A

SUPPLEMENT

TO THE

REPORT OF THE TRIAL

OF THE

SPANISH PIRATES,

WITH THE

CONFESSIONS

OR

PROTESTS,

WRITTEN BY THEM IN PRISON.

ALSO,

ALL THE EVIDENCE

IN SUPPORT OF A MOTION FOR A

NEW TRIAL:

TOGETHER WITH

THE OPINIONS

OF JUDGES STORY AND DAVIS (IN FULL) ON THAT MOTION,

AND

THE SENTENCE OF DEATH

UPON THE SEVEN PRISONERS.

CONCLUDING WITH

A BRIEF REVIEW

OF THE WHOLE CASE.

BOSTON:

PUBLISHED BY LEMUEL GULLIVER, 82 STATE STREET.

1835.

☞ The Trial of the Spanish Pirates is, perhaps, one of the most remarkable that has ever appeared on the records of a judicial tribunal; and the universal degree of interest which has been manifested by the public, from the commencement of the trial to the present time, has induced the publisher to present the following pages.

The reader may be assured that nothing can be found in this work that is not wholly authentic, as most of the documents were taken from the files of the court, and have been compared and revised with the utmost caution.

The contents of the work will be found entirely original, no part of which has ever been laid before the public.

BOSTON:
Samuel N. Dickinson, Printer,
52 Washington Street.

PROCEEDINGS OF THE COURT.

On Monday, Dec. 1st., the court met according to adjournment, when a motion for a new trial was filed by Mr. Child, counsel for the prisoners, and also a motion in arrest of judgment. The court then adjourned.

On Monday, Dec. 8th, the Court again met, and Mr. Hillard and Mr. Child occupied the whole day in opening, on the motions which had been filed by them. The following affidavits were also filed in Court.

I, Jose Velazquez, being first sworn on the Holy Evangelists of Almighty God, to testify the truth, the whole truth, and nothing but the truth, do depose and say, that I was a seaman on board the schooner Panda on her voyage from Havana to the coast of Africa, in 1832. We sailed from Havana 21st of August, and was about thirty seven days going to Cape Monte, on the coast of Africa. I had sailed in the Panda, before this voyage, from Cadiz, in the month of March, 1832, to the coast of Africa. She had at that time no figure head, no head at all; but a cutwater—it was in one continued piece. She was rigged with two topsails. She carried a carronade on each side, and a pivot gun abaft the mainmast. The carronades were of iron, the pivot gun of brass. On the second voyage, viz., the voyage from Havana to Africa, she had the same guns; but a new suit of sails, made as her old ones were; she was rigged the same manner this voyage as on her former one. On the voyage from Havana to the coast of Africa, we did not rob or see the brig Mexican or any such vessel. I was on board the Panda, lying in the river Nazareth, on the coast of Africa, when she was boarded by three boats and a canoe—the boats manned by Englishmen, and the canoe by negroes. The boats came from round a point, about a quarter of a mile distant. As soon as they came round the point, they commenced firing on the schooner with muskets. The boats were paddled and not rowed. I was lame at the time; no officer on board except the captain. We were going on shore to get wood with one boat, when they began to fire. The carpenter told us to get into the boat and get ashore; he would jump into a canoe along side and drift ashore if they did not take him. We left the vessel because we saw white men and negroes both coming down upon us; and believed for that reason that they were coming to rob us. If they had been all white men we should not have left her. They continued a brisk fire on us from the time they came round the point till we got ashore; and after they got on board they fired on us, when we were on shore, with musketry and one of the Panda's guns. I heard nothing said by any of the crew about setting her on fire before we left her, nor did I see any preparation to set her on fire; nor did I afterwards hear any of the crew say they set her on fire, or attempted it. But I know there was a barrel of powder on deck, when we left her, which the carpenter had there for the purpose of trading with the negroes for fish and fowl, for provisions for the crew. All the crew at the time of the attack were more or less sick, except her carpenter and Boyga. Domingo, the colored man, was ruptured and could hardly walk. He gave himself up, on the beach, because he could not walk. He stopped, and we went on and left him. Some of the officers of the African king could talk English and Spanish. I heard them talk about getting the English officers on shore and kill them and divide their clothes and other property; and they disputed who should have the epaulettes and coat of Capt. Trotter. This came to the knowledge of Capt. Gibert, and he interceded to prevent it, and made the king promise they should not be harmed. When the English came on shore, the king forced the Spanish crew to go out of the town, that they might not be

found by the English. We were forced to go. Capt. Gibert went to the king and requested him to let him have an interview with Capt. Trotter, to demand his vessel. The king refused, and said if they carried the vessel off they must bring it back again. Afterwards the English officers were on shore at the king's house, and the king sent for Capt. Gibert to come there, with pen, ink and paper, for Capt. Trotter would be there. I know Capt. Gibert went there with pen, ink and paper, and before he went I saw Capt. Trotter and the English officers go to the king's house. I do not know what was said or done there, for I was not present. I did not know, when we sailed from Havana, whether there was any money on board or not; but it is customary for vessels in the African trade to carry money. Five or six days out, we encountered a gale, and the masts creaked, and the captain said, never mind, boys, in case we carry away spars, we have spare ones on board. If we carry away masts we have plenty of money on board to go into any port and buy new ones. I saw no money after I arrived on the coast of Africa, and I never heard or knew of any being buried there. I was prisoner on board the English brig Curlew—I went on board 27th September, 1833. In three or four days after this, the brig went to a point called Fatisu, to the leeward of Cape Lopez, and came to anchor. One of the English officers with a boat took six Kroomen, Simon Domingo, Antonio Ferrer, and myself, and went on shore. Domingo acted as interpreter between the English officers and myself, and Ferrer. When we got on shore, the officer pointed his sword and the Kroomen their muskets at my and Ferrer's breasts, and threatened to shoot us if we did not tell them where Capt. Gibert had buried the money. We told them we did not know of any money being buried. We were greatly affrighted and trembled. We went a few steps from the boat, told them we knew nothing of the money—they threatened and we scratched with our hands in the sand and found nothing. Then we were carried back to the Curlew. We scratched in the dirt, keeping our eyes on the Kroomen, who were pointing their guns at our breasts, and threatening to shoot us if we did not find the money. I went in the Panda from the river Nazareth to Principe sick. Most of the crew were sick and went ashore to the hospital. There was a window, by which I had a view of the harbor and sea. While we were there I saw a steam frigate pass close to the harbor; and a sloop of war, and a brig at different times. These vessels came close by. I heard nothing there of the capture of the Mexican. We left Principe without any haste or precipitation. On our arrival at Cape Lopez, we passed to the leeward of the cape, fired a gun, and a pilot by the name of Jose Maria, came on board, and going round the point, she run aground; we passed our two guns forward, and she got off and came to an anchor. The captain and some of the sick went ashore at Nazareth. I remained on board. The second mate and boatswain had a quarrel the same day, and the second mate wounded the boatswain. The second mate, through fear, left the vessel and went ashore in a canoe. Where he went, I don't know. I never saw him after. Capt. Gibert tried to find and catch him, and punish him for what he had done to the boatswain. The second day after she came to anchor, we sounded her pumps and found her half full of water, and sent for the captain. When he came, he ordered us to put out an anchor off towards the sea, and we let out the cable till the schooner touched the shore. We put all the guns and heavy things on the starboard side, and careened her over and found the leak under the larboard quarter, and stopped it, and hauled her out again to her anchor. Capt. Gibert sent the pilot, Maria, ashore, and the negro king sent another pilot to take the schooner up the river.

On our arrival from Havana, on the coast at Cape Monte, we did not anchor, only made the land, and went to Grand Bassa, where we stopped about twenty-four hours, and got wood and water. Hence we made sail for Petit Sesters, and passed it in the night, and got almost to Cape Palmas, and put about next day and went back to Petit Sesters, where we were at anchor about two days, and got rice and cattle. Hence we went to Nifu and staid about four days, and bought rice and fowls, and paid in dry goods, rum, and beads. Hence back to

Petit Sesters, and stopped about a day and got rice. Rice was very scarce there at the time. Nifu and Petit Sesters, to the best of my knowledge, were about ten leagues apart. From Petit Sesters we went direct to Nazareth. We made no land after we saw Cape Palmas, till we made Cape Lopez. Don't recollect how many days we were on the voyage, but a good many.

In the Boston jail, where Delgado killed himself, I was in the first cell and he was in the last, on the same floor. I heard an outcry, but no words distinctly.

When we got on board the Curlew from searching for the money on shore, Capt. Trotter offered me a glass of strong liquor. I asked him if it was Malaga wine—(I am a native of Malaga)—if it was I would drink. The captain said there was no Malaga wine on board. I told him I did not drink strong liquor, and I did not drink it. After this the captain asked me if I was a Christian, and if they said mass in my country. I replied I was a Christian and a Roman Catholic. The captain told me, through an interpreter, if I would answer all the questions he should put to me in the *affirmative*, I should have leave to go home and see my friends and relatives. The captain put several questions to me, and I did not answer them to suit him, and he told me to go on deck. He told me if I did not answer them as he wished, I should not go home and see my father and mother, brothers and sisters.

his

(Signed) JOSE + VELAZQUEZ,

mark.

Suffolk, ss. November 28th, 1834. Sworn to before me.

WILLIAM SIMMONS, Justice of the Peace.

I, Antonio Ferrer, being first sworn on the Holy Evangelists of Almighty God, to testify the truth, the whole truth, and nothing but the truth, do depose and say, that I was cook on board the schooner Panda, on her voyage from Havana to the coast of Africa in 1832. I do not know exactly what day she sailed on. When she passed the Moro Castle, she was a two topsail schooner, and all her sails were set. She was painted all black the outsides, and her bulwarks inside were painted green. No white streak painted round her outside. She had no figure-head at all: it was one continued piece to the bowsprit. She had a brass pivot gun, and two iron carronades, one on each side. There was no change in the rig, or sails, or paint, of the schooner, from the time we left Havana till she was taken by the English. We did not *rob* or *see* the American brig Mexican on our voyage, or rob any other vessel. We saw several vessels on our voyage, but did not speak any of them. I know, for I saw it, that the Captain brought silver money, dollars, on board at Havana in his trunk; but I can't say how much—I should think over $1000. It was thirty-seven days from leaving Havana to the time of making land on the African coast. I know it by the notches which the sailors cut on their wooden spoons, and which I washed daily. I can count. We stopped at Grand Bassa, and got wood and water, one, two, or three days. Thence to Petit Sesters, which took one or two days; and stopped there I think two days, and bought rice. Thence to Nifu, which took about half a day; where we stayed two or three days, and bought rice; and thence back to Petit Sesters, and got rice; and made sail for the river Nazareth. I dont remember the time taken in making the passage. We had got fresh provisions, and kept no account. I believe we stayed there about three months, when the people got mostly sick, and we sailed for Principe, to get provisions and a physician, for the health of the crew. We were two days in making the passage, to the best of my recollection. I dont recollect how long we were there. I was on board all the time cooking. Saw no men-of-war pass. The hospital, where the sick were kept, was on a high piece of ground back of the town, and from it you might see all over the harbour. When we left the harbour, we did not leave it in any fear. We left about ten o'clock in the day. And we did not leave any provisions behind. We were two or

three days on our passage to Cape Lopez, and saw no vessel on our passage. We fired a gun, and a negro came on board; and the Captain asked him if he was a pilot, and he said he was; and the Captain gave him charge of the schooner to take her into the river. The first we knew, she thumped and took ground. We passed her guns forward, and got her off into deeper water, and came to anchor. The Captain went ashore with some of the sick. Two days after, we sounded her pumps, found her half full of water, and sent to the Captain. He came down with some negroes, sent by the king, to help pump her out. We got an anchor out, and let her go ashore, and careened her, and stopped leak. The king sent a pilot down, and took her into the river. The boatswain and second mate had a quarrel while we lay at Cape Lopez, and the mate wounded him. The second mate, on this account, went away from the schooner before she got into the river, in a canoe. The Captain searched for him, to take and punish him, but did not find him. While we lay in the river, we saw three boats, with white men, and a large canoe, with about thirty negroes, armed with muskets, come round the point. As soon as they came round the point, being so close that the balls reached us, they began to fire, and continued to fire on the schooner, till we left her in the boats; and then fired on us as we went on shore, and when we got there. When they got on board the schooner, they kept up firing with musketry, and they fired one of the schooner's great guns. I heard the balls whistle over my head. We ran into the woods, and scratched ourselves with bushes and briars. I heard them discharge a big gun after we got into the woods also. We left the vessel because we had no officer on board except the carpenter, and we saw blacks and whites coming together armed; and thought they were a set of savages coming to rob and kill us. I saw no preparations made by the carpenter, or any other one, to set her on fire; nor did I hear any thing of the kind said before or after we went on shore. I know there was powder and rum on deck, which the carpenter was selling to the natives, to purchase provisions for the crew. At the time of her capture by the English, Simon Domingo was sick below. We had to help him up to get him into the boat. His privates were so swollen, they had ruptured. When we got ashore, several of the crew carried him up, and laid him on the beach. I dont know what became of him. I believe the negroes took him, and carried him off. The English Captain, Trotter, and officers came on shore, to demand the Spaniards of the black king. The negroes were armed, and determined not to let them come on shore; and the Spanish Captain, Gibert, interfered, and quelled them; and spoke to the king, and told him, they had as good's let them come on shore, and see what they wanted. So they let them come on shore. Before the English came on shore, the Spaniards were taken in custody by the negroes, by order of the king, and taken back of the town, so the English might not see them. Before the English came on shore, the negroes were determined to kill and rob the Captain and officers of the English vessel, and were quarrelling who should have his coat and epaulettes. The Spanish Captain, Gibert, wanted to go on board the English vessel, and demand his schooner; but the king would not let him, and was very angry that the English had taken a vessel in his waters. When the English Captain and officers were at the king's house, the king sent for Captain Gibert, and he went with pen, ink and paper. What was said or done at the king's house I do not know. I have no knowledge that any money was ever carried ashore from the Panda, and buried; and I never heard that any was. All that was said by Perez on the trial, about the burying of money, is false. 'Twas in three days after I was prisoner on board the Curlew, we made sail from Cape Lopez, and went to the leeward of it, and came to anchor at Point Fatisu, some distance from the land. They lowered a boat, and manned her with six Kroomen, and an English officer, and Velasquez, and myself, and Domingo, and started to go on shore; and while we were going, we saw several canoes with negroes, and fired at them. We landed on the beach, where two canoes were hauled up; and the Kroomen commenced plundering the canoes of plantains and ground nuts. Then one of the Kroomen took a musket, and Simon Domingo took another. The English officer had a

sword in his hand, and a pair of pistols in his belt. The officer, Kroomen, and Domingo, took me and Velasquez a few paces from the boat, and, presenting their arms at our breasts, and Domingo discharging his musket over our heads, ordered us to show where the money was buried, taken from the Mexican. We told them we knew nothing about the money. We were frightened, and trembled, and stooped down, and scratched holes in the sand. While we were scratching we heard a noise behind us, and looked round, and saw a parcel of negroes armed with muskets. They fired on us as they advanced, and wounded two of the Kroomen. We all started for the boat, and got in, and pulled off as quick as possible, and went on board the brig, and carried a bunch of plantains and a bag of ground nuts as a present to the Captain. Captain Trotter offered me and Velasquez drink, and told me I must declare I was a slave, and that if I would answer such questions as he put to me, in the affirmative, he would send me to my friends at Havana, or get me a place in a good house in England. I did not drink the liquor: it was red, and smelt strong. Trotter put some questions to me about the robbery of the Mexican. I told him I knew nothing about it, and then he went off and left me. The Captain of an English barque acted as interpreter, and told me I was a fool not to turn against the Spaniards: that if I did, Captain Trotter would do well for me, and make a man of me; that Captain Trotter had got in a scrape. Unless he could condemn the Spaniards, he would have to pay for the schooner and cargo. When I was carried on board the Curlew, Captain Gibert was on board. He had been taken before I was. We sailed from this place for St. Thomas. When we arrived there, I saw the money which had been taken from Captain Gibert, divided on the capstan. He (Captain Trotter) brought it up in a bag, and divided it among the crew of the Curlew. I do not know how much there was. The way I know it was Captain Gibert's money, is, that all the sailors spoke of it as Captain Gibert's money. There was no money given to the officers on the capstan. They got their money down below. I know that the officers received some of the money: I found it out at Fernando Po. The Curlew captured the schooner Esperanza, at St. Thomas's, and put Mr. Quentin, a midshipman, on board of the schooner; and Captain Trotter tried again to make me and others confess and testify that we robbed the brig Mexican; but we said it was not true, and we would not declare as he wished us. On this he put the mate and myself, and others in irons, and sent us on board the schooner. The brig and schooner then went out on a cruise, and afterwards met at Fernando Po. When we arrived the Curlew had been there one day. Here I found out that Quentin had received a part of Gibert's money. Quentin's father came on board at Fernando Po, to buy some paroquettes of the cook of the schooner. I saw Quentin have a considerable quantity of money. He showed it to his father, and said it was a part of Captain Gibert's money. He went on shore, and had a spree, and got drunk, and came on board the schooner drunk, and got in dispute with some of the officers, and there was complaint made to Captain Trotter, and he sent for him on board the Curlew, and put him under arrest, and kept him under arrest several days.—At Plymouth, in England, on board the seventy-four, one afternoon, I and the boy Costa were below; and Perez came to see us, and asked me if I was not a slave. I told Perez he knew me very well in the Havana, and knew I was not a slave. Perez said he knew it, but said the English had requested him to coax me to confess or state that I was a slave; and that it would be better for me—that I should be set at liberty. And Perez said, "You know when I confessed at Fernando Po. I stated you was a slave; but the English gave me a good deal of wine, and got me drunk, and made me say what they had a mind to."—When I was measured for the clothes I now have on in the Boston jail, Mr. Badlam said to me, "You are a slave—I know you are—you had better confess it—it will be for your advantage—you will probably be acquitted if you declare you are a slave." I told him that I was a free man; that I had bought my freedom with $500. I had always stated that I was a free man, and always should; and that I was not afraid of being convicted, for I had done nothing. The United States Mar-

shall and the tailor were present at this conversation at the time Delgado killed himself in jail, I heard him sing out to Captain Gibert, "I am dying, and it is my fault and Perez's that you are brought here. All that I have declared is false, and I hope you will pardon me for it."

Suffolk, ss. Nov. 28th, 1834. Sworn to before me, W. SIMMONS, Jus. Peace.

his
ANTONIO + FERRER.
mark.

I, Nicolas Costa, being first sworn on the Holy Evangelists of Almighty God, to testify the truth, the whole truth, and nothing but the truth, do depose and say, that I was cabin boy of the Panda on her voyage from Havana to the Coast of Africa, in 1832. I do not recollect when we sailed. She was a two topsail schooner, had no figure head; but a cutwater on which her bowsprit rested. She was painted black, the outside and her bulwarks inside green. No white streak round her outside. I know the captain had a good deal of money in his trunk; but I can't tell what quantity. We saw no vessels that I remember, on our passage to Cape Monte. I kept an account of the days of her passage, by putting a bean one side of the cabin every day. The passage was thirty-seven or eight days. After we made Monte, we kept on to Grand Bassa—thence to Petit Sesters—thence to Nifu—thence back to Petit Sesters. This took up about two weeks, we got provisions, and water and bread, at these places. Then we shifted our course for Cape Lopez, and were fourteen or fifteen days on our passage thence. On our arrival, we found an English hermaphrodite brig there. Some necessary articles were exchanged between us. The next day we landed our cargo, consisting of bales of dry goods, bales of tobacco, rum, muskets, powder, axes, beads, cutlasses, knives, &c. There we lay trading with the natives ashore, two months and a half, or three months. Thence we went to Prince's Island, and lay there one month. I was sick, and at the Hospital during the time. I did not see any men-of-war pass the outside, I was so sick I should not have seen them if they did pass. When we left Principe, we left about 10 o'clock in the day, and did not run away. I did not see the captain bring on board a patent lever watch, or dressing case, or a silver basin, and I must have seen them if he had brought them on board, as I was cabin boy. The captain had a watch, which he brought from Havana. On our arrival at Lopez, we fired a gun, and a black pilot came on board, and run her on shore. We passed our big guns forward, and got her off into deep water, and came to anchor. No alteration was made in her rigging or paint or head, after we left Havana. The captain went ashore, and the next day sent orders for the sick to be landed, and I among the rest, went ashore sick. I remained on shore at the Barracoon, eighteen or nineteen days, and returned on board the Panda, when she was in the river. A little over three months after, I went on board, the boats came, the English boats. Three boats full of white men, and a canoe full of negroes, came round the point, and kept up a constant fire of musketry, as they advanced. We thought them a set of savages coming to rob us, and jumped into the boats and fled ashore. I was the last man who got into the boats. The carpenter left, with the schooner's papers, in a canoe. I saw no preparations by the carpenter to set the schooner on fire, and heard nothing of the kind stated. As soon as I got ashore, I made the best of my way into the woods. The English officers came ashore, and the negroes plotted to kill and rob them; but Captain Gibert interceded with the king, to protect them. Captain Gibert wanted to go and demand the schooner of them; but the black king would not let him; and told him that they could not make a prize of her, as they had taken her in the river.

I, the Captain, Antonio Ferrer, Jose Velasquez, were taken prisoners, at Cape Lopez, and put on board the Brig Curlew. I saw Captain Trotter take from Captain Gibert at the Barracoon, before he was taken on board, his watch, a silver handled sword, a spy-glass, and his money, but I can't say the amount; in fine every thing of value we had in the Barracoon. From here, we went

cruising down the coast five or six days. As we left Cape Lopez, we came to anchor at a point called Fatisu, and lowered a boat down, and manned her with six Kroomen, an English officer, and Velasquez, and Ferrer, and Domingo; they went ashore. What they did, I dont know. They came on board again. We got under weigh, and went to St. Thomas's, where I saw Captain Trotter divide money, Spanish dollars, among the crew. The English sailors said it was the money taken from Captain Gibert. Captain Trotter frequently said to me if I would say we robbed the Mexican, I should not be included among the rest, and he would make me his cabin boy, and give me any thing I asked. I told him all the statements he wanted me to make were false, and I could not and would not say they were true. From St. Thomas's we went on a cruise, and arrived at Fernando Po, the day before the schooner Esperanza. While we lay there, Mr. Quentin came on board drunk, and Captain Trotter put him under arrest, and kept him below four or five days. I was not taken on shore here, to make any confessions. I was coasting about here in the Curlew, about ten months—during this time, the captain showed the papers of the Panda, and had the captain of an English Barque on board, as an interpreter, he showed me the log-book, and asked me if I knew that. I told him I did. He showed me all the rest of the papers. I was carried to England in the Curlew. On board the seventy-four, at Portsmouth, I heard Perez say, that he was made drunk with wine, at Fernando Po, and made to say just what Captain Trotter wished, by a newspaper, containing an account of the piracy. He showed me a knife wrapped up in a rag, and said all that I have confessed is false; and this knife I have to cut my throat with, if you all get cleared.

At the jail in Boston, Mr. Badlam sent for me into the kitchen, and asked me if I did not want to be a witness for the government. I told him I did not know any thing of the robbery, and could not be a witness. When Delgado killed himself in jail, I was in a cell nearly opposite. I heard him exclaim, and call on the captain, and the rest of the crew, and said, "all I have said against you, innocent men, is false." There was a great noise in the jail, and I did not hear any more which I recollect.

(Signed) his NICHOLAS + COSTA. mark.

Suffolk, ss. Nov. 29, 1834, Sworn to before me. WM. SIMMONS, Jus. Peace.

I Nicholas Costa on this ninth day of December farther testify and say, that on the second day after I was taken prisoner by Capt. Henry D. Trotter, and when I was aboard the brig of war Curlew, which was then at anchor off Cape Lopez, I was sick and had much fever, and Capt. Trotter by means of a captain of an English barque, who acted as interpreter, called me to the companion way, and enquired of me whether I had parents, brothers and sisters, and grandparents. I told him that I had all these in Cadacace in Catalonia. Then said Trotter told the interpreter to get me a glass of wine, which the said interpreter did; but I was very sick with the fever, and had the itch also, and I refused to drink it. Trotter then spoke to the interpreter, and the interpreter said to me there was an American brig robbed by a schooner the same month, or the month after that you left the Havana, and if you will say that the Panda did it, you will be greatly in Capt. Trotter's favor, and he will give you any thing you ask for. He will give you money: if you wish to stop by this vessel, he will make a cabin-boy of you, and treat you well, and if you wish to go home to see your father and mother, he will send you, and give you a paper so the Spanish Government shall not molest you. I told him I could not say any such thing, because it was false. The interpreter then told me to go and lie down. After this I still remained on board the Curlew and was sick, and the said interpreter used to take me in his arms, and make me many caresses, and frequently told

me I was a good boy, and I must say as they wanted to have me; that if I did, I should be esteemed by Capt. Trotter and the English Government, and Capt. Trotter will give you any thing you ask. These things happened on a voyage to St. Thomas and back to Fernando Po, which took about two months. During all this time, Capt. Trotter sent me from his table in the cabin a plate of food every day for dinner, and the interpreter asked me often if I did not want something to drink. Just before we arrived at Fernando Po, I was sitting on an arm chest abaft the companion way, and was sitting so I could see through the cabin scuttle which was of glass, and I saw the steward in the cabin with a bottle of rum and a bottle of wine mixing it. Then Capt. Trotter called out from below, and the man at the helm made signs to me that I was called to go below; I went and found Trotter and the interpreter. The interpreter told me to sit, and I did. He then asked me if I was a good cabin boy, and knew how to set the table, and wait on the captain. I told him that no captain ever raised a hand against me on account of not doing my duty. Then Trotter went and brought the log-book of the schooner Panda, and asked me if I knew it. I told him yes, that I ought to know it, for I had it often enough in my hands. Then Capt. Trotter took out of a closet the liquor which I had seen the steward mixing, and offered me a large wine glass full of it; but I thanked him, and told him that I did not wish to drink it. Then he brought out a bag and took out a handful of groundnuts and threw them into my hat, and I went without asking leave on deck. After this I never received any more food from the officers' table, but had a common sailor's food, but on short allowance, and sometimes no bread.

When we arrived at St. Michael's the English Consul came on board, and Capt. Trotter called the cook aft, and asked him if he did not find fire in the Panda's magazine. And the cook answered that he did not; that he was the first man who got on board the Panda, and went aft and saw no fire on board of her except in the galley; and Capt. Trotter said to the cook, God damn you, go forward. The cook could speak Spanish, and told me this. In England, while we were lying at Portsmouth, the same cook told me that it was useless for Capt. Gibert to write letters to the Spanish Consul at Portsmouth, for he was an Englishman, and an intimate friend of Capt. Trotter and of Capt. Trotter's brother. I think Capt. Gibert wrote twice after this to the Spanish Consul in London, but never received any answer.

The first time that I knew Jose Perez was in the latter part of 1831, aboard of a brig called the Golden Eagle, and then I was with him on board a schooner called the Manuelita, at work; and while we were there, Perez stole from one of the men eight or ten dollars and ran away. He picked the man's pocket, I saw him do it and run away, and I and three others ran after him but could not catch him. On counting his money, the man found Perez had robbed him of eight or ten dollars in silver and gold.

I further say, that when the Savage brig of war arrived at Salem, a great many people came on board, among whom were the mate and two boys who belonged to the Mexican, and whom I saw on the stand testifying in court. I was confined on one side of the brig, with Antonio Ferrer, and Angel Garcia, and Ruiz, and Boyga, and Juan Montenegro, and Portana, the captain, Don Pedro Gibert, and Jose Velasquez, and Don Bernardo de Soto. The corporal of marines let in the three persons who belonged to the Mexican, to see us. They were looking at us about a quarter of an hour, and directly after that the corporal, who spoke some Spanish, came and told us with an air of gladness, that there was none of the Mexican's crew who recognized one of us. Afterwards I was told the same by the gunner's mate, who could speak Spanish pretty well. After this, a captain of a schooner came on board with two epaulettes on. I was called into the cabin, and asked if I would testify as Perez had. I said no, I could not and would not, because it was wrong and false. They showed me a watch, and asked me if the mate had it when he left Havana. I answered yes, that I knew the watch and trimmings very well, and that I knew also the dia-

mond ring which hung on it, and had some of the mate's wife's hair in it. The whole was just as I saw it in the Havana.

his
(Signed) NICHOLAS + COSTA.
mark.

The mark of Nicholas Costa made by him in my presence.

(Signed) THEOPHILUS PARSONS.

Boston, Dec. 10, 1834. I solemnly swear that I have truly interpreted from the Spanish into English the above deposition, and after the same had been reduced to writing in English, I interpreted the same from English into Spanish to the said Costa, truly and faithfully. So help me God.

(Signed) WM. H. PEYTON, JR.

Boston, Dec. 10, 1834. Then the above affidavits were sworn to in due form of law before me: the said Costa making oath upon the Holy Evangelists, through the interpretation of the said W. H. Peyton.

(Signed) THEOPHILUS PARSONS.
Commissioner of the U. S. Courts of this District.

Boston, Dec. 10, 1834. I solemnly swear that I interpreted from English to Spanish, to the said Costa the oath abovementioned, as the same was administered by the Commissioner, truly and faithfully. So help me God.

(Signed) WM. H. PEYTON, JR.

Dec. 10, 1834. Sworn before me.

(Signed) THEOPHILUS PARSONS.
Commissioner, &c.

[ENDORSED]

Dec. 10, 1834. Filed in Court by the Counsel for the prisoners, on motion for a new trial.

Attest, FRANCIS BASSETT, Clerk.

