

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.

Concluded. All testimony which serves to show the expedition to have been military in its character, as for instance testimony respecting their arms and provisions, no matter by whom purchased, their conduct, no matter by whom directed, or who was present, all legal testimony which serves to show the object of the expedition, as would be their actually marching against Mexico, any public declarations made among themselves, stating Mexico as their object, any manifesto to this effect, any agreement entered into by them for such an expedition, these or similar acts would be received to show the object of the expedition.

In the trials of Smith and Ogden they were received. Whether the particular acts of the accused, on which his guilt or innocence depends, must precede this species of testimony or may be preceded by it is a question which merely respects the order of evidence. There can be no doubt but that at some stage of the prosecution, either before or after the particular part performed by the accused has been shown, the character and object of the expedition may be shown, and that by any legal testimony calculated to develop the character and object. Whether this testimony is admissible before the proof of which particularly applies to the part performed by the accused or ought to be introduced by first proving that part, is a question which is not made in this case, and which was not made in the case of Smith and Ogden. In that case it was certainly unimportant, and it is probably not less so in this.

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, Blannerhasset, 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 inquiry 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, and 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 been also contended that no acts 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, made in Kentucky or elsewhere, that he had set on foot a military expedition on Blannerhasset's island, to be carried on against the dominions of the king of Spain while the United States are at peace with that power, would, I think, be evidence; so would the actual marching of the troops proved 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 for the United States 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 Blannerhasset'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 in criminal prosecutions a distinct crime for which a prosecution may be instituted can not 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. States 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 acts alleged in Kentucky do not prove the charges contained in the indictment. They would prove the defendant to have been connected in the enterprise, 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 enterprise. 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 enterprise 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 insinuating 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. 35, 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 county different from that in which the indictment was found, the defendant shall be acquitted.”

This rule is the stronger in the United States 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 yet been heard so far as I recollect. If there be such testimony it must also be shown 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 some accuracy and to treat it with more precision. Since those orders were 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 colonel 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 colonel 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 in either law, 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 too frequently urged to require further explanation. The one is a principal, the other an accessory. 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 8d 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 act 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 frame 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 United States which was stopped by my 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 accessory before the fact might plead in bar of an indictment as accessory 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 show that it could not effect 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. p. 292 says “if A and B be indicted of the murder of C. upon their evidence it appears that A committed the fact and B was not present but was necessary before the fact by commanding it, B shall be discharged.”

In H. 2. ch. 85, sec. 11. Hawkins discusses 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 the procurement of an act, even when both are criminal, as the same act.

I cannot therefore consider means provided by those who are his accomplices in the expedition as means provided by col. Burr.

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 6th. If there be testimony showing by orders from the accused, means were provided in Virginia by a person not an accomplice, it 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 has been committed relates to the effect rather than to the exclusion of the testimony. 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 enterprise 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 enterprise?

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 enterprise is, “an undertaking of hazard, an arduous attempt.” The proper meaning then of this 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 Blannerhasset's island. The 2d and 3d that he set on foot the enterprise in Blannerhasset'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 began; 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 expedi-

tion. 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. The disclosure of that plan does not begin it. 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 enterprise.

These 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 declaration of third persons not forming a part of the transaction 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 charges 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.

BY THIS DAY'S MAILS.

LONDON, Aug. 7. The following article from the Hague is, in our opinion, of much importance. It throws considerable light on the future intentions of Bonaparte relative to Turkey:—

From the Hague July 21.—The Haerlem Journal, under the head of intelligence from Paris, states, that an eminent French general and sovereign prince is intended to be king of Greece.

A German author, who has lately published some statistical observations respecting the state of Europe, says, that Europe contains 171,396 square German miles, of which France either governs directly or protects 38,893; that it contains 182,599,000 inhabitants, of which 37,050,000 obey France, or enter into its federal system; that there are in Europe 2,549,836 soldiers, of which France can put 854,800 in movement. The total revenues of Europe he estimates at 1,173,750,000 florins, of which France receives about 700,000,000 of livres.

NEW-YORK, September 22. There was a great bustle among our coffee house politicians this morning, in consequence of a report that the ship Science had arrived at the Hook in 27 days from London, with a copy of the treaty concluded by the American and British ministers. It was, however, soon discovered (though perhaps too late for some) that it was a mere report.

Arrived, the brig St. Brides, Tinney, from Cayenne, via Newport cocoa, rocoa, and cotton; Left, brig Julian, Peck, in 20 days from N. York.

Below last night, ship Dartmouth, Starr, 7 days from Savannah. Crew sickly.

The brig Northern-Liberties, Masterton, 48 days from Bordeaux, via R. Island, wine, brandy and dry goods. In lat. 40, long. 40 spoke the ship Monticello, 19 days from New-York for Amsterdam.

The schr. Katy-Maria, Stores, 6 days from Richmond, flour and tobacco.

The sloop Morning Star, Donnelly, from Washington, N. C. naval stores, beeswax and flaxseed.

The schr. Nancy, M-Cormick, 18 days from St. Juans, Cuba, sugar, honey, and hides. Was boarded by the sloop of war Ferret, and treated politely.

The schr. Good Intent, Stowe, from Washington, N. C. turpentine.

The schr. Delight, Fisher, from Currituck, lumber.

The schr. Independence, Sylvester, of Newbern, 25 days from Antigu, sugar.

The schr. Eagle, Van Name, from Currituck, lumber.

The schr's Rising States, Elwood, 7 days from Charleston, cotton, rice and sugar.—

The ship Hyades, arrived at Charleston in 15 days from New-York, with the loss of her foremast and main-top-mast. A Guineaman, with 300 slaves, went in completely dismantled.

