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1704-1736
TRIAL

OF

CAPT. HENRY WHITBY,

FOR

THE MURDER OF JOHN PIERCE,

WITH

HIS DYING DECLARATION.

ALSO, THE TRIAL OF

CAPT. GEORGE CRIMP,

FOR

PIRACY AND MANSTEALING.

BY AN EMINENT REPORTER.

NEW-YORK:

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PREFACE
OF THE
REPORTER.

GENTLE AND SAGACIOUS READER,

IN this report you are not to look for the tinsel of shining words, nor the sayings of ingenious counsel, which were used to stir the feelings and passions of juries or by-standers. And though many such matters were uttered with great and curious felicity, yet they are foreign to my purpose, which is to convey, in apt and plain words, the substance of the arguments on the matters of law, and a clear and faithful history of the evidence, without which the law cannot be understood, or its application considered. As to the graces and ornaments of discourse, to these I never did addict myself; but ever since I entered upon the study of the law, I made it my chief purpose to give diligent ear to such questions as were of most fame and credit, not because of the popular breath, but by reason of their depth or difficulty in matter of law. And it was so that I came at length to be a Reporter of Cases, and in process of time was encouraged by great judges and

lawyers, who were partial to me, though of excellent judgment in all other matters, to publish to the world those notes and memoranda which I at first was accustomed to take solely for my own instruction, and used carefully to set down in writing, not willing to trust that faithless servant memory, which often deceives its master. When I was yet a student, I frequented neither balls, assemblies, plays, nor concerts, nor ever turned aside to see shews or pictures, nor played on any instrument of music, nor danced nor dallied with ladies, but endeavored by sad and sage deportment and constancy in one path, to climb the tedious ascent which leads to credit and preferment in the law.

Some of my friends censured me in this, and thought the time not mispent which is dedicated to the muses, and to the lively and sprightly conversation of the fair sex: because they hold women to be more flippant with their tongues, and that nature, which has gifted all creatures with some powers for their own protection and preservation according to their condition, giving to the bull horns, and to the boar tusks, and to the timid hare swiftness of foot, had in recompence of the delicacy and weakness of their bodies, endowed them with beauty and grace, and moreover with volubility and prettiness of speech, by which, though unable to contend with the force of men, they might soften and persuade them; and we according find from history and experience, that they have been able to subdue those who subdued the whole world. Sometimes doing this by the fascination of wit and flattery,

sometimes by tender lamentations and bewailings, and sometimes by crocodile tears and amorous protestations. Thus many of my years did openly frequent such schools, and thought it not time lost because of the prettiness and readiues of discourse which was there to be learned, without the tedious pains of conning the rules of Cicero or Quintillian. But my propensities led me to moots and lectures, and into all courts of law and equity, where I might hear sage arguments, and sober and reverend judgments pronounced upon them. And I took principal delight in such intricate matters as arose out of demurrers at law, or on motions of arrest of judgment, or exceptions taken to records for the perplexity of the same; for the full knowledge and skill of these, I held the most profitable increase of learning and good science, and for the dispelling the mists of darkness that hung upon and eluded my weak faculties. And knowing myself to be of shallow memory and simple science, I was used to carry away in writing all that I heard spoken, and keep the same by me for my own secret use, to serve me in time of need as a crutch for my own natural lameness. Afterwards growing into more experience, I found it more profitable to make more summary reports of what was said, not only at the bar, but at the bench: for I heard few arguments so pure wherein there was not some dross, and that which was effectuous shone the more bright, being stripped of that which was superfluous. But then again I became oppressed and vexed for the want of that good and excellent judgment to know and discern what was effectuous,

and what it was which wanted substance; and most of all, when I came, through the desire of my good friends, to give my reports to be printed, so as that I might neither give offence to the bench nor to the bar. This judgment is the ray of divine light which every one hath not, and he only who hath it is a great man; for the greater a man, the greater his genius, and the greater his genius, it is the more radiant, and the more radiant is his genius, the more it will expel the mists of darkness, and the more it expels the mists of darkness, the more it will see the truth, and the more it sees the truth, the more rightly it will judge. This I thought necessary to prefix as my excuse for omitting many beauties of discourse which I leave to others better versed therein, and that the counsel who displayed much eloquence may not be esteemed according to my report, but their own merits and just fame. For the truth of the evidence and the arguments of law, it is a different matter.

ADVERTISEMENT.

THE following proclamation contains the history of the crime for which one of the prisoners suffered death, and is given as an important document of history, the better to elucidate the evidence on the trial.

BY THOMAS JEFFERSON,
PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

WHEREAS satisfactory information has been received, that Henry Whitby, commanding a British armed vessel, called the Leander, did on the twenty-fifth day of the month of April last past, within the waters and jurisdiction of the United States, and near the entrance of the harbor of New-York, by a cannon shot fired from the said vessel Leander, commit a murder on the body of John Pierce, a citizen of the United States, then pursuing his lawful vocations within the same waters and jurisdiction of the United States, and near to their shores, and that the said Henry Whitby cannot at this time be brought to justice by the ordinary process of law.

And whereas it does further appear that both before and after the said day, sundry trespasses, wrongs and

unlawful interruptions and vexations on trading vessels coming to the United States, and within their waters and vicinity were committed by the said armed vessel the *Leander*, her officers and people, by one other armed vessel called the *Cambrian*, commanded by John Nairne, her officers and people, and by one other armed vessel called the *Driver*, commanded by Slingsby Simpson, her officers and people, which vessels being all of the same nation, were aiding and assisting each other in the trespasses, interruptions and vexations aforesaid.

Now therefore, to the end that the said Henry Whitby may be brought to justice, and due punishment inflicted for the said murder; I do hereby especially enjoin and require all officers having authority, civil or military, and all other persons within the limits or jurisdiction of the United States, wheresoever the said Henry Whitby may be found, now or hereafter, to apprehend and secure the said Henry Whitby, and him safely and diligently to deliver to the civil authority of the place, to be proceeded against according to law.

And I do hereby further require that the said armed vessel the *Leander*, with her other officers and people, and the said armed vessels the *Cambrian* and *Driver*, their officers and people, immediately and without any delay, depart from the harbors and waters of the United States. And I do forever interdict the entrance of all the harbors and waters of the United States to the said armed vessels, and to all other vessels which shall be commanded by the said John Nairne, and Slingsby Simpson, or either of them: and if the said vessels, or any of them shall fail to depart as aforesaid, or shall re-enter the

harbors or waters aforesaid, I do in that case forbid all intercourse with the said armed vessels, the Leander, the Cambrian, and the Driver, or with any of them, and the officers and crews thereof, and do prohibit all supplies and aid from being furnished them, or any of them.

And I do declare and make known, that if any person, from, or within the jurisdictional limits of the United States, shall afford any aid to either of the said armed vessels, contrary to the prohibition contained in this Proclamation, either in repairing such vessel, or in furnishing her, her officers or crew, with supplies of any kind, or in any manner whatsoever, or if any Pilot shall assist in navigating any of the said armed vessels, unless it be for the purpose of carrying them in the first instance, beyond the limits and jurisdiction of the United States, such person or persons shall on conviction, suffer all the pains and penalties by the laws provided for such offences: and I do hereby enjoin and require all persons bearing office civil or military, within the United States, and all others, citizens or inhabitants thereof, or being within the same, with vigilance and promptitude, to exert their respective authorities, and to be aiding and assisting to the carrying this Proclamation, and every part thereof into full effect.

In testimony whereof, I have caused the seal
 (L. S.) of the United States to be affixed to these presents, and signed the same with my hand.

Given at the City of Washington, the third day of May, in the year of our Lord, one thousand eight hundred and

six, and of the sovereignty and independence of the United States, the thirtieth.

(Signed)

TH: JEFFERSON.

BY THE PRESIDENT,

(Signed)

JAMES MADISON,

Secretary of State.

TRIAL

OF

CAPTAIN HENRY WHITBY, &c.

ON FRIDAY, THE 13TH DAY OF MARCH,

The court met and the Judges being seated, proclamation was made in due form by the crier, that all persons who had any business should give their attendance, and that they should be heard.

And then another proclamation was made for the Grand Jury, that they should answer to their names as they were first called, and save their fines; some not appearing, a proclamation was made thus:

Crier. O yes, O yes, O yes, all persons are required to take notice, that the Court have set a fine of \$ 100 upon the following grand jurors, for not attending at this time. Fines were set upon several defaulters.

The grand jurors being sworn, and proclamation made for silence, the Court proceeded to its charge.

CHARGE TO THE GRAND JURY.

Gentlemen of the Grand Jury,

THE important duties you are now called upon to fulfil, naturally increase with the increasing difficulties of our country. But however great those difficulties may be, I am sure you will meet them with a firm and intrepid step, resolved, so far as you are concerned, that no dis-

honor or calamity, (if any should await us,) shall be ascribed to a weak or partial administration of justice.

If ever any people had reason to be thankful for a long and happy enjoyment of peace, liberty and safety, the people of these states surely have. While every other country has been convulsed with foreign or domestic war, and some of the finest countries on the globe have been the scene of every species of vice and disorder; where no life was safe; no property was secure; no innocence had protection, and nothing but the hastest crimes gave any chance for momentary preservation; no citizen of the United States could truly say, that in his own country any oppression was permitted with impunity, or that he had any grievance to complain of, but that he was required to obey those laws which his own representatives had made, and under a government which the people themselves had chosen. But in the midst of this envied situation, we have heard the government as grossly abused as if it had been guilty of the vilest tyranny; as if common sense or common virtue had fled from our country, and as if PURE PRINCIPLES could only be found in the happy soil of England, where the sacred fire is preserved by the majestic sway of an old man, for many years entirely bereft of his intellectual faculties, who never was remarkable for their strength; where the external conduct of the government is upon a par with its internal; where liberty, like the religion of Mahomet, is protected by the sword. Nations are not only compelled to be protected, but protected on the English plan, and placed under English guardianship; English arsenals are the repositories of their arms; English treasuries of their money; the city of London of their produce, and British men of war of our kidnapped citizens, and British ports of their ships. And we have been honored with this kind of protection, and with the support of English enterprize in all parts of the world. Such has been the progress of a power which begins by saying that its

object is to protect all nations against tyranny and oppression, and successively plunders the commerce, destroys the cities, or involves in ruinous combination and intrigue, every government; and after embruing the hands of every people in blood, leaves them to the horrors of civil or domestic war. Those who take no warning by such examples, may have deeply to lament the consequence of neglecting them.

The situation in which we now stand with that country is peculiarly critical. Conscious of giving no real offence, but irritated with injuries and full of resentment for insults; desirous of peace if it can be preserved with honor and safety, but disdaining a security equally fallacious and ignominious, at the expense of either; still holding the rejected olive branch in one hand, but a sword in the other. We now remain in a sort of middle path between peace and war, where one false step may lead to the most ruinous consequences, and nothing can be relied on, but unceasing vigilance, and persevering firmness in what we think right, leaving the event to heaven, which seldom suffers the destruction of nations without some capital fault of their own.

It may now be necessary to point your attention to the particular offences which it will be your duty to inquire into. It is notorious that for many years past our commerce on the sea has been the prey of a formidable, though expiring power. The most lawless and unsanctified dilapidations have been practised with impunity. Our ships have sometimes, under the wild and extravagant pretences of blockade, been seized upon even on our own peaceful coasts; above six thousand of our citizens have been dragged by violence from on board the merchant ships, and condemned to the most dreadful and debasing servitude. Many have suffered stripes, and some of them in insolent defiance, and in the teeth of our hopeless and despised remonstrances, publicly hanged. These American citizens

have been compelled to act in hostilities against their fellow citizens and their beloved country, and remain entirely unavenged. With rights equal to our own, members of one great family, citizens of one great nation, we have suffered them to groan and sigh unheeded and unclaimed. In this we have sinned too long, and those sighs and groans will be no longer in vain; for their wrongs have reached the heavens, and penetrated the caverns of the deep.

It is a painful part of my duty to add, that much of the evil has proceeded from the criminal encouragement held out by corrupt persons residing in the bosom of this happy country, some of them natives of the favored soil; some become citizens through the favour of our hospitable institutions; some of them aliens, who, under the protecting shade of our hospitality, meditate destruction to the bosom that has cherished them. Such have been those worthless, but truly mischievous characters who, by means of commercial patronage, foreign hire, or long rooted, vindictive and hereditary aversion to our free and enviable condition, never lose an occasion of festering and poisoning the public mind, and by falsehoods and calumnies favored by the freedom of our press, as well as by secret communications unfounded in truth, persuade the enemies of our peace, that we are ready to surrender our rights and liberties, to separate from, or to engage with each other in civil conflict. Who those strangers are, I need not point out. It is not they who, flying from the very despotism that follows them to our peaceful shores, have one common oppressor, one common cause, and I may perhaps even now say, one common enemy. Till the government be empowered as it was in 1798, to send out of the country, those mischievous and ungrateful subjects of a foreign despotism, we have no power to animadvert upon them. I mention them only for this end, that some persons not at present upon this calendar, have been

charged upon oath with acts done as accessaries to the crimes that are to be the immediate subject of your consideration. In the course of the examination, if it should appear to you that such charges are established, it will be your duty to present the offenders. Men whose prepossessions are very strong in favor of the power with which a war is impending, are just objects of vigilant jealousy. It is not their predilection and prepossession which constitutes their crime; it is their treachery to a people that harbours them as friends, and shares the blessings of freedom, peace and abundance with them. To prevent their committing crimes by sending them out of the country, is the province of the legislature. It was exercised in the year 1798 and perhaps may be so now. Some of them are wicked, rancorous and malignant; others corrupt and venal; others merely mercenary, and ready to take either side, and do most mischief for most money. Some less ignoble, but not less dangerous than, are those, who from perverted judgment and overheated prejudice, honestly imagine that they are acting virtuously. Nobody who ever heard of Major Andre, that possesses any liberality of mind, but must believe that he did what he thought right at the time, though in my opinion, it was in no manner justifiable. If men then of good characters, and held in universal esteem for integrity, can be tempted when a great object is in view, to violate the strict duties of morality, what may be expected from the grovelling and low minded, who have neither character nor virtue to oppose to temptations of any kind. The opportunities of using such instruments pending or during war, are too many; and we cannot be blind to what the whole world see, that more danger is to be apprehended from the adherents of an oppressive power, before hostilities are publicly declared than after; because there is less suspicion, and the usages and laws of peace do not admit of disposing of them in so

summary a manner, let their intrigues and machinations be ever so pernicious. Those to whom I allude have already, under the ungenerous idea that there was profit in serving the enemies of our country, and impunity in our mild laws, ventured beyond their depth. They will find too late their mistake, and taste the disappointment they so justly merit, if not in legal punishment, in the disgrace and contempt that sooner or later overtakes the guilty. They will not, however, be permitted the foul triumph of being recorded as the authors of their country's ruin. That providence that has kindly raised a favored people from the abject state of a subject colony, to the proudest rank among nations, will continue to protect us with its ægis, and we have no other course to follow than to persevere in justice towards all mankind, and putting our trust in the great being who has shed his blessings on us, to fear no consequences, and to give the great example of victorious justice. And may the inhabitants of this happy country deserve his care and protection, by a conduct best calculated to obtain them.

THE GRAND JURY RETURNED TWO BILLS
OF INDICTMENT, VIZ.

- | | | |
|-------------------------|---|---------------------------|
| 1st. THE UNITED STATES, | } | For Piracy and Murder. |
| vs.
HENRY WHITBY. | | |
| 2d. THE SAME, | } | For Piracy & Manstealing. |
| vs.
GEORGE CRIMP. | | |

These two persons were set to the bar, and informed that such bills were found against them, and that they were entitled to copies of their indictments which should be furnished them; that by the statute, they were entitled to have them two clear days before their arraignment, and as Sunday intervened, on which day counsel

was not presumed to be consulting with elients, they should have till Tuesday to prepare themselves to plead and take their trial.

