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SENATE OF THE UNITED STATES.

APRIL 9.

CASE OF JOHN SMITH.

CONTINUED.

MR. HILLHOUSE.—The cause before the Senate has been so fully heard, and so ably discussed, that it was my intention to have given a silent vote, had not the gentleman from Massachusetts (Mr. Adams) declared in so pointed a manner that even voting on the resolution would sanction the report of the committee which accompanied it; a report containing principles which I can never sanction by my vote, principles which go to discredit all our criminal tribunals, and those rules of proceeding and of evidence which govern the decisions of courts; rules which alone can shield innocence, and protect an accused individual against a govermental prosecution, or the overwhelming power of a formidable combination of individuals determined on his destruction—principles which would plant a dagger in the bosom of civil liberty.

Of the many erroneous principles contained in that report, there is but one which I shall think it necessary particularly to notice. The question (says the report) upon the trial "of a criminal cause, before the courts of common law, is not between guilt and innocence, but between guilt and the possibility of innocence." This is a principle which I can never sanction nor in the smallest degree countenance by my vote. In every country where civil liberty and individual rights are regarded, the common law rule is, that the trial is between *innocence* and *guilt*; and that every person is to be deemed *innocent* until his guilt is proved: a rule which, so long as we shall preserve our liberties, cannot be abandoned. Once admit that the person accused is to be *presumed guilty*, and to be put to prove the *possibility* of his innocence, and the same circumstances that would otherwise go to establish innocence, would be converted into proof of guilt. In the present case, admit the presumption of innocence, and many parts of the conversations and conduct of the member accused, which are now relied on as proof of his guilt, may be accounted for, as being exectly what an honest unsuspecting man would have said and done; but upon the supposition that he was engaged in Aaron Burr's conspiracy, many presumptions of his guilt may be drawn from them. This has been the ground assumed by the gentleman from Massachusetts, and on this he has built his argument. In this way the accused member, by doing what was commendable, and what was his duty as a good citizen to do, has furnished evidence of his guilt.

As to the two precedents referred to, and which appear on the journals of the Senate, they are misapprehended, and the facts entirely mistated, in the report of the committee. In one case I was an actor in the scene, being then a Senator, and have a perfect recollection of the facts, and know the statement to be wholly erroneous. Referring to the case of William Blount, the report says: "In all these points the committee perceive the admission of a species of evidence, which in courts of criminal jurisdiction would be excluded; and in the resolution of expulsion the Senate declared the person inculpated *guilty of a high misdemeanor*, although no presentment or indictment had been found against him, and no prosecution at law was ever commenced upon the case." By the journals of the Senate it appears that, "on motion, Mr. Martin and Mr. Cocke of the Senate being sworn, severally testified, on the inspection of the letter said to be written by Mr. Blount, that it was his hand writing, they being acquainted therewith, and having seen him write." This entry on the journal corresponds with my recollection of the fact. This was legal testimony, and the only testimony admitted on the trial. [Here Mr. Adams called for the reading of that part of the journal which states that Mr. Blount was requested by the President of the Senate to declare whether or not he was the author of the letter. The journal was read, and was as follows, viz.—"The President requested of Mr. Blount to declare, whether or not, he was the author of the letter, a copy of which was communicated with the message of the President of the U. States of the 3d instant. Mr. Blount declined an answer." Mr. A. said this was evidence not admissible in a court of law.] Mr. H. proceeded.—I sat in judgment on that case, and know that Mr. Blount's declining to answer was not considered as evidence. The question was asked, because Mr. Blount might have no objection to answer; he might have supposed the contents harmless, or have been able to give a satisfactory explanation thereof he being a member of their own body, it was no more than civil to give him this opportunity, before they proceeded to prove the letter upon him It was impossible the Senate should have made the enquiry for the purpose of drawing from Mr. Blount an accusation of himself; or that they should be capable of converting his refusal to answer into proof of guilt, in direct violation of that fundamental principle of civil liberty, that no man shall be compelled to accuse himself. The rule goes so far as to protect even a witness from being obliged to answer any question which may go to criminate himself. What is said respecting the comparison of his hand writing, appears by the journals not to have taken place in the Senate, or on the trial, but before the committee who made the report, and the preparatory arrangements for the trial.

