APPENDIX.

Note A to *Ex parte* Bollman, *ante*, p. 76.

Documents accompanying the President's message of January 22d, 1807.

WILKINSON'S FIRST AFFIDAVIT.

UNITED STATES *v.* BOLLMAN AND SWARTWOUT.

I, JAMES WILKINSON, brigadier-general and commander-in-chief of the army of the United States, to warrant the arrest of Doctor Erick Bollman, on a charge of treason, misprision of treason, or such other offence against the government and laws of the United States, as the following facts may legally charge him with, on my honor as a soldier, and on the Holy Evangelists of Almighty God, do declare and swear, that on the sixth day of November last, when in command at Natchitoches, I received by the hands of a Frenchman, a stranger to me, a letter from Doctor Erick Bollman, of which the following is a correct copy.

New Orleans, September 27, 1806.

"SIR: I have the honor to forward to your Excellency the inclosed letters, which I was charged to deliver to you by our mutual friend. I shall remain for some time at this place, and should be glad to learn where and when I may have the pleasure of an interview with you. Have the goodness to inform me of it, and please to direct your letter to me, care of ————————, or inclose it under cover to them. I have the honor to be, with great respect, sir, your excellency's most obedient servant,

(Signed) ERICK BOLLMAN."

"Gen. WILKINSON."

*Covering a communication in cipher from Colonel Aaron Burr, of which the following is substantially as fair an interpretation as I have heretofore been able to make, the original of which I hold in my possession: "I (Aaron Burr) have obtained funds, and have actually commenced the enterprise. Detachments from different points, and under different pretences, will rendezvous on the Ohio, 1st November. Everything, internal and external, favors views; protection of England is secured; T. (*a*) is gone to Jamaica, to arrange with the admiral on that station, and will meet at the Mississippi————England————navy of the United States are ready to join, and final orders are given to my friends and followers; it will be a host of choice spirits. Wilkinson shall be second to Burr only; Wilkinson shall dictate the rank and promotion of his officers. Burr will proceed westward, 1st August, never to return; with him go his daughter; the husband will follow in October, with a corps of worthies; [*456

(*a*) Truxton.

send forthwith an intelligent and confidential friend, with whom Burr may confer; he shall return immediately with further interesting details; this is essential to concert and harmony of movement; send a list of all persons known to Wilkinson, west of the mountains, who could be useful, with a note delineating their characters.

"By your messenger, send me four or five of the commissions of your officers, which you can borrow, under any pretence you please; they shall be returned faithfully; already are orders to the contractor given to forward six months' provisions to points Wilkinson may name; this shall not be used, until the last moment, and then under proper injunctions; the project is brought to the point so long desired; Burr guaranties the result with his life and honor, the lives, the honor, and fortunes of hundreds, the best blood of our country; Burr's plan of operations is to move down rapidly from the falls, on the fifteenth of November, with the first five hundred or one thousand men, in light boats, now constructing for that purpose; to be at Natchez between the fifth and fifteenth of December, then to meet Wilkinson; then to determine whether it will be expedient, in the first instance, to seize on, or pass by, Baton Rouge; on receipt of this, send Burr an answer; draw on Burr for all expenses, &c. The people of the country to which we are going, are prepared to receive us; their agents, now with Burr, say that if we will protect their religion, and will not subject them to a foreign power, that in three weeks all will be settled. The Gods invite to glory and fortune; it remains to be seen, whether we deserve the boon; the bearer of this goes express to you; he will hand a formal letter of introduction to you from Burr, a copy of which is hereunto subjoined; he is a man of inviolable honor and perfect discretion; formed to execute rather than to project; capable of relating facts with fidelity, and incapable of relating them otherwise; he is thoroughly informed of the plans and intentions of ————, and will disclose to you as far as you inquire, and no further; he has imbibed a reverence for your character, and may be embarrassed in your presence; put him at ease, and he will satisfy you; Doctor Bollman, equally confidential, better informed on the subject, and more intelligent, will hand this duplicate.

"29th July."

*457] *The day after my arrival at this city, the 26th of November last, I received another letter from the doctor, of which the following is a correct copy.

New Orleans, November 25, 1806.

"Sir: Your letter of the 16th inst. has been duly received; supposing that you will be much engaged this morning, I defer waiting on your Excellency till you will be pleased to inform me of the time when it will be convenient to you to see me. I remain, with great respect, your excellency's most obedient servant,

Erick Bollman."

"His Excellency Gen. Wilkinson, Fauxbourg Marigny, the house between Madame Trevigne and M. Macarty."

On the 30th of the same month, I waited in person on Doctor E. Bollman, when he informed me that he had not heard from Colonel Burr since his arrival here. That he (the said Doctor E. Bollman) had sent dispatches to Colonel Burr by a Lieutenant Spence, of the navy, and that he had been advised of Spence's arrival at Nashville, in the state of Tennessee, and observed that Colonel Burr had proceeded too far to retreat, that he (Colonel Burr) had numerous and powerful friends in the United States, who stood pledged to support him with their fortunes, and that he must succeed. That he (the said Doctor E. Bollman) had written to Colonel Burr on the subject of provisions, and that he expected a supply would be sent from New York, and also from Norfolk, where Colonel Burr had strong connections. I did not see or hear from the doctor again, until the 5th inst., when I called on him the second time. The mail having arrived the day before, I asked him whether he had received any intelligence from Colonel Burr; he informed me that he had seen a letter from Colonel Burr, of the 30th October, in which he (Colonel Burr) gave assurances that he should be at Natchez with 2000 men, on the 20th December, inst., where he should wait until he heard from

this place; that he would be followed by 4000 men more, and that he (Colonel Burr), if he had chosen, could have raised or got 12,000 as easily as 6000, but that he did not think that number necessary. Confiding fully in this information, I became indifferent about further disguise. I then told the doctor, that I should most certainly oppose Colonel Burr, if he came this way. He replied, that they must come here for equipments and shipping, and observed, that he did not know what had passed between Colonel Burr and myself, obliqued at a sham defence, and waived the subject.

From the documents in my possession, and the several communications, verbal as well as written, from the said Doctor Erick Bollman, on this subject, I feel no hesitation in declaring, under the solemn obligation of an oath, *that he has committed misprision of treason against the government of the United States. [*458

(Signed) JAMES WILKINSON.

Signed and sworn to, this 14th day of December 1806, before me, one of the justices of the peace of this county.

(Signed) J. CARRICK.

Philadelphia, July 25, 1806.

"DEAR SIR: Mr. Swartwout, the brother of Colonel S., of New York, being on his way down the Mississippi, and presuming that he may pass you at some post on the river, has requested of me a letter of introduction, which I give with pleasure, as he is a most amiable young man, and highly respectable from his character and connections. I pray you to afford him any friendly offices which his situation may require, and beg you to pardon the trouble which this may give you. With entire respect, your friend and obedient servant, A. BURR."

"His Excellency Gen. WILKINSON."

*Message from the President of the United States to the Senate and House of Representatives. [*459

I received from Gen. Wilkinson, on the 23d inst., his affidavit, charging Samuel Swartwout, Peter V. Ogden and James Alexander, with the crimes described in the affidavit, a copy of which is now communicated to both houses of congress.

It was announced to me, at the same time, that Swartwout and Bollman, two of the persons apprehended by him, were arrived in this city, in custody, each, of a military officer. I immediately delivered to the attorney of the United States, in this district, the evidence received against them, with instructions to lay the same before the judges, and apply for their process to bring the accused to justice, and I put into his hands orders to the officers having them in custody, to deliver them to the marshal on his application.

January 26, 1807. TH. JEFFERSON.

WILKINSON'S SECOND AFFIDAVIT.

I, JAMES WILKINSON, brigadier-general and commander-in-chief of the army of the United States, to warrant the arrest of Samuel Swartwout, James Alexander, Esq., and Peter V. Ogden, on a charge of treason, misprision of treason, or such other offence against the government and laws of the United States, as the following facts may legally charge them with, on *the honor of a soldier, and on the Holy Evangelists [*460 of Almighty God, do declare and swear, that in the beginning of the month of October last, when in command at Natchitoches, a stranger was introduced to me by Colonel Cushing, by the name of Swartwout, who a few minutes after the colonel retired from the room, slipt into my hand a letter of formal introduction from Colonel Burr, of which the following is a correct copy:

"Philadelphia, 25th July 1806.

"DEAR SIR: Mr. Swartwout, the brother of Colonel S., of New York, being on his way down the Mississippi, and presuming that he may pass you at some post on the river, has requested of me a letter of introduction, which I give with pleasure, as he is a most amiable young man, and highly respected from his character and connections. I pray you to afford him any friendly offices which his situation may require, and beg

you to pardon the trouble which this may give you. With entire respect, your friend and obedient servant,

(Signed) A. Burr."

"His Excellency General Wilkinson."

Together with a packet which he informed me he was charged by the same person, to deliver me in private, this packet contained a letter in cipher from Colonel Burr, of which the following is substantially as fair an interpretation as I have heretofore been able to make, the original of which I hold in my possession:

"I, Aaron Burr, have obtained funds and have actually commenced the enterprise. Detachments from different points and under different pretences, will rendezvous on the Ohio, 1st November. Everything, internal and external, favors views; protection of England is secured; T——— is going to Jamaica, to arrange with the admiral on that station; it will meet on the Mississippi——England——Navy of the United States are ready to join, and final orders are given to my friends and followers; it will be a host of choice spirits. Wilkinson shall be second to Burr only; Wilkinson shall dictate the rank and promotion of his officers. Burr will proceed westward, 1st August, never to return; with him go his daughter; the husband will follow in October, with a corps of worthies.

"Send forthwith an intelligent and confidential friend with whom Burr may confer; he shall return immediately with further interesting details; this is essential to concert and harmony of movement; send a list of all persons known to Wilkinson, west of the mountains, who may be useful, with a note delineating their characters. By your messenger, send me four or five of the commissions of your officers, which you can borrow under any pretence you please; they shall be returned faithfully. Already are orders to the contractor given to forward six months' provisions to points Wilkinson may name; this shall not be used until the last moment, and then under proper injunctions; the project is brought to the point so long desired; Burr guaranties
*461] *the result with his life and honor; with the lives, the honor and fortunes of hundreds, the best blood of our country. Burr's plan of operations is to move down rapidly from the falls, on the 15th November, with the first 500 or 1000 men, in light boats now constructing for that purpose, to be at Natchez between the 5th and 15th of December; there to meet Wilkinson; there to determine whether it will be expedient, in the first instance, to seize on, or pass by, Baton Rouge: on receipt of this, send an answer; draw on Burr for all expenses, &c. The people of the country to which we are going are prepared to receive us; their agents, now with Burr, say, that if we will protect their religion, and will not subject them to a foreign power, that in three weeks all will be settled. The Gods invite to glory and fortune; it remains to be seen, whether we deserve the boon; the bearer of this goes express to you; he will hand a formal letter of introduction to you from Burr; he is a man of inviolable honor and perfect discretion; formed to execute rather than to project; capable of relating facts with fidelity, and incapable of relating them otherwise; he is thoroughly informed of the plans and intentions of ————————, and will disclose to you as far as you inquire, and no further; he has imbibed a reverence for your character, and may be embarrassed in your presence; put him at ease and he will satisfy you.

"29th July."

I instantly resolved to avail myself of the reference made to the bearer, and in the course of some days drew from him (the said Swartwout) the following disclosure: "That he had been dispatched by Colonel Burr from Philadelphia, had passed through the states of Ohio and Kentucky, and proceeded from Louisville for St. Louis, where he expected to find me, but discovering, at Kaskaskias, that I had descended the river, he procured a skiff, hired hands, and followed me down the Mississippi to Fort Adams, and from thence set out for Natchitoches, in company with Captains Sparks and Hooke, under the pretence of a disposition to take part in the campaign against the Spaniards, then depending. That Colonel Burr, with the support of a powerful association, extending from New York to New Orleans, was levying an armed body of 7000 men

from the state of New York and the western states and territories, with a view to carry an expedition against the Mexican provinces, and that 500 men under Colonel Swartwout and a Colonel or Major Tyler, were to descend the Allegheny, for whose accommodation light boats had been built, and were ready." I inquired what would be their course; he said, "This territory would be revolutionized, where the people were ready to join them, and that there would be some seizing, he supposed, at New Orleans; that they expected to be ready to embark about the first of February, and intended to land at Vera Cruz, and to march from thence to Mexico." I observed, that there were several millions of dollars in the bank of this place; to which he replied, "We know it full well;" and on remarking, that they certainly did not mean to violate private property, he said, they "merely meant to borrow, and would return it; that they must equip themselves in New Orleans; that they expected naval protection from Great Britain; that the Capt. ———, and the officers of our navy, were so disgusted with the government, that they were ready to join; that similar disgusts prevailed throughout the western country, where the people were zealous in favor of the enterprise, and that pilot-boat built schooners were contracted for along our southern coast for their service; that he had been accompanied from the falls of Ohio to Kaskaskias, and from thence to Fort Adams, by a *Mr. Ogden, who had proceeded on to New Orleans with letters from Colonel Burr to his friends there." Swartwout asked me, [*462 whether I had heard from Doctor Bollman; and on my answering in the negative, he expressed great surprise, and observed, "That the doctor and a Mr. Alexander had left Philadelphia before him, with dispatches for me, and that they were to proceed by sea to New Orleans, where he said they must have arrived."

