

the prisoner, &c. that the counsel of the United States now shewed cause against his discharge, by charging him upon the indictment for a misdemeanor.

Mr. Botts contended that the court was a judge whether the charge was of such a nature as to detain him in custody. He then proceeded to argue, very much at length, that a person charged with an offence less than capital, is not to be retained in custody, but, in the first place, to be summoned to answer the indictment. He said that on indictments for misdemeanors, the regular course in Virginia was to issue a *summons* or *venire facias*, commanding the accused to appear; not a *capias* to take his body, until he should be in contempt; that it was contrary to common sense, in cases where the punishment, on conviction, is only fine and imprisonment, that imprisonment should precede the sentence. In support of this position he cited a number of cases.

He observed that the Judge in Callender's case had awarded a *capias* instead of a *summons*; but this was done without argument, and proceeded from his not being acquainted with the law of Virginia; that his doing so was the foundation of one of the articles of impeachment against him. The Senate had indeed unanimously acquitted the Judge on that article; but it did not follow that they approved of his opinion; since they might have thought, that he had acted inadvertently, and with no evil design. To shew that Judge Chase's opinion was erroneous, he quoted the argument of Mr. John Randolph, one of the managers of the impeachment (Chase's Trial p. 17) and cited Mr. Hay's own declarations (ib. p. 35).

Mr. Hay interrupted him & said, that this conduct in Mr. Botts was unfair; that Mr. Martin had delivered on that occasion a long speech maintaining a doctrine opposite to that now contended for by Col. Burr's counsel; but he would scorn on the present occasion, to make use against him of what he had then said.

Mr. Botts said there was a difference between the situation of Mr. Martin and Mr. Hay. Mr. Martin was defending a person accused, and was therefore justifiable in using the best arguments he could for his client, but Mr. Hay had declared that as to himself, he defended Callender merely as the Lawyer of the Constitution; and on that occasion was giving testimony as a witness.

The Chief Justice took time to consider the question, and adjourned the court till Thursday 10 o'clock.

Thursday, Sept. 3.

The Chief Justice delivered his opinion in writing at considerable length on the question made the day before: the result of which was that a *capias* was declared to be the proper process, in this and other cases of misdemeanor, where imprisonment is part of the punishment upon conviction; but that the accused being already in custody, it was unnecessary to issue it. He might, however, be admitted to bail.

Mr. Hay said he would then proceed with the indictment for a misdemeanor.

Col. Burr mentioned that the letter from Gen. Wilkinson to the President of the U. S. had not yet been produced.

Mr. Hay declared that he had looked over all the papers received from Mr. Rodney, and had not been able to find it. He had written to that gentleman on the subject; and offered to furnish Col. Burr with a copy verified by an affidavit.

Col. Burr said he was not prepared to go into trial to-day. He would consider by to-morrow whether he could accept a copy.

A variety of desultory conversation took place on the subject of the quantum of bail to be required of Col. Burr; and on a question, whether his giving bail might not entangle or obstruct the motion to commit him for treason; the Chief Justice seemed inclined to think, that if he was bound in a recognizance here, he could not be sent to another state for trial; and his counsel contending that, to get rid of the difficulty, the counsel for the U. S. ought to dismiss the prosecution for a misdemeanor. At length the Chief Justice declared it necessary to bring the question at once to a close: that if the prisoner was ready to proceed to trial for the misdemeanor, on the next day the trial should take place; that if a continuance should be obtained, and a motion then be made to commit him for treason, the difficulty suggested should be reserved, for consideration after hearing the motion at large; that in the

mean time Col. Burr should be admitted to bail in the sum of 5000 dollars.

Mr. Hay entered a *nolle prosequi* on the indictment for treason against Jonathan Dayton; declaring he had no evidence against him except certain letters which he had written to Gen. Wilkinson; and that he had never been present at any of the overt acts of treason.

Mr. Wickham said that Gen. Dayton was ready to plead not guilty on the indictment for a misdemeanor, and go to trial immediately.

Mr. Hay said he would take up his case after that of Aaron Burr had been disposed of; that as counsel for the U. States he had a right to exercise discretion on the subject: in which the court and Mr. Wickham appeared to acquiesce.

The court adjourned till Friday 12 o'clock.

Friday, Sep. 4.

