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cluding interest on the amount of the appraised value of the said ship Neptune, to be computed from the date of the decree of the said district court.

THE UNITED STATES v. PALMER *et al.*

A robbery committed on the high seas, although such robbery if committed on land would not by the laws of the United States be punishable with death, is *piracy*, under the 8th section of the act of 1790, ch. 36, (ix) for the punishment of certain crimes against the United States; and the circuit courts have jurisdiction thereof.

The crime of *robbery*, as mentioned in the act, is the crime of robbery as recognized and defined at common law.

The crime of robbery committed by a person who is not a citizen of the United States, on the high seas, on board a ship belonging exclusively to subjects of a foreign state, is not piracy under the act and is not punishable in the courts of the United States.

When a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the Union must view such newly constituted government, as it is viewed by the legislative and executive departments of the government of the United States.

If that government remains neutral, but recognizes the existence of a civil war, the courts of the Union cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy.

The same testimony which would be sufficient to prove that a vessel or person is in the service of an acknowledged state, is admissible to prove that they are in the service of such newly erected government. Its seal cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits; and the fact that a vessel or person is in the service of such government may be established otherwise, should it be impracticable to prove the seal.

THIS case was certified from the circuit court for the Massachusetts district.

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At the circuit court of the United States, for the first circuit, begun and holden at Boston, within and for the Massachusetts district, on Wednesday, the fifteenth day of October, in the year of our lord one thousand eight hundred and seventeen:

Before the honourable Joseph Story, associate justice, and John davis, district judge.

The jurors of the United States of America within and for the district aforesaid, upon their oaths, do present, that John Palmer and Thomas Wilson, both late of Boston, in the district aforesaid, mariners, and Barney Colloghan, late of Newburyport, in the aforesaid district, mariner, with force and arms, upon the high seas, out of the jurisdiction of any particular state, on the fourth day of July now last past, did piratically and feloniously set upon, board break, and enter a certain ship called the Industria Raffaelli, then and there being a ship of certain persons (to the jurors aforesaid unknown,) and then and there, piratically and feloniously, did make an assault in and upon certain persons, being mariners, subjects of the king of Spain, whose names to the jurors aforesaid are unknown, in the same ship, in the peace of God, and of the said United States of America, then and there being, and then there piratically and feloniously did put the aforesaid persons, mariners of the same ship, in the ship aforesaid then being, in corporal fear and danger of their lives, then and there, in the ship aforesaid, upon the high seas aforesaid, and out of the jurisdiction of any particular state, as aforesaid, and piratically and feloniously did, then and there, steal, take and carry away five

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hundred boxes of sugar, of the value of twenty thousand dollars of lawful money of the said United States; sixty pipes of rum, of the value of six thousand dollars; two hundred demijohns of honey, of the value of one thousand dollars; one thousand hides, of the value of three thousand dollars; ten hogsheads of coffee, of the value of two thousand dollars; and four bags of silver and gold, of the value of sixty thousand dollars, of the like lawful money of the said United States of America, the goods and chattels of certain persons, (to the jurors aforesaid unknown,) then and there, upon the high seas aforesaid, and out of the jurisdiction of any particular state, being found in the aforesaid ship, in custody and possession of the said mariners in the said ship, from the said mariners of the same ship, and from their custody and possession, then and there, upon the high seas aforesaid, out of the jurisdiction of any particular state, as aforesaid; against the peace and dignity of the said United States, and the form of the statutes of the United States, in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do farther present, that the aforesaid district of Massachusetts is the district where the offenders aforesaid were first apprehended for the said offence.

To which indictment the prisoners pleaded not guilty, and upon the trial the following questions occurred, upon which the opinions of the said judges of the circuit court were opposed.

1st. Whether a robbery committed upon the high seas, although such robbery, if committed upon land, would not, by the laws of the United States, be pun-

ishable with death, is piracy under the eighth section of the act of congress, passed the thirtieth of April, A. D. 1790; and whether the circuit court of the United States hath authority to take cognizance of, try, and punish such offence?

2d. Whether the crime of robbery, mentioned in the said eighth section of the act of congress aforesaid, is the crime of robbery, as recognized and defined at common law, or is dispunishable until it is defined and expressly punished by some act of congress, other than the act of congress above mentioned?

3d. Whether the crime of robbery, committed by persons who are not citizens of the United States, on the high seas, on board of any ship or vessel, belonging exclusively to the subjects of any foreign state or sovereignty, or upon the person of any subject of any foreign state or sovereignty, not on board of any ship or vessel belonging to any citizen or citizens of the United States, be a robbery or piracy, within the true intent and meaning of the said eighth section of the act of congress aforesaid, and of which the circuit court of the United States hath cognizance, to hear, try, determine, and punish the same?