Though determined to deceive him, if possible, I could not refrain telling Mr. Swartwout, it was impossible that I could ever dishonor my commission; and I believe, I duped him, by my admiration of the plan, and by observing, "That although I could not join in the expedition, the engagements which the Spaniards had prepared for me in my front, might prevent my opposing it;" yet I did, the moment I had deciphered the letter, put it into the hands of Colonel Cushing, my adjutant and inspector, making the declaration that I should oppose the lawless enterprise with my utmost force, Mr. Swartwout informed me, he was under engagements to meet Colonel Burr at Nashville, the 20th of November, and requested of me to write him, which I declined; and on his leaving Natchitoches, about the 18th of October, I immediately employed Lieutenant T. A. Smith to convey the information, in substance, to the president, without the commitment of names; for, from the extraordinary nature of the project, and the more extraordinary appeal to me, I could not but doubt its reality, notwithstanding the testimony before me, and I did not attach solid belief to Mr. Swartwout's reports respecting their intentions on this territory and city, until I received confirmatory advice from St. Louis.

After my return from the Sabine, I crossed the country to Natchez, and on my descent of the Mississippi from that place, I found Swartwout and Peter V. Ogden, at Fort Adams; with the latter I held no communication, but was informed by Swartwout, that he (Ogden) had returned so far from New Orleans, on his route to Tennessee, but had been so much alarmed by certain reports in circulation that he was afraid to proceed. I inquired, whether he bore letters with him from New Orleans, and was informed by Swartwout that he did not, but that a Mr. Spence had been sent from New Orleans through the country to Nashville, with letters for Colonel Burr.

I reached this city the 25th ultimo, and on the next morning, James Alexander, Esq., visited me: he inquired of me aside, whether I had seen Doctor Bollman, and on my answering in the negative, he asked me, whether I would suffer him to conduct Bollman to me, which I refused. He appeared desirous to communicate something, but I felt no inclination to inculpate this young man, and he left me. A few days after, he paid me a second visit, and seemed desirous to communicate, which I avoided, until he had risen to take leave; I then raised my finger, and observed, "Take care, you are playing a dangerous game." He answered, "It will succeed." I again observed, "Take care;" and he replied with a strong affirmation, "Burr will be here

by the beginning of next month." In addition to these corroborating circumstances against Alexander, I beg leave to refer to the accompanying documents, A. B. From all which, I feel no hesitation in declaring, under the solemn obligation of an oath, that I do believe the said Swartwout, Alexander and Ogden, have been parties to, and have been concerned in, the insurrection* formed, or forming, in the states and territories on the Ohio and Mississippi rivers, against the laws and constitution of the United States.

*463]

(Signed) JAMES WILKINSON.

Sworn to, and subscribed before me, this 26th day of December, in the year of our Lord, 1806.

(Signed) GEORGE POLLOCK,
Justice of the Peace, for the County of Orleans.

The following are the Depositions made in open court, and alluded to in the foregoing statement:

THE DEPOSITION OF WILLIAM EATON, ESQ.

Early last winter, Col. Aaron Burr, late Vice-President of the United States, signified to me, at this place, that, under the authority of the general government, he was organizing a secret expedition against the Spanish provinces on our south-western borders, which expedition he was to lead, and in which he was authorized to invite me to take the command of a division. I had never before been made personally acquainted with Col. Burr; and, having for many years been employed in foreign service, I knew but little about the estimation this gentleman now held in the opinion of his countrymen and his government; the rank and confidence by which he had so lately been distinguished, left me no right to suspect his patriotism. I knew him a soldier. In case of a war with the Spanish nation, which, from the tenor of the president's message to both houses of congress, seemed probable, I should have thought it my duty to obey so honorable a call of my country; and, under that impression, I did engage to embark in the expedition. I had frequent interviews with Col. Burr, in this city, and, for a considerable time, his object seemed to be to instruct me by maps, and other information, the feasibility of penetrating to Mexico; always carrying forward the idea that the measure was authorized by government. At length, some time in February, he began, by degrees, to unveil himself. He reproached the government with want of character, want of gratitude, and want of justice. He seemed desirous of irritating resentment in my breast, by dilating on certain injuries he felt I had suffered from reflections made on the floor of the house of representatives, concerning my operations in Barbary, and from the delays of government in adjusting my claims for disbursements on that coast, during my consular agency at Tunis; and he said he would point me to an honorable mode of indemnity. I now began to *entertain a suspicion, that Mr. Burr was projecting an unauthorized military expedition, which, to me, was enveloped in mystery; and, desirous to draw an explanation from him, I suffered him to suppose me resigned to his counsel. He now laid open his project of revolutionizing the western country; separating it from the Union; establishing a monarchy there, of which he was to be the sovereign, and New Orleans to be his capital; organizing a force on the waters of the Mississippi, and extending conquest to Mexico. I suggested a number of impediments to his scheme; such as the republican habits of the citizens of that country, and their affection towards our present administration of government; the want of funds; the resistance he would meet from the regular army of the United States on those frontiers; and the opposition of Miranda, in case he should succeed to republicanize the Mexicans.

*464]

Mr. Burr found no difficulty in removing these obstacles; he said, he had, the preceding season, made a tour through that country, and had secured the attachment of the principal citizens of Kentucky, Tennessee and Louisiana to his person and his measures; declared he had inexhaustible resources to funds; assured me the regular army would act with him, and would be reinforced by ten or twelve thousand men

from the above-mentioned states and territory, and from other parts of the Union; said he had powerful agents in the Spanish territory; and, as for Miranda, said Mr. Burr, we must hang Miranda. He now proposed to give me the second command in his army. I asked him, who should have the chief command? He said, General Wilkinson. I observed, it was singular that he should count on General Wilkinson; the elevated rank and high trust he now held as commander-in-chief of our army, and governor of a province, he would hardly put at hazard for any precarious prospects of aggrandizement. Mr. Burr said, General Wilkinson, balanced in the confidence of government, was doubtful of retaining much longer the consideration he now enjoyed, and was, consequently, prepared to secure to himself a permanency. I asked Mr. Burr, if he knew General Wilkinson? He answered yes, and echoed the question. I said, I knew him well. "What do you know of him?" said Mr. Burr. I know, I replied, that General Wilkinson will act as lieutenant to no man in existence. "You are in an error," said Mr. Burr, "Wilkinson will act as lieutenant to me." From the tenor of repeated conversations with Mr. Burr, I was induced to believe the plan of separating the Union, which he had contemplated, had been communicated to, and approved of by General Wilkinson (though I now suspect it an artful argument of seduction), and he often expressed a full confidence that the general's influence, the offer of double pay and double rations, the prospect of plunder, and the ambition of achievement would draw the army into his measures. Mr. Burr talked of the establishment of an independent government, west of the Allegheny, as a matter of inherent constitutional right of the people, a change which would eventually take place, and for the operation of which the present crisis was peculiarly favorable. There was, said he, no energy in the government to be dreaded, and the divisions of political opinions throughout the Union was a circumstance of which we should profit. There were very many enterprising men among us, who aspired to something beyond the dull pursuits of civil life, and who would volunteer in this enterprise, and the vast territory belonging to the United States, which offered to adventurers, and the mines of Mexico, would bring strength to his standard from all quarters. I listened to the exposition of Colonel Burr's views, with seeming acquiescence. *Every interview convinced me, more [*465
and more, that he had organized a deep laid plot of treason in the west, in the accomplishment of which he felt fully confident; till, at length, I discovered that his ambition was not bounded by the waters of the Mississippi and Mexico, but that he meditated overthrowing the present government of our country. He said, if he could gain over the marine corps, and secure the naval commanders, Truxton, Preble, Decatur and others, he would turn congress neck and heels out of doors, assassinate the president, seize on the treasury and the navy, and declare himself the protector of an energetic government. The honorable trust of corrupting the marine corps, and of sounding Commodore Preble and Captain Decatur, Colonel Burr proposed confiding to me. Shocked at this proposition, I dropped the mask, and exclaimed against his views. He talked of the degraded situation of our country, and the necessity of a blow, by which its energy and its dignity should be restored; said, if that blow could be struck here, at this time, he was confident of the support of the best blood of America. I told Colonel Burr, he deceived himself, in presuming that he, or any other man, could excite a party in this country who would countenance him in such a plot of desperation, murder and treason. He replied, that he, perhaps, knew better the dispositions of the influential citizens of this country than I did. I told him, one solitary word would destroy him. He asked, what word? I answered, *Usurper!* He smiled at my hesitation, and quoted some great examples in his favor. I observed to him, that I had lately travelled from one extreme of the Union to the other; and though I found a diversity of political opinion among the people, they appeared united at the most distant aspect of national danger. That, for the section of the Union to which I belonged, I would vouch, that should he succeed in the first instance here, he would within six weeks afterwards have his throat cut by Yankee militia.

Though wild and extravagant Mr. Burr's last project, and though fraught with premeditated slaughter, I felt very easy on the subject, because its defeat he had deposited

in my own hands. I did not feel so secure concerning that of disjointing the Union. But the very interesting and embarrassing situation in which his communications placed me, left me, I confess, at a stand to know how to conduct myself with propriety. He had committed no overt act of aggression against law. I could draw nothing from him in writing, nor could I learn that he had exposed his plans to any person near me, by whom my testimony could be supported. He had mentioned to me no persons who were principally and decidedly engaged with him, except General Wilkinson, a Mr. Alston, who I found was his son-in-law, and a Mr. Ephraim Kibby, late a captain of rangers in General Wayne's army. Satisfied that Mr. Burr was resolute in pushing his project of rebellion in the west of the Allegheny, and apprehensive that it was too well and too extensively organized to be easily suppressed; though I dreaded the weight of his character, when laid in the balance against my solitary assertion, I brought myself to the resolution to endeavor to defeat it, by getting him removed from among us, or to expose myself to all consequences by a disclosure of his intentions. Accordingly, I waited on the President of the United States; and after some desultory conversation, in which I aimed to draw his view to the westward, I used the freedom to say to the President, I thought Mr. Burr should be sent out of this country, and gave for reason that I believed him dangerous in it. The President asked, where he should be sent? *466] I mentioned London and Cadiz. The President thought the *trust too important, and seemed to entertain a doubt of Mr. Burr's integrity. I intimated that no one, perhaps, had stronger grounds to mistrust Mr. Burr's moral integrity than myself; yet, I believed, ambition so much predominated over him, that when placed on an eminence, and put on his honor, respect to himself would insure his fidelity; his talents were unquestionable. I perceived the subject was disagreeable to the President; and to give it the shortest course to the point, declared my concern, that if Mr. Burr were not in some way disposed of, we should, within eighteen months, have an insurrection, if not a revolution, on the waters of the Mississippi. The President answered, that he had too much confidence in the information, the integrity, and the attachment to the Union, of the citizens of that country, to admit an apprehension of the kind. I am happy that events prove this confidence well placed. As no interrogatories followed my expression of alarm, I thought silence on the subject, at that time and place, became me. But I detailed, about the same time, the whole projects of Mr. Burr to certain members of congress. They believed Colonel Burr capable of anything, and agreed that the fellow ought to be hanged; but thought his projects too chimerical, and his circumstances too desperate, to give the subject the merit of serious consideration. The total security of feeling in those to whom I had rung the tocsin, induced me to suspect my own apprehensions unseasonable, or at least too deeply admitted; and, of course, I grew indifferent about the subject.

Mr. Burr's visits to me became less frequent, and his conversation less familiar He appeared to have abandoned the idea of a general revolution, but seemed determined on that of the Mississippi; and although I could perceive symptoms of distrust in him towards me, he manifested great solicitude to engage me with him in the enterprise. Weary of his importunity, and at once to convince him of my serious attachments, I gave the following toast to the public: The United States—Palsy to the brain that should plot to dismember, and leprosy to the hand, that will not draw to defend, our Union.

I doubt whether the sentiment was better understood by any of my acquaintance than Colonel Burr. Our intercourse ended here; we met but seldom afterwards. I returned to my farm in Massachusetts, and thought no more of Mr. Burr, nor his empire, till some time late in September or beginning of October, when a letter from Morris Belknap, of Marietta, to Timothy E. Danielson, fell into my hands, at Brimfield, which satisfied me that Mr. Burr had actually commenced his preparatory operations on the Ohio. I now spoke publicly of the fact; transmitted a copy of the letter from Belknap to the department of state, and about the same time, forwarded, through the hands of the postmaster-general, to the President of the United States, a statement in substance of what is here above detailed concerning the Mississippi conspiracy of the

said Colonel Aaron Burr, which is said to have been the first formal intelligence received by the executive on the subject of the conspirator being in motion.

I know not whether my country will allow me the merit of correctness of conduct in this affair. The novelty of the duty might, perhaps, have embarrassed stronger minds than mine. The uprightness of my intentions, I hope, will not be questioned.

*The interviews between Colonel Burr and myself, from which the foregoing statement has resulted, were chiefly in this city, in the months of February and March, last year. [*467

WILLIAM EATON.