In regard to the other precedent, the report of the committee goes on to say: "The event (the expulsion of Wm. Blount) occurred in July, 1797. About fifteen months before that time, upon an application from the legislature of Kentucky, requesting an investigation by the Senate, of a charge against one of the members from that state, of perjury, which had been made in certain newspaper publications, but for which no prosecution had been commenced, the Senate did adopt, by a majorty of 16 votes to 8, the report of a committee, purporting that the Senate had no *jurisdiction* to try the charge, and that the memorial of the Kentucky legislature should be dismissed. There were indeed very sufficient reasons, of a different kind, assigned in the same report, for not pursuing the investigation in that particular case any further; and your committee believe, that in the reasoning of that, some principles were assumed and some inferences drawn, which were altogether unnecessary for the determination of that case, which were adopted without a full consideration of all their consequences, and the inaccuracy of which was clearly proved by the departure from them in the instance which was so soon afterwards to take place. It was the first time that a question of expulsion had ever been agitated in Congress, since the adoption of the constitution. And the subject being thus entirely new, was considered perhaps too much with reference to the particular circumstances of the moment, and not enough upon the numerous contingencies to which the general question might apply. Your committee state this opinion with some confidence, because of the sixteen Senators who in March, 1796, voted for the report dismissing the memorial of the Kentucky legislature, eleven, on the subsequent occasion in July, 1797, voted also for the report, which concluded with a resolution for the expulsion of Mr. Blount. The other five were no longer present in the Senate. Yet if the principles advanced in the first report, had been assumed as the ground of proceeding at the latter period, the Senate would have been as impotent of jurisdiction upon the offence of Mr. Blount, as they had supposed themselves upon the allegations against Mr. Marshall." Mr. President, I was not then of the Senate, but feel for the character of its members, and regret extremely, that in drawing this report, it should have been deemed necessary to mention the then Senate, which was composed of many of the most respectable characters of our country in a manner that seems reproachful, and to imply that the majority were governed in their votes by political or party considerations. Could it be necessary to state, in such a pointed manner that of the 16 Senators who 15 months before voted for the dismissal of the Kentucky memorial, eleven voted for the expulsion of Mr. Blount, the other five being no longer present, both cases involving the same principle? Was it necessary to insinuate that the subject was considered perhaps too much with reference to the *particular circumstances of the moment*? It is still more unfortunate that such *reproachful insinuations* should have been made, seeing upon a careful examination of the report in the case of Mr. Marshall, it is manifest that its principles are intirely misapprehended. That part of the report reads thus: "Mr. Marshall is solicitous that a full investigation of the subject should take place in the Senate, and urges the principle, that consent takes away error, as applying on this occasion to give the Senate jurisdiction; but as no person appears to prosecute, and there is no evidence adduced to the Senate, nor even a specific charge. the committee think any further enquiry by the Senate would be improper. If there were no objections of this sort, the committee would still be of opinion that the memorial could not be sustained. They think, that in a case of this kind, no person can be held to answer for an infamous crime, unless on a presentment or indictment of a grand jury, and that in all such prosecutions the accused ought to be tried by an impartial jury of the state and district wherein the crime shall have been committed. If in the present case the party has been guilty in the manner suggested, no reason has been alledged by the memorialists why he has not long since been tried, in the state and district where he committed the offence. Until he is legally convicted, the principles of the constitution and of the common law, concur in presuming that he is innocent. And the committee are compelled, by a sense of justice, to declare that in their opinion this presumption in favor of Mr. Marshall, is not diminished by recriminating publications which manifest strong resentment against him. And they are also of opinion, that as the constitution does not give jurisdiction to the Senate, the consent of the party cannot give it; and that therefore the said memorial ought to be dismissed." Mr. President—the principle laid down in this report, as I then & now understand it, is, that the constitution not having given to the Senate *criminal jurisdiction*, the consent of the party could not give it. That it could not refer to the power of expulsion is manifest, because the *jurisdiction* of the Senate, in case of *expulsion*, is by the constitution *express* and *unlimited*; provided only that there be the concurrence of two-thirds. When the report says "the constitution does not give jurisdiction to the Senate, the consent of the party cannot give it," it must be understood to be an answer to Mr. Marshall's application for trial *to vidicate his character*. The Senate not finding any occasion to pursue the enquiry for the purpose of exercising their censorial power of expulsion, assumed the principle, and in my opinion correctly, that to establish the fact of *innocence* or *guilt* for any other purpose they had no jurisdiction; the consent of the party could not give jurisdiction. To assume such jurisdiction would be to convert the Senate into a criminal tribunal, which by the constitution is reserved to the common law courts and an impartial jury of the state and district. The reason for distinguishing the power of expulsion from the exercise of criminal jurisdiction, will be sufficiently manifest from a reference to the memorial, and report, from which it will further appear, that the charge was grounded on what had taken place in the court of appeals of Kentucky 18 months previous to Mr. Marshall's being appointed a Senator, and had been the subject of newspaper dissussion and was fully known to the legislature when the appointment was made. In the present case, suppose the Senate had been satisfied that no enquiry was necessary for the purpose of exercising their censorial power of expulsion, and Mr. Smith had requested the Senate to institute an enquiry for the purpose of giving him an opportunity of vindicating his innocence; would not the Senate have given him the same answer as was given in the case of Mr. Marshall? "No person can be held to answer for an infamous crime unless on a presentment or indictment of a grand jury," &c.—"that as the constitution does not give jurisdiction to the Senate, the consent of the party cannot give it." That the Senate have no power by the constitution to transform themselves into a court of criminal jurisdiction, to try any offence whatever, but a right only to enquire into such facts as may be necessary to enable them to exercise the power of expulsion. That the constitutional authority of the Senate to expel a member is not the jurisdiction of a court instituted for the trial and punishment of crimes, but a political power to be exercised only when necessary for preserving the purity of this branch of the legislature, is evident from the consideration that it does not exempt a person from the liability to be tried and punished by the criminal tribunals of the country. The use that is attempted to be made of this precedent, shews in a strong point of light the impropriety and impolicy of attempting to settle abstract questions, or to detail reasons not necessary for coming to a proper result in the case before us; being liable to be misunderstood or mistated.

