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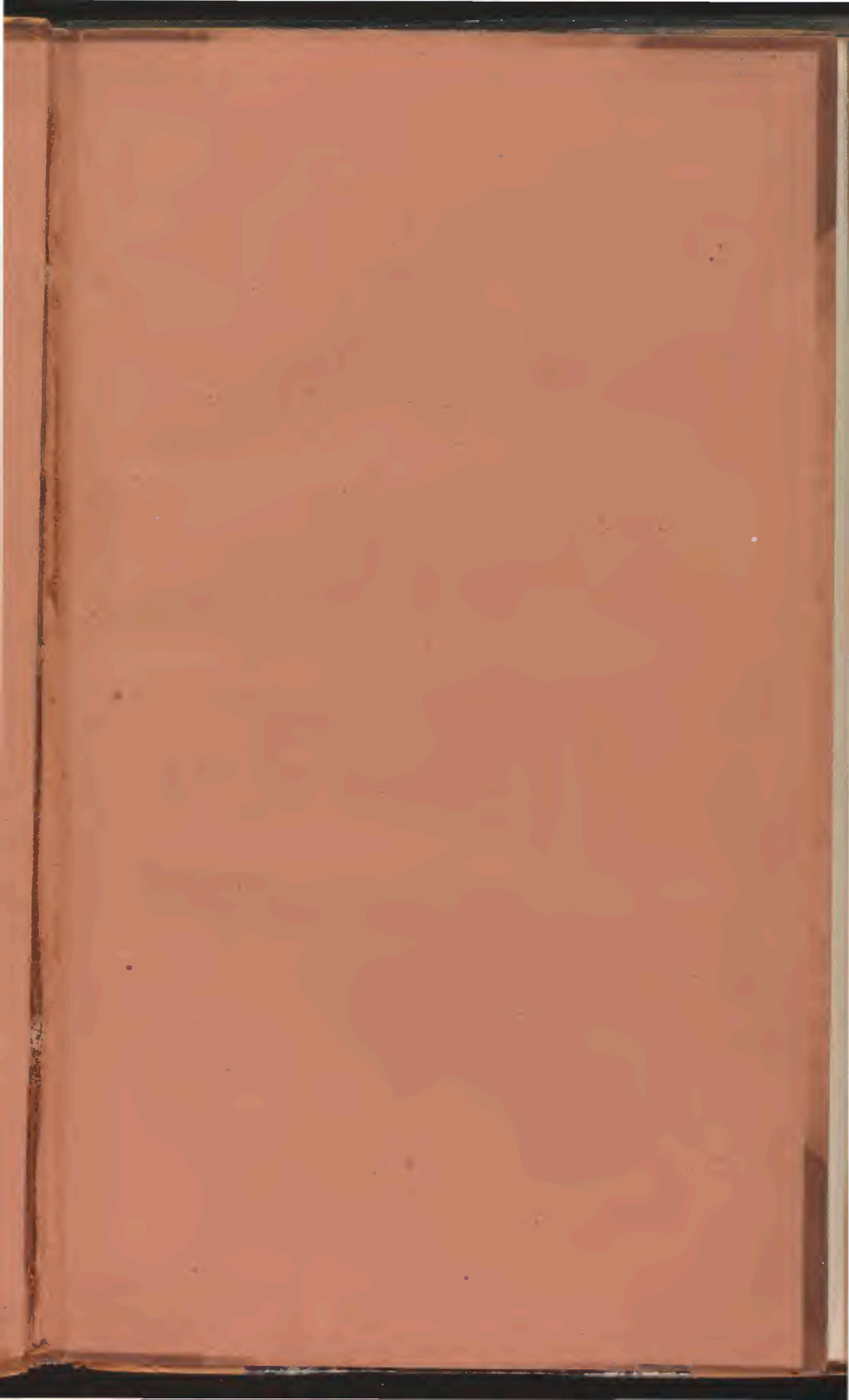
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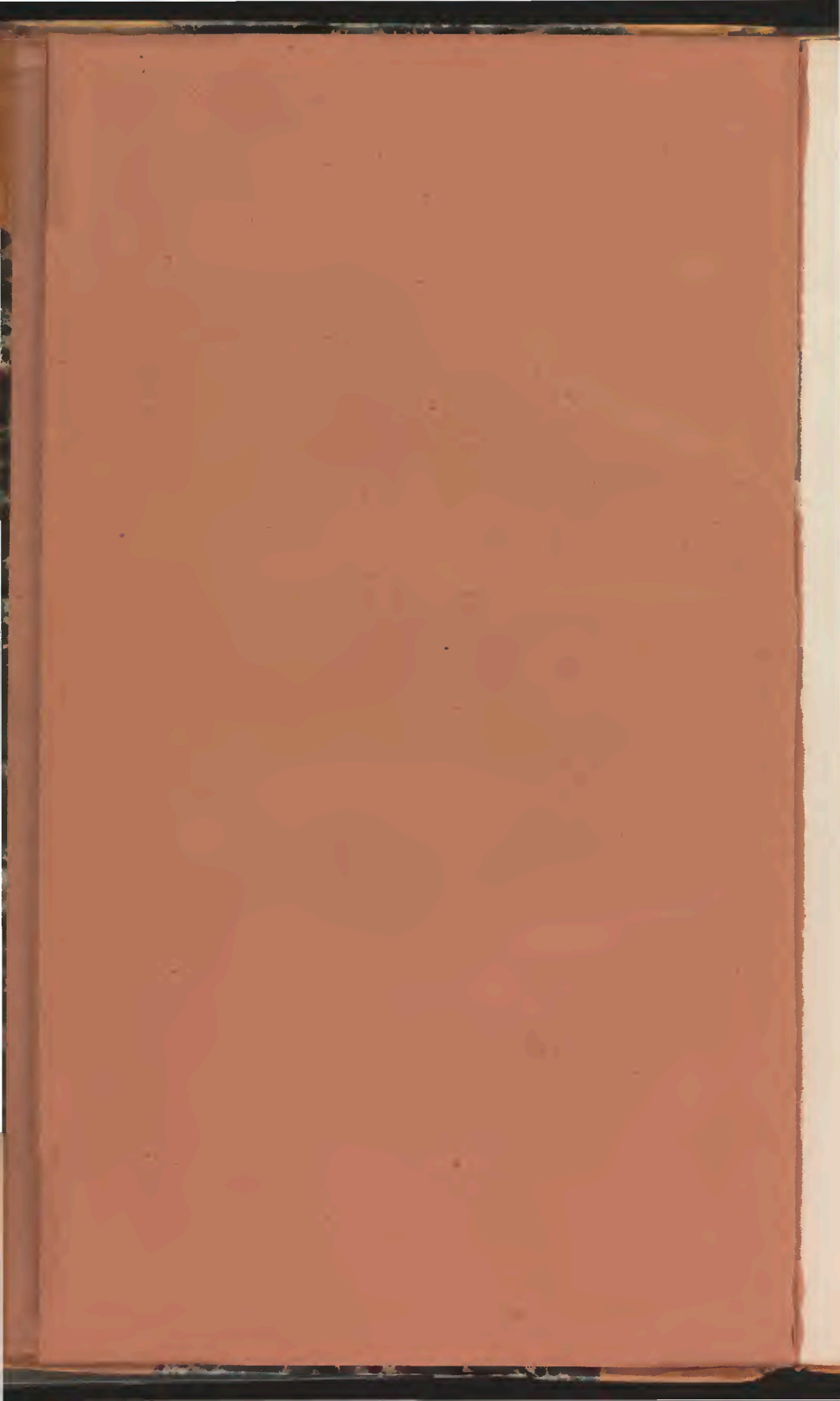
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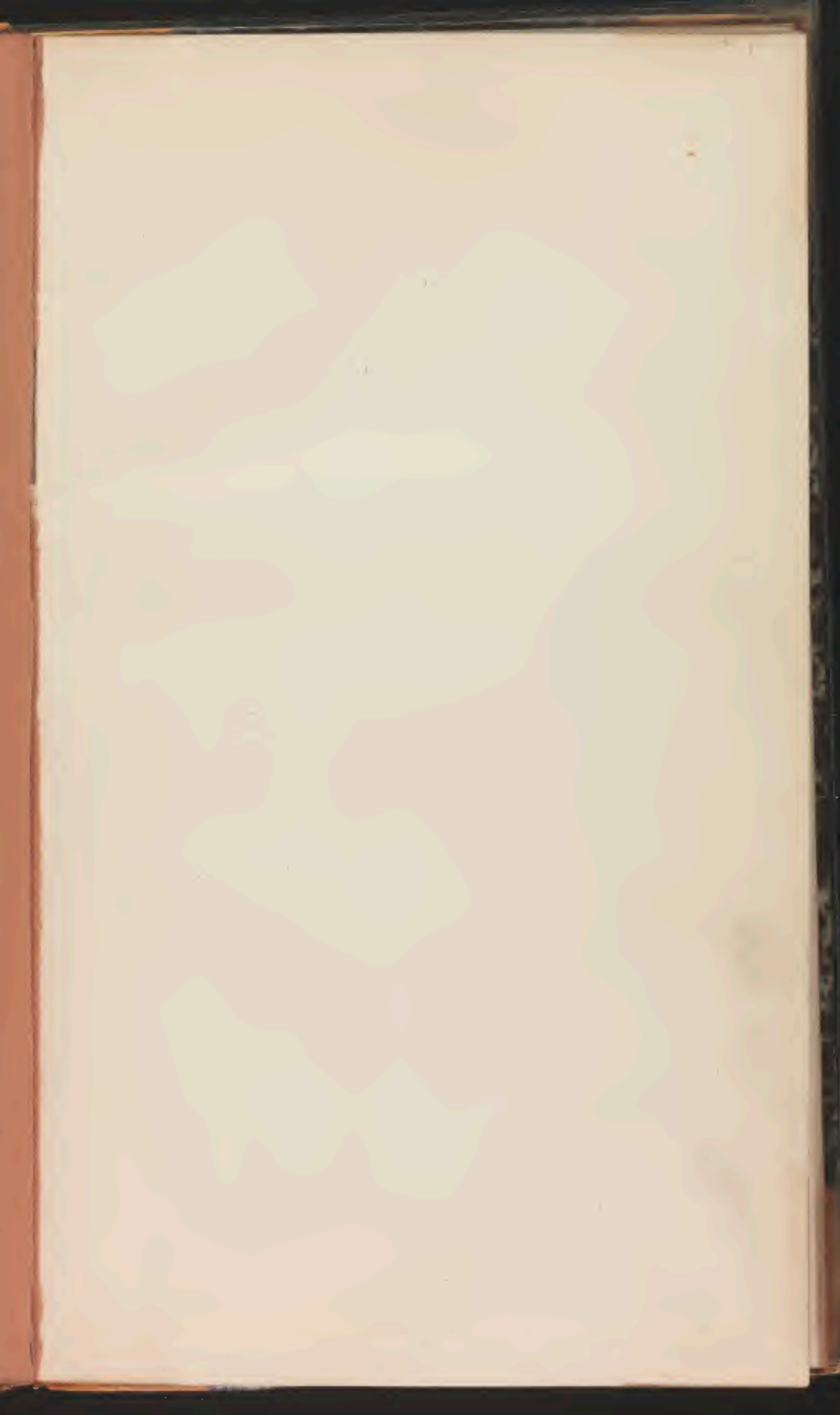
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UNITED STATES OF AMERICA.







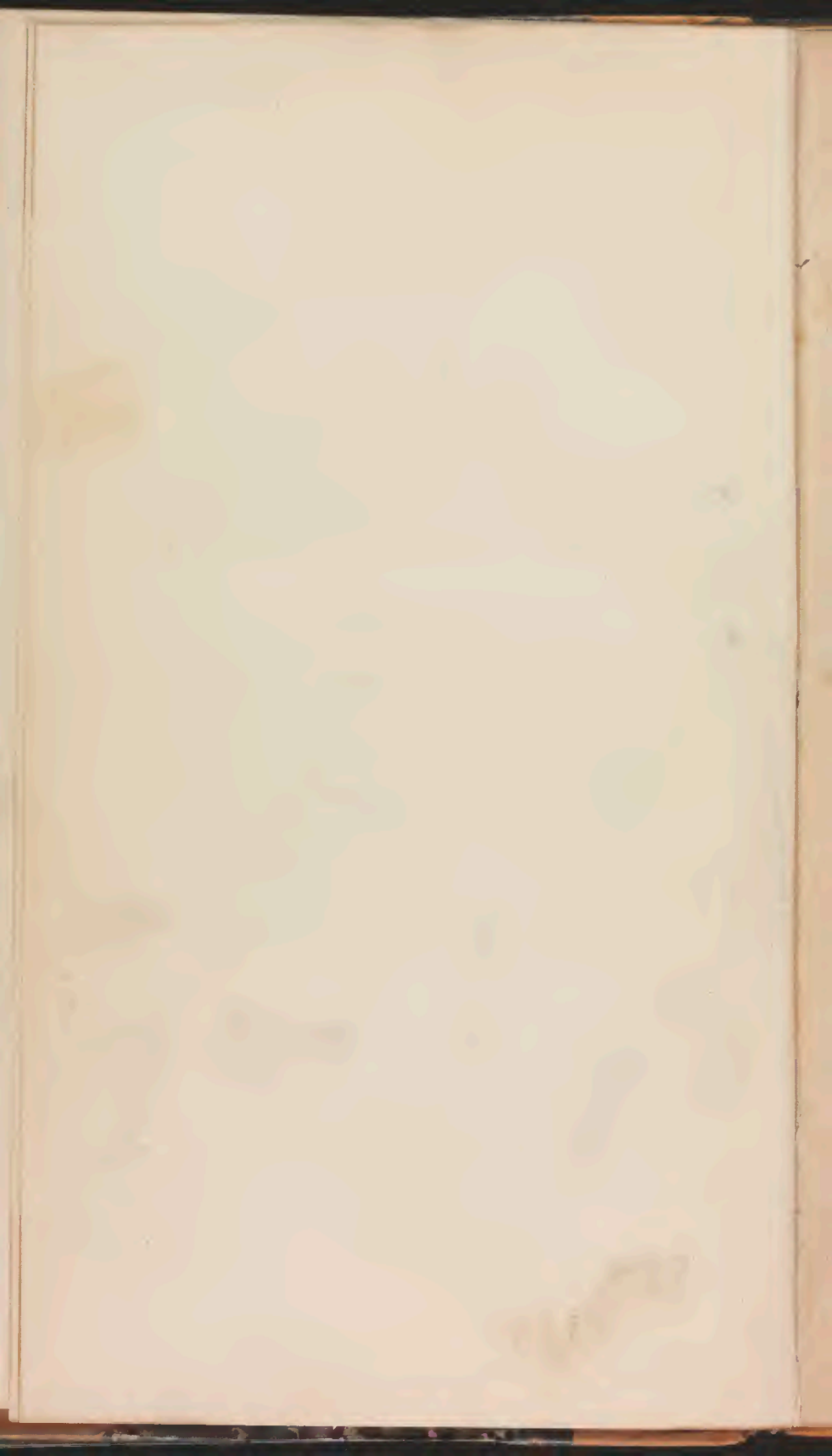












1925

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THE TRIAL  
OF  
JOHN H. JONES,  
FIRST LIEUTENANT  
OF THE  
PRIVATEER SCHOONER REVENGE,  
ON A  
*Charge of Piracy,*  
INCLUDING THE ARGUMENTS OF THE COUNSEL AND CHARGE OF  
JUDGE WASHINGTON.

REPORTED  
BY ONE OF THE COUNSEL CONCERNED IN THE CAUSE.

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PHILADELPHIA  
Printed by John Binns, No. 70, Chesnut-street.  
For the Reporter.  
1813.

