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Ours are the plans of fair delightful peace,
Unwarp'd by party rage, to live like Brothers.

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TRIAL
of
Colonel Aaron Burr.
(CONTINUED.)

[The following debate, on the motion to commit Col A. Burr on the charge of treason against the United States, was considered as not proper to be heard by the grand jury then impannelled, & was therefore not inserted But since it has already been admitted into the other papers published in this city, we trust we shall be excused for communicating to our readers the information which may be derived from it——*Virginia Argus.*

Monday, May 25.

Debate on the motion to commit Col. Burr for High Treason.

After the grand jury had withdrawn, Mr. Hay renewed his motion in the following words: "I now move the court to commit Mr. Burr on a charge of high treason against the United States, on the evidence formerly introduced, and on addit onal evidence which will now be brought forward."

Mr. Wickham enquired what sort of evidence was intended to be introduced? Whether that of witnesses to be examined *viva-voce*, or affidavits taken in writing?——Mr. Hay answered that, where the witnesses were present, he intended to examine them *viva-voce*; but, where they were absent, to make use of their affidavits regularly taken and certified.

Mr. Botts—We may have cause of much regret that timely notice of this application was not given. From the engagements between the prosecuting and defending counsel to interchange information of the points intended to be discussed, we had a right to expect that upon a subject like this, involving questions new and important, we should not have been taken by surprize. Indeed from the common courtesy and candor of the office of the attorney, we might have calculated on the previous communication.

Mr. Hay—If the gentlemen are not prepared they can take time until to-morrow.

Mr. Botts—Not one moment. We may sustain inconveniencies by being thus suddenly called upon to act without reflection or books, but we experience greater by a day's delay

The motion is to divest the grand jury of the office which the constitution and laws have appropriated to them, and to devolve it on the court.

There is a great objection to the exertions of the examining and committing power by a high law officer, who is to preside upon the trial.—He is obliged previously, without a full hearing, to commit himself upon the case of the accused. Every one will agree that a Judge, if possible, should come to the office of trial as free from prepossession as if he had never heard of the case before; yet as the grand inquest is not always embodied, it often becomes necessary that the Judge should enquire into the offence and commit to prevent the escape of the offender before the inquest could be legally organized. The examining office of the Judge is in these cases justified by the necessity of the case. But the necessity does not here exist.

This novel mode of proceeding, if carried into effect, would give the attorney for the United States the chance of procuring an opinion from the court unfavorable to Col. Burr: failing in that chance he would then betake himself to the only legal one before the grand jury.

Why should this court step out of its ordinary course to forestal or influence the deliberations of the grand jury? The object of the motion is without precedent or reason; against all principle, and would be most oppressive in its consequences. The history of our criminal jurisprudence yields no instance of such a motion during the session of the grand jury

It is unreasonable & against principle that the functions of the inquest should be suspended for the court to assume them It is not only oppressive, but of a piece with the long course of oppression, which has been practiced upon the gentleman whom I advocate.

We might, with propriety, have moved to discharge Col. Burr from the recognizance already given.

The laws of Congress have adopted our rules and practice in the state in proceedings upon indictments for misdemeanors. You were of opinion, you well remember, sir, that nothing more than probable cause of suspecting a misdemeanor appeared against Col. Burr. Even after an indictment, in Virginia, for a misdemeanor, nothing more than a summons can go against the indicted. No court of the commonwealth ever permitted a capias to go in the first instance, unless the case passed *sub silentio*. Now arrest and bail are utterly incompatible with a summons: and surely if an indictee cannot be arrested, one merely suspended cannot be held to bail.

The conduct of Judge Chase in awarding a capias was the subject of one of the charges in his impeachment. Mr. Hay vehemently and ably contended that a summons only ought to have gone against Callender.

I know that the court may have an impression, that I am wandering from the subject. I will soon show what application the past recognizance has with the motion now to examine the witnesses to commit for treason.

Notwithstanding Col. B. was committed upon a charge of misdemeanor, when under the state laws he could not have been committed: a public prejudice has been excited against the lenity of the measure and attempts have been set on foot thro' newspapers, and a general clamour, to intimidate every officer who might have any concern in the trial. This public prejudice would be increased by the present motion rather than allayed, if the necessary explanation should not be made. The multitude around us must hear what is passing, and we cannot submit to a course, which should further invest the public mind with the poison already too plentifully infused.

The prosecution of Col Burr has hitherto been without a check. The seizure of his friends, his papers, and his person, the activity of the satellites of power against him; the use of the low engines of military despotism in different departments of the territories of the United States; the total disregard of his rights and all law, in bringing him hither, ought to end the list of wrongs of which the country has to complain. It was rumoured that he would not appear; but he has appeared. He came on Friday, on Saturday and on Monday, to meet his accusers. He did not ask one hour, the government has had the time and means of preparation and they ought to have been prepared. Yet our purpose was to wait the pleasure of the prosecutor, unless that pleasure should be found too oppressive. We are now told though that the indictment cannot go up, and that in the mean time an inquisition must be held.