4th. Whether the crime of robbery committed on the high seas, by citizens of the united States, on board of any ship or vessel not belonging to the United States, or to any citizens of the United States, in whole or in part, but owned by, and exclusively belonging to, the subjects of a foreign state or sovereignty, or committed on the high seas, on the person of any subject of any foreign state or sovereignty, who is not, at the time, on board of any

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ship or vessel, belonging in whole or part to the United States, or to any citizen thereof, be a robbery or piracy within the said eighth section of the acts of congress aforesaid, and of which the circuit court of the United States hath cognizance to hear, try, and determine, and punish the same?

5th. Whether any revolted colony, district, or people, which have thrown off their allegiance to their mother country, but have never been acknowledged by the United States, as a sovereign or independent nation or power, have authority to issue commissions to make captures on the high seas of the persons, property and vessels of the subjects of the mother country, who retain their allegiance; and whether the captures made under such commissions are, as to the United States, to be deemed lawful; and whether the forcible seizure, with violence, and by putting in fear of the persons on board of the vessels, the property of the subjects of such mother country, who retain their allegiance, on the high seas, in virtue of such commissions, is not to be deemed a roobery or piracy within the said eighth section of the act of congress aforesaid?

6th. Whether an act, which would be deemed a robbery on the high seas, if done without a lawful commission, is protected from being considered as a robbery on the high seas, when the same act is done under a commission, or the colour of a commission from any foreign colony, district, or people, which have revolted from their native allegiance, and have declared themselves independent and sovereign, and

have assumed to exercise the powers and authorities of an independent and sovereign government, but have never been acknowledged, or recognized, as an independent or sovereign government, or nation, by the United States, or by any other foreign state, prince, or sovereignty?

7th. Whether the existence of a commission to make captures, where it is set up as a defence to an indictment for piracy, must be proved by the production of the original commission, or of a certified copy thereof from the proper department of the foreign state or sovereignty by whom it is granted; or if not, whether the impossibility of producing either the original or such certified copy must not be proved before any inferior and secondary evidence of the existence of such commission is to be allowed, on the trial of such indictment before any court of the United States?

8th. Whether the seal, purporting to be the seal of a foreign state or sovereignty, and annexed to any such commission or a certified copy thereof, is to be admitted in a court of the United States as proving itself, without any other proof of its genuineness, so as to establish the legal existence of such commission from such foreign state or sovereignty?

9th. Whether a seal, annexed to any such commission, purporting to be the public seal used by the persons exercising the powers of government in any foreign colony, district, or people, which have revolted from their native allegiance, and have declared themselves independent and sovereign, and actually exercise the powers of an independent government

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or nation, but have never been acknowledged as such independent government or nation by the United States, is admissible in a court of the United States as proof of the legal existence of such commission, with or without farther proof of the genuineness of such seal?

10th. Whether any colony, district, or people, who have revolted from their native allegiance, and have assumed upon themselves the exercise of independent and sovereign power, can be deemed, in any court of the United States, an independent or sovereign nation, or government, until they have been acknowledged as such by the government of the United States; and whether such acknowledgement can be proved in a court of the United States, otherwise than by some act, or statute, or resolution, of the congress of the United States, or by some public proclamation, or other public act of the executive authority of the United States, directly containing or announcing such acknowledgement, or by publicly receiving and acknowledging an ambassador, or other public minister from such colony, district, or people; and whether such acknowledgement can be proved by mere inference from the private acts or private instructions of the executive of the United States, when no public acknowledgement has ever been made; and whether the courts of the United States are bound judicially to take notice of the existing relations of the United States, as to foreign states and sovereignties, their colonies, and dependencies?

11th. Whether in case of a civil war between a mother country and its colony, the subjects of the different parties are to be deemed, in respect to neutral

nations as enemies to each other, entitled to the rights of war; and that captures made of each other's ships and other property on the high seas are to be considered, in respect to neutral nations as rightful, so that courts of law of neutral nations are not authorized to deem such acts as piracy?

And the said judges, being so opposed in opinion upon the questions aforesaid, the same were then and there, at the repuest of the district attorney for the United States, stated, under the direction of the judges and ordered by the court to be certified under the seal of the court to the supreme court, at their next session to be held thereafter, to be finally decided by said supreme court; and the court being farther of opinion, that farther proceedings could not be had in said cause without prejudice to the merits of the same cause, did order, that the injury impannelled as aforesaid to try said cause, be discharged from giving any verdict therein.

March 13th.