I, Domingo de Guzman, being first sworn on the Holy Evangelists of Almighty God, to testify the truth, the whole truth, and nothing but the truth, do depose and say, that I was an ordinary seaman of the Panda on her voyage in 1832, from Havana to the Coast of Africa. She sailed from Havana on the 21st of August, 1832. She was rigged a two topsail schooner, painted all black, the outside, and her bulwarks inside, green. Her stem was a cutwater, and her bowsprit rested on it. She had no figure head, or billet head. I helped pass the captain's trunk on board at Havana, it was very heavy, and I heard money jingle in it; it was carried into the cabin. There was no alteration in the rigging, or paints, or stem, of her, during her voyage, and when she was blown up. We were thirty-seven days from Havana to Cape Monte. I kept an account of the days in my head, but some of the sailors cut a notch each day on the handle of their wooden spoons. After we made Cape Monte, we did not stop, but kept on to Grand Bassa, where we got wood and water. I think we stopped about two days, and then went to Petit Sesters, and got rice, don't remember how long we stopped—thence to Nifu, and got rice, thence back to Petit Sesters, and got rice we had left there. We then made sail, and went to Nazareth. From the time we made Cape Monte, to the time we sailed for the River Nazareth, I think was almost a fortnight. I am not sure how long we were making the passage from Petit Sesters to the River Nazareth, but I think about fifteen days from Petit Sesters to making the land of Cape Lopez. When we arrived at Nazareth, there was an English hermaphrodite brig at anchor there. The English captain and mate came on board, and had supper, and got a box of macaroni, a box soap, box cigars, barrel vinegar, and gave us four bags of fine salt, in return. The captain of the Panda went on shore the same afternoon, and next day sent orders on board to commence discharging the

cargo. We landed dry goods, tobacco, rum, muskets, and powder, axes, beads, &c. We spoke no vessel from Havana to Cape Monte, and I have no recollection of seeing more than one sail. As to the Mexican, I never heard her named, till after I was made prisoner. We lay at Nazareth two months and a half, or three months before we went to Princes Island. We then went there, and I was taken sick, and went on shore to the Hospital with Velasquez, and the boy Costa, and others, who were also sick. We were almost a month at Prince's Island. I recollect seeing through the windows of the hospital, an English Ship of War, pass, and I recollect no others. I have no knowledge of Captain Gibert's having a patent lever watch, nor dressing case, nor silver basin there. I never saw any such articles. The articles I recollect of his bringing, were some dry goods, some tobacco, and two barrels of bread. When we left Principe, we did not leave it flying or running away. We saw no vessel from Principe to Nazareth. On our arrival at Lopez, we fired a gun for a pilot, and a negro by the name of Jose Mario, came on board, and he had charge of the vessel, and got us on shore; we passed the guns forward—got off into deep water, and came to anchor. The captain got into a canoe, and went ashore, and the next day sent for all who were sick to come ashore, I and others went ashore. Two days after, we heard of the schooner's coming up the river, I did not go on board of her any more, but remained on shore. I was at the Barracoon. I never heard any of the crew say any thing about the carpenter's attempting to set the Panda on fire. After the English had taken possession of the Panda, they came ashore and demanded the slaves and Spaniards of the Panda, of the Negro King, which he refused, and the negroes were very much enraged with the English, and would have killed Captain Trotter and his officers, if Captain Gibert had not interceded with the king and had them spared. Every time the English came on shore, we were taken in custody by the negroes, and taken off so that the English might not see us. Captain Gibert was sent for by the king, and went with pen, ink, and paper; but I don't know what was done, I know that Captain Gibert wanted to go on board, to demand of the English the restoration of his vessel, but the king would not let him go. Captain Gibert got into a boat with the schooner's papers to go on board, to demand her; but the king sent his men and would not let him go. They prevented him. I went from Cape Lopez to St. Thomas in the Schooner Esperanza, I, the mate, and others; and I was taken prisoner by the Curlew, at St. Thomas, on shore, in October, 1833—and was carried on board the Curlew, and there I saw them divide the money taken from Captain Gibert. I know it, because all the English sailors said it was taken from Captain Gibert. A good many of the English sailors spoke Spanish, and the people's cook spoke pretty good Spanish. He had been six years among the Spanish on the Coast of Lima. I went in the Curlew from St. Thomas on a cruise, and went to Fernando Po; we arrived there one day before the Schooner Esperanza. On our passage from St. Thomas, Captain Trotter offered me drink, and told me if I would declare that we robbed the Brig Mexican, he would give me my liberty, and make me a present. I did not comply. He made this attempt several times. When the Esperanza arrived, Mr. Quentin the English Midshipman went on shore and got drunk, (and his father was drunk) and Quentin was drunk when he came on board the Curlew; and Captain Trotter put him in arrest, and kept him so four or five days.

I went to England in the Curlew. When I was on board the seventy-four at Portsmouth, I heard Perez say that when he confessed at Fernando Po, he had had a plenty of wine, and got drunk, and the English made him say what they had a mind to, and that what he stated was all false. Nothing more occurred, till we arrived here in Boston and were in jail. I was in the cell nearly opposite to Delgado, where he killed himself. Delgado called on all of us, beginning with the captain, to pardon him for having made a false accusation against them at Fernando Po. He said "the English gave him and Perez wine, at Fernando Po, and told them that they would take their lives unless they confessed

the piracy as it was stated in a newspaper, which they there had before them. They made me and Perez confirm the statements in the newspaper. We were made drunk when we made the confession."

At Principe I was taken on shore by Captain Trotter, and taken by him before the governor. The governor read me a paper in Portuguese, and wanted me to sign it. This paper was a confession that the Panda robbed the Mexican. I told them I would not sign it, for it was not true. At another time I was taken on shore, at Fernando Po, by Captain Trotter, to recognise the Panda's papers at the governor's house. I there saw the log-book, the mate's documents, and all the rest of the Panda's papers. I can read and write; but I cannot write very well, for it is twelve years since I have written much. I went to school at Manilla to learn to read and write. I have also seen Perez read, and have seen him make letters.

Suffolk, ss. Nov. 29th, 1834. Sworn to before me, Wm. Simmons, Jus. Peace. } DOMINGO DE GUZMAN.

I, Juan Antonio Portana, being first sworn on the Holy Evangelists of Almighty God, to testify the truth, the whole truth, and nothing but the truth, do depose and say, that I was an ordinary seaman on board the schooner Panda, on her voyage from Havana to the coast of Africa, in the year 1832. We sailed on the 20th or 21st of August. I do not recollect which. She was rigged a two topsail schooner, painted black the outside, without any white streak. Her bulwarks were painted green inside. She was built very sharp, and had nothing in front but her cutwater, on which her bowsprit rested. She was armed with two iron carronades, and a brass pivot gun abaft the mainmast, and muskets and ammunition. We were thirty-seven days from Havana to Cape Monte. We did not rob, board, or see any vessel on the voyage. After making Cape Monte, we went to Grand Bassa, and stopped there two days, and got wood and water. Thence to Petit Sesters, and got rice and fresh provisions: thence to Nifu, and got more rice: then back to Petit Sesters, and got some more rice, which we had left there: and we then made sail for Cape Lopez. We were about two weeks making the passage, and had been about two weeks getting rice, &c., making in all about four weeks from the time we made land, to the time we arrived at Cape Lopez. We found lying there an English hermaphrodite brig. Her Captain came on board on our arrival, and exchanged a few articles with us. Our Captain went on there, and the next day sent on orders for our cargo to be landed; and we proceeded to land it, viz. bales of dry goods, bales of tobacco, rum, muskets, cutlasses, axes, powder, beads, knives, &c. We lay there two months and a half, and set sail for Prince's Island, and were three days going there. We saw no sail going there. We lay there near a month, and I was on board all the time. On our arrival, a boat from the fort, and a boat from the custom-house, boarded us, and left an officer on board, who stayed on board till we left there. While we were at Prince's Island, I heard the negroes, who came on board to trade with us, say something of an American brig having been robbed by a schooner. Several gentlemen, whom I took to be Americans or Englishmen, came on board, and overhauled the schooner. The Captain of an hermaphrodite brig or schooner, which lay there, came on board, and examined the Panda, and said she did not answer the description of the schooner which committed the robbery. I never saw our Captain have on board an elegant watch, dressing-case, or silver basin. The Captain purchased there, or I saw come on board, a case of dry goods, three or four bales of tobacco, two barrels of bread, and a few other articles of provisions. While at Principe, I saw a steam vessel and a ship of war pass. When we left Principe, we did not run away, but left about ten of the clock in the day. We were three days going, and saw no sails. On our arrival we fired a gun, and a black pilot, by name Jose Mairo, came on board. He got her aground. We passed the guns forward, got her into

deep water, and came to anchor. The Captain went ashore; the next day sent an order on board to send all the sick ones on shore; and we sent them ashore. The next day the carpenter sounded the pumps, and found her half full of water, and sent for the Captain. He came on board with a parcel of negroes, put out an anchor, and let her drift in till she got aground, at low water careened her over, and found a leak, and stopped it, under her larboard quarter. We then hauled her off to her anchor. The negro king sent a pilot on board, and took her up the river. We lay there about four months, trading with the natives. At the expiration of the four months, about eight in the morning, I saw three boats and a large canoe coming round the point; and they commenced, and continued, a tremendous fire on the schooner from the time we saw them. We took them to be savages coming to kill and rob us. We all jumped into the boats except the carpenter, and went on shore. The carpenter remained on board, got the vessel's papers, and came ashore in a canoe. The boat's crews took possession of the schooner, and fired on us from her. They fired one of her big guns. We ran into the woods. I think I heard the big guns twice. When I left the schooner, I did not hear the carpenter say he was going to set her on fire. There was a bag of powder and some rum on deck, which we were selling to the natives, to buy provisions for the use of the vessel. They took the schooner out of the river, and brought her back in nine or ten days after. The English Captain and some officers came on shore, to demand the Spanish Captain and the slaves; and the negroes determined to kill and rob them; and were quarrelling among themselves, who should have the Captain's hat, and his coat, and epaulettes. Captain Gibert heard this, and went to the negro king, and interceded for them, and in consequence they did not hurt them. I went from Nazareth to Cape Lopez in a canoe, and got passage in a Portuguese schooner, called the Esperanza, and went to St. Thomas in her. I was taken prisoner there by Captain Trotter, and taken on board the Curlew. Thence we went to Principe, to get water. When we had got water, we went into another port in the same island, called St. Antonio. They sent me on board of an English barque, the Captain of which could speak a little Spanish. I was on board two days. They carried me down in the cabin, and Captain Trotter, who went on board with me, offered me a glass of Madeira wine and a butter cracker. I refused at first to drink the wine; but Captain Trotter urged me to, and said I was a good boy, and it would do me no hurt; and I then drank it; and he asked me what wages I had on board the schooner, I told him, $20 per month; and he said it was very high wages; but said, never mind; and brought out a newspaper, and read about robbing the Mexican; and told me, that if I would confirm the statements in the newspaper, and when written down would sign it, he would pay me all the wages due me from the time I left Havana, and give me my liberty; and also told me he had got Perez to sign it, and that he intended to give Perez his liberty. I told the Captain, that if Perez had signed, he had signed a lie: that it was all a lie, and I would not sign such a paper. Captain Trotter told me that I was a damned rascal, and that he could get no good out of me; and went off on board the brig, and left me. The Captain of the barque took me into the cabin to live, and eat with him, and gave me cigars, and said I was a good fellow, and he would recommend me to Captain Trotter. He asked me if I had ever been at St. Antonio, and could pilot the barque in. I told him I had been there once, and thought I could; and I did pilot her in that night, and came to anchor. The next morning Captain Trotter sent for me, and put me in irons. The same afternoon they sent me and others on board the schooner Esperanza. We stopped on board three days, and then went in her to Fernando Po. Captain Trotter never spoke to me afterwards, to get me to confess the piracy. We cruised about eight months, and then went to England. While I was on board the prison-ship 74, at Portsmouth, I heard Perez confess that all he had declared was a lie; but plenty of wine was given him at Fernando Po; and he was made to say what the Captain

wished, and told, that if he did not stick to it, he should not have his liberty. I know that Captain Gibert wrote to the Spanish Consul at London several times, and the letters were sent on shore; but he never received any answers. I do not know why.—A sentry was kept over us, and no one who came on board permitted to speak to us. While I was in Boston Jail, nobody made any offers to confess against the crew. Nothing was said to me on that subject. I heard Delgado, who killed himself, say—"Sirs, brothers, I hope you will all pardon me. I am now dying, and Captain Trotter has been the occasion of all this,—that I have sworn false against you, and brought you into this trouble. Captain Trotter made me great promises on my arrival in England; and now I find myself confined in prison, and must in a few days go into court, and swear away your lives; and now, rather than do it, I am going to kill myself." While I was on board the brig Curlew, I heard the cook say, that Captain Trotter was a crazy head, that he did not believe he knew what he was doing, and that Captain Trotter wanted him to swear, that he found fire in the schooner Panda's magazine; and he told him he would not, for he could not without swearing to a lie. I believe his name was William. He could talk a little Spanish; and Manuel Boyga was on the forecastle with us when the cook said this. There was a lieutenant on board who could talk a little Spanish; and I heard him say one day, Captain Trotter would have to pay for all this. When we left the brig to go on board the 74, Captain Trotter shook hands with all of us.

Suffolk, ss. Nov. 29th, 1834. Sworn to before me, WILLIAM SIMMONS, Jus. Peace. } JUAN ANTONIO — his PORTANA. mark.

I, James Dalrymple, Jr., of Salem in the Commonwealth of Massachusetts, do on oath depose and declare, that I was twenty-one years of age last January; that in August of the present year, I went on board the British armed ship Savage, then lying in Salem harbor—I think on the very day she arrived at Salem—that I there saw the persons who were in confinement on board her on a charge of having robbed the brig Mexican of Salem. That while I was aboard said British ship, John Battis, who had been one of the crew of the Mexican, and with whom I am well acquainted, came on board; I was below at the time, and some one said to me that Battis was on deck, and I went up and asked him if he would not go down and see the prisoners—I mean to say that I was going up the companion way and met Battis, and asked him, as I have before stated. He went down with me, and looked at them as they were in the prison of the ship—and he examined them several minutes—when I asked him if he knew any of them? He answered me to this effect; "I can't say whether I do know any of them or not—but that one," (here Battis pointed to one of the prisoners, who I think was the one they said was the carpenter) "I think I *have* seen *him* before." I think Battis also said that he could not *swear* to *any* of them. There were a great many people on board at the time, and Battis being the only one of the crew of the Mexican on board, many persons were asking him questions about the prisoners. I staid below about fifteen minutes I should think, after Battis came below, and did not hear him say any thing more as to his recognizing the prisoners than I have above stated.

(Signed) JAMES DALRYMPLE, Jr.

Essex, ss: Salem. } Commonwealth of Massachusetts. Dec. 18, A. D. 1834. Then James Dalrymple, Jr., personally well known to me, appeared and made solemn oath that the matter and things contained in the afore written affidavit by him subscribed, are just and true.

Before me, JNO. GLEN KING.
Justice of the Peace, and a Commissioner appointed by the Circuit Court of the U. S., for the District of Massachusetts to take affidavits, &c., to be used in said Court.

I, Alexander Thomas, being first sworn on the Holy Evangelists of Almighty God, to testify the truth, the whole truth, and nothing but the truth, do depose and say, that I was born in Lisbon, am twenty-six years of age, and am a sailor. I have been two voyages in English ships, and three in different American vessels. I was lying in the river Nazareth, on the coast of Africa, on board a hermaphrodite brig named the Mariner, of Liverpool, when the Panda came in there from Havana. The Panda came to anchor between us and the beach, and our Captain, Faber, went on board of her, and got a box of cigars, a box of soap, some garlic, a barrel of vinegar, and a box of macaroni; and he gave the Panda four bags of salt in return. The Panda landed goods, tobacco, rum, and arms, and powder, to trade with the natives. We lay there a month and a half, and went away, and were gone a little over a month on the coast trading; and when we returned, the Panda was still there, but had been to Principe as the crew said. We remained there two days, and the second mate of the Panda came on board our brig, and wanted to get a passage to England, where we were expecting orders to sail. Our Captain told him, if he had a mind to come on board, he would give him a passage. So he came, and stopped. This was the second day after we returned to the river. We sailed the same day with him on board, and went to a place called Gabon, to take in some ivory. After we had been here four or five days, a French ship came in there from St. Thomas. The second mate of the Panda was acquainted with the Captain of the French ship, and went on board, and asked the Captain if he would give him a passage; and the Captain said he would give him a passage to France. He concluded to go in the French vessel, and I went to carry his things on board. He carried nothing on board but a small light trunk, containing clothes and a bed. As for money, I never saw him have any. There was nothing in his bed. It was light, and he slept on it on deck. I handled it every day. I threw it out of the boat on to the deck of the French ship. When we were at Cape Lopez, the news came that the Mexican had been robbed by a schooner. The news came from Principe; and it was said the Governor had a picture of the schooner, and went on board of all vessels which arrived, to see if they answered the description; and that the Panda was examined at Principe. When the Panda arrived from Principe at Cape Lopez, she confirmed the report that the Mexican had been robbed by a schooner, and that she had been searched, and that there was a newspaper at Principe, containing an account of the capture of the Mexican. I was told that the schooner which captured the brig, had a ring-tail, and that such was the picture of her.

Suffolk, ss. Nov. 1834. Sworn to before me this 28th. W. SIMMONS, Jus. Peace.

his
ALEXANDER + THOMAS.
mark.

On this 29th day of November, I further state, in addition to my testimony of yesterday, that when the Panda first arrived in the river, she had no figure-head or billet-head, but a smooth stem, on which the bowsprit rested. She was painted all black the outside, and the inside of her bulwarks was painted green. She had no white streak the outside. When we returned to the river a second time, and found the Panda there; there had been no change in her paints, or stem, or rig. Our Captain went ashore, and I with him, and to the Barracoon, where the Spanish Captain of the Panda was; and he told us that he had been with the Panda to Principe, during our absence, and that his vessel was overhauled by the governor to see whether she was the vessel that robbed the brig or not. On the same day Captain Gibert wanted to ship me to go to Havana, because his crew was diminished by sickness and death. I should like to have gone, and asked leave of my Captain; but he was short-handed, and could not let me go.

Suffolk, ss. Nov. 29th, 1834. Sworn to before me, W. SIMMONS, Jus. Peace.

his
ALEXANDER + THOMAS.
mark.

Commonwealth of Massachusetts. Suffolk, ss. City of Boston, Nov. 29th, 1834.—I certify that I swore W. H. Peyton, truly and faithfully to interpret the testimony of the aforesaid deponents to me. I then swore said deponents severally on the Holy Evangelists of Almighty God, to testify the truth, the whole truth, and nothing but the truth. I then took their testimony severally and separately from each others presence, through said interpreter. I reduced the same carefully as given to writing. Each deponent signed his name or made his mark, and was sworn as aforesaid, that the deposition signed by him was true. The foregoing depositions contain the testimony thus given, interpreted, and reduced to writing; and signed and sworn to before me,

WILLIAM SIMMONS,
Justice of the Peace for the County of Suffolk.

Tuesday, Dec. 9th, Mr. Dunlap replied to Mr. Child.

Wednesday, Dec. 10th, Mr. Child replied, and occupied nearly the whole day. The Court then adjourned to the Tuesday following, when the decision would be made known relative to the motions which had been filed.

On Tuesday, Dec. 16th, pursuant to adjournment, the Court assembled in the Supreme Court room, and the prisoners were brought in, and placed at the bar.

About half past 10 o'clock, the Hon. Judge Story proceeded to deliver his opinion on the motions for a new trial, &c., of which the following is a correct copy, from the original manuscript, and carefully revised by the learned judge himself.

UNITED STATES, } October Term, 1834.
v.
GIBERT and OTHERS. } Story, Justice.

This is an indictment for a robbery on the high sea, which is declared to be a capital offence and piracy by the statute of 1790, ch. 9. The prisoners having been found guilty, a motion has now been made for a new trial, upon grounds stated in a written motion submitted to the court. Upon the grounds thus stated, it is unnecessary for me to say any more at present, than that so far as they purport to be founded upon what took place at the trial in the presence of the court and jury, they are not admitted by the court, to present a full, accurate, or just representation of all the facts and circumstances. This remark is made simply to prevent any misapprehension from any silence or acquiescence of the court upon this subject.

The question now to be considered is, whether this court has, by the constitution and laws of the United States, authority to grant a new trial in a case circumstanced as the present is. And, in order to free the case as much as possible from any collateral and unimportent considerations, it is proper to state, that in examining this question, we shall, for the present, assume that the court had jurisdiction of the case; that there has been no mis-trial, in a legal sense, that is, no such irregularity or error in impannelling the jury to try the cause, or in the other proceedings in the course of the trial, as would upon the face of the process and proceedings be fatal as matter of substance, and that the indictment is sufficient in point of law to found a just judgment against the prisoners in conformity to the verdict. In other words, for the purpose of the argument, we shall for the present assume that the jurisdiction is clear, that the indictment is good, and that the trial has been regularly had, and the verdict has been regularly rendered by a competent jury.

Under such circumstances, has this court authority by the constitution and laws of the United States to grant a new trial after a verdict regularly rendered of guilty against the prisoners?

The constitution of the United States has exhibited great solicitude on the subject of the trial of crimes, and has declared, that the trial of all crimes, except in cases of impeachment, shall be by jury; and has in some cases prescribed, and in others required congress to prescribe, the place of trial. And certain amendments of the constitution, in the nature of a bill of rights, have been adopted, which fortify and guard this inestimable right of trial by jury. One of these amendments provides that "No person shall be held to answer for a capital or otherwise infamous crime,

unless on a presentment or indictment of a grand jury," (with certain exceptions not necessary to be mentioned); and it then proceeds—"Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

Now the question is, what is the true interpretation and meaning of this latter clause? When, in a constitutional sense, can a person be said to be twice put in jeopardy of life or limb? If resort should be had to the grammatical structure and meaning of the words, the natural interpretation would certainly seem to be, that no person should be twice put upon trial for any offence, for which he would be liable, upon conviction, to be punished with the loss of life or limb;—for jeopardy means hazard, danger, or peril; and when a party is put upon trial for an offence punishable with the loss of life or limb, and he stands for his deliverance upon the verdict of the jury, he is thereby put in jeopardy, hazard, danger or peril of his life or limb.

But, fortunately, in the present case there is no necessity of resorting to mere general principles of interpretation; for the privilege thus secured is but a constitutional recognition of an old and well established maxim of the common law; and therefore we are to resort to the common law to ascertain its true use, interpretation, and limitation.

The existence of this maxim as a fundamental rule of the common law in the administration of criminal justice, may be constantly found recognized by elementary writers and courts of justice from a very early period down to the present times. Thus Staundford, in his Pleas of the Crown, (lib. ii. ch. xxxvi. p. 105, 106,) says—("Home, per common leye, ne mittera sa vie deux foits in jeopardie de trial per un mesme felonie, sinon que sort en ascun especial cas de quel jèo dirra apres.") A man shall not by the common law put his life twice in jeopardy of trial for the same felony, except it shall be in some special case, of which I shall hereafter speak. And the excepted case, to which he here alludes, he states in the same chapter to be where there is not in the indictment sufficient matter to constitute felony in point of law. And he applies his doctrine directly to the case of a plea of a former acquittal, grounding the sufficiency of it as a bar upon the above maxim. And he then states, that if the acquittal was upon an insufficient indictment, it is no bar to a second indictment for the same offence, (eo que in tiel cas il ne unque mittoit sa vie in jeopardie sur le matter,) because his life has never been in jeopardy upon the matter. And the like doctrine may be traced up as early as the age of Bracton.*(a)*

Hawkins, whose work on crown law is deservedly held in very high estimation, states the doctrine in the most unqualified manner. "The plea (says he) of autre foits acquit is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offence more than once. From whence it is generally taken by all our books, as an undoubted consequence, that where a man is once found not guilty, on an indictment or appeal, free from error, and well commenced before any court, which hath jurisdiction of the cause, he may by the common law, in all cases, plead such acquittal in bar of any subsequent indictment or appeal for the same crime."*(b)* And Lord Hale recognizes the same doctrine.*(c)* And not to multiply authorities upon so plain a point, Mr. Justice Blackstone, in his Commentaries,*(d)* says, "The plea of autre foits acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence."

Hitherto we have been examining the doctrine with reference to cases of acquittal only. But the like doctrine, founded on the like maxim, will be found to apply to cases of conviction of a capital offence. And, here, in order to avoid any ambiguity, it may be proper to state, that conviction does not mean the judgment passed upon a verdict; "but if the jury find him (the party) guilty, he is then said to be convicted of the crime, whereof he stands indicted."*(e)* For there is, in point of law, a difference between the plea of auter foits convict, and auter foits attaint of the same offence; the former may be where there has been no judgment; the latter is founded upon a judgment."*(f)*

Hawkins, after remarking upon the plea of auter foits attaint, and saying that one reason why it is a good bar for a second prosecution for the same felony is, "because

(a) Staundford, P. C., lib. ii. ch. xxxvi. p. 106. See, also, Fitz. Abrd. Corone, pl. 444.
(b) 2 Hawk. P. C. b. ii. ch. xxxv. s. 1. 8, 9, 10.
(c) See 2 Hale, P. C., 131. 220. 249, 250. See, also, Com. Dig. Appeal. G. 9, G. 11.
(d) 4 Black. Comm. 335. Regina v. Carter, 6 Mod. 168.
(e) 4 Black. Comm. 362. 3 Inst. 131.
(f) See 2 Hawk. P. C. ch. xxxvi. s. 1. 10. Staundford, P. C. lib. ii. ch. xxxvii. p. 108. 4 Black. Comm. 336.

the life of the defendant was in danger by the first; and it is against a maxim of law to bring a man into such danger more than once for the same offence," proceeds to say, "the plea of auter foits convict seems chiefly to depend on this reason, that the party ought not to be twice brought into danger of his life for the same crime."*(a)* He afterwards makes the known exception, where the verdict is erroneous either in respect of insufficiency of the indictment, or for a mis-trial, &c., so that the life of the prisoners was not in danger at the trial.*(b)*

The same doctrine is abundantly established in the cases of Appeals and Indictments, reported in 4 Coke's Rep., 40 to 47; and especially in the cases of Richard Vaux, and William Vaux, there stated, (p. 40. 44, 45.) In the latter case, the court held "that the reason of auter foits acquit was, because, where the maxim of the common law is, that the life of a man shall not be twice put in jeopardy for one and the same offence; and that is the reason and cause, why auter foits acquitted or *convicted* of the same offence is a good plea; yet it is intended of a lawful acquittal or conviction, for if the conviction or acquittal is not lawful, his life was never in jeopardy; and because the indictment in this case was insufficient, for this reason, he was not legitimo modo acquietatus," &c. "So, if a man be convicted, either by verdict or confession, upon an insufficient indictment, and no judgment thereupon given, he may be again indicted and arraigned, because his life was never in jeopardy, and the law wants its end." And the same was ruled in Thomas Wigg's case in the same book, (p. 45. 47). So in Armstrong v. Lisle, (1 Salk 63.) where there was a plea of auter foits convict to an appeal of murder, the court said, "At common law auter foits convict or acquit was a good bar to an appeal, for no man's life ought to be twice endangered for the same offence."*(c)* And, lastly, Mr. Justice Blackstone in his Commentaries (4 Bl. Comm. 336) says, "The plea of auter foits convict or a former conviction of the same identical crime, though no judgment was ever given or perhaps will be (being suspended by the benefit of clergy or other causes) is a good plea in bar to an indictment. And this depends upon the same principle as the former (auter foits acquit) that no man ought to be twice brought in danger of his life for one and the same crime."

Thus we see that the maxim is embedded in the very elements of the common law; and has been uniformly construed to present an insurmountable barrier to a second prosecution, where there has once been a verdict of acquittal or conviction regularly had upon a sufficient indictment.

Indeed, so strong has been the influence of this maxim, that it was for ages construed not only to apply to cases, where there had been a verdict given by a jury; but even where the party had been once put upon his trial before a jury for deliverance. And Lord Coke laid it down that after a jury were once charged with a prisoner upon an indictment for treason or felony, the jury could not be discharged; but were bound to give a verdict.*(d)* And though that rule has been broken in upon in modern times, and juries have been discharged from giving a verdict in capital cases in cases of pressing necessity; yet it has been done with extreme caution, and confined to cases of pressing necessity; and as we shall presently see, the exercise of it has been greatly doubted, and even denied in cases where the jury were unable to agree on a verdict.

This matter was very gravely discussed in the case of the Kinlocks in 1745; and though the court upon that occasion did discharge the jury in favor of life, and so let the prisoners at their request into a new defence; yet the judges did it upon great deliberation and debate. And Sir Michael Foster on this occasion observed, (and it illustrates the force of the maxim) that "it was not to bring the prisoners' lives twice in jeopardy, *which is one inconvenience of discharging juries in capital cases*, but merely in order to give them one chance for their lives, which, it was apprehended they had lost by pleading to issue." So that even this humane judge felt that it was trenching upon the maxim, and that when once the party was put on his trial before the jury, if the jury were discharged he was subjected to be put twice in jeopardy for the same offence.

(a) 2 Hawk. P. C. B. 2. ch. 36. s. 1. s. 10. s. 15.

(b) Id. s. 15. See also 2 Hale, P. C. ch. 31. ch. 32. p. 243, p. 251. Regina v. Goddard. 2 Lord Ram. 922. Armstrong v. Lisle. 1 Salk. 63. The People v. Barrett. 1 John R. 66. The People v. Casbones. 13 John R. 351. See the distinction between a mistrial, and a new trial in The King v. Fowler, 4 Barn and Ald. 273.

(c) See Smith v. Taylor. 5 Burr. 2793. Com. Dig. Appeal. G. 9.

(d) 3 Inst. 110. 1 Inst. 227, 6. See also Foster, C. L. 28 to 37. 2 Hawk. Pl. C. B. 2. ch. 47. s. 1.