Washington City, Jan. 26, 1807.

Sworn to, in open court, this 26th day of January 1807.

WILLIAM BRENT, Clerk.

DEPOSITION OF JAMES L. DONALDSON.

In open court, personally appears James Lowry Donaldson, who, being duly sworn, deposeth and saith, that he was in the city of New Orleans, in the Orleans territory, and the environs of said city, from the 15th day of October to the 10th day of December 1806; that during the latter part of this time, he was frequently in the company of General James Wilkinson, and visited the general the day after his arrival at New Orleans. On this occasion, this deponent received in confidence from General Wilkinson information to the following purport: that the general had undoubted and indisputable evidence of a treasonable design formed by Aaron Burr and others to dismember the Union, by a separation of the western states and territories from the Atlantic states; that New Orleans was in immediate danger, and that he had concluded a hasty compromise with the Spaniards, so as to be able to withdraw his troops instantly to this the immediate object of attack and great vulnerable point; that he had received a letter from Burr, holding forth great inducements to him to become a party, of which he showed me the original in cipher, and another written paper purporting to be a deciphered copy of the letter. He expressed great indignation at the plot, and surprise that one so well acquainted with him as Burr, should dare to make to him so degrading a proposal, and declared his determination of defeating the enterprise, or perishing in the attempt. He observed, in addition, that there were many agents of Mr. Burr then in the town, who had already been assiduous in their visits, and towards whom he was determined to act with cautious ambiguity, so as, at the same time, to become possessed of the whole extent of the plan, the persons engaged, and the time of its execution, and also to prevent any attempt on his person, of which he declared he had serious apprehensions. Of the number of these agents he was not aware, but mentioned the names of two of whom he was certain, Messrs. Bollman and Alexander. From time to time, as this deponent had interviews with General Wilkinson, he informed this deponent, that he had received additional information respecting the movements and designs of Burr, by means of these agents, of whom he considered Bollman as the principal. In the *course of these transactions, this deponent was employed by General Wilkinson in the copying of certain papers and documents, and preparing certain dispatches for the general government, which the general intended to forward by the brig Thetis. While thus employed at the general's lodgings, this deponent has remarked, upon two different occasions, a person knock for admittance at a door with a window in it, opposite the table where this deponent was sitting, who, this deponent was informed by General Wilkinson, was Doctor Bollman. Upon these occasions, the general has suddenly risen from his seat, and accompanied this person in a number of turns up and down a balcony in the front of the house, apparently engaged in deep conversation. Upon the latter of these occasions, the general, on his return into the chamber, said to this deponent, "That is Doctor Bollman; his infatuation is truly extraordinary; he persists in his belief that I am with Burr, and has this moment shown me a letter from the latter, in which he says that he is to be at Natchez on the 20th December with 2000 men, that 4000 will follow in the course of a few days, and that he could, with the same ease, have procured double that [*468

number." General Wilkinson then observed, that he had obtained all the information he wanted, and that the affair would not be kept much longer a secret from the public.

When this deponent left the city of New Orleans, the inhabitants of that city were in a state of great alarm, and apprehended a serious attack from Mr. Burr and his confederates; this deponent understood that mercantile business was much embarrassed, and great fears were entertained of considerable commercial failures, in consequence of the embargo which had been imposed; that General Wilkinson was taking strong measures of defence, and that 400 persons were then actually engaged in the fortifications of the city. And further this deponent saith not.

Sworn to, in open court, JAMES L. DONALDSON.
January 26, 1807.
WILLIAM BRENT, Clerk.

DEPOSITION OF LIEUTENANT W. WILSON.

I left New Orleans on my way to this city, on the 15th of December last; at that time, and for some time preceding, the strongest apprehensions and belief universally prevailed among the inhabitants of that city, that Aaron Burr and his confederates had
*469] prepared an armed force, and were advancing *to attack and plunder the city; in consequence of which, the greatest alarms prevailed, a general stagnation of business ensued, and the danger was credited there as a matter of public notoriety; that Brigadier General Wilkinson, with the army of the United States, was at New Orleans, occupied in the most active military preparations for the defence of the place; repairing the forts, mounting cannon, collecting ammunition, &c. All under the firm persuasion and belief, that such an attack was meditated, and about very speedily to take place, by the said Burr; this deponent knows that the general was decidedly of opinion, from the most satisfactory information, that the said Burr and his confederates were advancing with an armed force against this place. And further this deponent saith not.

(Signed) WILLIAM WILSON.

Sworn to, in open court, this 27th day of January, 1807.
WILLIAM BRENT, Clerk.

The deposition of Ensign W. C. Mead is precisely similar to that of Lieut. Wilson, except that the former states that he left New Orleans, on the 19th of December.

*Note B. to *Ex parte* Bollman, *ante*, page 125.

Opinion on the Motion to introduce certain evidence in the trial of Aaron Burr for Treason, pronounced, Monday August 31st, 1807.[1]

United States *v.* Aaron Burr.

To levy war, is to raise, create, make or carry on war.

If an army be actually raised, for the avowed purpose of carrying on open war against the United States, and subverting their government, a commissary of purchases, who never saw the army, but who, knowing its object, and leaguing himself with the rebels, supplies that army with provisions, is guilty of an *overt* act of levying war.

So is a recruiting officer, who, though never in camp, executes the particular duty assigned to him.

The term "levying war," is used in the constitution of the United States, in the same sense in which it was understood, in England and in this country, to have been used in the statute of 25 Edw. III., from which it was borrowed.

All those who perform the various and essential military parts of prosecuting the war, which must be assigned to different persons, may be said to levy war. p. 473.

Those who perform a part in the prosecution of the war, may be correctly said to levy war?

But *quære?* Whether he who counsels and advises, but performs no act in prosecuting the war; or he who, being engaged in the conspiracy, fails to perform the part, can be said to levy war.

If the war be actually levied, if the accused has performed a part, but is not leagued in the conspiracy, and has not appeared in arms against his country, he is not a traitor. p. 475.

Constructive treason is, where the direct and avowed object is not the destruction of the sovereign power. p. 476–9.

Where a body of men are assembled for the purpose of making war against the government, and are in a condition to make that war, the assemblage is an act of levying war. p. 476.

The assemblage of men, which will constitute levying war, must be a "warlike assemblage" carrying the appearance of force, and in a situation to practice hostility. p. 480.

An assemblage of men, with a treasonable design, but not in force, nor in a condition to attempt the design, nor attended with warlike appearances, does not constitute the fact of levying war. p. 482.

To assemble an army of 7000 men is to place those who are assembled in a state of force. p. 484.

The travelling of several individuals to the place of rendezvous, either separately or together, but not in military form, would not constitute levying war. The act must be unequivocal, and have a warlike appearance. p. 485.

War can only be levied by the employment of actual force. Troops must be embodied; men must be openly assembled. p. 487.

Arms are not an indispensable requisite in levying war; nor the actual application of force to the object. p. 488.

It is not sufficient, that an indictment for treason allege, generally, that the accused had levied was against the United States. The charge must be more particularly specified, by laying an *overt* act of levying war, and this *overt* act must be proved as laid. p. 490.

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.

Every one concerned in a treasonable conspiracy, is not constructively present at every *overt* act of the treason, committed by others, not in his presence.

A man may be legally absent, who has counselled or procured the treasonable act. p. 491.

The prisoner can only be convicted upon the *overt* act laid in the indictment. If other *overt* acts can be inquired into, it is for the sole purpose of proving the particular fact charged. p. 493.

A person cannot be constructively present at an *overt* act of treason, unless he be aiding and abetting at the fact, or ready to afford assistance, if necessary. p. 493–4.

If the particular *overt* act of treason charged be advised, procured or commanded by the accused, he is guilty accessorily and not directly as principal. p. 494.

A person in one part of the United States cannot be considered as constructively present at an *overt* act committed in a remote part of the United States.

---

[1] 2 Burr's Trial, 401.

The presence of a party, where presence is necessary to his guilt, as part of the *overt* act, must be proved by two witnesses. p. 499.

An indictment charging a person with being present at an *overt* act of treason, cannot be supported by proving only that the person accused caused the act to be done by others, in his absence. No presumptive evidence, no facts from which presence can be inferred, will satisfy the constitution and the law.

The part which a person takes in the war, constitutes the *overt* act, on which alone he can be convicted. p. 501.

Quære? Whether he who procures an act, may be indicted as having performed that act? p. 502.

If proof of procurement be admissible, in England, to establish a charge of actual presence, on an indictment for levying war, it is only by virtue of the operation of the common law upon the statute of Edward III.

Quære? Whether there be, in this country, a similar operation of the common law?

If proof of procurement be admissible, upon a charge of presence, such procurement must be proved in the same manner, and by the same kind of testimony, as would be required to prove actual presence.

The conviction of some one who has committed the treason must precede the trial of him who has advised or procured it; and the right of the prisoner to call for the record of conviction is not waived, by pleading to the indictment. p. 504.

Quære? Whether the crime of advising or procuring a levy of war, be within the constitutional definition of treason?

If the *overt* act be not proved by two witnesses, so as to be submitted to the jury, all other testimony is irrelevant. p. 505–6.

Levying way is an act compounded of law and fact, of which the jury, aided by the court, must judge. p. 506.

Appearing at the head of an army, would be an *overt* act of levying war. So also, detaching a military corps from it, for military purposes.

Marshall, Ch. J.—The question now to be decided has been argued in a manner worthy of its importance, and with an earnestness evincing the strong conviction felt by the counsel on each side, that the law is with them. A degree of eloquence seldom displayed on any occasion, has embellished a solidity of argument, and a depth of research, by which the court has been greatly aided in forming the opinion it is about to deliver.

The testimony adduced on the part of the United States, to prove the *overt* act laid in the indictment, having shown, and the attorney for the United States having admitted, that the prisoner was not present when the act, whatever may be its character, was committed, and there being no reason to doubt, but that he was at a great distance and in a different state, it is objected to the testimony offered on the part of the United States to connect him with those who committed the *overt* act, that such testimony is totally irrelevant, and must, therefore, be rejected. The arguments in support of this motion respect, in part, the merits of the case, as it may be supposed to stand independent of the pleadings, and in part, as exhibited by the pleadings.

On the first division of the subject, two points are made. 1st. That conformable to the constitution of the United States, no man can be convicted of treason, who was not present when the war was levied. 2d. That if this construction be erroneous, no testimony can be received, to charge one man with the *overt* acts of others, until those *overt* acts, as laid in the indictment, be proved to the satisfaction of the court.

*471] *The question which arises on the construction of the constitution, in every point of view in which it can be contemplated, is of infinite moment to the people of this country and to their government, and requires the most temperate and the most deliberate consideration.

"Treason against the United States shall consist only in levying war against them." What is the natural import of the words "levying war?" And who may be said to levy it? Had their first application to treason been made by our constitution, they would certainly have admitted of some latitude of construction. Taken most literally, they are, perhaps, of the same import with the words raising or creating war, but as those who join, after the commencement, are equally the object of punishment, there

would probably be a general admission, that the term also comprehended making war, or carrying on war. In the construction which courts would be required to give these words, it is not improbable, that those who should raise, create, make or carry on war, might be comprehended. The various acts which would be considered as coming within the term, would be settled by a course of decisions, and it would be affirming boldly, to say, that those only who actually constituted a portion of the military force appearing in arms could be considered as levying war. There is no difficulty in affirming, that there must be a war, or the crime of levying it, cannot exist; but there would often be considerable difficulty in affirming, that a particular act did or did not involve the person committing it in the guilt, and in the fact of levying war. If, for example, an army should be actually raised, for the avowed purpose of carrying on open war against the United States and subverting their government, the point must be weighed very deliberately, before a judge would venture to decide, that an *overt* act of levying war had not been committed by a commissary of purchases, who never saw the army, but who, knowing its object, and leaguing himself with the rebels, supplied that army with provisions, or by a recruiting officer holding a commission in the rebel service, who, though never in camp, executed the particular duty assigned to him.

But the term is not, for the first time, applied to treason, by the constitution of the United States. It is a technical term. It is used in a very old statute of that country, whose language is our language, and whose laws form the *substratum* of our laws. It is scarcely conceivable, that the term was not employed by the framers of our constitution, in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly, terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is, therefore, reasonable to suppose, unless it be incompatible with other expressions of the constitution, that the term "levying war," is used in that instrument, in the same sense in which it was understood in England, and in this country, to have been used in the statute of the 25th of Edw. III., from which it was borrowed.

It is said, that this meaning is to be collected only from adjudged cases. But this position cannot be conceded, to the extent in which it is laid down. The *superior authority of adjudged cases will never be controverted; but those celebrated [*472
elementary writers who have stated the principles of the law, whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster and Blackstone, are not lightly to be rejected. These books are in the hands of every student. Legal opinions are formed upon them, and those opinions are afterwards carried to the bar, the bench and the legislature. In the exposition of terms, therefore, used in instruments of the present day, the definitions and the *dicta* of those authors, if not contradicted by adjudications, and if compatible with the words of the statute, are entitled to respect. It is to be regretted, that they do not shed as much light on this part of the subject as is to be wished.

