TRIALS

OF THE

MAIL ROBBERS,

HARE, ALEXANDER AND HARE.

WITH THE TESTIMONY, THE PROCEEDINGS OF THE COURT, AND THE ARGUMENTS OF COUNSEL AT LENGTH.

WILLIAM WIRT, ESQ. Attorney General of the United States; ELIAS GLENN, ESQ. District Attorney; THOMAS KELL and REVERDY JOHNSON, ESQS. for the prosecution.

GENERAL WINDER, DAVID HOFFMAN, CHARLES MITCHELL and EBENEZER L. FINLEY, ESQS. for the prisoners

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REPORTED

BY EDWARD J. COALE.

TO WHICH IS ADDED, THE TRIAL AND PROCEEDINGS BEFORE THE CIRCUIT COURT OF THE UNITED STATES, IN PHILADELPHIA, IN THE CASE OF

WILLIAM WOOD,

AN ACCESSARY BEFORE THE FACT.

Reported for the Franklin Gazette,

BY RICHARD BACHE, ESQ.

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TRIALS

OF

Joseph Thompson Hare, John Alexander and Lewis Hare.

In the Circuit Court of the United States, for the Fourth Circuit, held at the City of Baltimore, for the District of Maryland.—May Term, 1818.

PRESENT,

The hon. chief justice GABRIEL DUVALL, } Judges.
The honourable JAMES HOUSTON, }

The following indictments were returned by the grand jury, TRUE BILLS.

UNITED STATES, *vs.* JOSEPH THOMPSON HARE.

In the Circuit Court of the United States of America, for the Fourth Circuit, held at the city of Baltimore, in and for the Maryland District.

MARYLAND DISTRICT—TO WIT:

The grand inquest of the United States of America, for the fourth circuit, inquiring for the body of the Maland district, upon their oaths, do present; that *Joseph Thompson Hare,* late of the said district, yeoman, to-

gether with a certain *Lewis Hare* and a certain *John Alexander*, on the eleventh day of March, in the year eighteen hundred and eighteen, in the night of the same day, in the public highway at Harford county, at the district aforesaid, in and upon one David Boyer, then and there being the carrier of the mail of the said United States, and the person entrusted therewith, and in the peace of God, and of the said United States, then and there being, with force and arms at the district aforesaid, feloniously did make an assault, and him, the said David Boyer, in bodily fear and danger of his life in the highway aforesaid, then and there did put, and with the use of certain dangerous weapons, to wit: pistols and dirks, which the said *Joseph Thompson Hare*, then and there in his hands held, he the said *Joseph*, did put in jeopardy the life of said David Boyer, he the said David Boyer, then and there being entrusted with, and having the custody of the said mail of the said United States, and the mail aforesaid, so entrusted and in the custody as aforesaid, of said Boyer, certain bank bills, letters and packets, to the jurors aforesaid unknown, belonging to certain persons, to the jurors aforesaid unknown, from the personal custody and care of the said David Boyer, and against his will, in the highway aforesaid, at the district aforesaid, then and there feloniously and violently did rob, steal, take and carry away, against the form of the statute of the said United States, in such cases made and provided, and against the peace, government and dignity of the said United States of America.

And the jurors aforesaid, upon their oaths aforesaid, do further present; that the said *Joseph Thompson Hare*, together with the said *John Alexander* and

Lewis Hare, on the eleventh day of March, in the year aforesaid, in the night of the same day, in the public highway at Harford county, at the district aforesaid, in and upon David Boyer, he then and there being the carrier of the mail of the said United States, and the person entrusted therewith, and in the peace of God, and of the said United States, then and there being, with force and arms, at the district aforesaid, feloniously did make an assault, and him the said David Boyer, in bodily fear and danger of his life, in the said public highway, then and there, and with the use of certain dangerous weapons, to wit: pistols and dirks, which the said *Joseph Thomson Hare*, then and there held in his hands, the said *Joseph Thompson Hare*, did put in jeopardy the life of said David Boyer, then and there being entrusted with and having the custody of said mail, and the said mail of the said United States, from the custody, possession and care of said David Boyer, and against the will of said David Boyer, in the highway aforesaid, at the district aforesaid, did then and there feloniously and violently rob, steal, take and carry away, against the form of the statute of the said United States of America, in such cases made and provided, and against the peace, government and dignity of the said United States of America.

And the jurors aforesaid, upon their oaths aforesaid, do further present; that the said *Joseph Thompson Hare*, together with the said *John Alexander* and *Lewis Hare*, on the eleventh day of March, in the year aforesaid, in the night of the same day at Harford county, in the district aforesaid, in the public highway, in and upon David Boyer, then and there in the peace of God and the said United States, being, and then and there being

the carrier of the mail of the said United States, and the person entrusted therewith, at the district aforesaid, feloniously did make an assult, and him the said David Boyer, then and there having the custody of the said mail of the said United States, in bodily fear and danger of his life, then and there feloniously did put, and from the custody and possession of said David Boyer, and against the will of said David Boyer, in the highway aforesaid, at the district aforesaid, feloniously and violently did rob, steal, take and carry away the said mail of the said United States, then and there containing sundry letters, bank bills, and packets to the jurors aforesaid unknown, belonging to certain persons to the jurors aforesaid unknown, contrary to the form of the statute of the said United States, in such cases made and provided, and against the peace, government, and dignity of the said United States of America.

ELIAS GLENN,
District Attorney of the United States, for Maryland District.

TRUE BILL.
JOHN STRICKER, *Foreman.*

UNITED STATES, *vs.* JOHN ALEXANDER.

In the Circuit Court of the United States of America, for the Fourth Circuit, held at the city of Baltimore, in the Maryland District.

MARYLAND DISTRICT—TO WIT:

The grand inquest of the United States of America, for the fourth circuit, inquiring for the body of the Ma-

ryland district, upon their oaths, do present; that *John Alexander*, late of the said district, yeoman, together with a certain *Lewis Hare*, and a certain *Joseph Thompson Hare*, on the eleventh day of March, in the year eighteen hundred and eighteen, in the night of the same day, in the public highway, at Hartford county, at the district aforesaid, in and upon one David Boyer, then and there, being the carrier of the mail of the said United States, and the person entrusted therewith, and in the peace of God, and of the said United States, then and there being, with force and arms, at the district aforesaid, feloniously did make an assault, and him the said David Boyer, in bodily fear and danger of his life in the highway aforesaid, did feloniously put, and with the use of certain dangerous weapons, to wit: pistols and dirks, which he the said *John Alexander*, then and there in his hands held, he the said *John Alexander*, did put the life of the said David Boyer in jeopardy, he the said David, being then and there, the person having the custody of the said mail of the said United States, and being entrusted therewith, and the mail aforesaid, entrusted and in the custody as aforesaid, containing sundry bank bills, letters, notes and packets, to the jurors aforesaid unknown, belonging to certain persons to the jurors aforesaid unknown, from the personal custody, and possession of the said David Boyer, and against his will in the highway aforesaid, at the district aforesaid, feloniously and violently did rob, steal, take and carry away, and against the form of the act of the congress of the United States, in such cases made and provided, and against the peace, government, and dignity of the said United States.

And the jurors aforesaid, upon their oaths aforesaid do further present; that the said *John Alexander*, together with the said *Lewis Hare* and *Joseph Thompson Hare*, on the eleventh day of March, in the year aforesaid, in the night of the same day, at the district aforesaid, in the public highway, in Harford county, at the district aforesaid, in and upon one David Boyer, then and there being the carrier of the mail of the said United States, and the person entrusted therewith, and in the peace of God, and of the said United States, then and there being with force and arms, at the district aforesaid, feloniously did make an assault, and him, the said David Boyer, in bodily fear and danger of his life in the said public highway, then and there feloniously did put, and with the use of certain dangerous weapons, to wit: pistols and dirks, which the said *John Alexander*, then and there held in his hands, he the said *John Alexander*, did put in jeopardy the life of the said David Boyer, then and there being entrusted with, and having the custody of the mail as aforesaid, and the said mail of the said United States, from the custody, possession and care of said David Boyer, and against the will of the said David Boyer, in the highway, at the district aforesaid, did then and there feloniously and violently rob, steal, take and carry away, against the form of the statute of the said United States, in such cases made and provided. and against the peace government and dignity of the said United States.

And the jurors aforesaid, upon their oaths aforesaid, do further present; that the said *John Alexander*, together with the said *Lewis Hare* and *Joseph Thompson Hare*, on the eleventh day of March, in the year aforesaid, in the night of the same day, at Harford county,

in the public highway, at the district aforesaid, in and upon a certain David Boyer, then and there in the peace of God, and of the said United States, being, and then and there being the carrier of the mail of the said United States, and the person entrusted therewith, at the district aforesaid, did feloniously make an assault, and him, the said David Boyer, then and there having the custody of said mail, of the said United States, in bodily fear and danger of his life, then and there feloniously did put, and from the custody and possession of the said David Boyer, in the highway aforesaid, at the district aforesaid, and against the will of the said David Boyer, feloniously and violently did rob, steal, take and carry away the said mail of the said United States, then and there containing sundry letters, bank bills and packages, to the jurors aforesaid unknown, the property of certain persons to the jurors aforesaid unknown, contrary to the form of the statute of the said United States, in such cases made and provided, and against the peace, government and dignity of the said United States of America.

ELIAS GLENN,

Attorney of the United States, for the District of Maryland.

TRUE BILL.

JOHN STRICKER, *Foreman.*

United States, *vs.* Lewis Hare.

In the Circuit Court of the United States of America, for the Fourth Circuit, held at the city of Baltimore, in the Maryland District.

MARYLAND DISTRICT—to wit:

The grand inquest of the United States of America, for the fourth circuit, inquiring for the body of the Maryland district, upon their oaths, do present; that *Lewis Hare,* late of the said district, yeoman, together with a certain *Joseph Thompson Hare* and a certain *John Alexander,* on the eleventh day of March, in the year eighteen hundred and eighteen, in the night of the same day, in the public highway at Harford county, at the district aforesaid, in and upon one David Boyer, then and there being the carrier of the mail of the said United States, and the person entrusted therewith, and in the peace of God, and of the said United States, then and there, being with force and arms at the district aforesaid, feloniously did make an assault, and him the said David Boyer, in bodily fear and danger of his life in the highway aforesaid, did feloniously put, and with the use of certain dangerous weapons, to wit: pistols and dirks, which he the said *Lewis Hare,* then and there in his hands held, he did put the life of said David Boyer in jeopardy, he the said David, being then and there entrusted with said mail, and the person having the custody of the said mail, of the said United States, and the mail aforesaid, entrusted and in the custody as aforesaid, of said Boyer, containing sundry bank bills, letters, notes and packets, to

the jurors aforesaid unknown, belonging to certain persons, to the jurors aforesaid unknown, from the personal custody and possession of said David Boyer, and against his will, in the highway aforesaid, at the district aforesaid, feloniously and violently did rob, steal, take and carry away, against the form of the act of congress of the United States, in such cases made and provided, and against the peace, government and dignity of the said United States.

And the jurors aforesaid, upon their oaths aforesaid, do further present; that the said *Lewis Hare*, together with the said *John Alexander* and *Joseph Thompson Hare*, on the eleventh day of March, in the year aforesaid, in the night of the same day, at the district aforesaid, in the public highway, in Harford county, at the district aforesaid, in and upon one David Boyer, then and there, being the carrier of the mail of the said United States, and the person entrused therewith, and in the peace of God and of the said United States, then and there being, with force and arms, at the district aforesaid, feloniously did make an assault, and him the said David Boyer, in bodily fear and danger of his life, in the said public highway, then and there feloniously did put, and with certain dangerous weapons, to wit: pistols and dirks which the said *Lewis Hare*, then and there held in his hands, he the said *Lewis Hare*, did put in jeopardy the life of the said David Boyer, then and there being entrusted with, and having the custody of the mail as aforesaid, and the said mail of the said United States, from the custody, possession and care of said David Boyer, and against the will of the said David Boyer, at the district aforesaid, in the highway aforesaid, did then and there feloniously and

violently rob, steal, take and carry away, against the form of the statute of the said United States, in such cases made and provided, and against the peace, government and dignity of the said United States.

And the jurors aforesaid, upon their oaths aforesaid, do present; that the said *Lewis Hare*, together with the said *John Alexander* and *Joseph Thompson Hare*, on the eleventh day of March, in the year aforesaid, in the night of the same day, at Harford county, in the public highway, at the district aforesaid, in and upon a certain David Boyer, then and there, in the peace of God and of the said United States being, and then and there being the carrier of the mail of the United States and the person entrusted therewith, at the district aforesaid, did feloniously make an assault, and him the said David Boyer, then and there having the custody of said mail of the said United States, in bodily fear and danger of his life, then and there feloniously did put, and from the custody and possession of said David Boyer, in the highway aforesaid, at the district aforesaid, and against the will of said David Boyer, feloniously and violently did rob, steal, take and carry away the said mail of the said United States, then and there containing sundry letters, bank bills and packages, to the jurors aforesaid unknown, the property of certain persons, to the jurors aforesaid unknown, contrary to the form of the statute of the said United States, in such cases made and provided, and against the peace, government and dignity of the said United States of America.

ELIAS GLENN,
Attorney of the United States for the Maryland District.

TRUE BILL.
JOHN STRICKER, *Foreman.*

Monday, May the 4th.—The grand jury returned the bills of indictment, and the prisoners were immediately brought before the court for arraignment. Upon the arraignment of *Joseph Thompson Hare*, he pleaded not guilty. The indictment against *Lewis Hare*, was then read to him, when Mr. Mitchell on the part of the prisoner observed, that the counsel were not prepared to plead, nor to advise what plea was proper to be entered. The court decided, that as the prisoner had been arraigned, he must plead *instanter*, and observed that his plea should not be considered with any prejudice to his rights, and might be withdrawn the next day, if the counsel thought proper. A plea to the jurisdiction, and a plea of not guilty were then tendered. *John Alexander* was then arraigned, and the same plea tendered. The court desired his plea to be filed in writing, which was immediately done in the following words:

Circuit Court of the United States, for the Fourth Circuit.

JOHN ALEXANDER, *ats.* United States. } Indictment, &c.

And the said *John Alexander*, in proper person, comes and defends himself against the said indictment, and saith that the cognizance of the said crime, in the said indictment mentioned, doth belong and appertain to the courts of the said State of Maryland, having criminal jurisdiction, touching life and death, and that the county court of Harford county, by the laws of the State of Maryland, hath exclusive jurisdiction over all

crimes, the punishment whereof is death, or imprisonment, committed in said county, and that the said crime is not cognizable in this court, by the laws of the United States, nor hath this court jurisdiction thereof.—Wherefore, in as much as the cognizance of the said crime in the same indictment mentioned, doth belong, exclusively to the said county court, the said *John Alexander* prays judgment, whether this honorable court will have any further cognizance of the said indictment, and for further plea in this behalf, the said *John Alexander*, pleads not guilty."

The district attorney moved the court to strike out one of these pleas, either that of not guilty, or that to the jurisdiction of the court—the two pleas together being in the view of the district attorney incompatible. The court adjourned without coming to a decision.

TUESDAY, MAY THE 5TH.—The prisoners were brought before the court. Their counsel asked leave to withdraw their pleas, stating they had not considered what course would be most beneficial for the accused. Mr. Kell, on the part of government objected, unless the counsel for the prisoners would state what was their object in withdrawing the pleas. The counsel replied, that they had entered them upon an unconditional promise of the court, that the pleas might be withdrawn, if the counsel for the prisoner thought proper. To this Judge Houston assented, and by order of the court, the pleas were in each case withdrawn. The prisoners were then severally placed in the bar, and were informed by the court, that they had allowed their pleas to be withdrawn, and that they were now to plead anew.

The indictments were then read in each case, and the prisoners were severally arraigned, and upon being asked whether they were guilty or not guilty, they stood mute and refused to answer. The counsel for the prisoners informed the court that they had instructed them to stand mute. The district attorney then stated that the court might proceed in the same manner as if they had pleaded not guilty, either under the 30th section of the act of congress of 1790, entitled, "An act for the punishment of certain crimes against the United States," or that the court might proceed against them as at common law. The court, however, took time till the next day, to make up their opinion on the proper course of proceeding.

WEDNESDAY, MAY 6TH.—The court met, and the counsel for the prosecution, and the counsel for the prisoners appearing—the court heard an argument on the proper course of proceeding in the trials of the prisoners.

REVERDY JOHNSON, ESQ.

On the part of the prosecution addressed the court, to the following effect:

The court are now called on to decide a question, which I believe has never before presented itself to any of the courts of the United States. That is, whether this court has the power to proceed to the trial of the persons indicted of robbing the mail of the United States, notwithstanding their refusing to plead, or in technical language, their standing mute? As one of the counsel for the prosecution, it becomes my duty to

show the court that they have such power. And if in doing so, the view I shall take of the question before the court should not be as well drawn as that which will be presented them by the gentlemen who are to succeed me, I trust the court will attribute it, not to want of inclination but to inexperience in the artist.—Before proceeding however to lay that view before the court, I must beg leave to express some little surprise at the course which the counsel for the accused have thought fit to advise them to pursue at this stage of their trial. That is, that after they have been arraigned, and have plead not guilty, and that plea, at the instance of the counsel was withdrawn by the permission of the court, under an impression that they would plead again on their subsequent arraignment, they should be advised not to plead, but to stand obstinately mute.—In expressing this surprise however, I assure the gentlemen, it is far from my intention to cast the slightest censure on their conduct, for I am confident that on this, as on every other occasion, they have followed the path, which seemed to them the path of duty—my surprise therefore, is solely owing to the great ingenuity, which the gentlemen by this advice to their clients have evinced; an ingenuity, however, which, with the indulgence of the court, I will now endeavour to show, cannot accomplish their object.

If this offence was especially contained in the act of congress of 1790, chap. 9, then there could be no doubt as to the course which the court on this occasion ought to adopt, because it would be expressly provided for by the 30th section of that law. It will however, no doubt be contended by the counsel for the accused, that inasmuch as the offence for which their clients are in-

dicted, was not created by the act of congress of 1790, but by that for 1810, for the regulation of the post-office; that therefore, the provisions of the 30th section of the former law, for incidents like the present, in the trial of offences only embraces offences created by that law, and does not extend to those of a subsequent origin, or in other words that, that provision cannot be construed to apply to offences which did not exist at the time such provision was made. I will however endeavour to convince the court that by a fair and liberal construction of the act of congress of 1790, the case before the court is included in the provision in question—by the 29th section of that law, after directing that every person accused of treason, shall have a copy of his indictment, and a list of the jury, &c. three days before he shall be tried for the same, it is further directed, "*that in other capital offences*, he shall have such copy of the indictment, &c. two days before his trial." That section further provides, for persons so accused, many other rights and privileges. Then comes the 30th section, and so far as is necessary for the consideration of the question before the court; it is in those words, "if "any person be indicted of treason against the United "States, and shall stand mute, &c. or if any person be "indicted of *any other of the offences herein before set "forth* for which the punishment is declared to be death, "if he shall stand mute, &c. the court in any of the "cases aforesaid, shall notwithstanding proceed to the "trial of such person so standing mute, &c. as if he or "they had pleaded not guilty, and render judgment "thereon accordingly."

The court will perceive that the offences in both these sections of the law are enumerated in the same

order, and that the only variance in their language is, that the words *'other capital offences,'* are used in the second sentence of the 29th section and the words *"offences herein before set forth"* in that of the 30th sect. From this similarity therefore, it would seem to follow, that the provisions of both sections should receive the same construction, and since no one can doubt, but that the persons now indicted are entitled to copies of the indictments and to all the other privileges given by the 29th sect. so also, it seems to me impossible that any one can conceive that the power of the court to proceed to trial when the party stands mute as provided by the 30th section does not also extend to the case now before the court.—Again, the words *"herein before set forth"* contained in the 30th section, which the counsel on the other side will contend; prevents the provisions of that section from applying to the case before the court, can, as I apprehend receive no other sensible construction than that which will extend it, not only to offences, specially described in the preceding part of the law, but to every offence previously mentioned; and since the general words, "other capital offences" in the immediate preceding section of the law, it is admitted on all hands, embraces every offence against the laws of the United States, and therefore, the offence now to be tried; it follows that the provisions of the 30th section extend also to this case. As another reason for giving liberal construction to the words "herein before set forth," I would remark to the court, that the provisions of the 30th section did not infringe any right, which persons in such situations previously enjoyed, but on the contrary gave them an additional privilege. To show the court that I am correct in this opinion, I refer them to

the 11th section of the act of congress of 1789, c. 20, by which exclusive jurisdiction of all crimes and offences, cognizable under the authority of the United States is given to the circuit courts of the United States, except where it is otherwise directed, and to the 34th section of the same law, where it is provided, that the laws of the several states, except when otherwise directed, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply. If then the provisions of the 30th section of the act of congress of 1790, should be construed by reason of the words, "herein before set forth," to extend only to the offences created by that act, it follows: that in the trial of all other offences, where the persons accused stood mute, the court would be obliged to proceed as the laws of the state, in which the trial happened, in like cases directed. What then previous to the act of assembly of Maryland, of 1809, c. 138, by which, in all cases of treason or felony, where the party stands mute, a similar provision is made to that of the 30th section of the act of congress of 1790—was the law in such cases in this state? I state it to have been, and I do so without fear of contradiction, that a standing mute amounted to a confession of the charge, and that judgment would have been rendered thereon, as on the finding of the verdict. In order to satisfy the court that such was the law, I refer them to Kilty's Report of English statutes, p. 17, wherein a note on the statute of Westminster, 3. Edw'd. 1. c. 12, two cases are cited in which such a judgment was awarded, and to the statute of 12th, Geo. 3d c. 20, which directed such judgment in all cases of felony, to be entered, which statute extended to this state by express provision, as

the court will find by the same report of statutes, p. 199, I think that I have now satisfactorily shown the court, that I was right in saying, that the 30th section of the act of congress of 1790, did not restrain, but enlarged the privileges of persons accused of offences against the laws of the United States. If, however, the court should be of opinion, that I am wrong in giving this liberal construction to the act of 1790, and that the provision of the 30th section of that law, cannot be made to apply to the case before the court. I think their is another ground, on which the court may safely proceed to the trial of these persons, and it is shortly this. By the 34th section of the act of congress of 1789, c. 20, which I have before had occasion to refer to, it is directed, "that the laws of the several states, except where the "constitution creates, or statutes of the United States "otherwise require or provide, shall be regarded as "rules of decision in trials at common law in the courts "of the United States, in cases where they apply." I imagine it will hardly be contended, that this provision was intended to be confined to such laws of the states, as were in existence at the time that act of congress was passed. There is nothing in the language of the provision, which justifies such a restricted construction. The words are general—that the laws of the several states, &c. shall be rules of decision in the courts of the United States, except where it is otherwise directed. What then is the law in this state, on a case like the present? By the act of assembly of 1809, c. 138, section 12, which I have also before incidentally noticed, it is provided, "that if any person be indicted of trea- "son or felony, and he or she shall stand mute, or will "not answer to the indictment, the court in such case

"shall notwithstanding proceed to the trial of such per-"son so standing mute, as if he or she had pleaded not "guilty, and render judgment thereon accordingly." If therefore, the court should be of opinion, which I am far from anticipating, that they have no authority to go on with the trial of those persons, under the 30th section of the act of congress of 1790, I imagine they then cannot doubt, but that they have such power under the act of assembly of this state, when taken in connection with the 34th section of the act of congress of 1789. Because if "there be nothing in the constitution, treaties, or statutes of the United States, which otherwise provides;" that act of assembly must be regarded as a rule of decision by the courts of the United States, and this court is bound by it under the 34th section of the act of congress of 1789; and as no such provision can be found, this court has full and complete authority, nay, they are compelled to proceed according to that act of assembly, and that is, to go on to try those persons as if they had pleaded not guilty. Here I think I might safely rest this question. There are, however, some other remarks, which with the permission of the court, I will now suggest. If the acts of congress of 1789, and 1790 had never passed, I feel but little hesitation in saying, that you would notwithstanding have no difficulty in proceeding with this trial. Because as the trial by jury for offences of this kind, is directed in general words, by the constitution of the United States, it would follow, that all the incidents to that mode of trial, in the absence of particular provisions on the subject, would be considered as also directed. In the whole history then, of jury trial, previous to the time of Edw'd. 1st. I defy the counsel for the accused,

to point out a single instance where a person escaped a trial by standing mute. If this mode of trial was ever at any stage of its existence, so defective as to suffer such an escape, it is obvious, that they would always have been effected, and that the trial itself would have been only a mockery of justice. The gentlemen may possibly say, that the party might have escaped a trial by standing mute, he could not have escaped with impunity, as he would have been subject to the dreadful punishment of "*piene forte et dure.*" I deny, however, that such a punishment ever existed at common law. We are to look for its origin to the statute of Westminster, 3d. Edw'd. 1st, c. 12. By the common law, standing mute, was in all cases as it is now by the statute of 12, George 3d. a confession of guilt. To prove this, I refer the court to 4th. Black. Com. 327. In the United States, however, it is very certain that the punishment of "*piene forte et dure,*" never existed.

In the absence then of all statutary provisions, the court would be justified in considering those persons as confessing their guilt, and in according judgment against them accordingly. There is, however, another reason, which to my mind, shows conclusively, that you must have the power to proceed with this trial, and it is, that if you have not that authority, those persons must escape unpunished, since the state courts, in cases like the present do not possess concurrent jurisdiction, because they have not the power of punishing to as great an extent as the act of congress prescribes for the punishment of those persons if they should be convicted. The courts of the states have only jurisdiction over the prosecution of such offences against the act of 1810, under which the persons now before the court are

indicted as by the laws of the state they can punish to as great an extent as that act directs. If then the counsel for the accused are right, robberies of the mail of the United States may be effected with almost perfect safety, since, if detected, the robbers may escape being tried, by adopting the plan of the persons now charged with that offence; or in other words, if they will only stand mute, when arraigned, they may securely bid defiance to the laws of the land, and render the act of 1810, so far as it regards the offences of robbing the mail a dead letter. I believe I have now put the court in possession of all the observations that have occurred to me on this question, I feel confident that much more might be said than I have been able to suggest. I shall be followed however by gentlemen, who will add every thing which the question admits of. I feel sorry that I should have suffered myself to have tresspassed so long on the patience of the court. I return the court thanks for the kindness with which they have listened to me, and I conclude with a full assurance, that this trial will go on as if the prisoners had pleaded not guilty.

ELIAS GLENN, Esq.

DISTRICT ATTORNEY, FOR THE PROSECUTION.

The question now under consideration, presents more of novelty, than of difficulty. The learning respecting standing mute has been long considered rather as a subject for the curious student, than of essential importance to the practical lawyer. To day, for the first time since the adoption of our present form of government, we

have to enquire a little into its nature, and to ascertain, whether the voluntary act of a criminal can obstruct the progress of justice, and put at defiance laws the most salutary and necessary for society.

According to my understanding of the case, this is its situation—upon their arraignment in the first instance, the prisoners pleaded not guilty; their counsel, after some advisement, thought proper to request of the court that this plea might be withdrawn, in order, according to my impression, that the prisoners might plead *de novo*, for if such an understanding had not existed with the court, would they for one moment have permitted any alteration to have been made in a plea which gave to the prisoners every fair and proper advantage that a prisoner ought to possess—if such impression were correct and the court knew, as is the fact, that the visitation of God has not silenced the prisoners, would it not be proper for the court to insist on some plea being filed in the cause.

But waving, for argument's sake, this consideration —let us enquire in what predicament the court is now placed—whether the trial must stop at this place, and the infliction of the punishment provided by law for offences of the high character charged in this indictment is to be prevented by this course of proceeding.

I shall contend on this point—1st. that this conduct of the prisoners is a constructive confession, and the court must proceed to pass sentence upon them.—Or 2d. that the court may proceed to the trial, as if the general issue plea of not guilty had been interposed.

1st. The counsel for the prisoners contend that this is a *casus omissus* in the law, and there being no common law by which the courts of the United States can

be governed in criminal cases—We must stop here. If the prosecution is to derive no benefit from the common law, the prisoners must be upon the same footing in this respect—they are to have no benefit of it either, and our common sense is called in to govern in the decision of this case—and what would that say? that the prisoners were guilty, that their silence is a *constructive* confession. In pleading (which is justly said to be a system of sound reasoning not denying) an allegation, is an admission of it. If a defendant in a civil suit *say nothing*, judgment is rendered against him.

If a charge be made against a man in his presence, and in his hearing, and he does not deny it, this might be given as evidence to prove the fact thus charged upon him. Now if the very facts laid in this indictment, had been charged upon the prisoners, in any other place, than a court of justice, and they had pursued the same line of conduct, which they have now adopted, such conduct would have served as testimony to have produced a conviction for this very crime.

For whose benefit was the provision of the act of April 30th 1790—for the benefit of the prosecution or of the prisoners? Unquestionably for the benefit of the prisoner—he is by his obstinacy, amenable in a degree to the court—but our laws (wishing to give a criminal every possible advantage of a *fair and impartial trial*) have considered him as guilty of no offence in the particular cases therein mentioned—then if the provisions of that act do not reach this case—the prisoners are not even entitled to the lenient and merciful provisions of that law.

On the second point Mr. Glenn contended, that as an incident to the power and authority of the court, they

had a right to try these men. The prisoners have divers privileges for their own benefit; they may plead not guilty, they may have counsel, they may have witnesses, they may challenge jurors, they are entitled to a copy of indictments, and a list of the witnesses. But if they decline the enjoyment of there rights, is the progress of justice to be arrested? if they will not receive a copy of their indictments, are they never to be tried? if they will not enjoy the benefit of counsel, is the court obliged to wait until their better judgment shall induce them so to do? if they will not challenge jurors, must the court pause until they think fit to challenge them? These are all privileges granted to the prisoners; they may accept or refuse them, at their pleasure; but such refusal shall never operate to retard the march of justice in its course.

In England, a speedy disposition of these causes would have been made by the common law; this conduct of the prisoners is a constructive confession, Staundforde's Pleas of the Crown, 149—2 Hawkin's Pleas of the Crown, chapter 30, section 13, 2 Hale's History of the Common Law, page 322, 317—4 Black. Com. 324, 9. Now if the court cannot proceed with these trials. the monstrous absurdity follows, that a criminal by - shift, a trick, may forever evade the provisions of a ppeal law—a proposition, the statement of which carries with it, its own refutation.

This court must frequently proceed according to the directions of the common law, they can find jurymen and witnesses for non-attendance, nay, if a bystander had advised the prisoners at the bar to stand mute, would the court not have punished him for such conduct. In England they certainly would, 4 Black. Com.

126. It would be arresting the progress of justice, and I think the court would be fully authorized to impose a penalty, similar to that inflicted in England.

But we consider this case, as coming reasonably within the provisions of the act of 30th April, 1790, or to be governed by the rules of the laws of the State of Maryland—see act of congress, September 24th, 1789, vol. 4, page 47, and laws of Maryland, 1809, chapter 138. We are willing to allow to the prisoners, every advantage which they could derive under a plea of not guilty, and not even by his own improper conduct to injure his cause.

The reporter did not hear Mr. Glenn on this last point, and is unable to state his arguments upon it.

CHARLES MITCHELL, Esq.

In reply to Mr. Glenn observed; that he did not rise to take a part in the discussion of the question now before the court. Indeed, he should deem it indecorous, unasked, to offer any thing to the court, as to their future proceedings. He was bound to presume, until it should be attempted, that they would take no step in a case of such magnitude, which the law did not unequivocally sanction; but his present object was merely to repel the suggestions of the district attorney, against the counsel for the prisoners. From the remarks just made, one would be led to suppose the court engaged in the trial of the *counsel*, for illegal advice to their clients, and not, as they really were, in devising some mode of extricating the prosecution from the unexampled dilemma, into which it had fallen, through the zeal of the public officer charged with it. The gentleman seems to be

angry, sir, that the counsel dare to interpose legal ob stacles between him, and his victims; he even fears that we push our temerity so far, as to aim at defeating the punishment of our clients altogether, by this new and unlooked for procedure. Why, sir, what would the district attorney have more. If the law be as he has stated it, we have not merely stood *neutral* in the contest; but have shown a most *guilty* diligence, in hastening the catastrophe. We have even stript our clients of the formalities of a trial. We have publicly avowed their guilt, by confessing our inability to deny it, and have urged the court to sentence them to death without further ceremony. One would suppose, sir, this were sufficient in all conscience to secure the approbation of any prosecutor of moderate desires, but the gentleman is still dissatisfied; he now complains, that we lead the prisoners to execution through a new and untrodden path, and would fain have us go back and travel the beaten road. What a novel spectacle is here! It is the *district attorney*, who entreats the court, notwithstanding this public confession of guilt by the prisoners counsel, to be more merciful to them than they are to themselves, to enter for them the plea of *not guilty*, and proceed on as in ordinary cases. It is *he* who is solicitous to clothe them with the decent decorations of the law, preparatory to their execution. Then sir, if any impediment exists in the case, and the doctrines of the gentleman are well founded, who is chargeable with it? To whom is it to be imputed? But these doctrines fortunately for the prisoners, and their counsel are *not* well founded. The court will find on examination, that this is not one of the cases of standing mute mentioned in the act of congress, where they are to proceed as if the prisoners had pleaded

not guilty. Those cases are specifically enumerated in the act of 1790, and this power is limited to the cases there specified; *robbery of the mail* is not one of them. You must proceed then according to the law, and practice of this state, at the date of the judiciary system. At that period, the common law practice prevailed here; but the statute of Westminster, 1st. and the subsequent English statutes to 12 George 3d. providing for such cases, were never extended to this state.—It was by statute alone that the English courts were enabled to punish him who stood mute, as if he had plead guilty. At common law there was no such power. The utmost extent of common law punishment was *severe imprisonment until he pleaded.* Even the *piene dure et forte* was a *statute* punishment. If the prisoners stand *obstinately mute* therefore, it is a *casus omissus.* You have no power to try them or to inflict capital punishment. But if an inquest is awarded to enquire *how* they stand mute. it will be ascertained that they do *not* stand *obstinately* mute, but have merely exerted a legal right to refuse to plead *because their arraignment was irregular* and against the law of the land. I do not intend however, to enter into the discussion here. It was no part of my object in rising to address the court. I have merely said thus much to satify the court, that whether our conclusions are well or ill founded, we have some plausible reasons at least for the course we have adopted, and have not been impelled by a wanton desire to embarrass the court without any prospect of advantage to our clients. We had indeed indulged the hope that the court knew us too well to render such an assurance or explanation necessary—but the unusual, unexpected and extraordinary appeal from the district attorney

has extorted these remarks where we should otherwise have been silent. The gentleman has charged us with *obstructing the course of justice* and vehemently asks if such conduct is *to be tolerated here*, which, in the courts of Great Britain, would subject us to fine and imprisonment. Sir, I deny the law to be so in England, as he has stated it, and whenever he feels disposed to enter into that question—shall be ready to meet him—but if it *were* so *there*, I desire to bless God and those who purchased our inestimable privileges with their blood, that our situation in *this court* is not so humble and degraded. Has the gentleman forgotten sir, that while in England, the accused is denied the aid of counsel altogether, except on *questions of law* and then receives it as pure *bounty* from the court—here he has a legal—nay, a constitutional right to be heard and advised by counsel in every stage of the proceedings against him; that while in the criminal courts of England the counsel for the prisoner, is the mere creature, the automaton, the very *serf* of the court, holding his place by a base and servile tenure—*here*, he is an independant officer of the constitution, standing, erect and firm on his constitutional freehold, and accountable to God and his conscience alone, for whatever advice he may give his client. Execrated let him be, and forever abhorred by his professional brethren who shall meanly shrink from the sacred duties he has to perform, or tamely suffer the interposition of any judge or court between him and his client. Sir, we have deemed it a legal right of the prisoners to refuse to plead; we have thought it might be beneficial to them; and with these impressions, if we had not advised, or having advised, were afraid to avow it, should we not merit the blasting mildew of public

reproach, which would inevitably fall upon us after the warring passions of the multitude against these prisoners shall have abated. We *have* advised our clients to insist on every legal advantage in defence of their lives, and here openly avow it, fearless of consequences. Our object is to save them from punishment, if not *legally* obnoxious to it, whatever may be their *moral* guilt; and this cannot be censured in counsel, but by those whose unhallowed thirst for blood must be slaked in spite of the constitution and the laws of their country.

