

ion, that the conversation of Mr. Swartwout affords no sufficient proof of such assembling.

“ The prisoner stated that Colonel Burr, with the support of a powerful association, extending from New York to New Orleans, was levying an armed body of 7,000 men, from the state of New York and the western states and territories, with a view to carry an expedition to the Mexican territories.

“ That the association, whatever may be its purpose, is not treason, has been already stated. That levying an army may or not be treason, and that this depends on the intention with which it is levied, and on the point to which the parties have advanced, has been also stated. The mere enlisting of men, without assembling them, is not levying war. 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. \* \* \* \*

“ The particular words used by Mr. Swartwout are, that Colonel Burr was levying an armed body of 7,000 men. If the term levying, in this place, imports that they were assembled, then such fact would amount, if the intention be against the United States, to levying war. If it barely imports that he was enlisting or engaging them in his service, the fact would not amount to levying war.

“ It is thought sufficiently apparent, that the latter is the service in which the term was used. The fact alluded to, if taken in the former sense, is of a nature to force itself upon the public view, that, if the army had been actually assembled, either together, or in detachments, some evidence of such assembling would have been laid before the court.

“ The words used by the prisoner in reference to seizing at New Orleans, and borrowing perhaps by force from the bank, though indicating a design to rob, and consequently importing a high offence, do not designate the specific crime of levying war against the United States.

“ It is, therefore, the opinion of a majority of the court, that, in the case of Samuel Swartwout, there is not sufficient evidence of his levying war against the United States to justify his commitment on the charge of treason. \* \* \* \* ”

The order of the court was as follows:

“ The United States	} “ On a writ of <i>habeas corpus</i> .
“ vs.	
“ Swartwout	

“ The arguments of the attorney-general, and of the attorney of the United States for the district of Columbia, and the argument of the counsel for the prisoner having been heard, and the record of the circuit court for the county of Washington containing the order by which the said Samuel Swartwout was