Coke does not give a complete definition of the term, but puts cases which amount to levying war. "An actual rebellion or insurrection," he says, "is a levying of war." In whom? Coke does not say whether in those only who appear in arms, or in all those who take part in the rebellion or insurrection by real open deed.

Hale, in treating on the same subject, puts many cases which shall constitute a levying of war, without which no act can amount to treason, but he does not particularize the parts to be performed by the different persons concerned in that war, which shall be sufficicient to fix on each the guilt of levying it.

Foster says, "The joining with rebels in an act of rebellion, or with enemies in acts of hostility, will make a man a traitor." "Furnishing rebels or enemies with money, arms, ammunition, or other necessaries, will *primâ facie* make a man a traitor." Foster does not say, that he would be a traitor under the words of the statute, independent of the legal rule which attaches the guilt of the principal to an accessory, nor that his treason is occasioned by that rule. In England, this discrimination need not be made, except for the purpose of framing the indictment, and therefore, in the

English books, we do not perceive any effort to make it. Thus, surrendering a castle to rebels, being in confederacy with them, is said, by HALE and FOSTER, to be treason under the clause of levying war; but whether it be levying war in fact, or aiding those who levy it, is not said. Upon this point BLACKSTONE is not more satisfactory. Although we may find among the commentators upon treason enough to satisfy the inquiry, what is a state of internal war, yet no precise information can be acquired from them, which would enable us to decide, with clearness, whether persons not in arms, but taking part in a rebellion, could be said to levy war, independent of that doctrine which attaches to the accessory the guilt of his principal.

If, in adjudged cases, this question has been taken up and directly decided, the court has not seen those cases. The arguments which may be drawn from the form of the indictment, though strong, are not conclusive. In the precedent found in Tremaine, Mary Speake, who was indicted for furnishing provisions to the party of the Duke of Monmouth, is indicted for furnishing provisions to those who were levying war, not for levying war herself. It may correctly be argued, that had this act amounted to levying war, *she would have been indicted for levying war, and the furnishing of provisions would have been laid as the *overt* act. The court felt this, when the precedent was produced. But the argument, though strong, is not conclusive, because, in England, the inquiry whether she had become a traitor, by levying war, or by giving aid and comfort to those who were levying war, was unimportant, and because, too, it does not appear from the indictment, that she was actually concerned in the rebellion, that she belonged to the rebel party, or was guilty of anything further than a criminal speculation in selling them provisions.

*473]

It is not deemed necessary to trace the doctrine, that in treason all are principals, to its source. Its origin is most probably stated correctly by Judge TUCKER, in a work, the merit of which is with pleasure acknowledged. But if a spurious doctrine has been introduced into the common law, and has for centuries been admitted as genuine, it would require great hardihood in a judge to reject it. Accordingly, we find those of the English jurists, who seem to disapprove the principle, declaring that it is now too firmly settled to be shaken.

It is unnecessary to trace this doctrine to its source, for another reason. The terms of the constitution comprise no question respecting principal and accessory, so far as either may be truly and in fact said to levy war. Whether, in England, a person would be indicted, in express terms, for levying war, or for assisting others in levying war, yet if, in correct and legal language, he can be said to have levied war, and if it has never been decided, that the act would not amount to levying war, his case may, without violent construction, be brought within the letter and the plain meaning of the constitution.

In examining these words, the argument which may be drawn from felonies, as, for example, from murder, is not more conclusive. Murder is the single act of killing, with malice aforethought. But war is a complex operation, composed of many parts, co-operating with each other. No one man, or body of men, can perform them all, if the war be of any continuance. Although, then, in correct and in law language, he alone is said to have murdered another, who has perpetrated the fact of killing, or has been present, aiding that fact, it does not follow, that he alone can have levied war, who has borne arms. All those who perform the various and essential military parts of prosecuting the war, which must be assigned to different persons, may, with correctness and accuracy, be said to levy war.

Taking this view of the subject, it appears to the court, that those who perform a part in the prosecution of the war may correctly be said to levy war, and to commit treason, under the constitution. It will be observed, that this opinion does not extend to the case of a person who performs no act in the prosecution of the war, who counsels and advises it, or who, being engaged in the conspiracy, fails to perform his part. Whether such persons may be implicated by the doctrine, that whatever would make a man an accessory in felony, makes him a principal in treason, or are excluded, because that doctrine is inapplicable to the United States, the constitution having declared that

treason shall consist only in levying war, and having made the proof of *overt* acts necessary to conviction, is a question of vast importance, which it would be proper for the supreme court to take a fit occasion to decide, *but which an inferior tribunal would not willingly determine, unless the case before them should require it. [*474

It may now be proper to notice the opinion of the supreme court in the case of *United States* v. *Bollman and Swartwout.* It is said, that this opinion, in declaring that those who do not bear arms, may yet be guilty of treason, is contrary to law, and is not obligatory, because it is extra-judicial, and was delivered on a point not argued. This court is, therefore, required to depart from the principle there laid down. It is true, that in that case, after forming the opinion, that no treason could be committed, because no treasonable assemblage had taken place, the court might have dispensed with proceeding further in the doctrines of treason. But it is to be remembered, that the judges might act separately, and perhaps, at the same time, on the various prosecutions which might be instituted, and that no appeal lay from their decisions. Opposite judgments on the point would have presented a state of things infinitely to be deplored by all. It was not surprising, then, that they should have made some attempt to settle principles which would probably occur, and which were, in some degree, connected with the point before them. The court had employed some reasoning to show, that without the actual embodying of men, war could not be levied. It might have been inferred from this, that those only who were so embodied could be guilty of treason. Not only to exclude this inference, but also to affirm the contrary, the court proceeded to observe, "It is not the intention of the court, to say, that no individual can be guilty of this crime, who has not appeared in arms against his country. On the contrary, 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 court is told, that if this opinion be incorrect, it ought not to be obeyed, because it was extra-judicial. For myself, I can say, that I could not lightly be prevailed on to disobey it, were I even convinced that it was erroneous, but I would certainly use any means which the law placed in my power to carry the question again before the supreme court, for reconsideration, in a case in which it would directly occur and be fully argued. The court which gave this opinion was composed of four judges. At the time, I thought them unanimous, but I have since had reason to suspect, that one of them, whose opinion is entitled to great respect, and whose indisposition prevented his entering into the discussions, on some of those points which were not essential to the decision of the very case under consideration, did not concur in this particular point with his brethren. Had the opinion been unanimous, it would have been given by a majority of the judges. But should the three who were absent, concur with that judge who was present, and who, perhaps, dissents from what was then the opinion of the court, a majority of the judges may overrule this decision. I should, therefore, feel no objection, although I then thought, and still think, the opinion perfectly correct, *to carry the point, if possible, again before the supreme court, if the case should depend upon it. [*475

In saying that I still think the opinion perfectly correct, I do not consider myself as going further than the preceding reasoning goes. Some gentlemen have argued, as if the supreme court had adopted the whole doctrine of the English books on the subject of accessories to treason. But certainly such is not the fact: those only who perform a part, and who are leagued in the conspiracy, are declared to be traitors. To complete the definition, both circumstances must concur. They must "perform a part," which will furnish the *overt* act, and they must be "leagued in the conspiracy." The person who comes within this description, in the opinion of the court, levies war. The present motion, however, does not rest upon this point; for, if, under this indictment, the United States might be let in to prove the part performed by the prisoner, if he did perform any part, the court could not stop the testimony in its present stage.

2. The second point involves the character of the *overt* act which has been given in evidence, and calls upon the court to declare, whether that act can amount to levying war. Although the court ought now to avoid any analysis of the testimony which has been offered in this case, provided the decision of the motion should not rest upon it, yet many reasons concur in giving peculiar propriety to a delivery, in the course of these trials, of a detailed opinion on the question, what is levying war? As this question has been argued at great length, it may probably save much trouble to the counsel, now to give that opinion.

In opening the case, it was contended by the attorney for the United States, and has since been maintained on the part of the prosecution, that neither arms, nor the application of force or violence, are indispensably necessary, to constitute the fact of levying war. To illustrate these positions, several cases have been stated, many of which would clearly amount to treason. In all of them, except that which was probably intended to be this case, and on which no observation will be made, the object of the assemblage was clearly treasonable; its character was unequivocal, and was demonstrated by evidence furnished by the assemblage itself; there was no necessity to rely upon information drawn from extrinsic sources, or, in order to understand the fact, to pursue a course of intricate reasoning, and to conjecture motives. A force is supposed to be collected, for an avowed treasonable object, in a condition to attempt that object, and to have commenced the attempt, by moving towards it. I state these particulars, because, although the cases put may establish the doctrine they are intended to support, may prove that the absence of arms, or the failure to apply force to sensible objects, by the actual commission of violence on those objects, may be supplied by other circumstances, yet, they also serve to show, that the mind requires those circumstances, to be satisfied that war is levied.

Their construction of the opinion of the supreme court is, I think, thus far correct. It is certainly the opinion which was, at the time, entertained by myself, and which is still entertained. If a rebel army, avowing its hostility to the sovereign power, should front that of the government, should march and countermarch before it, should manœuvre in its face, and should then disperse, from any cause whatever, without firing a
*476] gun, I confess I could not, *without some surprise, hear gentlemen seriously contend, that this could not amount to an act of levying war. A case equally strong may be put, with respect to the absence of military weapons. If the party be in a condition to execute the purposed treason, without the usual implements of war, I can perceive no reason for requiring those implements, in order to constitute the crime.

It is argued, that no adjudged case can be produced from the English books, where actual violence has not been committed. Suppose, this were true. No adjudged case has, or, it is believed, can be, produced from those books, in which it has been laid down, that war cannot be levied, without the actual application of violence to external objects. The silence of the reporters on this point may be readily accounted for. In cases of actual rebellion against the government, the most active and influential leaders are generally most actively engaged in the war, and as the object can never be to extend punishment to extermination, a sufficient number are found among those who have committed actual hostilities, to satisfy the avenging arm of justice. In cases of constructive treason, such as pulling down meeting-houses, where the direct and avowed object is not the destruction of the sovereign power, some act of violence might be generally required, to give the crime a sufficient degree of malignity, to convert it into treason, to render the guilt of any individual unequivocal. But *Vaughan's Case* is a case where there was no real application of violence, and where the act was adjudged to be treason. Gentlemen argue, that Vaughan was only guilty of adhering to the king's enemies, but they have not the authority of the court for so saying. The judges unquestionably treat the cruising of Vaughan, as an *overt* act of levying war.

The opinions of the best elementary writers concur, in declaring, that where a body of men are assembled, for the purpose of making war against the government, and are in a condition to make that war, the assemblage is an act of levying war. These

opinions are contradicted by no adjudged case, and are supported by *Vaughan's Case.* This court is not inclined to controvert them.

But although, in this respect, the opinion of the supreme court has not been misunderstood on the part of the prosecution, that opinion seems not to have been fully adverted to, in a very essential point in which it is said to have been misconceived by others. The opinion, I am informed, has been construed to mean that any assemblage whatever, for a treasonable purpose, whether in force or not in force, whether in a condition to use violence, or not in that condition, is a levying of war. It is this construction, which has not, indeed, been expressly advanced at the bar, but which is said to have been adopted elsewhere, that the court deems it necessary to examine.

Independently of authority, trusting only to the dictates of reason, and expounding terms according to their ordinary signification, we should probably all concur in the declaration, that war could not be levied, without the employment and exhibition of force. War is an appeal from reason to the sword, and he who makes the appeal, evidences the fact, by the use of the *means. His intention to go to war may be proved by words, but the actual going to war, is a fact, which is to be proved [*477 by open deed. The end is to be effected by force, and it would seem, that in cases where no declaration is to be made, the state of actual war could only be created by the employment of force, or being in a condition to employ it. But the term having been adopted by our constitution, must be understood in that sense in which it was universally received in this country, when the constitution was framed. The sense in which it was received is to be collected from the most approved authorities of that nation from which we have borrowed the term.

Lord Coke says, that levying war against the king was treason at the common law. "A compassing or conspiracy to levy war," he adds, "is no treason, for there must be a levying of war, in fact." He proceeds to state cases of constructive levying war, where the direct design is not to overturn the government, but to effect some general object by force. The terms he employs, in stating these cases, are such as indicate an impression on his mind, that actual violence is a necessary ingredient in constituting the fact of levying war. He then proceeds to say, "An actual rebellion, or insurrection, is a levying of war within this act." "If any, with strength and weapons, invasive and defensive, doth hold or defend a castle or fort against the king and his power, this is levying of war against the king." These cases are put to illustrate what he denominates "a war in fact." It is not easy to conceive "an actual invasion or insurrection," unconnected with force, nor can "a castle or fort be defended with strength and weapons, invasive and defensive," without the employment of actual force. It would seem, then, to have been the opinion of Lord Coke, that to levy war there must be an assemblage of men, in a condition, and with an intention, to employ force. He certainly puts no case of a different description.

