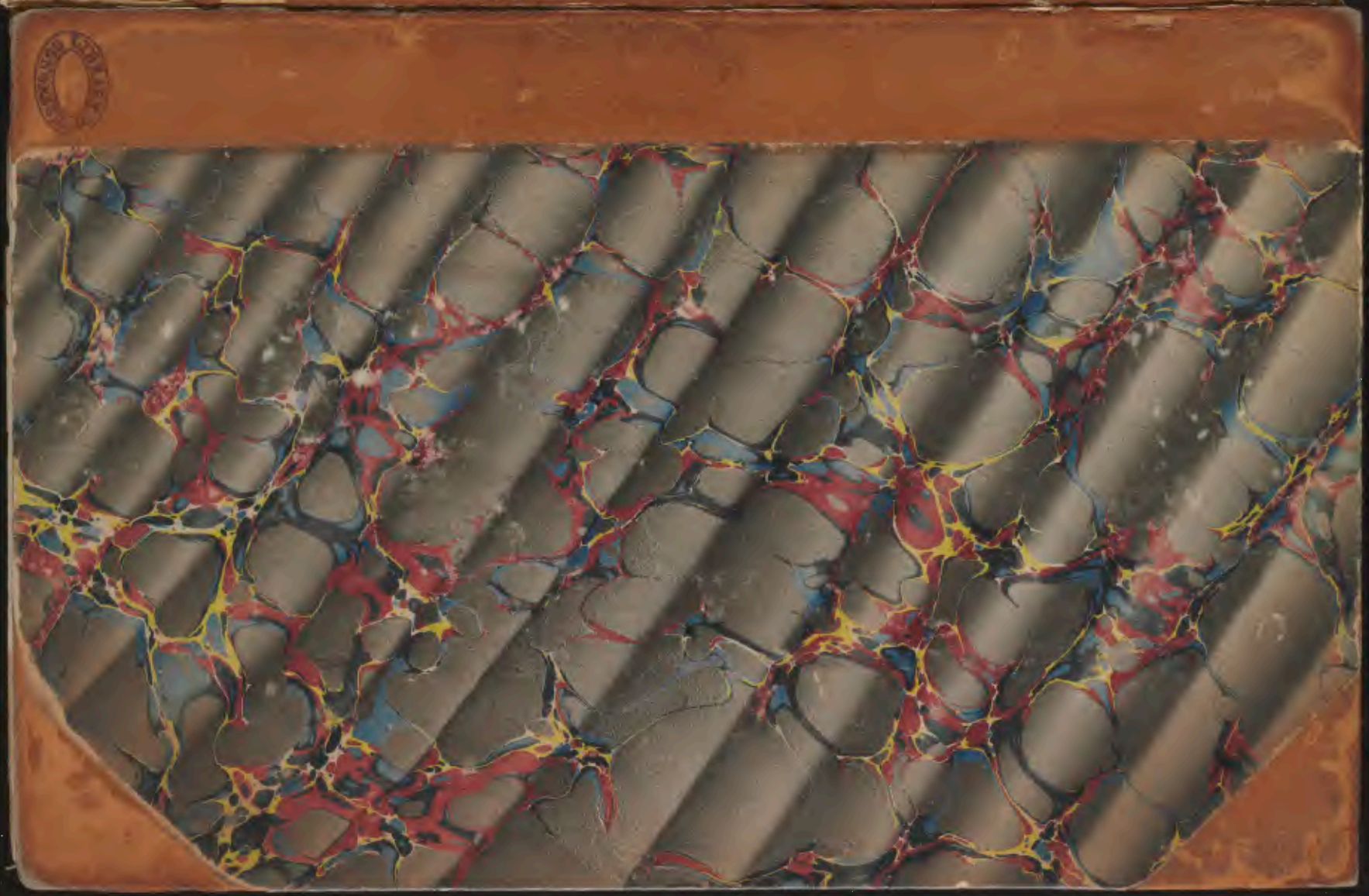

"THE CHESAPEAKE."

THE CASE OF

DAVID COLLINS, ET AL.,

PRISONERS ARRESTED UNDER THE PROVISIONS OF THE IMPERIAL ACT, 6 & 7 VIC., CAP. 76,

ON A CHARGE OF PIRACY,

INVESTIGATED BEFORE

HUMPHREY T. GILBERT, ESQ., POLICE MAGISTRATE OF THE CITY OF SAINT JOHN,

AND

THE ARGUMENTS ON THE RETURN TO THE ORDER OF HABEAS CORPUS,

BEFORE

HIS HONOR, MR. JUSTICE RITCHIE,

WITH

HIS DECISION.

COMPILED FROM THE ORIGINAL DOCUMENTS.

SAINT JOHN, N. B.,
J. & A. McMILLAN, PUBLISHERS, 78 PRINCE WILLIAM STREET.
1864.

THE importance and peculiar circumstances of this case have induced the publishers to present to the public all the proceedings taken before the Police Magistrate, and also before His Honor Mr. Justice Ritchie, with the evidence in full, and the various documents on which the arrest was made, together with those produced in evidence on the investigation.

Every effort has been used to publish a correct report, and the publishers in the compilation, have had the assistance of Charles W. Weldon, Esq., one of the Counsel engaged, and of William M. Jarvis, Esq., the reporter to the Law Society of Decisions at Chambers.

As this is the first case which has arisen in New Brunswick under the Treaty of Extradition of 1842, and the object and nature of the tenth article of the Treaty, with the mode of procedure thereunder is so fully discussed, and other questions of inter-national law presented that the publishers believe that the publication will be of interest to the people not only of this Province, but also to those of the neighbouring Colonies, and the United States.

"THE CHESAPEAKE."

DAVID COLLINS, ET AL.

Shortly after the retaking of the *Chesapeake* in Sambro, Nova Scotia, some of the original captors having returned to this Province, the United States Consul in St. John addressed to the Hon. S. L. Tilley, the Provincial Secretary, two letters under date 22d Dec., 1863.* Accompanying these letters was an affidavit jointly made by Isaac Willett, Captain, and Daniel Henderson, second mate of the steamer, detailing the facts within their knowledge concerning the capture of the steamer; the said affidavit having been sworn to before H. T. Gilbert, Esq., Police Magistrate and a Justice of the Peace for the City and County of Saint John, on the twenty-second day of December, A. D., 1863. On these papers His Excellency the Lieutenant Governor issued a warrant† under the provisions of the Act of Parliament 6 and 7 Vic., cap. 76.‡

Mr. Gilbert, on receiving His Excellency's warrant took the complaint § of Captain Isaac Willett, and on the 25th day of December issued his warrant || to apprehend certain persons therein named, and upon which warrant David Collins, James McKinney, and Linus Seely, parties named therein were arrested and brought before Mr. Gilbert for examination on January 4th, 1864.

Andrew R. Wetmore, Esq., Q. C., and William H. Tuck, Esq., appeared for the prosecution on behalf of the Federal authorities.

Hon. John H. Gray, Q. C., and Charles W. Weldon, Esq., appeared for the prisoners on behalf of the Confederate States.

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*See Appendix A. †See Appendix B. ‡See Appendix C and D. §See Appendix E. ||See Appendix F.

PRELIMINARY EXAMINATION.

Before the examination commenced Mr. Gray asked Mr. Wetmore to elect upon which charge he would now proceed, and to state in whose name he was proceeding. Mr. W. replied that he would only state that he was proceeding upon the complaint of Isaac Willett. He first stated that he would take up the charge of murder, and subsequently decided to proceed with that of piracy, in the first instance. Mr. Gray then objected:

1. That this Court has no power or jurisdiction to try for the offence of Piracy. That for the trial of Piracy a Special Commission must issue and a Court be specially constituted for the purpose; and that such Court is distinctly provided for by the Imperial Act.

2. That the Warrant was insufficient. It does not show upon the face facts which are essential, under the Treaty with the United States, to bring this matter into the Courts of this Province, or to create the special jurisdiction, which enables us to arrest parties under those charges. [Mr. Gray cited the case of Dillan, charged with an offence on the sea beyond Provincial jurisdiction who was arraigned before Judge Parker at the last circuit, and discharged. And Mr. Weldon cited the case of the brig Eliza, in '47.]

3. Not only is the Warrant insufficient on these grounds but on the face of it is bad, as charging two distinct offences triable before two different tribunals. There ought to be two Warrants.

Mr. Gray thought these objections fatal to any proceedings. Mr. Wetmore replied at some length, and read a large portion of the Provincial Act passed to give effect to the Extradition Treaty. He claimed that everything so far was regular, and that the Magistrate could not go back of the warrant, which was sufficient authority for him. The Magistrate told Mr. Gray that there was probably something in his argument; but that at present he would proceed with the preliminary examination, and if he decided before the case was through that he had no jurisdiction he would give the prisoners the benefit of it.

The following Witnesses were then examined:

EVIDENCE OF CAPTAIN WILLETT.

Captain Isaac Willett sworn: Am a citizen of the United States—live in Brooklyn—a seaman for 30 years—know the *Chesapeake*, owned by H. B. Cromwell, also a citizen of U. S.—was master of her in December, and had been for 17 months—she was re-built in New York about 3 years ago—previous to that she was called the *Totten*—[Mr. Wetmore asked where she was registered? Both Messrs. Gray and Weldon objected to the question as improper. The Magistrate agreed with them.] During the 17 months the vessel plied between New York and Portland—she had a coasting licence. [Mr. Gray objected to any evidence respecting contents of this licence; objection sustained.] He had the paper until it was taken away from him on board the ship. On the 4th and 5th Dec. I had charge of the *Chesapeake*, then lying in North River taking in cargo

for Portland. Most of the freight was taken in on the 5th, Saturday. She carried passengers also. I saw these three prisoners on board on the trip in question. Saw them first about supper time, about six o'clock in the evening. We left New York on the 5th December ; I was in the wheel house when the vessel left the wharf. They did not buy tickets, paid their money on board. I identify Collins and recognize the others. I wrote their names on a piece of paper and gave it to Stewardess to arrange rooms for them. [Wetmore asked the names of the other persons on board. Gray objected ; objection over-ruled.] There was a person who called himself John C. Braine, said he was Colonel. Understood there was a person named Brooks—don't recollect the names of Seely and Clifford. All the passengers paid their passage except two. We proceed direct to Portland from New York ; do not call. The vessel, a propeller, was worth $60,000 to $70,000. There was an assorted cargo, flour, sugar, wine, and such like. Do not recollect the owners—do not know its value—probably $80,000 to $100,000.

There was no disturbance until Monday morning, 7th. We were then about 20 miles N. N. E. of Cape Cod. Cape Cod is in the United States. About a quarter past 1 in the morning, the first thing I knew, the Chief Mate, Charles Johnston came to my room and called me saying somebody had shot the second Engineer, Orin Shaffer. I turned out of my room and went to see how badly he was shot, and had hardly time to get out of my room before I was shot at. I was at the engine room door, on the upper deck where my room was. I found the body of the second Engineer lying on the deck ; it is more than I could tell whether he was alive or dead ; he appeared to be dead. I was in the act of stooping down to raise him up, when I was shot at twice. I then walked forward and was shot at again. I supposed to be from a pistol ; next day I saw two places in the deck where pistol balls had gone through right by where I was. I can't tell who shot at me. I only saw two persons then. I cannot identify either of these prisoners as the parties. I saw no marks of violence on the Engineer, but I saw marks of blood where his head lay. When I walked forward I was going into the pilot house, when I was collared and a pistol was put to my face by first Lieut. H. A. Parr, who was in the pilot house. He collared me and said I was his prisoner in the name of the Southern Confederacy. Parr put the irons on me—two or three others stood beside him. They seemed to be standing there doing nothing. He put hand-cuffs on each wrist. The irons could be made small or large. They put me into my own room ; I could have come out when I pleased. No use for them to lock the door. I don't know what became of the body of the Second Engineer, except what I heard from the others. I was confined an hour, when Parr and sailing master Robinson came to me. They didn't say much, but took me into the cabin—there I saw some of the other passengers who were not concerned in the affair. While I was there the chief mate Charles Johnston and chief Engineer James Johnson were brought in wounded ; I had heard reports of fire arms. The mate was wounded in the right knee and left arm. The wounds appeared to be made by pistol shots. I saw the leaden ball taken out of the mate's arm. He suffered considerably from the knee, not so much from the arm. Lieut. Parr took the ball out of the arm. The chief engineer was wounded by a ball in the hollow of the chin. Parr said he would get the balls out of them if he could, and fix the wounds. The chief mate laid on a lounge until he was put on board of the Pilot Boat. I remained in the after cabin until 8 next morning. The irons were then taken off and Robinson went up to my room on deck with me ; I was in the room a few minutes and returned to the cabin. When on deck I saw Collins and Seely there ; Seely was scrubbing brass on one of the timber heads ; the others did not appear to be doing anything in particular.

Col. John C. Braine took my ship's papers from me in the afternoon before I was landed in the Pilot Boat. Braine seemed to have command of the vessel ; she was taken from me by these parties, against my will and consent. I saw Mr. McKinney on board the vessel. They seemed to be about the vessel and appeared to be eating the grub up as fast as possible. Don't recollect of seeing McKinney doing anything. The person who was navigating the vessel was named Robert Osburne, a passenger, one of the six who bought tickets in New York. None of the parties named in the warrant had tickets. The first land we made after they took possession was Mount Desert. I asked them where they were going,

they said Grand Manan ; I asked where they intended to land me, they said St. John. Mount Desert is on the American coast east of Portland. I would not see it if I were prosecuting a voyage from New York to Portland. After passing Mount Desert we saw land east of that place. We proceeded to Seal Cove Harbor, Grand Manan. The boat was lowered, three or four men went ashore, remained a little while and came on board again, when the steamer left and came up the bay to St. John. Next I was taken up to my room by Braine and Parr ; Parr made a copy of Braine's instructions and Braine gave it to me. He ordered me to give up the coasting licence, and permits for the cargo, and the money I had collected from Braine for his party, in all $87. He asked for the money he had paid over to me ; it was my employer's money ; I knew it would be worse for me if I did not ; I handed it over against my will ; Braine had a pistol in his hand at the time ; I handed money, ship's papers and permits to him. The " papers" were the ship's " coasting licence" from the New York Custom House, under which she was coasting at the time, as required under the American law. After this they (Braine and Parr) took me away from the room, took me aft and ordered me to stay there. We then saw a pilot boat. We were on our way to St. John. The pilot boat ordered us to stop ; some one came on board the steamer from her, stayed a few minutes and returned. Then Captain John Parker came on board and apparently took command. They then took the pilot boat in tow and steamed up to Dipper Harbor. All of the passengers and crew, except two engineers (James Johnston and Auguste Striebeck) and three firemen (Patrick Connor was one,) were put on board the Pilot Boat. The firemen and engineers were kept against their will. Those who went on board the Pilot Boat were myself, Charles Johnson, the chief mate, Daniel Henderson, three boys and four sailors, whose names I do not recollect, the stewardess and five passengers. One of the passengers belongs some thirty miles back of St. John the other four belonged to Maine. These five passengers had tickets. Robt. Osburne remained on board the *Chesapeake* ; he also had a ticket. The steamer towed the boat some five or seven miles and let go of us ; we were put on board the boat about five in the evening ; that was the last we saw of the steamer. I landed in St. John about four on Wednesday morning, I got a boat from a big ship near Partridge Island and came to town with four of my men and two passengers. From the way the parties acted in my steamer I was afraid of my life. Everything was taken against my will. I saw one or two of these prisoners on watch ; they were on deck. I supposed they were on watch. They seemed to be acting as other men would who were on watch. Braine's party assisted him in charge of the vessel. As far as I know these men were assisting him. I did not see them making sail, or shoveling coal. I don't recollect of seeing Collins or McKinney doing anything, except being on deck.

Cross-examined by Mr. Gray :—I don't deny there has been war in my country for two or three years between those calling themselves Confederate states and the United States. [Mr. Wetmore objected to this as an improper way of proving a state of war. The Magistrate did not think this evidence could be shut out.] I can't remember how many States are called the Confederate States—Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, (about one-third of the latter). Abraham Lincoln is President of the United States, and Jeff. Davis President of the Confederate States. I never heard of Mr. Benjamin, Confederate Secretary of War. I have *heard* they say they have a Government. I have read Lincoln's Proclamation of war against the South, ordering them to destroy the property of the South, but I do not recollect its contents. I never took notice of it to———[Here the witness was stopped.]

Parr *did* put a pistol to my head in the pilot house and said he took me prisoner in the name of the Southern Confederacy. They put the irons on me rather hard. They did not say any thing about taking the vessel in the name of the Confederate States then. After they took the handcuffs off there was always a guard with me when I went about. I did not see any act of violence towards the passengers after the capture of the vessel. The handcuffs were also removed from the officers. I left a copy of the " instructions," which Braine left with me, in New York. [Mr. Gray asked the Captain the substance of these " instructions ;" Mr. Wetmore objected. Mr. Gray argued the point, and then read from manu-

script a copy of Capt. Parker's order to Braine, (which Captain Willett had published in the N. Y. *Herald* and other papers), and asked the Captain if the copy was correct. The witness said it was nearly correct. The name of the Sailing Master in the copy handed him by Braine was George Robinson, not Tom Sayers ; the name of the Engineer was not given in it, and the number of the men stated was 11, not 22. In other respects Mr. Gray's copy was correct.]*

The Confederates kept of my private property, one double barrelled gun, one single barrelled, 5 five barrelled revolvers, and 1 six barrelled revolver, (I did not come out of my room "in what they call my shirt tail.") They kept me aft and plundered my room. They took 3 coats. I missed them when I commenced to pack up. I brought ashore my clock, 8 charts, sextant, 3 books. The passengers also brought ashore their own things. I did not see Braine give the passengers money to take them back to New York. The crew brought part of their things ashore. They put us into the Pilot Boat six or seven miles this side of Dipper Harbor. I did not see and do not know that the Confederate flag was raised over the vessel. They fired two shots at me, and I don't know how many more. The first two shots were fired at twelve feet. They must have been bad shots. The *Chesapeake* had two six-pounders forward, and of ammunition half a keg of powder. No cutlassess. The Confederates who cut out the "Caleb Cushing" at Portland were sent to Fort Warren ; I have heard so. The *Chesapeake* was engaged in retaking the "Caleb Cushing." I saw the Confederates who were then taken : they were sent to Fort Preble. I do not know that those Confederates were ever tried as pirates or in any other way. Only Lieut. Parr told us that their party was acting for the Confederate States. They all seemed to be working together, and were working under Parr and Braine. I was not at Sambro, and did not see the steamer after I got into the Pilot Boat. None of my crew to my knowledge were kept in irons the next day—the day after the capture. I never saw or heard of Braine or Parr before.

Re-examined by Mr. Wetmore :—I have heard the Confederates called rebels in the Northern States generally. The "Caleb Cushing" was lying at a wharf in Portland Harbor when captured. Braine was called Colonel : the parties all seemed to be working together. I cannot tell whether Braine paid the passage of these three men, the prisoners.

JANUARY 6, 1864.

EVIDENCE OF DANIEL HENDERSON.

Daniel Henderson, sworn—I belong to Portland, Me., I am second mate of the *Chesapeake* in the beginning of December. Five or six years ago I was employed on board her, and had been for two or three years. She was called the *Chesapeake* then, and traded from New York to Savannah, Charleston and Baltimore, and sometimes to Portland. She had previously been called the Totton, but when she was rebuilt her name was changed. She was owned in New York by H. B. Cromwell. She was latterly employed in the trade between New York and Portland. She lay in North River, New York, at Pier 9, on Dec. 4th and 5th, and took in considerable cargo. She had a great deal of wine and cotton, and was nearly full. She left on Saturday 5th, about 4 in the afternoon. She had 22 Passengers. This was not an unusually large number. She sometimes had 50, or 60, or 70. The crew numbered all told—including the stewardess—18. I paid no particular attention to the passengers, and the only one I knew was Braine, who had been a passenger from New York to Portland about a fortnight before, and then had a wife and child with him. He then said he had just come from England. The voyage usually occupied 36 to 37 hours.

On Sunday night at twelve o'clock my "watch" was over and I went to bed. My room was on deck immediately adjoining the pilot house. I had not been in bed more than an hour and a half when four men came to my door, broke the lower panel, and then opened the door. This awoke me. The four men then

*The order put in by Mr. Gray, will be found in Appendix H.

stood holding pistols over me—pointed at me—and bade me get up and put on my clothes. I did so. They then ordered me to put my hands together and hold them up, and they put handcuffs or irons on me. They told me when doing this that I was a prisoner to the Confederate States. I asked them if I could not see the Captain or some one belonging to the vessel. They told me "I couldn't see nobody." They then locked me in my room. About ten minutes after I heard a noise as if of a man falling on the deck near the pilot house door, and I then forced the door of my room open. The deck was covered with ice and I slipped and fell and then two of those other fellows caught me by the shoulders and hauled me into the pilot house, where I sat in a corner.

About 20 minutes after, Braine came in and said that the second engineer had been killed and thrown overboard. Several of those fellows went in and out of the pilot house while I was there. The prisoner Seely, who seemed to be keeping watch forward, went in twice to warm himself. A big tall fellow, with a long sandy beard, was steering. Neither of the other prisoners went in. He staid some time there. One of the other fellows an officer came to me and asked me where the paint was; I told him in the paint lockers. The officer then ordered me to show him where it was, and I went down and showed him. The officer said they wanted to paint out the steamer's name, and the yellow streak on the funnel. The officer held a pistol in his hand. I asked him to have the irons removed, but the officer refused. They were not taken off until the next morning about 7½ o'clock. I was taken to the passenger cabin and found the mate there wounded in the right leg and left arm, lying on a mattress, and the engineer wounded in the chin, and others of the crew and passengers. I asked Braine to allow me to sit by the mate and attend him. Braine said he would see what could be done, and sometime after told me I could sit with the mate and I did so and washed his wounds. A man armed with a revolver sat by them, and another also armed, kept guard at the cabin door. The prisoner M'Kinney was at one time on guard and was armed. When breakfast was ready they were taken to breakfast. Two men armed with revolvers stood on each side of the breakfast table, and M'Kinney, armed, stood on the stairs outside. I went on deck two or three times during the day, having obtained permission to do so. No guard accompanied me, but armed men kept guard on both sides of the steamer. Collins was one of the men on guard, and held a pistol in his hand. I saw Seely cleaning some brass work on the timber head. I was kept close prisoner all day, and pretty well down. At night they were all ordered below, the officers were put in the cabin and the rest of the crew in the forecastle, except the firemen who they kept at work. About six o'clock one of the officers, with a pistol in his hand, came down to the cabin, and ordered me to go up and show them how the bells from the pilot house to the engine room were worked. I did so, and then asked where all our men were, and the officer told me they were down in the forecastle.

