

the prevention of vexations and oppressions by arrests, and of delays in suits of law; except certain parts which have a local object, and are therefore inapplicable to this commonwealth; and certain other parts, which are altered by our acts of Assembly or the practice of our courts.)

- 16 and 17 Charles 2, c. 8. (Subject to the same exceptions.)
 17 Charles 2, c. 8.
 19 Charles 2, c. 6.
 22 and 23 Charles 2, c. 9. (c. 136.)
 30 Charles 2, c. 7.
 4 and 5 William and Mary, c. 21.
 8 and 9 William 3, c. 11.
 9 and 10 William 3, c. 15.
 10 and 11 William 3, c. 16.
 11 and 12 William 3, c. 6.
 3 and 4 Ann, c. 9. (Sect. 1, 2, 4 and 8 only.)
 4 Ann, c. 16. (The first 13, and 20th and 27th sections only.)

- 5 Geo. 1, c. 13.
 7 Geo. 2, c. 20. (Sections 1, 3.)
 11 Geo. 2, c. 19. (Sections 14 and 15 only.)

There are several statutes, called statutes of *mortmain*; one of which ('The statute *de religiosis*') was passed in the 7th year of Edw. 1, stat. 2d; another, in the 13th year of Edw. 1, c. 32, another in the 15th year of Rich. 2, c. 5; and another in the 23d year of Hen. 8, c. 10. These statutes are in part applicable to this country, and in part applicable, and in force. They are so far in force, that all conveyances, either by deed or will, of lands, tenements, or hereditaments, made to a body corporate, or for the use of a body corporate, are void, unless sanctioned by charter, or act of assembly. So also are all such conveyances void, made either to an individual, or to any number of persons associated, but not incorporated, if the said conveyances are for uses or purposes of a *superstitious* nature, and not calculated to promote objects of charity or utility.

CHAPTER DCCXXIX.

An ACT declaring what shall be treason, and what other crimes and practices against the state, shall be misprision of treason.

WHEREAS it is absolutely necessary, for the safety of every state, to prevent, as much as possible, all treasonable and dangerous practices that may be carried on by the internal enemies thereof, and to provide punishments in some degree adequate thereto, in order to deter all persons from the perpetration of such horrid and dangerous crimes: Therefore,

II. *Be it enacted, and it is hereby enacted,* That all and every person and persons (except prisoners of war) now inhabiting, residing, or sojourning within the limits of the state of Pennsylvania, or that shall voluntarily come into the same hereafter to inhabit reside, or sojourn, do owe, and shall pay allegiance to the state of Pennsylvania.

All persons now residing in this state owe allegiance to it.

III. *And be it further enacted,* That if any person or persons, belonging to or residing within this state, and under the protection of its laws, shall take a commission or commissions from the King of Great-Britain, or any under his authority, or other the enemies of this state, or the United States of America; or who shall levy war against the state, or government thereof; or knowingly and willingly shall aid or assist any enemies at open war against this state, or the United States of America, by joining their armies, or by enlisting, or procuring or persuading others to enlist for that purpose, or by furnishing such enemies with arms or ammunition, provision, or any other article or articles, for their aid or comfort; or by carrying on a traitorous correspondence with them; or shall form,

Enumeration of what shall constitute treason.

1777. or be anywise concerned in forming, any combination, plot or conspiracy, for betraying this state, or the United States of America, into the hands or power of any foreign enemy; or shall give or send any intelligence to the enemies of this state for that purpose; every person so offending, and being thereof legally convicted, by the evidence of two sufficient witnesses, in any Court of Oyer and Terminer, shall be adjudged guilty of high treason, and shall suffer death; and his or her estate shall be, and is hereby declared to be, forfeited to the commonwealth, except such parts thereof as the Judges of the Court, wherein such conviction may be, shall order and appropriate to the support of such traitor's children, or wife and children (if any) as to them may appear sufficient, until the same shall be otherwise regulated by act of General Assembly.

Punishment.

Exception as to wife and children.

[See post. chap. 773. sect. 20.]

What shall be misprision of treason.