United States, and within the jurisdiction of this court, being then and there in and on board of a certain private armed vessel of the said United States, called the *Revenge*, owned by certain citizens of the said United States, (to the said grand inquest unknown) did then and there with force and arms, unlawfully *turn pirates and felons*. And that the said John H. Jones and Richard Pickle, together with the said other persons to the said grand inquest unknown, then and there upon the high seas, aforesaid out of the jurisdiction of any particular state, of the said United States and within the jurisdiction of this court, with force and arms piratically, feloniously, violently and unlawfully, did then and there set upon, break and enter a certain *Portuguese Brig* called the *Triumph of Mars* whereof a certain Simao da Rocha Munho was then and there master, (Portugal and the said United States being then and there at peace) and then and there piratically, feloniously, violently and unlawfully did make an assault in and upon the said *Simas da Rocha Munho* and the *mariners* of the said *Portuguese Brig*, called the *Triumph of Mars*, in the said *Portuguese Brig*, in the peace of God and of the said United States, then and there being and them the said Simao da Rocha Munho, and the said mariners of the said *Portuguese Brig* called the *Triumph of Mars*, in bodily fear of their lives then and there piratically, feloniously, violently and unlawfully did put—And that the said John H. Jones and Richard Pickle, together with the said other persons to the said grand inquest unknown, then and there upon the high seas aforesaid, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, piratically, feloniously, violently and unlawfully did commit *robbery* and did then and there piratically, feloniously, violently and unlawfully steal, take and carry away from and out of the said *Portuguese Brig*, called the *Triumph of Mars*, *seventy five pieces of gold*, commonly called half johannes, each piece being of the value of eight dollars, lawful money of the United States amounting in the whole to the value of six hundred dollars, like lawful money of the said United States, two hundred and sixty four pieces of silver Spanish coin, commonly called Spanish milled dollars, of the value of two hundred and sixty four dollars of like lawful money of the said United States, a *quantity of ropes*, of the value of nine hundred dollars, like lawful money of the said United States, one *box of Sugar* of the value of five hundred dollars, like lawful money of the said United States; two *pieces of Canvas*, called respectively a *main top sail* and a *main top gallant star sail*, together of the value of two hundred and forty dollars, of like-lawful money of the

said United States; sundry pieces of *iron*, of the value of one hundred and twenty dollars like lawful money of the United States; sundry picces of *sail twine*, and a *log-line*, of the value of one hundred dollars of the like lawfu money of the said United States; certain ropes called *Ha yards*, of the value of seventy dollars, like lawful money of the said United States; a *Blunderbuss* of the value of five dollars, like lawful money of the said United States; a *Muske* of the value of five dollars, like lawful money of the said United States; certain *linen curtains*, of the value of ten dollars, like lawful moncy of the said United States; certain *China cups*, of the value of six dollars, like lawful moncy of the said United States; a *Spy Glass*, of the value of ten dollars, like lawful money of the said United States; and a *Quadrant*, of the value of ten ollars, like lawful money of the said United States; together with sundry other goods an chattels of great value, (the particulars whereof are to the said grand inquest unknown,) the goods and chattels of certain other persons to the said grand inquest unknown, being found in the said Portuguese Brig, called the Triumph of Mars, in the *custody and possession* of the said Simao da Rocha Munho, and the said mariners of the said Portuguese brig, called the Triumph of Mars, *fr m* the said Simao da Rocha Munho, and the said mariners of the sa d Portuguese brig, called the Triumph of Mars, and from and out of their custody and possession, and against their will, to wit: upon the high seas aforesaid, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court as aforesaid, against the form of the act of the congress of the said United States in such case made and provided, and against the peace and dignity of the said United States.

A. J. DALLAS,  
Attorney of the United States,  
for the Pennsylvania District.

A true bill as it respects John H. Jones, and ignoramus as to Richard Pickle.

THOMAS LEIPER,  
Foreman.

A true copy—Furnished pursuant to the act of Congress.

D. CALDWELL,  
Clerk of the Circuit Court.

April 20, 1813.

The Prisoner being arraigned pleaded not guilty: Monday the 29th day of April, was assigned for his trial, on which day the following jurors were duly empanelled and sworn, viz:

- |                   |                      |
|-------------------|----------------------|
| 1 John Singer,    | 7 James Brady,       |
| 2 Jesse Keasby,   | 8 James M'Keagh,     |
| 3 James Hammell,  | 9 John Sweeny,       |
| 4 John Cuningham, | 10 Charles Hupfeldt, |
| 5 William Humes,  | 11 Robert Anderson,  |
| 6 James Laidley,  | 12 Jacob Snyder.     |

Counsel—Mr. Dallas, (District Attorney) for the United States. Messrs C. J. Ingersoll, Phillips and Rawle, for the Defendant. The Clerk of the Court read the indictment.

Mr. Dallas opened the case on the part of the United States; he stated to the jury, that the offence with which the prisoner was charged, was usually denominated Piracy, according to the maritime law of nations; that it consisted in acts of violence, committed on the high seas, for the purpose of theft and fraud; he would turn to the act of congress for the nature of the offence, as described in the indictment.\*

“*Sect. 8.* And be it further enacted, That if any person or persons shall commit upon the high seas, or in any river, bason or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence, which if committed within the body of a county, would by the laws of the United States, be punishable with death, or if any captain or mariner of any ship, or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandize to the value of fifty dollars, or yield up such ship or vessel voluntarily, to any pirate, or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship, or goods, committed to his trust, or shall make a revolt in the ship, every such offender shall be deemed, taken and adjudged, to be a pirate and felon, and being therefore convicted, shall suffer death, and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may be first brought.”

That by the legislative description, the word robbery, would be found; but as they did not define it, it would be necessary for the jury to resort to some code to find out what is robbery; that they would therefore be obliged to resort to the common law code where

\* Vol. x. page 100. Sect. 8.

the definition of robbery would be found. It was the felonious taking of property from another by violence and against his will. If therefore in the course of the evidence, it should appear, that the defendant by violence, did take from the Portuguese vessel, the articles laid in the indictment, against the will of the persons, in whose custody they were, he is unquestionably guilty of the offence laid in the indictment. The defendant is stated in the indictment, to have been on board the private armed schooner *Revenge*, it is therefore admitted, that she was lawfully commissioned as a Privateer by the President of the United States. This being the fact, it becomes necessary to ascertain, what acts might be lawfully done, by those on board the privateer. On the 18th of June 1812, congress declared war against the United Kingdom of Great Britain and Ireland, and their dependencies, and by the same act, authorised the President of the United States, to issue letters of marque and general reprisal, in such form as he should think proper, under the seal of the United States. They very soon after, passed "an act concerning letters of marque, prizes and prize goods."\* There is no authority given by either of those acts, to commit aggressions on any but the enemies of the United States; a private armed vessel cannot sink, burn or destroy a neutral; but as it is sometimes very difficult to ascertain the true character of property at sea, they have authority to stop vessels of every description for that purpose, and in so doing, they are not authorised to rob and pillage the neutral; their bounden duty is, if they suspect such vessel or cargo, to be in part or the whole enemies property, to send him into the first port for adjudication. The great question for the consideration of the jury will be, with what mind, did the defendant arrest the Portuguese vessel, and take from her the articles mentioned in the indictment? Was it done with an intention to libel them? If the jury should be satisfied, that this was a capture, with a view to adjudication, I shall not contend that the defendant is guilty of piracy. (Mr. Dallas here stated the evidence, intended to be produced, and relied on by the United States, for the conviction of the defendant, which will be hereafter detailed.) Mr. Dallas concluded, by saying that he had heard objections of jurors, from conscientious scruples, in convicting any person, when the punishment was death; that he always should respect the religious scruples of every one, but that the jurors should remember, they were under a solemn obligation, to decide according to the laws of the land, that it certainly was not

\* 25th June, 1812.

a pleasant task, he as public prosecutor had to perform, but that as a duty enjoined on him, he should endeavor to discharge it faithfully and impartially, the law was the guide for the jury; if from the evidence they believed the prisoner to be guilty, it was their duty to say so, they had nothing to do with the punishment, that was left in the hands of other powers.

Testimony on the part of the prosecution—The following documents were produced.

- 1st. The formal application of William A. Shaw, for himself and the other owners of the private armed schooner *Revenge*, commanded by William Butler, John H. Jones, first lieutenant for a commission, dated 13th October 1812.
- 2d. A copy of the bond, agreeably to the act of Congress, dated, 15th October 1812.
- 3d. A list of the crew of the schooner *Revenge*.
- 4th. A copy of the commission, from the President of the United States.
- 5th. A copy of the instructions for the private armed vessels of the United States.

Witness for the United States.

Benjamin Nones, sworn to interpret.

Símao da Rocha Munho, sworn.

I am of the Portuguese nation, born in Lisbon, I commanded the brig *Triumph of Mars*, she was originally an American vessel, she was sold in Lisbon; she sailed with the necessary Portuguese papers, and under the Portuguese colours; I had an American colour below. I sailed from Lisbon on the 16th of September, 1812, bound to New-York, my cargo consisted of salt, sugar, and pepper. I met with no vessel whatever, except the vessel I met on the second day of November following; on that day at six A. M. I perceived a sail, at eight I found the vessel was chasing me, at eleven o'clock, they fired a gun, without hoisting any colours at all, at twelve they were near my vessel and hoisted an English colour, and pendant, I hoisted the Portuguese colours, immediately afterwards a boat was sent with two officers and four men; defendant came on board and asked where I was from and where bound to, I answered from Lisbon,



bound to New-York, he asked to see the papers. I requested him to come down in the cabin, which he did, I shewed him the Royal Register, the bill of lading, and the American consular certificate, proving the property; he paid no attention whatsoever to the papers, he came on deck, loaded a pistol and told me I was his prisoner, I can only say that he loaded the pistol with powder and ball, in my presence on deck; I told him that if he was, as he appeared by his colours to be, an English vessel, he should give me help and assistance, I did not know why I should be a prisoner. I also said, if he had been a Frenchman I might consider myself as his prisoner. I had a cook on board, who understood English, and he interpreted; the other officers ordered me to take my trunks on deck and go on board the schooner; I called my people and told them I was a prisoner. When the first trunks came on deck. Jones had a conversation with the other officer, and ordered the trunks back in the cabin; I was called down and told to open the trunks, I did, they were searched, and nothing found in them but clothes. Captain Jones ordered the trunks of my officers to be opened, I called Bernardo, one of my officers, and told him to open his trunk, which he did, Jones searched that trunk, and found fifty silver dollars, which he put in his pocket, Jones ordered a piece of timber to be thrown overboard, and said they wanted it for the schooner, I observed that I wanted it, as my spar was broke, and begged him to leave it, which he would not do. He ordered the scuttle to be opened, which was done, he ordered two sails and two coils of cordage to be taken away, he also filled two bags with sugar, which he took out of a box, I observed to him, why as he was English he should come to plunder me; he said his captain would give me an order on the British consul at Lisbon, who would pay me; Jones spoke English to the cook and mate, the other officer spoke Spanish which I understood very well. Jones sent the boat with what he had taken and remained on board the brig himself; a boat came back full of men, belonging to the schooner, and began to plunder generally, Jones remaining still on board. The boat came and went six or seven times with plunder, I was at no time on board the schooner, expecting to be permitted to proceed on my destination; I saw a boat coming from the schooner, with an officer and four men, that I had not seen before, these men

took from the brig what the others had left; they took from me, seventy five pieces of gold, value eight dollars each, thirty other pieces of gold and one hundred and eighty dollars in silver, all belonging to myself; they took eighty four dollars belonging to two of the officers and one of the seamen, the rest of the things are all enumerated and described in my protest. I remember perfectly well that they took away seven coils of cordage of different sizes; some fathoms of cables of large size, several other things belonging to the vessel, such as pullics, two sails, one top sail, and a stay sail, some iron, three blunderbusses, a musket, all the cloathing, and curtains of my cabin. The last boat that came on board completed the plunder of the cloathing; they made two bundles, threw them in the boat and went to the schooner, the last boat but one took the spy glass and quadrant. Jones remained on board until the last of all, he took the fifty dollars, the mate's coat and other cloathing and monies; he took the money belonging to the vessel; the eighty four dollars was taken by another officer, a tall man. When Jones took the mate's coat, he put it on his back and went on board the schooner. All my crew were Portuguese except one a Gallician, the cook and the mate were both Portuguese, but had navigated with the British occasionally. I shewed them the papers I had, they asked for no others; no prize master nor crew were put on board the brig. I hauled down my colours and pursued my voyage for New-York, I had no orders not to proceed there, my crew consisted of sixteen, officers included. The articles mentioned, were taken from me by robbery, I not being able to resist the force of the schooner. Jones presented only one pistol at my breast, when he said I was his prisoner, and ordered my trunks on deck. On the 16th of December I arrived at New-York; I presumed that the vessel which plundered me was French, I did not think the Americans, who are so generous, would have committed the act; by the mandates of the republic I remained here and sent the vessel back to Lisbon, on the 26th of February last. The royal passport was sent back with the proper documents."

Mr. Dallas then asked the witness, whether the vessel and cargo were bona fide Portuguese property? The prisoners counsel objected to this question, they contended that parol proof was not sufficient of this fact, that the register, bills of lading, invoices and

other papers, belonging to the vessel, were the best evidence, that if the question was prize or no prize, unquestionably the decision of the judge would be made up, from inspecting the documents and papers found on board the vessel, that in a case of insurance, a mere question of property, this is the kind of evidence that is always looked for and produced to the jury, unless a satisfactory account is given for their non appearance; that a fortiori in a case so highly penal as the present, if evidence could be improper in a civil case in a mere question of property; it could not be received on the present occasion.

Mr. Dallas maintained that the evidence offered was strictly legal and correct, that the issue now trying, was not whether it was Portuguese property or not, but whether defendant had been guilty of piratically robbing a Portuguese vessel on the high seas, that he had done enough in establishing this testimony, to shew that the burthen of proof lay on the defendant, if he justified the taking, he must shew that it was enemy's property and as such by the laws of war, he had a right to take it, he merely offered this evidence to meet the allegation laid in the indictment, that the vessel was a Portuguese. He put the case of a vessel being piratically sunk at sea, with all her papers on board. In this case he had shewn that the vessel had returned to Lisbon, and taken all her papers with her, of course it was not in the power of the United States to produce them.

Washington, Justice—The objection was overruled by the court.

“The usual evidence of property in a vessel, is the registry and bill of sale, if there be such papers, and in the cargo, the invoice bill of lading, bill of sales, &c. But this is not the only evidence, nor is it always the best. It does not appear that there was any registry, or bill of sale of the vessel, and altho' there were invoices and bill of lading of the cargo, yet other evidence of property may be given, such as acts of ownership and the like. These papers might be necessary, in case there was ground to suspect that they were kept out of sight for fraudulent purposes, but nothing of this sort is here pretended. The Portuguese captain proved that this vessel and cargo belonged to a Portuguese subject, who put the cargo on board and employed him and the crew to navigate the vessel; this is sufficient.”

Same witness in answer to Mr. Dallas' question.

I know the vessel to be bona fide Portuguese property, I know the one that chartered her, to be a Portuguese subject, having correspondents in the United States. The whole of the vessel and cargo, were Portuguese, acknowledged so by the American consul, the

cargo was put on board for account of a Portuguese merchant at Lisbon, and consigned to an American house. The English colours were flying on board the privateer during the whole time. By my calculation we were from twenty seven to twenty eight north latitude, four degrees east of Bermuda.

*Cross examined by Mr. Phillips.*

- Q. How long did the privateer remain in possession of your brig?
- A. Four hours and a half altogether.
- Q. At what time did the first boat come on board?
- A. Not quite half an hour after twelve.
- Q. How many persons came in the first boat?
- A. Two officers and four men.
- Q. How many came on board?
- A. The whole of the six came on board and tied the boat along, the side of the brig.
- Q. How did you designate the officers from the men?
- A. I designated them to be officers by their remaining together, and the others being ordered to go above in the yards.
- Q. Who did you understand these officers to be?
- A. One I understood to be captain Jones, I saw him afterwards in prison in Philadelphia, the other was Mr. Store or Stover, I have never seen him from that time.
- Q. When you first discovered the schooner did you make sail from her?
- A. I continued my course and she was pursuing me.
- Q. When you perceived the schooner was chasing you, did you make more sail?
- A. I pursued my voyage as usual.
- Q. What course were you standing on?
- A. West north west, wind at west.
- Q. Was your vessel armed, and what force?
- A. We had two four pounders, four blunderbusses and some other arms, of which I made no use.
- Q. What kind of weather?
- A. Clear and calm; the wind changed when on board to north east.
- Q. In what manner was captain Jones dressed?
- A. He had on a pair of pantaloons with feet, striped betwixt white and black, a check round about jacket with sleeves

a round hat, a cartridge box before him, a sword mounted yellow and two pistols in his belt.

Q. Was the weather very warm ?

A. Neither warm nor cold.

Q. Was the round about jacket open or closed ?

A. It was open.

Q. When captain Jones took the fifty dollars, where did he put them ?

A. In his pocket.

Q. Did captain Jones remain alone in the brig ?

A. Yes.

Q. W hat kind of a man was the other officer ?

A. He was a little taller than captain Jones ; it was he that addressed me in the Spanish language.

Q. Was it this officer who told you to get your trunks ready as you was his prisoner ?

A. Yes.

Q. Did you see him load his pistols ?

A. Yes, he loaded them with powder and ball which he took from his cartridge box that was before him.

Q. Did the defendant wear boots or shoes, when he came on board ?

A. Shoes.

Q. What time of the day was it, when you and the schooner parted ?

A. It was near the setting of the sun.

Q. What officer came in the second boat ?

A. The tall officer, who took the eighty four dollars, he was taller than captain Jones and fresher complexion.

Question by Mr Dallas. In what language did the prisoner address himself to you, when he presented the pistol to your breast, and said you were his prisoner ?

A. The prisoner spoke to me in English, and the other officer in Spanish and told me to get my trunks ready. This was on deck before every body, and after they had examined all the papers.

