

THE DEFENCE OF ARNOLD

Mr. Ewing read the following defence of Arnold:

May it please the Court: The evidence in Arnold's case is not voluminous. It is in a small compass - consists of but few facts, and the evidence as to these facts is all in accord. Between the testimony adduced against him by the prosecution, and that elicited by the defence there is no conflict, no contradiction, and it is all in harmony, and corroboration of the history which he himself gave after the affair, when arrested and examined by the detectives, at the store of his employer, Wharton, at Old Point Comfort. His statements on that occasion, were called out by the prosecution, and thus made evidence which, not being discredited, the Court is bound to adopt.

Mr. Horner, the detective, says that after Arnold's arrest at Fortress Monroe, on the 17th of April, they took him into a back room, and searched and questioned him. Arnold then stated that a week or two prior to his going to Fortress Monroe, a meeting of the conspirators was held at the Lichau House in this city; that the object of the conspiracy during the time he was connected with it was to capture the President and take him South, for the purpose of compelling this Government to an exchange of prisoners; that at this meeting he announced his intention, if the thing was not done that week, to terminate his connection with the plot, and withdraw from it, upon which an altercation took place between him and Booth, in which Booth declared that he (Arnold) ought to be shot for the expression of such an opinion; and that thereupon he (Arnold) did withdraw, and went and accepted employment at Old Point Comfort with John W. Wharton, as chief clerk in his store there, and since then he had nothing further to do with the conspiracy. Booth had previously furnished all the conspirators with arms, and so perfect was the understanding that Arnold's connection with them was ended, and that he had definitively withdrawn from further cooperation with them, that Booth told him to sell, or otherwise dispose of the arms as he pleased.

There is no reason to doubt that this statement of Arnold's was entirely truthful and ingenuous. All that occurred, both before and after, corroborates and confirms it. He never saw Booth again, but a few days after, on the 27th of March, he wrote him the letter from Hookstown, which was found in Booth's trunk after the assassination, and which seems to have been in reply to a letter from Booth, written to shake his resolution, and reclaim him as a conspirator. But he remained firm. He adhered to the wise conclusion he had reached, to abandon the enterprise. He says to Booth, "I told my parents I had ceased with you. Can I, then, under existing circumstances, come as you request?" "You nor any one can censure me for my present course. You have been its cause, for how can I now come, after telling them I had left you?" "Weigh all I have said and as a rational man and a friend you cannot censure or upbraid my conduct."

Can there be a doubt that the rupture with his former associates was complete and final? Booth himself so understood it. On the same day Arnold's letter was written at Hookstown, and before Booth could have received it, to wit on the 27th of March, Booth telegraphed O'Laughlin: "Get word to Sam. Come on with or without him, Wednesday morning" clearly indicating he did not expect Sam to come, and Sam did not come. And in strong corroboration of this is the testimony of Mrs. Van Tyne. About the 10th of February Arnold and O'Laughlin took rooms at her house, and remained till about the 20th of March, when they left, and she never saw them afterwards, till she met them in this room. During their stay at Mrs. Van Tyne's it is not disguised that Arnold was in a conspiracy to capture and abduct the

President. He was plotting with Booth and others for that end, and Booth frequently visited him. Arnold stayed at Hookstown constantly from the 21st of March until the 31st, excepting two or three days spent at his father's house in Baltimore, and then went to Fortress Monroe on the 1st of April.

A week or two prior to that time, which would be about the 20th of March, the meeting occurred, at which Arnold quarreled with Booth, and dissolved his connection with the conspiracy. Upon the happening of that event he gave up his room at Mrs. Van Tyne's; he had no further use for it; he left the city; never saw Booth afterwards, and was never here afterwards till brought here a prisoner. There is nothing further in the vast mass of testimony which has been taken that I regard as at all material to his case, except the evidence of Chester, and the confession in open court of Atzerodt, which strongly corroborate Arnold's statements as to the real purpose of the conspiracy, which on the 20th of March, he had abruptly and wholly abandoned.

