NATIONAL INTELLIGENCER,

AND

WASHINGTON ADVERTISER.

VOL. VII. WASHINGTON CITY, PRINTED BY SAMUEL HARRISON SMITH, PENNSYLVANIA AVENUE. No. 1086.

FIVE DOLLARS PER ANNUM WEDNESDAY, SEPTEMBER 30, 1807. *PAID IN ADVANCE.*

TRIAL OF A. BURR.

MONDAY, SEPTEMBER 14.

Opinion on the question concerning the admissibility of evidence on the Indictment, for a Misdemeanor against col. Burr.

(Concluded.)

The U. States vs. Aaron Burr, } On a misdemeanor.

It has been also contended that the acts no more than the declarations of third persons can be given in evidence on this indictment.

It has been already said that those acts of Equipment which go to show the character of the expedition may be given in evidence. If for example, Blannerhassett, Tyler, Smith or any other persons provided arms, ammunition or provisions which were applied to the armament, this would be evidence because it would show the character of the expedition. This was done in the case of Smith and Ogden without enquiring who provided the arms for they belonged to the expedition. Captain Lewis for instance purchased several military equipments. It was not deemed necessary to show that Smith was connected with Lewis, for these purchases were made for the expedition, & Smith was not charged with providing them. He was charged with providing other means; and the means provided by Lewis served to show the character of the expedition.

But although the acts of all persons providing means applied to the expedition may be given in evidence upon the same principle that the state of the expedition may be shown, it does not follow that other acts of third persons may be given in evidence.

It has also been contended that no transactions out of the district are testimony.

This position is correct to a considerable extent, but not to the extent in which it is laid down. A declaration of Mr. Burr for example, when in Kentucky or elsewhere, that he did set on foot a military expedition on Blannerhassett's island to be carried on against the dominions of the king of Spain while the U. S. were at peace with that power, would I think be evidence, so would the actual marching of troops provided to be raised by him against the province of Mexico. Testimony which goes directly to prove the indictment, may I think be drawn from any place.

But I do not understand this to be the point really in contest. I understand the counsel of the U. S. to insist that providing means in Kentucky, that enlisting men in Kentucky, that joining the expedition in Kentucky may be given in evidence to show that the accused did begin and set on foot the expedition in Blannerhassett's island, or did provide the means at that place as charged in the indictment. This I understand to be the great question which divides the prosecution and defence.

It is I believe a general rule that in criminal prosecutions a distinct crime for which a prosecution may be instituted cannot be given in evidence in order to render it more probable that the particular crime charged in the indictment was committed. If gentlemen think me wrong in this I will certainly hear them upon the point, but I believe the position to be correct. Now providing the means for a military expedition in Kentucky to be carried on against the dominions of a prince with whom the U. S. are at peace, is certainly in itself a distinct offence upon which an indictment may be as well supported as it can be for providing means for the same or a similar expedition in Virginia. According to the rule laid down then, this testimony cannot be received unless it goes to prove directly the charges contained in the indictment. But how can it go directly to prove those charges? Does it follow that the man who has provided the means in Kentucky has also provided the means in Virginia? Certainly it does not follow; and consequently the act alledged in Kentucky do not prove the charges contained in the indictment. They would prove the defendant to have been connected in the enterprize, and gentlemen argue as if they thought this sufficient for their purpose. I shall be excused if I employ a few moments in stating my reasons for thinking it not sufficient.

I have already said, and surely no man will deny, that two distinct persons, may at different places furnish different means for the same enterprize. It will I presume not be contended that one of them may be indicted for the means provided by the other. So too, if the same man shall provide means for the same enterprize at different places, as in Virginia and Kentucky, I do not imagine that an indictment for providing arms in Virginia, could be supported by proving that he provided ammunition in Kentucky. They are distinct offences for either of which he may be punished, and the commission of the one may render more probable, but does not prove the commission of the other.

How then do gentlemen mean to make this testimony relevant? It is by making the acts of Blannerhasset, Tyler and Smith the acts of Burr, by insisting that their acts show an unlawful expedition to have been begun by him in Virginia, or that the means for that expedition were provided by him in Virginia.—This being accomplished, his acts in Kentucky may be adduced to corroborate or confirm the testimony which discloses his conduct in Virginia.

As preliminary then to this testimony such proof of the specific charges contained in the indictment must be given, as may be left to the consideration of the jury.

This proof relates to place as well as to fact—"of whatsoever nature an offence indicted may be," says Hawkins, B. 2, ch. 25, sec. 35, "whether local or transitory, as seditious words or battery, &c. it seems to be agreed that if upon not guilty pleaded it shall appear that it was committed in a country different from that in which the indictment was found the defendant shall be acquitted."

