

UNITED STATES *v.* MARCHANT and COLSON.*Criminal law.—Separate trials.*

Where two or more persons are jointly charged, in the same indictment, with a capital offence, they have not a right by law, to be tried separately, without the consent of the prosecutor, but such separate trial is a matter to be allowed in the discretion of the court.

CERTIFICATE of Division from the Circuit Court of Massachusetts.¹

March 12th, 1827. The opinion of the court in this case was delivered by STORY, Justice.—The question, which comes before us upon a certificate of a division of opinion of the judges of the circuit court of Massachusetts, is this, whether two or more persons, jointly charged, in the same indictment, with a capital offence, have a right, by the laws of the country, to be tried severally, separately and apart, the counsel for the United States objecting thereto, or whether it is a matter to be allowed in the discretion of the court. We have considered the question, and are of opinion, that it is a matter of discretion in the court, and not of right in the parties. And it has become my duty briefly to expound some of the reasons which urge us to that conclusion.

The subject is not provided for by any act of congress ; and therefore, if the right can be maintained at all, it must be as a right derived from the common law, which the courts of the United States are bound to recognise and enforce. The crimes act of 1790, ch. 9, provides, in the 29th section, for the right of peremptory challenge in capital cases ; and this right, to the extent of the statute, must, *in all cases, be allowed the prisoners, [*481 whether they are tried jointly or separately. Upon a joint trial, each prisoner may challenge his full number, and every juror challenged as to one, is withdrawn from the panel as to all the prisoners on the trial, and thus, in effect, the prisoners in such a case possess the power of peremptory challenge to the aggregate of the numbers, to which they are respectively entitled. This is the rule clearly laid by Lord Coke, Lord Hale and Sergeant Hawkins, and, indeed, by all the elementary writers. Hawk. P. C. b. 2, ch. 41, § 9 ; 2 Hale H. P. C. 268 ; Co. Litt. 156 ; *Beauchamp's Case*, 9 Edw. IV. folio 27, pl. 40 ; Plowd. 100 ; Kelyng 9.

One consequence of this, in ancient times, was, that embarrassments often arose at trials at the assizes, on account of a defect of sufficient jurors. The statute of Westminster II., c. 38, ordained, "that in one assize, no more shall be returned than twenty-four." The common practice under this statute used to be, for the sheriff to return forty-eight jurors, although the precept named but twenty-four. It was, indeed, held, at an early period, that the statute of Westminster did not apply to criminal cases ; but, notwithstanding this, the usual practice prevailed, unless the court directed a larger number to be returned. And it was not until the reign of George II., that a larger number was required by law to be returned at the assizes. The

¹ For the opinion of Judge STORY, in the circuit court, see 4 Mason 158. And see *United States v. Gibert*, 2 Sumn. 20 ; *United States v. Kelly*, 4 W. C. C. 528 ; *United States v. Wilson*, Bald. 78 ; *United States v. Collyer*, Wharton

Hom. 489 ; *Commonwealth v. Manson*, 2 Ash. 31 ; *Commonwealth v. Skupinski*, 9 Leg. Int. 34. In New York, it is provided by statute, that in such cases, a separate trial shall be a matter of right. *Babcock v. People*, 15 Hun 353.

United States v. Marchant.

history of this branch of the subject is very clearly stated in 3 Bac. Abr. tit. Juries, B., 6, and in Kelyng 16. (a) It is obvious, that on joint panels, returned for joint trials, at the assizes, a defect of jurors might, from this limitation, often take place. And it became a question, in very early times, whether, under such circumstances, the court had power, against the will of the prisoners, to sever the panel, and to try them severally, if they insisted upon their right of several challenge. It was decided, upon full consideration, that the court had this power. To this effect are the cases in Plowd. 100, in Dyer 152 b, and in Kelyng 9 ; and the doctrine has received the sanction *482] of Lord HALE, and other writers of the highest authority. *Whether, then, prisoners, who are jointly indicted, can, against their wishes, be tried separately, does not admit of a doubt.¹ It remains to consider, whether they can insist upon a several trial.