I do most fully agree with the gentleman from Massachusetts, that the Senate, for the purpose of exercising their censorial power of expulsion, have cognizance of the case before us: that for that purpose they have cognizance of all crimes and offences, and are not bound to wait for the proceedings of the courts of common law. I further admit that the same degree of evidence is not necessary to justify an expulsion of a member, as to convict him before a court and jury. For example, on a charge of treason, two witnesses are necessary to a conviction. On such a charge, I should not hesitate to expel a member on the testimony of a single witness of irreproachable character. What I insist on is, that the evidence admitted must be legal evidence, and such as would be admissible in a court of law; not *exparte* depositions, hearsay evidence, or surmises founded on mere conjecture or suspicion.

Were I, in deciding this case, to be governed by *political* or *party* considerations, I should incline to vote in favor of the resolution on your table. But when we reflect, that agreeing to that resolution is to disrobe a Senator of his honor, to doom a fellow citizen, an amiable family, and an innocent posterity, to perpetual infamy and disgrace, party and political considerations ought not, cannot influence the decision: *impartial justice* and the *testimony* alone must govern, and flatter myself will govern every member of this Senate in the vote he is about to give.

Elias Glover, having volunteered in giving his deposition, when no accusation existed, was to be considered rather an accuser than a witness. An *exparte* deposition, taken under such circumstances, could not by me be considered as evidence on a question of expulsion, had not the accused member and his counsel agreed to its admission, by which I was bound to consider it as evidence. And in my mind it is so material, that if the force of it had not been destroyed by counter testimony, I must have voted for the resolution before us. But I have listened with pleasure, for it always gives me pleasure when a person accused can prove his innocence, to the evidence adduced which has completely done away the force of Glover's deposition. The gentleman from Mass. admits, and every member who has spoken seems to agree, that no reliance can be placed upon it. I shall therefore lay that out of the case; as also the other evidence attempting a direct proof of a participation in Aaron Burr's conspiracy, as in this also I fully agree with the gentleman from Mas. that it amounts to very little. It is the *conduct* and *confessions* of Mr. Smith by which his guilt is endeavored to be established; and when such talents and eloquence as are possessed by the gentleman from Mas. are brought to bear upon, and are urged with so much energy and force against an individual accused of being concerned in plots and conspiracies against the government of his country, charges peculiarly calculated to excite *jealousy* and *suspicion*, innocence itself could hardly expect to escape. After hearing his able & eloquent argument, I was much gratified by the motion of the gentleman from Virginia, (Mr. Giles) to postpone. I wished for one night to consider the subject; I was not then [illegible] make a reply.

