RALEIGH REGISTER,

AND

North-Carolina State Gazette.

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

THURSDAY, OCTOBER 29, 1807. No 423.

Vol. VIII.

OPINION OF THE COURT

On the motion

To arrest the Evidence

in

Burr's Trial.

Delivered August 31, 1807.

CONTINUED.

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 Blannerhassett'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 Blannerhassett'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, & 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 Blannerhassett'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 States. The court understands it to be directly charged, that the prisoner did assemble with the multitude & to 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 Blannerhassett'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 shewn hereafter.

The 2d position is founded on 1 Hale 214, 288 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 no to be charged as the same act. The great objection to this mode of proceeding is, that the proof essentially varies from the charg 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 limitted 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 treasons. Had he designed to apply the principle universally, he would have stated it as a general proposition, he would have laid it down in treating on other branches of the statute, as well as in the chapter respecting the coin he would have laid it down when treating on indictments generally But he has done neither Every sentiment bearing in any manner on the points which is to be found in Lord Hale, while on the doctrine of levying war, or on the general doctrine of indictments, militates against the opinion that he considered the proposition as more extensive than he has declared it to be. No court could be justified in extending the dictum of a judge beyond its terms to cases in which he has expressly treated; to which he has not himself applied it, and on which he as well as others has delivered opinions which that dictum would over-rule. This would be the less justifiable if there should be a clear legal distinction indicated by the terms in which the judge has expressed himself between the particular case to which alone he has applied the dictum, & other cases to which the court is required to extend it.

There is this clear distinction "They may, says Judge Hale, be indicted for counterfeiting generally" But if many conspire to levy war, & some actually levy it, they may not be indicted for levying war generally. The books concur in declaring that they cannot be so indicted. A special overt act of levying war must be laid. This distinction between counterfeiting the coins, and the class of treasons among which levying war is placed, is taken in the statute of Edward 3d. That statute requires an overt act of levying war to be laid in the indictment, & does not require an overt act of counterfeiting the coin to be laid. If in a particular case, where a general indictment is sufficient, it be stated that the crime may be charged generally according to the legal effect of the act, it does not follow, that in other cases where a general indictment would be insufficient, where an overt act must be laid, that this overt act need not be laid according to the real fact. Hale then is to be reconciled with himself, and with general principles of law, only by permitting the limits which he has himself given to his own dictum, to remain where he has placed them. In page 288, Hale is speaking generally of the receiver of a traitor, and is stating in what such receiver partakes of an accessary. 1st, "His indictment must be special of the receipt, and not generally that he did the thing, which may be otherwise in case of one that is procurer, counsellor or consenter."

The words "*may* be otherwise," do not clearly convey the idea that it is universally otherwise. In all cases of a receiver the indictment *must* be special on the receipt, and not general. The words it "*may* be otherwise in case of a procurer, &c." signify that it may be otherwise in all treasons, or that it may be otherwise in some treasons. If it may be otherwise in some treasons, without contradicting the doctrines of Hale himself, as well as of other writers, but cannot be otherwise in all treasons without such contradiction, the fair construction is, that Hale used these words in their restricted sense; that he used them in reference to treasons, in which a general indictment would lie, not to treasons where a general indictment would not lie, but an overt act of the treason must be charged. The two passages of Hale thus construed, may perhaps be law, and may leave him consistent with himself. It appears to the court to be the fair way of construing them.

These observations relative to the passages quoted from Hale, apply to that quoted from East, who obviously copies from Hale, and relies upon his authority.

Upon this point Keeling 26, and 1st Hale 626, have also been relied upon. It is stated in both, that if a man be indicted as a principal and accessary, he cannot afterwards be indicted as accessary before the fact. Whence it is inferred, not without reason, that evidence of accessorial guilt may be received on such an indictment. Yet no case is found in which the question has been made and decided. The objection has never been taken at a trial and overruled, nor do the books say it would be over-ruled. Were such a case produced, its application would be questionable. Keeling says, an accessary before the fact is *quodam modo* in some manner guilty of the fact. The law may not require that the manner should be stated, for in felony it does not require that an overt act should be laid. The indictment therefore may be general, But an overt act of levying war must be laid. These cases then prove in their utmost extent no more than the cases previously cited from Hale and East. This distinction between indictments which may state the fact generally, and those which must lay specially, bear some analogy to a general and a special action on the case. In a general action, the declaration may lay the assumpsit according to the legal effect of the transaction; but in a special action on the case, the declaration must state the material circumstances truly, and they must be proved as stated. This distinction also derives some aid from a passage in Hale, 625, immediately preceding that which has been cited at the bar.—He says, "If A be indicted as principal, and B as accessary, *before* or *after*, and both be acquitted, yet B may be indicted as principal, and the former acquittal as accessary is no bar."

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, while an acquittal as accessary may not be pleaded in bar to an indictment as principal? 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, in indictments where the law does not require the manner to be stated, 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, & must shew 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 his 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 is 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 also 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, & 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 becomes 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, of 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 U. S.

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 statutes 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 tribunal presupposes its creator. To extend them to the U. S. would seem to imply the decision that the U. States, 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 absolutely requiring it, unless I could confer respecting it with the judges of the supreme court.

I have said that this doctrine cannot apply to the U. S with out 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 in 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 & 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