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r 1, 1867.

June 20.

N BARR.
for the fifth circuit
Virginia.

Chief Justice of the
of the District

June 18.

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James Knox was then called, when Mr. McRae addressed the court. He said, that as this business was of considerable importance to the respectable gentleman (G. W.) who was immediately interested, it was extremely desirable that he might be present during the examination of this and the other witnesses who might be exhibited on this occasion; that these wishes had been communicated to the opposite counsel, but that they had objected to any delay, and hence he had made this application to the court; that G. W. was now before the Grand Jury, and would be in a short time before the court; that he knew G. W. wished to be here. He therefore requested that the court would suspend their examination for a short time, until he himself could be present; that perhaps some very important facts, which were unknown to the counsel for the prosecution, might be within the knowledge of G. W. who might materially direct their enquiries in this examination.

Mr. Martin, said, that gentlemen seemed not to know, in what stage of the enquiry they were now engaged. The question merely is whether a rule should be granted to show cause; in which neither G. W. nor his counsel were supposed to be present.

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

Mr. Martin. I know these gentlemen are personally present; and indeed they take care enough to remind us of it, by so often making us hear their voices. But certainly they are not legally present, & they have no right to interfere in the present discussion. The other day they detained the court three 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 made, then may Gen. Wilkinson come forward to shew cause why an attachment should not issue.

Continuation of the DEBATE on the motion for a subpoena *duces tecum*.

WEDNESDAY, June 10.
Mr. McRae. May it please the court? I regret extremely that on a question so simple, and so eminently divested of all personal feelings, as the present, the counsel for the prisoner should have considered it as their duty to wander so widely from the subject before us. I could have wished, sir, that instead of talking about shadows; instead of complaining against certain pretended persecutions attributed to the government of the United States, instead of indulging in defamation and abuse against the officers of government, which can neither be justified nor excused. They had confined their observations to the single and simple question now presented to your consideration; Whether this court had the right to issue a subpoena *duces tecum*, addressed to the president of the U. States? I will not, sir, imitate the example which has been thus bountifully set me; however ample may be the materials, or however rich the harvest, which is now spread before me. Whatever I may think of the guilt of Aaron Burr; by whatever emotions of disgust and indignation, my bosom may be agitated by a contemplation of his conduct; I will attempt to suppress my opinions and feelings for the present. The time may be, sir, when I shall be at full liberty to give them loose. When A. Burr shall be put upon his trial; when he shall stand at your bar as a dangerous and indicted criminal; I shall not hesitate, sir, in the presence of the petit jury, in the presence of this court, and in the presence of the whole world, to express all my opinions and feelings. But, sir, I shall waive this privilege for the present. I cannot but consider it as highly indecorous, when contemplating this single question, to embrace all the merits of the case. Mr. Martin need not have talked so much of the president's elevation. He need not have taken such uncommon pains to expatiate upon the high office which he fills, nor so individually compare it with the irresponsible monarchy of England; as if the present president considered himself superior to the laws. Although in this country the decisions of our courts are at best doubtful; perhaps certain, that a subpoena ought not to go against him; yet, sir, anxious to shew the world, that we feel nothing of that spirit of persecution which has been so industriously and idly attributed to our government, Solicitous to give an unerring proof of the principles on which we act, we shall not shelter ourselves under these precedents established by the courts of the U. States. Elevated as our illustrious president is; yet our principles are, that when life is in jeopardy, he may be summoned like any individual, where he is able to disclose important facts, and when the national interests will admit of his attendance. As, then, we admit that a subpoena may issue

against him as well as against any other man, where was the necessity of expatiating so widely upon his elevated station? When all the facts which relate to this transaction come to be fully developed; when truth and not passion shall guide our understandings; I do not hesitate to affirm my belief, that the bolt which has been so industriously levelled against his reputation, will vanish into thin air. I am sorry, sir, to be under the necessity of making such remarks as these; but let the blame fall where it is due; upon the gentleman from Maryland, who has extorted them, and not upon myself.

And here, sir, permit me to read the affidavit on which this motion is grounded. (This affidavit was published in the Enquirer of the 13th instant.) I do not understand from this affidavit, that any other order is required from the navy department, than the one which was addressed to Commodore Shaw, and it is said to have been published in the Natchez Gazette. That order is already in court; and the attorney for the U. States has pledged himself to produce it, if the court will decide on the propriety of its exhibition. The only new paper, therefore, which is required by this affidavit, is the original letter of Gen. Wilkinson to the P. of the U. States.

Mr. Wickham here observed, that the gentleman had mistaken the object of the application; "We not only want this letter but the order of the navy department. They tell us, they have the order and are ready to produce; but we doubt the identity of this copy. Without meaning any imputation upon Mr. Smith, we say that they have several orders from his department. Let us see this order then, and we may ascertain whether it be the identical one, which we want. Let us but inspect then the order which these gentlemen have in their possession, and if it be the one which we require, the process to be issued may be made more limited in its operation."

