*United States v. Mitchell.

Treason.—Evidence.

An insurrection, to prevent by force and intimidation, the execution of an act of congress, is treason, by levying war.

A bare conspiracy is not treason; there must be an *overt* act, proved by two witnesses.

On a trial for treason, a copy of a letter, inciting to insurrection, is admissible in evidence, on proof that it was one of the copies actually circulated.

Evidence is not admissible, that the defendant joined in the commission of a distinct felony, for which he is charged in another indictment: there being no evidence that such felony was committed with a treasonable intent.

Indictment for high treason, by levying war against the United States. It was alleged, that the prisoner was one of the party that assembled at Couche's Fort, armed; that he proceeded thence to Gen. Neville's, and assisted at the burning of the general's house; that he attended with great zeal at the meeting at Braddock's field; and that on the day prescribed for signing a submission to the government, he was intoxicated, refused to sign himself, and was active in dissuading others from signing. The circumstance of the prisoner's being at Couche's, was proved by a number of witnesses; his being at Braddock's field, by one witness and his own confession; but there was only one positive witness to the fact of his having been at the burning of general Neville's house, though a second witness said, "it ran in his head, that he had seen him there," and a third declared, that he had passed him on the march thither. The scope of the testimony, as it respected the general object of the insurrection, and as it particularly applied to the prisoner, will be found sufficiently stated in the course of the arguments and charge.

The Attorney of the District (*Rawle*) having closed the evidence, proceeded to state the law, in support of the prosecution. So frequently and fully has the offence of levying war against the government been defined, that a doubt can hardly be raised upon the subject. Kings, it is true, have endeavored to augment the number, and to perplex the descriptions of treasons, as an instrument to enlarge their powers, and to oppress their subjects; but in republics, and particularly, in the American republic, the crime of treason is naturally reduced to a single head, which divides itself into these constitutional propositions: 1st. Levying war against the government; and 2d. Adhering to its enemies, giving them aid and comfort. In other words, exciting internal, or waging external, war, against the state. The second branch of the crime, thus designated, renders it unlawful and

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at night), adjourned until eleven o'clock the next morning. Just after the adjournment took place, the jury requested to see Foster's Crown Law, and the Acts of Congress, which, by consent, were accordingly sent to them. I am told, that they remained together until between three and four o'clock in the morning, when they wrote, signed and sealed up their verdict, and adjourned. On the next morning (the 23d of May 1795), they appeared at the bar; and being called over, offered the written verdict, sealed up, to the clerk. But The Court said, that the paper could not be received. The foreman then pronounced the verdict, *vivâ voce*, and again offered the written verdict; but The Court repeated, "We cannot open or receive it." Nothing was said, publicly, of the jury's having adjourned. The defendant was eventually pardoned.

treasonable for any citizen to adhere to a foreign, public enemy, whether assailing the frontiers, or penetrating into the heart of our country. But while such a co-operation endangers the success and prosperity of the community, the effects *of domestic insurrection (which the first branch [*349] of the division contemplates) strike at the root of its existence; and in free countries, above all, must be prevented, or corrected, by the most vigilant and efficient sanctions of the law.

What constitutes a levying of war, however, must be the same, in technical interpretation, whether committed under a republican, or a regal, form of government; since either institution may be assailed and subverted by the same means. Hence, we are enabled, in the first stage of our own experience, to acquire precise and satisfactory ideas upon the subject, from the matured experience of another government, which has employed the same language to describe the offence, and is guided by the same rules of judicial exposition. By the English authorities, it is uniformly and clearly declared, that raising a body of men to obtain, by intimidation or violence, the repeal of a law, or to oppose and prevent, by force and terror, the execution of a law, is an act of levying war. Doug. 570. Again, an insurrection, with an avowed design to suppress public offices, is an act of levying war: and although a bare conspiracy to levy war, may not amount to that species of treason; yet, if any of the conspirators actually levy war, it is treason in all the persons that conspired; and in Fost. 218, it is even laid down, that an assembly armed and arrayed in a warlike manner for a treasonable purpose is *bellum levatum*, though not *bellum percussum*. Those, likewise, who join afterwards, though not concerned at first in the plot, are as guilty as the original conspirators; for in treason all are principals; and whenever a lawless meeting is convened, whether it shall be treated as riot or treason, will depend on the *quo animo*. 4 Bl. Com. 81; 1 Hale H. P. C. 123–4; Fost. 213, 210, 215, 218; 1 Hawk. P. C. 37; 4 Bl. Com. 35; 1 Hale P. C. 440; 8 St. Tr. 247; 2 Ibid. 586–7; Kelyng 19; 3 Inst. 9.