The sole ground upon which this claim can rest must be, if maintainable at all, that they have a right to select their jury out of the whole panel, and that as, upon a joint trial, one may desire to retain a juror who is challenged by another, and, if challenged by one, he must be withdrawn as to all, this right of selection is virtually impaired. But it does not appear to us, that this reasoning can, upon the principles of the common law, be supported. x The right of peremptory challenge is not, of itself, a right to select, but a right to reject jurors. It excludes from the panel those whom the prisoner objects to, until he has exhausted his challenges, and leaves the residue to be drawn for his trial, according to the established order or usage of the court. The elementary writers nowhere assert a right of this nature in the prisoner, but uniformly put the allowance of peremptory challenges upon distinct grounds. Mr. Justice Blackstone, in his Commentaries (4 Bl. Com. 353), puts it upon the ground, that the party may not be tried by persons against whom he has conceived a prejudice, or who, if he has unsuccessfully challenged them for cause, may, on that account, conceive a prejudice against the prisoner. The right, therefore, of challenge, does not necessarily draw after it the right of selection, but merely of exclusion. It enables the prisoner to say who shall not try him; but not to say who shall be the particular jurors to try him. The law presumes, that every juror sworn in the case is indifferent and above legal exception ; for otherwise he may be challenged for cause. What jurors, in particular, shall try the cause, depends upon the order in which they are called ; and the result is a mere incident following the challenges, and not the absolute selection of the prisoner, resulting from his power of challenge.

This view of the general principle of the common law is very much confirmed by other considerations. It is laid down by Hawkins (Pl. C. b. 2, ch. 41, § 8), that where several persons are arraigned on the same indictment, and severally plead not guilty, it is in the election of the prosecutor *483] either to take out joint *venires* against them all, or several *against each of them. This plainly supposes that it is in the election of the prosecutor, whether there should be a joint or separate trial. If there had

(a) See also, 2 Hale H. P. C. 263.

¹ Commonwealth v. Hughes, 11 Phila. 430 ; People v. Howell, 4 Johns. 296 ; People v. Vermilyea, 9 Cow. 369.

United States v. Marchant.

been any known right in the prisoner to control this election, it seems incredible, that so accurate and learned an author should not have stated it, when the occasion indispensably required him to take notice of a qualification so important to his text. His silence is, under such circumstances, very significant.

But a still more direct conclusion against the right may be drawn from the admitted right of the crown to challenge in criminal cases, and the practice under that right. We do not say, that the same right belongs to any of the states in the Union ; for there may be a diversity in this respect as to the local jurisprudence or practice;¹ the inquiry here is, not as to what is the state prerogative, but, simply, what is the common-law doctrine as to the point under consideration. Until the statute of 33 Edw. I., the crown might challenge peremptorily any juror, without assigning any cause ; but that statute took away that right, and narrowed the challenges of the crown to those for cause shown. But the practice, since this statute, has uniformly been, and it is clearly settled, not to compel the crown to show cause, at the time of objection taken, but to put aside the juror, until the whole panel is gone through. Hawkins, on this point, says (Pl. C. b. 2, ch. 43, §§ 2, 3), "if the king challenge a juror, before the panel is perused, it is agreed, that he need not show any cause of his challenge, till the whole panel be gone through, and it appears that there will not be a full jury, without the person so challenged. And if the defendant, in order to oblige the king to show cause, presently challenge, *touts paravaile* ; yet it had been adjudged, that the defendant shall be first put to show all his causes of challenge, before the king need to show any." And the learned author is fully borne out by the authorities which he cites, and the same rule has been recognised down to the present times. Hale H. P. C. ch. 36, p. 271 ; 3 Bac. Abr. Jury, E, 10 ; *Rex v. Conigsmarke*, 9 How. St. Tr. 1 ; *Rex v. Stapleton*, 3 Ibid. 502 ; *Rex v. Borosky*, 9 Ibid. 1 ; *Rex v. Gray*, Ibid. 127, s. c. T. Raym. 473 ; *Rex v. Grahme*, 12 How. St. Tr. 646 ; *Rex v. Cook*, 13 Ibid. 311 ; *Rex v. Horne Tooke*, 25 Ibid. 1, 24 ; 1 Chit. Cr. Law 533 ; *Rex v. Campion*, 1 How. St. Tr. 1050.

