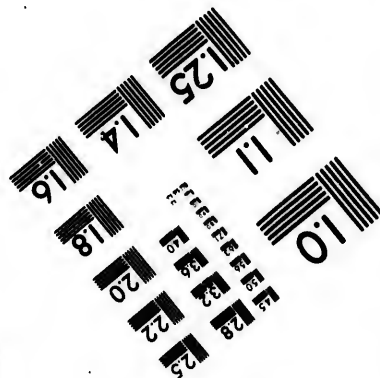
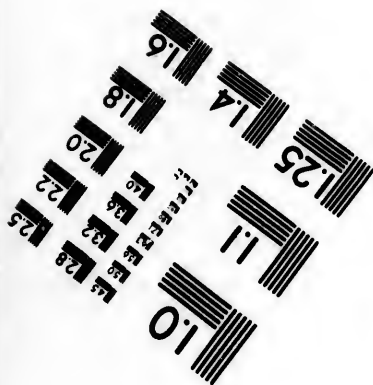
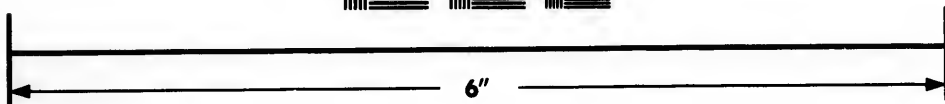
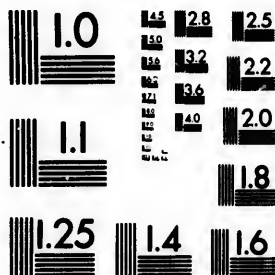


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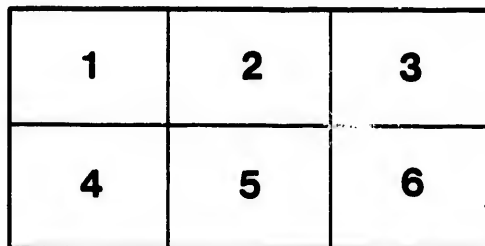
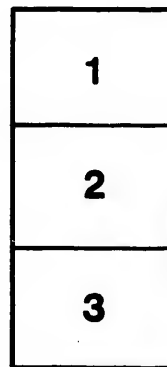
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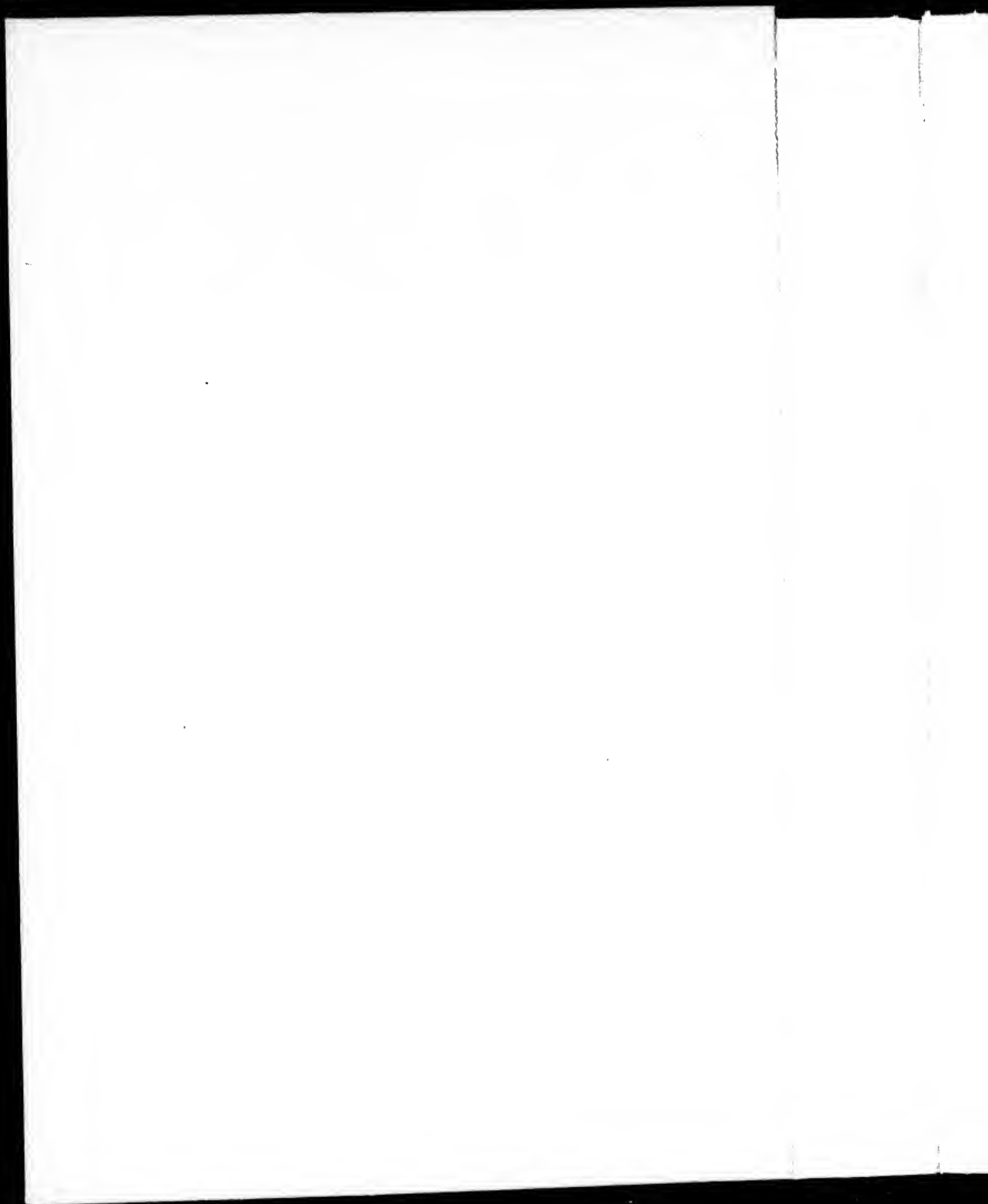
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JUDGMENT

OF

HIS HONOR JUSTICE RITCHIE,

IN THE CASE OF THE

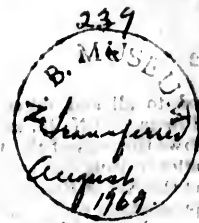
CAPTORS OF THE AMERICAN STEAMER

CHESAPEAKE.

ST. JOHN, N. B.

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JUDGMENT

OF
HIS HONOR JUSTICE RITCHIE,
In the case of the captors of the American Steamer Chesapeake.

IN RE

**DAVID COLLINS,
JAMES MCKINNEY,
and
LINUS SEELY,**

} Prisoners confined in the Common Gaol of
the City and County of Saint John.

