The United States,
v.
John Fries.
Pennſylvania, ſs.

Nicholas Mayer of the city of Philadelphia being duly ſworn, maketh oath, and ſaith, that ſome time after John Fries, above-named, was brought to this city, this deponent went to a place called Leſher's yard, near the Northern boundaries of the city of Philadelphia, and in going into it, he ſaw ſeveral people there from Northampton county, and among others, Mr. John Rhoad of the ſaid county, who afterwards ſerved, as this deponent is informed, as a juror, on the trial of the above indictment, againſt the ſaid John Fries—That the people then preſent were talking about the ſaid John Fries, and one of them ſaid, " ſome people think he will be hung." This deponent anſwered " I do not think he will be hung." On which the ſaid John Rhoads ſaid " what of it, if Fries will be hung—ſuch a man like him ought to be hung, who brings on ſuch a diſturbance."—That ſome of the perſons with whom the ſaid John Rhoads was then talking appeared to be of a different opinion from him, and they were diſputing about it; and the ſaid John Rhoads appeared to be quite ſerious and a little warm, in what he then ſaid reſpecting the ſaid John Fries; and this deponent further ſaith, that he never mentioned any part of the foregoing converſation to the ſaid John Fries, nor hath he any reaſon to believe that the ſaid John Fries hath any knowledge thereof.

NICHOLAS MAYER.

Sworn in open Court, May 14, 1799.

(A true copy.)

D. CALDWELL, Clk. Circuit Court.

NICHOLAS MAYER's oral Teſtimony interpreted.

Mr. Lewis—You were preſent at a converſation in which John Rhoad a juror on the trial of Fries, was in converſation on the event of the inſurrection, &c. pleaſe to inform the court the particulars of it.

Witness. The words I heard from Mr. Rhoad were ſpoken in German, it was at Seidell's tavern in the Northern Liberties—when I came into Leſher's yard I ſaw ſeveral people there from Northampton county whom I knew, among others was one Mr. Rhoad, whom I know very well: they were talking about Mr. Fries: one man ſtood up and ſaid he thought Mr. Fries would be hung, I replied myſelf that I did not think he would be hung; with that Mr. Rhoad began to ſay, in German, " what of it, if Fries was hung; ſuch a man as Fries ought to be hung," and he appeared to be very warm, which ſurpriſed me. I went away then, and left them ſtill arguing about it: they were talking about Fries.

Court. Do you remember the time?

Witness. I cannot remember exactly: it was ſome time after Fries was brought to town; perhaps three or four days.

Court. Did you go into the houſe at all?

No, I was not in the houſe.

Do you remember whether Harman Hartman was preſent or not?

No, there were ſome people there, but I do not know who.

Do you know Daniel Heberly?

No, I do not.

Court. Do you remember whether Rhoad ſaid any thing, and what, as to Fries bringing on the diſturbance?

I cannot ſay as for that.

After the queſtion was put the ſame again, upon a ſhort recollection the witneſs ſaid. Yes.

Do you think you heard all that paſſed upon that ſubject?

No, I did not.

The United States,
vs.
John Fries.

Pennſylvania, ſs.

Daniel Heberley of Macungy townſhip, in Northampton county, being duly ſworn, maketh oath and ſaith—That a day or two before the above indictment commenced, he, this deponent was at the houſe of an inn-keeper in this city, whoſe name he does not recollect; where he ſaw John Rhoad, one of the jurors on the trial of the above indictment, and ſeveral other perſons who were converſing reſpecting the ſaid John Fries, and the other inſurgents, when the ſaid John Rhoad ſaid "that they ſhould hang all theſe chaps, and that they "ought not to be permitted to live in the country."—This deponent never mentioned any part of the ſaid converſation to the ſaid John Fries, nor hath any reaſon to believe that he hath any knowledge thereof.

DANIEL HEBERLEY.

Sworn in open Court, May 14, 1799.

(A true copy.)

D. CALDWELL, Clk. Circuit Court.

DANIEL HEBERLEY's teſtimony interpreted.

Mr. Lewis. Relate to the court whether you were preſent at a converſation between Mr. Rhoad and others about John Fries, and where and when it occurred.

Witness. It was on a Monday or Tueſday, I am not certain which, of the firſt week after I came to town, and it happened in Seidell's room.

Attorney. Were you not down twice?

Witness. Yes, but this was the laſt time: (about the 24th of April, he came to town the 22d,) they were talking together, Rhoad and Shankweiler at the ſtove, about the buſineſs they were come down to the city upon—I did not pay very particular attention to all that they ſaid, but I underſtood ſo much as was ſaid, that they would hang the whole tote of them, but particularly Fries: Rhoad ſaid this: I did not pay particular attention to the reſt, but this I particularly minded in order to tell his comrades, that he might be ſtruck off the

liſt of jurymen, and not come upon the jury: ſo I immediately informed captain Jarrett of it.

COURT. Have you had any converſation with Jarrett to day?

WITNESS. No, I did not ſpeak to him, but I ſaw him in the court.

COUNSEL. Did Rhoad ſay any thing like this: that theſe people ought not to live in the country, and if he did, what was it?

WITNESS. I paid no attention to that: I was not very near, and did not hear that: there was a pedlar in the room that laid his pack on the table between Rheads and me.

COURT. Did or did not Rhoad keep ſaying other things although you do not know what they were?

WITNESS. I know that he ſpoke more to Shakweiler about it, but I do not recollect what it was.

The United States,
vs.
John Fries.
Pennſylvania, ſs.

HARMAN HARTMAN of Macungy townſhip, in Northampton county, being duly ſworn, maketh oath and ſaith, that about three or four days before the trial on the above indictment commenced, he, this deponent was at the houſe of —— Seidel, inn-keeper near the northern boundaries of the city of Philadelphia, where he ſaw John Rhoad, one of the jurors on the trial of the above indictment; and ſeveral other people who were converſing reſpecting the ſaid John Fries and other perſons late charged with treaſon, when ſome of the perſons preſent ſaid "it was hard they ſhould be ſo long in priſon and ſo far from home," when the ſaid John Rhoad anſwered "it was very right, he was glad of it, and that they ſhould hang every one of them." And the ſaid John Rhoad further ſaid "that he ſhould not be ſafe at home if they did not hang them all." This deponent never mentioned any part of the above to John Fries, nor hath he any reaſon to believe that he hath any knowledge thereof.

HARMAN HARTMAN.

Sworn in open Court, May 14, 1799.

(A true copy.)

D. CALDWELL, Clk. Circuit Court.

HARMAN HARTMAN's Teſtimony interpreted.

WITNESS. I was at Seidell's tavern three or four days before the jury were called upon, to try Fries—the Monday or Tueſday before the trial began. There was a converſation held by ſeveral perſons ſaying it was very hard for them that they muſt be down here, and ſome of them in gaol. Whereupon Rhoads ſaid he was glad it went ſo, or he (Rhoads) ſhould not be ſafe if they were at home: they ought all to be hung.

COUNCIL. Who was by at the time beſides Shankweiler?

WITNESS. There was another person bye, named Adam Stephan, from that part of the country, that heard it.

COURT. Did he mention Fries's name or not?

WITNESS. I cannot particularly say, I did not pay particular attention at that time, but they had considerable conversation, and that was the purport of it.

Were many people in the room?

Yes, the room was very full, and I was engaged in conversation myself, therefore I did not attend particularly.

COURT. Did you hear the whole conversation, or only a part of it?

Only part of it: I came in, and they were then conversing already.

ATTORNEY. Was Heberley in the room?

Yes, Heberley, Stephan, Shankweiler and more, but I do not recollect them.

Do you know Nicholas Mayer?

No, I do not.

ATTORNEY. Who did you mention this conversation to afterwards?

WITNESS. I do not recollect that I mentioned it to any body.—I afterwards passed by several times, and saw Rhoad speaking to other persons: I thought it rather hard before they knew what the crime was, that they should say so much.

Did you mention it to no one? Recollect.

I believe I mentioned it to some of the people who lodged in the same house: Henry Jarrett was one of them.

ATTORNEY. Had you any conversation with Jarrett to day upon the subject?

WITNESS. I spoke to him this morning out of court, but nothing particular. Since that I mentioned it to Henry Schiffert, Valentine Keenly and Dewald Aldbrecht, but cannot particularly recollect what time I mentioned it.

COURT. Did you mention to any of them before the trial came on?

WITNESS. Yes.

COUNSEL. Did you ever mention it to Fries?

WITNESS. No, I never had an opportunity—I never knew his name 'till this disturbance took place.

HENRY SHANKWEILER, sworn. Testimony interpreted.

Were you present at any conversation between Rhoads and others respecting Fries, &c.

WITNESS. Yes; it was at Sidell's tavern.

When?

It was the week after I came down—since the court began.