*Bernardo Antonio, sworn.*

I sailed as mate on board the brig Triumph of Mars, met with no vessel but the schooner privateer ; on the 2d of November at six A. M. saw a schooner, at eight she bore away on the brig, at eleven she fired a gun, at twelve she hoisted English colours with

English pendant, she put off her boat with two officers and four men, who came on board the brig and asked for the captain, asked where from and where bound; were told from Lisbon to New-York. The prisoner went down in the cabin, shortly afterwards came on deck and told the captain he was his prisoner. The cook spoke English and explained it to the captain; who answered, seeing English colours flying, that he could not be his prisoner, rather his friend than his enemy. The other officer told the captain in the Spanish language, make haste, get your trunks up, you are a prisoner; my captain then addressed his crew and told them he was a prisoner, he presumed to the French. When the trunks came on deck, Jones ordered them to be returned to the cabin, he ordered all the trunks to be opened, I was above, but the cook explained it to me, my trunk was opened and fifty dollars taken out, I opened it myself, by order of Jones, who took the fifty dollars and put them in his side jacket pocket. He then went on deck and ordered the spar to be thrown overboard, he said they were an English sloop of war, and would pay us for all they took. The first boat went back to the schooner and returned, loaded with people. They ordered the scuttle to be opened and filled two large bags, out of a box of sugar. They took two coils of cordage, and other articles belonging to the brig; they took three blunderbusses, one of brass, and two of iron. The boat went backwards and forwards six or seven times. They plundered the vessel of all the money and clothes they could find aboard. In the last boat that came, there was an officer and some seamen, who collected the remaining part of the clothes they found on board the brig, made them into bundles, and went on board the schooner. When the last boat reached the schooner, she fired a gun and bore away, and we continued our course to New-York.

*Questioned by Mr. Dallas.*

Q. How soon after Jones loaded his pistol, did he present it to the breast of Munho?

A. Immediately.

Q. What colours were hoisted on board the privateer?

A. English colours; they were kept flying all the time.

Q. Was any prize master put on board?

A. No.

Q. Of what did the cargo consist?

A. Sugar, Salt and Pepper.

Q. What money was taken by the prisoner?

*A.* Jones took seventy five half joes in gold and one hundred and eighty dollars in silver.

*Q.* Did you see him take the mate's coat?

*A.* Yes.

*Q.* What situation was you in on board the brig?

*A.* I was practising pilot—third mate.

*Cross examined by Mr. Ingersoll.*

*Q.* Did you keep the log book?

*A.* No.

*Q.* How do you know what day of the month this happened?

*A.* From the log book which the mate kept.

*Q.* When did you last see that log book?

*A.* I have not seen it since my arrival at New-York, on the 16th of December.

*Q.* When captain Jones took the money, where did he put it?

*A.* He put it in the pockets of the mate's coat, and went on board the vessel.

*Q.* How was Mr. Jones dressed at that time?

*A.* He had a round about jacket on.

*Q.* Did captain Jones, after he went on board the schooner with the money under his coat return to the brig?

*A.* He did not.

*Q.* At what hour did Jones leave the brig?

*A.* It was better than half after four.

*Q.* How long was it after he took the money and put it under his coat, before he left the brig?

*A.* Not quite a quarter of an hour.

*Q.* How long was Jones on board before you were ordered to open your trunks, and when were the half joes taken?

*A.* About half an hour after he was on board. The seventy five half joes he found towards the conclusion of the search; they were in the locker, I was in the cabin at the time he took it, and when he took it, he came on deck, and put the gold under his coat.

*Q.* Was Jones on board the brig at the time the sugar was taken?

*A.* He was on board, but down in the cabin at the time.

*Q.* What kind of a looking man was the officer who spoke Spanish?

*A.* He was a small man.

Q. Where was the gold and silver kept ?

A. They were both in one bag, in the locker.

Q. Do you know what course you steered ?

A. I do not.

*Solomon Le Brun, sworn.*

I shipped as an able seaman on board the privateer schooner Revenge ; at sea on the morning of the second of November, between six and seven o'clock, the man at the mast head sung out a sail ; the wind being very light, we steered towards this sail, before we came up with her, the privateer carried away her jib-boom. It was then about twelve o'clock, we fired a gun and hoisted English colours, at the same time, we had an American colour ready bent to run up. About twelve o'clock, drum for all hands to quarters ; the vessels canvas being black, we supposed she was British. Mr. Jones was first Lieutenant, he had charge of the first division of guns ; three belonged to him, that he fought under ; I belonged to number two, of his division. Captain Butler ordered the first division of boarders to appear aft for arms, all of us who belonged to the first division went aft, we each got a pistol and cutlass ; Mr. Jones asked me if I had loaded my pistol, I told him I had, he then ordered me to clear the last gun, I saw Mr. Jones load his pistol, between my gun and the number one gun ; short time afterwards, the retreat was beat, we left quarters. The vessel appeared to have but two guns on board, she was laying under our lee, with the main yard to the mast. Captain Butler ordered the boat to be lowered down, and manned, Mr. Jones handed his pistols to one of the men in the boat and went in himself, their names are Christian Kinsel, Sullivan Dunlap, Bill Smith and James Goodwin ; Mr. Jones was the only officer, then in the boat ; the brig was boarded, all hands went out of the boat but one, who staid in to keep her from the sides of the vessel. Short time afterwards, captain Butler hailed the boat, which came along side of the Privateer with two men in her, Mr. Jones and the other two men remained on board the Portuguese. Then Mr. Pickle, the second lieutenant took charge of the boat, and went on board the brig, where he remained, and directly afterwards, Mr. Jones came back in the same boat ; when he came on board he had a great coat under his arm, which he handed to the cabin steward, I thought he was a little in liquor, he went aft, leaned himself on a trunk and went to sleep ; the boat that Jones came in went back with Mr. Steward, prize master, Ingraham, boatswain and Hancock, Boatswain's mate. Mr. Jones remained all the while



on board the privateer. Stewart returned in a short time to the Privateer, with a bag of sugar. Mr. Jones was dressed in a long blue coat and stocking-nett pantaloons, I did not see any money, I observed none in his side coat pocket. Mr. Stewart went back again to the brig, and Mr. Pickle returned with the boat, and a spar towing along side and some coils of new rigging. The boat went back this time to the brig without any officer, Pickle remaining on board the privateer. Shortly afterwards the boat returned with Stewart, Ingraham and Hancock. He Hancock, had both his pockets full of dollars, and the bosom of his shirt, full of some money, I do not know what kind of money, but I heard them jingle in his pockets. Hancock had on a round about jacket with a red flannel shirt. Ingraham had a new spy glass and a new hat with the virgin Mary inside of it. After all the rest returned to the privateer; Stewart and Mr. Gunn, the captain of the marines, went in the boat to the brig, when they were shoving off from the sides, Butler asked where they were going, Stewart answered that they were going after something they had left on board. Butler told him to tell the Portuguese captain, when he hauled down his colours and fired a gun, it should be a signal for him to make sail. When Stewart and Gunn, returned they brought on board a couple of bundles of cloathes, the boat was ordered to be hoisted astern, as I went aft to hoist the boat, I saw two blunderbusses. which had come from the Portuguese brig. The privateer made sail and parted from the brig, who when she was going had her Portuguese colours flying. The carpenter went to work, fitting this old spar for the jib-boom for the schooner, he worked at it all night, next day morning, the watch was called and the jib-boom got out. The sugar was divided among all hands, all the money that came with Hancock went down the fore castle; it was not divided, I saw none of it. The schooner continued on her cruize and the first port we arrived at was Charleston. The cloathes were kept by the officers, Stewart and Gunn were agoing to fight a duel about them. It was the cabin steward, who took charge of the great coat, I saw it hanging in the stern of the small boat. It was not long before Mr. Jones went to sleep after his return to the schooner. He was not in liquor when he boarded the brig; I left him sleeping on deck when I went below, which was from four to six, when my watch was called. The coat was not fit for the Portuguese captain.

*James Whetford, sworn,*

I was a landsman on board the privateer *Revenge*: on the morning of the second of November, about six o'clock, the man at the mast head, sung out a sail, all hands were called to quarters. Portuguese brig hove in sight we had English colours flying, the boat was manned with four men and Mr. Jones, and they went on board the Portuguese brig. Captain Jones and the four men returned to the schooner, none of the crew were left on board; the boat was manned a second time, and Mr. Pickle went in her, with a different set of men, the boat returned again with some rigging, and went off a fourth time and brought a bag of sugar. I saw no money, whatever money was on board, was kept very close. The sugar was kept below, Stewart and Gunn each brought a bundle. Brig was under Portuguese colours. I arrived in Charleston early in January. Mr. Jones came back in the first boat, and did not return afterwards that I saw; my watch was from twelve to four. When I went below I saw Mr. Jones asleep on the trunk. They did not let me know much, being a landsman, I was knocked about like a dog.

Defendants counsel declined a cross examination of this witness.

*Solomon Le Brun, re-examined on the part of the United States.*

I thought Jones had something in the great coat, but I did not see any thing; the great coat was not folded up, I supposed he went on board for something, but I do not know whether he brought any thing or not. This is all the reason I had for supposing there was something in the coat. I gave some account of this transaction before Mr. Freytag, nearly the same as this; I did not tell him that I saw Mr. Jones have any money, nor yet that I did not. The boat went and came, and the second trip captain Jones returned. The first time the boat returned, but two men came in her, I do not recollect their names, they were two of the foremast hands. After the watch was called I went below, and saw no more of the prisoner that day. Whetford was clobbered, but it was unknown to any officer on board. The reason he was clobbered, was because we had fallen in with the *Shadow* privateer, and he had given some information to the men on board.

The brig was not more than one hundred and fifty yards from the privateer. It might have been twelve o'clock, when we first boarded the brig, I cannot say particularly, we have no watches on board, we all go by glasses. It might have been between two and

three hours, that we were along side of the brig, it was clear weather and light breeze ; It was day light when I went below.

Counsel for the defendant declined a cross examination.

*Mr. Dallas* offered to call Michael Freytag, the magistrate, who had taken the examination of Le Brun and Whetford for the purpose of proving that the testimony which they had given on their examination before him, differed materially from what they had given on the trial, and quoted Browne's Rep. in the Court of Common Pleas of Philadelphia County, page 176.

This was objected to by the prisoners counsel, on the ground of the general rule of the law of evidence, that it was not competent for the prosecutors to impeach their own witness.

*Washington, Justice.*

The general rule of law is, that a party shall not be permitted to discredit his own witness, and I see no difference between a criminal and a civil case, here a witness has been called and examined on the part of the prosecution. it is now attempted to discredit him by another witness, this is a case within the general rule ; without deciding that under no circumstance can an exception be admitted, the court is of opinion that the witness cannot be discredited, by merely proving that he had sworn or spoken differently on some former occasion from what he now has sworn.

Evidence rejected.

The evidence here closed on part of the United States.

*Mr. Phillips.*

May it please your Honours, and you, gentlemen of the jury— The evidence being closed on the part of the United States, it becomes my duty as one of the counsel for the prisoner, to open his case and state his defence in point of law and fact ; I am fully impressed with the importance of that duty, and notwithstanding its weight and magnitude, I shall not shrink from the task, but will endeavour to lay before you, a correct statement of the case of this truly unfortunate man, by which the jury will perceive that he is "more sinned against than sinning ;" and without meaning improperly to excite the sympathy of the jury. by any appeal to their feelings, I feel myself warranted in saying that when the evidence on the part of the defendant is heard, the jury will think with me that a more fit subject of prosecution for this offence might have

been picked out than captain Jones.—To some of the jury, perhaps, the course of proceedings in criminal cases may be well known; to others, who perhaps are unacquainted with the forms of proceeding, it may not be considered irrelevant if I state that it frequently happens that a man does not know of what crime he is accused until the indictment is read to him at the bar, he does not know what witnesses are to be brought forward against him, until he hears their testimony in open court, at the time he is placed at the bar for trial.—Hence arise the difficulties that so often occur in proving the innocence of a man charged with an offence, and the danger to which he is subjected from want of the necessary testimony to prove his innocence, hence the great inconvenience to which counsel are subjected in managing the defence.—In the present case the defendant could only know from the indictment that he was charged with being a felon, and a pirate, and as such on the high seas, assaulting and robbing the officers and crew of a defenceless neutral.—But as to the nature of the testimony or the names of the witnesses, who were to support the allegations laid in the indictment, he was until the present moment left in entire ignorance, and could therefore, conscious of his innocence of so foul a crime, prepare generally to prove himself so, without knowing in what particulars it would be necessary that he should procure testimony to rebut what might be sworn against him.

The offence with which the defendant stands charged, is in its nature enormous; in proportion then, gentlemen to that enormity should be the presumption in favour of his innocence; it should be only on the most full, clear and uncontradicted testimony that a jury should convict—It should not be upon vague, or light suspicions, doubtful or exaggerated testimony, produced either by the rankling of injured and outraged feeling, or proceeding from a corrupt and malignant heart, that should induce a belief of the guilt of the prisoner. It should not be upon any prejudice that may have been raised against the prisoner, in consequence of rumours of popular misrepresentations generally untrue always unjust (*a.*) If you have heard out of doors any thing of the defendant's cause, nay, if you have only heard his name mentioned as connected with it, you must discard all such recollections from your minds, they should

(*a.*) One of the jurors after he was impannelled, and before he was sworn, stated, that he considered it a duty to mention that he felt a considerable degree of indignation against the prisoner, in consequence of what he had heard of this case; he was put aside by consent.

be entirely forgotten, and that which may have afforded matter of idle conversation should not be remembered, least at this awful moment it might work against the life of the prisoner. The jury should come into the box (to use the language of a celebrated orator) "with minds like white paper, upon which passion, prejudice or calumny, hope, fear or interest have made no stain or blot."

The right of trial by jury is one of the greatest blessings, that the people of these free and happy States enjoy; Here the rights of property, liberty and life are justly and highly appreciated, and no man can be deprived of either, unless twelve of his fellow citizens should on their oaths say, that those rights have been forfeited. The constitution and laws provide that every man shall have a public and impartial trial, that he shall have (if necessary) compulsory process to compel the attendance, of every one whom he may believe can give testimony in his favour. He has a right to be confronted with the witnesses, and to be heard in his defence by himself and counsel. The prisoner rejoices that the laws of his country afford him the opportunity of vindicating his character from the foul obloquy that is cast upon it by a charge against him, like the present; he eagerly embraces this the earliest that has offered to prove his innocence before you, and I trust that will be so satisfactorily made out, as to leave not the least doubt upon your minds or upon the minds of the great number of auditors who have attended during this trial, as to the guilt or innocence of the accused. In the opening of a cause counsels are confined generally to a statement of the law and facts intended to be produced and relied on in support of their client, but I trust and hope that I may not be considered as going out of the line of the duty of an opening counsel in reminding the jury, that this is the first time, that they have had the solemn and important duty imposed upon them, of passing between the United States and a prisoner in a case of life and death, for so outrageous an offence as the present, charged on a man of high standing and character. I say gentlemen, on a man of high standing and character; because it will be proved on behalf of the defendant from unexceptionable testimony, that he had heretofore in life maintained a highly respectable character, that he was honoured with the confidence of his country in having the command of one of her public armed vessels: And if we were to go no further after the contradictory testimony of the Portuguese captain and mate; and that of the other witnesses Le Brun and Whetford on the part of the prosecution; adopting the well known

maxim, that no man *can of a sudden become most base*, we should be safe in contending that captain Jones could not all at once have fallen from the high station he held in society, to sink into the very lowest gulph of infamy and iniquity : The heart of man does not of a sudden become depraved ; man is naturally good ; he becomes otherwise from causes which he is unable to resist, and which after combating from time to time gradually lead him from the path of virtue to that of folly, and thence to vice. Such causes have not existed to lead captain Jones astray, and the course of his life has not been such, as to have created the least motive in him, thus to have destroyed himself by the commission of such a crime as he is now charged with.

Mr. Phillips here entered into detail of the testimony that would be produced in order to contradict the two Portuguese, and to establish that part of the other witnesses evidence, which went to prove that captain Jones remained but a very little while on board the brig, and returned to the privateer, being much indisposed, (and not as one of the witnesses supposed intoxicated,) in consequence of not having eaten any breakfast and being fatigued with a long chase ; that the Portuguese must either have wilfully sworn false, or had mistaken the defendant for Hancock the boatswain's mate, who in figure very much resembled the defendant, and who was dressed as described by the Portuguese, when captain Jones was dressed differently, that the evidence he should adduce would go to show, that so far from captain Jones having misconducted himself towards these poor miserable Portuguese he had acted with politeness and humanity ; and that whilst he was on board the brig, he would not permit the boats crew to touch a single article ; nay that he obliged one of the men to restore a handkerchief full of sugar, which he alledged had been given to him, threatening him with the severest punishment, if they took any article, without his permission, or that of captain Butler.