N. B. The like rule was made through indulgence to the prisoners, at the Special Sessions in Surrey, for the trial of the Scotch rebels, in the 19th Geo. 2. anno domini 1746, as appears by the report of Mr. Justice Foster. A list of the jury was also delivered to each of the prisoners, and the Court adjourned till Tuesday.

Tuesday March 17.

This day Captain Henry Whitby was placed at the bar of the Court.

Clerk. Prisoner at the bar hold up your right hand.

The prisoner put his hands into his pockets, and looked about with a disdainful air.

The Court. Proceed to arraign him, if he will not hold up his hand.

Clerk. Hearken to your indictment: the Grand Inquest of the United States of America for the district, &c. upon their respective oaths and affirmations, have presented, that you Henry Whitby, Esq. of Great Britain, commander of his Britannic Majesty's ship, the Leander; his said Britannic Majesty not then being at war, but on the contrary professing to hold the accustomed relations of peace and amity, to and with the said United States, and having an envoy extraordinary, and minister plenipotentiary then residing near the government of the said United States, yet not regarding the premises, nor respecting the laws and usages of civilized nations, nor the duties of religion, nor the obligations of good morals, nor the precepts of the christian faith, nor the peace of mankind, nor the freedom of the seas; all which the United States have ever since their independence and separation from Great Britain, continued to hold sacred and inviolate towards Great Britain and all other nations, gov-

ernments, and people ; not having the fear of God before your eyes, but being moved and seduced by the instigation of the Devil, wickedly, feloniously, and piratically, intending the peace of the said high seas, and of the said United States, and of all nations to disturb, vex, and molest, and being a felon, and rover, and a pirate upon the high seas, and an enemy of the human race, on the third day of May, in the year of our Lord 1806, and the thirtieth year our of independenee, in pursuance of your wicked and felonious designs, and as such pirate and rover, and enemy of the human race, being in and on board of the said ship the Leander upon the high seas, to wit, at Neversink, in the district of New-Jersey, within the jurisdiction of this Court, feloniously, piratically, and wilfully, and of your malice aforethought, made an assault in and upon one John Pierce, mariner, a citizen of the United States, in the peace of God, and of the United States then and there being, and a certain great gun of the value of one hundred dollars, being then and there charged with gunpowder, and with an iron ball of a great weight, to wit, of forty-two pounds weight, and of the value of five dollars, at and against the body of him the said John Pierce then and there in the peace of God, and the United States, so being as aforesaid, wilfully, feloniously, piratically, and of your malice aforethought, did present, and the said iron ball did shoot off, and discharge, and by means thereof, did then and there give to the said John Pierce, a mortal wound upon the body of him the said John, whereof he instantly died on the high seas aforesaid, to wit, at the highlands of Neversink within the jurisdiction aforesaid. And the gra d inquest aforesaid do say, that you the said Henry Whitby, him the said John Pierce in manner and form aforesaid, feloniously, piratically, wilfully, and of your malice afore-

thought, did kill and murder against the peace of the United States and their dignity.

How say you Henry Whitby, are you guilty of the murder, felony, and piracy, laid to your charge or not?

The prisoner hereto made no answer but stood mute, and taking out a tooth-pick from his pocket, began to pick his teeth therewith, and continued so to do, and hummed a couplet, of which the only words I could distinguish, were "Britannia, and bulwark."

The Court. Prisoner, as you are a stranger in this land, we think it our duty to admonish you of the awful situation in which you stand.

By the ancient law of your own country, the contempt you now manifest, would have incurred what is called the *peine forte et dure*: you would have been first remanded to the prison from whence you came, and then put into a low dark chamber, there laid upon your back on the bare floor, naked, unless when decency forbade.

Upon your body would be placed as great a weight of iron as you could bear, and more; you would have no sustenance save only the first day, three morsels of the worst bread, and on the second day three draughts of standing water that should be nearest to the prison door, and this would be your situation and alternate daily diet until you answered or until you died.

Our laws are strangers to torture of any kind, but it is provided by statute, and of this I warn you, that if you do not answer to your indictment, like proceedings will be had as though you pleaded not guilty; and then if upon the evidence the jury should find you guilty, sentence of death must inevitably follow.

If you have counsel, advise with them, or if you have not and you desire it, the court will assign you able counsel to assist and guide you in your defence.

The prisouer uttered not a word, but cast a haughty look.

The Marshal having previously returned the venire and the pannel, the Attorney General desired that the pannel might be called over.

Crier. O yes, O yes, O yes, you good men who are returned to enquire between the people of the United States, and Henry Whitby the prisoner at the bar, answer to your names every one, and save your fines

The whole pannel was then called over.

Clerk. Prisoner at the bar hold up your right hand, and hearken what is said unto you. Those good men whose names have just been called, and who now appear, are those who are to pass between you and the country on your trial, if therefore you will challenge any of them, your time to challenge them will be as they come up to the book to be sworn, and before they are sworn, and you will be heard: the prisoner stood looking disdainfully on the jurors till twelve were sworn, but did not open his mouth nor challenge any. The names of the jurors sworn were these:

Henry Trueman,	Jonathan Seelear,
John Freeman,	Timothy Trusty,
David Stout,	Isaac Steadyman,
William Sterling,	Jasper Trueblue,
Joshua Goodman,	James Fearnot,
Robert Neverfail,	Stephen Standfast.

Then the clerk said, prisoner at the bar hold up your right hand, of which the prisoner took no heed.

Clerk. Gentlemen of the jury, you that are sworn look upon the prisoner and hearken to his charge.

The prisoner at the bar stands indicted by the name and addition of Henry Whitby, &c. and after continuing to read through the whole indictment, he added: upon

this indictment the prisoner at the bar has been arraigned, and on his arraignment, has of his malice stood mute, and has not pleaded, but is nevertheless according to law to be tried by the country, which country you are, so that it will be your duty to inquire whether he be guilty of the crime laid to his charge, or not guilty; therefore sit ye together and hear the evidence.

The *Attorney General* then briefly opened the case to the jury. He said, that as the crime of the prisoner admitted of no shade or degree, it would be vain, by any affected elocution or pomp of language, to swell the measure of it; and as to the evidence, there was little needful to be said for the full and certain understanding of it, as it was brief and conclusive. The prisoner is charged with the crime of murder. Murder is the killing with malice aforethought, and this malice may be either express or implied. It is not necessary the offender should have any personal malice or grudge against the individual whom he slays, nor even a knowledge of his name or person. He who kills another in consequence of such a wilful act as shews him an enemy to all mankind in general, is guilty of murder; as going deliberately and with an intent to do mischief upon a horse used to strike, or coolly discharging a gun among a multitude of people. So if a man resolves to kill the first man he meets, and does kill him, this is murder although he knew him not; for this is universal malice. And if two or more come together to do an unlawful act against the peace, of which the probable consequences would be bloodshed, as to beat a man, commit a riot, or to rob a park, and any one of them kills a man, it is murder in them all, because of the unlawful act and the evil intended beforehand. And it is no matter at whom the gun be aimed, for if one shoots at A. and kills B. it is murder, because of the previous felonious intent, which the law transfers from the one to the other.

The instances on the books are numerous, but these are sufficient in so plain a case: although there are various degrees of homicide, there is but one of murder, and that in all nations has been punished with death: whoso sheddeth man's blood says the scripture, by man shall his blood be shed. Your inquiry gentlemen of the jury, will consist of two propositions. 1st. Did the prisoner occasion the death of John Pierce. 2d. Did he kill him of malice aforethought. The one is a matter of fact which will be proved past doubt, for it is the same whether he fired off the gun, or commanded it to be fired; the other is an inference of reason which cannot be resisted.

The malice consists in the barbarity of the act itself, which implies malice, and in the lawless course of roving and depredation, the frequent and continual outrages and aggressions upon the defenceless, unarmed, and unoffending, the following our harmless merchants and coasters, even into the mouths of our harbors, and plundering, kidnapping, and killing our citizens.

This habitual state of piratical and merciless warfare upon the peaceful and unoffending, this ferocious abuse of power without distinction of friend or enemy, or any regard to the rights of mankind, or the peace of nations, this in itself is malice in the amplest sense, and gives to every homicide committed in such a vagabond, and licentious career, the character of premeditated and deliberate murder; and this it is which justly stamps the offender as a pirate, or an enemy of the human race.

Enough, and too much has been said upon this subject, it is more becoming the dignity of this nation, that the punishment should fall upon this delinquent without any other effort than the ordinary exertion of justice.

The murder with which the prisoner stands charged, is without justification or excuse of any kind. It was committed without provocation; it was done in the wantonness

of an uncurbed and savage spirit. And if it should be offered as an extenuation, that the same, or similar offences have been often committed with impunity, it is but a reason the more for bringing this offender to condign punishment, least his impunity be hereafter vouched as an excuse for others.

I have heard it rumoured that this prisoner was to be rescued. Mistaken unhappy man! should he be convicted, he will find how impossible it is to resist the laws of a free country, which every individual is interested and inclined to maintain, and that a single tipstaff shall be sufficient to lead him to the place of execution, where he is to expiate all his crimes. If any of his partizans here, or of the servants of his master who nestle among us, have deceived him into such preposterous belief, he will find to what a broken reed he has been trusting.

EVIDENCE FOR THE PROSECUTION.

1st Witness Sworn.

Jesse Pierce, Master of the sloop *Richard* of Brandywine, State of Delaware, brother of the deceased, deposed, that as he was approaching *Sandyhook*, and was about a quarter of a mile from the beach, two miles southward of the light-house in his sloop, two shots were fired at different times from a large ship of war with two tier of guns called the *Leander*. One shot struck the foreyard ahead, and the other went nearly over the vessel. Witness then through fear rounded to his vessel, and about five minutes after another shot came from the same vessel, struck the taffel, and quarter rail, and killed *John Pierce*, witnesses brother, who was then at the helm.

2d Witness Sworn.

Hezekiah Pratt, Master of the brig *Sally* of New-York, was approaching the hook, coasting from St.

Thomas's, being about half a cables length from the sloop Richard, confirmed the testimony of the former witness, except as to the actual killing of the man.

There were three large English ships of war, of which the Leander was one. They all fired at witnesses's vessel as much as twenty shots but killed nobody. There were about twenty sail of vessels coming in at the same time, and upwards of one hundred shot were fired at them.

CHARGE OF THE COURT.

The court in charging the jury, said they approved entirely of all the Attorney General had said, that the evidence was clear, and the crime of murder and piracy was substantiated beyond all doubt, and the case called for no further observation.

The jury without leaving their box found a verdict of **GUILTY**.

Clerk. Prisoner at the bar hold up your right hand ; this the prisoner again refused to do.

Clerk. Hearken to what is said to you. You may remember that you have heretofore been indicted of a certain piracy and murder by you done and committed, upon your arraignment, you of your malice stood mute, and would not answer, and have been tried by a jury of the country, which country have found you guilty ; have you now any thing to say why the court ought not to proceed to pronounce judgment of death against you, according to law.

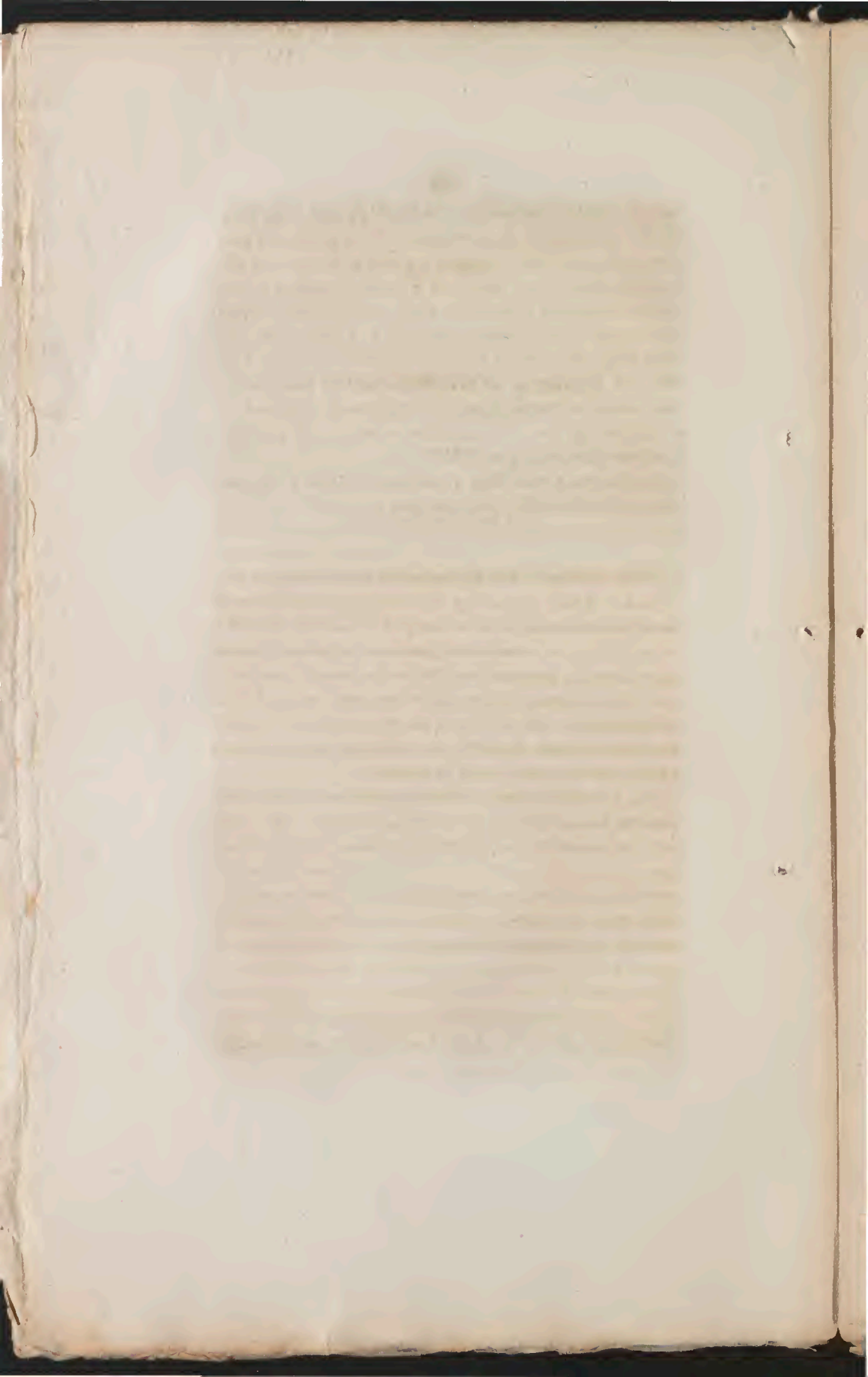
The prisoner instead of answering, laughed, and looked significantly round, and winked with his eye upon certain persons standing near him, but said nothing at that time.

SENTENCE OF THE COURT.

Henry Whitby, you have been arraigned, tried, and convicted, by a jury of the country, of the crime of pi-

ratical murder committed upon the high seas, and within the jurisdiction of this court. Your crime has been proved to the entire satisfaction of the court, and the sentence of the law which we pronounce against you is, that you be taken back to the place from whence you last came, and there detained until the twenty-third instant and at the hour of one in the afternoon of that day, that you be taken to the place appointed for your execution, which is the highlands of Neversink, and there to be hanged by the neck until you be dead; and may the Lord have mercy on your soul.

The prisoner was then remanded, and the court adjourned till Thursday, the 19th inst.



TRIAL
OF
CAPTAIN GEORGE CRIMP &c.

THURSDAY, MARCH 19.

THE court met this day pursuant to adjournment at 9 o'clock. There was a very full attendance of the bar to hear the important points of law and evidence which were expected to arise, and a great concourse of people curious to see how the prisoner would demean himself, and what would be the issue of his trial for the manstealing of their fellow citizen. He was set to the bar and desired to hold up his right hand, which he did, and was arraigned upon an indictment consisting of two counts.