The schr's L'Orient, Travis, 3 days from Fredericksburg, flour.

The schr's Sally, Mosier, 35 days from Newfoundland, fish and oil.

The sloop Little Poll, Lenter, 10 days from Alexandria, wheat and flour.

The sloop Sally, Mattocks, 16 days from N. Providence, sugar, leather, and cedar.

The sloop Hancock, Riggs, had sailed for Havana. The sloop Venus, Bush, from Norfolk; and snow Susan, from Philadelphia have arrived there.

The brig Northern Liberties, from Bordeaux for New-York, has arrived at Rhode Island.

Cleared, ship Britannia, Lovett, Halifax;

brig Maria, Randlet, Leghorn; schr. Victory, Kearny, Halifax; Traveller, Reading, Charleston.

PHILADELPHIA, Sept. 23.

We understand that the board of health, in consequence of infirmation of the unhealthy condition of Charleston and Savannah, have directed that all vessels arriving from those ports shall come to at the lazaretto, and be subject to all the necessary quarantine regulations. Although the salubrity of our air and period of the season afford us strong assurance of safety, this measure of precaution was highly necessary and judicious.

We learn from New-Orleans, that the fine ship Comet, formerly a regular packet between that port and Baltimore, had been put into the Philadelphia trade, and would sail for this port early in September. In this ship would come passenger, the hon. Daniel Clark, delegate to congress from N. Orleans.

Extract of a letter from J. M. Forbes, Esq. consul for Hamburg, to a merchant in this city, dated Tomning, 14th July.

I have however great pleasure in stating I have received an official communication from his Britannic majesty's consul-general Mr. Cockburn, by which permission is given to neutral vessels, coming from neutral places and laden with neutral cargoes and bound to the ports of Gluckstadt or Altona, to enter the Elbe and proceed to those ports, and to depart again with neutral cargoes for neutral places. The terms of the communication are general, and imply no prohibition of any merchandise except contraband of war; yet doubts have arisen, whether provisions liquors and tobacco, excluded by previous orders, would not still find difficulty.

On the special application by the master of a neutral vessel laden with French wines, The commanding officer at the mouth of the Elbe, lord Falkland permitted the vessel to go round. I have however, dispatched a boat with a letter demanding explanations on this point, and also to know if vessels cleared as are all our ships, for this place or Hamburg, if not blockaded, will be excluded, or whether they will be merely warned not to go to Hamburg, and suffered, under the general rule of blockade to proceed to the next free port. I expect an answer to day or to-morrow, and have little doubt that it will be favorable.

In any event, I have always an agent here, Mr. G. H. Loring, who will take charge of an consignments made to me and forward them, with the smallest possible expense, to Hamburg. I beg leave to renew to you and your friends an offer of my best services, observing that I have it in my power to make the customary advances on consignments and to give every facility which other houses give.

Arrived, brig Victory, Trefethen, Tobacco, rum, &c.; schr. Five Brothers, Stevens, Exuma, salt.

Cleared, ship America, Proet r, Rotterdam 3 schs. Timoph. Fallin, Martinique; Delesiderner, Drinkwater, Portland; sloop Favorite, Keen, Savannah.

Arrived, schr. Rover, Coleman, Nantucket, 11 days; oil; Seahorse, Hewet, Richmond 9, coals; Industry, Wils n, Richmond, 7, do; Speedwell, Baker, Norfolk 7, salt and cotton; Return, Grant, N. Carolina, 25, naval stores; sloop Maria, Wilcock, Stonington, 11; Heroine Williams, Norwich merchantize; President, Scull, Richmond, 9, coals; Independence, Scull, Richmond, 9, coals.

Cleared, brig Delaware, St. Andero; Good Friends, Harper, St. Sebastians; British brig Swift, M Lachlan St. Johns, a B. schr. Sally Watson, Kingston Jamaica; Retaliation, Daggett, Boston.

Ship Minerva, Bainbridge, and brig Superior, Haynes, hence at Havana.

Schr. Alleghany, Scheer, hence at St. Thomas.

Ship Jersey, Graham of and for this port from Cadiz, with a cargo of salt, was stranded on Chincoteague, on Saturday morning, and is expected to be lost.

By the ship Dispatch we learn, that when about half the cargo of the brig Holland, (who had been sent into St. Kitts) was discharged that she slipped out and intended to make the best of her way home.

Extract of a letter from the Lazaretto, dated Sept. 21.

“Yesterday afternoon arrived, the brig Mary Torrence, Devereaux, 19 days from St. Thomas, with cocoa and hides. Left brig Jefferson, time of sailing uncertain.

Also, brig Victory, Trefethen, 23 days from Tobago, with rum.

Also, brig William and Martha, Kuhn, twelve days from Havana sugar. Left the brig Meridian, and ship Hampden and Sidney, to sail the same day; brig Superior, uncertain; schr. Perseverance, in 3 or 4 days.

Also, the ship Dispatch, Baus, 19 days from St. Kitts, rum and molasses. The brig Holland, sailed 4 or 5 days before.”

NORFOLK, September 19.

Arrived, ship Live Oak, Yarell, 60 days from London, ballast. Sept. 7, lat. 37, 30, long. 55, spoke brig Josephine, 60 days from Liverpool, bound to this port. 10th, lat. 37, 36, long. 67, 52, brig Eliza, from Philadelphia, bound to Lisbon, 5 days out.

WASHINGTON CITY, September 23.

By virtue of a precept of the secretary of the navy of the 12th inst. a court of enquiry will be held at Norfolk on the 5th October, in the case of Commodore Barron. The court will be composed of the following officers, viz.