Mr. Phillips then continued ; it is gentlemen on the evidence, and on the evidence alone, that captain Jones wishes for an acquittance. It is not under any points of law, that his counsel think proper to bring forward that he wishes to shelter himself. His character is at stake ; it is dear to him ; and he authorises me to say, if any jury of his fellow citizens could believe him to be guilty of the outrages detailed by the Portuguese, his life would be of little value to him. But, we gentlemen, to whom the defendant has confided the management of his defence, should consider ourselves much wanting

in our duty, if we did not lay before you, who are the judges of the law as well as of the facts, those points which suggest themselves to us, as worthy of consideration and deliberation in this novel and interesting case. This prosecution is founded on the eighth section of the act of Congress of 1790, which has been read by the District Attorney: It will therefore be contended on behalf of the defendant.

First, That robbery on the high seas is not piracy by the laws of the United States; that the offence is not defined by the act of Congress, the word robbery being only made use of in the general, and that as there is no criminal common law in the United States, we cannot resort to that code for its definition.

Secondly, It is admitted by *Mr. Dallas* in his opening, that if a suspicion existed that it was enemy's property they had a right to seize and send it in for adjudication; we therefore shall contend that if at the time of seizure, an intention existed to libel the property, no matter how soon after they were in possession, they abandoned the idea, they cannot be guilty of felony.

Thirdly, That as the privateer was lawfully commissioned, no acts by her, done in virtue of that commission can be considered piratical; and that the third section, of the act of 26th June 1812, expressly provides for this offence, and the 15th section declares, that all offences committed by any persons, on board of letters of marque shall be tried and punished, as offenders are on board public armed vessels: And their trial and punishment is provided for, by the act for the government of the navy, (*a.*)

Fourthly, That the prisoner was only second in command, that all that was done, was by the directions of captain Butler; that the defendant as inferior officer was bound, if not to obey his commands, at least not to resist or controul them, and that the consequences would be dreadful if such a state of insubordination could be tolerated, as would place every superior at the will of his inferior officer.

These gentlemen will be the grounds in point of law that we shall take in defence of the prisoner, we shall hereafter discuss them fully and particularly, at present it is sufficient that I barely state them without any comments: Your patience, gentlemen, will meet yet a further trial, you will give us a candid and impartial hearing, and the result of your deliberations will be such, as to ensure you the approbation of your God and your country.

(a) 5th vol, p. 108. sect. 8, 9.

*James Goodwin, sworn*

I was a seamen on board the *Revenge*, I was captain of the top ; on the 2d of November, about 6 A. M. I sent a man up to the mast head, he was not there long before he sung out a sail, she bore three points on our starboard bow ; immediately all hands were called to make sail in chase of this vessel ; when we came within gun shot, captain Butler gave orders to give her a gun ; we fired and immediately hoisted English colours ; we were all at quarters, officers fore and aft ; we were all ordered to load our pistols, being nigh enough to the brig. Captain Butler called to Mr. Jones and told him to get a boat's crew and prepare to board that vessel, and learn what she was. Jones ordered me, Dunlap, Kinsel and Smith, to get the boat ready, which we did, and went in her ; I having my arms about me, a pair of pistols and a cutlass ; as I was ordered into the boat, I took them off. We all got in the boat, and went along side of the brig. As captain Jones came into the boat, he handed me his pistols, and I put them in the box of the stern sheets ; the cabin steward handed in captain Butler's great coat. Mr. Jones went on board the Portuguese brig ; Dunlap and I following ; Kinsel and Smith remained in the boat to keep her clear of the vessel. As soon as we got on board, Mr. Jones made his obedience to the captain of the brig, asked him where he was from, he answered, from Lisbon bound to New York, and was then out forty days. Jones was a looking at some papers on the companion ; what they were I know not ; a chart was brought up out of the cabin, and put upon the binnacle, and Mr. Jones was pointing out something to the Portuguese captain ; I heard them mention Bermuda. Mr. Jones asked for a drink of water, which he got ; I saw them go down in the cabin afterwards ; I walked aft, and looking down the companion, I saw Mr. Jones talking to the Portuguese captain with a glass of wine before him. Our boat was haled from the privateer ; I reported it to Mr. Jones, and he came up from the cabin, and ordered Dunlap and I to stop on board the brig, and the other two with the boat to go to the privateer ; which they did. While they were gone, Dunlap and I were standing at the starboard side of the gangway ; one of the Portuguese sailors came to Dunlap and asked him for a chew tobacco ; which he gave him ; after which the Portuguese asked him, if he wanted any sugar ; and Dunlap said, he would be very much obliged to him for a little. He beckoned Dunlap to follow him, and they both went down into the steerage ; they were there three or



four minutes, when Dunlap with a handkerchief in his hand was coming up full of sugar, which the Portuguese sailor had given him, Jones saw this aft at the companion and asked him how he came by the sugar, and he told him that the Portuguese had given it to him, Mr. Jones said he did not care, to give him back the sugar, as he did not allow any man to take any thing out of that vessel, without his orders or those of captain Butler, the man gave back the sugar, then our boat came along side the brig, with Mr. Pickle the second lieutenant and the two men who went in the boat, one came on deck with Mr. Pickle, he told Jones that captain Butler had given him orders, that if this vessel had any spare spars or rigging on board to take them out and send them to the privateer; Mr. Jones said very well, but he would take nothing without captain Butler's orders. The man who came out of the boat with Mr. Pickle, found a jacket on deck, which he put into the boat, one of the Portuguese saw it, and reported it to his captain, who told Mr. Jones, he immediately enquired which of them had put the jacket in the boat, Kinsel said it was him, Jones told him to come up out of the boat and bring the jacket with him, he asked if he had given him orders to put the jacket in the boat, he answered no, but he had no jacket and that was the reason he took it; Mr. Jones drew his sword, and said the first man that took any thing from the vessel, without his orders, or captain Butler's, he would run him through, Mr. Jones had taken the jacket and presented it to the Portuguese captain, who said he was much obliged to him; Mr. Jones as he was going over the side of the brig, wished the captain a safe voyage; we then returned to the privateer, he and I, and the three men who came first in the boat, as he went up the sides of the privateer, I handed him captain Butler's coat, which was in the boat; Butler seeing the tail of his coat wet, ordered me not to put it in the boat any more, I told him the cabin steward had handed it to me. Mr. Jones was speaking to Mr. Butler, telling him where the vessel was from and so on, captain Butler then ordered Ingraham the Boatswain, Hancock his mate and Stewart prize master, and told them to go on board the brig and take whatever they wanted out of her. Stewart had two bags, I asked what he wanted them for, he said to put sugar on board; we went in the boat on board the Portuguese brig, Mr. Jones being left on board the privateer; when we got to the brig the Portuguese captain was standing by the gang way, Hancock went up to him, and said this one very good hat for me, and put his old tarpaulin on his head. Stewart told him to get in the boat, he was his prisoner, the Portuguese captain said, "me speak to you

directly by and by." We were all on board, some in the fore-castle and some in the cabin. There was a spar which Mr. Pickle ordered us to take, he told two of the men to go in the steerage, where there was a new coil of rigging and cast it loose, and hand it on deck. he told Dunlap to cast it away in the boat till he told them to stop; I coiled in the boat between forty and fifty fathoms; Mr. Pickle told us to tow the spar along side of the schooner, Dunlap, Kinsel, Smith, Mr. Pickle and myself got in the boat and went to the privateer; Mr. Pickle went on deck, we handed out of the boat a bag of sugar, handed up the rigging and slung the spar, and I went out of the boat into the main chains, I asked for a drink of water, as I was drinking, I cast my eyes round and saw Mr. Jones on the trunk, leaning on the companion as if he was asleep. I went in the boat again, and was ordered by one of the officers to go on board the brig, when we were shoving off Mr. Gunn, the captain of marines, ordered us along side, and he got in, and went with us to the brig. Mr. Gunn went down into the cabin, where he remained a few minutes, and then came on deck with a bundle of cloathes, which he handed to me, and I put them in the boat. The cabin steward also brought several articles belonging to the brig and put them in the boat. Mr. Stewart put in a bundle of cloathes, Hancock put in a large bag of cloathes and two bundles in a handkerchief, Ingraham also put in a large bag of cloathes. Two blunderbusses were put in the boat, but by whom I do not know; Mr. Gunn came in the boat, the cabin steward also; as he stepped in I heard money rattle in his pockets. Hancock had money in his bosom and in his trowsers. I heard it rattle, he had on a short jacket, in the fob of his trowsers he had a watch, with a tortoise shell case, which he said belonged to the Portuguese captain, he had likewise a silver watch, he had one of these yellow belts and a cartridge box and belt before him, he had on white duck trowsers, he had on shoes; he handed his things up the privateer, the boats crew remained in the boat; Stewart went to captain Butler and told him, he had an article on board the brig, which he wanted to go for, Butler told him to go and make haste and tell the Portuguese captain when there would be a musket fired and the colours hauled down, to make sail. In three or four minutes we returned, Stewart brought on board a hat, and a small handkerchief, I believe it contained light linen, we were then ordered to drop astern with the boat and hoist her in, as I was securing the boat the cabin steward came to me with captain Butler's coat, which was wet at the tail, by laying in the boat, to dry it. All hands were called on board the privateer

to make sail. We first had English colours flying, but after Mr. Jones returned to the privateer, American colours were hoisted. Mr. Jones made it a rule, when he boarded a vessel, never to take his pistols out of the boat, only his sword.

*Cross examined by Mr. Dallas.*

- Q. At what hour did you first board the brig?
- A. It was about twelve more or less, I had the starboard watch.
- Q. Where was you during the chase?
- A. On account of being at quarters and the vessel in sight I was on deck all the time.
- Q. At what hour did the last boat return from the brig?
- A. About three or four, I had not dined, on account of being all the while in the boat.
- Q. How long were you on board the Portuguese the first time?
- A. From about an half to three quarters of an hour.
- Q. How long was the prisoner on board altogether?
- A. About three quarters of an hour.
- Q. Did you hear what he said on his return to captain Butler?
- A. I did not hear all he said, I heard him making his report, and immediately afterwards, the quarter master was about to haul down the English colours, and hoist American.
- Q. When was you first arrested, and where was you confined? Was the prisoner confined in the same prison with you?
- A. It was some time in January, when I was put in the work house, Mr. Jones was in the same prison, but in another apartment?
- Q. Had you ever any conversation with the prisoner in prison?
- A. None, except when I would meet him on the steps, to say good morning Mr. Jones, or the like.
- Q. When were you first told that you were to be a witness?
- A. Mr. Ingersol was the first one who talked to me about this business and asked me what I knewed, he said if he should want me as a witness, he would call for me.
- Q. Had you any conversation with a prisoner in your room by the name of John Smith? And did you not tell him about swearing to the property?
- A. I had no conversation with Smith, he was in our room, I never said any thing about swearing to the property, whether it was Portuguese, Spanish or English. We had conversation among ourselves, with some of my ship

mates, but I had none with Smith except what he might pick up when we were conversing.

Q. Did you talk among yourselves about the absence of the gunner, and the Spanish ship and Mr. Jones?

A. We did talk about the gunner and the Spanish ship, but we never mentioned Mr. Jones's name.

Q. Was Mr. Jones sick in the boat?

A. He complained of being sick, and said he had eaten no breakfast?

*Jacob Wonderley, sworn.*

I was on board the *Revenge*, I was a marine, I shipped as a landsman, when the Portuguese, hove in sight, we hoisted English colours, fired a gun and she hove too, a boat was lowered down and manned. Mr. Jones and four men went in the boat, and proceeded to the brig, he and two of the men went on board, the other two remained in the boat, which shortly afterwards returned to the privateer, with two men, leaving Mr. Jones and the other men on board the brig. Mr. Pickle went back in the boat to the brig, and Mr. Jones returned to the privateer, went aft, leaned his head on the companion or trunks and went to sleep. The boat returned and Mr. Pickle came back with some rigging and a spar towing astern. Stewart, Hancock and Ingraham then went to the Portuguese, and returned in a little while with cloathes. Two or three old blunderbusses and a small musket. Hancock run forward and said here is my gun; I heard money rattle in his pockets, but I did not see any, the cloathes were taken out of the boat, and some went forward and some went aft; Gunn also came in the boat, he had a bundle, it looked like curtains or some such thing. Boat went back and took two bags with them, returned with sugar besides the cloathes. Hancock did not go in the last boat, he appeared to have a great deal of money when he came on board from the brig, I could not perceive any one else have money. Hancock ordered me to help in with the rigging, which I refused and he flogged me; there was some small cakes of chocolate came on board, the sugar was shared out to the crew; each mess having so much. Some short time afterwards, Gunn and Stewart were a going to fight a duel in the cabin, about the cloathes; captain Butler prevented it, and broke Mr. Gunn of his commission for several days. Mr. Jones was dressed in a blue long coat, knit pantaloons and boots. Hancock had on a short round about jacket, red flannel shirt and duck trowsers, he also had on shoes. When Mr. Jones came forward after his return from

the brig, he looked pale, I thought he was in liquor, he might have been sick, for I never knew him to be in liquor.

*Cross examined by Mr Dallas.*

Q. What colours were flying on board the Revenge ?

A. The English colours.

Q. How long was Mr. Jones on board of the brig ?

A. Not very long.

Q. Did Pickle go to the brig in the boat with the same two men in her ?

A. Yes.

Q. How long were you in company with the brig ?

A. About three or four hours altogether.

Q. When did you last see Hancock ?

A. The last I saw of him was in the West Indies ; I have heard that he is now on board the United States schooner Non-such.

The following gentlemen were called and testified as to captain Jones's character.

*Isaac Worrell, affirmed.*

I have known captain Jones for ten or eleven years past, he has always borne the character of an upright, honest man, and a man of honor. I have heard that he was in the navy of the United States, but I do not know it of my own knowledge.

*Joshua Sullivan, sworn.*

I have known him a number of years ; I never heard or knew any thing but what was correct and honorable previous to this charge. He was in the navy of the United States, I have heard commodore Decatur say, he was one of his officers and a very meritorious one.

*William Allibone, affirmed.*

I have known the prisoner from ten to twelve years, his character and conduct has been most excellent.

*Thomas Rimer, sworn.*

I have known Mr. Jones upwards of ten years, his character has been uniformly unexceptionable.

*Joseph Tyson, affirmed.*

I have known captain Jones perfectly well for four or five years past, his character was alwas that of an honest man, and very much of a gentleman.

*William T. Donaldson, affirmed.*

I have known captain Jones a great number of years, I knew him when he was a lieutenant in the navy of the United States, he commanded the United States brig Scammel, his character stood high, and he was esteemed as a brave man, and a man of honor.

The following extracts from the jail docket were given in evidence by the prisoner.

John S. Jones, committed on the 12th January, 1813, by John Barker, mayor, charged on oath with having committed piracy on the high seas, by robbing a Spanish ship of 24,000 dollars.

Three other persons whose names the reporter does not think proper to mention, were also committed, charged in the same manner.

Solomon Le Brun, committed 9th of January 1813, by Michael Freytag, as a witness, on the part of the United States, against persons for piracy.

James Goodwin, committed by Judge Peters, on the 8th of January 1813, charged on oath with having piratically plundered a Spanish ship name unknown.

*Evidence for the Prisoner closed.*

Mr. Dallas here stated that he would examine one witness, who would discredit Goodwin; he produced a man by the name of John Smith, who had been convicted of forgery and sentenced to imprisonment at hard labour in Philadelphia penitentiary for three years, upwards of two of which having served out, he was pardoned by the governor of Pennsylvania. Of course the prisoner's counsel could make no objection to his competency.

*John Smith, sworn.*

I know Thomas Goodwin; I saw him in prison, when I was confined; he told me about a lawyer speaking to him, about the trial; It was not in relation to this trial; It was about the Spanish business, and the three thousand dollar boxes of money; he said

he was agoing to be tried on the Spanish business ; I never said any thing about the Portuguese trial at all. I once saw captain Jones in prison give Le Brun a pair of shoes, and half a dollar, which was sent out to buy segars.

*Mr. Dallas* opened the pleadings, by stating the grounds he should take, and the points on which he should rely for the conviction of the prisoner ; referring his counsel to the act of congress, and other authorities ; but as the concluding speech of *Mr. Dallas* includes the whole matter opened, in a very able and full discussion of the case. It is not considered necessary to give his opening speech.

*Mr. C. J. Ingersoll*.—May it please the court, gentlemen of the jury : It is said, I do not vouch for the authenticity of the anecdote ; but it is said, that on the explosion of the infernal machine, in Paris, in the year 1802, a great many persons were arrested on suspicion. After some few of them had been tried, condemned and punished, the judges enquired of the first consul, what was to be done with the other apprehended persons, adding that they (the judges) supposed they were to be released. No, said the consul, keep them in custody ; We shall want them to be punished for some other offence, tho' they have escaped from the implication of this. Just so it appears now, that tho' *Mr. Jones*, the prisoner, was not the guilty man, on board the *Revenge*, yet public example, the American character abroad, as I was surprised to understand from the District Attorney, requires that he should be held two days under trial, his life in jeopardy.

