

BURR'S TRIAL.

On the indictment for a Misdemeanor.

OPINION OF THE COURT

The question concerning the admissibility of evidence, on the indictment for Misdemeanor.—delivered on the 14th Sept.

The United States, vs. Aaron Burr. On a Misdemeanor.

The present motion is particularly directed against the admission of testimony of Neale, who is offered for the purpose of proving certain conversations between himself and Herman Blannerhasset. It is objected that the declarations of Herman Blannerhasset are at this time inadmissible on this indictment.

The rule of evidence which rejects mere hearsay testimony, which excludes from trials of a criminal or civil nature the declarations of any other individual than of him against whom the proceedings are instituted, has been generally deemed all essential to the correct administration of justice. I know not why a declaration in court should be unavailing unless made upon oath, if a declaration out of court was to criminate others than him who made it; nor why a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations made in his absence may be evidence against him. I know of no principle in the preservation of which all are more concerned. I know none by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important.

This rule as a general rule is permitted to stand, but some exceptions to it have been introduced concerning the extent of which a difference of opinion prevails, and that difference produces the present question.

The first exception is that in case of conspiracy the acts, and it is said by some the declarations, of all the conspirators may be given in evidence on the trial of any one of them, for the purpose of proving the conspiracy, and this case it is alleged, comes within the exception.

With regard to this exception a distinction is taken in the books between the admissibility and operation of testimony which is clear in point of law, but not at all times easy to practice in fact. It is that although this testimony be admitted, it is not to operate against the accused unless brought home to him by testimony drawn from his own declarations or his own conduct.

But the question to be considered is, Does the exception comprehend this case? Is this a case of conspiracy according to the well established law meaning of the term?

Cases of conspiracy may be of two descriptions.

1st. Where the conspiracy is the crime, in which case the crime is complete although the act should never be formed, and in such cases, if several be indicted, and all except one be acquitted, that one cannot say the books, be convicted, because he cannot conspire alone.

2d. Where the crime consists in the intention, and is proved by a conspiracy so that the conviction of the accused may take place upon evidence that he has conspired to do any act which manifests the wicked intention.

In both these cases an act is not essential to the completion of the crime, and a conspiracy is charged in the indictment as the ground of accusation. If the conspiracy be the sole charge, as it may be, the question to be decided is not whether the accused has committed any particular fact, but whether he has conspired to commit it. Evidence of conspiracy in such a case goes directly to support the issue. It has therefore been determined that the nature of the conspiracy may be proved by the transactions of any of the conspirators in the furtherance of the common design; the degree of guilt, however, of the particular conspirator upon trial, must still depend on his own particular conduct.

In the case at bar the crime consists not in intention but in acts. The act of congress does not extend to the secret design if not carried into open deed, nor to any conspiracy, however extensive if it do not amount to a beginning or setting on foot a military expedition. The indictment contains no allusion to a conspiracy, and of consequence the issue to be tried by the jury is not whether any conspiracy has taken place; but whether the particular facts charged in the indictment have been committed.

I do not mean to admit that by any course which might have been given to the prosecution, this could have been converted into a case of conspiracy; but most assuredly if it was intended to prove a conspiracy, and to let in that kind of testimony which is admissible only in such a case, the indictment ought to have charged it.

I have not been able to find in the books a single decision, or a solitary dictum which would countenance the attempt that is now made to introduce as testimony the declarations of third persons made in the absence of the person on trial, under the idea of a conspiracy where no conspiracy is alleged in the indictment. The researches of the counsel for the prosecution have not been more successful. But they suppose this case, though not within the letter, to come clearly within the reasoning of those cases where this testimony has been allowed.

It has been said that wherever the crime may be committed by a single individual, although in point of fact more than one should be concerned in it, as in all cases of

felony, the prosecution must be conducted in the usual mode, and the declarations of third persons cannot be introduced at a trial; but whenever the crime requires more than one person, where from its nature it cannot be committed by a single individual, although it shall consist, not in conspiracy, but in open deed, yet it is in the nature of a conspiracy, and evidence of the declarations and acts of third persons connected with the accused, may be received whether the indictment covers such testimony or not.