This was an application made to me on behalf of the above named prisoners, under the Act of Assembly 19 Vic. cap. 42, entitled "An Act for better securing the liberty of the subject;" and sufficient cause having been shown to me, I did, by order in writing, require and direct the Keeper of the Jail of the City and County of Saint John to return to me whether or no the said parties were detained in prison, together with the day and cause of their having been taken and detained; to which order the Sheriff of the City and County of Saint John, the Keeper of said Jail, returned to me that the said parties were confined in the said Jail under a warrant from Humphrey T. Gilbert, Police Magistrate and Justice of the Peace for the City and County of Saint John, from the following dates: McKinney from the 26th day of December last past; Collins from the 27th of December; and Seely from the 1st day of January last past, except when ordered for examination by the said Magistrate, up to 11 o'clock or thereabouts of the morning of the 28th of February, then instant, when they were taken to the Office of the said Magistrate; that the said Collins, McKinney and Seely were committed to the said Jail at said day on the 25th day of February, then instant, with warrant or commitment, which the said Sheriff cannot verify; and this he returns is the cause of the detaining of the said parties whose bodies he says he has ready.

The defendant or respondents do not appear under the hand and seal of the Province of New Brunswick, a Justice of the Peace of the City and County of Saint John, and Police

Magistrate for the City of Saint John, and dated 25th February, 1864, and is directed to any Constable or Peace Officer of the City and County of Saint John, and to the Keeper of the Jail, whereby the said Constable is directed to convey said parties in the words of the Warrant "charged by me," H. T. G. Esq., P. M. of N. B., and one of H. M. J. P. for N. B., acting under a Warrant under the hand and seal of His Excellency the Honorable Arthur Hamilton Gordon, C. M. G., Lieutenant Governor and Commander in Chief of the Province of N. B., bearing date the 24th day of December, A. D. 1863, and made and issued in pursuance of the Act of the Imperial Parliament, entitled "An Act for giving effect to a Treaty between Her Majesty and the U. S. A. for the apprehension of certain offenders," and in pursuance of and in accordance with the said Treaty and Act Requisition having been made to His Excellency on behalf of the said U. S. A. by J. C. Howard, Consul of the said U. S. A. at the City of Saint John, Province of N. B., stating that John C. Braine, H. C. Brooks, David Collins, John Parker Locke, Robert Clifford, Linus Seely, George Robinson, Galbraith Cox, Robert Cox, M. H. Parr and James McKinney, charged upon the oath of Isaac Wilket and Daniel Henderson with having committed the crimes of Piracy and Murder on the high seas, within the jurisdiction of the said U. S. A. on the 7th day of December, instant, all or some of them were now in the City of Saint John, within the Province, and requesting that the said parties may be delivered up to justice according to the provisions of the Treaty, such Warrant direct-

ed to all and every the Justices within the Province of N. B., and is as follows, (here follows the copy of the Warrant) which Warrant after reciting the enacting part of the 1st Sec. of the Act of Parliament 6 and 7, Vic. Cap. 71, proceeds to recite that in pursuance of, and in accordance with, the said Treaty and Act, a Requisition had been made, as before set forth, and then proceeds:—"Now know ye, that pursuant to the powers in me vested, in and by the said Act of Parliament, I do hereby by this Warrant, under my hand and seal, signify that such Requisition has been so made, and hereby require and command all Justices of the Peace and other Magistrates, and other Officers of Justice within this Province, within their several jurisdictions, to govern themselves accordingly, and to aid in apprehending the said parties (naming them as before) so accused, and committing them (naming them) to Jail for the purpose of being delivered up to Justice according to the provisions of the said Treaty; and hereof they will fail at their peril." And the Warrant of the said H. T. Gilbert then proceeded to recite that on the receipt of such Warrant, and acting under and by virtue thereof, and in pursuance of the said Act of Parliament, he did examine Isaac Willets under oath touching the truth of the said charges set forth in the said Warrant; and upon the evidence of the said Willets, in pursuance of the said Act of Parliament, he did on the 26th day of December last issue a Warrant under his hand and seal for the apprehension of said persons upon the charges aforesaid, a copy of which warrant is then set out. It is dated 26th Dec. 1863, directed to any Constable or Peace Officer of the City and County of Saint John, and proceeds: "Apprehend, John C. Braide and (the parties before named,) bring them before me, or some other Justice, at the Police Office in the City of Saint John, to answer the complaint of Isaac Willets, of the State of New York, in the United States of America, master mariner, made on oath, for raving on the 7th day of December, A. D. 1863, on the high seas, about twenty miles North North East of Cape Cod, in the U. S. A., on the 7th day of December, aforesaid, with force and arms, maliciously, wilfully, feloniously and piratically made an assault upon the said Isaac Willets and others the mariners then on board and in charge and command of the steamboat or vessel named the Chesapeake, the said vessel being a vessel belonging to one Henry B. Cromwell, a citizen of the U. S. A., and being of the value of \$80,000 of lawful

money of N. B., having on board a cargo of the value of \$80,000 of like lawful money, and the said vessel being then on a voyage from the port of New York in the U. S. A. to the port of Portland in the said U. S. A., and having then and there piratically, feloniously, wilfully and maliciously put the said Isaac Willets and others the crew of the said vessel in fear and danger of their lives on the high seas aforesaid, and having thereand then maliciously, wilfully, feloniously and piratically taken possession of the said vessel and cargo thereof; and with having then and there feloniously, wilfully, maliciously and piratically stolen and taken the said vessel and cargo upon the high seas aforesaid; and also for having at the time and place aforesaid, feloniously, wilfully, maliciously and piratically upon the high seas aforesaid killed and murdered one Orin Schaffer in and on board said vessel on the said voyage; and also for having at the time and place aforesaid with force and arms feloniously, wilfully, maliciously and piratically assaulted & wounded one Chas. Johnston; and also for having at the time and place aforesaid feloniously, wilfully, maliciously, and piratically assaulted and wounded one James Johnston, and to be dealt with according to law, the said complaint having been made and taken and this Warrant having been issued, in pursuance of a Warrant under the hand and Seal of His Excellency Sec. of hearing date the 24th day of Dec. 1863, and made and issued in pursuance of the Act of the Imperial Parliament," entitled &c. This Warrant then proceeded to set forth "that David Collins, James McKinney and Linus Seely, three of the persons named in the said Warrant, having been found within my jurisdiction, and having been arrested and brought before me under and by virtue of the said Warrant, and I having proceeded to the investigation of the charge of Piracy charged against the said named persons so brought before me, and upon the examination of the witnesses under oath touching the offences of Piracy charged against the parties so brought before me, and upon the evidence before me under oath, I do hereby under the said Act of the Imperial Parliament command you the said Constable or Peace Officers to convey the said David Collins, James McKinney and Linus Seely to the Common Jail of the City and County of Saint John and deliver each of them to the keeper thereof upon the charge of Piracy, for that they having on the 7th day of Dec. 1863, on the high seas, about 20 miles N. N. East of Cape Cod in the U. S. A., with force

