

BURR'S TRIAL.

OPINION OF THE COURT

On the motion to arrest the evidence, deferred August 27. -Continued.

It has been thought proper to discuss this question at large and to review the opinion of the supreme court, although this court would be more disposed to leave the question of fact, whether an overt act of levying war was committed on Blennerhassett's island to the jury under this explanation of the law, and to instruct them, that unless the assemblage on Blennerhassett's island was an assemblage in force, was a military assemblage in a condition to make war, it was not a levying of war, and that they could not construe it into an act of war, than to arrest the further testimony which might be offered to connect the prisoner with that assemblage, or to prove the intention of those who assembled together at that place. This point, however, is not to be understood as decided. It will, perhaps, constitute an essential inquiry in another case.

Before leaving the opinion of the supreme court entirely on the question of the nature of the assemblage which will constitute an act of levying war, this court cannot forbear to ask, why is an assemblage absolutely required? Is it not to judge in some measure of the end by the proportion which the means bear to the end? Why is it that a single armed individual, entering a boat and sailing down the Ohio, for the avowed purpose of attacking New Orleans, could not be said to levy war? Is it not that he is apparently not in a condition to levy war? If this be so, ought not the assemblage to furnish some evidence of its intention and capacity to levy war before it can amount to levying war? And ought not the supreme court, when speaking of an assemblage for the purpose of effecting a treasonable object by force, be understood to indicate an assemblage exhibiting the appearance of force.

The definition of the attorney for the United States deserves notice in this respect. It is "when there is an assemblage of men, convened for the purpose of effecting by force a treasonable object, which force is meant to be employed before the assemblage disperses, this is treason."

To read this definition without adverting to the argument, we should infer that the assemblage was itself to effect by force the treasonable object, not to join itself to some other bodies of men and them to effect the object by their combined force. Under this construction it would be expected the appearance of the assemblage would bear some proportion to the object and would indicate the intention. At any rate that it would be an assemblage in force. This construction is most certainly not that which was intended, but it serves to show that general phrases must always be understood in reference to the subject matter, and to the general principles of law.

On that division of the subject which respects the merits of the case connected with the pleadings, two points are also made.

1st. That this indictment having charged the prisoner with levying war on Blennerhassett's island and containing no overt act, cannot be supported by proof that war was levied at that place by other persons, in the absence of the prisoner, even admitting those persons to be connected with him in one common treasonable conspiracy.

2dly. That admitting such an indictment could be supported by such evidence, the previous conviction of some person who committed the act which is said to amount to levying war, is indispensable to the conviction of the person who advised or procured that act.

As to the first point the indictment contains two counts, one of which charges the prisoner with a number of persons unknown levied war on Blennerhassett's island, in the county of Wood, in the state of Virginia, and the other adds the circumstance of their proceeding from that island down the river, for the purpose of seizing New Orleans by force.

In point of fact the prisoner was not on Blennerhassett's island nor in the county of Wood, nor in the district of Virginia.

In considering this point the court is led first to enquire whether an indictment for levying war must specify an overt act or would be sufficient if it merely charged the prisoner in general terms with having levied war, omitting the expression of place or circumstance.

The place in which a crime was committed is essential to an indictment, were it only to show the jurisdiction of the court. It is also essential for the purpose of enabling the prisoner to make his defence. That, at common law, an indictment would have been defective which did not mention the place in which the crime was committed, can scarcely be doubted. For this, it is sufficient to refer to Hawkins B. 2, ch. 25, sect. 84, & ch. 23, sect. 91. This necessity is rendered the stronger by the constitutional provision that the offender shall be tried in the district wherein the crime shall have been committed, and by the act of Congress which requires that twelve petty jurors at least shall be summoned from the county where the offence was committed.

A description of the particular manner in which the war was levied, seem also essential to enable the accused to make his defence. The law does not expect a man to be prepared to defend every act of his life which may be suddenly and without notice

alleged against him. In common justice the particular fact with which he is charged ought to be stated, and stated in such a manner as to afford a reasonable certainty of the nature of the accusation, and the circumstances which will be adduced against him. The general doctrine on the subject of indictments is full to this point. Foster p. 149, speaking of the treason of compassing the king's death, says "From what has been said it followeth that in every indictment for this species of treason, and indeed for levying war and adhering to the king's enemies an overt act must be alleged and proved. For the overt act is the charge to which the prisoner must apply his defence."