Hitherto we have been chiefly considering the case of a new indictment, to which the party pleads the former indictment and a verdict of acquittal or conviction. And it was fit so to do, in order to understand the full import and bearing of the language of the maxim. But the question now more directly presented is whether the same maxim equally applies to the case of a new trial moved for in a capital case upon the same indictment. It is impossible, I think, to doubt, that, in England, the maxim according to the doctrine of the English courts of justice does apply to and govern the case of a new trial. As soon as a capital case is fully committed to a jury, the life of the prisoner is in their hands, and he stands in jeopardy of his life upon the verdict of the jury. He is in the truest sense put upon his deliverance from the peril. When once the verdict is pronounced, the case is fixed. If there is a verdict of acquittal, it is generally agreed that he cannot be put upon his trial again for the same offence. And why? Because it contradicts the direct language of this maxim of the common law. He would again be put in jeopardy of his life. And, how does the case at all differ in principle in the case of a conviction? The fact is the same. He is again put in jeopardy of his life. He is again to be tried and acquitted or condemned. If it be said, that it is for his benefit and in favor of his life to have a new trial, that may be true; but there is in the body of the maxim no such qualification or limitation of its meaning. It is nowhere laid down as a part of the maxim that if he is acquitted he shall not be tried again; but if he is convicted he may be allowed a new trial. And if the court are to assume the power in favor of the prisoner; why may it not equally assume it when it will prevent a manifest fraud upon the administration of justice to suffer his acquittal to remain? Cases may easily be put where an acquittal may have been produced by gross bribery of the witnesses, by false testimony fraudulently procured by the prisoner, by spiriting witnesses away, and even by means still more offensive and revolting to public justice. And yet no case has as yet been produced of a new trial granted against a prisoner upon such grounds. In the Queen v. Carter (6 Mod. R. 168) Lord Chief Justice Holt stated a case where a rank perjury had gone unpunished from some defect in entering of the record of the former case, in which the perjury was alleged, for that (the first trial for perjury) was final, so as the party could never be tried thereon again. It is true, that in order to avoid difficulties of this sort the courts in the reign of Charles II (that reign of bad precedents) did sometimes go so far as to discharge juries before a verdict was given, where there was reason to believe that evidence was suppressed, or, that there was not enough to convict the prisoner, or that there was reason to suspect malpractice. And even Lord Hale fell into this erroneous practice, and endeavoured to justify it.*(a)* But it has since been wholly repudiated, and it met the decided disapprobation of Sir Michael Foster.*(b)*

But in point of fact there is no instance of any new trial having been granted by the English courts in capital cases, where the indictment is sufficient, and there has not been a mistrial, upon the plain ground that it would violate the integrity of this fundamental maxim of the common law. Indeed, for a great length of time the opinion prevailed, that there could be no new trial granted in any criminal cases, even where the indictment was for a mere misdemeanour, although it is manifest, that the maxim does not apply except to capital felonies. Mr Justice Blaekstone has indeed in his Commentaries said, "In many instances where, contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside and a new trial granted by the Court of King's Bench; for in such a case, as hath been said, it cannot be set right by attaint. But there hath as yet been no instance of granting a new trial, where the prisoner was acquitted upon the first." Now, from the other citations already made, it must be manifest that the learned commentator was referring to cases of mere misdemeanors. And he cites in support of this doctrine the case of Rex v. Read (1 Lev. 9.) Rex. v. Smith (T. Jones, 163.), and Rex v. Simons, (10 State Trials, 416. s. c. 19 Howell *(c)* State Trials, 680.) which were all cases of mere misdemeanours. Even as late as this very case of Rex v. Simons, it seems to have been deemed a very unusual course to grant a new trial in any criminal case, where the party was convicted. And in this very case the distinction, as to granting new trials between capital cases and other criminal cases was already recognised; and well it might be, as the maxim applies only to offences where the party is put in jeopardy of life or limb, which the defendant clearly is not upon an indictment for mere misdemeanours.

(a) 2 Hale, P. C. ch. 41. p. 294, 295, 296.
(b) Kinlock's case. Foster, C. L. 30, 31.
(c) See 2 Hawk. P. C. B. 2. ch. 47. s. 12. and see Mr Curwood's note, ibid.

In Rex v. Mawbery (6 T. R. 638) Lord Kenyon lays it down expressly that "in one class of offences, indeed, those greater than misdemeanors, no new trial can be granted at all." In a note to the case of Rex v. Inhabitants of Oxfordshire, 13 East. R. 416. note,*(a)* Mr East, himself a most able and exact crown lawyer, says, "In capital cases at the assizes, if a conviction take place upon insufficient evidence, the common course is to apply to the crown for a pardon upon a full report of the evidence sent in by the learned judge to the Secretary of State for the Home Department. But I am not aware of any instance of a new trial granted in a capital case; and upon the debate of all the judges in Margaret Tindler's case in 1781, it seemed to be considered that it could not be." And this is admitted to be the received and settled doctrine in England by every elementary writer upon the criminal law, who treats of the subject. Thus Mr Chitty says in his work on criminal law, that in case of felony or treason it seems completely settled that no new trial can in any case be granted. But if the conviction appear to the judge to be improper, he may respite the execution to enable the defendant to apply for a pardon.*(b)* The like doctrine is stated by Mr Russell in his work on crimes.*(c)* And to show how inflexibly the doctrine stands in the jurisprudence of the common law, it may be added that in the Report made to Parliament by the Commissioners on the Criminal Law, at the very last session, it is stated as a known fact that parties charged with felonies "cannot have a new trial." Indeed, the total silence of the English books upon this subject during the last three hundred years is as significant as any positive expression could be. Considering the vast number of capital trials, amounting to hundreds every year, during this long period, the total absence of any trace of a motion for a new trial in any capital case for misdirection of the court, or upon the discovery of new evidence, or because the verdict was against the weight of evidence, or for any other causes not amounting to a mistrial, where the indictment was good, is perhaps the strongest possible proof, that the power was not supposed to exist in any of the courts.

This then was the actual posture of the common law on this subject, and this the received interpretation of the maxim at the time when it was solemnly incorporated into the Constitution of the United States, as an article of a bill of rights. If this clause does not in legal contemplation prohibit the granting a new trial after verdict in a capital case, then there is nothing in the Constitution which does prohibit it even in cases of acquittal. It may be said, that in practice a new trial is never granted in any criminal case after an acquittal. And as a matter of practice we know that such is the common course.*(d)* But in misdemeanors it is perhaps still open to inquiry whether the court do not possess the power, if it should choose to exercise it.*(e)* At all events, if any clause of the Constitution does not prohibit the grant of a new trial after verdict in capital cases, there is nothing to prevent Congress from investing the courts of the United States with the power of granting new trials in all criminal cases (capital or otherwise) as well in cases of acquittal as of conviction, a power which, I imagine, has never hitherto been generally supposed to belong to that body, and which is truly alarming both in its nature and its exercise.

Let us now see, how the American authorities stand upon the same subject. And, here, it is proper to state that my researches have not enabled me to ascertain a single case solemnly adjudged in the United States before the adoption of the Constitution, in which after a verdict, regularly obtained, a new trial has been granted in a capital case.

In the State v. Hopkins, in 1794, (1 Bay R. 373) *(f)* the prisoner was convicted of passing a ten pound bill, knowing it to have been forged; and he moved for a new trial; and it was granted by the court. There was another count in the indictment for forgery upon which he was acquitted. It does not distinctly appear upon

(a) See 2 Hawk. P. C. B. 2. ch. 47. s. 12. and see Mr Curwood's note, ibid.

(b) 1 Chitty Crim. Law, p. 654. (English Edit). S. P. Christian's note to 3 Black. Comm. 388.

(c) 2 Russell on Crimes, B. 6. ch. 1. s. 1. p. 589. (2 Lond. Edit.) See also 2 Tidd. Pract. p. 820. Rex v. Fowler. 4 Barn. and Ald. 272. Rex v. Edwards. 4 Taunt. R. 309.

(d) 2 Hawk. P. C. ch. 47. s. 12, and Curwood's note, 4 Black. Com. 361. Rex v. Mann, 4 M. and Selw. 337.

(e) See 1 Chitty Crim. Law, 657. (London Edit.) and cases there cited. Rex v. Reynall. 6. East R. 315. Coventry and Hughes Dig. Trial IX. pl. 5, 6. The People v. Olcott. 2 John. Cas. 301. Foster, C. L. 22 to 40.

(f) See also The State v. Duestoe. 1. Bay. R. 377.

the face of the Report that the offence was capital, though the argument of counsel would lead us to that conclusion. But no point was made at the argument as to the power of the court to grant a new trial. It was silently taken for granted on all sides. Now, whether the laws of South Carolina gave such a power to their court in such cases is what I have no means of knowing. But it is material to state that the Constitution of South Carolina contains no prohibition on the subject. There is no clause in it, like the prohibitory clause in the Constitution of the United States. The point not having been made, the court did not even advert to it.

In United States v. Fries in 1799, (3 Dallas R. 515.) which was a trial for treason in the Circuit Court of the United States for Pennsylvania District before Judges Iredell and Peters, a new trial was actually granted. This is an authority directly in point, and its bearing cannot be overlooked. But there are circumstances in the case which greatly weaken if they do not impugn its authority. The counsel for the prisoner contended that though it was not usual to grant a new trial in a capital case, it was unquestionably in the power of the court so to do; and for this they cited 4 Black. Comm. 391. (probably intending p. 361.) 1 Burr. R. 394. 2 Str. 968. and 6. Co. 14. Now, it will be found upon examination, that not a single one of these citations justifies the doctrine contended for. The citation from Blackstone, (p. 391. if the page be not miscited) contains not one word on the subject. If p. 361 was intended, the doctrine (as we have already seen) applies only to misdemeanors. The case in 1 Burr. 394 was a civil suit, and in which Lord Mansfield discussed the right to grant new trials, with reference to such suits only. The case in 6 Coke R. 14. (Arundell's case) was upon a motion in *arrest of judgment*, because there was a *mistrial*, the jury having in that case (murder) been drawn, not out of the parish, but from the vicirage of the city, or as it is phrased, that the venue ought to have been out of the parish, and not out of the city. And the court adjudged that "the *trial* was insufficient, and a new venire facias was awarded to try the issue again, for *his* (the prisoner's) *life was never in jeopardy*." This therefore was not a motion for a new trial grounded upon matters dehors the record, but for matters of error on the face of the proceedings showing that there had been a mistrial, or no lawful trial at all; in other words not by lawful jurors. In Rex v. Gibson (2 Str. R. 968) the defendent was indicted for forgery (of what sort is not stated) and would have moved for a new trial (for what cause is not stated) without appearing in court; and the court refused to hear the motion on account of his not being present. The same case is reported in 7 Mod. R. 205, where it is stated to be the forgery of a note, and it must have been a forgery at the common law, which was only a misdemeanor; for it appears that the offence was charged in the indictment to have been committed in 1713; and it was not until the Stat. of 2 Geo. 2 ch. 25. (1729.) that forgery of a note was made a capital offence.*(a)* In Fries's case the counsel for the government admitted the power of the court to grant a new trial in capital cases. and argued solely against the validity of the grounds assigned for granting it in that case. The point was therefore not argued; the clause in the Constitution of the United States was not even alluded to, much less reasoned out. The court did not in giving their judgment in any manner speak to the point; and the judges were divided in opinion as to the propriety of granting a new trial for the cause shown; But Judge Peters yielded his opinion and acquiesced in granting the new trial. Now, under such circumstances, it is not too much to say that the court might have been surprised into the decision; and certainly in a case of constitutional law it ought to have no decisive influence, especially (as we shall presently see) that in the very state of Pennsylvania, in whose Constitution a like clause exists, and where this cause was tried, the power has been solemnly denied to exist under stronger circumstances.

In the Comm'th. v. Hardy, in 1807, (2 Mass. R. 303) the Supreme Court of Massachusetts granted a new trial in a capital case, because there had been a *mistrial*, the prisoner having been arraigned before an incompetent tribunal, and there ore in legal interpretation the trial was utterly void as coram non judice. No one can doubt the propriety of this decision. But it stands wide of the present question.

In the Comm'th. v. Green (17 Mass. R. 515) the very point of the right of the Supreme Court of Massachusetts to grant a new trial in capital cases after verdict was brought before the court and argued at large; and the decision was in favor of the power; but the new trial was denied upon the merits. In delivering the opinion of the court Mr Chief Justice Parker said, "It appears by the English text books, and by several decisions cited in support of the position, that in cases of felony a new trial

(a) 4 Black. Com. 249.

is not *usually* allowed by the courts of that country. But whatever reasons may exist in that country *for this practice*, we are unable to discern any sufficient ground for adopting it here." Now, with the greatest deference for that learned judge I cannot admit that this language truly represents the state of the English common law doctrine on this subject. On the contrary as I understand that doctrine, it is no matter of practice at all (usual or unusual) in respect to which the English courts are at liberty to exercise any discretion; but it is a matter of power, which a fundamental maxim of the common law prohibits the courts from exercising in all cases (subject to the exceptions already adverted to); and which disability nothing but an act of parliament can remove. It is a matter of right of every British subject, which constitutes a part of his freedom, like other great rights secured by Magna Charta. If it were a matter of mere practice, there might be some ground for an American Court to adopt or reject it. But if it is a great common law right, then it stands upon a very different foundation. The learned Judge goes into a train of reasoning to show, why in cases of acquittal no new trial should be granted, in relation to those, whose lives have been once put in jeopardy; and also to show that in cases of conviction, the same reasons for denying a new trial do not apply. But I cannot find that he any where denies, that if a new trial is granted in a case of conviction, the party is put a second time in jeopardy of his life. But it is no part of my right or duty to enter upon the examination of the reasoning of the learned Judge in that case. First, because, in the Constitution of Massachusetts there is no clause similar to that contained in the Constitution of the United States; and it is for the Supreme Court of the state and not for me to decide what portion of the common law is in force therein. And secondly, because the Supreme Court of the state is the appropriate and exclusive judge of its own powers under the constitution and laws of the state; and it may well be that it has complete power to grant new trials in capital cases, when no such power exists in the courts of the United States. If this were not (as I think it is) a question of constitutional law under the constitution of the United States, but under the laws of the United States, I can read in the Judiciary act of 1789, ch. 20. s. 17. that the courts of the United States have not a universal power to grant new trials, but only "power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have been *usually* granted in courts of law." As far as the reasoning of the learned judge goes, it may show that it may be of great public utility to have the power to grant new trials in cases of capital convictions, and not in cases of capital acquittals. But this reasoning must address itself to the framers of the constitution, and not to those who are called upon to administer its actual provisions.

A case has also been cited from Virginia (Com'th v. Jones, 1 Leigh's Reports, 598) where a motion for a new trial was entertained by the appellate court in a capital case after a conviction; and upon the merits was denied. But to this case as an authority bearing on the present question, two objections may be properly made; first, that the point was not made at the argument, nor considered by the court; and secondly that the Constitution of Virginia contains no prohibitory clause bearing upon the point; and consequently the right to entertain such a motion was dependent wholly upon the local jurisprudence; and whether it was conferred upon the court was matter of local law, turning upon no general principles.

Another case has been cited from the Indiana Reports (Jerry v. The State, 1 Blackford R. 395.) in which a writ of error was brought in a capital case from a judgment of an inferior court, refusing to grant a new trial to the prisoner after a conviction, which was moved for upon the ground that the verdict was contrary to evidence. The Supreme Court of the state ordered the judgment of the court below to be reversed, and the verdict set aside, and a new trial granted upon the ground that strong doubts remained, whether the testimony supported the verdict. Upon this case it may in the first place be remarked, that a writ of error for the refusal of a court to grant a new trial does not lie at the common law; and so it has been repeatedly held in the Supreme Court of the United States, the granting of such new trial in any case being a matter of discretion. So that the case must stand upon some peculiarity of the local jurisprudence. And in the next place, though the Constitution of Indiana does contain a prohibitory clause, like that in the Constitution of the United States, it is not even alluded to in the opinion of the court, short and unsatisfactory, as it is; and therefore we cannot know whether the point has ever been argued in that state or not. Under such circumstances the case can have no intrinsic authority here.

In no one of the cases heretofore cited has the clause of the Constitution of the United States been brought under the review of the court, or its interpretation as-

certained. But there are cases in other courts of great respectability in which the question has come solemnly in judgment; and the true intent and meaning of the clause has been severely sifted. If I do not greatly mistake, some of these cases will be found to carry an opposite doctrine far beyond the limits necessary for the decision of the present case. One of these cases is the People v. Goodwin in 1820, (18 John R. 187) where the whole subject was most elaborately examined by the counsel and the court. It was an indictment for manslaughter, and the jury after the whole cause was heard, being unable to agree were discharged by the court without the consent of the defendant. The question was whether under these circumstances the defendant could be again put upon his trial. On the part of the defendant it was contended that he could not, among other reasons, because the Constitution of the United States had declared, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;" and that putting the party upon trial was putting him in jeopardy of life and limb. The argument on the other side was that this clause did not apply to state courts; and if it did, it was inapplicable to the cause, for if the cause was sent to another jury, the defendant would not be twice in jeopardy, nor twice tried, for there never had been a trial, in which the merits had been decided on. The court inclined to the opinion that the clause was operative upon the state courts; but at all events that it was a sound and fundamental principle of the common law, that the true meaning of the clause was that no man shall be *twice tried* for the same offence; that the true test by which to decide the point, whether tried or not, is by the plea of auter foits acquit or auter foits convict; and finally (what is most direct to the present purpose) that in a legal sense "a defendant is not once put in jeopardy until the verdict is rendered for or against him, and if for or against him he can never be drawn in question again for the same offence." And the court accordingly held that the discharge of the jury before giving a verdict was no bar to another trial of the defendant.

Soon afterwards (in 1822) the same question occurred in Pennsylvania before the Supreme Court of that state in the case of the Comm'th v. Cook (6 Serg. and R. 577); and what makes it still more direct, as an authority, there is a provision in the state Constitution of Pennsylvania exactly like that in the Constitution of the United States. The court held that the discharge of the jury because they could not agree, was unlawful, and was not a case of necessity within the meaning of the rule on the subject. Mr Chief Justice Tilghman on that occasion said, where a party "is tried and acquitted on a bad indictment, he may be tried again, because his life was not in jeopardy. The court could not have given judgment against him, if he had been convicted. But where the indictment is good, and the jury are charged with the prisoner, his life is undoubtedly in jeopardy during their deliberation." "I grant that in case of necessity they (the jury) may be discharged; but if there be any thing short of absolute necessity, how can the court without violating the constitution take from the prisoner his right to have the jury kept together until they have agreed, so that he may not be put in jeopardy a second time." So that the opinion of the learned Chief Justice, à fortiori, manifestly is, that if a verdict has been once regularly given upon a good indictment, the prisoner could not be tried again. Mr Justice Duncan was still more full upon the point. After adverting to the case of The People v. Goodwin, and the construction there given to the clause now under consideration he said, "I feel a strong conviction that the construction here [there] given to this provision of the Constitution of the United States, engrafted into the constitutions of Delaware, Kentucky, and Tennessee, and made an article in the Bill of Rights of this state, is not the true one, and that the provision that no person can be put twice in jeopardy of life and limb means something more than that he shall not be twice *tried* for the same offence. It is borrowed from the common law, and a solemn construction it had received in the courts of common law ought to be given to it," &c. "This is not the signification of the words used in their common use nor in their grammatical or legal sense. 'Twice put in jeopardy,' and 'twice put on trial,' convey to the plainest understanding different ideas, &c." "There is a wide difference between a verdict given and jeopardy of a verdict. Hazard, peril, danger of a verdict cannot mean a verdict given. Whenever the jury are charged with a prisoner, where the offence is punishable by death, and the indictment is not defective, he is in jeopardy of life." And he accordingly held, that in that case, the jury having been discharged without giving any verdict for an unjustifiable cause and without necessity, the prisoner was not liable to be tried again. And here I might repeat, à fortiori, if the jury had given a verdict he could not be tried again.

The same question came before the Supreme Court of North Carolina, in the

State v. Garrigues (1 Hayw. R. 241) and very recently again (in 1828) in the matter of Spier, (1 Dever. R. 491) before the same Court, where the jury in a capital case had been discharged without legal necessity and had given no verdict. The Court held that the prisoner could not be again tried. Upon this occasion the cases in the Supreme Courts of Massachusetts, New York, and Pennsylvania were cited; and the Court adopted that of the Supreme Court of Pennsylvania; and affirmed the exposition of the clause given by that Court, that no man shall be twice put in jeopardy, &c. for the same offence. Mr. Justice Hall said, "when the jury were thus charged with the prisoner he certainly stood upon his trial; his life was jeopardized;" and he afterwards proceeded to the exceptions of a discharge from necessity, and when the indictment is bad. Mr. Chief Justice Taylor delivered a more elaborate opinion, insisting that "twice put in jeopardy," and "twice put on trial," convey to the mind several and distinct meanings; for we can readily understand how a person has been in jeopardy, upon whose case the jury have not passed. The danger and peril of a verdict do not relate to a verdict given. When the jury are impannelled upon the trial of a person for a capital offence; and the indictment is not defective, his life is in peril or jeopardy and continues so throughout the trial."

Now, whatever diversity of opinion there may be among these learned Judges as to the right and power of the Court to discharge the jury in a capital case from giving any verdict, except in cases of extreme necessity, all of them agree in this, that after a verdict once given by the jury in a capital case upon a good indictment, the party cannot be again tried for the same offence; and that such an attempt would be a violation of the Constitution of the United States. The Judges in Pennsylvania and North Carolina go farther, and deem the case within the prohibition of the Constitution, if the party is once put upon trial before a jury and the jury is discharged without giving a verdict, except in cases of extreme necessity.

Upon the question of discharging a jury in capital cases, the Supreme Court of the United States have in the case of United States v. Perez (9 Wheaton R. 579) adopted the doctrine of the Supreme Court of New York. Upon that occasion the Court did not go into any exposition of the clause in the Constitution now under consideration; but simply stated that in the case of Perez the prisoner had not been convicted or acquitted, and therefore might again be put upon his defence. But I think I may say, that it was never for a moment at that time understood by the Court, that if there had been a *verdict* of conviction or acquittal, the prisoner could be again tried for the same offence. The point was not before the Court, and was not at all examined.

In the very recent case of the The People v. Comstock, (8 Wend. R. 549) the Supreme Court of New York treated it as perfectly certain and settled "that in offences greater than misdemeanors, a new trial cannot be granted on the merits, even where the prisoner has been convicted;" and the court placed the doctrine upon the same basis on which the English cases already cited have put it. I am not unaware that there is some general language attributed to the Court in The People v. Stone (5 Wend. R. 36.) which may bear a different interpretation. But it was a mere obiter dictum, and stands overruled by the later and more exactly considered case.

Now, in the face of these authorities bearing directly on the point, and in which the interpretation of the clause of the Constitution was before the Court, I confess myself greatly distressed in attempting to give a different interpretation, without reducing the words to an unmeaning formulary, vox et præterea nihil. I find that my brother, the late Mr Justice Washington, in the case of United States v. Haskell (4 Wash. Cir. R. 402), where a jury had been discharged in a capital case, before verdict, on account of the insanity of one of the jurymen, held that there might be a new trial; and that the discharge was no bar to a further prosecution—upon that occasion, he said that the jeopardy spoken of in this article can be interpreted to mean nothing short of the acquittal or conviction of the prisoner, and *the judgment of the court thereon*. And he asserted this to be the meaning affixed to the expression of the common law. Upon this I should greatly doubt as a doctrine universally true, especially when I find that it differs from the doctrine maintained by Mr Justice Blackstone in his Commentaries, (4 Comm. 336) as well as in some other authorities;(a) for, then, there would be no distinction between the plea of auter foits

(a) See on this subject, Vaux's Case, 4 Co. R. 44, 45. Wigg's Case. 4 Co. R. 45. 46. 2 Hawk. P. C. ch. 36. s. 13. s. 14. s. 19. But see 2 Hale P. C. ch. 32. p. 251. ch. 55. p. 391. ch. 31. p. 243.

convict and the plea of auter foits attaint of the same offence; and yet a distinction is manifestly maintained between them. And if it were even true that the plea of auter foits acquit or auter foits convict without a judgment could not be pleaded technically as a bar to another prosecution or another indictment, it would not follow that it might not be a good bar to a new trial upon the same indictment when there had already been one trial regularly had upon the ground of the maxim already adverted to; for upon the first trial the life of the prisoner was certainly in jeopardy. Mr. Justice Washington afterwards says, that the article does not apply to a jeopardy short of a *conviction;* which may be true, if we are to understand by conviction, (as is certainly the legal sense) a verdict against or confession by the party of record.*(a)* But what with me is decisive against the construction of the clause of the Constitution given by Mr. Justice Washington is, that he puts it as clear upon his interpretation, that after a verdict of acquittal in a capital case (upon a good indictment) the Court might still award a new trial against the prisoner. And he puts the case (to illustrate this doctrine) of an acquittal of the prisoner procured by his own fraud. Now, I am not aware that the maxim has ever received such an interpretation from any other judge; and all the authorities which I have seen are against it. I confess my extreme repugnance to adopt any interpretation of the maxim, which shall load to such consequences. It would remove the whole force of the prohibition, and submit the whole subject in criminal trials to the discretion of the Court. I have always understood that the great object of this clause was, on the contrary, to take away all discretion, and to forbid all Courts of the United States from trying a man twice upon a good indictment for the same offence.

It has been supposed that in all cases of conviction there may be ground to grant a new trial, because it will always be in favor of the prisoner. If this were true, the difficulty would still remain, that the constitution does not provide for a new trial only where it is favorable to the prisoner. If the twice being put in jeopardy is referrible only to cases after judgment, and not after verdict; and before judgment, even a new trial may be granted though it may be unfavorable to him. Cases of conviction may readily be conceived, in which a new trial may be injurious to the prisoner. If after conviction it may be granted at his request, it may also be granted without his consent. Suppose a man indicted for murder and convicted of manslaughter; can a new trial be granted at all, unless by putting him twice in jeopardy of his life? Suppose a robbery of the mail, charged in the indictment with being effected by wounding the carrier, or putting his life in jeopardy (which is a capital offenee) and there is a conviction of the robbery without such aggravated circumstances, can a new trial be granted, upon the application of the government or of the prisoner? Many other cases of a like nature may be easily put, where the offence in an aggravated form is a capital felony, and without such aggravations not. Yet the power to grant a new trial in cases of conviction, if it exists at all, is general, and may be required by the government as well as by the prisoner.

Upon the whole, having given this subject the fullest consideration, I am, upon the most mature deliberation, of opinion that this Court does not possess the power to grant a new trial, in a case of a good indictment, after a trial by a competent and regular jury, whether there be a verdict of acquittal or conviction. My judgment is, that the words in the Constitution, "Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb," mean that no person shall he tried a second time for the same offence, where a verdict has been already given by a jury. The party tried is in a legal sense as well as in common sense, in jeopardy of his life, when a lawful jury have once had charge of his offence as a capital offence upon a good indictment, and have delivered themselves of the charge by a verdict. In this respect I follow the doctrine of the Supreme Court of New York; and the doctrine of the Supreme Court of Pennsylvania and North Carolina goes not only to the same extent, but includes cases where the party is once put upon his trial before the jury, and they are discharged from giving a verdict without extreme necessity. This too is the clear, determinate and well settled doctrine of the common law, acting upon the same principle, as a fundamental rule of criminal jurisprudence. I deem it a privilege of inestimable value to the citizen; and that it was introduced into the Constitution upon the soundest principles of prudence and justice. But if it were otherwise, it is my duty to administer the Constitution as it stands and not to incorporate new provisions into it. If this clause does not prohibit a new trial, where there has already been a regular trial and verdict, then it is wholly immaterial

(a) See 4 Black. Comm. 362. And 4 Co. R. 46. 2 Hawk. P. C. ch. 36. s. 9. 1 Chitty, Crim. Law, 462, (2nd London edit.)

whether the verdict is of acquittal or of conviction of the offence; and the same party may in the discretion of the Court be put upon his trial ten, nay, twenty times, if the Court should deem it fit. It was (as I think) among other things, to get rid of the terrible precedents on this subject alluded to by Lord Hale, and even acted upon by him, in the reign of Charles II., in discharging juries from giving verdicts upon frivolous or oppressive suggestions, that this great maxim of the common law was engrafted into the Constitution. The Constitution has also in another clause declared, that "no fact once tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The only modes of making this re-examination known to the common law are by a writ of error and a new trial; and if by the common law there cannot be a new trial in a capital case after a regular trial once had upon a good indictment, as seems to me to be conclusively established by the English authorities already cited, then this clause also carries in its bosom another virtual prohibition.

Lest I should be thought to have overlooked the case of United States v. Daniel, (6 Wheaton R. 542) where the Circuit Court divided upon the motion for a new trial, I beg only to say that the point whether the Circuit Court had jurisdiction to grant a new trial in a capital case, was not before the Court. It was a mere certificate of division of opinion of the Circuit Court; and the Supreme Court held that it had no jurisdiction to entertain the point certified so far as it regarded a new trial.

If the language used by me in the Commentaries on the Constitution (3 Story's Comm. on the Const. ch. 38. s. 178.) should be thought to inculcate a different doctrine, I can only say that I do not so understand it. I have no doubt that there are cases where there may be a new trial; as in cases of a mistrial by an improper jury.*(a)* But in the language there used it should be considered that the author was not summing up his own private or judicial opinions, but only gathering together the opinions of others, which had come to his knowledge, to illustrate the text. But if there be any erroneus opinions inculcated in those commentaries, which upon more deliberate examination I should deem unfounded, I trust that I shall be the last person to insist upon them as obligatory or correct. My duty as a judge is to pronounce such a judgment as my conscience dictates, without reference to any preconceived opinions. But I freely admit that I see nothing in that passage of the Commentaries, so far as relates to the granting of new trials, which I deem incorrect, or which I wish to retract.

It may be thought by some, that there may be great inconvenience in the establishment of this doctrine. But if there be, it is for those who possess the power to amend the Constitution, to apply the proper remedy. For myself, I entertain great doubts whether in the actual administration of public justice the present doctrine would not be far more safe and useful than an unlimited power to grant new trials in all capital cases at the mere discretion of the Court. It may be, that a Court may sometimes err in the proper administration of the law; and it may also err in granting or refusing a new trial. But the consciousness that the trial is final will always impress every Court, mindful of its duty, with the utmost caution in all its opinions and judgments in capital cases, where the result may be unfavorable to the prisoner. It will naturally induce it to lean to the side of mercy; and it will look anxiously to the dictates of the law. But still, if, after all, errors should intervene, it will be but the common infirmity of the administration of all human justice. And the prisoner, even in such a case, will not be wholly without redress. He may apply for a pardon or mitigation of the sentence to the Executive; and it cannot be doubted that the Court itself, if conscious of any serious error, would cheerfully aid in his application. Hitherto this ultimate appeal to the pardoning power has been deemed satisfactory and safe in the land of our ancestors down to our own age; and it has been deemed equally satisfactory and safe in all those States whose jurisprudence does not permit a new trial in capital cases under like circumstances.

But whatever might be my opinion as to the authority of this Court to grant a new trial in capital cases generally, I shall under the present circumstances go over all the grounds insisted upon by the prisoners' counsel (some of which being in arrest of judgment, are indispensible to be disposed of before judgment) because if any error in point of law has been committed by the Court, injurious to the prisoners, or upon established principles of law, they ought (if the Court could grant it) to have a new

(a) See The People v. Kay. 18 John R. 212. 2 Hawk. B. 2. ch. 36. s. 15. Rex v. Kerte 1 Lord Raym. R. 139. 2 Hawk. P. C. ch. 27. s. 104. Id. ch. 47. s. 12. Arendell's Case, 6. Co. R. 14.

trial, I should feel it my duty to make a direct application in their behalf to the executive for a pardon to redress the error. God forbid that any man in this country should suffer death against the law, from the mere infirmity of judgment of those who are appointed to preside at his trial.

