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TRIAL OF AARON BURR.

OPINION of the Court on the motion to arrest the evidence, delivered on Monday, August 31—Continued.

This exposition which seems to be that intended by Judge Foster, is rendered the more certain by a reference to the state trials from which the extracts are taken. The words used by the Chief Justice are "when men form themselves into a body and march rank and file with weapons offensive and defensive, this is levying of war with open force, if the design be public." Mr. Phipps, the counsel for the prosecution afterwards observed, "Intending to levy war is not treason unless a war be actually levied." To this the chief justice answered, Is it not actually levying of war, if they actually provide arms, and levy men, and in a warlike manner set out and cruize, and come with a design to destroy our ships?" Mr. Phipps still insisted "it would not be an actual levying of war unless they committed some act of hostility." "Yes, indeed, said the chief justice, the going on board and being in a posture to attack the king's ships." Mr. Baron Powis added, "but for you to say that because they did not actually fight it is not a levying of war, is it not plain what they did intend? That they came with that intention, that they came in that posture, that they came armed, and had guns and blunderbusses and surrounded the ship twice; they came with an armed force, that is a strong evidence of the design."

The point insisted on by the counsel in the case of Vaughan, as in this case was, that war could not be levied without actual fighting. In this the counsel was very properly overruled; but it is apparent that the judges proceeded entirely on the idea that a warlike posture was indispensable to the fact of levying war.

Judge Foster proceeds to give other instances of levying war.—"Attacking the king's forces in opposition to his authority upon a march or in quarters is levying war." "Holding a castle or fort against the king or his forces, if *actual force be used in order to keep possession*, is levying war. But a bare detainer as supposed by shutting the gates against the king or his forces from within, lord Hale conceiveth will not amount to treason."

The whole doctrine of Judge Foster on this subject, seems to demonstrate a clear opinion that a state of force and violence, a posture of war must exist to constitute technically as well as really the fact of levying war.

Judge Blackstone seems to concur with his predecessors. Speaking of levying war, he says, "This may be done by taking arms not only to dethrone the king, but under pretence to reform religion, or the laws, or to remove evil counsellors or other grievances, whether real or pretended. For the law does not, neither can it permit any private man or set of men to interfere *forcibly* in matters of such high importance."

He proceeds to give examples of levying war, which show that he contemplated actual force as a necessary ingredient in the composition of this crime.

It would seem then from the English authorities, that the words "levying war," have not received a technical different from their natural meaning, so far as respects the character of the assemblage of men which may constitute the fact. It must be a warlike assemblage, carrying the appearance of force, and in a situation to practice hostility.

Several judges of the U. States have given opinions at their circuits on this subject, all of which deserve and will receive the particular attention of this court.

In his charge to the grand jury when John Fries was indicted, in consequence of a forcible opposion to the direct tax, Judge Iredell is understood to have said, "I think I am warranted in saying, that if in the case of the insurgents who may come under your consideration, the intention was to prevent by force of arms the execution of any act of the Congress of the U. S. altogether, any forcible opposition calculated to carry that intention into effect, was a levying of war against the U. S and of course an act of treason." To levy war then, according to this opinion of judge Iredell, required the actual exertion of force.

Judge Patterson, in his opinions delivered in two different cases, seems not to differ from judge Iredell. He does not indeed, precisely state the employment of force as necessary to constitute a levying of war, but in giving his opinion in cases in which force was actually employed, he considers the crime in one case as dependent on the intention, and in the other case he says, "combining these facts and this design," (that is, combining actual force with a treasonable design) "the crime is high treason."

Judge Peters has also indicated the opinion that force was necessary to constitute the crime of levying war.

Judge Chase has been particularly clear and expicit. In an opinion which he appears to have prepared on great consideration, he says, "The court are of opinion, that if a body of people conspire and meditate an insurrection to resist or oppose the execution of a statute of the U. S. by force, that 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 increases nor diminishes the crime; whether by one hundred or one thousand persons, is wholly immaterial.

"The court are of opinion, 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 that it is altogether immaterial whether the force used be sufficient to effectuate the object. Any force connected with the intention will constitute the crime of levying of war."

