

SUPREME COURT
OF THE
UNITED STATES,
FEBRUARY TERM, 1807.
The United States
vs.
Bollman and Swartwout.

Habeas Corpus on a commitment for treason.
Chief Justice Marshall, on the 21st instant
delivered the following opinion of the
court:—(Continued.)

That the letter from colonel Burr to general Wilkinson relates to a military enterprise meditated by the former, has not been questioned. If this enterprise was against Mexico, it would amount to a high misdemeanor, if against any of the territories of the United States, or if in its progress the subversion of the government of the United States in any of their territories was a mean, clearly and necessarily to be employed, if such mean formed a substantive part of the plan, the assembling of a body of men to effect it would be levying war against the United States.

The letter is in language which furnishes no distinct view of the design of the writer. The co-operation, however, which is stated to have been secured, points strongly to some expedition against the territories of Spain. After making these general statements, the writer becomes rather more explicit, and says, "Burr's plan of operations is to move down rapidly from the falls on the 15th of November, with the first 500 or 1000 men, in light boats now constructing for that purpose, to be at Natchez between the 5th and 15th of December, there to meet Wilkinson; then to determine whether it will be expedient in the first instance to seize on or to pass by Baton Rouge. The people of the country to which we are going are prepared to receive us. Their agents now with Burr say that if we will protect their religion, and will not subject them to a foreign power, in three weeks all will be settled."

There is no expression in these sentences which would justify a suspicion that any territory of the United States was the object of the expedition.

For what purpose seize on Baton Rouge? Why engage Spain against this enterprise, if it was designed against the U. States?

"The people of the country to which we are going, are prepared to receive us." This language is peculiarly appropriate to a foreign country. It will not be contended that the terms would be inapplicable to a territory of the United States, but other terms would more aptly convey the idea, and Burr seems to consider himself as giving information of which Wilkinson was not possessed. When it is recollected that he was the governor of a territory adjoining that which must have been threatened, if a territory of the United States was threatened, and that he commanded the army, a part of which was stationed in that territory, the probability that the information communicated related to a foreign country, it must be admitted, gains strength.

"Their agents now with Burr say that if we will protect their religion, and will not subject them to a foreign power, in three weeks all will be settled."

This is apparently the language of a people who, from the contemplated change of their political situation, feared for their religion, and feared that they would be made the subjects of a foreign power. That the Mexicans should entertain these apprehensions was natural and would readily be believed. They were, if the representation made of their dispositions be correct, about to place themselves much in the power of men who professed a faith different from theirs, and who by making them dependent on England, or the United States, would subject them to a foreign power.

That the people of New-Orleans as a people, if really engaged in the conspiracy, should feel the same apprehensions, and require assurances on the same points, is by no means so obvious.

There certainly is not in the letter delivered to gen. Wilkinson, so far as that letter is laid before the court, one syllable which has a necessary or a natural reference to an enterprise against any territory of the United States.

That the bearer of this letter must be considered as acquainted with its contents, is not to be controverted. The letter and his own declarations evince the fact.

After stating himself to have passed through New-York and the western states and territories, without insinuating that he had performed on his route any act whatever which was connected with the enterprise, he states his object to be "to carry an expedition to the Mexican provinces."

This statement may be considered as explanatory of the letter of col. Burr, if the expression of that letter could be thought ambiguous.

But there are other declarations made by Mr. Swartwout, which constitute the difficulty of this case. On an inquiry from general Wilkinson, he said "this territory would be revolutionized, where the people were ready to join them, and that there would be some seizing, he supposed, at New-Orleans."

If these words import that the government established by the United States in any of its territories, was to be revolutionized by force, although merely as a step to, or a mean of executing some greater project, the design was unquestionably treasonable, and any assembling of men for that purpose would amount to a levying of war. But on the import of the words a difference of opinion exists. Some of the judges suppose they refer to the territory against which the expedition was intended, others to that in which the conversation was held. Some consider the words if even ap-

pllicable to a territory of the United States, as alluding to a revolution to be effected by the people rather than by the party conducted by col. Burr.