Next morning they made Grand Manan. Braine came down to the cabin and ordered me go up and get ready the anchor to let go when they wanted to. This was, I understood, at the suggestion of the man who belonged to the other passengers, and not to those fellows, but who was acting as pilot for them. Braine, with a pistol in his hand, and the other man stood over me while I prepared the anchor. They reached a harbor and the anchor was let go. They then had breakfast. I did not eat much. I was too uneasy, as I did not know what was to become of me. I could not get any of them to tell me, and I did not know but I might have to go over the rail. After breakfast they lowered a boat and Braine and two or three of his men, as well as I could see through the cabin windows, went ashore. They remained two or three hours, then returned and weighed anchor. Some time after they met a pilot boat. The boat ordered the steamer to stop, and a man came on board the steamer from the boat, stayed some time, then went back to the boat, and soon after he and another man came on board the steamer and brought a valise.

I was kept aft on deck at the time and could see what went on, but could not hear what was said. The man went forward to the pilot house, could

not tell what his name was, or whether he took command. This was two or three hours after they left Grand Manan. The steamer then proceeded towards Saint John, having the pilot boat in tow. Some time after, all of our crew were put on board the pilot boat except the two engineers and three firemen, who were kept on board the steamer, and five of the passengers were also put on board. The other passengers who had acted as pilots remained on the steamer. The five passengers who were put in the boat had been taken prisoners like the others. The steamer towed them to within about 3 miles of Partridge Island, and then let them go and kept right on. It was about 8 o'clock when the steamer left the boat. We stayed in the pilot boat until 10 o'clock next morning, when they were brought to the steamer New England. Capt. Willet, with some of the crew, and all of the passengers, got a boat from a ship and came up to Saint John about 4 o'clock in the morning. I was in bodily fear from the time the vessel was taken from us and our crew until I got out of the pilot boat. I am not in the habit of being afraid under ordinary circumstances. The prisoners were on board the steamer when the pilot boat was cast off, and went off in the steamer; they had no place to land. Some of the parties got a stage over the stern, for the purpose of painting out the name of the steamer, and they said afterwards that they did so. They made our men paint the yellow streaks on the smoke pipe black. The *Chesapeake* carried the Stars and Stripes—the American flag. I never knew of her sailing anywhere except to American ports, and from one American port to another. The captain and crew had no control over her, or cargo, after she was taken possession of on Monday morning.

The second engineer might possibly get the apparatus for throwing hot water without help, but I doubt if he could, at all events he could not do it in less than twenty-five minutes. He would have first to go on deck from his engine room, then uncoil the hose from the hose box and extend it along the deck, then attach it to the goose neck on deck, then take it down to the engine room and put the machinery in motion and after that return on deck to use the hose.

Mr. Gray said all this was immaterial, as if a man under such circumstances as would create the impression that he had the means of throwing hot water immediately threatened to do so, the effect would be precisely the same as if he actually had the means of carrying out such threat.

The witness also said I heard Braine and the Chief Engineer disputing as to whether the Second Engineer had fired a pistol shot.—Braine said he must have fired the first shot. The engineer denied that he had fired, and said he would lay any wager that he could then, if Braine would let him make the search, find that pistol (it is presumed the pistol Shaffer owned) in the Second Engineer's room in his bed. I heard afterwards that it was found. I saw blood on the place where they told me Shaffer had fallen. Shaffer was nearly six feet high and a stout able man. He was a very kind, gentlemanly man, and very much liked by the whole crew. He was about 45 years of age, and I often heard him say he was born up North River, in the State of New York.

The only names I remember having heard were those of Braine, Parr, and Collins. All the party seemed to be acting under Braine's command.

Cross-examined by Mr. Gray.—From the time the vessel was taken until I left the pilot boat I was in bodily fear. I have not told more than occurred. A great many things happened that I did not see In coming to Saint John by train I did not get out at a way station, for fear of coming to Saint John. I came the whole way in the train. When the vessel was seized and they told me I was a prisoner to the Confederate States, I knew what they meant. I did not see the Confederate flag run up. I do not know that the North has taken many Southern ships: they may have taken some, but I do not know how many. I did not see the order given to the captain by Braine; heard something about it. The captain told me they had given him their names, but did not tell me they had given him a copy of the order. I was not treated with any unkindness, but the engineer was kept on duty after being wounded, and bleeding from the chin. I was allowed to take all my clothes when leaving the vessel. The cotton we had on board came from New York. Could not say whether it came from the Southern States or from Europe. Cotton is one of the chief productions of the Southern States. Have known cotton to come from Europe. No one was hurt who did not make

any resistance to the capture. Did not hear Braine say that he gave orders to his men not to injure any one, unless in case of resistance. On Monday morning after they had secured possession of the vessel, all of our men, that I could see were liberated from the irons. One of Braine's men told me that if I would keep quiet, and not attempt to recapture the vessel, they would take care of me. I believe the passengers got all their luggage. I lost nothing, and am not aware that any of the others lost anything, except what the captain spoke of.

Re-examined.—They told me they were acting in the name of the Confederate States. The chief engineer was forced to work after being wounded in the chin. I do not know what became of the second engineer's luggage. I did not know he was killed, as I was asleep at the time.

Jan'y 8, 1864.

EVIDENCE OF JAMES JOHNSTON.

James Johnston deposed—was born in Ireland; have been a resident of the United States 14 years; am not a naturalized citizen of the United States; follow the business of engineer; know the steamer *Chesapeake;* was Chief Engineer of the steamer *Chesapeake*; have been Chief Engineer something over a year; have been on board the steamer *Chesapeake* three years last July; was on board the *Chesapeake* on the 4th and 5th December last; this vessel was engaged in carrying passengers and freight between New York and Portland; the steamer had something over twenty passengers on board on the 5th December; I had charge of the engine on the 5th; remained in charge up to 12 o'clock at night; nothing unusual occurred on Saturday night or on Sunday; I had charge of the engine again on Sunday night until 12 o'clock; was waked up between 1 and 2 o'clock on Monday morning by the report of pistols; went from my room on deck and found Mr. Shaffer lying on deck at the engine room door.

I knew the steamer 14 years ago; she was then called the *Chesapeake*; have known her by the name of the *Totten*: she was at one time rebuilt; she was rebuilt in New York; she was afterwards called the *Chesapeake*; I had known her by the name of the *Chesapeake* before that time; she is owned by H. B. Cromwell, of N. Y; I raised the second engineer up when I found him lying on deck on the Monday morning of the capture; I called him by name; he was dead and lying with his feet down the hatchways; this was between 1 and 2 o'clock; I saw no blood then, it was quite dark; saw two spots on his neck which showed blood; I then went below to the place from which the second engineer came up; there I got a pistol put to my head by Collins; I caught him by the arm, and told him to hold on, then a man beside Collins whom I took to be Brooks, shot at me, the ball taking effect in the chin. [Mr. Gray objected to witness answering the question "who shot the second engineer?" Brooks made a statement, it appears, to the witness with reference to the shooting of the second engineer, which Mr. Gray objecting, the magistrate would not allow him to tell as not being admissable in evidence.] I went across the deck below and spoke to Wade. Wade did not answer. I was fired at without a word being said to me. I had the ball taken out of my chin two days ago It was taken out by Dr. Earle of King's County. The mate Charles Johnston, was shot in the knee and in the arm. He and I went into the kitchen through a little hatch; we remained there for half an hour. While there I saw Mr. Shaffer's body going overboard. There were three or four persons engaged in throwing it over. Knew none of them except Braine. The body was thrown over just as it was when lying on deck. The cook came to the kitchen. I asked him where Capt. Willett was. He said he was in the Cabin. I also asked him what was going on. He said the ship was taken. Robinson, the sailing master, took me to my room to dress, as I had only my night clothes on. I had been asleep and was awakened by the pistol shot. Robinson had no pistol with him that I saw. I heard two or three pistol shots.

After dressing I went to the cabin and found the Captain there in irons; Robinson was with him; the mate was there wounded; Parr was there taking a shot out of Brook's hand, he then took a shot out of the mate's arm; Parr then tried to take the shot out of my chin, but could not, as he said it was fast in the chin; I do not remember to have seen any of these prisoners present; I had some

conversation with Parr; he told me to keep the cold out of the cut; he assisted me in wrapping it up; we had no conversation in reference to the firing of the pistol. I spoke to Capt. Willett; I went with Robinson to the engine room to see if all was right there; there was nobody there but Striebeck, the oiler or assistant; I went there against my choice. Capt. Willett asked me if the ship wrs safe, I told him she was not, and Robinson overbearing my answer, got permission of somebody to take me there, and see if there was any danger of the ship blowing up, as Striebeck was not an engineer and had been on board the ship but a short time; did not remain there long; went back to the cabin after telling the oiler how much steam to carry; after being in the cabin an hour, went back to the engine room; there was some one with me all the time, a guard I mean; I was taken back on the second time to attend to the engine, and see if the engine was all right, I was then acting for Mr. Braine; Braine said he had no engineer, and that I would have to act; I was not in a fit state to work, on account of the wound in my chin, which was bleeding: I had to be at the engine all the time, as I had no assistance, there was some one on guard all this time; the priaoners were among those who were on guard, those on guard were armed with revolvers, I was not threatened. Two by the name of Cox, and two by the name of Moore, Treadwell, Wade, and the three prisoners, also Lieut. Parr and Brooks, were among those on guard over me, the guard was changed at stated times, Braine had command of these men, these are all the names that I can remember, these men acted under the orders of Braine, Parr, and the sailing master, as far as I could see, Robinson was the sailing master; was in the engine room pretty much all the time, I slept on the locker in the engine room. I was not on deck much; did not see much that was going on, on deck; the vessel did not stop till she reached Grand Manan. She remained there two or three hours; after leaving Grand Manan we sailed towards St. John, and got below St. John harbour about 7 or 8 o'clock on Tuesday evening; we remained at anchor. We stopped before reaching St. John, and got Parker on board from a pilot boat; he took charge over Braine; there was another gentleman, Mr. McDonald, came on board with Parker; he was introduced to me by Parr as Mr. McDonald; Mr. McDonald told me to content myself for a little while, as he would only keep me for 48 hours; he appeared to be concerned in the affair; told him I wished to get home as my folks would be uneasy; he asked for my address, and he said he would send a despatch to my wife, and inform her that I was well and would be treated well; he forgot his kind intentions, however, as the despatch was not sent. McDonald went ashore here. I saw McDonald a few days ago. he came from Halifax to the Bend with me, I did not request him to come, perhaps he came to see that I got through safely. We remained off Partridge Island in the steamer from three to five hours, a boat went ashore, in which were Parker and Braine. I do not know any of the others, or what they went ashore for. They came back to the ship and we started as soon as we could get steam up after they came aboard. I think McKinney went ashore with them. We did not take in any coal here, we left here about 2 o'clock next morning under steam, we got into Shelburne in the first place, got there about 9 o'clock on Thursday night. Capt. Parker had charge of the vessel on the way to Shelburne, I was not allowed to go ashore, neither was any of the crew. There were four others of our crew taken away in the vessel, their names were Striebeck, Connors, Tracy, Murphy. I had charge of the engine, I slept at little at one time, I slept three hours in the cabin. We had a very heavy gale of wind, also snow on the passage, which commenced on Thursday morning. We lay at anchor in the harbour, we lay there all Thursday night. We took in coal and wood there from a schooner on Thursday night. Parker told me there were ten tons of coal, and two cords of wood. Here we discharged a large quantity of freight, including flour, sugar, tobacco and port wine. It was put on board a schooner. I do not know how much wine was put ashore. The wine was put up in quarter pipes. The wine was distributed about the vessel. I got some. Capt. Parker said that Kenney, a man living there, had bought a thousand dollars worth of the cargo. Braine came back there in the day time. Cannot say on what day. We lay there 4 or 5 days. We were there on Sunday. Do not know on what day we sailed. Braine left the vessel again while there. He took a trunk with him, I heard there was jewelry in it Braine did not come back there again.

Got no additional men or coals at LaHave. We got some wood. Parr told me that he was going away for a day or two. He would return and bring Braine back, when he would endeavor to get the captain to liberate me, as it was too bad to keep me confined to the ship, wounded as I was and away from my family. Parr also said Braine had acted wrong in running off with a sum of $400.

(Mr. Gray objected to all evidence as to some statements made by Parr, and quoted from Roscoe's evidence in support of his objections. The Magistrate ruled in his favour.) Witness resumed:—Parr went away. I do not know where. We left that evening. I do not know the date. We got some wood there. We left La Have and came to the mouth of the river, towing a schooner of about 50 tons, and loaded with part of the cargo of the *Chesapeake*. I cannot say what kind of a load we gave her as it was at night, but it was a pretty good load. I did not hear Parker say what he got for this; we got some wood from the schooner We remained at the mouth of the river and then proceeded to Sambro, about 20 miles from Halifax. Our coals lasted until we got there. Got no additional crew at La Have. Capt. Parker went from Sambro to Halifax for coal, but took no part of the cargo with him. He returned with a schooner load of coal, two engineers, and two firemen. Parr had not returned. We commenced taking in the coal about 2 o'clock in the morning. I got up and spoke to Parker. He told me about the men he had got, and asked me to show the engineers the machinery. I told him I would after daylight. After that I was in my stateroom getting ready to leave, Parker having told me he was done with me, when the pilot (Flinn) reported to Parker that there was a gunboat in the harbour. Parker went on deck, and seeing her spoke to his new engineer about getting steam on. (This place they call Mud Cove.)

The engineer told Parker his men were not in order to get steam on. Parker then told me to scuttle the ship but I told him I did not know how. He said I could cut a pipe, and I said we had no pipes that I could cut. Parker left the cabin then. I carried my clothes on deck, and found him and his crew leaving the vessel and very good time they made. The three prisoners were among them. I then got an American colour out of the wheel house, and one of the firemen to run it up Union down. The gunboat came alongside and boarded us. She was commanded by Lieut. Nichols. There were none on board the Chesapeake then but myself and my three firemen, the two new engineers who were left behind, and one oil-man. There was no steam up then. Nichols asked me who was on board, and I told him. We tried to get up steam, but we had not coal enough, and no oil on board.

About an hour and a half after this we left, and proceeded to Halifax in company with the Ella and Annie. The Dacotah was behind us. I staid in Halifax until Monday last. Parker, Braine and Parr had charge of the Chesapeake from the time she was captured until they left her at Sambro. Capt. Willett and his crew had no control over her. I did not act of my own free will, but under orders from these people. I went to the second engineer's room in company with Parr and Striebeck, and found a pistol there which I handed to Parr. He examined it and said it had not been used. In the second engineer's drawer I found the pistol.

The second engineer's room was on the deck above where he attended the engine, and the same deck on which I found him dead. I hired him about two years ago, and have never known him to carry a pistol. I would have known it if he had done so. There was no means of putting boiling water on deck, nor were there at any time. There was a force pump to throw cold water in case of fire. I saw these prisoners every day from the time the vessel was captured until they left her at Sambro. They all carried revolvers. I do not know what position Collins occupied.

Cross-examined by Mr. Weldon.—When Brooks got to the cabin he was wounded in the left hand. Parr cut the ball out. I heard nothing said about the engineer shooting him. I found the second engineer dead at the top of the gangway, his duty was below. I went down and saw Brooks, who flashed a pistol within about two feet of me. The ball struck me in the hollow of the chin; did not knock any teeth out; but was bedded in the bone. I had it taken out the day before yesterday from the outside. After being shot, I went into the kitchen through a hatch used as a dumb-waiter. This may have been cowardly, but I

could not help it. I remained there about a half an hour, when I was taken to the cabin, and Parr cut the wound, but could not get the shot out. He then dressed it, and told me to keep the cold out of it. He took the ball out of the mate's arm. I did not hear the Confederate States mentioned at all, nor did I hear Braine say to any one that they were acting in the name of the Confederate States. They used a Secesh flag in Shelburne. I cannot describe it; it did not seem right to me. Cannot tell how many colors were in it. I could not describe four weeks from now a "rag" that I had seen to day. It was not the Stars and Stripes.

Parr did not tell me they had taken the *Chesapeake* for the Confederate States; but said that he and Braine had travelled in her about a month before, for the purpose of taking her. He also told me he had been in the Southern army, and was a released prisoner; but did not say what part of the Southern States he came from. He treated me very civilly said Parker had not fulfilled his word, and that he would try and get me away. They did not get any new engineers at Shelburne; they would have to "make them" there. I was allowed to go on deck alone occasionally, and took my meals in the cabin. When the vessel was first taken, Braine told me he had no engineer, and I worked the vessel to Grand Manan. Parker then came on board, told me he would have to keep me a little while, and asked me how much money I wanted. I said not to mind money, I would run the ship if I had to do it. I suppose Braine acted under Parker after the latter came on board. There was a guard in the engine room in the fire room and on deck, all the time. Parker said Shelburne was his native place; did not say he had been in the Southern States. I had never seen him before. We put into Shelburne, La Have and Sambro, and were about 4 miles inside Sambro and about half a mile from the shore, when the Ella and Annie took us. When Parker and his party left they took one boat with them. Wade must have gone on board the schooner, as he was found there by some of the crew of the Ella and Annie. I was left in charge of the *Chesapeake*. The two Halifax engineers and Wade were the only persons taken on board the Ella and Annie. The Dacotah lay off the harbour, and after speaking her we proceeded to Halifax, having got orders to that effect from her commander. I was kept only until they got engineers. I did not expect any money nor would I have taken any were it offered.

Re-examined by Mr. Wetmore:—The watch in the engine room and fire room were armed; I don't know whether the watch on deck was armed.

Jan'y 11th, 1864.

Mr. Wetmore put in evidence: Certified copies of the following Acts of Congress:

Act of Congress,	1819,	cap. 75,	Statutes at Large,	3 vol.	514.
do	1820,	cap. 113,	do	id	600.
do	1823,	cap. 7,	do	id	721.
do	1823,	cap. 72,	do	id	789.
do	1825,	cap. 87,	do	4 vol.	
do	1847,	cap. 51,	do	9 vol.	171.

Also proclamation of President Lincoln, dated April 19th, 1861.

EVIDENCE OF CHARLES WATTERS.

Charles Watters was called and testified as follows:—I reside in Carleton; have resided there twelve years; know the prisoners Seely and McKinney; had no conversation with Seely or McKinney on the subject of the capture of the *Chesapeake*; had heard a good many speak about it in their presence; I heard their conversation in Lower Cove, in the City of Saint John; McKinney was present; the two Coxes were present; do not know the names of the streets in Lower Cove; do no know in whose house this conversation took place: after going down Charlotte Street, would turn to the left in order to reach the house in which the conversation took place; it was the next street to the last street which runs east and west; [procuring a plan of the city, the witness pointed out Main street as the one on which the

house was situated where these meetings and conversations took place]; the house was on the right side of the street; it was a workshop; it was reached through a yard; saw the Captain there; think his name was Braine; heard conversations there; the Captain was not present; his name was Parker, as I since heard; he was a middling tall man; the captain said he wanted a crew of twenty men to go to New York to capture a vessel; we were all to have a share, do not know how much each man was to receive; did not hear anything about payment for the service; we were to have our passage paid to New York; Parr was to pay the passage; the prisoners were present at one of the meetings; there were two meetings; did not hear anybody say they would go; the prisoners were present at the second meeting; there were very few of the boys present at the first meeting; the Captain appointed the second meeting; never saw Collins before to-day. Have had no conversation with McKinney about the affair; had no conversation with Seely about it; I went over to Carleton in the same boat with Seely; I was present when the American boat went off, and Seely and McKinney were there. About a week after the last meeting I heard that the *Chesapeake* was captured; it was asked at the last meeting by the captain if those present would go; I cannot say that I heard any one assent; I was not present at the first meeting: I saw the prisoners Seely and McKinney the same night that the last meeting took place, before the meeting; I do not know how many meetings were held; I had a conversation with McKinney and Seely on the road to the meeting, when the prisoners said they would go to the meeting; the two Coxes and a man named Geo. Robinson were with us; Robinson asked the boys to go; they asked where they were going to, and he stated they would find out when they got there; when I speak of "they" I mean the prisoners and the others; they asked what they were going for; Robinson said they were going to see Braine, who was holding a meeting for the Captain; couldn't say what was said on the way; Robinson called at the Lawrence Hotel and got Capt. Parker and we all went to the place of meeting; I heard some time before the meeting that this man wanted to get a crew for the purpose of taking a steamer; those who intended to go were to go the next morning; I was present when the American boat left, and saw McKinney and Seely there; Seely was brought up in Carleton; I did not intend to go; I went to the boat to see who was going; of those men who were at the meeting I only saw McKinney and Seely; they were on the upper deck of the boat; did not know where they were going; I bid the time of day to them; I was there about a quarter to 8 o'clock; I left the wharf before the boat left; I heard the steamboat bell ring before I reached the wharf; I was at the head of the wharf when the fastenings were cast off; I saw the prisoners about five minutes before this.

