be in the case, in which the *subpœna* has been actually served. The prac-
*335] tice must always *be strict in the previous stages of the business, before an attachment can be awarded; and all the documents upon which it is awarded, must be filed with the court.

United States *v.* Montgomery.

Process of contempt.

An attachment against a witness, for contempt, must be served by the marshal, in any part of his district.

An attachment being awarded against the witnesses, who did not attend at the return of the *subpœna* that had issued in this cause, on the part of the defendant, the marshal, Nichols, suggested that they resided in a distant county, and asked the opinion of the court, whether it was his duty to serve the process.

By the Court.—An attachment is the process of the court, regularly issuing for the administration of justice; and therefore, must be served by the marshal.

United States *v.* The Insurgents of Pennsylvania.[1]

Trial for treason.—Jury.—Copy of indictment.

At common law, the court may direct any number of jurors to be summoned, on a consideration of all the circumstances under which the *venire* is issued.

The act of congress which refers the federal courts to the state laws, for certain regulations respecting juries, has respect to the designation and qualification of the jurors, and not to the number of which the panel should consist.

A copy of the caption of the indictment, as well as of the indictment itself, must be delivered to the defendant, three days before the trial.

In the list of the jury and witnesses, furnished to the defendant, the township in which they reside must be given—the county is not sufficient; but the statute does not require their occupations to be stated.

Several indictments for high treason having been found against persons concerned in the insurrection in the four Western counties of Pennsylvania, a *venire* was issued in each case, for summoning a jury, returnable to the present term; and to each writ, the marshal returned a separate panel, containing the names of thirty-six jurors from the city of Philadelphia, sixteen from the county of Delaware, nine from the county of Chester, and twelve from each county in which the treason was charged to have been committed, making twenty-two jurors on each panel, and one hundred and eight jurors summoned on the whole.

The act of congress (1 U. S. Stat. 88, § 29) having directed "that any person who shall be accused and indicted of treason, shall have a copy of the indictment, and a list of the jury and witnesses to be produced on the

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[1] For a full account of the western insurrection in Pennsylvania, see Findley's History of that event, and Brackenridge's History of the same transaction, in which the writers consider the subject from opposite political stand points.

trial for proving the said indictment, mentioning the names and places of abode of such witnesses and jurors, delivered unto him, at least three entire days before he shall be tried for the same," the attorney for the district had, in due time, delivered to the several prisoners copies of the indictment, of the panel of jurors, and of the list of witnesses; but he had omitted to deliver a copy of the caption of the indictment, and to specify the occupations, or the places of abode of the jurors and witnesses, otherwise than by mentioning the counties in which the jurors respectively resided.

*On this state of facts, *Lewis* suggested the following exceptions; [*336
which, he said, were not so much designed for the existing cases, as to prevent the introduction of precedents, injurious to the rights and safety of posterity.

1st. That the marshal had returned a greater number of jurors than the law authorised; and that he had returned a several panel in each case, instead of one general panel to try all the issues at this court.

By the act of congress (1 U. S. Stat. 88, § 29), it is declared, that "in cases punishable with death, the trial shall be had in the county where the offence is committed, or where that cannot be done, without great inconvenience, *twelve petit jurors shall, at least, be summoned from thence.* And jurors in all cases to serve in the courts of the United States shall be designated by lot, or otherwise, in each state respectively, according to the mode of forming juries therein now practised, so far as the laws of the same shall render such designation practicable by the courts or marshals of the United States; and the jurors shall have the same qualifications as are requisite for jurors, by the laws of the state of which they are citizens, to serve in the highest courts of law of such state, and shall be returned as there shall be occasion for them, from such parts of the district, from time to time, as the court shall direct, so as shall be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services."

By the act of Pennsylvania, for the better regulation of juries (2 Dall. Laws, 263, § 4), it is declared, "that every sheriff, or any officer, to whom the return of *venire facias juratores*, or other process for the trial of causes before the judges of oyer and terminer, general jail delivery, and *nisi prius* doth belong, shall, upon return thereof, unless in cases where a special jury shall be struck by rule of court, annex a panel to the said writ, containing the Christian and sur-names, additions, and places of abode, of a competent number of jurors, the names of the same persons to be inserted in the panel annexed to every such writ, for the trial of all issues in civil and criminal causes at the said courts, in each respective county; which number of jurors, in any county, shall not be less than forty-eight, nor more than sixty, without the direction of the judge or judges appointed to go to the circuit, and sit as judge or judges of oyer and terminer, general jail delivery, or *nisi prius*, in such county, who are hereby empowered and required, if he or they see cause, by order, under his hand or their hands, to direct a greater number, not to exceed eighty, &c."