*This acknowledged right of peremptory challenge existing in the crown, before the statute of 33 Edw. I., and the uniform practice [*484 which has prevailed, since that statute, to allow a qualified and conditional exercise of the same right, if other sufficient jurors remained for the trial, demonstrate, as we think, that no such power of selecting his jury belongs, or was ever supposed to belong, by the common law, to the prisoner ; and that, therefore, he could not demand, as matter of right, a separate trial to enable him to exercise it. In a separate or joint trial, he could, at any time, be defeated by the crown of such choice, by its own admitted prerogative.

The circumstances already alluded to, of the right of each prisoner, on a joint trial, to exercise his full right of peremptory challenge, and the small number of jurors usually returned on the panel at the assizes, accounts in a very satisfactory manner for the language used in some of the cases, as to the necessity of directing separate trials, where the prisoners refused to

¹ *United States v. Douglass*, 2 Bl. C. C. 207 ; *NELSON, J.* In Pennsylvania, the prosecution is not required to assign cause of challenge, until

the panel is exhausted ; *Zell v. Commonwealth*, 94 Penn. St. 258 ; even in cases of misdemeanor. *Haines v. Commonwealth*, 12 W. N. C. 193.

United States v. Marchant.

join in their challenges. The plain reason was, that otherwise there could be no trial at all, for defect of jurors, at the same assizes; and therefore, the court, in furtherance of public justice, were accustomed, without the consent of the prisoners, to direct a separate trial. In this way the reason of the practice is understood by Lord Hale (2 Hale P. C. ch. 34, p. 263), and by Hawkins (Hawk. P. C. b. 2, ch. 41, § 9), and by other more recent writers on common law. (a) In this manner, the language of Lord HOLT in *Charnock's Case* (12 Howell's State Trials 1454; s. c. 3 Salk. 81), is to be interpreted; for it is manifest, that he could not intend, that there could not be a joint trial, where the prisoners challenged separately, for no rule was better settled in his time than that they could. Indeed, in *Rex v. Grahme* (12 Howell's State Trials, 646, 673), the same learned judge uses similar language in a sense which admits of no other interpretation; and this was the answer given to it, when cited in a later case for the like purpose.

*That case is *Rex v. Noble and others*, in 1713, before Lord Chief
 *485] Justice PARKER, and reported in the State Trials (9 Harg. St. Tr. 1; s. c. 15 Howell's St. Tr. 731). In that case, which was an indictment for murder, Noble moved the court for a separate trial, and the motion was denied. He was convicted, and when brought up for judgment, he moved in arrest of judgment this very matter, that there was a mis-trial, because (to use his own words) "we were severed in our challenges, and yet were tried together by the same jury;" and he relied upon the language of Lord HOLT in *Charnock's Case*, as in point. The court overruled the objection, and stated, that Lord HOLT's language referred solely to the public inconvenience, on account of a probable defect of jurors, and not to any matter of right in the prisoners. Sentence was accordingly passed upon the prisoner, and he was executed. There is a curious and learned commentary appended in a note to this trial, which was printed before the execution of Noble, in which an attempt was made to question the correctness of the decision. But it is therein admitted, that Noble's counsel declined to argue the point, though requested; from which we cannot but infer, that they thought the objection unfounded. The decision itself has never since been questioned or denied. We have, therefore, in the present case, not merely the absence of any authority in favor of the matter of right, but the course of practice, and the general reasoning deducible from the prerogative of the crown against it; and lastly, a direct authority, in times when the administration of criminal justice was unsuspected, on the very point.