The first cause assigned for a new trial is, the discovery of new evidence. For the present I shall pass over this point, intending to examine it when all the other grounds shall have been passed under review.

The second cause is, that the prisoners were not permitted to be tried separately, although they made a motion for this purpose. Now, this has been long since settled by the Supreme Court of the U. S. to be a matter, not of right, but of sound discretion to be exercised by the Court. So it was held in the case of U. S. v. Marchant (12 Wheaton R. 480) upon the fullest consideration. The sole ground upon which the present motion was made was, that by means of separate trials, the prisoners wished and intended to make use of the testimony of each other in their defence. Now I was of opinion and still am, that the reason assigned was wholly in a legal point of view inadequate to justify the Court in the exercise of such a discretion. The charge was a charge of a joint piracy on the high seas, committed by all the prisoners, found by the Grand Jury upon their oaths; and therefore to be taken primâ facie to be well supported by competent evidence before them. There is no pretence now to say, when the trial has been had, that there was not a solid ground of probable cause to put all the prisoners in the indictment as confederates in the act, or that any of the prisoners were included upon mere false suggestions to evade their testimony. It is clear by law that confederates in the same piracy, put upon trial at the same time, are not competent witnesses for each other. And I do exceedingly doubt whether in point of law the Court possess the right to make witnesses competent in a trial by any act of their own, who would otherwise be incompetent. The Government has rights as well as the prisoners. The Government is not to be deprived of its rights merely because the prisoners request a separate trial. In a joint trial the Government has a right to exclude all the prisoners from being witnesses. If the Court deprive the Government of this right, it is an exercise of power, which may sometimes subvert the purposes of justice. It certainly does not necessarily promote it. It is no just cause of complaint on the part of prisoners, that they stand jointly indicted: for they can rarely be so, except where they have mixed themselves up with the criminal transaction in a manner which in the sober judgment of the Grand Jury implicates them in the common guilt. I have never before known a case, in which the sole ground for a separate trial has been to make the witnesses competent for each other. In the only cases in the Circuit Court in which a separate trial has been granted, there has been an express disclaimer of using the confederates as witnesses; and the defence has been exclusively placed upon several and distinct grounds. In the present case the main argument was at the trial and now is rested upon a defence common to all the prisoners, viz. that the robbery was not by the Panda or her crew; but by some other vessel. If, therefore, the question were now to be decided over again, I should under the circumstances refuse to concur in a separate trial of the prisoners. I should doubt the legal right so to do for the cause assigned. And I cannot but think that the granting it in a case of this sort, (in which, if in any, case there ought to be a joint trial) would be an abuse and not a just use of a sound discretion.

The third, fourth and fifth causes embrace in different forms the same subject matter. The prisoners who are all foreigners and strangers to our institutions, and do not, as far as we know, speak or understand the English language, and with whom the Court could communicate only by an interpreter, were after the indictment was found against them brought into Court, and were informed that they were entitled to copies of the indictment, and should be furnished with them two full days before they were required to plead; that they were entitled to Counsel to assist them in the defence, and that the Court would assign such counsel as they desired, and accordingly the learned gentlemen, who have since conducted the defence, were so assigned; and that at a subsequent time, after two full days, they would be arraigned and required to plead to the indictment. Accordingly after this period had elapsed and the copies were duly furnished, the prisoners were brought to the bar, and in the presence of their counsel were arraigned, and upon their arraignment they severally pleaded not guilty. But (as is said) the Clerk of the Court upon this arraignment did not further proceed upon their pleading not guilty, to ask the prisoners how they would be tried, so that they did not make the usual and common reply, "by God and their country." The District Attorney then moved the Court to assign a time for the

trial of the prisoners, and accordingly at the request of the prisoners' counsel a particular day named by themselves was assigned for the trial. It was then stated to the prisoners, that they were to be tried by a jury, that the list of the jurors would be furnished to each of them (and they were accordingly furnished) two full days before the trial, that they might exercise their full right of challenge. Accordingly at the time assigned the prisoners were brought to the bar for trial; they were then distinctly and in the usual manner informed by the Clerk, that they were then set at the bar to be tried, and that the good men and true, whom he was then to call, were to pass between them and the United States at the trial; and that if they would object to any of them they must do it as they were called and before they were sworn. The Jury were accordingly called, and not the slightest objection to the trial by the jury was intimated either by the prisoners or their counsel; but the prisoners proceeded with the assistance of counsel to make their challenges (amounting, I believe, in all, to thirty-six) and all the Jurors sworn and impannelled were those to whom they declared that they had no objection. The whole cause was then most elaborately examined and heard; the fullest defence made; and the jury returned their verdict, as it appears upon the record.

Now, the objection is, not that no *similiter* is joined (for it is admitted that this is not necessary) but that there is no issue to the country, until the prisoners have expressly put themselves, by the words already quoted, "upon God and their country;" and that until such an issue there can be no trial. In order fully to understand the nature of the objection it may be well to state the course of the proceedings at the common law in England; and this may be taken from the very ample account given by Mr. Justice Blackstone in his Commentaries, (4 Comm. ch. 25. p. 322 to 331. Id. ch. 26. p. 332 to 341.) *(a)* When the prisoner is brought into Court to answer the indictment, he is said to be brought in to be arraigned thereon; for "to arraign is nothing else but to call the prisoner to the bar of the Court to answer the matter charged upon him by the indictment." The indictment is then read to him, and when called upon to answer, he either stands mute or confesses the fact (which we may call incidents to the arraignment), or else he pleads to the indictment. Regularly a prisoner is said to stand mute upon being arraigned upon a capital felony, when he either (1) makes no answer at all; or (2) answers foreign to the purpose or with such matter as is not allowable, and will not answer otherwise; or (3) (what is most natural to the present purpose) upon having pleaded not guilty, refuses to put himself upon the country. If he says nothing, the Court ought ex officio to impannel a jury to inquire whether he stands obstinately mute, or whether he be dumb ex visitaton Dei. If the latter is the case the Court proceed to the trial and examine all the points, as if he had pleaded not guilty. If he be found obstinately mute, in cases of treason and petit larceny and misdemeanors, his standing mute was deemed equivalent to a conviction and he received the same judgment and execution. In other capital felonies the prisoner was not anciently deemed convicted, but for his obstinacy he received the terrible sentence of penance, or peire forte et dure (as it was called) which in substance was, that he was put into a low dark chamber, laid on his back naked, a weight of iron as great as he could bear, was placed on his body; he was to have no sustenance save only on one day three morsels of the worst bread, and on the second day three draughts of standing water that should be nearest to the prison door; and in this situation this should alternately be his diet till *he died.* And this remained the law in England, though rarely put in force, until the 12 Geo. 3 ch. 20, when it was enacted that all persons who should stand mute on being arraigned for felony or piracy, should be deemed convicted of the offence and punished accordingly.

We next come to consider the general issue, as it is called, which is the plea of not guilty. When upon his arraignment the prisoner pleaded not guilty, the Clerk immediately enters upon the record not guilty, or as it stood anciently abbreviated, non cul: for non culpabilis; and immediately the reply of the government, supposed to be *(b)* given viva voce, that the prisoner is not guilty (and by Blackstone supposed to be indicated by the abbreviation cul: prit); though in point of fact such reply is never formally made. When this is done issue is then said to be joined; for Mr. Justice Blackstone informs us, that "immediately upon issue joined it is inquired of the prisoner, by what trial he will make his innocence appear," which the Clerk

(a) See also 2 Hale P. C. ch. 43. 314, to 322. Id. ch. 28. p. 216 to 225.

(b) Mr Christian's account in his note to 4 Black. Comm. 340. Note (1) appears to me far more probable than that of Mr. J. Blackstone.

does by the words, "How wilt thou be tried." And indeed this must necessarily be so, for until an issue is virtually joined between the parties, there is nothing to be tried, and of course there can be no trial, until something is to be tried. And the question propounded becomes thus intelligible. So that the remark of the District Attorney is critically correct, that there is a joinder of the issue, before we arrive at this stage of the arraignment. *(a)* In order to ascertain why this inquiry is made, it is necessary to state that anciently in England the party accused had his choice of being tried in one of two manners, by battel or by a jury. And in those times of course it was indispensable that he should be put to his election. If he chose the trial by battel, he was accustomed to say that he would be tried by God; if by a jury, that he would be tried by his country. But since the trial by battel was abolished, (as it has been for ages upon indictments) there can be no trial but by a jury; and hence in England where the old form was still retained, the refusal to answer that he would be tried by God and his country was treated as a refusal to put himself upon the inquest in the usual manner, and therefore as legally standing mute. Now in America, the trial by battel was never introduced at all; and the only trial since the first settlement of the country has always, in criminal cases, been by a jury; and could not be in any other manner. But in England the right of trial by battel in certain cases continued down to our own day, viz. in cases of appeals and approvements; and as late as the case of Ashford v. Thornton (1 Barn. and Ald. R. 405) in 1818, was acted upon, though it has been since abolished by a recent statute. The continuation of the form in England may thus be easily accounted for; and though in America it has very probably been acted upon in many states, it would be proper only, where the common law rule that the party might otherwise be deemed to stand mute, was in force; for I believe that the punishment of peine forte et dure, never was adopted in any part of America. And it seems to me, that in all those States, where the Constitution provides that the trial of all crimes shall be by a jury, and the prisoner pleads not guilty, it is a mere mockery to ask him how he will be tried, for the Constitution has already declared how it shall be.

But be this as it may, under the state governments I am clearly of opinion, that the form is wholly unnecessary under the Constitution and laws of the United States in the federal courts. The Constitution has expressly declared, "that the trial of all crimes except in cases of impeachment shall be by jury." It is imperative upon the Courts, and prisoners can be lawfully tried in no other manner. As soon, therefore, as it judicially appears of record that the party has pleaded not guilty, there is an issue in a criminal case, which the Court are bound to direct to be tried by a jury. The plea of not guilty does import of itself a tender of a proper issue, and the Attorney for the Government in demanding a trial of that issue necessarily requires it to be by a jury. And so in point of fact, the plea of not guilty is always understood by the Court. When the Clerk enters it upon record, in making up the record he usually adds to it; and of this he (the prisoner) puts himself upon the country. And in misdemeanors this is the common course in England. And why? Plainly because in the case of a misdemeanor there never could be any other trial than by jury; and therefore, in cases of misdemeanor the prisoner never is asked, "How he will be tried;" but his plea of not guilty is of itself an issue to the country. The laws of the United States establish this to be the true view of the matter at least in the courts of the United States. The Crimes act of 1790, ch. 9, s. 30, provides that if any person shall be indicted for treason, and shall stand mute or refuse to plead, or shall challenge peremptorily above thirty-five of the jury; or if any person be indicted of any other capital offence, &c., if he shall stand mute or will not answer to the indictment, or challenge peremptorily above twenty of the jury, the Court, in any of these cases, shall, notwithstanding, proceed to the trial of such person, as if he had pleaded not guilty, and render judgment thereon accordingly. And the act of 1825, ch. 276, s. 14, provides the like rule in regard to offences not capital, declaring that in such cases the Court shall proceed to the trial of such person as if he had pleaded not guilty, and upon the verdict render judgment accordingly. Both of these statutes clearly establish that the party is not to be understood to stand mute, when he has pleaded not guilty; and that as soon as the plea of not guilty is put in, the cause must be tried by the jury. It is impossible consistently with the language of these acts for the court to adjudge that the party stands mute, when he pleads not guilty; and if he does not, in contemplation of law, stand mute after such plea, then the plea of not guilty includes every thing essential to put him on trial by the jury.

(a) See 1 Chitty, Crim. Law, 416.

It ought to be added, that the present being a charge of piracy on the high seas was not originally or practically within the ancient rules of proceedings at the common law on land. On the contrary until the statute of 28. Henry 8. ch. 13, piracies on the high seas were exclusively triable in the Admiralty according to the course of the civil law; and that statute first made them triable by a jury in the common form of jury trials.(a) So that the trial by battel was never applied to them; nor until the statute of Henry 8, were the forms of arraignment consequent thereon at the common law.

Besides:—What is the reason even at the common law of asking the prisoner how he will be tried? It is to ascertain whether he consents to a trial by jury. If he does consent in any clear and determinate manner, it is manifest that he cannot object that the form has not been gone through, if the substance has been preserved. Now, in the present case there is the most ample proofs of a consent, if consent were necessary, by the acts of the prisoners, and of their counsel before and at the trial. And if the prisoners had refused to consent, the trial must have been in the same manner precisely as it has been had. But I confess for one, that I deem it little short of an absurdity in the Courts of the United States to call upon the prisoners after they have pleaded not guilty to say how they will be tried, when the constitution and laws have peremptorily required the trial to be by jury. Suppose the prisoners had been asked, how they would be tried, and they had answered that they wished for no trial at all; must not the Court have proceeded to try them upon the plea of not guilty? Suppose they had answered that they wished to be tried by the Court, could the Court have tried the cause otherwise than by jury? Suppose they had been silent as to how and when and whether they should be tried, could the Court have done otherwise than order a trial by jury? We have no authority to inflict the punishment of the peine forte et dune, (and I trust our courts never will have it,) and our laws manifestly contemplate no such thing as either legal or necessary. It appears that by a recent statute in England (Stat. 8 Geo. 4. ch. 28) it is provided that if a person, being arraigned upon an indictment for treason, felony, or piracy, shall plead thereto a plea of not guilty, he shall by such plea, without further form, be deemed to have put himself upon the country for trial. And this is precisely what our laws, in my judgment, do in effect prescribe. The provision was indispensable in England, since the refusal of the prisoner to state, after he had pleaded not guilty, how he would be tried, was deemed in law as standing mute. In our law he cannot be deemed to stand mute, when he has pleaded not guilty. The constitution decides how he shall be tried, independent of any election on his part. The plea of not guilty puts the party for all purposes upon his trial by jury. My judgment, therefore, is that there is nothing in this objection.

The sixth cause respects the overruling by the court of a question asked by the prisoner's counsel, the relevancy of which was not perceived by the court, and the counsel refused to state it. The fact afterwards came out (I believe) incidentally upon the answer to other questions. But at all events, the relevancy of the question not having been shown at the time, (and indeed not even now at the argument.) it is clear that there is no ground to say that it ought to have been put. It would otherwise happen, that the right of cross examination might extend to every thing, whether it were material or immaterial, which had occurred in the whole course of the witness' life.

The seventh objection relates to certain supposed errors in the instructions of the court. The first specification respects the supposed remark of the court that Perez was not an accomplice. What the court actually said was this—After stating to the jury that a conviction ought not to be upon the naked testimony of an accomplice, unless strongly corroborated by other evidence or circumstances; the court said that it was not to be taken as a matter of course that Perez was an accomplice. That was for the jury to consider. Perez in his testimony utterly denied that he was an accomplice; the defence was that the crime was never committed by any of the crew of the Panda; and if the crime never was committed at all, Perez could not be an accomplice.. The government alone insisted that Perez was an accomplice. And under these circumstances, the jury were to say, whether he was an accomplice or not, upon the evidence. It is now argued, (as I understand it) that Perez might have been an accomplice, although the crime was never committed. This appears to me in point of law wholly unmaintainable—and at all events, the court left the matter to the jury upon the whole facts, exactly as the evidence and circumstances placed it before them.

(a) 4 Black. Comm. 71. 269. 1 Hawk. P. C. B. 1, ch. 20. s. 17, 18.

The next specification is to the supposed instruction of the court, as to the effect of the nonproduction of the written examinations under the circumstances. These circumstances took place in the presence of the court and jury. The counsel for the prisoners made a written demand of the District Attorney to produce the examinations of Perez and several of the prisoners taken at Fernando Po; the District Attorney offered to produce them if the prisoners would read them, or suffer them to be read to the jury. The counsel for the prisoners declined so to do upon that condition. But they afterwards stated that the District Attorney might, if he chose, read them to the jury as papers produced by him; and they would waive any objection to the examination of Perez being under oath. The District Attorney declined so doing, saying he was not in the habit of using the confessions of prisoners against them. Such was the substance of the proceedings—and the court were asked under these circumstances, to instruct the jury that the suppression of the examination of Perez by the District Attorney, afforded a legal presumption, that if produced, that examination would be unfavorable to the credit of Perez. Whether the District Attorney was right or not in insisting upon the withholding of the examinations, unless upon the terms proposed by himself; and whether the counsel for the prisoners were discreet or not in their offer, which was not accepted, are matters with which the court had nothing to do, and upon which they were not bound to express any opinion; and with which I do not now intermeddle, for they are matters properly resting in the discretion of the counsel on each side. But the court left the whole matter to the jury, instructing them that they might draw such inferences from the circumstances, in evidence, as they pleased, and which were warranted by them, provided they were not unfavorable to any of the prisoners—and that they ought not to presume any thing from these circumstances against the prisoners. In this instruction I cannot now perceive any thing objectionable. And I know not how, consistently with the rules of law, the court could have told the jury that the circumstances afforded a *legal* presumption against the credit of Perez.

Another specification is the supposed instruction of the court as to Captain Trotter's liability for loss and damages occasioned by the capture of the Panda. At the trial a vast deal of argument was urged to the jury by the closing counsel for the prisoners, to establish gross misconduct on the part of Captain Trotter, and his liability to losses and damages for his acts; and thus to found imputations, that he had a vital interest in this prosecution, and to influence the testimony of the witnesses. And upon the present motion, the same line of argument has been with even more zeal and earnestness pressed upon the court. At the trial the court said, that they did not perceive that these charges were made out by the evidence, but of that the jury would judge for themselves. But that the guilt or innocence of the prisoners at the bar did not depend upon the good conduct or malconduct of Captain Trotter. That Captain Trotter may have conducted himself incorrectly, and yet the prisoners may be guilty. And on the other hand, he may have had probable cause for the capture, and have acted bona fide, and with the most correct intentions, and yet the prisoners may be innocent. This instruction I then thought, and still think, entirely correct; and I cannot think that it was at all injurious to the prisoners.

Another specification is the supposed instruction of the court that certain confessions of the prisoners were proper for the consideration of the jury. It is to be observed, that none of these confessions were brought out by the District Attorney against the prisoners upon the direct examination of the witnesses—but they were all brought out upon the cross examination of the prisoners' own counsel. The court stated to the jury that these confessions were not to be viewed in any different light from their coming out upon the cross examination, from what they would be, if they had come out upon the direct examination. But that these confessions so far as they were not reduced to writing, were in the case, and were to be considered by the jury. And afterwards, upon the suggestion of the prisoners' counsel (whether rightly or not I do not now say in point of law) that the confessions, reduced to writing, and not now produced, ought to be disregarded by them although they came out upon direct interrogatories of the cross examining counsel. In this instruction I can as yet perceive no error; though I confess that upon farther reflection, I do doubt, whether *under all the circumstances* of the case, the court were right in directing the jury to disregard the confessions of the prisoners which were reduced to writing and not produced. But if there was any error in this direction, it was manifestly favorable to the prisoners.

The next specification referred to the same matter of the suppression of the said written examinations and confessions of the prisoners by the District Attorney, under

the circumstances above-mentioned, and called upon the court to instruct the jury, that, under the circumstances, the suppression of these writings afforded a *legal* presumption that, if the same were brought forward, the effect thereof would be in favour of the prisoners. The court left the matter at large to the jury, in the manner above-mentioned, as matter of fact, and presumption of fact, to be weighed by the jury; but with the express direction that they ought not to presume anything therefore unfavorable to the prisoners. There was no matter of presumption of law in the case, but of presumption of fact only; and I am entirely satisfied that the court did all that it ought in law to have done in this direction.

The next specification is upon the same subject, and required the court to decide, that the District Attorney ought to have put these writings into the case, or the parol testimony of the same confessions, which had been proved to be reduced to writing, ought to have been wholly rejected, and considered out of the case. The court did, under the circumstances, (as above stated), direct the jury to disregard the parol testimony of any of the confessions which were reduced to writing. The District Attorney did offer to put these writings into the case, if the prisoner's counsel required him to do it. So that there is no legal ground of complaint on this head.

Another specification respects the confessions, stated to have been made by the witnesses, or one of them, of *some* of the prisoners at the bar, without naming them, being allowed to go as evidence to the jury. Now, the confessions thus referred to, were brought out upon pointed interrogatories in the cross-examination; and the counsel for the prisoners did not follow up the cross-examination, and ask who the particular prisoners were. Upon examining my minutes of the testimony, I find that Domingo said, that he heard some of the crew confess to the captain of an English brig, that they had robbed an American brig. They had a Portuguese interpreter, who spoke English and Portuguese. The first five that were captured, confessed. Some of them are here. He afterwards stated, that some of them were examined on board, and some on shore, at Fernando Po; and he proceeded to give the names of those who confessed at Fernando Po, viz. Montenegro, Garcia, Castillo, Perez, Delgado, and Guzman. Now there was evidence, in other parts of the testimony, to show that the five who were first captured were Montenegro, Garcia, Castillo, Perez, and Delgado. Silveira (another witness), according to my minutes, testified to various confessions. Among others, he stated that he went in an English transport, with five others, viz. Delgado, Perez, Garcia, Montenagro, and Castillo, to Ascension; that some of the prisoners at the bar told him at Ascension, that they had robbed the Mexican. He stated also, that they had confessed it to him, not once or twice, but several times; that the three of the prisoners, who were present at the governor's house at Fernando Po, said they had robbed the Mexican; that the day before they denied it, but this last day they all confessed it, and laid the blame to the captain and officers; that the declarations at the governor's house were not taken down in writing. Now these are but a part of the confessions stated in the case, for Perez stated others; and the whole matter, as matter of evidence, was left to the jury under all the instructions in the case; and the court instructed the jury on this point, that if the persons who made the confessions at any time were not identified, but the statement was only that some did, or three did confess, not being named, and not being identified, such confessions could not be applied to any of the prisoners in particular as proofs of his guilt; but the evidence under such circumstances being in the case, might be weighed by them, so far as it applied to the identification of the Panda as the vessel which committed the robbery of the Mexican. Upon the most mature reflection, I am not persuaded that there was any error in this instruction.

The next specification is, that the court declined to instruct the jury, under the circumstances stated in the instruction, provided that a *legal* presumption arose that the log book of the Panda was taken at the same time and place, and by the same captors, and that they have it, or have destroyed it. Now, without dwelling upon the manifest impropriety of giving this instruction as asked, as it assumes certain facts, not admitted to be proved, the court, in my judgment, would not have been justified in giving any such instruction as a matter of law. But the testimony, so far as there was any evidence on the point before the jury, positively denied any possession of the log book by the captors; and Mr. Quentin directly stated, that it was not on board at the time when he boarded and captured the Panda; and that he never heard of its having been obtained afterwards. And there was not a tittle of proof upon the other side, that it had come to the possession of the captors. The court did, however, instruct the jury, that if they did believe that the log book of the Panda had come to the possession or power of the captors, or of the government officers, their omission

now to produce it was a circumstance unfavorable to the captors, and favorable to the prisoners. It appears to me that this was going to the extreme limits of the law in favor of the prisoners. The next specification being to the same point requires no further notice. The court gave an instruction in favor of the prisoners, if the Log Book was proved to be in the possession or power of the government prosecutors.

The next specification is that the court admitted parol evidence to establish the time of the sailing of the Panda on her voyage from Havana to Cape Mount, and to prove the course and termination of the voyage, without proving that the Log Book was missing or lost. This objection is, as I understand it, founded upon the notion that the Log Book is not only evidence of these facts, but the only proper evidence and the best evidence if it can be produced. I do not so understand the law. The Log Book is in no just sense proof *per se* of the facts therein stated, except in certain cases provided for by statute. It is not evidence under oath. It does not import legal verity. It could not, if it had been produced by the prisoners, have been per se admitted, (if objected to) as evidence of the facts stated therein. It would be mere hearsay not under oath. It might be introduced against those of the prisoners, to whom it should be brought home as having a concern in writing or directing what should be contained therein, to contradict their statements or their defence. But I am yet to learn that parties can thus create evidence for themselves by inserting facts in a Log Book. I know of no such rule of law; and no authorities are introduced to establish its existence. In the most common class of cases in which the Log Book is used, those of insurance, the Log Book has never to my knowledge been allowed (if objected to) as proof of the loss for the assured. The officers or others of the crew constantly prove all the facts by parol. The Log Book is often called for by the underwriters to contradict their statements on the stand; or to control or weaken the influence of these statements.

The next specification is that the court declined to instruct the jury that under the circumstances proved, resistance, flight or the destroying of the Panda by her officers and crew would be exercising the right of self-defence on the part of the said officers and crew. For myself I confess that it is utterly inconceivable to me, how the court could give any instruction in the manner required by this prayer. What were the circumstances? They were matters of fact to be ascertained and fixed by the jury. The court could not affirm what they were, or, before they were ascertained, declare to what extent the right of resistance might go. The court cannot judicially know why and wherefore the flight of the Panda's crew took place. It may conjecture that the jury have thought that it was occasioned by a fear of being captured, as pirates. But we cannot say so. Neither can we, nor could we at the trial say why it was done or whether it was done for other justifiable reasons. It did not indeed appear from any evidence in the case that there was any resistance to capture by the Panda's crew. And the defence expressly denied that there was any intention to blow up the vessel. On the contrary an elaborate argument was introduced to establish the contrary. It is a little difficult, therefore, to see, why these ingredients should have been thought so essential to the merits of the case presented in behalf of the prisoners. But the court left the whole matter to the jury; and stated that if the Panda's crew did believe and act upon the ground, that there was an intended hostile attack by public enemies or by pirates, their right of resistance and self-defence in any manner, which they might deem most beneficial, was not to be doubted. As I understood the application of the prisoners' counsel the court enlarged the prayer from a mere *hostile* attack (which was supposed to mean an attack of public enemies) to an attack also by pirates. But in every view my opinion is that the court stated the law correctly, and could not properly have gone farther.

The next and last specification under this head is that the court declined to instruct the jury that the failure of the government to produce the witness, who (it was testified) saw the match applied for the purpose of blowing up the Panda, and removed it, afforded a *legal* presumption against the truth of the alleged attempt by the prisoner, Ruiz, to destroy the Panda. Now it appears to me, that if there was any presumption at all to be drawn from this failure to produce the witness, it was a presumption of fact, and not a presumption of law; and as a presumption of fact it was most strenuously urged to the jury by the prisoner's counsel. The argument now is, that although Mr Quentin, who was upon the stand, stated that he was on board at the same time with the witness, that he saw the smoke coming from the cabin, and the absent witness go down, and bring up the match, and many other circumstances to establish an intention to set the Panda on fire and blow her up; yet

that his testimony was not the best evidence on this point, and ought to be rejected; and not only so, but the failure to produce the witness afforded a legal presumption against the truth of the alleged attempt to destroy the Panda. It appears to me that the whole basis of the argument is founded upon a mistake of the meaning of the rule of law as to the production of the best evidence. The rule is not applied to evidence of the same nature and degree; but it is applied to reject secondary and inferior evidence in proof of a fact, which leaves evidence of a higher and superior nature behind in the possession or power of the party. Thus, if the party offers a copy of a paper in evidence, when he has the original in his possession, the copy will be rejected, for the original is evidence of a higher nature. So, oral testimony is inadmissible to prove the contents of a written instrument, when the paper is in the possession or power of the party; for it is not of so high a nature as the paper itself. But the rule does not apply to several eye witnesses testifying to the same facts, or parts of the same facts, for the testimony is all in the same degree; and where there are several eye witnesses to the same facts, they may be proved by the testimony of one only. All need not be produced. If they are not produced, the evidence may be less satisfactory or less conclusive; but still it is not incompetent. And to apply the principle to the present objection. Mr. Quentin was a competent witness to prove all the facts, which he knew, which went to establish an intention to blow up the Panda. That another witness might have proved more and other facts to the same purpose, which might have been more full and satisfactory and conclusive to the jury, does not render Mr Quentin's testimony incompetent. The defects in the evidence whatever they might be, are very proper matters of observation to the jury to create doubts or justify disbelief of any intention to blow up the Panda. But the jury were to judge of all these maters in weighing the whole evidence on this particular point. A witness who has seen a party write several times is a good witness to prove his handwriting. But a clerk in the counting room of the party, who has seen him write innumerable times would be in many cases a more satisfactory witness to prove the handwriting. But nobody can doubt that each would be a competent witness of the facts within his knowledge to prove the handwriting.

Another cause assigned for a new trial is that the jury were furnished with newspapers in their room and did read them during the pendency of the trial; and subsequently another ground was added in a supplementary paper that the jury drank ardent spirit while they had the cause in charge. It is important to a right understanding of these objections to state the real facts and circumstances attendant upon the trial. The trial lasted I believe about fifteen days, during which time the jury were kept together night and day in the custody of officers. Some of them were engaged in very pressing business, which required them to communicate with friends respecting that business; and one or more of them was in ill health during the trial, and was obliged to have the aid of a physician. These circumstances were stated in open court, and it was agreed between the counsel in open court, that the jury might have all reasonable refreshments during the trial, that they might communicate on business with their friends, and write and receive papers from their friends on business, the papers being previously examined, and the conversation witnessed and heard by one or more of the officers of the court. And the court requested the jury during the trial and until the arguments were heard and the charge given not to converse with each other on the subject of the trial, in order to keep their minds open to the last moment to all the merits of the cause. While the jury were thus kept together, they were allowed by the officers of the court attending them to read the public newspapers, the officers first inspecting them and cutting out every thing that in any manner related to the trial. And it now appears as well from the affidavits of the officers, as from the affidavits of the jurymen, that in point of fact they never saw any thing in any newspaper relative to the trial. The officers granted the indulgence to read the newspapers, under a mere mistake of their duty, and as soon as the charge was given by the court, the jury were not allowed to see any newspaper until after they had delivered their verdict in open court. So far, then, as reading the newspapers went, there is not the slightest reason to believe that it could or did in fact in any manner whatsoever affect the verdict or influence the jury. The evidence, as far as it bears on the point, negatives any supposition of this sort. And, speaking for myself, I must say that considering the protracted nature of the trial, and the necessary privations of the jury, and the importance of keeping them when out of court from too constant meditation upon the subject of the trial while it was yet imperfectly before them, I do not doubt, that the indulgence had a tendency to tranquillize their minds, and to keep them in a state of calmness and freedom from anxiety highly

favorable and useful to the prisoners themselves. Without doubt it was a great irregularity in the officers of the court, for which they may be punishable, to have granted this indulgence without the express sanction of the counsel or of the court. I am not aware that any such sanction was given. But it is not every irregularity of officers, which would justify a court in setting aside a verdict and granting a new trial, or treating the matter as a mistrial. The court must clearly see that it is an irregularity, which goes to the merits of the trial, or justly leads to the suspicion of improper influence, or effect on the conduct or acts of the jurors. We must take things as they are in our days. Juries cannot now as in former ages be kept in capital cases upon bread and water, and shut up in a sort of gloomy imprisonment with nothing to occupy their thoughts. It would probably be most disastrous to the administration of justice, and especially to prisoners, to attempt in these days the enforcement of such rigid severities, so repugnant to all the usual habits of life. And for one, I am not satisfied that the irregularity in the present case has been in the slightest manner prejudicial to the prisoners; but on the contrary as far as the evidence leads me to any conclusion, I should deem it favorable to the prisoners. The indulgence ceased the moment when the charge was given, and the jury were then put upon their own solemn and exclusive deliberations on the case.