The proceedings of this day commenced with an application by A. Burr for the production of an original letter from Gen. Wilkinson to the President of the U. S. dated Nov. 12, 1806, which letter was in the possession of Mr. Hay. The President having confided to Mr. Hay the discretion of holding such parts of the said letter as were of a confidential nature, he refused to exhibit the whole of it in evidence. A writ of Subpoena duces tecum was thereupon awarded, returnable immediately, commanding Mr. H. to produce the letter. He made the following return:

"I hereby acknowledge service of the above Subpoena, and herewith return a correct and true copy of the letter mentioned in the same, excepting such parts thereof as are, in my opinion, not material for the purposes of justice, for the defence of the accused, or pertinent to the issue now about to be joined—the parts excepted being confidentially communicated to the President, and having devolved on me the exercise of that discretion which constitutionally belongs to himself. The accuracy of this opinion I am willing to refer to the judgment of the court, by submitting the original letter to its inspection. I further certify, in order to shew more clearly the irrelevancy of the parts excepted to any defence which can be set up in the present case, that those parts contain a communication of the opinion of the writer concerning certain persons, about which opinion, or the fact of his having communicated it, the writer, if a witness before the court, could not legally, as I conceive, be interrogated, and about which no evidence could be legally received from other persons. GEO. HAY."

Col. Burr's counsel then said, they had two resources for compelling the production of the paper, either to move for an attachment against Mr. H. which their friendship would forbid. [Mr. Hay declared these papers could not be extorted from him, without the intervention of the authority of the court, and even were they to issue in their process, that he would rather go to jail than surrender the letter] or to move for a rule "that this prosecution stand and be continued till that letter be deposited with the clerk." They would accordingly press the latter motion.

This motion produced an animated discussion. A few minutes before 5 o'clock, the Ch. Justice decided, that under the circumstances of this case, it was not in the power of the court to say, that the letter should not be produced that the reasons assigned for withholding it were not sufficient, and that if it were not produced, the court must either take measures to compel a compliance with its process, or continue the cause. With respect to such parts as were deemed confidential, the court would take measures to prevent their being made public, by providing that no copies should be taken, that no use was to be made of the letter except in relation to the trial, that it should not go out of court and that those persons who take notes of the proceedings, were not to consider themselves at liberty to publish any part of that letter. He concluded by repeating that the production of the letter in court might contribute to remove many of those suspicions, which its suppression would infallibly excite.

Mr. Hay observed that he was not distinctly acquainted with the wishes of Gen. Wilkinson on this subject, he should however, consult him; and he hoped that he would consent to the production of the letter under the restrictions mentioned by the court.

Some conversation then ensued upon the arrangement necessary to the trial for misdemeanor. The marshal was instructed to summon a jury, and Monday was fixed for the trial.

Saturday, Sept. 5.

Mr. Hay wished to extend the terms of the return which he made yesterday. There was one passage in Gen. Wilkinson's letter, which he was certain the President himself would keep back.

Mr. M'Rae. As the President is now at Monticello, is it not practicable to send an express to him with a subpoena duces tecum? It is advantageous on every consideration to have the trial completed at this term. Almost all the witnesses are present; and perhaps it would be impossible to collect them here again. An express might perhaps return in four days from Monticello; and is it not far better to postpone the trial for that period, than to the next term of the court?

Mr. Hay here read the following "Additional return:

I hereby certify, that upon a more minute examination of the letter above mentioned, I have observed other passages, which are entirely of a public nature, and which, according to my best judgment, ought not to be disclosed and which, I conceive, would not be disclosed by the President himself, if the return were to be made by him. GEORGE HAY."

Mr. Hay then observed that he did not conceive himself at liberty to put this letter into the hands of the defendant; but that he would immediately send an express to Monticello for instructions; and that the return might probably be made by Tuesday evening.

Chief Justice. Is there any objection then to the court adjourning till Tuesday?

Mr. Martin said that he proposed to bring the case of Israel Smith before the court on Monday.

Mr. Burr observed, that some agreement might be made between his counsel and the prosecution respecting the letter and that they might go to trial on Monday.

The Chief Justice then observed that the court would meet on Monday; as some arrangement might in the mean time be made, respecting the letter.

Mr. Hay.—I can consent to no arrangement but for me to furnish such parts of the letter only, as I may deem material to the defence. Chief Justice. If there are any state secrets in that letter, the court would be extremely unwilling to call for its production.