Lord Hale says (149, 6), "What shall be said a levying of war is partly a question of fact, for it is not every unlawful or riotous assembly of many persons to do an unlawful act, though *de facto* they commit the act they intend, that makes a levying of war; for then every riot would be treason," &c.; "but it must be such an assembly as carries with it *speciem belli*, the appearance of war, as if they ride or march, *vexillis explicatis*, with colors flying, or if they be formed into companies, or furnished with military officers, or if they are armed with military weapons, as swords, guns, bills, halberds, pikes, and are so circumstanced that it may be reasonably concluded they are in a posture of war, which circumstances are so various that it is hard to describe them all particularly." "Only the general expressions in all the indictments of this nature that I have seen, are *more guerrino arraiati*, arrayed in a warlike manner." He afterwards adds, "If there be a war levied, as is above declared, viz., an assembly arrayed in warlike manner, and so in the posture of war, for any treasonable attempt, it is *bellum levatum*, but not *percussum.*"

It is obvious, that Lord Hale supposed an assemblage of men in force, in a military posture, to be necessary to constitute the fact of levying war. The idea he appears to

suggest, that the apparatus of war is necessary, has been *very justly combated by an able judge who has written a valuable treatise on the subject of treason; but it is not recollected that his position, that the assembly should be in a posture of war for any treasonable attempt, has ever been denied. Hawk. c. 17, § 23, says, "That not only those who rebel against the king, and take up arms to dethrone him, but also, in many other cases, those who in a violent and forcible manner withstand his lawful authority, are said to levy war against him, and therefore, those that hold a fort or castle against the king's forces, or keep together armed numbers of men, against the king's express command, have been adjudged to levy war against him." The cases put by Hawkins are all cases of actual force and violence. "Those who rebel against the king and take up arms to dethrone him;" in many other cases, those "who in a violent and forcible manner, withstand his lawful authority." "Those that hold a fort or castle against his forces, or keep together armed numbers of men, against his express command." These cases are obviously cases of force and violence.

Hawkins next proceeds to describe cases in which war is understood to be levied under the statute, although it was not directly made against the government. This Lord HALE terms an interpretative or constructive levying of war, and it will be perceived that he puts no case in which actual force is dispensed with. "Those also," he says, "who make an insurrection, in order to redress a public grievance, whether it be a real or pretended one, and of their own authority attempt, with force, to redress it are said to levy war against the king, although they have no direct design against his person, inasmuch as they insolently invade his prerogative, by attempting to do that, by private authority, which he, by public justice, ought to do, which manifestly tends to a downright rebellion. As, where great numbers, by force, attempt to remove certain persons from the king," &c. The cases here put by Hawkins, of a constructive levying of war, do in terms require force as a constituent part of the description of the offence.

Judge FOSTER, in his valuable treatise on treason, states the opinion which has been quoted from Lord HALE, and differs from that writer so far as the latter might seem to require swords, drums, colors, &c., what he terms the pomp and pageantry of war, as essential circumstances to constitute the fact of levying war. In the cases of *Damaree and Purchase*, he says, "The want of those circumstances weighed nothing with the court, although the prisoners' counsel insisted much on that matter." But he adds, "the number of the insurgents supplied the want of military weapons; and they were provided with axes, crows, and other tools of the like nature, proper for the mischief they intended to effect. *Furor arma ministrat.*"

It is apparent, that Judge FOSTER here alludes to an assemblage in force, or, as Lord HALE terms it, "in a warlike posture;" that is, in a condition to attempt or proceed upon the treason which had been contemplated. The same author afterwards states at large the cases of *Damaree and Purchase*, from 8th State Trials, and they are cases where the insurgents not only assembled in force, in the posture of war, or in a condi-
*479] tion to execute the treasonable *design, but they did actually carry it into execution, and did resist the guards who were sent to disperse them. Judge FOSTER states, § 4, all insurrections to effect certain innovations of a public and general concern by an armed force, to be, in construction of law, high treason within the clause of levying war.

The cases put by FOSTER of constructive levying of war, all contain, as a material ingredient, the actual employment of force. After going through this branch of his subject, he proceeds to state the law, in a case of actual levying war, that is, where the war is intended directly against the government. He says, § 9, "An assembly armed and arrayed in a warlike manner for a treasonable purpose, is *bellum levatum*, though not *bellum percussum*. Listing and marching are sufficient *overt* acts, without coming to a battle or action. So, cruising on the king's subjects, under a French commission, France being then at war with us, was held to be adhering to the king's enemies, though no other act of hostility be proved."

"An assembly armed and arrayed in a warlike manner for any treasonable pur-

pose" is certainly in a state of force; in a condition to execute the treason for which they assembled. The words "enlisting and marching," which are *overt* acts of levying war, do, in the arrangement of the sentence, also imply a state of force, though that state is not expressed in terms, for the succeeding words, which state a particular event as not having happened, prove that event to have been the next circumstance to those which had happened, they are "without coming to a battle or action." "If men be enlisted and march" (that is, if they march prepared for battle, or in a condition for action, for marching is a technical term applied to the movement of a military corps), it is an *overt* act of levying war, though they do not come to a battle or action. This exposition is rendered the stronger, by what seems to be put in the same sentence as a parallel case, with respect to adhering to an enemy. It is cruising under a commission from an enemy, without committing any other act of hostility. Cruising is the act of sailing in warlike form, and in a condition to assail those of whom the cruiser is in quest.

This exposition, which seems to be that intended by Judge FOSTER, is rendered the more certain by a reference to the case in the State Trials, from which the extracts are taken. The words used by the Chief Justice are, "when men form themselves into a body, and march, rank and file, with weapons offensive and defensive, this is levying of war with open force, if the design be public." Mr. Phipps, the counsel for the prisoner, afterwards observed, "intending to levy war is not treason, unless a war be actually levied." To this the Chief Justice answered, "Is it not actually levying of war, if they actually provide arms and levy men, and in a warlike manner set out and cruise, and come with a design to destroy our ships?" Mr. Phipps still insisted, "it would not be an actual levying of war, unless they committed some act of hostility." "Yes, indeed," said the Chief Justice, "the going on board and being in a posture to attack the king's ships" Mr. Baron POWIS added, "but for you to say, that because they did not actually fight, it is not a levying of war, is it not plain, what they did intend? That they came with that intention, that they came in that posture, that they came armed, and had guns and *blunderbusses, and surrounded the ship twice; they came with an armed force, that is a strong evidence of the design." The point [*480 insisted on by counsel in the case of Vaughan, as in this case, was, that war could not be levied, without actual fighting. In this, the counsel was very properly overruled; but it is apparent, that the judges proceeded entirely on the idea, that a warlike posture was indispensable to the fact of levying war.

Judge FOSTER proceeds to give other instances of levying war. "Attacking the king's forces, in opposition to his authority, upon a march, or in quarters, is levying war." "Holding a castle or fort against the king or his forces, if actual force be used, in order to keep possession, is levying war. But a bare detainer, as suppose, by shutting the gates against the king or his forces, without any other force from within, Lord HALE conceiveth will not amount to treason."

The whole doctrine of Judge FOSTER on this subject, seems to demonstrate a clear opinion, that a state of force and violence, a posture of war, must exist, to constitute, technically, as well as really, the fact of levying war. Judge BLACKSTONE seems to concur with his predecessors. Speaking of levying war, he says, "This may be done by taking arms, not only to dethrone the king, but under pretence to reform religion, or the laws, or to remove evil counsellors, or other grievances, whether real or pretended. For the law does not, neither can it, permit any private man or set of men to interfere forcibly in matters of such high importance." He proceeds to give examples of levying war, which show that he contemplated actual force as a necessary ingredient in the composition of this crime.

It would seem, then, from the English authorities, that the words "levying war," have not received a technical, different from their natural, meaning, so far as respects the character of the assemblage of men which may constitute the fact. It must be a warlike assemblage, carrying the appearance of force, and in a situation to practise hostility.

Several judges of the United States have given opinions at their circuits on this

subject, all of which deserve and will receive the particular attention of this court. In his charge to the grand jury, when John Fries was indicted, in consequence of a forcible opposition to the direct tax, Judge IREDELL is understood to have said, "I think, I am warranted in saying, that if in the case of the insurgents who may come under your consideration, the intention was to prevent, by force of arms, the execution of any act of the congress of the United States altogether, any forcible opposition calculated to carry that intention into effect, was a levying of war against the United States, and of course, an act of treason." To levy war, then, according to this opinion of Judge IREDELL, required the actual exertion of force. *Judge PATERSON, in his opinions delivered in two different cases, seems not to differ from Judge IREDELL. He does not, indeed, precisely state the employment of force as necessary to constitute a levying of war, but in giving his opinion in cases in which force was actually employed, he considers the crime in one case as dependent on the intention, and in the other case he says, "combining these facts with this design" (that is, combining actual force with a treasonable design), "the crime is high treason." Judge PETERS has also indicated the opinion, that force was necessary to constitute the crime of levying war.

*481]

Judge CHASE has been particularly clear and explicit. In an opinion, which he appears to have prepared on great consideration, he says, "The court are of opinion, that if a body of people conspire and meditate an insurrection to resist or oppose the execution of a statute of the United States by force, they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution, by force, that they are guilty of the treason of levying war; and the *quantum* of the force employed neither increases nor diminishes the crime; whether by one hundred or one thousand persons, is wholly immaterial. The court are of opinion, that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution: some actual force or violence must be used, in pursuance of such design to levy war; but that it is altogether immaterial, whether the force used be sufficient to effectuate the object. Any force, connected with the intention, will constitute the crime of levying of war."

In various parts of the opinion delivered by Judge CHASE, in the case of *Fries*, the same sentiments are to be found. It is to be observed, that these judges are not content that troops should be assembled in a condition to employ force; according to them, some degree of force must have been actually employed.

The judges of the United States, then, so far as their opinions have been quoted, seem to have required still more to constitute the fact of levying war, than has been required by the English books. Our judges seem to have required the actual exercise of force, the actual employment of some degree of violence. This, however, may be, and probably is, because in the cases in which their opinions were given, the design not having been to overturn the government, but to resist the execution of a law, such an assemblage would be sufficient for the purpose, as to require the actual employment of force, to render the object unequivocal.

But it is said, all these authorities have been overruled by the decision of the supreme court in the case of the *United States* v. *Swartwout and Bollman*. If the supreme court have indeed extended the doctrine of treason further than it has heretofore been carried by the judges of England, or of this country, their decision would be submitted to. At least, this court could go no further than to endeavor again to bring the point directly before them. It would, *however, be expected, that an opinion which is to overrule all former precedents, and to establish a principle never before recognised, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established. Had the intention been entertained, to make so material a change in this respect, the court ought to have expressly declared, that any assemblage of men whatever, who had formed a treasonable design, whether in force or not, whether in a condition to attempt the design or not, whether attended with warlike appearances or not, constitutes the fact of levying war. Yet no declaration to this amount is made. Not

*482]

an expression of the kind is to be found in the opinion of the supreme court. The foundation on which this argument rests, is the omission of the court to state, that the assemblage which constitutes the fact of levying war ought to be in force, and some passages which show that the question respecting the nature of the assemblage was not in the mind of the court, when the opinion was drawn, which passages are mingled with others, which at least show that there was no intention to depart from the course of the precedents in cases of treason by levying war.

Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered. In the case of the *United States* v. *Bollman and Swartwout*, there was no evidence that even two men had ever met for the purpose of executing the plan, in which those persons were charged with having participated. It was, therefore, sufficient for the court to say, that unless men were assembled, war could not be levied. That case was decided by this declaration. The court might, indeed, have defined the species of assemblage which would amount to levying of war; but, as this opinion was not a treatise on treason, but a decision of a particular case, expressions of doubtful import should be construed in reference to the case itself; and the mere omission to state that a particular circumstance was necessary to the consummation of the crime, ought not to be construed into a declaration that the circumstance was unimportant. General expressions ought not to be considered as overruling settled principles, without a direct declaration to that effect. After these preliminary observations, the court will proceed to examine the opinion which has occasioned them.

The first expression in it, bearing on the present question, is, "To constitute that specific crime for which the prisoner now before the court has been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiracy to subvert, by force, the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences: the first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed."

Although it is not expressly stated, that the assemblage of men for the purpose of carrying into operation the treasonable intent, which will amount to levying war, must be an assemblage in force, yet it is to be fairly inferred from the context, and nothing like dispensing with force appears in this paragraph. The expressions are, "to constitute the crime, war must be actually levied." A conspiracy to levy war is spoken of as "a conspiracy to subvert, by force, the government of our country." Speaking, in general terms, of an assemblage of men for this, or for any other purpose, a person would naturally be understood as speaking of an assemblage in some degree adapted to the *purpose. An assemblage to subvert, by force, the government of our [*483
country, and amounting to a levying of war, should be an assemblage in force.

In a subsequent paragraph, the court says, "It is not the intention of the court to say, that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled, in order to effect by force a treasonable purpose, all those who perform any part, however minute, &c., and who are actually leagued in the general conspiracy, are traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war."

The observations made on the preceding paragraph apply to this. "A body of men, actually assembled, in order to effect by force a treasonable purpose," must be a body assembled with such appearance of force as would warrant the opinion, that they were assembled for the particular purpose; an assemblage, to constitute an actual levying of war, should be an assemblage with such appearance of force as would justify the opinion that they met for the purpose. This explanation, which is believed to be the natural, certainly, not a strained, explanation of the words, derives some additional aid from the terms in which the paragraph last quoted commences. "It is not the intention of the court to say, that no individual can be guilty of treason, who has not appeared in arms against his country." These words seem to obviate an inference which might otherwise have been drawn from the preceding paragraph.