This rule is the stronger in the U. S. where it is affirmed by the constitution itself, and where the jurisdiction of the court is limited to offences within the district. Its obligation therefore is complete.

If there be any direct testimony that an expedition was begun, or set on foot, or that the means were provided or prepared in Virginia, that testimony has not been heard so far as I recollect. If there be such testimony it must also be shewn that the expedition was begun or that the means were prepared by the accused. No single act of his in Virginia has been offered in evidence. He made a contract in the state of Ohio for boats and provisions which may have been intended as a part of the expedition, but no contract appears to have been made in Virginia, nor were the boats constructed or provisions procured in Virginia. How then is it to appear that he begun or set on foot a military expedition in Virginia, or that he provided or prepared the means for such an expedition?

It is said that if he gave orders from Kentucky or elsewhere, and in consequence of those orders the means were provided in Virginia the accused is within the letter of the act as well as its spirit, and has himself provided the means in Virginia.

If these orders were in proof, the court as well as the counsel would be enabled to view the subject with more accuracy and to treat it with more precision. Since those orders are not adduced, nor accurately stated, and the question has been argued without them, the court must decline giving any opinion, or consider the orders as offered, and say what orders would be admissible and what inadmissible. The latter course may save the bar the trouble of another argument.

To whom are orders supposed to have been given, and who are supposed to have executed them?

They must have been given to accomplices or to those who had no share in the expedition.

If accomplices, under the direction of col. Burr, have provided the means, can their liability to the penalties of the law be doubted? I presume not. If persons engaged in the expedition have provided the means for carrying it on, it will I presume be admitted that they are within the letter and the spirit of the act. Each man has himself provided and prepared those particular means which he has furnished. If col. Burr, as was the case with col. Smith, has supplied money for the expedition, then money may be charged as the means provided by him; but if that money was advanced to an accomplice, its investment in means for the expedition is the act of the accomplice, for which being a free agent, he is himself responsible. The accomplice has committed the very act which the law furnishes. Has the accused by suggesting or procuring that act, also committed it?

I will not say how far the rule that penal laws must be construed strictly may be carried without incurring the censure of disregarding the sense of the legislature. It may, however, be safely affirmed that the offence must come clearly within the description of the law according to the common understanding of the terms employed, or it is not punishable under the law. Now to do an act, and to advise or procure an act, or to be connected or leagued with one who does that act, are not the same either in language or in common parlance; and if they are not the same, a penalty affixed to the one is not necessarily affixed to the other. The penalty affixed to the act of providing the means for a military expedition is not affixed to the act of advising or procuring those means to be provided, or of being associated with the man who has provided them. The distinction made by the law between these persons is well settled, and has been two frequently urged to require further explanation. The one is a principal, the other an accessary. In all misdemeanors punishable only by a statute which describes as the sole offender the person who commits the prohibited act, the one is within and the other not within the statute. In passing the act under consideration, Congress obviously contemplated this distinction. I presume that in a prosecution under the 3d section for fitting out a privateer, it would not be alleged that a person who was concerned with the men who actually fitted out the privateer, but who performed no part himself, could be convicted on an indictment not for being concerned in fitting out the privateer but for actually fitting her out. These are stated in that section as separate offences.

This distinction taken in the law is well understood and cannot be considered as overlooked by those who framed penal acts. They cannot be considered as intending to describe one offender when they describe another, and if experience suggests defects in the penal code, the legislature exclusively judges how far those defects are to be remedied.

While expounding the terms of the act it may not be improper to notice an argument advanced by the attorney for the U. S. which was stopped by observing that he had not correctly understood the opinion delivered in the case of treason. He understood that opinion as approving the doctrine laid down by Keeling and Hale, that an accessary before the fact might plead in bar of an indictment as accessary that he had been acquitted as principal, whence it was inferred that on an indictment for doing an act, evidence of advising or producing that act might be received. I was certainly very far from approving this doctrine. On the contrary I declared it to contradict every idea I had ever formed on the subject. But if it were correct, I endeavored to shew that it could not affect that case. My disapprobation of the doctrine induced me to look further into it, and my persuasion that it is not law is confirmed. Hale v. 2, page 292, says "if A and B. be indicted for the murder of C, upon their evidence it appears that A committed the fact, and B was not present but accessary before the fact by commanding it, B shall be discharged."

In H. 2, ch. 35, sec. 11. Hawkins discussed this subject, shows in a note the contradiction in those authorities which maintain the doctrine, cites the opposing authorities, and obviously approves the opinion which is here given. It is apparent then that the law never considers the commission and procurement of an act, even where both are criminal as the same act.

