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.

this *venire*, the marshal, in due form, made a return of the whole number of sixty jurors, all of whom were summoned from the city and county of Philadelphia: and on a separate paper, signed by him, he returned an additional number of seventeen jurors, summoned from the county of Northampton, and of twelve jurors, summoned from the county of Bucks; making, in the whole, eighty-nine jurors. For this latter return, however, *no *venire* had issued, nor did any special award appear on the record; and the jury that tried the prisoner, was composed of jurors from Philadelphia, Northampton and Bucks. [*516

On these facts, the *prisoner's* counsel made the following points: That although it was not usual to grant a new trial in a capital case, it was, unquestionably, in the power of the court to do it. (3 Bl. Com. 391; 1 Burr. 394; 2 Str. 968; 6 Co. 14.) That before any process for the trial issued, the act of congress contemplates a decision of the court on the place of trial, the number of jurors to be summoned from the proper county, and the other parts of the district from which the rest of the jurors shall be summoned. That the *venire* had issued before the decision of the court on these preliminaries; that the authority of the *venire* went no further than to summon sixty jurors; and that sixty jurors being actually summoned and returned from Philadelphia county alone, the authority of the writ was executed. That neither the act of assembly of Pennsylvania, nor the common law of England, would furnish a power or precedent for returning a greater number of jurors than the *venire*, or an order of the judges, authorized. (2 State Laws, 262, § 4, 5; 3 Bac. Abr. 739; Co. Litt. 155 *a*; 2 Hale H. P. C. 263; Kelyng 16; 2 Dall. 340; 4 Bl. Com. 344; 3 Ibid. 352; Co. Litt. 155 *a*; 21 Vin. Abr. 472; 6 Co. 14.) That, therefore, a greater number of jurors have been returned than the *venire* directed, or the judges ordered; and that there was no authority at all for summoning the jurors from the counties of Bucks and Northampton.

That even supposing the 29th section of the judicial act could have the effect of a *venire*, that effect could extend no further, than to authorize the marshal to summons jurors from the county, in which the crime of the particular offender under trial is charged to have been committed; but the marshal had summoned the jurors from other counties; and in fact, the prisoner had been tried by jurors from the three counties. See 4 Hawk. P. C. c. 27, p. 136; 2 Hale 260; 2 Hawk. c. 41, § 2, p. 376; 4 Hawk. 171; 3 Bac. Abr. 754; Doug. 591.

That criminal prosecutions are not within the statutes of *jeoffaille*; the exception appears on the record; it may be taken advantage of, at any time; and for any mis-trial, on account of jury process, as well as on any other account, the verdict must be set aside. 4 Bl. Com. 369; 2 Hawk. c. 27; 1 Ld. Raym. 141; 4 Hawk. c. 31, § 4, p. 240; Ibid. c. 47, § 12, p. 464–5; Ibid. c. 27, § 104, p. 175–6; Law of Errors, 65; 4 Hawk. c. 25, § 24, p. 16; Ibid. c. 35, § 28, p. 17.

*That the *venire* for summoning the jurors on the trials in the year 1794, did not restrict the marshal, as the present does, not to exceed sixty; but required him, generally, to return "a number of honest and lawful men of your said district, not less than forty-eight (whereof twelve shall be of the said county of Allegheny) to serve as petit jurors;" and this mandate gave [*517

the marshal the discretion referred to by Judge PATERSON, as having been properly exercised. 2 Dall. 335.

II. The facts on the second ground in support of the motion for a new trial were, that Rhodes, one of the jurors, after he had been summoned as a juror, declared at several places, at several times, and to several persons, in substance, as follows: "That he was not safe at home for these people (meaning the insurgents); that they ought all to be hung, and particularly, that Fries must be hung." The juror was confronted with the witnesses who attested these declarations, and denied them,(*a*) as pointed particularly at Fries; but admitted that he had made use of general expressions, indicative of his disapprobation of the conduct of the insurgents.