DAVID HOFFMAN, Esq.

On the part of the prisoners to the following effect.

The learned gentlemen, who just preceded me has, I trust removed every unfavourable impression the court may have received, as to the motives of the counsel in the adoption of the course so zealously reprobated by the district attorney.

The prisoners refuse to plead, and *stand mute*. We find our apology and justification for this procedure, not only in the anomalous mode in which the prosecution has been thus far conducted, but we conceive it to be a solemn and imperative duty we owe the state, no less than the prisoners, to avail ourselves of every means recognized by the laws of the land, as advantageous, in any degree, to those whose lives are now at stake. Nothing can be more foreign to my wishes than to impede the course and natural flow of justice: far, very far is this from my motive; it is the *pure* adminis-

tration of justice we seek; that justice which rigidly conforms with *all* the known and prescribed forms of law. When I look around me and behold every individual within the compass of my voice, anxiously awaiting the condemnation of these men; when I perceive the eagerness with which publick sentiment would indict, arraign, convict and execute them, with but little attention to the decorums of law; my interest is invotarily challenged, not merely for the protection of the rights of these prisoners, but for the sake of wholesome precedent, that they may have a *deliberate, impartial* and strictly legal trial. No other motive has, or could have actuated the counsel than to secure to these men a patient, and deliberate trial. We desire, not to impede, or defeat public justice, but that this justice should be legal. No one can be more sensible than myself, that publick expediency and policy, publick sentiment and wishes call loudly, in these cases, for an impressive publick example; and no one feels more willing than myself that it should be made, if these men be guilty; but let this fact be legally established; for in the rigid adherence to the *forms* of law, every free country finds the best security for life, liberty and property. We conceive that the law of the land will enable the prisoners to reap certain advantages by the course they have taken, which might be lost to them by pleading. We further conceive that the necessity we are now under of refusing to plead, has arisen from the mode in which the prosecution has been conducted: believing so, we feel assured, that if this honourable court will deliberately examine and rigidly adhere to the operation of the measure adopted by us, the life of the prisoners cannot be in danger from this prosecution. This, if they are guilty,

may be a matter of publick regret, in this regret I should certainly join, but this regret should be that the *law* is thus defective. If guilty, it were infinitely better they should wholly escape punishment, than that the majesty of the law should suffer the least violation; the most notorious criminal should sooner go unpunished than a letter of the law should be strained out of its course to effect his conviction. In the present case, however, impunity is out of the question; since there are so many ways in which if they are guilty, they can be made amenable to public justice.

I shall now solicit your honours indulgence, whilst I briefly state our views as to the operation of the course adopted by the prisoners—viz. their *standing mute.*

The indictment in these cases is predicated on the 19th section of the act of congress, 1810. This provides that if any person shall rob any carrier of, or other person entrusted with the mail of the United States, of such mail, or a part thereof, such offender shall be imprisoned, not exceeding *ten* years; and if in effecting such robbery he shall *wound* the person having custody of the mail, or put his life in jeopardy, by the use of dangerous weapons, such offender shall suffer death.

The robbery of the mail, whether by mere putting in fear, wounding, or placing life in jeopardy, is an offence against the United States, *originating in this act of congress.* Its legal criminality, as a specific crime, or publick wrong against the union, is derived solely from this source. In *this act* we find no provision whatever on the subject of *standing mute,* nor do we find that any other act of congres has legislated on the subject, except the act relative to crimes and punishments of 1790, section 30; which surely can in no

way apply or be extended to the present case, since that act provides for the case of standing mute *only* on indictments for crimes *enumerated in that act.* The present must therefore be a clear *casus omissus*; for the act of 1790 enumerates a variety of publick wrongs, such as treason, piracy, perjury, bribery, forgery, falsifying of records, &c. &c. and constitutes these *crimes* against the United States. It then provides, that if "any person or persons be indicted *of any of the offences herein set forth*, for which the punishment is declared to be death, if he or they shall *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, as if he or they had pleaded not guilty, and render judgment thereon accordingly." Mail robbery, it is to be observed, is not one of the crimes enumerated in this act, but is an offence created by statute twenty years after. The power of the court to proceed to trial on the prisoner's standing mute is given by no other statute than the act of 1790, and this, as we have seen, only where the prisoner is indicted for a crime enumerated in that act. As this is not there to be found, but originates in a law long subsequent, the legal *sequitur*, to us appears to be that the present is a case at common law, wholly unaffected by the act of 1790.

The provision relative to standing mute, contained in the 30th section of the law of 1790, surely will not be extended to the offence made a crime by the act of 1810; inasmuch as it is a principle of law, that a statute which takes away a common law remedy or *privilege* ought never to have an equitable construction. 10 Mod. 282, and it is laid down that if the words of a statute do

not extend to a mischief which rarely happens they shall *not* be extended by an equitable construction, to that mischief, but the case shall be considered as a *casus omissus.* Vaugh. 373. As, therefore, the act of 1810, on which the indictment is founded, contains no provision for the case of standing mute, and as the common law operation of standing mute appears to have been recognized by congress, and as the act of 1790 is the only statute speaking on the subject, and this extends expressly to the offences *therein specified,* and, as its provision ought not to be extended by equitable construction, it appears to me a sound and legitimate conclusion that the present, as I have just stated, is a case of standing mute at common law, and as such is to be dealt with differently from the case of an indictment for treason, piracy &c.

What then is to be the proceeding of this court, if the view I have just taken, and I hope with great deference, be correct. The books on this subject say that if a prisoner on his arraignment *stand mute,* the court *ex officio* must ascertain, by a jury, whether this proceed *ex visitatione Dei,* or *ex malitia.* On the verdict of this jury a judgment of mute is to be entered; and if it be decided that the muteness be from the visitation of God, the court shall proceed to the trial *as if he had pleaded not guilty.* This power, it will be perceived, is only in case the muteness be *ex visitatione Dei,* vide 2 Hale's P. C. 317. 15 Vin. Abr. 532, and on this judgment, the better opinion appears to be that no sentence of *death* can be given. 2 Hale's P. C. 317. 4 Black. Com. 324.

If the decision be that the prisoner is mute *ex malitia,* that is, obstinately, and he stands indicted for a felony, he can neither be *tried* nor *convicted.* He cannot be

tried because there is no *issue*, for there can be no issue without a *plea*, and, as we shall presently see, the judgment of *piene forte et dure* was introduced to extort a plea. Nor can such a prisoner be *convicted*, because standing mute, amounts to conviction only in felonies of the highest and lowest degree, viz. in treason and petit larceny: so that *quacunque via data*, we cannot perceive how the prisoners in the present case, can receive sentence of death; since the muteness, if supernatural, cannot be followed up by a judgment of death, and if from obstinacy, it is equally so, as there can be neither verdict nor conviction. 4 Black Com. 325.

It may be proper here to note an errour of the learned district attorney, who in his observations just addressed to the court states it to be undoubted law, that standing mute in all cases, from the highest to the lowest crimes, amounts to conviction, and that the courts of England, for centuries past, have so considered it. The law I apprehend is not so. Standing mute amounts to conviction only in the highest *and* lowest crimes, viz. treason and petit larceny; and *not* as the gentleman has asserted, from the highest *to* the lowest. Prior to the statute, 12, George 3 a 20, (which can have no operation in this court, and therefore is to be wholly disregarded) standing mute on indictments for any felony, other than treason, and petit larceny was uniformly followed, not by conviction, but by the judgment of penance. The books are so explicit on this point, as to render misapprehension scarcely possible. Disingenuousness in stating the law is at all times censurable, but in a state officer, prosecuting in a case affecting the most dear, and most valuable possession we have—*life*—it is surely doubly reprehensible.

The crime, then, for which these prisoners stand indicted, being neither treason, nor petit larceny, nor a crime affected by the 30th section of the act of 1790, which authorizes the court to proceed to trial in certain cases of standing mute, the present must be a case in which, in England, prior to the statute, 12, George 2, the court would have proceeded to the sentence of penance, or *piene forte et dure*. Admitting then, that had this case occured in the court of king's bench, prior to the statute, 12, George 3d. the court would have awarded penance as the *only* means within their controul, and conceding, *gratia argumenti*, this court to possess the power of awarding this terrible judgment, is the court *now* in a situation to pronounce such a judgment? Has there been that preliminary procedure, which forms the legal foundation for such a judgment? Has there been a jury impanelled to pronounce whether this muteness were obstinate, or by visitation of God? Has there been a judgment of mute?—Further, the books say, that a mute prisoner, is entitled to a respite for reflection. The sentence of penance is to be solemnly read to him, that he may be fully apprised of his danger. He is then to receive the *trina admonitio*. 15 Viner's, Abri. 532. Staunf. P. C. 149. None of these formal ities have taken plea, so that if the court possess the power to award penance, as would unquestionably have been the only power of the court of king's bench, anterior to the 12, George 3d. the exertion of this power should have preceded by the forms just stated.

Let us now briefly examine, whether this court can be considered as possessed of the power of awarding any such sentence. Such a power can be derived only from

1. The common law of England.

2. The statutes of England.
3. The acts of congress.
4. The acts of assembly of the State of Maryland.

1. Admitting, for argument, this court, in some cases to be guided by the English common law, the common law could give this court no such power, as the power itself in England, is not derived from the common law, but from the statute of Westminster, 1—3 Edw'd. 1 vide Barring. on statute, 82, 4 Black. Com. 327, Pref. to 1 vol. state trials, XII.
2. There are no statutes of England, either prior to or since the declaration of independence of any force, or operation whatever, in any of the courts of the United States, so that we need not seek for this power in this source.
3. It will not be pretended, that any act of congress has legislated on the subject.
4. Nor has any act of assembly of this state any provision whatever, relative to this judgment of penance, and the statutes of Westminster, 1. 3 Edw'd. has not been considered as extending to this state. vide Kilty's report of British statutes.

The case under consideration appears, therefore, to be one, in which the prisoner can be made responsible, if at all, only under the 3d. count of this indictment, which is for an offence *not capital.* If these men be guilty of a crime which forfeits their lives, it may be a matter of regret, that they cannot be amenable to the punishment so manifestly intended. But if the law be defective, let it be amended by the national legislature.

The *piene forte et dure* was introduced in feudal times, for the purpose of extorting a plea in capital cases, so that if death ensued, there might be a *forfeiture* or *es-*

cheat of the prisoner's lands. But if there were no plea, neither death, corruption of blood, forfeiture nor escheat could ensue.

Finally—the prisoners in the present case stand mute. Can this court proceed to judgment as on a *confession* or *conviction?* We apprehend not, as standing mute is equivalent to conviction *only*, in treason and petit larceny, and the statute, 12 George 3. which renders standing mute in all cases a constructive confession, cannot alter the law of the case *in this court*. Can the court enter the plea of not guilty for the prisoners? We presume not, for even criminals have their rights, they cannot be forced to plead. Can this court proceed to trial, *as if the prisoners had pleaded not guilty*. We humbly conceive not, as such a power, is no where given but in the act of 1790, and there *only*, in the cases of crimes therein specified.

If the views I have thus briefly, hastily, and even to myself, unexpectedly taken, be not wholly unsound, I earnestly and respectfully entreat the court, to accord to it some consideration, and, in favour of life, not to proceed, but with great caution and consideration.

THOMAS KELL, Esq.

On the part of the prosecution, addressed the court as follows:

It is sufficient for me to consider this case as I find it to be—having heretofore taken no other part therein, than suggesting the propriety of the prisoners coun-

sel intimating to the court how the prisoners intended to plead when they asked leave to withdraw their first pleas. I saw, or thought I saw that some delay, if not difficulty might arise from the course then proposed. That permission, however, having been given unrestricted, they may exercise whatever right they possess in such way as they deem best; either by pleading to the indictment, or refusing to plead and standing mute; the latter they have preferred, and we are now to enquire what is to be done. Can it be conceived that the court is here to stop; that your authority is suspended; your jurisdiction and cognizance of this offence restrained by the silence of the accused. If so, every offender would find it his interest to be silent too, if thereby he could avoid your power and authority to reach him or his offence. Is it possible, seriously to think so great an anomaly can exist in the law?

What is to be done? You cannot make the man speak; the common law does not reach him in this court, and his right to be silent is not derived from that law; in standing mute, he exercises a right derived from nature and his maker. But is he not to be tried; is he to go unpunished if guilty? I answer, no; there is no difficulty in the course to be adopted by the court.

If this case is embraced by the act of congress regulating the trial of criminal offences, and I contend it is; then the way is clear, and the provisions of that act point out the course. Mr. Kell then read the 29th and 30th sections of the act of congress relating to crimes.

"SEC. 29. *And be it enacted*, That any person who shall be accused and indicted of treason, shall have a copy of the indictment, and a list of the jury and wit-

nesses, to be produced on the trial for proving the said indictment, mentioning the names and places of abode of such witnesses and jurors, delivered unto him at least three entire days before he shall be tried for the same; and in other capital offences, shall have such copy of the indictment and list of the jury two entire days at least before the trial. And that every person so accused and indicted for any of the crimes aforesaid, shall also be allowed and admitted to make his full defence by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorised and required immediately upon his request, to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours; and every such person or persons accused or indicted of the crimes aforesaid, shall be allowed and admitted in his said defence to make any proof that he or they can produce, by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them.

"SEC. 39. *And be it further enacted*, That 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 person or persons be indicted of any other of the offences herein before set forth, for which the punishment is declared to be death, if he or they shall also stand mute or will not answer to the indictment, or shall 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 of the person or persons so standing mute or challenging, as if he or they had pleaded not guilty, and render judgment thereon accordingly."

He then proceeded.—It cannot be doubted that the language of the 29th section embraces this case; after directing the providing in a case of treason—It directs, "and in other capital offences," certain proceedings preparatory to the trial shall be had; this is a capital offence, and the directions given in the section apply to it; it is further provided that "every person so accused and indicted, for any of the crimes aforesaid," shall have the benefit of counsel; and further that "every person accused or indicted for any of the crimes aforesaid" shall be allowed the benefit of their witnesses, and process to compel their attendance. Is it not the just construction, that the terms "*any of the crimes aforesaid,*" in which the benefit of counsel is allowed, and also that the words "*the crimes aforesaid,*" in which the benefit of witnesses is allowed, relate and refer as well to the "*other capital offences,*" embraced in the second provision of the section, as to the offences previously named in the act. Is it not also true, that by the terms "*other capital offences*" used in this section, is meant and included *all* capital offences, not those only which are previously mentioned in the act, but such also as might be subsequently declared. The unlimited sense and meaning of the terms embrace all; and there is nothing to restrict them to those offences only, which are previously designated in the act. Again, if these different provisions of the section are made to relate only to the offences specified in this act of congress, what becomes

of the prisoners benefit and right of challenge, or the privilege of his counsel. If the construction I ask for be wrong, they would soon have to become as *mute* as their clients; the construction I contend for secures those privileges; they are not given by the post office law, which creates the prisoners offence.

The 30th section, after providing for a refusal to plead or too great a challenge in case of treason, provides, that "if any person be indicted of any other of the "offences herein before set forth for which the punish-"ment is declared to be death, if such person stand "mute or challenge above twenty jurors, the court shall "proceed as if the accused had pleaded not guilty." Upon this provision, I insist that the language, "any other of the offences herein before set forth for which the punishment is declared to be death," ought not to be restricted to those offences only which are created by this statute; that the language and meaning relate as well to those offences set forth in the 29th section, by the description "other capital offences;" that this description contains and is a setting forth all capital offences, and all such are thus brought within the provisions of this section, if the punishment be death, which is the case in this present instance. The act of congress presents one continuing system, regulating criminal trials, and offences created since its passage are equally affected by it as if they had existed before. It is the law operating to day as if but just enacted.

The construction thus contended for is the more lenient and favorable to the accused, and if hereafter we should have any discussion about the right of challenge, the gentlemen, his counsel will have to claim my construction to show that right; it cannot be found unless

this case be within the provisions of these sections, this right and several others are not given by any other law.

If I am right in the view I have submitted of this subject, the course to be pursued is quite plain, it is to proceed in the trial as if the prisoner had pleaded not guilty, that being directed by the statute.

But if I am wrong in this view, and if the provisions of this act should be held not to govern this case, (which I do not apprehend) and the authority of the common law be absent here; I ask again, is the offence, if committed to pass unpunished? Is there no power to try him? I reply there is. This court possesses (by the law creating its powers) jurisdiction over this man and his offence. You have cognizance of and authority to try the offence, (see the 11th section of the judiciary act.) and the only question can be, how is this authority to be applied; the man chooses to be silent, he will not plead, and there is no power to make him; yet there is power to try him. It is in vain to say he cannot be tried because he stands mute. The court rightfully may, and no doubt will go on to try him, in such way as will not infringe any right secured to him by the constitution and laws of the government. Looking to these for their direction, (if the case be not regulated by the 29th and 30th sections before read) the court will settle the forms of proceeding, the trial by jury with all its benefits will be preserved to him as secured by the constitution, (see 8th article of the first amendment.)

If the court proceed with any analogy to the state practice, it would be by entering the plea of not guilty for the prisoner, that being the course directed by the statute of Maryland in similar cases. If with reference to other cases under the act of congress, the trial

would progress as if he had pleaded not guilty; there being no issue joined in the case, the substance, if not the form of the jurors' oath would be to try whether the prisoner be guilty of the matters whereof he stands indicted or not guilty; in framing the oath there can be no difficulty.

But we are told that this is a *casus omissus* in the law; it may be so in the letter of the statute, but surely it is not such in the meaning or reason of it. There is no *casus omissus* in your cognizance of the offence, or right to try the offender; and if there was no particular form of trial prescribed by law, the court could and ought to supply it, otherwise your jurisdiction over the offence would be vain. I might enumerate many instances of this sort of difficulty; suppose some of the jury were to die after being summoned, or whilst attending the court, here would be another "*casus omissus,*" in the letter of the statute; but do the gentlemen or any one else doubt the power of the court to have others summoned.

It would be strange indeed if it were thus in the power of a prisoner to arrest his trial, and paralize your cognizance and jurisdiction of his offence.

Hence, sirs, I submit whether there be any thing to prevent the trial from going on, and conclude that it must progress as if the prisoner had plead in chief to the charge against him.

OPINION OF THE COURT.

MAY TERM,—1818.

THE UNITED STATES, *vs.* JOSEPH THOMPSON HARE, LEWIS HARE, and JOHN ALEXANDER.	Indictment for robbing the mail; using weapons, which jeoparded the life of the mail carrier.

The two first named when arraigned, severally pleaded not guilty; the third pleaded not guilty, and also put in a plea to the jurisdiction of the court.

The attorney for the United States, objected to the double plea put in by Alexander; but it being after the hour of adjournment, the court adjourned till the next day, when the prisoners again being severally arraigned, Mr. Mitchell one of their counsel, asked leave to withdraw their pleas, intimating that he did not then know what to advise his clients to plead. In order to give the accused full opportunity to make their defence, the court granted leave accordingly, under the impression that their counsel meant to plead other pleas. The accused being severally called on to answer; were advised by their counsel to stand mute, and thus did stand mute; thus refusing to plead.

The attorney for the United States, moved the court to proceed to the trial in the same manner, as if the accused had pleaded not guilty, according to the 29th section of the act, for the punishment of certain crimes against the United States. To this, the counsel for the prisoners objected, contending that this mode of proceed-

ing was applicable only to the trial of the crimes specified in the act for the punishment of certain crimes against the United States, and could not be extended by construction to the crime of robbing the mail, made capital, by an act of congress *subsequently* passed.

On the part of the prosecution it was argued, that by the act to establish the judicial courts of the United States, full power, and authority are given to the circuit courts of the United States, to try all crimes and offences cognizable under the authority of the United States, and that the manner of conducting the trial prescribed by the 29th section of the act, for the punishment of certain crimes, is applicable to all cases arising under laws subsequently passed, inflicting the punishment of death, for the commission of any crime or offence. That standing mute by a criminal accused of a capital offence amounts to a constructive confession of guilt. That the privileges of a person accused of a capital offence, by the 20th section of the same act are general, and extend to the trial of all crimes made capital, whether specified in that act or not, and that the mode of trial must be the same. That by the 34th section of the act, to establish the judicial courts of the United States, which provides that the laws of the several states, except when the constitution, treaties or statutes of the United States shall otherwise provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases when they apply; the laws of the state of Maryland, and the practice of the courts under them would justify the court in pronouncing the prisoner guilty, on his standing mute.

The question presented to the court, is a novel one in the courts of the United States, but it is a question in the decision of which, they cannot doubt the power and authority of the court to proceed to the trial of the accused.

By the constitution of the United States it is declared, that the trial of all crimes except in cases of impeachment shall be *by jury*. The act aforementioned to establish the judicial courts of the United States gives to the circuit court *exclusive* cognizance of all crimes and offences cognizable under the authority of the United States, except when a different provision should be made. The act regulating the post office establishment by the 35th section, grants authority to the judicial courts of the several states, under certain restrictions, to try all causes of action arising under and all offences against that act; but this grant of power is *permissive* and does not impair the authority of the courts of the United States to try certain causes under that act. Without this grant of power to the courts of the states the jurisdiction of the courts of the United States would have been *exclusive*; with it, their jurisdiction is *concurrent*.

By the constitution a fair and impartial trial by jury in all criminal prosecutions is secured to every citizen of the United States. After all these solemn and salutary regulations, it would be strange indeed, if the accused could by any management evade a trial by jury.

The courts of the United States have not common law jurisdiction in criminal cases. They will not punish an offence at common law unless made punishable by statute. But they will resort to the common law for a construction of common law phrases. *Standing mute*

according to the antient common law of England, from whence we have derived most of our institutions, was, in many cases tantamount to a confession of guilt. And now by statutes passed at different times, standing mute in all cases amounts to a constructive confession, and is equivalent to conviction. Robbery, is felony by the common law. It is made felony by the laws of the United States, and punishable with death whether committed on land or water. Robbery of the mail, if committed with the use of weapons which jeopard the life of the carrier, is felony, and punishable with death. How is the criminal to be tried? Let the constitution and laws of the United States furnish the answer—*by jury*. This mode of trial is secured by the constitution to the accused in all criminal prosecutions; and the laws of the United States give full power and authority to the courts of the United States to try all offenders, and the trial is imperatively directed to be by jury. Yet the counsel for the prisoners contend that by *standing mute*, the criminal can evade a trial altogether. As well might they contend that if the plea to the jurisdiction had not been withdrawn and the court had passed their judgment of *respondeat ouster*, and the accused had refused to answer, there would have been an end of the trial; *standing mute* and *refusing to answer*, being substantially the same. The *peine or (prisone) forte et dure*, to compel an answer is unknown to the laws of the United States. The act for the punishment of certain crimes directs, that if any person indicted of any of the offences, other than treason, set forth in the act for which the punishment is declared to be death, shall stand mute, or will not answer to the indictment, or challenge peremptorily above the number of twenty

persons of the jury, the court shall notwithstanding proceed to the trial as if he had plead not guilty, and render judgment accordingly. The act for regulating the post office establishment inflicts the punishment of death on persons who may rob the mail, if attended with the aggravated circumstance beforementioned. The 19th section declares, that on conviction, the person committing such robbery shall suffer death. But how is he to be convicted? On trial by jury, conducted in the manner provided by law. The act for the punishment of certain crimes directs the manner, and if the person arraigned shall stand mute, or will not answer to the indictment, or challenge peremptorily above the number of twenty persons of the jury; the court shall notwithstanding proceed to the trial, *as if he had pleaded not guilty*. It is admitted that penal statutes should be construed strictly; that is, they shall be construed according to the strict letter in favor of the person accused, if there be any ambiguity in the language of the statute. But who ever heard of a construction that would *prevent a trial altogether*, until the present time? Such a construction is calculated not only to defeat the purposes of justice, but to prostrate the constitution and laws of the union.

Several acts of congress supplementary to the act to punish certain crimes have been passed at different times, inflicting heavy penalties for breaches of the law; and an act passed on the 3d March 1817, prescribes the punishment of death for all offences committed within the Indian boundaries, which before that time were punishable with death, if committed in any other part of the United States. In order to a just construction, it is proper to consider the whole system of criminal juris-

prudence as established by the United States in our view. All the laws should be taken in *pair materia.* The objection will then be removed, and the court may proceed on the trial.

If the laws of Maryland are to be regarded as the rule of decision, the result will be the same. The declaration of rights adopts the common law of England, and the trial by jury according to the course of that law; and also, all the English statutes existing at the time of their first emigration, and which by experience had been found applicable to their local and other circumstances, and such others as had been since made in England orGreat Britain, and had been introduced, used and practised by the courts of law or equity. As early as the year 1668, there are two cases on record in which criminals standing mute were sentenced by the court to be hanged. In the first case the crime was murder; in the second petit treason. By the act of 1737, c. 2. and 1744 c. 20, breaking open a tobacco house or other outhouse, and stealing goods and chattels to the value of five shillings sterling, and horse stealing are made felony and punishable with death; and if the accused shall stand mute, &c. the court may pronounce sentence against him. By the act of 1777, c. 20, if a person indicted for high treason, shall stand mute, &c. the court may pronounce sentence of death against him, and all his estate is forfeited. The chancellor of the state in his report in pursuance of the directions of the legislature of English statutes, adopted and made applicable to Maryland, includes the statute of 12 Geo. 3. c. 20, by which standing mute in all cases of felony and piracy is equivalent to conviction.

No new offence is created by the act of congress regulating the post office establishment. Robbing is the *genaric* term, and robbing is felony at the common law and punishable as such. The state of Maryland by an act passed in the year 1809, has adopted in substance and almost in words, the provisions of the 29th section of the act of congress to punish certain crimes. It is provided by that act, that in all cases of treason or felony, if the person accused shall stand mute, or will not answer to the indictment, the court shall proceed to the trial, as if he had pleaded not guilty, and given judgment accordingly. Hence it appears, that if the laws of the United States, have not provided for the case and the laws of Maryland are to be regarded as the rule of decisions; standing mute prior to the year 1809, would be equivalent to conviction. Subsequent to that period the trial would proceed as if the accused had pleaded not guilty.

The court orders that the trial proceed by jury, as if the prisoner had pleaded not guilty.

The court then appointed Saturday for the trial of the prisoners.

SATURDAY, May 9.

UNITED STATES vs. Joseph Thompson Hare. } Indictment, page 5.

COUNSEL FOR THE PROSECUTION.

William Wirt, Esq. Attorney general of the U. S.
Elias Glenn, Esq. District Attorney.
Thomas Kell, Esq. and Reverdy Johnson, Esq.

COUNSEL FOR THE PRISONER.

Gen. William H. Winder, David Hoffman, Esq.
Charles Mitchell, Esq. Eben. L. Finley, Esq.
Upton S. Heath, Esq.

After the prisoner was placed in the bar for trial, general Winder made the following observations:

In the case now called, it was with the greatest reluctance that he was compelled to ask of the court for a delay of the trial till Monday; he was bound to ask this in justice to the person charged, and on account of the novelty of the case, involving much law not heretofore discussed. He was decidedly of opinion that the prisoner ought to plead, but he was doubtful what plea it became him, as counsel, to advise him to put in. The delay asked for, involved little or no inconvenience to the public. On Monday, the counsel for the prisoner will come prepared. The indulgence he asked for, he deemed not unreasonable; by this short postponement

an opportunity would be given for counsel to speak, as advisedly as counsel ought, in a case which involves the life of their client. On Monday the counsel for the prisoner, will be prepared to proceed in the trial.

MR. WIRT, in reply to general Winder observed, that although the postponement of the trial till Monday *would* be inconvenient to him, yet he considered his own inconvenience of no importance in the decision of this motion; but the court would recollect, that there were other public officers of the government, attending as witnesses, to whom the delay might be still more inconvenient, that there were besides, private witnesses attending, at a great distance, and probably, with great inconvenience to their private affairs; that the counsel previously engaged by the prisoner, (three or four in number) had already had the most ample time for preparation; that it was the prisoners own fault that gen. Winder, had not been called in at an earlier day; that this very recent engagement of that gentleman, might be well suspected to form part of a system of dilatory defence, calculated to defeat the trial at this term; and he submitted it to the court, whether the conduct of the prisoners, in the previous stages of this cause, had been such as entitled them to the indulgence which was now asked.

GENERAL WINDER in reply, said, he felt for the inconvenience of the public officers and others, attending on the trial, but the delay asked for, was a very short one. This day was an inconvenient one to commence a trial which might not be finished until to-morrow, which would be Sunday; he considered that nothing

which had occurred in the proceedings in this case, ought to operate, and he trusted would not operate against the prisoner having a fair and impartial trial. The situation of the prisoner claims some indulgence. His life is at stake, and it is natural and excusable that he should endeavour to avert his fate, and no attempt to do this, ought to deprive him of full opportunity of a fair trial. Surely this ought not, and cannot make an impression unfavorable to him. For himself, GENERAL WINDER said, at this moment he was totally unprepared to advise the prisoner, and he trusted the postponement asked for, only until Monday, would be granted.

MR. WIRT, wished the court to understand distinctly, that he was perfectly willing to assent to the indulgence asked by general Winder, so far as his own personal inconvenience was involved in the proposition. That the assurance now so explicitly given by general Winder, that the trial should proceed on Monday, was entirely satisfactory to *him*, as one of the prosecution; and that for the sake of affording the most ample opportunity of defence, in a case of life and death, he begged to be understood as giving his assent, so far as that could avail, to gen. Winder's motion.

THE COURT. We are of opinion, that ample time has been allowed. If the prisoner sustains any inconvenience, he has brought it on himself—the trial must go on.

The clerk then commenced to call the jury.

CORNELIUS HOWARD, ESQ. was called a juror; he said, he claimed to be excused from serving on the jury;

that he was a justice of the orphan's court, and had business to transact in that court, and he was advised by his counsel, that he was entitled to a discharge.

THE COURT said, that they knew no law of the United States to exempt him from serving, and they could not excuse him.

MR. KELL read the 4th section of the act of assembly of Maryland, 1715 c. 37, which exempted him from serving as a juror in the courts of the state, and the juror was excused.

GENERAL WINDER asked the court, if they did not understand him, that on Monday, the counsel for the prisoner would advise him to plead. If they did not so understand him he wished it now to be so understood.

MR. GLENN, the district attorney observed, that he was disposed under this pledge, that the cause be postponed.

THE COURT. It is of no importance whether a plea be put in or not, as the court have decided that they will proceed as though a plea of not guilty had been entered.

MR. MITCHELL thought it proper to bring distinctly to the notice of the court, at this stage of the proceedings, *one fact,* to which he apprehended sufficient importance had not been attached, although it could not entirely have escaped the eye of the court. Their honours *must*

have been aware that *no copy* of the indictment *could have been* delivered to the prisoners or their counsel, pursuant to the act of congress, *two days previous to the arraignment.* In truth, no copy had been delivered at all, and the prisoners counsel had no knowledge of the nature of the charge *at the time of the arraignment,* (within two hours after the indictment found) except what might be derived from hearing the indictment once read by the clerk, and it was utterly impossible for them advisedly to plead *instanter,* according to the requisition of the court, in a case so vitally interesting to their client. They were far from being disposed to impede the *regular* course of justice, but were not authorized to dispense with that course, and they had refused to plead, not merely because they were unprepared, but also because pleading in chief was deemed a waver of their legal right to a copy altogether. This had been often decided as he was prepared to show the court, and even if it were not a legal waver, it was a virtual renunciation of the privilege secured by the act of congress, for of what possible use could a copy of the indictment be to the accused after pleading in chief; he could neither avail himself of a demurrur, a plea to the jurisdiction, nor of *autrefois acquit.* The act of congress is imperative. The accused *shall* have a copy of the indictment two days at least previous to the *trial.* The arraignment is a part of the *trial.* The act is a literal transcript from the English statutes, 7 Will. III, and 7 Anne, differing only in the number of days. In both these statutes, the word *trial* alone is used, and the English courts have uniformly considered the arraignment as a branch of the trial in their construction of these statutes. If the court have the least doubt on

this point, they shall be abundantly satisfied by authority; for there is no contradiction in the books on this subject.*

*Mr. Mitchell has furnished the Reporter with his notes and references on this subject which are annexed.—viz.

"Any person who shall be accused and indicted of treason, shall have a copy of the indictment and a list of the jury and witnesses &c. delivered unto him, at least three entire days before he shall be tried for the same; *and in other capital offences,* shall have such copy of the indictment and list of the jury, two entire days at least *before the trial.*"—Act of congress, April 30, 1790. vol. I. p. 100, sec. 29.

By the English statute, 7 Will. III. chap. 3 sec. 1, it is enacted "that every person that shall be indicted for high treason &c. shall have a true copy of the whole indictment &c. delivered to him five days at least *before he shall be tried* for the same. 2 Hawk. P. C. ch. 39, sec. 14, p. 567.

By the statute 7 Anne, chap. 21, sec. 11, it is provided, that "copies of all indictments for high treason &c. with a list of the witnesses, jurors, &c. shall be delivered to the party indicted ten days *before the trial.*" 2 Hawk. ibid. sec. 16.

In the margin 2 Hawk. ch. 39, sec. 14. there is this remark on the words "*before the trial,*" above recited. "This must be intended five days before *arraignment,* because the prisoner pleads *instanter* upon the arraignment." See Lord George Gordon's case, (accord.) Doug. 591.

"As the intention of this clause in granting a copy of the indictment is merely for the sake of enabling the person indicted to plead, it has been holden, that no person *after having pleaded* to an indictment, is entitled to have a copy thereof".—6 Gwill. Bac. ab. 544, *Tit. Treason* (Cc.)

"No exception can be taken to the fulness of a copy of the indictment after the indictment has been pleaded to."—Rookwoods Case, 4, State Trials, 646."