In various parts of the opinion delivered by judge Chase, in the case of Fries, the same sentiments are to be found. It is to be observed, that these judges are not content that troops should be assembled in a condition to employ force. According to them some degree of force must have been actually employed.

The Judges of the U. S. then, so far as their opinions have been quoted, seem to have required still more to constitute the fact of levying war, than has been required by the English books. Our judges seem to have required the actual exercise of force, the actual employment of some degree of violence. This, however, may be, and probably is, because in the cases in which their opinions were given, the design not having been to overturn the government, but to resist the execution of a law, such an assemblage would be sufficient for the purpose, as to require the actual employment of force to render the object unequivocal.

But it is said all these authorities have been over-ruled by the decision of the supreme court, in the case of the U. States against Swartwout and Bollman.

If the supreme court have indeed extended the doctrine of treason, further than it has heretofore been carried by the judges of England, or of this country, their decision would be submitted to. At least this court could go no further than to endeavor again to bring the point directly before them. It would, however, be expected that an opinion which is to over-rule all former precedents, and to establish a principle never before recognized, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established. Had the intention been entertained to make so material a change in this respect, the court ought to have expressly declared, that any assemblage of men whatever, who had formed a treasonable design, whether in force, or not, whether in a condition to attempt the design or not, whether attended with warlike appearances or not, constitutes the fact of levying war. Yet no declaration to this amount is made. Not an expression of the kind is to be found in the opinion of the supreme court. The foundation on which this argument rests, is the omission of the court to state, that the assemblage which constitutes the fact of levying war, ought to be in force, and some passages, which shew that the question respecting the nature of the assemblage, was not in the mind of the court when the opinion was drawn, which passages are mingled with others, which at least shew that there was no intention to depart from the course of the precedents in cases of treason by levying war.

Every opinion to be correctly understood, ought to be considered with a view to the case in which it was delivered. In the case of the U. S. against Bollman and Swartwout, there was no evidence that even two men had ever met for the purpose of executing the plan, in which those persons were charged with having participated. It was therefore sufficient for the court to say that unless men were assembled, war could not be levied. That case was decided by this declaration. The court might indeed have defined the species of assemblage which would amount to levying of war, but, as this opinion was not a treatise on treason, but a decision on a particular case, expressions of doubtful import should be construed in reference to the case itself—and the mere omission to state that a particular circumstance was necessary to the consummation of the crime, ought not to be construed into a declaration that the circumstance was unimportant. General expressions ought not to be considered as over-ruling settled principles without a direct declaration to that effect. After these preliminary observations the court will proceed to examine the opinion which has occasioned them.

The first expression in it bearing on the present question is "to constitute that specific crime for which the prisoner now before the court has been committed, war must be actually levied against the U. S. However flagitious may be the crime of conspiracy 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."

Although it is not expressly stated that the assemblage of men for the purpose of carrying into operation the treasonable intent, which will amount to levying war, must be an assemblage in force, yet it is fairly to be inferred from the context, and nothing like dispensing with force appears in this paragraph. The expressions are to constitute the crime "war must be actually levied." A conspiracy to levy war is spoken of as "a conspiracy to subvert by force the government of our country," speaking in general terms of an assemblage of men for this, or for any other purpose, a person would naturally be understood as speaking of an assemblage in some degree adapted to the purpose. An assemblage to subvert by force the government of our country, and amounting to a levying of war, should be an assemblage in force.

In a subsequent paragraph the court says, "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 in order to effect by force a treasonable purpose, all those who perform any part, however minute, &c. and who are actually leagued in the general conspiracy, are traitors. But there must be an actual assembling of men for the treasonable purpose to constitute a levying of war."

The observations made on the preceding paragraph apply to this. "A body of men actually assembled, in order to effect by force a treasonable purpose," must be a body assembled with such appearance of force as would warrant the opinion that they were assembled for the particular purpose; an assemblage to constitute an actual levying of war should be an assemblage with such appearance of force as would justify the opinion that they met for the purpose.

