to the fund represented by either, and it is upon this reasoning, that in every other jurisdiction, a delivery of them is regarded as vesting the donee with an equitable title which a chancellor would recognize.

In Walsh's Appeal, the Court seems to have thought that the character of the delivery required was the same as that necessary to support voluntary assignment to one person in trust for another (Milroy *v.* Lord, 4 DeG. F. and J., 264). There is nothing in common between the subjects mentioned — one is conditional and the other absolute. In *donatio mortis causa* there is no intention in the first instance to pass the property absolutely; because if the donor recover, the property is to remain in him, and a complete title might, therefore, be inconsistent with this conditional quality.

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EDITORIAL NOTES.

BY W. D. L.

TREASON AGAINST THE STATE OF PENNSYLVANIA.

THE threatened indictment of the leaders of the Homestead Riot for treason against the State of Pennsylvania brings the whole question of what treason is before the public. Treason against the State, as defined by its laws, consists in levying "war against the same," or "adhering to the enemies thereof giving them aid and comfort."[1] This is practically identical with treason against the United States, which is said in Article III., Section 3, of the Constitution to "consist only in levying war against them, or in adhering to their enemies giving them aid and comfort." We are not concerned with that treason which consists in giving aid and comfort to enemies of the government. Enemies in the sense in which the words are here used denotes exclusively the subjects of a foreign power at war with the

[1] P. D. 400, § 1.

government.[1] If, therefore, the strikers are guilty of treason, it is because they levied war against the Commonwealth of Pennsylvania. What is it that the rioters actually did? Before the trial it is perhaps a mistake to speak of the facts, and yet we can assume, if only for the sake of argument, that they held possession, by force, of the private property of the company. For a time at least they kept private property against the will of the lawful owner and in contravention of the principle of the laws of the State that every man has a right to the possession of his own property.

Now robbery in its legal signification may be defined as the taking of the property of another, by force and against his will. In its strict legal sense it is confined to personal property; while the crime of keeping another out of his real estate by force is called forcible detainer, and in the State of Pennsylvania renders one liable to a year's imprisonment and a fine of $500[2]. Still, in its broader and popular acceptation these strikers robbed the Carnegie company of the use of their works. In the same way, in the time of war, if an armed force enters the country it also takes private property in defiance of laws of the land. Yet we all recognize that there is a distinction between these acts. As Mr. Justice GRIER most aptly says: "ALEXANDER THE GREAT may be classed with robbers by moralists, but still the political distinction will remain between war and robbery."[3] The robber and the soldier both set the law of their victims at defiance, but there is this vital distinction between them: one acts for his own private end without a pretence of right, the other acts primarily for a public and general purpose, and always with a pretence of having right and justice on his side. With more or less clearness, this distinction has always been recognized by the profession in this country, and, practically, has invariably

[1] Opinion of Mr. Justice FIELD in U. S. *v.* Greathouse, 2 Abb. Ca. Ct., 372.

[2] P. D. 407, § 28.

[3] Op. U. S. *v.* Hanway, 2 Wall. Jr., op. p. 205.

been enforced by the courts in every case which has come before them. A cursory glance at the decisions on this subject will be sufficient proof of this statement.

The first indictments for treason against the United States were those found against some of the participators in what are known as the whisky disturbances of 1794. In 1791 and '92 Congress had passed an excise law affecting distillers, of whom there were a large number in the western part of Pennsylvania.[1] The Act was very unpopular in that section, until finally discontent broke out into an armed opposition, which required the whole energy and force of the newly established Federal Government to suppress. The nature and character of the opposition is seen from the preamble of a resolution passed by "A Meeting of Sundry Inhabitants of the Western Counties of Pennsylvania,"[2] in which it was declared that "a tax on spirituous liquors is unjust in itself, and oppressive upon the poor; and that internal taxes upon consumption must, in the end, destroy the liberties of any people." Many of those who took part in the disturbances could not have any direct interest in the distilleries themselves. The purpose of the inhabitants of the western counties was plain; they intended to prevent the enforcement of the law, because they denied to the government the power or right to pass such a law. Judge PATTERSON, who presided at the trial, therefore practically condemned the rioters when he said: "If its (the insurrection's) 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 the *usurpation of the authority of government;* it is high treason by levying war."[3]

Similar in its main outlines to the case above quoted is that of the trial of the Northampton Insurgents who had by force and arms resisted the collection of the Federal tax on houses and lands.[4]

[1] Acts of March 3, 1791, and May 7, 1792.
[2] Wh. State Trials, p. 107.
[3] Wh. State Trials, p. 182.
[4] Act July 9, 1798.