N. B.—One of the copies *actually delivered* in these cases was *essentially variant from those on file,* by omitting technical words, the omission of which would have been fatal after verdict, but according

Upon these grounds, the counsel did advise the prisoners, that they were under no obligation to plead *instanter*, upon their arraignment. They had a legal right to refuse to plead, and cannot be deemed by the court, standing *willfully* mute; nor ought this exercise of a legal right, to debar them from any indulgence which the court might otherwise feel disposed to ex-

to the course adopted, the party had no opportunity to raise this objection. The other copies did not come to the hands of the counsel.

"*If the prisoner pleadeth* without a copy of the *caption*, &c. he is too late, to make that objection, or *indeed any other objection, that turneth upon a defect in the copy*; for by *pleading*, he *admitteth that he hath had* a copy sufficient for the purposes intended by the act."—Foster, ch. III. page 230.

"By the letter of the act, the copy is to be delivered five days *be*-"*fore the trial*. But upon the true construction of it, the copy, after "the bill is found, for till then it is no indictment, ought to be "delivered five days before the day of *arraignment*, for that is the "prisoners time for pleading. And the five days must be exclusive "of the day of delivery and the day of arraignment. So with regard "to the copy of the panell, &c. *These points have been long settled* "*and are now matters of constant practice.*"—Foster, 230.

"By necessary construction, the ten days mentioned in the sta-"tute, 7 Anne, ch. 21, s. 11, must be reckoned after the bill is found, "and *before* the *arraignment* of the prisoner; for until the finding "of the bill, there is no indictment, and upon the arraignment, "the prisoner must plead *instanter*."—1 Chit. C. L. 405.—1 East P. of the C. 112.

These ten days must be reckoned exclusive of the day of delivery and of arraignment, and also, exclusive of an intervening Sunday.—1 Chit. 405.—Foster, 230.—1 East P. C. 112.

"*After pleading*, it is too late to object, either to the *want* of a "copy, or to any insufficiency in it: for that admits it to be sufficient."—1 East, P. C. 113.—Cites Greggs case, 12th January 1707. Mss.—Cooks case Salk, 634.—Cases of Rookwood and others, 4 State Trials, 661.—And case of May, *alias* Smith and others, April, 1708.

tend. As well might they provoke the court by refusing to plead *gui'ty*. At present we are not prepared to advise the prisoners, nor to underake their defence, in justice to them, or to ourselves. For my own part, I can assure the learned attorney general, that I came into the cases after the indictment was found, and only an hour previous to the arraignment; and that I know of no other *systematic delay*, but what proceeds from a fixed purpose to obtain a *fair trial* according to the constitution and laws of the land. I am sorry *their* provisions seem too *dilatory* in a case involving the life of the citizen.

In Cooks case Salk 634. After jury called, Sir B. Shower, counsel for the prisoner, objected to the trial at that time, because he had not received a copy. The court replied, that the object of the act of 7 W. 3, was to enable the prisoner to plead from the copy "and *till then he is not to plead.* In this case he *has* pleaded. *Therefore this benefit is waved, and the prisoner has admitted he has a copy, and did not think it for his service to require it; but was able to plead without the help of it.*

N. B. The act of 7 Will. 3, made it necessary for the prisoner, or his counsel to *demand* a copy. This was altered by the stat. 7 Anne, from which the act of congress is copied.

In Dr. Hensey's case, 1 Burr, 643. The indictment was brought into court on Tuesday, 2nd May. He was not arraigned until the succeeding Monday, May 8th; five days having been allowed for the service of a copy of the indictment, pursuant to the act, 7 Will. 3, and he was allowed until Monday, the 12th of June following; more than a month by lord Mansfield, to prepare for his trial without any application on his part whatever.

It appears then, that according to the established construction of the words contained in the act of congress; if a copy of the indictment had been actually served on the prisoners, the same day the indictment was found, viz: Monday, May 4. They could not have been *regularly arraigned* until *Thursday, May 7th.*

Mr. Kell said, on the part of the government, the attorney general and the district attorney, the gentleman may now enter a plea in chief.

In reply to Mr. Kell—Mr. Mitchell observed, that the arraignment was altogether irregular and illegal, directly in the teeth of a public act of congress, of which the district attorney was bound to take notice; that it would certainly have been deemed an act of supererogation on the part of the prisoners counsel, to have volunteered any advice or information to the district attorney, apprizing him how he could *regularly* convict their clients. Here was no ground to presume mistake or surprise, for he could not but know that two days had not elapsed between the indictment and the arraignment.

Mr. Glenn, the district attorney, said the gentleman ought to know, that the prisoners were arraigned by the order of the court, that he had nothing to do with it, and that all the proceedings were by their order.

The Court observed, that the whole proceedings have been strictly regular, and they were satisfied, they had given the prisoners all the privileges they were entitled to; and they meant to allow them all the privileges and advantages they can legally require.

The clerk proceeded in swearing the jury, and after three of the jury were sworn,

General Winder, addressed the court to the following effect:

He thought proper to state, that he was himself entirely unprepared, as to what advice he ought to give the prison-

or in the present situation of the trial, from want of opportunity to examine, and consider the subject; and this also, is the situation of the other gentlemen, concerned for the prisoner; they, therefore, with himself desire it to be understood, that they no longer consider themselves as taking a part in the trial.

JURY SWORN—viz:

John Kennedy,	John Snyder,
Robert N. Moale,	Isaac Dickson,
John Robinson,	Thomas W. Bond,
John Carter,	Thomas Wooden,
John Watson.	Richard B. Dorsey,
Thomas W. Peyton,	George Timanus.

Mr. Glenn, (district attorney) opened the case to the jury, by detailing the facts that would be proven, which could not leave a doubt on the minds of the jury, as to the guilt of the prisoner. He then read the law, under which the prisoner was indicted, which is in the following words:—

ACT, of April 30th, 1810.

Sec. 19. "That if any person shall rob any carrier of "the mail of the United States, or other person entrust-"ed therewith, of such mail, or of part thereof, such "offender or offenders, shall on conviction, be imprison-"ed not exceeding ten years; and if convicted a second "time, of a like offence, he or they, shall suffer death: "or if in effecting such robbery of the mail, the first "time, the offender shall wound the person having cus-"tody thereof, or put his life in jeopardy, by the use "of dangerous weapons, such offender or offenders shall "suffer death."

The following witnesses were then examined.

DAVID BOYER, *sworn*—I was driving up the mail between 10 and 11 o'clock, on the night of the 11th March; Mr. Ludlow was with me; a fence was across the road which stopt the leaders; three men came from behind it, and said "here we are, three of us, highway robbers, armed with double barrelled pistols and dirks." They took us into the woods and tied us. They then went to the waggon, and drove it into the woods; after which one man jumped into the waggon, and threw the mail on the ground, and put a knife into it; and they went to work; they were at work for a long time opening the letters. When they were done, they untied us, and told us to turn our backs to the tail of the waggon, which we did, and they tied us there. One of them said, "driver I am sorry you have been kept so long, here is some money for you to buy bitters." He gave me ten dollars, and said the person that was along with me, looked like a gentleman, and did not want any money. Each one had a pistol when they tied us; they asked me which was the fastest horses. Their faces looked black, but from their hands, I saw they were white men, and they called each other, by the names Gibson, Johnson and Smith. One of them said, what shall we do with these men; another answered, I know how to fix them. I was anxious to know. This alarmed me very much. I gave up the mail, because I was afraid of my life, they did not say they would kill us. I was much alarmed, because I did not know what moment they would kill us. They went off on the horses. After some time the witness released himself with his teeth, and with Mr. Ludlow proceeded to Havre-de-Grace.

THOMAS LUDLOW, ESQ. *sworn*—I left Baltimore on the 11th March last, in the mail waggon. When within two miles of Havre-de-Grace, our progress was impeded by a fence built across the road. Upon driving up to the fence, three men jumped from behind it, on the right side of the road, presented pistols which were cocked; said they were highway robbers, and would blow our brains out, if we made any resistance. I, with the driver, was then led into the woods, about sixty yards from the road, and tied to a tree. One of the men returned to the road, and brought the mail waggon into the woods, and removed the fence from the road. The mail was then cut open, and the letters taken out, and a great number of bank notes found in them. They occupied about three hours and an half in searching the letters. The men searched us in the waggon, to ascertain if we had arms. After they had finished searching the mail, about two o'clock in the morning, the driver and myself were untied from the tree, and tied to the back of the waggon. The horses were then taken from the waggon, and they galloped off towards Baltimore. The driver and I, after releasing ourselves from the waggon, proceeded immediately to Havre-de-Grace. After the prisoner was taken up, I returned to Baltimore, and went to the jail to see him. I had no recollection of his face, in consequence of its being blackened on the night of the robbery; but I very distinctly recognized his voice, which is peculiar. They used a phosphorus light to look at my watch; one remarked to the man, who was looking at my watch, that he was a fool, as I should see his face, but he put his hat over his face, so that I could not distinguish it.

Mr. Wirt.—Was the life of the driver in your opinion, sir, put in jeopardy?

Witness.—I beg leave to decline answering that question, unless the court should be of opinion, that I am compelled to do so. The court decided, the witness was compelled to answer the question.

Witness.—I did consider that the life of the driver was in danger, had he made any resistance.

Boyer was called, by one of the counsel, on the part of the prosecution, and asked under what impression he gave up the mail—he repeated a part of the testimony, and added, I was a good deal alarmed; and when one of them said what shall we do with these men, and the the other answered, I have got a way to fix them. I was very much alarmed indeed. I did not hear them say they would blow our brains out if we made resistance.

Jacob Rogers, Hatter, *sworn*—The prisoner, with another man, pretty early in the morning on which he was arrested, came into my shop, and bought each a hat, and asked where they could get ready made clothes. I sent them to Berteau and Dumas's Store. They had a great deal of money, in one, two and three dollars; it appeared to me of notes from Maine to Georgia. I saw no big money. Each one paid for his hat. I picked out the notes they paid me for the hats, as I was afterwards requested to do. They then went to Berteau and Dumas's where they were detected.

Peter Berteau, *sworn*—The prisoner came to my shop, about 8 o'clock on the morning of the 13th March,

with another man, both badly dressed. I was alone. They asked me for blue frock coats. I asked if they wanted blue superfine ones; they answered, yes. The prisoner went to the door, where there were two scotch plaid cloaks, and asked the price. I told him 35 dollars a piece; he said he would give sixty for both. I said, as they would buy other clothes, he might have them. This was about the time when Mr. Dumas came down from his breakfast. I told him to look for a coat that would fit the youngest one. I told him in French, that they were men that would buy, that they had already bought two cloaks for 60 dollars, and that I suspected they had the money of the mail, that had been robbed the day before, in their pockets. Dumas told me to say nothing about it, until we could see with what money they could pay their bills. About this time, a constable came in, and asked me if I knew the object of his visit? He began to question the men. I took him apart, and told him we were not ready, and requested he should wait till we should be ready. They continued purchasing clothes; the constable came in a little after, and without enquiring if we were ready, told them the mail had been robbed; it appears you are strangers in this place, and it is my duty to bring you before the court. They said they had not heard the mail was robbed. They went into the back shop, where Mr. Dumas had the clothes they had bought.

Peter Dumas, *sworn*—It was on the 13th March, last, at about a quarter past eight o'clock in the morning, passing through our store, I saw two men very commonly clothed, busy buying of my partner some cloathing. Having previously read in the newspaper, an account of the mail robbery, it came directly to my

mind that there was all possibility of these men having executed this robbery. I passed my way to the back shop, my partner came to me and said, these are the mail robbers, they are buying a great deal, I directly answered very well, they are ours. After a moments stay in the shop, I came up to one of them, so as to help with the sale of the goods; seeing that every article offered was instantly bought. They never minded the prices; and what made me suspect them more, is, that when asking them to try the pantaloons, they refused; telling me to take measure, and apply it to the pantaloons they had on. While in the act of taking measure, I felt a great abundance of papers in the pockets of the pantaloons, which induced me to be easy with them in all my endeavours, so as to bring those papers to light. I immediately let them at liberty to act as easy and freely as I would have done to any honest people. After a moment, two officers came in, and asked them if they could give satisfactory references, who they were, they answered in the affirmative; the officers said, we are officers, the mail has been robbed, and it is the duty of the people to take every person suspected, to be examined. One of them called for the bill; one bill was ready. I took them into the back shop, and counted out the goods. I placed myself opposite a looking glass in the shop, that I might see. I saw one step behind the curtain which hangs on one side the shop; he put his hands into his pocket, pulled out the money, and placed it between some cloth that had been cut out, and between some pantaloons that were lying on the counter; the other then emptied his pocket in the same way. One of them then asked me what they should do; I told them to go to court and be examined. When they had

left the shop, I went to the clothes and took out the money they had deposited there, and took it up to court. When one of them was emptying his pocket, I heard a pistol ball and a dagger fall, which I found on the floor. Both men had mud on their pantaloons as high as their knees, when they came into the store.

On leaving the store, one of them seized my right foot by laying his on it, knocking me with his left elbow; and showing me with his eyes the place of deposit; leave the goods said he, I will call for them. I told the clerk we have money enough in the house, and I called a gentleman passing, to step in so as to witness, while taking possession of the money.

ALEXANDER H. BOYD, ESQ. *sworn.*—I was in the room where the prisoner was examined, this note (*a one hundred dollar note, which was afterwards proved to have been robbed from the mail,*) fell from him as he was pulling off his pantaloons; his person was much chafed.

D. BELL, JR.—I put this note, (*the note above mentioned*) into the post office in Charleston, on the 4th March last, I also put into that office, at the same time, these notes, (*taking up some of the notes that were deposited amongst the clothes in the shop of Berteau and Dumas.*) These notes were directed to Churchman and Thomas, Philadelphia.

Col. BENTALOW, the marshal, *sworn*—I examined the prisoner, he was much chafed, as if he might have been riding on a bare-backed horse; this note was dropt from his pocket, which Mr. Boyd picked up; there was horse hair on the seat of his trowsers.

[Several witnesses were then called to prove, that the notes found at Berteau and Dumas's store, were the same that were brought into court.]

ANDREW RHOADS.—I saw the prisoners in Havre-de-Grace on the 11th March last, at 12 o'clock at noon, in the high road with two other men. They asked me how far it was to Baltimore. I told them. They then asked whether there were any bridges washed away between there and Baltimore? Whether stages came that way? I told them only the mail stage travelled that road; they asked me the time that it came, and I told them.

Here the testimony on the part of the United States closed. The prisoner produced no witnesses.

MR. LUDLOW was called, and asked if the prisoner had a pistol.

This man had a pistol; after we had left the road, he told me that if we made no resistance, I need not be alarmed, our lives should not be in danger.

THOMAS KELL, Esq.

The testimony being closed, Mr. Kell addressed the court to the following effect:

He said that having now progressed through the evidence to be offered in the case. It was not the intention of the attorney general, the district attorney, or of himself, further to press the calamity of the prisoner

by observations on the testimony. But they felt it incumbent upon them, and proper to relieve the jury from any doubt or difficulty, as to the law upon this subject. Whilst, therefore, they should decline saying any thing, to induce the conclusion, at which they had no doubt the jury would arrive. They would ask of the court the following direction.

"It is prayed of the court to give the following instruction to the jury.

That robbing the carrier of the mail of the United States, or other person entrusted therewith, of such mail, by stopping him on the highway, demanding the surrender of the mail, and at the same time showing weapons calculated to take his life, such as pistols or dirks, putting him in fear of his life, and obtaining possession of the mail by the means aforesaid, against the will of the carrier, is such a robbing of the mail, and such a putting the life of the carrier or person entrusted therewith in jeopardy, by the use of dangerous weapons, as will bring the offence within the following terms of the 19th section of the act of congress, of the 30th April, 1810, entitled, 'An act regulating the post-office establishment,' to wit: 'or if in effecting such robbery of the mail the first time, the offender shall wound the person having the custody thereof, or put his life in jeopardy by the use of dangerous weapons, such offender or offenders shall suffer death."

Mr. Kell then read the 19th section of the post office law.

ACT, OF APRIL 30, 1810.

Sec. 19. "That if any person shall rob any carrier of the mail of the United States, or other person en-

"trusted therewith, of such mail, or of part thereof, such "offender or offenders shall on conviction, be imprison-"ed not exceeding ten years; and if convicted a se-"cond time of a like offence; he or they shall suffer "death: or if in effecting such robbery of the mail, the "first time, the offender shall wound the person having "custody thereof, or put his life in jeopardy, by the use "of dangerous weapons, such offender or offenders shall suffer death."

He then disclaimed all idea of influencing the determination of the jury, whether the acts proven, bring the transaction within the meaning of the act of congress. And proceeded to enquire what is the putting life in jeopardy, by the use of dangerous weapons.

1 The weapons used.

2 The manner of using them.

3 The alarm of the carrier.

It appears said Mr. Kell, all necessary to constitute the offence is proven.—The party met the driver in the night, on the highway, proclaim themselves highway robbers; that they are armed with double barrelled pistols and a dirk, that the pistols were cocked. It was then ascertained, that they were armed with pistols, which were presented towards the driver, and passenger, and soon after, that they had a dirk. The exhibition of such weapons, the purpose for which such exhibition was made, does create danger and risk of life; in other words, it does jeopardize life. It certainly was a putting the life of the driver, (as well as of Mr. Ludlow) in jeopardy; did it not diminish their personal safety, and expose them to hazard.

It perhaps is not necessary, that the driver should have apprehended his life to be in danger. If it were so.

the language and requisites of the law are fully proven; he stood in the predicament of a man whose life was in danger, and under the fear, and apprehension of danger, he parted with the mail.

The prayer presents the case in the fairest and most favourable manner for the accused.

The weapons used were such as are eminently calculated to endanger life, or put it in jeopardy; the pistols were cocked and presented with the declaration; "if you esist, we will blow your brains out." This 'tis true, the driver says he did not hear, but he heard and saw enough to produce fear, and therefore gave up the mail; can it be thought by any deliberate mind, that such acts, for such a purpose, do not endanger life, or put it in jeopardy; can it be said, that the life of a man situated as was that of the carrier of the mail, at the time of this transaction was not in danger. It is not necessary, that the pistol be discharged, intimidation and danger, by such means are sufficient to constitute the offence; the jeopardy of life takes place, at the moment when the weapons are presented.

With this view and consideration of the subject, Mr. Kell felt himself authorised to ask the opinion, and direction of the court, contained in the prayer submitted to them.

GEN. WM. H. WINDER.

General Winder hoped the court would not deem it irregular or improper for him, after what had occurred, to suggest his views to the court as *amicus curiae*

on the question now propounded by the counsel for the United States. Indeed having been called upon by the prisoner, although at too late a period to be prepared to advise him preparatory to, or in the conduct of the trial; yet he had deemed it his duty to listen attentively, and he thought, if any thing occurred to his mind, of real importance to the prisoner, he was bound in duty, both to the court and the prisoner to state it. He had never seen the clause of the act of congress until the trial had commenced, and received from that perusal a very strong impression, that the evidence did not support those counts in the indictment, which charge the prisoner with a capital offence. This impression had been strengthened by the little reflection he had been able to bestow upon it, and more strongly confirmed, by what he had heard on the part of the United States. The words of the act of congress are.—"*If in effecting such robbery, &c. &c.*—(See page 74.)

Now the life of the carrier must be put in actual *jeopardy*, to bring the offence within that alternative of the clause; no *apprehension* of danger or being put *in fear of his life*, gratifies the words of the act. The terms of the prayer to the court, are a fair and just statement of the extent to which the testimony in this case can be urged, and by the very terms of the prayer no jeopardy of life is even supposed; it simply states, that *if the prisoner exhibited dangerous weapons calculated to take life, thereby putting the carrier in fear of his life, and thus obtaining, &c.* can it be supposed, for a moment, that this is what was meant by congress, when they say, put the life of the carrier in *jeopardy*. It would be to attribute to congress the most loose and unskilful use of terms; to make the *apprehension* of danger, the *existence* of

danger; the *fear* of jeopardy, *actual* jeopardy. It is wholly impossible to contend, that the words do not import an actual jeopardy; and if they do, surely the assumed state of proof, in this prayer, does not amount to actual jeopardy.

If the position contended for be true, it will follow, that a man may be guilty under this part of the act, where no jeopardy of life has occurred; and if the prayer exhibits the just interpretation of the act of congress, a robber may put the life of the carrier in *actual* jeopardy, without being guilty; for if he raises a *fear* of life, by having dangerous weapons, without doing any act, which could possibly put life in *jeopardy*, he is guilty—but if a robber in the dark, without the carriers knowledge, snaps a loaded pistol or gun, within killing distance, with intent to kill the carrier; no body will doubt, but here was *actual jeopardy;* but the carrier could not possibly have any fear of life, since he had no knowledge of it, and if the mail should be immediately stopped by the robber and his associates, without further acts of intimidation, the party would not be guilty under this clause; can it be imagined, that a construction leading to such absurdity can be just?

To support the construction contended for, it is necessary to confound *fear of life*, with *jeopardy* of life. Now, since a man may be in *great fear of his life*, where there is not the least *jeopardy of life*, so there may be *great jeopardy of life* without the least *fear of life*. To say that congress, therefore, meant *fear of life* by *jeopardy of life* is inadmissible, especially in a criminal statute. But further, this *jeopardy of life*, must, by the express terms of the act, be created by the *use of dangerous weapons*.

What is the *use* of dangerous weapons which can occasion *jeopardy* of life? certainly they must be so used, as that life may be destroyed; as if a man strike at another with a sword, or fire, or snap a loaded pistol, or gun at him within reaching distance—this is clearly a *use* of the weapon, that puts life in jeopardy. But if a man has a sword by his side, or a pistol in his belt, and he stops the mail, and says to the carrier; you see I am armed, deliver the mail; the carrier might justly be said to deliver the mail, in such case for *fear of life*; but can it be said, that in effecting this robbery, the carriers *life was put in jeopardy* by the *use* of dangerous weapons? It is impossible that it can.

Then if there be no ambiguity in the words of the statute, which it is respectfully believed there is not; how can any interpretation, especially in such case as this, be admitted different from these words?

The *use* of dangerous weapons, to produce *fear of life* may be very different from the *use* of dangerous weapons, to put life *in jeopardy;* but nothing in this act can render a man guilty, but such a *use* of these as puts life in *jeopardy*.

The facts in this case ought, therefore, to warrant the counsel for the United States, to ask the court to direct the jury—that if they believe the prisoner had dangerous weapons, which he *used* so as to put the carriers life *in jeopardy*, then he is guilty, othewise the court cannot instruct the jury to find a verdict of guilty on this point.

General Winder concluded, by remarking to the court, that this view of the subject appeared to his mind very strong, and he thought could not but have strong weight with every unprejudiced mind; and since upon so hasty a view of the question, such strong motives of

doubt, to say the least, if it had occurred, he trusted the court would in the forlorn case of the prisoner, being without counsel prepared to assist him, incline to the side of mildness; but at all events, if the learned attorney general, should be able to incline the balance against the prisoner, he respectfully submitted, whether the question was not so doubtful, as to require the court, to put it in a situation, to receive the deliberate judgment of the supreme court, before the life of the prisoner should be taken.

E. L. FINLEY, Esq.

Addressed the court after General Winder.

He observed, that in soliciting the indulgence of the court to a few suggestions, which had occurred to him, he was sensible, that he would be considered as having departed from the line of conduct, which the counsel for the prisoner had adopted; *viz.* of abandoning the case, and throwing the prisoner upon the mercy and justice of his jury. That young and unexperienced as he was, it might also be considered as great presumption in him, to attempt to enlighten the minds of the court, upon the construction to be given to an act of congress, after the able and ingenious argument of general Winder; an attempt likely to be attended with but little success, when it was considered, that he would be succeeded in the argument, by the learned attorney general. (Mr. Wirt) But that, notwithstanding these considerations, which in *ordinary* cases, would operate very powerfully upon him, he felt constrained from the

peculiar circumstances of *this* case, to come forward and offer the court some suggestions, which had occurred to him during the examination; suggestions which perhaps might operate in favour of the life of the prisoner, and save him from that death, which was impending over him.

"When (observed Mr. F.) all our objections, (this morning) to the *immediate* trial of the prisoner, and all our applications for a postponement of the case, until Monday, were overruled by the court, the counsel for the prisoner abandoned the case in despair. As one of the counsel, I *then* intended to have remained silent. I was in hopes, that the counsel for the prosecution, (situated as this man was, without counsel, and *precipitated* into a trial, notwithstanding his application for a *short* postponement,) would leave him to the humanity of his jury; that they would be satisfied with his conviction of a *simple* robbery, which would only subject him to a confinement; and that they would not insist to the court, upon a rigorous construction of the act of congress, which, if established, would subject the prisoner to the penalty of death. But when, after the examination of the testimony, I heard the counsel for the United States, pray the court to instruct the jury, that, if they believed particular facts, that this man had brought himself within the provision of the law, which subjected him to death! When I heard them contend for a construction, which, in my opinion, was neither consonant with the mild character of our laws, nor with the intention of the legislature, that framed them! When I reflected upon the extraordinary and almost unprecedented excitement of public feeling, against this man, which, from the time of his apprehension, until the pre-

sent moment, had been raging with encreasing violence: an excitement, which now fills your court-room, with an overwhelming crowd, anxiously anticipating a verdict of conviction; which has manifested itself, not only by the expression of pre-conceived opinions, as to this man's guilt, and an almost universal desire for his immediate conviction, and execution; but by *censures* and anathema's against *his counsel,* for undertaking his defence! When I reflected too, that the construction contended for, by the counsel for the United States, if established, would not only deprive *this* man of life, but would affect the lives of the two other men, for whom I am counsel! I could no longer remain silent; I felt guilty; I felt bowed down by the high responsibility I had assumed to myself, in abandoning his case, however desperate. It is under the influence of these feelings and this conviction, that I now claim the indulgence of the court. I could not sleep in my bed this night; I could not rest my head in peace upon my pillow, did I not *now* come forward and make a struggle, however unsuccessful, in favour of the *life* of this man." Mr. F. then read to the court, the clause in the act of congress, upon the construction of which, counsel had been arguing. He contended, that congress, in using the words, "jeopardy of life," did not intend, that the mere *presentation* of a pistol or dirk, at the mail driver without *wounding* him, should be such a "jeopardy of life," as would subject the party to the punishment of death—that the words, "*wound* the driver *or put his life in jeopardy,*" were used by them, as *convertible* and *synonimous* words; that the words "put his life in jeopardy," were intended, as *explanatory* of the words "wounding the driver," and defining, and limiting their

extent. "Congress (said Mr. Finley,) intended, that the *wounding*, should be such as would put the life of the driver in *jeopardy*. They may have supposed, that some doubts, might arise upon the construction of the words *wounding;* and as to the *nature*, and *extent* of the *wounding*. They, therefore, inserted the words 'jeopardy of life,' as explanatory, and to show that unless the wounding, was of so serious a nature, as to *jeopardise* life, the party should be subject only to imprisonment. The use of the disjunctive particle *or*, does not necessarily make them two distinct offences. Mildness, and humanity are the distinguishing characteristics of our criminal code. The number of offences, to which the punishment of death, is annexed, is very limited:—and it is only where the offence is of a very aggravated, and criminal character, that this humane consideration, for the lives of the citizens has been departed from. The act of 1810, was intended as an *amelioration* of the former post-office act. The act of 1794, section 17, annexed the penalty of *death*, to a *simple* robbery of the mail, *unaccompanied* with *injury* to the *driver*, or the *use of dangerous weapons*. This severe punishment was considered, as disproportioned to the offence. This act was repealed by that of 1810, which, in the first clause of the 19th section, provides, that for a *simple* robbery of the mail, the party guilty, shall be subject to 10 years imprisonment. Congress have determined, therefore, in this clause by the *punishment* annexed, the *degree* of enormity, they attached to a *simple robbery* of the mail. As then they did not consider it such an offence, as to deserve death, they must be presumed to have intended, that unless the offence was *attended* with very *aggravating*

circumstances, such as *jeopardising* the life of the *driver by seriously wounding* him, the punishment of *death* should not be superadded. This would be in my opinion, an *humane* and reasonable construction of the act of congress. But, if your honours should establish the construction contended for, by the counsel of the United States, viz. that *wounding* and *jeopardising*, are two distinct offences; this act loses all its character of mildness, and would deserve to be enrolled in the blood code of Draco. You could not undertake to *graduate* the *degree* of wounding. But, if in effecting the robbery of the mail, the party should wound the driver slightly or seriously—no matter, whether in consequence of such wound, his life should be jeopardised or not—it would be perfectly immaterial, and you would be obliged to inflict upon the party robbing, the punishment of death. To show then, the absurdity of this construction, and its incompatibility, with the object, which congress must have had in view, in making this provision of the act of 1810; viz. the *amelioration* of the act of 1794, punishing *simple robbery* with *death*—Suppose that in effecting the robbery of the mail, the robber should make a *slight*, and trifling puncture, with his dirk in the flesh of the driver; should scratch the face or cut the skin of the driver, or some other slight wound, which could not, by any posibility of construction or inference, *jeopardise* his *life*. Would this be a circumstance of such *aggravation;* of such enormity; as to entirely change the character, or degree of the offence of *simple robbery;* to *enhance* its criminality, and to give to it such an encreased and outrageous degree of wickedness, as to require the proportionably severe punishment of *death?* Is it equal in criminality, and does

it call for the same degree of punishment? Would this be an *amelioration* of the act of 1794? Heaven protect us from such an *amelioration!* But if the construction contended for, by the counsel of the United States, be correct, the slightest scratch or puncture given to the driver, or the *mere presentation* of a pistol, or dirk, *without wounding* him, changes the mild character o the law, and subjects the party to death. Where was then the necessity of repealing the 17 section of the act of 1794, and substituting the 19 section of 1810? The act of 1794, makes no mention of dangerous weapons; it simply speaks of the robbery of the mail, and whether the robbery was effected, by the use of weapons or not, the punishment was death. But is it to be presumed, that a highway robbery of the mail, would ever be attempted without dangerous weapons, such as pistols and dirks? If the mere *presentation*, then, of dangerous weapons, *without wounding*, attaches death to the offence, the 1st clause of 19 section of 1810, punishing a simple robbery would be *entirely nugatory*, and *superfluous;* as no robbery ever has, or ever would be committed without dangerous weapons. Can we suppose then, that congress had no object in view, in making this provision, and drawing a distinction between a *simple* robbery, and one accompanied with *wounding?*"

Mr. Finley then observed, that he had always understood it, to be an established principle, in all our courts of criminal judicature, and one from which courts or juries could not deviate; that the most favourable, the most refined, the most extended construction, should always be given, in "*favorem vitae*," to all penal acts. That too much value and consideration were attached to the life of a fellow creature, to permit it to be "*jeopar-*

dised," or taken away on account of indistinctness or ambiguity in the phraseology of a law. That when the provisions of a law appeared to be unusually harsh and severe, and repugnant to the general character and habits of the people; and a construction in "*favorem vitae,*" could be collected, from the probable intention of the legislature that enacted it; that, then, such *intention* was to be the *rule* of construction. That the law of 1810; in the severity of its provisions, *as contended for;* was an anomaly, in our criminal code; an isolated bloody statute, assimilating with nothing around it. That the most effectual mode of ascertaining the intention of congress, at the time of passing the law, and truly determining the construction they intended should be given to it, would be, by examining the *operation* of the law, and comparing it with the *policy,* which congress must have had in view, in repealing the law of 1794, and substituting that of 1810.

MR. FINLEY, then took a view of the laws of England and France, on the subject of robberies; of the respective *policy* of those laws, and their effect upon those two nations.

"In France, (said MR. FINLEY,) a robbery *unattended* with *murder* of the person robbed, is punished by fine and imprisonment; if accompanied with murder, the punishment is an ignominious and painful death. In England, a simple robbery, whether accompanied by murder, *or not,* is punished with death.

"What has been the effect and operation of these several laws? In France, all temptation to *murder* the person robbed, is taken away; the fear and the *interest,* if not the humanity, of the robber, are enlisted and appealed to. The law says to him, if the robbery you commit, is *unattended* by murder; if it is not *aggravated* by

taking away the life of a fellow creature, we will reward you for your forbearance, by respecting your *own* life. But if it is attended with the horrid and unnecessary crime of murder of your victim, the severest punishment which the law can inflict, viz. the deprivation of life, shall be the consequence of your cruelty. In England, no distinction of punishment is made, between robbery with, and, without murder; and the highwayman, who probably *impelled* by the severest *want*, takes from you, your purse, without endangering your life or even using any personal violence; and the hackneyed and hardened villain, who, to pamper and gratify his profligate passions, not only robs you of your purse, but deliberately and unnecessarily takes away your life; are alike involved in the *same* punishment, and punished in the *same* degree; notwithstanding the great disparity in the two crimes. All inducement to spare the life, is therefore taken away for want of this discrimination. The highwayman, in the first instance knows, that if he spares life, he leaves a *witness* to proclaim his crime, and to rise up in judgment against him when detected; that the law will not mitigate the severity of its punishment, on account of his forbearance; but that if he *murders* his victim, he saves his *own* life, by *silencing* the only witness that could appear against him at a *human* tribunal. The consequence of this *discriminating* policy of the French law, is, that scarcely an instance occurs of the perpetration of a robbery, accompanied with *murder;* whilst the lamentable result of the mistaken and barbarous policy of the English law, is, that *murder* is almost inseparable from, and concomitant with *highway robbery;* and the criminal annals of England, furnish a bloody calendar from one year to another. May not

congress then have had these several results of European policy in view, at the time of passing this law? Would they not profit by experience? The object of their legislation was the public good, and the reformation of criminals. But it would be charging them, with a most culpable disregard of the *lives* and safety of their fellow citizens, to suppose, that they would be uninfluenced by the consideration of these several results. A reference however to the *actual* operation of the act of 1794, furnishes an additional and conclusive corroboration, of the construction I contend for, and of the intention of congress to *ameliorate* the act of 1794, by that of 1810; for during the existence of the first act, several attempts at a robbery of the mail were made, and in almost every instance, it was attended either with the *murder* of the driver, or the dangerously wounding of him.

"In the instance of the robbery of the *Richmond* mail, the driver was murdered."

MR. FINLEY, then observed, that the construction he had contended for, he conscientiously believed to be the true and correct one; but *that*, as he might be unsuccessful in his attempt to transfer this conviction from his *own* mind, to the minds of the court; and as the counsel for the United States, had contended for a different construction, he would make a brief reply, to one of the arguments of the counsel, and then relieve the attention of the court. "The counsel for the United States, (said MR. FINLEY) have contended that the mere *apprehension* or *opinion* of the *party*, that his life was in danger, was to be the *criterion*, by which the jury was to determine, whether his life was put in *jeopardy*, within the meaning of the act of congress. This, I conceive, to be a most absurd and fallacious criterion. It would

require a scale in every instance, by which to *graduate* the *fears* of the party robbed. Some persons are operated upon by fear, more easily than others. Such is the constitutional timidity of some persons, as to magnify mole-hills into mountains, and to people every bush, with midnight assassins and robbers; should the driver be of this description, his life would be in continual *jeopardy*, according to *this* construction while travelling on his route. The counsel have not properly discriminated between the mere *fear* or *apprehension* of danger, and the *actual existence* of danger—a man may anticipate danger, when no danger exists. I will give but one example, in illustration of this distinction. Suppose a man presents a pistol which is not loaded, at the breast of another, (who is ignorant of its not being loaded) and in a threatening manner says, that he will blow his brains out. In this case; the party to whose breast the pistol is presented would most assuredly *apprehend* that his life was in *great jeopardy*, though the jeopardy would exist only in imagination."