If the means were provided by order of the accused, by persons not accomplices and not guilty under the act, the law may be otherwise. I shall not exclude such testimony. There is however some doubt whether the place of trial should be where the orders were given or where they were executed.

At common law, if an act was procured or advised at one place and executed at another, it was doubted whether the procurer could be tried at either place because the offence was not complete at either. This difficulty was removed by a statute made in the reign of Edward 5th. If there be testimony showing by orders from the accused, means were provided in Virginia by a person not an accomplice, or may be received, and the question respecting the scene of trial put in a way for final decision.

The question whether all the means must be provided before the offence described in the statute had been committed relates to the effect rather than to the exclusion of the territory. I shall certainly not reject any evidence which shews that any means *were provided by the accused in the place charged in the indictment.*

Upon the subject of beginning and setting on foot a military expedition or enterprize it would be unnecessary at this time to say any thing were it not on account of the question respecting the introduction of testimony out of the district.

What is an expedition? What is an enterprize?

An expedition, if we consult Johnston, is "a march or voyage with martial intentions." In this sense it does not mean the body which marches but the march itself. The term is however sometimes employed to designate the armament itself, as well as the movement of that armament.

An enterprize is "an undertaking of hazard, an arduous attempt." The proper meaning then of the word also describes the general undertaking and not the armament with which that undertaking is to be accomplished.

The first count in the indictment charges that Burr began the expedition in Blannerhassett's Island. The second and third that he set on foot the enterprize in Blannerhassett's Island.

If the term expedition is to be taken in its common and direct sense, that is to mean a march or voyage with martial intentions, it began where that march or voyage begun; and it must have been begun by the accused to bring him within the act.

If the term be taken in its figurative sense to designate the armament itself instead of the movement of that armament, then I cannot readily conceive an act which begins an expedition, unless the same act may also be said to provide the means of an expedition.—The formation of the plan in the mind is not the commencement of the expedition within the act. Our laws punish no mental crimes not brought into open deed. If it did, the first disclosure would be the beginning. I find a difficulty in conceiving any act which amounts to beginning an expedition which does not also amount to providing the means for an expedition. However, if there can be such an act, and if it has been committed in Virginia, it may certainly be given in evidence.

The same observations apply to setting on foot an enterprize.

The remarks are made to shew what it will be necessary to prove in order to let in corroborative proof.

It is then the opinion of the court that the declarations of third persons not forming a part of the transactions, and not made in the presence of the accused, cannot be received in evidence in this case.

That the acts of accomplices, except so far as they prove the character or object of the expedition, cannot be given in evidence.

That the acts of the accused in a different district which constitute in themselves substantive causes for a prosecution cannot be given in evidence, unless they go directly to prove the charge laid in the indictment.

That any legal testimony which shews the expedition to be military, or to have been designed against the dominions of Spain may be received.

That any testimony shewing that the accused performed within the district any one of the acts charged in the indictment may be received.

Gentlemen will know how to apply these principles. Should any difficulty occur in applying them, the particular case will be brought before the court and decided.

After the opinion was delivered several questions were addressed to the chief justice by the counsel for the U. S. as to the effect of that opinion, upon particular points. At length it was deemed the most eligible course to adjourn the court till to-morrow, in order that the counsel on both sides might be furnished with copies of the opinion, and be enabled to judge of its application to the evidence which might be offered to prove any particular fact.

The court adjourned till to-morrow ten o'clock.

NOTICE,

Several persons having trespassed upon my farm by pulling down my fences and riding through it, I take this method to caution and forewarn all persons against committing trespasses on it in future; and I will adopt legal measures to obtain redress in case they shall be repeated.

ANNE SOPER,

Prince George's County,

Sept. 25—3t.

NOTICE.

AT a Meeting of the Board of Trustees of the Institution for the education of Youth in the city of Washington, It was *resolved* that the Election of PRINCIPAL TEACHER for the *Western School*, be postponed until the 2nd Monday in October next, and that applications for the said place be received by the Secretary until that day.

WASHINGTON BOYD,

Secretary to the Board of Trustees.

September 23—8t

NOTICE.