and arms and piratically Isaac Willets and others the crew of the said vessel being on the high seas aforesaid, and having thereand then maliciously, wilfully, feloniously and piratically taken possession of the said vessel and cargo thereof; and with having then and there feloniously, wilfully, maliciously and piratically stolen and taken the said vessel and cargo upon the high seas aforesaid; and also for having at the time and place aforesaid, feloniously, wilfully, maliciously and piratically upon the high seas aforesaid killed and murdered one Orin Schaffer in and on board said vessel on the said voyage; and also for having at the time and place aforesaid with force and arms feloniously, wilfully, maliciously and piratically assaulted & wounded one Chas. Johnston; and to be dealt with according to law, the said complaint having been made and taken and this Warrant having been issued, in pursuance of a Warrant under the hand and Seal of His Excellency Sec. of hearing date the 24th day of Dec. 1863, and made and issued in pursuance of the Act of the Imperial Parliament," entitled &c. This Warrant then proceeded to set forth "that David Collins, James McKinney and Linus Seely, three of the persons named in the said Warrant, having been found within my jurisdiction, and having been arrested and brought before me under and by virtue of the said Warrant, and I having proceeded to the investigation of the charge of Piracy charged against the said named persons so brought before me, and upon the examination of the witnesses under oath touching the offences of Piracy charged against the parties so brought before me, and upon the evidence before me under oath, I do hereby under the said Act of the Imperial Parliament command you the said Constable or Peace Officers to convey the said David Collins, James McKinney and Linus Seely to the Common Jail of the City and County of Saint John and deliver each of them to the keeper thereof upon the charge of Piracy, for that they having on the 7th day of Dec. 1863, on the high seas, about 20 miles N. N. East of Cape Cod in the U. S. A., with force

and arms and piratically Isaac Willets and others the crew of the said vessel being on the high seas aforesaid, and having thereand then maliciously, wilfully, feloniously and piratically taken possession of the said vessel and cargo thereof; and with having then and there feloniously, wilfully, maliciously and piratically stolen and taken the said vessel and cargo upon the high seas aforesaid; and also for having at the time and place aforesaid, feloniously, wilfully, maliciously and piratically upon the high seas aforesaid killed and murdered one Orin Schaffer in and on board said vessel on the said voyage; and also for having at the time and place aforesaid with force and arms feloniously, wilfully, maliciously and piratically assaulted & wounded one Chas. Johnston; and to be dealt with according to law, the said complaint having been made and taken and this Warrant having been issued, in pursuance of a Warrant under the hand and Seal of His Excellency Sec. of hearing date the 24th day of Dec. 1863, and made and issued in pursuance of the Act of the Imperial Parliament," entitled &c. This Warrant then proceeded to set forth "that David Collins, James McKinney and Linus Seely, three of the persons named in the said Warrant, having been found within my jurisdiction, and having been arrested and brought before me under and by virtue of the said Warrant, and I having proceeded to the investigation of the charge of Piracy charged against the said named persons so brought before me, and upon the examination of the witnesses under oath touching the offences of Piracy charged against the parties so brought before me, and upon the evidence before me under oath, I do hereby under the said Act of the Imperial Parliament command you the said Constable or Peace Officers to convey the said David Collins, James McKinney and Linus Seely to the Common Jail of the City and County of Saint John and deliver each of them to the keeper thereof upon the charge of Piracy, for that they having on the 7th day of Dec. 1863, on the high seas, about 20 miles N. N. East of Cape Cod in the U. S. A., with force

and all persons, including Requisition

THE CHESAPEAKE TRIAL.

and arms maliciously, wilfully, feloniously and piratically made an assault upon the said Isaac Willets and others the mariners then on board and in charge and command of the steam-boat or vessel named the Chesapeake, the said vessel being a vessel belonging to the U. S. A. and registered in the U. S. A. according to the laws of such States, and belonging to one Henry B. Cromwell a citizen of the U. S. A., and being of the value of \$60,000 of lawful money of N. B., and having on board a cargo of the value of \$80,000 of like lawful money, and the said vessel being then on a voyage from the port of New York in the U. S. A. to the port of Portland in the said U. S. A., and having then and there piratically, feloniously, wilfully and maliciously put the said Isaac Willets and others the crew of the said vessel in fear and danger of their lives on the high seas aforesaid, and of having then and there maliciously, wilfully, feloniously and piratically taken possession of the said vessel and the cargo thereof, and having then and there feloniously stolen and taken the vessel and cargo upon the high seas aforesaid, there to remain until delivered pursuant to the Requisition as aforesaid; and you the said Keeper shall receive and safely keep each of them upon the said charge until delivered pursuant to such request as aforesaid.

On this return being made to me at the time appointed for the hearing of this matter, on application made on behalf of the said prisoners on the affidavit of David Collins, I did, in pursuance of the power and authority in me vested by the Act of Assembly, 19th Vic., Chap. 42, require and direct a return to be made to me of all the proceedings, examinations, orders, and depositions taken before H. T. Gilbert, N. M., and J. P., &c., under and by virtue of a Warrant purporting to be issued by His Excellency the Lieutenant Governor, dated the 24th Dec. 1863, the same being deemed by me necessary and proper for the purposes of Justice to enable me to examine into and decide upon the legality of the imprisonment of the said parties; and I directed that notice of such order should be forth with served on Mr. Gilbert, who, upon notice thereof, returned to me all such proceedings and documents before him, that is to say, the Warrant from His Excellency the Lieutenant Governor; the complaint of Isaac Willets, Mr. Gilbert's first Warrant to apprehend the prisoners, the evidence and all proceedings on the part of the prosecution, and the evidence and all proceedings on the part of the prisoners, including copies of the original letters and Requisition of J. Q. Howard, Esq. U. S. Consul

at the City of St. John, upon which the Warrant of His Excellency was issued, and of the original depositions of Isaac Willets and Daniel Henderson transmitted by the said Consul with one of the said letters, duly certified agreeably to the Act of Assembly, under the hand of the Hon. S. L. Tilley, Provincial Secretary, and the charge at length on which the examination before Mr. Gilbert proceeded.

The Consul's letters are as follows:—
(Copy.)

UNITED STATES CONSULATE,
St. John, N. B., Dec. 22, 1863.

Hon. S. L. TILLEY, Provincial Secretary.

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

You will please make known to His Excellency that, as an officer of the Government of the United States, I am authorized by the Executive Department of that Government to make a Requisition upon him as the Officer administering the Government of the Province in order that certain persons supposed to be guilty of the crime of Piracy may be brought before the proper officers of Justice, so that the evidence of their guilt or innocence may be heard and considered.