IV. *And be it further enacted*, That if any person or persons, within this state, shall attempt to convey intelligence to the enemies of this state, or the United States of America, or by publicly and deliberately speaking or writing against our public defence; or shall maliciously and advisedly endeavour to excite the people to resist the government of this commonwealth, or persuade them to return to a dependence upon the crown of Great-Britain; or shall maliciously and advisedly terrify or discourage the people from enlisting into the service of the commonwealth; or shall stir up, excite or raise tumults, disorders or insurrections in the state, or dispose them to favour the enemy; or oppose and endeavour to prevent the measures carrying on in support of the freedom and independence of the said United States; every such person, being thereof legally convicted, by the evidence of two or more credible witnesses, in any Court of General Quarter Sessions, shall be adjudged guilty of misprision of treason, and shall suffer imprisonment during the present war, and forfeit to the commonwealth one half of his or her lands and tenements, goods and chattels.

Punishment.

Misprision of treason where cognizable.

V. *And be it further enacted*, That all offences, by this act declared misprision of treason, shall be cognizable before any Justice of the Peace of the city or county where the offence was committed, or where the offender can be found; and every Justice of the Peace within this state, on complaint to him made, on oath or affirmation of one or more credible person or persons, shall cause such offender to come before him, and enter into a recognizance, with one or more sufficient surety or sureties, to be and appear at the next Court of General Quarter Sessions for the said city or county, and abide the judgment of the court; and in the mean time to be of the peace and good behaviour toward all people in the state, and for want of such surety, the said Justice shall commit such offender to the common gaol of the said city or county: And all persons charged, on oath or affirmation, with any crime or crimes, by this act declared to be treason against the state, shall be dealt with and proceeded against, as in other capital crimes is by law directed. (c)

Passed 11th February, 1777.—Recorded in Law Book, vol. I. page 79.

(c) By chap. 378, post. the executive was empowered to pardon persons, under sentence of death, for treason or felony, on condition of leaving the United States, never to return. The same act provided, that no attainer of treason, subsequent to the war between the United States and Great Britain,

should extend to the disinheriting of any heir, nor to the prejudice of any person or persons, other than the offender, which provision has since been confirmed by law, chap. 1505, section 2, and is incorporated into the existing constitution, art. 3, section 19.

The act further authorized the Attorney-General, with the leave of the Court, to prosecute persons charged with offences that amount to treason, or misprision of treason, for misdemeanors, and to give in evidence, on the trial, any act of treason, or misprision of treason, by one witness, or other legal testimony.

By an act of the 3d of December, 1782, (post. chap. 989, it was enacted, that any persons, who shall erect or form, or shall endeavour to erect or form, any new and independent government within the boundaries of this commonwealth; or who shall set up any notice, calling on the people to meet with that design; or who shall assemble for that purpose, in consequence of such notice; or who shall, at any such meeting, maliciously and advisedly recommend or desire the people to erect or form any new independent government in any part of this state; or shall read to them any new form of constitution, with a design to induce them to adopt the same, as a new and independent constitution; shall be adjudged guilty of high treason; on conviction by the evidence of two witnesses shall suffer death, and forfeiture of estate. The act likewise authorized the offenders to be tried in any county of the state; but it was soon afterwards so far repealed, chap. 1157. By the constitution of the United States it is now provided, that "New states may be admitted by Congress into the Union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress," art. 4, section 3. By the 18th section of the 9th art. of the constitution, it is declared that "No person shall be attainted of treason or felony by the legislature; and by the 19th section of the same art. it is declared, that "No attainer shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the commonwealth." A similar provision is contained in the federal constitution, art. 3, where, likewise, treason against the United States, is defined to consist only "In levying war against them, or in adhering to their enemies, giving them aid and comfort;" and it is de-

clared, that "No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court."

For the process of *outlawry*, on a charge of high treason, &c. see chap. 1572.

On the 22d April, 1794, chap. 1766, the punishment of death was abolished in all cases, except the case of murder of the first degree; and in the case of high treason, imprisonment at hard labour, for a period not less than six years, nor more than twelve years, was substituted. *Ibid.* section 4.

A person accused of high treason shall have a copy of the indictment a reasonable time, not less than one day, before the trial; and also, within the same time, a copy of the panel of the jurors. 1 Dallas, 33. *Republica v. Molder*.