They indicate, that in the mind of the court, the assemblage, stated in that paragraph was an assemblage in arms. That the individuals who composed it had appeared in arms against their country. That is, in other words, that the assemblage was a military, a warlike assemblage. The succeeding paragraph in the opinion relates to a conspiracy, and serves to show that force and violence were in the mind of the court, and that there was no idea of extending the crime of treason, by construction, beyond the constitutional definition which had been given of it.

Returning to the case actually before the court, it is said, "A design to overturn the government of the United States, in New Orleans, by force, would have been, unquestionably, a design which, if carried into execution, would have been treason, and the assemblage of a body of men for the purpose of carrying it into execution would amount to levying of war against the United States." Now, what could reasonably be said to be an assemblage of a body of men, for the purpose of overturning the government of the United States, in New Orleans, by force? Certainly, an assemblage in force; an assemblage prepared and intending to act with force—a military assemblage.

The decisions theretofore made by the judges of the United States, are then declared to be in conformity with the principles laid down by the supreme court. Is this declaration compatible with the idea of departing from those opinions on a point within the contemplation of the court? The *opinions of Judge Paterson and Judge Iredell are said "to imply an actual assembling of men, though they rather designed to remark on the purpose to which the force was to be applied than on the nature of the force itself." This observation certainly indicates that the necessity of an assemblage of men was the particular point the court meant to establish, and that the idea of force was never separated from this assemblage.

*484]

The opinion of Judge Chase is next quoted with approbation. This opinion, in terms, requires the employment of force. After stating the verbal communications said to have been made by Mr. Swartwout to General Wilkinson, the court says, "If these words import that the government of New Orleans was to be revolutionized by force, although merely as a step to, or a means of executing some greater projects, the design was unquestionably treasonable, and any assemblage of men for that purpose would amount to a levying of war."

The words "any assemblage of men," if construed to affirm that any two or three of the conspirators, who might be found together, after this plan had been formed, would be the act of levying war, would certainly be misconstrued. The sense of the expression "any assemblage of men," is restricted by the words "for this purpose." Now, could it be in the contemplation of the court, that a body of men would assemble for the purpose of revolutionizing New Orleans by force, who should not themselves be in force?

After noticing some difference of opinion among the judges respecting the import of the words said to have been used by Mr. Swartwout, the court proceeds to observe, "But whether this treasonable intention be really imputable to the plan or not, it is admitted, that it must have been carried into execution by an open assemblage for that purpose, previous to the arrest of the prisoner, in order to consummate the crime as to him." Could the court have conceived "an open assemblage" "for the purpose of overturning the government of New Orleans by force," "to be only equivalent to a secret furtive assemblage, without the appearance of force."

After quoting the words of Mr. Swartwout, from the affidavit, in which it was stated, that Mr. Burr was levying an army of 7000 men, and observing, that the treason to be inferred from these words would depend on the intention with which it was levied, and on the progress which had been made in levying it, the court say, "The question, then, is, whether this evidence proves Colonel Burr to have advanced so far in levying an army, as actually to have assembled them." Actually to assemble an army of 7000 men is, unquestionably, to place those who are so assembled in a state of open force.

But as the mode of expression used in this passage might be misconstrued, so far as to countenance the opinion, that it would be necessary to assemble the whole army,

in order to constitute the fact of levying war, the court proceeds to say, "It is argued, that since it cannot be necessary that the whole 7000 men should be assembled, their commencing their march by detachments *to the place of rendezvous must be [*485 sufficient to constitute the crime. This position is correct, with some qualification. It cannot be necessary, that the whole army should assemble, and that the various parts which are to compose it should have combined. But it is necessary there should be an actual assemblage; and therefore, this evidence should make the fact unequivocal. The travelling of individuals to the place of rendezvous would, perhaps, not be sufficient. This would be an equivocal act, and has no warlike appearance. The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage."

The position here stated by the counsel for the prosecution is, that the army "commencing its march by detachments to the place of rendezvous (that is, of the army), must be sufficient to constitute the crime." This position is not admitted by the court to be universally correct. It is said to be "correct with some qualification." What is that qualification? "The travelling of individuals to the place of rendezvous" (and by this term is not to be understood one individual by himself, but several individuals, either separately or together, but not in military form) "would, perhaps, not be sufficient." Why not sufficient? "Because," says the court, "this would be an equivocal act, and has no warlike appearance." The act, then, should be unequivocal, and should have a warlike appearance. It must exhibit, in the words of Sir Mathew Hale, *speciem belli*, the appearance of war.

This construction is rendered in some measure necessary, when we observe that the court is qualifying the position, "that the army commencing their march by detachments to the place of rendezvous, must be sufficient to constitute the crime." In qualifying this position they say, "the travelling of individuals would, perhaps, not be sufficient." Now, a solitary individual travelling to any point, with any intent, could not, without a total disregard of language, be termed a marching detachment. The court, therefore, must have contemplated several individuals travelling together; and the words being used in reference to the position they were intended to qualify, would seem to indicate the distinction between the appearances attending the usual movement of a company of men for civil purposes, and that military movement which might, in correct language, be denominated "marching by detachments."

The court then proceeded to say, "The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage. It is obvious, from the context, that the court must have intended to state a case which would in itself be unequivocal, because it would have a warlike appearance. The case stated is that of distinct bodies of men, assembling at different places, and marching from these places of partial to a *place of general ren- [*486 dezvous. When this has been done, an assemblage is produced which would in itself be unequivocal. But when is it done? what is the assemblage here described? The assemblage formed of the different bodies of partial at a general place of rendezvous. In describing the mode of coming to this assemblage, the civil term "travelling" is dropped, and the military term "marching" is employed. If this was intended as a definition of an assemblage which would amount to levying war, the definition requires an assemblage at a general place of rendezvous, composed of bodies of men who had previously assembled at places of partial rendezvous. But this is not intended as a definition, for clearly, if there should be no places of partial rendezvous, if troops should embody in the first instance, in great force for the purpose of subverting the government by violence, the act would be unequivocal, it would have a warlike appearance, and it would, according to the opinion of the supreme court, properly construed, and according to the English authorities, amount to levying war. But this, though not a definition, is put as an example; and surely, it may be safely taken as an example. If different bodies of men, in pursuance of a treasonable design, plainly proved, should assemble in warlike appearance, at places of partial rendezvous, and should march from those places to a place of general rendezvous, it is difficult to conceive, how such

a transaction could take place, without exhibiting the appearance of war—without an obvious display of force. At any rate, a court, in stating generally such a military assemblage as would amount to levying war, and having a case before them in which there was no assemblage whatever, cannot reasonably be understood, in putting such an example, to dispense with those appearances of war which seem to be required by the general current of authorities. Certainly, they ought not to be so understood, when they say, in express terms, that "it is more safe, as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not already within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide."

After this analysis of the opinion of the supreme court, it will be observed, that the direct question, whether an assemblage of men, which might be construed to amount to a levying of war, must appear in force or in military form, was not, in argument or in fact, before the court, and does not appear to have been in terms decided. The opinion seems to have been drawn, without particularly adverting to this question, and therefore, upon a transient view of particular expressions, might inspire the idea that a display of force—that appearances of war—were not necessary ingredients to constitute the fact of levying war. But upon a more intent and more accurate investigation of this opinion, although the terms force and violence are not employed as descriptive of the assemblage, such requisites are declared to be indispensable as can scarcely exist without the appearance of war, and the existence of real force. It is said, that war must be levied in fact; that the object must be one which is to be effected by force; that the assemblage must be such as to prove that this is its object; that it must not be an equivocal act, without a warlike appearance; that it must be an open assemblage for the purpose of force. In the course of this opinion, decisions are quoted and approved, which require the employment of force to constitute the crime. It seems extremely difficult, if not impossible, to reconcile these various declarations with the idea that the supreme court considered a secret unarmed meeting, although that *meeting be of conspirators, and although it met with a treasonable intent, as an actual levying of war. Without saying that the assemblage must be in force, or in warlike form, they express themselves so as to show that this idea was never discarded, and they use terms which cannot be otherwise satisfied.

*487]

The opinion of a single judge certainly weighs as nothing, if opposed to that of the supreme court; but if he was one of the judges who assisted in framing that opinion, if, while the impression under which it was framed, was yet fresh upon his mind, he delivered an opinion on the same testimony, not contradictory to that which had been given by all the judges together, but showing the sense in which he understood terms that might be differently expounded, it may fairly be said to be, in some measure, explanatory of the opinion itself.

To the judge before whom the charge against the prisoner at the bar was first brought, the same testimony was offered with that which had been exhibited before the supreme court, and he was required to give an opinion in almost the same case. Upon this occasion, he said, "War can only be levied by the employment of actual force. Troops must be embodied; men must be assembled, in order to levy war." Again, he observed, "The fact to be proved in this case, is an act of public notoriety. It must exist in the view of the world, or it cannot exist at all. The assembling of forces to levy war, is a visible transaction, and numbers must witness it." It is not easy to doubt what kind of assemblage was in the mind of the judge who used these expressions, and it is to be recollected, that he had just returned from the supreme court, and was speaking on the very facts on which the opinion of that court was delivered. The same judge, in his charge to the grand jury who found this bill, observed, "To constitute the fact of levying war, it is not necessary that hostilities shall have actually commenced, by engaging the military force of the United States, or that measures of violence against the government shall have been carried into execution. But levying war is a fact, in the constitution of which, force is an indispensable ingredient. Any

combination to subvert, by force, the government of the United States, violently to dismember the Union, to compel a change in the administration, to coerce the repeal or adoption of a general law, is a conspiracy to levy war, and if the conspiracy be carried into effect, by the actual employment of force, by the embodying and assembling of men, for the purpose of executing the treasonable design which was previously conceived, it amounts to levying of war. It has been held, that arms are not essential to levying war, provided the force assembled be sufficient to attain, or perhaps to justify attempting, the object, without them." This paragraph is immediately followed by a reference to the opinion of the supreme court.

It requires no commentary upon these words, to show that, in the opinion of the judge who uttered them, an assemblage of men which should constitute the fact of levying war must be an assemblage in force, and that he so understood the opinion of the supreme court. If, in that opinion, there may be found, in same passages, a want of precision, and indefiniteness of expression, *which has occasioned it to be differently understood by different persons, that may well be accounted for, when [*488 it is recollected, that in the particular case, there was no assemblage whatever. In expounding that opinion, the whole should be taken together, and in reference to the particular case in which it was delivered. It is, however, not improbable that the misunderstanding has arisen from this circumstance. The court, unquestionably, did not consider arms as an indispensable requisite to levying war; an assemblage adapted to the object, might be in a condition to effect or to attempt it, without them. Nor did the court consider the actual application of the force to the object, at all times, an indispensable requisite; for an assemblage might be in a condition to apply force, might be in a state adapted to real war, without having made the actual application of that force. From these positions, which are to be found in the opinion, it may have been inferred, it is thought too hastily, that the nature of the assemblage was unimportant, and that war might be considered as actually levied, by any meeting of men, if a criminal intention can be imputed to them, by testimony of any kind whatever.

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 then to effect the object by their
*489] 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 other *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. 2d. 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 a person who advised or procured that act.

As to the first point, the indictment contains two counts, one of which charges that the prisoner, with a number of persons unknown, levied war, on Blennerhassett's Island, in the county of Wood, in the district 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 inquire, 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, c. 25, § 84, and c. 23, § 91. This necessity is rendered the stronger by the constitutional provision, that the offender "shall be tried in the state and district wherein the crime shall have been committed," and by the act of congress which requires that twelve petit 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 seems 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.
*490] 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 p. 220, Foster repeats this declaration. It is also laid down in Hawk. b. 8, c. 17, § 29; 1 Hale 121; 1 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 7 Wm. III., 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 laying what is termed an *overt* act of levying war. The law relative to an appeal, as cited from Staundford, 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 at 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 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 New Hamp- [*491
shire, 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, 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 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 untruly.

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 nowhere suggested, that he is

by construction to be considered as present, when in point of fact he was absent. FOSTER has been particularly quoted, and certainly, he is precisely in point. "It is well known," says Foster, "that, in the language of the law, 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 that 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.

*492] *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 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, at any rate, they would be inapplicable to treason, 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 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. (See 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 *Lord Dacres*, 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. See Hale 534.

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 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 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 com-

posed 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 [*493 robbing. They set out together, or in parties, to rob a particular individual, and each performs the part assigned to 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 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 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 Blennerhassett'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 Blennerhassett'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 [*494 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 Blennerhassett'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 as-

sembled on Blennerhassett's Island, but the whole evidence shows 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 incontestably an accessory, and not a principal. But in treason, it is said, the law is otherwise, because the theatre of action is more extensive. This reasoning applies in England as strongly as in the United States. While in '15 and '45 the family of Stuart sought 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; nor 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 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 anywhere; 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.