This explanation, which is believed to be the natural, certainly not a strained explanation of the words, derives some additional aid from the terms in which the paragraph last quoted commences. "It is not the intention of the court to say that no individual can be guilty of treason who has not appeared in arms against his country." These words seem to obviate an inference which might otherwise have been drawn from the preceding paragraph. They indicate that in the mind of the court the assemblage stated in that paragraph was an assemblage in arms. That the individuals who composed it had appeared in arms against their country. That is in other words that the assemblage was a military, a warlike assemblage.

The succeeding paragraph in the opinion relates to a conspiracy and serves to shew that force and violence were in the mind of the court, and that there was no idea of extending the crime of treason by construction beyond the constitutional definition which had been given of it.

Returning to the case actually before the court, it is said "a design to overturn the government of the U. S. in N. 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."

Now what could reasonably be said to be an assemblage of a body of men for the purpose of overturning the government of the U. S. in New Orleans by force? Certainly an assemblage in force; an assemblage prepared and intending to act with force; a military assemblage. The decisions therefore made by the judges of the U. S. are then declared to be in conformity with the principles laid down by the supreme court. Is this declaration compatible with the idea of departing from those opinions on a point within the contemplation of the court? The opinions of Judge Patterson and Judge Iredell are said "to 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." This observation certainly indicates that the necessity of an assemblage of men was the particular point the court meant to establish, and that the idea of force was never separated from this assemblage.

The opinion of Judge Chase is next quoted with approbation. This opinion in terms requires the employment of force.

After stating the verbal communications said to have been made by Mr. Swartwout to general Wilkinson, the court says "if these words import that the government of New Orleans was to be revolutionized by force, although merely as a step to or a mean of exciting some greater projects, the design was unquestionably treasonable, and any assemblage of men for that purpose would amount to a levying of war."

The words 'any assemblage of men' if construed to affirm that any two or three of the conspirators who might be found together after this plan had been formed, would be the act of levying war, would certainly be misconstrued. The sense of the expressions "any assemblage of men" is restricted by the words "for this purpose." Now could it be in the contemplation of the court that a body of men would assemble for the purpose of revolutionizing New Orleans by force, who should not themselves be in force?

After noticing some difference of opinion among the judges respecting the import of the words said to have been used by Mr Swartwout, the court proceeds to observe: "but whether this treasonable intention be really imputable to the plan or not, it is admitted that it must have been carried into execution by an open assemblage for that purpose, previous to the arrest of the prisoner, in order to consummate the crime as to him."

Could the court have conceived "an open assemblage" "for the purpose of overturning the government of New Orleans by force" to be only equivalent to a secret furtive assemblage without the appearance of force?

After quoting the words of Mr. Swartwout, from the affidavit, in which it was stated that Mr. Burr was levying an army of 7,000 men, and observing that the treason to be inferred from these words would depend on the intention with which it was levied, and on the progress which had been made in levying it, the court say "the question then is, whether this evidence proves colonel Burr to have advanced so far in levying an army as actually to have assembled them."

Actually to assemble an army of 7,000 men is unquestionably to place those who are so assembled in a state of open force.

But as the mode of expression used in this passage might be misconstrued so far as to countenance the opinion that it would be necessary to assemble the whole army in order to constitnte the fact of levying war, the court proceeds to say, "It is argued that since it cannot be necessary that the whole 7,000 men should be 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 cannot be necessary that the whole army should assembe and that the various parts which are to compose it should have combined. But it is necessary there should be an actual assemblage; and therefore this 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 rendevvous would be such an assemblage."

The position here stated by the council for the prosecution is, that the army "commencing its march by detachments to the place of rendezvous (that is of the army,) must be sufficient to constitute the crime."

This position is not admitted by the court to be universally correct. It is said to be "correct with some qualification." What is that qualification?