Adherence to *American* troops, though in consequence of mistaking them for the enemy, cannot be treason. *Ibid.* *Republica v. Malin*.

Words, indicating the defendant's intention to join the enemy, are proper testimony to explain the motives upon which the intent was afterwards carried into effect. *Ibid.*

Evidence may be given of an overt act committed in another county, after an overt act is proved to have been committed in the county where the indictment is laid. *Ibid.*

Evidence that the defendant had a power to let people in and out of the city, when in possession of the enemy, ought to be received; but not as conclusive proof of his holding a commission under them. *Ibid.* page 35. *Republica v. Carlisle*.

But evidence of his seizing salt, or disarming the Americans, does not apply to that species of treason, though it may prove his having joined the armies of the enemy. *Ibid.*

It is enough to lay in the indictment, that the defendant sent intelligence, without setting forth the particular letter, or its contents. *Ibid.*

The charge of levying war is not, of itself, sufficient; but assembling, joining and arraying, with the forces of the enemy, is sufficient overt act of levying war. *Ibid.*

There must be an actual enlistment of the person persuaded, in order to make it treason in the persuader. *Ibid.* page 39. *Republica v. Roberts*.

If an overt act has been proved, where the indictment is laid, the defendant's confession may be given in evidence, to corroborate that proof. *Ibid.*

Treason is a crime known at the common law. *Ibid.* page 53. *Republica v. Chapman*.

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Treason, which is nothing more than a criminal attempt to destroy the government, may be committed, before the different qualities of the crime are defined and its punishment declared by positive law. *Ibid.* page 57.

After the peace with *Great Britain*, the court would not sustain a suggestion, filed by the Attorney General, against one, who was attainted in pursuance of a proclamation issued during the war, as a proceeding of that kind would contravene an express article in the treaty. *Ibid.* page 233. *Respublica v Gordon.* (Note to former edition.)

Respublica v. McCarty.

The defendant was indicted for high treason, in levying war, &c. by joining the armies of the king of *Great Britain*.

On the trial, the Attorney General offered to give the confession of the party in evidence, made at the time of his arraignment; but Ingersol objected, that a confession could only be admitted to be given in evidence by way of corroboration, and that therefore an overt act should be first proved. *Fost.* 10, 240.

Bradford, Attorney General, contended, that the confession proved by two witnesses, was of itself sufficient; but, that independent of that position, it was not necessary to prove the overt act, before the admission of the confession.

By the Court. No case of this kind has hitherto occurred in this court. In the case of the *Commonwealth v. Roberts*, the defendant's confession was offered merely to shew, *quo animo* he committed the treasonable act; and the Court were there of opinion, that it ought to be admitted as corroborative proof. We find, indeed, that in *Berwick's* case, *Fost.* 10, two Judges thought that a confession *after the fact*, proved by two witnesses, was sufficient to convict, within the 7th W. 3, but Justice Foster doubted the propriety of that opinion; as the statute seemed to require two witnesses to the overt act, or a confession *in open Court*.

The stat. 7, W. 3, on which that diversity of sentiment arose, does not, however, extend to *Pennsylvania*; but materially varies from our law on the subject. For instance: The Act of Parliament requires two witnesses to find the indictment, as well as to prove the overt act upon the trial: but the act of Assembly prescribes nothing about the evidence to find the indictment; which may, therefore, proceed either from one witness, or from any other kind of proof, that will serve to con-

vince the grand jury; and, although it declares that there shall be two witnesses to convict the defendant on his trial, it does not specify that they shall be witnesses to an overt act, or any other particular matter. Again: The stat. W. 3, provides for the case of a confession, "willingly, without violence, in open Court;" whereas the act of Assembly uses no such words.

Certain it is, that considered abstractedly at common law, the confession of the party would be sufficient proof to convict him. But upon the whole, we decline giving an opinion at this time, whether, taking into view the act of Assembly, the confession proved by two witnesses, can have such conclusive force. We do not hesitate, however, to receive it in corroboration of any other evidence that may be adduced in support of the proposition.

