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OPINION
Of the court, in the relation to arrest
the evidence, delivered on
TUESDAY, AUGUST 31.

(Continued.)
It is unnecessary to trace this doctrine to its source for another reason. The terms of the constitution comprize no question respecting principal and accessory, for as either may be truly and in fact said to levy war. Whether in England a peer might be indicted in express terms for levying war, or for affixing others in levying war, yet if in correct and legal language he can be said to have levied war, and if it has never been decided that the act would not amount to levying war, his case may without violent construction be brought within the letter and the plain meaning of the constitution.

In examining these words the argument that may be drawn from felonies, as for example, murder, is not more conclusive. Murder is the single act of killing with malice aforethought. But war is a complex operation composed of many parts, cooperating with each other. No one man or body of men can perform them all if the war be of any continuance. Although then correct and in law language, he alone who has perpetrated murdered another who has perpetrated the fact of killing, or has been present aiding that fact, it does not follow that he alone can have levied war who has borne arms. All who may perform the various and essential military parts of prosecuting the war which must be assigned to different persons, may with correctness and accuracy be said to levy war.

Taking this view of the subject, it appears to the court, that those who perform a part in the prosecution of the war may correctly be said to levy war and commit treason under the constitution. It will be observed that this opinion does not extend to the case of a person who performs no act in the prosecution of the war, who counsels and advises it, or who being engaged in the conspiracy fails to perform his part. Whether such persons may be implicated by the doctrine, that whatever would make a man an accessory in felony makes him a principal in treason, or are excluded, because that doctrine is inapplicable to the U. S. the constitution having declared that treason shall consist only in levying war, and having made the proof of overt acts necessary to conviction, is a question of vast importance which it would be proper for the supreme court to take a fit occasion to decide, but which an inferior tribunal would not willingly determine unless the case before them should require it.

It may now be proper to notice the opinion of the supreme court in the case of the U. S. against Bollman and Swartwout. It is said that this opinion is in declaring that treason consists not in bearing arms but is guilty of treason, is contrary to law, and is not obligatory, because it is extrajudicial, and was delivered on a point not argued. This court is therefore required to depart from the principle here laid down.

It is true, that in this case after forming the opinion that no treason could be committed, because no treasonable assemblage had taken place, the court might have dispensed with proceeding further in the doctrines of treason. But it is to be remembered, that the judges might separately, and perhaps at the same time, on the various professions which might be introduced, & that no appeal by their decisions. On some judgments on the point before them have presented a flat of things indistinctly to be deplored by all. It was not surprising then that they should have made some attempt to settle principles which would probably occur, and which were in some degree connected with the point before them.

The court had employed some reasoning to show that without the actual embodying of men, war could not be levied. It might have been inferred from this, that those only who were embodied could be guilty of treason. Not only to conclude this inference, but also to affirm the contrary, the court proceeded to observe, "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 the country. On the contrary, if war be actually levied, that is, if a body of men be actually embodied for the purpose of defending by force a treasonable object, all those who perform any part, however minute, or however remote from the scene of action, and who are actually engaged in the general conspiracy, are to be considered as traitors."

This court is told that if this opinion be correct, it ought not to be obeyed because it was extrajudicial. For myself, I can say that I could not lightly be prevailed on to disobey it, were I even convinced that it was erroneous; but I would certainly use any means which the law placed in my power to carry the question again before the supreme court, for reconsideration, in a case in which it should directly occur and be fully argued.

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In saying that I fill think the opinion perfectly correct, I do not consider myself as going further than the preceding reasoning goes. Some gentlemen have argued as if the supreme court had adopted the whole doctrine of the English books on the subject of accessories to treason. But certainly this is not the fact. Those only who perform a part, and who are leagued in the conspiracy are declared to be traitors. To complete the definition both circumstances must concur. They must perform some act which will furnish the overt act, and they must be "leagued in the conspiracy." The person who comes within this definition, in the opinion of the court levies war. The present motion, however, does not rest upon this point; for, if under this indictment the U. S. might be let in to prove the part performed by the prisoner, if he did perform any part, the court could not stop the testimony in its present stage.

2d. The second point involves the character of the overt act which has been proved in this case, provided on the court to declare whether that act can amount to levying war. Although the court ought now to avoid any analysis of the testimony which has been presented in this case, provided the decision of the motion should not rest upon it, yet many reasons concur in giving peculiar propriety to a delivery, in the course of these proceedings, of a decided opinion on this question, which is levying war? As this question has been argued at great length, it may probably give much

trouble to the counsel now to give their opinions on this subject.

In opening the case it was contended by the attorney for the U. S. and has since been maintained on the part of the prosecution, that neither arms nor the application of force or violence are indispensably necessary to constitute the fact of levying war. To illustrate these positions several cases have been stated, many of which would clearly amount to treason. In all of them, except that which was probably intended to be this case, and on which no objection was made, the object of the assemblage was clearly treasonable—its character was unequivocal, and was demonstrated by evidence furnished by the assemblage itself; there was no necessity to rely upon information drawn from extrinsic sources, or in order to understand the fact, to pursue a course of intricate reasoning and to compare notes. A force is supposed to be collected for an avowed treasonable object, in a condition to attempt that object, and to have commenced the attempt by moving towards it. I flatter these particulars because although the cases put are intended to support, may prove that the absence of arms, or the failure to apply force to tangible objects in the actual commission of violence on those objects may be supplied by other circumstances, yet they also afford a reason for the opinion, that those circumstances to be satisfied that war is levied.