I must confess that I do not feel the force of this distinction. I cannot conceive why, when numbers do in truth conspire to commit an act, as murder or robbery, the rule should be, that the declaration of one of them is no evidence against another, and yet, if the act should require more than one for its commission, that the declarations of one person engaged in the plot would immediately become evidence against another. I cannot perceive the reason of this distinction; but, admitting its solidity, I know not on what ground to dispense with charging in the indictment the combination intended to be proved. If this combination may be proved by the acts or declarations of third persons made in the absence of the accused, because he is connected with those persons; if in consequence of this connection the ordinary rules of evidence are to be prostrated, it would seem to me that the indictment ought to give some notice of this connection.

When the terms used in the indictment necessarily imply a combination, it will be admitted that a combination, is charged and may be proved. And where A. B. and C. are indicted for murdering D. yet in such a case the declarations of one of the parties made in the absence of the others, have never been admitted as evidence against the others. If then this indictment should even imply that the fact charged was committed by more than one person, I cannot conceive that the declarations of a *particeps criminis* would become admissible on the trial of a person not present when they were made, unless those declarations form a part of the very transaction charged in the indictment.

If in all this I should be mistaken, yet it remains to be proved that the offence charged may not be committed by a single individual. This may in some measure depend on the exposition of the terms of the act; and it is to be observed that this exposition must be fixed. It cannot vary with the varying aspect of the prosecution at its different stages. If as has been said, a military expedition is begun or set on foot when a single soldier is enlisted for the purpose, then, unless it be begun as well by the soldier who enlists as by the officer who enlists him, a military expedition may be begun by a single individual. So if those who engage in the enterprise follow their leader from their confidence in him, without any knowledge of the real object, there is no conspiracy, & the criminal act is the act of an individual. So too, if the means are any means, the crime may unquestionably be committed by an individual. Should the term be even so construed as to imply that all the means must be provided before the offence can be committed, still all the means may, in many cases, be provided by a single individual.—The rule then laid down by the counsel for the prosecution, if correct in itself, would not comprehend this case.

2dly. There are other cases in the books where acts are in their nature joint, and where the law attaches the guilt to all concerned in their commission, so that the act of one is in truth the act of others, where the conduct of one person in the commission of the fact constitutes the crime of another person; but this is distinct from conspiracy.

If many persons combine to commit a murder, and all assist in it, and are actually or constructively present, the act of one is the act of all, and is sufficient for the conviction of all. So in acts of levying war, as in the cases of Damane and Purchase, the acts of the mob were the acts of all in the mob whose conduct showed a concurrence in those acts, and in the general design which the mob were carrying into execution. But these decisions turn on a distinct principle from conspiracy. The crime is a joint crime, and all these who are present aiding in the commission of it, participate in each others actions, and in the guilt attached to those actions. The conduct of each contributes to shew the nature of this joint crime; and declarations made during the transaction are explanatory of that transaction; but I cannot conceive that in either case declarations unconnected with the transaction would have been evidence against any other than the person who made them, or persons in whose presence they were made. If, for example, one of several men who had united in committing a murder should have said, that he with others contemplated the fact which was afterwards committed, I know of no case which would warrant the admission of this testimony upon the trial of a person who was not present when the words were spoken. So if Damane had previously declared that he had entered into a confederacy for the purpose of pulling down all meeting houses, I cannot believe that this testimony would have been admissible against a person having no knowledge of the declaration and giving no assent to it.

In felony the guilt of the principal attaches to the accessories, and therefore the guilt of the principal is proved on the trial of the accessory. In treason all are principals,

and the guilt of him who has actually committed the treason, does in England attach to him who has advised, aided or assisted that treason. Consequently the conduct of the person who has perpetrated the fact must be examined on the trial of him who has advised or procured it. But in misdemeanors by statute, where the commission of a particular fact constitutes the only crime punished by the law, I believe there is no case where the declaration of a *particeps criminis* can affect any but himself.

3dly. The admission of the declarations of Mr. Blannerhasset may be insisted upon under the idea he was the agent of Colonel B. How far the acts of one man may affect another criminally, is a subject for distinct consideration, but I believe there is no case where the words of an agent can be evidence against his principal on a criminal prosecution. Could such testimony be admissible, the agency must be first clearly established, not by the words of the agent but by the acts of the principal, and the word must be within the power previously shown have been given.