The utmost scope of the evidence against Arnold established only that he was at one time party to a conspiracy, for the capture and abduction of the President.

And if the object of this conspiracy had been consummated, and the President had been abducted instead of being assassinated on the 14th of April, even then Arnold would not have been subject to, and could not lawfully be convicted and punished, because, before its accomplishment, he had entirely abandoned and withdrawn from the plot. Human, like Divine, law mercifully leaves a place of repentance for all, between the conception and the perpetration of crime.

The law deals with and punishes the consummated act, not the secret, immature, undeveloped intention. Even the solicitation or incitement of another to commit an offence is not indictable, unless it be accompanied or followed by some overt act towards carrying the intention into execution; but if no such act be done, it is nothing more than mere fruitless, ineffectual temptation. It stands as a mere wish or desire of the defendant to do an evil act. If any evil consequences ensue on such solicitation, the party is answerable; but there is a locus poenitentiae between the solicitation and the act; and if he countermand the act before it be done, he is absolved from the consequences. If A command B to commit a crime, but before execution thereof A repents and countermands B, and yet B proceeds in the execution of the act, A is not accessory, is not responsible, and cannot be punished, because he is not consenting thereto. His consent was withdrawn, and being withdrawn, B was no longer his agent, and could not impose upon A the consequences of his acts. A, therefore having committed no act, is subject to no punishment (1 Hale's Pleas of the Crown 618). After Arnold had terminated his connection with the conspiracy for the abduction of the President, he ceased to be responsible for what his former confederates did, whether in prosecution of the original object, or in execution of some new plot to which he was not a party for the common enterprise, so far as he was concerned, being at an end, no one of the remaining conspirators is permitted by a subsequent act or declaration to affect him. (Wharton's Am. Crim. Law 262) But if the conspiracy for the seizure and abduction of the President had continued, and Arnold had still been connected with it, awaiting an opportunity to execute it, with the full, firm, unaltered purpose to avail himself of such opportunity whenever it was presented, still that is not the offence for which he is on trial; and a conclusive, unanswerable argument against his conviction is, that there is not an atom of testimony concerning him in the remotest degree with the crime, which was in fact committed.

It will not do to say, and is no answer to say that he had confederated with the assassins, had agreed and intended to cooperate with them in committing an outrage upon the person of the President, and is therefore to be regarded and treated as an accessory to the crime which was in fact committed, though a totally different one from that to which he had assented.

It is conceded that if his consent had continued, and his co-conspirators, in his absence, had entered upon the execution of the enterprise of capture and abduction, and the murder of the President had ensued, in the prosecution of the plot to which he had assented, he would be amenable to punishment as an accessory before the fact. But this is not the case presented. Here the original plot, with which Arnold was connected, was abandoned, and a new one, of an entirely different character, to which he had never assented, of which he had no knowledge, and with which he was never in any way, or any extent, connected, was substituted.

For this new crime he is no more responsible than if he had never seen, or known, or heard of the wicked men who did the horrid deed. And he cannot be made responsible, by showing that he had previously combined with the same men for the perpetration of another, but different crime against the same person. A man is criminally answerable for his own acts only, not for the acts of others. No matter who actually does the deed; if he be answerable at all, it is upon the principle that the guilty instrument was his agent, and that by his consent, connivance, or cooperation he made the act his own.

He cannot be an accessory before the fact who was ignorant of the intended perpetration of the crime. An accessory before the fact is he, who being absent at the time of the actual perpetration of the felony, procures, counsels, commands, incites, or abets another to commit it. (1. Chit. Crim. Law 262) But it must be the crime which was committed that he counselled, incited or abetted, for the procurer will not be liable, if the agent commit a crime of a different complexion, or upon a different object than that to which he was incited.(Do.do.do. 263). If the agent, from the mere wickedness of his own mind, intentionally commits a different offence, the procurer will not be implicated in the guilt.(Do. 264)

