*Symes's Lessee *v.* Irvine.

Continuance.

It is not ground for forcing on a trial, in the absence of a material witness, that his deposition *de bene esse* might have been taken, under the statute.

The defendant's counsel moved to put off the trial of this cause (which was marked for the 20th of April), upon an affidavit setting forth, "that A. B. a material witness, who lived at Carlisle, in Pennsylvania (at a distance of more than one hundred miles from Philadelphia), was absent; and that he had been sick some time ago, but had promised the defendant to attend at the trial."

Lee, *Ingersoll* and *Rawle* objected to the postponement, because it was in the defendant's power, by virtue of the act of congress (1 U. S. Stat. 88, § 30), to have taken the deposition of the witness *de bene esse*. Nor is it sufficient in every case to make a formal affidavit; the court will inquire so far into the testimony which the witness could give, as to satisfy themselves, that the reason assigned for a postponement is not merely colorable; and if the facts, in the present instance, are material, there can be no injury from allowing the court to hear and decide on them. There can be less occasion, likewise, for indulging such motions in ejectments, than other suits, as the judgment is not conclusive.

E. Tilghman and *Lewis*, in support of the motion, stated, that the cause had never yet been put off, at the request of the defendant; and they urged the superior importance of *vivâ voce* testimony, as a sufficient reason for declining to take the deposition of the witness *de bene esse*, under the act of congress; whose provisions, in this respect, indeed, they regarded as abhorrent to the principles of natural justice.

Peters, Justice.—If any delay had heretofore occurred by the defendant's conduct, I should have been disposed to have held him strictly to the performance of everything, by which it was in his power to procure the testimony of the witness. The act of congress, however, appears to be rather harsh; and if no excuse, like the present, could be admitted, it would be declaring, in effect, that whenever witnesses resided more than one hundred miles from the court, their depositions must be, indispensably, taken.

Iredell, Justice.—It is not a sufficient reason for forcing this cause to a trial, in the absence of a material witness, that the act of congress authorized his deposition to be taken. Courts of justice have always been desirous to obtain *vivâ voce* testimony, where it was practicable; and even the plaintiff himself has given a proof of his sense of its superior estimation, by bringing his witnesses for this very trial from Richmond, in Virginia, though he was equally entitled to take their depositions. *The testimony may be of such a nature as not to admit of all its force being reduced to the form of a deposition.

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With respect to a disclosure of the facts, which depend on the testimony of the witness, we think, that it is not regularly in our power to compel it;

and even if we had the power, it might be essentially wrong, in many cases, to exercise it.

Nor do I think that, because this is a case of ejectment, the court should be less scrupulous in ordering the trial to proceed: for, it must be recollected, that the defendant is, at present, in possession of the premises, but will be evicted, if the cause is decided against him.

Upon the whole, the court cannot, perhaps, lay down a general rule for the continuance of causes; but must, under the circumstances of each case, take care that injustice is not done, either by precipitate trials or wanton delays. In the present instance, there appears to be a fair ground for the postponement; and therefore—

Let the cause be continued.

APRIL TERM, 1798.

Present, CHASE and PETERS, Justices.

UNITED STATES *v.* WORRALL.

Jurisdiction.—Divided court.

On the trial of an indictment for attempting to bribe a public officer, it is sufficient to sustain the jurisdiction, that the letter offering the bribe was mailed at a post-office within the jurisdiction.

The federal courts have no common-law jurisdiction in criminal cases.[1] CHASE, J.; PETERS, J., dissenting.

If the defendant in an indictment be found guilty, on the trial, and the court be divided on the question of jurisdiction, sentence will be passed.

THE defendant was charged with an attempt to bribe Tench Coxe, the commissioner of the revenue; and the indictment, containing two counts, set forth the case as follows:

"The grand inquest of the United States of America, for the Pennsylvania district, upon their respective oaths and affirmations, do present: That whereas, on the 13th day of May 1794, it was enacted by the senate and house of representatives of the United States of America, in congress assembled,[2] 'that as soon as the jurisdiction of so much of the headland of

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[1] This proposition appears to be supported by the weight of authority, though there are cases in which the opposite doctrine is held. See United States *v.* Hudson, 7 Cr. 32; United States *v.* Coolidge, 1 Wheat. 415; s. c. 1 Gall. 488; Pennsylvania *v.* Wheeling and Belmont Bridge Co., 13 How. 519; United States *v.* Reese, 92 U. S. 216; United States *v.* Clark, 1 Gall. 497; United States *v.* Wilson, 3 Bl. C. C. 435; United States *v.* Barney, 5 Id. 294; United States *v.* Ramsay, Hempst. 481; In re Bergen, 2 Hughes 516–17; United States *v.* Hutchinson, 4 Clark (Pa.) 211; United States *v.* Hare, 2 Wheeler C. C. 300; United States *v.* Mackensie, 1 N. Y. Leg. Obs. 374. The cases holding the contrary doctrine are, United States *v.* McGill, 4 Dall 429; United States *v.* Henfield, Whart. St. Trials 85; United States *v.* Willing, Id. 652; United States *v.* Smith, 6 Dean, Abr. 718. United States *v.* Meyer, Whart. Prec. § 955, n.; Serg. Const. Law, 272. Nothing can be punished under the laws of the United States, which is not made criminal by statute. United States *v.* Libby, 1 W. & M. 222; United States *v.* New Bedford Bridge, Id. 401; United States *v.* Lancaster, 2 McLean 431. The question, therefore, may be considered at rest, on authority, though never *directly* passed upon by the supreme court.

[2] Act 13th May 1794, 1 U. S. Stat. 368.