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TRIAL OF
Col. Aaron Burr,

(CONTINUED.)

Tuesday, August 11.

John H. Upfhaw was called up; when the Chief Juftice wifhed to know whether Mr. U's impreffions had related to treafon, or to what circumftances? A. To the tranfactions in the weftern country. Q. Did your opinions amount to the charge of treafon? A. My opinions have changed, as the lights of evidence feemed fucceffively to rife upon me. It was my firft impreffion, that col. B. had nothing more in view than the fettlement of the Wachita lands. I next fuppofed, that it was his intention to conquer Mexico: and laft of all, that his plans were of a more complicated nature; and that the taking of New-Orleans was to be a ftep towards the invafion of Mexico.

Mr. Wickham. Did you think, Sir, as the refult of all thefe confiderations, that col. B. was a dangerous man?

Anf. I did.

Mr. McRae. Have you formed or delivered an opinion, that he was guilty of the act charged in the indictment?

Anf. No: I have neither formed nor delivered fuch an opinion.

Mr. Baker. Have you in your part of the country fupported the ground that col. B. was guilty: and have you thus argued in converfation?

Anf. Yes; I have fo thought, on the prefumptive evidence that was before me; and I have not only fupported fuch opinions; but have gone on to vindicate the energy of the meafures that were taken by the government.

Mr. Burr. Enough, I think, has appeared to prove that Mr. U. has taken up deep-rooted prejudices againft me.

Mr. McRae. Have you any perfonal prejudices againft the prifoner?

Anf. None: I have no prejudices againft him, but from his fuppofed defigns againft his country.

Mr. Burr. Had you not taken up fome prejudices againft me anterior to thefe rumoured tranfactions in the weftern country?

Anf. I had formed impreffions rather unfavorable to you, from your conduct during the pending prefidential election of 1801: but I had no pofitive evidence on that fubject.—Here Mr. Upfhaw was fufpended; to make way for a general argument on the doctrine of challenges.

Mr. Martin rofe to proceed with this argument: He ftated, that it was one of the foundeft principles of law, that every man had a right to be tried by an impartial jury; that this rule was as well applicable in civil as in criminal cafes; but that in criminal cafes, it had been particularly fecured by the conftitution.

Mr. McRae apologifed for interrupting Mr. Martin; but begged leave to enquire, whether it would not be a faving of time, firft to know the objections of all the jurors, and then to hold one general argument to fettle the principles that would be applicable to all; inftead of thus holding an argument on each particular cafe as it might fucceffively occur.

Mr. Martin. And does the gentleman, fir, pretend to dive into our hearts that he thus underftands whether we are to hold twelve feparate arguments? He talks, fir, of œconomy of time. And is this the way to œconomize it? I had a fpecimen of this mode when I was here on a former occafion. Yes, fir, I well know how thefe gentlemen would fave our time. They would, if they could, deprive col. B's counfel of an opportunity of defending him; that they might as foon as poffible hang up their victim to gratify the feelings of the government.

Mr. McRae. *That* is a moft unprincipled and unfounded affertion; I fay it, fir, to his face.

Mr. Burr. We have entered into this argument, becaufe we thought it more precife to fix the principles on this fubject at once; and then to apply thefe to the particular cafes.

Mr. Hay. It is our wifh, fir, to purfue this enquiry as foon as poffible, and to fave time: but, fir, it is impoffible for us to hear fuch grofs infults as have been caft upon us; infults, which are offenfive to humanity itfelf.

The Chief Juftice had hoped that no fuch allufions would have been made: The government ought to be treated with refpect.

Mr. Burr had hoped, when he was up before, that he had made fufficient apologies, were any neceffary, for any expreffions which had been ufed; and that no allufions would be made to the fubject: In his own perfon he had carefully avoided fuch language, though the profecution had certainly furnifhed him with good reafons for it; and when it had been ufed by his counfel, it had met his decided difpleafure. He again repeated his hope that no allufions would be made to the paft; he would anfwer for it that his own counfel fhould furnifh no occafion for cenfure.

