NATIONAL INTELLIGENCER,

AND

WASHINGTON ADVERTISER.

VOL. VII. WASHINGTON CITY, PRINTED BY SAMUEL HARRISON SMITH, PENNSYLVANIA AVENUE. No. 1084.

FIVE DOLLARS PER ANNUM. FRIDAY, SEPTEMBER 25, 1807. PAID IN ADVANCE.

TRIAL OF A. BURR.

OPINION of the Court on the motion to arrest the evidence, delivered on Monday, August 31—Continued.

In page 220, Foster repeats this declaration. It is also laid down in Hawk. B. 8, chap. 17, sect. 29, 1st Hale 121. 1st. East. 116, and by the other authorities cited, especially Vaughan's case. In corroboration of this opinion, it may be observed, that treason can only be established by the proof of overt acts, and that by the common law as well as by the statute of 7th of William 3d, those overt acts only which are charged in the indictment can be given in evidence, unless perhaps as corroborative testimony after the overt acts are proved. That clause in the constitution too which says that in all prosecutions the accused shall enjoy the right "to be informed of the nature and cause of the accusation" is considered as having a direct bearing on this point. It secures to him such information as will enable him to prepare for his defence.

It seems then to be perfectly clear that it would not be sufficient for an indictment to allege generally that the accused had levied war against the U. S. The charge must be more particularly specified by laying what is termed an overt act of levying war. The law relative to an appeal as cited from Stamford, is strongly corroborative of this opinion.

If it be necessary to specify the charge in the indictment, it would seem to follow irresistably, that the charge must be proved as laid.

All the authorities which require an overt act, require also that this overt act should be proved. The decision in Vaughan's case is particularly in point. Might it be otherwise, the charge of an overt act would be a mischief instead of an advantage to the accused. It would lead him from the true cause and nature of the accusation instead of informing him respecting it.

But it is contended on the part of the prosecution that, although the accused had been never with the party which assembled at Blannerhassett's Island, and was, at the time, at a great distance, and in a different state, he was yet legally present, and therefore may properly be charged in the indictment as being present in fact.

It is therefore necessary to enquire whether in this case the doctrine of constructive presence can apply.

It is conceived by the court to be possible that a person may be concerned in a treasonable conspiracy, and yet be legally, as well as actually absent while some one act of the treason is perpetrated. If a rebellion should be so extensive as to spread through every state in the union, it will scarcely be contended that every individual concerned in it is legally present at every overt act committed in the course of that rebellion. It would be a very violent presumption indeed, too violent to be made without clear authority, to presume that even the chief of the rebel army was legally present at every such overt act. If the main rebel army with the chief at its head should be prosecuting war at one extremity of our territory, say in N. H. if this chief should be there captured and sent to the other extremity for the purpose of trial, if his indictment instead of alleging an overt act which was true in point of fact, should allege that he had assembled some small party which in truth he had not seen, and had levied war by engaging in a skirmish in Georgia, at a time when in reality he was fighting a battle in New-Hampshire—if such evidence would support such an indictment by the fiction that he was legally present though really absent, all would ask to what purpose are those provisions in the constitution which direct the place of trial, and ordain that the accused shall be informed of the nature and cause of the accusation?

But that a man may be legally absent who has counselled or procured a treasonable act, is proved by all those books which treat upon the subject, and which concur in declaring that such a person is a principal traitor, not because he was legally present, but because in treason all are principals. Yet the indictment I say upon general principles, would charge him according to the truth of the case. Lord Coke says "if many conspire to levy war, and some of them do levy the same according to the conspiracy, this is high treason in all."—Why? Because all were legally present when the war was levied? No.—"For in treason, continues Lord Coke, all be principals, and war is levied." In this case the indictment, reasoning from analogy, would not charge that the absent conspirators were present, but would state the truth of the case. If the conspirator had done nothing which amounted to levying of war, and if by our constitution the doctrine that an accessary becomes a principal be not adopted, in consequence of which the conspirator could not be condemned under an indictment stating the truth of the case, it would be going very far to say that this defect, if it be termed one, may be cured by an indictment stating the case untruly.

The doctrine of Lord Coke has been adopted by all subsequent writers; and it is generally laid down in the English books that whatever will make a man an accessary in felony, will make him a principal in treason; but it is no where suggested that he is by construction to be considered as present when in point of fact he was absent.