The evidence, and arguments of counsel being concluded, the Chief Justice delivered the following charge to the jury:

The crime imputed to the defendant by the indictment, is that of levying war, by joining the armies of the king of *Great-Britain*. Inlisting, or procuring any person to be inlisted, in the service of the enemy, is clearly an act of treason. By the defendant's own confession it appears that he actually inlisted in a corps belonging to the enemy; but it also appears that he had previously been taken prisoner by them, and confined at *Wilmington*. He remained, however, with the *British* troops for ten or eleven months, during which he might easily have accomplished his escape; and it must be remembered, that, in the eye of the law, nothing will excuse the act of joining an enemy, but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage upon property. But had the defendant inlisted merely from the fear of famishing, and with a sincere intention to make his escape, the fear could not surely always continue, nor could his intention remain unexecuted for so long a period.

In the present instance, the confession of the defendant was not taken in writing and subscribed: but the stat. 1 and 2 *Phil. & Mary*, c. 10, is in force in *Pennsylvania*; and, as in common cases it is sufficient for the purposes of evidence, if a man subscribes his examination before a magistrate, so, in the case of treason, a confession reduced to writing, and subscribed before a Justice and another witness, would be sufficient grounds for a conviction under our act of Assembly, or even under the stat. of

W. 3. At the time of *William's* landing in *England*, *James* still maintained a strong party; of whom some were to be found in the *House of Lords*, and some in the *House of Commons*. The statute was probably, therefore, framed, so as to be most favourable to those who espoused the cause of the invading monarch; and hence we may derive all the provisions which, on a charge of high treason, make two witnesses necessary, to the same overt act, or to two different overt acts of the same treason, or the confession of the defendant in open Court, 5 Bac. Abr. 145, (folio, letter I) —548—(octavo, letters D d—5th edit. by *Gwillim*, vol. 6.) It appears, however, as I have before intimated, that it has been decided that a confession, though not made in open Court, if made in the presence of two witnesses, may be read in evidence against the defendant, contrary to the opinion of *C. J. Trevor*, and the doubts of *Justice Tracy*, Bac. Abr. ib. Fost. 10, 240. The case in Bac. must have been the case of an examination in writing, as it is said it might be read in evidence; but *Berwick's* case was a confession at the time of the fact; so that the former had no conclusive influence on the latter authority.

It must, at the same time, be allowed that most of the authorities on this point, seem to lean against the admission of the party's confession in the presence of two witnesses, as sufficient for conviction, unless it is made at the time of committing the criminal act, or before a magistrate duly authorised. But the case now before us, arises on a confession in open Court; and though the whole confession must be considered together, yet the jury may, unquestionably, on this, as on every other point of evidence, believe one part, and disregard another. The prisoner was acquitted, 2 Dallas, 86.

In the case of *U. S. v. Vigol, Patterson, J.* declared in his charge to the jury, (corresponding with part of the foregoing case) "That the fear which the law recognizes as an excuse for the perpetration of an offence, must proceed from an immediate and actual danger, threatening the very life of the party. The apprehension of any loss of property, by waste, or fire; or even an apprehension of a slight, or remote injury to the person, furnish no excuse. If, indeed, such circumstances could avail, it would be in the power of every crafty leader of tumults and rebellion, to indemnify his followers, by uttering previous menaces; an avenue would be forever open for the escape of unsuccessful guilt; and the whole fabric of socie-

ty, must, inevitably, be laid prostrate. 2 Dallas, 347.

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In the *Commonwealth v. Weidle*, the defendant was indicted on the 4th section of the act in the text, for misprision of treason in speaking the following words: "That he had lived six years in *London*, and nine years in *Ireland*; and never lived happier in his life, than he had done under the *English* government; and that the *king of England* is our *king*, and will be your's." The words proved were somewhat different in expression, but the same in substance. Some attempt was made to shew that the defendant was intoxicated at the time of speaking the offensive words.

It was admitted that the section was obscurely and inaccurately worded; and the *C. Justice* said, that a law constituting a crime, must be strictly and literally interpreted and pursued. But the words spoken tended to excite resistance to the government of this commonwealth, to persuade the audience to return to a dependance upon the crown of *Great-Britain*, and to favour the enemy; which are distinct and substantive charges of misprision of treason. The words must be spoken with a malicious intention, in order to render them criminal; a mere loose and idle conversation, without any wickedness of heart, may be indiscreet and reprehensible, but ought not to be construed into misprision of treason. On the other hand, drunkenness is no justification or excuse, for committing the offence; to allow it as such, would open a door for the practice of the greatest enormities. Verdict, *Guilty*. 2 Dallas, 88.

