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TRIAL OF Col. AARON BURR.

On Friday June 26.

Mr. R. Randolph rose to proceed with his motion; when he was interrupted by *Mr. Hay*—"I have, sir, a communicat on to make to the court and to the jury. The court will recollect the 2 ple which I received from the President of the U. S. to me before trop ening certain papers; they will recollect that I he stated in that letter that gen. Wilkinson, the 27th of Dec. was in the ands of the attorney general, from whom he would attempt to obtain it. By the last night's mail, sir, I received a letter from the President of the U. S. touching the same subject. Mr. Hay then read the following letter to the court:

Washington, June 17, 07.

SIR,

In answering your letter of the 9th, which I received yesterday at one to me from gen. Wilkinson, specifically its date, I informed you in mine of the 12th, that I had delivered it, with all other papers respecting the charges against Aaron Burr, to the attorney general. When he went to Richmond, that I had supposed he had left them in your possession, but would immediately write to him, if he had not so forward, lest the publication of letter might end delay. I wrote to him accordingly on the same day, not having any notice I knew not whether he has forwarded the letter, I wrote to the same by mail that I had desired the secretary at war to examine his office in order to comply with your further request to furnish copies of the orders which had been given respecting Aaron Burr and his property; and in a subsequent letter of the same date I forwarded to you copies of two letters from the secretary at war which appeared to be within the description mentioned in your letter. The order from the secretary of the navy, I presume, you were in possession of. The receipt of these papers had I presume, to be anticipated, and whether this date, which will have substantially fulfilled, the object of a subpoena from the attorney general of Richmond, requiring that those officers & myself should attend the court in Richmond with the letter of gen. Wilkinson, the answer to the letter, and the order from the department of war and the navy therein generally described. No answer to gen. Wilkinson's letter, which this is a mere acknowledgment of its receipt is a letter written for a different purpose, was ever written by myself or any other. To these communications of papers I will, this if the court thinks that supposes there were any facts within the knowledge of the heads of departments, or of myself, which can be material for the defence, from a desire of closing any thing our situation will permit to furthence justice, we shall be happy to give him the benefit of it, by way of deposition through any person whom the court shall authorise to take our testimony at this place. I know indeed that this cannot be done but by consent of parties, and I therefore authorise you to give consent on the part of the U. S. Mr. Burr's counsel will be given of course, if he supposes the testimony material.

As to our personal attendance at Richmond, I am persuaded the court is sensible that paramount duties to the nation at large control the obligation of compulsion with their assent in this case, as they would, should we require a subpoena to issue, for the heads of Bluomerhasset and others in the Mississippi territory, from indians and Spanish Lous, and other places on the western waters, or at any place other than the seat of government. To comply with such calls, would leave the nation without our chief officers, branches and agency nevertheless is indeed not to be constantly necessary, that it is the sole branch of the executive employed in quires to be always in function. I could not then, he continued that it should be withdrawn from its station by an executive authority.

With respect to papers, there is certainly a public and private side to our affairs. Our foreign relations, grants of lands, patents for inventions, certain commercial transactions and other papers potent in their nature, of the strong kind, are the subject of proceedings. All nations have found necessary, that for the advantageous conduct of their affairs, some of these proceedings at least, should remain known to the executive department only. He of course, from the nature of the case, is the sole judge of what part of them the public interest will permit publication. Hence under our constitution, in requests of papers from the legislature to the executive branch, our exception is certainly expressed in a case those which he may deem the public welfare may require not to be disclosed," as you will see in the re-cited resolution of the House of Representatives, which produced the message of Jan. 22, respecting this case. The respect mutually due between the constitutional authorities in their official intercourse, as well as sincere dispositions to do for every one what is just, will always ensure from the executive, in exercising the duty of discrimination confided to him, the same candor and integrity, to which the nation has in like manner trusted in the disposal of its judiciary authority. Consequently we are to expect no communicating these sentiments to the court, I address them to you for that purpose, and assure you with sincere and respect.

TH: JEFFERSON.

Accompanying this letter, said Mr. H. is a copy of the resolution of the House of Representatives containing the exception to which the President refers. I have also received a letter from Mr. Smith, Secretary of the Navy, which contains all the papers of the order, which was wanted, precisely corresponding with the unauthenticated copy in my possession.

Mr. Wickham, I presume that these must be noted by the clerk, as the matters to the examiner *Duces Tecum*.

Mr. Hay, I have no objection. When we receive gen. W's letter, the return will be complete. I have also received a letter from the Secretary at war, which contains all the orders of his department, touching the case. All which papers I shall deposit with the clerk of this court.

