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THE
TRIAL
OF
JOSHUA BARNEY,

A MIDSHIPMAN IN THE UNITED STATES' SERVICE.

ON AN INDICTMENT FOR

MURDER.

BEFORE THE

Court of Oyer and Terminer, or General Gaol Delivery, in and
for the County of Richmond.

Held at Staten Island, on the First Tuesday, Wednesday and
Thursday of June, 1824.

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Trial &c.

The people of the State of New-York, } AT A COURT OF OYER AND TER-
vs. } MINER HOLDEN IN AND FOR THE
Joshua Barney. } COUNTY OF RICHMOND, at the Court-
House in said County, on Tuesday June 1st 1824.
PRESENT

The Hon. OGDEN EDWARDS,

And Judges of the Court of Common Pleas of said County.

The prisoner was indicted in September 1823 for the Murder of Joseph Haines.—The two first Counts being for Murder, at common Law, and the third Count for Murder, for Stabbing under the Statute.

The prisoner had been in close confinement since August 1823, and on which indictment the defendant was arraigned on the 31st, day of May 1824, and pleaded not Guilty.—This Indictment being supposed in formal, a new one was preferred containing a count for Murder only.—On which also, the defendant pleaded not Guilty on the 1st day of June 1824, and the Trial commenced. The Jury were sworn on both Indictments and the trial continued until half past three o'clock of the third day of June.

TALCOTT, Attorney General, & } for the Prosecution.
METCALF, District Attorney. }

J. O. HOFFMAN, }
G. L. THOMPSON, } for Prisoner,
& T. PHOENIX. }

The District Attorney in opening the case, stated that he should endeavour to establish the following points of fact and law.

1st. That the defendant unlawfully commenced an assault on deceased.

2d. That the deceased was all the time acting in *necessary self defence*.

3d. That the deceased renewed the contest without any provocation other than *necessary self defence*.

4th That the mortal wound was given with a sword procured by defendant; after all violence had ceased, and the production of which was both *unlawful* and *unnecessary*.

5th That in the interval of making complaint to the Captain, and going behind the companion for the sword, after former violence had ceased, there was sufficient time for the free use of reason and for passion if any existed, to subside—or rather that it did not appear that the mortal wound was given in a *passion*.

6th That it would appear that the object of getting the sword could be no other than the *destruction*, not the correction of the deceased, the motive to which could be no other than the most malignant cruelty and desire of revenge.

7th That the last affray commenced by giving deceased a blow with the flat part of the sword in the sheath—indicated an intention to

provoke resistance and thereby create a pretence and opportunity to slay deceased.

8. That the deceased *if he advanced* towards the defendant when attacked by prisoner, especially when the sword was produced, had a right so to do in order to defend himself, or disarm his adversary. That this point *of advancing or not advancing on prisoner*, was a matter in which the witnesses differed.

9 That the prisoner could not be justified or excused in using the sword in the manner he did but *in absolute and necessary self defence*, to which, by the circumstances of this case, he was not driven.

10. That the defendant took an unreasonable and unfair advantage of deceased in killing him before he had time to put himself on his defence.

11. That the circumstance of wounding with a sword which the prisoner had not in his possession at the time of the first affray, but procuring one elsewhere, after the first violence had ceased, was an evidence of deliberation and malice.

12. That if the prisoner meant correction as the master of the deceased, he exceeded the first measure thereof with a deadly weapon, and therefore it is murder.

13. That there was no legal provocation on the part of the deceased in this case at all, but all was necessary self defence.

14. Killing without provocation is murder.

15. That the declarations of the defendant after the mortal blow was given, would be proved, tending to show that he was actuated by *preceding considerations*.

The first witness called was Hugh Johnson, who testified that he was a Pilot for the port of New-York, where he resides—that on the eighteenth day of August last, he piloted the Schooner Blue-Eyed-Mary to Quarantine ground, where they arrived about ten o'clock at night. The prisoner was on board in capacity of second mate. On the morning of the nineteenth, between five and six o'clock, they were getting ready the boat to take the captain and passengers ashore; he was forward, and saw two of the hands in the main rigging, on the starboard side; but does not know whether deceased was there or not. He heard prisoner say something to deceased, upon which deceased answered that he (deceased) was as good a man as he (prisoner) was. They had had some dispute before that, but does not know what it was. Prisoner then struck deceased, who immediately clinched him. There was nobody in the main rigging at that time—but does not know whether, at the commencement of the dispute, there were any or no, for he was forward when the dispute commenced. The dispute commenced abreast of the caboose. The captain was below at that time. After deceased clinched prisoner, they had a scuffle, in which prisoner was thrown against the bulwarks abreast the main rigging. Prisoner only struck one blow before deceased clinched him. In the scuffle several blows passed. The second mate seeing deceased was too strong for prisoner, came and took deceased off, and slung him forward *as far as the caboose*, about eight feet, where deceased *stood still*. Prisoner then went aft to the companion way and called to the captain that Joe was beating him. "What is that you say?" said the captain. Prisoner then repeated his complaint. Prisoner then went to an arm chest, which was on the other side of the companion way, and which was a false hen

