NATIONAL INTELLIGENCER,

AND

WASHINGTON ADVERTISER.

VOL. VII. WASHINGTON CITY, PRINTED BY SAMUEL HARRISON SMITH, PENNSYLVANIA AVENUE. No. 10 5.

F VE DOLLARS PER ANNUM — MONDAY, SEPTEMBER 28, 1807. — PAID IN ADVANCE.

TRIAL OF A. BURR.

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

The crimes then are not the same, and may not indifferently be tried under the same indictment. But why is it that an acquittal as principal may be pleaded in bar to an indictment as accessary? If it be answered that the accessorial crime may be given in evidence on an indictment as principal, but that the principal crime may not be given in evidence on an indictment as accessary, the question recurs, on what legal ground does this distinction stand? I can imagine only this. An accessary being *quodam modo* a principal, indictments where the law does not require the manner to be settled, which need not be special evidence of accessorial guilt, if the punishment be the same, may possibly be received—but every indictment as an accessary must be special. The very allegation that he is an accessary must be a special allegation, and must show how he became an accessary. The charges of this special indictment therefore must be proved as laid, and no evidence which proves the crime in a form substantially different can be received. If this be the legal reason for the distinction it supports the exposition of these dicta which has been given. If it be not the legal reason, I can conceive no other.

But suppose the law to be as contended by the counsel for the U. S. Suppose an indictment charging an individual with personally assembling among others and thus levying war, may be satisfied with the proof that he caused the assemblage. What effect will this law have upon this case?

The guilt of the accused, if there be any guilt, does not consist in the assemblage, for he was not a member of it. The simple fact of assemblage no more affects one absent man than another. His guilt then consists in procuring the assemblage, and upon this fact depends his criminality. The proof relative to the character of an assemblage must be the same whether a man be present or absent. In the general, to charge any individual with the guilt of an assemblage, the fact of his presence must be proved. It constitutes an essential part of the overt act. If then the procurement be substituted in the place of presence, does it not also constitute an essential part of the overt act? Must it not be proved? Must it not be proved in the same manner that presence must be proved? If in one case the presence of the individual makes the guilt of the assemblage his guilt, & in the other case the procurement by the individual makes the guilt of the assemblage his guilt, then presence and procurement are equally component parts of the overt act, and equally require two witnesses.

Collateral points may, say the books, be proved according to the course of the common law, but is this a collateral point? Is the fact without which the accused does not participate in the guilt of the assemblage, if it was guilty, a collateral point? This cannot be. The presence of the party, where presence is necessary being a part of the overt act, must be positively proved by two witnesses. No presumptive evidence; no facts from which presence may be conjectured or inferred, will satisfy the constitution and the law. If procurement take the place of presence, and become part of the overt act, then no presumptive evidence, no facts from which the procurement may be conjectured or inferred, can satisfy the constitution and the law. The mind is not to be led to the conclusion that the individual was present by a train of conjectures or inferences, or of reasoning—the fact must be proved by two witnesses. Neither where procurement supplies the want of presence, is the mind to be conducted to the conclusion that the accused procured the assembly, by a train of conjectures or inferences, or of reasoning—the fact itself must be proved by two witnesses, and must have been committed within the district.

If it be said that the advising or procurement of treason is a secret transaction which can scarcely ever be proved in the manner required by this opinion—the answer which will readily suggest itself is, that the difficulty of proving a fact will not justify conviction without proof. Certainly it will not justify conviction without a direct and positive witness in a case where the constitution requires two. The more correct inference from this circumstance would seem to be that the advising of the fact is not within the constitutional definition of the crime. To advise or procure a treason is in the nature of conspiring or plotting treason, which is not treason in itself.

If then the doctrines of Keeling, Hale and East, are to be understood in the sense in which they are pressed by the counsel for the prosecution, and are applicable in the U. S.—the fact that the accused procured the assemblage on Blannerhassett's island must be proved, not circumstantially, but positively by two witnesses, to charge him with that assemblage. But there are still other most important considerations which must be well weighed before this doctrine can be applied to the United States.

The 8th amendment to the constitution has been pressed with great force, and it is impossible not to feel its application to this point. The accused cannot be truly said to be "informed of the nature and cause of the accusation," unless the indictment shall give him that notice which may reasonably suggest to him the point on which the accusation turns, so that he may know the course to be pursued in his defence.

