RALEIGH REGISTER,

AND

North-Carolina State Gazette.

Ours are the plans of fair delightful peace,
Unwarp'd by party rage, to live like Brothers.

VOL. VIII. THURSDAY, SEPTEMBER 24, 1807. No. 418

OPINION OF THE COURT

On the motion
To arrest the Evidence
in
Burr's Trial.

Delivered August 31, 1807.

CONTINUED.

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 person may be implicated by the doctrine that whatever would make a man an accessary in felony makes him a principle in treason, or are excluded, because that doctrine is inapplicable to the U. States, 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 United States against Bollman and Swartwout. It is said that this opinion in declaring that those who do not bear arms may yet be 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 there laid down.

It is true, that in that 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 act separately and perhaps at the same time, on the various prosecutions which might be instituted, and that no appeal lay from their decisions. Opposite judgments on the point would have presented a state of things infinitely 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 so embodied could be guilty of treason. Not only to exclude 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 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 object, 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."

This court is told that if this opinion be incorrect 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 would directly occur and be fully argued.

The court which gave this opinion was composed of 4 Judges. At the time I thought them unanimous, but I have since had reason to suspect that one of them, whose opinion is entitled to great respect, and whose indisposition prevented his entering into the discussion, on some of those points which were not essential to the decision of the very case under consideration, did not concur in this particular point with his brethren. Had the opinion been unanimous, it would have been given by a majority of the judges. But should the three who were absent concur with that judge who was present, and who perhaps dissents from what was then the opinion of the court, a majority of the judges may over rule this decision. I should therefore feel no objection, although I then thought, and still think the opinion perfectly correct, to carry the point if possible again before the supreme court, if the case should depend upon it.

In saying, that I still 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 accessaries to treason. But certainly such 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 a part," which will furnish the overt act, and they must be "leagued in the conspiracy." The person who comes within this description, 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. States 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.

2nd. The second point involves the character of the overt act which has been given in evidence, and calls upon 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 offered 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 trials, of a detailed opinion on the question, what is levying war? As this question has been argued at great length, it may probably save much trouble to the counsel now to give that opinion.

In opening the case it was contended by the attorney for the U. States and has since been maintained on the part of the prosecution, that neither arms nor the application of force or violence are indispensibly 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 observation will be 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 conjecture motives. 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 state these particulars, because although the cases put may establish the doctrine they are intended to support, may prove that the absence of arms, or the failure to apply force to sensible objects by the actual commission of violence on those objects, may be supplied by other circumstances, yet, they also serve to show that the mind requires those circumstances to be satisfied that war is levied.

Their construction of the opinion of the supreme court is, I think, thus far correct. It is certainly the opinion which was at the time entertained by myself, & which is still entertained. If a rebel army avowing its hostility to the sovereign power, should front that of the government, should march and countermarch 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 purposed treason without the usual implements of war, I can perceive no reason for requiring those implements in order to constitute the crime.

It is argued that no adjudged case can be produced from the English books where actual violence has not been committed. Suppose this were true. No adjudged case has, or it is believed, 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 silence of the reporters on this point may be readily accounted for. In cases of actual rebellion against the government, the most active and influential leaders 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 among 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 not the destruction of the sovereign power, some act 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 cruizing 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 are assembled for the purpose of making war against the government, & are in a condition to make that war, the assemblage is an act of levying war. These opinions are contradicted by no adjudged case and are supported by Vaughan's case. This court is not inclined to controvert them.

But although in this respect, the opinion of the supreme court has not been misunderstood on the part of the prosecution, that opinion seems not to have been fully adverted to in a very essential point in which it is said to have been misconceived by others.

The opinion I am informed, has been construed 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 advanced at the bar, but which is said to have been adopted elsewhere, that the court deems it necessary to examine.

Independent of authority, trusting only to the dictates of reason, and expounding terms according to their ordinary signification, we should probably all concur in the declaration that war could not be levied without the employment & exhibition of force. War is an appeal from reason to the sword, and he who makes the appeal evidences the fact by the use of the means. 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 end is to be effected by force, and it would seem that in cases where no declaration is to be made, the state of actual war could only be created by the employment of force or being in a condition to employ it.

But the term been having adopted by our constitution, must be understood in that sense in which it was universally received in this country, when the constitution was framed. The sense 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 compassing or conspiracy to levy war he adds, is no treason, for there must 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. The terms he employs in stating these cases, are such as indicate an impression on his mind, that actual violence is a necessary ingredient in constituting the fact of levying war. He then proceeds to say, "an actual rebellion or insurrection is a levying of war within this act." "If any with strength and weapons invasive and defensive doth hold & 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," unconnected with force, nor can "a castle or fort be defended with strength and weapons, invasive & defensive," without the employment of actual force. It would seem then to have been the opinion of Lord Coke, that to levy war there must be an assemblage of men in a condition and with an intention to employ force. He certainly puts no case of a different description.

Lord Hale says (140. 6) "what shall be said of levying war is partly a question of fact, for it is not every unlawful or riotous assembly of many persons to do an unlawful act, though *de facto* they commit the act they intended, that makes a levying of war; for then every riot would be treason, &c." but it must be such an assembly as carries with it *speciem belli*, the appearance of war, as if they ride or march *vexillis explicatis*, with colours flying, or if they be formed into companies or furnished with military officers, or if they are armed with military weapons, as swords, guns, bills, halberds pikes, and are so circumstanced that it may be reasonably concluded they are in a posture of war, which circumstances are so various that it is hard to describe them all particularly."

' Only the general expression in all the indictments of this nature that I have seen are *more guerrino arraiati*,' arrayed in warlike manner.

He afterwards adds, "If there be a war levied as is above declared, viz. an assembly arrayed in warlike manner, and so in the posture of war for any reasonable attempt, it is *bellum livatum but not percussum*."

It is obvious that Lord Hale supposed an assemblage of men in force, in a military posture, to be necessary to constitute the fact of levying war. The idea he appears to suggest, that the apparatus of war is necessary, has been very justly combatted by an able judge who has written a valuable treatise on the subject of treason; but it is not recollected that his position, that the assembly should be in a posture of war for any treasonable attempt, has ever been denied. Hawk. ch. 17. sec. 23, says, "That not only those who rebel against the king and take up arms to dethrone him, but also in many other cases, those who in a violent and forcible manner withstand his lawful authority are said to levy war against him, and therefore those that hold a fort or castle against the king's forces, or keep together armed numbers of men against the king's express command, have been adjudged to levy war against him."

(To be continued.)