The evidence, unfortunately, leaves no room for excuse, or extenuation, in the application of the law to the prisoner's case. The general and avowed object of the conspiracy at Couche's Fort, was, to suppress the offices of excise in the fourth survey. As an important measure for that purpose, it was agreed to go to General Neville's house, and compel him to surrender his office and his official papers. Some of the persons who were at Couche's Fort, went, accordingly, to General Neville's, and terminated a course of lawless and outrageous proceedings, by burning his house. The prisoner is proved by four witnesses to have been at Couche's Fort; and so far from opposing the expedition to General Neville's, he offered himself to reconnoitre. Being thus originally combined with the conspirators, in a treasonable purpose, to levy war, it was unnecessary that the purpose should be afterwards executed, in order to convict them *all of treason, and much less is it necessary to [*350] his conviction, that he should have been present at the burning of General Neville's house, which was the consummation of their plot, or that the burning should be proved by two witnesses. But he is, likewise, discovered, by one of the witnesses at least, within a few rods of the General's, at the moment of the conflagration; and he is seen marching in the cavalcade which escorted the dead body of their leader, in melancholy triumph, from the scene of action to Barclay's house. It is not necessary to consider the

meeting at Braddock's field as an independent treason, though the avowed intention was to attack the garrison at Pittsburgh, and to expel certain public officers from the town; but the conduct of the prisoner on that occasion, concurring in every violent proposition that was made; and his refractory and seditious deportment on the day prescribed for signing the declaration of submission to the laws, are corroborative demonstrations of that *mala mens*, that dark and dreary turbulence of soul, which is regardless of every social, moral and religious obligation.(*a*)

The counsel for the prisoner (*E. Tilghman* and *Thomas*) premised, that they did not conceive it to be their duty to show, that the prisoner was guiltless of any description of crime against the United States, or the state of Pennsylvania; but they contended, that he had not committed the crime of high treason; and ought, therefore, to be acquitted upon the present indictment. The adjudications in England upon the various descriptions of treason, have been worked, incautiously, into a system, by the destruction of which, at this day, the government itself would be seriously affected: but even there, the best judges, and the ablest commentators, while they acquiesce in the decisions that have already taken place, furnish a strong caution against the too easy admission of future cases, which may seem to have a parity of reason. Constructive, or interpretative treasons, must be the dread and scourge of any nation that allows them. 1 Hale, P. C. 132, 259; 4 Bl. Com. 85. Take, then, the distinction of treason by levying war, as laid down by the attorney of the district, and it is a constructive or interpretative weapon, which is calculated to annul all distinctions heretofore wisely established in the grades and punishments of crimes; and by whose magic *power, a mob may easily be converted into a conspiracy; and [*351] a riot aggravated into high treason. Such, however, is not the sense which congress has expressed upon this very subject; for, if a bare opposition to the execution of a law can be considered as constituting a traitorous offence, as levying war against the government, it must be equally so in relation to every other law, as well as in relation to the excise law; and in relation to the marshal of a court, as much as in relation to the supervisor of a district: and yet, in the penal code of the United States, the offence of wilfully obstructing, resisting or opposing any officer, in serving or attempting to serve any process, is considered and punished merely as a misdemeanor. (1 U. S. Stat. 117, § 22.) Let it be granted, that to compel congress to repeal a law, by violence or intimidation, is treason (and the English authorities, rightly construed, claim no greater concession), it does not follow, that resisting the execution of a law, or attempting to coerce an officer into the resignation of his commission, will amount to the same offence. Let it be granted also, that an insurrection, for the avowed purpose of suppressing all the excise offices in the United States, may be