Mr. *Blake* for the United States, argued 1. That a robbery committed on the high seas, is piracy, under the 8th section of the act of 1790, ch. 36. "for the punishment of certain crimes against the United States," although no law of the United States be subsisting for the punishment of the same offence if committed on land; and that such piracy is cognizable in the circuit court. The words of the statute are, That if any person or persons shall commit, upon the high seas," &c. "murder or robbery, or any other offence, which if committed within the body of a county, would by the law of the United States, be punisha-

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ble with death;" &c. "every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death," &c. The relative pronoun "*which*" does not relate back to the first specified offences of "murder or robbery" but refers only to its immediate antecedent, "any other offence." It is this last class of crimes only that must be punishable, by the laws of the United States, with death, if committed within the body of a county, in order to constitute them piracies, when committed on the high seas. It is a mistaken principle commonly applied to penal statutes, that they are to be construed *strictly*. Sir William Jones has laid down the true rule, that criminal laws are to be construed liberally as to the offence, and strictly as to the offender.[a] A strong illustration of the good sense of this rule, is to be found in the construction which has been given in England to the *Stabbing Act*.[b] A contrary construction of the statute now under consideration, would render it wholly inoperative, until there shall be a law of the United States, for the punishment of robbery committed in the body of a county; which will never happen, as the United States have no constitutional authority to punish a robbery committed within the body of a county. Forts, arsenals, dockyards, &c. "under the sole and exclusive jurisdiction of the United States," cannot be said to be within the body of a county. It may be admitted that there is some degree of loosness in the phraseo-

a Life of Sir W. Jones, p. 268.
b Foster's Crown Law, 297.

logy of this section, which was evidently copied from the British statute of the 39 Geo. III. ch. 37. relative to the same subject, without regarding the difference between the constitutions of the two countries. On the construction of the British statute, it would be perfectly immaterial whether the pronoun "*which*" was carried back to the words "murder and robbery," or whether it was confined to its immediate antecedent; because, in England, murder and robbery are punishable with death, when committed in the body of a county, under the same laws which constitute them piracies when committed on the high seas. But such a construction of our statute would render it wholly inoperative as to the great offences of murder and robbery, which are not, and cannot be made punishable under the laws of the United States, when committed within the body of a county. Nor can it be objected, that by the construction now contended for, the words "any other offence" would be equally inoperative; because there are various offences which would still be reached by the statute, such as treason, &c. for the punishment of which Congress may provide, though committed within the body of a county. It follows as a corollary, that the circuit court has cognizance of these offences; for, by the judiciary act of 1789, ch. 20. s 11. it has cognizance of *all* crimes and offences cognizable *under the authority of the United States.*"—2. The crime of robbery mentioned in the 8th section of the act of 1790, is the crime of robbery as understood at common law. A piracy or felony on the high seas is sufficiently defined, by terming it a robbery committed on the high seas.

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The import of the term "robbery," must be sought in the common law, in the same manner as the import of the terms *murder*, *manslaughter*, *rescous*, *benefit of clergy*, and many others that are used in the criminal code of the United States.—3. If the *robbery* in question amount to *piracy*, by the law of nations, the words "any person, or persons," in the 8th section, will embrace the subjects of all nations, who may commit that offence on the high seas, whether on board a foreign vessel, or a vessel belonging to citizens of the United States. A felony, which is made a piracy by municipal statutes, and was not such by the law of nations, cannot be tried by the courts of the United States, if committed by a foreigner on board a foreign vessel, on the high seas; because the jurisdiction of the United States, beyond their own territorial limits, only extends to the punishment of crimes which are piracy by the law of nations. But it is the right and the duty of the United States, as a member of the community of nations, to punish offences committed on the high seas against the law of nations.[a] By this statute, congress have exercised this power, which is also conferred on them by the constitution. The offence of piracy, which is imperfectly defined by the law of nations, is declared to be murder or robbery committed on the high seas, or in any river, &c. out of the jurisdiction of any particular state; and is made punishable with death. Congress cannot be presumed to have neglected so important a duty as that of defining and punishing the offence of general piracy.

[a] 4 *Bl. Com.* 71.

Without this statute, there can be found no definition and punishment of it; because the law of nations merely creates the offence, and the common law and statute 28 Henry VIII. ch. 15. may perhaps not be considered as in force in the United States.—4. The crime of robbery committed by a citizen of the United States on the high seas, on board a foreign vessel, or on the person of a foreigner, must be considered as a piracy, under the 8th section of the act; because the jurisdiction of a nation extends to its citizens, wheresoever they may be, except within the territory of a foreign sovereign.*a* The jurisdiction of a nation over its public ships is exclusive every where; but it is not exclusive over merchant vessels belonging to its subjects. It is there concurrent with the personal jurisdiction of other nations over their citizens. Consequently the personal jurisdiction of the United States over their citizens extends to offences committed by them on board of foreign merchant vessel on the high seas.—5. The general principle applied by the writers on the law of nations to the case of a civil war, considers the war, (as between the conflicting parties,) as just on both sides, and that each is to treat the other as a public enemy, according to the established usages of war.*b* So, also, it is the duty of other nations to remain neutral, and not to interfere with the exercise of complete belligerent rights by both parties within the territory which is the scene of their hostilities. But

a 2 *Rutherforth's Inst.* 180. *Vattel, L.* 2 *ch.* 6.
b Vattel, L. 3 *ch.* 18. *s.* 296.