It is also well worthy of consideration, that this doctrine so far as it respects treason, is entirely supported by the operation of the common law which is said to convert the accessary before the fact into the principal, and to make the act of the principal his act. The accessary before the fact is not said to have levied war. He is not said to be guilty under the statute. But the common law attaches to him the guilt of that fact which he has advised or procured, and as contended, makes it his act. This is the operation of the common law, not the operation of the statute. It is an operation then which can only be performed where the common law exists to perform it. It is the creature of the common law, and the creature presupposes its creator. To decide then that this doctrine is applicable to the U. S. would seem to imply the decision that the U. S. as a nation, have a common law which creates and defines the punishment of crimes accessorial in their nature. It would imply the further decision that these accessorial crimes are not, in the case of treason, excluded by the definition of treason given in the constitution. I will not pretend that I have not individually an opinion on these points, but it is one which I should give only in a case absolutely requiring it, unless I could confer respecting it, with the judges of the supreme law.

I have said that this doctrine cannot apply to the U. S. without implying those decisions respecting the common law which I have stated, because, should it be true as is contended, that the constitutional definition of treason comprehends him who advises or procures an assemblage that levies war, it would not follow that such adviser or procurer might be charged as having been present at the assemblage. If the adviser or procurer is within the definition of levying war, and, independent of the agency of the common law, does actually levy war, then the advisement or procurement is an overt act of levying war. If it be the overt act on which he is to be convicted, then it must be charged in the indictment, for he can only be convicted on proof of the overt acts which are charged.

To render this distinction more intelligible, let it be recollected, that although it should be conceded, that since the statute of William and Mary, he who advises or procures a treason may in England be charged as having committed that treason by virtue of the common law operation which is said, so far as respects the indictment, to unite the accessorial to the principal offence and permit them to be charged as one, yet it can never be conceded that he who commits one overt act under the statute of Edward, can be charged and convicted on proof of another overt act. If then procurement be an overt act of treason under the constitution, no man can be convicted for the procurement under an indictment charging him with actually assembling—whatever may be the doctrine of the common law in the case of an accessorial offender.

It may not be improper in this place again to advert to the opinion of the supreme court, and to shew that it contains nothing contrary to the doctrine now laid down. That opinion is that an individual may be guilty of treason "who has not appeared in arms against his country; that if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, 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."

This opinion does not touch the case of a person who advises or procures an assemblage, and does nothing further. The advising certainly, and perhaps the procuring, is more in the nature of a conspiracy to levy war, than of the actual levying of war. According to the opinion, it is not enough to be leagued in the conspiracy, and that war be levied, but it is also necessary to perform a part; that part is the act of levying war. This part, it is true, may be minute, it may not be the actual appearance in arms; and it may be remote from the scene of action, that is from the place where the army is assembled, but it must be a part, and that part must be performed by a person who is leagued in the conspiracy. This part however minute or remote, constitutes the overt act on which alone the person who performs it can be convicted.

The opinion does not declare that the person who has performed this remote and minute part, may be indicted for a part, which was in truth performed by others, and convicted on their overt acts. It amounts to this and nothing more, that when war is actually levied, not only those who bear arms, but those also who are leagued in the conspiracy, and who perform the various distinct parts which are necessary for the prosecution of war, do in the sense of the constitution levy war. It may possibly be the opinion of the supreme court 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.

It is then the opinion of the court that this indictment can be supported only by testimony which proves the accused to have been actually or constructively present when the assemblage took place on Blannerhassett's Island, or by the admission of the doctrine that he who procures an act may be indicted as having performed that act.

It is further the opinion of the court that there is no testimony whatever which tends to prove that the accused was actually or constructively present when that assemblage did take place. Indeed the contrary is most apparent. 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 procured in the same manner and by the same kind of testimony which would be required to prove actual presence.

The second point in this division of the subject is the necessity of adducing the record of the previous conviction of some one person who committed the fact alleged to be treasonable.

This point pre-supposes the treason of the accused, if any has been committed, to be accessorial in its nature. It's being of this description according to the British authorities, depends on the presence or absence of the accused at the time the fact was committed. The doctrine on this subject is well understood, has been most copiously explained, and need not be repeated. That there is no evidence of his actual or legal presence, is a point already discussed and decided. It is then apparent that, but for the exception to the general principle which is made in cases of treason, those who assembled at Blannerhassett's Island, if that assemblage was such as to constitute the crime, would be principals, and those who might really have caused that assemblage, although in truth the chief traitors, would in law be accessaries.