*Mr. Dallas*, I certainly said nothing of that kind—

*Judge Washington*, I did not understand it so—

*Judge Peters*, Nor I—

*Mr. Ingersoll*—I am happy then to understand that I was mistaken in an expression, which I thought fell from *Mr. Attorney*, in the career of discussion, and at which I must say I was not a little surprised. I am happy however that it was not so. I have never any objection to being stopped and set right, when I mistake either a fact or an argument ; because I am well aware that the honest merits alone of our defence can acquit us, if any thing ; and that no advantage is to be gained from any mistatements on either side.

Gentlemen, in mentioning this story of the infernal machine, I have no view to any ludicrous effect which it may occasion. I am,

on the contrary, impressed with the solemnity of the painful task, it is, and I trust, in this part of the world, ever will be, to administer that justice which is to deprive a fellow creature, in the present instance, so respectable a one, of his existence, and hurry him into eternity. Mr. Dallas may warn you of the necessity of shutting out such feelings and referring your conscience to your judgment and duty alone. It is true, as he has said, you have a duty to perform, for which you are responsible to your fellow citizens at large. But let me nevertheless observe that, however easy it may be to talk of a sense of abstract duty, and however correct it may be to exclude all other but mere dutiful considerations; it never has been usual, it is not even the injunction of the merciful law you are to dispense; that those instincts of humanity, those drawings of nature should be driven from your consideration, which are implanted in every bosom, and which, to the honor, as I say, of Pennsylvania, have been allowed so great an ascendancy here in particular.

I am one of those who hold, that, to take away man's life, is always an awful exercise of the rights of man, and calls for an extreme case to justify it. Life for life perhaps may be justified. But you have before you, the case of life to be sacrificed for property; nay, of the life of a most respectable fellow citizen, for the property of foreigners of whom you know nothing—surely, nothing to their advantage. The District Attorney has pronounced these foreigners, the two Portuguese, the captain and his mate, who alone support this prosecution; he has pronounced these men to be above all impeachment of their veracity or impartiality. I have, as he well knows, the strongest personal regard for that gentleman. But nothing shall deter me, in a case like this, from taking such grounds as, in my humble opinion, its merits call for. And as these Portuguese have been thus broadly authenticated on the part of the prosecution, I seize the very first opportunity of declaring that, far from subscribing to their eulogium, I shall uniformly treat them as creatures of vengeance and of perjury; as men exasperated by losses, which, their wrong-doer not being in their power, not being here on his trial, they persist in charging on a gentleman, from whom they experienced the treatment of a humane and unexceptionable officer—men goaded on by a dastardly spirit of vindictiveness to wreak on the head of the innocent, their retaliation for the abuses they received from another quarter; from what they must know to be another quarter; for when they swore at this bar, that this was the man, who presented pistols to the captain's breast and



rifled his brig of her property, they must have known that this was not the man, but him who explained to this poor ignorant foreign navigator his latitude and place on the ocean; who protected his cargo from the depredations of the boats crew, and in every act of his proceeding, while on board, exhibited a spirit the very reverse of that of spoliation and piracy. I shall certainly not deal with witnesses of this stamp, as above the reach of any discrediting.

Allow me to introduce the immediate subject of your deliberation, by reminding you that, unlike warfare by land; all warfare by sea presents a scene of either licensed or unlicensed depredation. The army or the detachment, which on its march, through even an enemy's country, should be guilty of any violation of private property, would be universally condemned. A soldier may be shot for robbing a poultry yard; and in all the extremities of hostilities on the land, the utmost attention is paid to the rights and possession of private property. At sea the reverse is the law of that species of warfare. Whether the ship carry 74 guns or 16, whether she be manned with 700 men or 100; whether she be dignified with the title of a man of war or sail under the humbler denomination of a privateer, it is all privateering in effect. Chasing, bringing too, overhauling, ransacking, and plundering.

The District Attorney has read sections of some acts of congress to shew that it is unlawful to break bulk; that the vessel taken, with her cargo, must be sent, or brought into an American port for adjudication; and the property is not transmuted to the captor till this takes place; all which is the law most unquestionably. But how would such a rigid interpretation of the law comport with the practice of your commissioned armed vessels, private and public? How did commodore Rodgers venture to take out the \$175,000 he captured from an English Packet, and bring it home in the President? How do our naval officers justify burning prizes, as they often do, with their cargoes? How did it happen, as the newspapers report, that several of our public ships have come into port, freighted with the booty they captured on the ocean? Look to the official letters of their commanders, and I am much mistaken, if you do not find there, that breaking bulk on board their prizes, is always a mere point of expediency, from which they never refrain if either safety or convenience require it. The intention; I grant, the intention must furnish the touchstone on these occasions. If the intention be not piratical and felonious; if the intention be to save the property, I submit it to you and their honours, as very clear law

that breaking bulk of itself, will not amount to an unpardonable infringement of the prevailing regulations.

Whatever the law is, however to be sure, we must abide by it. And if the master of the privateer *Revenge*, or any other officers, have been misled by a practice contrary to law prevailing in the navy, hard as Mr. Jones's fate would be to suffer under such a misapprehension. I do not pretend to say, that their erroneous example is to protect him from punishment.

In the first place then, I propose to examine what the law is, under which Mr. Jones is indicted; and in the next place, should it appear, on investigation, that the law covers this case, then, whether there is fact enough for his conviction.

1st. He is indicted for piratically robbing a Portuguese brig, on the high seas; of course the first question to be satisfied is, what is piracy? The common law of England as respects crimes, I understand, to be no longer the law of the United States. The supreme court having so decided at their session before the last, in a case from the district of Connecticut, of which not being reported, I am not apprised of the title. And if the common law of England did extend and prevail here, that would not answer the purposes of this prosecution, because piracy is not felony, by the English common law, but punishable by special provision, and triable by a special court.

This therefore brings us in the next place, to the law of nations, which is part of the law of the United States. From Mr. Duoupeau's translation of Bynkershoek, from Azuni and from other sources of information, we learn that the law of nations, considers those pirates, who are indiscriminate and uncommissioned plunderers—such as the Buccaneers formerly, and perhaps the Algerines now—sea rovers, who, without any commission, from any acknowledged sovereign power whatever, infest the high seas, marauding on all vessels they overtake. It being agreed that the *Revenge* was a regularly commissioned vessel, from the proper authority of this country, of course it seems to follow, that Mr. Jones' arraignment does not bring him within the offence of piracy by the law of nations.

Thus we are thrown on our own statute, for supporting the indictment against him; and I do consider that unless the 8th section of the act of 1790, under which it is acknowledged he is indicted, that unless that section of that statute comprehends his case, the law does not effect him. We are to construe and administer laws here, not to make them. And however we may regret such a deficiency as that law would betray, which, in dealing with provisions against piracy, overlooks the particular of piratical robbery, yet, if the deficiency does exist, we may only lament we cannot remedy it.

What then says the section before us? that a pirate is one who commits, on the high seas, murder, robbery or other offence punishable with death, &c.

Now it is a mistake to imagine that the constitution, which defines treason, does not speak also of piracy; or that the laws of the United States, contain no definition of any of the offences against which they enact punishments.

It is not pretended that murder was committed here. It will not be contended that the perpetration charged was larceny. It is robbery or nothing at all.

In the tenth paragraph of the 8th section, of the third article of the constitution, in the enumeration of the powers of Congress, will be found authority 'to define and punish piracies.' In the 4th section of the act of 1790, for prevention and punishment of crimes, the punishment is provided for murder. In the 16th and 17th sections of the same act, piratical larceny is very accurately defined and the punishment for it prescribed.

But where shall we find the definition of piratical robbery? Where shall we find its punishment provided for?

I look in vain, thro' all the sections of this elaborate act of congress, put together, I may be permitted to say, rather more accurately than acts of congress commonly are. I find in the constitution, a direction, an injunction to congress to define and punish piracies. But I cannot find that congress, who have met the cases of piratical murder and piratical larceny, have, as they were bound to do, provided for the crime of piratical robbery. If not, this prosecution falls.

The present is probably the first and only case of this precise kind, that has ever been on trial in America. There was in the year 1794, as his honor Judge Peters may remember, for he sat with the late Judge Wilson, on that occasion, my colleague, Mr. Rawle, prosecuting as District Attorney, there was a St. Domingo case, as it may be designated, in which something very like the offence here charged, was charged there. But an acquittal took place in that case; and it does not appear that the points now moved were then presented to the court.

If consequently, this is a first case, and if the law neither defines piratical robbery nor prescribes its punishment, how can this prosecution subsist?

The common law of England, we have seen, cannot come in to aid it. But suppose it could?—And I admit that we may go to that system for a definition, tho' I deny that we can go thither for a pun-

ishment. The commercial law, the laws of Confucius, or any other code, are all before our option, as much as the common law of England. But if the common law of England, affords a good definition of robbery, let us take it in preference to in any other, as that we have been used to.

What is that definition? Robbery is the taking by violence something of value *from the person* of another. But here was no taking *from the person*. The offence here charged, both in the indictment, and in the evidence for the prosecution, begins as if it were a robbery, and ends in a simple larceny. The taking, if at all, was from the vessel, which, without entering upon the great dispute whether a vessel be or be not an extension of territory, was certainly, to all the intents of my argument, the residence, the abode of the prosecutors, and not their persons.

I therefore submit it that no robbery within the act of congress, at any rate, if any robbery at any rate, has been made out here.

But again—The act of congress of the 26th of June, 1812, refers privateers for their regulation, to the act of 1800, for the government of the Navy. The fifteenth section of the last act, most expressly provides, that offences committed on board privateers, shall be punished as if they had been committed on board the public ships of the United States. The 8th and 9th sections of the act of 1800, provide as expressly what the punishment shall be for such acts of pillage and spoliation, as are here the subject of controversy. Now it is a very well settled law, as the case of the king against Davis, in Leach proves, and as might be established in a variety of legal adjudications could their production be requisite, to so very obvious a principle, which every man may be satisfied of, by consulting his common sense, that a subsequent law with a milder aspect repeals, for so much a preceding law with a harsher aspect. The crime alledged is at most, a mere constructive piracy; and here is a principle of law, which refers its punishment to another forum.

With these observations, I dismiss the law, involved in this trial, which will be handled no doubt by my learned colleague, Mr. Rawle, in a manner as much more satisfactory than mine, as he himself is superior to me in talents, acquirements and experience.

2d. The facts remain to be reviewed. In turning again to their department allow me to enquire, at the threshold, why was *this* prosecution instituted, why is *this* prosecution persevered in, notwithstanding the clear testimony of its total want of foundation in justice, at all events as respects the prisoner at the bar? You have

heard, in the course of the discussion, that this Portuguese case, as it is called for distinction's sake, is the offspring of another case, a Spanish case, for which alone Mr. Jones was apprehended; for which alone had he any previous knowledge; for which alone could he make any preparation, till acquainted by the presentment of a grand jury, with this additional arraignment. If then, the Spanish case be well substantiated, why press the Portuguese case too, into the service? The prisoner might be twice tried, twice convicted. Public sentiment either at home or abroad, might be gratified with his double purgation. But to what end as respects public example? Mr. Jones can be hanged but once, let him be prosecuted, tried and convicted never so often. There is then, in my opinion, something extraordinary, something cruel, in twice jeopardizing a man of his appearance and unblemished character, when the shocking result of a successful prosecution can be executed but once.

But this is in many respects, an extraordinary prosecution. In this prosecution, for the first time, I believe that such an attempt was ever made. The officer of the government after destroying his own evidence at first by his own evidence at last, has made (fortunately an unavailing) effort to adduce a fresh corps of witnesses to discredit his last preceding witnesses—to set your consciences afloat on the unexplored and unfathomable sea of winds and waves of proof, where all the blasts are at variance, and in collision with each other. With respect to the magistrate, Mr. Freytag, whose activity has appeared so conspicuously, and who came to the bar to introduce this singular classification of testimony, I shall confine myself to the simple observation, that I think he might have been better employed; I do think he might have had a better office. With respect to the man named Smith, who was here this afternoon, with his pardon on his back, his pardon for a forgery, and whose threatened developments, proved moreover a mere abortion, you saw, gentlemen, the figure Mr. Smith cut in your presence; and I dismissed him too after having merely convinced you of what he was to prove, what he was, and what he did not prove. Whetford, one of the witnesses against us, tho' he declared he shipped as a landsman, and *therefore* knew very little about the business. Whetford, as far as he went, completely supported Le Brunn, who completely acquitted Mr. Jones.

Le Brun is the witness who disappointed the prosecution, and who was to have been discredited, had the District Attorney not been foiled in his attempt to discredit his own witnesses. This Le Brun, you all know, come from prison, where he was committed on

the part of the prosecution, and where he lay, without our participation. I can assure you, gentlemen, that Mr. Dallas himself, was not more surprised at this man's circumstantial, consistent and unanswerable narrative, than we were on our side. We were not aware of what he would say. We regarded him as a witness against us; and most agreeable was our disappointment when we heard his examination. Not a question, you recollect, was he asked from our quarter. Through a long, acute and perplexing interrogation by the District Attorney, he maintained his consistency, his temper, his devotion to truth.

Goodwin, who saw every thing, who accompanied Mr. Jones in the first boat, and continued in her till the last; long after Mr. Jones had fallen asleep on the deck, confirmed all that Le Brun had detailed with the many additional circumstances, which his opportunities for observation enabled him to bring to light.

Young Wonderly, whose respectable connections in Philadelphia must be known to some of the jury, added his corroboration as far as his knowledge extended. And Wonderly, I rather think, stands unimpeached. Le Brun was to be overthrown by the party who produced him. Goodwin was to be destroyed by some exposure of a subornation of perjury, which however, entirely failed, and seldom if ever, did a case come under a jury's notice, so well exhibited in proof, so clear of all doubt. The prosecution in fact lays hold of straws and floating planks, as if it were defending itself from the prisoner's evidence. Instead of your seeing a guilty man availing himself of those little matters, which a man on trial for his life may be excused for clinging to, you see a prosecution to day straining into his forlorn service, by an unusual inversion of things, such trivial circumstances as would fail even if uplifted in the hands of a poor, overwhelmed and sinking prisoner.

But the Portuguese witnesses—they are free from all reproach; they have sworn to the conviction of their man. What! are we bound to take for granted all those ministers of Portuguese vengeance choose to depose to, in spite of the contrary proof from our own witnesses, in spite of their complete dispersion by the other witnesses for the prosecution, in spite of those more irrefragable testimonials, which our own senses afford us, since we know all the occurrences? I have said before I repeat it, that these men, who have no account to settle with you or the public here, who have only to swear their cue, and then go home to Portugal, with the gratification of having brought their victim to the gallows, to whom it matters not, provided they commit and execute a man of the priva-

teer, whether it be the guilty man or not, who have persisted to the last that Mr. Jones is the guilty man, when it is clear from numberless illustrations that he is not, that such swearers are not entitled to the least credit.

Let us test them by themselves. They have been in this country since last December. They have had no other occupation that we know of, than to prepare themselves, by conversation, comparison and otherwise, for at least a consistent deposition—one that would bear collation with itself. Yet in the most prominent and striking fact, those Portuguese disagree. Munhos swears Mr. Jones took the fifty dollars, and put it in his round about jacket pocket; but he does not pretend that Jones took the one hundred and eighty dollars, or the seventy five half joes. Bernardo swears roundly to the whole. Fifty dollars in silver, one hundred and eighty dollars in silver, seventy five half joes in gold, all find their way, through Mr. Bernardo's imagination, into the same side pocket of a round about sailors jacket. Mr. Jones is the blackbeard of the adventure. He talks all, robs all, pockets all. In this all important particula do these irreproachable witnesses, who disagree in every thing, with all the other witnesses, disagree with themselves. They should at least have contrived their story better contrasted with the other witnesses, the other witnesses for the prosecution, independent of ours, they are utterly irreconcilable. They swear to Mr. Jones in a round about jacket, sailor's trowsers, a cartridge box and belt, mounted with yellow, shoes and pistols without powder or ball; a description answerable enough for a boatswain's mate, and which no doubt, represents Hancock, the tall man, of whose resemblance to Mr. Jones, in size, whiskers, complexion and other respects, you have been so well satisfied. Mr. Jones wore a long blue coat, net pantaloons and boots, as an officer of his standing probably would, not the peajacket and duck trowsers of a jack tar. His pistols were left in the boat, never taken out at all, much less loaded, according to the absurd account of these immaculate Portuguese, or presented at the breast of that little foreigner, whose fears may have impressed him with apparitions of many things that were not; but who, not content with setting forth all these things, adds many more in a distorted shape, and suppresses others, which he must recollect, and which he ought to have disclosed. Could he forget Mr. Jones' taking his chart and shewing him where he was, in the neighborhood of Bermuda? Could he forget Mr. Jones' restoring the handkerchief full of sugar, which one of his men gave to one of Mr.

Jones' ? Could he forget that the polite and humane officer, had left his vessel before the boatswain's mate, whose conduct was so different, began to rummage and strip her equipments ? Could he, during a period of three long hours, half an age to him, in the durance he was held, continue to suppose, that a man was with him, who left him early in that time ? The failure in proving the identity of Mr. Jones is total. It is clear to every understanding.