Cross-examined by Mr. Gray.—It was stated at the meeting by Capt. Parker that they were going on behalf of the Confederate States to take this vessel; I think that it was stated at the meeting that this prize was to be divided among the crew by the Confederate Government; Capt. Parker stated that he had a commission from the Confederate Government; the Captain produced a paper which he purported to be a commission from the Confederate Government; the paper was read over; I did not hear what the paper contained; it commenced as near as I can remember "Jefferson Davis, President of the Confederate States of America." [Mr. Gray here produced a document which he refused to allow Mr. Wetmore to see. It was understood, however, that it was the Order of Jefferson Davis to Capt. Parker to go privateering.] I think the intention was expressed at the meeting that the vessel was to be taken for the Confederate States, or else they would not have gone; at the time that I heard that Capt. Parker and Lieut. Braine wanted a crew, I also heard that they were officers in the Confederate service; I heard at the same time that they wanted to raise this crew for the Confederate service for the purpose of taking this vessel; it was understood that this crew when raised was to be in the Confederate service. I did not hear it said that Parr had been an officer with Gen. Morgan; I was not sufficiently close to see the paper that Capt. Parker read, so as to be able to identify it; I did not see the mark upon it; I was not sufficiently near the paper to see it so distinctly that if it was now put into my hands I could identify it; did not see Braine there the first night; he was styled Lieutenant; did not remember that Captain Parker

stated that he was Captain of the Privateer Retribution ; went to Lawrence Hotel for Capt. Parker, then went down to the place of meeting.

Re-examined by Mr. Wetmore—I told you all you asked me. The vessel was to be a Confederate prize. I do not know what share we were to have. I think the steamer was to be brought to Grand Manan to land her passengers. There was some talk at the meeting about taking the vessel to Nova Scotia. It was talked among the men that the vessel was to be taken to Nova Scotia. The question was asked if the vessel was to be taken there. I did not hear it asked, and I did not hear the answer. I did not hear what the vessel was going to Nova Scotia for. The men were to have a share. I do not know what they were to have a share of. I can't say that they were to have a share of the vessel and cargo. I did not hear when or where the division was to be made. I did not hear who was to make the division. I heard from Robinson that Parker and Braine were officers in the Confederate service. I did not intend to go with the men. I went to the meetings to see and hear what was going on. It was stated at one of the meetings that the men would be protected.

To Mr. Gray—It was stated that the men would be protected by the Confederate Government. It might have been intended that the vessel should go to Nova Scotia for coal.

Jan'y 21st, 1864.

Mr. Wetmore put in evidence :—

Certified copy of coasting license granted to the Steamer "Chesapeake," under certificate of H. Barney, Esq., Collector at New York.

Certified copy of certificate of enrollment of the Chesapeake at New York.

The evidence for the prosecution closed.

At the close of the evidence for the prosecution, the depositions were read over to the prisoners and being asked, with the usual caution, what they had to say, Collins replied as follows :—

"I am not guilty of any of the charges alleged, and in any and every act done by me, in any way connected with the taking and capture of the *Chesapeake*, I say that act was done under the authority and in the service of the Confederate States of America, Jefferson Davis, President, as I then believed, and now believe. And I utterly deny that I am guilty of either piracy, murder, or robbery on the High Seas, or of any crime or offence whatever, and I positively assert that I never contemplated piracy, murder, or robbery, or any other crime or offence, and do not believe I have committed any."

(Signed) D. COLLINS.

The other two prisoners made and signed similar statements.

THURSDAY, 28th Jan'y, 1864.

The following Witnesses were then called for the defence :

EVIDENCE OF JOHN RING.

John Ring, I live in Carleton, lived there all my life. I know two of the prisoners, McKinney and Seely. I know Charles Watters. I was present at the meeting spoken of by Watters, about the *Chesapeake* ; Watters was there ; McKinney and

Seely were there. It was proposed to enter into the Confederate service at that meeting. I saw Braine there, a man they called Braine. I saw a man called the Captain; did not see Parr. I was at both meetings; some man showed a paper which the Captain said was his authority. I would know that paper if I saw it; I know it by a large seal not quite at the corner; a man's head and shoulders. There is another seal on it, on the right hand side, looking like a blot; I minded it when the man read it. I saw it afterwards in Mr. Gray's hands. Jefferson Davis' name was at the bottom of it. I went up and saw what it was he had done reading. This is the paper which was produced at the meeting. I swear this is the paper the man read at the meeting. I made a mistake about the head and shoulders of the seal. He had just done reading as I went in. This is the identical paper.*

Mr. Gray offers the paper in evidence as part of what took place at the meeting

The Magistrate declines to receive it until it is proved genuine.

Cross-examined.—The seal on the right hand looked like a small blot. I cannot say on which side it was, inside or outside.

EVIDENCE OF JAMES TRECARTIN.

James Trecartin, I live in Carleton. I was present at the last meeting. Ring was there. I think Watters was there. It was proposed to enter into the service of the Confederate States. I was introduced to Captain Parker. I heard a man called Braine was there. I asked the Captain what was his authority, and he pointed to a gentleman and said he will shew you my authority, he produced an envelope. He took a paper out, and I saw the red spot on the back. He then read it out. I saw the large seal afterwards on it. It commenced "Jefferson Davis, President of the Confederate States of America." It was signed on the right hand side "Jefferson Davis."

Cross-examined.—It was a round red mark. "Jefferson Davis" was written out in full; there was nothing after it. I saw the paper once at Mr. Gray's; do not recollect the day. I think it was Thursday 7th inst. in the evening. I gave the description of the paper to Mr. Gray, and then he shewed me the paper. Mr. Gray and Mr. Weldon were there. I swear this is the paper from the mark shown; the small red seal of the paper. It was a red seal. It was a diamond stamp. I could not say whose name was there.

A certified copy of the commission establishing a Court in the Province of New Brunswick, for the trial of Piracy and other offences committed on the high seas, passed at Westminster the 11th day of April, 1829, by writ of Privy Seal; put in evidence and read.

Jan'y 30th, 1864.

Certified copies of the letters of the American Consul to Mr. Tilley,† and affidavit accompanying them; put in and read.

EVIDENCE OF LUKE P. BLACKBURN.

Dr. Luke P. Blackburn being sworn, said: I am a resident of the Confederate States. Reside in Natchez, Mississippi. I was appointed Medical Director of the State of Mississippi, in January, 1863. I left the Confederate States on 16th July last. I am a native of the State of Kentucky. Have resided in the Southern States since March, '46, and have been connected with the armies since the difficulty between North and South commenced. Am intimately acquainted with Jefferson Davis, President of the Confederate States. Know his handwriting; have corresponded with him. Know the provisional seal of the Confederate States. A new seal and a new flag were adopted in May last. Am acquainted

*See Appendix G. †Vide Appendix A.

with Mr. Benjamin, who in October, '62, was Secretary of State. The Provisional Government was established in April '61. Mr. Benjamin acted as Secretary of war for only a short period; he is now Attorney General. [Mr. Gray here placed in the witness's hand Capt. Parker's authority,* and asked him to identify the signatures and seal.] Witness: The signature is that of Jefferson Davis, and the Seal is that of the Confederacy. I think that is the signature of Mr. Benjamin. The seat of Government was removed to Richmond in the fall of 1861. A very terrible war is now going on between the United States and the Confederate States. Prisoners are exchanged. We are recognized as belligerents; sometimes this rule is infringed by the North. I have just arrived from Montreal. Left that City last Saturday. Charleston, South Carolina, is in the Confederate States, and is likely to remain so. Confederate Government issue Letters of Marque and have vessels of war too. They issued letters of Marque in 1862. The South has a small navy but a very efficient one. I know the South has a vessel of war called the Alabama. In 1862, the States composing the Confederacy were: Texas, Louisiana, Arkansas, Missouri, Kentucky, Tennessee, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Virginia.

EVIDENCE OF ALONZO G. COLEMAN.

Alonzo G. Coleman sworn: I am a resident of the Confederate States. Was born and brought up there. Am a native of Alabama. Previous to the war my father had large estates in Alabama. Have been in the Confederate service since May, 1862. My rank is that of a private. [There was an objection raised to Mr. Gray asking witness whether according to the practice of Confederate service, officers commissioned for any particular duty have not power to delegate authority and appoint others under them to aid in carrying out that duty? The magistrate allowed the answer to be given.] I have known a Captain to delegate authority to subordinates under him to do a particular act. I have known it to be done. They have authority to do this. Though a private I have myself been appointed by my Captain to act as Lieutenant to do a particular duty. The acts spoken of were recognized by our commanding officers. I know of such acts being a recognized part of our service. I mean by commanding officers, not Captains but Generals in command. In cases of parties so acting being taken prisoners by the Federal authorities, they are regarded as prisoners of war. The Southern ports are *looked upon* as blockaded. I knew nothing of the *Chesapeake* matter until brought here.

Cross-examined by Mr. Tuck: I was not an officer, but was regarded as an officer when placed in command of a party. I only received Private's pay. If a Lieutenant places a Private in command of a party to act for him, he is privileged to act as Lieutenant commanding.

EVIDENCE OF CAPT. THOMAS HERBERT DAVIS.

Capt. Thos. Herbert Davis, sworn. I am a native of Virginia. Am in Confederate service. Am a Captain. I went into the service in South Carolina at Fort Moultrie, when the "Star of the West" came up. I went in as a Private, and have gone up through all the grades to a Captain. Have been in active service. Have been with Lee's army. Have been with it until within the last six months, during which time I was a prisoner at Johnson's Island. Have served under Johnson, Beauregard and Lee. My division General is Picket. I belong to Longstreet's corps. I have been in every battle except the seven day's battle at Richmond, and the battle of Chancellorsville. I was wounded at Seven Points. Was taken prisoner at Gettysburg, and sent to Johnson's Island, from which place I escaped on New-Year's night. That was the coldest night I felt for 12 years. I rode 15 miles, and walked some 120. I borrowed the horses I rode, or rather I took them while the farmers were asleep. According to the practice of our service, officers commissioned to do a particular duty have power to authorize and appoint others to do that duty, or aid in carrying it out; I have exercised it myself. Such acts have always been recognized by my General Offi-

*Vide Appendix G.

cer, and I suppose by the Government; to my knowledge no objection was ever made. It is no novel thing for these appointments to be made. When the persons so appointed to act have been taken prisoners by the Federal authorities, they have been regarded as prisoners of war. I was so treated myself. My Field Officer and two ranking Captains were shot at Gettysburg. After that until wounded I commanded the Regiment. I was then unable to get off the field, and was taken as a prisoner of war by the Yankees, and transferred to Johnson's Island. A person appointed by a Captain to do a particular duty, if taken, is regarded as a prisoner of war. I believe this to be the recognized rule of the service. Did not know Colcock, Collector at Charleston.

Cross-examined by Mr. Wetmore: If I wanted a person to do a particular duty, and was deficient in officers, I should appoint some person of less rank for the time being; he would hold the higher rank in the discharge of that particular duty. In our volunteer service, officers and men frequently mess together. I don't know that in any exchange of prisoners, a Private is given for an Officer. I know, however, that the Federals hold four hundred persons at Johnson's Island, who prior to the new organization of the regiments held commissions, but afterwards, having been voted out, occupied the position of private citizens, with a view to their exchange for officers. I could make an orderly Sergt. a Capt. to do a particular duty in event of there being no Lieut. The person appointed to discharge a particular duty in this way would be respected and obeyed by the men. These appointments are not officially notified to the General in command, except by the regular morning's reports. If a General came along and heard of the appointment of a subaltern in the manner described, he would recognize it. Never heard of Braine except in connection with the *Chesapeake* affair. Don't recollect that name among the army officers. There are so many officers in the service that it is impossible to remember the names of them all.

EVIDENCE OF E. TOM OSBORNE.

Ephraim Tom Osborne, sworn:—I belong to Kentucky. Am in the Confederate service. Have been serving with Gen. John H. Morgan since he was a Captain. The Yankees call him a guerilla. Have been in active service two years. Was on detached service the rest of the time. Was taken prisoner on the 19th July last. Escaped from Camp Douglas on the 2nd Dec. last. Gen. Morgan escaped from Columbus, Ohio, previously. According to the practice of our service, officers commissioned to a particular post, or to do a particular duty, have power to delegate their authority to others; I have known it to be the case. One year ago this winter I saw it done almost every day. The reports of such appointments are made to the Colonel and from them to his superior, and so on until it goes to head quarters. [Mr. Wetmore here observed that these reports were most likely going on yet, to which the witness observed they might stop when they reached Richmond. The quiet yet cutting way in which this retort was given caused some merriment in Court.] When persons so appointed have been taken prisoners they have been treated as prisoners of war. I arrived here this morning. All of our party arrived this morning. I have seen some account of the *Chesapeake* affair in the papers.

EVIDENCE OF EBEN LOCKE.

Eben Locke, sworn:—Am a Nova Scotian. Am a sea-faring man. Am a Captain. Shelburne, N. S., is my native place. Have a brother called Vernon G. Locke who goes by the name of Capt. Parker. He left Nova Scotia, about twenty years ago when a boy. He has been living in the States ever since. Believe his family live in Fayetteville, N. C. I have been in Wilmington, N. C. Was in Nassau this summer. Saw there a Confederate vessel called the Retribution. She was called a privateer. She had the Confederate flag flying. Saw there my brother in command of the Retribution, passing under the name of Capt. John Parker, He was received and recognized as Captain. He showed me his commission. I asked him to do so. I asked him either for his Commission or letters of Marque. The paper placed in my hand is the one he showed me at that time. It is in the same state now as it was then. I remember the writing on the back distinctly. My brother was on board of my vessel at Nassau. Had not seen him for 20 years.

In consequence of what I heard at Nassau, I found that Capt. Parker was my brother. Next saw him at Sambro, N. S. He was then in command of the *Chesapeake*. He was the same Capt. Parker, my brother, whom I saw at Nassau. I saw this same commission in his own hand in Halifax. How it got into your hands I don't know.

Cross-examined by Mr. Tuck :—I read part of the paper. Read enough of it to know that that is the same paper. Don't know why my brother changed his name. Don't know that my brother sailed out of Boston. Know that he sailed out of New York, and out of Cape Cod. Don't know how long since he sailed out. Never saw the *Chesapeake*. I went down from Halifax to Sambro ; half an hour before I arrived she had left. Never changed my name. Stayed two hours at Sambro. My brother remained till I went to Halifax. Got a carriage and brought my brother there ; then went home, 60 miles east of Halifax. Don't know where my brother now is. Don't know anything about Braine or Parr. Have not heard of Parker since leaving Halifax. Got none of the cargo at Sambro, nor did any of my family. Did not see any of the cargo belonging to the *Chesapeake*. My brother did not tell me of selling parts of the cargo all along the shore.

Re-examined by Mr. Gray :—My brother is a Nova Scotian by birth. He told me his family was at Fayetteville. Some questions put by the learned Counsel as to the conversation he had with his brother were objected to.

The Queen's Proclamation of the 13th May, 1861, as to the observance of neutrality pending the hostilities between the United States and the Confederate States of America, was put in evidence by Mr. Gray.

Feb'y 10th, 1864.

John Driscoll, being acquainted with Capt. Parker's hand writing, proves the signature to order to Braine,* and also to commission to Collins.†

W. C. Watson produced the register of the Kate Hale, a Confederate vessel, registered in Charleston, South Carolina, and by comparson proves the hand writing of 'W. F. Colcock,' Collector of Charleston, to the endorsement on the letters of marque.‡

The evidence for the defence here closed.

Feb'y 15, 1864.

Mr. Gray moved for the discharge of the prisoners, on a variety of grounds ; but as they appear in the argument before His Hon. Mr. Justice Ritchie, together with the authorities cited in support of them, they are omitted, except the following authorities which were not cited by the Counsel before the Judge.

2 Wheaton, 76. 10 Wheaton, 306. L'Aimiable, 6. Wheaton, 1. Brown vs U. S. 8 Cranch, 132. "The Hiawatha" Appendix to Wheaton, Int. Law, (Lawrence) 16 24. U. S. vs Klintock. 5 Wheaton, 152. U. S. vs Smith, Id. 154. The "Mariana Flora," 11 Wheaton. The Apollon, 6 Curtis, (Condensed Rep.) 92. The "Divina Pastora," 4 Wheaton, 52. "L. Invincible" 1 Wheat. 238. The "Savannah" crew tried in Philadelphia, in 1861. The "Saladin," before Court in Halifax, in 1843.

*Vide Appendix H. †Vide Appendix I. ‡Vide Appendix G.

After hearing Mr. Gray and Mr. Weldon, in support of these objections, and Mr. Wetmore, on the other side, the Police Magistrate adjourned to

Feb'y 24th, 1864.

When His Worship gave the following judgment:

After recapitulating the evidence he proceeded as follows:

In giving judgment in the case, I shall first consider the effect of the evidence iven on behalf of the prosecution, and what it discloses: 1st. It discloses the fact that the prisoners and a number of persons met together in Lower Cove, in the City of St. John, without authority from this or any other Government, and came to the conclusion to proceed to New York and take a steamer, the desigu being that they were to take passage on board of the steamer and capture her on her voyage—the work, I say, of a coward and a villain, which ought to be considered as against all law—Human or Divine. This was accomplished, and the vessel seized, as appears by the evidence.

Now upon examination of the law between a master mariner and his passengers it will be found that the grave responsibility of the person to whose skill and conduct life and property are entrusted on the ocean, and the situations of unforseen emergency in which he may be compelled to exert himself for the passengers' preservation, render it necessary that he should be invested with large, and, for the time at least, unfettered authority. Obedience to this authority, in all matters within its scope, is a duty which should be cheerfully discharged by every passenger on board the ship. Whatever is necessary for the security of the vessel, the discipline of the crew, the safety of all on board, the master may require not only of the ship's company, who have expressly contracted to obey him, but of those also whom he has engaged to carry to their destination, on the implied condition of their submission to his rule. Therefore a passenger who is found on board in time of danger, is bound, at the Master's call, to do works of necessity in defence of the ship if attacked, and for the preservation of the lives of all on board.

Now I shall consider the effect of the evidence, and what it discloses, produced on behalf of the prisoners, touching the seizure of the *Chesapeake*.

1st It appeared that a most terrible civil war was existing between the Federal States and the revolted Confederate States, and that they have been recognized by Great Britain as belligerents.

2nd. That the authority to seize and take the *Chesapeake* rests entirely on the authority and position which John Parker, *alias* Vernon G. Locke, held under the authority of the Confederate States. Now what was his position and what authority had he from the Confederate States to authorize him to commission persons in New Brunswick to commit this act? Does the talk at the meetings at Lower Cove about the Confederate service and officers of the Confederate service, and the presenting the Letters of Marque, give Parker, *alias* Locke, any power. I apprehend not. From the fact of Vernon G. Locke having possessed himself of the Letters of Marque at Nassau, a British port, constituting the vessel "Retribution" a private, not a public, armed vessel, in the Confederate service, whereof Thomas B. Power was commander, and there appearing on the back thereof an endorsement transferring the command of the Retribution to John Parker, and he, Locke, having assumed the name of John Parker, and there being no authority shown for making this transfer or that Locke was the person to whom it was in fact made, does not, I appprehend, give Locke the power on behalf of the Confederate States, to plan in the Province of New Brunswick the expedition, and create at will, officers for the Confederate service during the pendency of the war.

Now this brings me to the questions which I have to decide. 1st. There are the proceedings had before his Excellency, and his warrant in this matter. I decide that the jurisdiction given to His Excellency under the Imperial Act is not a subject matter for me to enquire into.

2d. As to my own jurisdiction. I hold that under the 10th section of the Treaty, and the Imperial Act, I have jurisdiction in cases of piracy, and that this

jurisdiction extends to piracy committed on board of American vessels on the high seas, as well as for piracy committed against the municipal laws of the United States. I have carefully examined the authorities cited upon this latter point, namely: Piracy by the law of nations, and piracy by the municipal law of the States. I find it stated in a note in "Wheaton" that in the construction of the British Treaty of Extradition, a crime committed at sea on board of an American vessel has been considered the same as if committed in the territory of the United States.

"Vattel" says that the domain of a nation extends to all its just possessions, and by its possession, we are not to understand its territories only, but all the rights (droits) it enjoys. He also considers the vessels of a nation on the high seas a portion of its territories.

The other points raised I have carefully considered, and have endeavored to search out a justification for the act perpetrated by the prisoners at the Bar and the other persons charged, and I must confess I can find no justification. Taking the whole circumstances of the capture of the *Chesapeake* it was not *jure belli*, but she was seized and carried away *anima furandi*. It was not a belligerent capture but a robbery on the high seas. Therefore I consider—1st. That this is an act of piracy; 2d. That it is justiciable by the Federal judiciary and therefore, 3d. I consider this to be rightfully a case of extradition.

It now only remains for me to declare to you David Collins, and to you James McKinney, and to you Linus Seely, that I shall commit you on the charge of piracy to the Common Gaol of the City and County of Saint John, there to remain until you are handed over to the United States authorities, pursuant to the requisition made to His Excellency.

The Police Magistrate having issued a warrant of commitment,* in accordance with his decision, the prisoners were committed to the gaol of the City of Saint John, and an application being at once made to His Honor, Mr. Justice Ritchie, he issued an order in the nature of a habeas corpus under 19 Vic. Cap. 42, returnable before him at the Judge's Chambers, in the Law Society's rooms, in St. John, on the 26th February.

Feb'y 26th, 1864.

James A. Harding, Esq., High Sheriff of the City and County of Saint John, attended before Judge Ritchie, and made his return to the order of the Judge.†

The order and return having been filed and read,

GRAY, Q. C., applied on the part of the prisoners, for an order to the Police Magistrate to produce the evidence and proceedings, taken before him on which the warrant for the commitment of the prisoners was issued. He referred to Act 6, W. 4, c. 36, "for more effectually securing the liberty of the subject by enforcing the execution of writs of habeas corpus;" under which the Judge before whom the return was made, was authorised to examine into the truth of the facts set forth in the return—even when that was sufficient and the Act 19, V. c 42,

*Vide Appendix F. †Vide Appendix K.