I have therefore the honor to request that, in accordance with the provisions of the said Act of Parliament, His Excellency will by warrant signify that a Requisition has been made for the apprehension of John C. Braice, H. C. Beeson, David Collins, John Parker Locke, Robert Clifford, James Seely, George Robinson, Gilbert Cox, Robert Cox, H. H. Parr, and James McKinney, and request that all Judges of the Peace and other Magistrates within the Jurisdiction of the Province, shall aid in apprehending the above named persons, and in detaining them for the purpose of having them brought to trial.

I am, Sir, very respectfully,
Your obedient servant,
(Signed) J. Q. HOWARD,
United States Consul.

(Copy.)
St. John, N. B.,
Dec. 22, 1863.
Hon. S. L. TILLEY, Provincial Secretary.
SIR,—I have the honor to transmit the depositions of the Captain and second Mate of the steam-boat "Chesapeake," to be presented to His Excellency as one of the requisites of evidence of the criminality of the persons charged with the crime of Piracy before issuing the Warrant for having them brought to trial.

It is to be sincerely hoped that no obstacles will

THE CHESAPEAKE TRIAL.

be thrown in the way of bringing those charged with so grave an offence to justice.

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

Very truly

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

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

The charges, together with the witnesses were examined by Mr. Gilbert in as follows: "The examination of Isaac Willets and other

witnesses (naming them) taken in the presence and hearing of David Collins of the City of St. John, laborer, James McKinney and Linus Seely of same place, laborers, who stand charged before me, Humphrey T. Gilbert, Esquire, Police Magistrate for the City of St. John, and one of Her Majesty's Justices of the Peace for the City and County of Saint John, acting under a Warrant under the hand and seal of His Excellency the Honorable Arthur Hamilton Gordon, C. M. G., Lieut. Governor and Commander in Chief of the Province of New Brunswick, bearing date the twenty-fourth day of December, A. D., 1863, and made and issued in pursuance of the Act of the Imperial Parliament, intitled "An Act for giving effect to a Treaty between Her Majesty and the United States of America for the apprehension of certain offenders," such Warrant directed to all and every the Justices of the Peace and Officers of Justice in the Province of New Brunswick, for that they, the said David Collins, James McKinney and Linus Seely, together with John C. Braine, H. C. Brooks, Robert Clifford, George Robinson, Gilbraith Cox, Robert Cox and H. A. Parr, not brought up before me for examination, did on the 7th day of December, A. D., 1863, on the high seas, about 20 miles North North East of Cape Cod, in the said United States of America and within the jurisdiction of the said United States of America and the Circuit Courts thereof, then being passengers in and on board a certain passenger and freight steamer called the Chesapeake, of United States Register, owned, belonging and appertaining to Henry B. Crowell, a subject of the said United States of America, whereof Isaac Willets, also a subject thereof, was Master, while on a voyage from New York to Portland in the said United States of America, with force and arms, turned pirates, and the said steam vessel, and the apparel and tackle thereof of the value of \$60,000 of lawful money of the said United States of America and of the Province of New Brunswick, and a cargo owned by persons unknown of the value of \$20,000 of like lawful money, there and then being in the said steam vessel, under their care and custody and in the possession of the said Isaac Willets, as Master of the said vessel, then and there, with force and arms, did unlawfully and feloniously, within the jurisdiction of the said United States of America, and against the will of the said Isaac Willets, and the crew and mariners

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ers assisting the said Isaac Willets in the navigation of the said steam vessel, piratically and feloniously did steal, take and run away with, they the said David Collins, James McKinney and Linus Seely being passengers on board the said steam vessel, in and on board the same on the high seas aforesaid, against the laws of the United States of America and the Statutes of the United Kingdom of Great Britain and Ireland."

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

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

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

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

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

The Queen has a right to know why any of Her subjects, or persons in Her dominions, who are alleged to be wrongfully imprisoned are so restrained of their liberty. The Writ of *Habeas Corpus* at Common Law and by Statute, and the Statute of the General Assembly under which I am now acting, are the constitutional means in this Province by which all alleged improper imprisonments are enquired into, and Her Majesty's Supreme Court and the Judges of that Court are bound on proper cause

shown to investigate all cases of alleged unlawful arrest, and to relieve therefrom, if shown to be contrary to law. The right to grant such relief in this case has not been, and cannot be questioned. Having then all the proceedings before me I have to ascertain and determine whether or not such proceedings are justified by and in conformity with the Treaty and Act of Parliament. If they are, this application must be dismissed. If they are not, the prisoners must be discharged.

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

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

THE CHESAPEAKE TRIAL.

surrender of such fugitive. The expenses of such apprehension and delivery shall be borne and defrayed by the party who makes the Requisition and receives the fugitive.

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

"Be it enacted, &c., That in case requisition shall at any time be made by the authority of the said United States in pursuance of and according to the said Treaty, for the delivery of any person charged with the crime of murder, or assault with intent to commit murder, or with the crime of piracy or arson, or robbery or forgery, or the utterance of forged paper, committed within the jurisdiction of the United States of America, who shall be found within the territories of Her Majesty, it shall be lawful for one of Her Majesty's Principal Secretaries of State, or in Ireland for the Chief Secretary of the Lord Lieutenant of Ireland, and in any of Her Majesty's Colonies or Possessions abroad, for the officer administering the Government of any such Colony or Possession, by Warrant under his hand and seal to signify that such Requisition has been so made, and to require all Justices of the Peace and other Magistrates and Officers of Justice within their several jurisdictions, to govern themselves accordingly, and to aid in apprehending the person so accused, and committing such person to Gaol, for the purpose of being delivered up to Justice, according to the provisions of the said Treaty; and thereupon it shall be lawful for any Justice of the Peace or other person having power to commit for trial persons accused of crimes against the laws of that part of Her Majesty's Dominions in which such supposed offender shall be found, to examine upon oath any person or persons touching the truth of such charge, and upon such evidence as, according to the laws of that part of Her Majesty's Dominions would justify the apprehension and committal for trial of the person so accused if the crime of which he or she shall be so accused had been there committed, it shall be lawful for such Justice of the Peace, or other person having power to commit as

aforsaid, to issue his warrant for the apprehension of such person, and also to commit the person so accused to Gaol, there to remain until delivered pursuant to such requisition as aforsaid.

2nd. Provided always and be it enacted. That in every such case, copies of the depositions upon which the original Warrant was granted, certified under the hand of the person or persons issuing such Warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended."