Mr. Finley, then laid down a distinction between the jeopardy of the *driver's life* and the life of Mr. Ludlow. He contended that under this act it was perfectly immaterial whether Mr. Ludlow's life was *jeopardised* or not. That the act only extended to the driver's life, and expressly *confined* and annexed the punishment of death, to cases of robbery, when the *driver* was wounded, or *his* life put in *jeopardy*. That this was an important distinction to be kept in view, by the jury, in the examination of, and decision upon the testimony in this case. That there was a manifest difference in the testimony of Mr. Ludlow, and of the driver. That, although Mr. Ludlow swore, that he

considered *his* life in great danger, yet the driver swore, that *he* felt no apprehension of danger to his life, until after the robbery was effected, and that this *apprehension* arose, from an observation by one of the robbers, 'what shall we do with these men,' and the reply, 'I have a way to fix them:' but that his fears were removed, when he found, that "the way to fix them" was by tying them to the tail of the mail waggon. That he did not intend, by adverting to this difference in their testimony, to impeach the credit either of Mr. Ludlow, or the driver. But to show, that, whatever may have been the apprehensions of Mr. Ludlow, or however *his* life may have been *jeopardised:* yet, that the *driver's* life was not *jeopardised,* neither did he feel any apprehensions of it.

"Such said (Mr. FINLEY,) are my views of the law. These views, which occurred to me during the examination, and which are necessarily confused and indistinct, I have felt bound to submit to the court, from a sense of duty to my client, and a conscientious belief that they were correct. I did hope that I should have been spared the necessity of submitting them, by the conduct of the counsel opposed to us. I did hope that they would not have pressed the case; that they would not have insisted upon so rigorous a construction of the act of congress; that they would have been satisfied with the conviction of the prisoner, of an offence which would have subjected him only to confinement, and that they would have left the jury to the free exercise of that prerogative, which is the brightest jewel in a monarch's crown; the prerogative of mercy; a prerogative to be exercised, not in *pardoning* a criminal, when once convicted, (for such power they have not) but in giving to the

law, under which he is indicted, the most *merciful*, the most humane, the most liberal construction, *"in favorem vitae."* But I have been disappointed; I must therefore submit this man, to the mercy and justice of his jury. I entertain but little hope, that my exertions in his favour will be attended with success. I am sensible that I am stemming a torrent, not to be resisted; when I reflect that I shall be succeeded in the argument by the attorney general, whose splendid talents have been enlisted on the side of the prosecution. But whatever may be the result, I shall have at least, the gratifying consciousness of having earnestly endeavoured, however feebly and unsuccessfully, to discharge the duty I owed to the prisoner at the bar, as his counsel.

WILLIAM WIRT, Esq.

Then addressed the court to the following effect:

He observed, that the counsel who first addressed the court, in opposition to the prayer, had presented himself in a very imposing character; that of a friend of the court; a character calculated to create a prepossession in his behalf; and to pre-dispose the court to confidence and respect for his opinions; but the gentleman would excuse him for recollecting, that but a few hours ago, he had appeared as the open and zealous advocate for the prisoner; and he must pardon him for doubting whether, it had been in his power, in so very short a time, to disengage himself from that bias of mind from which no advocate is free; he would excuse him also, for observ-

ing that in the warmth with which he had just addressed the court, as well as in the nature of the arguments he had urged, he had discovered more of the zeal of the advocate, than of the coolness and impartiality of an *amicus curiae*. He thought *he* might, with at least equal propriety, assume to himself the character of a friend of the court. That although engaged as one of the counsel on the part of the prosecution, there was nothing in that engagement which required him to express a legal opinion which he did not sincerely entertain; that he represented a government which desired only a faithful execution of the laws, by a fair and just construction; and that he should misrepresent the views of those by whom he was engaged, by seeking to impose a false construction on the court; that he made these remarks however, merely as a counterpoise to the character assumed by the opening counsel on the other side, and not with the intention of attaching to his remarks a weight to which they were not in themselves entitled; that he wished for nothing more than that the scales of judgment should hang in equilibrio, and the balance should be inclined by truth alone.

He hoped the opposite counsel would both, excuse him for observing, that they did not appear to him to have found the key which unlocked the construction of this law, in a manner the most simple and natural. They seemed to have taken it for granted, that congress intended to describe, by this section, a new kind of robbery, unknown to the common law, and which called for a different kind of proof. From this opinion, he begged leave to dissent. He contended that congress had not intended to create a new offence unknown to the common law, so far as the circumstances attending

the act, and the degree of proof were concerned. That although the mail was a species of property unknown to the common law, and congress, in making the mail a subject of robbery, had extended the offence to a new subject, yet that the character of the offence, *the robbery*, was the same, both at common law, and under this statute; that the only effect of the act was to extend the offence to a new subject, leaving the character of the offence, and the degree of proof, exactly where the common law had left them, in regard to other subjects.

To make this clear, he begged the court to recollect, that wherever the constitution or laws of the United States, used a common law phrase, without any definition of that phrase, it was the uniform course to resort to the common law for its explanation. It was unnecessary to cite to this court, to whom they were familiar, the decisions which illustrated and proved this course; it was, indeed, impossible to conceive that any other could be adopted. But the court would observe that this principle was essential to the construction of this law, and that it demonstrated the truth that a new kind of robbery was not intended to be created. For in the first part of this section, the term, *robbery*, is used without any definition. The words are:

ACT, OF APRIL 30th, 1810.

SEC. 19. "That if any person shall rob any carrier of "the mail of the United States, or other person entrust-"ed therewith, of such mail, or of part thereof, such "offender or offenders, shall on conviction, be imprison-"ed not exceeding ten years; and if convicted a second "time, of a like offence, he or they, shall suffer death:

"or if in effecting such robbery of the mail, the first "time, the offender shall wound the person having cus- "tody thereof, or put his life in jeopardy, by the use "of dangerous weapons, such offender or offenders shall "suffer death."

Thus far the provision is general, by the use of the term, *robbery*, which is left unexplained; a resort must, therefore, be had to the common law, from which it is borrowed, to explain it; and every species of robbery known to the common law, is clearly embraced by the clause just quoted. If the court will attend to the structure of the sentences, which follow this first sentence, and which are supposed to create a new offence, they are merely exceptions from the first sentence, and were consequently included in it, until so excepted; if the first sentence therefore, covers, and merely covers the common law offence of robbery, and the latter are only exceptions from it, these exceptions are merely parts of the common law offence of robbery, and consequently no new offence, and calling for no new and more aggravated degree of proof. Again, if you recal the different species of robbery as they have been decided to exist at the common law, you will perceive that the sentence, on which the two first counts of the indictment are founded, describes a kind of robbery perfectly familiar to the common law.

At the common law, robbery might be committed:— 1st. by *violence*, without putting life in danger, and without previous fear; the lady whose ring was snatched from her ear in some place of public amusement, and dropped among the curls of her hair, was decided to have been robbed, although there was no danger of life and no previous fear operating on her will to cause a

surrender of the property. 2. By fear for reputation, as by a threat to charge the party with an infamous crime unless he should surrender his purse; in this case, there is no violence offered to the person and no danger to the life, yet the robbery is complete—it is the lawless constraint acting on his will, from regard to his character, which induces the surrender of his property and which constitutes the offence. 3. By fear of personal violence—but this must not be the groundless fear of cowardice; the law requires that the danger should be apparent; and hence circumstances are always required to show that the fear was well founded; this was the kind of robbery in the contemplation of congress, in the sentence under cousideration.

They have stated the evidence which shall show that the danger was real, the fear well grounded; wounding the driver, or (without wounding him) *putting his life in jeopardy, by the use of dangerous weapons.* The robber, who, with a pistol, stops a traveller on the high. way, and demands his purse (a case familiar to the common law courts of criminal jurisdiction in England,) presents the very case, put by the act of congress. The weapon used is a pistol; a weapon fabricated for the very purpose of danger to life; it is used because it is dangerous; and the use produces the effect intended, by acting on the fears of the traveller, and inducing him to surrender his purse, by reason of the jeopardy to his life. There is nothing in the descriptive circumstances of the offence under the act of congress, to distinguish that offence from the high-way robberies, once so common on Hounslow Heath and Bagshot in England.

But it is insisted on the other side, said Mr. Wirt, that something more is meant by the expression, *put-*

ting the life of the driver in jeopardy, by the use of dangerous weapons; it is not enough that the robber be in possession of the dangerous weapons; it is not enough that he carry them to the ground; it is not enough that he perpetrates the robbery by the terrour which they inspire; but they must be used in such a way as to produce jeopardy: for example, if the weapon be a dirk, a stroke must be made with it; if it be a pistol, it must at least be snapped. Let us examine some of the consequences of this construction. If a stroke be made with a dirk at right angles from the driver, it is not easy to conceive that *greater* jeopardy is produced thereby, than by the mere possession and display of the weapon in the robbers hand; such a stroke would be nothing more than a flourish, *in terrorem;* if the stroke be at an angle of forty-five or twenty-two and a half degrees, the same answer might be given to it; and so through all the gradations of angular distance; if the stroke miss the object, and be not repeated, the jeopardy is over, a miss we are told, being as good as a mile—or if gentlemen think this answer too light, is it not obvious, that by insisting that the stroke shall, at all events be made, in order to constitute the jeopardy, they force the court and jury upon a mathematical disquisition as to the distance and the direction of the stroke, in order to jeopard the life? points extremely difficult of ascertainment, considering that their attempts are generally, if not always, made in the night time, when the distance and the direction, and even the fact of a stroke being made at all, can rarely be discerned. As to the snapping of the pistol, all the remarks made upon the direction of a stroke with the dirk, apply; and indeed it is not very easy to discern, even if the

pistol be levelled at the driver's head, how its having been *snapped* increases his jeopardy, after the snap is over; besides, the chances are sadly against the calculation, that a pistol, prepared for a robbery, *will* snap; the probability is, that it will go off; and then there is no jeopardy; for jeopardy implies uncertain danger; whereas, on this supposition, the hazard is reduced to a doleful certainty; the driver is killed. Can it be believed, that this was the intention of congress? Can it be believed, that any thing more was meant than the robbery should be effected, by the use of dangerous weapons—of weapons calculated to take life?

But still bolder ground is assumed on the other side; it is contended that in this case, there was no jeopardy to life, because the robbers gave the assurance that, if the driver and passenger would not resist, they should not be hurt: it may be very true, gentlemen say, that if they had resisted, they would have been killed; but they had only to give up the mail without resistance, and there was no jeopardy at all; and hence the case is not within the act of congress. This is the construction given to an act of congress, intended to prevent robberies! Sir, it must be very clear, that the jeopardy within the contemplation of congress, was that kind of jeopardy which was in no other way to be avoided, than by yielding to the lawless purposes of the robber; a jeopardy of life, so imminent, that the driver could not elude it, except by surrendering that which the robber had no right to demand. This ground so intrepidly taken in the the construction of our statute, would be just as tenable under the English common law; for example, by that law, it is required, that the party shall be put in fear; but the courts there require that this fear shall have a

reasonable foundation; the robber there might say, it is true I was armed, it is true the traveller was put in fear; but the case is not within the law; because his fear had not a reasonable foundation; for he admits, I told him, I would not hurt him, *if he would surrender his purse.* Such an agreement, I must be permitted to say, would make but a sorry figure in Westminster Hall, or even at the old Bailey; for it goes to patronize and protect, not to prevent or punish robberies; it founds the robbers exemption from punishment on the very circumstance which constitutes his guilt; the success of the robbery.

The gentleman who urged this argument attempted to support it by a case from the law, touching assaults and batteries, which he seemed to think analogous; that case is this; if a man were to lay his hand upon his sword and say, if it were not assize time, he would not take such language; this the gentleman says, and says truly, would not be an assault; but why? for a reason, which destroys the analogy; because the words show an *absolute purpose* to do him no mischief *at that time;* the forbearance is not put on the condition of any act to be done by the party menaced—but suppose the assailant had drawn his sword, and required the other to fall upon his knees instantaneously, and beg his pardon, or he would run him through the body—when the gentleman shall show, by authority, that this would not be an assault, he will have furnished a case, which does not present something like the appearance of analogy."

The respectable young gentleman, (MR. FINLEY) who last addressed the court, has insisted, that the words "*wounding the driver* or *putting his life in jeopardy by the use of dangerous weapons,*" mean the same thing; that the driver is, at all events to be wounded, and so

wounded as to put his life in jeopardy; to this I think it sufficient to answer, that the conjunction used is the disjunctive, *or*, and that according to all the rules of fair construction there were two cases in the contemplation of congress—the one wounding the driver, the other putting his life in jeopardy, by the use of dangerous weapons, without wounding him. The aid which the gentleman attempts to derive to this construction from the act of 1799 is not in my opinion, fairly furnished; the expression in that law is, "shall *much* wound the person having custody thereof, or put his life in jeopardy, by the use of dangerous weapons"—these were clearly distinct offences: in the present law, the word *much*, is dropped, obviously because it was indefinite, and might lead to difficulties in the decision of cases arising under it, and because any wounding of the driver, would be sufficient to show the wicked and determined purpose of the robber; but that purpose would be shown with equal clearness without wounding the driver, in effecting the robbery by the use of dangerous weapons calculated to take the drivers life.

If any doubt could remain on this subject, it would be removed, by pursuing this section of the law a little further. It appears that robbing the mail, *generally*, is punished by the first clause of the section, only with imprisonment, for the first offence, yet there were some modes of perpetrating such robbery, so peculiarly obnoxious, that congress had singled them out by express exception, and punished the first offence *committed in either of these modes* with death:—Congress have gone still further, and punished even the unsuccesful attempt to commit the robbery, *in either of these modes* with imprisonment for three years, and the words in the sec-

tion, in which *the attempt* is described, are intended to represent the same mode, in which *the act* is described. So far as we have yet gone, the purpose is to punish the offence, *if effected;* congress, next, take up the *attempt,* to commit the offence, where it fails. In defining the different modes of such *attempts,* they have kept up the analogy between the successful, and unsuccessful attempts, and, by a slight variation of language, have thrown new light on the clause, we are considering. The language of the law, where the offence is compleat, is as follows: "If any person shall *rob* any carrier of the mail of the United States, or other person entrusted therewith, of such mail, or of part thereof, such offender or offenders shall on conviction, be imprisoned not exceeding ten years; and if convicted a second time of a like offence; he or they shall suffer death; or if in effecting such robbery of the mail, the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy, by the use of dangerous weapons, such offender or offenders shall suffer death." I beg the court, now to mark the correspondent description of the attempts; the words are these, "and if any person shall attempt to rob the mail, of the United States, by *assaulting* the person having custody thereof, *shooting at him,* or his horse or mule, or threatening him with dangerous weapons, and the robbery is not effected, &c."—Here it is clearly observable, that the *assault,* generally, meets the general description of the robbery, in the first sentence; 2ndly. that the *shooting,* in the attempt, corresponds with the *wounding* in the robbery; and thirdly, that the *threatening the driver with dangerous weapons,* in the unsuccessful attempt, corresponds with *the putting*

his life in jeopardy, by the use of dangerous weapons; thus the description of *the attempt,* reflects light on the description of *the act,* and demonstrates that congress, by using the terms "putting his life in jeopardy, by the use of dangerous weapons," meant nothing more than "threatening him with dangerous weapons," without having in view any other use of the weapons, or any further degree of jeopardy. According to the opposite construction, it would appear that congress had been solicitous to punish this peculiar mode of attempting the robbery, with a peculiar punishment, distinguishing this kind of *attempt* from any other attempt; while the actual perpetrating the robbery by the use of dangerous weapons, was left unpunished by any peculiar degree of rigor—thus convicting congress of an absurd solicitude about the *attempt,* without any correspondent solitude, in relation to the *act:* and to produce this absurd consequence, you are required to adopt principles of construction, so subtil and metaphisical, as to what will or will not constitute jeopardy, that there are, perhaps, no twelve men, in the community who will agree in their application to the same case; if you take the plain case, which it seems to me was clearly before congress, that of robbing the mail, upon the highway, by the use of weapons, dangerous to life, every case which can arise is carved, and the act is in perfect harmony with itself. By any other construction, the act is rendered imperfect, unjust and absurd.

The same gentleman has animadverted on the impolicy of punishing with death, a robbery which has not been attended with the death of the party robbed, and he has enlarged on the different effects of the English and French law, in this particular. In the re-

marks which the gentleman made on this subject, he has presented a pleasing proof of his habits, of accurate and extensive investigation. In this case, however it was misplaced; for it is an investigation of a legislative, not of a judicial character; whether the robbery charged in the indictment ought, or ought not in good policy, to be punished with death, is obviously a question for congress, not for this court; for those who make the laws, not for those who expound them.

The same gentleman has commented on the particular facts of this case, in his address to the court. This, also, was out of place. The court have nothing to do with the facts; these belong to the jury; we have not called for the court's opinion on the facts; we have prayed merely for their construction of the law; should they give it, as we have prayed, it will remain for the jury to say, whether the evidence brings the case within that construction. Since, however, the jury had, in effect, been addressed through the court, in relation to the facts, he would barely remark, that, according to the evidence of the driver, the mail stage had been stopped, about midnight, by a fence purposely erected across the high-way, that immediately on its stopping, three men rushed from the fence to the stage, declared themselves high-way robbers, that they were well armed with pistols and dirks, and had come to rob the mail; that the driver gave up the mail, through fear of his life, and that he saw the weapons in the hands of the robbers—this we contend, brings the case within the construction of the act, for which we contend; the identification of the prisoner at the bar, as one of the three robbers, has not been disputed.

The gentleman made another remark to the court, intended, he presumed, to awaken the sympathies of the jury. The gentleman alluded to the peculiar manner in which this prosecution had been carried on, and represented these men as having been pursued *with fire and fury*. The remark had not been deserved by any thing that had appeared in the prosecution since he (Mr. Wirt) had come into it. The prosecution had on the contrary, been conducted with the utmost coolness and moderation: and he was well assured that its previous stages had been marked rather by excessive lenity and indulgence, than by a spirit of persecution.

Mr. Finley.—I am sorry to be obliged to interrupt the learned gentleman, but he has entirely misapprehended the nature and *extent* of my observations. I did *not* make any reflections upon *him*, for the manner in which the prosecution had been conducted. Such reflections would have been unjust and unfounded, as the learned gentleman, only this morning came into the case. I spoke of the *general* character of the prosecution; and of the powerful excitement of public feeling, which threatened to overwhelm, not only the prisoner at the bar, but the counsel who defended him—and which has manifested itself, in a manner so general and so violent, as almost to preclude the possibility of a fair and impartial trial.

Mr. Wirt admitted, that he had mistaken the gentleman. The popular indignation, however, of which the gentleman complained so vehemently, was certainly very natural, and he would add very honourable. It was the indignation of a virtuous people against a most

flagitious and daring offence. He hoped never to see the day, when the recital of such a crime would be heard with composure by the American people. It would be a mournful proof that our moral sensibility was gone. At the same time he should regret, extremely, that the indignation of the jury against the offence, should mingle itself with their examination of the evidence against the person here accused: for it did not by any means follow, that because the offence was enormous, the prisoner at the bar was the person guilty of it. He was to be tried by the judgment, not by the passions of the jury; he was to be tried by the evidence, and not by their feelings, either of indignation or of mercy: for mercy was not as the gentleman had alleged, the prerogative of the jury; mercy towards criminals was the prerogative of the president of the United States; to him under our constitution, and to him alone, belongs the power of reprieve and pardon. The jury had sworn to try the cause according to the evidence: to whatever conclusion, therefore, the evidence conducted them, that conclusion was to be their verdict: they had no alternative—they could make no compromise with their consciences; they had only to discharge, with inflexible firmness, that duty which the laws of their country had confided to them, and when the question of mercy came before the president, there could be no doubt, that he would discharge *his*, with equal fidelity. When that question shall come before him, if ever it shall come, he will remember that mercy, however amiable in itself, degenerates into weakness, and even into guilt, where it is improperly directed. He will remember, that there is a mercy due to society, as well as to individuals, that the proper object of mercy is, either suf-

fering virtue, or penitent guilt; *penitent guilt, which presents a well-founded hope of reformation;* he will remember that a penitentiary is not always a place of repentance, that there have been persons who have been once, twice, thrice and four times sentenced to that species of confinement, to whom it has proved no school of reform, who have applied the hours of their solitude to no other purpose than to sharpen their wits in projecting new schemes of rapine, and who have come forth into society, only the more hardened in guilt, and the better prepared to carry on their depredations on a broader, bolder and more daring scale. There are such men—we do not say that the prisoner is one, but there are men, we all know, so perfectly dead to every touch of virtuous feeling, so obdurate and stubborn in guilt, and so perversely proud of the success of their crimes, as to set at nought, all obligations, human and divine, and to laugh not only at the whip of the law, but even at the thunder of Heaven. What mercy would there be to the virtuous part of society, in letting loose upon them, men (if such monsters can deserve the name of men) of this description? These remarks, he said, were drawn from him against his purpose, by the unexpected course pursued by the gentleman, to whom he was replying. Adverted again to the instruction prayed for; he said the question before the court was simply, one of law; that the counsel for the prosecution than embodied their construction of the act, in the prayer which they had addressed to the court; that they sought only to relieve the jury from the perplexity of a legal enquiry, to which they could not be supposed to be so competent as the court, and that they should be perfectly satisfied with any instruction as to the law,

which the court should think proper to give the jury. The court would observe, that there were three counts in the indictment; the two first of which embraced the construction given to the act, by the counsel for the prosecution; the third count, was founded on that construction, which was advocated on the other side, so as to leave the jury at liberty, under the construction of the court, to find the prisoner guilty under either, or all the counts, or not guilty at all, according to their view of the evidence, and as I do not propose to address them, I will only add, that whatever verdict they can reconcile to their consciences, will be satisfactory to us; content, as we shall be, with having done *our* duty.

After Mr. Wirt had closed his observations, the ccurt charged the jury upon the law, and gave their opinion in support of the prayer submitted to them by Mr. Kell, page 72,—the jury retired to their chamber where they remained near two hours, when they desired some legal advice from the court, for which purpose they returned to their box; they observed that the indictment set forth, that the prisoner had pistols and dirks, and it was not in evidence that he had a dirk. The court stated their opinion to be, that if the party, were armed with pistols and dirks; it was immaterial, whether they were in the hands of the prisoner.

One of the jury then asked Mr. Ludlow, if any threats were used. He answered there were, in case any resistance should be offered.

The jury then without again leaving the box, delivered their verdict GUILTY, *on all the counts in the indictment.*

MONDAY, MAY 11th, 1818.

UNITED STATES,
vs.
JOHN ALEXANDER. } Indictment p. 8.

The same counsel on the part of the prosecution appeared as in the preceding trial.

DAVID HOFFMAN, Esq. EBEN. L. FINLEY, Esq. and CHAS. MITCHELL, Esq. on the part of the prisoner.

The prisoner was placed in the bar, and the clerk proceeded to call the jury.

THOS. W. PEYTON, called—He requested to be excused on account of his having served on the former jury, and because he was much indisposed. The juror was sworn or the *voir dire*, and asked by the court, whether he believed himself to be so much indisposed, that by serving on the jury, it would effect his life. He replied in the negative.

MR. WIRT observed, that as the juror was unwell, he could not have sufficient possession of his mind, accurately to examine the case of the prisoner; and it was within the discretion of the court, to excuse him.

MR. PEYTON was excused.

Each juror called, was asked, whether he had formed and expressed an opinion of the guilt or innocence of the prisoner, and after a number being challenged, the following persons were sworn:

William Maynus,	Samuel Owings,
Nathan Levy,	Ralph Clark,
Wm. H. Allen,	Jos. Kelly,
Thos. Wooden,	Benj. G. Jones,
Jas. P. Preston,	Jno. M. Warfield,
David Williamson, Jr.	George Gardner.

Mr. Glenn, (the district attorney) as in the previous trial, opened the case to the jury, he stated the testimony would in this trial be somewhat different, but if possible, would be stronger to establish the guilt of the prisoner than that in the former trial. He read the section of the act of congress on which the indictment was found, (see page 64) and made a reference to the opinion of the court on the trial of *Hare*. He then gave to the jury, a clear statement of the evidence, he should produce on the occasion. He closed by observing, that the jury, in criminal cases, were the judges of the law, and the evidence; and had a right to acquit the prisoner, if they thought proper to do so, even against the wisdom of the court.

David Boyer, *sworn*—His testimony (see page 65.) In addition to his testimony in the previous trial, he said, that after some time, Mr. Ludlow asked them, if they were not almost done, and complained he was cold, the robbers then put paper over his feet to warm them, that one of them took Mr. Ludlow's watch to ascertain the hour of the night, and observed, it was a handsome gold watch; that Mr. Ludlow replied; it was an old family piece; the robber returned it, saying, I dont want any thing you have got.—I suppose you may have $10,000 with you, but we will not take it; that he did not see

their arms till he got off the waggon; as soon as he descended the waggon, one of the robbers got into it; he was in fear when he descended from the waggon; directly he got off, they clinched him—he then saw the pistols.

Question by Mr. Hoffman—Did you feel any apprehension for your life, till the time, when they were about to tie you to the tail of the waggon?

Boyer—Why I felt alarm from the beginning and all the time they were there; but I felt more seriously *scared* at the time they were about to tie us to the tail of the waggon.

Mr. Hoffman—Did you suppose, that men, who treated you, under the circumstances of the case, so kindly, meant to take your lives?

Witness—Why any one that would turn highway robbers, and undertake to stop the mail and rip it open, right in the face of a man, why they would think no more of taking ones' life, than nothing. He did not hear them threaten to take his life, in case of resistance.

Mr. Wirt—What induced you to give up the mail?

Witness—God bless your soul, sir, how did I know how soon they would have killed us.

Question—Are you easily terrified?

Witness—Answered in the affirmative.

MR. WIRT—From the commencement to the end did you consider your life in danger?

WITNESS—Yes, sir.

Question by MR. MITCHELL—Did you know the pistol was loaded?

WITNESS—I did not, but I considered our lives in danger.

THOS. LUDLOW, ESQ. *sworn—See his testimony in the former trial,* page 66—In addition thereto, he said if he had not seen arms, he would not have been disposed to have given up to them, as he had a pistol. When the robbers first met them, he thought they were in danger, and believes that if resistance had been made, the robbers would have murdered them. The pistol was raised, but he cannot say it was directly pointed at the driver.

In reply to MR. MITCHELL'S question; the witness admitted that if the pistols had been made of wood and gilded over so as to *resemble* real pistols, he should have apprehended the danger to have been equally great. After the witness and the driver had left the waggon, the lamps to the waggon were extinguished; that the personal treatment of the robbers to them, was very good, except their threats in case of resistance, they took out his watch twice to ascertain the hour; *Joseph Thompson Hare* took it out the last time and returned it—he said to the witness, I suppose you may have $10,000 about you, but we will not take a cent from you. They

were quite as civil as highway robbers need be; they manifested a disposition to do him and the driver injury, in case resistance was made.

JOHN HART, *high constable of the city of Philadelphia, sworn*—On Tuesday, the 16th March last, I was called on to aid in catching the mail robbers. Two men were arrested on Monday, who had some of the money; they were committed. One of them was very hardened, the other appeared penitent and said he was innocent. In consequence of the information we obtained, alderman Bartram and myself, laid a plan to take *Alexander*.—There were eleven of us in number. We went to his house, he was not there—six staid in the house, five went in pursuit of him, at the different rendezvous, and at length found him in the night; we took him to a tavern and kept him till morning; we had our reasons for not taking him to jail. In the morning, the mayor committed him for a further hearing. *Mrs. Alexander*, in the meantime was also committed by the alderman, so that she should not give information. Mr. Bailey and I, went to *Alexander's* house to make a search; there we found a quantity of money—we found half of a $100 note, and half of a $50 note in the mantle-piece. I went up stairs, and in the cleet of a trunk, I found a note of $500 of the bank of the United States. *These are the notes*—I marked them. On the 19th of March, all were brought out for examination. Such things were then disclosed, as left no doubt, that *Alexander* was one of the men who robbed the mail. We took him into the alderman's parlour. Mr. Ingersoll, the district attorney, advised him to tell where the rest of the money was. He said he would say nothing until

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he should see his attorney. Mr. Biglow, his lawyer, was called in. Mr. Ingersoll said he could promise the prisoner nothing; that they had proof enough without his confession, but he was desirous to ascertain where the money was. *Mrs. Alexander* then advised *Alexander*, to confess every thing; he then proceeded to make his confession.

Mr. Finley—I object to the witness stating the confession, if it can operate on the case of *Lewis Hare*, who is yet to be tried; he may state so much of a voluntary confession of the prisoner as may effect himself, but he cannot be permitted to state any thing which may effect *Lewis Hare*, who is yet to be tried.

The Court—The witness must state the whole confession of the prisoner.

Witness—The prisoner said, that on Sunday morning, he went with the three *Hare's*, on the road towards Baltimore, to rob the mail. That *Thomas Hare*, being unwell, was left on the road; he was advised to go back as they were sufficient to do the business—they were to have taken the mail between Elkton and Havre-de-Grace, but when there, they concluded on crossing the Susquehanna; that after night, they built a fence across the road to stop the mail; that they found in the waggon two men, whom they tied; that they robbed the mail and then rode off towards Baltimore, that they staid in the woods all the next day and night, and in the morning went into Baltimore, having divided the money; that *Alexander's* part amounted to $4,000, and the other two to near $4,000 each of paper negotiable; while in the

woods, one of the *Hare's* sewed a note of $1,000 in the button of his pantaloons, and a draft on Boston for $600, in the collar of his coat. Hearing that *Joseph and Lewis Hare* were arrested, the prisoner said, he took the Steam Boat for Philadelphia; he then told us where the money was in the chimney-piece, we had got it; he then told us, where the money was in the chest, we had got it; he then told us where some money was in the stairs, this had been taken away by *Thomas Hare;* he acknowledged putting $650, behind the looking glass, which were the proceeds of money he had exchanged, also a $500 note, under the handle of an old chest in the garret, $150 behind the mantle-piece; and $2,300 under a step of the stairs, and this last sum had been taken from that place by *Thomas Hare.* $1,400 of the last sum, were recovered from *Thomas Hare,* and the whole of the other sums were found in the places where *Alexander* stated he had put them.

CHESTER BAILEY, *sworn*—What I have to say, is much of a repetition of *Mr. Hart's* testimony—as soon as I heard at Philadelphia, of the robbery of the mail, I started towards Baltimore, and met the driver at Havre-de-grace. I there learnt, that two of the men were arrested at Baltimore, and one had escaped. I thought, that this man might get north before me—I therefore, turned round and rode all night, back to Philadelphia—I had, previously, sent to all the brokers to stop suspected money—the day following, a broker informed me, that two persons, had offered him a post note, which I ascertained, was one in the mail, that had been robbed; I sent out a description of the

persons—they were arrested—we took them to a tavern—gave them drink—we asked them, if they had not heard the mail had been robbed—they said they had. In consequence of what one of them said, we found out *Alexander's* house, and had him arrested. I was not present at his confession, but he has since told me, that he was one of the party that took the mail—I was at his house, when all this money was found, as related by *Mr. Hart.* The witness corroborated the testimony of the preceding witness.

RICHARD BACHE, Esq. *Post-Master of the city of Philadelphia, sworn.*—In consequence of information I received from one of the persons engaged in passing some money that had been robbed from the mail, means were immediately taken to apprehend *John Alexander.* He was taken on the evening that this information was received, and was committed to prison for a further hearing until two days after. When he was brought before the magistrate, every person who had a knowledge of the robbery, or was concerned in it, (as accessaries before and after the fact) were present, *Alexander* was called upon by the magistrate, to step forward, he denied having any knowlege of the robbery, or any participation in it. The pistol that had been found on the ground, where the mail was robbed, had been sent to me, and was in the office, also the fellow to it, which had been found on one of the men in Philadelphia, who had been previously committed under a suspicion of his being concerned in the robbery. I presented one of them to *Alexander*, and asked him whether he had seen it before, he said no; I then showed him the one found at Havre-de-Grace, which was loaded to the muzzle.

and asked him whether he knew any thing about that? He turned pale, and appeared much alarmed; after a few minutes, he requested permission to retire into the adjoining room with Mr. Ingersoll, the district attorney. During the time they had retired, I was conversing with one of the accomplices in the magistrate's office. I then went into the adjoining room, when the counsel of *Alexander* told me, that *Alexander* had made a voluntary confession of all the facts. Previous to this time, we had found in *Alexander's* house, $650, between the glass and board casing of a mirror, that hung in his parlour, a $500 note, nailed under the handle of an old trunk in his garret, and a $50 note behind the mantle-piece. I went to the prison the ensuing day, to ascertain from *Alexander*, whether there was any more money, not yet found. I made no promises of pardon to him, nor did he solicit me to intercede for a pardon for him. He voluntarily gave me the history of the whole robbery and plan. He said that *Joseph Hare*, *Lewis Hare*, *Thomas Hare* and himself had agreed to rob the mail, that *Thomas* was unwell, and did not proceed but a short distance with them, when at their persuasion, he turned back; that they intended robbing the mail on the side of the Susquehanna, nearest Philadelphia, but when they arrived at the spot, they concluded that it would be best for them to cross the river, as they could more easily escape to Baltimore, without detection, than to Philadelphia. That they prepared the pistols in Philadelphia; and the gunpowder which they dissolved in gin, and with which they blacked their faces. They had previously arranged they should build the fence across the road to stop the mail, and they were to remain behind the fence until the

driver got out of the carriage, when they were to jump from behind the fence and seize him. That when the mail came up, they immediately jumped over the fence and seized the driver before he got from his seat—they secured him and Mr. Ludlow, by tying them to the trees in the woods, then took down the fence from across the road and led the stage into the woods, where they rifled the mail. That they rode off on the horses, and when they arrived within about ten miles of Baltimore, they tied the horses in the woods, and remained in the woods all the next day, where they counted their money and divided it. That his portion was $4,000 in notes, (principally post-notes.) and he gave up to the two *Hare's* all the checks, drafts and lottery tickets. That whilst in the woods, *Joseph Hare* sewed a $1,000 note in the button of his pantaloons, and *Lewis Hare*, a note of $600 in the cape of his coat. That they walked into Baltimore the next night, and separated at the edge of the city, to meet at a particular spot in Baltimore that afternoon, to come to Philadelphia by the Steam Boat. That he heard of the *Hare's* being arrested in the morning, and came off to Philadelphia in the afternoon by the Steam Boat. I asked him whether they would have killed the driver, if he had made any resistance, he answered that they would, for it was their determination to have the mail.

JOSEPH B. PAINE, Esq. *of Charleston, (S. C.) sworn*—I put this note of $500 *(already proved to have been found in the house of the prisoner)* with five others, in the post office in Charleston, to be forwarded by the mail on the fourth of last March.

THOMAS KELL, Esq.

