CIRCUIT COURT,

PENNSYLVANIA DISTRICT.

April Term 1806.

Present WASHINGTON, an Associate Judge of the Supreme Court.
PETERS, District Judge.

The United States *versus* Richard Johns.

THIS was a prosecution, on the 2d section of the act of congress, of the 26th of *March* 1804, (*7 vol.* 126.) which is expressed in these words: "*Be it further enacted*, That if any "person shall, on the high seas, wilfully and corruptly cast away, "burn, or otherwise destroy, any ship or vessel of which he is "owner, in part or in whole, or in anywise direct or procure the "same to be done, with intent or design to prejudice any person "or persons that hath underwritten, or shall underwrite, any "policy or policies of insurance thereon, or if any merchant or "merchants that shall load goods thereon, or of any other owner "or owners of such ship or vessel, the person or persons offend-"ing therein, being thereof lawfully convicted, shall be deemed "and adjudged guilty of felony, and shall suffer death." (1)

In the course of the prosecution and trial, the following points occurred.

I. The defendant was brought, by *habeas corpus*, before the Court, holding an adjourned session, on the 8th of *January* 1806, when it appeared that, on the 27th of *December* 1805, he

(1) The second member of the section is so inaccurately expressed, that the attorney of the district thought, at first, there must have been some error of the press; but the secretary of state informed him, that the printed copy was found, upon a comparison, to agree exactly with the roll. See the analogous *English* statutes, 4 *Geo.* 1. c. 12. & 3. 11 *Geo.* 1. c. 29.

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had been committed by the mayor of the city of *Philadelphia*, 1806.
" charged on the oath of *Andrew Clarke* with having on the 20th
" day of *August* last, or thereabouts, on the high seas, scuttled
" the schooner *Enterprize* of *Baltimore*, with intention to defraud
" the underwriters, as he believes."

The prisoner's counsel objected, 1st. That the commitment was vague, and did not describe the offence, within the words of the act of Congress. 2d. That the offence was not committed within the district of *Pennsylvania*; and no demand having been made for his surrender by the executive of any other state, there was no law to warrant his arrest, or detention. 3d. That the evidence was not sufficiently strong, to found an indictment against him and he was entitled, at all events, to be discharged on bail.

It was answered, by the attorney of the district, 1st. That whatever might be the formal defects of the original commitment, the Court, being now satisfied with the evidence, would remand the prisoner for trial. 2d. That it was not necessary, for that purpose, to give positive proof of guilt; but to show probable cause for the accusation. 3d. That the case did not come, at all, under the constitutional, or legislative, provisions, for the surrender of a fugitive from the justice of another state; but it was the case of a crime against the *United States*, committed on the high seas; when the trial is directed to be in the district, where the offender is apprehended. 1 *vol.* 103. *s.* 8. 1 *vol.* 72, 3. *s.* 33.

By the COURT: Upon a *habeas corpus*, we are only to inquire, whether the warrant of commitment states a sufficient probable cause to believe, that the person charged, has committed the offence stated. We have heard the evidence; and cannot doubt of its sufficiency to that extent. We do not think, that the prisoner ought either to be discharged, or bailed. He must be remanded for trial.

II. When the panel of jurors was called over, the prisoner's counsel claimed the right of challenging thirty-five jurors peremptorily, as the offence, charged in the indictment, had been created, since the act of the 30th of *April* 1790 (1 *vol.* 113. *s.* 30.) and the right of challenge remained as at common law. 4 *Hawk.* 389. 4 *Bl. C.* . The clause, respecting challenges is in these words: " If any person, or persons be indicted of treason against
" the *United States*, and shall stand mute, or refuse to plead, or
" shall challenge peremptorily above the number of thirty-five of
" the jury; or if any other person, or persons, be indicted of any other
" of the offences *hereinbefore set forth*, for which the punishment
" is declared to be death, if he or they shall so stand mute, or
" will not answer to the indictment, or challenge peremptorily
" above the number of twenty persons of the jury; the Court, in
" any of the cases aforesaid, shall notwithstanding proceed to the
" trial

1806. " trial of the person or persons so standing mute, or challenging,
" as if he or they had pleaded not guilty, and render judgment
" thereon accordingly."

The attorney of the district, said he was indifferent which way the Court decided the point; but it was proper to remark, that the 29th section of the judicial act referred, generally, to the state law, for the rule relating to juries; (1 *vol.* 67.) that the state law limited the right of peremptory challenge, in cases like the present, to the number of twenty; that the 30th section of the penal act (1 *vol.* 113.) obviously considers the whole law of peremptory challenge provided for, in future, as well as existing, capital cases; and that it was improper to refer to a common law rule, if a rule was prescribed by statute.