"for better securing the liberty of the subject" under which the order in this case had been issued, which gave the Judge enlarged powers, enacting (S. 3) that "upon return to such "order, the Judge may proceed to examine into and decide "upon the legality of the imprisonment, and make such order, "require such verification, and direct such notices or further "returns in respect thereof as he may deem necessary or pro-"per for the purposes of justice, and may, and he is hereby "empowered by order in writing signed as aforesaid, to re-"quire the immediate discharge from prison, or may direct "the bailment of such prisoner in such manner and for such "purpose, and with the like effect and proceeding, as is now "allowed upon Habeas Corpus."

Ritchie J.—I think some facts should be shown on affidavit to authorise my making the order asked for. I have no judicial knowledge of the proceedings before the magistrate.

Gray, Q. C., referred to the language of the Act giving the Judge the power to order the evidence to be brought before him, even if the warrant of commitment were sufficient. The Act should have a construction in favour of liberty. There was a distinction between applications before and after indictment. Where an indictment has been found the Court cannot go behind it. But on a commitment before indictment, it is otherwise. People *v.* Martin, 1 Parker, Crim. R. 187.

Ritchie J.—I have no doubt I may make the order, but do not think I ought to do so until some reasons are brought before me on affidavit I must presume everything to be correct.

Gray, Q. C., stated he would obtain an affidavit if required; none could however be made before the return to the order was filed, and the only reason for making the present application was to save unnecessary delay. The Police Magistrate had received notice to produce the papers required.

On the 27th February

Gray Q. C., applied for an order to the Police Magistrate to produce the proceedings and depositions taken in this case, on an affidavit of David Collins one of the Prisoners, stating that they were confined by virtue of a warrant issued by the Police Magistrate of Saint John, on a charge of Piracy, that the warrant was founded on certain depositions taken before the said Magistrate, by which it appeared that the offence, if any, was committed on the high seas, and without the jurisdiction of this Province and the United States, that no charge had been made on proceedings commenced against any of the

prisoners, for Piracy or otherwise in any Court of the United States, that they were acting under due authority from the Confederate States of America, and not Pirates, but belligerents acting against the United States *jure belli*, that no requisition by the proper authorities in the United States had been made to justify the proceeding taken against the prisoners; and also stating that the facts set out in the warrant of commitment were not supported by the evidence adduced

He cited Archibold's Criminal Practice by Waterman. v. 1, pages 220, 2, 3. People *v* Martin, 1 Parker's Crim. R. 187. id. 1.

WETMORE Q. C., for the prosecution objected that this proceeding took place under the Imperial Statute passed to give effect to the Ashburton Treaty and not a habeas corpus act.

RITCHIE J. I am proceeding not under a habeas corpus nor the Imperial Statute referred to, but under an act giving me like powers upon an order issued under the act as in a proceeding upon habeas corpus.

I have no doubt this is a proceeding which peculiarly calls for the interposition of the highest tribunals of the land. It is the duty of Her Majesty's Justices to see that the liberty of Her subjects is preserved. If the court will interfere in the case of persons committed for trial in this Country, *a fortiori* the court will interfere where the parties are to be sent abroad. The only English case I am aware of under the extradition Statutes is one which arose under that passed to carry out the Treaty with France, (In re Besset, 6 Q. B. 481) where the court held that their powers, being statutory, were to have a strict construction. I cannot doubt I have power to review the proceedings before the Magistrate, and if there was no ground for those proceedings, or the Magistrate has fallen into any error, either in form or substance, and I should be of opinion the parties are illegally imprisoned, to discharge them. I think I should be failing in one of the most important of my duties did I not order not only the warrant, but also, as an affidavit has been made before me that the evidence did not warrant the conclusion the Magistrate arrived at, the depositions and proceedings before him to be brought up; and I consider it my duty, in the words of the act to "examine into and decide upon the legality of the Imprisonment," and, the return being questioned "to require such verification" as I may deem necessary, and, to enable me so to examine and decide. I think I ought to "direct the further returns" asked for to be made.

The depositions being then handed in by Mr. Gilbert, and being read, including the charge contained in the heading of the depositions,* the case was then fully argued before the learned Judge, on Saturday the 27th February, and the following Monday, Tuesday, and Wednesday.

GRAY, Q. C., and C. W. WELDON, for the prisoners.

The proceedings have taken place under the Imperial Act 6 & 7, V. c. 76, (2 R. S. 429,) passed to give effect to the Ashburton Treaty. The treaty is entitled "A treaty to settle and define the boundaries etc.—and for the giving up of criminal fugitives from justice in certain cases," and the 10th Article provides for the extradition of persons charged with the commission of the crimes specified, within the jurisdiction of either country, and seeking an asylum, or being found within the territories of the other. But the treaty could give no power in itself to any officers in this Province, to act in such cases. Their powers must come from the statute and from it alone.

And since a man who has committed no crime in the Country where he is, is entitled to his freedom, and a man who has committed a crime against the Laws of that Country, is entitled to be tried by its Courts; a statute such a this, being in derogation of these Common Law rights, must be construed strictly (In re Besset 6 Q. B. 485.) The statute provides (s. 1) that if requisition shall be made "*by the authority* of the said United States," for the delivery of any person "*charged*" with an offence committed "within the *jurisdiction* of the United States," and found within the territories of Her Majesty; the Lieutenant Governor shall signify that *such requisition* has been *so made*, and require "all Justices of the Peace and *other Magistrates, and officers of Justice within their several jurisdictions*," to aid in apprehending the persons so accused; and that thereupon "any Justice of the Peace or *other person* having power to commit for trial, persons accused of crimes against the Laws of that part of Her Majesty's Dominions in which such supposed offender may be found;" may examine into the charge and commit the accused person to gaol until delivered up, pursuant to the requisition.

Under the provision of this statute, a warrant of commitment should shew upon its face.

(1) That a requisition had been made by the authority of the United States.

(2.) That the offence was committed within the jurisdic-

*See Appendix I.

tion of the United States, and that must be their exclusive or terrritorial jurisdiction.

(3.) That the committing Magistrate had jurisdiction over the charge.

(4.) That the evidence taken before the Magistrate, was such as according to the laws of this Province, would justify the apprehension and committal of the persons accused if the crime had been committed in this Province, and upon such finding the warrant, should order the committal.

But the warrant of commitment in this case is defective in the following particulars.

(1.) It does not state that the evidence before the Magistrate, was such as would have been sufficient to justify an apprehension and committal for trial in this Province, and thereupon under the committal.

(2.) It does not allege the offence charged was committed in the United States, or within its jurisdiction. It simply alleges that Cape Cod is in the United States.

(3.) It shews the offence to have been committed on the high seas, 20 miles off Cape Cod, and beyond the territorial jurisdiction of the United States, and directs the prisoners to be detained "until delivered up pursuant to the requisition etc." Whereas for an offence committed on the high seas, *per se* the Prisoners are justiciable in the Courts here, and cannot be delivered up or discharged otherwise than by due course of law here.

(4.) It shews on its face that the Magistrate who committed, was acting simply as a Justice of the Peace, and not as a commissioner or officer under the Imperial Statutes for the trial of crimes and offences committed on the high seas, and the commission for that purpose in force in this Province and therefore it shews that the case was without his jurisdiction, and does not come within the Imperial Act to give effect to the Treaty.

(5). It does not allege or shew that any complaint or proceeding had been taken or was pending in the foreign state or that the foreign state had made any application for the rendition of the prisoners under the Treaty, or that the application was made by the *authority* of the United States.

(6). It should not only shew that the offence charged was committed within the jurisdiction of the United States, but should go further and negative any co-ordinate jurisdiction which co-ordinate jurisdiction must be inferred from the allegation of the piracy being committed on the high seas.

And two minor objections are—

(7). There is no allegation that the evidence was taken in the presence or hearing of the prisoners.

(8). There is no allegationthat the place where the evidence was taken was within the City and County of Saint John.

The warrant does not set forth the grounds of the commitment. A mere averment that it was issued "upon due proof as by the statute required" is insufficient. Nash's case 4 B. and Ald. 295. And so of the averment in the present case "upon the evidence before me taken on oath." And the form of warrant given in In re Kane's 14, Howard, 77, and the terms of the Canadian Act (consol. Stats. Canada c. 89,) passed to give effect to the extradition Treaty are to the same effect. It is perfectly consistent with the terms of the warrant in this case that there was no evidence sufficient to justify the commitment by the laws of this Province. A particular kind of evidence is required by the statute. And where a person is committed on a special authority, the commitment must be special and follow the authority. Here there is nothing to shew the nature of the evidence or that there was any sufficient evidence at all. Ex parte Anderson Jurist, March 16, 1861, Ed. portion p. 110.

The warrant shews no proper jurisdiction of the United States over the offence. It alleges the parties were charged with having "on the high seas 20 miles N. N. E. of Cape Cod in the United States of America, with force and arms," &c. And the jurisdiction is sought to be inferred from the *Chesapeake* being a registered United States vessel, owned by a U. S. citizen. And even then there is nothing in the warrant to shew Capt. Willet was legally in charge of the vessel. Nor can the exclusive jurisdiction be inferred from the *Chesapeake* being a United States vessel. The jurisdiction of every nation extends "to the punishment of piracy and other offences against the law of nations, by whomsoever and *wheresoever* committed." Lawrence's, Wheaton's, Intl. law 2d Ed. p. 231. A pirate is of no country and liable to be tried wherever he may be found, and wherever he may be arrested that country takes jurisdiction of his crime. U. S. *v* Palmer, 4 Curtis, 314, In re. Kane, 14 Howard, 77.

The warrant should show on its face, that the Magistrate had jurisdiction. Kite and Lane's case 1 B. and C. 101 In re Peerless 1 Q. B., 143. Ordinary Justices of the Peace have no jurisdiction over piracy. The imperial Act refers to this when it says it shall be lawful for the Lt. Governor to require "all Justices of the Peace and *other Magistrates ana officers of justice within their several jurisdictions*" to aid in appre-

hending persons charged, and further that it shall be lawful "for any Justice of the Peace or *other persons* having power to commit for trial," to examine into the truth of the charge alleged. The only authority in this Province to try charges of piracy is under the Imperial Statutes 28 Hen. 8 c 15 and 11 and 12 W. 3 c 7, and under those statutes a commission has been issued and is in force. And the commission only extends to the persons named in it and not to all Magistrates within the Province. Special Statutes have given justices power to act in England 7 Bac Abr p. 446. Title Piracy 7, Geo. 4 c 38; but there is no such authority to Justices here. Justices of the Peace as such have no jurisdiction on the high seas. By the terms of their appointment in this Province their jurisdiction is confined to the County for which they are appointed. The Governor's warrant could give no jurisdiction. The Canadian statute specially authorizes Justices of the Peace to act in such cases, but the Imperial Statutes does not, but limits the action of the respective officers "within their several jurisdictions."

The Lieutenant Governor is bound to pursue the terms of the act and until a proper requisition is made he cannot issue a legal warrant. But the requisitions of the United States Consul in the present case as shown in the recital in the warrant of commitment are not sufficient. They do not even assert the application to be made "by the authority" but only "on behalf" of the United States terms entirely different since an application may be made on behalf of another without his knowledge, and such an application would fix him with no liability. It may be adopted or repudiated as the party principal chooses. Nor does it appear that the right to make such requisitions is vested in the American Consul *virtute officio*—nor is any direct authority or instructions to him, or any subsequent ratification of his actions shown—nor if shown, could it cure the defect.

The warrant states the parties were brought up "to answer the complaint of Isaac Willett of the State of New York," and not a complaint made by authority of the United States. That complaint of Willett's was made in this Province, and not in the United States It was made before a magistrate who had no jurisdiction in cases of piracy. If he had power to take such a complaint where was the use of the Lieut. Governor's warrant at all. The whole proceedings were *coram non judice.*

The requisition should be made by the executive authority. Opinions of the U. S. Attorney General cited in Wheaton's Int. Law, pp. 241, 2.—Notes—In re. Kane, 14, Howard, 77, and

the terms of the Canadian Statutes are to the same effect. The U. S. Consul's requisitions refer to no such authority. It is consistent with their terms that he merely applied to have the parties tried here. Nor does it appear that the parties had been legally "charged" in the United States as required by the terms of the statute. The requisitions merely say the parties were "believed to be guilty." The second section of the Imperial Act refers to "the depositions upon which the original warrant was granted," shewing that their existence is necessary. And in re Kane, 14, Howard, 77, and Metzger's case, 1 Parker, C. 188, are to the same effect. Here even if the prisoners were taken to the boundary line, for all that appears on the warrant of commitment, there would be no one authorised on the part of the United States to receive them—no warrant issued there on which they could be detained.

This proceeding though on its face a mere commitment for trial is a quasi conviction, since the Magistrate commits the parties to be handed over to another jurisdiction and deprived of rights they would here enjoy, and the warrant should therefore be construed with the utmost strictness.

But leaving the questions as to the validity of the warrant, and taking up the facts which appeared in evidence, the prisoners are entitled to their discharge on the following grounds:—

First. The offence charged is Piracy on the High Seas. It is therefore cognizable by the proper tribunals of the Country, and the parties committed do not come within the Extradition Treaty with the United States:—

(1). The jurisdiction which a nation has over its public and private vessels on the high seas, is exclusive only so far as respects offences against its own municipal laws. Piracy and murder on the high seas are punishable by the Law of Nations wherever the criminal may be found, and no Country has exclusive jurisdiction of such offences.

(2). No Country can make that Piracy which is not Piracy by the Law of Nations, in order to give jurisdiction to its own courts over such offences.

(3). The Extradition Treaty between the United States and Great Britain, contemplates only a demand and delivery in cases where the crime committed falls exclusively within the jurisdiction of the Country demanding, and is not applicable where a co-ordinate jurisdiction to try and punish for the crime committed exists in the Country where the person demanded is found. Therefore, if the taking of the "Chesa-

peake" be Piracy under the Law of Nations, the tribunals of this Country can take cognizance of the crime, and the party charged can neither be demanded nor legally given up.

Second. Under the relative positions which the United States and the Confederate States bear to each other—both having been recognized as belligerents by Her Majesty's Government—the offence is not Piracy at all; the parties committed are in no way punishable, and cannot be surrendered:—

(1). It is not Piracy, because open war exists between the revolted Country of the Confederate States and the United States, and in such case the Law of Nations does not regard acts of aggression done by the Subjects of the revolted Country against the persons, property or commerce of the parent Country as piracy or murder, and the same immunity is extended to all who aid or are acting with them *bona fide* in the act committed.

(2), The circumstances of the case shew conclusively that the parties seizing and taking the "Chesapeake," in so doing, were not acting as Pirates *cum animo depredandi aut furandi*, but as belligerents seeking to capture and destroy the property of an enemy, and acting in the name of, and on behalf of the revolted Country.

(3). It is not even necessary in such cases that the party acting should be commissoned by his Government—that is simply a matter between himself and his own Government, and affects him so far only as it vests the property captured in the Government and not in the captor. It is only necessary to prove two facts—first, the existence of open war; second, that the act done was not for piratical purposes, but in the furtherance of a belligerent object.

(4). Great Britain having recognized the Confederate States as belligerents, the Subjects of the Confederate States must be regarded *quoad hoc* as ceasing to be Subjects of the United States, and not bound by its municipal laws; so that even though the seizure and taking of the "Chesapeake" might, in a Subject of the United States be piracy, yet it cannot be so in a Subject of the Confederate States or those acting with them.

(5). The term Piracy used in the Treaty must be regarded as used in a sense which would not clash with the Law of Nations; not as used in the sense created for it by the municipal law of a particular Country. Thus the Law of Nations does not regard acts committed by belligerents as piratical; though the Country against which the acts have been com-

mitted may have passed a law that those acts are piratical. The word "piracy" as used in the Treaty must have reference to acts for which there is no punishment in the Country to which the party charged has escaped, but which in that Country, if committed there, would nevertheless be considered as piracy; for instance certain offences in harbours etc. In the present case, the offence being on the High Seas, cannot come within the latter class, and Great Britain having recognized the Confederate States as belligerents, they cannot come within the former.

(6.) Officers and men having no permanent connection with the Country, or interest in its cause, are and may be privateers, and cannot be treated as pirates, and fraud may be employed as well as force.

(7.) The Courts of a Neutral Government which recognises the existence of a civil war in another Country, cannot consider as criminal those acts of hostility which war authorises, and which the new Government may direct against its enemies.

Third. The Court of a Justice of the Peace has no jurisdiction in cases like the present, and a Justice of the Peace as such, has no power either to investigate or commit:

(1.) A Justice of the Peace has no jurisdiction or authority to issue a warrant or hold an investigation, and the Governor can give no such authority.

(2.) The warrant issued in this Province, must be based upon preliminary proceedings, had before a competent tribunal in the United States, having jurisdiction of the offence, and showing that the criminal acts charged were committed within the territorial jurisdiction of the United States, which proceedings must be forwarded to the Governor of this Province, before the Governor can issue his warrant, in order to give any tribunal or authority in this Province, jurisdiction to enquire into the offence.

(3.) On the face of the warrant to apprehend the prisoners, it discloses no requisition made by the proper authorities of the United States, by its authority, as required by the treaty, and is therefore invalid.

(4.) It does not shew that in the United States any complaint has been lodged, or proceeding taken against the parties charged, on which the proceedings in this Province can be based, and is therefore on that account invalid.

(5.) The warrant to apprehend the prisoners, is defective in combining two crimes which are triable before seperate and distinct tribunals.

(6,) The authority to a Magistrate to act, is limited to such crimes as could be committed in that part of the kingdom in which the Magistrate resided; and as the high seas are not a part of Her Majesty's Dominions, a Justice of the Peace, in the absence of any specific legislation thereupon, has no jurisdiction or power to act in any matter relating to piracy; the examination and warrant in such cases must be before one of the officers composing the mixed Court for the trial of piracy and offences on the high seas, constituted by the Imperial Act.

Fourth. This expedition, starting in a neutral territory, however gross a violation of that neutrality, does not affect the status of parties engaged in that expedition, *quoad* the other belligerents, but only is illegal as regards the neutral Country whose laws have been violated.

Fifth. The evidence shewing that these prisoners were enlisted in the cause of the Confederate service, under a genuine commission of that State, this neutral Court cannot enquire into the validity of that enlistment, except for offences against its own laws.

It has been urged that the Chesapeake being an United States ship, her deck should for all purposes be considered a portion of the United States territory. The Police Magistrate in part based his decision upon this. But the authorities cited (Wheaton's Int. Law, p. 208, Vattel, Laws of Nations, Book 1, c 19, Sec. 216, and Book 2, c 7, Sec. 8,) do not bear out the conclusion. The jurisdiction of a nation in such case is exclusive only so far as respects offences against its own municipal laws, (Wheaton's Int. Law pp. 735, 208, 9, 256, Dictum of Cockburn, C. J., Regina *v* Heane, Times of Feb. 1st, 1864.) The offence charged in the present case is Piracy on the high seas, there is no allegation in the warrants of any violation of the municipal laws of the United States. But Piracy by the Law of Nations, was never contemplated by the Extradition Treaty or statute. It only contemplates piracy by municipal law, (Wheaton's Int. Law, p. 240, n 1.) It could never have been intended to deprive either of the contracting parties of a jurisdiction it already possessed; the reason of the treaty and statute is plainly that escaping prisoners not punishable by the laws of one Country, should be delivered up to the other, and if this crime can be punished here, that reason is at an end. If the word piracy in the statute is to have a general meaning, France might claim the jurisdiction as well as the United States. There is no necessity for the treaty as regards Piracy on the high seas. A party commiting such an offence is to be tried within the

jurisdiction where he is found, (In re Kane, 20 Curtis, 93.) And the United States Statutes as put in evidence, require that pirates should be tried in the first district in which they are taken or found, and give jurisdiction to that district Court alone, (3 U. S. Statutes at large, p. 514.) And no legislation on their part, could make an offence on the high seas piracy, so as to give their Courts exclusive jurisdiction. (U. S. v Palmer, 4 Curtis 314. The Antelope, 10 Wheaton 344.) Their jurisdiction not being exclusive, in giving up parties triable here, we should stultify ourselves. The right to try the offence attaches in the United States only on the parties being found there; the Statute only contemplates the rendition of *fugitives* escaping from justice in another country, which these are not.

The acts of the captors of the "Chesapeake" subsequent to the vessels capture, cannot render their act piracy. Belligerents have no rights; their vessels and goods when captured by an enemy, may be disposed of as he pleases. Wheaton's Int. Law, pp. 629, 659, 660, 13 Howard 515.

The treaty did not contemplate civil war. In the present case, the parties claimed to capture vessels for the Confederate States. They had the colour of a Commission. If a *bona fide* commission it was sufficient to protect them. A belligerent may enlist men in a neutral country; though amenable to its municipal laws for doing so. The offence is only cognizable by the neutral state. An officer may be shewn by his acts as well as by his Commission. Here Parker was recognised in the British harbor of Nassau, as having a letter of marque. A person having a letter of marque implies his having men, and he has a right to send his officers and men out to act on separate expeditions. The evidence shews a *bona fide* enlistment in the Confederate service. A person may obtain the rights of a citizen of a foreign country without naturalization. Marryat v Wilson, 1 B. & P. 444. The Santissima Trinidad, 7 Wheaton, 283. In this case Captain Parker had been for 20 years a resident in the Southern States. Any private citizen of a belligerent, has a right to destroy the enemy's property wherever found. A commmission from the belligerent government is unnecessary. Kents Coms. v 1. pp 106, 7, 8, Wheatons Int. Law, pp. 252, 627. The only effect of the want of a commission, is that a prize goes to the government and not to the captor. As between belligerents, any man fighting on one side is the enemy of the other. But the genuineness of the commission in the present case is undoubted. The right of Captain Parker to hold it, is alone questioned. But a commission does not follow the ship. It goes to the Commander.