(*a*) Paterson, Justice.—Before the defence is opened, I wish to direct the attention of the prisoner's counsel to two considerations: 1st. Whether the conspiracy to levy war at Couche's Fort, was not, in legal contemplation, an actual levying of war? 2d. Whether the proceedings at General Neville's house, were not a continuation of the act which originated at Couche's Fort? For, several witnesses have proved that the prisoner was at Couche's Fort, and one positive witness has proved, that he was at General Neville's house.

construed into an act of levying war against the government (and the English authorities speak expressly of the universality of the object, as an essential characteristic of this species of treason), it does not follow, that an attempt to oblige one officer to resign, or to suppress all the offices in one district, will be a crime of the same denomination. 1 Hale P. C. 135. Nor can another doctrine, urged in support of the prosecution, be fairly recognised. It is laid down in all the books which have been cited, it is admitted by the attorney-general, that a bare conspiracy to levy war, does not amount to treason ; but it is contended, that if, at any time afterwards, a part of the conspirators should execute the plot, the whole of them will be involved in the guilt and punishment. Thus, no opportunity is left for repentance ; the motives which restrain the absentees from attending at the scene of action, however pure, can furnish no excuse ; and they are doomed to answer for the conduct of others, which they may, in fact, disapprove, and which they cannot, in any degree, control. The state of the evidence, however, renders it unavoidable, that this ground should be taken ; for, unless the proceedings at Couche's Fort and at Gen. Neville's house can be so combined and interwoven, as to form one action, there are not two witnesses to prove that the prisoner was at the latter place ; and the conduct at the former could only amount, under the most rigid construction, to a conspiracy to levy war, not to an actual levying of war against the government. With the necessity for two witnesses to an *overt* act of treason, it is not in the power of judges or juries to dispense ; it is a shield *from [*352] oppression, with which the constitution furnishes the prisoner ; and it cannot be supplied by vague conjectures, founded on the feeble recollection of a witness ; nor by idle declarations of the party himself, in a state of intoxication ; a state that does not justify the perpetration of a crime, but may fairly be supposed to deprive the criminal of a knowledge of the extent of his confession. 2 Hawk. 604, in note ; Fost. C. L. 240 ; 4 Bl. Com. 356 ; 1 Dall. 39, 40.

If this view of the law is correct, it will be easy to show, that its operation upon the facts will entitle the prisoner to an acquittal. By the meeting at Braddock's field, no act of treason was committed; nor was any plan for levying war contrived. The people assembled there, upon a general invitation, founded on the calamitous state of the country ; and though they proposed banishing certain citizens (who were not public officers of the United States) from Pittsburgh (which cannot surely be deemed treason), they neither executed that project, nor committed any other outrage ; but after some menaces and an idle parade, dispersed to their respective homes. The prisoner was certainly at Braddock's field ; but no treason being committed there, his attendance is not a foundation for the present indictment. It may be admitted, likewise, that at Braddock's field, he made some vaunting declarations of a traitorous intention ; but a traitorous intention there, is no proof of his having levied war against the government, at another time and in another place. With respect to the criminal proceedings at Gen. Neville's house (which, after all, amount to the crime of arson, and not of treason), it is agreed, that only one positive witness proves the fact of the prisoner's having been there ; but even that witness states, that the prisoner was alone, at the distance of thirty or forty rods ; and it is not recollected, whether he had a gun. Then, it only remains to consider the