The authority which this statute gives the officer administering the Government of any Colony and all Justices of the Peace and other Magistrates and Officers of Justice within their several jurisdictions to act being a statutory power, they must one and all act strictly in accordance with the authority given, and rigidly pursue that authority. Bearing this in mind I proceed to the consideration of the first objection. We must look closely to the Act of Parliament, for it is from that, and that alone, the authority to act proceeds, and the very first words of the enacting part of the statute show that the basis of this right is on an event. "In case Requisition shall at any time be made by the authority of the United States in pursuance of and according to the said Treaty for the delivery of any person charged with (certain crimes including Piracy) committed within the jurisdiction of the United States." &c. Thus we see the Requisition is not to be a simple bald request for the delivery up of the person named, but it is a Requisition which must be by the authority of the U. S.—it must be in pursuance of and in accordance with the Treaty—it must be for the delivery of a person charged with one of the offences mentioned in the Treaty, and the offence with which he is charged must have been committed within the jurisdiction of the United States. If a case perfect in all these ingredients is presented the statute says it shall be lawful for the Administrator of the Government of any Colony or Possession by a Warrant under his hand and seal, to signify that such requisition has been made. Deficient in any one of these statutory requirements the Governor is powerless to act.

Let us therefore examine the documents upon which His Excellency issued his Warrant in this case. They all bear date on the same day, and in the absence of any evidence to the contrary, I may assume were laid be-

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for His Excellency at the same time, but the letter signed J. Q. Howard, U. S. Consul, in which the prisoners are named, would appear to have been the first written. It is a communication addressed to the Lieut. Governor through the Provincial Secretary. The first part of this letter is simply a request that the Governor will use his authority under the Act of Parliament "to the end that certain offenders (not naming them or their crimes, or the place or jurisdiction within which committed) may be apprehended and delivered up to Justice" (not stating to whom). It then proceeds to desire the Secretary to make known to His Excellency that, as an officer of the United States Government, the writer is authorized by the Executive Department of that Government to make a Requisition upon him as the officer administering the Government of this Province, in order that certain persons (not naming them) believed (not charged) to be guilty of the crime of Piracy (not stating within what jurisdiction committed, and not stating whether piracy against the law of nations or piracy against the municipal laws of any particular country) may be brought before the proper officers of Justice, so that the evidence of their guilt or innocence may be heard and considered; and then he requests that, in accordance with the provisions of the said Act of Parliament, His Excellency will by Warrant signify that a Requisition has been made for the apprehension of John C. Braine and others, including the prisoners, and require that all Justices of the Peace and other Magistrates within the jurisdiction of this Province shall aid in apprehending the above named persons accused (not charged) of the crime of piracy, for the purpose not of having them delivered up, but for the purpose of having them brought to trial. Under the statute we have seen the Requisition must be made "by the authority of the United States," that is of the Government of the United States. Had Mr. Howard been a public Minister of the United States, and so the representative of that Government, a Requisition by him would doubtless have been good; but I am not aware that as Consul he has any such authority unless specially delegated. Perhaps the fair construction of that letter would be that Mr. Howard intended to convey to the Governor that he was so specially authorized, but the authority he claims is simply "in order that certain persons believed to be guilty of the crime of piracy may be brought before the proper officers of Justice, so that the evidence

of their guilt or innocence may be heard and considered." This is all that he puts forward as to the extent of his authority, and upon this, without production of the authority, he proceeds to request that His Excellency will by Warrant signify as before stated. No authority from the Government of the United States is shown or directly alleged authorizing him to ask for the apprehension of the individual parties he names, or to ask for their apprehension as charged with the crime committed within the jurisdiction of the United States, but simply of parties accused of the crime of piracy, for the purpose, not of being delivered up under the Treaty, but for the purpose of having them brought to trial. Had His Excellency issued such a Warrant as is here asked for, I have no hesitation in saying, for the reasons that will hereafter be given in considering another branch of this case, it would have been bad. Is the matter then helped by the second letter? By this letter the Consul transmits affidavits of the Captain and second Mate, sworn at St. John before H. T. Gilbert, Police Magistrate, on no charge or complaint, to be presented to His Excellency in case "he requires evidence of the criminality of the persons charged with the crime of Piracy before issuing the warrant for having them brought to trial." A sincere hope is then expressed that no obstacles will be thrown in the way of bringing those charged with so grave an offence to justice. If there are deficiencies in the first, it can hardly be urged that they are supplied by this letter or by the depositions accompanying it. His Excellency being one of the Commissioners named in the Royal Commission for taking information and apprehending and committing for trial persons charged with offences on the high seas, and if brought to trial, one of the Judges to try them, this letter instead of being a Requisition under the statute, or in aid of a Requisition, if I may use the expression, more resembles an application to His Excellency in that capacity than to him under the 6th and 7th Vic., as an officer administering the Government, more particularly as the last paragraph says: "We had believed until this hour that a Requisition before the Executive would not have been required in the first instance," which would rather corroborate the view that proceedings were desired, independent of a requisition. As to the deposition, in my opinion it cannot make the requisition good if not good without it.

It appears to have been sworn before Sir.

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

Daniel, Justice, concurred in all that Nelson, Justice said. And that this principle has been acted on will be seen by reference to Bisset's case, 6 Ad., and Bl., in England, where we find a warrant was first issued in France, and to Kane's case in the United States, just referred to, where a warrant was issued in Ireland, in addition to the special authority and affidavit of the Consul. In Kane's case, reported in 14 Howard, Mr. Barclay the British Consul was specially employed, the report says by direct authority of the British Minister, accredited to the Government of the United States, and in pursuance of this authority Mr. Barclay made the necessary affidavit; and no case has been cited to me, nor am I aware of any, where a different practice has been adopted. On the contrary I find in a note to the last edition by Lawrence of Wheaton's International Law, this view confirmed by the opinion of Mr. Cushing, May 31st, 1854, in the published opinions of the Attorneys General of the United States, volume 6, page 486. The practice is declared by him in these words:—

"The practice of our own Government, as well as that of Great Britain, requires that all claims of Extradition should be founded on a judicial warrant, with proper evidence to justify the warrant. The United States will not, therefore, make a demand on Great Britain for a person alleged to be a fugitive from the justice of one of the United States without the exhibition of a judicial warrant issued on sufficient proof by the local authority." And again in an opinion by the same learned gentleman, Nov. 2, 1854, published in the same work, vol. 7, page 6, he says: "A mere notification from a foreign legation that a party guilty of a crime has escaped, and perhaps fled to the United States of America, is not sufficient to justify the preliminary action of the President. The general rule is, the Government of which extradition, whether by comity only, (citing Kluber Sec. 66, Martin's Precs, Sec. 101) or by Treaty, is demanded, before it is called on to act, must have reasonable *prima facie* evidence of the guilt of the party, submitted to it, as well as the demand of the Executive authority." And again vol. 8, 216 page, in another opinion of the same, he says: "But to justify the commencement of proceeding in extradition it must appear that the criminal acts charged were committed within the territorial jurisdiction of the demanding Government."

