Trial of Aaron Burr,

FOR HIGH TREASON,

Against the United States.

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 liberality which are as 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 inquiry, 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 alledged 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 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 plead 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 candour, and with a firm determination to do justice between the United States 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 in wickedness. I have heard them declare, that though as individuals they might be satisfied of the guilt of a prisoner, as men 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 alledged, 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 these 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 the augmentation. By the 3d sec. of the 2d art. of the constitution of the United State, treason against the United States "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 unnecessry to say any thing, as the offence charged in the indictment is "levying war against the United States." 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 United States?

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 been adjudged by the supreme court of the United 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 substantially the same with that furnished by the supreme court of the United States, and is given in conformity to what I understand to be the spirit of that decision. In the opinion of that court, delivered by the chief justice, in the case of Bollman and 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 this 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 and 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 United States 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 United States 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 United States; 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 New-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 or places of general rendezvous would be such an assemblage." It seem 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 these 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 practised. 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 or 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 copitol. 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 your volunteers. Will any one say, that these men are not traitors to their country? Or suppose that any number of individuals were to assemble on 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 New-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 have 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 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 United States (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. 103.

In Great-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 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 United States 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 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 spirits, and thinks that arms add 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 armed men were to march to Washington in order to take possession of the capital of the United States: 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.

[Here Mr. Hay cited several authorities, which our room will not admit, and concludes as follows]

It will be proved to you, that the *design* of the prisoner was not only to wage war against the Spanish territories, but to seperate the western from the eastern states; for which purpose New-Orleans was to be seized, and an independent government there was to be established. You will perceive from the evidence, that he intended to take possession of New-Orleans, to excite the people thereto insurrection; and to take advantage of the hostile sentiment which prevailed, to the west of the Alleghany, against the Spaniards. If either of those 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 at all, he is completely guilty of treason.—It would be absurd to suppose that a man who had revolved such an immence project in his mind, would communicate it to many. But he did disclose it to a few, and fortunately for our country the evidences of his design have been disclosed to our government. I shall lay before you, gentlemen of the jury, evidence the most positive and direct, as well as numerous and conclusive circumstances, to establish the existance of this design.

For the purpose of establishing an empire in the west, of which New-Orleans was to have been his capital, he made two long visits in the western country. He was in Kentuckey and Tennessee, and traveled in various directions until he arrived in New-Orleans. Wherever he went, with a view of facilitating the consummation of his own designs, he spoke disrespectfully of the government of his country. He represented it as destitute of energy to protect our national rights, or spirit to maintain our national character. He asserted that all the men of property and influence were dissatisfied with its arrangements, because they were not in the proper situation to which they were entitled; that with 500 men he could effect a revolution, by which he could send the president to Monticello, intimidate congress, and take the government into his own hands; and that the people were so little acquainted with, and so indifferent about their rights, so completely destitute of public spirit and of an efficient leader, that they would be mean enough to acquiesce in this revolution. Such were his expressions about the government and the people. To the people of the west, he spoke a different language. He represented to them, that they were in a state of colonial dependence on those of the Atlantic states; and that they annually paid millions for which they received no return. They were told, that a separation was necessary and would unquestionably take place; not as resulting too from the operation of natural causes, but as determined by a particular chain of events; that the destiny of the republic was fixed, and that in the course of two years they would see it in ruins. I thank God! that this prediction is not fulfilled; and our posterity will thank their God, that the accomplishment has not reached *their* own times. Such were the sentiments which he avowed; such were the doctrines which he endeavoured to propogate, though all this while pretending that his objects were of a purely agricultural nature.—Nor was this language, confined to conversation alone: for writings were published by one of his adherents, calculated to scatter disaffection among the people, and prepare them for his plans.