They were convicted of treason, one Fries being convicted twice.[1] Judge PETERS in his charge to the jury said: "It is treason in 'levying war against the United States' for persons *who have none but a common interest with their fellow citizens*, to oppose or prevent, by force, numbers or intimidation, a public and general law of the United States with intent to defeat its operation or compel its repeal."

These italicised words indicate the true line of distinction between treason and mere robbery, murder or other crime. In one case the primary interest must not be for private gain; it must be an opposition based on principle, however false and mistaken that principle may be. Thus the smuggler who, in attempting to land his goods and escape gives battle to the revenue cutter, defies the law, and enters into armed resistance to authority; but he does not commit treason, he does not try to annul the revenue Act, but simply to break the law for his own private gain. Again, the highway robber breaks the law regarding private property, but he does not commit treason. As between the government and the individual, he is perfectly willing that the individual should own property. He simply desires to appropriate another's property for his own ends, and not for the purpose of annulling the laws respecting private property. He may combine with others to rob, murder or steal, but the fact of their combination does not make their act treason. Combination to break a law is not itself treason. It depends on the intent with which the combination was formed.[2]

Thus where a body of men fully armed disregarded the embargo laid on the exportation of goods to Canada and captured from the marshall a raft laden with goods, taking the same into Canada, it was held not to be treason although the men carried on a regular battle with the troops while escaping with the raft.[3] Judge LIVINGSTON, in his remarks to the jury on the trial, said: "If the Court does not

[1] Wh. State Trials, p. 584.
[2] Wh. State Trials, p. 456, 610.
[3] U. S. *v.* Hoxie, 1 Paine's Cr. Ct., 265.

greatly err, no construction in England, and certainly none in America, has yet carried this doctrine the length to which we are expected to go. . . . It is impossible to suppress the astonishment which is excited at the attempt which has been made to convince a court and jury of this high criminal jurisdiction, that between this and levying war there is no difference."[1] The same principle was recognized and enforced in the celebrated case of the United States *v.* Hanway,[2] which grew out of the fugitive slave law. A Marylander, named Gorsuch, desiring to recover a runaway slave, procured, under the Act, a warrant from the United States Court in Philadelphia for the arrest of the slave. Armed with this warrant, and in company with a deputy marshall, he attempted to arrest his slave in a village called Christiana, near the town of West Chester, "a place infested with abolitionists." He found the slave in a house with many other blacks. Hanway, a white man of avowed abolitionist sentiments, was on horseback near the house. The negroes and the marshall's party fired on each other, the negroes escaped and the slave-owner was killed. On the ground that he had taken part in this disturbance Hanway was arrested and tried before the late Mr. Justice GRIER for treason against the United States. That learned jurist was of the opinion that the acts in question were not treasonable, even if Hanway had taken part in them. "A number of fugitive slaves may infest a neighborhood and may resist with force and arms their master or the public officer who may come to arrest them; they are guilty of felony and liable to punishment, but not as traitors. *Their insurrection is for a private object, and connected with no public purpose.*"[3] That some of the blacks or Hanway himself may have believed the fugitive slave law wrong and desired its repeal, did not make an act whose primary and principal intention was the liberation of a particular slave treasonable. The vast majority of those who participated

[1] Op. p. 270 and 373.
[2] U. S. *v.* Hanway, Wall Jr., 139.
[3] U. S. *v.* Hanway, 2 Wall J., p. 205.

combined and fought for the purpose of preventing their friend from being carried back into slavery, and it could not be proved that their principal object was to emphasize their objection to a particular law of Congress or to its power to pass such a law.

