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[NUMBER 533.] WILMINGTON, N. C. TUESDAY, MARCH 24, 1807. [11TH YEAR.]

Supreme Court of the U. States,

FEBRUARY TERM, 1807.

The United States
vs.
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. States.

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 the government—none can more affect the safety of both.

To prevent the possibility of these 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 United States 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 United 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 treaties 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 assemblage 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. States, 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 United States 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. States, 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 United States.

The opinions given by judge Paterson and judge Iredell in cases before them imply an actual assemblingof men though they rather designed to remark on the subject 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 on 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 United States 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 United States is not treason, unless combined with 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 considesed is that of General Eaton. This gentleman connects in one statement the purport of numerous conversations held with colonel 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 colonel 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 colonel 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 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 Col. 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 a testimony delivered in the presance 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 found 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 gen. 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 designs 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 Baton Rouge; why engage Spain against this enterprize, if it was designed against the U. 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 3 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 certainty 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 gen. 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."