SUPREME COURT OF THE UNITED STATES,

FEB. TERM, 1807.

The United States v. Bollman & Swartwout, } Habeas Corpus on a commitment for treason.

Chief Justice MARSHALL on the 21st instant, delivered the following opinion of the Court.

The prisoners having been brought before this court on a writ of *Habeas Corpus*, and the testimony on which they were committed having been fully examined and attentively considered, the court is now to declare the law upon their case.

This being a mere enquiry which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is whether the accused shall be discharged or held to trial; and if the latter, in what place they are to be tried, and whether they shall be confined, or admitted to bail. "If," says a very learned and accurate commentator, "upon this enquiry it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison or give bail."

The specific charge brought against the prisoners is treason in levying war against the U. S.

As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made a deliberate and temperate enquiry. Whether this enquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government—none can more affect the safety of both.

To prevent the possibility of those calamities which result from the extension of treason to offences of minor importance, that great fundamental law which defines and limits the various departments of our government has given a rule on the subject both to the legislature and the courts of America which neither can be permitted to transcend.

"Treason against the U. S. shall consist only in levying war against them, or in adhering to their enemies giving them aid and comfort."

To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the U. States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried that, in a case reported by Ventris, and mentioned in some modern treatises on criminal law, it has been determined that the actual enlistment of men to serve against the government does not amount to levying war. It is true that in that case the soldiers enlisted were to serve without the realm, but they were enlisted within it, and if the enlistment for a treasonable purpose could amount to levying war, then war had been actually levied.

It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force, a treasonable purpose, all those who perform any part, however minute or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war.

Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our constitution who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same overt act, or on confession in open court, must have conceived it more safe that punishment in such cases should be ordained by general laws formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is therefore more safe as well as more consonant to the principles of our constitution that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition should receive such punishment as the legislature in its wisdom may provide.

To complete the crime of levying war against the U. S. there must be an actual assemblage of men for the purpose of executing a treasonable design. In the case now before the court, a design to overturn the government of the U. S. in New-Orleans by force, would have been unquestionably a design which if carried into execution would have been treason, and the assemblage of a body of men for the purpose of carrying it into execution, would amount to levying of war against the U. S. but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war.

In conformity with the principles now laid down have been the decisions heretofore made by the judges of the U. States.

The opinions given by judge Paterson and judge Iredell in cases before them imply an actual assembling of men though they rather designed to remark on the purpose to which the force was to be applied than on the nature of the force itself. Their opinions however contemplate the actual employment of force.

Judge Chase in the trial of Fries was more explicit.

He stated the opinion of the court to be "that if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the U. S. by force, they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war; and the *quantum* of the force employed, neither lessens nor increases the crime: whether by one hundred, or one thousand persons, is wholly immaterial. "The court are of opinion," continued Judge Chase, on that occasion, "that a combination or conspiracy to levy war against the U. S. is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war; but it is altogether immaterial whether the force used is sufficient to effectuate the object; any force connected with the intention, will constitute the crime of levying war."

The application of these general principles to the particular case before the court will depend on the testimony which has been exhibited against the accused.

The first deposition to be considered is that of general Eaton. This gentleman connects in one statement the purport of numerous conversations held with col. Burr throughout the last winter. In the course of these conversations were communicated various criminal projects which seem to have been revolving in the mind of the projector. An expedition against Mexico seems to have been the first and most matured part of his plan, if indeed it did not constitute a distinct and separate plan, upon the success of which other schemes still more culpable, but not yet well digested might depend. Maps and other information preparatory to its execution, and which would rather indicate that it was the immediate object, had been procured, and for a considerable time, in repeated conversations the whole efforts of Col. Burr were directed to prove to the witness who was to have held a high command under him, the practicability of the enterprise, and in explaining to him the means by which it was to be effected.

This deposition exhibits the various schemes of col. Burr, and its materiality depends on connecting the prisoners at the bar in such of those schemes as were treasonable. For this purpose the affidavit of general Wilkinson comprehending in its body the substance of a letter from Col. Burr has been offered and was received by the circuit court. To the admission of this testimony great and serious objections have been made. It has been urged that it is a voluntary, or rather an extrajudicial affidavit made before a person not appearing to be a magistrate, and contains the substance only of a letter, of which the original is retained by the person who made the affidavit.

