

*OCTOBER TERM, 1806.

Present—WASHINGTON, Justice, and PETERS, District Judge.

UNITED STATES *v.* JAMES MCGILL. (a)

Murder on the high seas.

To constitute the crime of murder on the high seas, the mortal stroke must be given, and the death happen, on the high seas: the defendant had given a mortal stroke to one, in the haven of Cape Francois, but the deceased did not die, until his removal on shore: *Held*, that the offence was not cognisable under the 8th section of the act of congress of the 30th April 1790.¹

THIS was an indictment for the murder of Richard Budden, containing three counts. 1st. Charging the murder to have been committed on the high seas. 2d. Charging it to have been committed in the haven of Cape Francois. 3d. Charging the mortal stroke to have been given on the high seas, and the death to have happened, on shore, at Cape Francois.

The indictment was founded on the 8th section of the penal law (1 U. S. Stat. 113), which provides “that if any person or persons shall commit,

(a) s. c. 1 W. C. C. 463.

¹ It was decided by the circuit court for the District of Columbia, in 1809, in the case of United States *v.* Bladen, 1 Cr. C. C. 548, that where a mortal blow is given within the district, and death ensues in another jurisdiction the courts of the district have no power to entertain an indictment for murder. And the same point was decided in United States *v.* Rolla, 2 Am. L. J. 138. See also, United States *v.* Armstrong, 2 Curt. 446. But in Guiteau *v.* United States, 26 Alb. L. J. 89, the supreme court of the district arrived at an opposite conclusion, and the prisoner was executed, without being allowed an opportunity for a review of the conflicting cases. It is much to be feared, that the enormity of the crime, and the popular clamor for the infliction of the death penalty, had great influence in the denial of such review. That the decision of a subordinate court, upon the question of its own jurisdiction, in a case involving the life of a citizen, and overruling two former decisions of the court of which it is the successor, should not be reviewed by the court of last resort, is unheard of, in the annals of jurisprudence. The execution of a prisoner under the sentence of a court, without jurisdiction to pronounce it, is but a judicial murder. Such was the case of Mrs. Surratt, who was executed under the sentence of a military commission, which was subsequently decided by the supreme court, to have been without jurisdiction to try the case. Ex parte Milligan, 3 Wall. 2, 118, *et seq.* In Guiteau's case, the court sustained the jurisdiction,

principally, on the ground, that the British statute of 2 Geo. II., c. 21, was in force in that part of the district ceded by the state of Maryland; and Judge BRADLEY, of the supreme court, refused an application for a writ of *habeas corpus*, to review the question of jurisdiction, on the same ground; holding, that no such question arose in the cases of McGill, Armstrong or Bladen, the latter having arisen in the portion of the district ceded by Virginia, in which the 2 Geo. II., c. 21, was, confessedly, not in force; and the court below, on examination of the record in Rolla's case, held, that the question of jurisdiction could not have arisen and been decided. The fact, however, still remains unanswered, that an important question of jurisdiction, in a capital case, arose, and that a review of it in the court of last resort was denied. Guiteau's crime was a terrible one; he, undoubtedly, labored under an insane delusion, but not to the extent of legal irresponsibility; he richly deserved his fate; but the American people could have afforded to await the decision of the court of dernier resort upon the important question of jurisdiction, which Judge BRADLEY admitted was in his favor, on common-law principles. The rules for determining whether a British statute, passed since the settlement of the American colonies, extends to those colonies, are stated in Mr. Wharton's note to 1 Dall. 1. They hardly seem to embrace the case of Guiteau; at all events, they raise a serious question of jurisdiction.

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upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder, &c., every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death."

Upon the evidence, it appeared, that the prisoner was mate of the brig Rover, of which Richard Budden, the deceased, was master; that on the 3d of May 1806, while the brig lay in the harbor of Cape Frangois, the prisoner gave the deceased a mortal stroke, with a piece of wood; that the deceased, languishing with the wound, was taken on shore, alive, the next morning: and that he died the day subsequent to that on which he was taken on shore.

After a defence on the merits, the prisoner's counsel (*Ingersoll* and *Joseph Reed*) objected, in point of law, that the death, as *well as the [*427] mortal blow, were necessary to constitute murder; and that both the death and the blow must happen on the high seas, to give jurisdiction to this court, under the terms of the act of congress. These positions were elaborately argued; and the following authorities were cited in support of them. 1 Hale 425-6; 4 Co. 42-6; 2 Hale 188; 3 Hawk. 188, 333; Plowd.; 1 Hale 427; Leach C. L. 723; 4 Bl. Com. 303; 2 Co. 93; 2 Inst; 1 Hawk. 187; East's C. L. 365; 1 Leon. 270; Cro. Eliz. 196; Leach's C. L. 432.