With this statement of the principles by which we should test acts to determine whether they are treasonable or not, and the practical illustrations of the few cases which have occurred, let us return to the Homestead rioters. Before, under the law, a conviction can be obtained, the State must prove that a decided majority of those who took part in the riots did so, not only from a desire to be personally reinstated in the Carnegie Mills, but from a desire to emphasize their belief in the principle that a man who works in an iron foundry has a vested interest in his position, of which the managers cannot deprive him without the consent of a union composed of iron workers, and from a desire to emphasize his hatred of those principles of the law of the State of Pennsylvania which allow the owners of iron foundries to discharge their workmen and take others, irrespective of the wishes of the rest of their employees. It will be impossible to tell till the trial whether the State can prove all this. If not thoroughly proved, let us hope the jury will take to heart the warning of the Supreme Court of the United States, "That it is more safe, as well as more consonant to the principles of our Constitution that the crime of treason should not be extended by construction to doubtful cases." On the other hand, if it is clearly proved that this was an armed attempt to change the laws of the State, let us also hope, for the present dignity and future peace of our Commonwealth, that the jury will not shrink from their duty to convict. With the wisdom or the justice of the laws as they exist the jury will have nothing to do. If the people do not like the laws, let them change them by their ballots, not by their bayonets.

ADDENDUM.

Since the above was written, the Chief Justice of Pennsylvania presiding over a Court of Oyer and Terminer,

has defined "treason" under the laws of the State. In speaking of what the State had to show in order to make the acts of the Homestead Rioters treason, we presumed that the line dividing treason from other crimes would be drawn by the courts of the State as it had been in the Federal Courts, seeing that the statutes of the State defining treason were almost identical with that crime as defined in the Constitution of the United States. In this, at least as far as the Chief Judicial Officer of the State is concerned, we were mistaken. The criterion of treason against the State, as defined by that learned jurist in his clear and concise charge to the Grand Jury, is not that the act shall have been done for a public as distinguished from a private purpose, but that there should be *organized resistance to the authority of the State.* He says:

"A mere mob collected upon the impulse of the moment, without any definite object beyond the gratification of its sudden passions, does not commit treason, although it destroys property and attacks human life. But when a large number of men, arm and organize themselves by divisions and companies, appoint officers and engage in a common purpose to defy the law, to resist its officers and to deprive any portion of their fellow-citizens of the rights to which they are entitled under the Constitution and laws, it is a levying of war against the State, and the offense is treason; much more so when the functions of the State Government are usurped in a particular locality, the process of the Commonwealth and the lawful acts of its officers resisted, and unlawful arrests made at the dictation of a body of men who have assumed the functions of a government in that locality, and it is a state of war when a business plant has to be surrounded by the army of the State for weeks to protect it from unlawful violence at the hands of men formerly employed."

Treason here consists in the "appointing of officers" and "engaging in a common purpose to defy the law." The defying the law in a certain manner, *i.e.*, by organization,

is made the test, and not the purpose for which the law is defied. Thus, A's robbery, or B's resistance to the law, would not be treason, unless the robbers combined in sufficient force to require "the plant of companies to be surrounded by the armies of the State for weeks;" but, then, though private gain be the motive, it is treason against the State. Conducting an illicit distillery is not treason; but if several persons engaged in the business combine to resist arrest, their act becomes treason.