But suppose the documents contain a charge against these prisoners, where do we find it alleged in them that the offence charged was

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THE CHESAPEAKE TRIAL.

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

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

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

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

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

The terms of the Statute are that the Warrant of the Governor shall "require all Justices of the Peace and other Magistrates and officers of Justice within their several jurisdictions to govern themselves accordingly and to aid in apprehending &c. —and thereupon it shall be lawful for any Justice of the Peace or other persons having power to commit for trial persons accused of crimes against the laws of that part of Her Majesty's Dominions in which such supposed offenders shall be found to examine upon oath, &c." The words of the Statute differ from the Treaty. The words of the Treaty are "Judges and other Magistrates." I am bound to think this alteration advisedly made, and I find it difficult to conceive any other reason than to preserve consistency in the administration of Justice. In the Treaty nothing is said as to the jurisdiction of the Justices and other Magistrates. In the Statute the Governor can only require Justices of the Peace and other Magistrates and officers of Justice to act within their several jurisdictions; beyond their jurisdiction then they cannot act. But the Statute says, it shall be lawful for any Justice of the Peace or other person having power to commit for trial persons accused of crime, &c.—that is, I am inclined to think, when accused of crimes in the United States over which the officers respectively have jurisdiction, to commit if committed in this Province. Then in such cases they should examine on oath, and if the evidence would justify their committal here, issue their Warrant, &c.; and an insertion of the words "or other persons having power to commit for trial" would seem unnecessary if Justices of the Peace and other Magistrates could act in all cases. As at present advised I am disposed to read the

terms "in their several jurisdictions" in their broad signification; I think it more consistent with the scope of the Statute and the duties to be performed that they should be considered as applying to their judicial as well as their territorial jurisdiction, it being, I think, unreasonable to suppose that a Justice of the Peace, who cannot receive an information on a charge of piracy, or examine into the truth of such charge if cognizable in this Province, should, if committed in the United States, determine on the sufficiency of the evidence according to the laws of this Province if the crime was committed here; or in like manner that the Commissioners authorized solely to receive information and commit for trial in cases of offences on the high seas, should deal with crimes over which if committed in this Province they have no jurisdiction; and from this construction no possible difficulty can arise, because for every crime named in the Statute we have either the Justices of the Peace or other persons having power to commit for trial; so that in this case when it appeared by His Excellency's Warrant that the crime charged was Piracy, Mr. Gilbert, whether as Police Magistrate or Justice of the Peace, not having jurisdiction over such an offence and no power to commit for trial a person charged with Piracy, could have referred the matter to the Judge of the Court of Vice Admiralty, or some other one of the Commissioners having authority over that offence and power to commit for trial persons charged therewith. To confine the Magistrates and officers to their respective jurisdictions is, in my opinion, in no respect to conflict with any clause in the Treaty but in harmony with it, and in furtherance of a proper and discreet execution of its stipulations.

But assuming the Requisition right and that the Magistrate had jurisdiction, we must consider the third Point. The question here raised was argued as if I was sitting in the character of a Court of Review or Error on the decision of the Magistrate on the facts proved before him. Such, I think, is not the case. The duty of determining on the sufficiency of the evidence is cast on the Magistrate or other officers. He is the person to be satisfied that the evidence justifies the apprehension and committal for trial of the persons accused. The amount and value of that evidence is for his determination. A Judge of the Supreme Court might think the evidence of guilt strong and of innocence weak, or vice versa, but the law has vested the Magistrate with the power of weighing and deciding on the effect of the evidence and it is the result on his mind that is to determine its sufficiency or insufficiency. It is a judicial discretion with which he is vested, which, I think, is not open to question on *Habeas Corpus*, and cannot be taken from him and assumed by a Judge of the Supreme Court. If it was manifestly apparent that the evidence showed that no offence had been committed or that the party was unquestionably innocent and therefore there was really no matter of fact or law to be tried, no matter in

which the Magistrate could exercise a discretion or judgment, then the case would be very different; but is such the case before us? That the vessel was seized and by force taken from the Captain and crew on the high seas, is not disputed. Unanswered this is a *prima facie* case of Piracy, and the burthen is cast on the accused of justifying this apparently wrongful act. The justification set up is that hostilities were existing between the United States and the Confederate States of America, and this seizure was made under a Commission from, or by authority and on behalf of, the Confederate States, and that therefore it was an act of legitimate warfare and not of a piratical character. This, on the other hand, is denied, and it is alleged that the claim to act under the authority of the Confederate States is mere pretence and color to disguise and cover an illegal depredation. The object of privateering in general, is not, as Mr. Kent observes fame or chivalric warfare but plunder and profit: but at the present day the rights of private armed vessels and private belligerents cannot be doubted. Unless restrained by Treaty stipulations the right to commission private armed vessels is, by the laws of nations, esteemed a legitimate means of destroying the commerce of an enemy, and captures made by private armed vessels of one belligerent, even without a Commission, though not in self defence, are not regarded as piratical either by their own Government or by the other belligerent State. It does not indeed vest the enemy's property thus seized in the captors, but the seizure would be declared a prize of war to the government of the captors; and it is equally true that neutrals taking commissions as privateers and acting on them are likewise free from the imputation of Piracy. They may make themselves amenable for the violation of the laws of their own country, and may denude themselves of the right to claim her protection to shield them from the consequences of their acts, but they cannot be dealt with by the belligerent against whom they are acting as pirates. But as neutrals they stand in a very different position from belligerents. Belligerents, we have seen, may make captures without commissions. Neutrals can only protect themselves by commissions from, or by acting under authority of, the belligerent Government, or on board commissioned vessels, or under duly authorized officers. They cannot, without any commission or authority, fit out in a neutral country a hostile expedition against a power at peace with such country, and, under pretence of acting in the name of, or on the behalf of, a belligerent power, commit acts on the high seas that would, unless protected by belligerent rights, be acts of Piracy, and not be held responsible criminally for such acts. And therefore it behooves persons not belligerents but subjects of a neutral power engaging in acts of hostility, if they wish to escape the imputation of criminality, to be well assured when they depredate on the shipping of a nation at peace with the one to whom they owe allegiance, and in opposi-