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 of men for that purpose, previous to the arrest of the prisoner, in order to consummate the crime as to him; and a majority of the court is of opinion that the conversation of Mr. Swartwout affords no sufficient proof of such assembling.

The prisoner stated that "col. Burr with the support of a powerful association extending from New-York to New-Orleans, was levying an armed body of 7000 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 may 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 col. Burr to have advanced so far in levying an army as actually to have assembled them.

It is argued that since it cannot be necessary that the whole 7000 men should have 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 assembling, and therefore the 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 particular words used by Mr. Swartwout are that col. Burr was levying an armed body of 7000 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 sense in which the term was used. The fact alluded to, if taken in the former sense, is of a nature so 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.

Against Erick Bollman there is still less testimony. Nothing has been said by him to support the charge that the enterprise in which he was engaged had any other object than was stated in the letter of col. Burr. Against him, therefore, there is no evidence to support a charge of treason.

That both the prisoners were engaged in a most culpable enterprise against the dominions of a power at peace with the U. States, those who admit the affidavit of general Wilkinson, cannot doubt. But that no part of this crime was committed in the district of Columbia, is apparent. It is therefore the unanimous opinion of the court that they cannot be tried in this district.

The law read on the part of the prosecution is understood to apply only to offences committed on the high seas, or any river, haven, basin, or bay, not within the jurisdiction of a particular state. In these cases there is no court which has particular cognizance of the crime and therefore the place in which the criminal shall be apprehended, or if he be apprehended where no court has exclusive jurisdiction, that to which he shall be first brought, is substituted for the place in which the offence was committed.

But in this case, a tribunal for the trial of the offence, wherever it may have been committed, had been provided by congress, and at the place where the prisoners were seized by the authority of the commander in chief, there existed such a tribunal. It would too be extremely dangerous to say, that because the prisoners were apprehended not by a civil magistrate, but by the military power, there could be given by law a right to try the persons so seized in any place which this general might select, and to which he might direct them to be carried.

The act of congress which the prisoners are supposed to have violated describes as offenders those who begin or set on foot, or provide or prepare the means for any military expedition or enterprise to be carried on from thence against the dominions of a foreign prince or state with whom the United States are at peace.

There is a want of precision in the description of the offence which might produce some difficulty in deciding what cases would come within it. But several other questions arise, which a court consisting of four judges find itself unable to decide, and therefore as the crime with which the prisoners stand charged has not been committed, the court can only direct them to be discharged. This is done with the less reluctance because the discharge does not acquit them from the offence which there is probable cause for supposing they have committed, and if those whose duty it is to protect the nation by prosecuting offenders against the laws shall suppose those who have been charged with treason to be proper objects for punishment, they will, when possessed of less exceptional testimony, and when able to say at what place the offence has been committed, institute fresh proceedings against them.

The order of the court was as follows:
The United States } On a writ of Habeas
vs. } Corpus.

Swartwout, }
The arguments of the attorney general and of the attorney of the United States for the district of Columbia, and the arguments of counsel for the prisoners 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 committed on the charge of treason in levying war against the United States and the testimony in which the said commitment was made having been inspected and attentively considered, the court is of opinion that the testimony does not furnish probable cause for supposing that the said Samuel Swartwout, and levied war against the United States, and do therefore direct that he be forthwith discharged from the custody of the marshal.

The same order with regard to Bollman.

From the London Morning Chronicle.
NEGOCIATION WITH FRANCE.

In offering a few remarks upon the papers relative to the negotiation with France, it is principally our intention to give a short view of the case drawn from a careful perusal of the voluminous documents laid before parliament. This condensed statement being made, little will be requisite in the way of deduction or argument to justify the government in the eyes of this nation and of Europe. The question shortly is, whether ministers entered into negotiation upon principles suited to the dignity of the nation, and were ready to conclude peace upon conditions, consistent with its relative situation, & to its true interests.