Now this idea of the main constituents of treason is something very different from what Mr. Justice CHASE had in his mind when he said in his charge at the trial of the Northampton Insurgents: "You are to consider with what *intent* the people assembled at Bethlehem,[1] whether for a *public or private purpose.*"

It is not the treason of Mr. Justice GRIER, when he said, speaking of the Christiana negroes, who had combined to prevent the capture of one of their number: "Their insurrection, their violence, however great their number may be, so long as it was to attain some *personal or private end of their own*, cannot be called levying war." The word "combination" had no place in this jurist's definition of treason, as he says: "A whole neighborhood of debtors may *conspire* together to resist the sheriff and his officers. . . . They may perpetrate their resistance by force; may kill the officer and his assistants, and yet they will be liable only as felons."[2]

Nothing, indeed, could show more clearly the difference between the idea of treason heretofore existing, and treason as defined by the Chief Justice of Pennsylvania, than the following from the opinion of Judge CHASE: "The true criterion to determine whether acts committed are treason, or a less offense (as a riot), is the *quo animo*, or the *intention* with which the people did assemble. Whether the intention is universal or general, as to effect some

[1] Wh. State Trials, p. 635; U. S. *v.* Hanway, 2 Wall., Jr., 205.
[2] Ibid.

object of a general public nature, it will be treason, and cannot be considered, construed or reduced to a riot. . . . The *intention*, with which any acts (as felonies, the disturbances of property or the like), were done, will show us to what class of crimes the case belongs."[1]

With one jurist the criterion is the intention—a subjective fact; with the other, it is the objective fact of the *combination to defy the law.*

Perhaps lawyers are not the best judges of the respective merits of what we may now call the Pennsylvania idea of treason, (unless the majority of the Supreme Court of the State are not satisfied with the criterion as laid down by Mr. Chief Justice PAXSON), and of the criterion which has heretofore invariably governed the Courts of the United States. We may be too apt to look at questions which touch knotty social questions from a legal point of view solely. But unquestionably from such a standpoint there has been substituted for a clear cut criterion of treason—the private or public object of the Act, the uncertain and shifting criterion of whether the resistance of the law was an *organized resistance.* The law of treason becomes, like the law of negligence, always doubtful, because depending on the particular circumstances of each case. What would be a sufficient organization to amount to treason under some circumstances, might not be sufficient under others. As indictments for treason come usually after times of great popular excitement, and when "several hundred thousand dollars of the taxpayer's money has been expended in maintaining order," it is to be feared that the "law of treason" in its future development in the State of Pennsylvania, will depend, in no small degree, on the amount of public indignation aroused by the resistance to lawful authority.

From what has been said we do not wish to be understood as criticising the officers of the State in bringing these indictments for treason. If it can be proved by the State,

[1] Wh. State Trials, p. 364.

as is alleged in the daily newspapers, that the Advisory Committee of the Homestead rioters were at pains to declare to the world that their primary object was to show to the citizens of the State and its government that an employer must deal with representatives of organized labor; then, under either criterion, the members of the Board, together with everyone who directly or indirectly took part in the riots, are guilty of treason against the Commonwealth of Pennsylvania, and should be both indicted and convicted. In what we have said we simply wish to express regret at the introduction of a new criterion of treason.

THE MEMBERSHIP OF THE NEXT ELECTORAL COLLEGE.—In view of the nearness of the Presidential election it is of interest to learn that the proper number of electors to which each State is entitled has been questioned. The Constitution on this point says: "Each State shall appoint in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be *entitled in Congress.*"[1] Apparently nothing could be more simple or plain. And yet it so happens that the present Congress was elected in 1890, and the number of Representatives sent by each State depends on the Apportionment Act of February 25, 1882. The present Congress, however, has passed a new Apportionment Act, based on the census of 1890. The Congress to be elected on the 8th of next November will contain more members than the present Congress. The number now is three hundred and thirty one, with one vacancy and four territorial delegates. The membership of the Fifty-third Congress will be three hundred and fifty-six Representatives and eighty-eight Senators. The Electoral College, as based upon this apportionment, will be four hundred and forty-four, while on the basis of the present Congress it would be only four hundred and twenty. The question presented by these facts, therefore, is by which

[1] Art. II, Sec. 1–2.