Here addressed the court, by observing, that the court and jury, had now heard, all the testimony in the case; that on the part of the prosecution, the same course would be taken, as had been before adopted in the other case.

It is, that the court is prayed to direct the jury in the matter of law, agreeably to the prayer heretofore submitted to them, in the case of *Joseph Thompson Hare*. Mr. Kell, then read the direction prayed of the court; and proceeded by observing, that he knew not whether on the part of the prisoner, there would be any objection made to the direction asked of the court; and therefore he should say nothing on the subject, unless such objection was made.

Mr. Finley, one of the counsel for the prisoner, remarked, that it was intended on their part to place the law and facts before the jury.

Mr. Kell, then addressing the jury, observed, that by declining to submit any remarks, to the jury, in this stage of the trial, the right of replying on the part of the prosecution, to such a view of the case as the prisoners counsel should present, might be waved or lost; to preserve that right, and as he now understood, that the law upon the subject, was to be disputed before them; he would detain them by taking only a general view of the law and facts, of which it was admitted, that they might judge, upon the matter of the law; the court would however, assist the jury by giving their opinion upon the construction of the act of congress—(Here Mr. Kell

read the section of the act relating to the offence, read on the former trial) and then proceeded. The jury will see in the testimony, a deliberate purpose formed in Philadelphia of robbing the mail; they will find that purpose prosecuted throughout to its end; and that it was to have been effected by taking the life of the driver, if it should have been necessary to have done so. Can it be believed, that after the direful extent of crime, determined on, it would have been attempted with empty pistols; can any one doubt, but that the pistols presented, were charged; the party also held a dirk or dirks; the driver was led from the carriage by one of the party, holding him by the breast with one hand, having in the other a pistol sufficiently raised to be used.

The offence in the act of congress, is first, robbing the mail without describing any manner of doing it; but it is afterwards declared, that if such robbery be attended with either of the two other circumstances mentioned in the act, then the offence is punishable with death. In the first case, the offence is a robbery, and the punishment, imprisonment. But if it be effected, by wounding the carrier, or person intrusted with the mail, or by putting his life in jeopardy, by the use of dangerous weapons; in either of these cases, the punishment is death.

It is worthy the attention of the jury, that no degree of danger is defined in the act, nor is the manner or kind of a use (of weapons) described. The jury must therefore judge of, and determine upon both; and say whether the life of the carrier was not put in jeopardy. They will first ascertain that the mail has been robbed, then that the prisoner was one of the party who committed this crime; these facts are fully and undeniably established, which leaves the jury only to enquire whe-

ther the act was accompanied by the other circumstance of putting the life of the carrier in jeopardy by the use of dangerous weapons.

The weapons certainly were dangerous ones; they were used in the manner you have heard from the witnesses; no man of common sense, deliberately judging, can well doubt but that the life of the carrier and of Mr. Ludlow also, were in danger. The carrier was stopped on the highway in the night, by three men with pistols in their hands, and to produce intimidation, to induce them to leave the carriage, they declared, "we are highway robbers, we are well armed, we have double barrelled pistols and a dirk.

The pistols are raised towards the carrier and Mr. Ludlow, and they are told to get out of the carriage— In alarm and fear they do so; they are then led into the woods, by the persons holding arms, ready to destroy them if necessary to their purpose, and which the prisoner declared, they certainly should have done, if resistance had been made. Mr. K. here asked the jury, if they were inquiring into the degree of danger, if they would not decide, that here was a great degree of it indeed. There is the threat, the means of carrying it into effect, and the avowed purpose of "blowing out the brains of the carrier and passenger, if they resisted;" they saw their lives were in danger, they knew it, they felt it. The driver it is true, was more alarmed when one of the robbers asked, "what shall we do with these men, and another replied, I have a way to fix them." Did not these acts which produced the alarm and fear, also produce danger to life. When we consider the ability, with which they had provided themselves, it cannot be doubted, they intended to take the life of the

carrier, if it had been necessary to effect their purpose. Mr. K. asked the jury, if he was to take a loaded pistol, cocked, and present it at one of them, and declare if he did not leave the jury box, he would shoot him, intending to carry such threat into execution; if they would not think, and feel there was danger and jeopardy of life; or with a dagger, he was to declare to the gentleman before him, that he would stab him, if he did not leave his chair, intending to execute the threat, would there be no danger, peril, or jeopardy of life in this.

The danger or jeopardy of life, occurred with and accompanies the act, it is true, the danger might be in either case avoided, and it was avoided by giving up the mail. But did it not exist. The performance of the condition of safety, might indeed remove the danger. This is, not like the common case put in the law books, of a person drawing a sword, and declaring if it was not in court, he would kill you—there all idea of danger is negatived, no intention of mischief exists. It is not necessary, that the pistols should be snapped, or fired, the presenting them with intent to shoot, if resistance was offered, brings the case within the penal part of the act of congress.

This wide extent of plunder, to be effected with the murder of the mail carrier, if necessary, presents a hell born scheme of mischief—in which these deluded men supposed they were to incur imprisonment only—yet they had resolved to effect their purpose at the expense of the life of the unprotected, unarmed driver, if necessary to destroy it—If it be urged that the arms were used only to intimidate, that use produced danger of life, and they were used to the extent, necessary to accomplish the crime—with such intent and view, they pro-

ceeded—but fatal was their mistake—their eyes are now open, they now know their danger, and calamitous is their situation.

DAVID HOFFMAN, Esq.

Addressed the court to the following effect:

I have no doubt, gentlemen of the jury, after the speedy and *informal* disposition of the case of *Joseph Thompson Hare*, you will be not a little surprised to hear me say, with the deepest sincerity, that the case of the prisoner at the bar, is embraced, neither by the *spirit*, nor *letter* of the law, on which he stands indicted, so as to subject his *life* to forfeiture. The declaration which I now make, is the honest result of my mature judgment, unaffected by that insensible bias, which the mind often receives from the relation of prisoner and counsel. The interest I feel for this unhappy man, is necessarily of very recent origin, as I never before this day saw him, and am a volunteer in his cause, actuated by no other fee or reward, than that which every feeling heart would foster—a hope of rescuing a fellow being, from an unmerited and untimely end.

That the prisoner has been guilty of robbing the mail, is altogether undeniable; but that this crime has been attended by those circumstances, which a *wholesome* and *sound construction* of the law demand as essential to the forfeiture of life, is what I wholly and conscientiously deny. So deeply impressed am I with this opinion, after minute attention to the testimony in the cause, that

were I now in the responsible situation of a juror, I could *never* be argued into the belief, that the man's crime merits so *heavy a penalty:* I therefore flatter myself, if you will accord me your patient attention for a short time, I shall impart a portion of this conviction to your minds. Your individual attention, gentlemen of the jury, will be necessary; and in a case of so much moment as the present, where the *life* of a fellow being rests on your decision, I am sure you will grant it. *Life*, did I say, would to God, that his *life only*, were now at stake; remember gentlemen, that there is an interminable existence *beyond the grave*; that the extinction of animal life, is but the dawning of the soul; 'tis but the inception of a career eternal; and which may be inconceivably wretched.

The zeal which I feel on this occasion, is derived from three sources.

1st. Because I verily believe that the incipient stages of this cause, have been attended by circumstances of peculiar hardship, and I would further say, of palpable non-conformity, with what, I conceive wholesome, and prescribed *forms* of law.

Here Mr. Hoffman was interrupted by the court.

Mr. H. repeated, that he conceived there had been a manifest departure from wholesome forms of law; and was again interrupted by the court. Mr. H. then stated, that he had too much respect for the dignity of courts of justice, to say ought, that would wound the feelings, sully the dignity, or tarnish the reputation of a court. That nothing was more foreign to his intention, than to impute unworthy motives to this tribunal; but he con-

ceived the *preliminary forms* of this prosecution were defective.

And here gentlemen of the jury, (continued Mr. H.) I would remark, that however gross the defects or errours in criminal presecutions may be, there is no correction, no remedy. The supreme court of the United States, has no appellate jurisdiction in *criminal* cases. There is no Writ of Errour, or Bill of Exception, as in *civil* cases; if this court be unanimous in an opinion, *that* opinion is *final;* the *death warrant,* then gentlemen of the jury, of this man, is signed by your verdict: no hand can save him but your's. But the learned attorney general, informs us, that mercy is no province of a jury, but a *jewel* of the crown, a *prerogative* of the executive; most true, if by mercy we mean a power of mitigation, or pardoning of punishment; but widely the reverse, if we understand by this mercy, the power of a jury, in the case of doubtful interpretation, to adopt a construction the most favourable for the prisoner; this, the jury are not only warranted in doing, but it is their duty. But we are told that *penal* statutes are sometimes *liberally* construed; this is likewise true, if properly understood. But it will be uniformly found, that this *liberal* construction is in favour of the *prisoner,* not of the *state.* The general rule is, that penal statutes are to be *strictly* construed in favour of the accused. Consentaneous to this principle, is it that penal statutes are sometimes said to be *liberally* construed; but this arises from the different phraseology of laws, and in *both* cases, whether the *strict* or *liberal* construction be adopted, it is uniformly in favour of the *accused.*

But the learned attorney general is not satisfied with denying the jury this bright and invaluable attribute, mercy, but would likewise take from you, the power of deciding on the law. He says juries, are composed of merchants and farmers, and not *lawyers*. Gentlemen of the jury, if you be authorised *in this case to judge any thing*, your power extends as well to the *law* as the *facts*. I acknowledge I am somewhat at a loss to know how to address you, or to recognize you as a *jury*. I know not what you are to *try*; for there is, in this case, no *plea*, and consequently no *issue*; but I presumse I must address you as twelve honest and intelligent men, who are willing to say, under the sanction of an oath, whether in your opinion, the prisoner is guilty or not of the crimes of which he is *acoused*; I will not say arraigned.

2d. Another cause, which should challange the feelings and interest of every reflecting mind, is the very indecorous manner in which publick opinion has been indicated. We desire, and have a *moral* and *legal* claim to a dispassionate trial, by an unprejudiced jury; but such has been the torrent of publick indignation, that we can scarce hope for that coolness of reflection, which minutely distinguishes between *rumour* and *fact*; between opinions previously formed, and those which are the result of the evidence in the cause.

3dly. I feel additionally interested for the fate of the prisoner, because his case is, in my opinion, manifestly out of the letter and spirit of that clause of the law, which implicates life. But a jury has already pronounced the destiny of *Joseph Thompson Hare*. None of you, gentlemen, were on that jury; I therefore, strongly hope, that the former case will be placed by you entirely

out of view, and that you will consider the question, as to *jeopardy of life*, as one of great interest, yet to be investigated.

We will now proceed to inquire into the true and legitimate construction of the second clause of the 19th section of the act of congress, which speaks of "putting "life in jeopardy by the use of dangerous weapons."— To this question, I shall principally restrict myself.—

It will be readily conceded, that this act of congress, is greatly defective in that clearness and precision of phraseology and style, which should characterize penal statutes. But without commenting on these blemishes, let us enquire what it is *"to put life in jeopardy by the use of dangerous weapons."*

If the origin and policy of this clause of the law be such as I have been informed, it is decisive that congress never meant to inflict death, for robbery of the mail, through the instrumentality of fear, excited by the harmless use, or the possession of dangerous weapons. This clause, as I have heard, originated in a desire of protecting the life of the mail carrier, by holding out to the robber a stronger inducement to spare the carriers life; than existed under the *prior* law; congress therefore, must have intended that death should be consequent on some *decided act on the life* of the driver or mail carrier, and not on the simple robbery of the mail through agency of fear, occasioned by the possession of dangerous weapons. The positions, to which I desire particularty to call your attention, are

1st. That the life put in jeopardy must be *his* to whom the mail of the United States was entrusted: for if the lives of those who accompany the carrier be put in jeopardy, or even if taken, it would not affect this

case; because had Mr. Ludlow been murdered, and the driver kindly treated, the case would not be embraced either by the *letter* or *spirit* of the law. Nay further, if the driver's life be not in jeopardy by the use of dangerous weapons, and he should actually expire on the spot, from the terrour excited by the treatment which another may have received, the offender would not be amenable under either of the first counts. You are, therefore, gentlemen of the jury, to confine your inquiry exclusively to the use which has been made of the dangerous weapons, as applied to the carrier, without any regard whatever, to the evidence as applied to Mr. Ludlow.

2dly. We desire not to fortify our cause, or to derive any argument from extreme cases; we wish to look to the common sense of this clause of the act of congress. Now, the words are, "if the *offender* shall put life in jeopardy by the use of dangerous weapons, &c." this no doubt would cover the use of *a* dangerous weapon, because manifestly included by the *spirit* of the law; but as we shall endeavour presently to show, the doctrine which has been advanced by the honourable attorney general, is as much out of the *spirit*, as it is foreign to the *letter* of this law.

3dly. We contend that there must not only be *some* use, but a *dangerous* use of dangerous weapons, to gratify the intention of this law; for surely no one ought to to advance such positions as these:

1st. That the possession of dangerous weapons at the time of effecting the robbery is *perse*, a *use* of them, or putting life in jeopardy. 2d. Or that the firing of a pistol in the air with a view of intimidation, is such a use as the law contemplated. 3d. Or that the brandish-

ing of swords or daggers, or charging pistols in the presence of the carrier; is such a use of dangerous weapons as puts life in jeopardy.

All these are, without doubt, circumstances which in this country, as well as England, constitute *robbery*, by putting in fear; but this as we apprehend is widely different from putting life in jeopardy by the use of dangerous weapons, since the jeopardy of life is an addition to, and aggravation of the robbery.

4th. But we are exultingly asked, if the uses, we have just mentioned, be not a putting life in jeopardy, what is? And the learned attorney general has said, that it is not in the power of any man, when he seriously reflects on it, to arrive at any other conclusion, or to give any other solution—that any other construction involves us in difficulties and absurdities without end, and casts a cloud around the mind wholly impenetrable.

The gentleman will pardon me, if I differ with him in opinion. I feel unwilling to believe that he can find no other solution. We have had, on various occasions, too many proofs of the great penetration of that gentleman's mind, for a moment to question his power of dissolving this *dark cloud;* we conceive that this imaginary difficulty is at once removed by attending to the distinction between such a use of dangerous weapons as excites *fear*, and that which places life in *actual* and *imminent* hazard. The answer then is manifest—If a thrust be made with a *sword* or *dagger*, which misses, or a pistol be *snapped* or *fired* with no effect, this is the *dangerous use* contemplated by the law; for this would be the use of dangerous weapons, so as to place life in jeopardy. Hence we see, that it is exceedingly easy to conceive how these dangerous weapons can be

variously *used,* and so used as to effect the robbery without putting life in jeopardy.

5th. I have mentioned that there must be, in point of fact, a *dangerous use* of dangerous weapons in order to gratify the meaning of the law; and have shown that this is not attended with difficulties or absurdities. If a pistol be not cocked, it is as harmless and ineffectual as a pop-gun; so if cocked, it may still be harmless as to life, as it may be presented to the feet, or may have been charged with powder only. I mention these apparently extreme cases for no other purpose than to expose the sophistry of confounding *jeopardy* of life with *fear*, and strongly to illustrate the position I have taken, that it is not every use of dangerous weapons that can place life in jeopardy. We therefore arrive at this sensible conclusion, that dangerous weapons must be dangerously used, so as *decidedly* to show a *malus animus.* The *quo animo* must be evinced by an act of unequivocal intention to *take life,* otherwise it will be mere *robbery,* or taking goods by *fear,* and not jeopardy of life.

6th. Again, it is absurd to imagine, that any one will attempt to rob the mail, without the possession of dangerous weapons, and such a use of them as may excite fear. I can therefore scarce conceive it possible, if the prisoner's case amounts to jeopardy of life, how any one can be found guilty, under the first clause of this act, which subjects the offender to ten years imprisonment.

Examine for a moment the grammatical or etymological signification of this word *jeopardy.*

I am perfectly aware that etymology is often a very frail and fallible guide to the true meaning of words, since language is variable, and the radical significations

of words change. But there are some words which uniformly retain their primitive meaning; such I conceive to be the fact, with respect to the word *jeopardy*.

The assertion, perhaps would not be rash, that in all languages into which it has been translated, it will be invariably found to signify a *real, imminent* danger, an *actual, substantial*, hazard or peril.

The verb to *jeopard*, is derived from the French *j'ai perdu—I have lost all.*

The substantive, jeopardy, is said to come from *jeu perdu—A lost game;* in both cases importing much more than apprehension or great fear of danger.

In the Spanish language *arriesgar* signifies jeopardy, or *real peril;* for *poner en peligro* or *poner en riesgo*, are by no means as strong expressions as *poner en arriesga;* the latter meaning, exposure to extreme danger.

If we refer to the latin, we shall find that *in discrimen adducere*, or to bring into jeopardy, is a very forcible expression, importing much more than *in terrorem adducere;* or to bring into fear.

Chaucer, is, I believe, the only eminent poet who uses the verb *to jeopardize*, in lieu of the real verb to jeopard, and likewise the adverb *jeopardously*. He uses these words to signify great and impending danger.

In the scriptures, likewise we find the word jeopardy twice used; and both times importing *present, actual* and *positive* danger.—Luke, chap. VIII, v. 23.—Jud. chap. XV, v. 18.

From this short examination we may infer, that this word has at all times retained its *radical* meaning, and that it invariably imports an actual state of danger or peril.

We will now leave this philological discussion and proceed with more gravity, to examine the doctrine advanced the other day, by the learned *attorney general*, and which is, indeed, the main pillar or *fulcrum* on which his argument, as respects the prisoners life, rests.

The doctrine contended for is, that congress in the the act of 1810, has made no alteration whatever in the common law doctrine of robbery, which may be by simple *violence*, by *threats*, or by fear, by the use of weapons, and that "putting life in jeopardy by the use of dangerous weapons," and robbery by "putting in fear," are identical, or strictly synonymous. This doctrine was advanced with all that plausibility, which example, method, and classification could give it; but when examined, will, I think, be found totally destitute of foundation.

1. There can be no doubt but that the word *robbery*, used in the act of congress, has precisely the same signification that it has at common law; and that what constitutes robbery in England, is equally robbery in this court. But it is ever to be borne in mind, that this man is not simply indicted for robbery, but for a robbery effected by the use of dangerous weapons, so as to put life in jeopardy. It will not, therefore, be sufficient to resort to the common law for decisions as to what constitutes robbery—for these are all admitted; but the putting life in jeopardy by the use of dangerous weapons, is an *addition*, expressly prescribed by the act of congress. The *fallacy* of the learned gentleman's argument consists in this—in his total disregard of the *means* by which this robbery is, according to the act of congress, to be effected. If robbery *by putting in fear* with deadly weapons and robbery by the *use* of

dangerous weapons, *so as to put life in jeopardy*, signify the same thing, it results as a corollary from the gentleman's position, that simply putting in fear, is putting life in jeopardy, whereas it is manifest, that if life were in jeopardy, though there were *no* fear, the law would reach it; but if there be the most overpowering fear *without jeopardy*, it is as I conceive simple robbery, and, as such, punishable with imprisonment.

2. The gentleman's doctrine, if I understand it, is, that any getting of the United States mail through the instrumentality of dangerous weapons, if accompanied by that fear, which in England would constitute robbery, will, under this act of congress, constitute the *jeopardy of life* contemplated by the law; or in other words, that *fear*, occasioned by dangerous weapons, and *jeopardy of life* are the same. Now if *fear* means *jeopardy*, and jeopardy fear, then as robbery in England may sometimes be effected without fear; then, to carry on the gentleman's argument, though there is no *fear* or jeopardy, the prisoner is found guilty of death, maugre, the express words of the act of congress.

3. That the act of congress meant to distinguish between simple robbery of the mail, and robbery accompanied by jeopardy of life, is manifest.

And although the act of congress introduces, we might concede, no new species of *robbery*, yet it has expressly enacted that robbery attended by the use of dangerous weapons, putting life in actual danger, shall be punished by death; the *fear* attending the taking occasioned by dangerous weapons, which both in England and this country, would constitute *robbery*, is not sufficient to constitute the crime laid in the first count; for, that there has been a robbery, and considerable fear

in this case has at once been allowed: but it never can be admitted that such a possession, or use of dangerous weapons as would be sufficient to excite fear, and consequently robbery, can be the same thing as putting life in jeopardy, by the use of dangerous weapons; and this is precisely the argument on which this prosecution, or rather, that of *Hare*, has been supported.

4. Robbery, in England, is rather explained, than defined; and signifies, no doubt, the same here as it does there; but the act of congress, in this second clause, has added the jeopardy of life by the use of dangerous weapons. Now this, surely must be supposed to mean something more than simply putting the mail carrier in *terror* by *threats*, *positions* and *attitudes*, with dangerous weapons. *If dangerous weapons* should be so used, in effecting the robbery, as *not* to put life in jeopardy, it would be nothing more than robbery at common law, or under the first clause of the 19th section of our law, and as such, punishable with ten years imprisonment; on the whole, therefore, the conclusion to me appears irresistible, that in order to condemn this man to death, he must have *so* used a dangerous weapon on the *person of the driver*, as to place his *life* in *imminent peril*. The *fears* of the carrier are to be disregarded, but their *cause* strictly inquired into; which must be nothing less than the *actual use of the instrument, so as to clearly indicate a deadly purpose, and place his life in real danger*.

We will now briefly examine another objection started by the learned attorney general on the first trial. In reply to Mr. Winder, he urged, that if life had been *actually taken*, we should *now* be contending that life was not put in *jeopardy;* so that the argument of the

prisoner's counsel, as he conceived, would stand thus —If dangerous weapons be so used as *not* to produce death, there is no jeopardy of life. If so used as to produce death, there would be no *jeopardy*, but death.

The reply to this is fourfold.

1. We have never for a moment contended, that the dangerous use of weapons would not place life in jeopardy—so that this is manifestly a gratuitous position of the learned gentleman. Our argument is, that life is not put in jeopardy by *every* use of dangerous weapons. But the argument of Mr. Winder leads to no such absurd conclusion, as the gentleman would desire to involve him in, nor could we have found any occasion to adopt so far fetched an argument; for

2. If the carrier had been *killed* there would surely have been a *punctum temporis,* or a point of time in which there would have been actual jeopardy; viz. the interval between the presentation of the weapon, and the mortal wound. That there would have been in the case of *death* sufficient jeopardy to satisfy the act, even on the first count, is too manifest to justify the supposition, that we should have adopted such untenable grounds. That this, therefore, would have been, our argument appears to me, neither a *legal* nor a *logical sequitur.*

3. Again. It would have been altogether nugatory in us, to adopt such an argument, since it would have been wholly immaterial, whether there were jeopardy or not; because the prisoner's life would have been forfited on two grounds; first, for the *murder,* and secondly, on the ground of *wounding;* for the act of congress also inflicts *death* for *wounding* the carrier.

4. The last reply evincive of the sophistry of such an argument, and of consequence, that we could never have used it, is, that if putting in *fear* by dangerous weapons, and putting *life in jeopardy* be identical; then, on the gentleman's own principles, *death* by a wound *would* be putting life in jeopardy: because, if a robber should knock a man down, and simultaneously deprive him of *sensation*, and his *money*, this would be putting in fear, according to the authorities, and would be robbery, though *physically* speaking, there might have been no actual fear. Hawk. Pleas Crown, chap. 45, sec. 6.

On every ground, therefore, this argument would not have been used by us.

In the present case however, there has been no killing nor wounding, nor, as we conceive, any such use of dangerous weapons as can, on fair and reasonable construction, amount to jeopardy of life. The weapons, if used at all, were only so used as to excite fear. It is a clear *robbery*, but not *jeopardy of life*.

I have promised, gentlemen of the jury, to confine myself to the point of jeopardy; and it was not my intention to have made any application of the testimony to the observations which I have in this hasty and desultory manner, thrown out. I must, however, beg your indulgence for a moment longer, and take a rapid survey of the proof in the case.

The mail of the United States is suddenly arrested, by an erection across the road. As this was at once, known to be a recent and artificial impediment, alarm was no doubt, instantly excited. Three men appear, who proclaim themselves highway robbers. Boyer, the carrier, expressly says he did *not* hear the robbers say they would blow their brains out; and if he had, it

would have been as I have contended, wholly immaterial, as respects jeopardy of life.—They calmly examine the carrier and Mr. Ludlow, in order to take their arms from them, no doubt to protect *their own lives*, and to prevent a contest. Each robber had a dangerous weapon, but there is no evidence as to the particular manner in which they were exhibited *towards the carrier*. Boyer and Mr. Ludlow are carried into the woods. Their *first* apprehensions, consequent on the very fact of their arrest, had now subsided. A variety of circumstances take place, evincive of the intention of the robbers not to injure the persons of either. One of the robbers takes Mr. Ludlow's watch to ascertain the hour, and returns it, saying that "he neither wanted his watch, nor his money;" the robber who does this act, is censured by his companions, for going so near to Mr. Ludlow with *a light*, lest his face might be seen; conclusive evidence, I think, to Mr. Ludlow, as well as to the carrier, that their lives were in no danger; for had *death* been intended, Mr. Ludlow's seeing the robber's face, would have been of very little consequence.

We also find, that when Boyer complains that his feet are cold, the robbers cover them with papers; this tenderness surely was sufficient to dispel every apprehension, had any existed. Boyer expressly says, that he considered his life in danger *all the time;* but this is manifestly the fear of a timid man. He likewise says, he saw no arms till he descended from the carriage, and the robbers were *in possession of the mail*. He states further, that he does not know that the *prisoner* had arms, he saw but one pistol, and did not hear them threaten *his* life. He additionally states,

that they at once informed him, that "it is not *you* we want, but the *mail*," and Mr. Ludlow states, that no more violence was at any time used, than was necessary to obtain the mail. Boyer allows, that his principal fears, were, when they came to untie him, and carry him from the tree, to which he was then fastened to the mail waggon; and further, he unequivocally admits that he is *very easily terrified*. Now, from the whole of this testimony, can any thing be more obvious, than that the mail was *at once* abandoned; that the fear excited, was incident to the very nature of the case; and not at all owing to any jeopardy of life. This appears to me, to be precisely the testimony, which I should expect to be given on the last count, and should justly subject the prisoner to ten years confinement.

But, gentlemen of the jury, where do you find that jeopardy of life, which is necesary to a capital conviction? At what stage of this transaction? At the commencement, it was evidently, overwhelming fear, incident to the nature of the situation they were in—that is, the mere circumstance of being stopped by robbers.—These fears however, are almost instantly dissipated; and subsequently revived, but for a moment, when they hear the robbers ask each other "what they should do with the men;" to which one replied, "he had a *way* for them;" this *way*, gentlemen, was soon ascertained to be nothing more than to tie them to the mail waggon!

Here gentlemen, let me pause. This case, to say the least of it, is one of *great doubt*. For myself, I seriously declare, I *cannot* see any evidence of jeopardy of life. I am not one of those who have been hackneyed in criminal defences; what I have now declared, should therefore, be regarded by you, as the honest

judgment of my mind and heart. I have never before allowed myself to be engaged in a *capital* case, and it shall certainly be the *last*. In a case of doubt *you* are this man's only hope, his only refuge. Remember, gentlemen, I entreat you to remember, if you pass the Rubicon, if the *Ita jacta est* should be proclaimed by you, the death warrant of this man, is forever sealed. On your verdict, hangs the *eternal* destiny of that man. Could your decision consign him to the *grave*, it were perhaps, fortunate for him: but there is a life beyond the grave, which knows no bounds. Happy is the man, who is prepared to meet it, but wretched, beyond conception, is *his* fate, who dies not in CHRIST JESUS.

EBENEZER L. FINLEY, Esq.

THEN ADDRESSED THE COURT.

I also must be permitted to disclaim, as has been done by my friend who has preceded me in the argument, the influence of any *pecuniary* motives, in undertaking the defence of the prisoner at the bar. Much as our motives have been misrepresented, they are conscientious—not mercenary: I have received no compensation. I expect none. Neither am I influenced by any peculiar sympathy for the prisoner. He is a stranger to me: one whom I never saw before three days ago, when he requested my professional aid. But having been selected by him, as his counsel, and believing conscientiously, that he is not *legally* guilty, to the extent contended for, by the counsel for the United States, I

feel myself constrained to prosecute his defence, from a sense of duty, and a regard for the integrity and purity of our laws, which I conceive would be compromitted, by the construction contended for. When I make this declaration, I hope that the jury will listen, with that degree of attention, which the importance of the case requires: and which is justly due to counsel, honestly contending for a legal construction, which they conscientiously believe to be correct, and upon the establishment of which the *life* of a fellow-creature depends. It is not for the *complete acquittal* of the prisoner, that I now contend. This is not the point to which my exertions are directed. I do not attempt to deny, that he has been guilty of a robbery of the mail, within the *first* clause of the 19th section of the act of 1810. Such a denial, were I disposed to make it, would be precluded by the evidence in the case, and the prisoners *own confessions*, which establish the point, beyond all controversy. But I *do* contend, that his offence does *not* come within the operation of the *second* clause of the section, which would subject him to death: and that the construction insisted upon by the counsel for the prosecution, which would bring it, within that clause, is rigorous and incorrect. I wish not to arrest the arm of justice! but simply that justice be tempered by *mercy*. I wish not to save this man, from that imprisonment, which is the just consequence of his crime!—I ask—I contend in his behalf, *only* for *life!*—That the thread of his existence, be not prematurely cut off:—That nature be not *anticipated* in her course, and this man be sent "unanointed and unanealed" into the presence of his Almighty Judge, to answer for the sins and omissions of his past life:—but that the short span of his exis-

tence be protracted for a while, to enable him to prepare for that *eternity*, from which the best of us, recoil with dread: and to endeavour by the sincere contrition and repentance of his future life, to propitiate the anger of his justly offended Creator. Can these demands be deemed unreasonable? Will not the ends of justice, *viz.* the reformation, as well as the punishment of the criminal—be effectually promoted, by the *imprisonment* of this man? Is his offence so heinous? Is his *death* so absolutely necessary, that *policy* and *humanity* must be *outraged* in effecting it? Is the construction of the law, contended for by the United States so clear and self-evident, as to leave *no doubt* on your minds? I shall endeavonr to convince you to the contrary. Though I laboured unsuccessfully in my argument on Saturday, to satisfy the minds of the court, on these points, I hope, that with *you*, I shall be more successful. To you, I appeal then (*notwithstanding* the *opinion* of the *court*) as the constitutional judges of both *law* and *fact*. Though you are not lawyers, you are fully competent to determine on the question of construction. You are *not* bound, by the *opinion* of the court. You are the *ultimate* judges. To *you* I appeal: for however in *ordinary* cases, I might be deterred from considerations of *delicacy*, from arguing to the jury, on a point of law after an express decision by the court against me: yet in a case of life and death, motives of delicacy must be disregarded.

I must claim your most patient indulgence, gentlemen, as I shall necessarily be obliged to recapitulate many of the points, I insisted upon, before the court on Saturday. If in this recapitulation I should succeed in satisfying your minds of the correctness of my views

of the case, I shall experience the most gratifying consciousness, which can be imparted to the mind—that of having partially contributed, by at least *zealous* exertions, to save the life of a fellow-creature.

Whatever construction you may think proper to give to the act of congress, under which the prisoner stands indicted; whether such construction be in favour of the prisoner, or of the prosecution, there are some preliminary distinctions essentially necessary to be kept in view, in your examination of this case. The first distinction I would call your attention to, is between the *jeopardy* of Mr. *Ludlow's* life, and the life of the *driver*. It is perfectly immaterial whether Mr. Ludlow's life was jeopardised or not. The law is explicit in its terms, and expressly confines the *jeopardy*, to the *driver's* life. The words are: "Or if in effecting such robbery of the mail, the first time, the offender shall wound the *person having custody thereof*, or put *his* life in jeopardy, by the use of dangerous weapons, such offender or offenders shall suffer death." You must therefore discard from your consideration of this case, all the testimony of Mr. Ludlow, relating to the jeopardy of his *own* life, and confine your attention to that, relating to the *driver*. The testimony of the driver furnishes no evidence that *his* life was jeopardised, according to our construction of the word jeopardy, viz. *actual* danger, and not the mere *fear* of it. He stated that when the cart was first stopped, he saw no pistol; that none was presented to his breast; but that *after* he descended from the mail waggon, one of the robbers, collared him, and held a pistol in his hand: upon our cross examination of him, he was interrogated as to the precise *position* of the pistol; whether it was directed against his breast or body, or whe-

ther it was not inclined to the ground, and along the robber's thigh. He answered, (and I remarked it at the time as an important fact) that the robbers arm was not raised against his breast, but that it lay in the direction of his thigh: that he was then tied to a tree; but from the time, that he was collared, until the robbers departed with their plunder, no further personal violence was used; or any dangerous weapon presented to him; that he (the driver) having complained of the cold, whilst tied, one of the robbers, brought a number of the mail papers, and covered his, and Mr. Ludlow's feet with them. Here then evidently there was no *jeopardy* of life, as contradistinguished from *fear or apprehension.*

But the counsel of the United States have contended; that the mere *apprehensions* of the party robbed, that *his* life was in jeopardy is sufficient to constitute this a capital offence, and that this apprehension is to be the *criterion*, by which you are to determine, whether or not, there was any *jeopardy* of life. Even admitting (for the sake of argument) that this doctrine is a correct one, I contend notwithstanding that the driver furnishes no evidence, *sufficient* to bring this man within its operation. Mr. Ludlow's evidence can have no relation, to the point of the *drivers* jeopardy. He himself was in the custody of the other robbers; and even admitting that he retained his coolness and self possession, he was unable from the darkness of the night, and the distance betwixt him and the driver, to determine the degree of the latter's jeopardy. You have therefore to depend entirely upon the drivers testimony; and unless you can be satisfied on this point by *his* evidence, you cannot convict this man on this ground. But I *impeach* the credibility of

this witness. He has involved himself in contradiction which must destroy his credit. Upon his examination on Saturday, in *Joseph Hare's* case, he expressly stated, that he felt no apprehensions of danger to *his* life, until after he was tied to the tree, and that his apprehensions then, arose from an observation by one of the robbers "what shall we do with these men," and the reply "I have a way to fix them;" but that his fears were *removed*, when he found "that the way to fix them was by tying them to the tail of the mail waggon." This evidence impressed itself strongly on my mind, and I treasured it up, with a view of detecting any contradiction in his testimony on *this* trial. I *have* detected a most palpable contradiction. Upon his examination this morning he stated, that he *did* consider his life in *jeopardy*, from the moment the mail waggon was stopped. Startled at so glaring a contradiction, I involuntarily suggested it to one of the counsel for the prosecution, who sat next to me. The mystery was immediately unravelled. The problem was solved? His reply was "the man was *drunk* on Saturday." Good heavens! and was it upon *such* testimony that the prisoner upon Saturday was convicted of *death?* Is this the security guaranteed to us, by the trial by jury? Is the tenure by which we hold our reputations, our *lives*, and our liberties so precarious, that they may be *sworn* away, by the testimony of a *drunken* witness? Can the counsel for the United States conscientiously call upon you, to convict *this* man, upon *such* testimony; or will you permit a man, who has thus impeached himself, to appear before you in the character of a witness, and consummate his crime, by adding another to his list of victims?