THE Commiffioners appointed in purfuance of an act of the City Council, to fuperintend the improvement of the Grave Yards in the city of Wafhington, hereby inform the public that, the Grave Yard on fquare No. 109, near Mr Holmead's will be completely inclofed in a few days—that they have laid off the faid fquare into fites for graves agreeably to a plan filed in the office of the Regifter of the City, and that a part of the faid fites, as defignated on faid plan, will be ready for fale on Saturday the 10th day of October next, for which purpofe a fubfcription paper will be left in the office of THOMAS HERTY, Efq. Regifter of the City, where thofe perfons difpofed to purchafe or fubfcribe, will have an opportunity of examining the plan, and of making their felections, the right of which will be in the order of purchafe or fubfcription, referving a pre-emption to thofe who have already interred part of their families in faid Grave Yard, of felecting in thofe fections contiguous to the part heretofore buried in. No perfon or family can take more than fix fites, for which they will have to pay Two Dollars each, within 30 days from the day of fubfcribing.

No interment will be permitted in the faid Grave Yard, after the date hereof, except under the direction of the Sexton, or, until his appointment, under the direction of one of the Commiffioners.

ROBERT UNDERWOOD,
THOMAS N. CILLISS,
HENRY INGLE,
Commiffioners.

Wafhington city, Sept. 11—w1O10

From the New York Daily Advertiser.

BRITISH TREATY.

An interesting pamphlet made its appearance yesterday, entitled "The British Treaty," dedicated "to those members of Congress who have the sense to perceive and the spirit to pursue the true interests of their country." The following is given as the "purport of that treaty."

The first article, like the first of that concluded on the 19th November, 1794, by Mr. Jay, is merely formal; and the second confirms the first ten articles of the old treaty. It is, therefore, proper to give a glance at them.

The first, as is already mentioned, is merely formal; and the second is executed.

The third gives to each party the right of passing through the territories of the other, in America, except within the limits of the Hudson's Bay Company. We find in it the following clause. "But it is understood, that this article does not extend to the admission of vessels of the United States into the sea ports, harbors, bays or creeks of his majesty's said territories, nor into such parts of the rivers in his majesty's said territories as are between the mouth thereof and the highest port of entry from the sea, except in small vessels trading *bona fide* between Montreal and Quebec, under such regulations as shall be established to prevent the possibility of any frauds in this respect: Nor to the admission of British vessels from the sea into the rivers of the United States beyond the highest ports of entry for foreign vessels from the sea. The river Mississippi shall, however, according to the treaty of peace, be entirely open to both parties; and it is further agreed, that all the ports and places on its eastern side, to whichsoever of the parties belonging, may freely be resorted to and used by both parties, in as ample a manner as any of the Atlantic ports or places of the United States, or any of the ports or places of his majesty in Great Britain."

The fourth article, after mentioning that, "it is uncertain whether the Mississippi extends so far to the northward as to be intersected by a line to be drawn due west from the Lake of the Woods, in the manner mentioned in the treaty of peace," provides "for a joint survey of the northern part of that river;" and agrees, that "if on the result of such survey it should appear that the said river would not be intersected by such a line," the parties will regulate the boundary in that quarter by amicable negociation.

The fifth article, after mentioning that "doubts had arisen what river was truly intended under the name of the river St. Croix," provides for ascertaining that river, and the latitude and longitude of its mouth and source.

The sixth, seventh and eighth articles have been executed.

The ninth provides for persons holding lands in the dominions of one of the parties who are subjects or citizens of the other; and the tenth is a stipulation in favor of moral honesty, viz. that neither party shall sequester or confiscate debts or property in the funds, &c.

The third article of the new treaty provides for and regulates commerce between the United States and the British East Indies, in the same terms as the thirteenth article of the old treaty, except that the words, *and sailing direct from the ports of the said states*, are inserted in the first clause, which now runs thus: "His Majesty consents that the vessels belonging to the citizens of the United States of America, and sailing direct from ports of the said states, shall be admitted and hospitably received in all the seaports and harbors of the British territories in the East Indies, &c."

The fourth article of the new treaty is the same as the fourteenth of the old one, and stipulates for a general liberty of trade between the United States and the British dominions in Europe.

The fifth article of the new treaty is the same as the fifteenth of the old one, (regulating the duties on ships and merchandize,) with two exceptions: The first reserves to the United States the right previously reserved to Great Britain, of imposing a tonnage duty equal to what shall be imposed by the other party. The second is made by substituting a new clause for the reservation formerly made by Great Britain, of "the right of imposing on American vessels entering into the British ports in Europe, such duty as may be adequate to countervail the difference of duty now payable on the importation of European and Asiatic goods when imported into the United States in British or in American vessels." Instead of this, the following words make part of the new article. "And in the trade of the two nations with each other, the same duties on exportation or importation of goods or merchandize shall be imposed, and the same drawbacks and bounties allowed in either country, whether the exportation or importation shall be in British or American vessels."

The sixth article of the new treaty states that the parties cannot agree