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this does not imply a right on their part to push their wars on to the ocean, and to annoy the rest of the world on this common highway of nations. The generality of the expressions used by Vattal on this subject may, indeed, seem to import such a right. But it should be remembered that, with all his merit, he is very deficient in precision, and on this question peculiarly unsatisfactory. The maritime rights of a belligerent power must be perfect, or they cannot exist at all. They must, therefore, include the right of visitation and search, and of detaining for adjudication; and of punishing a resistance to the exercise of these rights by the appropriate penalty of confiscation. So that neutral nations may come to be affected in their most valuable interests by a mere domestic quarrel, which never ought to have been extended beyond the territory of the people where it originated. This renders it indispensable to inquire how far neutral nations are bound to submit to the exercise of these high prerogatives of sovereignty in a civil war, under colour of a commission from one of the belligerent parties, whose independence has not been acknowledged by any power. The right of an insurgent people to be treated by the parent state, against which it revolts, with all the humanity and moderation which are required in any other war, and the duty of neutral nations to abstain from interfering in the contest, are not denied. But the right of the new people to thrust themselves into the family of nations, and to make the ocean the theatre of their predatory hostilities, without the consent of other nations, is denied. Such a right can only be founded

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upon a perfect title to sovereignty, which cannot exist in a case where the very object of the war is to decide whether the claim of the former sovereign, or of the revolted people shall prevail. This title cannot be taken notice of by the courts of justice until it has been recognized by the government of the country under whose authority they sit.[a]—6. If, then, a revolted colony or people, whose independence has not been recognized by the government of the United States, have no authority to issue a commission to make captures on the high seas, which can be considered as valid in the courts of the United States, a capture under such a commission is, in no respect, distinguishable from a capture without any commission. A privateer, cruizing under two commissions from different sovereigns is a pirate.[b] In the case of the famous pirate *Kydd*,[c] the indictment was for general piracy. He had two commissions, one against the French, the other against certain pirates, which he produced in his justification. But Lord Chief Baron Ward said, "If he had acted pursuant to his commission, he ought to have condemned ship and goods, if they were French; but by his not condemning, he seems to show his *aim*, *mind*, and *intention*, and that he did not act in that case by virtue of his commission, but quite contrary to it. Whilst

a Rose v. Himely, 4 *Cranch*, 292. Gelston v. Hoyt, *ante* p. 324.

b 2 *Sir L. Jenkins' Life*, 714. *Ord. de la Mar. L. 3. t. 9. art. 3. Martens on Privateers*, 44.

c 5 *State Trials*, 314.

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men pursue their commissions, they must be justified; but when they do things not authorized, or never intended by them, it is as if they had no commission." This principle, that where the criminal intention is apparent, the quality of the act will not be changed by its having been committed under colour of legal authority, is illustrated by all the analogies of criminal law.[a]—7. The established rules of evidence ought not to be dispensed with in the proof of an authority to capture, where that authority is set up as a defence to an indictment for piracy. All civilized nations have departments and offices, in which the commissions issued to their cruizers are registered; the original is borne about with him by the cruizer as his authority to search, to detain, and to capture; a copy of it may always be readily obtained by application at the proper office. The impossibility of producing the original, or an examined copy of such a commission, is, therefore, an inadmissible supposition. The rule of evidence which requires that it should be produced is inflexible, and is founded upon the reasonable suspicion, excited by a resort to inferior testimony, that there must be some fatal defect in the original documents.—8. There can be no doubt that the seal of a recognized foreign state or sovereignty, is to be admitted as proving itself, without other proof of its genuineness. But the seal of a new people, or state, is not sufficiently notorious to prove itself, and to give credit to it would be to recognize the sovereign from whom it emanates, which courts of justice are not

a 2 *East's Crown Law*, 660. *Forster*, 135, 154. 312.

competent to do. 9. The ninth question certified from the court below has been already answered. 10. The first branch of the tenth question has been before answered by this court in the cases already cited.[a] The second branch of this question pre-supposes that no distinct acknowledgment of the new state has been made by the United States, since it excludes from consideration any public act of recognition by the legislative and executive departments, and confines itself to the mere private acts and instructions of the executive. On a subject of such importance as a change in the foreign relations of the country, nothing but the most explicit, public, and notorious acts of the government should be noticed by courts of justice. Nothing should be left to inference and conjecture; because, such a course might lead to a usurpation by the courts of the high prerogative of making war and peace, and the whole nation would become responsible to other nations for the error of judgment in a department with which it had not entrusted the care of its foreign affairs. In the infinite variety and complication of these affairs, the language and conduct of the executive may be misunderstood; and, therefore, nothing short of an act of the whole legislature, a treaty, a proclamation of the president, or the public reception of an ambassador from the new state, ought to be considered as a recognition of its independence. 11. The eleventh

[a] Rose v. Himely, 4 *Cranch*, 292. Gelston v. Hoyt, *ante*, p. 324.