ATTORNEY. What time of the week?

WITNESS. I think towards the latter end—Thursday or Friday.

COUNSEL. What passed there?

WITNESS. Rhoad said it was very well it happened, or went on so, for they should be no longer safe at home else.

What went fo?

That the people were taken prifoners.

Relate how the converfation began, and what were the very words, as near as you can.

WITNESS. Some of the country people faid it was very hard they were brought down here prifoners; in anfwer to that Rhoad ufed thefe words. Rhoad further faid, that they ought to be hanged, and Fries muft be hanged, for he had been the leader of it, or of them to go to Bethlehem, and he took the prifoners from the Marfhal.

ATTORNEY. Were Hartman and Heberly prefent?

WITNESS. Yes, I flept with them in the fame room.

Do you now fleep with them?

Yes.

COURT. Did they fleep in the fame room with Rhoad?

Yes, all three of us.

COURT. Did the converfation pafs in that room?

WITNESS. The converfation was down ftairs, where they were, in the bar room drinking; but he related the fame up ftairs too.

COUNSEL. Do you know John Fries?

The firft time I faw him was at Bethlehem.

Did you ever fee him fince?

Only here in court, except once at Mark's, when I came to Philadelphia to deliver myfelf up.

Did you ever tell Fries of this?

No.

HENRY JARRETT, fworn.

COUNSEL. Do you know Daniel Heberley?

Yes.

Did he communicate to you, and at what time, a converfation between Rhoad and others about Fries?

WITNESS. I cannot particularly mention the day, but one day he came to me in the court houfe at yon window, telling me that I muft tell either Fries or his attorney that he fhould challenge him, becaufe he had faid at Seidell's tavern that Fries muft be hung.

Did he tell you any thing farther?

No.

How long was this before the trial begun?

I cannot tell, but it was before.

Did you tell either Fries or the counfel?

I believe I did not, but I think, if I am right, I told it to fomebody. I had not feen Fries, only in the bar, and never told him.

After a fhort paufe, the witnefs thought he had told it to Judge Mulhollan, but was not certain. I told it feveral times, but I cannot fwear when or to whom.

Evidence againft the motion.

JOHN MULHOLLAN, fworn.

He depofed that he had a diftant idea, fomething like a dream, but had no recollection of what it was. On the court applying the quef-

tion, he did not recollect any thing said to him by Mr. Jarrett about challenging Rhoad, but he was not certain whether he did not say that he would not like to be tried by him.

COURT. Did he assign any reason?

WITNESS. No, I believe not.

COURT. Had you any conversation afterwards with John Fries on that subject, or did Fries ever consult you as to the challenge of his jurors?

WITNESS. No, never.

COURT. Nor his counsel?

WITNESS. Yes, they asked me what I knew of the jury: I told them nothing, but from the temper of the times I would rather lie in prison for years than be tried at this time.

COURT. Did you mention to Fries what Jarrett told you?

WITNESS. I do not know; I took but little notice, but let it pass on.

The deposition of JOHN RHOAD.

United States,
vs.
John Fries.

Having heard three depositions read in the above cause, to wit: the depositions of Herman Hartman, Daniel Heberley and Nicholas Mayer, I do solemnly declare, that I never did use the expressions imputed to me by these deponents.

I recollect that I was in conversation with sundry persons at Seidell's tavern, at which, the said Hartman, Heberley and Mayer were present, in which the late disturbances in Northampton county were mentioned, and I there expressed myself to the following effect, and no other effect nor purpose whatever, viz. "That unless a stop was put to "such proceedings, as have lately taken place in Northampton county, "especially at Bethlehem, I would not wish to live in that part of "the country."

And I have not, at any other time expressed myself to the effect, stated in those affidavits.

I further declare, that I went to the trial of the said John Fries, with a mind perfectly open to conviction, as to his guilt or innocence, and that before I assented to the verdict, I deliberately weighed and considered all that had been adduced in his favor.

JOHN RHOAD.

Sworn in open Court, May 15, 1799.

D. CALDWELL, Clk. Circuit Court.

The oral Testimony of JOHN RHOAD (interpreted.)

MR. SITGREAVES. Do you recollect any conversation between Shankweiler, Heberly, Hartman and yourself at Seidell's tavern?

WITNESS. Yes, perfectly well, but I do not recollect that they were all present: some of them I know were. They said it was hard for them (Fries and others that were here) to come down, as they were

in poor circumſtances, it would coſt them ſo much trouble and expence, whereupon I ſaid that it had been very hard for us (the witneſs and others in that country) in the winter and in the ſpring to be up there: I think I ſaid that if the government had not power to bring thoſe people to trial, or before the court, we could not live in the country, nor in any other country: whereupon they ſaid that the priſoners got ſeverely puniſhed for it; I ſaid that the puniſhment would be according as the law would inflict. They then diſperſed—this was in the yard, before the door at the ſide of the houſe.

ATTORNEY. Had you any converſation of the ſame kind in the room or by the ſtove?

WITNESS. Yes, I talked about it with Hartman near the ſtove.

What time?

It was in the firſt week, toward the latter end of the week, near as I can recollect, but I cannot perfectly recollect. Hartman did not ſay it plain, but he as much as gave me to underſtand that it was hard, or not right that they (the priſoners) ſhould come into that trouble, for that two might ſwear againſt me and bring me to the ſame place; I thereupon ſaid that neither two nor ten of them could bring me to the ſame place, as I had never drawn in the ſame yoke with him, (Hartman) againſt the government. If they were to ſwear, I would prove before all the magiſtrates in the place, that I never had any thing to do with it, but was always in favor of government. This is all I can recollect.

ATTORNEY. Was there nothing at this converſation ſaid about Fries and the other people?

WITNESS. No, I then went away from the ſtove.

COURT. Did you ever talk with Shankweiler about it?

WITNESS. I believe he was preſent.

Did you to Herberly?

He was likewiſe there—in the houſe or at the door.

COURT. Do you recollect ſaying to either of them that they (the priſoners) ought to be hanged—either in the ſtove room or in the bed room?

WITNESS. I do not recollect that I ſaid any thing. I took particular care not to ſay any thing of that kind, ſince I have been ſummoned on the jury, becauſe I new it was neceſſary to take care.

COURT. Some were ſaying you were warm: were you warm or offended in conſequence of what Hartman ſaid to you?

Yes, it was diſagreeable to me, and offended me, elſe I ſhould not have ſaid ſo much.

ATTORNEY. At the firſt time you come down had you converſation with Nicholas Mayer, or any body elſe?

I do not recollect: I know I have ſeen Nicholas Mayer before, but cannot ſay where.

How long did you ſtay in town the firſt time?

From evening till the next day at noon only—I came in about eight o'clock, and went away about three or four next day.

COURT. Did you ſay any thing about the preceedings at Bethlehem in Northampton county?

WITNESS. I recollect that there was a talk, but I cannot recollect the converſation itſelf.

Do you recollect ſaying that you would not wiſh to live in the country, except a ſtop was put to ſuch proceedings?

Not at that time, but I believe I recollect ſomething of the kind afterwards.

COURT. What did you ſay?

WITNESS. I ſaid that if the government had not the power to puniſh the evil, or evil doers, I would not wiſh to live in ſuch a country. I do not recollect any more.

COUNSEL. At this laſt time did you ſee Nicholas Mayor?

I did ſee him; but I am not certain whether it was before the door, or in the houſe.

COURT. When did you come to town the ſecond time?

WITNESS. On the 22d of April, at eight in the morning.

COUNSEL. Had you any converſation with Mayer then?

I never had any converſation with him, but I ſaw him in the yard.

MICHAEL SNYDER was next ſworn as to the character of John Rhoad the juryman; he depoſed that he had known him 27 or 28 years, during all which time he had been a good character, and a man of veracity. He did not think he would talk farther then he could make appear.

JOHN MORETZ depoſed that he had known him about 25 years, he was a very clever honeſt man; a man of truth as much as he knew of him: he could ſay nothing againſt him.

PHILIP WALKER did not know him very particu'arly, but he never heard any thing amiſs of him: as much as he knew of him he was an honeſt man.

JACOB ARNOT junior had been acquainted with Mr. Rhoad ſome years, and believed him to be a man of unblemiſhed character, as good as any in that country.

MR. SITGREAVES ſaid he would not have troubled the court again upon this queſtion, had circumſtances reſted as they were before the evidence, but upon inveſtigation palpable differences would be diſcovered between the affidavits and the verbal relations, not only of the deponents with themſelves, but which other. He then analized and compared the affidavits of Mayer, Heberly and Hartman, which he only recommended to the examination of the court, and he thought the difference muſt appear ſo eſſential as to give a ſerious doubt of the accuracy or truth of either, while the character of Mr. Rhoad was unimpeachable,

MR. LEWIS ſaid if any trifling difference appeared in the affidavits from the relation, it was eaſily accounted for in the manner the affidavits were taken: thoſe of Heberly and Hartman, were taken in his office, and interpreted by a German, from whom he had very great difficulty to collect the meaning in Engliſh. Only one of theſe affidavits were taken by himſelf, the other by Mr. Ewing, a young gentleman, ſtudent in his office [Mr. Ewing corroborated the fact: " that he could not underſtand what the interpreter ſaid."]