If A command or counsel B to commit felony of one kind, and B commits a felony of another kind, A is not accessory; as if A command B to steal plate, and B commits burglary to steal the plate, A is accessory to the theft, but not to the burglary; A commands B to burn the house of C. A kills, robs, or steal from C. A is not accessory for it is an offense of another kind. (1 Hale's Pleas of the Crown 616.61)

It is conceded, or at least so proven as to put it beyond the reach of controversy, that Arnold had no actual participation either in the murder of the President, or the assault upon the Secretary of State and his family. He was not in Washington, not nearer to the scene of the tragedy than Fortress Monroe. Nor had he any intercourse or communication with, nor did he give any aid, comfort, assistance or protection to the guilty agents after the crime was perpetrated. This is not claimed. If then, he is implicated at all, it must be as an accessory before the fact. And to make him an accessory before the fact, it must be shown that he counselled, incited, connived at, or consented to an unlawful act, from which the crimes that were actually committed naturally resulted. And this must be established by testimony so clear and cogent as to remove from the mind all reasonable doubt of the truth of the fact. A mere preponderance of evidence, or any amount of preponderant evidence which falls short of convincing the mind to the actual exclusion of all reasonable doubt, will not suffice.

Even in civil cases, involving the most paltry pecuniary value, the law demands a preponderance of evidence upon every material point necessary to a recovery. But in criminal cases in favor of life and liberty, adopting the humane and just maxim that it is better, always and under all circumstances, for the interests of society, that ninety and nine guilty persons shall escape, than that one innocent one shall suffer, it tolerates no conviction on probabilities, however numerous and cogent they may be, but inexorably demands as near an approach to a demonstration of the very truth of the fact charged, to the exclusion of all reasonable doubt, as human testimony is capable of attaining. Nothing is to be let to conjecture, nothing assumed, but every material fact must be fully proven, by indisputable testimony, to the full and entire conviction and satisfaction of the mind of the judge or juror charged with the investigation. It must be so proven that the judge or juror would unhesitatingly act upon it in matters of the highest possible importance in his own affairs, so proven that he will be willing to say upon his oath, and to abide the consequences, in time and eternity, that he has no doubt of the truth of the fact assumed.

Recurring now to the attitude which Arnold occupies before the Court, and remembering that, if he be guilty at all, he is guilty as an accessory before the fact, and as such only, let us inquire where and what are the proofs to connect him with the crime. Nowhere is one word or syllable to be found. Against him, in connection with the crime which was actually committed, there is nothing, absolutely nothing. So far as the evidence shows, he stands as disconnected from the assassination of the President, and assault upon the Secretary, as any other individual in the community. There is not one word of testimony, either oral or written, neither on the statement of witnesses on the stand, nor in the disclosures of anonymous letters, which have been scattered from New York to Georgia, which even insinuates that Arnold had ever heard or suspected, or had reason to suspect that anyone on earth had ever plotted, intended or imagined the assassination of the President and his Cabinet, or anyone of them.

If he did not know of the intended crime, how could he be an accomplice before the fact in its commission? If he did know of it, I ask to be pointed to the precise testimony which proves it. He was a party to a conspiracy, but the entire scope of that conspiracy was the abduction of the President. It contemplated no other act. But for this conspiracy, such as it was, he is not on trial, and it can have, or certainly ought to have, no influence whatever upon the minds of the Court. It was abandoned by him before the assassination, and with that abandonment, his connection and intercourse with the conspiracy ceased.

The accomplishment of its objects and purposes was never attempted, and the crime now under investigation did not result from it, but was the fruit of a new plot, a new conspiracy, to which Arnold was not a party, and of the existence of which it does not appear that he had the slightest knowledge or intimation. How then will it be possible to justify a judgment of condemnation against him as accessory before the fact, to a crime of the intention to commit what he was utterly and profoundly ignorant, and from which, we are warranted in believing, from what the evidence has disclosed of his character, he would have shrunk with loathing and dismay.

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