apply that rule to the definition and give us the result. But while we were expecting this, even while we have our eyes on the gentleman, he vanishes like a spirit from American ground, and we see him no more until we see him in England, resurging by a kind of intellectual magic in the middle of the sixteenth century, complaining most dolefully of my Lord Coke's bowels.

Before we follow him in this excursion it may be well to inquire what it was that induced him to leave the regular track of his argument. I will tell you what it was. It was, sir, the decision of the supreme court in the case of Bollman and Swartwout. It was the judicial exposition of the constitution by the highest court in the nation, upon the very point which the gentleman was considering, which made him take this flight to England; because it stared him in the face and contradicted his position.

Sir, if the gentleman had believed this decision to be favorable to him, we should have heard of it in the beginning of his argument; for the path of inquiry in which he was led him directly to it.

Interpreting the American constitution, he would have preferred no authority to that of the supreme court of the country. Yes, sir, he would have immediately seized this decision with avidity. He would have set it before you in every possible light. He would have illustrated it. He would have adorned it. You would have seen it under the action of his genius appear with all the varying grandeur of our mountains in the morning sun. He would not have relinquished it for the common law, nor have deserted a rock so broad and solid, to walk upon the waves of the Atlantic.

But he knew that this decision closed against him completely the very point which he was laboring. Hence it was

that the decision was kept so sedulously out of view until from the exploded materials of the common law he thought he had reared a Gothic edifice so huge and so dark as quite to overshadow and eclipse it. Let us bring it from this obscurity into the face of day. We who are seeking truth and not victory, whether right or wrong, have no reason to turn our eyes from any source of light which presents itself, and least of all from a source so high and so respectable as the decision of the supreme court of the United States.

The inquiry is, whether presence at the overt act be necessary to make a man a traitor? The gentlemen say that it is necessary; that he cannot be a principal in the treason without actual presence. What says the supreme court in the case of Bollman and Swartwout?

"It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country; on the contrary, if war be actually levied, that is, if a body of men be assembled for the purpose of effecting by force a treasonable purpose, 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 to be considered as traitors."

Here then we find the court so far from requiring presence that it expressly declares that, however remote the accused may have been from the scene of the treasonable assemblage, he is still involved in the guilt of that assemblage, his being leagued in the general conspiracy was sufficient to make the act his own.

The supreme court, being of that opinion, proceeded to an elaborate examination of the evidence, to ascertain whether there had been a treasonable assemblage. It looked to the depositions of General Eaton and General Wilkinson, the ciphered letter, the declaration of Swartwout that Burr was

levying an armed body of seven thousand men; and it looked to these parts of the evidence expressly for the purpose of discovering whether it were probable that Burr had actually brought these men together; not whether Bollman and Swartwout were present at any such assemblage.

It knew that, if any such assemblage had taken place, Bollman and Swartwout must have been at that time at the city of Orleans, or on their way thither; indeed the whole reasoning of the court proceeded on the fact, as admitted, of the prisoner's absence. Why, then, the laborious investigation which the court makes as to the probability of Burr having brought his men or any part of them together, unless the guilt of that assemblage were to be imputed to Bollman and Swartwout? If their absence were sufficient to excuse them, that fact was admitted, and the inquiry would have been a very short one. But, the court having previously decided that the fact of presence or absence was unimportant, that it made no odds how far distant the accused might be from the treasonable assemblage, it became the unavoidable duty of the court to proceed to the inquiry whether any such assemblage had taken place; and if the evidence had manifested that fact to its satisfaction, it is clear that, in the opinion of that court, the prisoners would have been as deeply involved in the guilt of that assemblage as any of those who actually composed it.

The counsel knew that their first point was met directly by the counter authority of the supreme court. They have impliedly, if not expressly, admitted it; hence they have been reduced to the necessity of taking the bold and difficult ground that the passage which I have read is extra-judicial, a mere *obiter dictum.* They have said this, but they have not attempted to show it.

Give me leave to show that they are mistaken; that it is

not an *obiter dictum,* that it is not extra-judicial; but that it is a direct adjudication of a point immediately before the court. What were the questions before the court? The court made no formal division of this subject, but these questions are necessarily and irresistibly involved in it. It must first be observed that the arrest of Bollman and Swartwout at New Orleans, and the fact that they had not been present at any assemblage of the traitors in arms, were notorious and admitted. The case then presented to the court three distinct questions.

First. Has Aaron Burr committed treason, or has he been engaged or leagued in any treasonable conspiracy?