coop, and took out a cutlass, which witness thought was a wooden sword. Prisoner then came forward by the caboose and made a blow at deceased, who was standing still by the caboose. Prisoner came up on the larboard side, and made a blow at deceased from the larboard side, deceased standing on the starboard side. The blow was given with the sword with the scabbard on, over the head or shoulders. The blow seemed *to stun* deceased. Prisoner made no halt, and nothing was said on either side. Deceased did *not see prisoner come up*, for he stood "kind of sideways" towards prisoner—has seen the sword since—being shewn one, thinks that it is the same—has no reason to doubt it. Deceased turned round and faced prisoner *but did not advance* upon him. Prisoner immediately *took off the scabbard and made a plunge* at deceased, who instantly clapped both his hands to his side, saying, "for God's sake Put my guts in." Prisoner stood astonished—the captain then came up, caught the deceased, and laid him on deck and put a jacket under his head—he never spoke afterwards. He (witness) went ashore in the schooner's boat for the doctor. When he left the vessel, the man was lying on deck. The doctor came aboard in his own boat. The schooner was lying from two to three hundred yards from the Quarantine Dock, west of the channel, and on the Staten Island side of it, and within the quarantine buoys. Went back to the schooner the next day—saw them fetch deceased ashore about half an hour afterwards dead. He did not return until the schooner was cleared. Deceased appeared to be about twenty years of age, stouter and larger than the prisoner "every way." As prisoner made the thrust, witness saw it was a real sword. Saw deceased's bowels gushing out—was not more than three feet from prisoner *when he gave the first blow*. When the *thrust* was made, thinks not more than five or six.

Cross Examined by Hoffman. The fray continued not more than three or four minutes—never swore that it continued more than a minute was the sword yesterday—saw the scabbard after the *blow* was given, but not after deceased fell. two Men were up in the rigging—heard no words between prisoner and men in the rigging. Deceased did not heave prisoner down before he threw him against the bulwarks—witness was on larboard side—saw no blows when prisoner was against the bulwarks. Witness was abreast the caboose which did not intercept his sight—did not interfere at all—thought it none of his business—*saw prisoner draw the sword*—does not know why he did not stop prisoner. When prisoner drew the sword was close by him on the larboard side—deceased was about midships when the *thrust* was given, and on the starboard side when the blow was given. (Being shewn a diagram of the deck, pointed out the relative situations of the parties.) Prisoner came up with the sword on the larboard side—does not know what men were on deck—does not know whether or no there was a black man on deck. Companion way was aft. Boarded the schooner four or five o'clock in the afternoon of 18th. When deceased was stabbed, thinks it likely all the crew were there—has made use of strong language against the prisoner—has said that he ought to be hanged without judge or jury, before he was examined before the Coroner's Jury—might have said it since—thinks Cook was on deck, might or might not be.

Dr. John S. Westervelt, Physician and Surgeon, and Assistant Health officer at the Quarantine Ground. Was called to view the body, by the Coroner's request. The wound was in the left side below

and before the short ribs. The wound answered to the weapon produced before the coroner's jury. It had passed through the coats of stomach. Passed between the intestines and cut the largest vein in the body, near the back bone, half off. The wound bled inwardly so much so that witness had to sponge the blood out of the cavity of the stomach. The point of the weapon appeared to have penetrated the back bone. Did not penetrate more than 5 or 6 inches. That the wound was the cause of his death. Has no doubt of it. Examined the wound on the morning of 19th of August.

Cross examined. There was no resistance to the weapon, it was stopped in its progress, by the back bone. A man might rush on it so as to produce death, if there were sufficient force.—Can not now say whether the point of the instrument was up or down.

Richard Cary. Coroner of the County, went on board of the schooner, on the morning of the 19th found deceased lying on the deck dead. The sword now produced was laying by him. Prisoner was there, went and asked him how it happened and how he could be so rash: he said he told deceased to do something aloft, that he grumbled very much, there was a scuffle, he had heard that some of the men had said that if any of the officers attempted to strike them they would stab them with the first thing they could get, then said he, I went aft and got the weapon and so it happened. He appeared to regret it very much. Witness understood that it was in consequence of this rumour of the determination of the men that he got the sword.

Cross-examined. The pilot was examined before witness, as Coroner. Apprehended prisoner—he was before the jury, he went willingly,—shewed no reluctance.—

Here the testimony for the prosecution closed.