Foster 3d, has been particularly quoted, and certainly he is precisely in point. "It is well known, says Foster, that in the language of the case there are no accessaries in high treason, all are principals. Every instance of incitement, aid, or protection, which in the case of felony will render a man an accessary before or after the fact, in the case of high treason, whether it be treason at common law or by statute, will make him a principal in the treason." The cases of 'incitement' and aid are cases put as examples of a man's becoming a principal in treason, not because he was legally present, but by force of that maxim in the common law that whatever will render a man an accessary at common law will render him a principal in treason. In other passages the words "command or procure" are used to indicate the same state of things, that is a treasonable assemblage produced by a man who is not himself in that assemblage.

In point of law then, the man who incites, aids, or procures a treasonable act, is not merely in consequence of that incitement, aid or procurement, legally present when that act is committed.

If it does not result from the nature of the crime that all who are concerned in it are legally present at every overt act, then each case depends upon its own circumstances, and to judge how far the circumstances of any case can make him legally present who is in fact absent, the doctrine of constructive presence must be examined.

Hale in his 1st vol. p. 615 says "regularly no man can be a principal in felony unless he be present." In the same page he says "an accessary before is he that being absent at the time of the felony committed, doth yet procure, counsel, or command another to commit a felony." The books are full of passages which state this to be the law. Foster in showing what acts of concurrence will make a man a principal, says "he must be present at the perpetration, otherwise he can be no more than an accessary before the fact."

These strong doctrines would be idle to treason, at any rate they would be inapplicable, if they were to be entirely lost in the doctrine of constructive presence.

Foster adds (p. 349) "when the law requireth the presence of the accomplice at the perpetration of the fact in order to render him a principal, it doth not require a strict actual immediate presence, such a presence as would make him an eye or ear witness of what passeth." The terms used by Foster are such as would be employed by a man intending to show the necessity that the absent person should be near at hand, although from the nature of the thing no precise distance could be marked out. An inspection of the cases from which Foster drew this general principle will serve to illustrate it. Hale 439. In all these cases, put by Hale, the whole party set out together to commit the very fact charged in the indictment, or to commit some other unlawful act, in which they are all to be personally concerned at the same time and place, and are at the very time when the criminal fact is committed, near enough to give actual personal aid and assistance to the man who perpetrated it. Hale in p. 449, giving the reason for the decision in the case of the word decree says "they all came with an intent to steal the deer, and consequently the law supposes that they came all with the intent to oppose all that should hinder them in that design. The original case says this was their resolution. This opposition would be a personal opposition. This case even as stated by Hale would clearly not comprehend any man who entered into the combination, but who, instead of going to the park where the murder was committed, should not set out with the others, should go to a different park, or should even lose his way. Hale 534.

In both the cases here stated, the persons actually set out together and were near enough to assist in the commission of the fact. That in the case of Pudsy the felony was as stated by Hale, a different felony from that originally intended is unimportant in regard to the particular principle now under consideration, so far as respected distance, as respected capacity to assist in case of resistance, it is the same as if the robbery had been that which was originally designed. The case in the original report shows that the felony committed was in fact in pursuance of that originally designed. Foster 350, plainly supposes the same particular design, not a general design composed of many particular distinct facts. He supposes them to be co-operating with respect to that particular design. This may be illustrated by a case which is perhaps common. Suppose a band of robbers confederated for the general purpose of robbing. They set out together, or in parties, to rob a particular individual, and each performs the part assigned to him. Some ride up to the individual and demand his purse, others watch out of sight to intercept those who might be coming to assist the man on whom the robbery is to be committed if murder or robbery actually take place, all are principals, and all in construction of law are present. But suppose they set out at the same time or at different times, by different roads, to attack and rob different individuals or different companies—to commit distinct acts of robbery. It has never been contended that those who committed one act of robbery or who failed altogether, were constructively present at the act of those who were associated with them in the common object of robbery, & who were to share the plunder, but who did not assist at the particular fact. They do indeed belong to the general party, but they are not of the particular party which committed this fact. Foster concludes this subject by observing that "in order to render a person an accomplice and a principal in felony, he must be aiding and abetting at the fact, or ready to afford assistance if necessary." That is, at the particular fact which is charged—he must be ready to render assistance to those who are committing that particular fact—he must as is stated by Hawkins be ready to give immediate and direct assistance.

All the cases to be found in the books go to the same point. Let them be applied to that under consideration.

The whole treason laid in this indictment is the levying of war in Blannerhassett's island, and the whole question to which the enquiry of the court is now directed is whether the prisoner was legally present at that fact.

I say this is the whole question because the prisoner can only be convicted on the overt act laid in the indictment. With respect to this prosecution it is as if no other overt act existed. If other overt acts can be enquired into, it is for the sole purpose of proving the particular fact charged; it is as evidence of the crime consisting of this particular fact, not as establishing the general crime by a distinct fact.