There is no evidence of any legal proceedings before any United States tribunal. No warrant appears to have issued in the demanding country as was the case in ex parte Besset, 6 Q. B. 481, and In re Kane, 20 Curtis 64. Nor can the application be made by the Consul *virtute officii*. In the United States the necessity for the prior action of the Executive is done away with by their Statute, but here it is otherwise. And the Consul's application was only supported by a deposition not clearly charging piracy and sworn before a magistrate who in a case of piracy had no authority to take depositions at all. The proceedings must be construed *strictissimi juris* and the warrant etc., cannot be corrected by the depositions. Ex parte Besset 6 Q. B. 481, Christie *v* Unwin, 11 Ad. and E. 373.

An expedition organized in a neutral country is only illegal so far as the neutral country is concerned. The legitimacy of the use of mercenary troops has always been recognized. A familiar instance is that of Sir DeLacy Evans, and the Spanish contingent. The only party to complain is the neutral whose territory or subjects are employed.

The evidence shows clearly an enlistment. However gross an infraction of neutrality, that enlistment is only punishable by our own laws. The United States cannot complain. Had Parker been at Nassau without authority he would have been taken and punished. His commission was duly transferred from Power the Retribution's first Captain. The witness Calcock's signature being official must be presumed correct. The commission was shewn by Parker as his authority, and the men enlisted under him in the service of the Confederate States, for the purpose of waging war against the United States.

[RITCHIE J. Assuming as you must do at this stage of your argument, the correctness of the proceedings against the prisoners, and the magistrate's jurisdiction of the offence; do not these questions fall within the province of the Superior Court on the trial of the prisoner? Is it not the Magistrate's duty now merely to see if a preliminary case is made out? I think we must act in this case just as if it was an offence committed here. The question is, would I on the evidence commit for trial in this Country. If so, must I not commit the parties for extradition?]

In Anderson's case a *prima facie* case was made out, but the prisoner was discharged. And so in U. S. *v.* Palmer, 4 Curtis, 314. Parker is found in command of the Retribution and Braine and Parr acting under him.

[RITCHIE J. I think these questions are proper for a jury

and not for the magistrate. His duty is simply to deal with this case as a magistrate would deal with an offence to be tried in this Country.]

The parties were only making war on the United States. They took the vessel on the part of the Confederate States. The organization was under the color of a Confederate commission and that was sufficient.

But if all other points fail, the heading placed by the Police Magistrate to the depositions is sufficient to discharge the prisoners. He says the prisoners were charged with having committed piracy "within the jurisdiction of the United States and the Circuit Courts thereof, and against the laws of the United States, and the Statutes of the United Kingdom of Great Britain and Ireland." But by the United States Statutes put in evidence, it is clear that those Courts have no jurisdiction until the prisoner is found within their districts, and there is no evidence in this case of any such jurisdiction attaching at all. The United States by their Acts of Congress recognise that the high seas are not within that jurisdiction. Besides, the evidence varies from the Lieutenant Governor's warrant, which gives no authority to enquire into offences committed within the jurisdiction of the Circuit Courts of the United States, and against the Statutes of the United Kindom of Great Britain and Ireland. The allegations put in by the Magistrate, were not read to the prisoners—were not charged at first. They arose out of the evidence and on the argument before the Magistrate. There is nothing in the original warrant and proceedings to support the investigation of such a charge; and unless the evidence was taken under those warrants and proceedings, it was not rightly taken at all.

WETMORE, Q. C., (with him was TUCK) for the prosecution.

Admiting the first deposition of Willett's before the Police Magistrate to have been taken without jurisdiction and *coram non judice*, the United States Consul's letter containing the statement of the offence, and names of the parties, and professing to be made by authority of the executive department of the United States government, is in itself sufficient. The only person to judge of the validity of the requisition is the Lieutenant Governor. If a requisition is presented to him he must decide, and no inconvenience can arise from this, as the parties are not committed to be given up under the Governor's warrant alone. It merely authorises an investigation. The Statute does not require the requisition to be in writing. A verbal one would be sufficient.

The Governor's warrant recites the treaty, and although it states that requisition had been made *on behalf of* the United States; it says also that it was made "in pursuance of the

treaty;" the words "on behalf of" were unnecessary. They are mere surplusage. The warrant would be sufficient if they were left out.

With regard to the Magistrate's jurisdiction in cases of piracy, the words of the Imperial Statutes are cumulative. Where it says, "it shall be lawful for any Justice of the Peace or other Person having power to commit for trial," to examine into the charge, etc., it is intended that any of these persons may act in the investigation of any of the offences referred to. The Magistrate under the statute, is to examine into the charge, and this whatever it is—and wherever he may do it, it will be equally valid. It is not necessary that it should be in presence of the party. The statute authorises the examination into the offence, even before the warrant for the apprehension of the criminal is issued.

Under the construction of the Act, the Magistrate must first issue his warrant to apprehend, and then by warrant commit the offender. No evidence subsequent to the issuing of the warrant is required. The Magistrate could, had he seen fit, have committed them on Willett's depositions alone.

The second section of the statute which enacts that "copies of the depositions upon which the original warrant was granted, certified under the hand of the person or persons issuing such warrant, and attested upon oath, may be received in evidence," does not render a preliminary proceeding in the demanding country necessary in all cases. The words are merely permissive. They legalise the use of such depositions if taken in the demanding country—do not render it necessary to take them. The parties were duly "charged" within the terms of the statute by the United States Consul's requisition. The word "charged" in the statute does not mean any specific charge or particular form of charge. Suppose the case of proceedings before a Justice on an accusation of murder; but it appeared on investigation that the crime had been committed beyond his jurisdiction, and in the United States. There the party would be "charged" by the depositions before the Justice. And in this view the parties were "charged" by Willett's first deposition. In the form of warrant given in Besset's Case, (6 Q. B. 481) the word used is not "charged" but "accused."

The Statute does not confine the rendition to *fugitives* from the jurisdiction of the demanding Country. The words of the Treaty recited in the Statute expressly extend to all criminals who "should be found" as well as those who "should seek an asylum" within the territories of the other nation.

As to this crime having been committed on the high seas

and our Courts having jurisdiction over it, there can be no doubt that the Courts of the United States have a co-ordinate jurisdiction. Having made a requisition, then they are entitled to have the criminals given up. The United States vessel was United States Territory, and the United States had full jurisdiction over her. Kent's Com. Ed. 1832, v. 1, pp. 184, 6, 7. Wheaton Intl. Law, pp. 205, 9, Regina *v.* Heane, Times, Feb. 1, '64. "The Flowery Land" London Morning Post, Feb. 5, '64. The "Chesapeake" had an United States Register and carried the United States flag.

There is nothing in the Statute to limit the word "piracy" to municipal piracy. If it does not mean piracy by international law it means nothing at all, and if it intends only what would be piracy by the municipal law of the United States and not here, for such an offence the parties could not be given up at all. There must be a similarity in the laws of the two Countries as to the offence.

The question of the parties holding a valid commission from the Confederate States would clearly be a matter for consideration at their final trial, and not at this preliminary stage of the proceedings. It is a question for a jury. There was no real proof of Colcock's signature to the transfer from Power to Parker.

No greater particularity can be required in the warrant of commitment in the present case, than in any proceeding in our own Courts. This is a preliminary proceeding, and no such great particularity is therefore required. Besides the proceedings may be amended. The English decisions cited on this point by the prisoners' Counsel, do not apply. The Act under which the order was granted in this case, differs from the habeas corpus statutes, and enables the Judge to "make such order as he may deem necessary." The Magistrate's heading of the evidence is immaterial. It cannot create any variance between the Lieutenant Governor's warrant and the proceedings taken under it, or invalidate the proceedings if otherwise correct.

GRAY, Q. C., in reply. The alteration in the heading of the evidence is very important. It saps the very foundations of justice. If a requisition is made and a warrant issued and the magistrate takes evidence on a different charge it is a serious matter. The alteration has a suspicious appearance and was made to cover an objection raised at the trial. It has a material bearing on the case. If the evidence does not correspond with the Lieut. Governor's warrant what evidence is there to show the parties are guilty at all. In that case the parties are in gaol under a commitment not supported by the evidence. If there is no evidence the commitment is irreg-

ular and illegal. If there is evidence it does not support the charge. And the proceedings cannot be amended by the evidence. Christie *v.* Unwin, 11 Ad. and El. 373.

As to the sufficiency of the requisition, the effect of the argument of the Counsel for the prosecution would be that a warrant for the arrest of any person, claimed to have committed an offence in the United States, could be issued without any sworn depositions at all. And the evidence negatives the inference drawn from the warrant's reciting it was issued "in pursuance of the treaty." Surely any person calling himself an United States Consul cannot by merely writing a letter to the Lieut. Governor, have a warrant issued, calling on all Magistrates to arrest any number of her Majesty's subjects the Consul may choose to name.

And under the Imperial Statute, the Lieut. Governor's warrant could not authorise the magistrate to take Willett's second deposition. It could only authorise magistrates to act "within their several jurisdictions." The United States can only be entitled to jurisdiction over piracy on the high seas when the pirates are found within their jurisdiction. If found here we have jurisdiction, and our Courts must use it. There is nothing to shew that this particular case is, in the opinion of the United States Government or Courts, within their jurisdiction. Had proceedings first been taken there it would have been otherwise. There is now no United States officer authorized to receive the prisoners on their being taken to the boundary. The original warrant is bad as combining two distinct offences—murder and piracy.

The Learned Judge, having taken time to consider, on the 10th March, 1864, delivered the following

JUDGMENT.

IN RE

DAVID COLLINS, JAMES McKINNEY, and LINUS SEELY,	Prisoners confined in the Common Gaol of the City and County of Saint John.

This was an application made to me on behalf of the above named prisoners, under the Act of Assembly 19 Vic. cap 42, entitled "An Act for better securing the liberty of the subject;" and sufficient cause having been shewn to me, I did by order in writing, require and direct the Keeper of the Jail of the City and County of Saint John to return to me whether or no the said parties were detained in prison, together with the day and cause of their having been taken and detained; to which order the Sheriff of the City and County of Saint John, the Keeper of the said Jail, returned to me that the said parties were confined in the said Jail under a warrant from Humphrey P. Gilbert, Police Magistrate and Justice of the Peace for the City and County of Saint John, from the following dates: McKinney from the 26th day of December last past; Collins from the 27th of December; and Seely from the 1st day of January last past; except when ordered

for examination by the said Magistrate, up to 11 o'clock or thereabouts of the morning of the 24th February, then instant, when they were taken to the Office of the said Magistrate; that the said Collins, McKinney and Seely were committed to the said Jail at mid-day on the 25th day of February, then instant, with a warrant or commitment, which the said Sheriff sets out *verbatim;* and this he returns is the cause of the detaining of the said parties whose bodies he says he has ready.

The warrant or commitment set forth is under the hand and seal of Humphrey T. Gilbert, Esquire, a Justice of the Peace of the City and County of Saint John, and Police Magistrate for the City of Saint John, and dated 25th February, 1864. (Vide Appendix F.)

On this return being made to me at the time appointed for the hearing of this matter, on application made on behalf of the said prisoners on the affidavit of David Collins, I did, in pursuance of the power and authority in me vested by the Act of Assembly, 19th Vic., chap. 42, require and direct a return to be made to me of all the proceedings, examinations, orders and depositions taken before H. T. Gilbert, P. M. and J. P., &c., under and by virtue of a Warrant purporting to be issued by His Excellency the Lieutenant Governor, dated the 24th Dec. 1863, the same being deemed by me necessary and proper for the purposes of Justice to enable me to examine into and decide upon the legality of the imprisonment of the said parties; and I directed that notice of such order should be forthwith served on Mr. Gilbert, who, upon notice thereof, returned to me all such proceedings and documents before him, that is to say the Warrant from his Excellency the Lieutenant Governor, the complaint of Isaac Willett, Mr. Gilbert s first Warrant to apprehend the prisoners, the evidence and all proceedings on the part of the prosecution, and the evidence and all proceedings on the part of the prisoners, including copies of the original letters and the requisition of J. Q. Howard, Esq., U. S. Consul at the City of St. John, upon which the Warrant of His Excellency was issued, and of the original depositions of Isaac Willett and Daniel Henderson transmitted by the said Consul with one of the said letters, duly certified agreeably to the Act of Assembly, under the hand of the Hon. S. L. Tilley, Provincial Secretary, and the charge at length on which the examination before Mr. Gilbert proceeded. (Vide American Consul's letters—Appendix A.)

The depositions transmitted with one of these letters professed to have been sworn before "H. T. Gilbert, Police Magistrate of the City of Saint John," on the 22nd Dec., 1863, the *Jurat* does not say where. The depositions are headed "Province of New Brunswick, City and County of Saint John, to wit," and commence "Isaac Willett of the City of New York in the State of New York, United States of America, Captain of the steamer "*Chesapeake*" belonging to the United States of America, and Daniel Henderson of the City of Portland in the State of Maine, one of the United States, Second Mate of the said steamer," and then detail, so far as within their own knowledge or what they heard on board, the circumstances of the capture by certain passengers (fifteen in all,) of whom the names of Braine, Collins, Robinson and Parr are given, the names of the others being unknown to them, of the steamer *Chesapeake* when she was about 20 miles North North East of Cape Cod, the shooting of the Engineer, wounding of the Mate and Second Engineer, and the forcible taking possession of the vessel, and the sending on shore in New Brunswick of the Captain and all the crew except the first and third Engineers and three Firemen, who were retained on board; and the deponents state that they are informed and fully believe that J. C. Braine, H. C. Brooks, David Collins, John Parker Locke, *alias* John Parker, Linus Seely, George Robinson, Galbraith Cox, Robert Cox, James McKinney, Robert Clifford, and H. A. Parr were among others the captors of the said steamer *Chesapeake*, a steamer of the said United States of America, on her passage from New York to Portland, and that these persons being passengers on board took forcible possession of the said steamer against their will and that of the other officers and crew of the said steamer. But except detailing the facts above referred to, no charge of Piracy or Murder is made, and no allegation whatever of the acts having been committed within the jurisdiction of the United States.

Vide Appendix I for charge, touching which the witnesses were examined by Mr. Gilbert

The prisoners by their Counsel claim that their detention is illegal, and a great variety of objections were urged at length to the proceedings in this case. They are all, I think, covered by the following:

First, that there was no legal charge against the prisoners in the United States or in this Province of an offence mentioned in the Statute committed within the jurisdiction of the United States, nor any proper requisition by the authority of the United States for the rendition of the prisoners, and therefore the Governor had no authority under the treaty and statute to issue his warrant.

Secondly—That if he had, Mr. Gilbert had not, either as Police Magistrate for the City of Saint John, or as a Justice of the Peace for the City and County of Saint John, any authority to examine touching the truth of the charge of Piracy alleged in the warrant, or to commit the persons accused thereof.

Thirdly—That if Mr. Gilbert had jurisdiction, the evidence before him showed that the offence was not piracy, and the prisoners were not guilty of that crime, and consequently there was no evidence of the truth of the charge, but to the contrary.

Fourthly—That if he was not wrong in this he wrongfully took a fresh complaint, and wrongfully examined on charges contained in that complaint, and not on the charge in the Governor's Warrant, and that the Warrant he issued and under which the prisoners are now detained is bad on its face and not sufficient in law to justify their detention.

The Queen has a right to know why any of Her subjects, or persons in Her dominions, who are alleged to be wrongfully imprisoned are so restrained of their liberty. The Writ of Habeas Corpus at Common Law and by statute, and the statute of the General Assembly under which I am now acting, are the constitutional means in this Province by which all alleged improper imprisonments are enquired into, and Her Majesty's Supreme Court and the Judges of that Court are bound on proper cause shown to investigate all cases of alleged unlawful arrest, and to relieve therefrom, if shown to be contrary to law. The right to grant such relief in this case has not been, and cannot be questioned. Having then all the proceedings before me I have to ascertain and determine whether or not such proceedings are justified by and in conformity with the Treaty and Act of Parliament. If they are, this application must be dismissed. If they are not, the prisoners must be discharged.

The Treaty, under which the delivery up to the United States Government of the prisoners is sought, is a Treaty ratified on the 13th of October, 1842—"to settle and define the boundaries between the possessions of Her Britannic Majesty in North America and the Territories of the United States"—for the "final suppression of the African slave trade, and for giving up criminals, fugitives from Justice, in certain cases." The recital of it having reference to that portion which bears on the present case is:—"Whereas it is found expedient for the better administration of Justice and the prevention of crime within the Territories and Jurisdiction of the two parties respectively that persons committing the crimes as hereinafter enumerated, and being fugitives from Justice, should, under certain circumstances, be reciprocally delivered up." And Article X. contains the stipulation agreed on. (Vide Appendix B.)

To enable this Treaty to be carried out in the British Dominions a statutary enactment was necessary, and the Parliament of Great Britain in the 6th and 7th year of Her Majesty's reign passed an Act for giving effect to the Treaty, which after reciting the 10th article of the Treaty, and the 11th with reference to the duration of this portion of it, after reciting that it is expedient that provision should be made for carrying the said agreement into effect, enacts as follows:—Vide Appendix C.

The authority which this statute gives the officer administering the Government of any Colony and all Justices of the Peace and other Magistrates and Officers of Justice within their several jurisdictions to act being a statutary power, they must one and all act strictly in accordance with the authority given, and rigidly pursue that authority. Bearing this in mind, I proceed to the consideration of the first objection. We must look closely to the Act of Parliament, for it is

from that, and that alone, the authority to act proceeds, and the very first words of the enacting part of the statute show that the basis of this right is on an event. "In case Requisition shall at any time be made by the authority of the United States in pursuance of and according to the said Treaty for the delivery of any person charged with (certain crimes including Piracy) committed within the jurisdiction of the United States &c. Thus we see the Requisition is not to be a simple bald request for the delivery up of the person named, but it is a Requisition which must be by the authority of the U. S.—it must be in pursuance of and in accordance with the Treaty—it must be for the delivery of a person charged with one of the offences mentioned in the Treaty, and the offence with which he is charged must have been committed within the jurisdiction of the United States. If a case perfect in all these ingredients is presented, the statute says it shall be lawful for the Administrator of the Government of any Colony or Possession by a Warrant under his hand and seal, to signify that such requisition has been made. Deficient in any one of these statutary requirements the Governor is powerless to act.

Let us therefore examine the documents upon which His Excellency issued his Warrant in this case. They all bear date on the same day, and in the absence of any evidence to the contrary, I may assume were laid before His Excellency at the same time, but the letter signed J. Q. Howard, U. S. Consul, in which the prisoners are named, would appear to have been the first written. It is a communication addressed to the Lieut. Governor through the Provincial Secretary. The first part of this letter is simply a request that the Governor will use his authority under the Act of Parliament "to the end that certain offenders (not naming them or their crime, or the place or jurisdiction within which committed) may be apprehended and delivered up to Justice" (not stating to whom.) It then proceeds to desire the Secretary to make known to His Excellency, that as an officer of the United States Government the writer is authorized by the Executive Department of that Government to make a Requisition upon him as the officer administering the Government of this Province, in order that certain persons (not naming them) believed (not charged) to be guilty of the crime of Piracy (not stating within what jurisdiction committed, and not stating whether piracy against the law of nations or piracy against the municipal laws of any particular country) may be brought before the proper officers of Justice, so that the evidence of their guilt or innocence may be heard and considered; and then he requests that, in accordance with the provisions of the said Act of Parliament, His Excellency will by Warrant signify that a Requisition has been made for the apprehension of John C. Braine and others, including the prisoners, and require that all Justices of the Peace and other Magistrates within the jurisdiction of this Province shall aid in apprehending the above named persons accused (not charged) of the crime of piracy, for the purpose not of having them delivered up, but for the purpose of having them brought to trial. Under the statute we have seen the Requisition must be made "by the authority of the United States," that is of the Government of the United States. Had Mr. Howard been a public Minister of the United States, and so the representative of that Government, a Requisition by him would doubtless have been good; but I am not aware that as Consul he had any such authority unless specially delegated. Perhaps the fair construction of that letter would be that Mr. Howard intended to convey to the Governor that he was so specially authorized, but the authority he claims is simply "in order that certain persons believed to be guilty of the crime of piracy may be brought before the proper officers of Justice, so that the evidence of their guilt or innocence may be heard and considered." This is all that he puts forward as to the extent of his authority, and upon this, without production of the authority, he proceeds to request that His Excellency will by Warrant signify as before stated. No authority from the Government of the United States is shown or directly alleged authorizing him to ask for the apprehension of the individual parties he names, or to ask for their apprehension as charged with the crime committed within the jurisdiction of the United States, but simply of parties accused of the crime of piracy, for the purpose not of being delivered up under the Treaty, but for the purpose of having them brought to trial. Had His Excellency issued such a Warrant as is here asked for, I have no hesitation in saying, for the reasons that will hereafter be given in considering

another branch of this case, it would have been bad. Is the matter then helped by the second letter? By this letter the Consul transmits affidavits of the Captain and second Mate, sworn at St. John before H. T. Gilbert, Police Magistrate, on no charge or complaint, to be presented to His Excellency in case "he requires evidence of the criminality of the persons charged with the crime of Piracy before issuing the Warrant for having them brought to trial." A sincere hope is then expressed that no obstacle will be thrown in the way of bringing those charged with so grave an offence to justice. If there are deficiencies in the first, it can hardly be urged that they are supplied by this letter or by the depositions accompanying it. His Excellency being one of the Commissioners named in the Royal Commission for taking information and apprehending and committing for trial persons charged with offences on the high seas, and if brought to trial, one of the Judges to try them, this letter instead of being a Requisition under the statute, or in aid of a Requistion, if I may use the expression, more resembles an application to His Excellency in that capacity than to him under the 6th and 7th Vic., as an officer administering the Government, more particularly as the last paragraph, says: "We had believed until thia late hour that a Requisition before the Executive would not have been required in the first instance," which would rather corroborate the view that proceedings were desired, independent of a requisition. As to the depositions in my opinion it cannot make the requisition good if not good without it.