G. L. THOMPSON, Esq. opened the defence, and observed that it was with the greatest want of confidence in himself that he rose in this important and interesting case. *Important*, because the jurors sworn to try this cause had a most arduous and responsible duty to perform, to their country, to themselves and the prisoner at the bar. *Interesting*, for the life of a fellow being depends upon the result of your deliberations, he who was so unfortunate as to have lost his life in this unhappy affair is now gone, and it is to be hoped, to a better and happier world. My client, the prisoner at the bar, remains, if guilty, the object of vengeance of the offended and broken laws of his God and his country. In his defence before the former, his conscience must be his counsel and adviser, no human voice can be raised in his behalf, and if the crime charged in the indictment, has been committed with malice aforethought and he has taken the life of a fellow creature, contrary to the divine law, there is a power above, much more awful than the humble tribunal before which he is now arraigned. But in his defence before a jury of his country, it is the imperative duty of his counsel to use their greatest energies in his behalf, and to exert their utmost powers for his protection. He only asked a cool and deliberate investigation of all the facts in this interesting case. In the early stage of this cause on the part of the defence, he took the liberty to suggest the indispensable necessity of guarding against undue prejudices, formed from the various reports in circulation, after the occurrence of this unfortunate accident. It was true that our warmest sympathies are justly enlisted on the part of the

deceased, but let not those sympathies induce us to decide other than with the utmost precaution. He mentioned them because he was induced to believe that opinions had been formed that might operate against the accused. But he was persuaded that if such prejudice did exist, that they would be soon dissipated on the introduction of the testimony on the part of the defence. He regretted extremely that the public prosecutor had opened with so much feeling against his unfortunate client, he would not treat the District Attorney with harshness, but on any other occasion it would call from him a severe animadversion, he would not reciprocate it, his cause did not require it, he only asked a patient and candid investigation. He could pourtray the character, the services and connections of the accused, his deportment through a tedious imprisonment. That he was an American, that he was a naval officer, and though young of most unexceptionable character, that he was a youth, and that he believed, that some of those to whom he had the honour to address himself, were fathers, in them he reposed with confidence, and to them he could appeal for the protection of his youthful but unfortunate client. But it was not his duty or desire to appeal to their passions, but to their sober judgments. He then defined the crime charged in the indictment, and the law applicable to the same. He then mentioned the case of Selfridge and Goodwin as in many respects resembling the case now under consideration, and cited parts of the same, and suggested that in this case a very important question presented itself, that of the jurisdiction of this honourable court to try this cause, in this country, that he was perfectly willing, and seemed anxious that it should be tried before so enlightened a tribunal. But that the laws of this state, are to say the least, indefinite and uncertain, on this important point that question would be formally decided. He said that after a careful investigation of the evidence, and the law applicable to this case, he would pledge himself that there would not be a man, who was impannelled on that jury, who could entertain a single doubt, and he confidently hoped that he should be able to convince them that there was no evil intention either expressed or implied, but that the unpleasant occurrence, the subject of investigation could only have been the result of accident and misfortune, and if they should be convinced of this fact, he would ask at their hands an honourable acquittal.

In conformity with the stipulation entered in, on the part of the counsel for the prisoner, and the counsel for the prosecution, the facts in this case were submitted. The question of the of Jurisdiction was argued by J. O. Hoffman, and the Attorney General. The following authentic law was cited, appendix to 1 vol. R, L. page VII. Charter of New-York, page 25 2 vol. R. L. 31 32. 1 R. L. 342.

The Hon. Judge Ogden Edwards delivered the opinion of the court and creed, that the County of Richmond has jurisdiction of the offence charged in the indictment.

William Chevers [black] was Cook and Steward on board of the schooner. Has followed the sea for 30 years—was on board on the 19th August. Heard prisoner give orders to deceased to go to duty, when he went to duty, witness found him grumbling;—he was grumbling all the time, took notice of it because he had no occasion for it.—Witness was standing in the caboose. He went to his duty, up the main rigging on the starboard side.

He came down (witness still at the Caboose), grumbling. Prisoner still remaining at the main rigging, prisoner came from the starboard

