion in the character of an *amicus curia* to prevent the court from making an improper order, or from burdening some officer by compelling an unnecessary attendance. This court would certainly be very unwilling to say that upon fair construction the constitutional and legal right to obtain its process 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 subpœna 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 an overstrained rigour 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 controuled 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 shew the nature of the discretion which may be exercised. If it is apparent that the papers are irrelative to the case, or that for state reasons they cannot be introduced into the defence, the subpœna *duces tecum* would be useless; but if this is not apparent; if they may be important in the defence; 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 favour of this position has been urged the opinion of one whose loss, as a friend and as 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 revise the judgment I had formed. But I perceive no such opposition.

In the trials of Smith and Ogden, the court in 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 as 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 a 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 most 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 compulsory process to bring in a witness, and moved a continuance until they could have the benefit of this process. The continuance was to arrest the ordinary course of justice, and therefore, the court required a special affidavit shewing the materiality of the testimony before this continuance could be granted. *Prima facie*, the evidence could not apply to the case, and this was an additional reason for a special affidavit. The object of this special statement was expressly said to be for a continuance.

"COLDEN *proceeded.* "*The present application is to put off the cause on account "of the absense of witnesses whose testimony the defendant alledges is material for "his defence, and who have disobeyed the "ordinary process of the court. In compliance with the intimation from the bench "yesterday, 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 the witnesses who are the objects of this application, then the cause will not be postponed.*

"*Or if it appears to the court that the "matter disclosed by the affidavit might not "be given in evidence if the witnesses were "now here, then we cannot expect that our "motion will be successful. For it would "be absurd to suppose that the court will "postpone the trial on account of the absence "of witnesses whom they cannot compel to "appear; and of whose voluntary attendance there is too much reason to despair; "or on account of the absence of witnesses "who, if they were before the court, could "not be heard on the trial.*"

This argument states unequivocally the purpose for which a special affidavit was required.

The counsel for the United States considered the subject in the same light. After exhibiting an affidavit for the purpose of showing that the witnesses could not probably possess any material information, Mr. Stanford 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 shew 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 what is 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 shew cause why an attachment should not issue ought to be granted.—He could not have required the materiality of the witness to be shewn 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 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 General Wilkinson, which was referred to in the Message of the President to Congress. The application of that letter to the case, is shewn, by the terms in which the communication was made. It is a statement of the conduct of the accussed, made by the person who is declared to be the essential witness against him. The order for producing this letter is opposed:

1st. 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 declaration. 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 was with some surprize an argument was heard from the bar insinuating that the award of a subpœna on this ground gave the countenance of the court to suspicions 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 contests 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 United 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 in the court that the witness had not spoken the truth? Respecting so unjustifiable an interposition but one opinion could 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 in some form to have the benefit of it, if it was 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 shews 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 subpœna.

3dly. 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 could not be superior to the original, and the original itself could not be admitted if denied without proof that it was in the hand writing 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 hand writing of the person indicted. Would its being deposited in the department of state, make it his writing or subject him to the consequences of having written it? Certainly not. For the purpose then of shewing 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