Mr. Lewis then mentioned the grounds upon which the rule to ſhow cauſe had been granted; whether either, or all of theſe grounds had weight in them, he would not undertake to aſſert; but certain it was, that it was the duty of the priſoner's counſel to lay them before the court, and wait the event, which if favourable, would cauſe a new trial: if not, they ſhould be ſatisfied with having diſcharged their duty; in either caſe, they ſhould cheerfully ſubmit to the opinion of the court; and he was ſorry to ſee that the laſt queſtion, to wit, That the trial ought to have been held in the proper county, had given any diſcompoſure to the court: he then explained the reaſon, to ſhow the court that it was not agitated out of any diſreſpect to their former deciſion, which was that "manifeſt inconvenience" did prevent the trial being held there, but this did not appear on the record. In criminal proſecutions, and eſpecially capital caſes, it was uſual for the priſoner's counſel to avail themſelves of every ſlip and inaccuracy, and therefore he was excuſeable in the preſent. He quoted 4 Burrows, 252.

It was common for the court to err, and in ſuch a caſe, he conſidered himſelf in duty bound to point it out to them, and he was ſatisfied if that error was of conſequence enough, the court would grant a rule thereupon, and thus retract from their former opinion, which they were fully authoriſed to do. He referred to 3 Blackſtone 391—1 Burrows, 393.

Mr. Lewis then went on to point out the propriety of granting a new trial in criminal as well as in civil caſes, although the proſecuting counſel, had enforced the want of precedent, as a reaſon againſt it; indeed he ſaid it was evidently of more conſequence, and therefore he ſuppoſed it had been the more ſtrongly oppoſed: a man's life and his fame was of more value than a part of his property, and he had no doubt that, whatever might have been the verdict, the court would go as far in granting it. It was admitted that the court had the power, if it had the power, there was no doubt but the honorable judges would exerciſe it according to their conviction.

Mr. Lewis ſaid the council for the priſoner did not come forward to prove that the verdict was given againſt evidence, but to inſiſt that the priſoner had been tried by eleven jurors only, for the other ſtood indifferent as he ſtood unſworn, they went further—they went to prove that there was an eſſential error in the pannel, and thus the priſoner was bereſt of thoſe benefits, to which the law entitled him. If we prove this, ſaid he, we do not addreſs ourſelves to the diſcretion of your honors; it is not a matter of will, it is a matter of juſtice, to which we are entitled. As it reſpects the evidence, you are not at all to conſider its weight: the evidence may be clear, and yet the verdict may be wrong given, becauſe of the incompetency of the jurors. The gentlemen have ſaid the period for application is paſt—it is too late,—but with all their talents and induſtrious reſearches, thoſe learned gentlemen have not been able to produce a ſingle authority to ſupport the doctrine that it is too late; after conviction, or even after condemnation, the court have authority to order a new trial; no time is ſpecified to limit the diſcretion, if the reaſons are

good. If the law has not distinguished the period, those gentlemen are certainly unwarranted in saying it is too late. 2 Strange, 968, is a case where an argument was held on a plea for new trial, but not a single argument is used, that a new trial could not be held on capital cases: that seems to be taken for granted.

It was argued against a new trial, in capital cases, that the court proceeded more deliberately, and more cautiously, and because the prisoner was allowed a challenge of his jury. The argument amounts to this: because the law requires more caution, and gives the prisoner more advantages where his life is at stake, for that reason, he should have less advantage and less indulgence, or in other words, because the benignity of the law allowed more benefits in the awful event of life or death; therefore in another point, essential to the prisoner, he should be bereft of an advantage, enjoyed by one indicted for an assault, or in a common civil cause. It may be argued, that the benevolence of the executive, may extend mercy to the prisoner, because of any irregularity in evidence or proceeding, but this will not satisfy the law; it is an hazard at best, while the law gives him the certain advantage of a new trial. The power and right of granting a new trial in some cases, is admitted; now if any of the witnesses or jurors could be proved to have perjured themselves, the evidence being first given, and the verdict pronounced; this, it will be allowed, would have weight to grant a new trial; but the case before the court, goes as far, if not farther; and if there should appear an extreme error in summoning, the jury, or that one of the jurors had disqualified himself from wearing the characteristics of an unbiassed man, then it must equally appear, that there has been an infringement of a legal right, sufficient to lay the foundation of a second hearing.

Another doctrine that was insisted on was, that it was discretionary in the court; that where they were satisfied with a verdict, although against evidence, no new trial ought to be granted: there may be instances of a civil nature, in which that doctrine will be allowable, but they differ materially from the one now before the court, and therefore will not apply: that application may go to the favor of the court, where they see the evidence strong, but no favor can be exercised, nor is any asked in this case; we only appeal to the justice of the case.

It was said by one of the gentlemen, that this juror's declaring his sentiments, was only cause of challenge to the favor, for which triers ought to have been appointed, and the qualification or disqualification of the juror been determined by them, but for which it was now too late. Mr. Lewis denied the position. He had already proved, both on his own declaration, and by the evidence, that it did not come to their knowledge, until after the verdict was given, and therefore they came forward as soon as they were obliged: this was allowed a sufficient excuse in Salkeld 645, and 11 Modern 119, and therefore the objection was unimportant. The witnesses could not inform John Fries, for he was in gaol; he could not know it, until yesterday morning when the motion was made in court, for the witnesses had no knowledge of each other, so as to be able to communicate it. 3 Bac.

258—9, says, that "it is particular cause of challenge, if a juror has "declared his opinion touching the matter." In causes of particular challenge, the court is to inquire into the truth of the fact, and no triers are to be called, and if they find the cause a true one, they are not to judge, nor to be left to discretion, but, *they must try the issue again.* This is the doctrine of ancient law and usage, 266 Bacon. Then all the argument about triers is out of the question, the question is, whether the juror stood indifferent, or whether he was under the influence of bias, and a prejudiced mind: the law compels the issue to steer clear of friends or enemies: no partiality whatever is to predominate; but can any man in the world, say that Rhoad's mind was free from prejudice, when he took opportunities to make such declarations?

MR. LEWIS then went into an examination of the evidence and depositions. Now suppose the court to believe the fact nearly as stated by the evidence, Mr. L. asked, whether it was possible, consistent with law or justice, to believe that a just verdict was given, or that any man ought to suffer under such a verdict? Suppose the whole twelve to have made similar declarations, it would require no argument to convince the unbiassed, that the consequence must be fatal.

It has been attempted to be proved, that even such a declaration was no ground of challenge, if it was not made from malice; but what is the meaning of an independent man? It means a man who stands on the high ground of justice and impartiality, and is not warped by prejudice, nor warmed by resentment—quite free from interest in the issue: also a man whose judgment has not been made up in favor of either the one party or the other, for if it has, though he may be an honest and well meaning man, it is not likely that his mind would be freely given *according to evidence.* Without he is free from these entanglements upon his mind, he will—he must err. Now, it appears by the evidence of even Mr. Rhoad himself, that he was warm, and might have forgotten the expressions, and nothing can be shown, but that Mayer, the witness, who has lived in thas country, is a man of good character; however, he must be supposed so, until he can be proved otherwise. Mr. Lewis remarked, that the witnesses spoke of different conversations: Mayer of one, when Rhoad came first to town; the others of two afterwards, in the room where they were sitting, and in the bed-room. He contended that no material, although a verbal difference did exist; but the testimony of Rhoads differed materially from them all; his verbal testimony and deposition was also different, as might be seen. But Mr. Lewis said, he doubted whether the testimony of Rhoad in this matter, was legal evidence or not, because it was a matter in which he was materially concerned, however they had not much objected, as there was a considerable difference in evidence going to a court, and to a jury; he had no doubt, their honors would make the necessary allowance.

Although Rhoad was not sworn at the time he used these expressions, he was summoned on this trial, and it was on high misdemeanor, whether it was indictable or not, he would not say, but it was a very imprudent disposition to encourage or even suffer. In

Salkeld, 153, Cook's cafe, chief juftice Holt holds, that if a man ought not to be compelled to prove that he is a party, neither fhould he be allowed to prove that he is not a party, by his own evidence: this applies to Rhoad giving evidence, in which his character is concerned. 4 ftate trials 747—8 the cafe appears more fully: fuch a conduct is here declared to be fcandalous, and a mifdemeanor, and the man *ought not to be on any jury*. By four witneffes, neither inconfiftent with themfelves, nor with each other, Mr. Lewis faid this fact was clearly proved, and he thought incontrovertibly fo: of the refpectability of thofe witneffes, he knew nothing; but nothing difrefpectful had been proved, and confequently not their incompetency.