effect of the prisoner's presence at Couche's Fort ; for his being seen in a cavalcade on the road for Gen. Neville's, and his conduct on the day prescribed for signing the submission to government, when he was notoriously drunk, may prove him to be a very bad man, but will not be sufficient to maintain a charge of high treason. It does not, then, appear by the testimony of two witnesses, that the meeting at Couche's Fort was convened for the purpose of accomplishing a compulsory repeal of the excise laws, or a suppression of the excise offices. The meeting seems to have originated merely in a wish to consider what it was best to do, in the actual state of the country. On this point, a committee was chosen, or rather was self-created ; and the members determined to send a flag to Gen. Neville. It does not appear, with what view the flag was to be sent ; but it will not be presumed, when the evidence is silent, to be with a view to attack the General's house, to force a repeal of the excise *law, or to compel the [*353] officer's resignation ; and even the fact itself is only proved by one witness. Besides, the conduct of the committee, however culpable, will not be sufficient to involve the whole assembly in the guilt of treason. It is true, that the prisoner expressed his willingness to reconnoitre Gen. Neville's house ; but this expression, likewise, is only proved by one witness ; and even if it were proved by fifty witnesses, it does not amount to an *overt* act of treason, by levying war; nor does it appear that he ever did reconnoitre, or furnish intelligence to the committee. The proof against Porter (*ante*, p. 345) was as strong, and yet he was acquitted. Upon the whole, if the proceedings at Couche's Fort and Gen. Neville's house, must be considered as one action, that action must take its color, quality and character, from what was done at the latter place ; and as there are not two witnesses to the *overt* act committed there, it is immaterial what was the conduct of the prisoner at Couche's Fort. The perpetration is the gist of the crime ; and he only is to be adjudged guilty, who joined in the actual perpetration.

The *Attorney-General* of the United States (*Bradford*), in reply.—It is essential to the security of life, liberty and property, that the powers of government should exist under some modification ; and under whatever modification they exist, an attempt to defeat or destroy them, must be treason. If, however, the principles asserted in the course of the prisoner's defence should prevail, a flagrant attempt to obstruct the legitimate operations of the government, to prevent the execution of its laws, and to coerce its officers into a dereliction of their trust, must no longer be regarded as high treason ; every man engaged in the administration of the public affairs has erred in considering the insurrection as anything more than a common, contemptible riot ; Vigol, who has been convicted, ought to have been acquitted ; and all the prisoners committed upon the same charge, ought instantly to be released ! But this doctrine and its consequences will not be found compatible with our constitution ; and cannot receive the countenance of a court of justice.

To proceed, however, in a more minute analysis of the defence ; it has been argued, that congress has provided a specific punishment for the offence of resisting or obstructing the service of process, obviously distinguishing it from treason ; and that it is as much treason to resist the execution of one law as another ; to resist the marshal of a court, as much as the

supervisor of a district. The analogy is, in a great measure, just: in either case, if the resistance is made by a few persons, in a particular instance, and under the impulse of a particular interest, the offence would not amount to high treason; but if, in either case, there is a general rising of a whole county, to *prevent the officer from discharging his duty in relation [*354] to the public at large, the offence is, unquestionably, high treason. Thus, an opposition was lately made to the appointment of a particular judge in Mifflin county, and he was forcibly driven from the bench; but the offence was prosecuted merely as a riot, upon this principle of discrimination, that the design was not to prevent the governor from appointing any judge, but only to displace an unpopular individual.

Again, it has been urged, that the criminal intention must point to the suppression of all the excise offices in the United States, or it cannot amount to high treason. If it is meant by this argument, that the insurgents of Pennsylvania must have contemplated a march from Georgia to New Hampshire, it is extravagant and absurd: but in another view, it is perfectly correct; for if it was intended that, by their lawless career and example, congress should be forced into a repeal of the obnoxious law, it necessarily followed, that, from the same cause, the offices of excise would be suppressed throughout the Union. That universality of object, which the books require, was inseparable from the nature of the opposition; for it was impossible to contemplate the repeal of the excise law in one survey, or in one state, without affecting it in every survey, and in every state.