The opinions of the circuit court of N. York in trials of Smith and Ogden have been frequently mentioned. Although I have not the honor to know the judge who gave those decisions, I consider them as the determination of the court of the United States and I shall not be lightly induced to disregard them or unnecessarily to treat them with disrespect. I do not however perceive in the opinions of Judge Talmage any expression indicating that the declarations of third persons could be received as testimony against any individual who was prosecuted under this act. If he has given that opinion, it has certainly escaped my notice and has not been suggested to me by counsel. He unquestionably says in page 113 of the trial "that the reference which was made to the doctrine of conspiracy did not apply in that case." The reference alluded to was the observation of Mr. Emmet who had said that if the object was to charge Col. Smith with the acts of Capt. Lewis, they ought to have laid the indictment for a conspiracy." The opinion of the judge that the doctrine of conspiracy had no application to the case appears to me to be perfectly correct.

I feel therefore no difficulty in deciding that the testimony of Mr. Neal, unless he can go further than merely stating the declarations made to him by Blannerhasset, is at present inadmissible.

But the argument has taken a much wider range. The points made, comprehend the exclusion of other testimony suggested by the attorney for the United States, and the opinion of the court upon the operation of testimony. As these subjects are entirely distinct, and as the object of the motion is the exclusion of testimony supposed to be illegal, I shall confine my observations to that part of the argument which respects the admissibility of evidence of the description of that proposed by the attorney for the United States.

The indictment charges the accused in several counts with beginning, with setting on foot, with preparing, and with providing the means for a military expedition to be carried on against a nation at peace with the United States. Any legal testimony which applies to any one of these counts is relevant. That which applies to none of them must be irrelevant. The expedition, the character and object of that expedition, that the defendant began it, that he set it on foot, that he provided and prepared the means for carrying it on, are all charged in the indictment, and consequently these charges may be all supported by any legal testimony. But that a military expedition was begun or set on foot by others, or that the means were prepared or provided by others, is not charged in this indictment, is not a crime which is or can be alleged against the defendant, and testimony to that effect is, therefore, not relevant.

(Opinion to be concluded in our next.)

BY THIS DAY'S MAILS.

TONNINGEN, July 27.

Extract of a letter from Lord Falkland, commander of the blockade ship Quebec.

"With respect to the letter from Messrs. Stoppel and Co. I have to state that I have received recent orders to consider the ports of Altona & Gluckstadt, in a state of blockade, that no vessels of any description with cargoes in, will be allowed to go up the Elbe, and that neither wine, spirits nor liquors of any kind will be allowed to pass the Watten on any account whatever.

BOSTON, September 18.

Arrived, brig Hannah, Bicknell, of Cohasset, 59 days from St. Petersburg.

Via quarantine, brig Louisa, Lovell, St. Croix, 25 days, rum and sugar.

Schooner Jane, Hampett, Porto Cavallo, 30 days, cocoa. Left no American vessels.

Sailed in company with the brig Sea Nymph, Wheeler, for Philadelphia.

Schooner Active, Givens, of Harpwell, Bay of Honduras, via New-York.

Brig Mercury, Covington, of Plymouth, Russia, 63 days, with hemp, iron and duck.

Spoke nothing.

Cleared, ship Moonson, Babson, Havana; schooner Delaware, Hills, St. Parts; Olive, Osborn, Halifax.

Why should it appear strange, that there are many in the United States, not democrats, who have a little sneaking inclination to

have a *spare* with Great-Britain, before she is subject to Bonaparte. It is of all things the most natural that *men of spirit* should have a desire to improve the *last opportunity* they will ever have, of shewing their prowess. When England falls, there will not be a nation that we can touch, that will not form a part of the Gallic empire, either as acknowledged subjects, or under the delusive name of allies. We must therefore be indulged with the privilege of fighting England a little, just as she is going; of helping to put her under Bonaparte's feet, for notoriety's sake. Yes, fellow citizens, you who burn for glory, let us seize the fleeting occasion. Let us have war with England, and that soon—lest the precious opportunity pass, lest she fall without our interference and without our leaving a military name on record. We must fight now or never; we must fight England or no nation; for after her subjugation, the calm of universal despotism will render it totally *inexpedient* to seek military renown. The last spasms of her expiring independence will undoubtedly be tremendous to those who join to crush her—So much the more honorable, to rush into a conflict, where there will be peril and suffering. [Reperatory.]