“saying what is that you are saying?” deceased made some reply, whereupon prisoner with the back of his left hand tried to strike or to push him—but does not know whether it hit him,—does not think it did, deceased sprang at prisoner like a tiger and struck him two “licks” before prisoner could close in with him.—Deceased turned with as much venom as a man that has been angry a long time striking violently as he was able—when they closed, being the strongest, he threw the prisoner down in the water way of the vessel and struck him several blows when down, was taken off by the second mate, some of the hands singing out that’s “a pretty boy.” Prisoner then seized on old broom and struck at deceased; who was endeavouring to break from the second mate and get at him.—Deceased caught the broom and threw it overboard. The second mate then shoved deceased forward; *as far as half way between the bow of the schooner and the caboose*, near to the fore rigging. Prisoner then run aft and called to the captain that Haynes was flogging him—Witness was cleaning a pair of boots in the rear of caboose on the larboard side. Prisoner in coming from the companion, stopped at the arm chest, and took from it a cutlass with a scabbard on—Prisoner only called to the captain once, he then passed witness, when deceased ran to meet prisoner from the foreshroud on the larboard side, they met about midships, deceased with his fists doubled, *running*.—Prisoner had got to about the mainmast when deceased started from the rigging to meet him—Both met in front of witness. Prisoner struck deceased over the shoulders with the sword, with the scabbard on, deceased made prisoner retreat so very fast that witness had to retreat behind the mainmast to escape from the combatants. Prisoner had retreated three or four steps before he first struck deceased, and so fast that witness had to take care of his toes.—As deceased came up he endeavoured to clinch prisoner;—witness jumped behind the mast, and heard nothing till he heard deceased sing out, “Captain put my guts in.” Saw the pilot at that time; *He was near neither* of them. Witness was the nearest person in the vessel, the pilot was looking over the bows the whole time apparently at the cable, on the larboard side.—The affair commenced on the starboard side, and continued as far as midships—was surprized, and vexed at not seeing the pilot do his duty as an officer on board—will take an oath before the Lord that made heaven and earth, that the pilot was looking over the bows, the whole time before the captain came up and hailed him quite loud, and asked him to take the boat and try to get a doctor. Prisoner was very kind and condescending to the hands.—so much so that witness has taken the liberty to expostulate with him for his mildness, prisoner said what can I do?—I am a young man, and want to get along in the easiest way I can. Deceased was not at the caboose after he was shoved forward by the second mate. After the accident, prisoner said to witness? O Cook: before you let that fellow come on me; why did you not knock me down? Did not see prisoner take the scabbard off, nor make any thrust.—Pilot never has had any conversation with witness since affray.

Cross-examined. Lives on board the Constellation at the Navy Yard as steward;—shipped in January or February last—has been 13 years in the British service—has sailed with prisoner two voyages to the West Indies—was in the schooner on 19 of last August.—Deceased was up the rigging four or five rattlings, Prisoner on deck giving him orders.—Prisoner was fonder of deceased than any hand in the

essel. After deceased had come down he was leaning over the caboose, prisoner looking up in the rigging—deceased remained leaning over the caboose, about 15 minutes speaking very sharp—prisoner looking up into the rigging—does not know whether any body in the rigging—supposes prisoner must have been looking to see if the work was done properly.—Prisoner hearing deceased grumble, said; what are you grumbling at—did not hear any word pass between them, until this expression.—Did not *sense* the word, of either, while deceased was in the rigging.—Prisoner advanced and attempted to strike deceased a back handed blow with his left hand—they then closed and prisoner was thrown—then deceased was taken off by the second mate—prisoner then got a broom and struck at deceased who seized the broom and threw it overboard.—Prisoner went to call the captain—got the cutlass and stood by the caboose. Does not know how the scabbard got off if deceased did not pull it off in trying to wrest it from prisoner. Witness observed that the man was dying and the captain exclaimed, “what can I do?” He then called the pilot, who was forward and directed him to go ashore for the doctor.

Prisoner then went forward. The first stroke was given on the larboard side—never saw the pilot any where but forward—deceased did not live more than four or five minutes, he had on a red flannel shirt—a good deal of blood flowed from the wound—witness did not remain behind the mainmast one minute. The pilot could not have had time to come from where he stood and go back again between the first blow with the scabbard, or until the fatal accident. Before and after the affray. The pilot continued looking over the bow, until called by the captain.

Richard Crouch. Second mate of the schooner—prisoner was first mate—commanding officer on deck at that time—gave orders to deceased to cast the stop off the main stay in the main rigging, the order was a proper one—deceased grumbled and growled and said it was unnecessary work, he went up five or six rattlings grumbling all the time—the rest of the hands were on deck witness stood abaft the fore rigging, deceased came down, prisoner and deceased stood between the mainmast and caboose. Deceased continued grumbling for a considerable while, witness could not hear what was said; prisoner shoved deceased with the back of his hand: deceased then clinched prisoner, struck him and threw him down in the waist—struck him when down several times as hard as he could, witness immediately went up and collared deceased and tried to take him off,—deceased desired witness to let him alone and struggled to get back at prisoner, deceased held on prisoner when down as long as he could till forced off by witness. Prisoner then picked up a “little short stump of a hickery broom,” and struck at deceased—Prisoner endeavouring all the time to free himself from deceased. Witness shoved deceased forward nearly to the bows of the long boat, which was on deck, and there kept him. Prisoner went round to the cabin door and called the captain that Joseph Haynes was flogging him—Prisoner then picked up the sword—does not know whether he took it out of the chest or no—he then came aft between the mainmast and caboose, and *there stood*. Deceased slipped past witness and *ran* on fast as he could with both hands *out* to clinch prisoner, then witness followed him as he came up, which prisoner *ran* two or three spaces and then struck deceased with the flat of the