That the overture of negotiation came from the French government, it is only important to prove in order to maintain an assertion to the French government, which has been denied by the French.

It may be asked then, what was the object of Talleyrand's letter, including a passage from the speech of the emperor? Not surely, to communicate that brief article of news, then not quite recent; but to communicate along with pacific expressions, a general notice of disposition to treat, made particular and official, in being addressed to the English secretary of state. It is to be remarked that this is the very mode in which the French government have, on former occasions, made overtures. This is not the first time that the speeches of the emperor have been officially communicated for the purpose of leading to a negotiation.

It is to be observed, moreover, that Talleyrand makes the communication in a separate letter from that of private civility to Mr. Fox, about the assassin; and if any thing more were necessary to prove that the French government considered it as an overture, it is their totally suppressing it in the papers published by themselves in the Monitor.

The principal points then, are the form & the basis of the negotiation.

It is manifest, from the correspondence, that Mr. Fox refused to negotiate without Russia; and that when, according to the assertion of the French, that point was given up, it was only given up in appearance while maintained in fact. It is undeniable that we had the concurrence of Russia for negotiating, that our government went hand in hand with that of Russia, and that the French government was perfectly apprized, at the outset, that such was to be the case. In the representation of the 14th of June (No. 11), Mr. Fox continues to insist upon this course in substance, by referring to the precedent of 1782, when we concluded a treaty with America, to take effect, in case a peace was concluded between this country and France.

Lord Yarmouth left London to negotiate in this form only, and it was recognized by Talleyrand. Mr. D'Oubril's being at Paris, for the purpose of negotiating, rendered any further discussion of the form quite superfluous.

In this instance, however, as indeed throughout the negotiation, the most scrupulous adherence to our engagements with our allies has been manifested, as we shall have occasion to show more particularly in the sequel.

As to the basis of the negotiation, the French government at last denied that the basis of *uti possidetis* had been admitted. But although the express testimony of lord Yarmouth would be sufficient to establish the fact, Talleyrand's letters to Mr. Fox leave no pretence of dispute on the subject. Talleyrand in his letter of the 1st of April (No. 6) says, "l'Empereur n'a rien a desirer de ce que possede L'Angleterre."

But this expression, which can apply to that state of possession in which England stood, is rendered more clear and unquestionable by what immediately follows.

"Peace with France is possible, and may be perpetual, provided there is no interference in her internal affairs, and that no attempt is made to restrain her in the regulation of her custom duties; to clamp her commercial rights; or to offer any insult to her flag."

willing to make peace, does not in the smallest degree object to the state of possession. Talleyrand does indeed qualify the basis of *uti possidetis*, but it is by a reference to objects of quite a different kind. He tells us what pretensions would be inadmissible, but these conditions relate solely to matters of internal policy, to commerce and navigation. The explanation added to the basis, while they left the state of possession untouched; and there can be no doubt that in this letter, as it most certainly was in the conferences with lord Yarmouth.

In this very dispatch Talleyrand states the same effect that lord Lauderdale does after, the reason why the basis of *uti possidetis* should be adopted. He says,

"Our interests are irreconcilable, inasmuch as they are distinct. You are the rulers of the ocean, your naval force are equal to those of all the sovereigns of the world united. We are a great continental power—but there are many who equal our power by land, and your maritime preponderance will always place our commerce at the mercy of your squadrons, immediately after declaring war. Do you think it reasonable to expect that the emperor should ever consent to submit himself to your discretion, in continental affairs also? If masters of the sea, through your own power, you propose being masters of the land likewise by a combined force, peace is impossible—for in that case you will be striving for an object you can never attain."

Here is a complete recognition of the applicability of the *uti possidetis*, viz. that the state of possession was not likely to be altered in consequence of our decisive and naval superiority, by any thing in the power of the enemy.

