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

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OPINION OF THE COURT

On the motion
To arrest the Evidence
in
Burr's Trial.
Delivered August 31, 1807.

CONTINUED.

THE cases put by Hawkins are all cases of actual force & violence. "Those who rebel against the king, and take up arms to dethrone him." in many other cases those "who in a violent and forcible manner withstand his lawful authority." "Those that hold a fort or castle against his forces, or keep together armed numbers of men against his express command."

These cases are obviously cases of force and violence.

Hawkins next proceeds to describe cases in which war is understood to be levied under the statute, although it was not directly made against the government. This Lord Hale terms an interpretative or constructive levying of war; and it will be perceived that he puts no case in which actual force is dispensed with.

"Those also, he says, who make an insurrection in order to redress a public grievance, whether it be a real or pretended one, and of their own authority attempt *with force* to redress it, are said to levy war against the king, although they have no direct design against his person, inasmuch as they insolently invade his prerogative by attempting to do that by private authority which he by public justice ought to do, which manifestly tends to a downright rebellion. As where great numbers *by force* attempt to remove certain persons from the king, &c." The cases here put by Hawkins of a constructive levying of war, do in terms require force as a constituent part of the description of the offence.

Judge Foster, in his valuable treatise on treason, states the opinion which has been quoted from Lord Hale, and differs from that writer so far as the latter might seem to require swords, drums, colours, &c. what he terms the pomp and pageantry of war, as essential circumstances to constitute the fact of levying war. In the cases of Demaree and Purchase, he says "the want of those circumstances weighed nothing with the court although the prisoner's counsel insisted much on that matter." But he adds, "the number of the insurgents supplied the want of military weapons; and they were privided with axes, crows and other tools of the like nature, proper for the mischief they intended to effect. *Furor arma ministrat.*'

It is apparent that Judge Foster here alludes to an assemblage in force, or as Lord Hale terms it, "in a warlike posture," that is in a condition to attempt or proceed upon the treason which had been contemplated. The same author afterwards states at large the cases of Damaree and Purchase from 8th state trials, and they are cases where the insurgents not only assembled in force, in the posture of war, or in a condition to execute the treasonable design, but they did actually carry it into execution, and did resist the guards who were sent to disperse them.

Judge Foster states, sec. 4. all insurrections to effect certain innovations of a public and general concern *by an armed force*, to be in construction of law, high treason within the clause of levying war.

These cases put by Foster of constructive levying of war, all contain as a material ingredient, the actual employment of force. After going through this branch of his subject, he proceeds to state the law in a case of actual levying war, that is, where the war is intended directly against the government.

He says, sec. 9, "An assembly armed and arrayed in warlike manner for a treasonable purpose is *bellum livatum* though not *bellum pucussum*. Listing and marching are sufficient overt acts without coming to a battle or action. So cruizing on the king's subjects under a French commission, France being then at war with us, was held to be adherring to the king's enemies though no other act of hostility be proved."

"An assembly armed and arrayed in a warlike manner for any treasonable purpose," is certainly in a state of force; in a condition to execute the treason for which they assembled. The words "enlisting and marching," which are overt acts of levying war, do in the arrangement of the sentence, also imply a state of force, though that state is not expressed in terms for the succeeding words, which state a particular event as not having happened, prove that event to have been the next circumstance to those which had happened, they are "without coming to a battle or action. "If men be enlisted & march," (that is if they march prepared for battle or in a condition for action, for marching is a technical term applied to the movement of a military corps) it is an overt act of levying war, though they do not come to a battle or action. This exposition is rendered the stronger by what seems to be put in the same sentence as a parallel case with respect to adhering to an enemy. It is cruising under a commission from an enemy without committing any other hostility. Cruizing is the act of sailing in warlike form and in a condition to assail those of whom the cruizer is in quest.

This exposition which seems to be that intended by Judge Foster, is rendered the more certain by a reference to the case in 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 prisoner 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 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 over-ruled; but it is apparent that the judges proceeded entirely on the idea that a warlike posture was indispensible 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 suppose by shutting the gates against the king or his forces without any other force 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 opposition 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 our consideration, the intention was to prevent by force of arms the execution of any act of the Congress of the U. States altogether, any *forcible opposition* calculated to carry that intention into effect, was a levying of war against the U. States, 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 levying 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 explicit. 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. States 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. States, 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. States, then, so far as their opinions have been quoted, seem to have required some 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 overruled by the decision of the supreme court in the case of the United 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 overrule all former precedents, & 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 appearance 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 show 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 show 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 United States 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 of 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 overruling settled principles without a direct declaration to that effect. After these preliminary observations the court will proceed to examine the opinion which have occasioned them.

(To be continued.)

LOAN-OFFICE, *N. Carolina,*
June 12th, 1807.

Notice is hereby given,

THAT, in conformity with the provisions of the act supplementary to the act, intuled "An act making provision for the redemption of the whole of the public debt of the United States," books will be opened at the office of the commissioner of loans for North-Carolina on the first day of July next, to continue open until the seventeenth day of March, 1808, inclusively, the fourteen last days of each quarter excepted, for the purpose of receiving subscriptions for such parts of the old six per cent. deferred six per cent. and three per cent. stocks, as may, on the day of subscription, stand on the books of the said commissioner of loans

Those proprietors of the old six per cent. and deferred stocks, who may subscribe, will receive in lieu thereof a new six per cent. stock, equal to the unredeemed amount of the stock surrendered, redeemable at the pleasure of the United States, under a proviso however, that no reimbursement shall be made except for the whole amount of any such new certificate of stock, nor till after six months previous notice: and the proprietors of the three per cent. stock, who may subscribe, will receive in lieu thereof, a six per cent. stock, equal to sixty-five per cent. of the amount of three per cent. surrendered, redeemable in the same manner as the new six per cent. abovementioned, but not reimbursable however, without the assent of the holders, until after the whole of the new six per cent. (given in exchange for old six or deferred as abovementioned,) as well as the whole of the eight per cent. stock of the United States, shall have been reimbursed. It is also provided that in every reimbursement which may take place, a preference will be given to those creditors who may notify their wish to be reimbursed; and that if the applications to that effect shall at any time either exceed or fall short of the sum then applicable to that purpose, the priority of payment shall, so far as may be necessary, be determined by lot

The present stock-holders who reside in any part of Europe, and may assent to that modification, may, at their option, receive the interest accruing on the new stock, either in the United States as heretofore, or in London, or Amsterdam, at par: in which last case, the interest will be paid there by the bankers of the United States, six months subsequent to the day on which the same would be payable in the United States and subject to no variation; nor to any other deduction than a commission to the bankers, of one half per cent. on the interest thus paid.

S. HAYWOOD.
Commissioner of Loans.

NOTE.

Proprietors of 1000 dollars nominal six per cent stock, subscribed before the 1st October, 1807, will be entitled to receive 649 62 of new six

If subscribed between the 1st October, and 31st December 1807. 644 37 —

Between the 1st of Jan. and 17th March 1808 619 03 —

Proprietors of 1000 dollars nominal deferred, subscribed before the 1st October 1807, will be entitled to receive, 855 78 —

If subscribed between the 1st October and 31st December 1807. 853 62 —

Between the 1st January and 17th March 1808. 831 42 —

Being the unredeemed amount of the old stock on the 1st July, and October, 1807, and 1st January 1808, respectively.

Proprietors of 1000 dollars three per cent. stock, will be entitled to receive 650 dollars of new six.