But we accompany him now to the Revenge again, in the second boat, complaining of being sick as he went, and soon after see him fall asleep on the quarter deck. Who proves this ? Wonderly, Goodwin, Le Brun, and I believe, I am not sure, Whetford ? Who disproves it ? Nobody. Who contradicts it ? Nobody. Who throws a doubt upon it ? Nobody. Who impeaches, detracts from, discredits or contradicts the witnesses, four of them, who swear to it ? Nobody.

Asleep then we have Mr. Jones during all the afternoon, while other people, Haneock and his associates are pilfering, pillaging the Portuguese brig—pirating her if you will.

But, says the District Attorney, he went on board ; he made his communications to captain Butler—the piracy followed at least, if it did not accompany his interposition ; and he must answer for it with the rest.

That he did not board, with a piratical intention, is certain, because inasmuch as until boarded and ascertained not to be subject to capture, they had reason to believe she would prove to be such, it is as clear that no piratical intention previously existed, as that men would not rob an individual, who proved, on examination, to be their slave. You will recollect Le Brun's swearing that her canvas being black, they took her for an English vessel. She was an American built ; not a Portuguese. When brought too, therefore, the expectation, the hope was, that she would prove good prize—not that she would be found fit only to be pirated and dismissed. After boarding and examining, Mr. Jones returned to the privateer, not an article on board the Portuguese having been molested. After making his report to his superior he went to sleep. To say then, that while asleep and notwithstanding it, he was responsible for captain Butler's indiscretions, or irregularities, is to argue, that a man in Philadelphia, would be punishable for what had been done by another man at sea. Captain Jones was at least asleep. He may have been dreaming of his wife and children at home. And if so, he was as much in Philadelphia, in intention, in mind, as if he had been here, instead of there. Whether dreaming or not his intellectual



faculties were not present during his repose. It is the mind that is guilty, the intention must concur with the act, the body sleeping or awake, cannot commit a crime, without the impulse of the mind. A different law might suit these portuguese witnesses. But in this country the law neither punishes the absent for the present, the sleeping for those awake, the innocent for the guilty, nor the body unless it detects the soul, also in its mis-deeds.

To all this proof respecting the transaction we have added the most acceptable proof to captain Jones' general character. In feeble or even doubtful cases, character can weigh but little. Juries will think that if the crime be made out, the character can not absolve from conviction, But in a strong and honorable case like this, character is the consummation, the last finish, of proof. You have heard what the most respectable men have testified as to the integrity, the never questioned reputation of the prisoner. One of these witnesses in particular, Mr. Donaldson, swore to captain Jones' having many years ago, before the reduction of that establishment, commanded the brig Scammel, in the navy of the United States. That constraint, which compels so many men in this country to quit public service for private, operated to occasion captain Jones' resignation—And what a painful posture his present one is, compared with what it might have been, had he continued in the navy. Instead of being brought up from jail, to be tried for his life, on a charge of piratical robbery, he might have commanded one of those American frigates, whose renown is so recent, so universal, so unparralleled. The navy, of which he no longer has the honor of being an officer, has afforded him however the advantage of having been brought up in the discipline of that school, where so much clemency is learned with so much courage. Captain Jones appears to have behaved, on board the Portuguese brig, like an officer of that corps, which cannot be complimented by any thing I or any other person can say in their praise. This deportment, far from being criminal, was gentlemanly, correct, within the performance of his lawful duty. As he is innocent, I am sure you *will* acquit him. As his conduct was laudable, I trust you will rather applaud than condemn it—and, with an apology for the time I have trespassed on your patience in his cause, I take my leave of his defence.

After Mr. Ingersol had concluded, Mr. Phillips rose to address the jury, and was asked by the court, if Mr. Rawle intended to speak; he answered in the affirmative; they then observed that the rule of the court permitted no more than two counsel of aside

to sum up; Mr. Phillips replied, that neither he nor his colleague knew that the rule applied otherwise than as to civil causes; the court said it applied both to civil and criminal causes: He then withdrew, and Mr. Rawle, after some preliminary remarks, divided his address to the jury into the following points:

First. Whether a piracy has been committed?

Secondly, Whether the defendant was guilty of it?

He observed, that in the elementary writers in the English books, the definitions of piracy, although generally accompanied by some rhetorical flourishes, which rather misled than aided the mind, might be considered as terminating in the commission of robbery or other felony on the high seas.

With them it was indictable at common law and independent of statutory provisions; but when a statute affecting the subject was passed, whatever was deficient or obscure in it, would by them be interpreted, supplied or assisted by reference to the common law.

With us, at least in the courts of the United States, the case is different. By the decision of the supreme court of the United States in Williams case,\* he understood it to be now finally settled, that the judicial power of the United States, recognized no common law in criminal cases, and cannot go beyond the letter of the statute.

With this decision we were all bound to comply, whatever difference of opinions we might have originally entertained on the subject.

Its effect in the present case might, if the evidence were less favorable to the prisoner, be sufficient even on the points of law to ensure his acquittal. The ease must be brought clearly and precisely within the statute or the jury must find a verdict of not guilty. There is no other source of authority, no other code of law, from which what is deficient or doubtful in the act of congress can be supplied. If it cannot be found in the act itself, it is, as to us, as if it had never existed.

The definition, or perhaps more properly, the description of piracy, occupies several sections and parts of sections of the act of congress of April 30th, 1790. (a)

It is, first, murder, robbery or any other offence, which by the laws of the United States would, if committed within the body of a county, be punishable with death.

\* Not yet reported.

(a) 1st vol. page 178.

It is piratically and feloniously running away with ship or goods.

It is yielding up a ship to a pirate.

It is laying hands on the commander to prevent his fighting, or making a revolt in the ship.

In the ninth section of the act, there is another description of piracy, which he would subsequently notice

In the first of these, there was an obvious distinction :

The punishment of death is in the same statute appropriated to murder committed on shore ; (a) but robbery is not elsewhere noticed : it does not fall within the concluding description of capital offences ; it is no where, but in this eighth section, recognized as a crime against the United States. We are then to seek the definition of this crime, in some other code, and we are not instructed by the legislature in what code to find it.

It is a technical term at common law : Murder also is a technical term at common law ; but in the same act the nature of the offence of murder, is in a degree and at least sufficiently for the present object, recognized by congress, when it is rendered punishable with death, if committed any where within the jurisdiction of the United States ; but the offence of robbery is only punishable under their authority, when committed at sea.

If there is a doubt as to the true construction of this section ; if we are no where told what robbery is ; if we do not find that the offence which at common law is termed robbery, is in the other parts of the law, punished capitally, and if we are bound to abjure the common law, all these considerations must acquit the prisoner.

The United States are now placed in a new position : after many years of harassed neutrality, we have entered the lists of war.— With our belligerent attitude, and, as a part of a modern system of warfare now universally practised, we have authorised the fitting out of vessels of war, bearing national commissions--

(Here Mr. Rawle read and commented on the terms of the commission granted to the privateer schooner *Revenge* ) He continued :

This is no longer that naked piracy on which the acrid eloquence of elementary writers has been so profuse. The commissions gave authority to the officers and crew of this privateer, to a certain extent, the question turns upon their exceeding that authority. Mr. Rawle said, that he could not admit, that exceeding the authority, even if carried to acts of depredation, committed on board vessels,

(a) Sec. 3d, p. 177, 1st vol. acts of congress.

originally chased, and boarded as prize, could amount to piracy.— The act of congress pointed out one particular case ; in the ninth section it declared, that if “ any citizen (meaning perhaps any citizen of the United States) shall commit any piracy or robbery “ aforesaid, or any act of hostility against the United States, or any “ citizen thereof, upon the high sea, under colour of any commission from any foreign prince or state, or on pretence of authority “ from any person, such offender shall, notwithstanding the pretence “ of any such authority, be deemed, adjudged, and taken to be a pirate, felon and robber, and on being thereof convicted shall suffer “ death.”

This explicit declaration, in this particular case, repels the inference attempted from the general description of piracy in the preceding sections. If the excess of a commission from the United States, amounted to piracy, the excess of a commission from a foreign power would also be piracy, but by thus declaring that the latter shall be piracy, it is fully manifested that the legislature did not consider the eighth section as applicable to acts, however violent, committed under the colour of a commission.

Nor was the law settled in foreign countries on this subject : some learned jurists positively assert, that exceeding the authority of a lawful commission may amount to piracy ; others, perhaps not less celebrated, nor less worthy of attention, doubt and even deny this position.

Mr. Rawle referred to passages from 2d sir *Leoline* Jenkins, page 714, 754, to 2d Woodison 423, 425, to Bynkershock, (in the recent translation of Mr. Duponceau) page 135, and to Azuni, vol. 2. 350, (Johnson's translation) on all of which he very ably commented, and strongly urged that the life of a citizen of the United States, ought not to depend on such unsettled speculations. He admitted that *Kid the pirate*, whose case is reported at length in the fifth volume of state trials, sailed under lawful commissions, but objected to this case being considered as an authority in the present instance. He thought little of any case as an authority, where one of the parties was not allowed counsel. He considered it as marked throughout with a strong tincture of that party spirit, which then prevailed, when James the second, in France, and William the third, in England, were respectively granting commissions, and in other forms, waging hostilities against each other. Each claiming to be king of England, and having his partisans, insomuch that an eminent civilian of the time, had refused to prosecute as pirates, in the English courts of vice admiralty, those who, under the sanction

of commissions issued by James, committed outrages on the English merchantmen, sailing under the protection of William. He observed that the statute of 11 and 12, William 3d, had been passed with a view to meet those cases; that Kid's case took place in the 13th of William, and the decision must be considered as not a little influenced by that statute.

The late case of Luke Ryan in 1782, is stated by Woodison, (page 426) to be expressly an indictment on the statute, and these two cases are the only instances recollected, in which the English courts have been led to apply the doctrine of piracy to acts of mere depredation of property, committed by a letter of marque or privateer.

In this dearth of foreign authorities, we are thrown back on our own statutes; provisions may be found in them for several of those cases, which arise under a commissioned cruising, whether under our own flag or a foreign one.

First. A citizen of the United States under a foreign commission, from a nation at war with us, committing depredations on our own citizens. This would be inclined to think, amount to treason under the 1st section of the act of April 30, 1790; but it would also fall under the 9th section of the same act, which he had already noticed. Mr. Rawle referred to 1st Hawkins, 268, 9, and observed very fully on the English statutes, therein quoted.

Secondly. The next class was cruising against persons in amity with us. This by the acts of 5th June, 1794 (a) and 14th June 1797, (b) was declared to be punishable as a misdemeanor. In both acts, however, there is a saving of treason and piracy.

Thirdly. The third class arose, on the change of our national position, by the declaration of war. He conceived the act of the 26th June, 1812, referring to that of the 23d of April, 1800, (c) merited close attention. By the 15th section of the act of 26th June, 1812, "all offences committed by any officer or seaman on board any vessel, having letters of marque and reprisal, shall be tried and punished in the same manner as when committed by any person belonging to the public ships of war of the United States." This led into the act for the better government of the navy—April 23d, 1800. In the 8th and 9th articles, the very acts charged in the present case, as constituting piracy are noticed, and subjected to such punishment as a court martial, or, in some instances, a court of admiralty shall impose.

(a) 3d vol. acts of cong. p. 97.

(b) Vol. 5, p. 3.

(c) 5, p. 102.

He urged the rule, that if a later statute imposed a milder punishment, it abrogated that part of a preceding statute, which inflicted one more heavy. He also argued that these acts gave a legislative construction to the act of 1790, and fully manifested the legislative sense, that depredation and pillage (however reprehensible) when committed by an American privateer, could not be deemed piracy, within the meaning of the eighth section of that law. If there was any difficulty in applying the mode of trial and degree of punishment, it rested with the legislature to remove it—a jury cannot legislate.

He then enquired whether the present case, came within the 8th and 9th article, and contended that the Portuguese brig was in the first instance boarded as a prize, that whatever might have been the liberal opinion of Mr. Jones, as to enforcing the capture; we had no evidence of the determination of captain Butler, with whom alone it rested to decide, 'till the last trip, when the Portuguese captain was directed on a gun being fired, to proceed on his voyage to the United States. At what time Butler came to this conclusion we cannot tell. What then is the result? The pillage committed as prize, and if sent in as such, is clearly within the articles of war. From the moment the captain (who does not appear to have consulted with any one) decides, that he will not proceed against her as prize, it is to become felony of death. Is the life of man to hang on such a slender point? He put this case without admitting the adverse construction, for he continued to urge, that no existing law rendered it felony in either case. He contended that dismissing the vessel with orders to proceed on her destined voyage, refuted all idea of piratical intentions. A pirate would not suffer the subject of his outrage, to proceed directly to the country to which he himself belonged, and where redress and punishment were certain. He quoted 2d Dall. Rep. 22, & 3d Dal. 333. And an opinion given by Mr. Randolph, then Attorney General of the United States; and Mr. Lewis then Attorney of the district of Pennsylvania, and observed in reference to these cases and that opinion, that if captain Butler had left a prize master on board to proceed in the vessel to New York, it would not be contended that the acts done amounted to piracy; so that the life not only of Mr. Jones, but of every man who boarded her was thus to depend on the uncertain decision of the commander of the privateer; He added, that the property might at this moment be English. The evidence

on that subject though admitted by the court, being the mere assertion of the captain, unsupported by the customary papers.

Mr. *Rawle* concluded his view of the law by observing that if the doctrine on which this prosecution was founded should be supported; its mischievous consequences would be extensive and alarming; and that in all cases, but more particularly in our naval service, it was all important, that crimes should be so clearly defined, as to form a certain guide to the individual, in teaching him what he ought to avoid, and what were the penalties imposed on transgressions. In the naval service generally it was necessary where the rough duties, the sudden emergencies to which it was subject, gave so little time to reflect, or opportunities to consult. In our naval service, which as he had shewn placed on the same footing in this particular, the conduct of both our national and private armed vessels, it was still more necessary.

He then contended that even if his view of the law should not meet the concurrence of the jury, they could have no difficulty on the facts, into the consideration of which he entered at large, and concluded with adverting to the humane doctrine of Blackstone 4 Com. 358, that if the evidence was doubtful it was the duty of the jury to acquit; but disdaining the necessity of relying on this rule in a case where so many of the witnesses for the prosecution, independent of the defendants witnesses had placed the innocence of Mr. Jones in a light so unquestionable.

Mr. *Dallas*, Attorney of the United States &c. The prosecution is highly important in itself, as it involves the honor of the American flag; as it relates to the just expectation of foreign governments that every nation will punish offences against the law of nations. and as it may, eventually, affect the life of a fellow citizen. But the nature of the defence has added a new interest to the prosecution; and it is no longer a question, whether a guilty individual, in a single instance, shall elude the public justice; but whether the penal code of the United States, affords absolute impunity, for the perpetration of the most flagitious crimes upon the high seas.

The occurrences, during the trial have, also contributed to excite the feelings, and to fix the attention of the court and the audience. Mr. *Dallas*, therefore thought it his duty to animadvert, upon the unusual, unjustifiable and improper manner, in which one of the prisoner's counsel, had arraigned the conduct of the prosecuting officer, and stigmatized the veracity of the Portuguese witness. Having done this, he proceeded to investigate the evidence, in order to shew the nature of the transaction, and the part which the

prisoner had performed ; while he endeavoured to reconcile the conflicting testimony of the disinterested witnesses, and to detect the fallacies of those who spoke from partial, or from corrupt dispositions.

Proceeding from the facts, to a consideration of the law, Mr. *Dallas* stated certain propositions, which independent of the immediate circumstances of the case, must have an influence upon the decision : To constitute a felonious and piratical robbery, upon the high seas, the act must be committed with the intention to seize by way of pillage ; and not with the intention to capture by way of prize. 2d The commission of a private, as well as of a public armed vessel, of the United States, authorises, not only the capture of the enemy as a prize, but the act of boarding, and searching, a neutral vessel, at sea, and of sending her into port, for further examination, in a case of doubtful ownership, or equivocal conduct. 3d Any act of violence or spoliation, not done feloniously, although it cannot be justified by a commission, can only be pursued as a trespass, not as a piracy. 4th All property captured as prize, at sea, must be sent into port for adjudication, without breaking bulk, except in cases of necessity ; when a transshipment may be caused ; but the property must still be submitted to the adjudication of a competent tribunal. All the officers and crew of a privateer, who take any part, in committing a piracy, are principals, and can never justify themselves, by alledging obedience, to the orders of a superior. 6th But any officer, or mariner, of a privateer, who boards a vessel at sea, to ascertain her character, does not thereby involve himself in the guilt of a piracy, afterwards committed upon the vessel, by the other officers and mariners, without his actual participation.

With these preliminary remarks, Mr. *Dallas* introduced two general objects of legal enquiry : 1st Whether the prisoner's case was embraced by the provisions of the Act of the 30th of April, 1790 ? And 2d, Whether the provisions of that Act were repealed, or superseded, by the provisions of any subsequent Act of Congress ?