The sixth article of the constitution of the *United States*, among other things declares, That the constitution, and laws of the *United States* made in pursuance thereof, shall be the SUPREME LAW OF THE LAND; and the Judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

It will be useful for the people of *Pennsylvania*, therefore, to have the means of information on a subject so interesting, within their power at all times.—The act of the *United States*, and abstracts of the decisions under it, are here referred to for that purpose.

Treason, is defined in the constitution itself; and the proof necessary to conviction is prescribed. (See the first part of the note to the act in the text.)

An act for the punishment of certain crimes against the *United States*, was passed April 30th, 1790, vol. 1, pa. 100. (Folwell's edition.)

Sect. 29. In cases of treason, the

1777. prisoner shall have a copy of the indictment, list of the witnesses and jury, &c. at least three entire days before he shall be tried for the same, and process to compel his witnesses to appear.

Sect. 30. If the prisoner stand mute, or challenge peremptorily above the number of thirty-five of the jury, the Court shall notwithstanding proceed to the trial, as if he had pleaded not guilty; and render judgment thereon accordingly.

Sect. 31. The benefit of clergy is taken away in treason.

Sect. 32. No person shall be prosecuted, tried or punished for treason, unless the indictment for the same shall be found by a grand jury within three years next after the treason shall be done or committed.

The first section defines treason as in the Constitution, and the proof necessary to a conviction; and declares the punishment to be death.

The second section defines misprision of treason to be, "if any person having knowledge of the commission of treason, shall conceal, and not as soon as may be, disclose and make known the same, to the President of the United States, or some one of the Judges thereof, or to the President or Governor of a particular state, or some one of the Judges or Justices thereof;" and directs the punishment to be imprisonment not exceeding seven years, and a fine not exceeding one thousand dollars.

With respect to the number of jurors that may be summoned and returned; the form of the panel; what is a sufficient addition, and what a sufficient definition of the places of abode of jurors and witnesses, see 2 Dallas, 335 to 342.

A copy of the caption of the indictment, as well as of the indictment itself, must be delivered to the prisoners. *ib. U. S. v. The Insurgents of Pennsylvania.*

A reasonable time shall be allowed, after the list of the names of the witnesses is furnished to the prisoner, for the purpose of bringing testimony from the counties in which those witnesses live: For (the Court said) unless an opportunity were afterwards given to investigate the characters, and trace the conduct of the witnesses, it would be delusive and nugatory to furnish the list of their names. *U. S. v. Stewart and Wright, 2 Dallas, 343.*

Vigol was indicted for high treason, in levying war against the *United States*.

The prisoner was one of the most active of the insurgents in the western counties of *Pennsylvania*, and had accompanied the armed party, who attacked the house of the Excise officer, (*Reigan's*) in *Westmoreland* county, with

guns, drums, &c. insisted upon his surrendering his official papers, and extorted an oath from him, that he would never act again in the execution of the excise law. The same party then proceeded to the house of *Wells*, the excise officer in *Fayette* county, swearing that the excise law should never be carried into effect, and that they would destroy *Wells* and his house. On their arrival, *Wells* had fled, and concealed himself; whereupon they ransacked the house; burned it, with all its contents, including the public books and papers; and afterwards discovering *Wells*, seized, imprisoned, and compelled him to swear that he would no longer act as Excise officer. Witnesses were likewise examined, to establish, that the general combination and scope of the insurrection, were to prevent the execution of the excise law by force; and in the course of the evidence, the duress of the Marshal of the district, burning of *General Neville's* house, &c. were prominent features.

The case was submitted to the Court without argument.

Patterson, Justice. The first point for consideration is the evidence, which has been given to establish the case stated in the indictment; the second point turns upon the criminal intention of the party; and from these points (the evidence and intention) the law arises.