I will not weary out the patience of the court. I sit down in anxious solicitude that the success of the motion may not add to the catalogue of Col. Burr's grievances.

The Chief Justice supposed that it was intended by the counsel for the United States to open the motion more fully.

Mr. Hay did not suppose that a doubt could have existed as to the power of the court to commit. He, therefore, saw no necessity for opening the motion more fully than he had done. The general power of the court to commit cannot be questioned. If gentlemen say that it cannot be exercised in the present case, it is incumbent on them to shew it.

Mr. Wickham—It would certainly have been an accommodation to us, if the gentlemen had given us notice of their intended motion. We come into this discussion completely off our guard, completely unprepared; and it may be presumed it was merely an omission in the opposite counsel, not to have given us notice of the motion they intended to bring forward: because it was distinctly understood, that if any specific motion was to be made on either side, timely notice of the nature and object of such motion was to be given. I am sorry that they have departed from this agreement in the present instance; but if I have not forgotten every principle of law that I ever learnt, or every principle of common justice, this motion cannot be supported.

Mr. Hay—The gentleman will permit me to set him right. He might have relied on my candor, that when I was about to lay my indictment before the grand jury, I would have given him timely notice of my intention. They might then have moved for the instructions to the jury which they are so anxious to obtain. This was the only understanding between us on the subject; and our agreement extended no farther;—much less to the particular case before the court: On the other hand, there was a very strong reason against our making this communication. I feel no hesitation, sir, in assigning this reason; and I hope that it will wound neither the feelings of the prisoner or of his counsel. I do not pretend to say what effect it might produce on Col. Burr's mind: but certainly Col. B. would be able to effect his escape, merely upon paying the recognizance of his present bail. My only object then, sir, was to keep his person safe, until we could have investigated the charge of treason; and I really did not know, but that if Col. Burr had been previously apprized of my motion, he might have attempted to avoid it. But I did not promise to make this communication to the opposite counsel; because it might have defeated the very end for which it was intended. I have said the only pledge I gave, merely related to the indictments to be sent up to the grand jury.

Mr. Wickham observed, that after this explanation, he must suppose that he had misapprehended the extent of their agreement. He knew the gentleman too well to think he had intentionally misled him. But what could he think of the motion he had made? It was a strange episode which he weaved into his tale It may be good poetry, indeed, but it was not certainly matter of argument. Every man who hears me, every man who has ever read on the subject, must know what are the feelings which dictate those suspicions of A. Burr. Some mortification was felt by his enemies (not that the attorney for the U. S. himself ever felt it) that he did return here for trial.—But here Col. Burr is, as he always *will be*, ready to face every man who dares to say any thing against him The gentleman will not open his case—and why? Because, when he has heard our arguments against his motion, he may come out with the adverse arguments against us. If they do not choose to open their case, we hope the court will grant us the right of concluding the argument.

Here a desultory conversation ensued upon the order of proceeding, when it was determined the counsel of Col. Burr should open and conclude the argument.

Mr. Wickham proceeded & read from the act of Assembly of Virginia, page 103 of the Revised Code. sect. 10, as bearing upon this case. He observed that the present motion was also unprecedented in a system of criminal jurisprudence, which was upward of 100 years old. If the motion be a proper one, there must be some precedents in this country or in England.—But if there be none such, and the gentlemen have not produced them, it is but fair to infer that there are none such. It is therefore obvious that the present motion is contrary to the act of Virginia as well as to the common law.

The attorney for the U. S. has said that he can take no final measures until Gen. Wilkinson is present. *His* deposition is greatly relied upon. Now, sir, I refer to you as well as to the Superior Court of the United States, where you presided, that the facts contained in that deposition (if facts they were) did not amount to treason: but to a probable proof of the misdemeanor only As to Gen. Eaton's, it is not relied on. The sole reliance of the prosecution is upon Wilkinson's. Of course, if Wilkinson were present, he could prove nothing new. But if Gen. Wilkinson is so material a witness, why are they not prepared to go with him before the grand jury? Why is not Gen. Wilkinson here? He is a military officer, bound implicitly to obey the head of the government. In the wars of Europe, a General has been known to march the same distance at the head of his army in a shorter time than General Wilkinson has had to pass from N. Orleans to this place. He is bound to go where ever the government directs him; to march to Mexico, to invade the Floridas, or to come to this city. Perhaps there are other reasons for his not coming. But let us not press this subject.

What, sir, is the tendency of this application? What is the motive? I have no doubt but that the gentlemen mean to act correctly. I wish to cast no imputations. But the counsel and the court well know that there is a set of busy people (not I hope employed by the government) who thinking to do right, are laboring to injure the reputation of my client. I do not charge the government with this attempt. But the thing is already done. Attempts *have* been made. The press from one end of the continent to the other has been enlisted on their side; to raise prejudices against Col. Burr. Prejudices? Yes; they have influenced public opinion; by such representations, and by persons not passing between the prisoner and his country, but by exparte evidence & mutilated statements.—Ought not this court to bar the door as far as possible against such misrepresentations? To shut every effort to excite further prejudices, until the case is decided by a sworn jury, not by the floating rumors of the day, but by the evidence of sworn witnesses?—The attorney for the U. States offers to produce his testimony, no doubt the least impartial which he can select; testimony which is perhaps to be met and overthrown by superior evidence. Do they, besides these things, wish that the multitude around us should be prejudiced by garbled evidences? Do precedents justify such a course as this? "Produce your witnesses," they may say. No sir, Col. Burr is ready for a trial, but he wishes that trial to come before a jury. I do not pretend to understand the motive which led to these things: it is enough that they produce the same mischievous effects upon ourselves. Should government hereafter wish to oppress any individual; to drag him from one end of the country to the other by a military force; to enlist the prejudices of the community against him, they will pursue the very same course which has now been taken.