In page 220, Foster repeats this declaration. It is also laid down in Hawk. B. 8, ch. 17, sect. 20, 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 the 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 criminal 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 United States. The charge must be more particularly specified by saying 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 irresistibly, 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 never been with the party which assembled on Blennerhassett'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 inquire 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's 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 any 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 accessory 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 truly.

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 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 the 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 case 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 the 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 that assemblage.

In point of law, 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 first volume page 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 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 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 to 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 about 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 deuce 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 position would be 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.

[To be continued.]

BY THIS DAY'S MAILS.

HALIFAX, August 28. On Wednesday last, a court martial was held on board H. M. S. Belleisle, rear admiral sir A. F. Cochrane, K. B. capt. N. D. Cochrane, for the trial of John Wilson, alias Jenkin Ratford (lately taken from the American frigate Chesapeake) on charges of Desertion, Mutiny and Contempt.

It clearly appeared on the trial, that the prisoner was born in London—was a volunteer in the service—had been some years in H. M. S. Leopard, but last in the Halifax. That, on the 7th of March last, the ship being then in Hampton Roads, the prisoner was sent with four other men, under a petty-officer, in the jolly-boat, to weigh a kedge anchor, when, taking advantage of the dusk of the evening, the men mutinied upon the officer, and some of them threatened to murder him; but the rest interposing, they desisted—and landing at Sewell's point, the five made their escape. A few days after, the deserters were seen parading the streets of Norfolk, in triumph, under the American flag.—One of them, H. Saunders, being accosted by 1rd Townsend, asserted that he had no intention of deserting, but was compelled by the others; and would embrace the first opportunity to return on board. At that moment the prisoner, Jenkin Ratford, took the arm of

Saunders, declaring that neither he nor any of the others should return to the ship—with a contemptuous gesture, asserted—that they were then in the Land of Liberty, and instantly dragged Saunders away; That the prisoner had entered on board the Chesapeake—had proceeded to sea in her—and had been found on board that ship, after the action (by an officer of H. M. S. Leopard) hid in the coal-hole.

A variety of other circumstances were developed in the course of the evidence. The whole of which tended to prove, that altho' Deserters from the American naval or military establishments had been readily given up by H. M. ships on the station: yet, on the other hand, they had ever been refused by the Americans, when demanded by British officers.

Two men had entered on board H. M. S. Chichester: who, being demanded by an American officer as deserters from their service, were instantly restored, notwithstanding they were confessedly Englishmen.—But W. Phillips, corporal of marines, John Mahoney, 37th regiment, and others, having deserted from the Chichester, and entered, with their uniforms on, into the American service, were positively refused to be given up to the British officers sent to demand them.

After a full and patient hearing of the evidence on both sides, the court withdrew for about half an hour; and, on its return, the Judge Advocate pronounced the sentence Death!

\* Application was then made to Lt. Sinclair, the American officer, at the Rendezvous; but without effect.

September 1.

The above sentence was carried into execution yesterday morning, at a quarter past nine o'clock, at the fore-yard-arm of his majesty's sloop of war Halifax—the ship he deserted from—He was one of the four deserters taken out of the American frigate Chesapeake.

NEW-YORK, September 13.

Arrived.

Yesterday, the ship Robert Burns, Wait, from Liverpool (mentioned in our last) informs, that the ship Mars, of New York, sailed August 2: John and Alice, for Philadelphia, do; Alexander Hamilton, for Savannah do; Hercules, and Abena, for Baltimore, do; Chatham, Wasser, for N. York, the 9th; Caroline & Ann, for Charleston, do. The ship Phoenix, Stanton, for New-York, in 3 days; Anna, Flowers, for do, in 8; Eliza, for do, in 5 days. August 23, lat. 30, long. 38, spoke ship Mary of Newburyport, 29 days from St. Petersburg, for Boston. 30th, lat. 44, long. 55, spoke ship Philadelphia; and the British brig Andromeda, 14 days from Wiscasset for Whitehaven.