Their construction of the opinion of the former court is, I think, thus far correct. It is certainly the opinion which was at the time entertained by myself, and which is still entertained. If a rebel army avowing its hostility to the foreigner power, should front that of the government, should march & counter-march before it, should manoeuvre in its face, and should then disperse from any cause whatever without firing a gun, I confess I could not without some surprise, hear gentlemen seriously contend that this could not amount to an act of levying war. A case equally strong may be put with respect to the absence of military weapons. If the party be in a condition to execute the purpose of treason without the use of implements of war, I can perceive no reason for requiring those implements in order to constitute the crime.

It is argued that no assemblage can be produced from the English books where actual violence has not been committed. Suppose this were true. No assemblage can, or is intended, can be produced from those books in which it has been laid down, that war cannot be levied without the actual application of violence to external objects. The language of the reporters on this point may be readily accounted for. In cases of actual rebellion against government, the Lord Chief Justice and his associates are generally most actively engaged in the war, and as the object can never be to extend punishment to extermination, a sufficient number are found amongst those, who have committed actual hostilities, to satisfy the avenging arm of justice. In cases of constructive treason, such as pulling down meeting-houses, where the direct and avowed object is to extend punishment to extermination, powers, some acts of violence might be generally required to give to the crime a sufficient degree of malignity to convert it into treason, to render the guilt of any individual unequivocal.

But Vaughan's case is a case where there was no real application of violence, and where the act was adjudged to be treason. Gentlemen argue that Vaughan was only guilty of adhering to the king's enemies, but they have not the authority of the court for so saying. The judges unquestionably treat the assemblage of Vaughan as an overt act of levying war.

The opinions of the best elementary writers concur in declaring, that where a body of men is assembled for the purpose of making war against the government, and are in a condition to make

that war, the assemblage is an act of levying war. The opinions are contradicted by the assemblage of Vaughan's case. This court is not inclined to convert them. But all is such in this respect, that the opinion of the supreme court has not been misinterpreted on the part of the prosecution. The court were themselves fully advised to in every essential point in which it is said to have been misinterpreted by others. The opinion I am informed, had been confirmed to mean, that any assemblage whatever for a treasonable purpose, whether in force, or not in force, whether in a condition to use violence or not in that condition, is a levying of war. It is this construction, which has not indeed been expressly avowed at the bar, but which is said to have been adopted elsewhere, that the court deem it necessary to examine.

Independent of authority, tracing it to the dictates of reason, and expounding terms according to their ordinary significations, we should probably all concur in the declaration that war could not be levied without the employment and exhibition of force. When an appeal from treason to the throne, and who makes the appeal evidences the fact by the use of arms. His intention to go to war may be proved by words, but the actual going to war is a fact which is to be proved by open deed. The absence of arms, or the failure to use them would form no declaration in itself to be made, the fact of actual war being established by the employment of force or being in a condition to employ it.

But the term having been adopted by the court, it might be understood that those in which it was universally received in this country, when the constitution was framed. The facts in which it was received is to be collected from the most approved authorities of that nation from which we have borrowed the term.

Lord Coke says that levying war against the king was treason at the common law. "A conspiracy or confederacy to levy war, was also treason, for there could be a levying of war in fact." He proceeds to state cases of constructive levying war, where the direct design is not to overturn the government but to effect some general object by force. "A conspiracy or confederacy in raising the coasts, are such, that actual violence is an imposition on his majesty, and actual violence is a necessary ingredient in constituting the fact of levying war. It then proceeds to say, "an actual rebellion or insurrection in a levying of war within the realm." "The use of arms and weapons invasive and defensive doth hold and defend a castle or fort against the king and his power, this is levying of war against the king." These cases are put to illustrate what he denominates "a war in fact." It is not easy to conceive "an actual invasion or insurrection" unaccompanied with force, nor can a castle or fort be defended with strength and weapons invasive and defensive" without the employment of actual force. It would seem to have been the opinion of Lord Coke, that to levy war was to be a "war in fact" in a condition and with an intention to employ force. It certainly puts no case of a different description.

Lord Hale says, "what shall he be said levying a war is partly a question of fact, for it is not every insurrection or riotous assembly of many persons to be a levying of war, though de facto they commit the act they intend, that makes a levying of war; for then every act of violence is treason, and it must be said an assembly as carries with it *specimen belli*, the appearance of war, as if they ride or march *à la suite* *expliciter*, and they are to be formed into companies or furnished with military officers, or if they are armed with military arms, and if they are clothed in bills, halberds, pikes, and so on, unless that it may be reasonably concluded they are in a posture of war, which is constructive treason, and it is hard to describe them all particularly."

He adds the general expressions in all the judgments of this nature that I have seen are *more guerris armatis*, arrayed in arms. "If there be a war levied as is above declared, viz. an assembly of many persons, and if they are in a posture of war, viz. any treasonable attempt, it is *bellum domesticum* and not *externum*." It is obvious that Lord Hale supposes