NATIONAL INTELLIGENCER,

AND

WASHINGTON ADVERTISER.

VOL. VII. | WASHINGTON CITY, PRINTED BY SAMUEL HARRISON SMITH, PENNSYLVANIA AVENUE. | No. 1071.

FIVE DOLLARS PER ANNUM | WEDNESDAY, AUGUST 26, 1807. | PAID IN ADVANCE.

TRIAL OF
AARON BURR,

Substance of Mr. HAY'S opening SPEECH.

TUESDAY, AUGUST 18.

May it please the Court, and you Gentlemen of the Jury:

In the preliminary stages of the prosecution, in which we are now engaged, many observations were made extremely derogatory to the government under which we live, and injurious to the feelings of the counsel employed in the prosecution. It was said, amongst other things, that we had indulged an intemperate zeal which transgressed the limits of reason and humanity; that we were solicitous to convict the prisoner, whether innocent or guilty; and to deprive him of all the proper means which were necessary to his defence. I know not, gentlemen of the jury, whether this charge has reached your ears; or if it has, whether it has made any serious impressions upon your minds; but if it had, it is my duty to efface them. But by what means? By professions of candor and of liberality which are easily made and as easily forgotten? No. I shall prove the injustice of this charge by the course and conduct of the prosecution. We have arrived at a most serious crisis in this enquiry, on whose result the life of a man, and of a fellow citizen, who once stood high in the estimation of his country, must certainly depend. It is alleged to be forfeited to the violated laws and justice of his country. It is my duty to support that allegation; but I shall support it only by facts which I believe to be true, and by arguments which have produced my own conviction.

The prisoner at the bar is charged with treason; in levying war against the United States. To this charge he has pleaded not guilty. It is your solemn duty to decide upon the validity of this plea, and you have sworn to decide it by facts alone. If you attend to the obligations of your oath, any admonitions from me will be unnecessary. You will divest your minds of every bias, of all extraneous rumors or political prepossessions. You will enter upon the case with candor, and with a firm determination to do justice between the U.S. and Aaron Burr. If after that patient investigation of the evidence which the importance of the case requires, you should doubt whether he is guilty, you must decide that he is not. Such is the language of the law, and such the dictate of common sense. If you doubt, you must declare him to be innocent. But there is one distinction, which I have heard from the lips of jurymen, which seems to me to be a distinction without a difference; and to be founded in folly and wickedness. I have heard them declare that though as individuals they might be satisfied of the guilt of a prisoner, as jurymen they were not. This is a fallacy. I can conceive, that a juryman may entertain a belief founded on what he has heard out of doors, which is not warranted by the legal evidence before him; but if he once believes from the evidence, that the prisoner has committed the crime alleged, he is then guilty of treachery to himself, to his country, and to his God, if he does not pronounce that belief.

The indictment before you consists of two counts. The first charges the prisoner with levying war on Blannerhassett's island: The second repeats the same charge in substance, with this addition, that in order to levy it more effectually, the prisoner had descended the Ohio and the Mississippi with an armed force for the purpose of taking possession of New Orleans. If either of those charges be supported by adequate evidence, you must find the prisoner guilty.

In Great Britain there are no less than *ten* different species of treason; at least it was so when Blackstone wrote. Perhaps the catalogue has been since increased. But in this country, there are only *two* descriptions, which are defined by the constitution itself; so that it is beyond the power of the Legislature to increase the list, however important they might consider such an augmentation. By the 3d section of the 3d art. of the constitution of the U. S. "treason against the U. S. shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." Of the last description of treason, it is unnecessary to say any thing, as the offence charged in the indictment is "levying war against" the U. S. This offence being thus constitutionally defined, the only question at this stage of the enquiry is, what shall constitute an overt act of levying war against the U. S.