With respect to the evidence, the current runs one way: it harmonises in all its parts. It proves that the prisoner was a member of the party who went to *Reigan's* house, and, afterwards, to the house of *Wells*, in arms, marshalled, and arrayed; and who, at each place, committed acts of violence and devastation.

With respect to the intention, likewise, there is not, unhappily, the slightest possibility of doubt: To suppress the office of excise, in the fourth survey of this state; and particularly, in the present instance, to compel the resignation of *Wells* the excise officer, so as to render null and void, in effect, an act of Congress; construed the apparent, the avowed object of the insurrection, and of the outrages which the prisoner assisted to commit.

Combining these facts, and this design, the crime of high treason is consummate in the contemplation of the constitution and law of the *United States*.

And in the same case it was held, that if the overt act of treason is proved; and laid before the charge is presented, it is sufficient; and whether committed by the number of insurgents specified in the indictment, is immaterial. *U. S. v. Vigol, 2 Dallas, 346; and see U. S. v. Mitchell, ibid. 348.*

A new trial was granted in a case of treason, on account of the previous declarations of one of the jury. *U. S. v. Fries*, 3 Dallas, 515.

The following extracts from some late cases of great notoriety, are taken from *Cranch's Reports* in the Supreme Court of the *United States*, vol. 4.

To constitute a *levying of war*, there must be an *assemblage* of persons for the purpose of effecting *by force*, a treasonable purpose. *Enlistment* of men to serve against government is not sufficient.—

When war is levied, 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 traitors.—

Any assemblage of men for the purpose of revolutionizing *by force* the government established by the United States, *in any of its territories*, although as a step to, or the means of executing some greater projects, amounts to *levying war*.—

The travelling of *individuals* to the place of rendezvous is not sufficient; but the meeting of particular *bodies of men*, and their marching from places of *partial*, to a place of *general rendezvous*, is such an assemblage as constitutes a levying of war. *Ex parte Bollman and Swartwout*, 4 Cranch, 75, to 137.

So, in the case of *United States v. Burr*. 4 Cranch, appendix, 471 to 507.

To *levy war*, is to *raise, create, make or carry on war*. *Ib.* 471.

If an army be actually raised for the avowed purpose of carrying on open war against the United States, and subverting their government, a commissary of purchases, who never saw the army, but who, knowing its object, and leaguering himself with the rebels, supplies that army with provisions, is guilty of an *overt act of levying war*. *Ib.*

So is a recruiting officer, who, though never in camp, executes the particular duty assigned to him. *Ib.*

The term "*levying war*," is used in the constitution of the United States, in the same sense in which it was understood in *England*, and in this country to have been used in the statute of 25 Edw. 3, from which it was borrowed.

All those who perform the various and essential military parts of prosecuting the war, which must be assigned to different persons, may be said to *levy war*. *Ib.* 473.

Those who *perform a part* in the prosecution of the war, may be said to *levy war*, and commit treason under the constitution. *Ib.* 473.

But *quere*, whether he who counsels and advises, but performs no act in prosecution of the war; or, who being engaged in the conspiracy, fails to perform his part, can be said to *levy war*? *Ib.*

If the war be actually levied, if the accused has performed a part, but is not *leagued in the conspiracy*, and, *has not appeared in arms* against his country, he is not a traitor. *Ib.* 475, both circumstances must concur, *Ib.*

Constructive treason is where the direct and avowed object, is not the destruction of the sovereign power. *Ib.* 476-7-8-9.

Where a body of men are *assembled* for the purpose of making war against the government, and are in a condition to *make that war*, the assemblage is an act of *levying war*. *Ib.* 476.

The assemblage of men which will constitute *levying war*, must be a "*Warlike Assemblage*" carrying the appearance of *force*, and, in a situation to *practise hostility*. *Ib.* 480.

An assemblage of men with a treasonable design, *but not in force*, nor in a condition to attempt the design, nor attended with *warlike appearances*, does not constitute the fact of *levying war*. *Ib.* 482.

To assemble an army of 7000 men is to place those who are assembled, in a state of *force*. *Ib.* 484.

The travelling of several individuals to the place of rendezvous, either *separately* or *together*, but not in *military form*, would not constitute *levying war*; the act must be unequivocal, and have a *warlike appearance*. *Ib.* 485.