Mr. Hay. The secretary of the navy inclosed this order to me; for what purpose I know not, unless it was for the sake of showing it. But as I am not particularly instructed on this point, I do not conceive myself authorized to produce it at present. I will exhibit this paper if the court thinks it material.

Mr. Wickham. We have a right to apply to the President of the United States for the copy of any order; but if it is alleged to be a state paper, it must not be refused on the allegations of counsel, but on the oath of the officer.

Mr. McRae. Is your subpoena then to be addressed to these other officers?

Mr. Wickham. No, sir, to the President alone, who has all these officers under his control.

Mr. McRae. I will attempt to satisfy the court, that the counsel have not grounded their motion upon the affidavit; (Here Mr. McRae read the affidavit)—"May be material to his defence." Now, sir, how is this? I had always understood before, that all applications of this kind must be founded upon positive testimony; that the party was not at liberty to state vague and loose conjectures; but that he must give undoubted assertions; and what was still further, that he should swear that these documents were material to his defence. The oath is not, that they may possibly be of use; that they may or may not be material; on this subject it is not merely sufficient to advance some precarious conjectures; but the party must explicitly state his belief, not that they may be; but that they are material. Nay, still further, in criminal cases, the party is not merely required by the court to say, that they are material, but to say in what respect they are so. In these points then, this affidavit is essentially defective; It certainly does not state how these documents are material; it does not even assert that they are material; but only advances a conjecture, that they may be so.

I believe, sir, on the authority of a decision of the court of the United States, in the case of Cooper of Northumberland, (p. 13 of the Report of the trial) it may be shown, that the present party has no authority to demand these papers.

And, sir the case of Cooper was materially distinguished from the one before the court; in this important feature: that the public officers were in the very city and on the very spot, where the trial was to be conducted. The secret government, was then at Philadelphia and not at Washington. This case, sir, was well known to every individual, who was well known in the politics of those times. It is sufficient merely to repeat, that Cooper was tried for a libel; that he put in two pleas; 1st. not guilty; and justification; and that in order to support his plea of justification, he applied to the court for a subpoena on the President of the U. S. to obtain certain public documents. And what did the judge decide?

(Omitted for want of room.)

But, sir, strong as that declaration is in our favour, and though it completely goes, to deprive the prisoner of the privilege which he claims; and though it is to be considered as law in the courts of the U. S.; yet, sir, abhorring any thing that looks like persecution, we should have disclaimed to shelter ourselves under this abominable precedent. We desire that the prisoner may possess all the information which is necessary to his defence. It is my sincere wish, in this as well as in every other point, to give him all the assistance, which evidence can afford. From our souls, do we abhor every, the slightest thing which wears the appearance of persecution.—Sir, I have only read this authority to show, that we might easily have refused this demand, under one of the precedents established by a court of the U. S.

Mr. Martin has said, that no secrets ought to be withheld from a court of justice, except those which have been confidentially entrusted to legal counsel; that this is the only exception to the general doctrine of evidence; and that in all other cases, the witness may be compelled to give information. The exception recognized by Mr. Martin, certainly does exist; but Mr. M. has taken ground too narrow, nor is this the only case where the witness is permitted to keep his information to himself. Sir, if a confidential communication has been made to Thomas Jefferson, he is not responsible to a court of justice for its contents. I speak, sir, with due submission to the court; but I ground my opinion principally on a decision of the supreme court of the U. S. My position is, that if a communication is confidentially made to Thomas Jefferson, he is not bound to appear before any other court, to disclose it. It is unnecessary to collect arguments to support the soundness of the policy on which this principle is constructed. That would be as

early taken, sir, instead of wasting my time and the time of the court upon the policy of the measure, I will refer you at once to a precedent. In the case of *Marbury vs. Madison* in the supreme court of the U. S. Mr. Lincoln the attorney general was called into court, and it was vehemently contended that he might be compelled to give information, like any other citizen. Mr. Lincoln stated his objections in the following terms.

(Omitted for want of room.)

In the same book p. 166, the case of the secretary of state is also stated:

It follows from these opinions, that the court should always receive special information about the papers, which a party wishes to obtain, before they authorize him to demand them. They ought to ascertain whether these papers contain confidential communications to the head of the government. But, sir, if the papers which are called for by the affidavit of A. Burr be of a public nature; why should the court issue a subpoena *duces tecum* to demand them? The opposite counsel may rest assured, and the attorney for the U. S. has actually pledged himself solemnly to this court, that he would spare no exertions to obtain a copy of them if the copy would be sufficient; or the originals if copies will not avail. But, Sir, if this letter be of a confidential nature, it is not the duty of the P. of the U. S. to produce it in this court nor any where else.