It is obvious, that the interval between the first movements of a treasonable conspiracy and actual hostilities is immense. There may be a conspiracy to levy war, but this is not treason. Individuals may meet together for making arrangements to bring forces into the field; nor is this conspiracy treason. They may advance a step further.—They may not only project a plan for levying war, but they may proceed to levy troops; but this is not an overt act of treason. It has even been adjudged by the supreme court of the U. States that the concerned persons may proceed one other step further; the separate individuals may proceed to a place of rendezvous; and yet remain on the safe side of the line of treason.—But, gentlemen, common sense, and principles founded on considerations of national safety, obviously require, that the crime of treason should be declared to be complete, before the commission of actual hostilities against the government. If any hostilities must be committed, what is the consequence? Why, that a man may take his steps until he is sufficiently strong to laugh at all your definitions of treason. He will not strike a blow; he will not commence actual hostilities, until he is prepared to give efficacy to that blow and to bid defiance to your government. Where then is the point at which a treasonable conspiracy shall be said to have arrived at its maturity? I answer, when there is an assemblage of men convened for the purpose of effecting by force a treasonable design; which force is intended to be employed before their dispersion. The answer which I now give is not literally, but is substantially the same with that furnished by the supreme court of the U. S. and is given in conformity to what I understand to be the spirit of the decision. In the opinion of that court delivered by the chief justice on the cases of Bollman & Swartwout, there occur the following expressions: "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. If war then be actually levied, in this manner, every person concerned is to be considered as a traitor". The same idea is expressed in ten or fifteen other parts of this decision. "To complete the crime of levying war against the U. S. there must be an *actual assemblage of men for the purpose of executing a treasonable design*." And again, "In the case now before the court, a design to overturn the government of the U. S. at 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. S.—but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war." If then according to this definition, the accused and his associates had assembled together to attack N. Orleans and separate it from the union, though no actual force had been used, though no battle had been fought, they would have been guilty of treason. The same idea also occurs in these passages, "It cannot be necessary that the whole army should be assembled, and that the various parts which are to compose it should have combined. But it is necessary that there should be an actual assemblage." "The meeting of particular bodies of men and their marching from places of partial to places of general rendezvous would be such an assemblage." It seems to me then, that I am warranted in the answer which I have given, by the solemn decision of this supreme tribunal. Perhaps, gentlemen, in opening this case, I may occupy more of your time than you may consider to be necessary. But you must excuse me. Justice to the accused requires, that I should freely communicate the grounds on which this accusation is to be maintained; that the counsel on the other side may prepare for his defence.

It is necessary for me to state my reasons, for having omitted two circumstances in this definition of levying war, which the counsel for the prisoner may perhaps consider as essential parts of treason. I have taken no notice of *military weapons*; nor have I introduced the employment of any actual *force*, of any violence or hostility to effect the treasonable design. I have stated neither of the circumstances, because I think neither of them essential, according to the constitution and laws of this country.

On the first point I shall offer but a few observations. Before satisfying you of the legal propriety of this omission, permit me to state the question on the principles of common sense. It is true that it does not always happen in legal discussions, that this principle is consulted from the beginning to the end; but in many cases this disrespect is most unhappily practiced. Instead then of considering this question as it would be presented to us by lawyers and by judges, let us view it on the sound principles of common sense and national policy. It is not necessary that the men should have arms in their hands to make them traitors. The act of treason might be completed, and yet not a single gun nor even a pen-knife be employed in the transaction. Suppose a case. There was a time, when 10,000 stands of arms were deposited under the roof of this Capitol. Suppose that 5 or 10,000 unarmed men had assembled within a few miles of this city, with a preconcerted design of marching to the Capitol, seizing upon the arms, dispersing our legislature, and usurping the powers of the government. Let us suppose, what is no very difficult supposition, that the cavalry and the infantry of this city were to gird on their armor, and resolve to disperse these men, before they could execute their treasonable intentions. They arm; they march; and the conspirators, conscious of their abominable guilt, fly in all directions at the approach of our volunteers. Will any one say, that these men are not traitors to their country? Or suppose that any number of individuals were to assemble at Blannerhassett's island. We will suppose, that they had no arms, although I do not believe that such was the fact. They intend to descend the Ohio and Mississippi to seize upon N. Orleans, calculating upon meeting their leader at the mouth of Cumberland river and receiving arms from the Spanish minister at Baton Rouge. Would the simple circumstance of their being unarmed produce any difference in their guilt? And would it not be an absurdity to say, that the moment after arms had been put into their hands they are traitors, but that they were not the moment before? The supreme court have given a correct opinion on this subject, when in one passage they are silent as to the possession of arms, and in another, if I am not mistaken, they have expressly disclaimed it. If this point were not to be determined in this way, what would be the consequence? That conspirators would take care never to touch their arms, until they were ready to strike their blow. They would have military weapons placed within their reach; but they would not once venture to touch them before their organization should be completed. On the principles of common sense then, it is not necessary that they should have arms to consummate the overt act of treason. And what says the law? In the case decided by the supreme court, you will not find a single allusion as to the necessity of arms being in the hands of the conspirators. And in the case of Fries, p. 167, this subject has been particularly mentioned and my opinion embraced by one of the judges of the U. S. (Judge Chase.) It is remarkable too, in this case, that the same principle is conceded by the counsel for the defendant (Mr. Dallas) whose opinion is certainly no authority with you on this occasion; but it carries along with it the strong presumption that the law was against him, p. 168.

