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TRIAL OF
Col. Aaron Burr,
(CONTINUED.)

Saturday September 12.

The arguments were this day closed on the important queſtion which has for ſeveral days paſt been diſcuſſed before the court.

Meſſrs. Randolph, Martin and Wickham ſeverally ſpoke at conſiderable length. On Monday next it is ſuppoſed the Chief Juſtice will deliver his opinion.

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Monday, September 14.

The Chief Juſtice delivered the following opinion on the queſtion concerning the admiſſibility of evidence on the preſent indictment, for a Miſdemeanor, againſt Col. Burr.

The United States } On a Misdemeanor.
Aaron Burr.

The preſent motion is particularly directed againſt the admiſſion of the teſtimony of Neale, who is offered for the purpoſe of proving certain converſations between himſelf and Herman Blannerhaſſett. It is objected that the declarations of Herman Blannerhaſſett are at this time inadmiſſible on this indictment.

The rule of evidence which rejects mere hearſay teſtimony, which excludes from trials of a criminal or civil nature the declarations of any other individual than of him againſt whom the proceedings are inſtituted, has been generally deemed eſſential to the correct adminiſtration of juſtice. I know not why a declaration in court ſhould be unavailing unleſs made upon oath, if a declaration out of court was to criminate others than him who made it; nor why a man ſhould have a conſtitutional claim to be confronted with the witneſſes againſt him, if mere verbal declarations made in his abſence may be evidence againſt him. I know of no principle in the preſervation of which all are more concerned, I know none by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle ſo truely important.

This rule as a general rule is permitted to ſtand, but ſome exceptions to it have been introduced concerning the extent of which a difference of opinion prevails, and that difference produces the preſent queſtion.

The firſt exception is that in caſes of conſpiracy the acts, and it is ſaid by ſome the declarations, of all the conſpirators may be given in evidence on the trial of any one of them, for the purpoſe of proving the conſpiracy, and this caſe, it is alledged, comes within the exception.

With regard to this exception a diſtinction is taken in the books between the admiſſibility and operation of teſtimony which is clear in point of law, but not at all times eaſy to practice in fact. It is that although this teſtimony be admitted, it is not to operate againſt the accuſed unleſs brought home to him by teſtimony drawn from his own declarations or his own conduct.

But the queſtion to be conſidered is, does the exception comprehend this caſe? Is this a caſe of conſpiracy according to the well eſtabliſhed law meaning of the term?

Caſes of conſpiracy may be of two deſcriptions.

1ſt. Where the conſpiracy is the crime, in which caſe the crime is complete altho' the act ſhould never be formed, & in ſuch caſes if ſeveral be indicted, and all except one be acquitted, that one cannot, ſay the books, be convicted, becauſe he cannot conſpire alone.

2d. Where the crime conſiſts in the intention, and is proved by a conſpiracy, ſo that the conviction of the accuſed may take place upon evidence that he has conſpired to do any act which manifeſts the wicked intention.

In both theſe caſes an act is not eſſential to the completion of the crime, and a conſpiracy is charged in the indictment as the ground of accuſation. If the conſpiracy be the ſole charge, as it may be, the queſtion to be decided is not whether the accuſed has committed any particular fact, but whether he has conſpired to commit it. Evidence of conſpiracy in ſuch a caſe goes directly to ſupport the iſſue. It has therefore been determined that the nature of the conſpiracy may be proved by the tranſactions of any of the conſpirators in furtherance of the common deſign; the degree of guilt however of the particular conſpirator upon trial, muſt ſtill depend on his own particular conduct.

In the caſe at bar the crime conſiſts not in intention but in acts. The act of congreſs does not extend to the ſecret deſign if not carried into open deed, nor to any conſpiracy however extenſive if it do not amount to a beginning or ſetting on foot a military expedition. The indictment contains no alluſion to a conſpiracy, and of conſequence the iſſue to be tried by the jury is not whether any conſpiracy has taken place; but whether the particular facts charged in the indictment have been committed.

I do not mean to admit that by any courſe which might have been given to the proſecution, this could have been converted into a caſe of conſpiracy; but moſt aſſuredly if it was intended to prove a conſpiracy, and to let in that kind of teſtimony which is admiſſible only in ſuch a caſe, the indictment ought to have charged it.