It appears to have been sworn before Mr. Gilbert as Police Magistrate, and was, I think on his part wholly extra judicial. No complaint or information appears to have been laid before him to justify his taking the deposition, and if the charge of Piracy, which the statements in it unanswered would justify, had been made at that time before him, he had no jurisdiction to entertain it; still less had he jurisdiction if the offence was an alleged crime committed within the jurisdiction of the United States, and therefore amounted to no legal charge, and to no legal evidence of the crime of Piracy; but is it not absolutely necessary that the parties should be charged with the commission within the jurisdiction of the United States of one of the crimes mentioned, that is legally charged judicially, or by public process, or in some manner warranted by the laws of the country in which the alleged offence was committed. I think the words of the statute too clear to admit of any reasonable doubt on this point; and the 2nd section of the Act confirms me in this view. This Section contemplates it being done by the issuing of a warrant, for in providing that certain evidence may be used by the Magistrate or officer in the investigation of the criminality of the person apprehended, it says, "copies of the depositions upon which the original warrant was granted, &c." This obviously refers to the original warrant granted in the country where the crime was committed, and anterior to the requisition; and this view would seem to be entertained by jurists of the highest celebrity in the United States, for in the judgment of Nelson, Justice, in the Supreme Court of the United States in Kane'a case, as reported in 14 Howard, he says; "This species of evidence is very differently guarded in the Act of Parliament, 6th and 7th Vic. There, copies of the depositions laid before the Government, and upon which the proper officer issued his warrant to the Magistrates authorizing them to institute proceedings to arrest and commit the fugitive, are those only permitted to be given in evidence; in other words, copies of the depositions upon which the Government acted in the matter are admissible as evidence of criminality. The original of these are those upon which our Government make the requisition, and of course the good faith of the nation is pledged that they are taken before competent officers, and that the facts stated are true." And Chief Justice Taney concurring, as he said he did, in all that Nelson, Justice, then said, contented himself with expressing his entire assent to the opinion Nelson had then just delivered; and Daniel, Justice, concurred in all that Nelson, Justice said. And that thia principle has been acted on will be seen by reference to Bisset's case, 6 Ad., and El., in England, where we find a warrant was first issued in France, and to Kane's in the United States, just referred to, where a warrant was issued in Ireland, in addition to the special authority and affidavit of the Consul. In Kane's case, reported in 14 Howard, Mr. Barclay, the British Consul was specially employed, the report says, by direct authority of the British Minister, accredited to

the Government of the United States, and in pursuance of this authority Mr. Barclay made the necessary affidavit; and no case has been cited to me, nor am I aware of any, where a different practice has been adopted. On the contrary I find in a note to the last edition by Lawrence of Wheaton's International Law, this view confirmed by the opinion of Mr. Cushing, May 21st, 1854, in the published opinions of the Attorneys General of the United States, volume 6, page 485. The practice is declared by him in these words:—

"The practice of our own Government, as well as that of Great Britain, requires that all claims of Extradition should be founded on a judicial warrant, with proper evidence to justify the warrant. The United States will not, therefore, make a demand on Great Britain for a person alleged to be a fugitive from the justice of one of the United States without the exhibition of a judicial warrant issued on sufficient proof by the local authority." And again, in an opinion by the same learned gentleman, Nov. 2, 1854, published in the same work, vol. 7, page 6, he says: "A mere notification from a foreign legation that a party guilty of a crime has escaped, and perhaps fled to the United States of America, is not sufficient to justify the preliminary action of the President. The general rule is, the Government of which extradition, whether by comity only, (citing Kluber Sec. 66, Martin's Precis, Sec. 101) or by Treaty, is demanded, before it is called on to act, must have reasonable *prima facie* evidence of the guilt of the party, submitted to it, as well as the demand of the Executive authority." And again vol. 8, 215 page, in another opinion of the same, he says: "But to justify the commencement of proceeding in extradition it must appear that the criminal acts charged were committed within the territorial jurisdiction of the demanding Government."

But suppose the documents contain a charge against these prisoners, where do we find it alleged in them that the offence charged was committed within the jurisdiction of the United States of America? The crime stated is Piracy. In its primary and general signification, this indicates an offence against the law of nations, justiciable wherever the offender may be found. In the codes of different countries it has been arbitrarily adopted as a term applicable to offences against the Municipal Laws of such countries, or as expressed by the Commissioners in England in their report on the criminal law: "by Statutes passed at various times and still in force many artificial offences have been created which are to be deemed to amount to piracy." All such offences would be cognizable only by tribunals having jurisdiction either territorially or over the person of the offender. If it was intended in this case to be used in its limited or artificial sense, should not the requisition have shown it, to enable the Governor so to state it in his Warrant; otherwise how could the Justices or Officers, without knowing whether it was such an offence as would be cognizable in our Courts possibly be able to enquire into the sufficiency of the evidence according to the laws of this Province? If it was intended to use the term, as I think it must be taken to have been in its general sense, then the question has been raised whether inasmuch as it was not alleged that any of these parties had been in the United States since the acts on the high seas complained of were committed, but the contrary was admitted on both sides, how can the offence be considered as committed within the jurisdiction of the United States? The object of the Treaty is to be found in one of its recitals, which is: "Whereas it is found expedient for the better administration of justice and the prevention of crime within the territories and jurisdiction of the two parties respectively, that persons committing the crimes hereinafter enumerated, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up."

It is well known that the principles of the Common Law pervade the jurisprudence of both Great Britain and the United States, and by the Common Law, crimes are unquestionably considered local, cognizable and punishable exclusively in the country were they are committed; and it was doubtless to prevent the failure of Justice that would necessarily result from offenders in one country seeking refuge in the other and there being amenable to no punishment, that this Treaty was entered into; and it is not difficult to understand how the crime of Piracy, in its general sense, might come within the operation of the Treaty when

a pirate having gone into one or other of the countries and so made himself amenable to its courts and had been there legally charged with the offence had fled or been subsequently found within the territory of the other, that in such a case the country where he was first found might claim jurisdiction over the crime and the person so charged. But I have great difficulty and am as yet unable to arrive at the conclusion that, when the pirate has never after committing the offence entered the country of one of the contracting parties but is found in the territory of the other, the Government of the former can assume jurisdiction over the offence and person, and require him to be given up, and so denude the latter country of its clear jurisdiction in the matter.

I cannot, as at present advised, think it was intended by this Treaty to raise such a conflict of jurisdiction and authority, but that the word piracy was intended to apply to piracy in its municipal acceptation, or if to piracy against the law of nations then to the exceptional case I have above supposed; but assuming the offence as alleged to be one within the Treaty, and the Requisition to be sufficient, I proceed to consider the next objection.

Had Mr. Gilbert, either as Police Magistrate or a Justice of the Peace, authority to examine touching the truth of the charge?

The terms of the Statute are that the Warrant of the Governor shall "require all Justices of the Peace and other Magistrates and officers of Justice within their several jurisdictions to govern themselves accordingly and to aid in apprehending &c.,—and thereupon it shall be lawful for any Justice of the Peace or other persons, having power to commit for trial persons accused of crimes against the laws of that part of Her Majesty's Dominions in which such supposed offenders shall be found, to examine upon oath, &c." The words of the Statute differ from the Treaty. The words of the Treaty are "Judges and other Magistrates." I am bound to think this alteration advisedly made, and I find it difficult to conceive any other reason than to preserve consistency in the administration of Justice. In the Treaty nothing is said as to the jurisdiction of the Justices and other Magistrates. In the Statute the Governor can only require Justices of the Peace and other Magistrates and officers of Justice to act within their several jurisdictions; beyond their jurisdiction then they cannot act. But the Statute says, it shall be lawful for any Justice of the Peace or other person having power to commit for trial persons accused of crime, &c.,—that is, I am inclined to think, when accused of crimes in the United States over which the officers respectively have jurisdiction to commit if committed in this Province. Then in such cases they should examine on oath, and if the evidence would justify their committal here, issue their Warrant, &c.; and an insertion of the words "or other persons having power to commit for trial" would seem unnecessary if Justices of the Peace and other Magistrates could act in all cases. As at present advised I am disposed to read the terms "in their several jurisdictions" in their broad signification. I think it more consistent with the scope of the Statute and the duties to be performed that they should be considered as applying to their judicial as well as their territorial jurisdiction, it being, I think, unreasonable to suppose that a Justice of the Peace, who cannot receive an information on a charge of piracy, or examine into the truth of such charge if cognizable in this Province, should, if committed in the United States, determine on the sufficiency of the evidence according to the laws of this Province if the crime was committed here; or in like manner that the Commissioners authorized solely to receive information and commit for trial in cases of offences on the high seas, should deal with crimes over which if committed in this Province they have no jurisdiction; and from this construction no possible difficulty can arise, because for every crime named in the Statute we have either the Justices of the Peace or other persons having power to commit for trial; so that in this case when it appeared by His Excellency's Warrant that the crime charged was Piracy, Mr. Gilbert, whether as Police Magistrate or Justice of the Peace, not having jurisdiction over such an offence and no power to commit for trial a person charged with Piracy, could have referred the matter to the Judge of the Court of Vice Admiralty, or some other one of the Commissioners having authority over that offence and power to commit for trial persons charged therewith. To confine the Magistrate and officers to their respective jurisdictions is,

in my opinion, in no respect to conflict with any clause in the Treaty but in harmony with it, and in furtherance of a proper and discreet execution of its stipulations.*

But assuming the Requisition right and that the Magistrate had jurisdiction, we must consider the third Point. The question here raised was argued as if I was sitting in the character of a Court of Review or Error on the decision of the Magistrate on the facts proved before him. Such, I think, is not the case. The duty of determining on the sufficiency of the evidence is cast on the Magistrate or other officers. He is the person to be satisfied that the evidence justifies the apprehension and committal for trial of the persons accused. The amount and value of that evidence is for his determination. A Judge of the Supreme Court might think the evidence of guilt strong and of innocency weak, or *vice versa*, but the law has vested the Magistrate with the power of weighing and deciding on the effect of the evidence, and it is the result on his mind that is to determine its sufficiency or insufficiency. It is a judicial discretion with which he is vested, which, I think, is not open to question on *Habeas Corpus*, and cannot be taken from him and assumed by a Judge of the Supreme Court. If it was manifestly apparent that the evidence showed that no offence had been committed or that the party was unquestionably innocent and therefore there was really no matter of fact or law to be tried, no matter in which the Magistrate could exercise a discretion or judgment, then the case would be very different; but is such the case before us? That the vessel was seized and by force taken from the Captain and crew on the high seas, is not disputed. Unanswered this is a *prima facie* case of Piracy, and the burthen is cast on the accused of justifying this apparently wrongful act. The justification set up is that hostilities were existing between the United States and the Confederate States of America, and this seizure was made under a Commission from, or by authority and on behalf of the Confederate States, and that therefore it was an act of legitimate warfare and not of a piratical character. This, on the other hand, is denied, and it is alleged that the claim to act under the authority of the Confederate States is mere pretence and color to disguise and cover an illegal depredation. The object of privateering in general, is not, as Mr. Kent observes fame or chivalric warfare but plunder and profit: but at the present day the rights of private armed vessels and private belligerents cannot be doubted. Unless restrained by Treaty stipulations the right to commission private armed vessels is, by the laws of nations, esteemed a legitimate means of destroying the commerce of an enemy, and captures made by private armed vessels of one belligerent, even without a Commission, though not in self defence, are not regarded as piratical either by their own Government or by the other belligerent State. It does not indeed vest the enemy's property thus seized in the captors, but the seizure would be declared a prize of war to the Government of the captors; and it is equally true that neutrals taking commission as privateers and acting on them are likewise free from the imputation of Piracy.

They may make themselves amenable for the violation of the laws of their own country, and may denude themselves of the right to claim her protection to shield them from the consequences of their acts, but they cannot be dealt with by the belligerent against whom they are acting as pirates. But as neutrals they stand in a very different position from belligerents. Belligerents, we have seen, may make captures without commissions. Neutrals can only protect themselves by commissions from, or by acting under authority of the belligerent Government, or on board commissioned vessels, or under duly authorized officers. They cannot, without any commission or authority, fit out in a neutral country a hostile expedition against a power at peace with such country, and, under pretence of acting in

* The Imperial Statute 12 and 13 Vic. c. 96, passed in 1849 "to provide for the prose-"cution and trial, in Her Majesty's Colonies, of offences committed within the jurisdic-"tion of the Admiralty" and giving Colonial Magistrates jurisdiction in such cases, was not cited before the Police Magistrate, nor brought to His Honor Mr. Justice Ritchie's notice in the argument in this case. It would appear to affect so much of His Honor's decision as relates to the jurisdiction of the Police Magistrate of Saint John in cases of piracy, without however affecting the conclusion finally arrived at; that being based on defects in the requisition and other proceedings, and the construction of the Imperial Statute 6 and 7 Vic. c. 76, as well as the want of jurisdiction in the Magistrate.—*Reporter.*

the name of, or on the behalf, of a belligerent power, commmit acts on the high seas that would, unless protected by belligerent rights, be acts of Piracy, and not be held responsible criminally for such acts. And therefore it behooves persons not belligerents but subjects of a neutral power engaging in acts of hostility, if they wish to escape the imputation of criminality, to be well assured when they depredate on the shipping of a nation at peace with the one to whom they owe allegiance and in opposition to the municipal laws and neutral policy of their own Government, and in direct defiance of the express Proclamation of their Sovereign, that they are acting under the authority of a commission which will bear the test of a strict legal scrutiny. In the present case, can it be said that this was made out so clearly and unequivocally that there was nothing for the Magistrate to deliberate on—nothing for a Superior Court or Jury to try? Without expressing the slightest opinion of the guilt or innocence of the parties, or the probable result of a trial either before a judicial tribunal in this Province or in the United States, it will only be necessary to refer generally to the evidence on behalf of the prisoners to show that the case is by no means so entirely free from doubt or question as their Counsel assumed. Instead of showing that they were acting under a regular commission, or were belligerents themselves, or that the expedition proceeded from the Confederate States of America, it appears, so far as there is evidence of the nationality of the parties engaged, that they were British subjects, that the plot to seize the vessel was concocted in this City, that the commission under which they claim to act was not directed to any of the persons engaged in this capture, nor were any of them named in it, nor did it relate in any way to seizure under circumstances such as the present—that it was a commission dated 27th Oct., 1862, wherehy the vessel "Retribution," Thomas B. Power, Commander, was authorized to act as a private armed vessel for the Confederate States on the high seas against the United States, on the back of which commission is an endorsment dated 21st Nov., 1862, signed Thomas B. Power, whereby he transfers the command of the schooner "Retribution" to John Parker. The commission is proved by proof of the signature of Jefferson Davis, President of the Confederate States, and of the Seal of the Confederate States attached thereto; but the endorsement is proved by the slightest evidence of the hand-writing of the subscribing witness. There is no evidence of who this John Parker was. It was proved that at Nassau a Nova Scotian named Vernon G. Locke, who had been residing for the last twenty years in the United States, and whose family is now living at Fayetteville, was last summer in the month of May at Nassau, in command of the "Retribution," and that he was there received and recognized as her Captain, under the name of John Parker. Whether he was really the John Parker named on the back of the commission, or assumed that name with a view of representing that person was not shown, except as an inference might be drawn from the facts one way or other. This commission was produced at the Lower Cove meetings by Locke *alias* Parker, but there is not a particle of evidence as to the whereabouts of the "Retribution," at that time or since, or that he was then Captain of her. In fact the only evidence of her at all was her being at Nassau in May last summer. Whether she was in existence or not, or, if in existence, where she was, or under whose command when this expedition was planned and executed, did not appear; nor was there any evidence to show that any of the parties engaged in the capture had ever been on board the "Retribution," or in any way connected with her. On the contrary, Braine, who would appear to have been in charge of the capturing party, described himself on board the "Chesapeake," and was addressed by the title of Colonel. Locke *alias* Parker, did not proceed on the expedition, (though he boarded her subsequently off Grand Manan and took the command,) but addressed an order to "Lieut. Commanding John Clibbon Braine," requiring him to proceed to New York with 1st Lieutenant H. A. Parr, 2nd Lieutenant David Collins, Sailing Master Tom Sayers, one Engineer and crew of 22 men; engage passage on board the steamer, using his own discretion as to time and place of capture, to act towards the crew and passengers in accordance with President's instructions, and as circumstances permit, bring his prize to Grand Manan for further orders. This is signed John Parker, Captain C. S. Privateer "Retribution." There is no evidence of what these parties were officers, or how or by whom they were appointed, with the exception of David Collins, and he

appears to have got his commission of second Lieutenant from John Parker. It is in these words:

To David Collins.

Reposing confidence in your zeal and ability, I do hereby authorize and commission you to hold and assume the rank of 2nd Lieutenant, and this shall be your authority for any act, under order from me, against the Government of the United States, or against the citizens of the United States, or against the property of either, by sea or by land, during the continuance of hostilities now existing. This commission to bear date from the 1st December, A. D., 1863.

(Signed) JOHN PARKER.

Had this commission been from Jefferson Davis it might have been easily understood and possibly free from question; but issued by a British subject to a British subject, in the Queen's Dominions, it is certainly a proceeding, to say the the least of it, novel in its character and fairly challenging investigation. It is true, evidence was offered of military men attached to the Confederate Army, shewing that in operations on land officers commissioned to discharge a particular duty had, by the practice of the Confederate service, authority to appoint others under them to act as officers to carry out such duty, and that such was a recognized custom of the service; but the practice pursued by officers unquestionably in the service of the Confederate States in the field, actually engaged in the war of the hostile territories, is not quite conclusive as to British subjects and British territory. But be all this as it may, can it be deemed that the proceeding, if justifiable, was not, in many of its features, most irregular, and the *prima facie* case before the Magistrate being on the one hand clear, and the alleged justification presenting the irregularities and peculiarities, it did, and being open to so much question, can the Justice be fairly said to have exceeded his discretion if the result at which he arrived decided that the evidence was such as would justify their apprehension and committal for trial had the alleged crime been committed here, leaving the prisoners to substantiate their defence before a competent Court where the legal points could be properly determined, and where the questions of intent and of fact or inference would be submitted to and determined by Jury. As at present advised I cannot say that, in this particular, the Magistrate arrived at a wrong conclusion, nor do I think the Magistrate did wrong in refusing to go behind the Governor's warrant and determine on the sufficiency of the Requisition to His Excellency. Over that matter, I think, the Statute gives the Justice no jurisdiction or authority.

Before leaving this branch of the case I cannot refrain from expressing my deep regret that any inhabitants of New Brunswick, being British subjects, should have been seduced from their clear duty to their Sovereign, and have availed themselves of the hospitality of a friendly power by going into its territory and obtaining a passage from one of its ports, on board one of its ships, and, by a strategem possibly justifiable by the usages of war in a belligerent, have risen against an unarmed crew peaceably engaged in their lawful calling, and dispoiled them of the property under their charge, and that too with an amount of violence resulting in the death of one of the crew, which, under the evidence in this case, would not seem to have been necessary for the accomplishment of the end sought to be attained—an example, I may be permitted to add, I earnestly trust will not be followed by any of Her Majesty's loyal subjects in this Province.

As to the 4th objection. The Commitment first sets out, as we have seen, the Warrant of His Excellency, which alleges the parties to be charged upon the oaths of Isaac Willett and Daniel Henderson, with having committed the crimes of Piracy and Murder on the high seas within the jurisdiction of the United States of America, on the 7th December, then instant. Now where are these averments obtained by the legal adviser of the Governor, who I presume, drafted the Warrant? Reverting to what has been said as to the Requisition, not a word is alleged by the Consul of this crime of Murder, and not a statement made by him that either Piracy or Murder had been committed within the jurisdiction of the United States. No doubt, the legal gentleman who drew the Warrant felt the difficulty of the want of a distinct charge, and the absolute necessity of the averment that the crime was committed within the United States of America; but as there was

neither of these particulars in either of the letters of the Consul, he no doubt from necessity, resorted to the affidavit transmitted therewith of Willett and Henderson and from the facts stated by them transformed an affidavit intended, as the Consul says, " to be presented to His Excellency, in case he requires evidence of the criminality of the persons charged with the crime of Piracy before issuing the Warrant for having them brought to trial," into a charge by Willett and Henderson of Piracy and Murder. The valuelessness of this document, either as a charge or verification, I have already shown; but where the allegation that the alleged offences were committed within the jurisdiction of the United States was obtained I am at a loss to conceive, for neither the Consul nor Willett nor Henderson say anything about it, unless it was assumed that as there could not be a Requisition for an offence unless so committed, the offence alleged must necessarily have been committed within the necessary jurisdiction. Again, this Warrant does not allege that the Requisition was made by the authority of the United States but on behalf of the United States, by no means convertible terms, though it is true this allegation is preceded by the averment that in pursuance of and in accordance with the said Treaty and Act, a Requisition has been made, &c.