1st. For having upon the high seas and within the jurisdiction, &c. to wit: at Neversink, with force and arms, made an assault upon Nehemiah Lockman, late of Windham county in the state of Connecticut, mariner, and piratically and feloniously taken him by force and against his will, from on board the ship *America*, whereof Jonathan Spenceer was then and there master, and piratically and feloniously carried him away, and forced him to serve in a certain ship of war of his Britannic majesty, called the *Vixen*: and to commit hostilities against the ships, vessels, mariners, citizens, &c. of the United States, sailing under

the flag of the United States; with many other enormities in aggravation, which it is not here material to insert.

The second count differed from the first, in as much as it laid the offence with a *piratice depredavit* and such other phrases, by way of averment, as are used in the *civil law* and in the course of *admiralty proceedings*; stating the defendant to be an *enemy of the human race*. As little objection was made to the form of the indictment, I have thought this notice sufficient and refer the curious to the record which is on file.

The prisoner's counsel Mr. Formedon and Mr. Silver-tongue, moved to quash the indictment upon two grounds.

1st. That it appeared on the face of the record that the prisoner was a commissioned officer of a sovereign prince, and as such could not be a pirate.

2d. That there was no law of the United States by which the court could take cognizance of the offence.

The court refused to dispose of so great a question in so summary a way; saying that the prisoner might have the full advantage of every point of law upon the demurrer, on the general issue or in arrest of judgment.

The counsel then tendered a plea to the jurisdiction which they had ready drawn, setting forth the prisoner's commission and instructions, asserting that he had acted by virtue thereof and not otherwise, and praying judgment if court would further proceed upon the indictment and that he be dismissed of and upon the premises.

The attorney general demurred; and the prisoner by his counsel joined in the demurrer.

They cited the case of Kinlock in Foster's report of the proceedings of the special commissions in Surrey, for trying the Scottish rebels, 19 Geo. 2. and also, Rockwood's case from the 4 state trial, p. 649.

But the court distinguished between this case and those cited, saying that here, there could be but one jurisdiction, and if the offence was not cognizable here it was so no

where, and therefore it was a good defence upon the general issue, which was more to the advantage of the prisoner.

The prisoner then pleaded not guilty, but moved the court for delay on account of the absence of certain witnesses, whom he swore to be material to his defence, and without whose attending he could not, as advised by his counsel and as he believed, safely take his trial.

These witnesses were his royal highness William Henry, duke of Clarence, admiral of the fleet, the right honorable earl St. Vincent; formerly first lord of the admiralty, lord James Townsend, sen. captain, commanding the squadron at Halifax, admiral Sawyer, Herman W. Ryland, late secretary to his excellency, sir James Craig late governor general of the British provinces in North America, his excellency captain John Henry, late envoy extraordinary and minister plenipotentiary to his Britannic majesty, near the Essex Junta in Massachusetts, and Mr. Lookout, of Pasmaquoddy.

This motion was argued and after some debate overruled, the court saying that as it was a motion to its discretion, it would be going to an absurd length to postpone a trial upon so general an affidavit, touching the absence of persons who it was unreasonable to presume would voluntarily cross the seas or come from distant countries to attend a trial in this court. It would require much more specific grounds to induce them to trifle so far with their duty to the public, but that every indulgence should be granted that was reasonable or proper.

The attorney general offered to admit the commission and instructions of the prisoner in any shape the counsel chose, and upon this they acquiesced and the trial went on.

They then prayed that the whole pannel might be called over in the prisoner's presence and hearing.

The attorney general said it was useless, as the prisoner had a list of the jurors furnished him together with a copy

of his indictment. But the counsel insisted that it would be of use to the prisoner in taking his challenges, to know before any jurors came to the book, who of the whole panel appeared and who did not. The court ruled in favour of the prisoner, and then for the first time, the counsel suggesting that the prisoner was an alien, challenged the array for want of aliens, and demanded a jury *de medietate lingue*, and a new jury process to that effect; and relied upon the authorities of Dyer, 304 (a) and the year book 21 Henry 7, 32.

The attorney general said the application came too late; that the prisoner on his first coming to the bar, might have suggested his alienism and then prayed a venire *de medietate*. But he had had a list of the jurors three days, and had caused the jury here to be called over with a view to his challenges, and then suddenly changed about and demanded a new venire. Such means of delay were not to be allowed. And the substantial reason for allowing such challenge to the array, ceased when the prisoner had already had an opportunity of praying for a special venire. Besides there is no real injury to the prisoner. His vernacular language being the same as that of the jurors. Nor can there be any *medietates lingue*, when all speak one language. This privilege first grew in England in favor of foreign merchants, when the cause was between them and the minister of the staple, and before the mayor of the staple, on account of the difference of language which might prejudice the foreign merchant, as it was the policy of England to encourage such to come to the staple, but had it not been for the difference of language, it would not have been thought of Dyer, [folio 28, 44. 21 Henry 7. 32.]

The prisoner's counsel denied this, saying that it was, in use before the Norman conquest, only that it was to be

sued out by charter from the king. The statute 27 Edward 3. c. 8. first gave it to the merchants of the Staple, where one was alien, the other Denizen. The 28 Edward 3. c. 13. enlarged the former statute, and gave it to all manner of aliens, merchants or others. It was not because of the different language of the parties to the suit, but for the protection of their interest and rights, as appears strongly from a case referred to by Dyer, where it is laid down that if an alien be sued as administrator of an Englishman, the trial shall be by all English, and if an Englishman be sued as administrator of an alien, the jury shall be *de medietate*.

Besides aliens of different countries, and speaking different tongues, may be jurors *de medietate*, so that we should not be led astray by etymologies, or the speciousness of conjectures upon terms which never can be so guarded at all points, as to afford no subject of equivocation. It is plainer still from this, that it is a challenge taken for favor, with which the language has nothing to do.

The court said the matter had been well debated, and was curious in its nature; but the statute of the United States referred to the statute of the State, and that gave the trial by half aliens, to all aliens in all cases. Therefore it was useless to waste time in searching after antiquities. The prisoner indeed ought to have prayed this venire when he was first arraigned, but it being a case of life or death the motion was allowed, and a venire *de medietate* was awarded to the marshal returnable on the 21st inst.

On the day last mentioned the court met again. The marshal having returned the venire with the panel, and the same being called over, there appeared thirteen aliens and sixteen citizens. The Attorney General desired they might be called separately to the book, and sworn alternately, first a citizen and then an alien, until a full jury was sworn, and cited Lilly's abridgement, 157.

Principal challenges to the poll were made to several of the citizens. Several were set aside for defect of qualification, some being applicants for the benefit of the late insolvent act whose cases were yet depending, others having lately taken it, and who were not to be presumed worth 150 dollars, either in real or personal estate. One was above the age of sixty years, and another under twenty-one.

But the challenges taken to the aliens were more special, and chiefly for favor, which I think very worthy of particular note.

The first was an English manufacturer who had lately come over, and established a cotton manufactory, which had been burned down; the prisoner objected to him, because if he had been a loyal subject he would have staid to pay the taxes, or fight the battles of his country, and if he had been as he ought, his factory would not have been burned down in this country. The counsel conferring with his client in a low voice, put a stop to the matter, and the juror was challenged peremptorily.

The next was Mr Solomon of Amsterdam. According to the rights of his religion, being a Jew, he put on his hat on coming to the book, at which the prisoner shewed much displeasure, and said amongst other things, that in his town, (New-Castle) by the charter, no such persons dare to set their foot there, much less into a jury box to sit in judgment on one of his Majesty's officers. At these words many smiled, but the court gravely reprehended the prisoner, saying that such religious distinctions were banishd from our code, and sacrificed with other remnants of barbarity on the altar of reason. The juror was then peremptorily challenged.

The next was an Irish gentlemen, young, and of good figure, his name was Dennis O'Grady.

Clerk. Prisoner, look on the juror ; juror, look on the prisoner. When these words were spoken, and the juror's hand already on the book, they looked scornfully one upon the other.

Prisoner. Where does this genettlman come from ?

Juror. From the county of Tipperary, my name is Dennis O'Grady.

Prisoner. I challenge Mr. Dennis O'Grady from the county of Tipperary.

Juror. You speak like a gentleman, Captain, and if the honourable court will be satisfied with my security I will go bail for your appearance to-morrow morning dead or alive. All present were moved with sarprise, and some with laughter, to see the mistake into which this young gentleman had been led by the term used in quite a different sense from what he understood it; for he interpreted it into a challenge, that he should fight with the prisoner in a single combat, which was not what the prisoner intended, but only that he should not be on his jury to try him for his life or death, because of the ill favour he might bear him, judging from his name and his country. And they wondered at his great alaerity to accept of such defiance, seeing he had no personal quarrel to revenge.

The court told the juror of his mistake, and reproved his ardor, saying at the same time, that if he bore either favor or aversion to the prisoner, it was not hesiting he should be a juror to try him.

The juror bowed very respectfully to the court, and then spoke after this manner. If this honourable court think me capable of taking away unfairly the life of an enemy, it is mistaken, for that is not the way of the O'Grady's. And it makes me quite uneasy to see twelve upon one in a strange country. It is for the very reason, and because I have a holy and religious hatred to the

Oppressors of my country, that I would not be on the jury of this man. Those who have driven my persecuted countrymen from the home they prized so dearly, and those who follow them across the sea, and with a lawless gripe snatch them from the asylum of the persecuted, and doom them again to slavery, are, and shall be hateful to my sight. But even to avenge the wrongs of my country, I scorn to take an inglorious, and cowardly advantage of a degraded, and prostrate foe.

Prisoner. Is this gentlemen a hero of Vinegar Hill, or Scullabogue massaere ?

Juror. I know of but one massaere, and that is yet unatoned for. It was at Kildare, where your countrymen, and their traitorous adherents, prevailed on my credulous countrymen to lay down their arms, promising peace, and murdered them when defenceless, whom they dare not face with arms. I know where innocence has been deflowered, and the ruffian's hand has spared neither age nor sex. I know where the government has been carried on by the picket and the pitchcap; the walking gallows and the gibbet; the triangle and the knife. I know the terrible account of half hanging, dungeons and prison-ships, and horrors that hell could not exceed. But till that blessed time arrives that my arm can strike for noble vengeance, I scorn to imitate the treasons I abhor, and murder the defenceless; I cannot try this gentleman, I will not be his executioner. The prisoner's counsel with much address, seeing the romantic spirit of this juror, and judging of his character by his great animation, withdrew all objection, and prayed that he might be sworn, but the Attorney General desired he might stand aside.

To this the counsel objected, and they produced the statute by which the public prosecutor if he has any ground of challenge, is bound to shew it presently. The Attorney General desired the juror might be examined on the *voire*

dire: but it being a challenge for favor, it was necessary to appoint triors, for the court could not of itself decide upon the indifference of the juror, that being a matter of fact. Coke, Lit. 158. (b) n. 2.

Triors were sworn, and so was the juror on his *voire dire*, and he was examined whether he had made up his mind, as to the conviction or acquittal of the prisoner, in case he should be one on his jury.

The prisoner's counsel objected to the question, as tending to dishonor the juror himself, as he could not justly make up his mind, having heard no evidence. A witness who was a by-stander, was then sworn as to the juror's words, that he had said, "he would not be the executioner of the prisoner" but whether the conclusion was, that he would not in any case convict him, remained doubtful. It was left to the triors, and it was strange to hear the very counsel who had first challenged him, afterwards trusting to his romantic generosity, insist that he should be sworn. It was agreed that he was not an indifferent juror; first, because he hated the prisoner, as one of the supposed oppressors of his countrymen: and secondly, because of his excessive scruples of honor, that he would not take away his life where he could make no defence; and though there was bias against bias, yet that did not amount to such indifference as made him above all exception. And it being so found by the triors he was set aside.

The next was Obadiah Upwright, of the society of friends, commonly called quakers. When called to affirm, he stood forward, and upon his head he wore a broad hat, at which the prisoner expressed as much displeasure as he had before against the hat of Mr. Solomon of Amsterdam, and complained of such outrageous treatment of a christian gentleman; and used some contemptuous terms towards the juror.

Juror. Friend, have I ever harmed thee? or how has my hat offended thee.

Prisoner. Friend, if thou wert on my quarter deck, thou shouldst be clobbered for the sake of thy big hat.

Juror. I am thankful thou hast not thy evil desires.

Here the juror prayed of the court, to exempt him from serving on the jury, as he was not willing to judge of another's life or death.

The court looked into the statute, and found the words, "No quaker or reputed quaker, shall be compelled to serve as a juror upon the trial of any indictment for murder, or treason." And though this was manstealing, and neither treason nor murder, yet as it was a felony, and capital, it was thought fair to extend the construction of the act, which was in favour of the conscientious scruples of this virtuous class of the community.

The next was Mr. Henry Du Bois, a subject of the Emperor Napoleon, and native of Ronen in Normandy. He was challenged also for favor, and it was insisted that the French and English were not only engaged in war *ad internecionem*, but that they were natural enemies. This matter was stated as a ground of challenge, and demurred to by the Attorney General, who maintained that there could be no such thing as natural enemies among men, and particularly among christians, who were commanded to love one another. That nations were mostly at war from the ambition of princes, and not any natural quarrel, so that after whole years of devastation and bloodshed, when there is no more of men or money to be expended, peace is restored by intermarriage of the princes, and then they are all commanded to be friends, and love each other. For the prisoner it was said, that if that were the case generally, the present war between the two principal belligerents, tended to extirpation, or utter subjection. It was left to the triors, and found that he was not an indifferent juror.

The next was Mr. Ignatio De Silva, a Portuguese merchant. The prisoner's counsel seemed willing that he should be sworn without objection, but the prisoner himself insisted that he should not. He exclaimed against the laws, and the indignities he had received, and protested against being tried by papists of any country. He said he was a born protestant, and a loyal subject of King George of England, where a dog would as soon be seen on a jury as a papist.

The court gravely reprehended the prisoner, saying that his words sounded strange and without meaning, for what reason was there, that a man might not worship God in his own way, and yet be a good juror.

The Attorney General said he was aware how many and great prejudices still continued to hang upon the European, and particularly the nation of the prisoner, who often engaged in civil, as well as foreign wars upon the strength of them. But he could see that there was not so much folly in these objections as of design: for the object seemed to be to exhaust the panel, particularly the aliens, by frivolous challenges, and then to pray for a tales of by-standers. And it was not for nothing that every time the prisoner came to the bar, the same collection of foreign merchants, and editors of newspapers from Boston, Philadelphia, New-York, and Pasmaquoddy, crowded about him, and filled up the court.

The prisoner's counsel took fire at this, and there passed warm words on both sides, which I think, I am well excused in not setting down in this my report, as when such things fall out from the zeal and warmth of counsel, it is more for the honor and profit of the profession, that they should be forgotten than remembered.

The next juror-called to the book was Mr. Stanislaus Sobrouwousky, a native of Warsaw. The prisoner's counsel willing to set him aside, very artfully and ingeniously touched upon the massacre of Praga, and the

partition of Poland by the treaty of Pilnitz. The juror who was before of a mild and dejected aspect, like one who bore a load of sorrow in his breast, broke out into a rage, and before he could be quieted, related how the streets of Praga ran with the blood of helpless and defenceless old men, women, and children; that the pumps for many days drew it up out of the earth, and the gutters ran full of gore; that those who hid, were smoaked with wet straw burned in the cellars, till trying to escape by the door or windows, they were received on the bayonet's point. He was asked if he did not blame and hate the whole nation of the English, because their King was a party to that treaty. He answered that no honest man could do otherwise, particularly a Pole.

It was argued he could not be an indifferent juror in this case, where the prisoner's defence was the commission and authority of the very power which he held in detestation, because of that massacre, and he was set aside.

The next alien who was challenged for favor, was Mr. Rosenerantz, a merchant of Copenhagen. He had lost his wife and daughter by the conflagration of his house, and his only son was killed by the bursting of a shell, at the bombardment of that city by the English. It was proved that he said some time ago, in speaking of Fulton's Torpedoes, that he wished they could blow up every ship in the English navy, for that he knew of no greater scourge to humanity, and that he had often said that Captain Humphries should be hanged by the laws of war, for attacking the Chesapeake, that Captain Whitby deserved his fate, and that all kidnappers, blockaders, bombardiers, and other pirates should be hanged, without mercy. He was set aside, although allowed by all to be a just and upright man, and of very high estimation.