[The District Attorney observed, that he was sorry to interrupt the gentleman, but that he must suggest to the court, whether the observations that were made, were perfectly proper; whether side-bar observations of counsel, were to be brought in as evidence to the jury.]

MR. FINLEY.—Important discoveries frequently proceed from accidental circumstances, and mysteries are sometimes elucidated and explained by the veriest trifles. The present is an evidence of it. But as the counsel appears uneasy on the subject, and as I shall endeavour to show, that the drivers evidence is *unimportant*, even admitting it in its fullest extent, I will not press the point. Although I consider myself perfectly warranted, when the *life* of my client is at stake, in taking advantage even of side-bar observations of counsel, when they serve to detect a *tripping* witness, or to convict him of contradiction.

To follow then the argument of the counsel for the United States a little further. The force of their reasoning appears to resolve itself into this: that the apprehensions of the driver would not be excited, unless the conduct of the robbers was such as *actually* to put his life in *jeopardy*. They go upon the hypothesis, that the driver is a man of more than ordinary courage; that he would not be easily intimidated, and that having established the fact, that his apprehensions *were* excited, that *you* are bound to infer, that his life *was* in *jeopardy*. Incorrect as this hypothesis is, and at variance with the facts in the case, it can only stand good, until rebutted. I think it can be rebutted. To show then, that these apprehensions were well *founded*, the counsel for the United States must satisfy you, that there was an unqualified intention on the part of the robbers,

to take the *life* of the driver; mere *threats*, unaccompanied by such an intention, are not sufficient. If then *we* can satisfy you, that there was *no* intention to kill, and that the threats and declarations of the robbers, were solely for the purposes of *intimidation*, the hypothesis of the gentlemen must fall to the ground. What was the situation of the parties? It was a notorious fact, that the mail was transported in a small cart, in the care of the driver alone, *unaccompanied* by any guard. Mr. Ludlow's being with the driver, was an accidental circumstance. It was known too, that the mail drivers were generally unarmed. The time and place, when and where, the robbery was to be committed, precluded any fear of interruption; and it was not to be supposed, that a single unarmed man, when stopped by *three* highway robbers, all armed, would make any resistance, which would render his *death* necessary, to effect their purpose. When the prisoners set out, therefore, to rob the mail, the murder of the driver could not have been in their contemplation. Neither when they rushed out of the woods, and stopped the mail, could they have supposed that resistance would be made, although they discovered that the driver was accompanied by another person. The declaration of the robbers, "we are three highway robbers, armed with double-barrelled pistols and dirks,"—connected with the appearance of three men, with arms in their hands, must have been intended, and was eminently calculated, to *intimidate* and prevent resistance. They found themselves, three stout *armed* men, opposed to two, *one* of whom was *unarmed*. Resistance in this case would have been imprudent and *fruitless*. The result showed how correct the robbers were in their conjectures. The dri-

ver and Mr. Ludlow immediately gave up the mail *without* resistance. From all the circumstances then—the solitude of the place—the disparity of numbers—and the probable effect of the declarations of the robbers—they could not have supposed that any resistance would be made. They therefore had no intention to kill the driver, when they robbed the mail.

The object of this point of my argument, gentlemen, has been, to rebut the inference drawn by the counsel for the United States from the *apprehensions* of the driver, and to show that those apprehensions were *unfounded*. I hope, that I have succeeded. But even admitting, that the driver *did* feel apprehensions of *danger* to his life: I will call your attention to another distinction, which is calculated, if established, to destroy the force, of that part of their argument. The distinction is between the *actual existence* of danger and the *mere apprehensions* of it. This distinction, to *my* mind, is very clear, and manifest. A person from a variety of causes, such, as the effect of education: great constitutional timidity: a misconception of particular circumstances: or a misapprehension of the actions, and intentions of another who is the cause of alarm, may *apprehend* great danger to his life, when *in fact* no danger does exist. Persons of lively and susceptible feelings, whose imaginations, during childhood, have been strongly affected, by nursery tales of spirits and evil beings, generally retain in their more mature and advanced years, the impressions thus early made. Place a person of this description in a solitary wood, at night, and although there may be no living creature within twenty miles, yet his distempered imagination will people every bush with robbers, and metamorphose every tree into an assassin.

But would you make the *fears* of this person, the *criterion* of his *danger?* Suppose that a person, for the sake of a jest, should present to the breast of one of you, a pistol *cocked,* but *not loaded,* accompanying the action with a threatening look, and a declaration, that he would blow your brains out, unless you delivered him your purse! would you not reasonably *apprehend* great danger to your life, but would any danger *actually exist?* But why multiply examples? The doctrine contended for by the counsel for the United States, viz. that the mere *apprehensions* of the party is to be the *criterion* by which you are to determine whether his life was put in *jeopardy* or not, appears to be so self-evidently absurd, as scarcely to deserve a refutation. The mere *apprehensions* of danger, *cannot* create such an offence, under the act of 1810, as to make it a capital crime. Otherwise it would depend, upon the timidity or distempered imagination of the person attacked, whether the criminal would suffer a *forfeiture* of his *life,* or merely imprisonment. The law never contemplated, that, a man's life, however criminal he might be, should be held on so variable and precarious a tenure.

The counsel for the United States, have advanced another doctrine; viz. that the mere *presentation* of a pistol at the driver, without firing it, or the mere raising of a dirk, without *wounding,* is such a *jeopardy* of life, by the *use* of dangerous weapons, as will bring the offence within the 2d. clause of the section. How far a man's life can be said to be put in *jeopardy—i. e. endangered* by the mere presentation of a pistol, that is no *further used,* or by the mere raising of a dirk, without *inflicting* any wound; I shall not, at present undertake to argue. The copious and admirable definition

of the word *jeopardy*, which has been given by my friend (Mr. Hoffman) in his argument, sufficiently illustrates it. But I contend, that such a construction of the words "jeopardy by the use of dangerous weapons," was never contemplated, nor *intended* by congress. The words "wound the driver, or put his life in jeopardy" were used by them as convertible and *synonimous* terms. They were intended, as *explanatory* of each other, and to show that unless the *wounding* was of such a nature, as to *jeopardise* life, the offence was not a *capital* one. In the enumeration of offences, the highest is always put last: but if the words are not synonimous, this rule has been departed from: for certainly the severely *wounding* the driver, or *mutilating* him, in such a manner, as to incapacitate him for any business, although his *life* would not be *endangered*, would be a higher offence, in contemplation of law, than the mere presentation of a pistol, which only endangers life, from the *possibility* of its going off, and dangerously wounding. The *wounding* is to be the *criterion* of *jeopardy*. The Attorney General in his reply on Saturday, stated that the use of the disjunctive "*or*" sufficiently shewed, that there were two offences in contemplation of congress. But are synonyms, never connected by the particle "*or*?" When you wish to convey an idea distinctly, do you not frequently use tautological expressions—each one conveying the *same* idea, though some of them more *distinctly* than others? Can congress be too guarded or explicit in the phraseology of a law which affects life, and must their endeavours to avoid ambiguity, subject them to the charge of pleonasm? What was the object of the act of 1810? It was the *amelioration* of the former post-office acts. The act of 1794, sec. 17, punished a *sim-*

ple robbery with *death.* The severity of this law was intended to be mitigated, by the 19th sec. of 1810, which subjects the party guilty of a *simple* robbery, *only* to ten years *imprisonment.* Congress have therefore determined, that a *simple* robbery of the mail, is not an offence, so heinous as to deserve *death.* What then, is to be the circumstance of *aggravation* accompanying the robbery, which will change its character, and require this severe punishment to be superadded? Is it the wounding of the driver? But suppose, that the wound is so slight, that his life could not possibly be endangered by it—such as scratching his face? Would this deserve *death?* And yet, according to a different construction, for the one offence you would *imprison* the robber, and for the other, you would deprive him of *life,* notwithstanding the *equality* of the two offences, because you could not *graduate* the *degree* of wounding. A reference however, to the act of 1799, sec. 15, shows conclusively, that congress never intended that a robbery of the mail, attended with the *slight* wounding of the driver, should subject the party guilty to death. The words of the act of 1799 are *"much* wound the driver." The use of the word *"much"* in the act of 1799, is the *only* variance between its phraseology, and that of the act of 1810, which repealed it. Under the act of 1799, then, unless the driver was *much* wounded, the punishment was only imprisonment. Does the mere *presentation* of a pistol or dirk, then, furnish this circumstance of aggravation? If it does, the mitigation of the act of 1794, punishing a *simple* robbery, with *death,* has *not* been effected by the act of 1810, punishing a *simple* robbery, only by *imprisonment.* The repeal of the 1st act was unnecessary, as no simple rob-

'bery of the mail, would ever be perpetrated without the presentation of dangerous weapons to the driver. Congress, then have been guilty of a criminal trifling with their fellow-citizens. They have tantalized and deluded them, with the *prospect* of an maelioration, when *no* amelioration was made. The *third* clause, however, of the section of the act of 1810, relieves congress from this charge, and explains what is meant by the "*use* of dangerous weapons," jeopardizing life. "19th sect. And if any person shall attempt to rob the mail of the United States by *assaulting* the person having custody thereof, *shooting* at him, or his horse or mule, or *threatening* him with *dangerous* weapons, and the robbery is not effected, every such offender, on conviction thereof, shall be punished by *imprisonment*, not *exceeding three* years." Here then is a manifest distinction, made by congress, between the mere *assaulting*, *shooting at*, and *threatening* with dangerous weapons, the mail driver, and the "*wounding* or putting life in jeopardy, by the *use* of dangerous weapons" described in the 1st clause. It is a distinction not only of crime; but of punishment. The mere *assaulting*, *shooting at*, or *threatening* the driver, without *wounding*, is punished only by imprisonment, whilst the wounding, or putting his life in *jeopardy*, is punished with death. The words used in the 3d. clause, are exactly descriptive of the offence of simple robbery, in the 1st. clause—for no robbery of the mail ever was, or ever would be perpetrated, without *assaulting*, *shooting at*, or *threatening* the carrier with *dangerous* weapons. The only difference between the two clauses, is, that if the robbery is *effected*, in the manner last described, the punishment is *ten* years imprisonment, but if the attempt to rob should *fail*, the

punishment is reduced to *three* years imprisonment. If however, the robbery should not only be effected, but in the *assaulting, shooting at,* or *threatening* with dangerous weapons, the driver should be *wounded so,* as to put his life in *jeopardy,* then the punishment is *death.* According to the opposite counsel's own construction; the mere *presentation* of a dangerous weapon, amounts to "jeopardy of life" within the words of the act: there is, however, *no difference* between the *presentation* of a dangerous weapon, without *further using it,* and the "*threatening* with dangerous weapons" mentioned in the 3d. clause: They are tautologous expressions: but congress have made a most marked distinction, between "threatening with dangerous weapons" in the 3d. clause, and "*jeopardy* of life" in the 2d. clause: for one is punished with *imprisonment,* the other with *death:* the mere *presentation* of dangerous weapons, then, *cannot* amount to "*jeopardy* of life," within the meaning of the act of congress.

The attorney general in his reply on Saturday, to this argument, which I then advanced* stated that the distinction of punishment arose, not from the jeopardy of life, by assaulting, shooting at, &c. but from the *attempt* to rob, being *successful* or *unsuccessful.* The learned gentleman has placed himself in this dilemma. If the punishment of death is added, because the drivers life is put in *jeopardy,* as contradistinguished from *threatening* or *presenting* dangerous weapons, than the prisoner is not guitly of death, under the 2d. clause,

*Note by the editor.—This argument derived from the act of 1799, and the 3d. clause of 1810, was also slightly touched upon by Mr. Finley, in his argument on Saturday, but it was omitted (owing to the hurry in which the notes of the reporter, were corrected by counsel) to be included, in that argument already published.

as the drivers life was not put in *jeopardy*, but he was merely *threatened* by the *presentation* of dangerous weapons: or if the punishment of death, depends upon the attempt to rob, being *successful* or not, then he convicts congress of a most palpable absurdity—nay—criminality—viz. that of legislating, not for the protection of the drivers *life*, but solely for the preservation of the public property: for under his construction, the shooting at, assaulting, &c. the driver is immaterial, and does not *aggravate* the offence. It is not the *manner* in which the attempt is made, but it is the *success* of the attempt, which constitutes the crime, and calls for the severe punishment of death. This could not have been the intention of congress, for in the 2d. clause, punishing with death, the *aggravating* circumstance, which distinguishes it from the offence of *successful* simple robbery, contained in the 1st. clause, and punishable only by imprisonment, is the "*wounding* or *putting* his life in jeopardy." The real distinction between the offences mentioned in the 3d. clause of the 19th section of the act of 1810, appears to me to be this. If the attempt to rob the mail, does not succeed, and the driver is not *wounded*, in the attempt, so, as to *endanger* life, but merely *assaulted, shot at, or threatened* with dangerous weapons, the party guilty, is punished under the 3d. clause of the act, only by *three* years imprisonment. If the attempt to rob the mail *succeeds*, but the driver's life is not endangered by *wounding* him, the party guilty is punished, under the 1st. clause of the act, by *ten* years imprisonment. But if the mail is not only *robbed*, but in effecting such robbery, the driver is—not merely *assaulted, shot at*, or *threatened*—but put in *jeopardy* of his *life*, by seriously *wound-*

ing him, then the punishment is *death*. The object of congress in making these distinctions, must have been, to prevent the murder of the driver, by holding out to robbers, an inducement to spare his life—viz. by punishing a robbery, unaccompanied by *murder* of the driver, only with imprisonment. Penal statutes must be construed "*in favorem vitæ*." And when the terms of a law are ambiguous, and a construction in favour of life, can be collected from the probable intention of the legislature, that enacted it, such intention must be the rule of construction; an effectual mode of ascertaining this intention, is by enquiring into the policy, which must have been in contemplation of congress, in making this law. But the Attorney General, (Mr. Wirt) in his reply to my argument on Saturday, observed, that the jury had nothing to do with the question of policy: that my observations were misplaced, for it was an investigation of a legislative, not of a judicial character. With great deference to the learned gentleman, I must be permitted to *insist* upon the propriety, and applicability of the argument. He appears to have misapprehended the nature of it. I admit, with the Attorney General, that you have no right to determine, how far the law is politic, in its *operation*. This is a question for congress. But I contend, that, to enable you to ascertain the intention of the legislature, that enacted it, and to determine upon the *construction* to be given to it, you *have* a right, (and you are bound to exercise it) to enquire into the policy, that *originated* the law. Congress legislate for the general good. Before they pass a law, they are presumed to enquire whether its operation will be politic or not. They are also presumed to profit by the experience of the past.

They must have had some object in view, in altering the laws of 1799, and 94. That object could not have been, to make the law *more* sanguinary in its provisions: for the act of 1794 was as cruel and bloody, as the most perfect despot could have wished it to be: their object was rather amelioration. A reference to the policy, and operation of the laws of England and France, on the subject of highway robberies, must have convinced them of the necessity of *discriminating* between robbery, with and without murder.

[Mr. Finley here commented at some length on the laws of England and France, on the subject of robberies—upon the respective policy of those laws, and argued that congress must have had these several results in contemplation, when they passed the act of 1810: but as this part of his argument was a recapitulation of the same point which he advanced before the court on Saturday, we omit inserting them.]

These considerations, gentlemen, upon the law, and the application of the facts in the case, I submit to you as the result of *my* most unbiassed judgment and reflection; and with an anxious hope, that they may prove of some avail. I trust that they will be well weighed by you. You have an important duty to perform. You have assumed to yourselves a great and fearful responsibility. When you stepped into that box, you assumed new characters: you undertook to raise yourselves above the common frailties and imperfections of your natures to divest yourselves of all those passions and feelings, which sometimes imperceptibly influence our judgments; and to decide according to the evidence, uninfluenced

by any considerations, but a love of justice; and unaffected by any pre-possessions, but those in favor of the innocence of the prisoner. For the correctness of this decision you are responsible; not to your fellow man, but to your God. You are amenable, not to any *human* tribunal—but to that tribunal, whose decisions are marked by unvarying wisdom, and *from* which there is *no appeal.* If these considerations should be disregarded! If rejecting all the suggestions of mercy, and discarding from your deliberations, this ministering child of heaven, you adopt the *rigorous* and inhuman construction of the counsel for the United States, which will deprive this man of *life!* When the short carreer of *your* existence shall have been run, and you appear before the judge of all men, appealing for *mercy,* what will be your feelings, if you should be told in answer, "this man appealed to *you* for mercy, but you *denied* it him." But, if listening to the mild calls of mercy, you adopt a *different* construction; one warranted by sound sense and humanity, and perfectly consonant with the spirit of the law! When you retire from that box, the smiles of an approving conscience will accompany you; and when you lay your heads on your pillows, your slumbers will be sweet and balmy, from the reflection, that you have by your verdict, given to this man, *life,* and imparted to his wife and family, peace and happiness. Could you, now retire to your room, under your present impression, I should at least *hope,* for a successful verdict. But when you shall have heard the Attorney General: (Mr. Wirt,) when you shall have listened to the "Syren voice" of that gentleman, upon whose honeyed accents assembled multitudes have hung in transport, I shall tremble for the result, and await in fearful anxiety for your verdict.

CHARLES MITCHELL, Esq.

IN CONCLUDING THE DEFENCE.

Gentlemen of the jury.

The counsel who have already addressed you, in behalf of the prisoner, have left me an exhausted case.

The principal features of the defence, have been so strikingly and happily portrayed, that any further illustration by me, would not only be superfluous, but impracticable.—I cannot hope to add either strength or grace by any coloring of mine: and dare not even *retrace* what they have *finished*, lest a single touch should impair the vigor of expression they have given to our cause.

I am therefore compelled to seek some other point of view, or silently surrender the prisoner to the overpowing attack of the very distinguished gentleman, who has been specially summoned here to ensure his conviction. The last of these alternatives I do not now feel at liberty to adopt, having so early engaged in the defence. My sympathy perhaps might sleep, where guilt has been confessed, but a sense of justice ought ever to be awake and equally attentive to the legal rights of guilt and innocence. Such rights, and those too, of a most sacred character, the accused certainly has, in common with ourselves; and it is my duty to insist upon them here, although his crimes should mount to heaven: nor is it less *yours*, gentlemen, to secure him their full enjoyment, whatever may be the result; this, I am sure you *will* do, because *you* will not violate the law to punish

its violation by others.—This is all the prisoner asks. Indulgence he cannot claim: he does not expect it: the course of these prosecutions forbids such a hope: but strict justice and law—rigid impartiality and liberal constructions of doubtful points in his favor, he *demands* of you: not as a boon to him: but as a tribute to your own souls: nay—to the security and freedom of all those around, and those who shall come after you.

Instead of consuming your time unnecessarily, by further observations on the construction of the act of congress so ably supported, and as I conceive, demonstrated by the counsel who have preceded me—I beg leave to direct your attention more particularly to the bold and novel doctrines advanced on the part of the prosecution, to reach the prisoner's life: doctrines which I believe unfounded in reason, and unsupported by authority:—notwithstanding the learned counsel who advanced them, avowed a sincere conviction of their truth.—Most of you, gentlemen, no doubt listened with great attention, and great pleasure to what fell from the learned attorney general, on the previous trial, in support of the prayer offered to the court, for their direction to the jury. The same prayer has again been offered here—but as the court have declared you judges as well of the law as of fact, in criminal cases, the argument is deferred until he comes to address you, when you will unquestionably hear the same principles again advanced and enforced with all the fascination of eloquence.—I shall therefore take the liberty to anticipate the argument, which will probably close this case, and hope it will not be deemed premature: especially as the gentleman will have an opportunity of enforcing it by reason and authority, and convicting me of error, if I attempt to mislead you.

Before I proceed to this, however, permit me to make some remarks, upon the very unusual and ingenious *direction* that has been given to this case by the learned counsel opposed to us.

I am far from attributing to those who appear here in behalf of the government, or to those who administer it, the least hostility to jury trial; in state prosecutions—on the contrary, I feel assured, that they consider this mode of trial, a noble feature in our constitution—the grand bulwark of our civil liberty.—But unfortunately for my client, whether it proceeds from the influence of professional habits, or from a great respect to the opinions of courts as well on matters of fact as of law: or from a laudable wish to save time, which *palpably* exists in this case: from whatever cause it may proceed, it is but too manifest that the counsel for the government have given a direction to this prosecution, which if it does not strike at the existence of jury trials, certainly defeats their efficacy, by confining the jurisdiction of this tribunal and narrowing the questions submitted to its *exclusive* judgment, to very inconsiderable and trifling points. Do the gentlemen shrink from the *unbiassed* and impartial judgment of twelve intelligent and upright men, selected out of the body of that community for whose protection the laws are made: and selected too in a manner that gives to the government, at least equal influence with the accused? If not. Why that prayer you have just heard? Why blend law and fact confusedly together:—then carefully bury *both*, under subtle distinctions, calculated to confound and bewilder the understanding of jurors; and thus blinded, lead you to the court, to be extricated from this technical labyrinth:—and lest both court and

jury should perchance light upon a construction favorable to the prisoner, in the mild policy of our criminal code, crown this admirable scheme for his conviction, with the broad, imposing principle, that *courts and juries have no concern with the policy of laws!*

What the learned gentleman who advanced this doctrine, intended, by declaring it under existing circumstances, a question *for congress and not for this court,* whether the robbery charged, ought or ought not in good policy to be punished with death—I am at a loss to determine.

If he meant *merely* that courts and juries have no right to disregard positive injunctions of the legislature *clearly* and *unequivocally* expressed, because such injunctions may appear to judges or jurors impolitic and inexpedient, the truth of his doctrine is unquestionable; but what application has it to a case where the terms of the act are *obscure* and *equivocal?* To make it at all pertinent, he must have assumed, in the case he was considering, not only that the robbery *charged* came strictly within the description of the act; but also, that the act had *clearly* and *unequivocally* annexed the punishment of death to the crime charged and proved—whereas in truth, the *equivocal* terms of the act, gave birth to the very discussion in which he was then engaged: so that if this were his meaning, he made a gratuitous assumption of the very point in dispute. If he meant any thing more:—and more I think he must have intended, or would not have pronounced the very impressive argument of my friend, (Mr. Finley) on the *policy* of the one, or the other construction of the act, *misplaced:* if he meant that policy is not to enter into the construction and exposition of legislative acts, which are *ambigu-*

ous in terms:—that when courts and juries are called in the course of their judicial functions to expound an act of congress like this, so equivocal in terms as to divide the opinions of two eminent lawyers like Mr. Wirt and general Winder; as to puzzle those best versed in the critical explication of statutes:—if he meant, that in such a case, courts and juries, are not to consider the policy of a rigorous or lenient construction in expounding obscure phrases in the law—a few moments examination of this doctrine will convince you, that it must be unfounded.

In what other way, gentlemen, can you arrive at the real design of congress where they have failed to express it clearly in terms. By legislating at all on the subject, they manifest a design to prohibit and punish the offence in some manner—But what that precise purpose was, or how far they intended to punish rigorously cannot be certainly known by reading the act: because, they have failed to express it, in clear unambiguous language—The language of the act may import either one or another of two purposes:—which of these was it? Will the gentleman go in quest of the individual members to enquire: and if so—will he ask *all* or be content with a *majority?*—if the *last*, he must take care that his *majority* is composed of those, who voted for the law: for surely the *minority* would not presume to vouch for the design of others who have never expressed any design intelligibly—Nay, I should be glad to know how the majority themselves could answer for each other, as each may have acted on a different understanding of the bill. What then is to be done? If you cannot obtain light from the members respecting the obscure passage, is the law to become a dead letter? Unquestionably, if

this doctrine be correct—for how shall it be expounded. The act itself affords no clue to the design, else it would not be ambiguous—and you have no right to go out of the act to ascertain the object of congress by enquiring into the *probable motives*—the various political considerations suggested by their own experience and the history of their own and other countries:—for these we are told, *are matters of legislative—not of judicial investigation, questions for those who make laws—not for those who expound them*—Why gentlemen, it is for that reason and that alone: it is because these *were* matters of legislative consideration, and the *probable inducements* to the act in question, that courts and juries, in order to give effect to the legislative will, must and do proceed to investigate them, with a view of ascertaining that will, where it is imperfectly expressed: and thus it is that such matters become not only properly, but *necessarily*, the subjects of *judicial* consideration—It is by ascertaining the *policy* of the measure, that you arrive at the *probable intention*, and design of congress. The *probable intention*, must govern courts in construing laws, where the *certain* intention cannot be known—The *certain* design is concealed by the *uncertainty* of the expression—Political motives alone gave birth to the design, and yet in groping your way, through a dark and ambiguous phraseology—you are not to lay hold of the *motives*, because forsooth, *policy* is a *question for congress*, and *not for courts and juries:* for those who *make* laws, *not* for those who *expound them!*

But, gentlemen, the very ingenious counsel opposed to us, do not stop here. Having shut the eyes of both court and jury, as far as they were able, to the monstrous *impolicy* of their construction, by this specious protest against usur-

pation of legislative powers; they next proceed to assail the jury *alone;* and by a prayer the most extraordinary that ever reached the ear of a court, have wrested from you matters of *sheer fact,* which you *alone* are sworn to try, of which you *alone* are the competent, constitutional judges, and have submitted them to the court. Gentlemen, it is one of the most solemn duties of juries to guard with jealous vigilance their *sole* and *exclusive* jurisdiction over all matters of fact against encroachment; while they submit with respectful deference in matters of law to the *concurrent* jurisdiction of the bench. This honorable court did not sanction that prayer on the previous trial, without essential modifications, and I trust, it will not on this: so far as the opinion then expressed went, on the matters of law—I have no inclination or necessity to appeal from the bench to you—I cheerfully acquiesce in the opinion delivered—But if all the courts on earth should declare pure matters of fact, to be questions of law,—the common sense—common rights and legal powers of jurors would still overrule their decision.—And I shall now endeavor to shew you, gentlemen, that if the several matters contained in that prayer, are proper, for the consideration and judgment of the court,—juries, in criminal cases are mere autometa—legal machines—nay worse—less:—solemn mockeries—'terrible shadows.'—Even in civil cases, jurors are the *sole* judges of fact—and the court have no concern with it—no eye to see—no ear to hear it—no scales to weigh it—But here, what have the counsel left you to enquire? Whether the prisoner is one of the persons concerned in the daring outrage at Havre-de-Grace? That, he has long since, freely and openly confessed: and if *that,* were the main question, why were you impannelled? It is your pro-

vince to settle *disputed,* not admitted facts.—Or is it, whether that outrage amounted to a robbery in law? That also is admitted:—why do you still wait here? Is it to enquire whether that robbery was committed in one way or another—attended with one class of facts or another? These very obliging gentlemen have saved you that trouble—this enquiry, they have embodied in their prayer, and applied to the honorable court to solve all doubts.—They have desired the court to instruct you in substance, that if you believe the prisoner was on the spot—confederated with the rest—whether he actually held weapons or not—whether he really intended to take life or not—it is your duty to swear that you believed he actually committed the crime charged in the indictment—or in the words of that instrument, that *"with certain dangerous weapons, to wit: pistols and dirks, which the said John Alexander, then and there held in his hands, he the said John Alexander did put in jeopardy the life of the said David Boyer."*—Do you pause—do you ask before you can swear to the truth of this charge, to be satisfied, that the life of the said David Boyer was actually put in jeopardy or danger: that such danger not only existed, but was actually created by the manner in which pistols and dirks were used: or, if pistols alone were used, that such pistols were loaded and in a capacity to breed actual danger: and that the said John Alexander actually held these dangerous weapons in his hands with intention to take life? Why do you hesitate? Go on, gentlemen, you are too scrupulous for use—These are severally questions of law with which you have no concern, or at most a very subordinate concern, and of which you have no capacity to judge—It is true

you *alone* must swear to the existence and proof of these several circumstances—but then you must graduate your credulity by the scale of the law: The learned counsel will furnish you with a sealed standard of weights and measures, by which you can regulate your consciences to a tittle—so that you can safely swear to his *legal* guilt, although in your souls, you do not believe in the *actual* existence of one of the circumstances necessary to constitute it—Nay, they will shew you further, how you may hereafter easily hush the rebukes of conscience, by whispering to it, that these were questions of law, on which you felt obliged to give implicit faith to the court. The court indeed might safely reply, that these were questions of pure fact, which although embodied in that prayer, they did not particularly notice, as they were for your *exclusive* consideration: that to preclude all mistake however, they had submitted both fact and law to your judgment, and if blood had been illegally shed, it must lie at your door.—Thus, gentlemen, you are in danger of being beguiled into a verdict from the very high respect you may feel for this court, through a mere mistake—a misapprehension, that the opinion of the court embraced and could legally embrace the several matters of fact in that prayer, to which, as I understood it, it did not extend—If it did so, and you are required to regard it as binding on you, the old exploded doctrines of implicit faith and passive obedience, were downright scepticism and rebellion to this.—But we shall be charged with appealing from the court to the jury, on pure questions of law.—It is not so gentlemen.—God forbid, I should ever aid in divesting our courts of any portion of that salutary reverence, which is due to

learning and integrity, and which is so essential to the just administration of the law—But it is necessary to discriminate properly between what *are* questions of law and what, of fact.—On dark and intricate points of *technical law*, it is the unquestionable duty of jurors to pay the most respectful homage to the technical acumen of the bench.—It is true, that you are not *bound* by the opinion of the court on *these* points—but may, if you please, resort to books and cases, whence *their* knowledge is derived, and judge for yourselves.—Still as all technical terms are necessarily complex and remote from popular use, it is most proper to resort to the professors of the science for critical explanation of their genuine import: and quite as much so in law, as in chemistry or medicine.—and it is highly improbable that, during the short examination of a single trial, you should be able to form so accurate, or even so satisfactory an opinion for yourselves, of the import of the technical term *robbery*, as that which you may derive from the judges who are versed in the science, in which it has grown up with a peculiar signification,—more especially as it is neither known, used or understood out of the science to which it belongs—It belongs to the common law, and being engrafted into an act of congress, the attorney general has said very truly, that we must resort to the common law in this, as in other similar cases, to ascertain its signification—But are the phrases, "*putting life in jeopardy*" and "*using dangerous weapons*" technical phrases of the common law, that resort must be had to the technical learning of the court, to ascertain their genuine meaning—Will the learned counsel have the goodness to produce a single case out of his well furnished armoury, where the word *jeopardy* so much *used*

in this case has received a technical and legal construction—I have not been fortunate enough to find one—and if no book can be produced, whence the court *could* have derived any further knowledge of this word, than is to be obtained from its popular use, it is no contempt of court, gentlemen, to say, that you are quite as competent—as sagacious and as able judges of its meaning, as their honors on the bench, or any accomplished lawyers.—It is not a knowledge of the common law—but a knowledge of the *English language*, only, that is requisite to the true and thorough understanding of this word—It is unknown to the common law—but perfectly familiar to the common ear—What its true signification is, has been unanswerably explained by the learned gentleman who opened our case—To convict of *simple* robbery, the act of congress like the common law requires proof of *actual violence, or that the carrier was put in fear*—I speak now of the *proof* merely, and not of the *indictment*—To convict of this *higher* species of robbery, the act of congress requires proof of *jeopardy of life created by the use of dangerous weapons.* This last circumstance is stated in only *two* of the counts —but the two other circumstances are stated in *all three* of the counts—and these are also stated (one or both) in all indictments for robbery at *common law*—as well as the circumstance of *taking against the will of the owner*. But was it ever heard that the existence of *fear*, or of *violence*, or the *want of consent* in the owner, were questions of *law*, in the English courts? Did any English judge ever attempt to wrest these questions of fact from the jury and take their decision upon himself? By what legal legerdemain, what technical sagacity can judges dive into the mind of the owner, so as

to decide, that the property was taken *against his will?* And yet, these are as necessary and precisely as much, *legal* ingredients, in the lower species of robbery, as *jeopardy of life* and *using dangerous weapons* are in the higher class—and this court might, with the same propriety judge of the existence of *violence, fear* and *constraint on the will* in the one case, as of *jeopardy of life* and *using weapons* for that purpose in the other —They are all alike unmixed *matters of fact,* for the *exclusive* consideration of the jury and for this very obvious reason, that they are all to be proved by witnesses, and not by a reference to the law—nor by the opinions of professional men, or experts. But on the other hand—whether *robbery* or not, is a question of *law.*—Resulting from these several facts combined, when they have been proved, and found by the jury—for *that* is not ascertained by *testimony,* but by reference to the law.

It is for these reasons, gentlemen of the jury, that in all indictments, the several *matters of fact* which go to make up a crime, are first stated, and are also accompanied with the *technical term,* which expresses the *legal character* of all these facts combined—so that both court and jury may be enabled to judge in their several distinct provinces of the whole matter in controversy, from the face of the indictment. The *facts* must be first found by the jury, and after these have been proved, then the question of law arises, whether *all these together,* amount to the *crime* charged, and that is a proper question for the consideration of the court, although the jury in criminal cases are to decide this also. What then is the specific crime charged here? It is *robbery*—a complex term embracing several facts, two of which, according to this clause of the act, are

the use of dangerous weapons and putting life in jeopardy.—When you are fully satisfied that these facts have been proved—if you have a doubt, whether the crime of *robbery* has been proved, according to the legal import of this term as used in the act and the indictment—it will be proper for you to consult the court—because that is a complex question, on which they are able to enlighten you: but not so, if you have a doubt as to the *existence* of *danger*, or the *use made of dangerous weapons*, or of the *existence* of *fear*, of *violence*, or *constraint*, or any other matter of *fact*—If you have the least doubt there, you are not to consult the court—but are bound by your oaths to acquit and deliver the prisoner from so much of the charge. I have been obliged to detain you gentlemen, longer on these points, in consequence of the *direction* given to this case by the counsel for the prosecution, in order if possible, to rescue it from their hands, and put it fairly into yours, where it should have been left at first.

I have attempted to show, that in *this* case you are *proper* judges of the *policy* of punishing any robbery with death, and the *sole* judges on the two questions, whether jeopardy of life existed—or dangerous weapons were used; and are not to be biassed by any opinion of any court, on *matters of fact*, with which they have no concern.

In regard to the pure questions of law here—I am happy, that there is no occasion for the prisoner's counsel to appeal from the court to you—for there is no difference.

I will now proceed to consider these questions of fact, in connexion with the legal doctrines advanced upon the other side, to elucidate them—and as I know of no

treatise—no decision—no case—no dictum of any judge —no opinion of any writer, which sanctions those nice and subtle distinctions which have been produced to accomplish this legal *metempsycosis*—this mystical transmutatioń of the good plain old English word *jeopardy*, into a *technical term* of the common law, I hope to be pardoned for presuming to scrutinize some of them as they shall occur.

Here then, gentlemen, let me ask, are you perfectly satisfied of the existence of *jeopardy of life?* Are you convinced beyond all reasonable doubt, that the life of the mail carrier was really in *danger?*—What is *jeopardy?* I have used this word as synonimous with *danger*, because, I conceive it has been indisputably demonstrated, that the word *jeopardy* has precisely the *same* meaning, whatever it may be, as the words *hazard, peril*, or *danger*—Indeed, it is admitted on the other side, that *jeopardy* means *danger* of some sort; but attempts have been made to distinguish very nicely—first between *certain* and *uncertain*, and secondly, between *real* and *apparent* danger.

