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Ours are the plans of fair delightful peace,
Unwarp'd by party rage, to live like Brothers.

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OPINION OF THE COURT

On the motion

To arrest the Evidence

in

Burr's Trial.

Delivered August 31, 1807.

CONTINUED.

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 alledging an overt act which was true in point of fact, should alledge that he had assembled some small party which in truth he had not seen, & had levied war by engaging in a skirmish in Georgia at a time when in reality he was fighting a battle in N. 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 lies 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 war, and if by our constitution the doctrine that an accessory becomes a principal be not adopted, in consequence of which the conspirator could not be convicted under an indictment stating the truth of the case, it would be very far to say that this defect, if it be termed one, may be cured by an indictment stating the case as true.

This 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 accessory 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 accessories in high treason, all are principals. Every instance of incitement, aid or protection, which in the case of felony will render a man an accessory 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 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 accessory 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 the 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 accessory *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 shewing 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 accessory before the fact."

These strong distinctions 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 shew 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, & 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 shews 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, & each performs the part assigned to him. Some ride up to the individual & 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 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 suoject 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 & 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 act 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 Blannerhassett's island, or perhaps had he set out for that place, tho' 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 & 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 Blannerhassett's island, and was not constructively present, aiding & 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 shews he was not of the 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 States. 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 a theatre of action, the English books unite in declaring, that he who counsels procures or aids treason, is guilty accessorily and solely in virtue of the common law principle, that what will make a man an accessory 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 doctrine of the English law.

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

The indictment is not specially; 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 for 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.

(To be continued.)