JUDGE PETERS faid that he did not know about their fwearing fallely, nor could he fay any thing about Mayer, but of the others he well knew that one was extremely ftupid, and the others deeply prejudiced, on which account, their evidence fhould be carefully fcrutinized, and carefully received.

The neceffity of great precaution and care, Mr. Lewis was willing to admit; but this ftupidity was a good apology for their not revealing the fact, until it was drawn from them: their ignorance indeed, was deducible from the whole of their conduct, and the oppofition they made to the government, but it did not ftrike at their credibility: uninformed, and mifinformed as they were, their verity might be good. They were under indictments, and therefore perhaps afraid to fpeak; befides, coming from different parts of the country, they knew not John Fries: but let their offence or fituation be what it may, they may be honeft men, and men of truth and integrity, and therefore they muft ftand upon as good a footing as witneffes could ftand.

We muft take it for granted then, faid Mr. Lewis, that the juror made thefe declarations, and if fo, according to the law of England, and of the United States, he is difqualified from the office, otherwife, that moft invaluable right, *trial by jury*, would be eminently impaired.

MR. LEWIS then examined fome authorities which had been quoted by the profecuting counfel, fome of which were irrelevant; and fome he thought not at all applicable. With refpect to the cafe of Ann Clifton, as quoted from the Pennfylvania practices, the juror declared that "he did not know how any body could do otherwife than "bring her in guilty, but he did not fpeak as a *juryman*." The court were of opinion, it was not fufficient to grant a new trial. The objection of the court was not becaufe it was a *capital case*, but they gave as a reafon, that thefe words were not fufficient to vitiate a juror: his mind as a juror, he declared was ftill open to conviction.

It was ftated, that the application ought not to be liftened to, becaufe the prifoner had the challenge of *sixty eight* in effect, out of the whole pannel: how this was meant to be applied, he could not difcover, but one fact was plain, that the fmaller number there were fummoned above 35, the better choice there was for the prifoner, and therefore the whole number cannot be made to exceed 60, agreeable to common law. Mr. Lewis then obferved, that one remark of Mr. Rawle, that Mr. Rhoad was the laft they could challenge, but they would rather have him, than truft to the next, was a plain implication

that they were ignorant of the fact, instead of militating against the motion. In order to remove every suspicion of inaccuracy from the former testimony, he said, he had happily been able to procure one, whose respectability could not be questioned, and which he should now introduce to the court.

GEORGE YOHE, sworn.

COUNSEL. Were you present when any conversation took place between Rhoad and others respecting Fries and others?—relate the particulars.

WITNESS. A few days after Mr. Rhoad came down, he was at my house, sitting at my stove, with two other gentlemen, farmers I believe: they were having conversation a good while before I came out of the bar, when I stood up by them: they were talking about the insurgents and Mr. Fries, and those who came from Northampton: they were mentioning that those people there, who were not of the same opinion as those now brought down, were in danger, and some of them ought to be hung, and Fries in particular. One of them mentioned that if Fries knew that, he would not have him on the jury; Rhoad said that it was not his wish to come on the jury. I heard no more, but returned into my bar.

COURT. Do you recollect that Mr. Rhoad mentioned any reason, why they ought to be hung?

WITNESS. No, I do not recollect.

COUNSEL. You are confident that he said Fries in particular?

Yes.

Cross examination. What language was it spoken in?

WITNESS. German.

Did Rhoad lodge at your house at that time?

No.

Who were present at the time?

I do not know who they were.

To whom did you mention this circumstance, and how came you first to be brought before the court?

I mentioned that such things were said in my house, when I heard that it was brought forward; that was the first time.

How long had you known Rhoad before?

Six or seven years.

COURT. Do you recollect any persons particularly, who were present at that time?

WITNESS. No, there were more people present, but they were at the other end of the room.

How long was it since?

It was soon after they came down; he was here ever since.

Friday, May 17.

MR. LEWIS resumed his argument in favor of the evidence, which he said, had not Mr. Yohe came forward, the others being suspected, would have been a question, whether the negative testimony of Mr. Rhoad, in which he was a party, or the positive testimony of four others, who were not concerned, had the most weight; but now,

taking it for granted, that Rhoad is mistaken, it can be only accounted for in two ways: first, that his memory failed him; or secondly, that he was extremely prejudiced: imputing nothing corrupt to him, still we cannot allow him to be less so than any one of the five witnesses we have brought to controvert his assertions: allowing him not to be free from prejudice, he cannot be supposed to be capable of judging for himself.

MR. LEWIS then mentioned another objection founded on the act which says, "in cases punishable with death, the trial shall be held "in the county," &c. To remove this, one of two things must take place: the court in whom is the discretion, must, from facts within their own knowledge, or facts laid properly before them, order it elsewhere; otherwise secondly, it must take place in the city of Philadelphia, as a matter of course, as the law has, without a contrary necessity, fixed on the county, no entry need be made: but if that necessity did exist, it ought to be entered. How the order was taken, and by what application the court was removed, he would not say, all he contended for, was, that it must appear the court did so adjudge it, and for good reasons. The court could not be changed, but under certain circumstances; these occurring must appear on the record of the court. A motion was agitated on this point, and decided against, but all that appears upon record, is that the motion was refused: whether amendment can or cannot be made after trial, he would not contend, but he had doubts. He quoted Hawk. C. 22, 129. Lord Raimond 141.

Farther. The court did not direct from what part of the state the jury were to come, but left it to the marshal, or else the marshal exercised it without authority or power. To him the judiciary act sect. 29 appeared too plain to be mistaken, or to be open to construction: by this it appeared that part of judicial proceedings was left—not to the marshal, but to the judge of the court, and on him it was enjoined as a duty, which, if left to the marshal, would give just cause of exception in the power of the prisoner. This was the practice of the marshal; a practice entirely new, and could have no manner of weight, because the contrary was the positive law of the land, and if so, nothing could contravene it; it was so except that power was transferred to the marshal from the court, for if this could be left, he did not see why a great part of the duty of a judge could not be left for the marshal to exercise as well! The marshal could upon the same principle, assume the bench and try causes, because the law in that part of his duty does not assign it more to the judge than in the other. Certain duties were assigned to the judge, to the clerk, and to the marshal, to which each was respectively bound. The first state trials were in 1795, and there both the judges gave the order in court, how the jury should be summoned, directing that at least 48 should be summoned to attend for the trial of certain persons, and at least 12 from the proper counties—48 were to come from the state at large. The *venire facias* must be signed by the judge and sent to the marshal as his direction, otherwise a separate order of direction so signed, though not on the *venire* may answer the purpose. Respecting the twelve from the county, Mr. Lewis said he concurred in sentiment, that it

was not neceſſary the direction ſhould be given, becauſe the law required it as indiſpenſible, on which account he ſuppoſed it was that judge Peters juſt reminded the marſhal that capital acts had been committed in certain counties. In anſwer to this it was ſaid that the whole directions were given by the judge, but he contended that the whole muſt be in conformity, and muſt come from the court, and the marſhal could not take it up of his own accord. It was ſaid that there had been but one inſtance of this ſpecial order; true, but there had no more than one inſtance occurred to occaſion it. If Congreſs had not thought it a power neceſſary to be exerciſed by a judge, it would not have been a law, and though exerciſed but once, or although not at all it was equally ſo, for the law may ſleep, but it cannot die, nor will it be called up, but when occaſion demands.