By the same act (§ 5), it is further declared, "that the sheriff of the county of Philadelphia, or other county where the *supreme court of judicature shall be holden, or other officer to whom the return of the [*337

venire facias juratores, or other process for the trial of causes at bar before the justices of the supreme court, doth belong, shall, upon return thereof, unless in cases where a special jury shall be struck by rule of court, annex a panel to the said writ, containing the Christian and sur-names, additions and places of abode, of a competent number of jurors, the names of the same persons to be inserted in the panel annexed to every such writ, for the trial of all issues to be tried at the bar of the said court, during the ensuing term, which number of jurors shall not be less than forty-eight, nor more than sixty, &c."

The laws of the state being thus made for the federal courts, *Lewis* contended, that, in no case, could the marshal be authorized to return more than eighty jurors; that the power of extending the panel to that number does not vest in the circuit court, sitting in its ordinary character, as the act only vests it in the courts of oyer and terminer, general jail delivery, and *nisi prius;* but that in the present instance, even that number, and without the order of the court, had been far exceeded, since twelve jurors had been summoned from each of the four counties in which the charges were laid, and sixty had been summoned from other parts of the state, making in the whole one hundred and eight, which he considered as an unnecessary, as well as an expensive and oppressive, call on the citizens. He insisted that, as different charges were laid in the four counties, forty-eight jurors should have been summoned from them, and only the number necessary to complete the panel of sixty, or, in case of a special order, the panel of eighty might be summoned from any other part of the state. In England, the power of summoning jurors is limited to forty-eight, unless by the special order of the justices of oyer and terminer and general jail delivery. Kelyng, 16. The act of congress does not direct, that the twelve jurors, to be brought from the county where the offence was committed, shall be over and beyond the sixty jurors directed by the state law to be summoned; nor does it permit the marshal to summon the jurors whence he pleases, without the express order of the court.

The return of several panels for the trial of each issue, *Lewis* deemed to be equally inconsistent with the terms and policy of the Pennsylvania law, which the law of congress had likewise adopted. Great inconvenience had been experienced from such a practice; and the state legislature, as a reformation in the system of jurisprudence that previously prevailed, expressly enacted, that the panel annexed to every writ of *venire facias juratores*, should be "for the trial of *all* issues to be tried at the bar of the said court, during the said term."

*338] 2d. That a copy of the *caption* of the indictments, as well as *a copy of the indictments themselves, had not been delivered to the respective prisoners.

The caption is material, for it must state the judges before whom, the grand jury by whom, the time when, and the place where, the indictment was preferred. For if the judges sit without a commission, or the commission has expired; if the grand jury was composed of a number less than twelve, or the members of it were not qualified according to law; if the indictment was found at a place where the court was not authorized to sit, or at a time when, in fact, it was not sitting, the prisoner is entitled to take advantage of the defect, and he cannot have the opportunity of

doing so, unless he is furnished with the caption of his indictment. On the same principle, Foster contends for the same privilege; and declares it to be founded on the constant practice, though the act only mentions a copy of the indictment. Fost. Cr. L. 229. And Blackstone, as well as Foster, shows that it is of importance, that the prisoner should receive the copy, before arraignment, "for then is his time to take exceptions to the indictment, by way of plea or demurrer." 2 Hawk. c. 25, § 118. In reason, and in effect, the caption is a part of the indictment. Whenever it becomes necessary to exemplify the indictment, the caption must accompany it; and no inferences drawn from the practice respecting indictments for other offences (where the caption is not supplied, as it is said, until the record is finally made up), can be applicable to the present question, since in no other case, but treason, is the delivery of a copy of the indictment prescribed as a preliminary to the trial. Nor is there any essential distinction between this court, and the courts to which the cited authorities relate, for although the jurisdiction of the court is ascertained and known, the constitutionality of the commissions of the judges who compose it, the legality of the number and qualifications of the grand-jury who attend it; the place of its sessions, &c., will still afford ample materials for investigation and just objection.

3d. The lists furnished to the respective prisoners do not contain a sufficient specification of the addition and places of abode of the jurors and witnesses.