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question is involved in the discussion of the proceeding.

No counsel appeared to argue the cause for the prisoners.

March 14th. Mr. Chief Justice MARSHALL delivered the opinion of the court. In this case, a series of questions has been proposed by the circuit court of the United States, for the district of Massachusetts, on which the judges of that court were divided in opinion. The questions occurred on the trial of John Palmer, Thomas Wilson, and Barney Calloghan, who were indicted for piracy committed on the high seas.

The first four questions, relate to the construction of the 8th section of the "act for the punishment of certain crimes against the United States."

The remaining seven questions, respect the rights of a colony or other portion of an established empire, which has proclaimed itself an independent nation, and is asserting and maintaining its claim to independence by arms.

A robbery committed on the high seas, although such robbery, if committed on land, would not by the laws of the U. S. be punishable with death, is piracy, under the act of 1790 ch. 36. s. 8.; and the circuit courts have jurisdiction thereof.

The 8th section of the act on which these prisoners were indicted is in these words: "And be it enacted, that if any person or persons shall commit, upon the high seas, or in any river, haven, basson, or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or

merchandize, to the value of fifty dollars or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship, or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought."

Robbery committed on land, not being punishable by the laws of the United States with death, it is doubted whether it is made piracy by this act, when committed on the high seas. The argument is understood to be, that congress did not intend to make that a capital offence on the high seas, which is not a capital offence on land. That only such murder, and such robbery, and such other offence as, if committed within the body of a county, would, by the laws of the United States, be punishable with death, is made piracy. That the word "other" is without use or meaning, if this construction be rejected. That it so connects murder and robbery with the following member of the sentence, as to limit the words murder and robbery to that description of those offences which might be made punishable with death, if committed on land. That in consequence of this word, the relative "which" has for its antecedent the whole preceding part of the sentence, and not the words "other offences." That section

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consists of three distinct classes of piracy. The first, of offences which if committed within the body of a county, would be punishable with death. The second and third, of particular offences which are enumerated.

This argument is entitled to great respect on every account; and to the more, because, in expounding a law which inflicts capital punishment, no over rigid construction ought to be admitted. But the court cannot assent to its correctness.

The legislature having specified murder and robbery particularly, are understood to indicate clearly the intention that those offences shall amount to piracy; there could be no other motive for specifying them. The subsequent words do not appear to be employed for the purpose of limiting piratical murder and robbery, to that description of those offences which is punishable with death, if committed on land, but for the purpose of adding other offences, should there be any, which were not particularly recited, and which were rendered capital by the laws of the United States, if committed within the body of a county. Had the intention of congress been to render the crime of piracy dependent on the punishment affixed to the same offence, if committed on land, this intention must have been expressed in very different terms from those which have been selected. Instead of enumerating murder and robbery as crimes which should constitute piracy, and then proceeding to use a general term, comprehending other offences, the language of the legislature would have been, that "*any offence*" committed on the high seas, which, if

committed in the body of a county, would be punishable with death, should amount to piracy.

The particular crimes enumerated were undoubtedly first in the mind of congress. No other motive for the enumeration can be assigned. Yet on the construction contended for, robbery on the high seas would escape unpunished. It is not pretended that the words of the legislature ought to be strained beyond their natural meaning, for the purpose of embracing a crime which would otherwise escape with impunity; but when the words of a statute, in their most obvious sense, comprehend an offence, which offence is apparently placed by the legislature in the highest class of crimes, it furnishes an additional motive for rejecting a construction, narrowing the plain meaning of the words, that such construction would leave the crime entirely unpunished.

The correctness of this exposition of the 8th section is confirmed by those which follow.

The 9th punishes those citizens of the United States who commit the offences described in the 8th, under colour of a commission or authority derived from a foreign state. Here robbery is again particularly specified.

The 10th section extends the punishment of death to accessories before the fact. They are described to be those who aid, assist, advise, &c. &c any person to "commit any murder, *robbery*, or other piracy aforesaid." If the word "aforesaid" be connected with "murder" and "robbery," as well as with "other piracy," yet it seems difficult to resist the

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conviction that the legislature considered murder and robbery as acts of piracy.

The 11th section punishes acccessories after the fact. They are those who, "after any murder, felony, *robbery*, or other piracy whatsoever, aforesaid," shall have been committed, shall furnish aid to those by whom the crime has been perpetrated. Can it be doubted, that the legislature considered murder, felony, and robbery, committed on the high seas, as piracies?

If it be answered, that although this opinion was entertained, yet, if the legislature was mistaken, those whose duty it is to construe the law, must not yield to that mistake; we say, that when the legislature manifests this clear understanding of its own intention, which intention consists with its words, courts are bound by it.

The crime of robbery, as mentioned in the act of 1790 ch. 36. is the crime of robbery as recognized and defined at common law.

Of the meaning of the term robbery, as used in the statute, we think no doubt can be entertained. It must be understood in the sense in which it is recognized and defined at common law.