The following is the order of the jury respectively:

I CERTIFY, that the annexed is a true copy from the records, in the office of the secretary of war of the U. S. States, of the letter from the Secretary of war to the colonel John Shaw, dated 20th Dec. 1806.

In Testimony, I, Robert Smith, Secretary of the navy of the U. S. of America, have signed this certificate, and affixed the seal of my office to be affixed SEAL. hereto, at the city of Washington, this 17th day of June, A. D. 1807, and in the year of the independence of the said states.

R. SMITH

Secretary of the Navy.

REGISTERED,

W. WOLCOTT,

Chief Cir. Navy Dept.

CLERK'S

Navy Department, 20th December, 1806.

SIR,

A military expedition formed on the Mississippi, and a fleet of the navy soon proceed down the Mississippi, and by the Indian country, may cause excite probably at near New-Orleans. You will by all the means in your power, aid and protect the officers in supplying this enterprise. You will with your knowledge of the parties to intercept and to take and if necessary to destroy the boats destroying assist the commander of the fleet, or of any person holding an appointment under the U. S. and you will continue on your vigilance and exertions.

I have the honor to be sir, &c.

Your most obedient,

(Signed,) ROBT. SMITH.

Capt. John Shaw, or the commanding officer of the Gunboats at N. Orleans.

Mr. Randolph. I will now proceed, sir, with my motion—May it please your honor, I am sorry I have to trouble you with a matter of this nature, but the general purport of it is, to award a rule to show cause why an attachment should not issue against gen. Wilkinson for obstructing the fair administration of justice, by his conduct in the affair with my intention of delaying general Wilkinson, I have endeavored to do, but I shall can not extremely entire the gentlemen, that our objects extremely different, I shall not be precise, as I go on more general summary, or interest, I shall not be tedious, but as brief as we shall attempt to remove all the prejudices which may have arisen in the mind of gen. Wilkinson, and our anxious hopes is to guard the public mind against errours which may have been the consequence of the conduct of general Wilkinson. I shall not be tedious, I hope it is not one point, Hesitas, sir, to bear the attention of the court and the consequences of those doctrines. He cannot complain. It is due from the U. S. to the court, I have to make, in motions to the administration of justice, and to the public, I have to make attack general Wilkinson, sir, on specific allegations and by specific facts. It is due to general Wilkinson by legal evidence, and not by the insinuations of his counsel. I prefer this course, sir, that no more of our time may be unnecessarily wasted upon his eulogy. Perhaps the time may yet come when he will need all the nerve of his glory to defend him against our attacks; and better is it, sir, that none of his beauts should be dissipated, until we come home upon him.

The grounds, on which we make our motion, is this; that in this case between the U. S. and A. Burr, a witness his been summoned and brought here by the abuse of military authority; and that for this illegal proceeding, it is the duty of this court to take notice of gen. W. I name gen. W. only as present; but time may arrive, when it shall be necessary to extend this principle to others. The grounds of this accusation are the illegal arrest of James Mann, and Butler Lindsley, which I shall read to the court.

Mr. Hay objected to the production of these affidavits, he contended that they had been either written or declared by the opposite counsel; he did not pretend to say that they contained any thing, which they did not believe to be true; but he had understood, that these very witnesses had gone to the opposite counsel to give them certain information, and that upon this information the counsel had either written or dictated the terms of the affidavit.

Mr. H. conceived, when affidavits were taken by the opposite counsel, however for the other means which had been employed, that such affidavits are illegal. What is the reason? Because in no case will the court issue an attachment, where the affidavits have been taken by agents alone. And in this very case the court will remember that they will admit of no exceptions to this decision, principle, however strongly convinced of the soundness of grounds on which they are taken. *Mr. H.* wo pretends any affidavit taken in a case, ten by the opposite counsel—he stated a written case where the court had set aside an affidavit, that had been sworn to, and signed by a party. But present is even a stronger one than this, and more in the scope of that policy, on which the decision of the court is founded; for in that case, the affidavit had only been written by the counsel, but in this, it had been penned by them. Mr. H. did not however, mean to reproach gentlemen, for the mode which they had pursued; for he would prefer it, to the mode of proceeding in their situation.

Mr. Burr. May it please the court, I shall not undertake to say, what *Mr. Hay* ought to have done in our situation, nor am I sufficiently in his knowing. But I solely for the purpose of correcting a misrepresentation, he has fallen. He says that these affidavits were taken by counsel, and by B's. counsel. As to Mr. Knox's affidavit, I know he can say nothing. As to Mr. Lindsley's affidavit, I know these; Mr. L. whom I had never seen before, came to me with the affidavit already written, to know whether it was true. I read it, and found it incorrect. I observed in it some grammatical, which I thought ought to be corrected, I wrote the affidavit over again, having corrected these grammatical errors, I gave it to Mr. Lindsley to read, for inspection, who said that it was perfectly true.