I have not been able to find in the books a ſingle deciſion, or a ſolitary dictum which would countenance the attempt that is now made to introduce as teſtimony the declarations of third perſons made in the abſence of the perſon on trial, under the idea of a conſpiracy where no conſpiracy is alledged in the indictment. The reſearches of the counſel for the proſecution have not been more ſucceſsful. But they ſuppoſe this caſe, though not within the letter, to come clearly within the reaſoning of thoſe caſes where this teſtimony has been allowed.

It has been ſaid that wherever the crime may be committed by a ſingle individual, although in point of fact more than one ſhould be concerned in it, as in all caſes of felony, the proſecution muſt be conducted in the uſual mode, and the declarations of third perſons cannot be introduced at a trial; but whenever the crime requires more than one perſon, where from its nature it cannot be committed by a ſingle individual, altho' it ſhall conſiſt, not in conſpiracy, but in open deed, yet it is in the nature of a conſpiracy and evidence of the declarations and acts of third perſons connected with the accuſed, may be received whether the indictment covers ſuch teſtimony or not.

I muſt confeſs that I do not feel the force of this diſtinction. I cannot conceive why, when numbers do in truth conſpire to commit an act, as murder or robbery, the rule ſhould be that the declaration of one of them is no evidence againſt another, and yet if the act ſhould require more than one for its commiſſion, that the declarations of one perſon engaged in the plot would immediately become evidence againſt another. I cannot perceive the reaſon of this diſtinction; but, admitting its ſolidity, I know not on what ground to diſpenſe with charging in the indictment the combination intended to be proved. If this combination may be proved by the acts or declarations of third perſons made in the abſence of the accuſed, becauſe he is connected with thoſe perſons; if in conſequence of this connection the ordinary rules of evidence are to be proſtrated, it would ſeem to me that the indictment ought to give ſome notice of this connection.

When the terms uſed in the indictment neceſſarily imply a combination, it will be admitted that a combination is charged and may be proved. And where A. B. and C. are indicted for murdering D. Yet in ſuch a caſe the declarations of one of the parties made in the abſence of the others have never been admitted as evidence againſt the others. If then this indictment ſhould even imply that the fact charged was committed by more than one perſon, I cannot conceive that the declarations of a *particeps criminis* would become admiſſible on the trial of a perſon not preſent when they were made, unleſs thoſe declarations form a part of the very tranſaction charged in the indictment.

If in all this I ſhould be miſtaken yet it remains to be proved that the offence charged may not be committed by a ſingle individual. This may in ſome meaſure depend on the expoſition of the terms of the act; and it is to be obſerved that this expoſition muſt be fixed. It cannot vary with the varying aſpect of the proſecution at its different ſtages. If, as has been ſaid, a military expedition is begun or ſet on foot when a ſingle ſoldier is enliſted for the purpoſe, then unleſs it be begun as well by the ſoldier who enliſts as by the officer who enliſts him, a military expedition may be begun by a ſingle individual. So if thoſe who engage in the enterprize follow their leader from their confidence in him without any knowledge of the real object, there is no conſpiracy, and the criminal act is the act of an individual. So too if *this* means are *any* means, the crime may unqueſtionably be committed by an individual. Should the term be even ſo conſtrued as to imply *that* all the means muſt be provided before the offence can be comitted, ſtill all the means may, in many caſes, be provided by a ſingle individual. The rule then laid down by the counſel for the proſecution, if correct in itſelf, would not comprehend this caſe.

2dly. There are alſo caſes in the books where acts are in their nature joint and where the law attaches the guilt to all concerned in their commiſſion, ſo that the act of one is in truth the act of others, where the conduct of one perſon in the commiſſion of the fact conſtitutes the crime of another perſon: but this is diſtinct from conſpiracy.

If many perſons combine to commit a murder, and all aſſiſt in it, and are actually or conſtructively preſent, the act of one is the act of all and is ſufficient for the conviction of all. So in acts of levying war, as in the caſes of Damane and Purchaſe, the acts of the mob were the acts of all in the mob whoſe conduct ſhowed a concurrence in thoſe acts, and in the general deſign which the mob were carrying into execution. But theſe deciſions turn on a diſtinct principle from conſpiracy. The crime is a joint crime, and all thoſe who are preſent aiding in the commiſſion of it participate in each others actions, and in the guilt attached to thoſe actions. The conduct of each contributes to ſhew the nature of this joint crime; and declarations made during the tranſaction are explanatory of that tranſaction; but I cannot conceive that in either caſe declarations unconnected with the tranſaction would have been evidence againſt any other than the perſon who made them, or perſons in whoſe preſence they were made. If for example one of ſeveral men who had united in committing a murder ſhould have ſaid that he with others contemplated the fact which was afterwards committed. I know of no caſe which would warrant the admiſſion of this teſtimony upon the trial of a perſon who was not preſent when the words were ſpoken. So if Damane had previouſly declared that he had entered into a confederacy for the purpoſe of pulling down all meeting houſes, I cannot believe that this teſtimony would have been admiſſible againſt a perſon having no knowledge of the declaration and giving no aſſent to it.