War can only be levied by the employment of *actual force*. Troops must be embodied, men must be openly assembled. *Ib.* 487.

Arms are not an indispensable requisite to *levying war*; nor the actual *application of force to the object*. *Ib.* 488.

It is not sufficient that an indictment for treason allege generally, that the accused *had levied war* against the United States. The charge must be more particularly specified by laying an *overt act of levying war*, and this *overt act* must be proved as laid. *Ib.* 490.

A person may be concerned in a treasonable conspiracy, and yet be *legally*, as well as *actually absent* while *some one act of treason is perpetrated*. *Ib.*

Every one concerned in a treasonable conspiracy is not constructively present at every *overt act* of the treason committed by others not in his presence. *Ib.*

A man may be legally absent who has counselled or procured the treasonable act. *Ib.* 491.

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A person cannot be constructively present at an *overt* act of treason, unless he be *aiding and abetting at the fact, or, ready to afford assistance if necessary.* *Ib.* 493-4.

He who counsels, procures, or aids treason, is guilty *accessorily*, and solely in virtue of the common law principle, that what will make a man an *accessary* in felony, makes him a *principal* in treason. So far from considering a man as constructively present at every *overt* act of the general treason in which he may have been concerned, the whole doctrine of the books limits the proof against him to those particular *overt* acts of levying war with which he is charged. *Ib.* 494.

And a person in one part of the United States cannot be considered as *constructively* present at an *overt* act committed in a remote part of the United States. *Ib.*

The presence of a party, where presence is necessary to his guilt, is part of the *overt* act, and must be proved by *two witnesses.* *Ib.* 499.

An indictment charging a person with being present at an *overt* act of treason, cannot be supported by proving only that the person accused caused the act to be done by others in his absence. No presumptive evidence; no facts, from which presence can be inferred will satisfy the constitution and the law. *Ib.*

The part which a person takes in the war constitutes the *overt* act, on which alone he can be convicted. *Ib.* 501.

It possibly may be the case (the Chief Justice adds) that those who procure a treason, and do nothing further, are guilty under the constitution; I only say, that opinion has not yet been given; still less has it been indicated, that he who advises shall be indicted as having performed the fact. And with respect to admitting proof of procurement to establish a charge of actual presence, the court is of opinion, that if this be admissible in *England* on an indictment for levying war, which is far from being conceded, it is admissible only by virtue of the operation of the common law upon the statute, and therefore is not admissible in this country, unless by virtue of a similar operation; a point far from being established, but on which, for the present, no opinion is given. If,

however, this point be established, still the procurement must be proved in the same manner, and by the same kind of testimony which would be required to prove actual presence. *Ib.* 502.

The conviction of some one who has committed the treason must precede the trial of him who has advised or procured it, and the right of the prisoner to call for the record of conviction, is not waived by pleading to the indictment. *Ib.* 504.

Quere, whether the crime of advising or procuring a levying of war, be within the constitutional definition of treason? *Ib.*

If the *overt* act be not proved by *two witnesses*, so as to be submitted to the *Jury*, all other testimony is irrelevant. *Ib.* 505-6.

Levying war is an act compounded of law and fact, of which the *Jury*, aided by the court, must judge. *Ib.* 506.

Appearing at the head of an army, would be an *overt act of levying war*. So also, detaching a military corps from it, for military purposes. *Ib.*

The cases from which the foregoing extracts are taken, run into great length, so that it was impossible to insert them entire. The editor thought it his duty to insert so much, that those who incline to consult the cases at large may have a ready reference to them. It is true they have already greatly agitated the public mind; but it is humbly hoped that the period may never occur, when it shall be necessary to reconsider, or confirm a single point of them.

See post, chap. 773, sect. 4. All subjects of this state, serving the enemy, as civil or military officers, voluntarily, at any time during the continuance of the war, declared to be attainted of high treason.

By the 3d section, preceding, all other persons, subjects or inhabitants of this state, aiding the enemy, and not surrendering themselves on the day fixed by proclamation, which the executive council were authorized to issue, declared to be attainted of high treason. See 1 Dallas, 59.

By the constitution of the *United States*, a person charged in any state with treason, &c. who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime. Art. 4, sect. 2.