COMMERCIAL CORRESPONDENCE.

We have received the following communication from a correspondent in Havana:

Havana, August 21.

DEAR SIR,

We are sorry to acquaint you of an additional duty being levied here upon the importation of all goods, wares and merchandise, of four per cent. except upon articles of fixed valuation, which are affected in a smaller degree by this augmentation. Upon all these the increase is at 22 per cent. on the amount of duty quoted in our prices current. And upon all exports, of the produce of this island there is an additional duty of two per cent. Thus the rates of duties, as they now stand, are 38 per cent. upon imports, and 12 1/2 per cent. upon exports, and payable from and after the 20th instant. Yours, &c.

NEW-YORK, Sept. 21.

By the Ann, from Bordeaux, we have received French papers to the 1st of August.

Bordeaux was illuminated for three nights on account of the peace.

The French emperor Bonaparte arrived at Paris, the 27th of July, from the grand army. The rejoicings and illuminations on this occasion, were the most extravagant of any thing of the kind, we ever heard of.

PARIS, July 20.

Yesterday, at four o'clock in the afternoon, agreeably to the order of his majesty the emperor and king, his serene highness the prince arch-chancellor of the empire, repaired to the senate, in order to communicate to its members the two treaties of peace signed with Russia and Prussia.

His serene highness was received with the accustomed ceremonial, and having taken his seat, he said,

"Gentlemen, the rapid course of the victories of his majesty, the emperor and king, was the certain omen of a glorious peace. Our hopes are accomplished by the two treaties of peace which I bring to the senate. His majesty would not suffer them to be made public until they were laid before you. The senate duly appreciate the delicacy of this reserve, and it will perceive therein a new proof of the attention of our august sovereign, in maintaining the forms consecrated by custom and our laws.

"Amidst the great results which these political transactions present, there is one that will interest your liveliest affections.—Devoted as you are, gentlemen, to the glory of the Imperial dynasty, with what satisfaction will you not see its splendor, continually increasing, elevate to the throne of Westphalia, a young prince, whose wisdom and courage have just been signalled by deeds so noble. In that, as well as in every other disposition forming these treaties, you will trace, gentlemen, the constant cares of the founder of the empire, to consolidate the great system of which he has laid the basis. Your hearts will applaud the conceptions of a genius friendly to humanity, whose views and precautions all tend to spare the effusion of human blood. The continent may at length calculate upon a durable peace. The memorable interviews which have just taken place on the borders of the Niemen, are the pledges of long tranquility. The tokens of mutual esteem and confidence which have been established between the sovereigns of the two most powerful nations of Europe, present a warranty against which all the efforts of hatred and ambition, will henceforward prove abortive."

His serene highness having then banded the two treaties, they were read by senator Dupere, one of the secretaries.

The reading being ended, the senator Lacpede, speaker of the senate, made the following reply:

"My lord, the reading of the two treaties of peace, which his majesty the emperor and king, has been pleased, through your serene highness, to communicate to us, impress upon the senate new sentiments of the liveliest gratitude.

"After so many harvests of glory, so many prodigies, and so much good, the senate feels more than ever the necessity of presenting to his Imperial and royal majesty its homage and its vows.

"We know we shall soon have the advantage, so precious for every Frenchman, of enjoying the august presence of the greatest of monarchs. But days, hours and even moments, seem like so many ages to our just impatience.

"I then move, senators, 1st. that the senate orders the transcription upon its registers of the treaty with Russia, and of that with Prussia. Secondly, that a special committee be charged to draft an address expressive of the sentiments of love and respect with which the senate is so deeply affected for his Imperial and royal majesty."

The two motions of senator Lacpede, were unanimously agreed upon.

The committee appointed to frame the address, consists of his eminence Cardinal Fesch, Messrs. Lacpede, Monge, Laplace, and Semonville. They will make their report on Monday, the 27th instant.