The Attorney General said if it were true, that the British were the enemies of all other nations as the indictment stated, *hostes humani generis*, and if it was allowed as an objection to the honest subjects or citizens of every nation, that they loved their own country, and bore resentment against their oppressors, the prisoner must be tried only by the abettors of wrong, or accomplices in crime.

The prisoner challenged so many of the aliens for cause, or peremptorily, that there was a defect in the panel for want of a sufficient number of aliens, and his counsel then prayed a tales who should be all aliens. This was at first opposed, as the tales should follow the nature of the venire; but upon reference to the Case of *sir Julius Cæsar vs. Philip Corsini, Cro. Eliz. 305* it was ruled otherwise.

The Attorney General now prayed, that the marshal should be instructed to be careful in returning the aliens, not to take such as he might find immediately about the prisoner, but rather to go to the outermost part, where the more modest kind of persons were to be found. Upon this being said, a number went out, and the crowd that was before about the prisoner disappeared, and some of the same, but indeed not many, were afterwards returned upon the panel.

The first of these new returned aliens was a Mr. Sly. He was asked of what country and calling he was, he said he was from Glasgow, and acted as an agent for a house in London. There was no objection to him on the part of the prisoner, but he was challenged by the attorney general. He was asked for what house in London he was concerned, and answered evasively. He was asked if it was a house in Whitehall, meaning perhaps that he might be employed by the treasury, he declined to answer, and some witnesses were called, but the counsel thought fit to admit the challenge, as they said, to save waste of time.

Another juror was challenged by the public prosecutor, and it was proved that he was an editor of a newspaper called *The Spirit of Washington*, and under that title had written many things in favor of the rights of impressment by the British navy, that he had lately mentioned that if the prisoner was hanged, it would be murder in the jury and all concerned, and they would suffer for it. He was of course set aside.

In this manner two more were challenged, and when they were all nearly gone through, the prisoner took peremptory challenges to those jurors already sworn, to make up his number of twenty peremptory challenges. It was doubted at first if he could challenge those already sworn, but upon looking into the year books, 32 Hen. 6, 26 (b) 14 Hen. 7, 19 (a) it was found to be good law. And it was necessary now to award another tales, which was done. And after divers objections and moot points raised on one side and the other a jury was sworn.

I have been so far minute and particuar touching those niceties in challenging of jurors, the like whereof no man living had ever witnessed, and a knowledge whereof may be of profit to the profession, and be called up after the lapse of centuries, as were the authorities cited, of which though good law here at this day, many had been suffered to slumber with the dead.

The jury being at length sworn, empanelled, and informed of the indictment, for which and other forms see the preceding trial. The attorney general opened the evidence. He began by a picture of the happiness of this nation, in that perfect freedom which had so long passed for the vision of the poet or philosopher, and had been treated as a wild impracticable theory. He then adverted to the desolating ravages of despotism, war and rapine throughout the nations of Europe. He shewed how religiously this nation had observed its neutrality towards the

great belligerents whose quarrels disturb the universe, and with what scrupulous justice, ever since our independence we had acted towards other nations. How many ancient crimes, how many recent transgressions had been pardoned to the British and their adherents. How many injuries, besides, had been concealed that our shame might not be revealed too fully. All this has only served to raise the pride and invite the contempt of that power, which, though verging rapidly to its own dissolution, is yet a cruel affliction to the human race, and, in its last agonies seizes with delirious gripe, whatever has the bad fortune to be within its reach: whose acts are all convulsive, violent and spasmodic; and whose maniae and haggard vision can no longer discern the light of reason, of safety, or of honor. Our government has long thought it prudent to elude its desperate fury, and the great distance that lies between us, has favoured, in some degree, that policy: we have shut ourselves up from all commerce on the seas: again we have ventured abroad: our ships with their merchandize have been seized and confiscated. We have in vain broken off all intercourse with this frantic power: it has pursued us to our own peaceful coasts, attacked our ships of war, insulted our national flag, fired upon our innocent merchantmen, killed our coasting seamen, kidnapped our citizens in sight of their native shores, and doomed them to slavery, on board these very ships which plunder their fellow citizens: thus forcing these unhappy men, to commit acts that would be high treason, if they were consenting to them.

The attorney general then painted in affecting terms the cruelty and horrors which take place on board those floating dungeons, less terrible to their enemies than to the wretches within them, none of whom have any desire so near their heart, as to escape from such terrible coercion.

The crime with which the prisoner stands charged, is called by the law of nations, *plagii crimen* or manstealing. The crime of murder is less cruel.

This sort of piracy often ends in death, but is sure to inflict torture. It is altogether unparalleled amongst nations pretending to civilization, and has been considered deserving of death, and to warrant the summary execution of the offender, without even the form of a trial. And great men have held the observance of an oath unnecessary, towards those who stand marked out as enemies of all the human race, by such atrocities. It is in vain for those pirates to glorify themselves in their numbers and power. They are in that respect indeed, so much the more terrible, but nothing the more honest. Were it known and considered how dearly their *glories* are paid for, by the sighs and groans of humanity, they would look grim as death.

The attorney general then stated, that it was impossible for us to go to war with them upon the sea, without following them also, to that destruction to which they are blindly hastening. We have nothing then to do but to punish with firmness, the criminals that fall into our hands, that the example may be of use to deter others from such practices. But what is more important, is to convince our citizens that they are not abandoned by a government, which exists only for their protection, nor by their magistrates, whose duty it is to do them justice even at the peril of their heart's blood. Whatever be the result, it is necessary that an example be made, lest long acquiescence and impunity grow into law, and the right of trafficking with the liberties of our citizens, and of taking them for slaves and soldiers, be claimed hereafter as a right by concession.

Gentlemen, added the Attorney General, it calls the blush of shame upon my cheek, when I think into what

degradation we Americans have already fallen. It is time, full time, to assert our rights, and our honor in every possible manner, and to proclaim from the house-tops, that we will no longer tamely endure such reiterated indignities. It is time to teach this proud and insolent offender, and by his example, all his fellows, that the citizens whose rights they have trampled upon, are every way their betters; that while they strut in the trappings of a despotic master, the American citizen knows no master, and is equal to their King, and above the degree of any subject, or of any nobleman.

He then stated what the witnesses were to prove, but that will appear in my report of their testimony, which I took down very exactly.

EVIDENCE FOR THE PROSECUTION.

1st. *Witness Sworn*

Nehemiah Lockman. This witness stated that he was the son of a farmer, of Wyndham county in Connecticut. His father had four sons, and three daughters. His elder brother went a long time ago to settle in the state of Ohio, and he and his brother Ebenezer followed the sea. His younger brother Nathaniel remained with his father, and died during the time witness was detained in the British service. Witness married in Boston, and had two children before he was impressed. He had shipped on board the *America* with Captain Speneer, on a voyage to Liverpool, and back to New-York. Captain Speneer was a relation of witnesses' wife. On the homeward bound passage, the very day they struck soundings, they were brought to by the *Vixen* sloop of war, and boarded by a Lieutenant and a Midshipman. The crew were mustered upon deck, and witness, together with two others, were ordered into the man of war's boat.

Witness produced his protection, and shewed it to the Lieutenant, who took it from him and tore it in pieces, and let the pieces fly over to leeward. Witness was then forced on board; and the next day was stationed in the main top, and compelled to do duty. He was three times flogged severely, and being desired to strip and shew his back, it was opposed by the prisoner's counsel very vehemently. They said it was done to prejudice the jury against the prisoner, without conducing any thing to the proof, the issue which was the impressment, which they chose to call *manstealing*.

The Court. This is not an offence which the municipal law has defined. There is no technical description of it. It is to be decided after the law of nations, which is the law of nature or natural justice, tempered by reason and humanity. It is therefore proper to let the extent of the injury be shewn in evidence that the truth may be known. The intention of kidnapping our citizen will be better discovered by shewing what was afterwards practised upon him; and the intention is always material in criminal cases, most of all in those which are least defined. It was every way proper, that any cruelty committed upon Mr. Lockman should be exposed.

The witness thereupon stripped off his garments, and shewed to the jury how his body had been miserably lacerated with the scourge: which when the spectators beheld, there was, as if by one consent, a deep and angry groan; and I laying down my pen looked around and observed the gestures, and countenances of the citizens, who needed no authorities of law to teach them how they should feel, and behave at the sight of this, their fellow citizen's mangled body. Some clinched their fists, as if they already grappled with an enemy; some made involuntary motions as though they were about to draw

their swords; and all of them seemed like angry soldiers impatient for death or victory. But these things I am not able to picture, having made it more my study to gather up curious points of learning than to describe matters of fact. And I do moreover believe, that no poet whatsoever, could describe the thing to the life, so as to come near to what it was: so picturesque, and so terrible an anger burned in the eye of every citizen.

I except some few, who were humbled, fearful, and abashed, these retired and hid themselves from the sight of the beholders. But I remarked with much pleasure, that no man suffered his passion to hurry him into any violent act, or imprecation: all maintained that respect to themselves, to their own magistrates and judges, that was becoming a free and great people; vastly different from what I have seen in foreign countries, where soldiers are brought to keep down the tumultuous anger of the populace.

Witness then put on his clothes and continued to give testimony. He had been three times severely flogged: once for leaving the boat which was in Trinidad; once because he murmured against firing upon an American ship, and that he for some time refused so to do; the third time was for resenting some insulting expressions of the boatswain's mate touching yankees, by which he was unfortunately led to lift his hand, and was punished with great severity by flogging and irons. Witness said moreover that he had been five years and seven months on board, and when he left the ship, she was indebted to him in the whole of his wages, except some purser's slops and tobacco, and other very light advances. But what moved most pity was, when the witness stated, that on his return home, he found that his wife was dead, and his children in the alms house, and upon this he sobbed and shed abundance of tears, and could proceed no farther.

Captain Jonathan Spencer was called and sworn, and testified that he was master of the said ship which was called the *America*, whereupon he shipped the former witness by articles for a voyage from Boston to Liverpool, and back to New-York, and that owing to rough weather he had met with misfortunes, and lost one man overboard; that he was rather short-handed before the impressment, and was the more distressed, as he had on board a very valuable cargo, consisting of English merchandize. He stated that the officers who boarded him, took away two others besides the last witness. He then took an old man and a boy with him in his own boat, leaving only a black cook and one man on board, and followed the man of war's boat on board, where he saw and spoke to the prisoner who acted as the Captain, and was so called by the officers. He entreated Captain Crimp in the humblest manner to let him have his men back again, representing his dangerous situation in making the land, and the *America* was at present a little down by the head, and not easy to work, and had only got out of the English port by backing and filling: that she did not feel the helm, and several times trailed, and was near striking in the mud. The Captain, (the prisoner at the bar) bid the witness not to talk through his nose, said he wanted men, and not long talkers. He then ordered the ship's sails to be filled, and gave the witness his choice to go or stay. Witness in vain entreated that two of his hands, and afterwards one might be returned. This was denied, and he was roughly, and contemptuously ordered into his own boat, and east off with some jeers and scoffs, and with great difficulty afterwards got into his port.

The prosecutor's testimony here ended, and the prisoner's counsel opened their case, and said they would give no other evidence than the commission of captain Crimp, and his instructions.

They accordingly produced the commission, which was admitted. But the attorney general desired to look upon the instructions before he admitted them to be read. Some debate arose thereupon, and the prisoner stretching forth his hand, took the same from the counsel, and for what reason I cannot pretend to say, tore it in pieces.

Mr. Formedon then rose to observe upon the evidence, on behalf of the prisoner, and delivered himself in a speech of five hours, wherein he evinced profound knowledge of the antiquities of law and history, and great research into the mines and occult treasures of precious and profitable doctrine. All that knew the value of such science, were exquisitely rejoiced, but it was like pearls cast before swine, to the unlearned laity, and to the jury, half of whom were foreigners, and few of whom had ever such matters treated of before.

Much of this discourse went to shew that the acts of the prisoner were not by the law of nations, to be taken as acts of piracy. But for the present, I pass over those arguments, as they were afterwards repeated with little variation, on motion to arrest the judgment, and will be found in the sequel of my report. But what relates to the ancient sovereignty and dominion of the kings of England over the sea, acknowledged by all princes and people, so now to be past all question, this it is proper I should now set down, with somewhat as to the manner of the delivery.

The learned counsel when he rose, stood some minutes in face of the court in a grave and thoughtful posture, as reverend preachers are wont to do, and then said lowly and slowly, "may it please your honors," He then spit out

of his mouth some tobacco juice, which to any other than so approved an orator, I should have said conferred little grace or dignity. And then turning to the jury, he said with due solemnity, "and you gentlemen of the jury." After a solemn and lengthened pause, he raised up his eyes and countenance, as from under a great weight of meditation, and proceeded to discourse of the law of nations, for the space of three hours; but that part of his speech or the substance of it, will be found in the sequel.

When he came to the ancient prerogative of the English navy, and the admiralty powers over all the seas, he clothed himself with terms formerly used by the sage Cambden, and the illustrious sir Edward Coke, to this effect.*

It appears from the most ancient records and rolls, that the admiralty is sometimes called *admiralitas* and sometimes *admiralitus*, and sometimes by other names, as *admirallius capitaneus*, or *custos maris*, or *marinæ*, or *flotæ navium*. The office is called admiral indifferently, both in English and French: derived of *amir*, *i. e. præfectus* and *αλιος* *i. e. marinus*, *præfectus marinus admirallius*, *admirallus*, *admiralli curia res maritimas tractat*. To conclude: the king of England's navy doth excel the shipping of all other foreign kings and princes; for if you respect beautiful stateliness or stately beauty, they are so many large and spacious, kingly and princely palaces. If you regard strength and defence, they are so many moving impregnable castles, and barbicans, and were deemed of old, the walls of the realm. When the English navy is among the ships of other nations, it is like lions into *pecora campi*, like Falcons among Pheasants, and Partridges, and other timorous fowls of the air, *salia volatilia timida cæli*) like the Eagle in a Dove cote. Besides,

* See 4 Just. 146. see also, Ley Marine, and Ley de Mariners.

adds my Lord Coke, no part of the world hath such timber for building and repairing ships as our King hath.

The counsel then cited a notable record from the tower of London, of the 21st. year of King Edward I. which he read in the Norman dialect, beginning thus: *Edmund de Botertort amiral de la dit mer deputy per le Roy d'Engliture et tous les autres amirals, par mesme celui Roy d'Engliture et ces ancestres jades Roys d'Engliture eussent est en paisible possession de la dit souveraigne.* Having no characters of stenography by which I could take down this, I was left behind; but the roll is in the Tower of Loudon, and the substance was thus. That in the wars, between Phillip King of France and Guy Earl of Flanders, Reginerus Grimbaldus Admiral of France, had spoiled merchants of divers nations, and the deputies of the prelates, nobility and commonalty of England, Genoa, Catalonia, Spain, Holland, Friesland and Norway, declare, that the King of England by reason of his realm had, time out of mind, the sovereign dominion of the sea, with all manner of eonnsanee high and low.

He appealed also to the black book of the admiralty, stiled, *Vetusti tribunalis maritimi commentarii*, in which Selden in his notes upon Fortescue, c. 32. says there are things worthy of observation.

And he shewed that the laws which King Richard I. made at the isle of Oleron, in returning from his crusade, are still in force.

He cited also the Inquisition of Queensborough, which Malines certifies to have seen in the Tower of London, and which was taken in 1376, before William Neville admiral of the north, Phillip Courtney admiral of the west, and Lord Latimer admiral of the cinque ports.

And he read from Zouch,* to shew, that the Admirals

* Jurisd. p. 142.

of the Kings of England have the power of *punishing without bounds.*

He affirmed that no person endowed with reason could read Selden and doubt that the sea was entirely subject to the imperial diadem of the Kings of Great Britain, and that Kings would not be reasoned out of their rights and regalities; particularly King George, who asserted his rights by the blood of so many thousands.