The ship Factor, Riddle, 30 days from Greenock, with coal and dry goods. Some passengers. August 10 was boarded by a frigate's boat, and treated politely; same day, spoke the ship John Adams of Newport, for the island of May. 24th, spoke ship Nancy of Providence, 19 days from City Pt. for Liverpool. 30th, lat. 44, 58; long. 48, spoke brig S. lift, Mash, 42 days from Copenhagen for R. Island who informed that the British had got possession of the Danish fleet. Sept. 6, spoke a ship from G. tenburg, for Boston, and a schooner, 61 days from Lisbon, for Cape Ann. 10th, ship Elizabeth, 57 days from Amsterdam for Baltimore.

The ship Magnet, Burger, 55 days from Liverpool, coals, salt, crates and dry goods. Sept. 1, lat. 41, long. 62, spoke ship Brutus of New-Orleans, out 25 days for Europe—the day before, the Brutus spoke the ship Fanny, Galloway, from Liverpool for New-York, having lost here fore and mizen masts—supplied her with provisions. Sept. 9, lat. 40, 30, long. 65, spoke ship John and Alice, Taylor, 36 days from Liverpool for Phila; and the ship Frederick-Augusta, Potter, 33 days from Amsterdam for do. 10th spoke brig Nancy of Hartford, from New-London, for the West-Indies, with the loss of her masts and deck had returned. Aug. 11, lat. 42, long. 36, spoke ship Sheffield, 16 days from Norfolk for Rotterdam. Passenger, capt. Pigot.

The ship Devoti n. Noble, 64 days from St. Petersburg, hemp, iron, piecegoods and allow. Sailed from Elsinour in co. with ships Edward and Charles, for Philadelphia; Ulyses for Boston; Moranda for do; and from St. P. ship John, for Salem; brig Fame, for R. Island; Acorn, Folger, for Lisbon; Triton, Appleton, for New-York. Left, brig —, Hitchcock for New-York in 10 days; ship Messenger, arrived 2 days before from Philadelphia; ship —, Gardner, from do. 8 days before. July 31, off Fair Island, spoke ship Fanny Almira, Hicks, of New-York, 30 days from Baltimore for Newcastle.

The ship Rhoda and Betsey, Terry, 40 days from Liverpool, coal. August 4, in the Channel, spoke the brig Bedford, from Liverpool for New-York. August 29, spoke a ship from St. Croix for Denmark. Sept. 1, lat. 43, 15, spoke brig Concord, 39 days from Boston, and ship Nabby, Rider, of Wiscasset, 30 days from Liverpool for Norfolk—had spoken the brig Bedford the 26th for New-York—had lost some of her spars, but repaired the damage.

The ship Cincinnati, Matlock, 38 days from Liverpool, dry goods and coal. [Vessels left have been reported.] Off Cape Clear, spoke ship Alexander Hamilton, 3 days from Liverpool for Savannah. August 16, lat. 50, 9, long. 23, brig Prudence, for New-York. 30th, lat. 43, 42, long. 51, spoke ship Georgiana, 34 days from Amsterdam for Norfolk. Sept. 3, lat. 43, 3,

long. 58, 35, ship Fair Trader, 44 day from Tonningen for Philadelphia. 2d, lat. 42, 49, long. 58, 10, brig Cynthia, 42 days from Malaga for Salem. 6th, lat. 43, 12, long. 61, ship George, of Boston, 43 days from New-York for London. Same day, schr. Betsey, 48 days from Bilbao for Marblehead; having on board the passengers, of the ship Sheppard, captured on her passage from Lou-on to this port. 7th lat. — long. 60, 40, spoke ship President Adams, Wood, from Liverpool for Boston, that sailed in co.

The brig George, Doyle, in 38 days from New-Orleans, with logwood, cotton, lead &c. August 26, lat. 25, long. 80, 40, spoke schr. Dart, 25 days from Boston for the Bay of Honduras, had that day struck on the Florida shore, and unhung her rudder. 29th, lat. 23, 57, long. 78, 30, brig Susannah, Bissell, of New York, 4 days from Havana for Savannah. Sept. 8, lat. 33, 42, long. 33, 42, ship H-be, 36 hours from Philadelphia for Amsterdam. Passengers, Messrs. Linton, Wellman, Johnston, Buchan, M'Heron, and others.