*495] *The opinion of Judge PATERSON, in *Mitchell's Case*, has been cited on this point. 2 Dall. 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 Allegheny, 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 Allegheny, for the purpose of committing acts of violence at Pittsburgh. There was also an assemblage at a different time at Couche's 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 Couche's 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 Couche's 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? Couche's Fort and Neville's house being in the same county, the assemblage having been at Couche's Fort, and the resolution to attack the house having been there taken, the body having, for the avowed purpose, 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 Couche's, 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 Couche's, 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 Couche's, 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 PATERSON 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 Jeffreys 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 Blennerhassett'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 Blennerhassett'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 perfectly 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 Blennerhassett'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. [*496

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 alleged 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 alleged 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 allege that the prisoner was one of the assemblage at Blennerhassett's Island, it ought to be so construed now. But this is unimportant, for if the indictment alleges that the prisoner procured the assemblage, that procurement becomes part of the *overt* act, and must be proved as will be shown hereafter.

The second 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 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 [*497

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 everywhere, 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 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 inindicted for counterfeiting, generally, within the statute, for insuch 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 coin, and that class of treasons among which levying war is placed, is taken in the statute of Edw. III. That statute *498] 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 p. 238, HALE is speaking generally of the receiver of a traitor, and is stating in what such receiver partakes of an accessory. 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, bu 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, Kelyng 26, and 1 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 accessory 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. Kelyng says, an accessory 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 it 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. [*499
He says, "If A. be indicted as principal, and B. as accessory before or after, and both be acquitted, yet B. may be indicted as principal, and the former acquittal as accessory 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 acquital as principal may be pleaded in bar to an indictment as accessory, while an acquittal as accessory 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 accessory, the question recurs, on what legal ground does this distinction stand? I can imagine only this. An accessory 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 accessory must be special. The very allegation that he is an accessory, must be a special allegation, and must show how he became an accessory. 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 is contended by the counsel for the United States. 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, and 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, *500] 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 Kelyng, 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 United States, the fact that the accused procured the assemblage on Blennerhassett'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 eighth 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 accessory before the fact into the principal, and to make the act of the principal his act. The accessory 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 United States, would seem to imply the decision, that the United 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 in a case 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 United States, 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 & 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 show 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 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 [*502
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 Blennerhassett'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 as-

semblage 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 proved 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 presupposes the treason of the accused, if any has been committed, to be accessorial in its nature. Its 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 Blennerhassett'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 accessories.

It is a settled principle in the law, that the accessory 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, de-
*503] pends upon the actual commission *of that crime. No man is an accessory 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 accessory 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 accessory was originally the same, and although, in many instances, it is still the same, the accessory 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 accessory can never precede the conviction of the principal? Not because the one is denominated the principal and the other the accessory, 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 Blennerhassett'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 accessory, 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 accessory, 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. [*504

If from reason we pass to authority, we find it 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 Leach, in his notes on Hawkins, and is not, so far as the court has discovered, anywhere 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 United States.

It is, however, contended, that the prisoner has waived 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, waived 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 operations. 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 waiving 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 waive 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 accessory; 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 United States. 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 accessory, 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. [*505

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 set 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 United States, and alleges 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 accessories 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 Blennerhassett's Island? No; that is not alleged. 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 United States 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 Blennerhassett'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 nowhere alleged, except in the indictment, the *overt* act is not proved by a single witness, and of consequence, all other testimony must be irrelevant.

*506]

The only difference between this motion as made, and the motion in the form which the counsel for the United States 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? If 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 United States 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 traitors, and would the commander-in-chief escape punishment? Let the opinion which has been given, answer this question. Appearing at the head of an army would, according to this opinion, be an *overt* act of levying war; detaching a military corps from it, for military purposes, might also be an *overt* act of levying war. It is not pretended, that he would not be punishable for these acts, it is only said, that he may be tried and convicted on his own acts, in the state where those acts were committed, not on the acts of others, in the state where those others acted.

Much has been said, in the course of the argument, on points, on which the court feels no inclination to comment particularly, but which may, perhaps, not improperly, receive some notice. That this court dares not usurp power, is most true. That this court dares not shrink from its duty, is not less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him, without self-reproach, would drain it to the *bottom. But if he has no choice in the case; if there is no alternative presented to him but a dereliction of duty, or the [*507 opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace.

That gentlemen, in a case the most interesting, in the zeal with which they advocate particular opinions, and under the conviction in some measure produced by that zeal, should on each side press their arguments too far, should be impatient at any deliberation in the court, and should suspect or fear the operation of motives to which alone they can ascribe that deliberation, is, perhaps, a frailty incident to human nature; but if any conduct on the part of the court could warrant a sentiment that they would deviate to the one side or the other from the line prescribed by duty and by law, that conduct would be viewed by the judges themselves with an eye of extreme severity, and would long be recollected with deep and serious regret.

The arguments on both sides have been intently and deliberately considered. Those which could not be noticed, since to notice every argument and authority would swell this opinion to a volume, have not been disregarded. The result of the whole is a conviction, as complete as the mind of the court is capable of receiving on a complex subject, that the motion must prevail.

No testimony relative to the conduct or declarations of the prisoner elsewhere, and subsequent to the transaction on Blennerhassett's Island, can be admitted, because such testimony, being in its nature merely corroborative, and incompetent to prove the *overt* act in itself, is irrelevant, until there be proof of the *overt* act by two witnesses.

This opinion does not comprehend the proof by two witnesses that the meeting on Blennerhassett's Island was procured by the prisoner. On that point, the court, for the present, withholds its opinion, for reasons which have been already assigned; and as it is understood from the statements made on the part of the prosecution, that no such testimony exists, if there be such, let it be offered, and the court will decide upon it.

The jury have now heard the opinion of the court on the law of the case. They will apply that law to the facts, and will find a verdict of guilty or not guilty, as their own consciences may direct.

*Note C, to Rose *v.* Himely, *ante*, p. 242.

Opinion of Judge Johnson, in the Circuit Court.

The following contains the statement of the case, and the judge's reasons for the decrees given by him in the cases of Rose *v.* Himely, and Rose *v.* Groenings.

Although there are three distinct libels filed in these cases, yet in the course of investigation, they are brought all to depend upon the same circumstances, and were argued before me as one cause.

The first two were decided in September last, when the copy of the condemnation had not been received, and the decision of the district court rested upon the ground of a defect of condemnation. But upon a motion before this court for leave to adduce new evidence upon the appeal, I decided in favor of its admissibility, and the condemnation having been received, before the expiration of the term probatory assigned the appellants, consistently with my decision, I am to consider the condemnation as equally affecting the rights of the parties, on all the three cases: at the hearing upon the appeal, there was also a witness produced and sworn in behalf of the appellants, who testified that he was one of the officers of the capturing vessel, and that he saw in possession of the master, a permit from the agent of the French government, resident at St. Jago de Cuba, to sell the Sarah and her cargo, and that she was advertised and sold by virtue of that permit; but I shall take no notice of this evidence, in forming my opinion, because it appears to me subject to this objection, that a certificate of the granting of such a permit might have been obtained from the chancery of the agent himself, if there existed such an officer, and he had done that act in an official capacity. Upon the hearing of the first two causes in the district court, the identity of the goods was also made a point, and a defect of evidence to prove their identity was strongly
*509] insisted *upon in the argument, but this ground was relinquished upon the appeal, and the only point contested was the right of property.

The following are the circumstances on which the court proceeds to form its decision, as they are collected from the libels, answers, depositions and writings in evidence:

The schooner Sarah, an American bottom, owned by citizens of the United States, sailed from Norfolk, with a cargo consisting entirely of provisions, owned likewise by citizens of the United States. Whatever port she may have cleared for, her real destination was to the brigand ports in the island of St. Domingo, several of which she entered, and having disposed of her outward cargo, took in return the sugar and coffee which is the subject of the suit. On her voyage from Port au Paix, one of the brigand ports, she was captured by a French privateer, and carried into Barracoa, where Henry Rose, the supercargo, and now the libellant in these cases, purchased her of the captors. The principal part of the cargo was purchased by Captain Cott, of the Example, lying then at Barracoa, in behalf of the respondent, J. J. Himely, and was transferred, during the night, from the Sarah to the Example. The Example having sailed for this port, she was followed by Captain Rose, and the sugar and coffee, shipped on board her from the Sarah, has been libelled on behalf of the original owners. Prior to the suing out the libel, a part of the coffee had been sold to Messrs. L. & R. Groening, of this place, merchants, who are acknowledged to be innocent purchasers without notice; but as the English doctrine relative to sales in *market overt* is unknown to the laws of this state, it is not contended, that their claim rests on any better ground than that of Himely or Cott, the immediate purchasers from the captors. It appears, that when the cargo of the Sarah was sold, no condemnation had taken place; that she was afterwards libelled and condemned at St. Domingo, the 13th July 1804; whereas, the vessel was captured on the 23d February, the sale of the cargo took place on the 18th March, and it had arrived in this port, and a warrant actually issued and served upon it, the 4th May preceding. Upon examining the condemnation, it appears to be professedly founded upon an *arrête* of the Captain-General Ferrand, dated 1st March 1804, declar-

ing the port of Santo Domingo to be the only free port in that island, and directing the vessels of neutrals trading to any other port to be brought to adjudication.

It was, indeed, asserted in the argument, and I believe was the fact, that General Le Clerc had formerly issued a similar *arrête*, but there was not then, nor is there now adduced, any evidence to prove it to the satisfaction of the court, nor does it appear to be one of those facts of general notoriety, which this court is sanctioned in noticing as such.

On behalf of the claimants, it is contended, that there is an original defect in the title of the libellants, as the property appears to have been purchased from revolted slaves, a description of people who could not possess, and, of course, could not convey, a right of property to another. That there is a turpitude in this trade, which ought to predispose this court to discountenance the pretensions of the libellants. That if the libellants ever possessed a right, it was defeated by the capture, which alone gave them a possession, not to be violated by us; if not by the capture, by the carrying *infra præsidia;* if not by carrying *infra præsidia*, by the effect of the condemnation.

*For the libellants, it was argued, that there could be no original defect in [*510
the title acquired from the brigands, because a power existing *de facto* is, as to neutrals, a power *de jure*. That the subjects of the existing government of Hayti were a mixt multitude of slaves and colored freemen, the latter of whom, before the revolution, possessed extensive estates, and who, for aught we know, may have been the vendors of these articles. That the law of nations knows no such description of people as slaves, and it is not, in fact, every description of slaves who are destitute of rights of property; even within the bounds of the United States, widely different are the opinions entertained, and laws existing, on this subject, and the decisions of the court would fluctuate according to the state in which the decisions took place, and the judge who presided. That if there is turpitude in the trade to the brigand ports, there is an equal degree in the conduct of the claimants, in lying in wait to draw a profit from the ravages on our commerce, and in the clandestine manner in which the cargo was transferred from the one vessel to the other. That the property of the libellants would not be divested by the capture or carrying *infra præsidia*, because a sentence of condemnation is indispensably necessary to change the property.

That this sentence of condemnation could not operate to produce that effect, because, 1st. Before the condemnation, the captors had parted with that possession which alone could give the court its prize jurisdiction over the property. 2d. Because, before the condemnation, it had actually returned within the jurisdiction of our own courts, and thus became revested by the *jus postliminii*. 3d. Because the sentence of condemnation appears on the face of it to be inconsistent with every idea of law and justice, inasmuch as the fact was committed before the *arrête* was passed, which was made the foundation of the sentence. 4th. Because it is in direct violation of the 12th article of the convention with France, inasmuch as the trade to Port au Prince was a trade to a port of an enemy of France, which is sanctioned, under certain restrictions, by that article; also of the 22d article, which enjoins that the adjudication of American vessels captured shall be made by the tribunals of the country into which the prize shall be carried; also, inasmuch as the 22d article has also been violated, which prohibits the sale of goods captured, previous to adjudication by a competent authority.

Without considering these arguments in detail, I shall recur to principles adopted by the district court in its decisions, and afterwards cursorily examine *such of the [*511
arguments of counsel as shall not appear to me to be disposed of by my previous observations.

In the decree of September 1804, there are three questions considered. 1st. Whether the libellants could acquire any legal interest by a purchase from the brigands? 2d. Whether the capture and firm possession, without a condemnation, would convey a title to the claimants which this court could not violate? 3d. The question of identity.

The last of these questions has been relinquished upon the appeal. The second no longer exists, since the production of the condemnation; and on the first, I would only

remark, that it is too much of a refinement upon the acquisition of property in commercial transactions, especially, in the purchase of the products of the earth from the actual possessors and cultivators of the soil; and it is conclusive against the doctrine on this point insisted on for the claimants, that even the French courts have not ventured to adopt such a principle. But I must here express my dissent from the opinion of my much-respected associate in this court, in the decision made by him in the court below on this point, to wit, that he had no jurisdiction of the question; because, that, whenever a court has a jurisdiction of the principal subject of a suit, it must, of necessity, decide upon all questions which occur in the course of investigation, and have any bearing upon the principal cause of action. Had the libellants never acquired any legal interest in this property, it is plain, that their suit must have been dismissed, without any inquiry into the subsequent occurrences.

