*United States v. The Insurgents of Pennsylvania.

Special courts.

The judges have power to hold a special court, in capital cases, in the county in which the offence was committed; but they have a legal discretion on the subject.

Several indictments were found against persons charged with high treason, by levying war against the United States, in the counties of Northampton and Bucks, in the state of Pennsylvania; and the prisoners having pleaded "not guilty," *Lewis* and *Dallas*, their counsel, filed a suggestion, that all the offences were charged to have been committed either in Northampton or Bucks, and moved for a trial of each indictment in the proper county, on the provision contained in the 29th section of the judicial act (1 U. S. Stat. 88, § 29), "That in cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done, without great inconvenience, twelve petit jurors at least shall be summoned from thence." The motion was opposed by *Rawle* (the attorney of the district) and *Sitgreaves*. And after argument, The Court delivered an opinion to the following effect:

By the Court.—The mere circumstance of delay, in trials of so much expectation and importance, though entitled to some consideration, would not be sufficient of itself to prevent a compliance with the present application: and we think, that the 29th section of the judicial act ought to be so construed, as to vest in the judges a power of holding a special court, in the proper county, if in other respects they do not deem it greatly inconvenient. The act of congress, passed the 2d of March 1793 (1 U. S. Stat. 334, § 3), empowers the judges to "direct a special session of the circuit court to be holden for the trial of criminal cases, at any convenient place within the district, nearer to the place where the offences may be said to be committed, than the place or places appointed by law for the ordinary sessions;" but this provision does not expressly discriminate between cases of a capital, and of an inferior nature, and a provision having been previously made for capital cases, it would be justifiable to apply this to *inferior cases. At all events, any criticism upon the word *nearer* (considering the whole state as a district or county, in relation to the United States), would not prevent our appointing a special court in the proper county, if such an appointment was otherwise eligible. [*514

The truth is, that the act gives to the court a legal discretion upon the subject. A trial in the proper county might have been ordered, when the offences were committed; but no candid man will say, that, at that time, such an order would have been justifiable. The next step, therefore, was to bind the offenders over to this court, having complete jurisdiction of the case; and now, the only questions are, whether it is practicable to refer the trials to the counties, respectively, in which the offences were committed? And, if practicable, whether it can be done without great inconvenience?

On the question of practicability, two difficulties occur: 1st. Whether the indictments found at this court, can be transferred to a special court?(*a*)

(*a*) 3 Dall. 17, 18, was cited on this point.

And 2d. Whether the motion is not too late? for as "the indictment ought to be considered as inseparably incident to the trial, and in truth a part of it" (Fost. C. L. 235–9), can the trial be commenced here, and be terminated elsewhere?

But even if it were practicable, on legal principles, to direct a special court, can it be thought convenient or safe, in the present state of Northampton and Bucks counties, to do so? It is evident, that nothing but an armed force has recently been sufficient to quell the insurrection, and to arrest the insurgents; and we hope, that it will never be expected from the exercise of a judicial discretion, that a court of justice shall be voluntarily placed in a situation, where the execution of its functions, and the maintenance of its authority, must depend on the same military auxiliary. Upon both grounds, however, we think the motion ought to be rejected.

Motion refused.

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*515] *United States *v.* Fries.

Jury.—New trial.

The court may direct any number of jurors to be summoned, in view of the particular circumstances under which the *venire* is issued.

A new trial was granted, in a capital case, on the ground, that one of the jurors had, before the trial, made declarations manifesting a bias against the prisoner, which was not known to him at the time the jury was impannelled.[1]

Indictment for treason, by levying war against the United States, at Bethlehem, in the county of Northampton. The prisoner, after a trial that lasted fifteen days,(*a*) was convicted: whereupon, *Lewis* and *Dallas*, his counsel, moved for a new trial, on two general grounds. 1st. That there had been a mis-trial. 2d. That there had not been an unbiassed and impartial trial.

I. The facts, on the first ground, appeared to be these: A *venire*, tested the 11th of October 1798, and returnable the 11th of April 1799, had issued, by which the marshal was commanded to summon twenty-four grand jurors, and "a number of honest and lawful men of your said district, not less than forty-eight, and not exceeding sixty, to serve as petit-jurors." Annexed to

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(*a*) The length of the trial introduced the question, how far the court could order an adjournment in a capital case? The principle of necessity, and the recent precedents in England, in the cases of Rex *v.* Hardy and Rex *v.* Tooke, were considered by the court, and acted upon. The jury were, however, kept together in the same room at a tavern, during the times of adjournment; and once (on Sunday) were taken for recreation, in a carriage, into the country; but still remaining under the charge of an officer and within the jurisdiction of the court.

[1] See United States *v.* Gibert, 2 Sumn. 48; wherein Judge Story says, that there were circumstances in this case, which greatly weaken, if they do not impugn its authority. It will be found, upon examination, that not a single one of the citations justifies the doctrine contended for. The counsel for the government admitted the power of the court to grant a new trial, in capital cases; so that the point, in fact, was not argued; and the judges were divided in opinion as to the propriety of granting it, for the cause shown. But the power is asserted, nevertheless, in subsequent cases. United States *v.* Harding, 1 Wall. Jr. C. C. 127; United States *v.* Keen, 1 McLean 429; United States *v.* Conner, 3 Id. 573; United States *v.* Macomb, 5 Id. 286.