1st. *Jeopardy*, it is said, "imports *uncertain* danger." I know not what Lexicographer has been consulted for *this* distinction—but until it was made here, I had always supposed that the word 'danger,' like the word jeopardy, did in itself import *uncertainty*, risk, hazard, *chance* of harm; and should therefore, as soon have thought of qualifying it by its own adjective, as by that which has been used; for I can see no difference on the one hand between *dangerous* danger, and *uncertain* danger: nor, on the other between *certain chance* and *certain* dan. Tgerhis verbal distinction would not have been noticed however, if it had not given birth to two disco-

veries and an argument, in favor of the prosecution.—First, it has been discovered, that whenever a *pistol goes off*—*death* is the *sure consequence;* notwithstanding congress have been stupid enough, to make provision in the very next clause of this act, for a case of shooting at the driver, where no death ensues: (the very circumstance, we suppose, which should exist here) and secondly, that whenever it happens, that one is *actually* killed, it is perfectly clear, *he has never been in danger;* because "danger or jeopardy imports *uncertainty,* and death here is a doleful *certainty;*" as if jeopardy of life had not in all cases necessarily preceded the actual privation of it! And hence the learned gentleman argues, that as it is difficult to conceive how *danger* is *increased* by *snapping a pistol*—(for he cannot conceive, it seems, that if it goes off, it may only *wound* instead of killing,) but as the jeopardy is not *enhanced* by *snapping,* he would have *danger* begin, *before* the snap: and as I suppose also, *before* the pistol is charged, for that cannot be at all *essential,* since it is not to be fired—the *lock* surely, must be useless, as it is not to be snapped—and as the *barrel* cannot be dangerous without the lock—the apparent pistol may in truth be a *tinder-box,* and still a very *dangerous weapon* according to the learned gentleman's facetious reasoning.

The real question here gentlemen, is not between *certain* and *uncertain* chance, as has been represented:—but between *danger* and *no danger:*—between *risk actually existing,* and merely *seeming to exist:* when in fact, there was *no risk* at all.

But 2dly, we are told that *jeopardy,* imports only *apparent* and not *real* danger.—Such apparent danger as may be supposed to create a well grounded fear in a

courageous mind.—Sometimes indeed the gentleman appears to consider *real* danger essential to constitute this crime, for "dangerous weapons, he says, were required by congress, as *evidence* that the *danger* was *real.*" But then again, he says that "nothing more is requisite to constitute *this species of robbery*, than that the *danger* should be *apparent*—and the weapons appear to be well calculated to take life:—for that proof of dangerous weapons is *only important* to show *fear* to be *well grounded.*" So that according to this reasoning—although the *crime* is compleat by *apparent danger*, yet congress have required *proof* of weapons, as *evidence* of *real danger*, and as weapons are essential only to show a *well grounded fear*—it follows, that proof of *apparent* danger is not sufficient *evidence* of the crime, although the offence consists in *apparent* danger—For weapons must be proved to show well grounded fear—and if proved, they show the danger to be *real* and not merely *apparent.*—These different positions of the learned counsel can only be reconciled ont he *assumption*, that *apparent danger, well grounded fear, and real danger*, are one and the same.—Or in other words, that *reasonable fear* or apprehension of danger, *cannot* exist in the breast of a courageous man, without *actual peril* to awaken it.—How is this? Are *apprehension* of peril and *actual* peril convertible terms? A passenger in a leaky vessel; a sick man languishing under disease; or a traveller at night, waylaid by an assassin, may severally be in imminent *jeopardy*, without the least knowledge or *apprehension* of the danger: so on the other hand, one unaccustomed to the sea—unused to sickness—or to travel by night, may be exceedingly *fearful*, without any just cause of alarm; so that fear may exist without

danger and danger without fear—How then can one be the measure of the other? Again—danger may be *apparent* to a *daring* man, without inspiring fear—while the same danger may excite a *well grounded fear* in the breast of a truly *firm* one—So that *well grounded* fear, is no criterion of even *apparent* danger. But to aid your enquiries on the question of *jeopardy*, one of the learned counsel has very obligingly favored you with a legal *quadrant* of his own invention, to enable you to take the precise *altitude* of danger, and ascertain, if it be high enough in any given case, to bear a *well grounded fear;* and that is by taking the *degree of courage.* This is certainly an admirable plan; much better than that which the prisoners' counsel had credit for, of taking the *angular direction of the weapon:* because the difficulty which the learned gentleman started of measuring angular distances accurately in the dark, would I am afraid operate very considerably against the utility of that invention; but there can be no objection of that sort against *his* new *legal horoscope;* for the qualities, humours and nervous temperament of the man robbed, can be ascertained precisely, as well in the dark as in the light, and the *self same act* on the part of the robber, may thus have two *different degrees* of *guilt* readily annexed to it, besides one of *innocence*—Thus if it should happen, that of three travellers, two were of undoubted courage, and one of *tried* cowardice—the same circumstances might operate differently upon each. They might alarm *one* of the *courageous* men, who of course has a *well grounded fear;* while the other, who has more hardy nerves, perceives the *apparent* danger, but it awakens no *apprehension* in his breast.—The money of both, indeed is taken—but only *one* of these, can be said to be *rob-*

bed; and as to the third—though he should see as many horrible and ghastly sights, as Tam O' Shanter, and quaking with terror, surrender his purse—this clearly is no *robbery,* because *these* are the *groundless fears of cowardice.*—Thus, gentlemen, you can hereafter discriminate with the utmost precision, whether life was in jeopardy or not.—You have only to put a very simple but pungent question to the witness, which may quite as well be put in the dark, as in the light; it is simply this, whether or no, he deems himself a *coward!*

This accounts for the extreme anxiety, exhibited on the examination of Mr. Ludlow and the carrier, to extort from them testimony, not only that they were *put in fear*—but that *life was in jeopardy*—as if Mr. Ludlow and the driver, were to *judge* for *you* on this fact, which is charged in the indictment, and on which you are sworn to pronounce truly according to all *the circumstances now proved!*—Possibly they might judge as well as any other bye-standers here, but Mr. Ludlow being a lawyer, protested against the question, no doubt, because he knew *you* were to decide from *all the facts actually existing* in the case, and not from his *opinion* respecting bare appearances, which merely *seemed* at that terrible crisis to exist. I was surprised to find the learned counsel opposed to us, so pertinacious in this enquiry, as to call for the compulsory power of the court against the witness—when according to their own principles, enough for their purpose had already been proved by him: because both Mr. Ludlow and the carrier, had before been explicit as to the *apparent* danger, sufficient to lay a *well grounded fear.* They had proved the *robbery* most clearly—why then press them further to prove *jeopardy of life,* if in truth, *apparent* danger is all the law requires to prove this *jeopardy.*

It has indeed been very *apparent* throughout, that the attorney general has entertained a *well grounded fear*, that he should not be able to support this case by proof of *jeopardy*, although the law requires such proof, unless he could confound the two crimes of the act, and thus let in the feverish fears of the carrier as proofs of *jeopardy*. He therefore resolved at the outset, to rest the prosecution upon the broad assumption, that *congress had not intended, to create a new kind of robbery, unknown to the common law;* and that *there is nothing in the descriptive circumstances of this offence under the act*, to distinguish it from the highway robberies, once so common on Hounslow Heath and Bagshot. If he should succeed with this position—he would of course confound *apparent* danger with *jeopardy*, and both with *well grounded fear:* for nothing is more certain in the law, than that *jeopardy* is not essential to constitute robbery at common law. It is enough that *apparent danger* exists, such as would be likely to awaken fear in men of ordinary firmness. Thus robbery may be perpetrated in England, as well by a painted piece of wood resembling a pistol, presented at the breast of a benighted traveller, and his fears will in the eye of the law be quite as well founded, as if dirks or pistols were used. And I challenge the learned counsel to show a single case at common law, where *jeopardy* or *danger* is *required.*—The bare spectre and shadow of danger is enough to constitute that offence in England, for reasons which I shall mention presently.

In order, however, to support this broad doctrine, that congress did not intend to create a *new* offence, *three more* subtle distinctions have been produced, by which it appears, that all common law robberies are divisible into

three classes: all three of which, it seems have been introduced into the first clause of this very comprehensive statute, by the general word *'rob,'* and punished with ten years imprisonment; and afterwards one class, of peculiar malignity, has been taken out again to be punished with death. Yes, gentlemen, it is insisted in effect, that although congress by the first *clause*, declare their conviction, that *all* common law robberies are *equally* atrocious and merit *equal* punishment—yet by the second clause, they tell us they have changed their minds and have concluded on more mature reflection, after the first clause was penned, that really one of the classes in that clause mentioned, is so atrocious, as to deserve a little more punishment; but as they have already limited the imprisonment for *all* kinds of robbery to ten years—it would look like a contradiction to extend *this* species of punishment any further—and therefore to be consistent, after the ten years have run, instead of *superadding* time, by way of punishment for this class, they have resolved to cut it short, by death!

Admitting for the present, that congress have been guilty of annexing two distinct punishments to the same identical crime, in the same sentence, which must be so, if the position on the other side be correct—because the second clause does not necessarily repeal the first: admitting this, I say for the present—let us now examine the three distinct classes of common law robberies, which have been mentioned. These are: 1st. Robbery by violence, without putting life in danger, and without previous fear: which was happily illustrated by Lapier's case of a ring, torn from a lady's ear:—2d. By fear of reputation—excited by threats of prosecution for infamous crimes—3d. By fear of personal violence: provid-

ed this fear is well grounded: and not the groundless fear of cowardice.—And this *third* kind of robbery, it is said, was in the contemplation of congress, in the sentence under consideration.—Now conceding these distinctions to be well founded—would it not be a singular discrimination for congress to make, between these three kinds of robbery—and while they punish the *two first* species, with *ten years imprisonment*—inflict *death* upon the *last*.—What more direct and palpable inducement could they offer to the villain, to be cruel and unsparing? If he only excites *fear* of *personal violence*, and stops here, it is *death:* but if he proceeds to *blows*—to *actual violence*—and maims his victim—he fairly brings his case within the first class of simple robbery—provided, nevertheless, that he comes *from behind*, and strikes warily, without giving notice, lest *fear should be excited.* and with these meritorious circumstances in his case—he need not fear the halter, it is only ten years imprisonment, at the most.—A bare *assault* will cost him his *life*—but an assault and *battery*, only *imprisonment*.—Besides, if these distinctions are correct as laid down—*jeopardy of life*—is not embraced as an essential circumstance in either of the three classes of common law robberies—from the *first* class it is *expressly* excludedin terms—so that if *actual* violence be used to a degree that *endangers life*—it is not a robbery of *this* description; no, nor if the *actual* violence used, shouldput the man robbed, in *fear of losing his life*, because no fear at all must exist, to bring it within *this* class.—From the *second*class it is excluded, because that is confined to jeopardy of *character*—and to the third class—*jeopardy of life*—(even admitting the *fears* of the person robbed, to be the crite-

rian) is in no way *essential*—because it is *enough*, that he has fears of *any*, the *least* personal violence—even of a tweak of the nose—to bring the robbery within *this* class.—True, it must be a rational *well founded fear*—and not the groundless fear of cowardice.—But I suppose, if the robber should appear to be a strong and resolute man, not likely to threaten where he did not mean to execute, and should actually *swear* he would proceed to *this indignity*, if the purse were not surrendered; this would be sufficient to establish a well grounded fear of the personal violence threatened; even such fear as the bravest man might very *reasonably* entertain.—So that *jeopardy of life* or even *fear* of such jeopardy, is not essential to constitute a *common law* robbery, according to these distinctions—or in any way important to be proved.

Neither, secondly, according to these, is *the use of dangerous weapons essential* to be either charged, or proved to constitute a *common law* robbery—To the *first* class, these are not essential, as appears by the very case stated to illustrate it, where no weapons at all were used or displayed.—To the second, they cannot belong, for that relates to character: and to the *third*, they cannot be in any way *important*, since we have seen that any threatening *words* or *attitude* may as reasonably put the party in *fear* of a *personal violence*, of *some* sort—as the *use of dangerous weapons;* although the *degree* of violence to be apprehended may not be quite so great without, as with them—but the *degree* is not material—because *any* personal violence *reasonably apprehended* is sufficient to bring the case within *this* class of robberies. If then, neither *jeopardy of life* nor the *use of dangerous weapons* were necessary to be

charged or proved on a trial for *common law robbery of any kind*, as was very truly admitted by these distinctions, and would be true still, if it were not admitted, and might be demonstrated from all the books.

If neither of these, I say was in any way essential, either to *complete* or *prove* the *crime* at *common law*.— How can it be insisted that congress have not intended to distinguish this offence in any of its descriptive circumstances, from the highway robberies once so common on Hounslow Heath and Bagshot in England? Congress have made the descriptive circumstances, jeopardy of life, and the use of dangerous weapons, *essential* circumstances to constitute that species of robbery which they intended to punish with death. These circumstances must therefore be stated in the indictment, like the other circumstances of putting in fear, or taking against the will of the owner—else the indictment would not warrant the punishment of death. The counsel for the prosecution very prudently did not deem it safe to leave them out. The attorney general himself, admits, that they are essential to be proved in evidence to make out the crime—and yet denies that they are such circumstances, as vary the common law crime, although he acknowledges these are not necessary, either to be stated or proved to complete a common law robbery.

Again, it is said the use of dangerous weapons is only important to show a *well grounded fear*—and the *danger* to be real—but, not to complete the crime of robbery.—To test this, suppose the robbers in this case, calculating on the disparity of strength, had repaired to the scene of action with only the rope which they used, to tie the driver to the tree, and displaying this, when they demanded the mail, had threatened to strangle the

carrier, if he did not surrender it. Will it be pretended, *that* would have made this species of robbery complete, by the use of dangerous weapons within the contemplation of congress? And yet the carrier would no doubt have been impelled by *fear* quite *as well grounded*—and his life have been quite as much jeopardised in that case—as in this, which happened—because it depended solely on the *will* of the robbers, whether life should be taken in the one way or the other, or whether it should be taken at all, or left entirely out of danger.

Again, it is said, in order to make this if possible a *common law* robbery, and thus make fear the criterion of *jeopardy*, or jeopardy consist in *apparent* danger; that the *first sentence* in this act clearly embraces *every* species of robbery known to the common law—that it covers and *merely covers*, the common law offence—and that the second clause which we are considering, is merely an *exception* from the first—and was *consequently included in it* until so excepted! A most extraordinary *exception* indeed, that is *included* in that from which it is *excluded.*—According to this, when divines tell us the *whole world* was swallowed in the great deluge, *except* one family—the orthodox belief should be, that Noah and his sons were drowned first, but resuscitated afterwards by virtue of the *exception.*—This is the second *word*, which has given birth to an argument. Having assumed, that when *all* robberies but *one* are punished with imprisonment, *that one* is also included, it is thence argued, that if the first sentence merely covers the common law offence, and the last clause only contains *exceptions* from the first, then it is clear, that these *exceptions* are *merely parts* of the *common law robbery*. The argument would be

perfectly sound on this postulate—provided, common law robberies of *any* kind *required* jeopardy of life, or the use of dangerous weapons.—It happens, however, that we have been favored with a complete classification of *all* common law robberies; from which it appears, conclusively, that neither jeopardy of life nor dangerous weapons were in any way *essential* to the *common law* offence. You perceive, therefore, that instead of being *exceptions* from a common law robbery—these are *additional* circumstances, which aggravate the guilt and enhance the crime beyond a mere common law robbery; so as really to merit a higher degree of punishment.

The second clause contains a higher species of robbery than the first, else it would not merit a higher punishment.—But the *first clause* confessedly includes all common law robberies.—I should suppose, therefore, it would be evident to every mind, that the crime described in the second clause including more than the first, is a new crime of higher degree, than a mere common law robbery—precisely as man-slaughter by stabbing, under the English statute of stabbing, is a distinct offence from common man-slaughter.—If so, what becomes of the doctrine of *apparent danger* or *well grounded fear* as proofs of actual jeopardy.

The whole argument on the other side is founded upon the idea—that *danger* is of the essence of common law robbery—whereas, it is only one mode of perpetrating the crime.

The *essential feature* of common law robbery, is *constraint on the will*—No robbery is compleat *without* it—and *all* taking of property from the person is robbery *with* it; in whatever manner it may be perpetrated, whether by violence—or fear—with weapons or with-

out, with danger or without—whether danger be real, or only apparent, and extends to life—or to mere bodily harm—or to character alone. These subtle distinctions then, which we have been considering, are the offspring of pure ingenuity to suit this case, and to introduce the opinion of Mr. Ludlow, and of the driver, as *conclusive* evidence of actual jeopardy. It is the only proof indeed, of jeopardy, which the case affords.—Those are merely the *various modes* of perpetrating the crime, and it would have been just as easy to have made fifty classes of common law robberies in this way, as three.

Robbery, at common law, as I have said already, consists in taking the property of another from his person, *by constraint on his will.* This constraint is usually produced in one of two ways—either by actual violence *on the person,* which may afford such palpable evidence of constraint, as to supersede the necessity of all further proof—As where one is knocked down without notice, and his pockets rifled. Or by the *pressure of terror operating on the mind alone,* without touching, or any intention to touch the body—and *here,* the fear must be well founded—not the idle vision of a distempered brain.—But the enquiry in this case is very properly made of the party, whether he was put under constraint or not. Either of these modes will make robbery—but there is no enquiry in either, whether constraint was induced by the use of weapons—nor whether life was in danger. It is sufficient that *constraint* is proved in any way. This is the common law robbery embraced in the *first* clause of the act of congress. This is also included in the *second* clause, and therefore the indictment charges, *well*

grounded fear in *all* the counts—But the *second* clause goes further—It not only requires *constraint,* but that it should also be accompanied with another fact, *viz. danger.*

To bring the case within this clause—1st. It is not enough, that life is in jeopardy from the nature of the transaction and the lawless character of those engaged in it: for that is common to *all* robberies—nor that the taking of life has been in the *previous* contemplation of the robbers—as was here confessed by the prisoner—because that design might be changed before they arrive at the spot; nor, that there is even an *existing* purpose to take life in the *mind* at the *very time* of the transaction: nor, that such purpose is manifested by *threats.*—Nay, they may even go so far as actually to *attempt* to take life, and if done in any other way; as by strangling or drowning—jeopardy of life is not yet completed within the act of congress. The *present* purpose *to take life* must also be accompanied with the *overt* act, of using dangerous weapons to accomplish such purpose: else the felonious *intent* will not concur with the felonious *act*—which is punishable with death.

Again, 2dly. It is not enough that the weapons should be *dangerous*—or well calculated to take life—but they must be *used:* and so used too, as not merely to operate on the *mind* by inspiring terror—but to create *danger.* They must be used for the *purpose* of putting life in jeopardy—of course, for the purpose of inflicting *great bodily harm* at the moment they are used—because using them so as to jeopard life, imports a design to use them for some *further* purpose, than merely to *inspire terror*—and if used merely to create *alarm,* with a view to operate on the *mind* or *will* alone, and not upon the

person, it is evident they are not so used, as to create *danger*, or peril of death—because mere *fright*, seldom if ever, produces death—at least, I think you will not believe this act of congress, was intended to guard the carrier from being *frightened* to death—for then a hideous mask might be a dangerous weapon.

We are brought then to this simple question of fact. Did the robbers *intend* to assail the *person*, or only the *mind* of the carrier, by the use which they actually made of the weapons? That the weapons had *any influence* at all, in *effecting* the robbery may well be doubted. The driver swears expressly, that he did not see *any weapons*, until *after* the robbery *was effected*—until *after* he had come down from the carriage and surrendered the mail—your enquiry is *confined* to the *carrier*.—The state of Mr. Ludlow's mind or person is altogether immaterial. The carrier declares the robbery to have been effected *altogether* by the *lauguage* of the robbers; and that the mail was surrendered by him before he knew, whether what they said was true or false—It turned out to be *false*, for they were not armed in the manner they wished him to believe—they represented the pistols as *double barrelled* and he believed them so; a strong collateral proof, that he did not in truth see the weapons, when he abandoned the mail—and here let me remark, that if you believe the carrier's testimony, on this point, you cannot convict on the higher robbery—because the act requires weapons to be used in *effecting the robbery* and you might as well have convicted this prisoner of that crime, if on his return to Philadelphia the next day, instead of taking the steam boat, he had travelled back the same road, and finding the carrier still bound to the

carriage, had plunged the dirk into his heart for the purpose of concealment.

But admitting that pistols and dirks were used *in effecting* the crime, let us next enquire, for what *purpose* they were used? With what design? Was it to *take life*—to inflict great bodily harm—and in this way to obtain the booty? If so—the carriers life, no doubt was in imminent jeopardy; because it was threatened by those who had both the *means* and the *will* to take it. But if either the *will* or the *means* were wanting, *life* was in *no peril*—because it could not *possibly* be taken unless *both means* and *will* should *concur:*—danger of life, if any existed, arose from its being in the *power* of those who *intended* to take it.—Its being in their *power*—clearly does not constitute *danger* within the act, if there be no *intentian* to make use of the power. The life of my friend here, is in my power, as the dirk is within my reach—but he apprehends no danger, because he knows, *that* must grow out of my *intention,* to use the power to endanger, or take his life.—If the weapons on the other hand were used, not for the purpose of taking life, but for the sole purpose of inspiring *terror:*—not to injure the *person,* but to paralize the *mind,* and thus to ascomplish their object, *then* it is evident, that the *will* to take or endanger life, was wanting here—although the *means* were in the hands of the robbers.—And the want of *will,* affords as ample security to his life, as the want of *means.* It cannot *possibly,* in the nature of things, be *taken* without the concurrence of *both,* where the *means* are *subject,* as in this case, to the absolute control of the *will.* How then can it *possibly* be *endangered,* where it cannot *possibly* be *taken?* The same means it is true, might have served

the double purpose of striking terror upon the mind, and *taking life* also, *if used for both*—but if used for only *one* of these, will it be pretended, that they must necessarily accomplish *both*. If then, you should be convinced, on reviewing the several circumstances proved here, which I need not recapitulate, that the *purpose* of using the pistol or dirk, was merely to *inspire alarm*, and *not to take life, when it was presented*, you cannot possibly arrive at the conclusion, that life was *then* put in danger.—And if not *then*, at what moment was it in jeopardy, either before or after? I should suppose, indeed, that since the event is known, no one could believe, that the carriers life was *really in danger*—for if so, what *saved* it? If it were not the *intention* of the robbers to *save* it, what hindered them from *taking* it? And if they did not *intend* to *take* it, as they had the entire control of the weapons—life was never in *danger;* because, whether in *real danger* or not, depended on their *intention* to take life.

But here we are met with the testimony of Mr. Bache, who exclaimed on hearing *Alexander's* confession, 'surely you did not intend to take the carrier's life;' and the prisoner replied "we certainly should have taken it, *if he had resisted*." This, no one can doubt, was a faithful exhibition of the real design.—The robbery of the mail was to be accomplished at all events—compulsion of some sort would unquestionably be necessary—for voluntary compliance could hardly be expected. Two modes of compulsion present themselves; first, *intimidation*—by which the mail might be surrendered on the hope of preserving life—and this, no doubt, appeared most eligible, if it could but succeed—for the object might then be accomplished without dipping hands in

blood.—But possibly *this might fail*, and what course should be taken *then*.—They resolve *in that event*, to resort to the other mode of compulsion, *viz*. the use of actual force to take life:—but it was more than probable, that this would not be necessary.—They, therefore, fix on the resolution to try the *influence* of *terror* first, and to *suspend* the other, until after they shall have arrived at the scene of action, and by actual experiment have ascertained that *terror* will not answer the purpose.—So long as the purpose to take life remains *suspended*, it is clear, that life cannot be in danger—because the *suspension* shows, that taking all things into consideration which now appear, they have determined, *that it shall* NOT *be taken or assailed*:—but a future emergency *may* arise, which may change this present design and give birth to another—and *that* they have resolved shall depend on the *will* of the *driver*; but it depends no longer on their own free choice—because *their* choice is fixed on the milder course.—This is not a *conditional* purpose to take life, as has been supposed—but an *absolute* purpose on the one hand to strike *only* at the *mind*, and on the other, an absolute purpose *not* to strike *at the person* all things considered—because at present it seems to be quite useless. It will be soon enough to form that design, when it shall appear to be *necessary*—until then, it is *deferred*.—In this state of mind, they leave Philadelphia—they arrive at Havre-de-Grace—they try the experiment:—*it succeeds*. Their calculation was right, and the time *never* comes where it *is* found necessary to *alter* their *first purpose* and *resort to force*—when the weapons need be used to *endanger life*.—Presentation of a pistol, is in all the books, considered merely as a compulsory *threat*. (1 East. 416, 2 East. 719)—It

shows a determination to deprive another of his free agency and liberty of choice, as to the thing demanded—but nothing more.—The only actual design at the moment, was to strike terror, and every thing conspired to aid it. The solitude of the spot—the hour of the night—the awful gloom of a thick forest—the terrible surprize—the mysterious visage—the disparity of strength—the tone of preparation—the blunt avowal of *such* a purpose; and withal, the display of deadly weapons, "where it was useless to contend, and impossible to fly;" were all calculated to quell the stoutest heart, and wilt the energies of the bravest soul.—But all this machinery still produced nothing more than *the pressure of fear*, and the effective weapons used, were after all, like those which tortured Macbeth, *"the mere coinage of the brain—the daggers of the mind."*

But, say the gentlemen on the other side, "the danger was only to be avoided by a surrender of the mail!" What then?—It is still *avoided*—and to *threaten* it, only shows a fixed purpose to commit the *robbery*. But, they exclaim with uplifted hands, "this is a most unrighteous and unhallowed condition on which to suspend the carriers life!" Be it so—for we certainly shall have no dispute about the *equity* and abstract justice of such conduct—but is it less a *suspension*, because it is unlawful.—If proposing such terms, manifested a determination to *compel* the surrender of the mail, it manifested no less, a determination to suspend the use of any other means to accomplish it—until the result of the proposition could be ascertained.—The very *delay* to take life, shows that the design to take it, is not yet ripe, but waits the issue of something else:—for if they designed to take it—why was it not taken? All that we

ask gentlemen, is simply this, that you will not convict the prisoner of an act, that he never *intended* to commit. *Intention* must concur with every *act* to make it criminal, and we trust the evidence will convince you, that the prisoner never intended to put the carriers life in jeopardy, by the use actually made of weapons upon this occasion.

Mr. M. here recapitulated the several positions he had attempted to refute, and those he had advanced, and concluded with some remarks upon the probable consequences of inflicting capital punishment, in such a case as this.

WILLIAM WIRT, Esq.*

Mr. Wirt had not intended, to address one word to the jury—he had no inclination to put their precious time in *jeopardy, by the use of* that *dangerous weapon*, the tongue. He was rather too old to speak *for display*, and too humble to hope for success, if he should attempt it—as to the multitudes who have been said, to have hung in transport on his tongue, he had the mortification to acknowledge, that if such multitudes ever existed any where, but in the imagination of the young gentleman, who had made the remark, they must have been easily transported, indeed. For my own part, (said

*Mr. Wirt, for satisfactory reasons assigned to the publisher, declined writing this speech out at length. The publisher was, therefore, left to make *this imperfect sketch* from his own notes, which he submitted to several gentlemen of the bar, who heard it delivered; and they were so good as to revise it.—Ed.

Mr. Wirt) I have never seen them, and after I have made but a few observations, those who hear me, will readily discover the remark to have been altogether unfounded. The gentlemen have told you, that they are volunteers in this cause, and if the honor of volunteers is to be measured by the desperation of the cause, in which they embark, the gentlemen deserve as rich a wreath of laurels, as ever graced the brow of the bravest of the knights of Malta. One of the gentleman had paid a compliment to his understanding, at the expense of his sincerity. Mr. Wirt, was Frenchman enough, to thank the gentleman, for the bright side of his remark, but he must take leave to disclaim the other. In a case involving life, Mr. Wirt observed, he was not disposed to do violence to his own feelings, in the discharge of official duties, nor was there any official duty in the case, which called for such a sacrifice. He was the agent of government, it was true; but of a government, not disposed illegally to take the life of an individual. The case before the jury, Mr. Wirt contended, was a most atrocious one. The jury should consider themselves the trustees of the lives and property of the community on the one hand, and of the life of the prisoner on the other—all considerations of feeling, therefore, were at least balanced: and the case was left to rest where their oaths had placed it—*on the evidence*. If the testimony does not cover the case, the jury were bound to acquit the accused. If it does cover the case, their oaths, and their duty bind them to find him guilty. Mr. Wirt observed, that one is never too old to learn something new—such he found to be his case in the present instance. He had always understood, and wherever he had practised, he had found

it to be so understood, that the judges of a court were the judges of the law, and were to instruct the jury upon the law.—Certain it was, there was no more perplex and obscure science in the world; one, for the accomplishment of which, the lucubrations of twenty years were required, and then the student was but a sciolist in his profession—for instruction to the jury on the law, he had always been in the habit of applying to the court; for this, the court (generally composed of men learned in the law,) was instituted. He was surprised to find in these cases the gentlemen had adopted a course of proceeding, altogether without precedent. On Saturday, the gentlemen addressed the jury through the court; to-day, they have reversed it, and have addressed the court through the jury; but Mr. Wirt presumed every thing is allowable in war. Mr. Wirt said, that he would now enquire, whether this case came within the latter clause of the law, so as to make the offence capital. He observed that the prisoner's voluntary confession was good evidence against himself. He enquired what was this case? It appeared by the confession of the prisoner, that this affair was planned in Philadelphia, to rob the mail, and if necessary in effecting it, to take the life of the driver—they arrest him on the highway—proclaimed themselves "highway robbers, armed with pistols and dirks."—Is it asked if they meant to use them?—The prisoner answers the question in the affirmative. These are, in brief, the facts—and unable to assault this fortress of facts, the gentlemen have directed their battery against the law. How do they do it? By addressing the court—no—they do not choose to take that course—they prefer addressing the jury on the law—they purposely turn from the

court and address the jury upon the law in the case. Mr. Wirt asked the jury, if they would consult a carpenter, upon the best style of a cotillion, or a dancing master, on the building of a house; if either of the gentlemen of the jury wanted a legal opinion, would they go to the merchant or the farmer, or would they, on such an occasion, as the present, resort to any other source of information, than the bench, legally and constitutionally organized to advise them; they would not apply to him, or the gentlemen concerned on the part of the prosecution, nor to the gentlemen engaged for the prisoner—because *they* might be considered as interested, and not impartial. But they would seek the opinion and instruction of the bench, specially constituted to expound and execute the law of the land. The gentleman first up, had paid a compliment to the legal understanding of the jury, to whom he had explained the law in the case, in the *Spanish*, the *French* and the *Latin languages*. He would endeavour to do it, in *plain English*, he deemed it the best. The gentleman contend, that the present case is not robbery at common law, and they admit the first clause of the section, covers the common law description of robbery. When a term is used in our statutes, which is not explained, and which is a common law term, we must resort to the common law, to explain its meaning. The second clause the gentlemen contend, does not belong to the common law description of robbery. Mr. Wirt desired this clause to be considered as merely *an exception* from the *first* clause of the section, which unquestionably was a statutory provision founded on the common law description of robbery. MR. WIRT read the section. (see page 91.)

If the first clause of this section covers the common law, the second must likewise.

Mr. WIRT, then proceeded in his argument on the law, very much in the same manner, he had done in his address to the court, in the previous trial. He described robbery at common law—

1st. *By bodily force or violence without fear.* Such as the case of the ear-ring, taken by violence, (page 92) or a purse suddenly taken by force.

2ndly. *By fear for reputation,* such as extorting property from the party, by a threat, to accuse him of a crime which would affect his reputation.

3dly. *By fear on the presentation of deadly weapons.*

This last requires *a well grounded fear,* not that of a coward—this is the case which congress intended to meet. Weapons, dangerous weapons, were necessary, to test, that *the fear was well grounded.* In this case they were used, to the effect of accomplishing the robbery of the mail. Did they put the life of the driver in jeopardy? Mr. Mitchell says they did not. Has not the carrier told you, he considered himself in danger, from the beginning to the end. It is *that* fear, arising from the exhibition of dangerous weapons, precisely, what is meant by the act. The design of congress was to cover every possible case. Here Mr. Wirt, recapitulated what he had said in the former trial, (see page 98 and 99.) He then observed, that the mail was public property; it belonged to the whole community; it goes to relieve the wretched; to bear comfort to the afflicted; to aid the merchant in prosecuting his commercial concerns, &c. &c.

The jury were the faithful trustees of the public rights; it belonged to them to regard those rights as well as the rights of the prisoner.

Mr. Wirt was not disposed to speak for the purpose of *exhibition*, and as he had said all that belonged to the case, he would say no more; he would no longer detain the jury.

Mr. Wirt closed by making some general observations on the nature of our republican government and its institutions.

The court charged the jury as in the former case, and after having retired about one hour and an half, the jury brought in a VERDICT, *guilty on all the counts in the indictment.*

Tuesday, May 12.

UNITED STATES, *vs.* Lewis Hare. } Indictment, page 12.

Counsel, the same as in the previous trial.

After several of the jury were sworn, Mr. Wirt, (the attorney general) suggested to the counsel for the prisoner, that on account of his youth (being about twenty years of age) it was not desirable to convict him on the first counts in the indictment, which made his crime a capital offence, and that he was disposed to enter a *noli prosequi* on these counts, if he would plead

guilty to the last count which would subject him to an imprisonment for ten years. It was doubted by the late attorney general of Maryland, (Mr. Montgomery) whether this proceeding would be regular, and whether the attorney general in Maryland, had a right in any case to enter a *noli prosequi*. An admission of *not guilty* on the two first counts, by the counsel on the part of the prosecution, and a plea of guilty on the third count, to be entered by the counsel on the part of the prisoner, was then suggested as a course of proceeding. To this arrangement the district attorney, (Mr. Glenn) was disposed to yield, provided it met the approbation of the attorney general. Mr. Wirt observed, that he was unwilling to *admit* the innocence of the prisoner on either of the counts, though he was disposed to enter into any arrangement in a legal proceeding, which would not subject the prisoner to the punishment of death. As difficulties and doubts had been suggested on the course of proceeding, he preferred the good old way of a trial by jury, and in case he should be found guilty, he pledged himself that no exertion or influence on his part should be withheld, to obtain from the president of the United States, a pardon, on the two first counts in the indictment, leaving with the court to pronounce a sentence on the last count according to the act of congress. Any other course of proceeding, Mr. Wirt observed, might invalidate the judgment of imprisonment for ten years, as prescribed by the act of congress, and this he deemed it his duty to guard against. Should he be convicted on all the counts, and the court should suspend their judgment for three days, he had no doubt he would be able to procure from the president his pardon on the first and second counts in the indictment.

JURY SWORN—VIZ:

Jos. Frost,	Robert W. Holland,
Wm. H. Allen,	Robert Casey,
Jno. Henderson,	Jos. Jones, of Jos.
Joshua Stevenson,	Jno. Moones,
Baptiste Mezicke,	Nathan Levy,
Jas. Cochran,	Wm. Young.