PETERS, *Justice.* The words of the penal act, when they restrain the common law right of peremptory challenge, also expressly confine the operation of the restraint, to the offences before set forth in the act. For offences not set forth in the act, the only rule is furnished by the common law; and it is the privilege of the prisoner, that it should be applied and enforced.

WASHINGTON, *Justice.* The right of challenge was a privilege highly esteemed, and anxiously guarded, at the common law; and it cannot be doubted, but that at the common law, a prisoner is entitled, on a capital charge, to challenge peremptorily, thirty-five of the jurors. If, therefore, the act of congress has substituted no other rule (and, in the present instance, it is clear that none has been substituted) the common law rule must be pursued.

It is not easy, indeed, to assign a reason, for introducing the words, that confine the provision, respecting peremptory challenges, to offences *before set forth* in the act; but it is enough to bind our judgments, that the words are actually introduced.(2)

III. The indictment contained four counts: 1st *Count.* That the prisoner being owner, in whole, of a certain ship, or vessel called the *Enterprize* of *Baltimore*, " the *Baltimore* Insurance Compa-
" ny, by their president, and under their corporate seal attested
" by their secretary did subscribe and underwrite a certain policy
" of insurance upon the said ship, or vessel, called the *Enterprize*
" in the sum of 2700 dollars upon a certain voyage &c. And the
" said *Richard Johns* well knowing the premises with intent and
" design wilfully, corruptly, unlawfully and feloniously to preju-
" dice the said *Baltimore* Insurance Company &c. and by means

(2) In the case of the *United States* v. *Russel*, on an indictment for murder on the high seas, tried at *October* term 1806, the prisoner's counsel, at first, claimed the right of peremptorily challenging thirty-five jurors; but, that being an offence set forth in the penal law, was expressly embraced by the provision limiting the peremptory challenges to twenty; and the claim was, accordingly, over-ruled.

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of the aforesaid insurance unjustly to acquire to himself unlaw- 1806.
" ful and corrupt gain and advantage on the &c. with force and
" arms on the high seas &c. wilfully corruptly unlawfully and
" feloniously did cast away and destroy the said ship or vessel
" called the *Enterprize* in and upon the voyage in the said policy
" of insurance mentioned &c. to the great damage of the said
" *Baltimore* Insurance Company, against the form of the act of the
" congress of the *United States* &c." *2d Count.* That he committed the felony, by feloniously boring auger holes through the bottom of the vessel. *3d Count.* That he feloniously directed and procured the vessel to be cast away and destroyed. *4th Count.* That he feloniously directed and procured the vessel to be cast away and destroyed, by feloniously boring auger holes through the bottom of the vessel.

1st. The president of the *Baltimore* Insurance Company was offered as a witness, to prove the order for insurance, and the subscription to the policy. The prisoner's counsel objected to his competency; and cited 1 *P. Wms.* 595. 1 *M'Nall.* 52, 3. But the objection was over-ruled.

2d. A copy of the manifest of the outward cargo of the *Experiment*, certified under the hands and seal of the custom-house officers of *Baltimore*, was offered in evidence, after proof by the witness, that he had himself compared it with the record. The prisoner's counsel objected, that there was no evidence, that the original manifest was subscribed by the prisoner, or even delivered by him. The district attorney answered, that by the 21st section of the impost law (4 *vol.* 311, 312.) it was made the duty of the collector of the port, " to record, in books to be kept for that purpose, all manifests;" and that, being a record, the proof offered was unexceptionable.

By the COURT: In that point of view, the evidence is clearly admissible.

3d. The policy of insurance, under the corporate seal of the company, signed by the president and attested by the secretary, was offered in evidence. The prisoner's counsel objected, that the charter of incorporation must be produced, before any corporate act, or instrument, could be given in evidence. The attorney of the district opposed the objection, on account of the difficulty, which the precedent would create in future prosecutions: but the COURT deeming it necessary to establish the corporate capacity of the Insurance Company, he read the acts of the legislature of *Maryland* on that subject, from the statute book, published by authority; and these being limited in their duration, he offered an exemplification of a recent act, protracting the existence of the corporation at, and beyond, the time of subscribing the policy in question.

1806. question. The exemplification, however, was under the great seal of *Maryland*, but was not attested by the governor, or any other principal officer, of the state. The prisoner's counsel objected to the want of such attestation; but the objection was overruled.

By the COURT: The act of congress declares, "that the acts of "the legislatures of the several states shall be authenticated, by having the seal of their respective states affixed thereto." 1 *vol.* 115. It does not require the attestation of any public officer in this case; although in all the cases afterwards provided for, such an attestation is required. There is a good reason for the distinction. The seal is in itself, the highest test of authenticity; and leaving the evidence upon that alone, precludes all controversy, as to the officer entitled to affix the seal, which is a regulation very different in the different states.