Farther. The marſhal, without any direction from the court, or a judge thereof, has returned a greater number of jurors than he was legally authorized to do. By the act of Congreſs, a ſingle judge is empowered to hold court in certain caſes, but if that judge was to give an order out of the time of holding court, it would be conſidered as an act of the judge and not of the court, and therefore not an official nor legal order. The *venire* in the preſent inſtance is not ſigned by the judge, but by the clerk, wherein a return of ſixty is authorized, but not a word about the county, therefore the ſixty are ſummoned from the ſtate: thus the venire goes to the marſhal, whom the judge ſees, and informs him that the caſe is capital, on which account, in addition to the ſixty returned in the venire, he makes a due and regular return of twelve from one county, and ſeventeen from another, ſigned with his own name: no doubt this was in conſequence of the intimation received from the judge. He had before gone as far as his authority led him, and now he annexes twenty-nine in a ſeparate paper under the ſame order, which gave no ſuch directions, but only that not leſs than forty-eight nor more than ſixty ſhould be ſummoned. The pannel is compleated, but whether the intimation or order of the judge was given before or after, we know not: to give the intimation was right, but a wrong uſe was made of it, for thoſe from the county ought to have been included in that pannel, which he might have included, by firſt ſtriking out the ſame number, any time before it came into court, and there his power would have ended, and every thing would have been right except his having had no order from the judge; but twenty-nine more are annexed, which not being done under the venire was improper, and if it had been, it would have been equally ſo, becauſe not authoritatively given. The court have power to direct ſuch a return as they think proper, under the direction of the law, but if this is the act of a clerk, judge or marſhal, it is irregular. Part of the number of ſixty, and not beyond it, ſhould come from the county, except the expreſs order, of, and ſigned by the court, ſhould otherwiſe direct. But in this caſe even the twelve is exceeded, and ſeventeen more annexed: under that venire he might have returned the whole from the county, but he could return no part above ſixty. Here is a certificate produced by his honor Judge Peters, ſignifying that he had told the marſhal it was a capital caſe, and

twelve muſt be ſummoned from the county of Northampton: this is to be filed as an excuſe for the ſurplus, for there cannot be an additional venire! In the trials of 1795, there were 108 jurors ſummoned, 72 from the ſtate at large and 36 from three counties named, but that was by different pannells, and the ſame could have been done now in the like way, and with the like authority, but this ſurplus is not to be annexed to the ſingle pannel. This certificate of the judge cannot amount to any thing whatever, and his honor could not have meant to give it as any thing like legal authority, all the official acts of a judge muſt be in writing, ſome way or other in order that he may be made reſponſible, otherwiſe it muſt depend upon his memory, and too much upon his will. But this never can be meant as a legal act.

In 1795 an act of Aſſembly of Pennſylvania, limited the greateſt number of the jurors to be ſummoned from the ſtate at large to ſixty, and not leſs than forty-eight. The court determined that they could not be governed by act of aſſembly but by common law. See 2 Dallas, but ſtill the matter was left to the judges, and not the marſhal: the judges exerciſed diſcretion according to circumſtances, but the act of Congreſs requiring twelve from the county remains binding, and is preſerved as an invaluable privilege to which every man is entitled; he can be tried by men of his own neighborhood, and ſurely if this is ſuch a privilege in common law, and eſteemed in England as well as America, he has a much greater chance of getting his neighbors from the ſmaller number than from the greater; and if this number is farther exceeded by twenty-nine, the chance is ſtill leſs. The marſhal may be a man of virtue—ſuch is the preſent marſhal; but a man of a different character might ſucceed him, and he is to hold his place during will and pleaſure. Now if it is conſidered as a privilege that a man ſhould have as many of his neighbors as he can to try him, and the increaſe of number diminiſhes that privilege, and, increaſed to a certain extent, almoſt annihilates it, and if it is conſidered that the marſhal has this authority, (which I deny) how little chance has the priſoner, and how much power has the marſhal over him! For this reaſon the law intruſts the court with this power, and will not, nor has ever intruſted it to the marſhal. (He here quoted 3 Bacon 245, and Keyling 16.) The caſes referred to by Mr. Rawle; Mr. Lewis ſaid was done by ſeparate pannels, as in 1795—2 Hale, 263—4 Black. 344—11 Mod. 1—and 5 Bacon, 244.

When theſe directions are not complied with, the proceedings are null and void, for the ſheriff not following the order of the court are good reaſon for a new trial, and therefore we conclude that the preſent jurors, ſeven of them actually ſerving, not being ſummoned by the order of the court, but by an aſſumed power of the marſhal, both as to place and number, makes a mis-trial. 21 Viner, 172, has a caſe ſimilar to the preſent: one perſon on the jury was illegally admitted, accordingly the court ſet aſide the verdict: on the preſent occaſion there are ſeven illegally admitted. There was a caſe when two indictments were brought in, and two pannels ſummoned, but it happened that the one ſummoned to try A, tried, B, and vice verſa:—they were tried and both convicted; but on the plea, new trials were

ordered becauſe they were not the men ſummoned for the purpoſe—2 Hawk. C. 27, ſect. 108, 9, 10. See law of errors 65. The authorities referred to ſhow how it may be amended—the court are bound to render all which has been done null and void. In Aurundell's caſe, 6 Cook, the error was as to the jury proceſs for murder: the court ſet aſide the verdict, ſeeing that while there was error in the jury proceſs, his life had not even been put in danger: every thing elſe was regular—the jury was returned from the pariſh where the offence was laid; (the very pariſh, and not the city was named,) the trial went on, and no challenge was made in the array, but for the above reaſon all was ſet aſide, and a *venire facias de novo* granted.—Thus it may be ſeen challenge to the array after challenge to the poll is not too late, if good cauſe be aſſigned—2 Lord Raymond, 884.

The gentleman on the other ſide has oppoſed a ſpecious argument as to number, to wit, that the words of the venire are, you ſhall cauſe to come before the court ſuch a number, and therefore, although a much greater number were ſummoned, and no more than the legal number appear in court, there is no cauſe of complaint, but this is the common form of a venire. But in what manner is the officer to *compel* the pannel to appear before the court? By ſummoning them, otherwiſe they are fined. In a legal view as it reſpects the venire, they did all appear before the court. Hale, Blackſtone, nor any of the authorities ſay how many ſhall come, but how many ſhall be ſummoned.

Mr. Lewis here concluded a very laborious inveſtigation of the points of law referring to the motion, and ſubmitted them to the conſideration of the court, truſting that if his client was at laſt to fall a victim, it would be to the ſword of juſtice, and not to the preſent ſtate of public opinion, ſeeing that the important proceedings on his caſe would operate as a precedent to be tranſmitted down to poſterity. He would leave the event with full ſubmiſſion, impreſſed with a firm reliance on the impartial and juſt deciſion of the court.

Mr. Dallas obſerved that the jurors were not alone ſummoned from Northampton county, but five on the jury were from Bucks county.

Mr. Rawle anſwered that there was a bill of indictment for treaſon committed in Bucks county, and therefore the marſhal had ſummoned them to be ready. They could as well be on the preſent jury as thoſe from Philadelphia, ſince there were twelve ſummoned from the proper county, and the law not departed from in that reſpect.

The court, obſerving that the depoſition of Mr. Rhoad, and the evidence given by Mr. Yohe contradicted each other, ſuggeſted the propriety of confronting the witneſſes in open court, in order to diſtinguiſh where the error was, accordingly

JOHN RHOAD was called.

Court. Do you recollect being at the houſe of George Yohe, ſince you came to town to attend court?

Witness. Yes.

Do you recollect being engaged in any converſation relative to the inſurgents.

Yes, there was ſome converſation about it.

Did you talk about John Fries?

I cannot recollect; it was a general talk about the buſineſs, but not of Fries in particular.

What did you ſay? Recollect.

There was not much ſaid—there was one behind the ſettle talked about ſetting up liberty poles, but I did not know the man. Yohe ſaid that if they put up liberty poles it would do no harm, becauſe for liberty they could do what they pleaſed. Whereupon I ſaid that the liberty poles had occaſioned a great deal of offence and diſpute. The man then went away, when I ſaid to Yohe that that man ſeemed very merry: he anſwered that he was there every day, and that he got drunk. I do not recollect any thing more that was ſaid, I was not above five minutes in the houſe.

COURT. Were you there at any other time?

WITNESS. Not in the houſe, but I was before the door.

Where did you lodge the firſt night you came to town?

At Seidell's.

Do you recollect any other perſon who was preſent at this time beſides Yohe and the drunken man?

No.

Do you recollect ſitting by the ſtove at any time, in converſation with two farmers about this inſurrection?

No.

Do you recollect being at Yohe's any other time?

I was at Yohe's no more than that once, and then did not ſit down.

MICHAEL SNYDER, ſworn.

ATTORNEY. What did Mr. Yohe ſay to you after he went out of court yeſterday; did he not tell you, that you were preſent when Rhoad made uſe of the words alluded to?

WITNESS. Yes, he ſaid, I believe you was there when he ſaid it.

Do you know any thing about it?

I do not know that I ſaw Rhoad there at all: I lodged in the houſe, but was ſometimes in, and ſometimes out of it. I told him I did not know about it.

GEORGE YOHE again called.

COURT. The court are very deſirous of your giving evidence to day, on the ſubject you did yeſterday, in the preſence of Mr. Rhoad, leſt there ſhould be a miſunderſtanding.

WITNESS. Mr. Rhoad was ſitting in my room at the ſtove, ſome days after he came down, two other gentlemen with him; they had ſome converſation before I came out of my bar, when I ſtood behind the ſtove: they were talking about the people that came from Northampton, and the inſurrection, and mentioned Mr. Fries: Mr. Rhoad ſaid that thoſe people who were not of the ſame opinion as theſe inſurgents who came down, were not ſafe; and Rhoads farther ſaid, that ſome of them ought to be hung, and Fries in particular. I returned into my bar, and then I was called into another room. I ſat there ſome time afterwards, but did not hear any thing in particular.