Besides, that these things are acknowledged by the enlightened and learned, the most barbarous nations see by the light of nature that there is a dominion of and in the sea. For why else do the greater fish swallow up the lesser. It is the law ordained of God, as the illustrious author observes, and to give laws, the life of execution requires nothing but superior force.

It is said, the seas are the highways of nations, and as such, common to all and equally free to all. But this is no reason why they should not be protected. For what does Aristotle say? That to maritime states the sea is the territory, because from it they take sustenance: and for the same reason, Venice as long as she had force enough to maintain her *commercial and maritime rights*, was called queen of the sea.

Is it not a fallacy and a defect in reason, to maintain that the land should be governed and not the sea? Do not those deceive themselves by gross equivocations, who tell you that the great vastity of the sea renders it impossible to be governed? Are there not great vastities in this new world, and are not they to be ruled and protected? Did not God give dominion over the sea as well as over the land? If it be said that the sea is like the air an unstable element, and that when we serve ourselves of one part, the other escapes out of our hands: then we ask, are not rivers subject to princes and potentates, and does not the same happen to them? The waters of the Adriatic,

of St. George's channel or of the Chesapeake, may run in and run out, but they are still the same seas; so the Tiber, the Po, the Rhine, the Thames, the Ohio, the Mississippi are the same rivers they were a thousand years ago.

It is no good policy then to reason with kings and attempt to overturn their ancient usages, which are of divine dispensation, and therefore though they be errors and abuses, ought to be tolerated and respected: because as Grotius writes,* Though *people* may relinquish such punctilios for the sake of peace or emolument, yet *princes* must not suffer their authority to be weakened, nor their honour to be impaired. And the gospel precepts are fittest for weak states who more resemble individuals. They should render the coat and the cloak also, but great monarchs who bear the sword will not bear it in vain.

The same power and sovereignty that the Kings of England have upon the sea, time out of mind, the same was exercised by great nations of antiquity. If Queen Elizabeth interdicted the French King from building more ships without her permission, so did the Carthaginians forbid the Romans to equip any fleets, and Antiochus to build no more than twelve. The Athenians prohibited the Medians, and prescribed to the Lacedaemonians how they should sail.

The learned counsel having established this right of dominion over the sea, proceeded to the Gulf of Venice, and shewed upon the authority of *Baptista Nani, vol. 2, fol. 446, &c.* that it is nothing but a large bay, or inlet of the sea, which enters in between two lands, and severs them for many miles in continuance, and in the end, receives a stop or passage by an opposite shore. It

* *De Antiq. Rep. in præfat.*

it is called the Gulf of Venice, from the ancient city situated upon some broken lands near the bottom thereof; and the Adriatic, from the city of Adria, not far from the former.

The counsel proceeded to state the length and breadth of this gulf, and how the southwest shore was bounded by the provinces of Puglia and Abbruzzo, and unfolded to the jury a large and ancient map, that they might see he was not deceiving them, when it was perceived that three of them were in a sound sleep. Such is the effect of deep learning, and weighty discussion, upon those whose minds are not disciplined, and exercised to study.

The counsel requested of the court to make a note of this circumstance, and begged all present to keep it in mind, as it might concern the life of the prisoner; and some difficulty arose in what manner the three jurors were to be awakened, the thing being without precedent. And he further intimated that it was an irregularity of which he would have the advantage, if it should be necessary. Some silence ensued, and upon the voice of the speaker ceasing, two of the jurors spontaneously awoke. These finding that they had unintentionally incurred the displeasure of the court, excused themselves because of the latin that was spoken to them, which was the cause of that heaviness. But they promised that if the rest should be spoken to them in English, and, if it were possible, something more brief and to the point, they would do their best endeavours to bear up, and sleep no more. But as to that one who still continued sleeping, a fine was set upon him, and this the crier was ordered to proclaim so loud that he might hear it. This he did in a loud voice, calling upon him by his name of Peter Headfast, so that he started suddenly, and in a fright from out of his dreams, and cried out in a disturbed accent, fire! fire! Those without the bar not knowing the cause,

but hearing the fearful cry, repeated it, and the whole crowd rushed down the stairs, and trampled upon each other, the weakest, as happens in such cases, getting the worst. The cry of fire was again repeated through the streets: the greatest consternation prevailed, and the bells of the churches were set a ringing. It was said that this trivial accident, had cost four lives; but I have examined the bills of mortality, and they do not confirm the story.

When order was restored, the counsel resumed his argument, and cited Palatius, to shew how jealous the Duke of Venice had been of the sea, to which he was wedded. For when Mary the sister of the King of Spain, had married Ferdinand King of Hungary, he would not allow her to go in the Spanish navy, from Naples to Trieste: so that though the Venitians were then infected with the plague, she was obliged to ask it as if it were a favor to be transported in their gallies, according to the usage of the Gulf: but as soon as she submitted, Antonio Pisano, conveyed her with great state and ceremony.

The same, and much more ancient prerogatives, belong to the British Kings in right of their island. For Cæsar preferred their ships before those of the Romans; and Domitian, and Agricola, claimed the rights of Britain to the seas, and sailed round their newly achieved conquest with terror to the neighbouring nations.

Then the counsel proposed to shew that the impressment of seamen was a lawful exercise of that sovereignty, particularly when the necessity fortified the paramount right. It is argued that the sea should be in common, because by nature all things were once in common, and so, it is not against nature that they should be so again. Then steps in necessity, which is the first law of nature, and says, this I take, and occupy for my present and future

need, and being able to maintain it, I will keep it. So Xenophon in the expedition of Cyrus, counselled the Greeks to seize the ships, and mariners of all nations; only to provide food and wages for the mariners. The right of discipline follows of course. And as Roughton, *de off. ad. act.* 10. lays it down, that if those impressed for the King's service break their arrest, they are liable to be punished by the King, or his Admiral. Then if Lockman was not unduly impressed, so neither was he flogged without cause for leaving the boat at Trinidad.

Mr. Silvertongue followed Mr. Formedon in a speech of about three hours, which was indeed a very pretty and and poetical effusion. And he evinced the most singular dexterity, in interweaving into his discourse many shining passages from British Dramatists and other poets, epic as well as lyric, and particularly from the works of that sweet poet Mr. William Shakspeare, so that they seemed to be all his own conceits and inventions, and so were taken to be, by the majority of the by-standers, and chiefly by the aliens of the jury. Nor did I perceive the finesse of the ingenious counsel till afterwards, and since I came to write off from my notes, when I happened by good fortune to light on a pretty collection of passages, entitled *Elegant Extracts*: of excellent invention, and quite modern: by which any young gentleman of good parts and moderate judgment, may compose a florid and fanciful oration, and yet not diminish his own stock of invention by the expence of a single word. I nevertheless give much credit to the sufficiency of the counsel, and by no means would detract from his merited applause, and well earned fame, nor disparage the orator because of this plagiarism. For as no man invents the words he uses, and phrases are but the skilful combination and connexion of words, why should it not be as lawful to borrow phrases, as the words of which they are composed. Is it

more mean to borrow a dollar which is made of a hundred several cents, than to borrow one hundred several cents to make up one dollar.

MR. SILVERTONGUE'S SPEECH.

MAY IT PLEASE THE COURT,

Gentlemen of the jury,

When the fountains of the great deep were broken up,
and the windows of heaven opened, and the ocean swal-
lowed up the land, and the feet of the Dove could find
no resting place,

“ And o'er the high pil'd hills of fractur'd earth,
Wild dash'd the waves in undulation vast,
'Till from the centre to the streaming clouds,
A shoreless ocean tumbled round the globe.”

When

“ * * * * * the one just man alive,
Did build a wonderous ark as thou beholdest,
To save himself and household, from amidst
A world devoted to universal waste.”

Let me ask you who was then sovereign of the sea? I anticipate your answer. It was Noah. Then a question, gentlemen of the jury, and an all important question arises. Why was he so. This may be said to be a question of law, and for the determination of the court. But gentlemen, in a great national concern of this kind, and in a criminal, case the jury have a right; yes it is their constitutional right and privilege to judge, if they think fit to do it, both of law and fact. I speak with humble deference to the court, for whom I entertain a most profound respect. Why then was Noah sovereign of the “vasty deep?” First, because he was the only just man: and secondly, because there was no other to cope with him.

For encumbered as he was, with his deck load and hen coops, had he met with another ark, the chance of war had been doubtful. All force, gentlemen, is relative, and power is comparative. If Noah with one ship, one port-hole, and *no* gun, could rule the sea; for that memorable year when all was sea. What shall we say of the British sovereign with his thousand ships and twenty thousand guns, who speaks his "winged words" through mouths of fire. Whose iron parts of speech weigh from six, to two and forty pounds.

Of the voyage of Noah, it is enough to say that it was long and tedious, being before the use of the compass, and the wonderful invention of the magnetic pole. Lonely and tedious must have been the wanderings of this ark without log or log-book, but

"There is a tide in the affairs of man,
Which taken at the flood, leads on to fortune."

The counsel here gave a pretty history of the voyage of the patriach, from his first getting afloat in China, till he was stranded on a mountain in Armenia, and proved the draft of water of the ark, which was 22 feet: for she went aground in fifteen cubits water.

"At last from Aries rolls the bounteous sun,
And the bright bull receives him."

"And sea born gales their gelid wings expand,
To winnow fragrance o'er the smiling land."

"'Twas on the morn of sweet May day,
When nature painted all things gay."

When I say that nature painted all things gay, let me not be understood to say the ark, for she was

"Pitched both within and without."

Then it was, gentlemen of the jury, that this primæval
navigator first time, took out his dead lights,

“And thought it pleasant through the loop holes of retreat,
To peep at such a world.”

For

“He look’d and saw the ark hull on the flood,
Which now abated : for the clouds were fled,
Driven by a keen north wind, that blowing dry,
Wrinkled the face of deluge, as decay’d,
And the clear sun on his wide watery glass
Gaz’d hot : and of the fresh wave largely drew.”

This patriareh gentleman was then advanced in life,
being already in his five hundredth year. No wonder
gentlemen, no wonder then indeed, if he grew weary of
the sea, and if he

“Would give a hundred aeres of green wave, for half
an aere of brown firze.”

And this brings me very naturally to the second epoch,
the reign of Neptune. And now let us pause a moment
and reflect on the wonderful works of nature. And who
is Neptune ? A god it will be said. Be it so gentlemen,
be it that he was a Pagan god. I say he was a mere wa-
tery god. But did he ever see a gun fired ? What knew
he of the

“Pride, pomp and eircumstance of glorious war.”

He sailed, if traditions dont deceeive me, in a shell. A
shell ! Gentlemen of the jury, what think you of that.
A sovereign in a shell no bigger than a fish-ear !!! Did
he take the city of Troy ?

“And if he did I care not.”

You have heard of the seige of 'Troy, gentlemen. Or you have not heard of it. But I will tell you of the seige of Troy.

“ I will relate.”

You therefore give due audience and attend.

“ Troy nods on high and totters to its base.”

Does it indeed? And what of that? If it cost this god ten years, with all his Greeks invulnerable, as well as vulnerable, to take this city, compare him with George, who, without stirring from his elbow chair, set fire to Copenhagen in a day: the Christian king thus doing as much mischief in one day as the Pagan God did in ten years; for

“ Like Leviathans afloat,
Lay the bulwarks on the brine,
And each gun
From its adamant lips,
Spread a death-shade round the ships,
Like a hurricane eclipse
Of the sun.”

Then were scattered

“ Fire brands, arrows, and death and “deep damnation.”

In vain did this Neptune boast,

“ The realms of the ocean and fields of air
Are mine. * * * * *
* * * * * by fatal lot to me,
The liquid empire fell, and trident of the sea.”

And why was Copenhagen set on fire, gentlemen of the jury? Not to destroy, but to preserve.

For

“Out spoke the victor then,
As he hailed them o’er the wave,
We are brothers, we are men
We conquer but to save.”

For

“The quality of mercy is not strained,
It droppeth like the gentle rain from heaven
Upon the place beneath. It is twice blessed.
It blesseth him that gives and him that takes.
’Tis mightiest in the mightiest, and becomes
The sceptered monarch better than his crown.”

Such is the the legitimate sovereign of the ocean, whose captain you are called upon to pronounce a pirate and a felon. And to take from him not only his life, but what is dearer than life, his honor.

“Who steals my purse, steals trash.
’Twas his, ’tis mine, and may be slave to thousands,
But he who filches from me my good name,
Robs me of that which not enricheth him,
But makes me poor indeed.”

If you destroy the life of this captain, you make war upon the person of his sovereign. And as well might you lop from great King George, one of his fingers or his toes. Alexander conquered Asia, and the Indies, not by his own arm, but by Hephestion, Parmenio, and Clitus. Cæsar conquered Spain, and many other countries, by his Lieutenants. Augustus was deified through the valor of Agrippa. Justinian triumphed over the Persians, and destroyed the Goths, and Vandals, by the aid of Bellisarius, and Narcece; and great George conquers not by his own skill or valor. so much as by his captains. War then must be the consequence of an unhallowed verdict

against the captain of the Lord's anointed ; which is neither more or less than to

“ Cry havoc, and let slip the dogs of war.”

And for what embark in the “dizzy din of war ?” for

“ An airy nothing :”

“ An empty bubble.”

Because forsooth, Mr. Loekman was transported from one ship into another : and instead of going home to kiss his wife and children, was honored with the full participation of the glories of the British flag, and made a protector of the

“ *Maritime and commercial rights*”

of all the universe.

Have you marked, gentleman of the jury, how the fowls of the air, which live upon the troubled deep, repair at seasons to their native cliffs, to bring forth new broods, and perpetuate their kind. Not so with the hardy British tars. They spend their whole lives upon the wave, either cruising, bombarding, or blockading, and

“ 'Biding the pelting of the pitiless storm.”

They do not go ashore to breed in feathered nests : but they perish by hardship, accident and war. Did the Romans impress women of the Sabines, to raise up men ? And shall they not take men as they find them ready made ? Let the counsel for the prosecution shew any precedent of a Roman tried and convicted as a manstealer in a Sabine court, for the impressment of a Sabine wife, and I will bow to such authority. Yes gentlemen of the jury : I put it to that test ; let him produce one example ; call upon him solemnly before you, gentlemen of the

jury, to shew report or record of such a case; and if he will not, it is because he cannot. And with all his profound learning and research, if he cannot do it, it is because there is none such. Need I say more? Be not then led astray by idle, declamation addressed to your imaginations, and intended to play upon your passions, about widows, and stripes, and orphans, and liberty. I also, gentlemen, am a devout adorer of

“ The mountain nymph, sweet liberty,
 _____but dear as freedom is,
 And in my soul’s just estimation prized
 Above all price.”

Yet let me perish but in Cato’s judgment.

“ One day, one hour, of virtuous liberty
 Is worth a whole eternity of bondage.”

Yet let me ask you gentlemen, are we prepared for

“ —hardy deeds of broils and battles?”

If we are not, then I would ask

“ Is this a time that every nice offence should bear its comment?”

It is an easy matter, let me tell you gentlemen, to

“ Cry courage, to the field, and then to talk
 Of sallies and retires; of trenches, tents,
 Of pallisadoes, fortins, parapets,
 Of basalisks, of cannon, eulverins,
 Of prisoners ransom, and of soldiers slain,
 And all the current of a heady fight.”

But where are our soldiers? or if we have any, should we not first

“ Teach their young ideas how to shoot.!”

Where are our arsenals, magazines, and treasury? Let
us see into this, before we

“—— Set our fortunes on a single eart.”

Let us rather

“ Cast one longing, lingering look behind.”

Let us pause upon the

“ Giddy verge,”

“————— and shrink aghast,
Baek from the bending preeipice.”

“ This is the day, the great and importaut day :”

“ To be or not to be? that is the question.
Whether it is more noble in the mind, to bear
The slings and arrows of outrageous fortune,
Or to take arms,”

And

“ Seek the bubble reputation,
Even in the canuon’s mouth.”

“ Angels, and ministers of graee defend us.”