Congress shall we determine the number of electors to which any State is entitled—by that Congress which exists to-day, or by that Congress which we elect on the day of the election of the Presidential electors. The use of the word "entitled" in the Constitution without any qualification as to whether the Congress actually in existence was meant or not, was very unfortunate. In fact there is no conclusive way of logically determining the matter. To us, if the question could fairly be considered open, we confess the expression "is entitled" would seem to indicate that a present, actually existing Congress at the time the electors met was contemplated. Though even here the reason, even if sound, is not conclusive as at the time the mythical and now largely nonsensical college which never meets, "meets," two Congresses may be said to be in existence—the actual sitting and voting Congress and the newly-elected Congress which comes into legal existence on the 4th of March following. However, where the possible ambiguity is patent to all, and the only thing of vital importance to the country is to have the matter definitely settled, the interpretation put on this clause of the Constitution, by the men who had seen its adoption, and in some instances had helped to make its provisions, should be respected, especially where their interpretation has been silently acquiesced in for one hundred years. On March 1, 1792, probably in view of a similar state of facts to that in which we now find ourselves, Congress passed the following Act: "The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice-President to be chosen come into office; except that where no apportionment of Representatives has been made after any enumeration, at the time of choosing electors, the number of electors shall be according to the then existing apportionment."[1] The interpretation of the provision is plain. The word "entitled," in the estimation

[1] Rev. Stat., 132.

of the men who passed this Act, referred to the number of Representatives which each State would have a right to elect under the existing apportionment law, and, therefore, not necessarily numerically the same as their actual representation in the Congress in existence at the time the election takes place or the Electoral College "meets."

This interpretation, while by no means as conclusive as many of the daily papers have treated it—the Supreme Court alone having the power to interpret the Constitution —is nevertheless perfectly reasonable. There is nothing which would lead us to say it was *a priori* impossible. As a practical solution there is much to be said in its favor; and happily there is little doubt but that both parties will quietly acquiesce in it.

THE DEATH OF PRESIDENT AND VICE-PRESIDENT.—The time of a presidential election is perhaps as good a one as any other to point out a duty of Congress, with reference to the office of President, which that body has neglected ever since 1886. In case of the death of both the President and the Vice-President, the law of January 19, 1886, provides, that the different members of the Cabinet in the usual order of presidence, shall temporarily fill the office until their *successor is elected.* Previous to this Act, the acting President of the Senate, and failing him the Speaker of the House of Representatives, was to become the acting President. The change was due to the manifest unfairness of the possibility that under such an order of succession one of the opposite party of the deceased President and Vice-President might become President, and to the evident danger of their being no acting President of the Senate, the Vice-President by hypothesis being dead, or that the House should not as yet have organized and elected a speaker. But under the old law there was provision for the election in the usual way, within a reasonable time, of a new President and Vice-President. The acting President of the Senate and the Speaker of the House were only to

act *ad interim.* This was evidently in accordance with what we may almost call the direct mandate of the Constitution as expressed in the sixth paragraph of the first section of the Second Article: * * "and the Congress may by law provide for the case of removal, death, etc., both of the President and Vice-President, declaring what *officer* shall then *act as president*, such *officer* shall then act accordingly, until the disability be removed, or a President *shall be elected.*" The intention of the Constitution is shown not only from the last words italicised, but from the fact that Congress in its choice of an acting President is confined to an *officer* of the government, designated by law. The law of 1886, however, repeals the sections of the Revised Statutes—"146–156"—which provide for the election of another "College," and as yet Congress has substituted nothing in their place. A Cabinet officer, taking the position of President, would, therefore, continue to act as President until the 4th of March following the next quadrennial election, unless Congress provided for an election of his successor. This it could not do without passing "a law," which like other laws would have to receive the approval of the cabinet officer as acting President. In most instances this would be like asking a man to sign his own death warrant. As the law stands at present, therefore, in case of the death of both President and Vice-President, the evident intention of the Constitution, which was that the people should elect a college to select a new President for the unexpired term, would be defeated, and a mere cabinet officer, an appointee of the former President, might hold the highest office in the State for nearly four years.

Of course there is no remedy for the defeat of the spirit of the Constitution by the non-action of Congress. It is as if Congress should fail to provide for the enumeration of the people every ten years. There would be no help for it. A people can tell their representatives what they shall not do, but they cannot force them to pass a law, and still retain their character as a deliberative assembly.