In the decree of April 1805, the only subject considered was the effect of the decree of condemnation, and it was declared irrelevant upon two grounds. 1st. Because, upon the face of it, it appears to have been founded on an ordinance passed subsequent to the commission of the act for which the vessel and cargo were condemned. 2d. Because the property was actually brought within the jurisdiction of the United States before the sentence of condemnation was pronounced.

Upon considering the first of the grounds, it will be immediately perceived that it supposes two things, viz: That a decree of a foreign court is examinable, and that it derives its validity only from its correctness—doctrines which, in my opinion, can in no wise be maintained. The respect required to be shown to the decrees of foreign tribunals is not founded upon the mere comity of nations; it has, for its foundation, that universal equality and independence of all governments, from which it results, as Vattel observes, "That to undertake to examine the *justice of a definitive sen-
*512] tence, is an attack on the jurisdiction of him who passed it." It becomes, therefore, an absolute right of nations, as universal as the principle on which it depends, and one which we cannot dispense with conceding, "that decisions made by the judge of the place, within the extent of his powers, shall be considered as justly made." Not being at liberty, as it were, to lift the mantle of justice cast upon their decrees, it is, as to other tribunals of justice, immaterial what errors it covers; neither the fallibility of the judge, the perjury of witnesses, nor the oppression and injustice of nations, will sanction a deviation from this general rule. And, perhaps, if this doctrine were not deducible from any fixed principle, nations must long since have adopted it from a necessary attention to general convenience; for, otherwise, the sentence which I am now considering might, perhaps, again be reviewed in the courts of Santo Domingo, and from thence return to our own jurisdiction, after making the circuit of all the courts of Europe.

A question will no doubt here suggest itself to those who hear me; are our citizens, then, bound to acquiesce under every species of injustice? and do they sue in vain to our courts for relief? The answer is, while our government makes one of the society of nations, we are bound to submit to the obligation of those rules which that society has assumed for their government; rules which are founded in truth and wisdom, and, but for the misapplication of fraud and flagitiousness of power, are well calculated to produce the best effects.

It is not in our courts that redress is to be sought for the errors or injustice of foreign adjudications. Nations pledge to each other the lives, the fortunes of their citizens, and even their very national existence, for the integrity and correctness of their judicial tribunals, and "when justice is refused, or palpable and evident injustice done, or rules and forms openly violated, or an odious distinction adopted, to the prejudice of the subjects of another," and negotiation for satisfaction fails, the appeal lies to the *ultima ratio* of nations. The government is bound to extend a protecting arm to her citizens, whilst confining themselves strictly within the limits of their duty, and to make compensation to them for such injuries as policy may withhold her from resenting.

The jurisdiction of the court of admiralty is of a peculiar nature. Acting wholly

in rem, and not affecting the rights of any persons whomsoever, except so far as they exist in the thing which is the subject of the libel, its decrees are laid down to be conclusive against all the world: a doctrine which, as to the right of property in the subject libelled, is strictly and universally correct, "Whenever the court is erected within the jurisdictional limits of the power which constitutes it, when the subject is of admiralty jurisdiction, and the court professes to sit and judge according to the law of nations, and the style of the admiralty." Nor must it be supposed, that to produce this effect upon the right of property, the decision of the court must be formed upon a just idea of the law of nations, as applies to any particular case; a decision founded upon an erroneous opinion will be as efficient, in that respect, as one which flows from the most unerring judgment. It is the thing decreed, that courts of justice are to look to, not to the reasons from whence the conclusions are deduced. *Governments will, [*513
indeed, examine into the correctness of proceedings against their citizens, and insist on satisfaction, or dissolve the bonds of peace.

It remains for me to consider the second of the principles upon which the court below founded its decree of April last in favor of the libellants, to wit, "that as the property of the actors was actually brought into their own jurisdiction, long before any judicial decision had taken place elsewhere, and the marshal of this court had the custody of it, at least three months prior to any such decision, that alone might have been good cause for ordering restitution."

In the argument upon this head, the counsel contended, that it was the possession alone which could bring the subject within the jurisdiction of the court of admiralty which condemned it; that in parting with the possession, by the sale, the court then lost its jurisdiction, and could not affect the right of property by their decree. The court below, without adopting this idea, in the extent contended for, appears to assume another, to wit, that coming within our jurisdiction, it could no longer be subject to the court of France, and the property revested by the *jus postliminii*. I am sorry, here again, to be under the necessity of adopting a different opinion. Mere locality will not, of itself, deprive the prize court of one nation of its jurisdiction, nor give jurisdiction to another. The taking as prize is the foundation of admiralty jurisdiction. A prize, brought into our ports by a belligerent, continues subject to the jurisdiction of the capturing power, although the *corpus* be within the limits of another jurisdiction; and it is now the general practice of European nations, to condemn in their own courts, captured vessels carried into the ports of an ally, or even a neutral. On the other hand, a prize brought into our ports would be in no wise subjected by that circumstance to our jurisdiction, except, perhaps, in the single case of its being necessary to assume a jurisdiction to protect our neutrality or sovereignty; as in the case of capture within our jurisdictional limits, or by vessels fitted out in our ports. Nor does it appear to me, that the *jus postliminii* can at all attach in this case, because that this capture was not a reprisal upon us as a nation, but upon a single offending individual in the commission of an act unauthorized by his nation.

To satisfy the mind on this subject, it is necessary to inquire, what is the liability of an individual of a neutral state, who commits an act inconsistent with his neutrality, or even with the municipal laws of another nation? How is his state affected by his conduct, and who is to decide upon the offence with which he is charged? As to the tribunal that must determine on the offence, there is no longer a contrariety of opinion entertained among civilized nations. Every nation is the arbiter and vindicator of its own rights, and the courts of the capturing power have exclusive jurisdiction of questions arising on supposed breaches of neutrality, the violation of belligerent rights, or even of municipal law. With regard to the liability of individuals charged with these offences, it is proper to observe, that, in strictness, every nation is bound to restrain its own citizens from the commission of offences against all other nations. But as it is impossible, in the present state of things, for the most vigilant government to prevent these aggressions, which a desire of gain and the spirit of adventure are hourly producing, nations have agreed in giving up the individual to the consequence of his own temerity, and the offender is now treated as an individual enemy, abandoned by his own

government, and who cannot even claim the rights of war, but from the humanity or
*514] policy of his captor. A consideration *which will set this idea in a strong point of view, and show that he is considered as waging an individual war with the capturing belligerent, is, that if he escapes, or rescues his vessel after capture, he is never demanded of his government, nor complaint made against him, whatever acts of violence he may commit in so doing, but avoids the danger as another enemy would under similar circumstances.

If an American vessel charged with a breach of neutrality, were to be captured by a belligerent, beyond our jurisdictional limits, and before condemnation, were to be driven into one of our ports, either by stress of weather, or the pursuit of any enemy, will it be contended, that this court could interfere to divest the captor of his possession? It must be recollected, that such an attempt would draw to this court the jurisdiction of a question which it is the acknowledged right of the belligerent to have decided by his own tribunals. Therefore, in the case of a neutral, captured on a charge of a breach of neutrality, the *jus postliminii* can only attach, in case of rescue or recapture, and his nation cannot interfere to restore him that possession which he has lost by the capture, without becoming a party in the contest; she regards the individual and capturing power as belligerents, between whom she is bound equally to observe the laws of neutrality, and particularly to consider possession as the criterion of right, at least, while the cause of capture is in its progress to adjudication. It will be perceived, how large a portion of the argument went to justify and condemn the trade in which this vessel was engaged; the one side contending that the libellants had committed no act for which she was liable to condemnation, the other, that they had a question which is exclusively cognisable in the courts of the capturing power, but which this court would be compelled to decide upon, if the libel be sustained upon a claim interposed on behalf of the captors, or, even, I conceive, of their vendee, unless there were reason to contend that the vessel was piratically captured.

At the same time, I heartily concur in the opinion, that so far as between neutrals, at least, a sentence of condemnation is indispensably necessary to produce a complete divesture of property, and unless the neutral property captured be put in a train for legal adjudication, I should think a nation at liberty to seize it as being piratically taken; for the capturing power is bound to satisfy the neutral nation that she had a legal right to attack her citizen; and it will be found, upon reflection, that this cannot be satisfactorily done, in any other mode than by a decree of her tribunals of justice. Much has been said about the different rules adopted by European nations respecting the divesture of property. These rules were universally adopted by the respective nations, to regulate the claims of their own citizens in questions of salvage and restitution. In case of alliances in war, each nation extended to its ally the benefit of a rule which ascertained the rights of her own citizens. And the correctness of these rules was mere matter of speculation, in no wise affecting the interest of neutrals, until Great Britain thought proper, in the last war, to exact a salvage on the re-capture of neutral property.

There appears to me to remain but two of the points made by counsel, on which it
*515] may be necessary for me to remark. *1st. How far the sentence of condemnation would affect the property, after the sale? 2d. Whether the whole transaction was not inconsistent with the treaty subsisting between the two nations, and therefore, producing no change of property?

1st. In the case of *Sheafe and Turner* v. *A Parcel of Sugars*, decided in the district court of this district, in the year 1800, in favor of the purchasers, and affirmed on appeal to the circuit court, the property captured was carried into the Havana and libelled and condemned by a French court, sitting at the Cape. The sale also took place, prior to the condemnation. It was, indeed, asserted in that case, as it was in this, that the sale was made with the consent of the master, but there was no evidence to prove it. In two important features, these cases are parallel, and I might rest my opinion on this point, on precedent alone; but it affords me more satisfaction to be able also to decide on principle. As the sale was not made by order of a competent

tribunal, and was made by the captors, at a time when their rights were not consummated by a judicial decision, the claimant in this case could have acquired no more than an inchoate right, subject to be confirmed or defeated by the event of the decision of the court to which the cause was preferred; that is, he acquired no more interest than what was possessed by the captor from whom he purchased. Had the decision been against the captors, with the evidence now before me, I should not hesitate to decide in favor of restitution; but when once the decree of condemnation was passed, the government of France has made the act of capture its own, and all questions of individual interest are at an end.

The whole of the argument founded on the violation of the treaty, is subject to the general objection, that it leads to a revision of a decree of a foreign tribunal. The French courts are bound by the convention with France, and it is to be presumed, that they bear it in mind in their decisions. They possess the same power in construing its meaning and effect that we do, and though influenced by an erroneous opinion, that would not, of itself, vitiate their decrees. With regard to the ground of the argument drawn from the 12th article, to wit, that Port de Paix is the port of an enemy of France, and therefore, a trade with it is sanctioned by that article, I think is totally incorrect in point of fact. France has not yet relinquished the contest, and until she does, I think that all the ports of the island are still ports of France, and that she possesses the right to exclude all the world from a commerce with them, and to fix the penalty for a breach of such exclusion. There is a peculiarity in the unhappy conflict raging in that devoted island, which should make us hesitate in applying to it the general rules of war between independent nations. Great Britain, deeply interested as she is, in embarrassing and distressing her enemy, has not ventured to apply the general laws of war to this newly-erected empire. On the contrary, she condemns our vessels carrying contraband of war to the brigand ports, as if carrying to the ports of her enemy, although, in fact, it is carrying them to the most inveterate enemy of her rival. As the 20th article relates only to the case of a capture for carrying contraband of war to an enemy's port, I shall pass it over without *any observations, and shall close with a few remarks on the 22d article, the last noticed in the argument. [*516

The first clause of this article, and the only one relating to this case, is in the following words: "It is further agreed, that in all cases, the established courts for prize causes in the country to which prizes may be conducted, shall take cognisance of them," &c. It strikes me, upon an attentive consideration of this article, that the only object of it was a recognition of the established doctrine, that the courts of the capturing power shall judge of the legality of capture, and to add the very necessary provision that the reasons of condemnation shall be in all cases expressed in their decrees. But certainly, the words, literally taken, will produce the inference contended for by counsel, to wit, that vessels captured from our citizens, by France, cannot be condemned, except in a French port, for it would be absurd to suppose, that it was intended to give jurisdiction to the courts of any neutral or ally, into whose ports such prizes might be carried. If this were a just construction of the article alluded to, it would only follow, that a violation of the treaty had been committed, for which France is bound to make atonement, and that the court of admiralty of Santo Domingo was incorrect in proceeding to adjudicate a vessel not lying in their own port. But I conceive that the validity of the decree will still remain unshaken as to the change of property.

If this article was not brought to the notice of the court, it may well be attributed to the *laches* of the libellant himself, in not making this defence, or, indeed, any other in a court that was open to his claims. But there is a liberality and candor necessary in the construction of treaties, which would make me reject the one here contended for, were it necessary to decide upon it. I could never be induced to think, that a point of such importance would be left to mere inference, by the able men who negotiated that treaty, when it could have been so easily expressed, in a single unequivocal sentence. Nor do I think the interest of the neutral would be promoted, by a construction which would subject the fair trader to the melancholy inconvenience of being detained in

some distant port, until he could be safely conveyed to that of the captor for adjudication, or be exposed, perhaps, to the perils of the ocean, during some tedious voyage for the same purpose.

Upon the whole, I am of opinion, that the decrees in these cases should be reversed, and the libels be dismissed. But as the claimant purchased, before condemnation, and the libellant had a fair claim to this investigation, I am of opinion, that each party should pay his own costs.

316