On these facts, the counsel for the prisoner admitted, that the proper time for taking this objection, would have been, when the juror was called to be sworn, had they been apprised of it; but they insisted, that what would have been good cause of principal challenge, if known, is good cause to set aside a verdict, if not known; and that the previous hostile declarations of a juror would be a good cause of challenge. 11 Mod. 119; Salk. 645; 3 Bac. Abr. 258–9; *Cooke's case*, 4 St. Trials 743.

The answers given by *Rawle*, the attorney of the district, and *Sitgreaves*, in support of the verdict, were to the following effect:

I. That the *venire* and act of congress, furnished a sufficient authority to the marshal for both returns of jurors: and that, in fact, the district judge had given a verbal order, subsequent to the *venire*, for returning those additional jurors, who were summoned from the counties of Bucks and Northampton.(*b*)

That after having challenged the poll, the party was too late to challenge the array. (Co. Litt. 158; 12 Mod. 567; Ld. Raym. 884.)

*518] That the *venire*, on the English authorities, is in itself a *limitation, directing 24 to be returned; and yet for convenience, a greater number is always summoned. (3 Bac. Abr. 245, 276; Cro. Jac. 467; 2 Trials per Pais 599; *Lord Russell's case*, 3 St. Trials 707; *United States* v. *The Insurgents*, 2 Dall. 335.)

That if a person, not summoned at all, gives the verdict, the verdict will be bad; but where the whole of the jurors have been summoned by the marshal, an exception, even before trial, ought not to prevail. There were, in fact, only 50 of the 89 persons who were summoned, that did attend; and the *venire* is not exceeded by that number. (4 Hawk. c. 41; 1 Vol. Acts of Congress 58; Doug. 591.)

That there is, in substance, an award of the jury by the court, after issue was joined between the United States and the prisoner, as appears by the clerk's indorsement on the indictment; and the names of the twelve jurors who tried the indictment, were duly notified to the prisoner.

(*a*) It was doubted, whether the juror was a competent witness on this question; but the Court thought, that though he could not be compelled to give testimony, he might give it, if he pleased; and, accordingly, he was admitted, at his own request. On the examination, however, he appeared very incorrect in his recollection of facts, though it was agreed, on all hands, that he was an upright man.

(*b*) The district judge certified this fact, during the argument.

II. That although the power of the court to grant a new trial in a capital case could not be denied, such a new trial had been seldom, if ever, granted; and cause of challenge to a juror ought to be very cautiously received as a ground for setting aside a verdict. That, in this case, if the court thought there was no injustice, there ought to be no new trial. 2 Burr. 936.

That the declarations of the juror related to the general transaction; they were not applied to the issue he was sworn to try; and they were not personally vindictive as to Fries. 21 Vin. Abr. "Juries"; Co. Litt. 157 *b*; Trials per Pais 189; 2 Roll. Abr. 657; 4 St. Trials 748; 21 Vin. Abr. "Trial" 266; 1 Salk. 153; *Respublica* v. *Clifton*, in the Supreme Court of Pennsylvania, Pamphlet.

After a solemn consideration of the subject, IREDELL, Justice, delivered his opinion in favor of a new trial, on the second ground of objection, that one of the jurors had made declarations, as well in relation to the prisoner personally, as to the general question of the insurrection, which manifested a bias, or pre-determination, that ought never to be felt by a juror. He added, that he did not regard the first ground of objection as insurmountable; but deemed it unnecessary to give a decisive opinion on it.

PETERS, District Judge, did not think that either objection ought to prevail. He thought, that the *venire* and returns of the jurors, were authorized by principle and precedent; and that the declarations of Rhodes were such as might naturally be made in relation to the insurrection, without manifesting a particular hostility towards the prisoner, or leading to a conviction in spite of any evidence or argument, that might *occur on [*519
the trial. As, however, the consequence of dividing the court, would be a rejection of the motion; and as the interests of public justice, and the influence of public example, would not be impaired by the delay of a new trial, the district judge determined to acquiesce in the opinion of Judge IREDELL.

A new trial awarded.

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