The counsel for the prosecution have charged those engaged in the defence with considering the overt as the treason, whereas it ought to be considered solely as the evidence of the treason; but the counsel for the prosecution seem themselves not to have sufficiently adverted to this clear principle, that though the overt act may not be itself the treason, it is the sole act of that treason which can produce conviction. It is the sole point in issue between the parties. And the only division of that point, if the expression be allowed, which the court is now examining, is the constructive presence of the prisoner at the fact charged.

To return then to the application of the cases.

Had the prisoner set out with the party from Beaver for Blannerhasset's island, or perhaps had he set out for that place, though not from Beaver, and had arrived in the island, he would have been present at the fact; had he not arrived in the island, but had taken a position near enough to co-operate with those on the island, to assist them in any act of hostility, or to aid them if attacked, the question whether he was constructively present would be a question compounded of law and fact, which would be decided by the jury, with the aid of the court, so far as respected the law. In this case the accused would have been of the particular party assembled on the island, and would have been associated with them in the particular act of levying war said to have been committed on the island.

But if he was not with the party at any time before they reached the island; if he did not join them there, or intend to join them there; if his personal co-operation in the general plan was to be afforded elsewhere, at a great distance, in a different state; if the overt acts of treason to be performed by him were to be distinct overt acts; then he was not of the particular party assembled at Blannerhasset's island, and was not constructively present, aiding and assisting in the particular act which was there committed.

The testimony on this point, so far as it has been delivered, is not equivocal. There is not only no evidence that the accused was of the particular party which assembled on Blannerhassett's island, but the whole evidence shows he was not of that party.

In felony then, admitting the crime to have been completed on the island, and to have been advised, procured, or commanded by the accused, he would have been incontestibly an accessary and not a principal.

But in treason, it is said, the law is otherwise, because the theatre of action is more extensive.

The reasoning applies in England as strongly as in the U. S. While in '15 and '45 the family of Stuart fought to regain the crown they had forfeited, the struggle was for the whole kingdom; yet no man was ever considered as legally present at one place, when actually at another; or as aiding in one transaction while actually employed in another.

With the perfect knowledge that the whole nation may be the theatre of action, the English books unite in declaring, that he who counsels, procures or aids treason, is guilty accessorially 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.

What would be the effect of a different doctrine? Clearly that which has been stated. If a person levying war in Kentucky, may be said to be constructively present and assembled with a party carrying on war in Virginia, at a great distance from him; then he is present at every overt act performed any where; he may be tried in any state on the continent, where any overt act has been committed; he may be proved to be guilty of an overt act laid in the indictment in which he had no personal participation, by proving that he advised it, or that he committed other acts.

This is, perhaps, too extravagant to be in terms maintained. Certainly it cannot be supported by the doctrines of the English law.

The opinion of judge Patterson in Mitchell's case has been cited on this point. 2 Dal. 348.

The indictment is not specially stated; but from the case as reported, it must have been either general for levying war in the county of Alleghany, and the overt act laid must have been the assemblage of men and levying of war in that county; or it must have given a particular detail of the treasonable transactions in that county. The first supposition is the most probable; but let the indictment be in the one form or the other, and the result is the same. The facts of the case are, that a large body of men, of whom Mitchell was one, assembled at Braddock's field, in the county of Alleghany, for the purpose of committing acts of violence at Pittsburg. That there was also an assemblage at a different time at Couches fort, at which the prisoner also attended. The general and avowed object of that meeting was to concert measures for resisting the execution of a public law. At Couches fort, the resolution was taken to attack the house of the inspector, and the body there assembled marched to that house and attacked it. It was proved by the competent number of witnesses, that he was at Couches fort armed, that he offered to reconnoitre the house to be attacked, that he marched with the insurgents towards the house, that he was with them after the action attending the body of one of his comrades who was killed in it; one witness swore positively that he was present at the burning of the house, and a second witness said that "it ran in his head that he had seen him there." That a doubt should exist in such a case as this, is strong evidence of the necessity that the overt act should be unequivocally proved by two witnesses.

But what was the opinion of the judge in this case? Couches fort and Neville's house being in the same county, the assemblage having been at Couches fort and the resolution to attack the house having been there taken, the body having for the avowed purposes moved in execution of that resolution towards the house to be attacked, he inclined to think that the act of marching was in itself levying war. If it was, then the overt act laid in the indictment was consummated by the assemblage at Couches and the marching from thence, and Mitchell was proved to be guilty by more than two positive witnesses. But without deciding this to be the law, he proceeded to consider the meeting at Couches, the immediate marching to Neville's house, and the attack and burning of the house, as one transaction. Mitchell was proved by more than two positive witnesses to have been in that transaction, to have taken an active part in it, and the judge declared it to be unnecessary that all should have seen him at the same time and place.