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tion to the municipal laws and neutral policy of their own Government, and in direct defiance of the express Proclamation of their Sovereign, that they are acting under the authority of a commission which will bear the test of a strict legal scrutiny. In the present case, can it be said that this was made out so clearly and unequivocally that there was nothing for the Magistrate to deliberate on—nothing for a Superior Court or Jury to try? Without expressing the slightest opinion of the guilt or innocence of the parties, or the probable result of a trial either before a judicial tribunal in this Province or in the United States, it will only be necessary to refer generally to the evidence on behalf of the prisoners to show that the case is by no means so entirely free from doubt or question as their Counsel assumed. Instead of showing that they were acting under a regular commission, or were belligerents themselves, or that the expedition proceeded from the Confederate States of America, it appears, so far as there is evidence of the nationality of the parties engaged, that they were British subjects, that the plot to seize the vessel was concocted in this City, that the commission under which they claim to act was not directed to any of the persons engaged in this capture, nor were any of them named in it, nor did it relate in any way to seizure under circumstances such as the present—that it was a commission dated 27th Oct., 1862, whereby the vessel "Retribution," Thomas B. Power, Commander, was authorized to act as a private armed vessel for the Confederate States on the high seas against the United States, on the back of which commission is an endorsement dated 21st Nov., 1862, signed Thomas B. Power, whereby he transfers the command of the schooner "Retribution" to John Parker. The commission is proved by proof of the signature of Jefferson Davis, President of the Confederate States, and of the Seal of the Confederate States attached thereto; but the endorsement is proved by the slightest evidence of the hand-writing of the subscribing witness. There is no evidence of who this John Parker was. It was proved that at Nassau a Nova Scotian named Vernon G. Locke, who had been residing for the last 20 years in the United States, and whose family is now living at Fayetteville, was last summer in the month of May at Nassau, in command of the "Retribution," and that he was there received and recognized as her Captain under the name of John Parker. Whether he was really the John Parker named on the back of the commission, or assumed that name with a view of representing that person, was not shown except as an inference might be drawn from the facts one way or the other. This commission was produced at the Lower Cove meetings by Locke, *alias* Parker, but there is not a particle of evidence as to the whereabouts of the "Retribution" at that time or since, or that he was then Captain of her. In fact, the only evidence of her at all was her being at Nassau in May last summer. Whether she was in existence or not, or if in exist-

ence where she was or under whose command when this expedition was planned and executed, did not appear; nor was there any evidence to show that any of the parties engaged in the capture had ever been on board the "Retribution" or in any way connected with her. On the contrary, Braine, who would appear to have been in charge of the capturing party, described himself on board the "Chesapeake," and was addressed by the title of Colonel. Locke, *alias* Parker, did not proceed on the expedition, (though he boarded her subsequently off Grand Manan and took the command,) but addressed an order to "Lieutenant Commanding John Clibbon Braine," requiring him to proceed to New York with 1st Lieutenant H. A. Parr, 2nd Lieutenant David Collins, Sailing Master Tom Sayers, one engineer and crew of 22 men; engage passage on board the steamer, using his own discretion as to time and place of capture, to act towards crew and passengers in accordance with President's instructions and as circumstances permit—bring his prize to Grand Manan for further orders. This is signed John Parker, Captain C. S. Privateer "Retribution." There is no evidence of what these parties were officers, or how or by whom they were appointed, with the exception of David Collins, and he appears to have got his commission of 2nd Lieutenant from John Parker. It is in these words:

To David Collins.

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

(Signed) JOHN PARKER.

Had this commission been from Jefferson Davis it might have been easily understood and possibly free from question; but issued by a British subject to a British subject, in the Queen's Dominions, it is certainly a proceeding, to say the least of it, novel in its character and fairly challenging investigation. It is true, evidence was offered of military men attached to the Confederate Army, shewing that in operations on land officers commissioned to discharge a particular duty had, by the practice of the Confederate service, authority to appoint others under them to act as officers to carry out such duty, and that such was a recognized custom of the service; but the practice pursued by officers unquestionably in the service of the Confederate States in the field, actually engaged in the war of the hostile territories, is not quite conclusive as to British subjects and British territory. But be all this as it may, can it be deemed that the proceeding, if justifiable, was not, in many of its features, most irregular, and the *prima facie* case before the Magistrate being on

the one hand clear, and the alleged justification presenting the irregularities and peculiarities, it did, and being open to so much question, can the Justice be fairly said to have exceeded his discretion if the result at which he arrived decided that the evidence was such as would justify their apprehension and committal for trial had the alleged crime been committed here, leaving the prisoners to substantiate their defence before a competent Court where the legal points could be properly determined, and where the questions of intent and of fact or inference would be submitted to and determined by a Jury. As at present advised I cannot say that in this particular the Magistrate arrived at a wrong conclusion, nor do I think the Magistrate did wrong in refusing to go behind the Governor's warrant and determine on the sufficiency of the Requisition to His Excellency. Over that matter, I think, the Statute gives the Justice no jurisdiction or authority.

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

As to the 4th objection. The Commitment first sets out, as we have seen, the Warrant of His Excellency, which alleges the parties to be charged upon the oaths of Isaac Willets and Daniel Henderson with having committed the crimes of Piracy and Murder on the High Seas within the jurisdiction of the United States of America, on the 7th of December, then instant. Now where are these averments obtained by the legal adviser of the Governor, who, I presume, drafted the Warrant? Reverting to what has been said as to the Requisition, not a word is alleged by the Consul of this crime of Murder, and not a statement made by him that either Piracy or Murder had been committed within the jurisdiction of the United States. No doubt, the legal gentleman who drew the Warrant felt the difficulty of the want of a distinct charge, and the absolute necessity of the averment that the crime was committed within the United States of America; but as there was neither of these particulars in either of the letters of the Consul, he, no doubt from necessity, resorted to the affidavit transmitted therewith of Willets and Henderson, and from the facts stated by them

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

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

Now, with all respect for the Police Magistrate, I think this was not the proper mode of proceeding

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under the Statute. When he received the Governor's Warrant, assuming he had jurisdiction to act under it, he should have taken no fresh complaint. He should have embodied nothing in the form of a complaint or charge against the prisoners but what was contained in the Warrant of the Governor; and as this was his sole authority to act, he should have confined himself strictly within its requirements, which was simply in the first instance to aid in apprehending the persons accused which he should have done by issuing his Warrant reciting the Governor's Warrant, the charge therein contained against the prisoners, the requirement imposed on him thereby, and commanding the apprehension of the persons named therein, and should not have received a new complaint or introduced new charges or new matter against the accused. The correctness of this view will, I think, be confirmed by reference to the Imperial Act 8 and 9 Victoria, Chap. 120, passed 8th August, 1845, and the forms there given.