The gentleman from Mas. has [illegible] lied on the conversations, confessions, and conduct of Mr. Smith to prove his guilt, but he does not take the whole conversations & confessions together; and it is a rule of law, always admitted, and never to be departed from, that when the confession of the party is taken, the whole must be taken together; and not to make out proof of guilt, by selecting different detached parts, leaving out other parts that go to explain what otherwise might appear criminal. A strict anherence to this rule will leave little of evidence, or even ground of suspicion of guilt in this case. If all Mr. Smith's conversations and confessions are taken together, there can remain little doubt of his innocence.

The first circumstance in Mr. Smith's conduct which is laid hold on, and on which the gentleman from Mas. has built his argument to establish his guilt, is that Mr. Smith has confessed that in September, 1806, he gave Aaron Burr a hospitable reception under his roof, for four or five days; that he afterwards saw him again at Cincinnati and in Kentucky. What was there suspicious in all this? Who was Aaron Burr? And what was the situation of Mr. Smith in relation to him, that extending to him the rights of hospitality should excite suspicion, and fix the imputation of crime? A. Burr was a man who had stood high in the confidence of the people of the U. S.—a man who had been associated with the present Chief Magistrate, and had received an equal number of the votes of the electors for President—a man who had been by the voice of his country placed in the second office in the nation—a man who for four years filled the chair you now occupy, and presided over this Senate with impartiality and dignity; and in a manner to command universal approbation. So great was the ascendancy which he had acquired in this body, that towards the close of his term of service a bill was passed granting to him for life the privilege of sending and receiving letters and packets through the mail free of postage, a privilege which had never been extended to any but a President of the U. S. and Mrs. Washington. So great was the confidence of a majority of the Senate in A. Burr, as to produce an unusual zeal, no doubt a laudable zeal, for passing the bill. It was pressed in an unusual manner; and we were called to a decision when he was himself in the chair; he who could almost look down opposition. Under such circumstances it was painful to oppose the bill; and nothing but a strong sense of duty could have impelled any one to make opposition. The Yeas and Nays on the Journal* will shew how great a portion of the Senate, of which number was Mr. Smith, had so high a confidence in Mr. Burr. At that time I had no more suspicion than the majority of Col. Burr's having any treasonable designs; though in opposition to the bill, I did state it as a possible case, that a Vice-President, ambitious of rising to the first office in the nation, and meeting with disappointment, might become disaffected, and engage in treasonable plots to overturn the government, and avail himself of his privilege and the mail to circulate his treason into every corner of the union. The bill was arrested in the House of Representatives. The Senate also adopted the following: "Resolved unanimously, that the thanks of the Senate be presented to Aaron Burr, in testimony of the impartiality, dignity and ability with which he has presided over their deliberations; and of their entire approbation of his conduct, in the discharge of the arduous and important duties assigned him as President of the Senate." I was happy on this occasion to unite in what I considered a just tribute of applause for his conduct as President of the Senate.

This was the close of A. Burr's po-

* YEAS.—Messrs. Adams, Anderson, Bradley, Brackenridge, Brown, Cocke, Condit, Dayton, Gaillard, Jackson, Mitchel, Moore, Smith, Md. Smith, N. Y. Smith, Ohio, Smith, Vt. White, Wright.—18.

NAYS.—Messrs. Baldwin, Ellery, Franklin, Hillhouse, Howland, Logan, Maclay, Olcott, Pickering, Plummer, Stone, Sumter, Worthington.—13.