In G. Britain there is a statute, which was passed many years ago, in the 25th year of the reign of Edward the 3d, which describes treason in the very identical words of our constitution. This statute makes "levying war" against the king to be treason. Now; when the framers of our own constitution, many of them great lawyers too, have chosen to define treason in the very same words which had been so often in use, so often the subject of discussion and adjudication; it is certainly a fair presumption that they were to be used in the same sense which is annexed to them in England. An observation of a very able judge of the court of the U. S. amply confirms this remark, Fries's trial, p. 167. I beg the jury to believe, that my only purpose for referring to the English law, is to show that the decision of the supreme court on this subject is not an innovation, not a new doctrine, but is an exact counterpart of the English authorities. To prove this position, I will refer to Foster, p. 208, where he declares that there may be treason, that is, "levying war" against the country, without the presence of arms; and that the only question is, the *quo animo*, with which the thing is done; if it be to effect some treasonable plot. This opinion of Judge Foster is quoted in East's Reports, v. 1, p. 67, who approves its spirit, and thinks that arms and military array are not essential to treason. I have entered into this tedious investigation of this point, though it did not seem to me to be necessary, because our own courts have, in words too plain to deceive mortal man, pronounced that a bare assemblage of men was sufficient; and because the persons assembled at Blannerhassett's island, were actually armed for offensive as well as defensive purposes. It is to you, gentlemen of the jury, that I must submit, how far I have succeeded in justifying the propriety of my having omitted "arms" in the definition of treason.

I have also omitted, that the persons assembled for a treasonable purpose have committed hostilities or employed any actual force. I contend that it is not necessary to have waged battle or to have committed any act of violence. Perhaps the other side may, however, contend (though I am scarcely persuaded that they will) that there must be arms and actual force. But if they do contend for this, observe the embarrassment in which they will be involved by their doctrine. If 10,000 men were to march to Washington in order to take possession of the capital of the U. S. send the President to Monticello, and turn Congress out of doors; these persons thus assembled are no traitors, because they have not yet struck a blow. They meet with no opposition; the government disperses through fear; but there is no treason. The doctrine that would make force, the presence and actual exertion of arms, necessary to the consummation of treason, would be eminently fatal. It is the very doctrine that traitors met together to make laws for their own security, would be most solicitous to recognize: for if they were not traitors, ere they had struck a blow, they would take care never to strike one until they could do it with effect. I contend that my doctrine is unequivocally confirmed by the decision of the supreme court. There is not a single word in it which makes force or actual hostilities necessary to treason.

I know not, but gentlemen may be disposed to take shelter under an opinion, expressed by Judges Chase and Peters in the case of Fries, p. 197; and I most candidly admit, that there are certain expressions in that opinion, which seem to countenance their doctrine. But if the observation were correct in fact, still it should be recollected that it was but the opinion of subordinate judges, which cannot be opposed to the decision of the supreme court. It must also be recollected, that their opinions on this point are extrajudicial; by that term I mean, that it was not such a point as was necessary to be settled in the case before the court. The question before them was not, whether force does actually enter into the composition of treason; for in the case of Fries, there was force enough employed. It was a case of an actual opposition to the laws of the U. S. by force. Now, the opinion of any court is never considered as good authority, unless it be delivered on the very point actually before the court. It will be seen too upon an accurate inspection, that the opinion of Judge Chase is not even consistent with itself. In his definition of treason, (Fries's trial, p. 196) he expressly says, that "any insurrection or rising of any body of people within the U. S. to attain or effect by force or violence any object of a great public nature, or of public and national concern, is a levying of war against the U. S. within the contemplation and construction of the constitution." Thus excluding from his definition the two circumstances which I have excluded from mine, military weapons, and *the actual employment of force*. In the next page, he expressly states, that military weapons, &c. are not necessary in the consummation of treason. And yet in the course of the same charges he seems to think that some force must be employed before the crime is legally complete. The ideas of judge Peters on this point (see page 204 and page 207) seem to be in like manner at variance with each other. The truth is, that they did not express themselves on this subject, with the precision which they would have displayed, had the question before them been what it was before the supreme court and what it is here.

Judge Patterson in his exposition of the law, in his construction of the constitution, agrees with the supreme court in their decision. 2 Dall: 335, and even Mr. Lewis, an advocate in the case of Fries, distinguished no less by his zeal, than by his legal erudition, seems to concede that the crime may be consummated without the actual commission of hostilities, or employment of force.