Having so examined Isaac Willets, the final commitment recites that upon the evidence of the said Isaac Willets and in pursuance of the Act of Assembly, he issued his Warrant directing the apprehension of the parties to answer, not the charges in the Governor's Warrant, but the complaint of Isaac Willets made on oath for having &c., in the words which I before mentioned, to be dealt with according to law, the said complaint having been made and taken, and this Warrant having been issued in pursuance of a Warrant under the hand and seal of the Governor &c., in which, however, I am constrained to differ from the learned Police Magistrate, the Warrant of the Governor not authorizing the taking of such complaint nor the arresting the parties to be dealt with according to law, but in the words of the Statute to be delivered up to Justice according, &c. and had an application been made to discharge the prisoners while detained under this Warrant I do not see how it could have been successfully resisted, *Russell's case* 6, Q. B. 485 being a direct authority against it in one point. That was the first decision under the French convention, Act 6 and 7 Vic., Chap. 75 which is in the same words as the American Treaty. Act we are now considering. The Warrant of the Lord Mayor there set out that the Constable do, should convey and deliver into custody the body of J. B. being charged before him &c., for that the said J. B. is accused of having committed in France the crime of fraudulent bankruptcy, as appears by the Warrant of Arrest issued by a competent Judge in France, and duly authenticated before me, and as also appears by the Warrant of one of Her Majesty's principal Secretaries of State requiring me to take cognizance of such crime &c., & then avers that the crime and the warrant committed the prisoner until he should be discharged, upon oath of law, which is the exact under the commitment under the words to be dealt with according to law. But the Court held the Warrant to be

upon the ground that as the commitment was under a special Statutory authority, the terms of the commitment must be special and exactly pursue that authority, acting on and recognizing the authority; or *Masha's case*, 2 Wm. Bl. 806, where it is laid down that the true distinction is that when a man is committed for any crime, either at Common Law or created by Act of Parliament, for which he is punishable by indictment, then he is to be committed until discharged by due course of law, but when it is in pursuance of a special authority the terms of commitment must be special and exactly pursue that authority.

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

In the first instance the Consul simply presents the complaint as that certain persons believed to be guilty of the crime of Piracy. The Governor's Warrant puts it as a charge of Piracy and Murder, on the High Seas, within the jurisdiction of the United States of America, on the complaint of Willet and Henderson. The commitment before the Police Magistrate is the complaint of Willet alone, and alleges the crimes of Piracy and Murder in the United States of America, and adds the felonious shooting and wounding of a vessel and crew and felonious stealing of the cargo. And on the examination before the Magistrate there is the addition of the crime being within the jurisdiction of the Circuit Courts of the United States, and so being contrary to the laws of the United States, &c. &c. The charge is now a charge of Piracy and Murder, on the High Seas, within the jurisdiction of the United States of America, and the Circuit Courts thereof, against the laws of the United States of America and the statutes of the United Kingdom of Great Britain and Ireland. So we see that at every stage of these proceedings the charge assumes a different phase.

objection to this Warrant. This is the final commitment of the accused to Jail, there to remain until delivered pursuant to the Requisition. But after examination of the witnesses, and before the committal, there was something to be done, an all important duty to be discharged, which I cannot discover from the Warrant or from any of the proceedings before me, and I can look to nothing else to have been performed, and which, if done, I think should clearly, unequivocally and unambiguously appear on the face of Warrant, which it manifestly does not; and that is, that after hearing and considering the evidence, the Justice determined and adjudicated that he deemed the same sufficient according to the laws of this Province to justify the apprehension and committal for trial of the prisoners, if the crime had been committed within this Province. Without such an adjudication, the Warrant of Commitment could not issue, and without such an adjudication appearing on the face of it when issued, I think the Warrant bad, there being without it a want of jurisdiction shown to issue the Warrant, or perhaps rather a want of jurisdiction to sustain it; and this view is confirmed by reference to 8 and 9 Vic., before referred to, for even there where a statutory form is given to be used by the Police Magistrate of the Metropolis, the adjudication is set forth. The form given is thus: "Be it remembered that on &c., A. B. &c., is brought before me, J. P. &c., and is charged before me for that he, the said A. B., on &c., within the Jurisdiction of the United States of America did (here state the offence); and forasmuch as it has been shown to me upon such evidence as by Law is sufficient to justify the committal to Jail of the said A. B. pursuant to an Act passed in the 7th year of the Reign of Her Majesty entitled &c., that the said A. B. is guilty of the said offence, this is therefore to command, &c." The cases to be found bearing on this point lay down the principle very clearly, some of which I will quote. In *Re Peerless* 1 Q. B. 152. This was a Warrant setting forth a conviction—Denman C. J. says "The Magistrate having no jurisdiction except by the express Statutory enactment, the offence is not here described sufficiently to show jurisdiction." Per Littledale J. "I do not say that this may not be a good conviction, upon which a good Warrant might be framed, but I think this Warrant clearly bad for not shewing jurisdiction." "In what way it is that Justices have jurisdiction, ought to appear by the Warrant, I found myself on Lord Tenderden's Judgment in *Kite & Lane's case*, 1 F. and C. 101. And Coleridge J. says: "By a legal Warrant, I mean a Warrant which upon the face of it shows a right to detain, and that right cannot exist unless there be jurisdiction in the Magistrate. To deny that this must appear upon the face of the proceedings is to call in question one of the most important rules of the Criminal Law." In *Kite & Lane's Case* referred to, Abbot C. J. says: "It is a first principle as to all acts done by Magistrates that the jurisdiction should appear on the face of their pro-

ceedings." And Best J. says: "It is a settled principle that penal Statutes, and such as create new jurisdiction shall receive a strict construction. Nash's case 4th B. and A. 295, was the case of a warrant issued under the 57th George 3d, Cap. 87 Sec. 6, by which Act, in case any person, found on board a vessel liable to forfeiture under 46 George 3, Cap. 121, be fit and able to serve His Majesty in his naval service, he shall upon such proof as by the said Act of the 45th year aforesaid, is required, be committed by such Justice to prison to answer such information and abide such judgment &c. Abbot C. J. says:—"This Act of Parliament of the 57th year of George 3, Cap. 87, is one highly beneficial in preventing frauds upon the revenue, but at the same time, inasmuch as it trenches very strongly on the liberty of the subject, we must take care that its provisions are strictly pursued." And again: "these circumstances stated in the introductory part of this return seem to me quite sufficient to warrant this commitment, and if it had been stated upon due proof of the matters before mentioned the prisoner was committed, I should have thought it sufficient." And Per Holroyd, J.: "The power of the Magistrate to commit depends on the proof before him, and the Rule is, that where a limited authority is given it must be shown to have been strictly pursued." And in *Christy vs Unwin*, 11 Ad. and El. 377, where the validity of an order made by the Lord Chancellor under 6th, George 4th, Chap. 15, Sec. 18, was questioned, it was held that the order must shew on the face of it whatever was necessary to give jurisdiction. And Coleridge, J. says:

"We cannot intend for or against the order but must decide according to the words. However high the authority may be where a Statutory power is exercised, the person who acts must take care to bring himself within the terms of the Statute whether the order be made by the Lord Chancellor or by a Justice of the Peace. The facts which give the authority must be stated."

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

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

This I have honestly endeavored to do, and the

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

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