The crime of robbery committed by a person who is not a citizen of the U. States, on the high seas, on board of a ship belonging exclusively to subjects of a foreign state, is not piracy under the act, and is not punishable in the courts of the United States.

The question, whether this act extends farther than to American citizens, or to persons on board American vessels, or to offences committed against citizens of the United States, is not without its difficulties. The constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States. The only

question is, has the legislature enacted such a law? Do the words of the act authorize the courts of the union to inflict its penalties on persons who are not citizens of the United States, nor sailing under their flag nor offending particularly against them?

The words of the section are in terms of unlimited extent. The words "any person or persons," are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them. Did the legislature intend to apply these words to the subjects of a foreign power, who in a foreign ship may commit murder or robbery on the high seas?

The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature. The title of this act is, "an act for the punishment of certain crimes against the United States." It would seem that offences against the United States, not offences against the human race, were the crimes which the legislature intended by this law to punish.

The act proceeds upon this idea, and uses general terms in this limited sense. In describing those who may commit misprision of treason or felony, the words used are "any person or persons;" yet these words are necessarily confined to any person or persons owing permament or temporary allegiance to the United States.

The 8th section also commences with the words "any person or persons." But these words must be

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limited in some degree, and the intent of the legislature will determine the extent of this limitation. For this intent we must examine the law. The succeeding member of the sentence commences with the words, "if any captain or mariner of any ship or other vessel, shall piratically run away with such ship or vessel, or any goods or merchandize, to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate."

The words "any captain, or mariner of any ship or other vessel," comprehend all captains and mariners, as entirely as the words "any person or persons," comprehend the whole human race. Yet it would be difficult to believe that the legislature intended to punish the captain or mariner of a foreign ship, who should run away with such ship, and dispose of her in a foreign port, or who should steal any goods from such ship to the value of fifty dollars, or who should deliver her up to a pirate when he might have defended her, or even according to previous arrangement. The third member of the sentence also begins with the general words "any seaman. But it cannot be supposed that the legislature intended to punish a seaman on board a ship sailing under a foreign flag, under the jurisdiction of a foreign government, who should lay violent hands upon his commander, or make a revolt in the ship. These are offences against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are. Every nation provides for such offences the punishment its own policy may dictate; and no general words of a statute ought to

be construed to embrace them when committed by foreigners against a foreign government.

That the general words of the two latter members of this sentence are to be restricted to offences committed on board the vessels of the United States, furnishes strong reason for believing that the legislature intended to impose the same restriction on the general words used in the first member of the sentence.

This construction derives aid from the 10th section of the act. That section declares, that "*any person*" who shall "knowingly and wittingly aid and assist, procure, command, counsel, or advise, any person or persons, to do or commit any murder or robbery, &c." shall be an accessory before the fact, and, on conviction, shall suffer death.

It will scarcely be denied that the words "any person," when applied to aiding or advising a fact, are as extensive as the same words when applied to the commission of that fact. Can it be believed that the legislature intended to punish with death the subject of a foreign prince, who, within the dominions of that prince, should advise a person, about to sail in the ship of his sovereign, to commit murder or robbery? If the advice is not a crime within the law, neither is the fact advised a crime within the law.

The opinion formed by the court on this subject might be still farther illustrated by animadversions on other sections of the act. But it would be tedious, and is thought unnecessary.

The court is of opinion that the crime of robbery, committed by a person on the high seas, on board of

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any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States.

This opinion will probably decide the case to which it is intended to apply.

When a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the union must view such new ly constituted government as it is viewed by the legislative and executive departments of the government of the U. States.

Those questions which respect the rights of a part of a foreign empire, which asserts, and is contending for its independence, and the conduct which must be observed by the courts of the union towards the subjects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult.

As it is understood that the construction which has been given to the act of congress, will render a particular answer to them unnecessary, the court will only observe, that such questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. In such contests a nation may engage itself with the one party or the other—may observe absolute neutrality—may recognize the new state absolutely—or may make a limited recognition of it. The proceeding in courts must depend so entirely on the course of the govern-

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ment, that it is difficult to give a precise answer to questions which do not refer to a particular nation.—It may be said, generally, that if the government remains neutral, and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy. To decide otherwise, would be to determine that the war prosecuted by one of the parties was unlawful, and would be to arrange the nation to which the court belongs against that party. This would transcend the limits prescribed to the judicial department.

The same testimony which would be sufficient to prove that a vessel or person is in the service of an acknowledged state, is admissible to prove that they are in the service of a newly created government

It follows as a consequence, from this view of the subject that persons or vessels employed in the service of a self declared government, thus acknowledged to be maintaining its separate existence by war, must be permitted to prove the fact of their being actually employed in such service, by the same testimony which would be sufficient to prove that such vessel or person was employed in the service of an acknowledged state. The seal of such acknowledged government cannot be permitted to prove itself; but it may be proved by some testimony as the nature of the case admits; and the fact that such vessel or person is employed may be proved without proving the seal.