sword with the scabbard on. Deceased then attempted to close in with prisoner who retreated five or six paces with the sword unsheathed before him--does not know how the scabbard came off, did not see prisoner take it off--Deceased was "eager to clinch" prisoner and was forcing himself on prisoner, and was very angry. *Did not see prisoner give any thrust with the sword at all. If he had witness would have seen it,* was not distant more than two or three feet from either of them--saw the sword the moment the accident happened. It began midships, and terminated on the larboard side. Believes that deceased forced himself on the sword--Is confident that prisoner did not thrust it. Deceased did not fall for 4 or 5 minutes--steward was standing by the mainmast, had been cleaning boots before, by the caboose. *The pilot was forward looking over the bows, the whole time the accident happened.* Scabbard would come off very easily by the least force such as striking a blow or the like--The pilot was leaning over the rail forward, when the captain came up, who came up before deceased fell.--The captain called the pilot to go ashore and get a doctor. Witness is confident of this, the pilot then came aft, witness did not see pilot near either prisoner or deceased, at any time of the affray he was forward until called by the captain, this could not be otherwise, or witness would have seen it. The pilot could not have been there, and witness not see him--did not hear what deceased said when grumbling--the whole of the crew were a grumbling set. Has heard the crew threaten to whip prisoner when they got home--there never could be a better or more even tempered man in the world than prisoner.--He was always very kind to deceased, deceased joined in the threat uttered by the crew.

Cross-examined. Held deceased forward two or three minutes. Prisoner came from the companion way on the larboard side, *deceased was forward by the bows of the long boat.* Prisoner came aft as far as the mainmast, and there stood--witness thinking there would be no more of it, relinquished his hold of deceased, who slipped past him and ran to attack prisoner, followed closely by witness who attempted to stop him--deceased ran so fast that witness could not overtake him, till engaged with prisoner. Witness passed deceased about midships between the mainmast and caboose, but not in time to prevent the accident--just as deceased received his wound; witness caught hold of him--The cook was standing by the mainmast--could not see how the scabbard came off, *saw the sword all the time,* at the time of the blow the cook was standing by the mainmast--the scabbard was on when the blow was given.--Prisoner might have made one or two steps backwards, before given the first blow--cook was standing by the camboose, one second before the first blow was given, does not know whether he slipped behind the mainmast, and before or after the first blow--*the pilot at that time was leaning over the bow forward.* The crew was on deck muttering and grumbling.--Witness thinks prisoner took the sword for self defence, more than any thing else. Prisoner did not follow deceased at all. The distance between camboose and mainmast about 3 feet. Deceased staggered back six or seven feet, before he fell, captain met him in time to lay him down--*The pilot was then looking over the bow.* The captain called him aft and directed him to go for a doctor, thinks deceased said, Oh! my God! I am dead, or words to that effect. Prisoner only called captain once, that Je

was beating him.—The crew six in number, were about the deck, or standing about the boat looking on—As deceased fell they all went aft to look at him. *Pilot forward looking over the bow.*

Captain Daniel Gardner. Was captain of the schooner Blue Eyed Mary. Prisoner was the first officer on board,—had command of the deck when witness was absent—Witness had given deceased no orders—the order given by prisoner was necessary, it was the duty of the mate to give it, witness had been up before, but was dressing to go on shore—was hailed by prisoner, who informed him that Jo was beating him,—witness was not dressed—only heard prisoner call once, heard him then go forward—witness dressed himself as fast as possible—when he got on deck, met deceased five or six feet abaft the mainmast—Deceased said; for God's sake put my guts in, he has let them out—these were the only words he ever said—*Pilot was at that time forward looking over the bow.* Witness cannot be mistaken. For the pilot was the first person witness looked for—his back was towards him as if he did not know any thing of what had happened, witness called out to him to go ashore for the doctor. He then came aft and appeared to be very much surprised—said, for God's sake what has happened, or words to that effect. From what passed witness concluded that the pilot had seen nothing of what had happened, from his being forward—it was not more than a minute and a half from the time that he was called, until he went on deck.—The character of the cook for truth and veracity was very good—he had always conducted himself with propriety—had as much confidence in him as in any coloured man he ever saw—has known Crouch for eight years—has sailed with witness six years, his character for truth and veracity as good as that of any body he knows—he is an honest, sober, steady man, never knew him to tell a lie. About an hour and an half after prisoner was taken on shore—he might have escaped before, had he been so disposed—went below and turned into his birth—appeared to be very much affected—he might escaped in the schooners boat, or in boats continually passing and repassing. The doctors boat arrived about 2 hours after the schooners boat. Prisoner had been two voyages to the West Indies with witness, he was too easy and kind to the sailors, and therefore they took advantage of him, prisoner about 19 years old, son of Com. Barney, now deceased, has mother, and brothers living in Baltimore.