The objection that the affidavit is extrajudicial resolves itself into the question whether one magistrate may commit on an affidavit taken before another magistrate. For if he may, an affidavit made as the foundation of a commitment, ceases to be extrajudicial, and the person who makes it would be as liable to a prosecution for perjury as if the warrant of commitment had been issued by the magistrate before whom the affidavit was made,

To decide that an affidavit made before one magistrate would not justify a commitment by another might in many cases be productive of great inconvenience, and does not appear susceptible of abuse if the verity of the certificate be established. Such an affidavit seems admissible on the principle that before the accused is put upon his trial, all the proceedings are exparte. The court therefore over-rule this objection.

That which questions the character of the person who has on this occasion administered the oath is next to be considered.

The certificate from the office of the department of state has been deemed insufficient by the counsel for the prisoners, because the law does not require the appointment of magistrates for the territory of New Orleans to be certified to that office, because the certificate is in itself informal, and because it does not appear that the magistrate had taken the oath required by the act of Congress.

The first of these objections is not supported by the law of the case, and the second may be so readily corrected that the court has proceeded to consider the subject as if it were corrected, retaining however any final decision, if against the prisoners, until the correction shall be made. With regard to the third, the magistrate must be presumed to have taken the requisite oaths, since he is found acting as a magistrate.

On the admissibility of that part of the affidavit which purports to be as near the substance of the letter from Colonel Burr to General Wilkinson as the latter could interpret it, a division of opinion has taken place in the court. Two judges are of opinion that as such testimony delivered in the presence of the prisoner on his trial would be totally inadmissible, neither can it be considered as a foundation for a commitment. Although in making a commitment the magistrate does not decide on the guilt of the prisoner, yet he does decide on the probable cause, and a long and painful imprisonment may be the consequence of his decision. This probable cause therefore ought to be proved by testimony in itself legal, and which, though from the nature of the case it must be exparte, ought, in most other respects to be such as a court and jury might hear.

Two judges are of opinion that in this incipient stage of the prosecution an affidavit stating the general purport of a letter may be read, particularly where the person in possession of it is at too great a distance to admit of its being obtained, and that a commitment may be founded on it.

Under this embarrassment it was deemed necessary to look into the affidavit for the purpose of discovering whether if admitted, it contains matter which would justify the commitment of the prisoners at the bar on the charge of treason.

That the letter from Col. Burr to general Wilkinson relates to a military enterprise meditated by the former has not been questioned. If this enterprise was against Mexico, it would amount to a high misdemeanor, if against any of the territories of the United States, or if in its progress the subversion of the government of the United States in any of their territories was a mean clearly and necessarily to be employed, if such mean formed a substantive part of the plan, the assemblage of a body of men to effect it would be levying war against the United States.

The letter is in language which furnishes no distinct view of the design of the writer. The co-operation, however, which is stated to have been secured, points strongly to some expedition against the territories of Spain. After making these general statements the writer becomes rather more explicit and says, "Burr's plan of operations is to move down rapidly from the falls on the 15th of November with the first 500 or 1000 men in light boats now constructing for that purpose to be at Natchez between the 5th and 15th of December, there to meet Wilkinson; then to determine whether it will be expedient in the first instance to seize on or to pass by Baton Rouge. The people of the country to which we are going are prepared to receive us. Their agents now with Burr say that if we will protect their religion and will not subject them to a foreign power, in three weeks all will be settled."

There is no expression in these sentences which would justify a suspicion that any territory of the U. S. was the object of the expedition.

For what purpose seize on Batton Rouge; why engage Spain against this enterprize, if it was designed against the United States?

"The people of the country to which we are going are prepared to receive us." This language is peculiarly appropriate to a foreign country. It will not be contended that the terms would be inapplicable to a territory of the United States, but other terms would more aptly convey the idea, and Burr seems to consider himself as giving information of which Wilkinson was not possessed. When it is recollected that he was the governor of a territory adjoining that which must have been threatened, if a territory of the United States was threatened, and that he commanded the army, a part of which was stationed in that territory, the probability that the information communicated related to a foreign country, it must be admitted, gains strength.

"Their agents now with Burr say that if we will protect their religion and will not subject them to a foreign power, in three weeks all will be settled."

This is apparently the language of a people who, from the contemplated change of their political situation, feared for their religion, and feared that they would be made the subjects of a foreign power. That the Mexicans should entertain these apprehensions was natural and would readily be believed. They were, if the representation made of their dispositions be correct, about to place themselves much in the power of men who professed a faith different from theirs, and who by making them dependent on England, or the United States would subject them to a foreign power.

That the people of New Orleans as a people, if really engaged in the conspiracy, should feel the same apprehensions, and require assurances on the same points, is by no means so obvious.