Mr. Martin. Gentlemen need not be so scrupulous, sir, upon this subject; for we can compel the appearance of the President before this court with that letter. Mr. Hay. Shall I furnish such parts in the mean time as I am disposed to surrender?

Mr. Burr.—Yes; under the reservation, that such a step does not impair my right to demand the remainder.

The Chief Justice then observed, that the court would meet again at half after two, when he understood that Col. Burr was to give bail on the trial for misdemeanor.

At 2, the court assembled, when Luther Martin and Thomas Langborne were accepted as his securities.

Monday, Sept. 7.

Mr. Botts. The court will recollect, that when the order was moved for the continuance of the trial for misdemeanor, we deprecated the serious inconveniences of delay. It is much to be regretted that we should now be driven into the trial without the letter, which we have required; but as that letter may probably be received in the course of the trial we are willing to enter into it.

Mr. Hay observed that he should not wish the trial to be gone into with such a declaration on the part of the accused; that he had sent an express to Monticello, agreeable to his promise; and that he expected him to return by to-morrow 12 o'clock. He therefore did not wish the jury to be fully sworn to day.

The Chief Justice did not see any necessity for delay on that account. The paper would probably be here by the time when it is wanted, as it will not be required until the defence is opened.

Mr. Hay said he wished every preparation for the trial to be made to-day, but hoped that the trial will not be gone into until to-morrow. He expected some communications from the President, which would have considerable influence on him, with respect to his conduct on the trial.

At this moment Herman Blannerhasset appeared in court, when

Mr. Botts observed that Mr. Blannerhasset had attended for the purpose of understanding his true situation. He could obtain bail for the misdemeanor, and it was obvious, that under the opinion of the court, the indictment for treason could not be supported. Will you, Mr. Hay, enter a *nolle prosequi* to the prosecution for treason.

Mr. Hay acquiesced.

The same question was asked respecting Israel Smith and John Smith. Mr. Hay acquiesced as to the former, but said the case of the latter was not before the court. Mr. Woodbridge was security for Mr. Blannerhasset in 5,000 dollars.

Some conversation then ensued about the jury; when it was determined to examine but not to swear them to-day.

26 Jurymen were then examined, and out of the number the prisoner selected James Bootwright, John Murphey, William Bently and Y-omen Smith.

The Chief Justice then instructed the deputy marshal to summon twelve additional jurymen by to-morrow. Mr. Burr.—The Marshal can hand me the list of them this evening.

The court then adjourned till to-morrow 10 o'clock.

Tuesday, September 8.

No measure of importance was adopted this day.

Mr. Hay informed the court, that his messenger had not returned from Monticello.

Mr. Israel Smith appeared in court and bailed on the indictment of a charge of a misdemeanor; himself in the sum of 5000 dollars and his securities John B. Walton and John Alcock in 2500 dollars each.

The names of the jurors who had been summoned, were called over, out of which Carter Berkeley and Robert McKim only were accepted.

Wednesday, Sept. 9.

Mr. Hay informed the court that the express he had sent to the President of the United States, had returned, and brought a copy of such parts of the letter of November 12, from Gen. Wilkinson as the President thought proper to be laid before the public; with a certificate written by the President annexed to the said copy.

After many of the jury had excused themselves from serving, the following were sworn:

Messrs. Orris Paine, Jas. Bootright, Obadiah Gathright, John Murphey, John M'Kim, Wm. Bently, Yeamans Smith, Carter Berkeley, Jesse Bowles, Jus. Penn, Robert Gordon and Thomas Lewis.

Mr. Hay addressed them in a short and perspicuous speech, in which he explained the nature of the charges, exhibited in the indictment, which indictment contained seven counts. The first charged the defendant with beginning a military expedition against the dominions of the King of Spain (with whom the United States then were and still are at peace) on the 13th day of December, 1806, from Blannerhasset's island in the county of Wood; the second with setting on foot a similar expedition at that time and place. The third was to the same effect except that it specified Mexico, as the particular territory of the King of Spain, against which the enterprize was directed. The fourth was similar to the first and second, but used the words "preparing the means for" a military expedition, instead of the word "beginning" or the words "setting on foot." The 5th was the same as the fourth, except that "Mexico" was specified, as in the third count. The 6th & 7th resembled the 5th, except that, in one of them "an unknown territory of the King of Spain," and, in the other, "a foreign territory unknown," was mentioned instead of Mexico. Mr. Hay observed to the jury, that if any of the charges in those counts were proved, it would be incumbent on them to find the defendant guilty. He then proceeded to examine witnesses.