I. The Prisoner's case is embraced by the provisions of the Act of the 30th of April 1790.

First, The crime of piracy was known and punished, in the earliest times, by every civilized and commercial people. It forms an article in the penal code of every country, and has always been a part of the laws of nations. Whenever it is described, the definition is substantially the same. " Pirates and plunderers (*fra-*



*done*s) are those, who without the authorization of any sovereign, commit depredations by sea, or land," *Bynk. c. 17. p. 27. Duponc. edit.* "A pirate is he, who sailing, without being authorised by any sovereign to make captures (or with commissions from different sovereigns, at war with each other) commits depredations at sea, or on shore," *Ibid in not. Moll. B. 1. c. 4 s. 1.* The authorisation of the Sovereign is indispensable in order to justify the capture ; and the authority must be directed, to the particular case, in which it is exercised. The possession of a public commission, either in a time of peace, or of war, does not exempt the possessor, from the imputation and punishment of piracy, for an act of violence and plunder, on the high seas, which the commission does not warrant, or contemplate. What the commission of the Sovereign authorises to be done, either expressly, or by necessary implication, may lawfully be done ; but for every other act of a criminal nature, the party stands in the same state of responsibility as if no commission had issued. *Bynk. c. 17, p. 127. Duponc. edit. 1 Sir Leo. Jenk. 94. 2 Sir Leo. Jenk. 714, 754. Moll. 44. 2 Woodes. 422, 423, 425, 426. 2 Azuni 351 5 State Trials 313, 314.* In Kyd's case (which was an indictment for piracy, at common law, tried in 1701, the 13 *W. 3.*) the defence of a commission, or letter of marque, was also alledged, but deliberately over-ruled, 5 *State Trials* 313, 314. And that the law has been so adjudged, on every occasion, will appear, not only from the books already cited, but from the common law authorities. *Roll Abr. 530, Moor 776.*

2 While the law of nations is thus clear upon the subject of piracy, the common law will not be found less distinct and decisive. *Hawkins* represents the general character of a pirate to be, "one who to enrich himself, either by surprise, or open force, sets upon merchants, or others, trading by sea, to spoil them of their goods, or treasure," and he afterwards states, that "a pirate, by the common law, is a person, who commits any of those acts of robbery and depredation, upon the high seas, which, if committed on land, would have amounted to felony there." *Hawk. Pl. C. B. i. c. 37. 1. 4. p. 268, 269.* The common law, then, adopts substantially the definition of the law of nations; and, notwithstanding the reference to felonies committed on land, it is explicitly stated by an English writer of high authority, on subjects of this kind, that "whether a charge amounts to piracy, or not, must still depend on the law of nations, except where, in the case of British subjects, express acts of parliament have declared, that the crimes therein specified, shall be adjudged piracy, or shall be liable to the same mode of trial, and

degree of punishment." 1 *Woodes*, 140. The authorities already cited show, that the common law, as well as the law of nations, recognizes the doctrine, that piracy may be committed by a commissioned vessel, and if the piratical act is committed by a public ship of war, the perpetrators of the crime are as amenable to justice, as the officers and crew of a delinquent privateer.

3. The statute law of England, generally speaking, makes no change in the definition of piracy, but leaves it upon the footing of the law of nations, and the common law; and is principally, occupied in providing a forum for the trial of maritime offences, and in giving to the offenders, the benefit of a common law trial, by jury. 28 *Hen.* 8, c. 15. 18 *Geo.* 2, c. 30, 32 *G.* 2, c. 25. 11 & 12, *W.* 3, c. 7. 33 *Geo.* 3, c 67. 4 *Geo.* 1, c 11. 1 *Hawk.*, c. 37, p. 268, 9. In some instances, however, certain acts committed on the high seas, or on board of English ships, are declared to be piracy and felony, by particular acts of parliament. Thus, for example, to remove a legal doubt, whether persons acting under commissions, issued by *James the second*, in France, after his abdication, could be deemed pirates; or, in other words, whether such commissions were of valid authority; it was enacted, by the 11 & 12 *Will.* 3, c 7, § 8, "that if any of his majesty's natural born subjects, or denizens of this kingdom, shall commit any piracy, or robbery, or any act of hostility, against others of his majesty's subjects, upon the sea, under colour of any commission from any foreign prince, or state, or pretence of authority from any person whatsoever, such offender, or offenders, and every of them, shall be deemed, adjudged, and taken to be pirates, felons, and robbers; and they, and every of them, being duly convicted thereof, according to this act, or the aforesaid statute of *Henry the eighth*, shall have and suffer such pains of death, loss of lands, goods, and chattels, as pirates, felons and robbers upon the seas, ought to have and suffer." But, in relation to the offence of piracy, it must still be remembered, that the English statutes enforce the law of nations, as a part of the common law. 4 *Black. Com.* 171, 3. *Hawk. P. C. B.* 1, c. 37, p. 270. And that although some controversy has arisen among the different governments of Europe, whether a person sailing under a commission can be tried for piracy, by any courts, but those of the sovereign, who issued the commission; yet, it never has been doubted, by England or by any other government, nor by any elementary writer, or by any judge, before or since, the passing of the statute of the 11 & 12 of *Will.* 3, c. 7; but that a person, sailing under a commission, might commit piracy, and ought to be tried and punished for the

offence, by a competent tribunal. *Kyd's* offence was committed, before the passing of the statute ; (in the 9 *Will.* 3) but his trial was subsequent (in the 13 *Will.* 3) and the indictment was at common law; he having regular commissions from his own sovereign as a letter of marque, to fight against France. 5 *State Trials*, 297.—The case of *Luke Ryan* occurred in the year 1782, and he was indicted for piracy, on the statute ; he having, as it was alledged, a Dutch commission, to fight against England. 1 *Woodes*. 426. (n.) In the former case, the law of nations and the common law, would not recognize the commission as an instrument for impunity ; and, in the latter case, though the commission, colourably, authorised the act; and though the act might amount to treason; the statute rendered the commission invalid, and declared the act to be piracy, just as if no commission had been granted.

4. After this review of the state of the English law, upon the subject of piracy, it will not be difficult to ascertain the principles of the act of congress, of the 30th of April, 1790 ; and to give to its provisions, a fair and legitimate operation. It is admitted, that the present indictment is not founded on the law of nations, nor on the common law, in the abstract ; but although it is founded on an act of congress, and although the case, for the purposes of conviction, must be brought completely within the terms of the act ; yet, it should not be forgotten, that the act of congress adopts the law of nations and the common law, nay, a portion of the English statute ; and consequently, that the example brought from those codes, may be justly and satisfactorily used, in the adoption of the act.. Again : It is true, that unless crimes and offences are defined, by a positive act of congress, there is no jurisdiction in the federal courts to prosecute the offenders ; but the language employed by congress to define a crime, must be explained, in every doubtful case, by the standard established, as the source, from which the language is derived. It is so, with respect to all terms of art, as well as of jurisprudence : It is so, with respect to the terms used in the constitution, as well as with respect to those which are used in legislative proceedings

The constitution declares, that congress shall have power, “ to define and punish piracies and felonies, committed on the high seas, and offences against the law of nations ;” *Art.* 1, § 8 ; but unless piracy is defined and punished by the act, on which the present indictment is founded, congress, while providing for a variety of comparatively minor offences, has neglected the execution of a power, peculiarly important to the administration of national justice ; upon a subject belonging exclusively to the federal jurisdic-

tion. This omission or neglect, will not hastily be presumed; and, surely, the language of the *8th section*, affords no countenance for the presumption. It is there enacted, in a phraseology, partly borrowed from the statute of 28 *Hen. 8, c. 15*, that "if any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder, or robbery, or any other offence, which if committed within the body of a county, would by the laws of the United States, be punishable with death, &c. every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death." Now, here is a plain definition of what shall constitute a piracy and felony on the high seas, under three forms of description: 1. *Murder* committed on the high seas. 2nd. *Robbery* committed on the high seas. 3d. *Any other offence* committed on the high seas, which would be capital, by the laws of the United States, if committed on land. *Murder* and *robbery* are both technical terms, and are here equally unexplained. Without reference to the degree of punishment inflicted upon murder or robbery if committed on shore, by a federal, or a state penal code, congress evidently meant, and have explicitly said, that murder and robbery, if committed on the high seas, shall be deemed piracy and felony, subject to the punishment of death. But after selecting these crimes, for capital punishment, without any reservation or reference, congress proceeded to define *other* maritime offences, not by naming the offences, but in terms of reference, by declaring, that only such other offences, as were capital, if committed on land, should be adjudged piracy and felony, if committed at sea. The relative pronoun "which," must be connected with the next antecedent, "any other offence." If it is carried more remotely back, it would not only be a violation of the rules of grammar, but lead to this legislative absurdity, that congress after naming robbery on the high seas, with an evident view, to render it a capital piracy and felony, have in the same sentence, declared, in effect, that it shall be no offence at all. Penal laws must be strictly, but they must be truly, construed; and the meaning of the Legislature thus intelligibly expressed, cannot be sacrificed, to the safety of criminals

If, then, robbery on the high seas is to be adjudged and punished as piracy and felony, it still remains to fix the legal import of the term "robbery." The glossary is not given in the act of congress, in this case, any more than in the cases, where the terms "murder," "manslaughter" &c. occur; and, indeed, it will hardly be found in the statute law of any state in the Union. It is necessa-

ry, therefore, to resort to the common law, from which the term is derived. "Robbery is the felonious and forcible taking, from the person of another, goods or money to any value, by violence, or "putting him in fear." 4 *Bl. Com.* 243. It is sufficient, as to the degree of terror, that so much force, or threatening by word, or gesture, be used, as might create an apprehension of danger, or induce a man to part with his property, without or against his consent. *Ibid.* And the taking of any thing from another, openly and before his face, which is under his immediate and personal care and protection, though not in his actual and manual hold, is legally a taking from his person. *Hawk. P. C. B.* 1, c. 34, § 6, *ft.* 235. 2 *East. Cr. L.* 707, 708.

But even admitting that robbery on the high seas, is a crime within the provisions of the 8th section of the act of congress, it is contended, that it does not alter the general law, with respect to vessels sailing under a public commission; by which (it is alledged) the crime of piracy cannot be committed, however otherwise they may be answerable, either to the government, or to suffering individuals, for their misconduct: and, in support of this position, arguments are added, from the particular terms of the 9th section of the act. Enough has already been said, on the general doctrine, to show, that by the law of nations, by the common law, and by the statute-law of England, the possession of a public commission does not exempt the party from a prosecution for piracy, if he commits a piratical act. With respect to the 9th section of the act of congress, it will be premised that it is copied from the English statute of 11 & 12 *Will.* 3. c. 7. s. 8. although that statute was enacted upon a special occasion (to invalidate the commissions issued by *James the second*, after his abdication), which had no immediate connection with the policy of the American law. Still, however, there were motives sufficient for introducing the provision of the 9th section of the act of congress, upon general principles of public policy, without defeating the previous law of piracy, and reducing the crime of robbery on the high seas to a mere misdemeanor or trespass. The words of the section are these: "That if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility, against the United State, or any citizen thereof, upon the high sea, under colour of any commission from any foreign power or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged, and taken to be a pirate, felon, and robber, and on being thereof convicted, shall suffer death." Now let it be re-

membered that the law has already provided, according to the construction hitherto offered, for piracy committed by any person, sailing with or without a public commission, against any other person, of whatever nation. But the law had not yet particularly provided for the case of a citizen of the United States committing acts of hostility against his fellow-citizens, under colour of the authority of a foreign commission. The subjects of the foreign sovereign who issued the commission might lawfully commit such acts, the two countries being at war; but an American citizen, by committing them, would probably be guilty of treason; and, under the power of Congress to define piracies and felonies on the high seas, he might certainly be declared a pirate and felon. Such, then, is the real design and effect of the 9th section of the act. If an American citizen, sailing under a commission from his own government, exceeds the authority of his commission, but not with a felonious intention, he will not be liable to a prosecution for piracy, under the 8th section of the act. On the other hand, if an American citizen sails under a foreign commission, and commits any act of depredation upon a fellow-citizen, he will be liable to a prosecution for piracy, under the 9th section of the act, whether the foreign commission authorized his conduct or not, and whether that conduct, being an act of hostility, amounted to felonious robbery or not.

II. The provisions of the act of the 30th of April, 1790, are not repealed, or suspended, by the provisions of any subsequent act of congress. In maintaining this proposition, Mr. Dallas confined himself to a review of the acts, from which the prisoner's counsel had inferred such repeal, or suspension, in the order that they had been cited.

1. It is said, that the acts of Congress, which punishes the acceptance and exercise of foreign commissions, and the preparations of military force, either of vessels, or of men, to fight against any power, at peace with the United States, or to commit hostilities upon the citizens of the United States, declare those offences merely misdemeanors; and, consequently, it is inferred, that an act of spoliation, under either a foreign or domestic commission, could no longer be adjudged a piracy and felony. But it is answered, that, in those acts of Congress, it is expressly provided, that they "shall not be construed to prevent the prosecution or punishment of treason, or any piracy defined by a treaty, or other law, of the United States." 3 vol. p. 88. s. 6. 4 vol. p. 3. s. 2.

2. It is said, that the rules and regulations for the government of the navy, provide for the punishment of spoliation and pillage;

by the sentence of a court-martial ; and, consequently, it is inferred, that such criminal acts, committed by a commissioned public vessel, are not to be punished, as piracy and felony, under the penal law. But it is inferred, that the provision alluded to respects spoliation and pillage committed by the captors, upon property captured, and sent for adjudication, as prize of war ; and does not, in any degree, apply to the case of felonious and piratical robbery. 5 *vol. p. 108. act 7, 8.*

3. It is said, that the act for the government of privateers makes "all offences committed by any officer or seaman, on board any such vessel having letters of marque and reprisal, shall be tried and punished in such manner as the like offences are, or may be tried and punished when committed by any person belonging to the public ships of war of the United States;" and, consequently it is inferred, that the prisoner should be tried by a court-martial, for spoliation and pillage, under the act for the government of the navy, and not for piratical and felonious robbery, under the penal law. But it is answered, 1. That this regulation applies to offences committed by individuals on board of the privateer, and not to offences committed by the officers and crew of the privateer upon other persons ; as, indeed, the proviso to the section demonstrates, when it declares that the offenders be confined on board the vessel in which the offence shall be alleged to be committed, until her arrival at some port of the United States, or meets with a public armed vessel; and that the court-martial, for the trial of the offenders, shall be held, upon application made by the commander of the vessel on board of which the offence is alleged to be committed. 2. That the regulation does not vary the nature of the crime but only the manner of the trial ; and the navy act no where provides for the trial of a like offence ; to wit, a piratical and felonious robbery. Whenever such a crime is committed by a public or a private armed vessel, the prosecution and punishment must be in the manner prescribed by the act of the 30th of April, 1790.

Upon the whole, Mr. *Dallas* concluded, 1. That a piratical and felonious robbery had been committed, by persons belonging to the privateer *Revenge*, because the property mentioned in the indictment had been violently and forcibly taken out of the possession of the captain and crew of the Portuguese vessel ; and because the taking was, not as prize of war, but felonious, was not done through mistake, but wilfully, was not a mere excess in the exercise of a lawful authority, but an act beyond the terms and contemplation of the commission granted to the privateer.

2. That the prisoner was one of the perpetrators of the piratical and felonious robbery, because he was not only present, but aided in the unlawful transaction ; because the evidence of his identity is direct, reasonable, and positive, while the evidence to acquit him is strained, suspicious, and improbable ; and because the law does not allow the excuse which has been offered on his behalf, that he acted in obedience the commands of a superior officer.

Of the guilt or innocence of the prisoner, however, Mr. *Dallas* cheerfully left the decision to the jury. Having discharged his public duty, and feeling no personal animosity on the occasion, he said that he could not suffer any regret at an acquittal of the individual, through the medium of a verdict, pronounced by a jury so intelligent and so upright. But he confessed that he was anxious that the legal doctrines advanced, in the course of the defence, should be authoritatively condemned by the court : and he hoped that whatever might be the fate of *Jones* himself, no man would leave the court with the dangerous opinion, that the laws of the United States had made no provision for the prosecution and punishment of such a crime as the indictment imputes to the prisoner.

#### WASHINGTON, JUSTICE.

*Gentlemen of the Jury,*—

Although this case will probably be decided upon the evidence, it is of great importance, that the questions of law which have been raised in the able discussion which it has received should be settled, that the commanders of our public armed vessels, and more particularly those belonging to commissioned privateers may know how far their commissions authorise them to go, in relation to neutral vessels, which they may meet at Sea.