Gentlemen of the jury, I doubt not the counsel who will
next address you, is an honourable man ;

“ So are they all, all honourable men.”

But “ Ambition is a grievous fault,”

A phantom

“ That only flies,”

“ To lure you to your doom.”

Better to bear the ills we have,
Than fly to others that we know not of.”

Better, yea far better gentlemen of the jury ;

“ To sit like patience on a monument
Smiling at grief ;”

Than

“ _____to become
A fixed figure for the hand of scorn,
To point her slow unmoving finger at.”

The ingenious counsel then drew a moving picture of French tyranny, past, present, and to come, to which he said we must submit,

“ And drag at each remove, a lengthening chain.”

“ If the meteor flag of England,”

Should cease

“ To sweep through the deep ;”

I conjure you therefore, both citizens and aliens, by your altars and firesides ; by your fathers and your mothers ; by those long dead, and those yet unborn, to find such a verdict as may give peace to this country, and to your consciences ; and if you have even a doubt of the right of an English captain to impress an American seaman. Yet, lay to your hearts the counsel of

“ That great good man,”

Sir Matthew Hale, and

“ Lean to the side of mercy,”

I beseech you.

“ Wrest once the laws to your authority,
To do a great good, do a little wrong.”

For believe me when I say it to you gentlemen of the jury,

“No ceremony that to great ones ’longs,
 Not the King’s crown, nor the deputed sword,
 The marshal’s truncheon, nor the judge’s robe,
 Become them with one half so good a grace
 As mercy does.”

Put yourselves a moment in the prisoner’s place,

“If he had been as you, and you as he,
 You would have slipp’d like him.

Then the counsel sat down much exhausted. The whole speech was delivered with rapturous vehemence, and goodly and animated gesture. And as in projectiles, it is demonstrated by philosophers, that force is compounded of weight and velocity; so between these two discourses of Mr. Formedon and Mr. Silvertongue, the one weighty and the other voluble, it is difficult to say which bore the palm.

Non meum est tantas componere lites.

The District Attorney said that he rose to discharge an awful duty, to vindicate an insulted nation, and call forth the vengeance of the law upon a delinquent, who had perpetrated an inhuman crime, and with astonishing effrontery, had come forward on his trial, to justify it by the plea of necessity: and what was more insolent still of authority? to what abject degradation must this nation be sunk, when such effrontery can find an advocate. What? after piratically and feloniously carrying off the free citizen of an independent and sovereign nation, an honest and industrious man, a portion of his country’s most valuable treasure, to fling a scornful defiance in the teeth of our law, and produce in the face of a tribunal of an offended nation, a commission to commit the crime. And who is he that can give a commission to violate the rights of man-

kind, and the plain precepts of religion and justice? To what humiliation must we bow our souls, if we admit of such authority. Such commission could only issue from a maniac's hand, or from the prince of darkness. By the first law of nature, by the obvious right of self defence and preservation, the prosecutor was well entitled to dash the brains out of the hardened ruffian, that robbed him of his liberty; and that too, in the moment when his heart beat high with anxious, hope, after a long absence, to enjoy a short but sweet repose in the bosom of a wife, whom he has now lost forever. At the instant when he anticipated the embraces of his infants, now driven to beggary; and in sight of his beloved country, to be dragged by the lawless buccaneer to slavery and misery; to be flogged and chained by the brutal commands of stern and merciless freebooters; to be forced into aggressions upon his own countrymen, and be told that this was done by force of a commission.

A commission! And under the hand of a king, who at the same instant, had delegated by his commissions another of his minions to treat with our government, of *peace and amity*, whilst his minister with his threefold instructions, was amusing our national councils with treacherous, equivocating, insulting propositions, and profiting by its mild indulgence, to scatter distrust and divisions through all parts of our extended territory; and forming alliances with every desperate traitor.

By the laws of nations this offender is so decidedly of that description, which is termed pirate, or enemy of the human race, that he is not entitled to any form of trial. Yet mark with what lenity, with what tenderness, he has been indulged; so mild and so benignant are the sacred institutions of that community, whose rights he has rudely trampled under foot. Delays have been granted him by his merciful judges, upon pretences void of all

reason or probability. Wild and capricious objections have been listened to, and patiently refuted. He has had almost the selection of his own jury; and if amongst you there should be one who from prepossession, influence or bribe, could abet his guilt, he may retire from this bar, with triumphant impunity, and boast to his often deluded countrymen, and his ignorant masters, that his threats had prevailed, and that we were too pusillanimous to punish him. For cruelty and generosity are strangers that dwell not together in one breast: and the hardened malefactor can better fathom the depth of his own guilt, than the magnanimity that would pardon it. It was therefore that we were threatened with the vengeance of his masters and his accomplices. It was so that Cæsar was threatened by the pirates: but Cæsar despised their threats, and punished them. If war should be the consequence of his conviction, better soon than late, for there is less terror in the enmity of his government, than in its treacherous professions. Let them come forth arrayed in the full majesty of their infernal terrors. Let them come forth with their ten thousand mouths of fire. They will meet with millions of hearts and hands, and once more be taught that victory is still true to the standard of liberty and justice. The first shot they fire against one of our cities, shall be the memorable signal of their doom. For then the spirit of the mighty shall rise from their sleep of death, and animate their slumbering sons. Though Washington be dead; though Montgomery be fallen, and Green and Gates be no more, yet their voice shall break the silence of the tomb, and their souls shall mingle with the fires of death.

Away then at once, and forever with their perfidious embassies, their bitter intrigues, and pettifogging artifices. Our councils shall take the tour of our necessities, and when they least expect us, they shall feel us. The

diminutive factions which their gold has bribed, will sink to their nation nothing, and the traitors to their country will call upon the mountains to cover them. We will no longer oscitate between their enemies, and them; fighting them with the one hand, and with the other combating their foes, but pursue them with a just vengeance, and make a great and common cause with all mankind, for their destruction. They tell us of their necessity: if they have brought themselves to that hideous necessity of outlawed banditti, and acknowledge with profligate impudence that they can exist only by piracy; how cogent is that necessity, that compels us to bestow every effort and strain every nerve, for their utter and eternal extinction? if they send ministers and emissaries amongst us to stir up sedition, and fester public sentiment, we must in return ally ourselves with the rest of the world, and acknowledge every foe to such pirates, a friend of humanity. We must avoid them when they are powerful, and annoy them when they are defenceless. We must banish from amongst us their adherents, and their partizans; and let them feel to their heart's core, that if we have so long submitted to their reiterated insults, their murders, and their robberies, it was not the submission of sycophants or cowards, but the love of peace which after liberty and safety, is by good men, most to be desired. But let it be treason hereafter to name that blessed word of peace, till their power is annihilated: for not till then, shall we with security, taste its sweets. Let us borrow lessons of wisdom from other nations. Let us observe the policy of the powers of the east. In China, they have never been allowed to gain a footing, and therefore, have committed no horrors: But the peaceful plains of Hindostan have been stained with the blood of their natives: and that harmless race, whose religion is to suffer death from their fellow-man,

but never to shed his blood, how have they been rewarded? With famine, slaughter, plunder, and bondage: with wild and wanton desolation, with perfidy, and forth-breaking: with fiend-like inflictions, the perpetrators of which, have been hailed and caressed, and permitted to kiss the hands of that King, who signs the commissions of the murderers, and kidnappers of our citizens, and promotes them for their horrible deeds.

They make title to oppress all nations through usage of long antiquity. That they have long been the scourge of nations, is not questioned, but it is a usage by which this nation is not bound. We have fought for our freedom, and will again fight to maintain it. If there be any where such usage, it is time it should be abolished. It is surely a preposterous mode of argument to search in history for all the crimes that have been committed, and offer them as arguments for perpetrating more. They tell us of their protection. Impudent mockery! who have they ever protected but to ruin and desolation. For the last twenty years of their history, how many have been blotted out of the great community of nations, not by pestilence or famine, nor any convulsion, or calamity of nature, but by the simple, and natural operation of their protection. Where are now the Kings, and Princes of Europe whom they have protected. For centuries they warred against the Bourbons: they were not able to destroy them, though to that end, they pledged all future generations to an enormous debt. But from the fatal day, that they avowed *themselves* the protectors of that devoted race, then fell that race to rise no more. They protected the King of Sardinia till he was banished from the continent of Europe. And him of Naples, till he followed the example. At Naples their illustrious Nelson first offering amnesty, and then dealing death, gave to friend and foe, the measure of British atrocity,

and perfidy. They protected Spain, till her King became a captive, and lost at once his crown, in the old world, and his dominions in the new. Portugal they protected, till its miserable Prince fled across the Atlantic; and the King of Prussia, till half his territory was seized to the profit of their enemy. Holland, till her territory was incorporated with that of the conquering foe, and till her Stadtholders was added together with so many other potentates, and Princes, to the ever growing list of British paupers. The great sovereign of the German empire they protected, till he abdicated his imperial diadem, and ransomed the remnant of his dominions, and his existence, by the person of his fair daughter. From the alliance of that daughter with the victorious enemy, has sprung the infant King of Rome, for whom is destined the throne of the Cæsars, and the Roman empire. We have seen this protecting monarch, the sworn oppressor of the Catholic faith, his crown bound on his brows with chains of bigotry, at one and the same time, proscribing the Catholic subjects of his own dominions, and protecting the Pope, who shut the gates of heaven against him, and would not turn the key to save his soul. And where is now his holiness? by virtue of that same desolating protection, like all other crowned men who have been affected with it, a captive, or a wandering fugitive! We have seen the frantic Paul, stiled "the magnanimous ally," protected, and assassinated. The Indian Nabobs, the Rajahs, and Bejums; have they not been protected? Has not famine, slaughter, spoliation, and slavery, been the bitter portion of the protected Indian? And Oh! Ireland! with what a memorable protection hast thou been protected; all this reminds me of the saying of the boy Andes to Don Quixotte. "For the love of God, though you see they are beating me to pieces,

never succor me again, for my misfortune cannot be so great but a greater may follow from your worship's aid." And what is their proffered protection? they will seize us for trading with their enemies, but if we pay them tribute, they will permit us to carry our own produce to such ports as they approve. They will do more, they will trade with their enemy themselves, and in our ships, provided we oblige their enemy to buy their wares. Is there not every thing in this, that shame, or honesty revolts at. Is it then to this government, at once so humbled and so arrogant, that we must owe our safety? what will they do for love of us? they will forge notes for our banks; papers for our ships; tomahawks, and scalping knives, for the deluded Indian; for even the poor tenant of the wood cannot escape their protection. They will send ministers to play the upper plot, with three forked instructions, and spies to play the under plot, with cypher, and sympathetic ink. They will smile in our face, and point the dagger to our heart. They will murder, and kidnap, and seize, and condemn, and call it *necessity, and maritime rights*. Away with them, away with them. There is no safety for us, till we have the courage to look them in the face, to call them to their beards, murderers, pirates, robbers, man-stealers, and enemies of the human race, and to treat them as such, until they cease to be so.

* As to that farrago of cases, and citations pressed upon you as the law of nations, I shall not stop to notice them. They have already put you all to pain, and some of you to sleep. Must we toil through so many fulsome and nauseous compilations? must we unfold the metaphysical windings of twisting juris consults? must we

* Most of the cases cited will found in the sequel.

wade through the jarring controversies of paid, and party writers, whose buisness it has been to contradict each other, before we can judge for ourselves, whether the subject of another nation has a right to seize upon the citizens of ours? shallow indeed must be the head, and cold the heart, that looks to books for counsel in such cases.

The prisoner's counsel having quoted much from history, with what point or application, I leave to your good sense, I shall cite one fact from history, worth all their volumes; which may afford a useful inference, and is not foreign to our subject.

There were certain pirates of Cilicia, who infested the Greck seas, much in the manner that the British rovers now infest the world. According to the descriptions given of them by Plutarch, Appian, and other historians, they not only exceeded the Barbary rovers of modern days in insolence, but even the British themselves. Their power from their first origin had continually augmented, and finally grew to such height, that they had a thousand great ships well built and fitted out, manned by a flourishing youth, and commanded by skillful pilots. To this formidable navy, they added magnificences: and if people feared them, they were still more offended by the pride, and pomp they affected. They made their ships glitter with gold and silver; the curtains of their cabins were of purple, and their oars were silvered over. They seemed to insult over the human race, and to glory in the depredations they committed upon the world. Their ravages, and depredations, rose beyond all imagination, and thirteen of the most famous cities in the universe, had been blockaded, bombarded, and plundered by them. Pompey was less illustrious for the conquering these terrible pirates, than for the manner he afterwards disposed of them. He reflected, says Plutarch, that man is

not so brutal, or unsociable, that such violence, and avarice, are contrary to his nature, and may be changed with the change of habitation, and mode of life, as the fiercest wild beast may with good management be tamed. There remained in his hands, twenty thousand prisoners, whom, as pirates, he might justly have put to death ; but he preferred to reclaim them, and settle them in those parts of the empire which were in want of people. Now without pretending to conquer by force, this dangerous and terrible horde, we may find a means of freeing the seas, more brilliant, because more humane. It is notorious, that the persons in these ships are mostly dragged there by coercion, and in violation of their rights, and degraded, below the condition of the slaves that row the gallees of the Turks. It is certain, that their only object is to destroy and terrify, and their only and avowed destination, to carry havoc and destruction through the works of man, without adding one ear of corn, or one blade of grass to the treasures of the earth. How great would be the honor of that victory, which, without shedding the blood of these unhappy and ill-fated fellow-creatures, could reclaim at once, three hundred thousand of them from the scourge of their oppressors, and from a dishonest, and desperate course of life : and this, not by offering as the British government does, great bribes for great crimes ; but by the persuasion of right, backed by the bidding of virtue, and humanity.

Amongst these unhappy beings, shame ! oh ! shame to relate, are above six thousand of our own citizens. Do we live and tell it ? where is our nation's honor that it sleeps, while our fellow-citizens are slaves ? where is that sentiment of courage and fidelity, that wafted our little embarkations over the Atlantic wave ; that fired the breasts of Rogers and Decatur, and all their generous companions. Their slender barques were the jest of the

scoffer and the coward. Yet like great souls in small bodies, they sought the powers to which the British King pays tribute, and humbled them in sight of their own ports ; they delivered their captive countrymen, and returned with the wreath of well earned fame, giving to the world a specimen of American valor, and a bright earnest of future glory.

If we cannot grapple with the gigantic power of the British navy, which after destroying all others, has nearly destroyed the nation that supports it ; we can do better. We can by our law vest the property of every ship, into which one of our citizens is kidnapped, in that citizen, for his use and that of all who shall aid him in recovering his rights : so that the ship, on her arriving in any of our ports, shall be appraised or sold for the benefit of all. Would not this be consonant to justice ? Is it not as just that we should have their ships as they our citizens ? Let us confer upon those, who give liberty to American citizens, the rights of American citizens. And if they will submit to our laws, and desire to fix their abode in our hospitable soil, let them have land for a peaceful habitation and maintenance. Let them, if they will, free themselves from cruel restraint, and a vicious and dishonorable course of life, and return to peace and civilization, and become useful members of our great community, and citizens of the freest and happiest of countries. Does such a project seem wild and romantic ? So does every thing that is great or noble, to minds too little to conceive it. It may be hard to persuade some men, for virtue or for honor's sake, to forego interest. It may be difficult to make stubborn honesty yield to the temptation of profit and advantage. But when you offer to the miserable victims of coercion, and the unwilling agents of wickedness and crime, the fair allurements of freedom, honor and re-

ward, the voice of nature speaks assent. Such is the generous and Christian warfare I would propose. Thus should we heap coals of fire upon our enemy.