The other ground is that the jury, while they had the cause in charge, drank ardent spirit. Now it is most material to state certain facts which took place at the trial, and which though wholly passed over in this motion yet essentially affect its validity and force. After the charge was given by the court to the jury, one of the jurors in open court stated that he had been unwell for several days, and still was so, and that it was impossible for him under the circumstances to confine himself to water, without danger to his health; and he wished permission to use such spirit as might be required for his health. The counsel for the prisoners then assented in open court to this indulgence, and it was also assented to by the District Attorney, who at the same time suggested that the like indulgence ought to be extended to any others of the jurors, whose state of health from the great length of the trial and their unusual confinement might also require it. The counsel for the prisoners then gave their consent to this extension of the indulgence. It was accordingly stated to the jury in open court that it was so granted; but they were at the same time advised to use the indulgence as little as possible, and in as moderate a manner as practicable.

Now upon this statement, where there was an express consent given by the prisoners' counsel in open court to this indulgence to the jurors, it seems to me impossible that the present objection can be sustained, unless it is shown, that the indulgence was grossly abused, and operated injuriously to the prisoners. Of this there is not the slightest proof, nor indeed was it even pretended at the argument. On the contrary the only evidence in the case to establish the fact of drinking ardent spirits comes from one of the jurors, who is said to have stated after the trial was over that he was sick and went down to the bar and got a glass of brandy and water. The juror himself has not been examined.

And this renders it wholly unnecessary to consider the authority and bearing of the cases cited at the bar on this subject; and especially the cases of The People v. Douglas. 4 Cowen R. 26. Brant v. Fowler 7 Cowen R. 562, and The People v. Ransom, 7 Wendell R. 417. for they all turn upon very different circumstances.

The other parts of the original motion are in arrest of judgment, if the motion for a new trial should be denied. Some of the causes assigned for this purpose, viz. those respecting the arraignment, and that there was no joinder of issue and no putting themselves upon the country for trial by the prisoners, have been already considered. It only remains to take notice of the objections taken to the sufficiency of the indictment. The first objection is, that no Venue is laid in the indictment; that is, that no particular place is stated on the high seas at which the robbery was committed, but it is only alleged that it was committed on the high seas. And reference has been made to some indictments in cases of piracy, where the offence is stated with more particularity of place, for example "on the high seas in a certain place distant about ten leagues from Cursheen, &c." and "on the high seas about a half league distant from Leghorn, &c."*(a)* But there certainly are precedents which contain no such specification of place,*(b)* and in all the indictments for piracy in this district (which have been numerous, and upon which convictions and executions

(a) See 3 Chitty, Crim. Law, 1130, &c. Id. 1135. (English Edit.) See also Kidd's case, 14 Howell, State Trials, 130. 147. 187, 188, 189, 190.

(b) See 3 Chitty, Crim. Law, 1135. (English Edit.)

have taken place,) our researches have not detected a single one in which such locality of place is to be found. The indictment has usually charged the piracy to be committed upon the high seas within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, as it is charged in the present indictment, and without any further specification of place. And I am not aware that any different course of practice has been adopted in any other district.

Now, it is certainly not sufficient proof that an indictment is bad, substantially to show that forms can be found which are more special and particular in their allegations of place; for such particularity may be adopted only ex majori cautela by the pleader. It will be necessary to sustain the objection to show some authorities, which establish the necessity of averring such special locality of the offence, or some principle of law, which leads to the same conclusion. No such authority or principle has been shown upon the present occasion. My opinion is that the objection is unfounded in point of law; and that the averment in the indictment that the offence was committed on the high seas within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, is sufficient certainty for all the purposes of the indictment and trial, without any other particular designation or averment of the locality of the offence. If such particular designation or averment of locality had been put into the indictment it could not have tied up the proofs to that particular spot; but proofs of the commission of the offence in any other place on the high seas would have sustained the indictment. The doctrine of venue in indictments at the common law is inapplicable to cases of this sort. At the common law all offences were required to be tried in the county where the offences were committed; and as the jury were to come from the neighborhood of the place, where the offence was committed, (technically called the visne or visinage) it was farther necessary to state in the indictment the particular parish, vill, or other place within the county from which the jury might come. And, in criminal cases it seems true even at this day in England, that the right to challenge the pannel for want of hundreders exists, though it has fallen into disuse. *(a)* But even at the common law, although this certainty of averment of place was required, yet it did not tie up the party in his proofs; for the offence, if proved to have been committed any where within the county, was sufficient to maintain the indictment. *(b)* But the reason of the common law for laying the venue so particularly in offences on land does not in any manner apply to offences on the high seas; for no jury ever did or could come from the visne or visinage on the high seas to try the cause; and no summons could issue for such a purpose. And even now in England when offences on the high seas are cognizable and punishable under the Statute of 28 Henry 8. ch. 15, by the special commission court, and by a jury of the county for which the commission is issued, *(c)* no venue of any parish, vill or other place within the county is included in the indictment. The allegation that the offence was committed on the high seas is sufficient of itself to found the jurisdiction, and all the incidents of the trial and judgment.

But if it were otherwise at the common law, we are to consider, that, in the jurisprudence of the United States the present is a statute offence, and that the jurisdiction is given also by statute; and if the offence is so laid in the indictment as to bring the case within the language of the statute in point of jurisdiction and certainty of description, that is all which can properly be required in our country. The Crimes Act of 1790, ch. 9. s. 8. provides that if any person shall commit upon the high seas, &c. murder, or robbery, &c. he shall on conviction suffer death. And it further provides that the trial of all crimes committed on the high seas or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought. And there are direct and positive allegations in the present indictment to all these facts. So that the jurisdiction is upon the face of the indictment made out in the most positive manner. And the Judiciary Act of 1789, ch. 20. s. 29, has provided for the manner of summoning juries for all cases of trials in the courts of the United States. So that there is in reality nothing upon which to suspend a legal doubt as to the sufficiency of the indictment in this respect. No further Venue is necessary than what the indictment contains. It in no manner affects the summoning the jury.

The other objection to the sufficiency of the indictment is that it concludes in the

(a) See 1 Chitty, Crim. Law, 177. 189, 190. 194. 196, 197. (English Edit.) 4 Black. Comm. 303. 305, 306.
(b) See 1 Chitty, Crim. Law, 200.
(c) See 4 Black. Comm. 269. 2 Hawk. P. C. B. 2. ch. 25. s. 43 to s. 47.

plural, "against the form of the *statutes* of the United States in such cases made and provided," whereas it ought to conclude "against the form of the *statute*," &c. in the singular. It is admitted that the offence, as charged in the indictment, is within the Act of the 15th of May, 1820, ch. 113; and that if it is also within the Crimes Act of the 30th of April, 1790, ch. 9. s. 8. the objection is unmaintainable. Upon this point I profess not to feel the slightest doubt. There never was, as far as my knowledge extends, any judicial doubt ever breathed on any occasion that the Act of 1790, ch. 9. did apply to all murders and robberies committed on board of or upon American ships on the high seas. If the Act did not apply to such cases, it is difficult to conceive to what cases it could legally apply. The general terms not only cover such cases, but many others. The only doubts that ever did occur, and were thought worthy of being considered by the Supreme Court, were in the first place whether murders and robberies committed on the high seas on ships belonging exclusively to subjects of a foreign state and then under the acknowledged jurisdiction of a foreign sovereign came within the meaning of the Act. The Supreme Court in United States v. Palmer (3 Wheaton R. 610) thought they were not. Neither question was whether such offences committed on board of a piratical vessel, then in possession of pirates and acknowledging the jurisdiction of no foreign sovereign, were within the meaning of the act. The Supreme Court in the United States v. Klintock (5 Wheaton R 144) decided that they were. On this occasion the court said that the opinion in Palmer's case might well be understood to indicate an opinion "that the whole Act of 1790, ch. 9. must be limited in its operation to offences committed *by or upon citizens of the United States*," which is the very case before the court. And, indeed, Palmer's case necessarily leads to this result. And the case of the United States v. Furlong and others (5 Wheaton R. 184) is direct to the same purpose, and covers the very case now before us. And, indeed, the language of the court upon this last occasion is express, that it is sufficient for the indictment in such a case to conclude against the form of the statute in such case made and provided, (in the singular) although it might be equally within the act of 1790, ch. 9. and the act of 1819, ch. 76. s. 5; thereby laying down the broad principle that a conclusion against the form of the statute (in the singular) is sufficient in all cases, where the offence is distinctly within more than one independent statute. But I am of opinion that the present case is equally within the act of 1790, ch. 9, and the act of 1820, ch. 113; and if so then it is admitted that the conclusion is in the strictest sense right. And I am also of opinion, that if the offence was punishable by a single statute only, and the conclusion was against the form of the statutes (in the plural) that it would in point of law be a good conclusion. I am aware that there is some diversity of opinion in the books on this point; but having had occasion many years ago in Kenrick in Error v. United States (1 Gallis. R. 268) to consider the question with great care, that was the conclusion to which my judgment deliberately led me; and I have since seen no occasion to change it upon principle or authority. Either way, then, the objection is unmaintainable.

These were all the causes or grounds contained in the original motion. At a subsequent day, however, other causes were assigned, which will now be considered.

The first is that interpreters were admitted to interpret a part of the testimony of Perez without being previously sworn to interpret truly and faithfully. The facts were that Mr Badlam was sworn as a general interpreter of Spanish at the trial, and in an early stage of his interpretation of some of the testimony, Mr Child (one of the counsel for the prisoners and who himself understood Spanish) objected to some of the interpretations as incorrect, and requested that two other gentlemen whom he had selected might be sworn as interpreters. This was objected to by the District Attorney, who thought that it was his right to use such an interpreter as he had confidence in, leaving to the counsel for the prisoners to swear other interpreters in their own employ in the cause. The court then upon the suggestion of the prisoner's counsel allowed these two interpreters to sit near Mr Badlam and the witness, and to suggest to Mr Badlam any doubt or mistake in his interpretation for him to consider and rectify. This was accordingly done; and whenever any such suggestion was made by these interpreters to Mr Badlam, (who did not profess to be well acquainted with Spanish nautical terms) he considered it, and I believe invariably adopted their interpretation, and then stated it to the court as his own interpretation. In a short time, however, it being perceived that the interpretation of nautical terms became very important in the cause, upon the suggestion of the court both of these interpreters were sworn, and one of them (Mr Peyton) was afterwards, during almost the whole of the trial, used by the government as the exclusive interpreter. Now, it is not, and it was not at the trial, pretended, that ultimately any interpretation of the

language of the witnesses by Mr Badlam went to the jury, which was incorrectly given, without due correction. There was no dispute upon this head; and it could have been corrected in a moment, if it had been suggested, for Mr Peyton was present throughout the whole trial. Under these circumstances the objection seems to me wholly groundless. Mr Badlam gave every interpretation to the court under oath; and he had certainly a right to use the knowledge of others to assist his own judgment in any case of doubt, giving his own interpretation finally to the court. If there has been no mistake in the interpretation, what ground can there now be for any just complaint?

The next objection is that upon the application of the counsel for the prisoners, the latter were not allowed to be placed near to the counsel for the purpose of instructing the counsel in their defence as they deemed necessary. Now the facts were, that though the usual place for prisoners in all capital cases is in the Dock or Prisoner's Bar, the prisoners in this case were all, for their own accommodation, and that they might hear the testimony, witness the proceedings, and have free intercourse with their counsel, placed within that portion of the bar, which is assigned for the use of counsellors at law, and within a reasonable distance from their counsel, who could constantly have the freest access to them; and to whom the court stated, that every delay of time for this purpose would be cheerfully given; and it was accordingly given. But the counsel wished to have the prisoners placed in the very front benches of the bar, in places constantly assigned for gentlemen of the bar. The court thought such an indulgence inconvenient and unnecessary; and if it was yielded to in that case, it must form a precedent in all other cases, and that such a departure from the whole course of practice usually adopted upon such occasions would from its nature become liable to great objection. But the court added, that an interpreter should sit by the prisoners, and punctually state to them the proceedings and questions and answers; and that they might communicate with their counsel freely and as often as they wished. And this was accordingly done. Even this objection, such as it is, applied only to a short period of the trial; for when the court removed to another place (the Temple) the prisoners were placed as near to their counsel as they well could be. Nor should it be put out of sight, that during this long and protracted trial every indulgence as to time and examination was granted to the prisoners' counsel; that they had the fullest opportunity to communicate in court, and out of court, with the prisoners, upon all the matters in evidence, and to obtain their instructions. And we have not the slightest reason to doubt that such communications, as far as they were deemed useful by the counsel, were most freely and fully used by them. Nay, to this very hour no suggestion has been made that any material fact or disclosure was omitted, which could have aided in the defence. Under such circumstances I can perceive no ground to sustain this objection.

The next cause is that the court refused to have the order in which the prisoners were placed at the bar, changed before the introduction of each of the witnesses for the government, who were excluded from the court room, after the first of these witnesses had been examined and had retired. The court did so refuse; and I am yet to learn, that there is any principle of law or duty which required them to act otherwise. The reason why the court did not yield to the request was, that it might otherwise seem as if the court intended to cast some imputation upon these witnesses, as confederating out of court together to tell the same story, and charge the same persons sitting in the same order with the crime. But the court said that it was open for the counsel of the prisoners to make inquiries from each of the witnesses when upon the stand, whether they had had any such communication with the others out of court; or whether they had had any knowledge of the order, in which the prisoners were arranged. To some of the witnesses (if I rightly remember) such questions were put, and they negatived any such communications. Nor is there now any proofs, that any such communications were had which could have influenced the testimony of these witnesses. The motion itself was new. It was a matter for the exercise of the sound discretion of the court; and there is no proof that it operated injuriously to any of the prisoners. Without imputing fraud and wilful perjury to these witnesses, I cannot perceive how the objection can be sustained.

The next objection is that the witnesses for the government were allowed with the chart of the Mexican's route on her voyage before them, to be asked the question, whether under the circumstances stated, of the supposed time of starting of both vessels, the Mexican and Panda would or would not be likely to meet at the point marked on the chart. The objection proceeds upon the ground that under such circumstances the question became a leading question; and ought not to have been

put. My opinion is that the objection is unfounded in law. The chart of the Mexican was already in the case, and it was proved by the mate that it contained her route on the voyage, and that he had marked that route from day to day during the voyage on the chart up to the point where the robbery was committted and back again to Salem. For the purpose of asking the question, then, it might properly be taken as a supposed fact that the Mexican was at a particular spot on the day of the robbery, having sailed from Salem on the 29th of August, and the question then to be asked of nautical witnesses was whether a vessel sailing from Havana bound to Cape Mount on the coast of Africa, on the 20th or the 26th of August, would or would not be likely to meet her at that point. It seems to me that this was not only a proper question to be asked of the witnesses; but in no just sense a leading question. It was a matter of nautical skill, experience, and opinion, and the examination of the chart was fit to enable the witnesses as well as the jury with more accuracy and clearness to examine all the elements which ought to enter into their opinion. The question was but coming directly to that very point, which however circuitously, must have been aimed at, in the course of the inquiries, before the testimony could have any strong bearing on the case. Wherever the vessels might have met, if they could not have met at this very spot, where the proof stated that the Mexican was at the time of the robbery, the fact could have had no material influence on the case. If the vessels could not have met there, then the cause was clearly for the prisoners. If they could have met there; it would still remain to be shown that they did meet there. The real point, therefore, of the whole inquiry was to ascertain, whether these vessels might or might not under the circumstances have met at the very point where the Mexican was. It was the true and appropriate question, which the witnesses were called upon to solve in the negative or affirmative, according to their own skill, judgment and experience in nautical affairs. The form of the question could not lead them, and it could not mislead them. And the question in this very form was afterwards repeatedly asked on behalf of the prisoner's counsel of their own witnesses.

The next objection is that the court declared to the jury and delivered it as their opinion that the prisoners had no right to pray instructions to the jury on particular points after the delivering of the principal charge. The court did not give any such direction to the jury upon the subject. The court stated to the leading counsel for the prisoners, who was praying instructions at that stage of the cause and proceeding to reason them out at large, that he must be aware that it was wholly irregular at that stage of the cause to proceed in this manner. The regular course of practice in this court in all cases of this sort, is to state the points of law on which the counsel rely and wish the instructions of the court in their argument to the jury, or at least at some time before the charge is given, that the court may have time to examine and consider them. It would otherwise happen, that the court might be surprised into the necessity of expressing opinions before due time was allowed to deliberate on them. It is understood, that this objection, after the explanations which have passed at the argument, is not now insisted on.

The next objection is founded upon the supposed refusal of the court to give an instruction to the jury that under certain circumstances, at Nazareth, stated in the instructions, the crew of the Panda had a right to resist, to flee, or destroy the Panda, or to resort to any other means of self defence, which they might deem expedient. In the actual form and qualified manner, in which this objection is now couched, that "if the jury believed upon the evidence that," &c. (stating certain facts) I have not the slightest recollection that the instruction was ever asked of the court. On the contrary I then understood it to be asked in the manner and form in which it is expressed in the original motion and not otherwise. And the circumstance that it was so asked is strongly corroborated by the fact, that it is so stated in the original motion. But if it were otherwise still I am of opinion that the court have given the instruction as fully as the prisoner's counsel were entitled to require it: and in a manner quite as favorable to the prisoners. And indeed the whole merits of this objection have been already considered in the preceding part of this opinion.

These are all the objections, which are in the written motions, and which have been so elaborately argued at the bar, excepting those which respect the weight of evidence upon the trial and the new evidence now offered. I shall now proceed with the consideration of these objections.

And first it is said that the verdict is manifestly against evidence and the weight of evidence. My opinion is the other way. If the jury believed the evidence, (and its credibility was a matter exclusively for their consideration) it appears to me that their verdict was not contrary to evidence or against the weight of evidence but co-

incident with both. And I apply this remark equally to the case of Boyga, Montenegro, Castillo, and Garcia; although certainly the evidence was not equally strong against each of them.

The other point respects the new evidence now before the court. I lay no particular stress upon the affidavit of Dalrymple (which has been objected to) for two reasons: first because he might have been produced as a witness on the stand at the trial by the counsel for the prisoners, as Battis expressly pointed him out at the trial as having been spoken to by him. And secondly because I do not think, correctly considered, that any thing contained in Dalrymple's affidavit does impugn what Battis stated at the trial. The affidavit of Alexander Thomas is principally to collateral matters only.

The other affidavits are of the prisoners who have been acquitted. They positively swear to certain facts, which if true are utterly inconsistent with the testimony and statements of the witnesses for the government. First, they utterly deny that they ever met or robbed the Mexican during the voyage. Secondly they utterly deny any intention or attempt to blow up the Panda at Nazareth. Upon this last point they are opposed by the direct and strong testimony of Quentin, Domingo and Silveira, all three of them disinterested witnesses. Upon the first point their testimony is irreconcilable with the strong and direct and disinterested testimony of the officers and crew of the Mexican, (seven in number) and especially of those who speak positively to the identity of Ruiz, Boyga and Delgado, if that testimony is not utterly unworthy of belief, and is not founded in the grossest and most extraordinary mistakes. It is also irreconcilable with the positive testimony of Domingo and Silveira, as to the confessions of several of the prisoners. And, if Perez is to have any credit, where he is confirmed by other testimony, it is utterly irreconcilable with the whole substance of his testimony. Besides these considerations, it cannot escape observation that these acquitted witnesses stand in a very delicate and peculiar predicament in relation to the case. They were embarked in an enterprise, if the evidence upon the trial is to be credited, and upon which their own acquittal mainly proceeded, on a voyage in the slave trade, a voyage prohibited by the Spanish laws and treaties, and of such a character that under such circumstances it cannot but detract somewhat from the confidence which we should otherwise repose in their perfect integrity and credit. To this it should be added, that they were incompetent witnesses at the trial. And I cannot but think it would be most injurious to the general administration of public justice to allow a new trial upon the merits upon the evidence of persons charged as joint offenders after their acquittal, when they were incompetent witnesses at the time of the trial. The observations of the Supreme Court of Massachusetts upon this point in the recent case of Sawyer v. Merrill (10 Pick. R. 16) strike me as entitled to very great weight and I entirely concur in them. Indeed, an acquittal is not always proof of actual innocence; and it is frequently little more than a declaration that the guilt of the party is not established by the proofs beyond a reasonable doubt.

But in a capital case, like the present, it appears to me that the court ought not upon general principles to grant a new trial, unless the fullest credit is given to the new evidence, and the court is of opinion that it outweighs in strength and clearness and force, the evidence on the other side. In short my opinion is that in a capital case a new trial ought not to be granted if the court possess the power, unless taking into consideration the new evidence the verdict in the opinion of the court ought to be the other way; and that therefore injustice has been done to the prisoners. There is much good sense in the remarks of the court upon this subject in the State v. Duestee, (1 Bay's Rep 377). And looking at the evidence produced at the trial by the government in this case, I cannot escape from the conclusion, that if the court were to grant a new trial upon the affidavits of the acquitted prisoners, it could scarcely be justifiable except upon the belief that five at least of the government's witnesses were either perjured, or their testimony was grossly and culpably incorrect, Butman, Reed, Quentin, Domingo and Silveira; and that the others had rendered themselves incredible in their statements. To such a conclusion I should be slow to arrive under any circumstances, when the witnesses were disinterested and unimpeached in point of general character, and their credit had been fully sustained by the verdict of an impartial jury. But if I could arrive at such a conclusion in any other case, I could not arrive at it in this case, where the whole stream of evidence comes from persons who were indicted as confederates in the offence, and who were then incompetent to testify. I cannot feel such confidence in such testimony as to lead me to the conclusion that all is rank perjury or reckless delusion on the side of the government's wit-

nesses. This ground, therefore, for a new trial, is in my opinion insufficient also to sustain the motion.

I have now gone over all the grounds offered for a new trial, whether they are matters of law or matters of fact, as briefly as I could, though many of them would have furnished topics for a much longer discussion, if the occasion had required it. My decided judgment upon a deliberate survey of all these matters is that the court ought not to grant a new trial, if we possessed the power to grant one. But being of opinion that we do not possess the power under the circumstances I am for overruling the motion altogether.

I trust that I have a due and a deep sense of the responsibility thrown upon the Court upon the present occasion. No person could have desired more anxiously than myself that I might have been spared from this painful duty. With the private opinions of other men, not sitting in judgment under the solemnity of an oath, or called upon to express opinions upon a judicial survey of the whole evidence, (which the learned counsel for the prisoners has thought fit to bring into the case) we have nothing to do. As little have we to do with the appeals made through the press during the pendency of this cause, or with the supposed popular excitements, which have been alluded to at the argument. I trust that this court is incapable of being influenced by any such considerations, or of being betrayed by them into an abandonment of its own proper duty. I trust that while I shall never be insensible to human life or human sufferings, I shall always possess the firmness to follow out with an unshrinking fidelity the dictates of my own conscience, and the high commands of the Law. I may err in my judgment, for I have not the slightest pretension to infallibility; but if I do err, it shall not be an error forced upon me by private opinions promulgated through the press or otherwise.

My present judgment I cheerfully submit to the sober consideration of my country. It is my conscientious judgment, for which I am ready to assume the full responsibility belonging to my station, it having been the result of the best exercise of the powers of my understanding.

The Hon. John Davis, Judge of the U. S. District Court, then proceeded to deliver his opinion, of which we give below a correct copy, taken from the files of the Court.

JUDGE DAVIS' OPINION.

I concur with the presiding Judge in the disposal of the motions before us, in this very serious case, which has so long engaged the devoted and solicitous attention of the court, counsel, and jury. With the grounds and reasons of that opinion my own views coincide, excepting in one point, and on that, from its important bearing, as a constitutional question, I consider it a duty to express my opinion. I refer to that part of the argument, which rests the denial of a power, in the Courts of the United States, to grant a new trial, on the merits, in a capital case, though at the request of a person convicted, as contravening the provisions in the 5th article of amendments to the Constitution, declaring, that "no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb."

The case of a person, convicted of a capital offence, put on trial again, would certainly be embraced by the terms of the article, and yet, in my view of the question, it would not present a case within its true intent and meaning. That article, in the amendments to the Constitution, corresponding to a rule of the common law, according to the prevailing spirit and character of those amendments generally was, doubtless, intended for the security and benefit of the individual. As such it may be waived and relinquished. That the request of a prisoner, for a new trial, affording a chance of escape from death to which a previous conviction would assign him, should be rejected, from adherence to the letter of the rule, that his life would be again in jeopardy, would present an incongruity not readily to be admitted.

It is true, that according to approved authorities, the plea of *auter foits convict*, depends on the same principle as the plea of *auter foits acquit*, that no man ought to be twice brought in danger of his life, for one and the same cause.(a) The doctrine establishes a right in the prisoner to resort to that defence, if it be attempted or moved, against his will, to subject him to a second trial. The case of a verdict of convic-

(a) Bl. Comm. Book 4. C. 26. 2. Hawk. P. C. 377.

tion set aside, at the request of the prisoner, is not suggested in those authorities, and would stand, in my opinion, on very different ground. The previous conviction, would not, I apprehend, under such circumstances, be considered as a sufficient bar to a second trial. The concise manner in which many general maxims of the law are expressed, like general rules on other topics, admit or require in their application, distinctions, exceptions and qualifications, all just, reasonable, and, in some instances, indispensable, not expressed in their terms. We have an instructive exemplification of this in an early case, in the Supreme Court of the United States, in which the meaning of the prohibition, in the Constitution, of *ex post facto* laws, came in question. "I do not consider," said Judge *Chase*, "any law as *ex post facto*, that nullifies the rigor of the criminal law, but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction." 3 Dall. 391. The benign spirit, ever pervading over law, which dictated that distinction, may, as appears to me, have a proper influence and application, in reference to the rule of law under consideration, and in other instances of analogous character. By the old common law, observes Sir W. Blackstone, the accessory could not be arraigned till the principal was attainted, "unless he choose it, for he might waive the benefit of the law." (Comm. Book 4, C. 25.) And in the People vs. McKay (18 Johns. Rep. 21,) a case of murder, Chief Justice Spencer remarks, "We know of no case which contains the doctrine, that where a new trial is awarded, at the prayer, and in favor of a person that has been found guilty, he shall not be subject to another trial."(*a*) On the whole, I am not convinced that the article of the Constitution under consideration, would, in just and reasonable construction, be a bar to a new trial granted at the request of a person capitally convicted. I am not aware that there is any direct decision on this point. It is an open question. If a second trial, in capital cases, be inadmissible, under the article, though at the request of the prisoner, then no legislative enactment can vary the law on the subject, without an amendment of the Constitution. The question may thus become highly important, though the article should be binding only in the Courts of the United States; still more so, if, conformably to Chief Justice Spencer's opinion, it extends to decisions in the State Courts. A decision on this point, however, is not essential, as this case stands, to a determination on the motion for a new trial, in which, notwithstanding a difference in opinion in reference to the constitutional question, we come to the same result. The discretion of the Court on the subject of new trials is not unlimited. They are allowable "for reasons for which new trials have usually been granted in the courts of law," and with this statute direction, we are to bear in mind the 7th article of amendments to the Constitution—"No fact tried by a Jury, shall be otherwise re-examined, in any Court of the United States, than according to the rules of the common law." Having reference to such directories, should the motion for a new trial in this case be allowed, there would, in my opinion, be a departure from the usages of courts of law, and from the principles manifested by the great current of decisions in cases of this description.

I agree with the presiding Judge, in the views which he has expressed on the motion in arrest of judgment, as well as with those on the motion for a new trial, excepting in the instance which I have specified, and in the result, that the motions be overruled.

The decision of the Court was then interpreted to the prisoners by Mr. Badlam.

Mr. Child then begged leave, with much feeling, to file a bill of exceptions, with a view of carrying the question before the U. S. Supreme Court, and urged that the case involved several important points of law.

The Court replied, that they must proceed to pass the sentence, but the

(*a*) *McKay* was convicted on an indictment for murder. Judgment was arrested, on motion in his behalf, for defect in the issuing and return of the *venire*. Agreeably to repeated decisions, there may be a new trial, in all cases, where there has been a mistrial or mere irregularity in the former trial, vitiating or vacating the proceedings. But the question made by the counsel in that case, whether the arrest of judgment did not entitle the prisoner to be discharged, does not appear to have been met by the Court on that ground. "It will be observed," says the Chief Justice, "that the judgment is arrested on the motion of the prisoner, an act done at the request, and for the benefit of the prisoner, we are clearly of opinion cannot exonerate him from another trial."

motion of Mr. Child could be taken into consideration, and would be acted upon on the following Tuesday, to which time the Court would adjourn.*

Mr. Child then earnestly pressed upon the Court to respite the execution, to give time to send to Havana and to England, to clear up this dark and mysterious affair.

The Court said it should be allowed, and if the time proved not long enough, the Executive clemency would no doubt extend it, by a reprieve.

The following motion was then made by Andrew Dunlap, District Attorney:

May it please your Honors; Pedro Gibert, Bernardo de Soto, Francisco Ruiz, Manuel Boyga, Manuel Castillo, Angel Garcia, Juan Montenegro, otherwise called Jose Basilio de Castro, the prisoners at the bar, have been at the present term of this Court, indicted by the Grand Jury of this District, for a felonious and piratical robbery of twenty thousand dollars, on board a vessel of the United States, perpetrated on the high seas, and within the admiralty jurisdiction of the United States. On the twenty-eighth day of October last, they were placed at the bar, informed of the indictment which had been found and returned against them, and furnished with copies and translations of the same in the Spanish Language, the language of the prisoners. Counsel, learned in the law, of their own selection from the Bar of this Court, were assigned to assist them in their defence. On the twenty-seventh day of October, they were again set to the bar, and arraigned upon the indictment, to which they severally pleaded not guilty.