By the act of congress (1 U. S. Stat. 88, §§ 28, 29), as well as the act of Pennsylvania (2 Dall. Laws, 263), the specification of the place of abode of the jurors is prescribed, and the Pennsylvania act, which is adopted by the other, calls likewise for the additions of the jurors. It is true, that in the copy of the panel, the county is mentioned from which the jurors respectively are summoned, but as the sheriff could not, in a case arising under the state jurisdiction, summon any citizens as jurors, who were not inhabitants of the proper county, the act, when it requires a specification of the place of abode, cannot *surely be satisfied by merely mentioning the county. The express relation between the state and federal laws on the subject [*339 demands an analogous conclusion, in a case arising under the jurisdiction of the general government, and the general reasons for furnishing such information to prisoners acquire great additional force, from a consideration of the distance between the place of trial and the place where the offence is charged to have been committed.

In answer to these exceptions, *Bradford*, the attorney-general of the United States, and *Rawle*, the attorney of the district, premised, that they were also impressed with the propriety and necessity of establishing sound and permanent principles on this first discussion of the doctrine of treason, as it applied to the existing constitution of the United States; but they contended—

1st. That the exception to the number of jurors returned, and to the mode of returning separate panels, ought not to be allowed. They observed, that the leading question on this point called for a decision, whether, when a federal court was referred by an act of congress to state regulations for its government, the state law, in its strict words, or in the practice under it, should furnish the rule. But even from the context of the judicial act

of congress, an intention cannot reasonably be inferred, to incorporate all the provisions of the Pennsylvania act relating to jurors, into the practice of the federal courts. The reference to the state laws respects only the mode of designating the jury by lot, or otherwise, and the qualification of the jurors; it does not respect the number to be returned on the panel, which is still left (under the power of framing writs suited to the exigency of every case (1 U. S. Stat. 276), in the discretion of the court, to be prescribed by *venire*, as at common law. But the Pennsylvania act, without admitting such a distinction, must produce the greatest embarrassment; for it prescribes a different number of jurors to be returned to different courts, and there is nothing in the act of congress to determine which number shall be adopted here.

The act of Pennsylvania, however, had obviously an economical object in view, when it limited the number of jurors to sixty, as a compensation was originally allowed for their attendance, though it has since been repealed (2 Dall. Laws, 268); and the practice of the supreme court, it is believed, changed in consequence of the repeal. But even taking the act of Pennsylvania as an indispensable rule, it is substantially complied with. The act of congress introduced a particular regulation for the trial of offenders, which required that twelve jurors should be taken from the county where the offence is charged to have been committed; and this is done. The act of Pennsylvania authorized sixty jurors to be summoned; and in addition to the twelve from the proper county, the marshal *has, accordingly, summoned sixty from the state at large. To each *venire* there are no more than seventy-two jurors returned.

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The return of a separate panel in each case is, likewise, perfectly consistent with law, practice and public convenience. The indictments depending are all separate; none of them are joint. The exception, however, if it is at all available, goes to the *venire*, and not to the panel; for the latter is in strict conformity to the former. After the court has prescribed that twelve of the jurors shall be brought from the proper county, the marshal has a legal discretion to bring the rest from any part of the district that he pleases. The court will not, and cannot, interfere with the exercise of that power, unless it becomes necessary, in order to obtain an impartial jury. There must be as many panels, as there are counties, in which offences are charged to have been committed; and if twelve jurors are taken from the proper county for each case, there can be no legal ground to object that the same sixty, to complete the panel of seventy-two, are returned to all the cases. But the adverse doctrine would require the jurors to be brought from every county in which an offence is charged. Suppose, therefore, five counties involved, sixty jurors would, of course, be returned from them; and if the court (as it has been contended) cannot increase that number, then a pirate, or any other felon, charged with an offence committed out of those counties, could not be brought to trial at the same term.

2d. That it is not necessary, nor is it material, to furnish the prisoner with a copy of the caption, as well as of the indictment. The act of congress must be presumed to have been passed with a full knowledge of the state law; and by the state law, evinced and supported by a constant practice, nothing more than a copy of the indictment was required. 1 Dall. 33. Sufficient appears on the indictment to show, what it is incumbent on the

prosecutor to show. The case referred to in Fost. p. 229, was that of a special court, where a caption is undoubtedly necessary; and the distinction is expressly so taken. Fost. 11; 2 Hawk. c. 25, § 126.(*a*)

3d. That the addition of the jurors and witnesses, as to the place of abode, is sufficient; but if the court think otherwise, time will be allowed to amend it. The act of congress, however, does not require a specification of the occupation of the jurors and witnesses, but only of their names and places of abode; and it cannot be controlled by the provision of the state act, which is in that respect different; but must be deemed substantive and independent.