4th. On the evidence in the cause, various grounds of defence were adopted by the prisoner's counsel, *Lewis*, *Rawle*, *S. Levy*, *S. Ewing*, and *C. Ingersoll*, and controverted by *Dallas*, attorney of the district, of which the principal were these: 1st. That the second section of the act of congress does not expressly authorise an indictment against an *American* citizen; and it would be an usurpation of legislative power, to extend its operation to aliens, committing offences on the high seas. 2d. That the act does not expressly embrace the case of an insurance by a corporation; and a corporation is not included in the description of *persons*. 3d. That the indictment describes the *Experiment* to be *a ship or vessel*, which is not sufficiently specific. 4th. That in fact, and in law, the vessel was not cast away and destroyed. 5th. That if the vessel were feloniously destroyed, the evidence does not prove the prisoner to be the felon. (3)

The COURT, in the charge to the jury, having reviewed and commented upon the facts, observed, that the objections, in point of law, would appear on the record, and might be taken advantage of, upon a motion in arrest of judgment. On the law, therefore, the COURT avoided giving any opinion at present, except in relation to the question,—what constituted the destruction of a ship, or vessel, within the meaning of the act of congress? On this question, they had deliberated much; and, as the result, reduced to writing an opinion, which they delivered, in charge to

(3) In the course of the defence, the following authorities were cited: 2 *East, P. C.* 1097, 8. *Johnson's Dict.* "*Cast-away.*" 8 *Mod.* 67. *ca.* 48. *Ib.* 74. *ca.* 52. 4 *Hawk.* 67. 62. 2 *Burr.* 1037. *Plowd.* 177. 1 *Leach*, 215. *Rex* v. *Harrison.* 2 *Stra.* 1241. 8 *Mod.* 66. 1 *Hale*, 635. 2 *Hale*, 389. 6 *Inst.* 202. 4 *Bl. C.* 881. *Leach*, 109. *Con. Interp.* 2 *Hawk. c.* 25. *s.* 58, 59. *Ib. c.* 23. *s.* 82. 2 *Rol. Abr.* 30. 5 *Mod.* 137, 8. The attorney of the district cited 1 *Leach*, 215. 1 *Bl. C.* 467. 2 *Inst.* 702. 1 *Woodes.* 195.

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the jury, in these words: "To *destroy* a vessel, is to unfit her 1806.
"for service, beyond the hopes of recovery, by ordinary means.
"This, in extent of injury, is synonymous with *cast away*. It is
"the generical term: *casting away* is a species of *destroying*, as
"*burning* is. Both mean such an act, as causes a vessel to perish,
"or be lost, so as to be irrecoverable by ordinary means."

The defendant was acquitted, owing, it is believed, to a doubt, whether he had bored himself, or directed any other person to bore, the auger holes in the bottom of the vessel; which was a new vessel, picked up at sea, after she was abandoned, carried into *St. Jago de Cuba*, and there (the holes being discovered) soon repaired, and fitted again for sea.

Symonds *versus* The Union Insurance Company.

THE plaintiff had effected, at the office of the defendants, three policies of insurance, dated the 12th of *September* 1803. The first on the schooner *Diana*, *Nicholas* master, valued at 4500 dollars; the second on the freight of the schooner, valued at 1500 dollars, and the third on her cargo, valued at 4000 dollars; on a voyage, "at and from *New-York* to *Cape François* with liberty to "proceed to another port, should *Cape François* be blockaded, and "the vessel prevented entering that port, from that, or any other; "cause, and at and from thence back to *New-York*." The order for the insurance, declared "that the assured is not to abandon, "if she cannot enter the *Cape* from blockade or other cause, but "liberty is given to proceed to some other port."

The schooner sailed from *New-York*, on the 19th of *September* 1803, with instructions "to proceed to *Cape François;* and, if she "could not enter, from blockade or other cause, to steer towards "the Bite of *Leogane*, and enter either into *Port-au-Prince*, or "some other port in the bite." On the 8th of *October*, she was boarded, off the island of *St. Domingo*, by an officer from the *Blanche*, a *British* frigate, who sent her papers on board the *Bellerophon*, another *British* ship of war. On the next day capt. *Nicholas* was taken on board the *Bellerophon*, and was informed, "that the "island of *St. Domingo* was blockaded by an *English* squadron, "in consequence of which no vessel would be permitted to enter "any port or harbour, in the said island;" and, to that effect, the register and papers of the schooner were indorsed. It appeared, also, from the captain's testimony, "that he was told he was not "permitted to proceed on his intended voyage, nor to go to *Cuba;* "but should proceed down to *Kingston, Jamaica;* that he was "ordered to keep near the frigate *Desire*, until they had cleared "the island of *St. Domingo;* that on his arrival at *Kingston*, he "was, also, told by the custom-house officers, that he could not