On the 28th day of October, the list of the traverse Jurors, summoned for this Court, were delivered to each of the prisoners. On the 4th day of November, they were again set to the bar and put upon their trial, having been first informed by the Court, of the right of challenging the Jurors; and a Jury was duly empannelled for the trial. All the witnesses subject to the processes of the Court, whom the prisoners desired to have summoned, were summoned in their behalf by the Government.

They were defended with fidelity, eloquence and learning by their Counsel, and the Jury, after a patient investigation, which occupied fifteen days, returned their verdict, which the Court have recorded, that each of the prisoners is guilty. Motions for a new trial and for arrest of judgment have been filed, and learnedly argued by their Counsel; those motions the Court have considered and overruled; it therefore becomes my duty to move, that judgment be rendered on this verdict, and that the sentence which the law awards against each of these prisoners at the bar, be now pronounced.

Judge Story then directed that each of the prisoners should stand up, and be separately asked, if they had any thing to say previous to being sentenced; and the solemn formalities proceeded as follows:

Clerk. Pedro Gibert, what have you to say why the sentence of the law should not now be pronounced against you.

Capt. Gibert stood up, and said firmly in Spanish, waving his hand with a commanding dignity—I am innocent of the crime,—I am innocent. The whole difficulty in which I am unfortunately placed, is to be attributed to the conduct of Capt. Trotter. He then presented a statement, drawn up by himself in a remarkably well written hand, of which the following is a correct translation, and which was then read to the Court by Mr. Child.

GIBERT'S PROTEST.

We sailed from the port of Havana on the 21st of August, 1832, in the Spanish schooner called the Panda, of the registry of the said Havana, destined for

* At a meeting of the Court, held on Tuesday, Dec. 23, this motion was also overruled.

the island of St. Thomas, coast of Africa, and arrived in thirty-seven days at Cape Mount.

Two days afterwards we anchored in Grand Bassa. We wooded and watered, and in two days we set sail with an English ship in sight, which as the wind had calmed, approached us within cannon-shot, and being so near we considered that she was an English ship of war, but she did not make for us, and the wind having freshened, we proceeded running along the coast. We anchored in Nefu and Petit Sesters, where we staid some time, purchasing rice, and having sufficient of that we set sail, and in the first days of November arrived at the Point of Nazareth. We found this town suitable for our business. I unloaded the cargo: the greater part I entrusted to the king, Gula, and with the rest, I began buying various articles of lawful commerce, as tortoise-shell, gum, ivory, palm oil, and fine straw carpeting.

Soon afterwards seeing that some of my crew had died, and finding myself, the captain and master, Pedro Gibert, and Don Bernardo de Soto, owner and mate of the vessel, the second mate, Don Augustin Ambron, and a portion of the crew sick, we came to a determination, and sailed for Prince's Island, for the purpose of recovering our health, leaving the factory in the charge of the boatswain and some seamen to keep him company. We were absent a little more than a month, and finding ourselves somewhat better, on the 9th of February we sailed for Nazareth. I shipped at Prince's Island four Portuguese seamen, being in want of hands, as at that date I had lost eight of my crew by death. We made the land at Cape Lopez; we anchored, and with a boat I arrived at Nazareth in search of a pilot to take the schooner into the river, as well because I knew that the temperament was better, as because water spouts are very frequent thereabouts.

Having arrived at Nazareth, I sent immediately the boatswain aboard, where he had a quarrel with the 2d mate. This man gave him a stab with a knife in the shoulder, a slight wound, and embarked on board an English brig schooner, which sailed from Nazareth to Gaboon, as he was afraid of my just chastisement. In seven days I effected the entrance of the schooner into the river, returned again to my house, and proceeded to buy the above mentioned articles. I pressed the king for my departure soon for Havana, and according to my calculation upon all that had been done, I considered that we might put to sea in one month. Eight months were now completed, during five and a half of which the schooner had been in the river, when an unexpected event overturned all our hopes and left us in the saddest affliction, which occurred in the manner following.

On the fourth of June, in the year 1833, between 8 and 9 o'clock of the morning, there appeared in the river, and came out from behind a point at half musket shot distance from the schooner, three boats manned by white men armed, and a canoe of negroes, likewise armed, who making a brisk fire of musketry, directed themselves aboard with the greatest velocity. Seeing this, the small crew of the schooner, some of whom were sick, and with no officer to command them, fled affrighted, saving only the ship's papers. The English having taken possession of the vessel, hoisted the sails, and on the following day sailed from the mouth of the river and anchored. On the day after they set sail, and in company with a brig, which was anchored at a great distance from the coast, they sailed southerly. In the river, after having taken the schooner, they took no pains to capture any one of the crew as they did not pursue them. They only carried off one Portuguese seaman, named Simon Domingo, who being very sick, made no attempt after he was landed, to escape; he presented himself to them, and they received him on board. Nor did they claim the captain or papers, nor did they find on board of the schooner any illicit article, which could be the cause of such a capture, which mode of procedure none but a pirate could have adopted.

On the following day my people began to arrive at Nazareth, 7 leagues distant; they related to me what I have stated without being able to inform me what sort of enemies the captors were.

Immediately I formed my protest, and on the following day I embarked in a boat to go on board to make a demand of the vessel; when we observed that the schooner in company with the brig, was sailing in the manner I have mentioned, crowding all their sail, I remained until I lost sight of them. Then I returned in the greatest affliction to my house, where I found my people disconsolate, seeing that we remained abandoned at a place so unhealthy, and the inhabitants sufficiently ill-disposed as they soon began to show. We were reflecting upon our unhappy lot, and had as yet come to no resolution, when on the 13th of the same June, our schooner presented itself at the port in the morning, and cast anchor. I was preparing to go aboard to reclaim my vessel, when the king sent for me and with the greatest seriousness ordered me and the mate, guarded by a group of his people, to leave the town for a farm near by, ordering that they should not permit us to come to the town until they were directed by him. I fatigued myself with supplicating him in respect to my wish to go aboard and make my demand. I made no progress. He only replied to me that if the English had robbed me of my vessel, he wished to preserve my person, to the end that with the cargo, he furnishing another vessel, I might return to the Havana, for by this means his reputation would remain good, and the Spanish would come to trade with him.

The boat of the schooner came to land, bringing the captain of his Brittanic Majesty's Brig Curlew, Mr. Henry D. Trotter, in company with one of his officers, both in their uniforms, and immediately they were conducted to the presence of the king. Trotter demanded the captain and mate of the schooner, with my crew and cargo of negroes. The king laughing at him, replied, that slaves we had bought none, and had none, and that the captain, mate, and crew he would not deliver, and that they might give themselves no further trouble about it. Then Trotter replied, where is the Spanish captain? let him come forward and reclaim his vessel. The king replied that he had sent me out of the town, and that he need not trouble himself. Trotter, according to what Simon Domingo has stated to me, only waited for me to reclaim my vessel, in order to deliver her up. But he saw that he was scorned by the king, and he began to make threats of demolishing the town; that he would go for a frigate and steamboat, both of war, would make a landing and destroy the town and its inhabitants, asking the king whether he did not know that the English nation was very powerful? The king again paid no regard to him, and again fell a laughing, and the people who heard so many threats, posted themselves to the number of more than 80 negroes, on the road to the beach, to tear Trotter and his companions to pieces, when they should go to embark.

At this time there came three persons, being of the principal ones in the nation, appearing very well satisfied, and saying that we might congratulate ourselves, that not only the king would not deliver us up, but also that within a very short time the English captain and officer would not be in existence, that they were going to be torn in pieces, alluding to what I have already related.

As soon as I was informed, I began to entreat them that in no manner they should offend the English, since all the mischief that they should do them would recoil upon the heads of the Spaniards, who found ourselves there; and that I wished by all means to go and prevent it. Then being surprised, they did not permit us to go, as the king had ordered, but they promised me that they would go and restrain their countrymen. At the expiration of an hour they informed me that the Englishmen had embarked without any farther occurrence.

On the following day, 14th of June, the captain and officer came again to the land, and went only to the house of the prince. He told them that they must not molest his father, that they need not fatigue themselves, for they would effect nothing. Upon this they retired, and hauled the schooner as near land as they could.

On the following day, 15th of June, they repeated the same operation, and in the afternoon fired two cannon-shots, of which one ball passed over the

town. At the third fire, a great flame was seen to issue from the schooner; the magazine took fire, the whole stern blew off, and the vessel was fallen and striking the bottom, with all the English floating in the water. I know not whether this event, sufficiently rare, was for want of care or from the malice of Trotter. The inhabitants of the town ran and gathered on the great beach, part of them armed with guns.

The King ordered that they should permit us to go forth in order that we might go and see the English. In effect we went to the beach. There were more than 300 men assembled together near their canoes and boats, of which they had an abundance, exciting one another with warmth to go aboard, saying, now the English shall see, that they have declared war against us. Of course the negroes wished to profit by the accident without any danger, because the English brig which had arrived on that night, was at so great a distance that her fire could not molest them. I and the mate began to intercede with the negroes to the end of restraining them; and seeing that there was no remedy, that they desired in every manner to take vengeance upon the English; in this state of things, we ran to the house of the king to entreat him not to meddle with the English, since any injury against them would be the same as done to the Spanish, who were there. The king after a stout altercation with me, approved of our generosity, and sent four of the nobles whom he had at his side, who came to the beach to restrain the multitude. We came there, and at the king's command they desisted from their design; they all went to my house, and I contented them by giving them ardent spirit to drink, until night came on and they retired to their posts. There remained in my house a Krooman, who on that day had been aboard, and I having made some inquiries touching what had happened, he replied, "Don Pedro, when I came for the land, on board the schooner, there were none to be seen but drunkards, and in their drunken scrape they wished to give fire, and thus the misfortune happened."

The inhabitants were always with arms in their hands to oppose the English, if they should make any attempt to disembark, and during this period there was but one disaster; which was that a small schooner of Prince's Island having arrived, her boat went to the south of Nazareth, and disembarked two Portuguese near a town, called Tierra de los Burros. It was night, and the negroes believing them to be English, fell upon them with musket shots, then came up to them, and knew them to be Portuguese, whom on the following day they brought badly wounded to Nazareth.

According to the accounts of those who were on board the schooner, when she was burned, an officer, the second I believe of the brig Curlew, and three individuals more perished, and some were wounded.

Before the aforesaid disaster, of which Captain Trotter was the cause, I had hoped that at his departure with the brig, he would leave us the schooner at anchor in the port where she had been, not from any good motive, but from fear of the protest, which he had, and always has had, to avoid the payment of it, amounting to more than $70,000, as he well knows. He has availed himself of all baseness, seductions and threats, of all that he could do for his safety, against unhappy prisoners, whom he has detained so long a time, in order to contrive the falsehood, or fictitious accusation, which he has sent to the authorities of the United States of North America; and instead of receiving our vessel, we had the labor of which we did not weary, of saving the life not only of Capt. Trotter and his officer, but also on the day of the burning of the vessel, of more than 40 Englishmen, who would have died by the hands of the negroes; which persons in 11 months and 16 days after this occurrence, happily arrived in England, their country, with the brig Curlew, in company with us.

The English remained six or seven days at anchor with the brig, and all hands were employed in saving the cargo and completing the destruction of the burned vessel. The negroes when the English retired from their labors, went aboard and brought to Nazareth all that they could find. They dove and brought up many sacks of clothing of English seamen. In seven days the brig sailed from Nazareth.

On the same day that the schooner was burned, in the morning, the small Portuguese schooner put to sea. Four Portuguese seamen whom I had in my house, among them one who had been east away upon the coast, and whom I had taken from kindness, embarked on board of her; they were going to Prince's Island, and Capt. Trotter, as they were going out, made them prisoners. Of these there is but one now with us, Anastasio Silveira; the others Capt. Trotter sent to the coast of Africa. I know not the motive of his reserving only *two* out of the *five* that he had—the said Anastasio and Simon Domingo, as all of them were in our company four months.

For ourselves, each one formed his own calculation and took the route which seemed to him best. I finding myself without a vessel, could not maintain a considerable crew, especially as I found myself destitute of means for that, and when this was stated they all readily acquiesced. The Boatswain, named Juan Lopez, the seamen Angel Garcia, Manuel Delgado, Joseph Barcla, the false witness or false declarant, (falso testigo o' declarador falso) Manuel Del Castillo and Juan Montenegro, whom I took on board in the Havana, in the place of Jose Basilio de Castro, as this person fell sick of the yellow fever, on the point of sailing, and there was no opportunity to correct the Roll, and put Montenegro in his place, by reason of this thing happening in the moments of our departure—these individuals were with me in the factory; they combined and choosing the boatswain for their head, informed me that they wished to be gone, and consequently that I would pay them, presenting to me that although we had lost the Schooner the cargo still remained safe, and that the Boatswain knew that we had brought some money from Havana, which also the rest knew by reason of being with me in the factory. In spite of considerable resistance, I had no remedy and I paid them, and they did not agree to take less than $150 a piece, and the Boatswain $250. They purchased a boat and departed.

Before their departure there arrived a small bark from Prince's Island and brought much news, and among the rest that Captain Trotter had said that if he could catch any person of the Panda he would hang him on the spot. I did not listen to such a thing, but my people were put in fear.

Those who remained with me supposed that I had only given to those who went away some bales of merchandise, and the boat with which they went, but the boat was sold to them and they paid me for it. These individuals arrived at the river Camerones, from thence they proceeded to Bimbia, thinking that they could from thence pass to Calabar in search of some Spanish vessel. Having arrived at said Bimbia, they found themselves with unfriendly people, and most of all were they disliked by an Englishman who had a factory there. The boatswain was very much of a coward, and they had informed him that when they robbed a white man there they killed him in order to prevent discovery, already they had robbed them of some wearing apparel. One night the negroes assembled in a multitude near where the men were lodged; the boatswain in a fright went forth to the margin of the sea and cast his money into the water. He returned advising his companions to do the same, for on that night assuredly they would be robbed and murdered, and that it was better to lose their money than their life. Being terrified they likewise threw their money into the sea. On the following day a small English Schooner gave them a passage and they sailed for Fernando Po. The Government put some questions to them, and they remained free to make their arrangements to transport themselves to said Calabar, where there were Spanish vessels. The Brig Curlew, after her departure from Nazareth, went to Prince's Island. The Captain was visiting at the house of an officer of the Government, Don Jose Barro, where there was also a Captain of a Spanish merchant brig, and Trotter having related the affair of the schooner Panda, the Spanish captain replied, asking whether he had found any illicit articles aboard? Trotter said that he had not, and then the Spanish captain said to Trotter, "the English vessels of war which cruise on this coast, when they do some absurd thing with a merchant vessel, having no other excuse or resource, they say it is a pirate. I know captain

Gibert, and certainly he has a different character from what you suppose, and therefore I assure you that you will have to pay for the voyage which you have ruined." This information was given me by a captain of a Portuguese brig schooner, who was present at the conversation and came to Cape Lopez.

The brig Curlew sailed on a cruise, the captain being in great affliction, fearing the punishment of his Government for the men who had perished in the burning of the schooner, and at the same time he said that he wished to make prize of some slaver in order that with her he might pay for the Panda, according to what the Portuguese *Simon Domingo* has communicated to me in presence of various individuals of my crew on several occasions. He understands English, and was aboard the brig Curlew, which being tired of cruising went to Fernando Po, and was with the boatswain and other mariners, who accompanied him from Nazareth and were within two days of their departure for Calabar. These men remembering the notice which the bark from Prince's Island had given before their departure from Nazareth, said that they were of or belonged to another vessel, which had been lost giving fictitious names, and that they were not of the Panda. For this reason they, the English, communicated with these men through *Simon Domingo*, and as this person had already given a hint that he knew them, and that they were of the brig Panda, he confirmed it and they were taken into custody. The English began to take their examinations, but obtained nothing from the boatswain and the rest; they were merely able by means of offers and cups of liquor to seduce the mulatto, Jose Barcla, who deposed according as Trotter desired him, interrogatories being regulated by a Gazette of Boston, which they had there.

Manuel Delgado came short of all this. They had sent to seek him at Camerones, where he had remained; they carried him aboard of the brig Curlew.—Before he expired in the jail of Boston, he declared "that on board the brig they interrogated him to obtain a deposition, telling him that they had already hung the boatswain, because he had not told the truth, and that as to Jose Perez or Barela, they were going to shoot him at that moment." This being said musket shots were heard from the shore; they asked him if he had heard; he replied that he had; then said they, "now they have executed him, that Jose Perez," for thus he subscribed himself, his real name being Jose Barela, as appears by the roll. After this they continued to address Delgado as follows:

"Wherefore tell the truth to all that shall be inquired of you." "Making me at the same time many offers on the part of Captain Trotter, and giving me many draughts of drink, they began now to question, shaping their inquires also by the Boston newspaper, and I replied, that I had not committed such an infamous thing; they threatened me again with death, and offered me liberty and other things, if I would answer in the affirmative to what they asked me. I now remember well that I was drunk, that they reduced to writing a deposition and made me sign it, and I did sign it, Francisco Vejerano, my name being Manuel Delgado."

When Manuel Delgado made this statement he gave himself blows upon the head with the cover of the tub, soon he resumed and said, that by his means, and by means of that villain the mulatto Barela, we were suffering imprisonment, and that as to himself captain Trotter not having fulfilled the promises which he had made him, he was undone on all sides, and for this cause would kill himself, that the same would happen to the villain Barela, and that seeing the failure of fulfilment on the part of captain Trotter, he (Perez) was prepared to kill himself with a razor, which he had sewed in the collar of his jacket. With cries and exclamations said Delgado uttered what I have related until he broke the glass window, thurst a piece of glass into his throat, cut it and soon after expired.

They were kept prisoners in said Fernando Po, the brig Curlew having landed them, when she put to sea. They were carried to the Hospital and in five days the Boatswain died of poison, saying "my friends, these knaves have given me poison, my entrails are on fire," striving to vomit, and calling for water and speaking against Trotter he died, foaming much at the mouth, and discharging

blood through the anus. All of them imputed his death to captain Trotter, because he had a dispute with him, and it appears that Trotter disliked him, and that the villain ordered this deed to be done. During all this the mulatto Barela was at large six days, always lodged in the house of the Governor, after which they put him in prison, and seeing the dead body of the boatswain he said, "God forgive me for the false witness I have borne, and do thou also forgive me what I have said in the false deposition which I have given. Then all his companions fell upon him, demanding why he had been so infamous as to have declared facts which they had never done. Then Barela replied that his heart was not bad. "I dont know what you would do; for myself when I am before a justice I tremble all over and say just what they wish."

The brig Curlew joined company with a bark, captain Feliz Facio, who spoke very good Spanish, and the two vessels went to St. Thomas, the brig landed a number of Spanish prisoners, belonging to a slaving schooner of Cuba, which the brig of war Trinculo had captured, and delivered the prisoners to the Curlew which being at anchor in said St. Thomas. The officers were ashore and my mate, Don Benardo de Soto with some seamen was also tarrying there, and there was nothing new occurred nor any demand on the part of Trotter.

The vessel of captain Facio anchored in front of the Point Fatisu, and he sent his boat to Cape Lopez where the king resided, for since the burning of the schooner the king had gone from Nazareth, and all his people had built new towns at the said Cape Lopez and the neighborhood. I also had removed thither with the king in company with one seaman, Jose Velasques, the cook, a colored freeman, Antonio Ferrer, and the cabin boy Nicholas Costa. The mate Don Bernardo de Soto with four more individuals had departed for St. Thomas in a Portuguese schooner, called the Esperanza, which having come from the Havana arrived at that port.

At the said Cape Lopez I waited for the occasion of some vessel to embark for Havana with the articles which I had collected. When on the 25th of September of the last year 1833, there appeared a boat of an English ship coming from Liverpool, stating to the king that they had need of a pilot to bring the said vessel to Cape Lopez for the purpose of trading. This an officer of the Brig of war Curlew communicated to the king, which officer was in the frigate in the capacity of a common sailor, for the purpose of executing the stratagem which he had contrived. The king much pleased sent his son and some others in the said boat which put back. Very early the next morning there appeared in sight the ship with the English flag and a Brig with the Portuguese flag. These vessels made for the port, the brig anchored first. The king sent his boat, in which there went a duke and a nephew of the king and other persons. The boat arrived aboard, and they made prisoners of those individuals. The brig fired two cannon shots for the ship and this cast anchor. The brig hauled down the Portuguese flag and run up the English flag and pennant. The boat proceeded to the ship and took the king's son and the others, and having them all on board of the brig, the captain sent a message to the king that if he wished for his son and the rest, he must deliver up the Spanish captain Don Pedro, and his people, that if this were not done, he would hang them all. The king through terror and to rob me of the valuable cargo which I had collected was excited and the people also, and particularly the wives of the said prisoners, and without my suspecting any thing, on the following day, 27th of September 1833, at about 6 o'clock in the morning, the boat of the Curlew came with captain Trotter, I was surprised and delivered up. I was carried aboard the said Curlew, after Trotter had robbed me from my house of $700. Every thing else—all my baggage, and ten sacks of tortoise shell, which I had, weighing 100 lb. each, the negroes robbed me of, and I was left with only the clothes I had on. The residue of the cargo remained in the king's store-houses, who of course took good care of it.

We sailed next day for the point Fatisu, where Trotter believed, or appeared to make believe, that I had money. They grew weary with searching, but effected nothing; they returned, bringing the colored man Antonio Ferrer.

They fired a musket at him on shore at point Fatisu, and the ball passed immediately over his head, threatening, and putting him in fear, declaring that he was knowing to the burial of money. They got nothing from him, for he had nothing to say. At these operations, I remembered what generally happens when wayfaring men are attacked by banditti, that their general expression is "your money, or your life."

I with my people distributed in separate berths, eating in the forecastle, without any distinction whatever, was called upon by him who served as interpreter, the Captain of the ship, said Facio, that I should give my deposition respecting the robbing of an American Brig of $ 20,000, which they imputed to me. I answered, that they did me much honor; that I was no robber, and that I had no declaration to make in that place; that if they verified their charge before a competent tribunal, then I would declare, and prefer my protest against the captor and burner of my vessel, and I would then institute my defence. They left me for that time, and took the depositions of the others, but they remained dissatisfied, because they found not what they desired.

Having wearied themselves with searching for the $ 20,000 dreamed of, and finding nothing, we sailed for St. Thomas, where we arrived in four days. He (Trotter,) began to demand Don Bernardo de Soto, and the other individuals. The governor was not willing to deliver them up.

On the following day there came in sight, the Portuguese schooner, *Esperanza*. It was a calm, and they despatched boats and took her, brought her into port, and anchored astern of the Brig. The captain of the said schooner was ashore in the St. Thomas, somewhat ill, and was by report, an intimate friend of the governor, and it appears that this man agreed with Trotter, that on condition of delivering up the Spaniards, he should leave the schooner *Esperanza*, and should not cause her any extortion, inasmuch as there was no cause further than that she had brought as passengers from Nazareth to St. Thomas, those persons whom he demanded. The governor was a facile man; he delivered up the Spaniards on the 5th of October, of the same year 1833, and Trotter retained the schooner. There came on board of the Brig Curlew, Don Bernardo de Soto, mate, and owner of the schooner Panda, and the seamen, Manuel Boyga, Juan Antonia Portana, the carpenter, Francisco Ruiz, and Domingo de Guzman. The mate informed Trotter, that the baggage of them all remained in the house ashore, and that his own consisted of a trunk, of which he delivered him the key, an octant, of which he delivered to him the key, a large tube of tin, which contained many charts, fastened with a small padlock, of which he delivered the key: also a sack, full of his own wearing apparel. Captain Trotter with this information, and with the keys in hand, went ashore instantly. He returned without saying a word, or giving any information about the baggage. On the following day, they brought on board of the Curlew, the trunk of Don Bernardo, open and much injured, and all the papers and documents which it contained, missing. Of the documents, one was a diploma of captain, (or sea pilot,) and another paper from the government of the United States of North America, in which was manifested the service performed in the saving of the persons who were on board the American ship, called the Minerva, of Salem, which was lost in the Bahama Channel. We also saw the tube of charts; the octant we did not see; the sack instead of clothes, contained a bed, and a pillow, and the said trunk, four old rugs. In respect to the sacks of clothes belonging to the rest, none were delivered to them, and on board of the Curlew, in the course of the voyage, they saw some of their things. From the mate, the same Trotter took with much grace, his watch from his pocket. It was of silver, with a small gold chain, key and a ring with small diamonds of no great value, lined with his wife's hair, with the initials of the husband and wife; and he told the mate, that that was too extravagant for a mate. They called him to give a deposition, and Trotter said to him, "So you have done a service to the American nation," evident proof that he had possessed himself of all the documents, and the villain with this confessing it, the deposition being concluded, (which did not at all please him,) or-

dered him to retire. They called all the others in regular order, and in the same order sent them away, they only retained, making much of him, the young Indian from Manilla, called Domingo de Guzman.

To me, in particular, at the said St. Thomas, the same interpreter offered more than a thousand dollars, and that I should be protected, and carried to my country, provided, however, that I would make certain the capture of the American Brig, and that from the moment I should do so, I should be admitted as a companion, and should have a place below among the officers on this account at the table in the cabin of Trotter; and offering and presenting me cups of rum and gin, as was their custom to all whom they invited to testify and wished to seduce. The interpreter after some time, taking all the time cups with me, said to me, "I am drunk." I laughed, and retired, penetrated with the full infamy of their proceedings.

We sailed from St. Thomas the 3d of the same month, in company with the schoener Esperanza. We arrived at Prince's Island, and the Brig had scarcely dropped her anchor, when Trotter took a boat and carried Domingo de Guzman to the house of the governor, and before that authority, and the public secretary and witnesses, Trotter asked him to confirm the declaration which he had made. It was read in Spanish, and the boy was struck with horror. He replied that it was all a lie, that he had said nothing, and that all he knew was, that they had asked him if such things were not true, but that he had denied the whole as false. Trotter was very angry. The boat returned aboard, and Guzman was cut off from communication.

On that day, Trotter said that he would carry us to England for the purpose of justifying himself with his government, for the people who had been lost in the burning of the schooner. "This is best for me, although I have to pay for the vessel, for I am really afraid I shall lose my head." What I have now expressed, the boatswain of the Portuguese schooner Esperanza, who speaks very good English, heard said to the officers; and it appears in the journal of the said boatswain, of all that took place, which journal he delivered on our arrival in England, to the Portuguese Consul General.

Trotter conversed occasionally with the boatswain of the said prize Esperanza, Philip Reynes, by name, catechising him, and he perceived that he could not make him say that which would be useful to him; then he, with his interpreter, called the boatswain anew to the cabin, and made him the following proposition. "If you will say that when the schooner Esperanza carried from Nazareth to St. Thomas the mate, Don Bernardo, and the four seamen of the Panda, they carried a large sum of money, and also, that you know that they are pirates, you shall receive a gratification of one thousand dollars, and shall receive the first patronage, and, if you wish, even an epaulette in the English Marine; it shall be conferred upon you, for contributing to the taking of those pirates." To the cook of the same schooner on condition of his giving the same testimony, they offered a present of $500, recommendations for wheresoever he would choose to go, and that if he preferred to remain with Trotter, he should be well regarded and treated by all; all which also appears in the same journal, with all the rest which happened. They also took the depositions of all the crew of the Esperanza, and they got nothing which Trotter wanted; wherefore they began to land some of them, together with the Portuguese, who had been in the factory with us at Nazareth, and whom I have already said, that I received in Nazareth by reason of his being abandoned, and moreover, the Curlew in her former voyage to Prince's Island, had landed another Portuguese of the crew of the Panda.

The schooner Esperanza had among her crew, four free colored men of St. Thomas; these, Trotter pressed to give their depositions, not only in relation to us, but also because he wished in virtue of their being slaves of the captain, to condemn the prize, but they defended themselves with their articles made at St. Thomas, whereby it appeared that they were free colored men, and seamen of said schooner.

I forgot to mention that when I was in the said port of St. Antonio, of

Prince's Island, and sailed as I have said on the 9th of February, 1833, I left as sick, two seamen, who remained very feeble, but promised me as soon as they should recover, they would come to Nazareth to rejoin me, which did not take place, undoubtedly by reason of their being seduced by the knave shipkeeper, who disappeared at the time of my setting sail.

The mate, Don Bernardo, the carpenter, Francisco Ruiz, the seamen Manuel Boyga, Juan Antonio Portaña and the colored cook, Antonio Ferrer, they transferred on board the schooner Esperanza, and set sail. On the following day we sailed in the Brig, and proceeded to a port at the west of the same Island. In four days we returned to the principal port, until we sailed for Fernando Po, where we arrived in four or five days, believing that from thence we should proceed to England. We heard of the death of the boatswain, and that they had sent the other prisoners to the Island of Ascension. On the second day of our arrival there, the schooner Esperanza arrived, and cast anchor with an English flag and pennant of war.

I forgot also to mention, that in Prince's Island was the owner of the bark, commanded by Feliz Facio, who acted as interpreter to Trotter. As soon as he was informed of the commission which his vessel had been employed in, he kicked this captain, who had to come and lodge under the lee of his patron. Trotter became very much disgusted with this owner, and they had their altercations, which Trotter had to suffer, for he said to Trotter, that he did not keep his vessels for the persecuting of any body, and that consequently, in view of the demurrage which had happened, and of the damages which he had suffered by his fault, he had protested against whom he ought, for the amount of two thousand pounds. The ex-Captain Facio remained very downcast, and told me if he went to England, they would put him in prison, if he did not pay two thousand pounds. They were all very angry with Mr. Ley, the owner of the vessel. In the evening, Facio went ashore with three officers, and at about 10 o'clock the same night, they reappeared, all of them beaten, with their heads broken, which beating according as the same ex-Captain informed me, was administered by the said owner of the ship, the captain of an American corvette, and some one of the citizens.

Being, as I have said, in Fernando Po, on one day the negroes of the Esperanza were carried aboard of a steamboat. Trotter and Facio took their depositions, pointing a gun at them, and telling them that they must tell truth, i. e. that they were slaves of the captain; moreover, that when they carried the passengers of the schooner Panda, from Nazareth to St. Thomas, those passengers in truth carried money; and that they also knew that we were pirates; that if they said this, nothing would happen to them, but if they would not confess it, the God of the whites would punish them, shooting them with that gun, and they would die. This they did to each one separately, and with all these manœuvres they got nothing.