There certainly is not in the letter delivered to general Wilkinson, so far as that letter is laid before the court, one syllable which has a necessary or a natural reference to an enterprise against any territory of the United States.

That the bearer of this letter must be considered as acquainted with its contents, is not to be controverted. The letter and his own declarations evince the fact.

After stating himself to have passed through New York and the western states and territories, without insinuating that he had performed on his route any act whatever which was connected with the enterprise, he states their object to be "to carry an expedition to the Mexican provinces."

This statement may be considered as explanatory of the letter of col. Burr, if the expressions of that letter could be thought ambiguous.

But there are other declarations made by Mr. Swartwout, which constitute the difficulty of this case. On an enquiry from general Wilkinson, he said "this territory would be revolutionized where the people were ready to join them, and that there would be some seizing, he supposed, at New Orleans."

If these words import that the government established by the United States in any of its territories, was to be revolutionized by force, although merely as a step to, or a mean of executing some greater projects, the design was unquestionably treasonable, and any assemblage of men for that purpose would amount to a levying of war. But on the import of the words a difference of opinion exists. Some of the judges suppose they refer to the territory against which the expedition was intended, others to that in which the conversation was held. Some consider the words if even applicable to a territory of the United States, as alluding to a revolution to be effected by the people rather than by the party conducted by col. Burr.

But whether this treasonable intention be really imputible to the plan or not, it is admitted that it must have been carried into execution by an open assemblage of men for that purpose, previous to the arrest of the prisoner, in order to consummate the crime as to him; and a majority of the court is of opinion that the conversation of Mr. Swartwout affords no sufficient proof of such assembling.

The prisoner stated that "col. Burr with the support of a powerful association extending from New York to New Orleans, was levying an armed body of 7000 men from the state of New York and the western states and territories, with a view to carry an expedition to the Mexican territories."

That the association, whatever may be its purpose, is not treason, has been already stated. That levying an army may or may not be treason, and that this depends on the intention with which it is levied, and on the point to which the parties have advanced, has been also stated. The mere enlisting of men without assembling them is not levying war. The question then is whether this evidence proves col. Burr to have advanced so far in levying an army as actually to have assembled them.

It is argued that since it cannot be necessary that the whole 7000 men should have assembled, their commencing their march by detachments to the place of rendezvous, must be sufficient to constitute the crime.

This position is correct, with some qualification. It can not be necessary that the whole army should assemble, and that the various parts which are to compose it should have combined. But it is necessary that there should be an actual assemblage, and therefore the evidence should make the fact unequivocal.

The travelling of individuals to the place of rendezvous would perhaps not be sufficient. This would be an equivocal act, and has no warlike appearance. The meeting of particular bodies of men and their marching from places of partial to a place of general rendezvous would be such an assemblage.

The particular words used by Mr. Swartwout are that col. Burr was levying an armed body of 7000 men. If the term levying in this place imports that they were assembled, then such fact would amount, if the intention be against the United States, to levying war. If it barely imports that he was enlisting or engaging them in his service, the fact would not amount to levying war.

It is thought sufficiently apparent that the latter is the sense in which the term was used. The fact alluded to, if taken in the former sense, is of a nature so to force itself upon the public view, that if the army had then actually assembled either together or in detachments, some evidence of such assembling, would have been laid before the court.

The words used by the prisoner in reference to seizing at New Orleans, and borrowing perhaps by force from the bank, though indicating a design to rob, and consequently importing a high offence, do not designate the specific crime of levying war against the United States.

It is therefore the opinion of a majority of the court, that in the case of Samuel Swartwout, there is not sufficient evidence of his levying war against the United States to justify his commitment on the charge of treason.

Against Erick Bollman there is still less testimony. Nothing has been said by him to support the charge that the enterprise in which he was engaged had any other object than was stated in the letter of col. Burr. Against him, therefore, there is no evidence to support a charge of treason.

That both the prisoners were engaged in a most culpable enterprise against the dominions of a power at peace with the United States, those who admit the affidavit of general Wilkinson cannot doubt. But that no part of this crime was committed in the district of Columbia, is apparent. It is therefore the unanimous opinion of the court that they cannot be tried in this district.

The law read on the part of the prosecution is understood to apply only to offences committed on the high seas, or in any river, haven, bason or bay, not within the jurisdiction of any particular state. In these cases there is no court which has particular cognizance of the crime, and therefore the place in which the criminal shall be apprehended, or, if he be apprehended where no court has exclusive jurisdiction, that to which he shall be first brought, is substituted for the place in which the offence was committed.