COURT. Had they been fitting there sometime before?

Yes.

What time of the day was it?

I cannot tell, but I think it was in the forenoon.

Can you tell who the other men were?

I cannot, they were strangers to me, and appeared like farmers.

Did you know any more who were in the room?

There were six or seven more, I think Michael Snyder was one, but I think there were none within hearing.

Was any thing said about Mr. Rhoad being on the jury?

Nothing that time that I recollect. I knew before that he was one. The man that was fitting by his side, said that if Fries knew that, he would not have him on the jury; he replied, that he wished he would not have him.

Do you recollect any thing else?

No.

MR. RHOAD went to explain to Mr. Yohe some part of the conversation, but Mr. Yohe could not recollect it, as he said he went in and out about his business. Mr. Yohe said Mr. Rhoad was often in his house, which contradicting what Mr. Rhoad had sworn before, that "he was never in the house but once, and then not five minutes, and "did not sit down," the court asked Mr. Rhoad to recollect whether he was never there but once. He then answered, that he believed he was twice, or perhaps three times, before he was called upon the jury.

COURT to MR. RHOAD. Was that after you was summoned down on the jury or befo e?

RHOAD. The last time I came down, and before the jury were sworn. I came there to inquire about a man, and I believe it was one of the men who was sitting with me at the stove.

To MR. YOHE. Did you sit down with them?

No. I stood a little, and returned to the bar.

. MR. RHOAD having said he never sat down, Mr. Yohe reminded him of some of the circumstances, and said that he was sitting there more than half an hour; but Mr. Rhoad could not be brought to recollect it.

COURT to RHOAD. Do you recollect either of the two men that were in conversation with you?

RHOAD. I do not recollect seeing any person there, that I was acquainted with, but Mr. Snyder.

COURT to YOHE. Was this a serious conversation about the prisoner?

YOHE. I do not know, but I thought so. I knew he was summoned upon the jury, on that very account, I took particular notice.

The court desired Mr. Yohe to repeat the words used by Mr. Rhoad in the same language, (German.) He did so, and Mr. Erdman the interpreter, declared them precisely what had been before sworn to.

MR. RHOAD declared again that he never had said so.

The examination here closed, and the court adjourned for about four hours, to give the judges opportunity of examining the authorities.

In the Evening the Court again meet.

JUDGE PETERS observed that the opinion of lord chief justice Trevy, in 4 State Trials was much to the point, but that question was not determined by the court. In a question of so much national importance as the present, Judge Peters thought it his duty to give an opinion—A man who lives in the county where insurrection has happened, his impressions of injury from the repetitions of such scenes will be stronger than might be expected in other men, and therefore all that Rhoad said about it being unsafe for the friends of government to live there, is accounted for, and no way improper for him to speak. I think Rhoad an honest man, and do not think he had any malice against Fries more than any of the rest, but I think he must have forgotten. As to what appeared to strike Mr. Lewis with such force, does not appear to me important. I think the proceedings might have been more regular, but yet I think they were regular enough to stamp the event with a sufficient sanction. The proceedings were much the same as the court of Oyer and Terminor, when the sheriff summons a number more than is wanted, in order to have them ready, and when twelve are wanted, they are taken out of that number. This venire issued by the same course as all others do, perhaps not knowing the offences would be capital, but it appearing otherwise afterwards, agreeable to act of Congress some were summoned from the proper counties. The venire says the number is not to exceed 60, yet these words do not designate more than those in the practice of England which directs 12, but 24 is generally returned. To be sure the court might have given the order, but I do not see how this could be done without the defendant lying in gaol, or a special court being holden. There is some weight to be sure in the arguments on that point, but they are not so important as they were held up to be. The marshal having ready a certain number, when the issue was joined, then, and not before, was the number who did appear, made to appear in court. The pannel was returned, and furnished to Fries, on which the trial was suffered to proceed, and on that account I think it appears it was approved of by the court, which is a sufficient designation.

JUDGE IREDELL—The question which the court have now to decide is certainly as important an one as ever was before a court. With regard to any interest, the government could be supposed to have in the event, or the feelings of private humanity or compassion as men, for the very unhappy situation of the prisoner—these must both be sacrificed to that impartial justice which our duty preremptorily commands us to exercise according to the best of our capacities. Sure I am that it is always my disposition so to be influenced, as I am convinced it is also of the judge with whom I have the honor to sit on the bench.

It is admitted, I believe on both sides, that it is in the power of the court in criminal cases to grant a new trial in favor of the prisoner, though they cannot to his perjudice, and it must be readily admitted that it must be the most obvious considerations, which could possible render it the duty of the court, lest they *too readily* grant a

new trial: for if the power is placed in a court, it is proof that it must, or might be sometime exercised, and if ever proper occasion arise for the exercise of it, it must depend on some particular, strikingly applicable circumstances.

With regard to the particular circumstance now brought forward, that one of the jurymen made certain declarations unfavorable to the justice, a prisoner has a right to expect, I must confess that until the evidence yesterday given by Mr. Yohe, I was not satisfied that he had said any such thing as could give the court full ground to believe him improperly biassed, so as to admit just cause for a new trial; but that testimony corroborating the testimony of those before given on which, independantly, we could place but little dependance, strikes me with great force, otherwise I should have entertained some doubt owing to their different relations of apparently the same event. This caution was invigorated by the very excellent character which the juror had borne. From this I have every reason to believe that he has not willfully done any thing wrong, nor sworn to any thing which he does not believe to be true. From the relation, it was difficult to arrange the particular parts of the conversation so as to make it accord at any interval of time, on which account I was extremely desirous that Mr. Rhoad and Mr. Yohe should be confronted, and questions put to remind each other of the facts, so as both might accord; but it does appear that Mr. Rhoad's memory is extremely defective in some material points, and therefore, without any impeachment we may presume it was a gross mistake. It is the clear opinion of the court in 4 State Trials, that if a juryman, not out of particular malice against the individual, but from any *other* cause appears to have formed a predetermined opinion, he was not fit to be a juryman, and it was therefore good cause of challenge. In that case the expressions used were much similar to the present case: that opinion appears to be grounded upon the supposition that were a man, from any ill motives, *or otherwise*, forms an opinion strongly on his mind, an improper bias is extremely difficult to get clear of, and will influence an honest man unwarily to give a wrong verdict, and to these circumstances every man is liable. It is impossible for me to resist the impression, from the number of depositions produced, that Mr. Rhoad must, at different times, have used expressions similar to those related by Mr. Yohe, but I can readily conceive that such expressions were used with an innocent intention, and without meaning to prejudice himself from afterwards serving as an honest juryman, yet I cannot be certain, but it might originate from a predisposed opinion of the guilt of the man, and therefore it must render him less able to discriminate facts, but if no such idea of guilt did exist, according to the authority stated, it would be good cause of challenge, if known, but if not known until after verdict is given, it would then be sufficient time, for what is good cause of challenge previous to trial, is good ground for a motion after verdict. It is very much to be regretted that the witnesses who heard these declarations did none of them communicate it to the counsel or the prisoner before the jury were sworn, because he might have been set aside, and much unnecessary public expence and distress to the un-

fortunate man, befides delay of the execution of juftice, in this particular cafe, been prevented.

It being admitted that the court may grant a new trial in criminal cafes upon fufficient caufe to fhow, and it following that they ought to do it if fhown, I farther think that if there is caufe of challenge before, there is equal caufe, if it is proved that the juror was biaffed, to order it, after verdict is pronounced, whatever delay or inconvenience may refult therefrom; that can be no reafon to withhold a priviledge to which a prifoner is entitled: from thefe views, I think it my duty to vote for a new trial in the prefent cafe, as the fact appears too clear to be controverted. In this event, there will be ftill an opportunity for the prifoner to be freed, and juftice be done between himfelf and his country.

With regard to the point of law, if my mind had not been clear on the evidence refpecting the juror, I fhould have been decidedly againft a new trial, and accordingly fhould have taken the trouble more fully to have delivered my fentiments; it being fo, I fhall now make but a few general remarks. As to the point, that the record fhould evince the proceedings of the court, otherwife they are invalid, with reafons why trial could not be held in the county, I think there is no neceffity of the reafons appearing on the record of court. If the queftion had ftood fimply upon this ground, it would have been immaterial; but it did not: application was made to the court, after feveral indictments were found, alledging that the trials ought to be held in the county, whereupon the court declared opinion, that "great inconvenience" prevented a compliance with the motion: but farther, it appeared to be gone out of the power of the court, becaufe the indictment had been found in this court, which muft be confidered a part of the trial; and the law means the whole proceeding fhall be in one place, fo that the indictment muft have been found in that county, otherwife the trial by jury could not be held there. Thefe were the reafons which operated to influence the court to refufe the application. In this dilemma, it was impoffible for the court to fay the trial fhould not proceed here; and had it been removed, a new indictment could not have been found; if it had, the trial could not proceed upon two indictments. The only times for confidering this queftion, I believe, was, when this man was charged with the offence, before he was committed, or even after the court fat, and before the indictment was brought into court. If it had been the opinion of the judge who committed him, that trial could be held there, then it could have been referred to the fupreme court, who, if they had been of the fame opinion, would have ordered a fpecial court. But from the ftate of that county, no one can believe that trial could have been held there in any way conducive to juftice, or fo as to make the proceedings of the court fuch as they ought to be, becaufe the Prefident has declared, by proclamation, that the law could not be executed without military affiftance, which I never wifh to fee guard a court of juftice as matter of choice, though unavoidable neceffity may fometimes make it prudent.