And where is the propriety of directing this subpoena in any event, to the President? If it be a public letter, it is undoubtedly deposited with every other paper of the same complexion in the archives of state: Why then, is not this subpoena addressed to the secretary of state, instead of the president of the United States? There is no specific reason why this informality is adopted; for gentlemen do not even pretend that they want the president's person. All that they pretend to require are certain papers in his possession; and these are evidently to be obtained, without the necessity of dragging him from Washington to this city. But, sir, if these papers are not of a public nature, if they should prove to be confidential communications addressed to the president of the United States, then by the reasoning which I have heretofore employed, it is not necessary and it is not proper to subpoena Thomas Jefferson.

One remark more, and I have done! The gentlemen insist upon the necessity of producing in this court the original letter from general Wilkinson to the president of the United States. I will suggest an expedient, which may obviate every possible inconvenience. If your honors say, that a copy of this letter may be read in evidence like copies of all other documents in the departments of government; then also will the attorney for the United States consent, that this copy may be read and have the very same effect as the original. But gentlemen may contend that general Wilkinson would object to this copy. Sir, general W. would have no right to urge such an objection; and much less, when he should understand that this very copy is expressly introduced into the court on the principle of possessing the same validity as the original itself. But, sir, if general Wilkinson should dare to raise this objection, if he should pretend to declare that this was not his letter, or that it was not an authentic and correct copy; a few days only would elapse when the original would certainly be produced.

Mr. McRae concluded with repeating his sincere wish, that every proper testimony necessary to the prisoner's defence should be produced; but with expressing his hopes that no such step as was at that time recommended by the opposite counsel would be sanctioned by the court.

Mr. Botts. In a government of laws, where majesty and prerogative are proscribed, and where the authorities of all the public functionaries are to be exercised for the benefit of the people, there are but few instances in which the policy of state secrecy can prevail. In the national intercourse with foreign states, where the relations present subjects fit for privacy, the rare duty of concealment may occur. Some time ago, when the hue and cry of treason was rung through the country, there might have been an excuse for the claim of securing from the eye of the suspected, particular acts of the cabinet. At this moment it will not be pretended, that the public good can require that Col. Burr should not have the means from the departments required for his justification.

Can any innocent purpose, said Mr. Botts, be subserved by the President's withholding the documents demanded? And will the counsel malign him by imputing to him a guilty one? The act of Congress provides fees for copies from the ministerial offices under the control of the President, and every individual has a right to demand them on paying the statutory charges. If individuals in common have this right, why has it been denied to Col. Burr whose fate may depend in some degree on them? One of the copies was promised, but the promise was forgotten! State policy in England has done a great deal of mischief; it has of an sheltered wicked and corrupt ministers from the punishment due to their crimes, yet not ere, (I have the principles of liberty are not understood so well as in this country) in Sir some Popham's trial, Lord Melville, President of the Board of Admiralty, was compelled, a few months ago, to appear and give evidence concerning the instructions he had given to that admiral. I do not now complain of the liberal caution of the gentlemen in keeping hidden their written evidence, which if known in time, we might refute: but such testimony as we think material in our defence, at any rate entitled to, without favor from them. But the gentlemen have made a concession of great liberality!—They say they are willing that the President may be summoned to attend; but not to give evidence when he does attend; not to disclose any thing but what he may himself condescend to make known. The President may be, and no doubt is, a very great and good man; but while his policy in relation to the accused is so completely enveloped in mystery, the counsel for the prosecution must pardon us, if we cannot consent to pin our faith on his sleeve, and if we choose rather to betake ourselves to our legal rights.

The opinion given by Judge Chase on the trial of Cooper, was repudiated by the politics of those gentlemen who prosecute for the U. S.; and yet they now wish to avail themselves of that authority. I congratulate them upon their dereliction of the old democratic opinions which prevailed at the time of Chase's trial, and which I thought would have gone with my friends to their graves.

Mr. McRae observed, that Mr. Botts had misrepresented the object for which he had introduced the opinion of Judge Chase; that he had not pretended to cite it as authority; but, on the contrary, had expressly declared that he scorned to avail himself of it.

Mr. Wickham said that Judge Chase's opinion pronounced in the case of Cooper was not correctly understood. It was not that the President could not be summoned as a witness; but that he ought not to be summoned to give evidence against himself.

Mr. Botts proceeded to say, that even that qualified opinion of Judge Chase had been

produced by the gentleman, and now that they shelter themselves under it, (he said), because they use it as authority against the success of the present motion.

The gentleman contended, that the extensive must judge, whether the documents require secrecy or not. But how can this judgment be exercised until they are called upon? And how can the government be legally called on but by process of subpoena *duces tecum*? When this is served the President may make out his return.