Cross-examined. Prisoner might have sworn to any of the neighbours vessels, he did not appear to wish to escape, but went below and went to bed—the pilot was looking over the bow at the time of the stabbing—Witness heard prisoner call only once—witness answered what! Jo beating you? had been in the cabin from five to ten minutes changing his dress to go ashore—met deceased a little abaft the mainmast, he clapped his hands up to his side saying, for God's sake push my guts in.—He died ten or twelve minutes after—when witness got to him he was in the act of falling. Prisoner went below directly after deceased was laid on deck—there were four passengers on board, all below, crew on deck principally forward by the bow of the long boat, the vessel lay between a quarter and half a mile from the Quarantine on the Staten Island side of the channel.

Israel O. Crocheran, son of the sheriff at Richmond. Prisoner has been in charge of witness since he has been in Richmond county jail—has had many opportunities of escape. Witness slept with prisoner, the

keys in the same room, and he might have arisen in the night and taken the keys and escaped. Witness allowed prisoner many privileges on account of the confidence he reposed in him.

Cross Examined. Is no deputy sheriff—acted by permission of his father. Supposed his duty to be to take care of his prisoner—has had many opportunities to escape, but never appeared to wish to take the least advantage of them.

[Here the counsel for the prisoner rested the case, and the counsel for the prosecution called

Richard S. Cary again. Crouch was sworn before him as coroner.—Thinks he said that prisoner struck at deceased with a broom, and hit him, (Crouch) on the hand.]

Chevers was also examined. His evidence corresponded exactly with that of Crouch. Believes Chevers said deceased did not refuse to do his duty. [Here the witness was interrupted by the court, who informed him that he was not to give what he *believed* the witness had said, but that he must give either the exact words of the witness, or which he knew, (not *believed*) they said, in substance.] Chevers said he saw the first blow given—witness did not put many questions to the witnesses. Concerning the position of the witnesses, Cook said that the second mate took deceased off of prisoner—that he did not know what prisoner said to the captain when he went to the companion-way. When the Pilot was examined, the Cook and Second Mate were not present—nothing was said of the situation of the Pilot.

Cross Examined. The first witness examined was the Pilot. Captain Gardner was not the second witness—(being told to refresh his memory with his minutes, he found he laboured under a mistake)—must have examined Captain Gardner and the pilot before Chevers and Crouch came ashore. The examination of the Pilot was very long. Witness' memory is very indistinct as to the whole matter.

PROSECUTION.

Caleb T. Ward. Was on the Coroners' Jury. The examination of the Pilot was the longest of all. Crouch said that deceased rushed on prisoner, and that then prisoner struck him with the flat of the sword. The Cook said the same thing. Every witness said, that from the beginning of the first to the end of the second affray, was one minute.—Crouch and Cook were aboard the schooner when the Pilot was examined—every witness agreed that deceased rushed on prisoner.

Captain Gardner again. Crouch and Cook were not present when witness and the Pilot were examined. They were aboard to take care of the vessel.

Caleb T. Ward—Cross Examined. Think all the witnesses said that both frays occupied one minute. Cook said he was nearest of all when the wound was given—said deceased rushed on prisoner and received the wound—saw no blow but with the flat of the sword—does not know whether the second mate said where he stood or no. The second mate did not say that he saw the wound given, only the blow with the flat of the sword—was not asked any thing about it.

Samuel Bartow. Was on the Grand Jury—heard the testimony of Crouch and the Cook, but has but little recollection of the particulars. Recollects that Cook said he did not see the fatal wound given, for that

he was crowded behind the mast. Thirdly, he said that prisoner hit deceased with the back of his hand—that deceased did not come up with clenched hands—thinks Cook said that he was shoved behind the mast by the Hands, who, crowded around to see the dispute.

Denys Denys, was on the Grand Jury—kept no minutes, but has very little recollection about the matter—Cook said he got behind the mast.

FOR PRISONER.

Dr. Westervelt, again. It depends altogether on the force with which a person might rush on a weapon of that kind, and the firmness with which it was held, whether it would penetrate the body or no—if the force were sufficient it might be done without a thrust.

Question by the Court. If the force were sufficiently great it might be done without a thrust—there was no resistance to the weapon, it had nothing but soft parts of the body to pass through.

Lieut. Jonathan D. Williamson, has been acquainted with prisoner since 1821; served under him in the *Aligator* part of the years 1821 and 1822—his temper is mild—his character and disposition unexceptionable—prisoner is a midshipman in the navy—was always too mild to the men, among whom he was “a great pet”—among his equals and superiors he was a great favorite.