It is a settled principle in the law that the accessary cannot be guilty of a greater offence than his principal. The maxim is, *accessorius sequitur naturam sui principalis*; the accessory follows the nature of his principal. Hence results the necessity of establishing the guilt of the principal before the accessory can be tried. For the degree of guilt which is incurred by counselling or commanding the commission of a crime, depends upon the actual commission of that crime. No man is an accessary to murder unless the fact has been committed.

The fact can only be established in a prosecution against the person by whom a crime has been perpetrated. The law supposes a man more capable of defending his own conduct than any other person, and will not tolerate that the guilt of A shall be established in a prosecution against B. Consequently, if the guilt of B depends on the guilt of A, A must be convicted before B can be tried. It would exhibit a monstrous deformity, indeed, in our system, if B might be executed for being accessary to a murder committed by A, and A should afterwards, upon a full trial, be acquitted of the fact. For this obvious reason, although the punishment of a principal and accessary was originally the same, and although in many instances it is still the same, the accessary could in no case be tried before the conviction of his principal, nor can he yet be tried previous to such conviction, unless he requires it, or unless a special provision to that effect be made by statute.

If then, this was a felony, the prisoner at the bar could not be tried until the crime was established by the conviction of the person by whom it was actually perpetrated.

Is the law otherwise in this case, because in treason all are principals?

Let this question be answered by reason and by authority.

Why is it that in felonies however atrocious, the trial of the accessary can never precede the conviction of the principal? Not because the one is denominated the principal and the other the accessary, for that would be ground on which a great law principle could never stand. Not because there was in fact a difference in the degree of moral guilt, for in the case of murder committed by a hardy villain for a bribe, the person plotting the murder and giving the bribe, is, perhaps, of the two, the blacker criminal; and, were it otherwise, this would furnish no argument for precedence in trial.

What then is the reason?

It has been already given. The legal guilt of the accessary depends on the guilt of the principal; and the guilt of the principal can only be established in a prosecution against himself.

Does not this reason apply in full force to a case of treason?

The legal guilt of the person who planned the assemblage on Blannerhassett's Island, depends, not simply on the criminality of the previous conspiracy, but on the criminality of that assemblage. If those who perpetrated the fact be not traitors, he who advised the fact cannot be a traitor. His guilt then, in contemplation of law, depends on theirs, and their guilt can only be established in a prosecution against themselves. Whether the adviser of this assemblage be punishable with death as a principal or as an accessary, his liability to punishment depends on the degree of guilt attached to an act which has been perpetrated by others, and which, if it be a criminal act, renders them guilty also. His guilt, therefore, depends on theirs, and their guilt cannot be legally established in a prosecution against him.

The whole reason of the law then relative to the principal and accessary, so far as respects the order of trial, seems to apply in full force to a case of treason committed by one body of men in conspiracy with others who are absent.

If from reason we pass to authority, we find laid down by Hale, Foster and East, in the most explicit terms, that the conviction of some one who has committed the treason must precede the trial of him who has advised or procured it. This position is also maintained by each in his notes on Hawkins, and is not, so far as the court has discovered, any where contradicted.

These authorities have been read and commented on at such length that it cannot be necessary for the court to bring them again into view. It is the less necessary because it is not understood that the law is controverted by the counsel for the U. S.

It is, however, contended, that the prisoner has waved his right to demand the conviction of some one person who was present at the fact, by pleading to his indictment.

Had this indictment even charged the prisoner according to the truth of the case, the court would feel some difficulty in deciding that he had by implication waved his right to demand a species of testimony essential to his conviction. The court is not prepared to say that the act which is to operate against his rights, did not require that it should be performed with a full knowledge of its operation. It would seem consonant to the usual course of proceeding in other respects in criminal cases, that the prisoner should be informed that he had a right to refuse to be tried until some person who committed the act should be convicted, and that he ought not to be considered as waving the right to demand the record of conviction, unless with the full knowledge of that right he consented to be tried. The court, however, does not decide what the law would be in such a case. It is unnecessary to decide it because pleading to an indictment in which a man is charged as having committed an act, cannot be construed to wave a right which he would have possessed, had he been charged with having advised the act. No person indicted as a principal can be expected to say I am not a principal, I am an accessary; I did not commit, I only advised the act.