But suppose not a single witness had proved Mitchell to have been at Couches, or on the march, or at Neville's. Suppose he had been at the time notoriously absent in a different state. Can it be believed by any person who observes the caution with which Judge Patterson required the constitutional proof of two witnesses to the same overt act, that he would have said Mitchell was constructively present, and might on that straining of a legal fiction, be found, guilty of treason? Had he delivered such an opinion what would have been the language of this country respecting it? Had he given this opinion, it would have required all the correctness of his life to strike his name from that bloody list in which the name of Jeffries is enrolled.

But to estimate the opinion in Mitchell's case, let its circumstances be transferred to Burr's case. Suppose the body of men assembled in Blannerhasset's island had previously met at some other place in the same county, and that Burr had been proved to be with them by four witnesses: That the resolution to march to Blannerhasset's island for a treasonable purpose had been there taken; that he had been seen on the march with them; that one witness had seen him on the island, that another thought he had seen him there; that he had been seen with the party directly after leaving the island; that this indictment had charged the levying of war in Wood county generally; the cases would then have been precisely parallel, and the decisions would have been the same.

In conformity with principle and with authority then, the prisoner at the bar was neither legally nor actually present at Blannerhasset's island; and the court is strongly inclined to the opinion that without proving an actual or legal presence by two witnesses, the overt act laid in this indictment cannot be proved.

But this opinion is controverted on two grounds.

The first is, that the indictment does not charge the prisoner to have been present.

The second, that although he was absent, yet, if he caused the assemblage, he may be indicted as being present, and convicted on evidence that he caused the treasonable act.

The first position is to be decided by the indictment itself. The court understands the allegation differently from the attorney for the U. S. The court understands it to be directly charged, that the prisoner did assemble with the multitude and did march with them. Nothing will more clearly test this construction than putting the case into a shape which it may possibly take. Suppose the law to be, that the indictment would be defective unless it alledged the presence of the person indicted at the act of treason. If upon a special verdict facts should be found which amounted to a levying of war by the accused, and his counsel should insist that he could not be condemned because the indictment was defective in not charging that he was himself one of the assemblage which constituted the treason, or because it alledged the procurement defectively, would the attorney admit this construction of his indictment to be correct? I am persuaded that he would not, and that he ought not to make such a concession. If, after a verdict, the indictment ought to be construed to alledge that the prisoner was one of the assemblage at Blannerhasset's island, it ought to be so construed now. But this is unimportant, for if the indictment alledges that the prisoner procured the assemblage, that procurement becomes part of the overt act and must be proved as will be shown hereafter.

The 2d position is founded on 1 Hale 214, 238 and 1. East 127.

While I declare that this doctrine contradicts every idea I had ever entertained on the subject of indictments, since it admits that one case may be stated, and a very different case may be proved, I will acknowledge that it is countenanced by the authorities adduced in its support. To counsel or advise a treasonable assemblage, and to be one of that assemblage, are certainly distinct acts, and therefore ought not to be charged as the same act. The great objection to this mode of proceeding is, that the proof essentially varies from the charge in the character and essence of the offence, and in the testimony by which the accused is to defend himself. These dicta of Lord Hale, therefore, taken in the extent in which they are understood by the counsel for the U. S. seem to be repugnant to the declarations we find every where, that an overt act must be laid, and must be proved. No case is cited by Hale in support of them, and I am strongly inclined to the opinion that, had the public received his corrected, instead of his original manuscript, they would, if not expunged, have been restrained in their application to cases of a particular description. Laid down generally, and applied universally to all cases of treason, they are repugnant to the principles for which Hale contends, for which all the elementary writers contend, and from which courts have in no case, either directly reported or referred to in the books, ever departed. These principles are, that the indictment must give notice of the offence, that the accused is only bound to answer the particular charge which the indictment contains, and that the overt act laid is that particular charge. Under such circumstances, it is only doing justice to Hale to examine his dicta, and if they will admit of being understood in a limited sense, not repugnant to his own doctrines, nor to the general principles of law, to understand them in that sense.

"If many conspire to counterfeit, or counsel or abet it, and one of them doth the fact upon that counselling or conspiracy, it is treason in all, and they may be all indicted for counterfeiting generally within this statute, for in such case, in treason, all are principals."

This is laid down as applicable singly to the treason of counterfeiting the coin, and is not applied by Hale to other trea-