But it is said, the navy of Great Britain is the bulwark of nations, and the ægis of humanity! But for it our soil would be invaded by a despot who has overrun so many countries, and trampled on their liberty and rights! And we can only enjoy our freedom, it would seem, so long as the British flag sweeps triumphant on the sea! Do they suppose that these trite and trivial arguments can avail? Do they forget that they are addressing honest men, who have hearts and souls, and understanding? Do they think to frighten us with such childish bug-bears? That a nation should submit to the vilest indignities, and perpetual wrongs, give up independence, security and honor, for fear of what may by the remotest possibility happen in the lapse of years, is insulting human reason. What should this mighty conqueror, this terror of the world do with us? What flattering temptation does our country offer to dazzle his ambition? Has he yet overstepped the career of Charlemagne? Has he effaced the footsteps of Alexander? Has he surpassed the labours of Hercules? Are there no more countries to conquer, where submission, obedience and adoration may strew his way with chaplets, and bear him along through ares of triumph: where Oriental splendour and voluptuous refinement may minister to his pleasures and his pride? If he be so mighty and so irresistible, that not even the Welleslys, nor the Beresfords, nor the cabinet of pettifoggers, can arrest his progress, let him first conquer the remains of Europe. Let him round in the empire of the west, and review the empire of the east. Let him possess himself of the dominions of the Cæsars. Let him seat himself upon the throne of Alfred, and be crowned in Westminster-Hall. Let him fix the seat of his power in Constantinople. Let him overrun

Turkey, Persia, Arabia, Tartary and India. Let him subdue both China and Japan. Then, and not till then will he turn his views to this stern republic, where there are no temples to spoil, no palaces to inhabit, nor crowns to usurp. Where there are no man-worshippers nor idolators. The course I have traced will occupy him for the rest of this century, and by the next, we may have fifty millions of men to receive him, all determined to live free or not to live. In the mean time, the best preventative for future wrong, is to punish the present. Gentlemen of the jury, without taking up one tenth of the time the opposite counsel have consumed, I fear I have taken more than there was any necessity for. Your duty though solemn, is simple. The prisoner is charged with piracy and man-stealing: and you are sworn to say whether upon the evidence given to you, he is or is not guilty of the crime. The act has been proved by two witnesses, and not denied by any. The prisoner's defence has been a commission, which neither did nor could justify an unlawful act. His instructions he has not suffered to be read to you. If he had, they would avail as little. If he had a joint or several commission from every monarch that sits upon a throne; it could prove no more than that there were so many pirates who wore crowns. You have seen the stripes inflicted on the body of your citizen, by one who could have no possible authority to punish him. And had he as many lives as there were stripes, they would be too few to answer such enormities.

CHARGE OF THE COURT TO THE JURY.

The charge delivered to the jury by the court, was to this effect.

That the matter of fact had been too clearly proved, to need any observation; the more so, as there was no attempt to deny it. As to the law, although it was the right of the jury to judge of both law and fact, if they were willing to take upon themselves that burthen: yet it was the duty of the court to lay down to them what the established law of the land is, and to assist and advise them in all questions of difficulty. The only defence here set up, has been a commission from a foreign King, to whom none of our citizens are bound by any allegiance. No doubt, a lawful act done under a lawful authority, would not be the subject of punishment. But the kidnapping of our citizen, is what no commission could justify. And the Attorney General went no further than he was warranted, in saying that the author of such a commission, could not by his authority, justify the offender, for he rather stood himself in the light of an accessory, before the fact, and a principal in the guilt. And although such acts are, upon reparation demanded and refused, just cause of war, and the usual precursors of it: yet it surely does not follow, that the individual is not therefore to be punished, if he has the temerity to set his foot on the soil of the injured nation, and to brave the law he has offended. The jury are therefore bound by the oath they have taken, and by that awful responsibility with which no virtuous man will ever trifle.

The jury retired for a short space, and returned with a verdict of GUILTY.

At the request of the prisoner's counsel, they were examined by the poll, and all confirmed their verdict, which was recorded

GUILTY.

MOTION FOR A NEW TRIAL.

The prisoner's counsel preferred a motion for a new trial, because of the misconduct of the jurors who had fallen asleep. For they said, that in no case, a jury should separate after evidence given, until they had delivered their verdict, and least of all in a capital case. That it was doubtful whether the consent, or even the prayer and motion of the prisoner, would cure such error. It is a vain subterfuge to say they were not separated, because their material bodies remained enclosed in the same box, and the moral intellectual being was absent. And how far was that one extravagating from the cause he was sworn to judge, when hearing his own name called he answered by the dismal cry of fire. The law also forbids the jurors, after hearing the evidence, to receive any kind of indulgence, or either meat or drink, lest they might be induced to slumber upon their duty; whereas, here, three of them were plunged in the darkest night of oblivion, and sunk in lethargic apathy. If a man may be tried by sleeping jurors, as well may he be judged by pictures, statues, images, or effigies. Better put his fate to the hazard of a die, than make it depend upon the capricious wanderings of a dreamer.

Again: of the sleepers only one was a citizen, whereas two were aliens, which was a detriment to the prisoner, as the aliens were for his benefit, and it was no longer a jury *de medietate*, or half aliens, seeing the numbers thus became unequal.

In support of their argument, they cited *Lord Delamere's case*, 4 *St. Tri.* 232. 1st inst. 227, (b) 3d inst. 110. *Carthew*, 465. *Stra.* 984. 4 *Johns*, 294,

Mr. Attorney in answer observed, that here no oppression or unfairness was complainant of. It was not like

the case of a juror withdrawn, for the purpose of preferring another indictment, or to produce more evidence on another trial. Nor any other unfair practice. But it was the case of the counsel who first talked the jury to sleep, and then says that his client must have the advantage of his tediousness. The jury did not fall asleep till after a long and conscientious struggle between duty and necessity, when tired nature gave way, and the Latin, as they expressed it, put heaviness in them.

Mr. Formedon. I deny the fact. I spoke as little Latin as might be, from the nature of my subject.

Mr. Attorney. Latin or French is all one, if it be not understood by the hearers; and they are not bound to understand it.

Mr. Formedon. I spoke little Latin, and less French.

Mr. Attorney. French or Norman, or whatever it was, it put the jurors to sleep, because they were tired of hearing of Edmund de Buttertort, Regineras Grimbaldus, and Guy earl of Flanders.

The Court. If we thought the prisoner had suffered any real prejudice by the slumbering of the jurors, we should use our discretion in his favour, either by granting a new trial, or recommending him to pardon. But the jurors all paid great attention to the evidence, and only fell asleep when they ceased to understand the argument, which although highly learned, was too abstruse for their conception. We cannot then presume, that had the jurors been awake, it would have made any difference in their judgment, and if such an objection could avoid a verdict, it might encourage intentional prolixity and tediousness, and the counsel who could best fatigue the jury, would be surest of his end; which would be more against justice, than the irregularity complained of.

Motion refused.

ON A MOTION IN ARREST OF JUDGMENT.

Two points were insisted.

1st. That the acts charged in the indictment, constituted no offence against the laws of nations.

2d. That if they did, this court had no jurisdiction to take cognizance of them.

As to the first point, the counsel relied much upon definitions by great writers on the laws of nations.

According to Cicero, those only are pirates who have neither commonwealth, courts of justice, nor treasury, nor agreement of citizens, and who pay no regard to treaties nor alliance. (*De Jure. Civit.* 3 c. 5.)

Bynkershack defines them to be such who commit depredations by sea or land, without the commission of any sovereign, for if he had a commission, he is no pirate. (*Ch.* 17.)

Molloy calls a pirate a *sea thief*, who sets upon merchants and spoils their shipping. (*C.* 4 sec. 4.)

Woodeson says a nation as such, can never be pirates. (*Lecture* 34.)

Beawes calls him a sea thief, who enriches himself by marine robberies.

Azuni after distinguishing between pirates and privateers, describes a pirate as one who roves the sea in an armed vessel, without any commission or passport from any sovereign but solely on his own authority for the purpose of appropriating to himself, without discrimination, every vessel he may meet, and differs only from a robber in this, that the depredations of one are on sea and the other on land; and Santerna, Straccia and Loecenius, are to the same effect. (*Beawes, part 2, chap. 5, sec. 2, art. 3.*)

Casaregis says the same, and cites Ansaldus and Hubner; and he tells the grand Duke of Tuscany, that the commander of a ship of war or cruiser, with his commis-

sion and flag, is not to be considered as an individual, but as representing the person of his prince. (*De Com. disc. c. 4, n. 4.—Disc. 214 n. 57.*)

Lord Coke derives the word from the Greek *Πειρατης* (a rover) but adds, that he is a robber. Sir Lionel Jenkins certifies to King Charles II. that from the time the Algerine government was owned by treaties, establishment of trade, and consuls from princes and states, particularly his majesty, they were no longer pirates or sea rovers acting without commission, but were to have the benefit of open war. (*Letter of 11th Feb. 1679.*)

Molloy has this remarkable passage. "Tunis and Tripoli, and their sister Algiers, do at this day, though nests of pirates, obtain the right of legislation. And Sir John Layson did conclude a peace between his majesty, by the name of the serene and mighty prince Charles the second, by the grace of God, King, defender of the faith, and so forth, and the most excellent signors, MAHOMET BASHAW, the DIVAN of the NOBLE CITY of TUNIS: and he cites another treaty by Sir John Norborough, HALIL BASHAW, IBRAHIM DEL, AGA DIVAN, and governor of the NOBLE CITY, and KINGDOM of TRIPOLI in Barbary: *In the presence of Almighty God, in our house in the City of Tunis, the last day of the moon Delcadi, and the year of Hegira, 1807.* (*Ch. 4, page 54.*) So that now (though a nest of pirates) yet having acquired the reputation of government, they cannot be esteemed pirates.

The counsel then drew this inference, that if this nest of pirates, were no longer pirates, because princes had acknowledged them by treaty and legation, a *fortiori*, the prisoner could not be a pirate, who represented the mightiest sovereign in the universe, and the rightful sovereign of the sea, and the only

one who would, and did, protect all lesser powers. And they concluded by reminding the court that it was not many years since the commissioned officer of this nation, Paul Jones, was outlawed as a pirate, and that Washington and the other commanders of our armies were proclaimed as rebels and only ceased to be so, when they grew strong, so that it would be dangerous policy to call in question a title which was our own, and our only one.

Secondly. Admitting captain Crimp to be a pirate by the laws of nations, where was the municipal law of this country, by which the court had jurisdiction to try or punish him. The constitution has given to congress, it is true, power to define and punish piracy upon the sea, and offences which are against the laws of nations. Congress has defined the crime of piracy; and it remains only to see whether their definition includes such acts as these charged with the indictment, or on the contrary, exclude them. If so, it is enough to have tried the prisoner without jurisdiction. To adjudge him to death, would be an error to be repented of, when repentance came too late.

According to Blackstone, a crime or misdemeanor is an act committed or omitted in violation of some public law, either forbidding or commanding it. The act of congress says "If any person shall commit upon the high seas, murder, robbery, or *other offence*, which if committed within the body of a county, would by the law of the United States, be *punishable with death*, every such offender shall be adjudged pirate and felon, and suffer death." Then let us suppose that the prisoner had taken Lockman on shore: can any one point out the law of the U. States that would punish that act with death. (*See the law of April 30, 1780, section 8.*)

It is not enough that the constitution has given congress the power to define the crime, and fix the punishment until they do it, the courts can have no jurisdiction, for judges cannot supply political defects, or legislature omissions, by resorting to the principles of common law.

Such was the argument of Mr. Dallas, and Mr. Levy, in the case of *The United States vs. Warrall*, 2 Dal. 384. Two eminent judges, (Chase and Peters) differed indeed in opinion: but judge Tucker maintains the opinion of judge Chase, that there can be no jurisdiction by implication, and that the United States have no such thing as common law. (*Notes on Blackstone, vol. 4. app. 7.*)

ARGUMENT FOR THE UNITED STATES.

Attorney General. If the counsel are right, it is the first instance of an independant nation tying its own hands from the protection of its own citizens, and shutting the temples of justice against their rightful complaints: reason and honor revolt at the idea. What have we to do with the garbled conceits of poets, rhetoricians, or party scribblers, who tell us that pirates are no longer pirates, when princes make treaties with them. One simple ray from the fountain of light, is worth millions of such volumes, "Do unto others, what you would they should do unto you." That is the law of reason, of faith, and truth. All books that depart from it, should be buried fathoms under ground. Then suppose our officers so far to degrade themselves, as to turn kidnappers, and drag British subjects from British ships: would their admiralty judges consult Hubner, or Loeceenius, whether it was a crime?

Every author from Cicero down, has defined pirates to be "*enemies of the human race,*" upon whom, by the law of nature and of nations, summary justice may be executed, that even oaths are not binding towards them. Grotius holds, that governments are responsible for not

suppressing and punishing them: and Plutarch approves of the act of Caius Cæsar, who upon the pro-consul's delay, hanged those who had attacked him, of his own private authority. *Plut. in Cæsar.*

Molloy, whom they cite, settles the question against them. He says, that by the *marine law* it is piracy and felony to attack a ship, though *nothing be taken*: though by the *municipal law*, there must be a *taking* if it be but of a *penny*, and if any of the men are taken to be sold as slaves, that is piracy and felony. *C. 4. f. 16.*

It will not be said, I trust, that the taking them to market is the crime, it is surely enough in reason, that they are enslaved by those who take them.

They argue from Beawes, (*see p. 250*) that none is a pirate that is not a thief of *money* or *goods*: forgetting that murder, without robbery, is certainly piracy: and their argument reaches to this extravagance, that to take a seaman's knife is piracy, but to take the man with it is no crime: that to deprive him of his tobacco box is felony, but to deprive him of his liberty is no offence in law.

By the law of England, it is indictable to take a dead body, even for the beneficial purpose of dissection. Is the dead body of a British subject more protected than the living citizen of free America?

Beawes's description of pirates, applies to these terrible depredators in every point. The severe usage they give those who fall under their hands—that they confine themselves to no place, but rove where there is most prey, supplies, and ports for their safety—that *America is the part of the world most pestered with them*—that they are enemies to all, and all ought to be enemies to them—that they despise the law of God and man, and all should destroy them.

For my part, I think all nations are bound to unite against these destroyers, in a league as holy as the

Greeks of Amphyetion did, in the vindication of the temple and territory of their Delphic God, and to denounce as heavy a curse on the violators of that league.

Binkershoek (*Treat. on l. of war. c. 17*) seems to judge according to Dutch measure, for after denying that the Barbary rovers are pirates, he asserts, that *enemies* who in *war time* come too near the *Dutch buoys* are so. But he tells us in the same chapter, that the Spaniards consider the barbarians as pirates, and that the Dutch sell their Algerine prisoners in Spain. And a Spanish writer, (for they all uphold their own power) maintains the justice of such sales. (*See Albericus Gentilis, de advoc. Hisp. l. 1. c. 15.*) By the same rule, we might sell all the English we could lay our hands upon for slaves.

If the British power is more friendly to the Algerines than to us, or to other nations, we may apply the old adage, *dog will not eat dog*. So much for their treaties with the illustrious Signors, Deys, and Bashaws, and the *soldiers* of the noble cities and kingdoms of Tripoli and Tunis. They say, that a commission absolves a pirate, and they cite Sir Lionel Jenkins, but even Sir Lionel Jenkins is against them, for he holds it as much piracy to spoil with a commission, as without one, when the act is committed against those whom the aggressor has no right to fight or meddle with. (*2 Lion. Jenk. 744. 754.*)

Vattel says, the justice of each nation ought to be confined to crimes committed on its own territory, but he excepts from that rule, those who by the quality and habitual frequency of their crimes, violate all security, and so become enemies of the human race. Such are poisoners, assassins, incendiaries, and pirates *by profession*. They should be brought to the gibbet, and exterminated in whose hands soever they may fall, and be delivered if demanded, into the hands of the sovereign they have principally offended, he being naturally the most interested in bringing them to punishment. (*B. 1. C. 20. sec. 133.*)

If there is any where a nation (he adds) of restless, and mischievous disposition, ever ready to distress others, to traverse their designs and raise domestic troubles, all men ought to join in chastising and repressing them, and putting it forever out of their power to do further mischief. (*Ib. b. 2. c. 4.*)

And a nation that would preserve itself, must protect every one of its individuals: for let it be once known that it has not this sentiment of honor, it will meet renewed insults, and its members will abandon the government that will not protect them, for some other that will. (*Ib. b. 1. c. 2. sec. 17.*)

This sentiment is so respected by all civilized powers, that Louis XV. sent an ambassador to Savoy, merely to offer satisfaction, because some of his subjects had carried off a noted smuggler; but we find that the British sovereign prefers and promotes the individuals, who insult our national honor the most.