Second. Were Bollman and Swartwout connected with him?

Third. Could they be guilty of treason without being actually present? Now, if the court had been satisfied that there had been an overt act, and that these men were leagued in the conspiracy which produced it, still it would have remained a distinct and substantive question whether their absence from the overt act and their having no immediate hand in it did not discharge them from the constitutional guilt of levying war; for, though leagued in the conspiracy, and although there might have been an overt act, these men would have been innocent if presence at the overt act were necessary to make them guilty.

The question then, of presence or absence, was a question really presented by the case of Bollman and Swartwout. It was one important to the decision of the case, and the court, thinking it so, did consider and decide it in direct opposition to the principle contended for on the other side.

A plain man would imagine that when the supreme court had taken up and decided the case its decision would form a

precedent on the subject; and, having that authority on my side, I should suppose that I might safely dismiss the gentleman's first point. But Mr. Randolph seems to think it very doubtful whether you ought to be bound by that authority, and that you must be very much embarrassed to have to decide it, even admitting it to be a regular judicial determination of this question; for he made a very pathetic and affecting apostrophe to the situation in which you would be placed if you differed from this opinion of the supreme court.

I see no difficulty in the case if our laws are to be uniform. How can the inferior court control the decisions of the superior court? You are but a branch of the supreme court. If you, sir, sitting as a circuit court, have a right to disegard the rule decided by the supreme court, and adopt a different rule, every other inferior court has an equal right to do the same, so that there will be as many various rules as to treason as there are courts; and the result might be, and certainly would be, that what would be treason in one circuit would not be treason in another; and a man might be hanged in Pennsylvania for an act against the United States of which he would be held perfectly innocent in Virginia.

Thus treason against the United States would still be unsettled and fluctuating, and the object of the constitution in defining it would be disappointed and defeated; whereas a principle of law solemnly adjudged by the supreme court becomes, I apprehend, the law of the land; and all the inferior courts are compulsorily bound by it. To say that they are not is to disorganize the whole judiciary system, to confound the distinctions and grades of the courts, to banish all certainty and stability from the law, and to destroy all uniformity of decision. I trust that we are not prepared to rush into this wild disorder and confusion, but that we shall temperately and

regularly conform to the decrees of that parent court, of which this is a mere branch, until those decrees shall be changed by the same high authority which created them.

But for a moment let us relinquish that decision, and, putting it aside, let us indulge the gentleman with the inquiry whether that decision be in conformity with the constitution of the United States and the laws of England. In interpreting the constitution let us apply to it the gentleman's own principles: the rules of reason and moral right. The question to be thus determined is whether a man who is absent may not be guilty as if he were actually present.

That a law should be so construed as to advance the remedy and repress the mischief is not more a rule of common law than a principle of reason; it applies to penal as well as to remedial laws. So also the maxim of the common law, that a law as well as a covenant should be so construed that its object may rather prevail than perish, is one of the plainest dictates of common sense.

Apply these principles to the constitution. Gentlemen have said that its object was to prevent the people from being harassed by arbitrary and constructive treason. But its object, I presume, was not to declare that there was no such crime. It certainly did not mean to encourage treason. It meant to recognize the existence of the crime and provide for its punishment. The liberties of the people, which required that the offence should be defined, circumscribed, and limited, required also that it should be certainly and adequately punished.

The framers of the constitution, informed by the examples of Greece and Rome, and foreseeing that the liberties of this Republic might one day or other be seized by the daring ambition of some domestic usurper, have given peculiar im-

portance and solemnity to the crime by engrafting it upon the constitution. But they have done this in vain if the construction contended for on the other side is to prevail. If it require actual presence at the scene of the assemblage to involve a man in the guilt of treason, how easy will it be for the principal traitor to avoid this guilt and escape punishment forever! He may go into distant States, from one State to another. He may secretly wander, like a demon of darkness from one end of the continent to the other.