Mr. Martin declared that it was not his wifh to hurt any one's feelings? but that when he was fo often interupted & accufed of a difpofition to wafte time, he could not reprefs them. As to the point before the court, what does the conftitution moft emphatically require? That the jury fhould be impartial; that they fhould have no impreffion on their mind to the prejudice of the prifoner; but that they fhould come here to take all their impreffions from the facts exhibited on evidence and upon oath. To this effect he would take the liberty of quoting Reevs's Hiftory of the Englifh Law vol. 1, p. 329 and vol. 2, p. 446, and Carey's Englifh Liberties, p. 245, 248, 249, to prove the rigid degree of impartiality required by the laws of England. Thefe authorities would fhow that a juryman ought to be completely indifferent to either party; that he ought to have neither enmity nor friendfhip; and that even a particular familiarity and at the fame table, was fufficient to difqualify him. But if a man was to be divefted of all affection and all relationfhip in a civil cafe, how much more fhould he be in that fituation, in a cafe of life and death? It was one of the moft facred maxims of the law too, that every man was prefumed to be innocent, until there was fufficient evidence produced to remove this prefumption. Mr. M. did not underftand this halving and quartering of prejudices. It was not fufficient that this man fhould have one fourth of the prepoffeffion of *that*; or that he fhould be 3-5ths or 4-7ths lefs prejudiced than another; but the law requires that he fhould be wholly and perfectly impartial. The conftitution forbids courts of juftice ever forcing up on a criminal any juror that is not perfectly unbiaffed. Gentlemen may fay, indeed, that we muft either take fuch men, or have no trial at all. But it was not fo: he fhould contend that under the conftitution a man fhould not be tried and hung becaufe a court cannot get impartial jurymen to try him. The fpirit of that inftrument declares, that no man fhould be tried, until he could be tried by an impartial jury. Mr. M. quoted 2 McNally, page 667 to fhow, that a trial may be put off on an affidavit, if the public mind is fo prejudiced by publications, as to exclude the chance of a fair trial. To the fame effect alfo he cited the cafe of the King vs. the Dean of St Afaph; and the cafe of Brookes and others, where the trial had been put off to another term, becaufe an imperfect ftatement of part of the evidence had been given to the public; that public, from which the jury was to be felected. What is the fituation of jurymen in the prefent cafe? They are to determine upon the fubject matter growing out of tranfactions in the weftern country.—Thefe gentlemen may fay that they are fatisfied of Col. B's treafonable purpofes: it would be enough if they had conceived that thefe purpofes were dangerous; becaufe it is the court, which is to give a name to thefe crimes. Can then a man, whofe mind is impreffed with an opinion of certain practices dangerous to the union, be looked upon as an impartial juryman? His mind is already half made up; and that half is perhaps the moft material part. The acts themfelves might be innocent if uncoupled with the intentions: 20 boats affembled at Blannerhaffet's Ifland, and their crews armed with rifles, are as harmlefs an apparatus, as if the men were going to fhoot game; but it is the intention which ftamps them with a different character. Men whofe minds are made up as to the intentions, need only have proof of certain acts; and the bufinefs is done. The conftitution and common fenfe both require that a jury fhould be as free from impreffions as to defigns as to overt acts. The principle is the fame as in a cafe of Burglary.—It is to be lamented that the public mind is in the ftate, which gentlemen have defcribed; but it is certainly not fo to the extent which they have reprefented. The 48 men who are on this pannel, are not an accurate fpecimen of the whole ftate.—And who is it that commenced with thefe inflammatory publications? Was it Colonel Burr's counfel? No; it was the public papers, under the patronage of the adminiftration. And it was the gentleman on the other fide who has contributed to keep up this fpirit. It was his zeal; it was he, who was fuppofed beft acquainted with the evidence againft him, that pronounced upon his guilt and prepoffeffed the public mind againft him. No man can be looked upon as impartial who has been prejudiced by fuch publications.

Mr. Burr rofe to narrow the argument not to extend it, not to add any thing more, but to throw out of the difcuffion what had been accidentally introduced. That the public mind was prejudiced againft him was an obvious fact; but how this prejudice had been produced, he knew not. He had not wifhed this point to be at all introduced.—Certain analogies had been introduced between treafon and other crimes. It was his hope, that the Court would, for the prefent difmifs fuch analogies, as they might be hereafter conftrued into opinions.—It was evident enough that no juryman could be impartial whofe mind was made up as to the intention. In the cafe of flaying, for inftance, the act might be differently conftrued. It may be a murder: it may be, a clergyable felony.—Could a juryman be confidered as impartial, that thinks the accufed perfon guilty of a murderous intent?