The English adjudications are to the same effect. Treasons, in the populous country of Great-Britain, where numbers are concerned, are generally accompanied by force; but that the actual employment of force, where the traitorous design is clearly proved, is not necessary, is in my judgement indisputably certain. See Fost 211, 213. East. 1, 67, Hale 146.

But whether I am correct in this remark or not, is immaterial. In our own country, the judges of the supreme court have placed this point beyond the reach of controversy.

You will probably be told, Sirs, that certainty in criminal law is important, & in that part of it which relates to treason, essential to public liberty. You may be reminded of an observation of the celebrated Montesquieu, who says, that uncertainty on this single point, is of itself sufficient to change a free into an arbitrary government. It is not admitted that this observation is applicable to our government; dependent as it is on the people, or to our people, informed as they are of their rights. But suppose it to be so. The answer is obvious. By the decision of the supreme court, the law is certain. Every man who can read, knows the situation in which he stands, and at what point he must stop, if he wishes to avoid the imputation and the guilt of treason.

You will probably be told also, of the danger of constructive treasons; that is, says Blackstone 4 vol. 75. "to raise by forced and arbitrary constructions, offences into the crime and punishment of of treason, which never were suspected to be such." Of this some terrible examples exist in the earlier periods of the English history, when the people were ignorant, and the judges entirely dependent on the king.

It is admitted that the doctrine, which shall let in treasons, not defined by the constitution, by mere arbitrary construction, inference or analogy, as in England formerly, ought not to be countenanced. But in fact in this country, there is no danger to be apprehended. It may serve as a topic of declamation, but the apprehension of mischief from this source is absolutely visionary.

It would be absurd to call the treason defined by the supreme court, a constructive treason. The words "levying war," do not present to the mind a clear and distinct idea, like the words 'murdering a man' or 'stealing a horse.' If the question what is levying war? were propounded distinctly & separately to every man in this assembly, or even to the most intelligent among them, there would be great hesitation, doubt, and variance—perhaps half as many opinions as men. Necessity, then, requires that the courts should ascertain the construction of these words. It is their province, it is their duty so to do: and in giving the definition for which I contend, they have performed that duty. (He then read a passage from Fries's trial, containing some remarks of Judge Peters, page 206 applicable to the point.)

If the law thus established by the supreme court, shall be said to be a constructive treason, the inference is either that the judges should not give any construction of the constitution on this subject, which would be illegal and absurd, and would moreover by leaving every thing to the decision of juries, produce all the mischiefs of uncertainty, on the most interesting of all legal subjects; or that the opinion of the supreme court is erroneous. The latter, it is presumed, is a position, which the counsel for the prisoner will hardly undertake to support.

If, however, they do undertake this task, if they do contend that an assemblage of men with a traitorous design is not sufficient, but that hostilities must be commenced, actual violence must be used before treason is complete, the constitution is a dead letter. No man can be pronounced to be a traitor, until he has, by striking a blow, shewn that he is or conceives himself to to be out of the reach of the law. The case, then, presents a question of force alone, and it is a matter of no consequence, what the definition of treason shall be, until it is decided by arms what side shall pronounce it.

Perhaps it will be said, that the decision of the supreme court, is not correctly understood, I may, for aught I know, be incorrect in my exposition of it: but if I am, it is idle to look into reported cases, for evidence of the law. The language which the court have used, is remarkable for its precision, and its perspicuity. In every part, the ideas which they have expressed, are perfectly consistent, and you will not find from one end of it to the other, a sentence, or even a word, which implies that any thing more is necessary for the completion of treason, than an assembly of men, convened for the purpose of executing a traitorous design.

Taking it for granted then that the decision of the supreme court is the law of the land; that the overt act of treason is complete, if there be an assembly of men for effecting treasonable designs, it is incumbent on the prosecutors to shew, 1st. that there was a treasonable design; and 2dly, that there was an assembly of men for the purpose of effecting it.

It will be proved to you that the design of the prisoner was not only to wage war against the Spanish territories, but to separate the Western from the Eastern states; for which purpose New Orleans was to be seized, and an independent government was there to be established. You will perceive from the evidence that he intended to take possession of New Orleans, to excite the people there to insurrection; and to take advantage of the hostile sentiment which prevailed, to the west of the Allegheny, against the Spaniards. If either of these is proved; if it be either established that his design was to dismember the union, or after seizing on New Orleans, to invade the Spanish provinces; if in fact it be established that he intended to occupy New Orleans