As to the argument that a copy of Gen. Wilkinson's letter will be sufficient; suppose, said Mr. Botts, General Wilkinson should swear to one thing, and the copy of this letter should say another, would you condemn him upon the President's certificate merely that the paper produced contained a true copy of a letter from him?

He concluded with observing, "if a trial shall ever arrive when a person shall stand accused of a crime of the highest nature, of a crime by which his life is endangered; if a part of the testimony shall be concealed by those who administer the government, and no policy of state requires it;—and yet the court does not compel it to be produced to furnish the devoted victim; it will be a dilatory time for our country!"

NORFOLK, June 27.
A Meeting of the Citizens of this Borough and Portsmouth, is earnestly requested at the Episcopal Church, This Morning, at 10 o'clock, as business of the utmost importance is to be discussed.
The Bell will be rung at 9 o'clock.

The following letters have passed between the Committee and the British Consul, which are published for the information of the public.

THOS. ARMISTEAD,
Secretary of the Committee.

British Consul's Office, Norfolk,
Virginia, June 25, 1867.

To Brigadier General Matthews, Chairman of the Committee appointed to carry into effect the Resolutions, &c.

SIR,
As I do not perfectly understand how far the construction of the Resolutions adopted at the meeting held yesterday, as they respect the communication between myself and his Majesty's ships in the Chesapeake, may be supposed to extend, I beg leave to enquire of you, Sir, as the Chairman of the Committee appointed to carry those resolutions into effect, whether any or what restraint is thereby intended to be laid on my communication with the King's ships—whether the schooners which have been heretofore used as advice boats, will be permitted to pass as heretofore, uninterrupted, and whether there will be any objection to myself, or any of my family, going backwards or forwards to the ships of war below, in such boats as may be allowed to carry my correspondence, or to our going by land to the bay-side, and embarking from thence and returning to the shore in the ships' boats.

I have the honor to remain,
With perfect respect,
Your most obdt. humble servt.,
JOHN HAMILTON.

To Col. John Hamilton, Consul for the State of Virginia.

SIR,
In answer to your letter of this date, I am directed by the Committee to say, that the ships heretofore employed as advice boats in the service of H. B. Majesty's ships, cannot be permitted to pass and repass as heretofore. The Committee view the effect of the Resolutions as intended to prevent supplies of every kind being afforded to these ships until the pleasure of our government be known. The Committee can see no obstacle to you or any of your family communicating with the Officers of H. B. Majesty's ships in either of the modes you mention, confident that no attempt will be made to contravene the resolution restricting supplies. The boats you may engage in this service will be permitted to pass without examination.

I have the honor to be,
With perfect respect,
Your most obedient servant,
THOS. ARMISTEAD,
Chairman of the Committee.

Norfolk, June 26, 1867.

Extract of a letter from Hampton, dated 26th June.

"We have late news from the British men of war by the Pilots that were discharged yesterday.—They declare, that if their water and provisions do not come to them as usual, they will lay three ships of war along side Hampton—and their barges ashore, and take them by force!—The Hamptonians are casting balls and making cartridges, to bid them welcome."

The following letter to the Committee on Correspondence has been received from George Hove, Esq. of Hampton, dated 26th instant.

SIRS,
I just now received yours with the enclosed resolutions of the citizens of Norfolk, and immediately communicated them to Col. Wray, and posted, to make them as public as possible. The inhabitants of this place unanimously feel indignant at the outrage committed on the Chesapeake, and are concerting measures to prevent the landing of any boats from the ships, which it is probable they may attempt.

I am, with respect,
GEORGE HOVE.

At a meeting of the Committee at the Eagle Tavern, on Friday, June 26, 1867.

Present—Thomas Matthews, Daniel Bedinger, J. W. Murdaugh, Luke Wheeler, William Newsum, Thomas Newton, Thomas Blanche, and Theo. Armistead, M. Myers.

Resolved unanimously, as the opinion of this Committee, that the British Officer who this day brought dispatches to Colonel Hamilton, or having hoisted a flag before his approach to our harbor, was not afterwards entitled to the consideration as coming under the protection of a flag of truce; and as such, he should not have been discharged, but should have been held in custody until the pleasure of the government was known.

Resolved unanimously, that it is the opinion of this Committee, that any British Officer coming to this place, shall be considered as a prisoner, until the decision of the government be known.

Resolved unanimously, That the proceedings of this meeting be regularly published.

The Committee of Correspondence laid before the Committee, a letter from Mr. Hope, of Hampton, which was ordered to be published.

Resolved, that Theodorick Armistead and Thomas Newton, just be a Committee to ascertain the best means of establishing a Telegraphic Communication between the seaboard and this place.

Mr. James W. Murdaugh, having informed the Committee that a number of young gentlemen had volunteered to act as sentries on the