Mr. McRae ftated that it had never been his wifh in this controverfy before the court, to wander from the way, in order to defend a government, that needs no defence; or to give an unneceffary wound to the bofom of the prifoner. He had moft ftudioufly avoided to excite the refentment or difturb the feelings of the oppofite counfel. Frequent as had been the occafions when he was prompted to imitate their example; he had carefully avoided profiting by the opportunity; unlefs on one occafion when he had been forced to retaliate the attack. He fhould not, however, always purfue this courfe, if fome of the oppofite counfel fhould ftill perfift in difregarding the admonitions of the court. He fhould attempt to retort with the force which fuch attacks deferved in every cafe, and more efpecially in cafes of this defcription. He declared before that court, before that people, and before the God of his being, that he had never felt the inhuman wifh of demanding the blood of the prifoner; or any human being. That man was a ftranger to him, who fhould attribute to him fuch a difpofition. He wifhed the prifoner to have an impartial jury; and if there was a fingle one among thofe fet over, who was not impartial, who was not capable of paffing between the U. States and Aaron Burr, he requefted the court to reject him. As to the principles ftated by Mr. Martin, he did not intend to controvert them. He only differed with him in their application to the prefent cafe. Which of thefe jurymen has informed the court, that he has an ill-will againft A. B? a perfonal prejudice? and that on the queftion of treafon, he has a bias againft him? It is true, they have formed fome opinions about his intentions; but they have received no evidence on which they can form any opinions as to the queftion of actual treafon. And as to thefe intentions, they may have related to other acts, than thofe charged in the indictment; to acts done without the diftrict; which are not now before this court. The diftinction which they have drawn between intentions and acts is perfectly clear and rational. Thefe jurymen prove that they have adverted to this diftinction, becaufe they quote the opinion of one of the judges now on the bench, who has formally adopted it.—And if this impartiality does not refide in the bofom of the judge, what reafon is there to afcribe lefs of it to the minds of the jurors?

Mr. Hay admitted that the prifoner was entitled to an impartial jury; but the queftion was who was an impartial juryman? He muft be one, faid Mr. Hay, that partakes of the common fentiments of the majority of the people among whom he refides. Will the court undertake to fay, that the majority of this diftrict is incapable of judging properly? If fo, he would unite with Mr. Martin in faying, that it was a libel on the ftate; and the majority would very truly return the compliment, by faying, you alone who brand us with this cenfure prove by this very act the prejudices with which you yourfelf are actuated.—The oppofite counfel have fpoken of news-paper publications. He would venture to fay that there is not a man of however remote a fituation, or of fupine a difpofition, who has not received fome impreffions on this fubject. Thefe impreffions were taken up without any fentiment of ill-will to the accufed; or without even knowing him. Is it reafonable then to pronounce, that with thefe impreffions the majority is incapable of deciding fairly? There may perchance be fome one ignorant man who has received no impreffions on this fubject, fome folitary hermit that is fhut up in the hollow of a tree; fome human being cut off from all human concerns; into whofe folitary bofom the hiftory of thefe tranfactions has never yet penetrated: but fuch is not the picture of the world at large. Our fociety is divided into two great parties; he knew that thefe two were not to a man united on this occafion; but he knew too that there was not a man among them, who had not taken his fide, one way or the other. Some authorities had been cited from Reeves and McNally; they did not bear upon this cafe; but he fhould cite two others which did. The firft was the cafe of Callender, where it was fuppofed fufficient to afk the juryman, whether he had formed and delivered an opinion on the point at iffue. The other was from 2 Hawkins, ch 46, p. 418 on the fubject of challenges, where it is faid to be no good caufe of challenge, that a man is a juryman on an indictment fimilar to that on which he has already found a verdict. Mr. Hay commented upon thefe authorities at confiderable length.

LATEST PROCEEDINGS.

SATURDAY, August 15.

It is proper to obferve that on Thurfday three of the jury, who had been fummoned on the *fecond* Venire, were difcharged by the court, viz. general Pegram, becaufe he was then engaged in military bufinefs; Mr. Lewis, becaufe he owned no freehold in the ftate of Virginia; and Mr. William Moncure of this city, on account of his indifpofition. It was underftood before the rifing of the court that the marfhal was to fummon three fubftitutes, and that the prifoner would accept them. Of courfe the Venire which was this day brought into court, was compleat, and confifted of 48.

Benjamin Tate was excufed from ferving, on account of his indifpofition.

Henry Randolph wifhed to be difcharged becaufe he was engaged in collecting the public revenue. The court would not however admit the validity of the excufe.

The Venire was then called over, in the following order:

Jacob Michaux, Powhatan, William Randolph, Surry, John Edmands, Suffex, George Minge, Charles City, William L. Morton, Charlotte, Chriftopher Anthony, Goochland, John Darricot, Hanover, Wafhington Truehart, Louifa, Martin Smith, Prince Edward, Benjamin Tate, City of Richmond, Chriftopher Tompkins, do. Benjamin Branch, Dindwiddie, Thos. Branch, Chefterfield, James Sheppard, City of Richmond, Gabriel Raifton, do. Micajah Davis, Bedford, Reuben Blakey, Henrico, Miles Selden, Suffex, Walter Bient, do. Richard N. Thweatt, Peterfburg, John Fitzgerald, Nottoway, Robert M'Kim, City of Richmond, Benjamin Graves, Chefterfield, Wm M'Kim City of Richmond, Robert Hyde, do. Thomas Miller, Powhatan, Robert Goode, Chefterfield, Henry Randolph, do. Miles Bott, do. Henry