*On the 18th of May, the Judges of the COURT delivered their opinions to the following effect. [*341

PETERS, Justice.—I have considered the objections made to the panels, and do not conceive these objections relevant. Although, in ordinary cases, it would be well to accommodate our practice with that of the state, yet the judiciary of the United States should not be fettered and controlled in its operations, by a strict adherence to state regulations and practice. But I see not that, in a liberal view and construction of the laws of the United States on this subject, a rigid adherence to all the local and economical regulations of the state, is directed or necessary. It should seem, that the most pointed reference was had to the designation and qualification of jurors, and not to the exact numbers of which the panel should consist. The legislature of a state have in their consideration a variety of local arrangements, which cannot be adapted to the more expanded policy of the nation. It never could have been in the contemplation of congress, by any reference to state regulations, to defeat the operation of the national laws. Now, there are cases, which have been stated, in which some of the criminal laws of the United States may be rendered impracticable, by an adherence to the rule of numbers prescribed as to jurors, in criminal cases, by the state law; and especially, if there must be but one panel, as has been contended. Yet, the most substantial requisites, to wit, the qualifications of jurors and mode of selection, may be adhered to. As to the clause in the law of the United States, directing, that "the laws of the states (with certain exceptions) shall be regarded as rules of decision, in trials at common law in the courts of the United States," I do not think, it applies to the case before us.

All the arguments founded on the inconveniences to the defendants, if, in this case particularly, any such exist (of which I much doubt), weigh lightly when set against the delays and obstructions which the objection would throw in the way of the execution of the laws of the nation.

PATERSON, Justice.—The objections that have been suggested on this occasion, are principally founded on the 29th section of the judicial act of congress, which refers the federal courts to the state laws, for certain regulations respecting juries. But the words of this reference are clearly restricted to the mode of designating the jury, by lot or otherwise; and to the

(*a*) PATERSON, Justice.—The case of special courts, or of inferior courts held by charter, &c., can furnish no analogy for this court, which is a court of original and permanent jurisdiction. The proceedings in the King's Bench can alone be applicable.

qualifications which are requisite for jurors according to the laws and practice of the respective states. Since, therefore, the act of congress does not itself fix the number of jurors; nor expressly adopt any state rule for the purpose, it is a necessary consequence, that the subject must depend on the common law; and, by the common law, the court may direct any number *of jurors to be summoned, on a consideration of all the circumstances under which the *venire* is issued. There are instances, indeed, where five juries have been summoned upon a trial for high treason, in order that, after the allowance of the legal challenges, a competent number might still be insured. In the present instance, the precept requires the marshal to return at least forty-eight jurors; and he has not, in my opinion, been guilty of any excess, in the exercise of that discretion for returning a greater number, with which he is legally invested.

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Neither is the mode of making his return justly exceptionable. As the act of congress directs that twelve jurors shall be summoned from the county in which the offence was committed, I cannot conceive any more proper, or more legal, way of proceeding, than by issuing a *venire* in each case; and then, there must, of course, be a separate panel returned, in conformity to every writ. Thus, likewise, the act of congress and the state act have been reconciled, and both put into operation; twelve jurors being returned in pursuance of the former, and sixty jurors being returned, in pursuance of the latter law.

With respect to the objection, that a copy of the caption of the indictment has not been furnished to the prisoners, it may be observed, that, although the practice of Pennsylvania has been different, yet, the caption and the indictment seem naturally to form but one instrument; and copies of both should, therefore, be delivered under the provisions of the act of congress. There can be little inconvenience in adopting this rule; and it is calculated to avoid much difficulty and controversy.

The objection, that the place of abode of the jurors and witnesses, has not been sufficiently designated, in the lists furnished to the prisoners, is, likewise, in our opinion, a valid one. The object of the law was, to enable the party accused to prepare for his defence, and to identify the jurors who were to try, and the witnesses who were to prove, the indictment against him. It is contrary to the spirit and intent of such a provision, that the whole range of the state, or of a county, should be allowed, as descriptive of a place of abode; and it is the duty of the judges so to mould the practice and construction of statutes, as to render them reasonable and just. With regard to the place, therefore, we think the townships in which the jurors and witnesses respectively reside, should be specified; but the act of congress does not require a specification of their occupations, and the niceties of the state act, are not, in that respect, incorporated into the federal system.

In consequence of this decision, the trials were suspended, in order to give the attorney of the district the three days required by the act of congress, for delivering to the prisoners, amended copies of the caption and indictment, and of the lists of jurors and witnesses.