With regard to the fummoning the jury, it is to be obferved that the practice now ufed, was an eftablifhed ufage of this court for

many years paſt, which is a ſanction ſufficient, if no poſitive law nullifies it. The venire, iſſued in this form, in my opinion, did iſſue with the ſanction of the court, and had the ſame effect, as though the expreſs order of the court had been annexed. It appears that it was not known, at the time the venire iſſued, that any caſes were puniſhable with death, and of courſe not neceſſary to include a ſpecial proviſion for twelve to come from the county. Mr. Lewis made a conceſſion, which, if right, did away the whole of this objection: he ſaid, that upon the marſhal's receiving information (whether it came from the judge or not) that a caſe puniſhable with death had occurred, he had a right, without any order from the court, written or verbal, to ſummon a greater number of men than in other caſes: the words of the law are, not that he ſhould ſummon twelve, but twelve at leaſt; but he obſerved that this ſhould not exceed, but be included in the number ſixty. I do not know what authority he had to limit the number to ſixty, in this or any other caſe. The law intends that a priſoner ſhall have a chance of men from his own neighborhood; certainly then the greater the number which comes from it, his chance is proportionably increaſed, therefore it can never prejudice the priſoner. I think that if the marſhal ſhould extend the diſcretion given him to an unneceſſary number, it would operate to the vexation of the perſons ſummoned, and they alone would have cauſe to complain. Formerly, by law, a ſheriff was directed to ſummon twelve, but by uſage, he actually did ſummon twenty-four, yet all above the twelve appeared to acquieſce, and it could not be of diſadvantage : ſo in the grand-jury for twenty-four, forty-eight was ſummoned: the power was aſſumed and not complained of. I preſume that if the marſhal had authority to return that number, without a venire or precept, he was not limited as to number; and that when they came here, they formed the jury attending court. I am farther of opinion, that when the pannel was preſented to the priſoner, that pannel obtained the full ſanction of the court, as much as though they had given the order.

So far as to ſubſtance. With reſpect to form, the words are, after joining the iſſue, "let the jury come." That is a direction given by the court to the marſhal to ſummon the jury, but as it would be inconvenient for him to ſummon the jury after this order, which is for him to do it without delay, thoſe jurors already ſummoned appear in court, ſo that if it was entered upon record it would appear that after the priſoner was arraigned, and iſſue joined, the marſhal had directed theſe men to come, and they had come. It appears to me that whether the marſhal ſummoned the jurors of his own accord, or whether they were ſummoned under the expreſs order of the court after iſſue was joined, in ſubſtance and in form the law is ſo far complied with as to do perfect juſtice. Though I am not certain that my opinion on theſe points of law are right, not having had much time to examine, yet I am ſtrongly of that opinion at preſent; however I have thought leſs and ſaid leſs upon them than if the main object of the motion reſted on it.

Senſible of the importance of the queſtion, and that if life is once loſt it can never be recovered; leaving aſide the queſtion which in-

volves doubt, and resting on the facts which have appeared before the court, I deem it my duty to say that A NEW TRIAL OUGHT TO BE GRANTED.

JUDGE PETERS. Upon the points of law urged, I should have thought proper to have given my opinion, although they would have materially differed from that of a gentleman whose law knowledge I much respect; yet I think it at this time unnecessary to say any thing farther than that I agree in the opinions of the gentleman with whom I sit.

As to the other point, to wit the conduct of this juror, I confess that my mind is not compleatly made up: I think that all which can be said on that is, that no juryman ought to go into that box with prejudice upon his mind. In a case which the public at large must feel materially interested, it is impossible to keep the mind from being affected; all the citizens will have their feelings; the question then is, whether this one individual had or had not particular malice against the prisoner? If not the evidence would weigh lightly on my mind: upon this point I confess myself to have doubts.

These *very striking expressions* the juror swears he cannot recollect using, although the others swear that he did use them. I am still doubtful, from the light opinions I entertain of all the witnesses except one, whom I do not know, but if any impressions are made upon my mind favorable to the motion, his evidence has made them, otherwise I could not hesitate what opinion to form.

I know the event of a refusal; I know that a division of the court will be the consequence, and the man must be left to the mercy of the executive. Individual punishment is nothing to public example; on the other hand the consequences of a new trial would be to delay the exercise of justice. I am satisfied that the prisoner has had a fair and impartial trial, with all the advantages he could desire; but as I think *public example* is the only object which the law contemplates, and as that public example will have a far more forcible effect when *every excuse* is removed, and the public fully satisfied with the proceedings of this court, which may not be the case if a division of the court takes place, I rather yield my opinion to the necessity, than a conviction of the justice of a new trial. On these accounts I submit to say that THERE SHALL BE A NEW TRIAL.

CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF PENNSYLVANIA,

Directed by the judge of the district to be held at Norristown, proclamation whereof was made by the marshal. Begun October 11th, 1799,

BEFORE

JUDGES BUSHROD WASHINGTON,

AND

RICHARD PETERS, Esquires,

JOHN FRIES and the other prifoners for treafon and mifdemeanor were brought up at this court, but a fufficiency of jurors did not appear to proceed to trial.

October 15.

MR. DALLAS contefted the jurifdiction of the court upon the general pofition that an indictment found in the city and county of Philadelphia, could not be tried at a court holden at Norriftown. The conftitution and laws of the United States, he obferved, were founded upon this principle: that the criminal fhould always be tried as near the place where the crime was committed as circumftances would admit; which was to be in the county, unlefs manifeft inconvenience fhould operate to prevent it. The circuit court could appoint fpecial courts for the trial of criminal cafes, but not for civil cafes. Laws of United States p. 226 vol. 2.

But the diftrict judge ordered the court to be holden at this place, agreeable to the powers he was vefted with by the quarantine and health law, paffed February 25th 1799. Sect. 5th and 7th reads thus: Sect. 5th It fhall be lawful for the judge of any diftrict court of the United States, within whofe diftrict any contagious or epidemical difeafe fhall at any time prevail, fo as in his opinion, to endanger the life, or lives of any perfon or perfons confined in the prifon of fuch diftrict, in purfuance of any law of the United States, to direct the marfhal to caufe the perfon or perfons confined as aforefaid, to be removed to the next adjacent prifon, where fuch difeafe does not prevail, there to be confined until he, fhe, or they, may be fafely removed back to the place of their firft confinement, which remove fhall be at the expence of the United States.

Sect. 7. That whenever, in the opinion of the chief juftice, or in cafe of his death, or inability, of the fenior affociate juftice of the fupreme court of the United States, a contagious ficknefs fhall render it hazardous to hold the next ftated feffion of the faid court at the

ſeat of government, it ſhall be lawful for the chief or aſſociate juſtice, to iſſue his order to the marſhal of the diſtrict within which the ſupreme court is by law to be holden, directing him to adjourn the ſaid ſeſſion of the ſaid court to ſuch other place within the ſame, or any adjoining diſtrict as he may deem convenient; and the ſaid marſhal ſhall thereupon adjourn the ſaid court, by making publication thereof in one or more public papers printed at the place, by law appointed for holding the ſame, from the time he ſhall receive ſuch order, until the time by law preſcribed for commencing the ſaid ſeſſion. And the diſtrict judges ſhall, reſpectively, under the ſame circumſtances, have the ſame power, by the ſame means, to direct adjournments of the diſtrict and circuit courts within the ſeveral diſtricts to ſome convenient place within the ſame reſpectively.

Neither time nor place could be changed in civil caſes, but both time and place might be changed in criminal caſes.

MR. DALLAS then proceeded to apply theſe laws to the preſent motion: ſuppoſing that the place of trial ought to have been at or near where the crime was committed, yet it was determined at the March term that it ſhould not be held nearer than at Philadelphia, although Norris town was nearer than Philadelphia. It was then laid down as an eſtabliſhed principle by both the judges, that the indictment was part of the trial, and where the trial was commenced, there it muſt be concluded; and therefore a motion to remove the priſoners for trial to the county where the offences were committed, were overruled.

