BURR's TRIAL.

OPINION OF THE COURT

On the motion to arrest the evidence, delivered August 31.—Continued

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 asist in case of resistance, it is the same as if the robbery had been that 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 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 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 inquiry 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 inquired 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, 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 Blannerhassett'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 that 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 United 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 the 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 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 Pittsburgh. That there was also an assemblage at different times 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 a competent number of witnesses, that he was at Couches fort armed, that he offered to reconoitre 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 assembly 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 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, 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 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 United States. 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 verdcit, 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 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 United States 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 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 this point 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 overrule. This would be the less justifiable if there should be a clear legal distinction indicated by the very terms in which the judge has expressed himself between the particular case to which alone he has applied the dictum, and other cases to which the court is required to extend it.

There is this clear legal distinction. "They may, says judge Hale, be indicted for counterfeiting generally. But if many conspire to levy war, and 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 that 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, and 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 the 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 238, 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 acquitted, 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 overruled. 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 the 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 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.

[*To be continued.*]

BY THIS DAY's MAILS.

BOSTON, Sept. 11.

Arrived, ship George Augustus, Jackson, 44 days from Liverpool, salt, iron & crates.

Brig Commerce, Robins, of Plymouth, 62 days from Lisbon, salt and fruit. Spoke August 10th, lat. 43, long. 47, ship Julia, 19 days from Norfolk, for Cork.

Ship Nancy, Hale, of Newburyport, 82 days from Cronstadt (Russia,) hemp, iron, duck, &c. Brig Robert, of Boston, was at Copenhagen 3d July, 47 days from Santa Croix, bound to Boston. Spoke, June 13th, 3 leagues W. of the island of Hogland, brig Industry, of New-York, from Nantz, for Petersburg; ship Mary, Holland, from Amsterdam for Petersburg—saw ship Hesper, Cushing, but not near enough to speak him. July 16th, lat. 60, long. 5, ship Eliza-Ann, Cox, 28 days from Petersburg for New-York. Aug. 7th, lat. 44, long. 35, ship Fair American, Marshal, 15 days from New-York. Aug. 23d, on the Grand Bank, ship, Augustus of Boston, 15 days from Norfolk, for London. Aug. 31st, lat. 42, long. 66, brig Shepherdess, Furber, 5 days from Boston, for Liverpool.

(Via quarantine) brig Rose, Rankid, of Kennebunk, 28 days from St. Vincents, rum, &c. Schr. Vulcan, Atkins, 25 days from Havana, sugar.

Arrived, ship Lucy, of Portland, capt. Curtis, 47 days from Liverpool, salt, crates, &c. Spoke, Aug. 26, lat. 41, 49, long. 59, brig Telegraph, Edes, 50 days from Amsterdam, for Boston. 31st, lat. 41, 21, long 59, brig President Jefferson, Barnard, 50 days from Cadiz for New-York, with her topmast gone.

Schr. Mary, Huxford, 8 days from Halifax, salmon and mackerel.

(Via quarantine) brig Rubicon, Thomas, 25 days from Havana, sugars, &c.

Arrived, (via quarantine) brig Return, Downing, of Kennebunk, 25 days from Tobago, rum. Left, brig Nancy, Hall, to sail in 5 or 6 days; brig Bellona, Patten, of Kennebunk, to sail in 10 days. Spoke Aug. 19th, brig Aurora, of New-York, 3 days from Trinidad. Aug. 20th, brig Merchant, Thompson, of Kennebunk, 4 days from Trinidad, for Kennebunk.

Quarantine list.

7th, ship Columbia, Carnes, 18 days from Havana. Brig Hazard, Donnel, 25 days from Antigua.

8th, brig Susan, Howard, 20 days from Havana.

9th, schr. Fortune, Foster, from Bay of Honduras.

Cleared brigs Creole, Newell, Isle of France; Evelina, Twycross, St. Croix; schrs. Industry, Collin, St. Johns, N. F.; Eleanor, Rider, Halifax; Commerce, Gardner, Jamaica; Maria, Windsor; Howland, Bay of Biscay; Regulator Hobbs, Newfoundland; Hoton Packet, Crane, Windsor.

NEW-YORK, September 14.

Arrived,

Ship Amiable, Rinker, 61 days from London, in ballast—4 days ago, spoke brig Hannah, from St. Croix, for Boston.—Next day, spoke a schooner from Havana for Boston. On Saturday, off Barnegat, sch'r Margaret, Ferguson, 7 days from Halifax for Philadelphia.

Ship Fanny, Galloway, 56 days from Liverpool, with dry goods, paints, crates and coal. Aug. 29, in lat. 41, 31, long. 63, 30 experienced a heavy gale at E. handed all the light sails and struck all the top-gallant mast; a heavy sea struck her forward, and carried away a part of her figure head—the gale increasing, at 8 A. M. was lying too, with nine streaks of the ship under water, and the sea making a fair breach over her; and in order to save the ship, cargo and lives, concluded to cut away the mizzenmast, and the maintopmast went with it; the gale still increasing, cut away the foremast, which eased her very much; several of her quarter boards were knocked away by the sea. At half past 9 A. M. the weather moderated, and all hands were employed in clearing the wreck, and securing the things on deck. The gale lasted 12 hours. (It is remarkable that a similar accident happened to this fine ship, on the same day, a