The brig Prudence, of and from New-Orleans, and 14 days from Halifax, logwood, and dry goods.

The brig Bedford, Dunbar, 40 days from Liverpool, coal. August 23, passed the ship Nabby, of Portland, from Liverpool for Norfolk. 31st, lat. 43, 53, spoke ship Fair Trader, of Portland, 25 days from Tonningen, for Philadelphia, very leaky. Sept. 6, lat. 43, spoke schooner Woodbury, Smith, 60 days from Lisbon for Gloucester.

The schooner Hamilton, Pierce, 65 days from Cadiz, sherry wine. Left at Cadiz, July 12, the ship Globe, Flanders; brig Frances, Dunlevy, of and for Philadelphia, in 5 days; Eliza, Horton, for Boston; Potitudo, Boyd, of Wiscasset, for Ireland; Albatross, Arnold; Hope, Williams, of New-York, for Ireland; Harriot, Gardner, —; Jersey, Graham, of Philadelphia; Friendship, —, of Boston; and John Adams. July 12 off Cadiz, was boarded by the British frigate Baryalus, examined and treated politely.— August 3, spoke schooner Sally & Priscilla, Parker, out 23 days from Norfolk, bound to Tenerife. 15th, latitude 38 longitude 40, 80, schooner Delight, 16 days from Nantucket, bound to Bonavista. 17th, was boarded and examined by the English privateer Harmony, and treated with much civility—supplied her with some wine and lemon ons. 27th, ship Belle Savage, Jones, 50 days from Amsterdam. Sept. 2, spoke the brig Two-Brothers, of New-Bedford, 12 days from New York, bound to Antwerp. 6th, spoke the schr. Trial, Harding, out 64 days from Cadiz, bound to Boston, in a very distressed situation, having lost most of her sails in a gale of wind—vessel in a very leaky condition, and short of provisions, being on allowance—supplied her with some bread. 9th, spoke ship Frederick Augustus, of Newport, with a number of passengers on board. Same day, spoke the ship John and Alice, from Liverpool, bound to Philadelphia.

The English schr. Rebecca, Ferguson, 7 days from Halifax, fish.

The schr. Hunter, Sneed, from Richmond, and 7 days from Norfolk, with flour. September 5, off the Cape of Virginia, spoke the sloop Semiramis, Slocum, 7 days from Rhode-Island, for Charleston.

Cleared, ship Resolution, Baiker, Amsterdam; brig Mary, Norton, Jamaica; Charlotte, Jones, Bermuda and Turk's Island; schr's Betsy, Gifford, Antigua; Augustus, Johnson, Bahamas; Cornelia, Bain, Charleston; Huntress, Montgomery, Philadelphia; sloop General Hodgson, Newbold, Antigua.

The ship Protection, Bears, at Belfast, in 26 days from this port.

Log's List, August 8.

At Gravesend, America, Congdon, New-York; Gullford, Baltimore. At Plymouth, Minerva, Cleveland, Wilmington. At Bristol, Johns, Robertson, Wilmington. At Dover, Young Factor, Gault, New-York; Four Friends, Livingston, Charleston; Cornelia, Hathaway, from Holland, for St. Michaels.

Below at 12, ship Fanny, Galloway, 49 days from Liverpool, with the loss of two of her masts—schr Atlantic, from Curacao, 2 ships, a brig and several schooners.

The Pilot, a London paper of the 8th ult. after publishing the president's proclamation subjoins the following remarks: Notwithstanding the adverse sentiments which breathe throughout the above State-paper, both in respect to the late affair between the Leopard and the Chesapeake, and other transactions alluded to in that document, we are not wholly without hopes, that with a spirit of conciliation, the misunderstanding between the two governments may be removed. We are happy to see that the door of accommodation is not yet closed; but that the American government, which we learn from an article in the Washington Federalist, was about to send a schooner from Baltimore, with an extraordinary minister to this country, for the purpose of requiring explanation. Is there a sound understanding in the country, which in the present position of surrounding circumstances, can wish for an interruption of the peaceable relations between the two governments?"

LONDON, August 9.

We insert some extracts from the Am...