Com. James Barron, has known the prisoner two years last September, his character is very remarkably good, disposition, mild.

Captain Stockton, has known the prisoner intimately since Aug. 1821—his character several years has always been remarkable for the mildness and suavity of his manners, goodness of disposition, and evenness of temper—his only fault was, too much kindness to the men, for which witness has spoken to him several times—sailed in the same vessel with and under witness—his conduct and morals are good, his conduct officer-like and gentlemanly—he was promoted from the rank of midshipman to that of acting sailing master, a very uncommon thing—a great favorite among the men, too kind and indulgent to them—has never been complained of by them, a thing very unusual.

Dr. Westervelt, again. It would depend altogether on the firmness with which the sword was held, whether or no it would penetrate—does not recollect what clothing deceased had on.

Johnson, Pilot. When Capt. came on deck, was abaft the fore rigging—felt sick at his stomach—had been there about half a minute.

The cause was submitted to the jury under the charge of the Judge, reserving the question of jurisdiction which if decided against the prisoner, he was to have the right of appealing to the Supreme Court with every facility.

JUDGE EDWARDS' CHARGE TO THE JURY.

Gentlemen of the Jury—The duty which devolves on me and you, is certainly of the most important and interesting nature. Few situations in which a citizen is placed by the direction of the laws of his country, are more trying and distressing to men of sensibility and humanity, than questions similar to the one in which we are now called upon to take a part.

The duty being enjoined upon us, nothing remains for us, but to discharge it with a conscientious regard to the obligations under which we are placed. In consequence of the counsel for the prosecution, and

the counsel for the prisoner having forborne to address you on questions of fact, under an arrangement that the whole should be submitted to the jury by the Judge in his charge. The embarrassment under which I rise is peculiarly great. In a question of such deep importance in itself and interesting the public attention at large, it would have been very desirable to have had my path illuminated by the reflections of able and ingenious counsel. As it is, however, we are deprived of such lights, and I will endeavour to furnish you with the sober dictates of my own judgment on this subject.

The subject embraces a very wide range of fact and of law. I shall occupy your attention for some time, and will endeavour to discharge to the best of my ability the duty imposed upon me. I shall therefore seek and hope to receive that attention which the importance of the case imperiously demands; and you will pay such respect to these remarks as the sober dictates of your own reflection shall point out they may merit. Though after all, the case will be submitted to your decision, for in criminal cases juries are made the judges of law as well as of the fact. Any opinion which the court may give on questions of law are not absolutely binding on you. It is included in the scope of their constitutional powers to regard or disregard it. The prisoner was arraigned on two indictments: the two first counts were for murder at common law, and the third for murder by stabbing under the statute.

The first to which I will turn your attention is the statute against stabbing, which provides that if any person or persons shall stab or thrust any person or persons, that hath not then a weapon drawn, or that hath not then first stricken the party who shall so stab or thrust, so as the person or persons so stabbed or thrust shall thereof die, &c.

And I will here observe, that in order to create this offence, it is necessary that the party should thrust or stab a person not having a weapon drawn. The question presents itself then that this must be made out, for if the deceased first *struck the prisoner*, the count, upon this statute, cannot be made out. In regard to the last count in the first indictment, the prisoner will be entitled to an acquittal. We are then to inquire as to the first striking; and on this subject it is not, according to my judgment, an open question. It does appear to me from the weight of authorities, to have been settled long ago. It does not mean that the deceased should give the first blow—but if deceased struck defendant at all, prior to being stabbed, that that, in the purview of the law, is a first striking. To show you that this rests upon authority, I will read to you from Chitty's Criminal Law, than whom there can be no greater authority. His Honor the Judge, then read several authorities on the above mentioned subject or point.

If the deceased gave any blow prior to receiving the thrust from the prisoner, that will take it out of the statute. East, also, another great writer on criminal law, says, "that if the deceased had struck at all, prior to being stabbed, that will take the case out of the statute." Another question also presents itself, whether, when the stab was given by the prisoner, (if given at all) he was not acting in his own defence. To this I will turn your attention bye and bye. Perhaps, however, I may here state, that the Pilot testified in the first instance, that the deceased did not advance on the prisoner after receiving the blow with the scab-

bard, and that the defendant was not acting on the defensive, whereas the testimony of the Cook is conclusive that the prisoner retreated so fast as to bring his (Cook's) toes into danger, and in consequence of which he retreated behind the main mast. With this the testimony of the second mate tallies exactly. Also, that when the prisoner approached the main mast, deceased ran violently towards him with his fists clenched. If this testimony of the Cook be true, the prisoner was certainly acting on the defensive. The Pilot speaks decidedly on this subject. The Cook and Second Mate speak as decidedly. It is your place to determine which you will believe. I will not trouble you with any remarks upon this count, under the statute; for upon it the prisoner cannot be convicted.

