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DIARY FOR FEBRUARY.

1. Wed.. Grammar School Trustees to meet.
2. Thur . *Purification of B. V. Mary*
5. SUN ... *5th Sunday after Epiphany.*
6. Mon ... Hilary Term commences
10. Frid .. Paper Day, Q. B New Trial Day, C. P.
11. Sat .... Paper Day, C. P. New Trial Day, Q. B.
12. SUN ... *Septuagesima.*
13. Mon ... Paper Day Q. B. New Trial Day, C. P.
14. Tues .. Paper Day, C. P. New Trial Day Q. B
15. Wed .. Paper Day Q. B. New Trial Day, C. P Last day
16. Thur . Paper Day C. P [for service for Co Ct.
17. Frid.... New Trial Day, Q. B
18. Sat .... Hilary Term ends
19. SUN .. *Sexagesima.*
24. Frid ... *St. Matthias.*
25. Sat ... Declare for County Court.
26. SUN ... *Quinquagesima.*
28. Tues... *Shrove Tuesday.*

NOTICE.

Owing to the delay that has unavoidably taken place in the issue of the January number and of this number of Law Journal *and* Local Courts' Gazette, *the time within which payments must be made to secure the benefits of cash payments is extended to 1st April next*

Owing to the very large demand for the Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take both publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

Upper Canada Law Journal.

FEBRUARY, 1865.

THE RECENT CHANGES.

We have most favorable accounts from all quarters of the reception of the *Law Journal* and the *Local Courts' Gazette*, and have every reason so far to be satisfied with the result of our exertions.

Some few there are amongst the magistracy and municipal bodies that seem to labour under the impression that it is quite out of the power of any mortal to add anything to their stock of knowledge, and so long as they have the "Consolidated Statutes," which they fondly imagine contain *all* the law on every subject, they think they cannot go wrong. The less such people *really* know the more they *think* they know. Fortunately the localities blessed with such luminaries are few, and there appears to be a growing desire on the part of those connected with magisterial and municipal duties to use every means of increasing their stock of information. The first judges in the land find it necessary to keep themselves well posted in the current law; and it is an invariable fact, that those who know most are always the persons most anxious to learn more

The Council of the County of Simcoe have taken the lead in this respect amongst the municipalities. They have with commendable enlightenment and liberality ordered several copies of both publications for the use of the County Council, and two copies of the *Local Courts' Gazette* for the use of each local municipality in the County. We venture to promise that it will not be money thrown away. Certainly not if we can help it. What will be useful for one county will be of the same advantage to another, and we hope to find this example followed by the majority of the other County councils in Upper Canada.

We have every reason to believe, and are extremely glad to be able to say so, that the changes that have been made have met with such general approbation from persons of influence and intelligence.

THE BURLEY CASE.

We give in other columns a very full and carefully prepared report of this important case as finally decided in Chambers before the Chief Justice of Upper Canada, assisted by the Chief Justice of the Common Pleas, Mr. Justice Hagarty, and Mr. Justice J. Wilson. It is one of the most important cases ever decided in Canada.

We had intended giving in this number some remarks on this case, and the law of extradition generally, but want of space compels us to defer them till our next.

WHAT IS AN ARBITRATOR?

Is an arbitrator the agent and advocate of the person who names him to settle a dispute employed to protect and further the interests of his client, or is he a judge—bound in honour and conscience to decide impartially and righteously, "without fear, favour or affection," and according to the truth of the case, without reference to its being adverse or favourable to the person appointing him?

Some may smile at the simplicity which asks such a question. All upright and intelligent men will answer that the latter definition alone describes the arbitrator proper, and that the former only suits the ignorant or dis-

honest man appointed to a duty for which he is wholly unfit.

We believe that by the mass of our people the true position of an arbitrator is utterly misunderstood. The common mode of settling a dispute is "to leave it to two men." Each disputant appoints "his friend," whom he fully expects to look wholly to his interests, to object to everything that bears against him, and to consent to nothing that may prejudice him, and the friend so appointed is generally too ready to do all this most faithfully. His opponent does just the same, and instead of two honest men sitting down to decide uprightly and impartially on the facts, without reference to the parties, we have two advocates each striving with might and main to stand by the man who named him, and with no chance of making an award except by calling in some third person, at increased expense, to turn the scale in favour of one or the other.

Now almost universal as this is in practice, it is, to say the least of it, a monstrous perversion of plain duty. An arbitrator, no matter by whom appointed, is to all intents and purposes a judge, and if he be an honest man and know his duty, he should feel as much shocked at leaning to one side or the other, or favouring one man above the other, as he would be if he saw a judge in court exhibiting favour or partiality. But this, the only true and honest view of an arbitrator's duty, seems to be little understood.