We sailed from Fernando Po, and instead of proceeding to England, went on a cruise to the River Bonny. We anchored opposite her mouth, where Trotter landed a portion of the prisoners of the Esperanza. Tired of cruising there, and going about and about, we returned to Fernando Po. In a few days we sailed again with the governor of the town for Calabar; we were there some days and returned. We sailed again on a cruise, every man of the Brig cursing Trotter for not going to England, for the cruise had been three years and a half complete, and with prisoners so long on board. We, above the deck, suffered all the inclemency of rains in abundance, and of a burning sun, which almost consumed us, without clothing sufficient for decency, and with no comfort, except that of being free from irons. We again arrived at the bar of the River Bonny. The Brig anchored. The captain in the schooner sailed into the Bonny, he sent his boats ahead, and there remaining but very few hands aboard, the schooner run aground, very near to the shore. They ordered the prisoners on to the bowsprit, making efforts to get off the schooner, which all thought would be lost. All of us might have escaped, but our only concern was to assist to get off the vessel, which after much labor floated, and we sail-

ed. We returned to Fernando Po. All the prisoners being assembled on board the Brig, passed a new year's night. Captain Trotter went ashore, and on board, every one of the English got intoxicated without any exception. All were asleep from 12 to 2 o'clock of the night. The boats, one of them with sails and oars, were ready; on the deck of the Brig, was a part of a barrel of water, and we had our rations for seven days—in short, we might have gone every one of us, in either of two successive nights, for it was entirely at our option, to go or stay.

Before this, Trotter divided among his people the money which he had robbed from me, at Cape Lopez, but he gave them little, and retained the greater part. At that time it being Easter, he presented me with two bottles of wine, and afterwards presented me with a bottle of French brandy from time to time, until at last he began to employ me in copying Portuguese papers. One day he was walking on the deck with the surgeon of the vessel, and he said to him, that I was a good man, that he was going to intercede with the governor for me. One day the ex-captain Facio came aboard, whom I had not seen from the first time that we arrived, for he had been ashore. He treated me with much endearment; he told me how much captain Trotter appreciated me, and making me the same offers as formerly, he urged me very much that I should the next day demand an examination of my case, and state the affair concerning the American Brig; protecting myself with a thousand senseless subterfuges, which he undertook to teach me to repeat; that by this means I should be safe, and should enjoy the benefits which were offered me. I had a good mind to send him to ————. The man was very heavy with the great quantity of rum, which he had taken. At last we parted, he promising me much fruit, which he would send, and which I wait for still.

We sailed again on a cruise in those seas, Trotter constantly delivering me Portuguese papers to copy, viz. invoices, letters, communications of the governors of Prince's Island and St. Thomas. In a short time we returned to Fernando Po. At this time, we had been three months and a half prisoners. We sailed for Prince's Island. The schooner separated from the Brig, and on making land, being in sight of Prince's Island, we descried the schooner, which came in company with a Brig schooner. They began to cry a prize to the Esperanza, for they said they knew the vessel, and that she was a slaver of Prince's Island. They made signals. The second officer of the Brig Curlew said to me, "the Esperanza has made a prize, for I know the hull of the vessel, and she is laden with slaves." I replied to him, that that would turn out another farce in the style of the rest. "You have seen that one prize can make another prize." The schooner came with her English flag and pennant of war, and the Brig schooner with her Portuguese flag. Trotter trotted with delight, like a boy. They arrived, Trotter himself went aboard, and at the end of a short time he returned, hanging his head; the vessel set her sails and followed her course for St. Thomas, as she had sailed from Prince's Island the day before with that destination. We also followed our course, and anchored in company with the schooner, in the principal port of the said Prince's Island. Constantly at anchor near the land, by night there was sufficient carelessness, and there were innumerable occasions, when the sentinel was asleep, and any one who pleased might have gone off with the utmost facility.

I forgot to say, that the ex-captain remained an adventurer in Fernando Po, without being able to go to England, for fear of imprisonment. So Trotter paid him for his services, as he said. We sailed from the principal port to the West. Trotter made arrangements to restore the schooner Esperanza, and found himself charged in a protest with 48,000 *mil reis*, in which it was declared that now the captain and master of the schooner would not receive her, by reason of Trotter having given occasion to make a claim of the value of the vessel and the cargo, which he had lost at Cape Lopez by the want of the schooner, which protest also alleged, that Trotter after having engaged in St. Thomas to deliver her up, had broken his word.

We sailed for Cape Lopez. We arrived in a day or two; we dropped anchor

and immediately a boat of the brig proceeded to reconnoitre a schooner of Prince's Island, which was at anchor very near the shore. Another boat of the same brig went off with the second and another officer. The boat also of the schooner with the captain of the prize went off, and the three boats arrived almost simultaneously at the king's town. The negroes received them with arms in their hands, captured and confined them. An officer made resistance, and they wounded him, and beat also some of the seamen. All of them made twenty, among whom were four officers. Night came on—no boats appeared. The brig fired cannon-shots all night, and no one appeared. On the following day, the wounded officer came on board. His dress was torn to rags. He delivered to Capt. Trotter a list of what the king demanded as a ransom. Trotter was quite unwell; he was holding a consultation with the officer, and finally asked him if they could not adjust the matter with Don Pedro and the other Spanish prisoners. The officer replied that what the negroes wanted was packages of merchandise, ardent spirit, in short, the contents of the list. They dressed the officer's wounds, put clothes on him, and he continued to say that if they did not satisfy the negroes by sending the goods which they required, they would carry their prisoners on the following day inland to kill them. Aboard some told me that the Spaniards were to go ashore, because they had understood what Trotter said. I replied that I would not go. On the following day they came from shore in a large boat. They made three trips laden with goods, according as had been demanded, for Trotter took good care to send them, and the last trip being completed, the English came on board. Trotter had already sent the schooner in search of all the vessels of war which it could find, with a view to disembark and avenge himself upon the negroes. Three vessels were assembled, besides the prize, which they manned. They made a trial, talked a good deal, drank considerable rum, and did nothing. They contented themselves with firing many balls in the air, which the negroes made fun of and defied.

In a few days we sailed, constantly in company with the schooner, and arrived at the island of Annabon, and from thence Trotter being very irritable, and having disgusted every body, we at last sailed for the island of Ascension, where we arrived the first of March. He wished to repair the rigging and paint the brig, and landed us all. He gave us a sail and timber, and on shore we erected a tent, and we lived there independently without any guard, and went to town when we pleased. An English corvette of war arrived from the Cape of Good Hope. The commander disapproved to Trotter of our capture, and of that of the schooner, and told him to take care how he put up the English flag and pennant again, ordering them to be hauled down. The corvette sailed for the department of Plymouth, England. Trotter was very sorrowful; he went about like a madman, and every body treated him as such. He caused to be well rigged the schooner Esperanza with the king's rigging, and was arranging to send her to Prince's Island, and to deliver her to that government. Already was she prepared to sail, and delivered to the captain of the brig schooner who was to take her there, when his notion was changed.

The said brig schooner of war sailed. In her Trotter sent two prisoners belonging to the schooner Esperanza. These resisted; they went to the house where Trotter resided, and told him that they would not go, but would keep on for England in order to recover their wages, when the protest of their captain should be paid. Send them now to Prince's Island! Why had he not landed them with the other prisoners, when he disembarked them at the said point or in Bonny, and not now after so many months of imprisonment? Finally he answered them in the best manner he could, giving them clothes and some money. They however would not go on any terms, until we suggested to them that we were in the power of a despot, and that if they resisted longer, they would be sent forcibly. Upon this they departed. An English frigate arrived; the commander went aboard of the Curlew. They came for us. The officer who accompanied us, asked me how I liked Ascension, and whether we should like to remain there. I told him no, and some of my people who heard

him, said the same, and we added that it was "to England that we now wished to go." We were mustered aboard and then returned. On Saturday there was a farce, the first after the frigate was there. An officer belonging to it had a warm dispute with another officer of the Curlew. Speaking of the prisoners, the officer of the frigate said, "Why if they are pirates, has not Trotter taken them to England, or sent them there? This delay is the cause of every one saying that it is for fear of coming out badly, and having to pay all the loss."

In front of our residence there were anchored three or four large boats with their sails and oars, which were employed in carrying turtles for the government to the yards. Almost every night we were visited by the seamen of the Curlew, who sufficiently reminded us to take one of them and go away. Trotter made me write much, especially when he was about to despatch the schooner for Prince's Island. I made copies of all the papers belonging to the said vessel. He came to see me, and took some of the papers, showed them to his companions praising my hand writing, so that I seemed more his amanuensis than his prisoner. He was well aware of my continued inquiries whether he had much property or was very rich in England, so that he could pay the damage which he had caused us, but he affected not to understand. I do not enter further into details, although I could relate much more.

Those who were missing of my people arrived. They put them on board the schooner Esperanza, and from that they were landed, and remained in Ascension. The four colored seamen of the same and also the shipping articles were at St. Thomas.

We sailed for England on the 3d day of April 1834, which completed six months and six days of my imprisonment. From the day of our sailing, the second officer told me that we should touch at St. Michael's, one of the Terceras. We had a voyage sufficiently tedious, for when there was good wind, Trotter never pressed any sail, and all detested him. At length, in forty-five days, I believe, of passage, we arrived at St. Michael's, where he prepared to make some repairs of rigging on the schooner. What he desired was to avoid carrying her to England; but it seems the affair turned contrary to his wishes. We sailed in three days. In respect to ourselves, when they sung out a sail, they took special care of us, until one day they said to me, "Do you know what Captain Trotter has said? He says if he should meet with an American vessel of war, he will deliver you up to be carried to the United States of North America, in order that you may be tried, but do you resist that plan, saying that you have been made prisoners by the English flag, and that by her government you ought to be tried. Trotter is afraid to carry you to England, and you must be ready to receive any insult or oppression he may choose to inflict." "I believe it, I answered; what he wishes is to go to England free and disembarrassed of us, and the schooner. It is this that makes him continually sick, and always looking over papers." After a few days we had a head wind; it continued, and now it was reported in the vessel that we were going to touch at Portugal. Every one was against Capt. Trotter, and believed he did not wish to arrive in England, because the bad weather had subsided, and with a fresh fair wind, he shortened sail, and made signals to the schooner to lay to, and sent his boat on board the schooner for one of the passengers who had embarked on board at St. Michael's. After dinner he became so merry he made all laugh, and when the guests returned to the schooner it was night. At other times he shot at a mark, which was made by towing a buoy by the schooner, and the brig was firing daily after they left St. Michael's. All were in despair, and cursing Capt. Trotter. With all this tardiness, we at last arrived at Plymouth on the first day of June. The captain and some others went on shore in the morning, and after a little while notice was given that the Admiral knew by the signals that it was the Curlew; he said, "Blery ful* Capt. Trotter." The corvette which was at Ascension had arrived, and her commander had informed the Admiral of Trotter's conduct, and shortly after we heard that they would

* This phrase was no doubt intended to be English, perhaps "very fool."

not receive us. In the afternoon Capt. Trotter returned on board with a face as pale as death, and early the next morning he made sail. It was laughable to see the schooner as a prize, which before had borne the English flag and pennant, enter the port without any flag whatever.

On the third day we came to anchor off Portsmouth, and on the fifth we entered into port. The Gazette announced the news that the Curlew had arrived from her cruise on the coast of Africa, and had brought in a Portuguese schooner which had been committing acts of piracy, *but they said nothing of us.* The scoundrel was afraid and said nothing about us. The five individuals which they had captured from my people with the boatswain at Fernando Po, as I have before stated, were on board the schooner ever since she left Ascension, that is to say, Angel Garcia, Manuel del Castillo, Juan Montenegro, Manuel Delgardo and Joseph Barela. Garcia and Castillo went on shore at Portsmouth, and were walking about all of one day, and came on board the schooner accompanied by a sailor of the schooner who was very drunk.

We being on board the Curlew, Capt. Trotter brought his brother and other individuals who came on board with him, and charged them not to talk with us; they therefore some of them took us for the crew of the schooner Esperanza, and others said that we were bad people and had burnt our schooner; but he was aboard only a short time in the morning and went away. The vessel was filled with people, and all of them were making inquiries about us of the crew of the brig; also frequently a great many women came on deck; there was one of them, a vender of provisions, which she sold to sailors to good account. In the afternoon beer was drank, so that every night there was a general frolic. We also participated in a little, and the officers every afternoon regaled us with beer. At night they all went away, even to the sentinel of the forecastle, and sometimes the very prisoners disguised his delinquencies. We were seven days without rations of bread. Some of the crew and others who had become acquainted with us, advised us to go away, and others said if I wished to go in the night they would come for me, and promised me protection, but we chose to remain quiet. A lady came on board a boat that was alongside one morning, and sent a letter to Mr. Soto, stating the manner in which we could escape by night, describing the place we should come to where we should be received, and in the morning we should find ourselves conveyed a great distance, where we should be secure; this also we did not choose to accede to. One night the second officer of the brig was talking very loud in the cabin with the other officers, saying, "On the coast of Africa I was not second officer to make prizes, but that Mr. Facio was; Trotter would not believe me; he made prize of the schooner Esperanza; I told him I did not wish to become responsible for any thing: he took no notice of it, he did not wish to take counsel of me, but he finds he has to go with his tail between his legs, there is no help for it; Trotter will have to pay for all of it." We remained on board the Curlew until the 15th of June, 1834. We went on board the Admiral's ship on this station, called the Royal Victory, by reason of Trotter's delivering up his brig on the following day, the 16th of June.

We, the prisoners of the Panda, were all together, to wit, captain, mate, carpenter, cabin boy, and sailors nine in number, and the two Portuguese. There was also with us the crew of the Portuguese schooner Esperanza, the prize that Trotter said was engaged in piracy. With this character which they had given to the poor schooner, they sent off all her crew as I have stated, and some of them gave them some trouble as they did not wish to go. It would not be surprising if after a while Trotter should be treated as an insane person. On bringing in a pirate schooner for a prize, if they should ask him for the crew what answer will he make?

When we were collected together, it was entertaining to hear Barela, who signed his name to the deposition at Fernando Po, "Perez." He said that Trotter was the greatest of scoundrels, that he had deceived him most infamously, and had not fulfilled his promise in any thing. Another accused him, stating his infamy in declaring falsely against all of us. He replied that Trotter

had deceived him, because he was so timid and so small, but that there was no danger of his being deceived by false promises when he should be again called on to testify, that he was aware of the error he had committed, that he would correct it, and asked our forgiveness.

Simon Domingo, the Portuguese, said, this devil has deceived me well; he promised to pay me for the time I worked on board the brig, and to set me free, that he had not heretofore been held as a prisoner, but that he was a prisoner now, and this rascal had paid him nothing.

Having been on board the Royal Victory fifteen days, we were ordered to take our miserable duds in order to embark. We were in the boat alongside, waiting, when the Portuguese Consul came with a counter order, and we returned to our former situation; this caused the boatswain and others of the schooner Esperanza to come to us. The next day a statement appeared in the public papers that their vessel was declared free, and discharged clearly in favor of the owners.

I was tired of writing to the Spanish Vice Consul, and the only answer I had received was, that I *must come to his house;* this caused me much vexation. I asked who this gentleman was, and was told he was an Englishman, and an acquaintance of Trotter's, to which I replied, "that was easily seen, and perhaps too a relation."

I now directed myself to the Consul General at London, making a full statement of our misfortunes, and that we were in the power of our mortal enemy, instead of being delivered up to his government that we might be tried if culpable, and if not, that we might be indemnified for our losses and damages caused by Trotter, who had taken us. This document was intercepted, and we, as it were, remained hidden.

The Portuguese and the boatswain were indeed with us, but they went on shore when they pleased; they were there one or two days before they returned. They called the Boatswain in order to deliver him the schooner, promising to enable him to go to the Havana at their expense, to which he dissented, not being authorized to comply therewith.

Ten or twelve days had elapsed, since they wished to embark us, when suddenly they seized upon and embarked us, and immediately got under way. The brig was at anchor about three miles distant. We were near to her when the Royal Victory made signals for us to return to our place. We met the Portuguese Consul, who in great vexation took out the boatswain and other Portuguese of the Esperanza who were with us, and sent them on shore to a tavern, at the expense of Trotter.

Two days after this the cook of the Portuguese schooner came to us, stating in behalf of the Portuguese Consul, that we might rely on his protection, which he had not before offered, because Trotter had given us a very bad character, saying that we had burnt our schooner; but that he was now undeceived, and it was Trotter himself that burnt our vessel, and that all the town were now undeceived, and that every one spoke ill of Trotter, at the same time stating that we must write to the Consul General in London, that he would forward the letter and take all the pains necessary on his part for our benefit. In continuation we wrote the letter and gave it to the messenger.

On the third day following, the same individual returned, and stating in behalf of the Portuguese Consul, that he had very good news from London, in answer to ours respecting our business, that we need no longer think of being embarked, nor of being sent any where except to London, where we were to be tried, as we had been so long prisoners under the English flag, and having been so long detained by our captor, without having our case laid before his government.

On the second day the Spanish Consul called on us, and took our names, rank on board of our vessel, nativity, &c., of every one of us, and informed us through the interpreter he brought with him, that the Consul General in London had directed him to do so in order for our defence. He asked us if we had any thing else to communicate, and to inform him what had been

done to us, and in regard to the time we had been prisoners; if we had already written to London; after obtaining this intelligence he retired. Some days elapsed without any new occurrence, and when by the information communicated by the Portuguese Consul, we expected to be sent to London, we were seized upon and conducted secretly, the boat in which we went being screened by the shipping in the harbor until we arrived on board the English brig of war called the Savage, which received us and put the captain in irons, a treatment he had not received since he had been a prisoner. They immediately got under way, 22d July, 1834.

The next day when I came on deck, the captain came and spoke to me in a very affectionate manner. I knew by his manner he grieved to see me in the state I was in; he is a fine man, and merits this our opinion of him. I requested him to let me have the papers which were taken from me the day before, when they were searching me; he directed them to be given to me immediately. I begged of him to inform me whither he was going to take me; he replied, to the United States. I said, very well; I said to him, "You must further know that Capt. Trotter never has presented us to his government, consequently we are ignorant of every thing relative to our situation, for he has told us nothing, but finding us quiet on board of the Royal Victory, he seized us and took us away." The captain enquired in regard to my Consul. I told him that by the last news we had received, we were expecting from day to day to be conducted to London for trial, when unexpectedly they took us away. They knew by my looks that I felt aggrieved. I continued my inquiries—"I don't know by what process I am taken away; by what I see I am sent by my enemy, Trotter. I beseech you to tell me if you have brought my vessel's papers." He hesitated a moment and then replied, "Yes." I said, "I hoped in God that none were missing, because a good intention may not be expected of an enemy whose happiness depends on our misfortunes."

On the 26th of August, after thirty-five days' passage, at night we anchored at Salem, and on the 28th we came on shore, and in the afternoon were brought to the jail in Boston.

REFLECTIONS WHICH CAPTAIN GIBERT makes to the tribunal to illustrate his innocence, and that of his companions.

[WRITTEN IN LEVERETT ST. PRISON.]

I have given a narrative of occurrences from the time of our departure from Havana, and have delivered it to my worthy counsel, who in view of the case has at various times manifested to me that he is penetrated with the belief of our innocence. Those who are destitute of equal knowledge may be deceived by appearances, but reflecting men, if they are impartial, will find occasion in what has transpired in our long trial, to perceive many and serious difficulties in the way of believing that we were the authors of the robbery of the Brig Mexican.

The Panda was a swift sailer, making seven to seven and a half knots on the wind, and eleven to eleven and a half with the wind free. We had a fortunate voyage, by reason of the free winds which blew from S.S.W. and W.S.W. On the 23d day of September we were south of the Cape de Verde Islands, when a strong breeze took us which bore us rapidly to Cape Mount. We arrived at Nazareth in the first days of November.

Having gone to Prince's Island for the recovery of the health of the crew, and being consigned to Colonel Don Jose Ferreira, Governor ad interim of that Island, this gentleman sent the sick of the crew to the house of a physician with nurses to attend them. Myself, Don Benardo and the other mate Don Augustin he sent to one of his estates near by, and sent aboard four of his slaves to take care of the schooner, in company with three of her crew, and the custom-house guard, which generally consisted of two.

We remained at Principe from the first days of January until the 9th of February, during which time the negroes and guard were always aboard of the

schooner, the hold was open and empty, and they could enter and inspect every part of her, as a man may his own house, and I now declare in the most solemn manner that I returned not on board until the day before we sailed on our return to Nazareth. Moreover three English vessels of war were anchored on the west side of the Island; two of them a steamboat and frigate passed in front of the port, and they would of course observe with their spy-glasses the vessel lying in the harbor of the city, being the principal one of the Island. The Governor told me previously to this that the commandant of the steamboat had informed him that a Columbian schooner had robbed an American brig. I ask whether I, surrounded by so many risks, could have remained a cold spectator, if I had had $20,000 aboard? For so says Jose Barela, a native of Cumana, who now says he is a native of Marguerita, and that his name is Jose Perez. He gave me the first name at the Havana, as appears by the roll of the vessel. He says moreover, that I disposed of $9000 in the Island of Principe. I was sick in the nearest house of my consignee; this gentleman is the wealthiest inhabitant of the Island; he is a great friend of the English nation, to which he has rendered distinguished services, for which the English Government have conferred on him an order of Knighthood. He is treasurer and Chief Judge of the Islands of Principe and St. Thomas. To dispose of such a sum, I must necessarily have had an understanding with him, my consignee, the only person I knew, as I did not go out of the house from the time of my arrival until my departure. He knew that I had brought a valuable cargo and $3500 from Havana, which were more than sufficient to purchase the homeward cargo, and if I had disposed of $9000, would this gentleman have had no suspicions? Would he have exposed himself for my sake, seeing such an amount of money, which had been kept from his knowledge, and that also of a person who was a stranger to him, for this was the first time of my visiting the Island? To this American captains can answer, who are acquainted with Don Jose Ferreira, and such there must be in Boston. And in so long a period would not the negroes and custom-house guard have met this pretended money?—Would not the said negroes in working as they constantly did on board, have got some scent or rumor of it?

And to take from on board the sum of $9000, was this possible without the knowledge of the said negroes and guard? Could this be done without its being discovered and that more remained? and the news, which fly from one principal port to the other in the west at a short distance, where the inhabitants of the city have their plantations, which are constantly visited by the English, as that is the place where the latter take in fresh provisions. Would not those have scented something? Would they not on the slightest suspicion have come and instituted a rigorous search of the schooner?

The schooner was left in charge of the carpenter at Nazareth, because I and Don Bernardo were on shore sick. The second mate had absconded, and the boatswain was put in irons for embezzlement and neglect of duty. When the Panda blew up and sunk in firing on the king's town, among the 40 English, thrown from her into the water, and about to be killed by the armed natives, was captain Trotter, whom we then again saved by our intercession with the King.

Perez says that I sent to bring, of the $11,0000, which we had buried after our return from Principe, $6000, with orders to leave $5000, and to bury it. If we had been pirates, should we have remained so tranquil as we were during seven months from our arrival until the seizure of the schooner?

If we had been pirates, should we have conducted our business at a point so near the English vessels, which are continually entering and leaving the port in the west of the Island of Principe?

If we had been pirates or the slightest suspicion of it, would the English vessels which were on the coast, have left it to Trotter during seven months to come from the Cape of Good Hope to take us?

Again I ask, if we had been pirates, should we have observed such a conduct in respect to Trotter, the destroyer of our vessel? should we have interceded to

save his life and that of the officer who accompanied him, and of the unfortunate men, who were aboard when the vessel blew up?

I ask if in the space of four months that the five Portuguese were with us, alternately like the other sailors, between my factory and vessel, with no work to do, would not they have discovered something of the robbery and the money? Idleness is the mother of the vices; there was plenty of ardent spirit aboard; there were several youths among the crew, very fond of those conversations, which originate disputes and falling out. Let those who are acquainted with the character of sailors answer the question. Let such say whether with any sailors with the bottle by their side, a matter of piracy and such a sum of money could have been so long concealed?

It is to be observed that when the schooner was seized my people brought away the boat, which they delivered to me. Could such subordination have been maintained among pirates, who found themselves without a vessel, and in a state of abandonment on the coast of Africa? The captain commands his crew; they go with his boat to seek for $11,000; they take $6000, leaving for me $5000 buried, so says Perez. The $9000 spent by me at Principe, and the $5000 left buried make $14,000, leaving only $6000 to be divided among all the rest! Would pirates have been content with such a division? Could the captain expect that his men, sent on such an errand with his only boat, would return having exactly fulfilled his orders, especially when Perez as he says was among them? Would they not have gone off with boat and money? Would Perez have minded further either Nazareth or the saint whose name he bears?

Perez did not contrive this part of his story well. He ought to have said that I went with the boat. In this manner he would have better colored his falsehood. Is it possible, I will not say among pirates, but even among good people, supposing their vessel to be on the coast of Africa, and the captain to have an ordinary sum of money some leagues off, is it possible that he could think of trusting it to any one without going himself in person or sending some confidential officer?

I will not now delay with a minute relation or reasoning. If I had known that I could present them to the Court, as I am now called upon to do, I would have prepared them with pause and reflection, for I have had sufficient time for the purpose. I would not have omitted the smallest particular. I now write running and seek only the most material.

After I was taken prisoner, I was carried on board the Curlew, I had a good berth to myself, excellent fare both as to food and drinks, and very courteous treatment. But I was asked to confess and testify that the Panda had robbed the Mexican of $20,000. I was regaled with liquor, and encouraged with the offer of $1000, and a conveyance to my country, to make me impart this piece of information. Trotter in presence of his interpreter served the liquors in his cabin, and then proposed that I should say that the Panda robbed the Mexican of $20,000. My answer was not agreeable, and we went on deck, after this my people were called one after another and regaled with rum and tempted with offers by the said Trotter.

When I returned in the Curlew from St. Thomas and Fernando Po, I heard the infamy of Perez. A seaman belonging to a schooner from Cuba, informed a friend of his, a seaman of the Esperanza, and this person recounted over the following particulars. The Spanish sailor had acted as interpreter in taking the declarations of the people of the Panda. None of them declared any thing save one. Him by means of drink and promises they seduced and made him testify what they pleased, regulating themselves by a Gazette of North America, which related the robbery of $20,000 from an American brig. Tell this, said the sailor, to captain Gibbert, and tell him too that if Trotter can seduce two or three more they are all lost, however innocent they may be, but said he there was one missing. They sent for him at Cameroncs and brought him. They took his declaration, but they did not call me to act as interpreter. It appears that now they distrusted me." The seaman of the Esperanza answered that he would relate the whole to me; and inquired the name of him, who had made a false dec-

laration. The Spanish sailor replied, "his name is Jose Perez, native of the Island of Marguerita."

We returned from the river Bonny, (where Trotter discharged some of the Esparanza, as he had previously done, some of them in Principe,) and arrived at Fernando Po. At this time many persons aboard the Curlew had said to me, "why did your people fly from the schooner when she was taken? If there had been any one aboard to present the papers, captain Trotter would have been very cautious how he carried the schooner off." "I replied that there was no officer but the carpenter aboard, and that as the boats had made a brisk fire of musketry, my few and infirm people were frightened, and that captain Trotter had not waited for the captain to present himself with his papers, but had enraged the natives by firing cannon shots among the canoes, and they prevented my going to him." All this they said was true, and therefore it is not true, as Mr. Quentin states, that Trotter at this time considered us pirates.

While we lay at Fernando Po I learned the following, that while we were in the port of Principe, Trotter said that "he detained the people of the Panda as an apology to his Government for the loss of the officers and men who had perished in the blowing up of the Panda. He said he would not mind the paying for the vessel, as he might lose his commission and perhaps his head." He had made a rash and unprovoked attack on a peaceable nation without any lawful cause, and had in so doing sacrificed the lives of officers and men. It was not therefore without reason that he expected the chastisement of his Government, if he did not contrive some color of justification for these proceedings.—Making us pirates would transmute acts infamous and punishable into acts justifiable and honorable!

The above declaration of Trotter was communicated to me by the boatswain and the cook of the Esperanza, and it appears in a writing or journal, which they kept from the time they were seized and made prisoners until their arrival in England, where they delivered it to their consul at Portsmouth, and he remitted it to the Portuguese Consul General, who resides in London.

At that time therefore, Trotter had not thought of sending us to North America. In the same journal appears also the many offers which Trotter made, and the $1000 which he proposed to the said boatswain, Philip Reynes, if he would swear that we were pirates, and that Don Bernardo de Soto, and four others, the carpenter and three sailors, (which the Esperanza received at Nazareth and conveyed to St. Thomas,) had sums of the money on board, which we had robbed from the Mexican. This proposition was made directly by Trotter, as he had no occasion for an interpreter, Philip Reynes speaking English perfectly.

In the same journal appears in the precise terms the many offers, and the $500 which said Trotter proposed to the cook of the Esperanza to induce him to testify as he had requested the boatswain to do, and in the same journal appear various other things which have a relation to us.

I was informed that the Governor of Fernando Po observed to Trotter, that his responsibility was very great, that he ought to consider well his position, that he might avoid an unhappy result, which would involve his ruin and that of his family; that he, the Governor, could not approve of the capture of the Panda nor the Esperanza. Already his first officer or Lieutenant of the Curlew had declared to Trotter that he would not be responsible in any manner whatsoever for his operations. In consequence of these things, Trotter sent the Esperanza to St. Thomas to see if they would receive her back again, and he found himself charged with a protest of 48000 milreas, made by the captain and master, Don Cosmo Roderiguez, and presented to the Governor of St. Thomas that it might take a due course of law, purporting that by reason of Capt. Trotter's having been wanting to his word that he would leave the schooner at that port, and having carried her off, he the master of said schooner, no longer claimed nor would receive her, but demanded the sum expressed as the value of vessel and cargo; inasmuch as captain Trotter alleged no other ground for her capture than that she had brought five individuals, who were abandoned

without a vessel on the coast of Africa, and in a state of misery in Nazareth, and to whom, having the feelings of a man, he could not refrain from giving some clothes and a passage from the coast to St. Thomas. This protest I myself copied.