Such is the substance of the reasons which induce us to decide against the claim as a matter of right. In our opinion, it is a matter of sound discretion, to be exercised by the court with all due regard and tenderness to prisoners, according to the known humanity of our criminal jurisprudence. A certificate is, accordingly, to be sent to the circuit court.

CERTIFICATE.—This cause came on, &c. : On consideration whereof, it
 *486] is ordered and adjudged by this court, *that it be certified to the said circuit court, that where two or more persons are jointly charged, in the same indictment, with a capital offence, such persons have not a right, by the laws of the country, to be tried severally, separately and apart, the

(a) 1 Chitty's Crim. Law 535 See Starkie's Crim. Pl. 35.

United States v. 350 Chests of Tea.

counsel for the United States objecting thereto ; but that such separate trial is a matter to be allowed in the discretion of the court before whom the indictment is tried. All which is ordered to be certified, &c.

UNITED STATES v. 350 CHESTS OF TEA : LIPPINCOTT and others, Claimants.

Smuggling.—Bonds for duties.—Seizures.—Lien, how enforced.

The term "concealed," as used in the 68th section of the duty act of the 2d of March 1799, ch. 128, applies only to articles intended to be secreted and withdrawn from public view on account of the duties not having been paid, or secured to be paid, or from some other fraudulent motive. The forfeiture inflicted by that section, does not extend to a case, where, the duties not having been paid or secured, in any other manner than by giving the general bond, and storing the goods according to the 62d section of the act, the goods were fraudulently removed from the storehouse agreed upon by the collector and the importer, by some person other than the claimants, who were *bond fide* purchasers of the goods, and without their knowledge and consent, to another port, where the goods were found stowed on board the vessel in which they were transported, in the usual manner of stowing such goods, when shipped for transportation.

Under the 62d section of the act, in the case of teas, the duties are "secured to be paid," in the sense of the law, by the single bond of the importer, accompanied by a deposit of the teas imported, to be kept under the lock and key of the inspector, and subject to the control of the collector and naval officer, until the duties are actually paid, or otherwise secured ; and no forfeiture is incurred, under the 58th section, by the removal and concealment of the goods on which the duties have been thus "secured to be paid."

To authorize the seizure and bringing to adjudication of teas, under *43d section of the act, it is necessary, not only that the chests should be unaccompanied by the proper [*487 certificates, but also by the marks required to be placed upon them by the 39th section.

The lien of the government for duties, attaches upon the articles, from the moment of their importation, and is not discharged by the unauthorized and illegal removal of the goods from the custody of the custom-house officers.

Quære ? Whether such lien can be enforced against a *bond fide* purchaser, without notice that the duties were not paid or secured ?

The lien for duties cannot in any case, be enforced by a libel of information in the admiralty ; the revenue jurisdiction of the district courts, proceeding *in rem*, only extending to cases of seizures for forfeitures under laws of impost, navigation or trade of the United States.

But a suit at common law may be instituted in the district or circuit courts, in the name of the United States, founded upon their legal right to recover the possession of goods upon which they have a lien for duties, or to recover damages for the illegal taking or detaining the same.

APPEAL from the Circuit Court for the Southern District of New York.¹

March 8th, 1827. This cause was argued by the *Attorney-General*, for the United States ; and by *Webster* and *Coze*, for the claimants.

March 15th. WASHINGTON, Justice, delivered the opinion of the court.—This was a libel filed in the district court of the United States for the southern district of New York, in the name of the United States, against 350 chests of hyson-skin tea, imported from Canton, in the ship Benjamin Rush, as forfeited to the use of the United States. The libel charges, that the chests of teas were seized by the collector of the customs for the district of Philadelphia, on the 6th of December, in the year 1825, at the city of New York, on waters navigable from the sea by vessels of ten or more tons burden, and alleges three distinct grounds of forfeiture. First, that the

¹ Reported below, 1 Paine 409.