Col. Burr is here ready for trial. They admit that their testimony is not sufficient to bring him before a grand jury; and of course to found an indictment against him. Why then is this partial evidence to be exhibited on a motion for commitment? It is to nourish the prejudices against him.—Will they then press a motion like this? Be it so, sir, I trust the court will stand between the prisoner & his pursuers; for every man is presumed to be innocent, before he is found guilty.

Mr. Wirt—May it please your honors. The attorney for the U. S. believing himself possessed of sufficient evidence to justify the commitment of A. Burr for high treason, has moved the court to that effect. In making this motion he has merely done his duty; it would have been unpardonable in him to omit it. Yet the counsel in the defence complain of the motion and of the want of notice. As to the latter objection, it must be palpable that the nature and object of the motion rendered notice improper. The gentlemen would have had the attorney to announce to the party concerned, that he was at length, in possession of sufficient evidence to justify his commitment for high treason: and that being apprehensive he might not be disposed to stand this charge, he intended, as soon as the accused came into court next morning, to move his commitment This would really be carrying politeness beyond the ordinary pitch: it would not have deserved the name of candor, sir; it would in fact, have been an invitation to the accused to make his escape. But as gentlemen seem to doubt, with an air at least of earnestness, the propriety of this motion at this time, and express their regret that they have not had time to examine its legality, the attorney has offered to waive the motion until to-morrow, to give gentlemen the opportunity which they profess to desire; but no, sir; they will not even have what they say they want, when offered by the attorney. Another gentleman, after having demanded why this motion was made, and by that demand drawn from the attorney an explanation of his motives, has been pleased to speak of the attorney's statement of his apprehensions as "an episode:" which "although good poetry," he says, "had better have been let alone when such serious matters of fact were in discussion." It may be an episode sir, if the gentleman pleases; he is at liberty to consider the whole trial as a piece of epic action, and to look forward to the appropriate catastrophe. But it does not appear to me to be very fair, sir, after having drawn from the attorney an explanation of his motives, to complain of that explanation: if a wound has been inflicted by the explanation, the gentlemen who produced it should blame only themselves. But, sir, where is the impropriety of considering Aaron Burr as subject to the ordinary operations of the human passions? Towards any other man, it seems, the attorney would have been justifiable in using precautions against alarm and escape; it is only improper when applied to this man. Really, sir, I recollect nothing in the history of his deportment which renders it so very incredible that Aaron Burr should fly from a prosecution. But at all events, the attorney is bound to act upon general principles, and to take care that justice be had against every one accused, by whatever name he may be called, or by whatever previous reputation he may be distinguished.

This motion, however, it seems, is not legal at this time, because there is a grand jury in session. The amount of the position is, that altho' it be generally true, that the court possesses the power to hear and commit, yet if there be a grand jury, this power of the court is suspended;—and the commitment cannot be had unless, in consequence of a presentment or bill of indictment, found by that body. The general power of the court being admitted, those who rely on this exception should support it by authority, and, therefore, the loud call for precedents which we have heard from the other side, comes improperly from that quarter. We ground this motion on the general power of the court to commit; let those who say that this power is destroyed by the presence of a grand jury, shew one precedent to countenance this original and extraordinary motion. I believe, sir, I may safely affirm, that not a single reported case or *dictum* can be found, which has the most distant bearing towards such an idea. Sir, no such dictum or case *ought* to exist; it would be unreasonable and destructive of the purposes of justice. For if the doctrine be true at all, that the presence of a grand jury suspends the power to hear and commit by any other authority, it must be uniformly and universally true, in every other case as well as this, and in every case which can be proposed while a grand jury is sitting. Now, sir, let us suppose, that immediately on the swearing of this grand jury and their retiring to their chamber, Aaron Burr had been for the first time brought to this town—the members of the evidence scattered over the continent; the attorney, however, in possession of enough to justify the arrest and commitment of the accused for high treason, but not enough to authorise a grand jury to find a true bill. What is to be done? The court disclaims any power to hear and commit, because there is a grand jury:—The grand jury cannot find a true bill, because the evidence is not sufficient to warrant such finding; the natural and unavoidable consequence would be, that the man must be discharged—And then, according to Gen. Wilkinson's principle of ethics, that every man is supposed to intend the natural consequences of his own acts, the gentlemen who advocate this doctrine intend that Aaron Burr be discharged without a trial.

I beg you, sir, to recollect what was said by gentlemen the other day,