Mr. Boyer, the driver of the mail waggon, Mr. Ludlow, Mr. Rhoades, Mr. Dumas and col. Bentalou, the Marshal were *sworn*, and severally gave a brief statement of facts, which were more particularly detailed in the previous trials. Mr. HOFFMAN made a short address to the jury, to urge them to find the prisoner guilty only of the last count in the indictment. MR. WIRT replied, in order that the court and jury should be under no mistake relating to his own conduct in connection with this trial—his opinion was not changed as to the disposition to be made of the prisoner, and he considered that justice would have been better answered by the regular arraignment of the prisoner at the bar, and trial in the correct course; this appeared to him the most safe mode of proceeding, inasmuch as the gentlemen of the bar differed upon any other course of proceeding. I therefore, said Mr. Wirt, preferred the case going before the jury. He did not deem it necessary to make any further observation on the subject; the jury would decide upon the testimony they had heard.

The jury retired a short time to their chamber.

VERDICT.—*Guilty on all the counts in the indictment.*

After the verdict was recorded, Mr. HOFFMAN addressed the court to the following effect:—stating,

That upon the first visit of the counsel, to the prisoners, shortly after they were committed, they induced them to deliver all the money then in their possession; this was concealed and sewed in their wearing apparel; it amounted to eighteen hundred dollars, and was immediately handed over to George Winchester, Esq. a respectable member of the bar, to be by him deposited in bank, till after the trial. That sum was now subject to the order of the court. None of the counsel for the prisoners had received, or expected to receive, or would receive one cent from them for their professional services—that they had zealously undertaken the defence Mr. H. added, because they *conscientiously* believed that they were not guilty of a capital crime, upon a fair and legal construction of the act of congress.

Circuit Court of the United States, Fourth Circuit District of Maryland.

The UNITED STATES, *vs.* JOSEPH THOMPSON HARE.	Indictment for robbery of the mail of the United States.

And now the prisoner *Joseph Thompson Hare*, within four days after the trial, moves the court in arrest of judgment, and prays the court that no further proceedings be had against him in this case, and for reasons, assigns to the court the following:

1st. Because it appears, on the face of the said indictment, that the offences charged upon the prisoner are charged against the act of congress, passed A. D. 1799, entitled "an act to establish the post-office of the United States," if any, and not against any other act; and by the 28th section of the said act, jurisdiction is given to the judicial courts of the several states, having cognizance of prosecutions, where the punishments are of a great extent, by the laws of such states over all offenders against that act; and it is further provided, in the said 28th section, that such state judiciary shall take cognizance of all offenders against that act and proceed to judgment and execution as in other cases—And because the circuit court hath no concurrent jurisdiction, with the state courts, over crimes and offences against the United States of this description—but such jurisdiction belongs exclusively to the state courts.

2d. Because in the first and second counts of the said indictment, the offence is not laid in the words of the act creating the aggravated robbery, the punishment of which is death—and because a material averment is altogether omitted in both the said counts—viz. That the said weapons were used and the life of the said *David Boyer* put in jeopardy, in *effecting the robbery of the mail*, therein set forth—and because material and traversible facts in the said first and second counts are laid without a proper specification of time and place, and without a proper *venire*.

3d. Because the said indictment is in many other respects substantially defective, insufficient and informal in all the counts thereof.

4th. Because it appears to the court from the record and entry of the clerk and otherwise, that the arraign-

ment was irregular and illegal, in as much as the said arraignment was first made on the same day the indictment was presented by the grand jury, to the court, and filed—and the final arraignment upon which the said prisoner has been tried, was made the day next succeeding the filing of the indictment, and before any copy thereof could have been in the possession of the said prisoner two days according to the act of congress; on which arraignment the prisoner then objected to plead as by law he had a right.

5th. Because the *venire* in this case, and other process, and proceedings by which the jury were summoned, and impannelled are irregular and illegal—and because the trial and proceedings were irregular and not warranted by the laws of the land.

JOSEPH THOMSON HARE,

By his counsel,

Hoffman, Finley and Mitchell.

TUESDAY, May 12, 1818.

The counsel did not urge the motion by an argument, and the court briefly assigned their reasons for overruling the motion.—The prisoners were placed in the bar, and *Joseph Thompson Hare* and *John Alexander*, were sentenced to death.—*Lewis Hare*, having received the pardon of the president of the United States, on the two first counts in the indictment, was on the last count sentenced to ten years imprisonment.

Philadelphia, June, 1st. 1818.

TRIAL OF WILLIAM WOOD.

REPORTED FOR THE FRANKLIN GAZETTE.—EDITED BY

RICHARD BACHE, Esq.

UNITED STATES *vs.* WILLIAM WOOD.	Indictment for having aided and abetted in the robbery of the mail, near Havre-de-Grace.

THIS trial came on this day, in the Circuit Court of the United States, for the eastern district of Pennsylvania, before B. Washington, esq. president, and R. Peters, esq. associate judge. The prosecution was conducted by C. J. Ingersoll, esq. district attorney, and the defence by Z. Phillips, esq. who was appointed for that purpose, by the court.

MR. INGERSOLL, opened the cause to the jury by detailing the facts that would be given in evidence, and concluded the opening by reading the law, on which the indictment was founded. It is contained in the 19th and 21st sections of the act "regulating the post-office establishment," passed April 20th, 1810— "That if any person shall rob any carrier of the mail of the United States, or other person entrusted therewith, of such mail, or of part thereof, such offender or

offenders shall, on conviction, be imprisoned not exceeding ten years; and if convicted a second time of a like offence, he or they shall suffer death; or if, in effecting such robbery of the mail, the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy, by the use of dangerous weapons, such offender or offenders shall suffer death."—Section 19.

"That every person who shall procure, aid, advise or assist in the doing or perpetrating of any of the acts or crimes by this act forbidden to be done or performed, shall be subject to the same penalties and punishments as the persons are subject to, who shall actually do or perpetrate any of the said acts or crimes, according to the provision of this act."—Section 21.

MR. INGERSOLL then offered the record of the conviction of *John Alexander* and *others*, who were the principals in the mail robbery, and who were convicted at Baltimore.

MR. PHILLIPS objected to this conviction being received by the court, because there is no attestation of the presiding judge, that the certificate attached to the record, is that of the clerk; or that the seal is that of the court; or, that the record is in a legal form. Also, that the record is on three distinct sheets of paper, not attached or connected together.

MR. INGERSOLL.—If this were a state court, and this record certified from one county to another, as it is, would it be in form? That is the question; for the districts of the United States are part of the same coun-

try, and not foreign to each other. To require the certificate of the presiding judge, would end in nothing; for then you must go further, and get a certificate, if such a thing could be had, that he is a judge of the circuit court, which would be a difficult thing, as the judges of the supreme court are not commissioned circuit judges. Besides, the circuit judge does not appoint the clerk, and probably never sees his commission. All he knows is the acting of the clerk *ex-officio*, and possessing and using the seal of the court.

As to the second objection, Mr. Ingersoll observed, that the record is written in the same hand, and is connected in the matter from sheet to sheet, and there is nothing in it that can for a moment make the court doubt that it is not the entire record. It is for the court to say, from an examination of it, whether they believe it to be one record.

Mr. Phillips—This record is signed by P. Moore, and it is impossible for this court to know, judicially, that P. Moore is clerk of the court whence the record issued; he gives the only evidence, that he is a clerk, which the law will not allow. The danger of accepting a record of this kind, would be very great, and might lead to very serious frauds, for it would be an easy matter for a man to sign himself clerk, and step into the clerk's office when he was absent, and attach the seal to a certificate, that he was clerk. In executing commissions in *civil cases*, the greatest strictness is observed and required; and where the record consists of more than one piece of paper, every sheet is marked and numbered, and attached together. The same strictness should be observed in *criminal cases*, particular-

ly, where the life of the man is the forfeit, in case of conviction.

Mr. P. also objected, that it was not certified to be a full exemplification of the record.

THE COURT over-ruled the objections. As to the first objection, there is no law which requires such a certificate. The act of congress of the 26th May, 1790, (1 vol. 115,) does not apply to the records of the federal courts; and even as the records of the state courts, that act does not require a certificate of the judge, that the person attesting the record is clerk. It is sufficient in this case, that the seal of the court is affixed. Were it the record of a state court, the certificate of the presiding judge, that it was done in due form, would be necessary.

As to the other objection, it is by no means fatal to the evidence, although it is certainly improper to certify records in the way that this is, in sheets unconnected by some fastening. But if the court, upon inspection, is satisfied (as we are in this case) with the verity of this record, that is sufficient.

MR. INGERSOLL, then read the conviction of *John Alexander* and *others*, indicted for robbing the mail, from the record of the circuit court in Baltimore. He then called the following witnesses:

OWEN CHURCHMAN, *affirmed*—In consequence of information left at my counting house by Mr. Baily, I was going to see him; on my way I met *Wood*, the prisoner, and another (by the name of *Davis*) conversing together, I followed them down to Water-street,

Davis went into a slop-shop; I spoke to an acquaintance to watch *Wood*, and went into the shop to watch *Davis;* he showed no money, I went out and waited. I had not been out many minutes, when a boy came out of the slop-shop with a note, and went into Mr. Pritchett's store.—(the note was payable to the order of Churchman & Thomas) *Wood* also went into Pritchett's store; I followed him and the boy in; *Wood* asked the price of flour; I caught him, and sent word to have *Davis* secured. We took them to Mr. Baily's office, and thence to alderman Bartram's.—When I first saw *Davis* and *Wood,* supposing them to be the men described by Mr. Baily, I followed them, and saw a paper pass from *Wood* to *Davis.* When at the alderman's, *Wood* refused to give any account of the manner by which he became possessed of the money; he said he was an honest man. The alderman told him if he was honest, he would not refuse to give an account of the money—*Wood* replied—"If this answer will do, I found it (the note) near the market-house, in Callowhill-street." I assisted in stripping him, and found a pistol in a belt under his waistcoat.—He acknowledged giving the note to *Davis.*

A statement had been made by Mr. Ducker, (a broker) of the manner in which the note had been presented to him; he said that *Wood* had been two or three times at his office, and had sold him parcels of North Carolina money; that the last time he was there, he presented this note; (the one he was endeavouring to pass, and charged in the indictment) that he, Ducker, discovered it was payable to Churchman & Thomas, that it wanted their names to make it negotiable, and asked him whether he was one of the firm; he replied

that his name was Churchman, and that he was from Baltimore; that Ducker then said, if he was one of the firm, and would endorse the note, he would purchase it; that *Wood* seemed confused and walked out. *Wood* said, in the alderman's office, that all which Mr. Ducker had stated was correct, and acknowledged being in prison before, in Philadelphia, and in Baltimore.

Cross Examined—There were a number of persons in the office, about twelve or fifteen. I do not recollect any particular conversation about the robbery of the mail; if *Wood* was charged with robbing the mail, I do not recollect it, it must have been when I was not near enough to hear. I stated, that this note must have come from the mail, but I do not recollect any particular charge, that *Wood* had robbed the mail. He said he was in the city when the mail was robbed, and he brought a witness who swore that he had lodged with him on the night of the mail robbery, he then called himself *Alexander*.

Chester Baily, *sworn.*—I first saw the fellow to the pistol, at Havre-de-Grace. I went there on the 13th March, after hearing the mail was robbed. After the information I received from Mr. Ducker, I got a written description of *Wood* from him, and sent it throughout the city. Churchman came in a short time after, with *Wood* and *Davis;* I immediately saw that *Wood* was the man I had given a description of. We went with the prisoner to alderman Bartram's office; the first thing done was to search *Wood,* and the pistol was found on him; I observed to the alderman, that this was the match to the pistol found at Havre-de-Grace;

I sent for the pistol, it was forwarded by mail. *Wood* was asked some questions about the note, he said the note belonged to him, and not to *Davis*. I asked him where he got it, and if he got it honestly he would tell; he said he got his money as honestly as I got mine, and afterwards he said he found it in the street.

DAVID BELL, *sworn.*—I saw this note enclosed in a letter at Charleston, S. C. and put it into the post-office; it was directed to Churchman & Thomas. The endorsement is my father's. There were forty $100 notes enclosed in the letter.

JOHN DUCKER, *sworn.*—About 9 o'clock of the morning that *Wood* was apprehended, he sold me a $100 note on the State Bank of N. Carolina. At the middle of the day he offered me some other notes, about $57, for which I did not offer enough; I wanted 40 per cent discount. He said he must consult his brother; he stept out and then came in and agreed to sell me the notes; they were Somerset notes, of Maryland: I bought them; he then offered me this note; I asked him if he was one of the firm, he said his name was Churchman of Baltimore. I gave this statement before the alderman; *Wood* said it was correct, and the alderman entered his acknowledgment on the docket.

FURMAN BLACK, *affirmed.*—I am one of the keepers of the prison; some day last week, a gentleman called at the prison, and wanted to see *Wood;* I went to the cells with the gentleman to see him; the gentleman addressed him by name of *Wood* or *Alexander,* and asked if he would do him the justice to give him

an order for some money that was in the hands of Bartram. *Wood* observed, that he had nothing to do with the robbery of the mail, that the money he got exchanged, he received from *John Alexander*, and returned the proceeds to him; he then stated the money was found with *Alexander*, behind the looking glass, and it was the identical money which was the proceeds of the notes he exchanged for *Alexander*.

MR. INGERSOLL here read the following order for this money, which was signed by the prisoner.

I hereby authorise Mr. J. A. Isaacs to receive of George Bartram, Esq. the sum of three hundred and thirty nine dollars, fifty cents, which was found in my possession, and taken by the officer who executed the process under which I am arrested, and which were the proceeds of Mr. J. M. Patton's check* on the Philadelphia Bank, or if the said money should not now be under the control of the said George Bartram, Esq. I authorise any person who may have the control of it, to pay the same to the said Isaacs.

(Signed) WILLIAM WOOD.

May 27th, 1818.

Witness present, Seth Price.

*N. B. The notes for which Mr. Patton gave his check, were of the state bank of North Carolina, viz.

No.	Amount
No. 515	$100
1378	100
1212	100
115	50
	$ 350

No. 745 missing

Thomas Hare, *sworn*—About the 27th of February last, *Wood* and myself started from Baltimore; we arrived here the 3d or 4th of March, when we came here, I understood that *Joseph* and *Lewis Hare* were in the city; I found them—*Joseph*, at *John Alexander's*, and *Lewis*, àt a house near there. *Lewis* came down to *John Alexander's*, and they told me about this plot of robbing the mail, which was to be executed as soon as *Joseph's* feet got well, which were sore by travelling. I do not recollect whether *Wood* was there at that time or not. They asked me, if I knew who had pistols; I told them *Wood* had; I asked *Wood* to let them have his pistols; he refused at first, and then consented to lend them. These look like the pistols; they were brass barrels; I never had them in my hands but once or twice; I think they received the pistols the day before they started. Sunday morning previous to the robbery, *John Alexander, Lewis Hare, Joseph T. Hare, W. Wood,* and myself, started from *Alexander's* house; we went into Arch-street, and went up Arch-street, as far as 10th or 11th street, when *Wood* and myself returned, the others went on to rob the mail, as they said. I returned to *Alexander's* house, and *Wood* went down town. On the Friday following, *John Alexander* returned, and said he had completed the business, and had received about $4,000. The next day *Wood* came to *Alexander's;* the conversation again took place about the mail robbery; *Alexander* told *Wood,* that he had got about $4,000, from the mail, as his share; and gave *Wood* a post note of $100; he said he did not know much about the note, but he would give it to him, that he expected it was good. I do not know whether this is the note. I gave him a $100 note also. *Alexander* gave him the note as

a present, or as a compensation for the loan of the pistols. *Wood* was present when the pistols were cleaned; I took one to pieces to clean it.

Cross examined.—I believe the plan to rob the mail, was made before *Wood* and I came from Baltimore. I knew nothing of it, until I came from there. *John Alexander* or *Joseph Hare* first told me of it. I think it was *Joseph*, they all talked to me about it. I think I mentioned to *Wood* first, that they were going to rob the the mail, but am not certain. *Wood* did not advise against it. I was not to go with them; *Lewis* wanted me to go, but *Joseph* did not want me. The three that went were to divide the spoil. I was to receive none. I did not state in my examination that I was taken sick, and returned on that account. I stated that I was unwell when it took place. *Mrs. Alexander* was opposed to the plan. I received two notes from *Alexander*, one of $100, and one of $10. I gave one of $100 to *Johnson*, and one of $100 to *Wood*. *Joseph* and *Lewis Hare*, are my brothers. *Joseph* is the oldest—*Lewis* is younger than I am. I saw *Wood* whilst the three were absent; he lodged in the same house with me for two or three nights. I do not know what part *Wood* took but lending his pistols. He was not invited to go; they thought three were enough, *Lewis* said he would rather have me than *Alexander*, as he was afraid *Alexander* would tell of them, and he did not know *Alexander*. I made the disclosure to Mr. Bache; my motives were, Mr. Bache said he would favor me all he could. What induced me, was for the sake of liberating my brothers. I supposed if I was not admitted as a witness, *John Alexander* would be, and we all three should be convicted, as *John Alexander* was present. I had not been

acquainted a long time before with *Wood*. I formed an acquaintance with him at Baltimore. I heard of the mail robbery before *Alexander* came up. It was understood that the mail was to be robbed when *Wood* lent the pistols. I informed him when I asked him for them.

T. W. Ludlow, *sworn*.—Gave the same evidence as on the trial of the three principals convicted at Baltimore.

D. Boyer, the mail carrier, was also *sworn*, and testified as in the former trial.

John M. Patton, *affirmed*.—On the morning of the day he was taken prisoner, *Wood* offered me $350 on the state bank of N. C. I exchanged the notes for him, and paid him in a check on Philadelphia bank; after I paid him he left the office. I sold the notes to H. M. Prevost. When I found the notes were taken from the mail, I went to Mr. P. to take a minute of the marks and numbers of the notes, which he did also.

Richard Bache, *sworn*.—I accompanied *Wood* to prison, to have him searched, he protested that he had nothing to do with the robbery of the mail, and refused to tell me at that time, where he got the $100 note that he had given *Davis* to pass. He told me, that he lived at Deal's tavern, up sixth-street, and afterwards, that he resided at Mr. Black's. I went to him the morning after he was committed to prison, and told him the object was not so much to punish the offenders, as to obtain the money robbed from the mail, and I urged him to tell me where it could be found; he denied

knowing any thing about it, and told me I might as well rob the mail, as to take the money which he said he became possessed of, lawfully. At the magistrates, he said that he worked on the turnpike, and received the note in payment for work done on the road. After *Hare* and *Alexander* had made a confession, I was of opinion, that a fourth person had been engaged on the spot in the robbery, as the four horses had been taken from the mail waggon, and as the sum which *Alexander* acknowledged to have been his portion, was so much smaller, than that found on the persons detected at Baltimore. I went to the prison therefore, and had *Alexander*, *Wood* and *Thomas Hare*, brought out of their cells into the entry. *Alexander* there stated, that *Wood* knew of the robbery, and that when he came from Baltimore, he gave him the money which he had taken from the mail to exchange, that he went along with him to the broker's office in fourth-street, (Mr. Ducker's) that he stood at a distance and gave *Wood* the money, which when exchanged, *Wood* returned the proceeds to him. *Alexander* said, that he had given the $100 note to *Wood* for himself; *Wood* did not deny any thing that *Alexander* said, but when *Alexander* assured me, that there were but three persons actually engaged on the spot, in the robbery; *Wood* observed, that we had *Alexander's* confession, that there were but three concerned, and he hoped we did not want to hang more than the three. I told him to be on his guard; and that persons concerned in aiding and abetting would share the same punishment as the principals. At a previous time, when I pressed him to tell me where the money was, and that it would be a serious matter to him if he did not disclose the facts, he said that he was not afraid, that

no person concerned in the robbery could be admitted as a witness against him, because they had all been convicted; that *Davis*, who informed against him, was a convict, and that *Alexander* and *Thomas Hare* were both convicts; to which I replied, that *Hare*, had been pardoned. *Wood* remarked to me, that *Alexander* had told me he had given up all the money, and he asked me why I suspected him. *Alexander* told me that he had placed the money, (the proceeds of that which *Wood* exchanged) behind the looking glass. He did not state, that *Wood* was to have a share in the plunder, but he said, that the reason why *Wood* and *T. Häre* did not accompany them was, that they concluded three were enough; and if there were more, there would be greater difficulty in escaping detection.

The prisoner offered no evidence.

Mr. Ingersoll, the district attorney, contended, that the evidence in relation to all the counts, which are not capital, was conclusive; whether the other counts were proved, would depend upon the meaning which the court and jury might give to the word, *jeopardy*, in the 19th section of the law. With respect to the term *jeopardy*, he observed, that the legislature used a word for which we can recur to no code of laws for a definition. We are obliged to enquire of dictionaries for its meaning. This is the first step of departure from that precision which the law exacts in a criminal case. Dr. Johnson derives it from the French *J'ai perdu—I have lost*—and defines it *peril-danger*, I should rather derive it from *Je perde—I lose*—and define it extreme peril or danger, equivalent to, *its all over*, *I am lost*, or

the like. When a loaded pistol is presented with a threat to discharge it, the man aimed at, may be in *fear*, as the driver of the mail says he was; and he may be in *danger* too, but not that *extremity* of danger which this word calls for. If the pistol had been fired, and missed, or snapped, I should consider the life in jeopardy by the use of the dangerous weapon; but I doubt whether a mere menace to use a loaded pistol or naked dirk, can be considered as within the law; and it would be especially severe to apply the strongest meaning of a *doubtful* word, in an accesorial case like this, where the accused was not at the place of perpetration.

In short my difficulty is this; the word is doubtful and the case is capital. Like the word *revolt*, therefore, on which this court had refused to settle a judgment of conviction in a capital case, it appears to me that, the prosecution is liable to be defeated by the mere doubtfulness of the word, used by the legislature. The best idea I have met with, of what strikes me as the true use of jeopardy is to be found in the Bible, in the 18th verse of the 5th chapter of Judges, "Zebulun and Naphtali, were a people that jeoparded their lives *unto death*, in the high places of the field." Here the word means a danger of an extreme degree, approaching close to death, and such I should suppose the word *jeopardy*. Perhaps the idea is a refinement. But such as it is, I think proper after some reflection, to state it, and under an impression of at least the questionableness of the term. I shall not press that part of the case which calls for the offenders life, when it is perfectly clear upon the testimony and the law, that he is guilty of that crime which is not capital.

MR. PHILLIPS for the prisoner stated, that as the prosecution upon the counts which charge the prisoner with a capital offence, was given up, he should submit, the prisoner's case upon the other counts to the jury.

JUDGE WASHINGTON informed Mr. Phillips, that the court did not entertain the doubt which the district attorney had expressed as to the meaning of the word *jeopardy,* and that it was proper to apprize him of this, in order that he might defend his client in like manner, as if no concession had been made, or doubt expressed by the district attorney.

The counsel still submitted the case to the jury under charge of the court.

JUDGE WASHINGTON then delivered the following charge.

The first inquiry for the jury is, whether the mail carrier was robbed of the mail, and if he was, whether it was effected by putting the life of the carrier in jeopardy by the use of dangerous weapons, or otherwise.

The conviction of *Joseph T. Hare, John Alexander* and *Lewis Hare,* before the circuit court of Maryland, and the sentence of the court thereon, is evidence the most conclusive against the prisoner, that the crime for which those persons were severally convicted, was committed by them. This is confirmed by the testimony of Boyer, the mail carrier and Mr. Ludlow the passenger.

As to the nature of the offence of which *Joseph T. Hare, &c.* were convicted, the court does not entertain a doubt. We think that putting the mail carrier in fear, and his life in peril or danger, is putting his life in jeopardy, within the meaning and intent of the act of con-

gress, and if the jury should be of opinion, under the circumstances which attended this transaction, that Boyer was put in fear, and in danger of his life—the offence of those principals was capital. We think it our duty to give you this opinion, notwithstanding the concessions which the candor of the district attorney induced him to make. We do not, however, think it necessary or proper in this case, to press this point against the prisoner; and with these few observations which have been made, I leave this point to the jury.

The next question is, whether the prisoner did aid, advise, or assist in the perpetration of a crime committed by the principals?

If *Thomas Hare*, who has given testimony on the part of the prosecution, is believed by the jury, he has clearly proved that the prisoner not only participated in the plan formed for robbing the mail, and aided its execution by his countenance and advice, but that he lent his pistols to the principals, with a distinct knowledge of the criminal purpose for which they were borrowed; and that he accompanied the perpetrators of the crime a short distance on their journey, to the place of its intended execution. In addition to the testimony of this witness, Mr. Bailey has proved the exact similitude of the pistol, found upon the prisoner at the magistrate's, and that found at Havre-de-Grace, near to the spot where the robbery was committed.

Should the jury be of opinion, that the prisoner is guilty of the offence charged against him, as capital, according to the explanation of the law given by the court they may find him generally guilty. If they should think him guilty of assisting only, in a simple robbery of the mail, or that the life of the mail carrier was not

in jeopardy, according to the meaning of that word, as given by the court, then they will find him guilty on the 3d or 4th count; and not guilty of the others. If they think him not guilty of any offence, they will find him "not guilty."

The jury retired at half past three o'clock, and at 5 returned, with a verdict of guilty. On being called over, and asked separately, one of them dissented from the verdict given in; after some observations from the court they again retired, and at half past six o'clock, brought in a verdict of *guilty*.

Motion in Arrest of Judgment and for a New Trial.

UNITED STATES *vs.* WILLIAM WOOD,	In the Circuit Court of the United States, in and for the district of Pennsylvania, before Judges Washington and Peters.

THE PRISONER being brought before the court to receive sentence of death, Zalegman Phillips, Esq. his counsel moved for a new trial, and in arrest of judgment, as follows:

The defendant, by his counsel, Zalegman Phillips, assigns the following as reasons for a new trial.

1st. That the verdict is against law and against evidence.

2d. That the jury have convicted the defendant capitally, to *wit:* on the first, second, fourth and fifth

counts of the indictment, when the attorney of the United States expressly stated to them, that he did not ask a conviction on those counts, as he considered the law very doubtful, and would be satisfied with a conviction on the third and sixth counts of the indictment, and that in consequence thereof, the prisoner's counsel did not enter into any examination of the law and facts in his behalf, as applying to the said mentioned counts, believing them to have been abandoned by the attorney of the United States.

3d. That the jury have mistaken the law and the facts, and have considered that the fact of *John Alexander* and *Joseph Thompson Hare*, having been guilty of "*robbing the mail, by putting the life of the carrier in jeopardy, by the use of dangerous weapons,*" was not only sufficient, but obligatory on them to convict the defendant capitally, from the single circumstance of the defendant's having lent his pistols; the jury not having distinguished, between aiding and assisting to commit the robbery, as described in the first branch of the 19th section, and aiding and assisting to commit the robbery, by putting the life of the carrier in jeopardy by the use of dangerous weapons, as described in the second branch of the said 19th section, which are distinct and separate offences, and which were laid in distinct and separate counts in the indictment.

4th. That evidence was admitted to go to the jury, to wit: a paper called a record of a court, which in point of law, was inadmissable.

Z. PHILLIPS, for defendant.

UNITED STATES } In the Circuit Court of the
vs. } United States, for the Third
WILLIAM WOOD. } Circuit.

Defendant, by his counsel, Zalegman Phillips, assigns the following as reasons in arrest of judgment.

1st. That the caption of the indictment states, a circuit court of the United States of America, in and for the Pennsylvania district, to have been holden at the city of Philadelphia, when in fact and in law, there is no such district as the district of Pennsylvania.

2d. That the indictment is the presentment of a grand inquest, styled and called the grand inquest of the United States, inquiring for the Pennsylvania district; when in fact and in law, there is no such district as the Pennsylvania district; the state of Pennsylvania, having been divided by an act of congress, passed previously to the presentment of the grand inquest, into two districts; one called the eastern district of Pennsylvania, and the other the western district of Pennsylvania.

3d. That the defendant is charged in the indictment, with procuring, aiding, advising and assisting in the doing and perpetration of the robbery of the mail of the United States, without stating that the said offence was committed by putting the life of the mail carrier in jeopardy, by the use of dangerous weapons.

4th. That it is no where stated in the indictment, that the defendant procured, aided, advised or assist-

ed in the doing and perpetration of the robbery of the mail of the United States, by putting the life of the mail carrier in jeopardy, by the use of dangerous weapons; which offence alone is made capital.

5th. Manifest errors.

The case was elaborately argued on Friday, 5th June, by Mr. Phillips for the prisoner, and Mr. Ingersoll, the district attorney, for the United States; and on Saturday the court delivered the following decision.

WASHINGTON J.—This is a motion in arrest of judgment, and various causes have been assigned; but as the decision of the court will be given on the two first, it will be unnecessary to state the others.

These were, 1st.—(see the first reason in arrest of judgment.) 2d. (see the 2d. do.)

The first objection then is, to the style of the court; which, it is contended, should be the circuit court for the eastern district of Pennsylvania, this change being produced by the act of congress "to divide the state of Pennsylvania into two judicial districts," passed on the 20th April, 1818.

It is not pretended that the style of the court is altered in express terms, but it is supposed to arise necessarily from the division of the state and the jurisdiction assigned to the western court. There might be some colour for this argument, if the law had created a new circuit court for the western district, in which case there would seem to be a propriety at least, in distinguishing that court from this, by calling that, *the western*, and this *the eastern* circuit court. But it

will appear from a correct analysis of the law, that the style of the western court is the *district court* for that district, in contradistinction to the *district court* for the eastern district, and that the division of the state into two districts, is in reference to those courts.

The title of the act is "an act to divide the state of Pennsylvania into two judicial districts."

Sec. 1. Divides the state of Pennsylvania into *two districts*, and designates their respective boundaries. Certain counties shall compose one district, to be called the western district, and the residue of the state shall compose another district, to be called the eastern district, and the terms of the *district court* for said eastern district, shall be held at Philadelphia, and the terms of the *circuit court* for the western district, shall be held at Pittsburg.*

Sec. 2. Richard Peters, esq. now judge of the district of Pennsylvania, is assigned as the judge to hold the *courts* in the eastern district, and to do all things appertaining to the office of a district judge, under the constitution and laws of the United States.

Sec. 3. The president is to appoint a *district* judge for the western district, and he shall do and perform all such *duties as are enjoined on*, or in any wise appertaining to a *district judge* of the United States.

Sec. 4. The *circuit court* shall be held for the *eastern district*, at Philadelphia, at the time, *and in the manner* now directed by law, to be held for the district of Pennsylvania, and the *district* court for the western district, in addition to *the ordinary jurisdiction*

*The only express appellation of the *circuit court* for the *western district*, is to be found in this clause, which fixes the place of holding the *circuit court*, and the terms at *Pittsburg*.

and powers of a district court, shall within the limits thereof, have jurisdiction of all causes, except of appeals and writs of error, cognizable by law *in a circuit court*, and shall proceed therein in the same *manner as a circuit court,* and writs of error shall lie to THE *circuit court* in the said eastern district, in the same manner as from *other district courts,* to *their respective circuit courts.*

Sec. 5. The president to appoint the district attorney and marshal for the western district; the district attorney and marshal for the district of Pennsylvania, to be district attorney and marshal respectively for the eastern district.

Sec. 6. Directs how *civil* causes shall be removed, and in all its terms has reference to *civil* causes, and to the *district court* for the western district.

It is true that the word circuit is used in the first section in connection with the western court; but the other parts of the law, show most obviously, that this was an inaccuracy of expression, since in every other section it is called a district court. It has not only the style and jurisdiction of a district court, but it is subordinate to the circuit court in the eastern district in the same manner, as other district courts are *to their respective circuit courts.* It is true that the western district court has the same jurisdiction assigned to it, as is exercised by the circuit court. But this circumstance does not constitute it a circuit court.

The second objection to the caption, is, that it states the presentment to be by the grand jury of the United States, enquiring for the district of Pennsylvania, when in truth there is no such district, and the jury had no power to enquire except for the eastern district.

The answer to this objection is, that the caption is consistent with the truth of the case, and would therefore have been faulty had it been qualified as the prisoners counsel has contended it ought to have been. The *venire* issued before the passage of the law in question, to summon the grand jury for the district of Pennsylvania, and on the 11th of April, some days before the passage of this act into a law, they were sworn and affirmed to enquire for the body of the district of Pennsylvania. The indictment therefore, is with strict propriety found by the grand inquest of the United States, enquiring *for Pennsylvania district* upon oath and affirmation, inasmuch as they were legally sworn and affirmed to enquire for the whole district.

Nevertheless there remains to be considered under this head, a very interesting question, which is, does this indictment show that this court has jurisdiction of the offence charged to have been committed by the prisoner? This question resolves itself into two others. Although the grand jury were sworn and very properly to enquire for the district of Pennsylvania—yet could they, after the passage of this law, enquire of offences committed on land out of the eastern district of Pennsylvania: and if they could not, then secondly, does the indictment sufficiently show that the offence of which the prisoner stands convicted, was committed within the jurisdiction of the court.

The court has not been able to find any act of congress, which in express terms fixes the jurisdiction of the circuit courts in criminal cases, by the place in which the offence was committed.

But the court is clearly of opinion, upon the fair and reasonable construction of the different laws upon this

subject; that the jurisdiction of the circuit court in criminal cases, is confined to offences committed within the district for which those courts respectively sit, where they are committed on land. See the 11th. 23d. and 29th sections of the first judicial act, and the 3d. section of the act of the 2d. March, 1793, 2d. vol. page 225.

It was contended by the district attorney, that the jurisdiction of the western district court, does not extend to criminal cases; but the court cannot give its assent to this construction of the law. The 4th section declares that that court in addition to the ordinary jurisdiction of a district court, shall, within the limits of the western district, have jurisdiction of all *causes*, except appeals and writs of error, cognizable by law in a circuit court. Now as it is clear that a circuit court has jurisdiction of all offences prohibited by the laws of the United States, committed at sea or on land, within the district where the court sits, it follows from the general expressions above quoted, that the western district court has the cognizance of offences limited as to jurisdiction, as the circuit courts are.

2. If then this court has not jurisdiction of offences committed within the western district, and the western court has, the next question is, does this indictment sufficiently show that the offence of which the prisoner is convicted, was committed within the jurisdiction of this court? The allegation in all the counts is that the offence was committed *at the district of Pennsylvania*. It might then have been committed as well in the western as in the eastern district, and the court cannot help the indictment in this respect by any presumptions, or because we know from the evidence that the offence was committed in this city. It is indispensable that the in-

dictment should distinctly show that the court has jurisdiction of the offence, and it ought therefore to have laid it to have been committed in the eastern district.— And since it might be proper in some cases of a capital nature, to try the cause in the county where the offence was committed, there would seem to be a propriety in stating the county also in the indictment, though on this point we give no positive opinion at this time, the case not requiring it.

Upon the whole we are of opinion, that the judgment must be arrested for the reason which has been stated.

[The judgment being arrested, a new indictment will be sent to the grand jury in October next; upon which the prisoner will be tried, if returned a true bill.]

THE END.