The next point is whether the defendant be guilty of murder at common law. Murder is the unlawful killing of a human being, and with malice aforethought. You will observe, that in order to constitute the crime of murder, there must be malice either expressed or implied. In order to give a more correct idea of what is meant by the term murder, it will be well to inquire what is meant by manslaughter. Every offence that falls short of murder, is either justifiable homicide or manslaughter. I will now proceed to consider the evidence in the case, and endeavour to see if this offence be murder at common law—whether it constitutes the crime of manslaughter, or is simply accusable homicide.

It appears from the testimony, that there was in the prisoner nothing like settled malice or previous enmity. The testimony of the witnesses is very inconsistent. [*Here the learned Judge went into the testimony, comparing that of the Second Mate and Cook, with that of the Pilot, in which he instructed the Jury totally to disbelieve the latter, who, according to his own statement, was so calous and dead to every feeling of humanity, as to permit a murder to be committed within three feet of him, and who would not even stretch out his hand to save the life of one fellow creature, and to save the other from all the horrors incidental to his having committed such an act.*] (In the conclusion he remarked, "As to the testimony of the Pilot, I reject that stock and fluke." At this expression, a murmur of approbation ran through the whole assembly, especially among the ladies, who came in crowds to witness the trial, after which, the learned Judge proceeded:)

I am afraid, gentlemen, that I have trespassed too long on your patience, but the subject is of so great importance, that I felt I could not say less. Indeed, with respect to cases of this kind, it is always the case that those who take broad views of it by which to govern their minds, arrive to much more correct conclusions than those who are too much refined. Too much refinement narrows the disposition. As respects the character of the prisoner, that has been testified to, and he has had the full benefit of it. This is one of the good effects of a good character, that in the day of trouble it shelters its own like a breast-plate. But what is the character of the prisoner, what his disposition? We have it in testimony that it is remarkably mild, modest, and inoffensive. This is a material point for him to establish. For it shews that if he is guilty of breaking the laws of his country, it is through inadvertence and not premeditation. Let us look a little at his previous history. At an early age he is admitted into the navy—trained up to habits of perfect subordination, he entertained ideas of acting with

spirit on all proper occasions—such a spirit is cherished in our navy, and very properly, and it is to these principles that our country is indebted for her most able seamen. He did not think it proper for him to skulk below when it was his duty to be on deck. Again, after he had received a beating, and that from a common sailor—a thing the most humiliating to one accustomed to entertain such principles as he was: after all this, he goes to the Captain and complains—he then goes to the arm chest and takes out a sword, *leaving the scabbard on*. During all this heat and excitement of temper, he exercises all this moderation. Deceased then starts from the bows of the long boat, and meets him about mid-ships. Although he sees him coming, he leaves the scabbard on, and simply strikes him over the shoulder with it, *and then retreats near to the side of the vessel*, the greatest extremity that he could go. Where, up to this time, is the least disposition to commit murder to be seen? The fact is that the scabbard flew off when the blow was given over the shoulders; and it would be very surprising if it did not. You have all seen the scabbard and know it falls off very easily, even by holding the point of the sword downward. The prisoner *retreats*, holding the sword before him. Now what is there that looks like a murderous intention? The testimony is before you, gentlemen, and after all, the case rests with you.

You have a right to exercise your sovereign judgment upon the subject—you must, however, follow the law to the best of your judgment. The court has endeavoured to expound to you that the law in criminal cases is different from the law in civil cases. In criminal cases it is necessary in order to convict the prisoner, that the jury should entertain no reasonable doubt of his guilt. The law goes so far as to say that it is better that ten guilty persons should escape than that one innocent man should suffer, a sentiment to which the heart of every humane man responds. You, gentlemen, are not to give up to your feelings. With feeling you have nothing to do. If you entertain a cool conviction of his guilt, you must say so—if on the other hand, you are satisfied that the stabbing was not given voluntarily, but was the result of accident, it is so far from being either murder or manslaughter, that it has been doubted by some whether it is not actually self murder on the part of the deceased and he *felo de se*.

If you are satisfied that the wound was not given intentionally, you will then find the prisoner not guilty. The case rests before you, and hinges on the fact, whether the wound was given intentionally or was the result of accident. If accidental, it is no legal offence; if given in the heat of passion, without malice, it is manslaughter, and with malice prepense, it is murder. With these remarks, Gentlemen, I submit the case to your decision.

The jury after the charge was delivered, retired, four officers having been previously sworn to accompany them. They remained out from 15 to 18 minutes. Having agreed brought in a verdict of *not guilty*.

Proclamation was then made, and Mr. Barney discharged.