To accomplish these plans, in the summer and fall of 1806, men were actually enlisted, boats built on the waters of the Ohio, provisions purchased to an enormous amount, and arms and ammunition provided. Some of these men, about forty, assembled with arms on Blannerhassett's island, in order to descend the river. Burr was not there at that moment. He had left it a short time before; he had intended to return; but he had been warned not to return. His presence however was not material. A man may levy war at the distance of 3,000 miles, we may probably have an experience of this truth in a few months. But this principle has been sufficiently established by the decision of the supreme court. "If war be actually levied—all those who perform a part however minute or *however remote from the scene of action*, and who are actually eagued in the general conspiracy, are to be considered as traitors." It is this assemblage of men that constitutes the overt act of treason, and is relied on in support of the indictment. These troops on the island seeing the country alarmed, and themselves threatened by the militia of Wood county, made a precipitate retreat by night, in company with Blannerhassett, and descended the Ohio to the mouth of Cumberland river, where Burr joined them with a small party and took the command. By this time their number increased to more than 100. The men under the command of Burr and Blannerhassett then descended the Mississippi, to a point called Bayou Pierre in the neighbourhood of Natchez. It was here that Mr. Burr understood that his preparations would be defeated through the exertions of the commander in chief; that his letter in cypher had been communicated to the president; and it was here that he expressed to another person the astonishment and indignation he felt at being (as he said) thus betrayed. Finding that all his schemes were baffled, he entered into a kind of capitulation with Cowles Meade; was bound to appear before a tribunal at Natchez; came off it is said without the leave of the court; and was arrested by Perkins in his flight.

It will be proved to you, by express and direct evidence, that a settlement on the Ouachita was merely a cover for concealing the design of himself and his associates. We have as yet indeed no kind of proof, that he has acquired a real title to this land. But the utmost mystery and circumspection prevailed on this subject. To the world at large and to those whom he had not tampered with, the object was avowed to be the settlement on the Ouachita. To some, intimations were dropped of an approaching rupture with Spain, against whose provinces the expedition was intended: his language continually varying with the character whom he addressed. To a few, and a few only, his real design was developed. But to all were held up the idea of some great project. All were told that the design was just and honorable; known and approved by the government and in which the co-operation of the army was to be expected; that it was one which would lead to great fortunes; and that it would be developed as soon as the proper time for the disclosure arrived. The time, however, never did arrive. At Blannerhassett's island, it was not the time; and when at the mouth of Cumberland river, some enterprising men, but who were not disposed to violate the laws of their country, were solicitous to understand this project, they were told that the time had not yet come. Ignorant people were led away from their homes, under an expectation that they would be informed of the whole project—the information was promised, but never imparted. The consequence was, that when Mr. Burr was apprehended, they were left to find their way back to their own homes in any way that they could.

Chimerical as this project may appear, there was only one single thing wanting to accomplish it; the co-operation of the commander in chief of the American army. If gen. Wilkinson had acted as some have represented; if instead of performing the part of a patriot, he had played the character of a traitor; what would have been the consequence? The people of the United States would have had a civil war raging in the west; while our eastern coasts would have been ravaged and insulted by an insolent foe, in consequence of our distractions. From calamity, at least from that which hovered in the west, we have been protected by the vigilance and integrity of the commander in chief. I care not for the constructions which may be placed on my assertions; but I will venture to declare, that since the adoption of the federal constitution, no man has had it so much in his power or has so effectually used it, to render services to his country, as gen. Wilkinson has done, in defeating this project; and yet for this illustrious service, he has been as much censured, insulted and denounced, as if he had joined in it.

It is not right to anticipate the defence; but the prisoner himself stated, while under examination, that the object of his expedition, was peaceful & agricultural. If this ground shall be taken again, we shall find no difficulty in bringing together a variety of circumstances to prove its instability. At present I am too much exhausted to detail them; but that task if necessary, shall hereafter be performed.

I have observed, that you would enter upon this equiry with calmness and impartiality; and I must hope, too, with firmness. This question is to be contemplated and decided on the very same principles, as if the place of the prisoner were occupied by the most ignorant man in the community. It is true that he has been the vice president of the United States, the second in office, and perhaps the second in the confidence of his fellow citizens; and that he has talents and energies which, at the approaching crisis, might have been employed most honorably to himself, and most usefully to his country. But these circumstances aggravate, if any thing can aggravate, rather than extenuate the enormity of his