"The travelling of individuals to the place of rendezvous," (and by this term is not to be understood one individual by himself, but several individuals either separately or together but not in military form) "would perhaps not be sufficient." Why not sufficient? Because says the court, "this would be an equivocal act and has no warlike appearance." The act then should be unequivocal and should have a warlike appearance. It must exhibit in the words of Sir Matthew Hale *speciem belli*, the appearance of war. This construction is rendered in some measure necessary when we observe that the court is qualifying the position, "that the army commencing their march by detachments to the place of rendezvous must be sufficient to constitue the crime." In qualifying this position they say, "the travelling of individuals would perhaps not be sufficient." Now, a solitary individual travelling to any point, with any intent, could not, without a total disregard of language, be termed a marching detachment. The court, therefore, must have contemplated several individuals travelling together; and the words being used in reference to the position they were intended to qualify, would seem to indicate the distinction between the appearances attending the usual movement of a company of men for civil purposes, & that military movement which might in correct language be denominated "marching by detachments."

The court then proceeded to say, "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."

It is obvious from the context, that the court must have intended to state a case which would in itself be unequivocal, because it would have a warlike appearance. The case stated, is that of distinct bodies of men assembling at different places and marching from these places of partial to a place of general rendezvous. When this has been done an assemblage is produced which would in itself be unequivocal. But when is it done? What is the assemblage here described? The assemblage formed of the different bodies of partial at a place of general rendezvous. In describing the mode of coming to this assemblage the civil term "travelling" is dropped and the military term "marching" is employed. If this was intended as a definition of an assemblage which would amount to levying war, the definition requires an assemblage at a place of general rendezvous, composed of bodies of men who had previously assembled at places of partial rendezvous. But this is not intended as a definition, for clearly if there should be no places of partial rendezvous, if troops should embody in the first instance, in great force for the purpose of subverting the government by violence, the act would be unequivocal, it would have a warlike appearance, and it would, according to the opinion of the supreme court properly construed, and according to the English authorities amount to levying war. But this, though not a definition, is put as an example; and surely it may be safely taken as an example. If different bodies of men, in pursuance of a treasonable design plainly proved, should assemble in warlike appearance at places of partial rendezvous, and should *march* from those places to a place of general rendezvous it is difficult to conceive how such a transaction could take place without exhibiting the appearance of war, without an obvious display of force. At any rate a court in stating generally such a military assemblage as would amount to levying war, and having a case before them in which there was no assemblage whatever, cannot reasonably be understood in putting such an example, to dispense with those appearances of war which seem to be required by the general current of authorities. Certainly they ought not to be so understood when they say in express terms, that "it is 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 already within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide."

After this analysis of the opinion of the supreme court, it will be observed, that the direct question whether an assemblage of men which might be construed to amount to levying war, must appear in force or in military form, was not in argument or in fact before the court, and does not appear to have been in terms decided? The opinion seems to have been drawn without particularly adverting to this question, and therefore upon a transient view of particular expressions, might inspire the idea that a display of force, that appearances of war were not necessary ingredients to constitute the fact of levying war. But upon a more intent and more accurate investigation of this opinion, although the terms force and violence are not employed as descriptive of the assemblage, such requisites are declared to be indispensable as can scarcely exist without the appearance of war and the existence of real force. It is said that war must be levyed in fact, that the object must be one which is to be effected by force; that the assemblage must be such as to prove that this is its object, that it must not be an equivocal act, without a warlike appearance, that it must be an open assemblage for the purpose of force. In the course of this opinion, decisions are quoted and approved which require the employment of force to constitute the crime. It seems extremely difficult, if not impossible, to reconcile these various declarations with the idea that the supreme court considered a secret unarmed meeting, although that meeting be of conspirators, and although it met with a treasonable intent, as an actual levying of war. Without saying that the assemblage must be in force or in warlike form, they express themselves so as to show that this idea was never discarded, and they use terms which cannot be otherwise satisfied.

The opinion of a single judge certainly weighs as nothing if opposed to that of the supreme court; but if he was one of the judges who assisted in framing that opinion, if while the impression under which it was framed was fresh upon his mind, he delivered an opinion on the same testimony, not contradictory to that which had been given by all the judges together, but showing the sense in which he understood terms that might be differently expounded, it may fairly be said to be in some measure explanatory of the opinion itself.

To the judge before whom the charge against the prisoner at the bar was first