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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 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 United States. 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 contex , 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 naturelly be understood as speaking of an assemblage in some degree adapted to the purpose. An assemblage to subvert by force the government of our coun ry, 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 agains 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 astrained 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 that 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 b yond 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. 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 war against the U. States.

Now what could reasonably be said to be an asemblage of a body of men for the purpose of overturning the government of the U. States, 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. States, 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 Paterson and Judge Iredell are said "to imply an actual assemblage 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 Gen. 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 than 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 says "the question then is whether this evidence proves Col. 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 constitute 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 assemble, and that the various parts which are to compose it should have combined. But it is necessary that 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 rendezvous would be such an assemblage."

The position here stated by the counsel 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 constitute 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, and 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 those places of partial to places 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 a levying of 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 levied 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 purposes 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 shew 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 yet 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 shewing 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 brought, the same testimony was offered with that which had been exhibited before Supreme Court, and he was required to give an opinion in almost the same case. Upon this occasion he said, "War can only be levied by the employment of actual force. Troops must be embodied: men must be assembled in order to levy war." Again he observed, "The fact to be proved in this case is an act of public notoriety. It must exist in the view of the world, or it cannot exist at all. The assembling of forces to levy war is a visible transaction, and numbers must witness it."

It is not easy to doubt what kind of assemblage was in the mind of the Judge, who used these expressions, and it is to be recollected that he had just returned from the Supreme Court and was speaking on the very facts on which the opinion of that court was delivered.

The same Judge in his charge to the Grand Jury who found this bill, observed, "to constitute the fact of levying war, it is not necessary that hostilities shall have actually commenced by engaging the military force of the United States, or that measures of violence against the government shall have been carried into into execution. But levying war is a fact in the constitution of which force is an indispensable ingredient. Any combination to subvert by force the government of the U. S. violently to dismember the Union, to compel a change in the administration to coerce the repeal or adoption of a general law, is a conspiracy to levy war, and if the conspiracy be carried into effect by the actual employment of force, by the embodying and assembling men for the purpose of executing the treasonable design which was previously conceived, it amounts to levying war.—It has been held that arms are not essential to levying war, provided the force assembled be sufficient to attain, or perhaps to justify attempting the object without them." This paragraph is immediately followed by a reference to the opinion of the Supreme Court.

It requires no commentary upon these words to show, that in the opinion of the judge who uttered them, an assemblage of men which should constitute the fact of levying war must be an assemblage in force, and that be so understood the opinion of the supreme court. If in that opinion there may be found in some passages, a want of precision, an indefiniteness of expression, which has occasioned it to be differently understood by different persons, that may well be accounted for when it is recollected that in the particular case there was no assemblage whatever. In expounding that opinion the whole should be taken together, and in reference to the particular case in which it was delivered. It is however not improbable that the misunderstanding has arisen from this circumstance. The court unquestionably did not consider arms as an indispensable requisite to levying war; an assemblage adapted to the object, might be in a condition to effect or to attempt it without them. Nor did the court consider the actual application of the force to the object as at all times, an indispensable requisite; for an assemblage might be in a state adapted to real war, without having made the actual application of that force. From these positions, which are to be found in the opinion, it may have been inferred, it is thought too hastily, that the nature of the assemblage was unimportant, and that war might be considered as actually levied by any meeting of men, if a criminal intention can be imputed to them by testimony of any kind whatever.

To be continued.

TREASURY DEPARTMENT,

Washington, April 28, 1807.

Public Notice is hereby given,

THAT in pursuance of a Resolution of the Commissioners of the Sinking Fund, at a meeting held on the 23d day of March, 1807, JOSIAH SMITH, Esq. Cashier of the Office of Discount and Deposit at Charleston, has been appointed Agent, under the Superintendance of the Secretary of the Treasury, to make purchases, at private sale, of the Eight per Cent. Stock, on Public Account. Such persons, therefore, who are Proprietors of Eight per Cent. Stock, standing on the Books of the Commissioner of Loans for North-Carolina, and who may be desirous of selling the same, within the price limited by law, are requested to make Application to the Commissioner of Loans at Raleigh, who will inform them of the course to be pursued.

It is further made known, for the information of the parties concerned, that, agreeably to a Resolution of the Commissioners of the Sinking Fund, the Principal of the Eight per Cent. Stock will be reimbursed to the respective Proprietors, on the first day of January, 1809

ALBERT GALLATIN,