Mr. Wirt. Do you know, Mr. Burr, who put *Mr. L.* on that course?

Mr. Burr. I understand, I did not never saw Mr. L. before.

Mr. Wickham hoped that gentlemen would persevere in the course, which they had thus begun; and instead of warm declamation on desultory subjects, come at once to the law and to the subject. It appears to have been, sir, between one individual an another, or between one individual and a party, that collateral points should occur, in which the public can be heard. But this ofen more evident, it is generally, it will lead to an unnecessary confusion and delay. The rule, sir, is plain and practical, therefore, is when any of those collateral points arise, which may be considered, may more testimony, but the affidavits of the witnesses. These affidavits are taken, sir, by the court upon private magistrates. These being in writing, the court, sir, will see, the affidavits of three descriptions of persons; by a party himself, or by his counsel, in many cases they cannot be written by a party, and in other cases, they may, and I would be too burthensome, if every affidavit, sir, should be written by a party. It is not contended, that the particular affidavit, which gen. W. has taken some of them are not able to write at all. They mull of course be written by their counsel. Done so gen; but it is not every man that has an agent at hand, and if his counsel prefered to do it, he, sir, he preferred for the time as an agent for the party. Gentlemen therefore, not being compellable; the parties are compellable, and the counsel being excluded by Hay's decision, sir, gentlemen, gentleman himself confesses that he has frequently done it. As to the subpoena issued by *Mr. H.* it is a fort of force. From this case it appears that the attorney for the prosecution had himself administered the oath. Now no rule is more forced in law, than that a magistrate before whom the oath is taken, should be disinterested between both parties. If the magistrate be as interest as it was in the case quoted, it vitiates the affidavit. A magistrate of this city has been frequently known to draw & administer the oath even in his own case: the rule is not improper but the administration of the oath is obviously so.

Mr. Burr observed, that it would be improper agreeable to law, if every person could be orally examined; but that he would defere the rebuke of the court, if he in every case of proof from the established usage; however if the court would listen to the inconvenience it would be perfectly agreeable to himself. As to the origin of this affidavit, certain unfounded insinuations had been made; that Mr. Knox had come to him and complained of the outrage which had received; that one of his counsel who was present during this interview had joined him in the opinion that some motion ought to be taken of this proceedings; that he first thought the better way would be to move Mr. Hay's attention to it; but that he recollected that Mr. Hay being in interested party, was probably indisposed from doing full justice to the case: It was Mr. Knox's own idea to come home and make complaint.

Mr. Wirt observed, that Mr. Wickham was right in the practice, but he seems to have forgotten that this practice is founded in expediency. When the expediency ceases, it does the rule. The question then is, it is not expedient to follow the practice, or to relax the rule? The tribunal may prolonged. He trusted that every man willed to come at the knowledge of the facts. The court was called on for a rule against gen. W. it ought to be satisfied of the propriety of granting the rule. One lawyer says, that the usual practice, is an affidavit: another contends, that it is a matter of grace, or expediency by one; nor tellimony. The question then is, which will best give satisfaction to the court? an affidavit signed by the party, or the witnesses himself? How can the court know whether the rule be proper until they have had the witnesses fairly and fully examined? Has the counsel of the prisoner of the affidavit offered the words of the witness himself? no doubt he has made the witness sign it; but no doubt he has attempted to wipe off every bias from his mind; and it is impossible that he could have perfectly succeeded; or that he could have precisely drawn forth an affidavit, as would have produced itself from the mind of the witness. They could not have sifted precisely the facts expressed; and this affidavit which should represent the state of the mind of the witness, is necessarily so much impaired with the color of mind of the counsel.

Mr. Burr. You misunderstand me, I have no objection to any thing, he feels the expediency of your proposition; and therefore consented to the exhibition of the very voce testimony itself; though he regrets the inconvenience and departure from usage, which it will involve.

Mr. Martin. If the witness himself is examined, the clerk will reduce the testimony and answers to writing, to give it all the effect of an affidavit.

Mr. Hay apologized for frequently interrupting the gentleman, he considered his distinct voice and emphatic manner, the gentleman, sir, himself presented him from being distinctly heard.