The *Attorney of the District* premised, that he was aware of this objection to the jurisdiction; but as there was no judicial decision upon it, he thought it a duty to bring it before the court, for an authoritative opinion; and with that view alone, he meant to submit all the ideas which he could suggest, in maintenance of the jurisdiction. He then considered the case:

1st. On the constitution and laws of the United States, which provide for the definition and punishment of felonies and murders on the high seas; Const. art. I. § 8 (1 U. S. Stat. 113, § 8), which provide for the locality of the commission of the offence, to vest a federal jurisdiction (§ 38); which provide for the place and tribunal of trial (Const. art. III. § 2; 1 U. S. Stat. 88, § 29; Ibid. 113, § 8; Ibid. 76, § 9, 11), which provide as to the manner of trial (Const. art. III. § 2; 1 U. S. Stat. 88, § 29), and which provide, generally, that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. Thus, for every crime, whether of common-law or admiralty jurisdiction, a common-law trial is provided by jury, and a place of venue prescribed; but two things are to be remarked; 1st. That there is no definition of the offence of murder (for instance), with a reference to the common law, any more than to the civil law, which is the law of the admiralty. 2d. That locality, as to the commission of a crime, is no further limited, than as it respects the high seas, or is out of the jurisdiction of any particular state.

2d. On the law of England. The case would be within the constable and marshal's jurisdiction, at civil law, if the blow and death were both in a foreign country; or the blow in a foreign country, and the death in England (13 Ric. II., c. 2; 3 Inst. 48; 1 Woodes. 139; 4 Bl. Com. 268). If the blow was on sea, and the death on land, neither the common law nor the admiralty have jurisdiction; nor is it a case under the statute of 28 Hen. VIII., "for the murder was not committed on the sea;" but the constable and marshal may try it, by 13 Ric. II. Offences committed upon the seas,

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or in any haven, river or creek, are triable by jury, in a county to be mentioned in a commission, issued under 27 Hen. VIII., c. 4; 28 Hen. VIII., c. 15. The 33 Hen. VIII., c. 33, provides that "persons, who have been examined before the king's council upon treasons, murders, &c., may be tried in any shire to be named *in a commission," in whatever shire or place, within the king's dominions or without, such offence was committed. The 35 Hen. VIII., c. 2, provides for the trial of treasons, committed out of the realm, by a jury, in the king's bench, or before commissioners. The 11 & 12 Wm. III. provides for the trial of offences in the colonies. The 2 Geo. II., c. 21, provides for the trial of a murder, where the mortal blow is given on the sea, or out of England, and the death happens in England; or where the blow is given in England, and the death happens abroad. Then, the only statute that provides for the case of the mortal blow and the death both happening abroad, is the 33 Hen. VIII., c. 23, under the modification of a previous examination, &c., before the king's council: and in England, the admiral's civil-law jurisdiction, in criminal cases, is at an end.

3d. On the civil law. The judicial power of the United States extending to all cases of admiralty and maritime jurisdiction, *ex vi termini*, embraces criminal as well as civil cases; and the civil law being the law in such cases, it is to be considered, what the civil law defines to be murder, as to the act and the place. The intent, not the event, constitutes the crime. (Dig. ad Leg. Corn. l. 14; Dom. 211.) The crime is committed, if there be the will to commit it. (Ibid.) In France, where the criminal law is founded on the civil law, if a man strikes another, with intent to kill him, he is punished with death, though the man is not killed. (1 Denizart 585.) The doctrine of all the cases cited for the prisoner, which requires the stroke and the death to be in the same county, or within the same jurisdiction, is an incident to the common-law trial by jury; where the jury of the vicinage are supposed to know the fact of their own knowledge; but it clearly has no application, in cases where the jury does not come at all from the place, where any part of the crime was committed. *Cessanteratione, cessat et ipsa lex.* The civil law being considered, therefore, as the law of the admiralty, remains under the general delegation of judicial power to the courts of the United States, unless it is expressly modified by statute. So far as respects the definition of murder, it has not been modified; but the constitution and acts of congress do provide, that all crimes, wherever committed, shall be tried by jury; and that crimes committed on the high seas, shall be tried in the district where the offender is apprehended, or into which he may first be brought. (1 U. S. Stat. 113, § 8.) (a) If, indeed, this reasoning fails, *429] *it may be doubted, whether even congress can amend the law, so as

(a) After the death of Capt. Budden, McGill had been sent on board the *Mediator*, an armed vessel, there put in irons, and carried to Baltimore, from which place (without any arrest, or process issuing against him), he voluntarily came to Philadelphia; and surrendered himself for trial to a magistrate. The attorney of the district suggested, that, having been first brought into the district of Maryland, his trial must be there. But, after argument, Judge PETERS decided, that the provisions of the act were in the alternative; and that McGill, being first apprehended in Pennsylvania, might be tried, and ought to be tried, here.

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to reach cases like the one under consideration, notwithstanding the power "to define and punish piracies and felonies committed on the high seas;" Const. art. I., § 8, since the crime of murder (adopting the common-law definition) must be consummate, in the mortal act and consequence, within the jurisdiction of the United States.