He may enter into the confidence of the simple and unsuspecting. He may pour his poison into the minds of those who were before innocent. He may seduce them into a love of his person, offer them advantages, pretend that his measures are honorable and beneficial, connect them in his plot and attach them to his glory. He may prepare the whole mechanism of the stupendous and destructive engine and put it in motion. Let the rest be done by his agents. He may then go a hundred miles from the scene of action. Let him keep himself only from the scene of the assemblage and the immediate spot of battle, and he is innocent in law, while those whom he has deluded are to suffer the death of traitors! Who is the most guilty of this treason, the poor, weak, deluded instruments, or the artful and ambitious man who corrupted and misled them? There is no comparison between his guilt and theirs; and yet you secure impunity to him while they are to suffer death! Is this according to the rules of reason? Is this moral right? Is this a means of preventing treason? Or rather, is it not in truth a direct invitation to it? Sir, it is obvious that neither reason nor moral rights require actual presence at the overt act to constitute the crime of treason. Put this case to any common man, whether the absence of a corrupter should exempt him from punishment for the crime

which he has excited his deluded agents to commit; and he will instantly tell you that he deserves infinitely more severe punishment than his misguided instruments. There is a moral sense much more unerring in questions of this sort than the frigid deductions of jurists or philosophers; and no man of a sound mind and heart can doubt for a moment between the comparative guilt of Aaron Burr (the prime mover of the whole mischief), and the poor men on Blennerhassett's Island, who called themselves Burr's men. In the case of murder, who is the most guilty, the ignorant, deluded perpetrator, or the abominable instigator? The decision of the supreme court, sir, is so far from being impracticable on the ground of reason and moral right, that it is supported by their most obvious and palpable dictates.

Give to the constitution the construction contended for on the other side, and you might as well expunge the crime from your criminal code; nay, you had better do it, for by this construction you hold out the lure of impunity to the most dangerous men in the community, men of ambition and talents, while you loose the vengeance of the law on the comparatively innocent. If treason ought to be repressed, I ask you who is the most dangerous and the most likely to commit it — the mere instrument who applies the force, or the daring, aspiring, elevated genius who devises the whole plot, but acts behind the scenes? . . .

I come now, sir, to the gentleman's third point, in which he says he cannot possibly fail. It is this:

"Because, if the prisoner be a principal in the treason at all, he is a principal in the second degree; and, his guilt being of that kind which is termed derivative, no further parol evidence can be let in to charge him until we show a record of the conviction of the principals in the first degree."

By this I understand the gentleman to advance, in other terms, the common-law doctrine that when a man is rendered a principal in treason by acts which would make him an accessory in felony he cannot be tried before the principal in the first degree.

I understand this to be the doctrine of the common law as established by all the authorities; but when I concede this point I insist that it can have no effect in favor of the accused for two reasons: first, because it is the mere creature of the common law; secondly, because, if the common law of England be our law, this position assumes what is denied, that the conduct of the prisoner in this case is of an accessorial nature, or such as would make him an accessory in felony.

First. Because this position is the mere creature of the common law. If it be so, no consequence can be deduced from it. It is sufficient, on this branch of the subject, to take his own declaration that the common law does not exist in this country. If we examine the constitution and the act of Congress we shall find that this idea of a distinction between principals in the first and second degree depends entirely upon the common law. Neither the constitution nor the act of Congress knows any such distinction.

All who levy war against the United States, whether present or absent — all who are leagued in the conspiracy, whether on the spot of the assemblage or performing some minute and inconsiderable part in it a thousand miles from the scene of action — incur equally the sentence of the law; they are all equally traitors. This scale, therefore, which graduates the guilt of the offenders and establishes the order of their respective trials, if it ever existed here, is completely abrogated by the highest authorities in this country. The convention which formed the constitution and defined treason, Congress which

legislated on that subject, and the supreme judiciary of the country expounding the constitution and the law, have united in its abrogation.

But let us for a moment put the convention, Congress, and judiciary aside, and examine how the case will stand. Still this scale of moral guilt, which Mr. Wickham has given us, is the creature of the common law, which, as already observed, he himself in another branch of his argument has emphatically told us does not exist in this country. He has stated that the creature presupposes the creator, and that where the creator does not exist the creature cannot.

The common law, then, being the creator of the rule which Mr. Wickham has given us, and that common law not existing in this country, neither can the rule, which is the mere creature of it, exist in this country. So that the gentleman has himself furnished the argument which refutes this infallible point of his, on which he has so much relied. But to try this position to its utmost extent, let us not only put aside the constitution and act of Congress and decision of the supreme court, but let us admit that the common law does exist here. Still, before the principle could apply, it would remain to be proven that the conduct of the prisoner in this case has been accessorial; or, in other words, that his acts in relation to this treason are of such a nature as would make him an accessory in felony.

But is this the case? It is a mere *petitio principii.* It is denied that his acts are such as would make him an accessory in felony. I have already, in another branch of this subject, endeavored to show, on the grounds of authority and reason, that a man might be involved in the guilt of treason as a principal, by being legally though not actually present; that treason occupied a much wider space than felony; that