But in this case, a tribunal for the trial of the offence wherever it may have been committed, had been provided by Congress; and at the place where the prisoners were seized by the authority of the commander in chief, there existed such a tribunal. It would too be extremely dangerous to say, that because the prisoners were apprehended, not by a civil magistrate, but by the military power, there could be given by law a right to try the persons so seized in any place which the general might select, and to which he might direct them to be carried.

The act of Congress which the prisoners are supposed to have violated, describes as offenders those who begin or set on foot, or provide or prepare the means for any military expedition or enterprise to be carried on from thence against the dominions of a foreign prince or state, with whom the United States are at peace.

There is a want of precision in the description of the offence which might produce some difficulty in deciding what cases would come within it. But several other questions arise which a court consisting of four judges finds itself unable to decide, and therefore as the crime with which the prisoners stand charged has not been committed, the court can only direct them to be discharged. This is done with the less reluctance because the discharge does not acquit them from the offence which there is probable cause for supposing they have committed, and if those whose duty it is to protect the nation by prosecuting offenders against the laws shall suppose those who have been charged with treason to be proper objects for punishment, they will, when possessed of less exceptionable testimony, and when able to say at what place the offence has been committed, institute fresh proceedings against them.

The order of the court was as follows:

The United States v. Swartwout, } On a writ of Habeas Corpus.

The arguments of the Attorney General and of the Attorney of the U. S. for the district of Columbia, and the arguments of counsel for the prisoner having been heard; and the record of the circuit court for the county of Washington containing the order by which the said Samuel Swartwout was committed on the charge of treason in levying war against the U. S. and the testimony on which the said commitment was made having been inspected and attentively considered, the court is of opinion that the testimony does not furnish probable cause for supposing that the said Samuel Swartwout has levied war against the U. S. and doth therefore direct that he be forthwith discharged from the custody of the Marshal.

The same order with regard to Bollman.

Valuable Property for Sale.

IN pursuance of an order of Washington county court, will be offered at public sale on the premises, on the 16th of March next, the real estate of Richard Cromwell, esq. late of said county, deceased, unless disposed of at private sale in the mean time.

THIS Valuable tract of Land lies on Conococheague creek, about 7 miles from Hagers-town, contains upwards of 1300 acres, and is at present occupied in four plantations.

Number 1. The late residence of the said Richard Cromwell, deceased, contains about 450 acres; it has the advantage of a fine stream of water running through it, on which there is a SAW MILL erected—the soil is productive, and there is 50 or 60 acres in meadow, and 150 acres or upwards still in timber. The improvements and other advantages of this farm are superior to most in the neighborhood, and for a stock farm it is surpassed by none in the county.

Number 2, at present in the occupation of Oliver Cromwell, and divided from the former by Conococheague creek, contains 340 or 350 acres—the soil is productive, the improvements neat and comfortable, and there is from 130 to 150 acres of it still in woods which is covered with timber of a very superior quality.

Number 3, adjoining the first mentioned tract, at present in the occupation of Richard Cromwell, contains 250 acres or upwards, the soil is rich and productive, it is well timbered and possesses the advantage of a never failing stream of water running through it, on which there is an excellent MILL SEAT, adjoining the public road from Mercersburg to Williamsport, 8 or 9 miles from the latter place—the improvements are a Dwelling House and Stables.

Number 4, containing 250 acres or upwards—the improvements are a good comfortable Log house and barn—there is about one hundred acres in cultivation, including 12 or 15 acres of good timothy meadow—the remainder is covered with fine thriving timber—this tract adjoins the first mentioned plantation, and is all good farming land—also, one undivided half of about 60 acres of timber land, lying on both sides of Conococheague creek, and adjoining the last mentioned tract; the greater part is creek bottom, is well timbered and embraces a good site for a mill on Conococheague. There is a good spring of water on each of the above plantations. The whole will be sold together or in separate plantations, as may be most suitable to those wishing to purchase. The terms will be, one third of the purchase money to be paid on the first day of April next, at which time possession may be had, and the balance to be paid in six equal annual payments. Any person wishing to purchase at private sale, may make application to any of the commissioners or to Messrs. Oliver and Richard Cromwell, who will show the lands to any person inclining to purchase.

WALTER B[illegible],
MARTIN KERSHNER,
HENRY ANKONY,
JOSIAH PRICE, } Com'rs.

Washington county, Feb. 21—w4t