The offence charged in this indictment is piracy by a robbery committed upon the property of a neutral, met with on the high seas. Before a definition of robbery is attempted, it will be proper to dispose of some preliminary objections intended to show that robbery on the high seas is not an offence punishable as piracy by the laws of the United States. It is said that the defendant is not indicted for piracy under the law of nations. That in the courts of the United States, no indictment at common law will lie, and that there is no statute of the United States which makes this an offence. It is true, that the defendant is not indicted for an offence against the law of nations, or the common law, and that unless the offence charged in this indictment, be made punishable by some law of the United States, he must be acquitted. But noth-



ing can be more clear, than that robbing on the high seas, is declared to be felony and piracy by the 8th section of the act, "for the punishment of certain crimes, &c." vol. 1 page 102. I understand the argument to be that as robbery on land is not declared by any act of congress to be a capital offence; it is not declared by this section to be piracy, if committed on the high seas. This is by no means the correct construction of the law. Murder and robbery committed on the high seas are declared to amount to piracy, and also any other offence, which would be punishable with death, had they been committed at land. It is clear that the words "which if committed within the body of a county &c. related not to murder or robbery" but to the words immediately preceeding, "or any other offence." All that remains then under this section is to ascertain the meaning of the word robbery, and it is admitted that the common law definition of the term may be resorted to. If a statute of the United States uses a technical term which is known, and its meaning fully ascertained by the common, or civil law from one or the other of which it is obviously borrowed, no doubt can exist that it is necessary to refer to the source from whence it is taken for its precise meaning.

It is objected that although robbing on the high seas should be piracy under this statute of the United States, still it is repealed by subsequent laws, which subject the offender to a slighter punishment and a different mode of trial. The answer to this is, that the 8th and 9th sections of the law, for the government of the navy, 5th vol. page 110, which inflicts such punishment upon those, who shall take from a vessel taken at sea, any part of her cargo, or embezzle the same, or who shall maltreat any of the persons relates expressly to *prizes*, or to vessels *seized as prizes*, and not to acts of piracy. And the act of June 1812, respecting privateers, is confined to the conduct of persons on board of privateers, and is intended for their government. But for piratical acts committed on others, no punishment or mode of trial by a court martial is prescribed, and it would be strange if it were, when it is observed that this court martial is to be called upon the application of the captain of the privateer. For suppose the captain and his crew should commit piracy by robbery, or by running away with the vessel, he would be the last man to invite an enquiry by a court martial, and yet it is said, that for such an act, he cannot be tried by the proper civil tribunal of the United States. This cannot be the law.

Having disposed of these objections, it will be proper to give the definition of robbery, which is the felonious taking of goods

from the person of another, or in his presence, by violence, or by putting him in fear and against his will. It is objected, that the taking must be *from the person*. The law is otherwise; for if it be in the presence of the owner, as if by intimidation he is compelled to open his desk, from which his money is taken, or to throw his purse, which the robber picks up, it is robbery as much as if he had put his hand into the pocket of the owner, and taken money from thence, (*a.*) But the taking must be in the presence of the owner.

We have then got so far in the examination of this cause, as to have ascertained that the *felonious* taking of goods from the person of another or in his presence, on the high seas, by violence or by putting him in fear and against his will, is felony and piracy by the law of the United States and is punishable with death.

But the taking must be felonious; and it is contended in behalf of prisoner, that spoliation of the property of a neutral on the high seas, by a commissioned cruizer, cannot be felonious, and consequently is not piracy. That the commission is a complete shield to the persons acting under tho' in contravention of it against any species of taking; although the same would amount to robbery, at the common law, if committed on land.

The counsel on each side have directed their principal strength to this part of the case, and its novelty as well as its importance, has merited the attention which has been bestowed, upon the examination of it. But I ask where do the counsel find this qualification of the general rule, that robbery on the high seas is piracy? Not in the 8th section of the act of congress constituting the offence. That section is general in its expressions, and applies to all persons whatsoever committing robbery on the high seas. Not in the law of nations; for many respectable writers on public law are express upon the subject, that, piracy may be committed by persons acting under a commission to cruize, and there is not a dictum of any writer to the contrary, to my recollection.

Such is the clear opinion of Sir Leolin Jenkins, supported by Molloy, Woodeson and by the decision given, in Kyd's, case 5 state trials 313, 314; wh ch latter case, tho' decided at common law is clearly bottomed upon the principles of the maritime law of nations with which the common law in this respect agrees. This doctrine is not contradicted by Bynker. who was relied upon by the prison-

(a) Sec. 2 East Crown Law 707, 1 Hale 533, 1 Hawk. c. 35 & 5.

ers counsel; who merely says (*a*) that if a commissioned cruizer exceed his authority he would not on that account hold him to be a pirate; neither is he held to be a pirate, or contended in this argument by any person, to be a pirate on that account. If such a cruizer capture a neutral vessel, he exceeds his authority, but if he takes her as a prize, it is a marine trespass, but not an act of piracy. But if the taking be felonious and with intent to commit a robbery, no writer on the law of nations has ventured to say that the act would not amount to piracy; and certainly it would be strange, if a commission to do a lawful act, sanctioned by the law of nations, could grant by implication, impunity against a *crime which that law* views with abhorrence, and which all civilized nations unite in punishing with the greatest severity.

The counsel who endeavour to maintain this qualification of the general law of piracy, would not, I presume, turn to the common law, in order to find it; and if they were to do so, they would equally be disappointed. Beside the positive decision against it in Kyd's cases, there is no analogy to the doctrine to be met with in the common law. If an officer having a warrant against a particular individual to arrest his person or seize his property, should abuse the person of his prisoner or his property, or should take the property of some other person, than against whom the writ was directed, he would be a trespasser. Should he under cover of such an authority steal the property, it would be larceny. So with respect to a commissioned cruizer; if he take the property of a neutral he is a trespasser, and will be compelled not only to make restitution, but compensation also in damages, unless he had probable cause for seizing the property as a good prize. And if he should make the seizure not as a prize, but with a felonious intent to convert the property to his own use without enquiry or trial; what reason can be given why his commission should shield him from the charge of felony and piracy. In deciding in either case, whether the act amounts to trespass or felony; the *quo animo* is to be sought after and is to be judged of by the actions of the party. If the doctrine, that a commissioned cruizer cannot commit an act of piracy is not to be found in the 8th section of the statute of congress, or in the common law or law of nations, does it receive any

(*a*) The words of this learned writer are "but whether one be a pirate or not, depends upon the fact whether he has or not a commission to cruise, and if it should be alledged that he exceeded the authority which that commission gave him. I would not on that account hold him to be a pirate. [See Dup. Ed. p. 135.

countenance in the provisions of the 9th section of the same act of congress? I understand the argument founded upon this section, to be this—that if a commission granted to a cruiser by the *United States* does not protect one of its citizens against a charge of piracy committed on a neutral and a foreigner, a commission granted by a *foreign nation* to one of our citizens, would not excuse a piratical or hostile act committed against another citizen, or against the United States. The 9th section therefore was altogether unnecessary; since upon the doctrine, that the commission in such case made no difference; the offence described in the 9th section, would be punishable under the general expression contained in the 8th section. But the legislature by introducing the former section has thereby intimated an opinion, that even a commission granted by a foreign nation, much more one granted by the United States, would protect the cruiser against a charge of piracy for robbery committed upon the high seas, unless the legislature should prescribe a different rule in relation to foreign commissions. Such I understand to be the argument—Let it be remarked in the first place that this mode of arriving at a legislative construction of a law is not always to be depended upon. The reason which induced the law, making of the provision from which the inference is drawn, can only be guessed at—It may be made merely from abundant caution—from ignorance of some general principle of law or of some provision in former laws—for it may be copied from a law found in some other code, without attending to the particular reason which had induced its adoption into that code. The 9th section of this law is, in fact, copied from the statute of the 11th and 12th Will, 3. C. 7. the history of which statute is explained by Hawkins: It was aimed at commissions granted to cruisers by James the 2nd, after his abdication; which, by many, were considered as conferring a legal authority to cruise, so as to protect those acting under them against a charge of piracy. Still I admit that unless some other reason can be assigned for the introduction of a similar provision into our law, the argument which has been founded upon it will deserve serious consideration. I do not think it difficult to assign a very satisfactory reason for the adoption of this section, without viewing it in the light of a legislative construction of the 8th section or of the general law.

If a citizen of the United States should commit acts of depredation against any of the citizens of the United States, it might at least

have been a question whether he could be guilty of piracy if he acted under a foreign commission, and *within the scope of his authority*. He might say that he acted under a commission, and not having transgressed the authority derived under it, he could not be charged *criminally*. But the 9th section declares that this shall be no plea, because the authority under which he acted is not allowed to be legitimate. It declares to the person contemplated by this section, that in cases where a commission from his own government would protect him from a charge of piracy; that is, where he acted within the scope of it, or even where he acted fairly, but under a mistake, in transgressing it, yet that a foreign commission should afford him no protection, even although he had not exceeded the authority which it professed to give him. But it by no means follows from this, that a citizen committing depredations upon foreigners or citizens, not authorised by the commission granted by his own government, and with a felonious intention should be protected by that commission against a charge of piracy. Another object of this section seems to have been to declare that acts of hostility committed by a citizen against the United States upon the high seas, under pretence of a commission, issued by a foreign government, though it might amount to treason, was nevertheless piracy, and to be tried as such.

The only remaining question of law, which has been raised in this cause, is, that the prisoner ought to be presumed to have acted under the orders of his superior officer, which it was his duty to obey. This doctrine, equally alarming and unfounded, underwent an examination and was decided by this court, in the case of general Bright. It is repugnant to reason and to the positive law of the land. No military or civil officer can command an inferior to violate the laws of his country, nor will such command excuse, much less justify the act. Can it be for a moment pretended that the general of an army, or the commander of a ship of war, can order one of his men to commit murder, or felony? Certainly not. In relation to the navy, let it be remarked, that the 14th section of the law, for the better government of that part of the public force, which enjoins on inferior officers, or privates the duty of obedience to their superiors, cautiously speaks of the *lawful orders* of that superior.

Disobedience of an unlawful order, must, of course, be dispensable, and a court martial would, in such a case, be bound to acquit the person tried upon a charge of disobedience. I do not mean to go further than to say, that the participation of the inferior offi-

cer in an act which he knows or ought to know to be illegal, will not be excused by the order of his superior.

What remains for me to say, as it concerns the evidence only, will be short. The evidence of the two Portuguese witnesses, unless it should, in your opinions, be overbalanced by that, given in favor of the prisoner, makes out fully the case stated in the indictment. The captain, officers and crew of a friendly vessel, were by intimidation and against their will, forcibly despoiled of their property by the prisoner taken, in their presence and carried away, and all this was done with a felonious intent, if it is possible, by the conduct and actions of men, to develop their intentions. That the prisoner did not act under a mistaken opinion, that the property belonged to enemies is plain; because; in that case, it would have been good prize, and the seizure would have been made as prize, and would and ought to have been sent in for adjudication. But no attempt of this sort was made. The spoliation was made under false colours, and the illegality of it was acknowledged by the prisoner, when he spoke of payment being made for the property by the American consul, at Lisbon. It has not been pretended that the privateer had not men enough to spare, for the purpose of taking possession of this vessel, and sending her in for adjudication, if it ever was the intention of the captors to consider her as prize. The plundered property was carried to the privateer, and instead of being preserved with a view to future enquiry, it was converted to the use of the spoliators, part of it at least divided amongst them, and the rest concealed. After their arrival within the United States, instead of instituting proceedings for the purpose of condemning the property, a profound silence in relation to it was observed. These circumstances, if sufficiently made out in proof, are sufficient to establish a felonious intent.

Le Brun and Whitford, supported by two other witnesses, all of them belonging to the privateer, confirm the testimony of the Portuguese captain and mate, as to the spoliation. All of them concur in describing a scene of lawless plunder, disgraceful to the national character of our country, and to that flag, which the gallantry of our naval officers and their crews has signalled and caused to be respected. But as to the identity of the prisoner, the evidence of the four witnesses, belonging to the privateer, is directly opposed to that of the two Portuguese witnesses. They concur in stating that the prisoner first boarded the brig, and that his conduct during the short time he remained on board of her, was unexceptionable.—

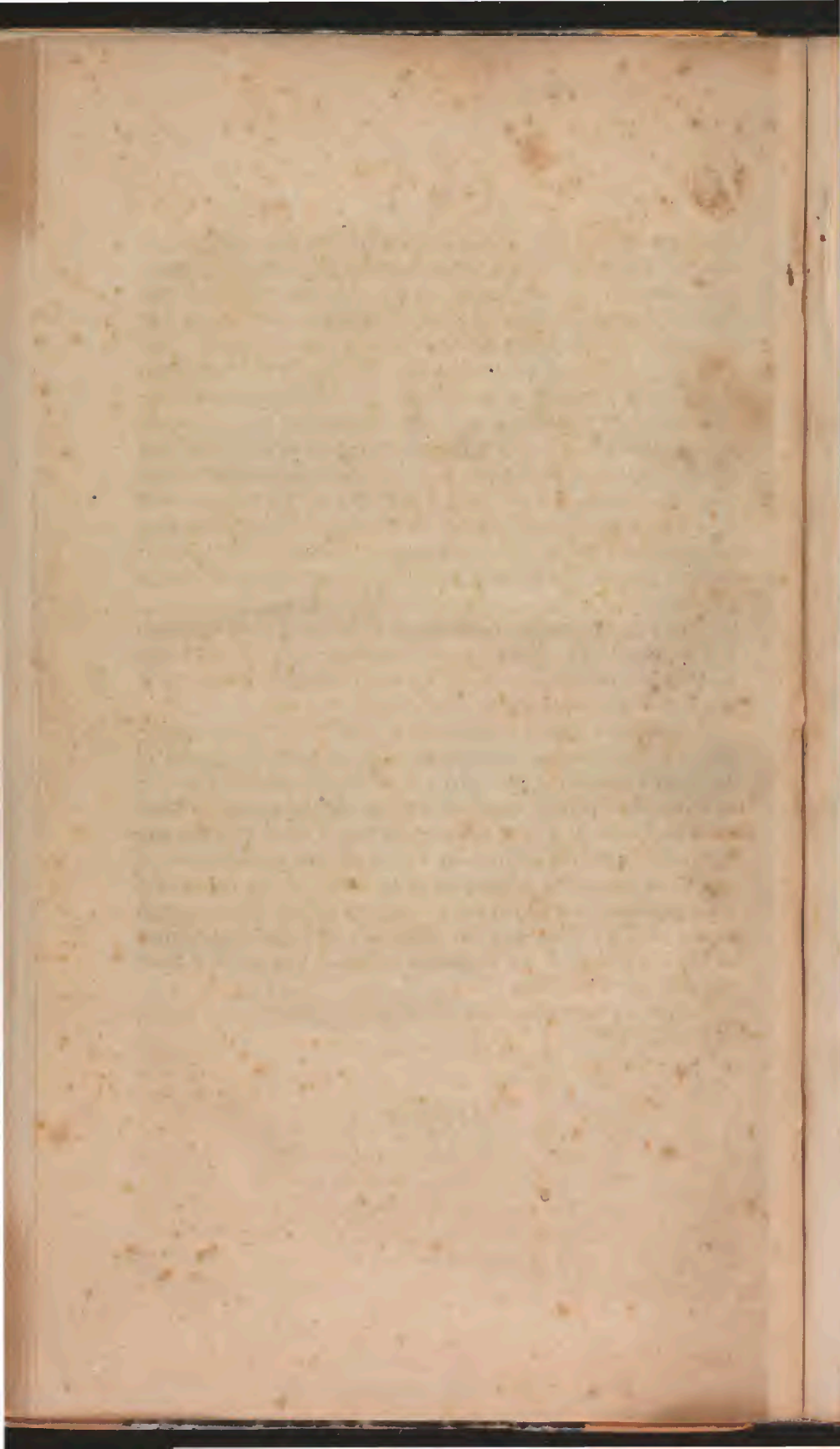
That he forb'd his men to take away with them the smallest articles, threatening them with the most severe punishment in case of disobedience—That he returned to the privateer indisposed, and was either asleep or appeared to be so, during the whole time that the robbery, by the orders of captain Butler, was committed. The Portuguese witnesses are positive as to the identity of the prisoner. But without imputing to those much abused strangers an intentional deviation from truth, it is possible they may very innocently have mistaken Hancock for the prisoner, as it appears that they strongly resemble each other in the features of the face and in size. If, indeed, the prisoners witnesses are believed, the mistake is apparent, because they prove the dress of Hancock to have been precisely that by which the prisoner is described by the Portuguese witnesses, and that of the prisoner to have been different in all respects.

To you, gentlemen, it belongs to weigh conflicting evidence, and to judge of the credit of witnesses, and in doing this you ought to throw into the prisoners scale, the good character which previous to this affair he is proved to have borne.

Should you incline to acquit the prisoner of any active participation in this robbery, he cannot be convicted upon the ground of his being a member of the society, which committed the offence.— If a number of persons associate to do an unlawful act, and proceed to its execution, it will be no excuse to one of them who, was present, that he did not individually do the act; all are principals.— But if the thing to be accomplished be lawful as the visitation of this vessel was, and all but one of the party commit felony, though in the presence of that one, but without his participation, the crime of his companions is not imputable to him. You will now retire and consider of this case.

The jury retired, and in a few minutes returned with a verdict of *Not Guilty*.

FINIS.



















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