Mr. Wickham observed, that Mr. McKee addressed the court: he said that his business was of considerable importance to the administration of justice (gen. W.) who was immediately concerned, and therefore, on this occasion; that those wishes had been communicated to the opposite counsel, but that they had objected to any delay. Gentlemen, he observed, this application to the court; that gen. Wilkinson was now before the Grand Jury, and would in a short time delivered their court—that he knew gen. Wilkinson wished, sir, to have the opportunity of proving that the court would suspend their exertions for a short time, until the business, sir, of gen. Wilkinson, who might attend the court, and direct their enquiries in this examination.

Mr. Martin, said, that gentlemen seemed not to be aware of the strong ground of the enquiry they were now engaged. The great inquiry is whether a rule should be granted to show cause; in which case gen. Wilkinson was his counsel were supposed to be present.

Mr. McRae. The gentleman from Mississippi has said that we were not present; although the court has been polite enough to recognize our presence; and even the gentlemen themselves, by some time now declaring their consent to any arrangement which would be most convenient for both sides have admitted the same fact; but I have hoped, that the reasons for desiring general Wilkinson's attendance seemed sufficiently strong to the court they did to the counsel for the prosecution that they would consent to his short delay; "we mean, sir, with the court of the court to put some questions to the witness ourselves; and still more, we mean with the leave of the court, to introduce something our own witnesses; and we feel confident, in satisfying this court, that no just foundation exists for the present motion."

Mr. Martin. I know that these gentlemen are personally present; and indeed they take care enough to remind me of it, I am often making an appeal to their voices. But certainly they are not legally present; and they have no right to interfere in the present discussion. The other day they detained the court, from two hours on the motion for a subpoena *duces tecum*, after the court had decided that they had no right to interfere. Let the court decide upon the present motion; and when the rule is granted, then, and not before, Gen. Wilkinson come forward to show cause why an attachment should not issue.

Mr. Wirt. If we are only here by our sufferance, we can do no more than *Mr. Martin* is pressed, and in fact that is the case. I cannot say one here besides himself. I am willing, however, if it be pleasant, to be legally absent; and in the presence which I have, I am to offer to be considered only as an *amicus curiæ*. Shall I proceed, sir, on the consideration of the court—I mean, sir, that our rule of the evidence in this case? Shall I read and one or two of the links presented before me, which I may have the pleasure to be itself unrolled? When other testimony is before the court, I wish to offer some full benefit of it? And let me serious, sir, on this point, whether they do not conceive that general Wilkinson's interrogatories are calculated to aid their enquiries? I ask it, sir, lest that they should have a whole view of the business, and the rule should be stated element? One word, sir, as to the *Mr. Wirt.* If we are only here by our sufferance, we can do no more than *Mr. Martin* is pressed, and in fact that is the case. I cannot say one here besides himself. I am willing, however, if it be pleasant, to be legally absent; and in the presence which I have, I am to offer to be considered only as an *amicus curiæ*. Shall I proceed, sir, on the consideration of the court—I mean, sir, that our rule of the evidence in this case? Shall I read and one or two of the links presented before me, which I may have the pleasure to be itself unrolled? When other testimony is before the court, I wish to offer some full benefit of it? And let me serious, sir, on this point, whether they do not conceive that general Wilkinson's interrogatories are calculated to aid their enquiries? I ask it, sir, lest that they should have a whole view of the business, and the rule should be stated element? One word, sir, as to the *Mr. Wirt.* I am willing, however, to be considered only as an *amicus curiæ*. Shall I proceed, sir, on the consideration of the court—I mean, sir, that our rule of the evidence in this case? Shall I read and one or two of the links presented before me, which I may have the pleasure to be itself unrolled? When other testimony is before the court, I wish to offer some full benefit of it? And let me serious, sir, on this point, whether they do not conceive that general Wilkinson's interrogatories are calculated to aid their enquiries? I ask it, sir, lest that they should have a whole view of the business, and the rule should be stated element? One word, sir, as to the *Mr. Wirt.* I am willing, however, to be considered only as an *amicus curiæ*. Shall I proceed, sir, on the consideration of the court—I mean, sir, that our rule of the evidence in this case? Shall I read and one or two of the links presented before me, which I may have the pleasure to be itself unrolled? When other testimony is before the court, I wish to offer some full benefit of it? And let me serious, sir, on this point, whether they do not conceive that general Wilkinson's interrogatories are calculated to aid their enquiries? I ask it, sir, lest that they should have a whole view of the business, and the rule should be stated element? One word, sir, as to the

Mr. Martin hoped that the court would express to its order, that this postponement was not in consequence of the right of the gentleman to demand it, but of the consent of his honorable opinion.

Chief Justice. Why this distinction? Every rule should be reasonable on Monday, or any other day.