Numerous instances have occurred, and are occurring among us, of the strange misconception that prevails. Arbitrators are heard talking of "their clients," meaning those who named them, just as the lawyer speaks of the person who retained his services. Men in good social position, who would be highly indignant at the imputation of dishonesty or ignorance, so speak, and what is worse, so act on arbitrations, not seeking even to disguise their advocacy of their client's interests; and yet beyond all shadow of doubt such men are either wholly ignorant of their duties or too dishonest to regard their proper performance. Instances are known of such men admitting that they bargained for a commission or per centage on whatever amount they could get awarded to the "client"! Between such and the judge who takes a bribe to pervert his judgment, there is no moral distinction whatever.

Awards have been made, intelligible on no principle deducible by an impartial mind from the facts in evidence. In the case of contests between individuals and public companies, the results are sometimes ludicrous, were it not for the serious consequences involved. Compensation has been, before now, awarded for a strip of land to an amount exceeding what any man, in his senses, would give as the price of the whole property from which the strip was taken. But these instances are of rare occurrence compared with the numberless cases between individuals occurring daily throughout the country.

Besides, men dead to the plainest dictates of duty, are generally too much alive to their own interests. The one is frequently the effect of the other. Men who scruple not to gain all they can, honestly or dishonestly, for those who employ them, seldom forget themselves. The consequence is, in many cases, not only awards outrageously unjust, but saddled with huge bills of costs in the shape of arbitrators' fees, modestly assessed by the arbitrators themselves.

It is well to call attention to this state of things. We believe there are many really honest and respectable men who misconduct themselves as arbitrators from mere ignorance of duty. The prevailing idea seems to be that an "experienced" arbitrator's duty, as it generally is his practice, is on the one side to get the largest possible sum of his friend, if the friend be seeking compensation, or on the other hand if the friend be resisting payment, to strive hard to reduce the amount to the smallest sum, or to resist it altogether.

The evil is one of a most serious kind, and any person who can succeed in attracting public attention to it will deserve the thanks of all. As a large portion of the evil results from misconception, it is only necessary, so far as honest mind is concerned, to explain the true position of the case. The legislature is constantly providing for the settlement of disputes by arbitration, and it is of the highest importance that men should rightly understand that an arbitrator is not an advocate or a partizan bound to stand by his client, but that he is a judge, bound to decide with rigid impartiality, and that if he favour one side more than another, or needlessly heap expenses on either party to the reference, he does not act the part of an honest man.

TIME IS MONEY—AN INCIDENT.

During Hilary Term two Queen's Counsel in the Court of Common Pleas, disputed as to the responsibility of setting down an appeal from a County Court, which had been set down during a previous term, but, owing to some defect in the proceedings, not heard. The expenditure involved was the crushing sum of fifty cents. The clerk of the court, with becoming dignity and a keen eye to the revenue, refused to receive the appeal books unless some one gave him a fifty cent stamp. The counsel for the appellant declined to pay as he said he had already disbursed that amount during the previous term. The counsel for the respondent contended that it was no part of his business to pay for setting down the appeal of his adversary. When the learned gentlemen were about to argue the weighty point in due and ancient form, the Chief Justice, much to the relief of counsel who had cases ready for argument, called the usher of the court, gave him a $1 bill, and ordered him to purchase a fifty cent stamp and hand it to the clerk of the court. This the usher did, whereupon the clerk was ordered to receive the appeal and "mark the fees paid." The business of the court was then proceeded with without further loss of time.

OUR APPEAL.

We are glad to say that the county judges, with one exception, have most kindly responded to our appeal for support.

The exception is that of a judge whose name out of charity we repress, but the only judge in the Province, we venture to say, that could indite such an epistle as the following:

"Judge ——— has the honor to acknowledge the receipt of the letter of the Editors of the *Upper Canada Law Journal* of date of Feb'y 1st instant.

"Judge ——— most respectfully begs to inform the Editors that he does not *understanding* touting for newspapers, and suggests that some better qualified person should be employed.

"———, Feb'y 4, 1865."

The *learned* Judge greatly misunderstands us if he supposes that by sending him the circular we intended him to infer that he understands "touting for newspapers" any better than he understands law or English grammar. We hoped in exchange for the law that he so greatly needs, to receive, at least, the politeness of a gentleman and the support which his position as a Judge is *supposed* to give him. It is quite possible that he has not the influence we naturally imagined he had and his excuse, under the circumstances, we are willing to accept. We have no doubt that we can easily find a person "better qualified" than himself to explain to others the value of that which he does not appear to understand.