Conformably to orders from his majesty, the emperor and king, transmitted to his serene highness the prince arch-chancellor of the empire, his excellency the grand master of the ceremonies, prescribed to the heralds to proclaim in Paris, the peace which has just been signed with Russia and Prussia. This publication has taken place yesterday 24th July, as follows:

At 5 o'clock, in the evening, the heralds on horseback, attended by 21 justices of the peace and a numerous detachment of troops, set off from the Tuilleries, and proclaimed throughout Paris, the articles of the treaties concluded between his majesty the emperor of the French and king of Italy, protector of the confederation of the Rhine, and their majesties the emperor of all the Russias and the king of Prussia.

The train in all its rounds was followed by an immense concourse of people, who evinced their gladness and gratitude by the liveliest transports and cries a thousand times repeated, of *vive l'empereur*. In the evening there was a general illumination.

The emperor is expected here tomorrow or the day following. It is supposed he will go direct to St. Cloud.

DRESDEN, July 18.

His majesty the emperor sat off from Koenigsberg, the 13th at 6 o'clock in the evening, and arrived on the 14th at noon, at Marienwerder, where he staid an hour. At 12 o'clock the same evening, he passed thro' Posen, where he remained two hours; during which he received the civil officers of the Polish government.

On the 16th, at noon, he arrived at Glogau, and on the 17th, at seven in the morning, at Bautzen, first town of the kingdom of Saxony, where he was received by the king. These two sovereigns conversed together for some time in the mansion house of the bishop; the king entered in the emperor's carriage, they arrived together at Dresden, and alighted at the palace. This day at 6, in the morning, the emperor mounted on horseback to survey the environs of Dresden.

The sentiments which his majesty found in Saxony, are similar to those that have been expressed to him on the whole of his way in Poland; an immense concourse of people crowded together every where on his passage. [Monteur.]

ARRIVED.

The brig Olive, Crowell 6 days from Savannah, cotton & rice. Left, ship Charleston, of N. York, for Liverpool in 15 days; ship Columbia, of do. for do. in 16; brig Friendship, of do. discharging; brig Lovely Lass, Wheeler, for N. York.

The brig Huntress, White, in 15 days from Charleston, cotton and logwood.

The sch'r. Favorite, Stone, 28 days from Tobago, rum. Left, brig Victory, of New-castle, for Philadelphia. Spoke brig He-len, 13 days from Guadeloupe for N. York.

The ship Eliza Sproat, Salter, of Portsmouth, N. H. 59 days from Amsterdam, gin. Sailed in co. ships Logan, Grace, and a brig, all for N. York; and spoke the Logan, off Seilly, out 20 days, all well.

Sept. 1, off the Grand Banks, spoke ship Thomas Gordon, from Rotterdam, for Portsmouth, N. H. August 19 lat. 42, 38, spoke ship Rolla, of Philadelphia, 20 days from London, for Norfolk. Sept. 5, lat. 41, 34 spoke the sch'r. New Bethia, of Harwich, 35 days from Bordeaux, for Philadelphia.

The barque Mary Southwick, of Boston, 57 days from G. stemburg iron. The ship —, Earl, for Rhode Island, and the ship —, Hopkins, for Boston, sailed 7 days before. 18th instant, in lat. 40 19, long. 70 45, spoke brig James, 20 days from Bermuda. — New-London.

The schooner Russell, Woodhouse, from Winton, N. C. naval stores and staves.

The sch'r. Sally, Tatem, from Currituck, staves and shingles.

The sch'r. Polly and Dorcas, Woodhouse, from Edenton, naval stores and staves.

The schooner Ceres, Thorp, 6 days from Charleston, sugar.

The sch'r. Mount Walliston, Kent, 7 days from Richmond, coal.

The sloop Factor, Allen, 9 days from Baltimore, cocoa, iron &c.

The sch'r. Antelope, Combs, from North-Carolina, turpentine.

The sch'r. Citizen, Sturges, 9 days from Alexandria, flour and wheat. On Friday, spoke ship Mechanic, 72 days from Amsterdam for Philadelphia, with passengers.

The sch'r. James Leiox, Willis, 7 days from Newberu, naval stores.

The British sch'r. Maria, Thomas, 18 days from Halifax, plaster.