This principle of *uti possidetis* unquestionably was subject to modification, because though the basis, it did necessarily regulate the precise form and condition of the treaty, or as lord Lauderdale so well states in his first dispatch, Enclosure (A) of No. 33. At the same time he (lord Lauderdale) is desirous it should be well understood that the adoption of this principle (*uti possidetis*) will not prevent him from hastening to any just and adequate indemnification to his Sicilian majesty, in exchange for Sicily, or from accepting any proposition for the exchange of territory between the two contracting parties, upon just and equal principles, such as may tend to the reciprocal advantage of the two countries."

This is the true character and qualification of the basis of *uti possidetis*, and upon it all the conferences, proposals and discussions, between lord Yarmouth and the French ministers were built.

Let us consider now, then, the specific proposals that were made.

It will be remembered, that after the different letters which had taken place between Mr. Fox and Talleyrand in the end of March and in April, Mr. Fox's dispatch of the 20th of April remained unanswered till the 2d of June. At this time Talleyrand seems to have been desirous to renew the overtures which from his silence had led to no result. Lord Yarmouth was therefore authorized by him to state to the government the confidential communication of the views of the French government, and the outline of the terms on which peace might be concluded.

Between Mr. Fox's last letter of the 20th of April, and this period, when Talleyrand sent for lord Yarmouth at Paris, the war with Prussia, respecting Hanover, had been declared. The French government saw clearly that our government was resolved to act with vigor, and particularly that Hanover would on no account be ceded. Lord Yarmouth likewise, aware of the importance attached to it, as he was much in restoration was connected with the national honor, represented that he could be the bearer of no communication in which its restoration was not a preliminary. This was agreed to by Talleyrand. Again, with respect to Sicily, did Talleyrand positively agree that, being in our possession, they did not ask it? And he repeated words to the same effect as he had before employed:

"*Nous ne vous demandons rien.*"

It was with these preliminaries sanctioning completely the *uti possidetis*, even in the explained case of Sicily, that lord Yarmouth came to England; and with instructions to communicate the willingness of our government to treat on this basis, he returned to Paris.

The arrival of D'Oubril at Paris, and the hopes which must already have been formed of cajoling or corrupting him into a separate treaty, seems to have changed the views of the French government, if ever they were pacific. From the moment of lord Yarmouth's return to Paris, the change was visible. Sicily, which Talleyrand had given up, became a point of great difficulty, in consequence to the representations of the case with which it could be taken; an imagination, however, which the victory of Maida ought entirely to have dispelled. But in lord Yarmouth's first interviews, this did not appear an insuperable obstacle. By degrees, however, and in proportion to the intrigue with D'Oubril, the French government departed from that basis they had admitted, and the conditions to which they had specially agreed. Indeed it is manifest, from the proposal of giving the Hanse Towns, or Dalmatia, Ragusa, &c. or the Balearic Islands, as indemnification to the king of Naples, the French government were really conscious that Sicily was an object to which not only the *uti possidetis* was applicable, but that they had specially admitted that it was to remain to king Ferdinand.

But the tergiversation which the French government had now evinced, rendered it necessary to bring the negotiations to a precise point. The insolent confession of gen. Clark, that the conferences with lord Yarmouth had been "political romances," made it indispensable to fix those who were destined to truth and good faith to something which they could not disavow. Lord Lauderdale therefore insisted upon having the points agreed upon committed to writing. The reason why the French government showed such repugnance to conduct the negotiations in writing was precisely that stated by Mably, and which the whole history of the late negotiations greatly illustrates. "The secret reason, says Mably (*Principes des Negotiations*, works, vol. 5, p. 187.) The secret reason why governments usually decline to negotiate in writing is, that they are afraid of committing themselves. They wish to change their principles with every event and every circumstance. At a word, they wish to reserve

the power of retracting what they had yielded, and of advancing or receding at pleasure." No wonder that the French government had changed its views with every change of circumstance, or was averse to a negotiation in writing.