Manstealing or plagiat, is punished with the utmost severity in every political state. And even foreign recruiters are immediately and justly hanged; as it is not to be believed that their sovereign ordered them to commit the crime, and if they did receive such order, they ought not to obey it. If they act by seduction, they are severely punished, if they are guilty of violence, and make their escape, their sovereign is bound to liberate the men they have taken, to deliver them up to punishment, and make every suitable reparation besides. (*B. 3. c. 2. sec. 15.*)

When a government by its manners or maxims accuses its citizens to ill use foreigners indifferently, all nations should unite against such an *enemy of the human race*. (*B. 2. c. 6. sec. 78.*)

The government that makes no resistance in such cases, almost legitimates the acts of the usurpers, and sins against the social compact. (*l. 1. ch. 17. sec. 199.*)

Lord Bacon thought the only mercy was to have no mercy on such offenders, and that the *droit de Bris*, that is, taking their property and destroying them, in case of their shipwreck was lawful. But to multiply authorities, is to debase human reason, where the heart of man, and the voice of God and nature speak so plain and irresistibly!

When the counsel say, this court cannot take cognizance of this delinquency, because the congress did not expressly legislate upon it, by defining the crime and fixing the punishment, can they have reflected upon the subject. In the case of the *United States vs. Warrall*, the jurisdiction of the court was maintained, by resorting to first principles and necessary implication, and judgment was passed upon the defendant: so far their argument fails them. But this is a question of much more cogent necessity. There it was made a doubt whether the common law of England was the law of the United States: this is another question. The law I invoke, is the law of all nations, which no single nation can alter. And indeed our congress did more wisely than the counsel give them credit for when they forbore to define the law of nations, until they had first been empowered by all the nations of the universe so to do. The power given to congress by the constitution to define and punish crimes, did not surely extend so far as to alter the law of nations, by which, if we are a nation, we must abide. For the same reason that, as citizens, we conform to the municipal laws of our country, as a nation we conform to the universal law of nations. The constitution of the United States, is paramount to the laws of congress: but the law of nations is paramount to both.

However large the powers given to congress might have been, one power certainly they never had; that is, the power of repealing the law of nations, and abandoning

the citizens to the entire mercy of the spoiler and the ravager. They had not power to step in between the freeman and his creator, and say God gave you the right of self protection, you have delegated that right to us, that it may be enforced by the national arm, and we take it from you altogether. That indefesible right of every human creature, to punish the assailant of his life or liberty by instant death, we your trustees and servants take from you altogether, and we define, or do not define, in such a manner, that the pirate who enslaves you, can come upon your territory, and in the sacred precincts of your courts of justice, laugh at you and your laws with impunity. Every unhallowed rover, every wandering pirate may take you for his soldier or his slave, and force you into arms against your native country, and make you the destroyer of your fellow citizens. Let us bridle our just indignation and condescend for a moment to expose with calmness, this frightful paradox.

What says the constitution ?

“ We the *people of the United States*, in order to form a more perfect union, establish justice and ensure domestic tranquillity, *provide for the common defence*, promote the general welfare, *and secure the blessings of liberty* to ourselves and our posterity, do ordain and establish this constitution.”

The 8th section of this constitution, empowers congress to define and punish piracies done on the high seas, and also, *all offences against the law of nations*. By these words it surely was not meant that they should define the offences against the law of nations, for their definition being in the law of nations that they could not alter, no more than an individual could alter the municipal law to his own purpose : for nations are subject to the law of nations, as individuals are to the laws of their respective communities. Here then is no supplying legis-

lation, omissions or political defect, by resorting to the common law of England as was said in Warrall's case: but it is a question whether an American citizen be the only human creature whom his country's laws do not protect, not even so much as they do the beasts of the field. To say this is an omission of congress that the court cannot supply, is insulting to congress, degrading to this court, and perfidious towards the people.

Solon indeed omitted the crime of parricide in his code, because he wished it to be unthought of: but our first congress knew what abuse of power the English government could exercise, and certainly did not affect to think it impossible that they might be pirates.

The only misfortune was, that that venerable body had too present to their view, the miserable statute books of England. And instead of forming a national code after the lights of their own wisdom, they adopted too many bad and crooked laws, made to answer the necessities of another country and of other times.

That this court has full jurisdiction over this offender, and full power to punish him, is so manifest, that it is wonderful how such a question could be raised. The constitution (*act 3. sec. 2*) extends the judicial power to all cases of admiralty, or maritime jurisdiction, without reference to any common law, or statute whatever. And the judiciary law (*sec. 9 and 11*) gives these courts cognizance of all crimes upon the high seas, each within its respective district, with as full authority as the United States possess. If then this heinous act of piracy be an offence by the maritime law, what hinders this court to try and punish the offenders: nay, what power has it to refuse or delay the justice of the nation to its citizens? No other court has the power, and if this court should not exercise it, then there is a failure of justice. Be it then proclaimed at once, that we are governed by a foreign

code which consists of three articles only, charecoal, brimstone and saltpetre : or the British code.

Had not the English statutes obtruded themselves upon our legislators, and their terms been too hastily adopted how clear and simple would this matter have remained. To disentangle our ideas from the parasytical entwining of English jurisprudence, is now the only difficulty. A short review of the English law upon this subject, may clear away all doubt.

Before the 28 Hen. 8, c. 15, the common law nor the common lawyers had nothing to do with offences committed on the seas. They belonged entirely to the admiralty, and were judged according to the maritime law, principally extracted from the civil or Roman law. All that the English statute did, was to give the trial by jury and change the mode of proceeding : but the crime remains to this day in England, undefined by any statute, and its description is found only in the law of nations.

Before the Stat. Hen. 8, the common law writers took no notice of the subject, nor is there any such head or title to be found in them, except the eases of prohibitions, and the war of jealousies and animosities between the common lawyers and the civilians, touching their conflicting jurisdictions : but the offence was still so peculiarly of admiralty jurisdiction, and independent both of common law and statute, that even after the statute, a general pardon of all felons did not extend to a pirate.

The reason of passing the statute, was that thieves, robbers, murderers and confederates upon the sea, many times escaped unpunished, because the common law extended not to their offences, which were judged before the admiral after the course of the civil law. The civil law held the confession of the guilty necessary to their condemnation, and administered torture to obtain it. To remedy this was one reason of the statute. Another was

that the civil law did not admit of the evidence of accomplices as approvers, and as in many cases all were concerned in the piracy, there was no other testimony, and they all escaped. Both these evils were remedied by giving *a mean* of trial by the common law, leaving the offence as it was before, by the civil law. (3 *Inst. c. 44, p. 112.* 4 *Bla. Com.* 268)

As before the statute, the common lawyers meddled nothing with this subject, as being foreign to them, and belonging only to the civilians; so since the statute, they have touched it with a trembling pencil. And the very use of the term, "common law," which bears so many different senses, has embarrassed their writings, and made it necessary to read them with caution. We all know that the term *common law*, means that which was before any statute, and is often put simply in contradistinction to *statute law*. It is sometimes in opposition to equity. It is sometimes used to discriminate between courts of general jurisdiction, and special, of which the latter are the admiralty ecclesiastical, or university courts, &c. And it is used to distinguish between the English law, and the civil, or Roman law: and in many other various senses. But notwithstanding the perplexity this has occasioned, no one law writer has referred the offence of piracy to any thing but the law of nations, or the civil law, and all repeating after each other, take the same words of Cicero for their text, admitting that whatever was piracy among the Romans, was piracy by the same rule in England.

Hale (*pl. c. 12.*) says the proceedings of the admiralty were *secundum legem maritimam*, and not according to the *custom of the realm*: and the conviction worked no corruption of blood, though it did a forfeiture, as in the case of other felony. The reason is, because it is an of-

fence of which the common law takes no notice, but leaves it as it was by the maritime law.

Lord Coke says in one work, that it does, and in another, that it does not corrupt the blood. (*See 3 inst.* 112, & *Co. Lit. sec. 745, p. 391.*)

Hale endeavours to reconcile this contradiction, by saying that it may depend upon the manner of laying it in the indictment, that by virtue of the words *vi et armis et felonice*, it might corrupt the blood: but if it ran according to the stile of the civil law, viz. *piratice deprædavit* it could not. This appears something frivolous, and is an argument amongst thousands, how much this nation would be exalted by a code suited to its own condition: but if there is any meaning, it is this, that piratical *depredations* of every kind are *felonies* by the law of nations. And the English statute, to treasons, murders, robberies, and confederacies, adds the term *felonies*, without other description, referring, no doubt; to the marine law. And unless manstealers were included in this word *felonies*, the worst of all pirates would be unpunishable.

Hawkins (*c. 37*) obscures the subject more than any that has treated of it, and gives two definitions of the crime, one by the statute, and one by the common law.

Now as we have shewn from Coke, Hale, and Blackstone, that the statute law did not alter the offence, and that the common law took no notice of it, we need not stop to read farther from this writer. His authorities are of little weight. One is nothing more than the speech of the Queen's advocate, on the trial of one Quelsh and others, in Boston, (Mass.) in the time of Queen Anne, (1704) *see 8. st. tr. 298.*) The other is the case of Golding and others, soldiers of King James, a case of great oppression, where the King's advocate was removed, and he, and the other eminent civilians threatened with the pains of treason, for refusing to assent to the prosecution.

Another reason why the English books are such blind guides may be, that offences of this kind, belonging still to the admiralty, and no printed reports being made of them, the decisions remain buried amongst the rolls of the admiralty.

M. Duponecan, an eminent jurist and civilian, in a note to his translation of Binkershoek, law of war c. 27, (*see Amer. Law Jour. vol. 3, p. 127*) says he has found no satisfactory definition of a pirate in any of the books. But he has carried his speculations to this very point; and starts the question, whether an act of piracy, clearly considered as such by the law of nations, may be inquired of, and punished by the courts of England, and those of the United States, professing admiralty jurisdiction, although it should not be expressly provided for by any statute. The learned Woodeson, he adds, is in favour of the affirmative, and that whether a charge amounts to piracy, must *still* depend upon the law of nations; though express acts of Parliament, have declared certain specific crimes done by British subjects, shall be *adjudged* piracy, or be liable to a similar *mode of trial*, and like *punishment*, as piracy.

The act of Congress would otherwise be void of meaning, for the words of it are these, "murder, robbery, and *other crimes*, which, if committed *within the body of a country*, would be punishable with death by the laws of the United States." What did the statute mean by these *other crimes*? certainly not treason, murder, or robbery, for they were all expressly defined before. And upon looking into the statute of *crimes*, there is not one punishable with death, besides those already enumerated, except one only, and that is counterfeiting the securities of the United States. This will not in any way satisfy the words "*other crimes*;" nor can any reasonable being suppose, that these words were intended merely to restrain men

from that improbable transgression of embarking upon the high seas, for the purpose of counterfeiting securities of the United States !! then if this be not referred to the law of nations, what meaning is in the law ?

I shall conclude with a few additional instances, shewing how far nations have, and do still, consider *man-stealing*, as a heinous and capital offence.

In the law of Moses it is thus written: He that stealth a man and selleth him, or if he be found in his hand, he shall surely be put to death. *Exod. c. 21, v. 16.*

By the Roman law, (*Lex Favia*) either selling, buying, exchanging, or receiving a freeman, was punished with death. (*Dig. lib. 38, tit. 15, sec. 1 & 4*) and *vid. Fs. 48. 15. 1.*

And the same crime called in the civil law, *plagii crimen*, is punishable in Scotland with death. A woman, (Margaret Irvine) was under that law, punished with death for stealing of children, so late as the 24th of September, 1804. (*See Bell's Scotch Deet.*)

And the stealing a woman for a wife, is death by the English law, "if she have substance in lands or goods." And the procurers, or abettors, are liable to death. (*Stat. 3. H. 7. c. 2. & 39. Eliz. c.*)

In Virginia, the stealing any free person was death, till 1794: since then, the offender is liable to ten years imprisonment in the penitentiary. (*L. V. 1794, c. 108, section 28. Ib. 1799, c. 58.*)

Having now shewn the nature of the offence, and established the jurisdiction of the court, in the name of an injured nation, I invoke the judgment of the law.

Curia advisari vult.

DYING DECLARATION.

On the day named in the sentence, captain Henry Whitby was conducted by the marshal of the district, to a green eminence, on the highlands of Neversink, overlooking the entrance of the harbour, where the murder

was committed. He was dressed in the full uniform of his rank, with his epaulets and a cocked hat. He appeared of about middle age and middle stature, with an aquiline nose, florid complexion, chesnut hair, and well set. He halted a little in his gait, and turned out the left toe rather than the right. His eye seemed full of courage and resolution, and something fiery. When he arrived at the place of execution, he stood a moment, and looked round on every side. And then, being warned that his hour was expired, he took off his hat, flourished it boldly round his head, and cheered three times, and called upon the friends of King George to shew themselves. This produced great amazement, but no person moved nor spoke. He seemed then to be struck with sudden consternation, and uttered a deep groan; his head sunk, and he clasped his hands together. In that posture he remained, till the marshal again reminded him that he must prepare for the execution of his sentence. He then cried out that he had been deceived, and asked permission to write a few words, which was granted. He took out his pocket book, and wrote over two vellum pages with his pencil, but with so trembling a hand, that though it was communicated to me, I have not been able to decypher the words, otherwise than as follows :

***** and ***** and ***** are
 d——d scoundrels, I was —— by their lying,
 —— and villainy —— to this disgrace. If
 ever —— should —— that —— be
 hanged. I die in charity with all —— but the Es-
 sex Junta, who have deceived and betrayed us ——
 merey —— and remember —— avoid bad
 company.

Just as he was preparing to mount the scaffold, a man wearing an English livery, came galloping on horseback, and delivered to the marshal a sealed paper, which turn-

ed out to be a reprieve. And the prisoner was conducted back to jail.

I cannot certainly say, for what cause this respite was granted, but I have heard that it was obtained by the entreaties of the British minister, who, it is said, had graduated instructions, with respect to the atonement to be offered to this nation. And at length finding that all trifling was now over, that he had pledged his government, for the liberation of the 6257 Americans detained in the British fleet, and the repeal of the orders in council, on condition that these two officers should be pardoned. It is further rumored, that all English vessels trading to South America, are henceforth to call at New-York, and pay at the Custom-House a transit duty.

In the mean time, the sentence lies over, until the full execution of this condition. And it is believed that the present embargo has been laid on our shipping, to guard against new acts of aggression, which might inflame the indignation of the people, and render every hope of accommodation impossible.

ADDENDUM.

IF this little book should amend all mankind, and bring peace to this and future generations, I shall have my reward. If captain Whitby was resolved to die in charity with all but the Essex Junta, so am I content to live in charity with all men, not excepting booksellers, though their dispensation be to live upon authors, who live upon their wits. I pray God rather to send them wit and me money.

My respected friend, the Attorney General, having glanced over my report, approves of all I have set down of his arguments, except one omission, which I now correct. In all he said, he meant to cast no reflections upon English or Scotchmen, acknowledging that men born in those countries, may possess all the virtues; and holding all national reflections (as indeed they are) the sour fruit of bad hearts and weak minds. But as long as a nation will suffer itself to be driven into hostilities with all mankind, so long, it must be manfully dealt with, and even exterminated, if necessary to the safety of the world. He also expressed his compassion for the English people, reduced by a corrupt government, to universal war and cruel hunger: declared that such as escaped from their oppression, and brought with them industry, capital, character, or science, should always be welcome to this hospitable land.

The counsel for the prisoner have expressed their satisfaction of what I have set down of their speeches. And the learned judge says he meant to say nothing in charging the grand jury, but what another eminent judge said before, when the nation was troubled with foreign aggression, and internal disloyalty. (*Vide trial of Johar Fries.*)

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