Firſt, he would obſerve, that the trial ought to have been held in the county: the judiciary act, vol. I. p. 67, provided that the trial ſhould be in the county where the crime was committed. Subſequent to that, an amendment to the conſtitution (8th) was paſſed, providing, "That in all criminal proſecutions, the accuſed ſhall enjoy the right to a ſpeedy and public trial, by an impartial jury of the State and *district* wherein the crime ſhall have been committed." From this Mr. Dallas conceived it clear, that what was called *district* in the conſtitution was ſynonimous *county* in the law, and recognized that expreſſion, and therefore he thought they ought to be tried in one of thoſe counties, and at no other place.

But in criminal caſes, there was a diſcretionary power in the court, or in the diſtrict judge, to remove the court in caſe of contagious ſickneſs, as well as a power to remove the priſoners.

The 5th ſection only provides for the removal for ſafe keeping of the priſoners to the next adjacent priſon, until they can with ſafety return. The court could be taken any where; but the priſoners could not be taken any where: it muſt be only to the "next adjacent priſon, where ſuch diſeaſe does not prevail." Norris town, he contended, was not the next adjacent priſon: it was to be the next priſon, to an adjacent priſon, and to one where the ſickneſs does not prevail, if it was in the power of the court to diſpenſe with one of theſe reaſons, it was with all. Norris town was 17 miles from Philadelphia, Cheſter was but 15, the difference to be ſure was but ſmall, but if the *words* of the law were not binding in every part, the ſame diſcretionary power might have removed the court 100 miles.

The prisoners were therefore not to be tried, but to be kept till they could be removed back with safety.

JUDGE PETERS said, he contemplated Chester, but he had heard that there were some cases of the fever there, and he knew it had before been much afflicted with it; he therefore did not consider himself so closely bound as to be forced to go there.

Mr. DALLAS said, vague report was not to be attended to, or he believed it would be a reason against going almost to every place: a court was held at Chester on the 9th inst. He believed Chester answered the perfect description of the law. But, he said, the prisoners were removed, not merely for safe-keeping, but for trial; however, he conceived the former decision, "that the trial was begun where the indictment was found," must prevent the trials being held any where but in Philadelphia, because the indictments were found there. Though a habeus corpus was powerful in its operation, yet it was certainly not meant to be in direct opposition, and to supercede an act of congress. Nor was the personal inconvenience of the court to be considered; the act of congress was peremptory, and could not be dissented to from any cause, without it was by a repealing clause.

He hoped the court would give an opportunity to his colleague (Mr. Lewis) who was now absent, to give his ideas on the subject. He was sent for, and expected shortly.

MR. RAWLE contended, that there was no division contemplated but that by which the United States were divided into 13 districts; he thought it impossible to conceive that "*district*" meant a county, and therefore the reference to the 8th amendment of the constitution, he thought, no support to the argument.

With respect to the power of the court to try the causes, Mr. R. thought it clear, that as both in civil and criminal cases, the courts could be removed, both with respect to time and place, under certain circumstances, so could the business of the court also; this was a matter of course, and therefore the power of habeus corpus, to bring all the prisoners up, was in the court. If it were not so, in vain would be the provision (at times of sickness) of the constitution, which directed *a speedy trial*, because inevitable delay must take place, or the lives of the court and jury, as well as of the prisoners, be in great hazard. He conceived, that the 5th section, which provided for the removal of the prisoners, was scarcely conformable to that part of the constitution which provided for a "speedy" trial, because, if the construction was, as supposed, by the other counsel, it infringed on the prisoner's right: they had no power to keep a man in long confinement, until his guilt was ascertained; and no prevalence of disorder could authorise them to it.

The gentleman said, that they were to be taken away for safe-keeping, until they could be returned in safety to the prison from whence they were taken. Now, suppose, for instance, those to be removed, who had been sentenced for eight months imprisonment, and that time expired, whilst they were at some other prison, on account of the prevailing sickness, could it be supposed that the law contemplated that they should be kept till they could with safety be returned? He presumed not.

Would they not thereby have suffered false imprisonment by being confined longer than the judgment of the court ordered? Most certainly they would.

As to the next convenient prison, Mr. Rawle thought the words were not very perspicuous, not sufficiently, he thought, as to measure geometrical distances to a nicety. He took it to be one of those cases which would bear a reasonable and circumstantial construction, and which was left in the judgment of the judge, whether it was convenient and safe to be rigorously executed, or not: there might be an alarm of disorder sufficient to warrant the judge to say, that it was not safe to lodge the prisoner in one place, and, as another was about the same distance, where no such alarm existed, he thought himself justifiable in ordering their removal to the latter: for though there was provision to remove them once, there was no provision to remove them away again, even in case of alarm, except it was back to the same prison they first were in. Upon the whole, as to removal, he thought the judge had executed his duty and his clemency. If it had not been right, the prisoners should have complained at the time of their removal, but they were all perfectly satisfied.

With respect to the effect the removal would have to the jurisdiction of the Court, he thought the arguments at the last court respecting trial in the same county, would not apply. He referred to the argument of Judge Wilson in the case of Hamilton, Dallas' Reports, 2 vol. p. 760. The Court had power in every county in the state, because the whole state constituted but one district, in which the law directs them to be tried.

He did not suppose the matter of convenience was any question at all: nor did he believe the Judges would be in the least guided by it.

As to the business began in Philadelphia, in as much as the indictment was there brought in, it was stated, that the trial must be continued there. This might be also the means of delay, which the constitution provided against; but he believed the argument could be answered in another way. The court was held in Philadelphia, and this business was continued, and therefore wherever the court sat, therefore its business must follow it. What would be the effect else, of an indictment being found in Norris-town, and the cause being continued over? Must the court remove back here at another session to try the cause here? This would bring the court into a continual state of vibration, and justice be much delayed. He thought the court was competent to take up what remained of former sessions.

Mr. Dallas hoped the court would consider the great inconvenience of the trials, especially on the treason cases, now going on: the deranged state of the country, owing to the disorder which had driven numbers of citizens from their homes, would make it ruinous to the prisoners; it would prevent the prisoners the opportunity of inquiring the characters of the jurors, and also of procuring witnesses. It would doubtless endanger his life.

Agreeable to Mr. Rawle's argument, Mr. Dallas contended, that the 5th and 7th sections of the Quarrantine Law were at war with each other, and not only so, but with the general policy of the laws and

constitution. But these two sections, in his opinion, were distinct in their nature and object, and no repealing clause had ever been passed, and thefore each part must be carried into effect. The 8th section provided for the removal of the prisoners, but there was not a word about trial in it. By the 7th section it would appear, that the district judge might take the court to Pittsburg if he pleased; he was not restrained at all; but there was no such power given to him respecting prisoners; he could not take them farther than the nearest prison of safety. How could these two sections be reconciled? Why were not the two sections formed upon one principle, if they were so connected as the gentlemen supposed? Of what avail would it be to take a court to a place where there was no power of taking the prisoners, who must be tried, before that court? But so it might be, if the reasoning which had been given was right. Had not the 5th section been introduced by the legislature, then, indeed the whole jurisdiction would have been removed with it.

With respect to the indictments that might be found in Norris town, the court having been held agreeable to the 7th section of that law, the question of precise distance being set aside, undoubtedly they would go to wherever the court would remove. Inasmuch as justice could not be done to the prisoners, and inasmuch as the former decision prevented the trial being held any where but at the place in which it was begun, he hoped the trials would not be proceeded on.

Mr. Lewis arrived in court, and apologised for not being able to attend earlier: he had not sufficiently weighed the motion, he said, to be able to add any thing to the ground ably argued by his colleague, and therefore wished to leave it to the decision of the court.

Judge Washington said, nothing was more clear than that the fifth and seventh sections of the Quarantine Law were, for different purposes: the 5th only relates to the removal of prisoners, that they might not fall a prey to any contagious disease that might occur wheresoever they may be confined; and this removal was not for the sake of trial, but for safe keeping. It was doubtful, previous to the passing of this act, whether the marshals had power to remove them, whatever might be the cause, or however dangerous to them to remain in prison; but against this doubt and danger, Congress provided. The 7th section applies altogether to the removal of the court for the purpose of trial of causes, both criminal and civil. But all the acts that have been mentioned may be reconciled together, and all with the constitution. The court, without any restriction as to the place of its session, if a contagious disease shall occur, are to be convened for the purpose of trying causes at the stated session; and, it is to be remembered, that this is not a new, nor a special court, but an adjourned stated court, merely removed from one spot to another, to be holden there: of course, all the trials pending, and before the court at any former term, are to come on at the *place* so changed; for the court is the same: the arguments of Mr. Attorney were sound, and need not be repeated.

On these grounds, the court thought that the trials ought to go on, and therefore the motion was over-ruled.

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