Mr. Graham (late Secretary of the Orleans Territory) was called; but it being objected that he could not speak to the facts stated in the indictment he did not proceed, but Peter Taylor, Maurice P. Belknap and Richard Neal were examined: the examination was frequently interrupted by Mr. Burr and his counsel on the ground that the testimony was irrelevant. It appearing Col. Burr was not on the island,

Mr. Botts opposed the introduction of further evidence in a speech which he did not get through before the court adjourned.

Thursday, Sept 10.

Mr. Botts concluded, and was followed by Mr. Martin. Mr. Hay replied at great length.

Friday, Sep. 11.

Mr. Martin cited several authorities to shew that the confession of a person concerned in a crime cannot be made use of as evidence against any of his coadjutors or associates. He was answered by Mr. M'Rae, who also commented on the other points of law made in the case. Mr. Witt continued the debate, and Mr. Randolph closed it for the day.

### European News.

By an arrival at Boston in 42 days from Liverpool.

LONDON, JULY 17.

Preliminaries of Peace have not only been signed between Russia and France, but according to the following letter from Rotterdam, between Prussia and France:

"Rotterdam, July 11.—11 at night. We have but time to inform you, that an express from the French head quarters brought the intelligence, that on the 26th of June, the Preliminaries of Peace were signed between France, Russia & Prussia. The particulars are not yet known."

"As soon as the Preliminaries were signed, the intelligence was announced to the army, and celebrated by discharges of cannon and illuminations. Of the conditions of the Treaties of Peace we are not yet accurately informed; but the following are said to be among the principal ones:

"That Poland shall be possessed as before by Prussia and Russia.—That all the Prussian Territories are to be restored, except Silesia and Westphalia.—That the fortress of Magdeburg shall be garrisoned by the French, until peace between Great Britain and France shall take place; and that all the ports and places on this side the Elbe shall henceforward be under the dominion and control of France. It is conjectured, that Bremen, Embden, and the whole of East Frisia, are to be united to Holland, and that Silesia is to be erected into a separate principality."

The above conditions, as our readers will see, apply almost entirely to Prussia. Indeed it is not to be supposed, that any cession of territory on the continent would be demanded from Russia. There are, however, we have no doubt, some stipulations with respect to the Seven Islands, and to Turkey. France would stipulate that the war between Turkey and Russia shall cease, and the *status ante bellum* be established between the two powers. We are anxious to know whether in the negotiation any mention was made of this country.

A letter from the banks of the Elbe states, that after the Armistice was agreed upon between the Emperor Bonaparte and Alexander, the latter wrote a letter to the King of Sweden, inviting him to become a party to the armistice.—A report was current that the English was banished from Russia.

It is stated, in a letter from Delft, of July 11, that after the Preliminaries of Peace were signed between Bonaparte and Alexander, the two Emperors had a meeting, and mutually embraced each other, rejoicing over this event. It is also said that a second interview took place, at which the King of Prussia was present, on the following day, in a pavilion constructed on a little island in the Niemen. A third meeting was had on the 28th, which was followed by a dinner, at which his Prussian majesty was also present.

A mail from Topingen enables us to contradict the account of Denmark having shut the Sound. On the 2d, about 50 ships belonging to the expedition passed the Sound, and sailed by Copenhagen without the least molestation. A part of the expedition went through the Great Belt. But though no attempt has yet been made to shut the Sound, ministers have reason to believe that Bonaparte will immediately endeavour to make Denmark depart from her neutrality, and they have therefore resolved to send a strong fleet into the Baltic without loss of time. Denmark may then reply to any demand to depart from her neutrality, that the measure would be of no avail, Great Britain having so powerful a fleet in the Baltic. The fleet, it is believed, will be under the command of the following officers: Admiral Gambier, Sir S. Hood, Admiral Essington, Sir Home Popham and Commodore Keate.

Two French sail of the line and four frigates escaped from Rochefort on the 8th of June.

The French troops occupied Memel before the conclusion of the armistice. Casel capitulated