PETERS, Justice.—It is a general rule with me, to abstain from the exercise of jurisdiction, whenever I doubt my authority to exercise it. On the present occasion, it is not necessary to give an opinion, whether the present is a case of admiralty and maritime jurisdiction, upon the general principles of the admiralty and maritime law; for, confining myself to the 8th section of the penal act, I find sufficient to decide, that, at all events, it is not a case within the jurisdiction of this court. The court can only take cognisance of a murder committed on the high seas; and as murder consists in both the stroke and the consequent death, both parts of the crime must happen on the high seas, to give jurisdiction; not one part on the high seas, and another part in a foreign country.

WASHINGTON, Justice.—The point principally argued by the prisoner's counsel is so clear, that it can receive little elucidation from argument. The offence, of which we have cognisance, is murder, committed on the high seas. Now, murder is a technical term, of known and settled meaning; and when used by the legislature, it imports the same, as if they had said, that the court shall have jurisdiction, in a case of felonious killing upon the high seas. We have no doubt, therefore, that the death, as well as the mortal stroke, must happen on the high seas, to constitute a murder there.

But the more important question is, whether the present case remains unprovided for by the laws of the United States? The judicial act gives jurisdiction to the circuit court, of "all crimes and offences, cognisable under the authority of the United States." (1 U. S. Stat. 78, § 11.) There are, undoubtedly, in my opinion, many crimes and offences against the authority of the United States, which have not been specially defined by law; for I have often decided, that the federal courts have a common-law jurisdiction in criminal cases: and in order to ascertain the authority of the United States, independently of acts of congress, against which crimes may be committed, we have been properly referred to the constitutional provision, that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction." But still the question recurs, is this a case of admiralty and maritime jurisdiction, within the meaning of the constitution? The words of the constitution must be taken to *refer to the admiralty and maritime jurisdiction of England (from whose code and practice we [^{*430} derive our systems of jurisprudence, and generally speaking, obtain the best glossary), but no case, no authority, has been produced to show, that, in England, such a prosecution would be sustained (independent of acts of parliament) as a cause of admiralty and maritime jurisdiction. Nor, am I disposed to consider the doctrine of the civil law, which has been mentioned, as furnishing a guide, to escape from the silence of our own code, as well as of the English code, upon the subject. Upon the whole, therefore, I am of opinion, that the present is a case omitted in the law; and that the indictment cannot be sustained. It is some relief to my mind, however, that I have no doubt of the power of congress to provide for such a case. It is

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true, that it would be inconsistent with common-law notions to call it murder; but congress, exercising the constitutional power to define felonies on the high seas, may certainly provide, that a mortal stroke on the high seas, wherever the death may happen, shall be adjudged to be a felony. (a)

Upon this charge, the jury immediately acquitted the prisoner.

SNELL et al. v. DELAWARE INSURANCE COMPANY. (b)

Measure of damages.—Evidence of value.

On an open policy of insurance, the assured is entitled to recover according to the actual value of the vessel, at the time she was insured, and not according to her prime cost.

Evidence of prime cost is admissible, to show her real value, but it is not conclusive against the assured.

Covenant, on an open policy for \$2500, at a premium of ten per cent., upon the brig Hound, on a voyage from Jamaica to New York.

The facts were these: the brig and cargo, belonging to the plaintiffs, sailed on a voyage from New York to Curaçoa, and back again; but, upon the return voyage, she was captured by a British cruiser, and carried into Jamaica, where vessel and cargo were libelled and condemned, on the 31st of July 1804, for a breach of blockade. The master, conceiving that the vessel would be sold, under her value, requested Messrs. Campbell & O'Hara, of Kingston, to buy her in for the owners, which was accordingly done, at the price of 1020*l.*, equal to about \$3500. For the price of the vessel, amount of repairs, outfit, &c. (in the whole 1939*l.* 4*s.* 11*d.*), advanced by Campbell & O'Hara, those gentlemen took from the master an hypothecation of the vessel, to guaranty the payment of a bill of exchange, which he drew upon the owners: and on the 9th of August 1804, they requested Messrs. Savage & Dugan to procure insurance upon the vessel for \$5000; which was effected at the office of the Phœnix Insurance Company, upon the following instructions:

*431] *“Brig Hound, Thomas W. Fuller, master, at and from Jamaica to New York. We expect she sailed on or about 16th ult., and is represented as a fine coppered vessel: 5000 dollars. Said vessel was condemned at Jamaica and purchased for the former owners. This insurance was made to cover the sums advanced, whether the same be secured by a bottomry-bond or conditional assignment or otherwise howsoever. Premium five per cent.

“Phœnix Insurance Company.”

The owners of the vessel being advised of these proceedings, stated to Savage & Dugan, that the above insurance was not sufficient to cover her real value, and directed a further insurance for \$2500, which was effected by the present policy. The vessel sailed from Jamaica, in August 1804; but was never heard of afterwards. At the expiration of a year, the

(a) See act 3d March 1825, 4 U. S. Stat. 115 (R. S. § 5339); which, however, has no application where the crime only amounts to manslaughter. *United States v. Armstrong*, 2 Curt. 446.

(b) s. c. 1 W. C. C. 509.