In the notes of general Clark will be seen less a denial of what had been conceded, than absurd and monstrous arguments to show why the basis of *uti possidetis* could not be adopted, such as that Bonaparte did not so negotiate when in military occupation of much of the Austrian dominions. The folly of confounding the temporary military occupation with possession like our, not likely to be shaken, is a proof how weak the cause of the French government was, when such men as Talleyrand and gen. Clark were driven to employ such ridiculous arguments. Bonaparte's occupation of these countries, he knew, could not be turned into secure possessions, and he was very glad to make peace on the principle of giving them almost all up. The principle of *uti possidetis* never was applied to such military occupation in itself so precarious and absolutely incapable of being long continued.

But the tergiversation of the French government is strongly displayed in their, in some degree, coming back to the principles originally laid down, as soon as they found that the treaty with Russia was not ratified, and their doing so is additional evidence of what had been at first settled and admitted. The tone of the French government had so much changed, that lord Lauderdale remarks, in his dispatch of 30th August (No. 44) that "as to the French possessions in the East-Indies, the Dutch colonies, St. Lucia and Tobago, on all of which they talk in a style so perfectly different from anything I had before heard that I should not be more surprised if, at our next conference, they were to give them up than I was at the change of tone manifested on the occasion."

Indeed, the conditions proposed after the rejection of D'Oubril's treaty were much more favorable, at least in detailed proposal, than any preceding. They were (See No. 51.)

1st. Hanover with its dependencies to be restored to his majesty.

2d. That the possession of Malta should be confirmed to Great-Britain.

3d. That France would interfere with Holland to confirm to his majesty the absolute possession of the Cape.

4th. That the emperor would confirm to his majesty the possession of Pondicherry, Chandernagore, Mahee, and the other dependent Comptoirs.

5th. Tobago to be ceded to us. Sicily was to be given up, and the Balearic islands, with an annuity from Spain, to be given to the king of Naples.

If we consider the terms which this country might have obtained separately, and how much more advantageous, than any that ever were even thought of in any preceding state of things before or since the treaty of Amiens, can it be denied that the interests of this country were, as strenuously maintained throughout this negotiation, as at any period of our history? If, indeed, we consider the acquisition made by Bonaparte, and the consolidation his power has acquired by time and victory since the war began, it may seem to many a subject of surprise that such favorable conditions should have been within our reach.

But this negotiation displays another character, very different, indeed, from what has been observed on other occasions; and it is the inflexible adherence to the interests of our allies which was maintained, and the consequence of which, contributing to the reputation, must redound to the real power of his majesty's government.

We have given an example to Europe of steadiness to its interests, a determination to obtain for others some security, which must be duly appreciated. Hanover, Malta, the Cape, every thing in the East-Indies, and Tobago in the West-Indies, were offered, and probably something more might have been obtained; but these conditions, though connected with considerable, if not perfectly adequate stipulations in favor of Russia and the king of Naples, were rejected, because the principle of good faith to our allies, and a liberal sentiment for the interest of Europe prescribed the sacrifice.

In these circumstances we think that the most warlike of those among us, and those who have the most sanguine hopes of reducing the power of France by war will not think that when such terms as the above were offered, the honor of the country was lowered in the hands of the government by which the negotiation was conducted.

It has been the subject of our censure that the negotiation was too long protracted, and as soon as the French government began to recede from the admitted grounds, our minister should have left Paris. It is ought to be remembered, however, M. D'Oubril had strongly expressed a wish that the negotiation might not be broken off abruptly. (See no. 20.) Besides if the treaty of M. D'Oubril had been ratified, and even held so important by the French government, it might fairly have been considered what rational hope there could be had so strenuously maintained. Even if the French government had been ready to submit to reasonable terms as between England and France, was our situation or the prospect of affairs such as to justify an abrupt rejection of them? The object of M. D'Oubril was certainly in the highest degree detrimental to the interests of Europe. This treaty, though rejected, gained a great deal for France. It introduced uncertainty into the councils of every government hostile to the interests of France, and suspended every measure that was to be calculated and adopted upon the supposition of either the aid of Russia in war or negotiation, or her entire separation from combined views.—But surely M. D'Oubril's