In felony the guilt of the principal attaches to the acceſſary, and therefore the guilt of the principal is proved on the trial of the acceſſary. In treaſon all are principals, and the guilt of him who has actually committed the treaſon does, in England, attach to him who has adviſed, aided or aſſiſted that treaſon. Conſequently the conduct of the perſon who has perpetrated the fact muſt be examined on the trial of him who has adviſed or procured it. But in miſdemeanors by ſtatute, where the commiſſion of a particular fact conſtitutes the only crime puniſhed by the law, I believe there is no caſe, where the declaration of a *particeps criminis* can affect any but himſelf.

3dly. The admiſſion of the declarations of Mr. Blannerhaſſet may be inſtituted upon under the idea he was the agent of Col. Burr. How far the acts of one man may affect another criminally, is a ſubject for diſtinct conſideration, but I believe there is no caſe, where the words of an agent can be evidence againſt his principal on a criminal proſecution. Could ſuch teſtimony be admiſſible, the agency muſt be firſt clearly eſtabliſhed, not by the words of the agent but by the acts of the principal, and the word muſt be within the power previouſly ſhown to have been given.

The opinions of the circuit court of New York in trials of Smith & Ogden have been frequently mentioned. Although I have not the honour to know the Judge who gave thoſe deciſions, I conſider them as the determination of a court of the United States, and I ſhall not be lightly induced to diſregard them, or unneceſſarily to treat them with diſreſpect. I do not however perceive in the opinions of Judge Talmadge any expreſſion indicating that the declarations of third perſons could be received as teſtimony againſt any individual who was proſecuted under this act. If he has given that opinion, it has certainly eſcaped my notice, and has not been ſuggeſted to me by counſel. He unqueſtionably ſays in page 113 of the trial "that the reference which was made to the doctrine of conſpiracy did not apply in that caſe." The reference alluded to was the obſervation of Mr. Emmet who had ſaid "that if the object was to charge Col. Smith with the acts of Capt. Lewis, they ought to have laid the indictment for a conſpiracy." The opinion of the Judge that the doctrine of conſpiracy had no application to the caſe, appears to me to be perfectly correct.

I feel therefore no difficulty in deciding that the teſtimony of Mr. Neale, unleſs he can go further than merely ſtating the declarations made to him by Blannerhaſſet is at preſent inadmiſſible.

But the argument has taken a much wider range. The points made comprehend the excluſion of other teſtimony ſuggeſted by the attorney for the United States and the opinion of the court upon the operation of teſtimony. As there ſubjects are entirely diſtinct, and as the object of the motion is the excluſion of teſtimony ſuppoſed to be illegal, I ſhall confine my obſervations to that part of the argument which reſpects the admiſſibility of evidence of the deſcription of that propoſed by the attorney for the United States.

The indictment charges the accuſed in ſeparate counts with beginning, with ſetting on foot, with preparing, and with providing the means for a military expedition to be carried on againſt a nation at peace with the United States. Any legal teſtimony which applies to any one, of theſe counts is relevant. That which applies to none of them muſt be irrelevant.

The expedition, the character and object of that expedition, that the defendant began it, that he ſet it on foot, that he provided and prepared the means for carrying it on, are all charged in the indictment and conſequently thoſe charges may be all ſupported by any legal teſtimony. But that a military expedition was begun or ſet on foot by others, or that the means were prepared or provided by others, is not charged in this indictment, is not a crime which is or can be alledged againſt the defendant, and teſtimony to that effect is therefore not relevant.

All teſtimony which ſerves to ſhow the expedition to have been military in its character, as far for inſtance teſtimony reſpecting their arms and proviſions, no matter by whom purchaſed, their conduct, no matter by whom directed or who was preſent, all legal teſtimony which ſerves to ſhow the object of the expedition, as would be their actually marching againſt Mexico, any public declarations made among themſelves ſtating Mexico as their object, any manifeſto to this effect, any agreement entered into by them for ſuch an expedition, theſe or ſimilar acts would be received to ſhow the object of the expedition.