Mr. Justice JOHNSON. The first of these questions arises on the construction of the first division of the 8th section of the act for the punishment of certain crimes.

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That act comprises two classes of cases, the second of which may again be subdivided into two divisions. In the second class of cases, each crime is specifically described in the ordinary mode of defining crimes, and so far the constitutional power of defining and punishing piracies and felonies on the high seas, is strictly complied with. But, with regard to the first class of cases, the legislature refers for a definition to other sources—to information not to be found in that section itself. The words are these: "If any persons shall commit, upon the high seas, &c. murder or robbery, or any other offence, which, if committed in the body of a county, would, by the laws of the United States, be punishable with death, &c. such person shall, upon conviction thereof, suffer death." Thus referring to the common law definition of murder and robbery alone, or to the common law definition of murder and robbery with the superadded statutory requisite of being made punishable with death, if committed on land, in order to define the offence which, under that section, is made capitally punishable.

The crime of robbery is the offence charged in this indictment, and the question is, whether it must not be shown that it must have been made punishable with death, if committed on land, in order to subject the offender to that punishment, if committed on the high seas. And singular as it may appear, it really is the fact in this case, that these mens' lives may depend upon a comma more or less, or upon the question whether a relative, which may take in three antecedents just as well as one, shall be confined to one

alone. Upon such a question I here solemny declare, that I never will consent to take the life of any man in obedience to any court; and if ever forced to choose between obeying this court, on such a point, or resigning my commission, I would not hesitate adopting the latter alternative.

But to my mind it is obvious, that both the intent of the legislature, and the construction of the words, are in favour of the prisoners. This, however, is more than I need contend for, since a doubt relative to that construction or intent ought to be as effectual in their favour, as the most thorough conviction.

When the intent of the legislature is looked into, it is as obvious as the light, and requires as little reasoning to prove its existence, that the object proposed was with regard to crimes which may be committed either on the sea or land, to produce an uniformity in the punishment, so that where death was inflicted in the one case, it should be inflicted in another. And congress certainly legislated under the idea, that the punishment of death had been previously enacted for the crime of robbery on land, as it had in fact been for murder, and some other crimes. And in my opinion this intent ought to govern the grammatical construction, and make the relative to refer to all three of the antecedents, *murder*, *robbery*, and other *crimes*, instead of being confined to the last alone. That it may be so applied consistently with grammatical correctness, no one can deny; and if so, *in favorem vitæ*, we are, in my opinion, legally bound to give it that construction. Again; there is no reason to think that the word *other* is altogether a supernumerary

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member of the sentence. To give the construction contended for in behalf of the United States, that word must be rendered useless and inoperative; the sentence has the same meaning with or without it. But if we retain it, and substitute its definition, or examine its effect upon the meaning of the terms associated with it, we then have the following results: *other* is commonly defined to mean *not the same*, or (what is certainly synonymous,) *not before* mentioned. With this expression, the sentence would read thus: "murder, or robbery, or any offence not before mentioned," for which the punishment of death is by law inflicted. And as the use of the comma is exceedingly arbitrary and indefiite, by expunging all the commas from the sentence the meaning becomes still more obvious. Or, if instead of substiuting the words not before mentioned, we introduce the single term *unenumerated*, in the sense of which the term *other* is unquestionably used by the legislature, the conclusion becomes irresistible in favour of the prisoners. There is another view of this subject that leads to the same conclusion; by supplying an obvious elision, the same meaning is given to this section. The word *other* is responded to by *than*, and the repetition of the excluded words is understood. Thus, in the case before us, by supplying the elision, we "make murder, robbery, or any crime other than murder or robbery," made punishable, &c. the signification of which words, had they been used, would have left no doubt.

There are several inconsistences growing out of a construction unfavourable to the prisoners, which

merit the most serious consideration. The first is, the most sanguinary character that it gives to this law in its operation; for it is literally true, that under it a whole ship's crew may be consigned to the gallows, for robbing a vessel of a single chicken, even although a robbery committed on land for thousands, may not have been made punishable beyond whipping or confinement. If natural reason is not to be consulted on this point, at least the mild and benignant spirit of the laws of the United States merits attention. With regard to the mail this inconsistency actually may occur under existing laws, should the mail ever again be carried by water, as it has been formerly. This cannot be consistent with the intention of the legislature.