With these exceptions the Warrant of His Excellency appears to be in strict conformity with the Statute. Mr. Gilbert's Warrant then, as we have seen, proceeds to recite that on receipt of this Warrant he examined Isaac Willett under oath touching the truth of the charges set forth in said Warrant and upon the evidence of the said Willett, on the 25th of December, issued his Warrant for the apprehension of the persons upon the said charges: and on reference to this examination I find it is headed: "The complaint of Isaac Willett &c., taken and sworn to this 25th day of Dec., 1863, before me H. T. Gilbert &c., acting under a Warrant under the hand and seal of the Hon. A. H. Gordon, &c. The said Isaac Willett being duly sworn, saith &c." It then details with particularity the circumstances of the capture and alleges facts not before anywhere stated, namely, the registry of the vessel in the United States of America, that the vessel at the time of capture was on the high seas about 20 miles N. N. E. of Cape Cod in the United States of America, and it avers a malicious, wilful, felonious and piratical assault on, and putting in bodily fear and danger of their lives, the Captain and mariners, and the malicious, felonious and piratical taking possession of the vessel and cargo; and that they did then and there wilfully, maliciously and feloniously and violently steal take and carry away the said cargo; and that they did with a pistol loaded with powder and leaden bullet shoot and feloniously, maliciously, wilfully and piratically kill and murder one Orin Schaffer, the second engineer; and in the same language and manner shot at and wounded in the right knee one Charles Johnson, chief mate; and in the same language and manner shot and wounded in the chin James Johnson, chief engineer.

Now, with all respect for the Police Magistrate, I think this was not the proper mode of proceeding under the Statute. When he received the Governor's Warrant, assuming he had jurisdiction to act under it, he should have taken on fresh complaint. He should have embodied nothing in the form of a complaint or charge against the prisoners but what was contained in the Warrant of the Governor; and as this was his sole authority to act, he should have confined himself strictly within its requirements, which was simply in the first instance to aid in apprehending the persons accused which he should have done by issuing his Warrant reciting the Governor's Warrant, the charge therein contained against the prisoners, the requirement imposed on him thereby, and commanding the apprehension of the persons named therein, and should not have received a new complaint or introduced new charges or new matter against the accused. The correctness of this view will, I think, be confirmed by reference to the Imperial Act 8 and 9 Victoria, Chap. 120. passed 8th August, 1845, and the forms there given.

Having so examined Isaac Willett, the final commitment recites that upon the evidence of the said Isaac Willett, and in pursuance of the Act of Assembly, he issued his Warrant directing the apprehension of the parties to answer, not the charges in the Governor's Warrant, but the complaint of Isaac Willett, made on oath, for having, &c., in the words which I before mentioned, to be dealt with according to law, the said complaint having been made and taken and this Warrant

having been issued in pursuance of a Warrant under the hand and seal of the Governor, &c., in which, however, I am constrained to differ from the learned Police Magistrate, the Warrant of the Governor not authorising the taking of such complaint nor the arresting the parties to be dealt with according to law, but in the words of the Statute to be delivered up to justice according, &c., and had an application been made to discharge the prisoners while detained under this Warrant, I do not see how it could have been successfully resisted, Besset's case, 6, Q. B., 481, being a direct authority against it on one point. That was the first decision under the French convention Act 6 and 7 Vic., Chap. 75, which is in the same words as the American Treaty Act we are now considering. The Warrant of the Lord Mayor there set out that the Constable &c., should convey and deliver into custody the body of J. B. being charged before him &c., for that the said J. B. is accused of having committed in France the crime of Fraudulent Bankruptcy as appears by the Warrant of Arrest issued by a competent Judge in France and duly authenticated before me, and as also appears by the Warrant of one of Her Majesty's principal Secretaries of State requiring me to take cognizance of such crime &c. It then avers proof of the crimes and the Warrant commits the prisoner until he should be discharged by due course of law, which is the effect under this commitment under the words, to be dealt with according to law. But the Court held the Warrant bad upon the ground that as the commitment was under a special Statutory authority, the terms of the commitment must be special and exactly pursue that authority, acting on and recognizing the authority of Mash's case, 2 Wm. Bl. 806, where it is laid down that the true distinction is that when a man is committed for any crime, either at Common Law or created by Act of Parliament, for which he is punishable by indictment, then he is to be committed until discharged by due course of law, but when it is in pursuance of a special authority the terms of the commitment must be special and exactly pursue that authority.

The commitment then proceeds to aver that the prisoners having been brought before the Justice under the Warrant, and he having proceeded to the investigation of the charge of Piracy charged against them, and upon examination of the witnesses under oath touching the offence of Piracy, and upon the evidence before him, so under oath, he did, under the Act of Parliament, require and command the said Constable to convey the prisoners to the Common Jail, and deliver each of them to the Keeper thereof upon the charge of Piracy, for that they having on the 7th day of December, &c., and then proceeds to recapitulate the particulars of the charge in the complaint made before him by Isaac Willett, omitting the felonious, &c., murder and shooting, there to remain till delivered pursuant to the Requisition aforesaid. On referring to the examinations themselves, we find the charge on which the examination proceeded was of an offence which it alleges took place on the high seas, about 20 miles N. N. East of Cape Cod, in the United States of America, and within the jurisdiction of the United States of America, and the Circuit Courts thereof, against the laws of the United States of America, and the statutes of the United Kingdom of Great Britain and Ireland. So we see that at every stage of these proceedings the charge assumes a different phase.

In the first instance the Consul simply presents the complaint as that certain persons were believed to be guilty of the crime of Piracy. The Governor's Warrant puts it as a charge of Piracy and murder, on the high seas, within the jurisdiction of the United States of America, on the complaint of Willett and Henderson. The complaint before the Police Magistrate is the complaint of Willett alone, and alleges the crimes of Piracy and Murder in the United States of America, and adds the felonious shooting and wounding of engineer and mate, and felonious stealing of the cargo. And on the examination before Mr. Gilbert there is the addition of the crime being within the jurisdiction of the Circuit Courts of the United States, and being contrary to the laws of the United States of America and the statutes of Great Britain and Ireland. But independent of these discrepancies, which would seem to me difficult to reconcile, or on legal principles to account for, there is, to my mind, a still more substantial objection to this warrant. This is the final commitment of the accused to Jail, there to remain until delivered pursuant to the Requisition. But after examination of the witnesses, and before the committal, there was something to be done, an all important duty to be

discharged, which I cannot discover from the Warrant or from any of the proceedings before me, and I can look to nothing else, to have been performed, and which, if done, I think should clearly, unequivocally and unambiguously appear on the face of the Warrant, which it manifestly does not; and that is, that after hearing and considering the evidence, the Justice determined and adjudicated that he deemed the same sufficient according to the laws of this Province to justify the apprehension and committal for trial of the prisoners, if the crime had been committed within this Province. Without such an adjudication, the Warrant of commitment could not issue, and without such an adjudication appearing on the face of it when issued, I think the Warrant bad, there being without it a want of jurisdiction shown to issue the Warrant, or perhaps rather a want of jurisdiction to sustain it; and this view is confirmed by reference to 8 & 9 Vic., chap. 20, before referred to, for even there where a statutory form is given to be used by the Police Magistrate of the Metropolis, the adjudication is set forth. The form ia given thus; "Be it remembered that on &c., A. B. &c., is brought before me, J. P. &., and is charged before me for that he, the said A. B., on &c., within the jurisdiction of the United States of America did (here state the offence); and forasmuch as it has been shewn to me upon such evidence as by law is sufficient to justify the committal to Jail of the said A. B. pursuant to an Act passed in the 7th year of the Reign of her Majesty entitled &c., that the said A. B. is guilty of the said offence, thia is therefore to command, &c." The cases to be found bearing on this point lay down the principle very clearly, some of which I will quote. *In re* Peerless 1 Q. B. 152. This was a Warrant setting forth a conviction—Denman C. J. says "The Magistrate having no jurisdiction except by the express Statutory enactment, the offence is not here described sufficiently to show jurisdiction." Per Littledale J. "I do not say that this may not be a good conviction upon which a good Warrant might be framed, but I think thia Warrant clearly bad for not showing jurisdiction. In what way it is that Justices have jurisdiction, ought to appear by the Warrant. I found myself on Lord Tenterden's Judgment in Kite & Lane's case, 1 B., and C. 101." And Coleridge J. says; "By a legal Warrant, I mean a Warrant which upon the face of it shows a right to detain, and that right cannot exist unleas there be jurisdiction in the Magistrates. To deny that this must appear upon the face of the proceedings is to call in question one of the most important rules of the Criminal Law." In Kite & Lane's case referred to, Abbot C. J. says: "It is a first principle as to all acts done by Magistrates that the jurisdiction should appear on the face of their proceedings." And Best J. says: "It is a settled principle that penal Statutes, and such as create new jurisdiction shall receive a strict construction. Nash's case 4th B. and A. 295, was the case of a warrant issued under the 57th George 3d, Cap. 87 Sec. 6, by which Act, in case any person, found on board a vessel liable to forfeiture under 45 George 3, Cap. 121 be fit and able to serve his Majesty in his naval service, he shall upon such proof as by the said Act of the 45th year aforesaid, is required, be committed by such Justice to prison, to answer such information and abide such judgment &c. Abbot C. J. says:—"This Act of Parliament of the 57th year of George 3, Cap. 87, is one highly beneficial in preventing frauds upon the revenue, but at the same time, inasmuch as it trenches very strongly on the liberty of the subject, wo must take care that its provisions are strictly pursued." And again; "these circumstances stated in the introductory part of this return seem to me quite sufficient to warrant this commitment, and if it had been stated upon due proof of the matters before mentioned the prisoner was committed, I should havo thought it sufficient." And Per Holroyd, J. "The power of the Magistrate to commit depends on the proof before him, and the Rule is, that where a limited authority is given it must be shown to have been strictly pursued." And in Christy *v.* Unwin, 11 Ad. and El. 377, where the validity of an order made by the Lord Chancellor under 6th George 4th, Chap. 16, Sec. 18, was questioned, it was held that the order must shew on the face of it whatever was necessary to give jurisdiction. And Coleridge, J. says:—"We cannot intend for or against the order but must decide according to the words. However high the authority may be where a Statutory power ia exercised, the person who acts must take care to bring himself within the terms of the Statute. Whether the order be made by the Lord Chancellor or by a Justice of the Peace, the facts which give the authority must be stated."

This case is, I believe, the first under the Treaty and Act of Parliament that has called for judicial investigation in this Province, and as points of a novel, certainly of a peculiar, and I may say of a delicate, certainly of an important character have been raised, I have endeavoured to give the case the most careful consideration, and in view of the possibility of this decision becoming the subject of discussion in other quarters, I have, to prevent misaprehension, felt it right, though at the risk of subjecting myself to the charge of unnecessary prolixity, to place on the face of my judgment, at length, the documents and facts necessary to enable all interested in the matter who have not access to the papers before me, or who may not have heard the arguments, correctly to understand the points raised and the reasons for the conclusion at which I have arrived.

In the prompt manner in which His Excellency the Lieut. Governor granted his Warrant, and in the determination of the Police Magistrate on the facts of the case, the Government of the United States cannot fail, I think, to discern the determination of the Queen's Representative and Her subordinate officers faithfully and honorably to carry out the Treaty entered into between the respective Governments of the United States and Great Britain; and the present decision, the result of my own judicial convictions, being, I believe, in conformity with the legal authorities of the United States, individually I might hope it would commend itself to the United States Government; but whomsoever it may please or displease must be to me, judicially, a matter of indifference. The only duty I have to discharge is to my Sovereign, to the people of this Province, and to my own conscience. That duty is, faithfully, to the best of my humble abilities, impartially, to declare the Law as I believe it to be, wholly regardless of consequences.

This I have honestly endeavoured to do, and the result of my judgment is, that for the reasons set forth, the proceedings before me, and the Warrant of commitment, returned to me by the Sheriff of the City and County of Saint John, do not justify the detention in custody of the prisoners, whose imprisonment I therefore declare illegal; and I do by this my order require the immediate discharge from prison of the said David Collins, James McKinney and Linus Seely, under the said Warrant and commitment; and as it appears to me that the Sheriff of the City and County of Saint John, the keeper of the Jail of the said City and County, acted upon the Warrant or commitment of the said H. T. Gilbert, according to the requirements of the same, without malice or evil intent, I do, by virtue of the power conferred on me by the Act of Assembly, exempt the said keeper of tho said Jail from all civil suits which may be brought against him for or by reason of having acted on the said Warrant or commitment.

APPENDIX.

A.

REQUISITIONS OF THE UNITED STATES CONSUL.

Saint John, N. B., Dec. 22nd, 1863.

HON. S. L. TILLEY, *Provincial Secretary.*

SIR :—

I beg leave to transmit the depositions of the Captain and second Mate of the Steamer *Chesapeake*, to be presented to his Excellency, in case he requires evidence of the criminality of the persons charged with the crime of Piracy, before issuing the warrant for having them brought to Trial. It is to be sincerely hoped that no obstacles will be thrown in the way of bringing those charged with so grave an offence to justice.

We had believed until this late hour that a requisition before the Executive would not have been required in the first instance.

Yours truly,

(Signed.) J. Q. HOWARD, *U. S. Consul.*

UNITED STATES CONSULATE,

St. John, New Brunswick, December 22, 1863.

HON. S. L. TILLEY, *Provincial Secretary.*

SIR,—

I have the honor to address, through you, a communication to the Lieutenant Governor of the Province, for the purpose of requesting that his Excellency will be pleased to use the authority vested in him by the Act of Parliament for giving effect to what is known as the "Ashburton Treaty," to the end that certain offenders may be apprehended and delivered up to Justice.

You will please make known to His Excellency, that as an officer of the Government of the United States, I am authorized by the Executive Department of the Government to make a requisition upon him, as the officer administering the Government of the Province, in order that certain persons believed to be guilty of the crime of Piracy may be brought before the proper officers of Justice, so that the evidence of their guilt or innocence may be heard and considered. I have, therefore, the honor to request, that in accordance with the provisions of the said Acts of Parliament, His Excellency will by Warrant signify that a requisition has been made for the apprehension of John C. Braine, H. C. Brooks, David Collins John Parker Locke, Robert Clifford, Linus Seely, George Robinson, Gilbert Cox, Robert Cox, H. H. Parr, and James McKinney, and require that all Justices of the Peace and other Magistrates, within the Jurisdiction of this Province, shall aid in apprehending the above named persons, accused of the crime of Piracy, for the purpose of having them brought to trial.

I am sir,

Your obt. Servant,

(Signed.) J. Q. HOWARD, *U. S. Consul.*

{L.S.}

I HEREBY CERTIFY that the foregoing are true copies of the original letters and requisition of J. Q. Howard, Esq., United States Consul, at the City of Saint John, and are now on file in my office,

(Signed.) S. L. TILLEY, *Prov. Secretary.*

Secretary's Office, 29th January, 1864.

B.

Extract from the Treaty between Her Majesty and the United States of America, signed at Washington, August 9, 1842; commonly known as the "Ashburton Treaty."

"ARTICLE X.

"It is agreed that Her Britannick Majesty and the United States shall, upon mutual requisitions by them or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other:—provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed; and the respective Judges and other Magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a Warrant for the apprehension of the fugitive or person so charged, that he may be brought before such Judges or other Magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining Judge or Magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the Party who makes the requisition and receives the fugitive."

C.

"6 & 7 VIC., CAP. LXXVI.

"An Act for giving effect to a Treaty between Her Majesty and the United States of America for the apprehension of certain offenders.

"WHEREAS by the Tenth Article of a Treaty between Her Majesty and the United States of America, signed at Washington on the ninth day of August in the year one thousand eight hundred and forty two, the Ratifications whereof were exchanged in London on the thirteenth day of October in the same year, it was agreed that Her Majesty and the said United States should, upon mutual Requisitions by them or their Ministers, Officers, or Authorities respectively made, deliver up to Justice all Persons who being charged with the crime of Murder, or Assault with Intent to commit Murder, or Piracy, or Arson, or Robbery, or Forgery, or the Utterance of forged Paper, committed within the jurisdiction of either of the High Contracting Parties, should seek an asylum or should be found within the Territories of the other; provided that this should only be done upon such evidence of criminality as according to the Laws of the place where the Fugitive or Person so charged should be found would justify his Apprehension and Commitment for Trial if the Crime or Offence had been there committed, and that the respective Judges and other Magistrates of the two Governments should have Power, Jurisdiction, and authority, upon Complaint made under Oath, to issue a Warrant for the Apprehension of the Fugitive or Person so charged, so that he might be brought before such Judges or other Magistrates respectively, to the end that the Evidence of Criminality might be heard and considered, and if on such Hearing the Evidence should be deemed sufficient to sustain the Charge it should be the duty of the examining Judge or Magistrate to certify the same to the proper executive Authority, that a Warrant might issue for the Surrender of such Fugitive, and that the expense of such Apprehension and Delivery should be borne and defrayed by the party making the Requisition and receiving the Fugitive; and it is by the Eleventh Article of the said Treaty further agreed, that the Tenth Article hereinbefore recited, should continue in force until one or other of the High Contracting Parties should signify its wish to terminate it, and no longer:

And whereas it is expedient that Provision should be made for carrying the said Agreement into effect, be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That in case Requisition shall at any time be made by the Authority of the said United States, in pursuance of and according to the said Treaty, for the Delivery of any Person charged with the Crime of Murder, or Assault with intent to commit Murder, or with the Crime of Piracy, or Arson, or Robbery, or Forgery, or the utterance of forged Paper, committed within the Jurisdiction of the United States of America, who shall be found within the Territories of Her Majesty, it shall be lawful for One of Her Majesty's Principal Secretaries of State, or in Ireland for the Chief Secretary of the Lord Lieutenant of Ireland, and in any of Her Majesty's Colonies or Possessions abroad for the Officer administering the Government of any such Colony or Possession, by Warrant under his Hand and Seal to signify that such Requisition has been so made, and to require all Justices of the Peace and other Magistrates and Officers of Justice within their several Jurisdictions to govern themselves accordingly, and to aid in apprehending the Person so accused, and committing such person to Gaol, for the purpose of being delivered up to Justice, according to the provisions of the said Treaty; and thereupon it shall be lawful for any Justice of the Peace, or other Person having Power to commit for trial Persons accused of crimes against the Laws of that Part of Her Majesty's Dominions in which such supposed Offender shall be found, to examine upon Oath any Person or Persons touching the Truth of such Charge, and upon such Evidence as according to the Laws of that Part of Her Majesty's Dominions would justify the Apprehension and Committal for Trial of the Person so accused if the Crime of which he or she shall be so accused had been there committed it shall be lawful for such Justice of the Peace, or other Person having Power to commit as aforesaid, to issue his Warrant for the Apprehension of such Person, and also to commit the Person so accused to Gaol, there to remain until delivered pursuant to such Requisition as aforesaid.

"II. Provided always, and be it enacted, That in every such Case, Copies of the Depositions upon which the original Warrant was granted, certified under the Hand of the Person or Persons issuing such Warrant, and attested upon the Oath of the Party producing them to be true Copies of the original Depositions, may be received in Evidence of the Criminality of the Person so apprehended."

[The remaining sections of the Act are not material to the decision in this case.]

D.

WARRANT ISSUED BY THE LIUETENANT GOVEBNOR UNDER THE TREATY AND STATUTE.

NEW BRUNSWICK.

By His Excellency the Honorable ARTHUR HAMILTON GORDON, C. M. G., Lieutenant Governor and Commander-in-Chief of the Province of New Brunswick, &c. &c. &c.

[SEAL.]

ARTHUR H. GORDON.

To all and every the Justices of the Peace and Officers of Justice within the Province of New Brunswick, Greeting:

Whereas in and by an Act of Parliament made and passed in the sixth and seventh years of the reign of Her Majesty Queen Victoria, entitled "An Act for giving effect to a Treaty between Her Majesty and the United States of America for the apprehension of certain offenders," it is among other things enacted "that in case requisition shall at any time be made by the authority of the said United States, in pursuance of and according to the said Treaty for the delivery of any person charged with the crime of murder, or assault with intent to commit murder, or with the crime of piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of the United States of America, who shall be found within the Territories of Her Majesty, it shall be lawful for one of Her Majesty's principal Secretaries of State, ur in Ireland, for the Chief Secretary of the Lord Lieutenant of Ireland, and in any of Her Majesty's

Colonies or Possessions abroad, for the Officer administering the Government of any such Colony or Possession by warrant under his hand and seal to signify that such requisition has been so made, and to require all Justices of the Peace and other Magistrates and Officers of Justice within their several jurisdictions to govern themselves accordingly and to aid in apprehending the person so accused and committing such person to gaol for the purpose of being delivered up to Justice according to the provisions of the said Treaty, and thereupon it shall be lawful for any Justice of the Peace or other person having power to commit for trial persons accused of crimes against the laws of that part of Her Majesty's dominions in which such supposed offender shall be found, to examine upon oath any person or persons touching the truth of such charge and upon such evidence as according to the laws of that part of Her Majesty's dominions would justify the apprehension and committal for trial of the person so accused of the crime of which he or she shall be so accused, had been there committed, it shall be lawful for such Justice of the Peace or other person having power to commit as aforesaid, to issue his warrant for the apprehension of such person, and also to commit the person so accused to gaol there to remain until delivered pursuant to such requisition as aforesaid.

And whereas, in pursuance of and in accordance with the said Treaty and Act, a Requisition has been made to me, on behalf of the said United States, by J. Q. Howard, Consul of the said United States at the City of Saint John, in this Province, stating that John C. Braine, H. C. Brooks, David Collins, John Parker Locke, Robert Clifford, Linus Seely, George Robinson, Gilbert Cox, Robert Cox, H. A. Parr, and James McKinney, charged upon the oath of Isaac Willett and Daniel Henderson with having committed the crimes of Piracy and Murder on the High Seas, within the Jurisdiction of the said United States of America, on the seventh day of December instant, are, or some of them are now in the City of Saint John, within this Province, and requesting that the said John C. Braine, H. C. Brooks, David Collins, John Parker Locke, Robert Clifford, Linus Seely, George Robinson, Gilbert Cox, Robert Cox, H. A. Parr, and James McKinney, may be delivered up to Justice according to the provisions of the said Treaty. Now know ye, that pursuant to this power in me vested in and by the said Act of Parliament, I do hereby, by this warrant under my hand and seal, signify that such requisition has been so made, and hereby require and command all Justices of the Peace and other Magistrates and other officers of Justice of this Province, within their several jurisdictions, to govern themselves accordingly and to aid in apprehending the said John C. Braine, H. C. Brooks, David Collins, John Parker Locke, Robert Clifford, Linus Seely, George Robinson, Gilbert Cox, Robt. Cox, H. A. Parr, and James McKinney, so accused, and committing them, the said John C. Braine, H. C. Brooks, David Collins, John Parker Locke, Robert Clifford, Linus Seely, George Robinson, Gilbert Cox, Robert Cox, H. A. Parr, and James McKinney, to Gaol for the purpose of being delivered up to Justice according to the provisions of the said Treaty. And hereof they will not fail at their peril.