The truth is, however, that the insurgents did not entertain a personal dislike for Gen. Neville; but in every stage of their proceedings, at Couche's Fort, at the General's house, and at Braddock's field, they were actuated by one single, traitorous motive, a determination, if practicable, to frustrate and prevent the execution of the excise law. The whole was one great insurrection; and it is immaterial, at what point of time, or place, from its commencement to its termination, any man became an agent in carrying it on. Many persons, indeed, may have attended innocently at Couche's Fort (as was the case with Porter), but those would not remain long, after the purpose of the meeting was developed. To render any man criminal, he must not only have been present, but he must have taken part with the insurgents; yet, whether he was present at Couche's Fort, on the march to Gen. Neville's, or at the burning of the General's house, if his intention was traitorous, his offence was treason. 3 Inst. 9. The *overt* act laid in the indictment (which is drawn from the most approved precedents) is levying war; and war may be levied, though not actually made. Fost. 218. It is agreed, that this *overt* act must be proved by two witnesses; but there is a difference as to what constitutes the act itself. Now, it is manifest, from every authority, that to assemble in a body, armed and arrayed, for some treasonable purpose, is an act of levying war; this was the case at Couche's Fort; and the prisoner's active attendance there is proved by a number of witnesses. It is not *required, that every witness should have seen [*355] him, at the same spot, at the same moment, and in the same act; but if they see him at the place and time of rendezvous, exhibiting the same species of traitorous conduct, the law is satisfied. The conspiracy to levy war being effected, all the conspirators are guilty, though they did not all attend at Gen. Neville's house. 1 Hale, P. C. 132; Fost. 213, 215. Besides, the

meeting at Braddock's field is a distinct and substantive act of treason; and the prisoner is proved by four witnesses to have been there. The design of the meeting was, avowedly, to oppose the execution of the excise law, to overawe the government, to involve others in the guilt of the insurrection, to prevent the punishment of the delinquents, to banish unpopular individuals from the town, and to attack the garrison of Pittsburgh. The hasty declarations of the *quo animo*, proceeding from the prisoner himself, ought not to have much weight, were they not so strongly corroborated by other testimony.

The charge of the COURT was delivered to the jury in substance as follows:

PATERSON, Justice.—The first question to be considered is, what was the general object of the insurrection? If its object was to suppress the excise offices, and to prevent the execution of an act of congress, by force and intimidation, the offence, in legal estimation, is high treason; it is an usurpation of the authority of government; it is high treason, by levying of war. Taking the testimony in a rational and connected point of view, this was the object: it was of a general nature, and of national concern.

Let us attend, for a moment, to the evidence. With what view was the attack made on General Neville's house? Was it it to gratify a spirit of revenge against him, as a private citizen, as an individual? No, as a private citizen, he had been highly respected and beloved; it was only by becoming a public officer, that he became obnoxious; and it was on account of his holding the excise office alone, that his house had been assailed, and his person endangered. On the first day of attack, the insurgents were repulsed; but they rallied, returned with greater force, and fatally succeeded in the second attempt. They were arrayed in a military manner; they affected the military forms of negotiation by a flag; they pretended no personal hostility to General Neville; but they insisted on the surrender of his commission. Can there be a doubt, then, that the object of the insurrection was of a general and public nature?

The second question to be considered is, how far was the prisoner traitorously connected with the insurgents? It is proved by four witnesses, that he was at Couche's Fort, at a great distance from his own home, and that he was armed. One *witness proves, positively, that he was at the burning of Gen. Neville's house; and another says, "it runs in his head, that he also saw the prisoner there." On this state of the facts, a difficulty has been suggested. It is said, that no act of treason was committed at Couche's Fort; and that however treasonable the proceedings at Gen. Neville's may have been, there are not two witnesses who prove that the prisoner was there. Of the *overt* act of treason, there must, undoubtedly, be proof by two witnesses; and it is equally clear, that the intention and the act, the will and the deed, must concur; for a bare conspiracy is not treason. But let us consider the prisoner's conduct, in a regular and connected course. He is proved by a competent number of witnesses, to have been at Couche's Fort. At Couche's Fort, the conspiracy was formed, for attacking Gen. Neville's house; and the prisoner was actually passed on the march thither. Now, in Foster 213, the very act of marching is considered as carrying the traitorous intention into effect; and the jury (who will sometimes find the most positive testi-

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mony contradicted by circumstances which carry irresistible conviction to the mind) will consider how far this aids the doubtful language of the second witness, even as to the fact of the prisoner's being at Gen. Neville's house.

On the personal motives and conduct of the prisoner, it would be superfluous to make a particular commentary. He was armed, he was a volunteer, he was a party to the various consultations of the insurgents; and in every scene of the insurrection, from the assembly at Couche's Fort to the day prescribed for submission to the government, he makes a conspicuous appearance. His attendance, armed, at Braddock's field, would of itself amount to treason, if his design was treasonable.