But, it is contended, if congress had not intended to make murder and robbery punishable with death, independently of the circumstance of those offences being so made punishable when committed on land, they would have omitted those specified crimes altogether from this section, and have enacted generally, that all crimes made punishable with death on land should be punishable with death if committed on the seas, without enumerating murder and robbery.— This is fair reasoning; and in any case but one of life and death, it might have some weight. But in no case very great weight; because, in that respect, a legislature is subject to no laws in the selection of the course to be pursued. In this case, the obvious fact is, that they commenced enumerating, and fearing some omission of crimes then supposed subject by law to death, these

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general descriptive words are resorted to. But every other crime that this division of the section comprises was punishable with death, both those which precede robbery in the enumeration, and those which come after. Robbery, except in case of the mail, stands alone; and, no doubt, was introduced under the idea, that that also had the same punishment attached to it. If it had not, in fact, then it was the case on which the legislature intended to act; and according to my views of the grammatical or philological construction of the sentence, it is one on which they have not acted. This construction derives considerable force, also from the consideration that this act is framed on the model of the British statute, which avowedly had this uniformity for its object.

The second question proposed in this case is one on which, I presume, there can be no doubt. For the definition of robbery under this act we must look for the definition of the term in the common law, or we will find it no where; and, according to my construction, superadd to that definition the circumstance of its being made punishable with death, under the laws of the United States, if committed on land, and you have described the offence made punishable under this section.

There are eleven questions certified from the circuit court of Massachusetts; but of those eleven, these two only appear to me to arise out of the case. The transcript contains nothing but the indictment and impannelling of the jury. No motion; no evidence; no demurrer *ore tenus*, or case stated, appears upon the transcript, on which the remaining questions could

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arise. On the indictment the two first questions might well have been raised by the court themselves, as of counsel for the prisoners; but as far as appears to this court, all the other questions might as well have been raised in any other case. I here enter my protest against having these general questions adjourned to this court. We are constituted to decide causes, and not to discuss themes, or digest systems. It is true, the words of the act, respecting division of opinion in the circuit court, are general; but independently of the consideration that it was not to be expected that the court could be divided, unless upon questions arising out of some cause depending, the words in the first proviso, "that the cause may be proceeded in," plainly show that the questions contemplated in the act are questions arising in a cause depending; and if so, it ought to be shown that they do arise in the cause, and are not merely hypothetical. In the case of Martin v. Hunter,[a] this court expressly acted upon this principle, when it went into a consideration of the question, whether any estate existed in the plaintiff in error, before it would consider the question on the construction of the treaty, as applicable to that estate.

If, however, it becomes necessary to consider the other questions in this case, I will lay down a few general principles, which, I believe, will answer all: 1. Congress can inflict punishment on offences committed on board the vessels of the United States, or by citizens of the United States, any where; but congress cannot make that piracy which is not piracy by the law of na-

[a] 7 *Cranch*, 603. *Ante*, vol. 1, p. 304.

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tions, in order to give jurisdiction to its own courts over such offences.

2. When open war exists between a nation and its subjects, the subjects of the revolted country are no more liable to be punished as pirates, than the subjects who adhere to their allegiance; and whatever immunity the law of nations gives to the ship, it extends to all who serve on board of her, excepting only the responsibility of individuals to the laws of their respective countries.

3. The proof of a commission is not necessary to exempt an individual serving on board a ship engaged in the war, because any ship of a belligerent may capture an enemy; and whether acting under a commission or not, is an immaterial question as to third persons: he must answer that to his own government. It is only necessary to prove two facts: 1st. The existence of open war: 2dly. That the vessel is really documented, owned, and commanded as a belligerent vessel, and not affectedly so for piratical purposes.

4. For proof of property and documents, it is not to be expected that any better evidence can be produced than the seal of the revolted country, with such reasonable evidence as the case may admit of, to prove it to be known as such; and a seal once proved, or admitted to a court, ought afterwards to be acknowledged by the court officially, at least, as against the party who has once acknowledged it.

CERTIFICATE.—This cause came on to be heard on the transcript of the record of the circuit court of the United States, for the district of Massachusetts,

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and on the questions on which the judges of that court were divided; and was argued by counsel on the part of the United States. On consideration whereof, this court is of opinion that a robbery committed on the high seas, although such robbery, if committed on land, would not, by the laws of the United States, be punishable with death, is piracy under the eighth section of an act entitled, "an act for the punishment of certain crimes against the United States;" and that the circuit courts of the United States have jurisdiction thereof. And that the crime of robbery, as mentioned in the said act of congress, is the crime of robbery as recognized and defined at common law

This court is further of opinion, that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not piracy within the true intent and meaning of the act, entitled, "an act for the punishment of certain crimes against the United States," and is not punishable in the courts of the United States.

This court is further of opinion, that when a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States. If the government of the union remains neutral, but recognizes the existence of a civil war, the courts

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of the union cannot consider as criminal those acts of hostility, which war authorizes, and which the new government may direct against its enemy. In general, the same testimony which would be sufficient to prove that a vessel or a person is in the service of an acknowledged state, must be admitted to prove that a vessel or person is in the service of such newly erected government. Its seal cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits. And the fact that a vessel or person is in the service of such government may be established otherwise, should it be impracticable to prove the seal.

All which is ordered to be certified to the circuit court of the United States for the district of Massachusetts.