When Trotter went to Cape Lopez after our capture, and sent his boats ashore with twenty officers and men, and the same were made prisoners by the King, the officer who returned to tell what ransom the king required, was wounded in the arm which he had in a sling, he was quite naked, his clothes being torn and hanging in strings. Trotter turned pale when he saw him, this officer told Trotter if he did not send the goods which the king demanded the whole of the prisoners would on the next day be sent inland to be put to death. Trotter sent several boat loads of goods ashore, and that being done the twenty men, including four officers, returned on board. This fact manifests the character of those natives, and confirms what I have expressed respecting the saving of the lives of Trotter, his officers, and his unfortunate men, on the occasion of the explosion of the Panda.

Captain Trotter remained much irritated at this event. All the people wished to return to England, three years and a half of cruising being now completed, and so many prisoners aboard. At length they prevailed over him, and to this event it contributed much that Trotter was sick. If it had not been for this I believe that we should be cruising on the coast of Africa at this moment, for sure I am that Trotter would not have left until he was obliged to do so. Let Mr Quentin tell to others that the motive was the waiting for orders from England; but let him not tell it to me, for I am sure that I know better what passed on board the Curlew, than he who was mate [Piloto] of the prize schooner Esperanza.

While we were aboard of the Curlew in the harbor of Portsmouth, viz. about ten or twelve days, great disorder and laxity of discipline prevailed, many women came on board and remained in the hold of the brig. The sentinel, who was on guard over us at the forecastle, asked one of the prisoners to take his place while he went to pass the night with his mistress, which the prisoner consented and actually stood sentinel over his fellow prisoners. There were again and again opportunities for us to have escaped; we were advised by innumerable persons to do so, and had offers of assistance, but we would not, we wished nothing but to be tried and afterwards to obtain of Trotter compensation for our loss and damages.

Can it be that men are pirates who despised all those opportunities, and observed a conduct so opposite to that of pirates, desiring nothing but that the Government should take us to a trial? Was it ever seen that pirates were detained eight months aboard a vessel, and indulged with liberty as we were?—And if Trotter could have proved us pirates would he not have announced us as such in the public papers? Would he not have delivered us to his Government in order that he might obtain his reward? Trotter was afraid to have us tried in his own nation.

On the 16th June 1834, we passed from the Curlew aboard of the Royal Victory. In a few days Trotter came aboard, and made dispositions in respect to us. Being divided into two parties, these parties were alternatively free and shut up in a place in the bow. We therefore depended still on Trotter although we were aboard the Royal Victory.

Some of the seamen of the Curlew came aboard, and the master at arms informed himself respecting us, and having observed our conduct he opened the door and we had the whole ship for a prison. He said it was not possible that we were the bad men that Trotter represented. At this time we were all reassembled, and learned in detail the seduction of Perez in substance as he himself stated it to Mr Badlam. God has permitted this to be.

In a few days they took us suddenly out, and the boatswain, cook and steward of the Esperanza; we were about half way to the brig Savage when the Royal Victory made signals, and we were ordered to be taken back.

Fifteen days after this we were ordered again to embark, and we were ready

with our baggage at the gangway, when the Portuguese Consul arrived and they suspended the execution of the order, and the said consul carried away in freedom the boatswain, cook and steward of the Esparanza, and the Esperanza herself was clearly discharged and placed at the disposition of her owner. Then it was that the Portuguese Consul learned that our Consul did nothing for us, and that to my last letter he had replied verbally asking, "whether I could not call at his house?" I learned that he was an Englishman and a friend of Trotter. The good Portuguese consul then did what he could for us, and by the last information we received, we were expecting every hour to proceed to London, when they seized and carried us from the Royal Victory, keeping us concealed under the vessels at anchor, so that those on shore could not see, and especially the good Portuguese consul, whose house was so situated that he might otherwise have seen us. In this way we were embarked on board the Savage. Here we were confined in a sort of cage in the bow, as if we had been tigers, and ironed. This had never been done to me before, it was to make a show and to deceive the inhabitants of these States.

At Salem many persons came on board on the 27th day of August, the first day after our arrival, and the doors were flung open for them to examine us.—They eyed us a long time, among them were some individuals of the crew of the Mexican. They said, (and I believe that the mate of the vessel was among them) that there was "nobody they knew here," and after they were gone the corporal of Marines of the Savage who had the care of us and the sentinel, an old man who speaks some Spanish, told us that those individuals said that they did not know any of us, and both the corporal and sentinel congratulated us, for they were kind-hearted men. On the 28th we were taken to the court in Salem. Mr Quentin had gone on shore before us, and without doubt had prepared the minds of the people, and of the witnesses. He is the agent of Trotter; and he was the only person of the officers and crew of the Curlew whom Trotter could induce to come as a witness against us. He has sworn to many things which are not true, and has concealed many things, which would have been in our favor. The like is true of the two Portuguese witnesses, Simon Domingo and Anastasio Silveira. They testified in many particulars the reverse of the truth and of what they had stated to us that they should testify. At the examination in Salem a great wrong was done to us, a wrong which very possibly has taken our lives. Perez was present when the mate and colored man pointed out some of us. Perez understands and speaks English, and it was easy for him to point out the same. By this rehearsal, the witnesses were prepared to play their parts at the trial. In our country they would not have been permitted to see us nor to see one another until they had given their testimony separately and finally in the trial. The coincidence between Perez and the witnesses of the Mexican, was immediately considered by all as decisive proof of our guilt, but they did not know that Perez understood English.

At the trial in Boston the mate and four others swore positively that they knew some of us. This they might well say, because they had seen as above related, and they had had time to transfer their recent knowledge to the time of the piracy, and to condense their imagings into facts. Fortunately for us three of these witnesses have been proved to be false, and if the said corporal and lieutenant of the Savage were here, I believe all the evidence of the people of the Mexican would be cut off.

There must be people in Salem, who were aboard when those persons were there, and know that they said they did not know any of us. I earnestly supplicate them to pity the unhappy lot of seven individuals (among them four fathers of families) who are suffering unjustly. I again supplicate them to disclose the facts to our counsel. Communicate them, worthy inhabitants, whoever knows them, if not personally, by writing, for you may one day receive the benedictions of our families.

As to Perez, I have to observe that if his evidence were true, he would not have told so many falsehoods as were detected in the very presence of the tribunal. He swore falsely there and at Salem that he could not read. He can

not only read as was proved, but also write. He either committed perjury in court or he lied to Mr Badlam in saying that all he said of the robbery was false, and that the English gave him much wine when he testified at Fernando Po, yet in the court he declared that the English did not give him rum nor other drink when he testified against us, and that "the scoundrel who said it was a liar." He described himself, for he had said it to Mr Badlam. His story was studied from the American Gazette, containing the captain of the Mexican's account how he was robbed, for this paper has been with Perez,—Barela, ever since he was taken, which is upwards of seventeen months.

Perez is a native of a country the most inimical to Spaniards, viz. the Island of Margucrita. He knew that I would not receive him if he told me the truth, and he therefore falsified his country and his name.

At Fernando Po the poisoning of the boatswain was generally attributed to Trotter, and it was imputed to him in the dying declarations of the boatswain himself.

The death of Manuel Delgado in the prison of Boston, manifests strongly the corruption of Trotter. No man cuts his throat without a powerful motive. He said among other things that Trotter had seduced him, that he had not performed his promises; that we were suffering unjustly by his means and Perez's; that he was undone forever, and for this reason was going to kill himself, that his companion Perez had a razor sewed in the collar of his jacket, with which he would do the same. This was the declaration which Francisco Ruiz gave to the inquest of this city. The interpreter was Mr Badlam. They sent off in haste when they heard of the razor of Perez. We never knew the result.

The captain and mate of the Mexican say they were robbed by a schooner which had on board 60 or 70 men. They say they were within 30 or 40 yards of the pirate, and the mate entered in his log that the pirate had 70 or 80 men. We had, as appears by the roll, 30 men, from captain to cabin-boy. Therefore it could not have been us who robbed the Mexican.

I conclude declaring that all I have stated is pure truth, sworn with my whole heart, and that we are innocent of the crime for which we are condemned.

PEDRO GIBERT.

Prison of Boston, Dec. 15, 1834.

Extract from the Portsmouth, (Eng.) Chronicle, dated June 7th, 1834.

On Thursday the *Curlew*, 10, Commander H. D. Trotter, arrived from the West Coast of Africa, with the *Esperanza* schooner, which she detained at St. Thomas's, in the month of October last, for having been piratically employed, and has brought her to England to be condemned.—The *Curlew* left Ascension on the 22d April, leaving there the *Isis*, 52, Captain Polkinghorne, and *Lynx*, 4, Lieut. Huntley; the former was to sail for the Cape of Good Hope, and the latter, when refitted, for the West Coast. The *Fair Rosamond* had left Ascension for the Bight of Benin; the *Griffin* was in the Bight; and the *Pelorus* at Prince's Island. The *Trinculo* arrived at Ascension, from Prince's Island, and sailed again for the Cape, during the *Curlew's* stay at the former place. The *Forrester* was at the Cape. The *Curlew* touched at St. Michael's on the 13th May, and sailed thence on the 15th. Perfect unanimity of political feeling prevailed there—a sincere attachment to the cause of Donna Maria; the Island was in the undisturbed possession of her troops. The *Curlew* put into Plymouth on Sunday, and left for this port on Monday morning.—Lieuts. De Saumarez and Dixon, R. N., and Lieut. Barnes, R. M., came passengers.—She came up the harbor to-day, to be paid off into ordinary, after having been in commission four years and three months.

Bernardo de Soto was next called, and to the usual interrogatory of the Clerk, responded by a firm declaration of his innocence, and presented a paper to the Court, of which the following is a correct copy.

DE SOTO'S PROTEST.

To the President and assistant Judge of the Criminal Court in the City of Boston, and District of Massachusetts.

Bernardo de Soto standing accused before the court of the crime of piracy, protests before the court, the whole universe, and before the Supreme Being, that he is innocent of this crime.

The city of Corunna is my birth-place; my father, Isidore de Soto, Manager of the royal revenue in said city, gave me a virtuous education conformable to his standing. From the age of fourteen, I cultivated the art of navigation, and by application and good conduct, at the age of twenty-two, I obtained the degree of captain in the India service. After a regular examination, the correspondent diploma was awarded me.

I was married to Donna Petrona Pereyra, daughter of Don Benito Pereyra, a merchant of Corunna. I continued my profession, sometimes in a vessel of my own, and sometimes in vessels belonging to others, giving every where proofs of my probity, good conduct, humanity, and regular habits; and the correctness of this statement not only my own countrymen, but the Anglo-Americans can verify. In 1832, I became connected with Don Pedro Gibert, merchant of the Havana, in a lawful voyage to the coast of Africa, and was interested therein to the value of the vessel, ceding the command to him on account of his superior knowledge in mercantile transactions, and his being more interested in the voyage, while I was constituted first officer, being better instructed in navigation.

We set sail from the Havana on the 21st day of August of the same year, in the schooner Panda, lawfully despatched and provided with all the necessary documents, and proceeded on our voyage, until we were in from 30 to 34 north latitude, and longitude of 41, having experienced fresh breezes and clear weather, wind between S. and W., the greatest way of the vessel being eleven and a half knots. From this point we laid our course direct for the Cape de Verd Islands, with fresh breezes from N. to E., without having had a single hour of calm weather. On the 23d of September, about which time it is well known to all nautical men, the equinoctial gales happen, we found ourselves to the southward of said islands, when there came on a violent storm from the northwest, which did not allow us to carry more sail than half our jib, which incident is the cause of my recollecting it. On the 27th of the same month, we made Cape Mount, not having spoken a single vessel on our voyage; having come to anchor at three different places on the coast, trading for what we needed on board.

On the 35th of October, we set sail from Petit Sesters for Nazareth, where we came to anchor on the 8th November. Five days after, we landed the cargo by the order of the captain, and the same was taken to his factory.

On the 4th of June, 1833, our vessel was boarded by four boats, manned with armed men, both white and black, frightening with the bullets from their musketry, the few people on board, who were in a sickly condition; they carried away our vessel, leaving us reduced to be the slaves of savages.

On the 15th of the same month, Captain Trotter being commander, the Panda, two days after having come to anchor opposite to the town of Nazareth, commenced hostilities with the negroes, demanding Captain Gibert and the slaves, (which they presumed he had purchased for his vessel,) that they might make a prize of her. At the second fire, whether from want of precaution or other cause, a spark from the match with which they had touched off the pivot gun, entered the magazine, which blew up, and reduced to ashes the stern of the vessel, from just abaft the mainmast.

BERNARDO DE SOTO.

Francisco Ruiz, on being called, firmly protested his innocence, desired two days to prepare his statement, and was informed that the Court would then receive it.

RUIZ'S PROTEST.

[On account of the insanity of Ruiz, we have been unable to procure any statement from him.]

Manuel Boyga said he had enough to say—in the presence of God, of this tribunal, and of the whole world, he declared his innocence. He presented a written paper which was also read, and which we give, as follows:

BOYGA'S PROTEST.

Senor President and assistant Judge of the Criminal Court, of this City, of Massachusetts.

Manuel Boyga, accused before this tribunal of the crime of piracy, protests before it, before the whole universe, and the Omnipotent Being, that he is innocent of this crime.

The city of San Lucar Barrameda is my native place; my father was Francisco Boyga. I was united by the church with Petrona Villarba, and have three children.

We sailed from the Havana on Tuesday, the 21st day of August. We made land at Cape Mount in thirty-seven or thirty-eight days. We anchored in three different places, and bought what we had need of to continue our voyage. On arriving at Nazareth we found an English hermaphrodite brig, and obtained some medicines from her. In five days we unloaded the cargo, and the captain established his factory. At the end of seven months, we were attacked by four boats manned by armed men, both white and black; frightening the small and sickly crew with bullets, they carried off the vessel. In nine days after robbing us of our vessel, Trotter opened hostilities with the natives, demanding Captain Gibert and the negroes, which, in his conception, our vessel had bought, in order that he might condemn her. At the second cannon-shot which Trotter fired from the Panda, she blew up and was burned.

I went to St. Thomas in the schooner Esperanza. I was there with four of my companions, and the governor did not hesitate to deliver us up, nor did we to deliver up ourselves, for we had done nothing. The schooner Esperanza was seized, and we were passed on board the Curlew. They took me into the cabin, where was a captain of a vessel, named Master *Facio*. He inquired of me whether I had passed in the schooner Esperanza to St. Thomas, and said if I would tell the truth of all that they asked me, they would give me liberty, and the wages which were due to me from the time of my sailing from the Havana. Having put to me many questions, whereof I was wholly ignorant, he rose up very furious, threatening me that I should be carried to Fernando Po, and there be shot, with the rest of my companions. What he wanted of me was that I should weave a false testimony against my unhappy companions. He ordered me to be taken back to the schooner, spitting in my face. They never put me any further questions during my imprisonment. We arrived in England. Trotter presented us not to any tribunals, and he hid from the public that he had us there. This being so, let him say we are pirates. If he had thought we were, he would have had us tried in England, for his Jose Barela says that we robbed an English vessel. But Trotter knew better than to bring us to trial there; the villain knew that all the villany which he had done to so many innocent men, whom he had kept in prison so long, would be laid open. This is the only reason why we were sent to the United States. The calumny which he has raised up against us is false, and the same is the opinion of us, which Trotter took care to convey by Quentin to the people of Salem. Nevertheless I say no more than that they have acted against us upon mere presumption. For my part I forgive them. But it will not be thus with my brothers, my wife, and my children, who will cry to the Supreme Being for my

life, sacrificed by the calumny and false witnesses of Trotter, and by the rash dresumption of some witnesses of the Mexican. MANUEL BOYGA.

MANUEL CASTILLO, the Peruvian, who has a noble, Rolla countenance—exclaimed, raising his hand—I am innocent in the presence of the Supreme Being, of this assembly, and of the universe. I swear it, and I desire the Court will receieve my memorial.

This was also translated and read by Mr Child—it is as follows:

CASTILLO'S PROTEST.

Senor President, and assistant Judge of the Criminal Court, of the City, and District of Massachusetts.

Manuel del Castillo, accused before this Tribunal of the crime of piracy, protests before it, before the whole universe, and before the Omnipotent Being, that he is innocent of this crime.

The city of Lima is my native place. I was united by the church with Rosa Garcia, in the city of Cadiz.

We sailed from the Havana on the 21st of August, 1832, in the schooner Panda, for the coast of Africa, and in thirty-seven or thirty-eight days arrived at Cape Mount. Having touched at several places to obtain necessaries, we sailed from Petit Sesters for Nazareth, where we anchored in the month of November. In the month of June, 1833, our vessel was boarded by four boats, which made a sharp fire of musketry upon us, and put the small and sickly crew to flight, and carried off our vessel, leaving us to become the slaves of savages.

On the 13th or the 14th of the same month, Trotter came back and opened hostilities upon the town, demanding Captain Gibert and the negroes, which in his conception we had bought, for the purpose of condemning the vessel. At the third fire, from the want of precaution or from the drunkenness of the men, they blew up the vessel.

The Captain not having means to support us, I with five others determined to leave for Calabar, where we expected to find some Spanish vessel which was to take us to the Havana. We asked Captain Gibert to pay us our wages, knowing that he had brought money from the Havana. We consented to take less than was due, because we did not wish to leave the Captain and the rest of our companions destitute. At that time there was due to me ten month's wages at $20 per month—$200. I agreed to take $150, and the others in proportion. We purchased a boat and arrived at Cameroues, and from thence we went to a place called Bimbia. Here the natives took from some of us our clothing, and one night they assembled to rob us and were informed that whomsoever they robbed it was their custom to kill. The boatswain advised us to throw our money into the sea, which flowed close to the house where we were lodged. We took his advice, and deposited our money in the water, in the first place to save us from these savages, and secondly because we thought there was a chance we might some day recover it. Perez has sworn falsely as to the reason of our throwing the money into the water. He says it was because we thought it would be the means of detecting us when we should arrive at Fernando Po. But if we had committed the robbery and had thought that we should be in danger at Fernando Po, we should not have gone there at all, for that is a British port where pirates would not be likely to go at all. Perez swears falsely as to the sum which I received. He says I had $250 of the money robbed from the Mexican. Would this have been my share out of $20,000? There were but nineteen of the crew of the Panda remaining when we left; and when Perez says the money was divided, eight had died and three had left the vessel at Principe.

From Bimbia we went to Fernando Po, intending to take passage from there to Calabar. We were at liberty sixteen days, and were then made

prisoners. Perez first gave his declaration. Trotter during five days, with promises and seduction, was instructing him out of a newspaper of Boston.

When they called me, Trotter asked me if our vessel, after sailing from Havana for the coast, had not met an American brig. I told him no; an English captain, Grout, who was with Trotter, then spit upon me and told me that I had but few days to live. Then they carried us aboard of the Curlew and put us in stocks, and the officers and sailors told us we were going to be hung. Barela remained in the governor's house, and Trotter was there.

After five days they carried us to the hospital. We might have gone away on any night, for we had no guard, and there were many boats in which we might have gone off. But we had no crime and would not go. Here the boatswain died of a poisoned cup, which they gave him to drink. Before he died, Perez came to his bedside, and asked pardon for the false declarations which he had given against him and us. He said Trotter had seduced him by promises and liquor to do it; that Trotter told him he should be set at liberty, and the rest of us hung at Fernando Po, or at the Cape of Good Hope. We went to Ascension in a transport. We were all kept in the stocks except Perez. The captain of the transport was directed by the governor of Fernando Po to ask the governor of Ascension to give Perez clothes, but he said he would not do it, that he who had promised him clothes might give them to him.

We departed for Sierra Leone in H. B. M. brig Flores. There they put us in prison. On another day they called us before the tribunal, and examined Perez, and at his farcical declaration, we all said it is a lie. They asked if we were of the Panda. We said that we were. At last, the government attorney told Perez that he was a very false fellow. He asked Anastasio Silveira, if he had ever heard us say any thing of ever having robbed the Mexican, and he replied that he had not.

We sailed to Sierra Leone, to the coast of Africa, to Fernando Po, to Principe, and finally to Ascension, and from thence for England. When we were about a month on our passage to England, Perez came aboard the Esperanza, and remained all one day. He said that Captain Trotter had told him that if he would say the Esperanza was a pirate, he would give him money and clothes, and send him to his country. We asked him how he dared to swear to a false calumny against us? He answered that he did not care for us: that he only wished to stand well with Trotter. Then we fell upon him with words, calling him the false and the base wretch that he was. He said, "You may talk, but I am not to turn back from my false declaration, though I should stand upon the gallows." We stopped at St. Michael's, where we had means to escape, once by the boats which came aboard, and another, because one night two sailors of the schooner said to me that I might embark in the boat, and get ashore. These were very friendly to me, because I washed their clothes, and we assisted them in their work. I would not go, because I had no crime. The night that we sailed from there, the sailors were all drunk, and the prisoners had to weigh the anchor. We arrived at Plymouth, and here, when we were to depart for Portsmouth, the crew were below drunk, and the prisoners again raised the anchor. It appears to me that no pirate, as Trotter calls us, would be called to work. We were masters of the vessel, by reason of the intoxication of the crew.

We arrived at Portsmouth, and we remained sixteen days on board the Esperanza, at our discretion. I and Angel Garcia went ashore with the captain of the prize, and with Quentin. We remained from 8 o'clock in the morning until the afternoon, walking about the streets, and if I had had a mind to go away, none could have prevented me. Moreover, I met a Spanish gentleman, a native of the same city with myself. He asked me what vessel I belonged to? I told him the Panda. He asked how it happened that the Panda had not been mentioned in the public papers? I told him I did not know. Then he said to me, "Don't you go aboard again, for they

are doing some villany against you. I will give you a letter of recommendation for London." I told him no, for I had committed no crime.

At length we were transferred from the Esperanza to a prison ship in the bay, without our arrival or offence being mentioned in the public papers, and without our ever being delivered up to the civil authorities or examined by them, or as we suppose, ever named to them, though we were in England a month and a half or two months.

Finally we were taken out of the prison ship in a despotic manner, and carried to the Savage, where they loaded us with chains, and enclosed us in a sort of cage, like wild animals, and treated in a manner revolting to nature. But it is of no use to complain of this. It was necessary that it should be so, in order that the good people of Salem should behold us as wild and ensanguined animals, and that thus vain and equivocal presumptions should be raised in their breasts.

Presented to the court on the following day, 28th of August, it was permitted to the captain, mate, and cook of the Mexican, and Perez, to point out, (without the least fear of God, or regard to religion or conscience) various persons of the schooner Panda. Perez is an actor, a wicked wretch, and an enemy of Spaniards.

Aboard the Savage they called Perez to the cabin, and took his declaration. They also called me. To the one who questioned me, who was an American captain, and to two gentlemen, I said that all they asked me about was a lie. I am innocent—I am innocent.

But I will say no more but this. They have acted upon mere presumption, and for myself I forgive them. But let them not think it will be thus with my parents, my wife, and four brothers. They will cry to the Supreme Being for my life, sacrificed without a crime, by the wicked false charge of Capt. Trotter, and the vain presumption of some of the witnesses of the Mexican.

I am innocent of the crime which is imputed to me.

MANUEL DEL CASTILLO.

ANGEL GARCIA said, I swear by the Almighty God, before this court and the world, that I am innocent, and also my companions here with me. He also presented a paper of which the following is a correct translation.

GARCIA'S PROTEST.

Senor President and assistant Judge of the Criminal Court, of the City, of Massachusetts.

Angel Garcia, accused before this Tribunal of the crime of piracy, protests before it, before the universe, and before the Omnipotent Being, that he is innocent of this crime.

The city Carthagena de Elefante is my native place, with a mother, father, and brothers.

We sailed from the Havana on the 21st of August, 1832, in the schooner Panda for the coast of Africa, and in thirty-seven or thirty-eight days we arrived at Cape Mount, and at three different places we traded for necessaries. We arrived at Nazareth in the month of November, and five days afterwards landed our cargo, and the captain established his factory. In the month of June, 1833, our vessel was boarded by four boats full of men, who made a brisk fire of musketry upon us, and frightened the small and sickly crew who were aboard, and carried off the vessel. On the 13th of the same month, Captain Trotter came and demanded of the negroes Captain Gibert, and the slaves, which in his conceit the vessel had bought, in order to condemn her. He began to fire upon the people, and at the third cannon-shot, owing to carelessness or much wine, which there was in the stores of the Panda, the schooner was burned, and some men lost their lives.

[The same account of the departure of this prisoner for Calabar, and his arrival and arrest at Fernando Po, is given by him as by Castillo.]

I was in the hospital, sick with an injury in a limb. Perez was the first who made a declaration at the government house, by reason of promises, and being instructed by Trotter out of an American newspaper. After my companions had been prisoners three days on board the Curlew, I was sent for at the hospital. Trotter asked me whether after sailing from the Havana, we met an American brig? I answered him, no. He then asked me why I did not say as Perez had. I told him I could not swear what I did not know. Trotter answered, "Since you will not testify what Perez has, you and your companions shall go to the Cape, and be hung." I told him I had done nothing to deserve death. They then pushed me with violence out of the cabin, and I returned to the hospital. In five days they brought my companions to the hospital, and Perez remained at liberty and in the house of the governor, and Trotter employéd six days in preparing him. This the player Perez told me himself.

In Fernando Po we had numerous opportunities to escape many nights, but we had committed no crime, we did not choose to run away. After being a month in the hospital, they gave the boatswain a drink, and this man died, raging like a mad dog. Some seamen of the Curlew told us it was poison. Before he expired, Perez came, asking forgiveness for the false testimony which he had given in his false declaration; but he said that Trotter had caused it by promises and drink, and telling him he should have his liberty, and that the rest of us would be hung. This Perez said.

We went to Ascension, and thence to Sierra Leone. Here we were brought before the tribunal, and the government attorney asked us if we belonged to the Panda; we answered, yes. He said that we should all be hung, as the captain and the rest of the crew of the Panda had been already. He asked Anastasio Silviera, if in the time he had been living with us, he had never heard us speak of having robbed any vessel, and Anastasio answered, no. The attorney told Perez that he was an impostor. Perez was recommended by Captain Trotter to the governor of Ascension to get some clothes, and he asked the governor for clothes, but the governor answered, that he who had promised him clothes, might give them to him, but he would not.

After sailing about to several places, we set sail for England. I was in the Esperanza. Perez came aboard, and in the presence of Silveira said, that the Captain had told him he must say that the Esperanza was a pirate, and then he would send him to his country, with money and clothes.

Finally Trotter is a villain and a seducer. I protest before the tribunal that Barela Perez accuses us with false swearing, and is seduced by Trotter. I say no more, than that we are condemned by false testimonies. For myself I pardon it. But think not that it will be thus with my parents and brothers, who will cry to the Supreme being for my life sacrificed without a crime by a wicked calumny of Trotter, and the vain presumption of some witnesses of the Mexican. ANGEL GARCIA.

Juan Montenegro, the last called, desired to state to the Court, and to the people here assembled, that he is innocent of the crime. The trouble has been brought on him by the villany of the English. He presented to the Court the following:

MONTENEGRO'S PROTEST.

Senor President, and Assistant Judge of the Criminal Court in this city of Massachusetts.

Juan Montenegro, accused before this tribunal of the crime of piracy, protests before it, before the whole universe, and the Omnipotent Being that he is innocent of this crime.

The city of Malaga is my native place with two younger brothers.

We sailed from the Havana on the 21st day of August, 1832, in the Schooner Panda for the Coast of Africa, and in thirty-seven or eight days, we made the land of Capo Mount, anchoring in three different places. We departed

from Petit Sesters for Nazareth, where we anchored and landed the cargo. Seven months afterwards they took our vessel, and burned it.

The Captain not having the means to support us, we went for Calabar, but before that to Camerones, and from thence to Bimbia, and from thence to Fernando Po, and were to go from thence to Calabar. We were at Fernando Po sixteen days free, until they called us into the house of the governor and asked me to say what I had not seen; and as I would not say what Trotter wished, he abused me with words, and ordered me aboard of the Curlew, a prisoner in company of my companions. There they told us they were going to hang us.

Barela remained in Fernando Po, and did not quit the house of the governor. This base fellow confessed to us that Trotter had seduced him with promises and drink; that he had no concern that he should not come out well, and we should be hung. The same occurred when the boatswain died of poison, Barela begged that he would forgive him for his false testimony.

In Ascension I told Barela that he was a wicked calumniator; and he replied, that he cared not so long as he stood well with Trotter. In Ascension we were embarked for Sierra Leone. We were prisoners there two days in the jail, and we went from thence to the house of a justice. Barela declared alone, made his false declaration, which Trotter had taught to him from an American Gazette. We were exclaiming loudly all the time, that what he said was false. The government attorney asked us two or three times, if we were of the Panda. We replied, "Yes, Sir." Barela is a wicked person, for he has accused us with false testimony; and the government attorney himself told him that he was an impostor.—From Sierra Leone we sailed for Fernando Po, and Principe, and from thence in the Trinculo for Ascension; and were there transferred on board the Esperanza, in which we departed for England. We were two days in the Island of St. Miguel; and I might have gone away; but I would not, for I did not find myself guilty.—In Portsmouth we were sixteen days on board the Esperanza. Without any announcement of us to the public, we were taken from the Esperanza to a prison-ship in the bay. At the end of a month and a half, they take us out with all the circumstances that despotism required, and which suited the purpose, to make a false appearance of that which was not, and put us in prison as if we had been bears. The manner of our transportation to the United States was infamous. This was done to us, who had mostly enjoyed freedom from irons and close confinement before, in order that the people of Salem might see us as wild and bloody beasts, to give rise in their breasts to equivocal presumptions.—Arrived at Salem, Barela, and those of the Mexican, in one another's presence, swore to some of us without any fear of God. Captain Trotter is a wicked villain, and has raised up this wicked, false charge, and seduced Barela with drink, money, clothes, and promising him liberty.—All that was testified against us is perjury or mere presumption. I forgive these false witnesses. But my brothers will cry to the Supreme Being for my blood, shed by means of the wicked, false charge of Trotter, and the empty presumption of some witnesses of the Mexican.

JUAN MONTENEGRO.

SENTENCE OF DEATH.

Judge Story then passed the sentence of the law, as follows:

Prisoners at the Bar:

The motions made by your Counsel for a new trial and in arrest of judgment having been overruled by the Court, and all other matters disposed of, it is now my painful duty to pronounce the sentence of the law upon each of you, for the crime whereof you severally stand convicted. I shall do this in as brief terms as possible, being conscious of the difficulty of addressing you through the medium of an interpreter only. The sentence is, that you, and each of you, for the crime whereof you severally stand convicted, be deemed, taken and adjudged to be pirates and felons, and that you, and each of you,