Upon the whole, whether the conspiracy at Couche's Fort may of itself be deemed treason; or, the conspiracy there, and the proceedings at Gen. Neville's house, are considered as one act (which is, perhaps, the true light to view the subject in), the prisoner must be pronounced guilty. The consequences are not to weigh with the jury: it is their province to do justice; the attribute of mercy is placed by our constitution in other hands.

Verdict, guilty.(a)

*357] *Same Cause.

In the course of the trial, the following points were ruled by the court.

I. The attorney of the district proposed to prove, that a circular letter had been written at Canonsburgh, on the 28th of July 1794, by several leaders of the insurrection, calling upon the militia officers, and other citizens, to assemble at Braddock's field, on the 1st of August following, with arms, ammunition and provisions; that the witness had seen the original letter, which was left with him, under instructions to pass it on to another person; and that the copy now produced was conformable, in substance, to the original.

But it was objected, by the counsel for the *prisoner*, that before a copy of the letter could be given in evidence, the loss of the original must be proved; and even then, the witness must be able to attest, that he had compared them, and that the copy offered was in all respects correct.

It was answered, by the *Attorney of the District*, that from the general circulation of the letter, copies must have been multiplied, and during a season of such confusion (to which the common rules of evidence are entirely inapplicable), it is impracticable to trace the comparison of any one copy with the original.

By the Court.—If it can be proved, that the copy of the letter now produced, was one of those copies which were actually circulated at the time of the insurrection, it is admissible evidence: but otherwise, it cannot be read to the jury.

II. The Attorney of the District offered testimony to prove, that, in the course of the insurrection, the prisoner joined in robbing the public mail of

(a) The prisoner was pardoned; and the president afterwards granted a general amnesty to all the insurgents, who were not objects of pending prosecutions.

the United States; and that several of the letters, thus intercepted, had been read at the meeting at Braddock's field.

But it was objected, on behalf of the *prisoner*, that the robbery of the mail was a felony, for which, as a substantive and independent crime, he was actually charged by another indictment; and that, therefore, evidence relating to it should not be given on the present issue, as the prisoner was not prepared to answer, and a prejudice might be excited against him in the mind of the jury.

By the Court.—An act committed with a felonious intention, cannot be given in evidence, upon the trial of an indictment for high treason. It does not yet appear, that the mail was intercepted and rifled with a traitorous intention; and so far as it respects the prisoner, there is another indictment against him, charging the offence merely as a felony. Under these circumstances, the testimony cannot be admitted.

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*APRIL TERM, 1796. [*358

Present, Iredell and Peters, Justices.

Hulsecamp *v.* Teel.

Jurisdiction.

In actions sounding in *tort*, the damages laid in the declaration, are the matter in dispute, and the test of jurisdiction.

This was an action for an assault and battery, committed on the high seas, and the damages were laid in the declaration at $1000; but the controversy being referred, the referees reported only $45 in favor of the plaintiff. In April term 1795, *M. Levy*, for the defendant, obtained a rule to show cause why the report of the referees should not be quashed, and the action dismissed: and the question was now argued by him, on the one side, and by *Rawle*, upon the other.

In support of the rule, *Levy*, having adverted to the 3d article of the constitution of the United States, as the foundation of the judicial authority, contended, that by the 11th section of the judicial act, which establishes the jurisdiction of the circuit court, no suit could be there instituted and maintained, unless the plaintiff was entitled to recover, and actually recovered, a sum exceeding $500, exclusive of costs. He drew a similar inference from the provision in the 12th section of the act, which requires that suits removed into the circuit court from a state court, should be of the same value; and he distinguished between actions for *tort*, and actions upon contract, in order more forcibly to exclude the cognisance of the court in the former, than in the latter instances. The 20th section, empowering the court to adjudge the plaintiff to pay costs, was manifestly designed, in that respect, to give a jurisdiction, which the court would not otherwise possess, on account of the general limitation of jurisdiction as to the sum or matter in dispute: and in the provision, that the district court shall have jurisdic-