Given under my hand and Seal at Fredericton, in this Province of New Brunswick, this Twenty fourth day of December, in the twenty-seventh year of Her Majesty's Reign. Anno Domini, 1863.

By His Excellency's Command,
(Signed) S. L. Tilley.

E.

COMPLAINT OF CAPTAIN WILLETT, TAKEN BY THE POLICE MAGISTRATE OF SAINT JOHN, the 25th December, 1863.

City and County of Saint John,—to-wit:

The complaint of Isaac Willett, of the State of New York, in the United States of America, Master Mariner, now in the City of Saint John, aforesard, taken and sworn to, this Twenty-fifth day of December, in the Year of Our Lord One Thousand Eight Hundred and Sixty-three, at the City aforesaid, before me Humphrey T. Gilbert, Esq., Police Magistrate for the City of Saint John, and one of Her

Majesty's Justices of the Peace for the City and County of Saint John, acting under a warrant under the hand and seal of His Excellency the Honorable Arthur H. Gordon, Lieutenant Governor and Commander-in-Chief of the Province of New Brunswick, bearing date the twenty-fourth day of December, one thousand eight hundred and sixty-three, and made and issued in pursuance of the Act of the Imperial Parliament, entitled an Act for giving effect to a Treaty between Her Majesty and the United States of America, for the apprehension of certain offenders; such warrant directed to all and every the Justices of the Peace, and officers of Justice within the Province of New Brunswick.

The said Isaac Willett being duly sworn, saith as follows: that he this deponent on the seventh day of December, one thousand eight hundred and sixty-three, was Master in charge and command of the American passenger steamboat or vessel Chesapeake, and owned by Henry B. Cromwell, of the State of New York in the United States of America, Merchant. That the said steamboat or vessel is duly registered in pursuance of the United States laws for the registering of ships or vessels, and was so registered on the seventh day of December, instant. That the said steamboat or vessel was of the value of the sum of sixty thousand dollars and upwards of current money of New Brunswick, and had on board a valuable cargo of the value of eighty thousand dollars and upwards of like current money, and there were at the time a number of passengers on board of the said ship or vessel. That the said vessel or steamboat left the Port of New York on the fifth day of December instant, being then duly registered as aforesaid, with the cargo of the value aforesaid on board, and a number of passengers on a voyage from said Port of New York to the Port of Portland, in the said United States, this deponent being in command of the said steamboat or vessel. That John C. Braine, H. C. Brooks, David Collins, Robert Clifford, Linus Seely, George Robinson, Gilbert Cox, Robert Cox, H. A. Parr, and James McKinney, having taken passage on board of the said steamboat or vessel, left the said Port of New York, in and on board the said steamboat or vessel, as passengers on the said voyage. That the said steamboat or vessel proceeded on her said voyage, and while on the said voyage this deponent being in command of said steamboat or vessel, the said vessel then being on the high seas about twenty miles North North East of Cape Cod, in the United States of America, on the seventh day of December instant, certain passengers on board the said vessel, namely, the said John C. Braine, H. C. Brooks, David Collins, Robert Clifford, Linus Seely, George Robinson, Gilbrett Cox, Robert Cox, H. A. Parr, and James McKinney, so being passengers on board the said steamboat or vessel, with force and arms, on the high seas, in and on board the said steamboat or vessel called the Chesapeake, in a certain place upon the high seas, distant about twenty miles from Cape Cod aforesaid then being, in and upon this deponent and upon others the mariners then navigating the said vessel upon the said voyage, maliciously, wilfully, feloniously, and piratically, did make an assault and this deponent and others, the said mariners, then and there piratically, feloniously, wilfully, and maliciously, did put in bodily fear and danger of their lives on the high seas aforesaid, and then and there maliciously, wilfully, feloniously and piratically took possession of the said steamboat or vessel and the cargo thereof; the said steamboat or vessel being under the charge and command of this deponent, and there and then with force and arms took the said steamboat or vessel, and cargo of said vessel, from the care and custody of this deponent and the said mariners, against the will of this deponent and the said mariners and then and there with force and arms upon the high seas aforesaid in the place aforesaid and within the Jurisdiction of the United States of America, piratically, wilfully, maliciously, and feloniously and violently did steal, take, and carry away the said vessel and cargo, and the said named persons did then and there with a pistol loaded with powder and leaden bullets shoot at, and feloniously, maliciously, wilfully, and piratically, kill and murder one Orin Schaffer, the second engineer, he being then a hand employed in and on board the said steamboat or vessel on the voyage aforesaid, and the said named persons having so taken possession of the said steamboat or vessel, put this deponent and others the crew of said vessel from the steamboat or vessel into and on board a pilot boat and the said named persons also then and there wilfully, feloniously, maliciously, and piratically, with a pistol loaded with powder and leaden bullets shot at and

wounded in the right knee and left arm one Charles Johnston, he the said Charles Johnston, then and there being chief mate of the said steamboat or vessel, and also then and there with a pistol loaded with powder and leaden bullets wilfully, feloniously, maliciously, and piratically shot at and wounded in the chin, one James Johnston, he, the said James Johnston, then and there being Chief Engineer in and on board the said vessel, and this deponent further saith that the said named persons having so taken possession of the said steamboat or vessel, they the said named persons proceeded from the said place where the said offences were committed, to and up the Bay of Fundy, and that having proceeded to a place on the high seas about fifteen miles below Dipper Harbor, in the Province of New Brunswick, one John Parker Locke came to the said steamboat or vessel and boarded her, and immediately took charge and command of the said steamboat or vessel and cargo, against the will of deponent and others the mariners of the said ship or vessel. That until the said John Parker Locke, came on board of the said vessel, the said John C. Braine appeared to have Command of the persons who so piratically took possession of the said ship or vessel as aforesaid, and this deponent further saith that he verily believes the said John C. Braine is now in the City of Saint John, in the Province of New Brunswick.

(Signed) ISAAC WILLETT.

Sworn at the City of Saint John, in the City and County of Saint John, this 25th day of December, A. D., 1863, before me.

(Signed) H. T. GILBERT, *P. M. and J. P.*

F.

WARRANT FOR THE APPREHENSION OF THE PRISONERS, ISSUED BY THE POLICE MAGISTRATE.

To any Constable or Peace Officer of the City, or City and County of Saint John.

Apprehend John C. Braine, H. C. Brooks, David Collins, Robert Clifford, Linus Seely, George Robinson, Gilbert Cox, Robert Cox, H. A. Parr, and James Mc Kinney, and bring them before me or some other Justice at the Police Office in the City of Saint John, to answer the complaint of Isaac Willett, of the State of New York, in the United States of America, Master Mariner, made on oath for having on the Seventh day of December, in the Year of Our Lord One Thousand Eight Hundred and Sixty-three, on the high seas, about twenty miles North North East of Cape Cod, in the United States of America, on the Seventh day of December aforesaid, with force and arms, maliciously, wilfully, feloniously, and piratically, made an assault upon the said Isaac Willett, and others the Mariners then on board, and in Charge and Command of the Steamboat or Vessel named the Chesapeake, the said Vessel being a Vessel belonging to one Henry B. Cromwell, a Citizen of the United States of America, and being of the value of sixty thousand dollars of lawful money of New Brunswick, and having on board a Cargo of the value of eighty thousand dollars of like lawful money, and the said Vessel being then on a Voyage from the Port of New York, in the United States of America, to the Port of Portland, in the said United States of America, and having then and there piratically, feloniously, wilfully, and maliciously put the said Isaac Willett and others the Crew of the said Vessel, in fear and danger of their lives on the high seas aforesaid, and having then and there maliciously, wilfully, feloniously, and piratically taken possession of the said Vessel and the Cargo thereof, and with having then and there feloniously, wilfully, maliciously, and piratically stolen and taken the said Vessel and Cargo upon the high seas aforesaid, and also for having at the time and place aforesaid, feloniously, wilfully, maliciously, and piratically upon the high seas aforesaid, killed and murdered one Orin Schaffer, in and on board the said Vessel on the said Voyage, and also for having at the time and place aforesaid, with force and arms, feloniously, wilfully, maliciously, and piratically assaulted and wounded one Charles Johnston, and also for having at the time and place aforesaid, feloniously, wilfully, maliciously, and piratically assaulted and wounded one James Johnston, and to be dealt with according to Law. The said complaint having been made and taken, and this Warrant having been issued in pursuance of a Warrant under the hand and seal of His Excellency The Honorable Arthur H. Gordon, Lieutenant Governor, and Commander in Chief of the Province of New Brunswick, bearing date the Twenty-fourth day of December, One Thousand Eight Hundred and Sixty-three, and made and issued in pursuance

of the Act of the Imperial Parliament, entitled, an Act for giving effect to a treaty between Her Majesty and the United States of America, for the apprehension of certain offenders.

Dated this 25th day of December, in the Year of Our Lord One Thousand Eight Hundred and Sixty-three, and given under my hand and seal on the said date.

(Signed) H. T. GILBERT, [L. S.]
Pol. Mag. & Jus. of the Peace.

G.

COMMISSION OF THE C. S. PRIVATEER "RETRIBUTION," AND TRANSFER TO CAPTAIN PARKER.

JEFFERSON DAVIS,

President of the Confederate States of America.

To all who shall see these presents,—Greeting:

Know ye, that by virtue of the power vested in me by law, I have commissioned and do hereby commission, have authorized and do hereby authorize the vessel called the "Retribution" (more particularly described in the Schedule hereunto annexed,) whereof Thomas B. Power is Commander, to act as a private armed vessel in the service of the Confederate States, on the high seas, against the United States of America, their ships, vessels, goods and effects, and those of their citizens, during the pendency of the war now existing between the said Confederate States and the said United States.

This commission to continue in force until revoked by the President of the Confederate States for the time being.

Given under my hand and the Seal of the Confederate States at
(L.S.) Richmond this 27th day of October, A. D., 1862.

By the President, (Signed) JEFFERSON DAVIS.

(Signed) J. P. BENJAMIN, Secretary of State.

Schedule of description of the vessel.
Name—Retribution.
Tonnage—150.
Armament—3 guns.
No. of Crew—30.

(Endorsed.)
State of South Carolina, }
District of Charleston. }

I hereby transfer the command of the schooner Retribution to John Parker
Witness, my hand and Seal, this twenty-first day of November. 1862.

Witness (Signed) THOMAS B. POWER, (L.S.)

(Signed) W. F. COLCOCK, Collector.

H.

ORDERS FROM CAPTAIN PARKER TO LIEUT. BRAINE.

ORDERS.

To Lieut. Commanding JohnClibbon Braine, You are hereby ordered to proceed to the City of New York and State aforesaid with the following officers; 1st Leiut. H. A. Parr, 2nd Lieut. David Collins, Sailing Master Tom Sayers, 1st Engineer Smith, and crew of 22 men. You will upon arrival there engage passage on board the steamer and use your own discretion as to the proper time and place of capture. Your action towards crew and passengers will be strictly in accordance with the President's instructions. You will as circumstances may permit bring your prize to the Island of Grand Manan for further orders, Seal Cove Harbor if accessible.

(Signed) JOHN PARKER,
Capt. C. S. Privateer Retribution.

December 2nd, 1863.

COMMISSION TO DAVID COLLINS.

I.

To David Collins.

Reposing confidence in your zeal and ability, I do hereby authorize and commission you to hold and assume the rank of 2nd Lieutenant, and this shall be your authority for any act, under orders from me, against the Government of the United States, against the citizens of the United States, or against the property of either, by sea or by land, during the continuance of hostilities now existing. This commission to bear date from tho 1st day of December, A. D., 1863.

(Signed) JOHN PARKER.

J.

HEADING OF THE EVIDENCE ETC., RETURNED BY THE POLICE MAGISTRATE BEFORE THE JUDGE.

David Collins, James McKinney, and Linus Seely stand charged before me, Humphrey T. Gilbert, Esquire, Police Magistrate of the City of Saint John, and one of Her Majesty's Justices of the Peace for the City and County of Saint John, acting under a warrant under the hand and seal of His Excellency The Honorable Arthur Hamilton Gordon, C. M. G., Lieutenant Governor, and Commander in Chief of the Province of New Brunswick, bearing date the twenty-fourth day of December, in the Year of Our Lord One Thousand Eight Hundred and Sixty-three and made and issued in pursuance of the Act of the Imperial Parliament entitled, "An Act for giving effect to a Treaty between Her Majesty and the United States of America, for the apprehension of certain offenders," such warrant being directed to all and every the Justices of the Peace and Officers of Justice, within the Province of New Brunswick—For that they the said David Collins, James McKinney, and Linus Seely, (together with John C. Braine, H. C. Brooks, Robert Clifford, George Robinson, Gilbrett Cox, Robert Cox, and H. A. Parr, not brought up before me for examination,) did on the seventh day of December in the Year of Our Lord One Thousand Eight Hundred and Sixty-three, upon the high seas, about twenty miles North North East of Cape Cod, in the said United States of America, and within the jurisdiction of the said United States of America, and the Circuit Courts thereof, then being passengers in and on board a certain passenger and freight steamer called the "Chesapeake," United States of America Register, owned, belonging, and appertaining to Henry B. Cromwell, a subject of the said United States of America, whereof Isaac Willett, also a subject thereof was Master, while on a voyage from New York to Portland, in the said United States of America, with force and arms turned pirates and the said steam vessel and the apparel and tackle thereof of the value of sixty thousand dollars of lawful money of the said United States of America and of the Province of New Brunswick, and a cargo owned by persons unknown of the value of eighty thousand dollars of like lawful money then and there being in the said steam vessel under the care and custody and in the possession of the said Isaac Willett as master of the said steam vessel, then and there upon the high seas aforesaid, within the jurisdiction aforesaid, about the distance of twenty miles North North East of Cape Cod aforesaid with force and arms from the care, custody, and possession of the said Isaac Willett and against the will of the said Isaac Willett and the crew and mariners assisting the said Isaac Willett in the navigation of the said steam vessel, piratically and feloniously did steal, take, and run away with, they the said David Collins, James McKinney and Linus Seely, being passengers on board of the said steam vessel and in and on board the same on the high seas aforesaid, against the laws of the United States of America and the Statutes of the United Kingdom of Great Britain and Ireland.

K.

RETURN OF THE SHERIFF TO THE ORDER OF *HABEAS CORPUS*.

SUPREME COURT.

I, James A. Harding, Sheriff of the City and County of Saint John, having charge of the gaol of the said City and County, do hereby certify that David Collins,

James McKinney, and Linus Seely, named in the annexed order were in the gaol of the City and County of Saint John, for safe keeping, under a warrant from H. T. Gilbert, Esq., Police Magistrate, and Justice of the Peace, from the following dates:—James McKinney, from the 26th day of December last, David Collins, from the 27th day of December last, and Linus Seely, from the first day of January last past, except when ordered for examination by the said H. T. Gilbert, Police Magistrate, and Justice of the Peace, up to 11 o'clock or thereabouts, on the morning of the 24th day of February, inst., when they were taken to the office of the said H. T. Gilbert, Police Magistrate and Justice of the Peace. That they were committed to the gaol of the saidCity and County, at mid-day of the 25th day of February, inst., with the following, a copy of the commitment:

"City and County of Saint John, to wit:—To any Constable, or Peace Officer, of the City and County of Saint John, and to the keeper of the Gaol thereof; you the said Constable, shall convey David Collins, of the City of Saint John, Labourer, James McKinney, of the same place, Labourer, and Linus Seely, of the same place, Labourer, charged before me, Humphrey T. Gilbert, Esq., Police Magistrate for the City of Saint John, and one of Her Majesty's Justices of the Peace for the City and County of Saint John, acting under warrant under the hand and seal of His Excellency the Honorable Arthur Hamilton Gordon, C. M. G, Lieutenant Governor, and Commander in Chief of the Province of New Brunswick, bearing date the twenty-fourth day of December, in the Year of Our Lord One Thousand Eight Hundred and Sixty-three, and made and issued in pursuance of the Act of Imperial Parliament intituled, "An Act for giving effect to a Treaty between Her Majesty and the United States of America, for the apprehension of certain offenders," and in pursuance of and in accordance with the said Treaty and Act, a Requisition having been made to His Excellency the Honorable Arthur Hamilton Gordon, C. M. G., Lieutenant Governor, and Commander in Chief of the Province of New Brunswick, on behalf of the said United States of America, by James Q. Howard, Consul of the said United States, at the City of Saint John, in the Province of New Brunswick, stating that John C. Braine, H. C. Brooks, David Collins, John Parker Locke, Robert Clifford, Linus Seely, George Robinson, Gilbrett Cox, Robert Cox, H. A. Parr, and James McKinney, charged upon the oath of Isaac Willett, and Daniel Henderson, with having committed the crimes of piracy and murder on the high seas, within the Jurisdiction of the said United States of America, on the seventh day of December, inst., are, or some of them are now in the City of Saint John, within this Province, and requesting that the said John C. Braine, H. C. Brooks, David Collins, John Parker Locke, Robert Clifford, Linus Seely, George Robinson, Gilbrett Cox, Robert Cox, H. A. Parr, and James McKinney, may be delivered up to Justice according to the Provisions of the said Treaty; such warrant directed to all and every the Justices of the Peace and officers of Justice within the Province of New Brunswick, and is as follows:—Here His Excellency's Warrant is inserted, Vide Appendix D.

And whereas on the receipt of the said warrant by me and acting under and by virtue thereof and in pursuance of the said Act of Parliament, I did examine Isaac Willett under oath touching the truth of the said charges set forth in the said warrant and upon the evidence of the said Isaac Willett in pursuance of the said Act of Parliament, I did on the 25th day of December last, issue my warrant under my hand and seal for the apprehension of the said persons upon the charges aforesaid in the words following:—(Here is inserted warrant of apprehension, vide Appendix F.)

And David Collins, James McKinney, and Linus Seely, three of the persons in the said warrant, having been found within my jurisdiction and having been arrested and brought before me, under and by virtue of the said warrant, and I having proceeded to the investigation of the charge of piracy charged against the said named persons so brought before me and upon the examination of the witnesses under oath touching the offence of piracy charged against the parties so brought before me, and upon the evidence before me under oath, I do hereby under the Act of the Imperial Parliament command you the said Constable or Peace Officers to convey the said David Collins, James McKinney, and Linus Seely, to the common gaol of the City and County of Saint John and deliver each of them to the keeper thereof upon the charge of piracy, for that they having on the seventh day

of December in the year of our Lord one thousand eight hundred and sixty-three on the high seas about twenty miles north north east of Cape Cod in the United States of America, with force and arms, maliciously, wilfully, feloniously, and piratically made an assault upon the said Isaac Willett and others, the mariners then on board and in charge and command of the steamboat or vessel named the Chesapeake, the said vessel being a vessel belonging to the United States of America and registered in the United States, according to the laws of such States and belonging to one Henry B. Cromwell, a citizen of the United States of America, and being of the value of sixty thousand dollars of lawful money of New Brunswick, and having on board a cargo of the value of eighty thousand dollars of like lawful money, and the said vessel being then on a voyage from the port of New York in the United States of America, to the port of Portland in the said United States of America, and having then and there piratically, feloniously, wilfully, and maliciously put the said Isaac Willett and others, the crew of the said vessel, in fear and danger of their lives on the high seas aforesaid, and having then and there maliciously, wilfully, feloniously, and piratically taken possession of the said vessel and the cargo thereof, and with having then and there feloniously stolen and taken the said vessel and cargo upon the high seas aforesaid, there to remain until delivered pursuant to the requisition as aforesaid. And you the said keeper shall receive and safely keep each of them upon the said charge until delivered pursuant to such requisition as aforesaid.

Given under my hand and seal at the City of Saint John, in the City and County of Saint John, this twenty-fifth day of February, in the year of our Lord one thousand eight hundred and sixty-four.

(Signed) H. T. Gilbert, *a Justice of the Peace for the City and County of St. John and Police Magistrate for said City.* [L. S.]

And this is the cause of the detaining the said David Collins, James McKinney, and Linus Seely, whose bodies I have ready.

James A. Harding, *Sheriff of the City and County of Saint John*

26th February, 1864.

ERRATA.

Preface, 15th line, for "is" read "are."
" 10th line, *dele* "that."
Page 5, 20th line, *dele* "and."
" 6, 26th line, for "Provincial" read "Imperial."
" 9, 36th line, for "am" read "was."
" 13, 48th line, for "at" read "a."
" 16, 45th line, *dele* "he."
" 23, bottom line, substitute a comma for the dash, and place a comma after "sufficient."
" 24, bottom line, for "on" read "or."
" 25, line next to bottom, *dele* tho stop.
" 26, 11th line, for "criminal" read "criminals."
" " 22nd line, for "a" read "as."
" " 24th line, for "485" read "481."
" 27, 9th line, *dele* the comma.
" " 15th line, for "under" read "order."
" 28, 11th line, read "In re Kane, 14 Howard, 77."
" 29, 10th and 11th lines, read "7 Bac. Abr. p. 446, Title Piracy; 7 Geo. 4, c. 38."
" " 17th line, for "statutes" read "statute."
" " 32nd line, for "*officio*" read "*officii*."
" 30, 1st line, for "statutes" read "statute."
" 31, 29th line, for "*caut*" read "*aut*."