The authority of the English cases on this subject depends in a great measure on the adoption of the common law doctrine of accessorial treasons. If that doctrine be excluded, this branch of it may not be directly applicable to treasons committed within the U. S. If the crime of advising or procuring a levying of war be within the constitutional definition of treason, then he who advises or procures it must be indicted on the very fact, and the question whether the treasonableness of the act may be decided in the first instance in the trial of him who procured it, or must be decided in the trial of one who committed it, will depend upon the reason, as it respects the law of evidence, which produced the British decisions with regard to the trial of principal and accessary, rather than on the positive authority of those decisions.

This question is not essential in the present case, because if the crime be within the constitutional definition, it is an overt act of levying war, and to produce a conviction ought to have been charged in the indictment.

The law of the case being thus far settled, what ought to be the decision of the court on the present motion? Ought the court to sit and hear testimony which cannot affect the prisoner, or ought the court to arrest that testimony? On this question much has been said—much that may perhaps be ascribed to a misconception of the point really under consideration. The motion has been treated as a motion confessedly made to stop relevant testimony, and in the course of the argument, it has been repeatedly stated by those who oppose the motion, that irrelevant testimony may and ought to be stopped. That this statement is perfectly correct, is one of those fundamental principles in judicial proceedings which is acknowledged by all and is founded in the absolute necessity of the thing. No person will contend that in a civil or criminal case, either party is at liberty to introduce what testimony he pleases, legal or illegal, and to consume the whole term in details of facts unconnected with the particular case. Some tribunal then must decide on the admissibility of testimony. The parties cannot constitute this tribunal, for they do not agree. The jury cannot constitute it, for the question is whether they shall hear the testimony or not. Who then but the court can constitute it? It is of necessity the peculiar province of the court to judge of the admissibility of testimony. If the court admit improper, or reject proper testimony, it is an error of judgment, but it is an error committed in the direct exercise of their judicial functions.

The present indictment charges the prisoner with levying war against the U. S. and alledges an overt act of levying war. That overt act must be proved, according to the mandates of the constitution and of the act of Congress, by two witnesses. It is not proved by a single witness. The presence of the accused has been stated to be an essential component part of the overt act in this indictment, unless the common law principle respecting accessaries should render it unnecessary; and there is not only no witness who has proved his actual or legal presence; but the fact of his absence is not controverted. The counsel for the prosecution offer to give in evidence subsequent transactions, at a different place, and in a different state, in order to prove what? The overt act laid in the indictment? That the prisoner was one of those who assembled at Blannerhasset's island? No—that is not alledged. It is well known that such testimony is not competent to establish such a fact. The constitution and law require that the fact should be established by two witnesses, not by the establishment of other facts from which the jury might reason to this fact. The testimony then is not relevant. If it can be introduced, it is only in the character of corroborative or confirmatory testimony, after the overt act has been proved by two witnesses, in such manner that the question of fact ought to be left with the jury. The conclusion that in this state of things no testimony can be admissible, is so inevitable, that the counsel for the U. S. could not resist it. I do not understand them to deny, that if the overt act be not proved by two witnesses so as to be submitted to the jury, that all other testimony must be irrelevant, because no other testimony can prove the act. Now an assemblage on Blannerhasset's island is proved by the requisite number of witnesses, and the court might submit it to the jury, whether that assemblage amounted to a levying of war, but the presence of the accused at that assemblage being no where alledged except in the indictment, the overt act is not proved by a single witness, and of consequence all other testimony must be irrelevant.

The only difference between this motion as made, and the motion in the form which the counsel for the U. S. would admit to be regular, is this. It is now general for the rejection of all testimony. It might be particular with respect to each witness as adduced. But can this be wished, or can it be deemed necessary? Enough is proved to show that the indictment cannot be supported, and that no testimony unless it be of that description which the attorney for the U. S. declares himself not to possess, can be relevant, why should a question be taken on each witness?

The opinion of this court on the order of testimony has frequently been adverted to as deciding this question against the motion.

If a contradiction between the two opinions does exist, the court cannot perceive it. It was said that levying war is an act compounded of law and fact, of which the jury aided by the court must judge. To that declaration the court still adheres.

It was said that if the overt act was not proved by two witnesses, no testimony in its nature corroborative or confirmatory, was admissible or could be relevant.

From that declaration there is certainly no departure. It has been asked, in allusion to the present case, if a general commanding an army should detach troops for a distant service, would the men composing that detachment be