The writer of the note before us professes to have, we are informed, a sovereign contempt for "American jurists," and has no favorable opinion of our own, for he finds that the cases in our Superior Courts "rather embarrass him than otherwise!" He is therefore consistent enough in declining to interest himself for a publication intended to circulate a knowledge of those very decisions.

HILARY TERM, 1865.

CALLS TO THE BAR.

The following gentlemen during this term passed the necessary examination qualifying them for call to the Bar of Upper Canada:

H. Bird, Woodstock; H. H. Coyne, London; F. Duggan, Toronto; F. M. Fairbairn, Peterboro'; George Airey Kirkpatrick, Kingston; J. F. McDonald, Ingersoll; D. Mitchell McDonald, Toronto; Ewan McEwan, Kingston; George Kennedy, Toronto; F. A. Read, Toronto; R. N. Rogers, Kingston; C. Scott, Stratford; J. F. Tom, Goderich.

Messrs. Coyne and Kirkpatrick were not required, owing to their very creditable written examinations, to go through the ordeal of the *viva voce* examination.

ADMISSIONS AS ATTORNEYS.

The following gentlemen during the same term were successful in passing their examinations for admission:

Richard R. Brough, London; Jno. J. Brown, London; John M. Bruce, Hamilton; Fred. Duggan, Toronto; James H. Esten, Toronto; Donald Gilchrist, Brampton; C. E. Hamilton, St. Catharines; John E. Hardinge; Erskine Irving, Hamilton; George Kennedy, Toronto; G. Airey Kirkpatrick, Kingston (without oral examination); George Lount, Barrie; J. A. Macpherson, Whitby; James F. McDonald, Ingersoll; Edward Morrill, Picton; J. J. Murphy, Ottawa; N. F. Paterson, Toronto; J. F. Patterson, Toronto; R. V. Rogers, Kingston; S. W. Scane, Chatham; F. P. Thompson, St. Catharines; Henry Totten, Brantford; J. White, Windsor.

UPPER CANADA REPORTS.

COMMON PLEAS.

(Reported by S. J. Vankoughnet, Esq. M.A., *Barrister-at Law, and Reporter to the Court.)*

Hall v. Goslee.

Fi. fa. lands—Seizure—Expiration of writ—Abandonment—Return.

The expiration of a *fi. fa.* lands before the intended day of sale, which has been regularly advertised, does not cause a cessation of the seizure, which the *commencement* of the advertisement is.

In this case, where lands had been advertised under other writs, the plaintiff's writ of *fi. fa.* being at the time in the sheriff's hands,—*Held*, that although the sale under the writs so advertised neither took place nor was adjourned, yet that the plaintiff's writ operated upon the lands under the seizure by such advertisement, and that the return of "lands on hand" to this writ after its expiry was, under the circumstances, the only return which could have been made; and further, that the sheriff might have proceeded at the plaintiff's suit without a *venditioni exponas* to sell the lands then in his hands.

Held, also, that the non-adjournment of the sale advertised for 12th September, 1863 (which did not take place), and the publication of an apparently independent notice in the following June, under the plaintiff's writ of *ven. ex.*, did not necessarily and conclusively constitute an abandonment of the seizure, which had been lawfully made under the former writs; although no positive rule could be laid down as to what would constitute an abandonment of lands once seized, this being a matter of fact which must rest very much upon intention.

[C. P., M. T., 1864.]

C. S. Patterson, on behalf of the sheriff of the United Counties of Northumberland and Durham, obtained a rule on the plaintiff and defendants to shew cause why the rule requiring the sheriff to to return the writ of *venditioni exponas* and *fieri faciae* for the residue should not be set aside, either in the whole or so far as the same relates to the *venditioni exponas*, on the ground that no lands were seized or were seizable thereunder by the sheriff; that no lands were seized by sheriff Fortune under the original writ of *fi. fa.*, or if seized the same did not come into the hands of the present sheriff; and that the writ being returnable only after execution thereof, and not having been executed, the sheriff could not be ruled to return it.

The facts agreed upon between the plaintiff and the sheriff, and upon which the rule was granted, were in effect, as follow: the *fi. fa.* against lands in this suit was issued on the 30th of August, 1861, and delivered to sheriff Fortune on the following day, and was renewed on the 14th August, 1862: the return to it was made by sheriff Fortune on the 29th of August, 1863, "lands on hand": the *ven. ex.* and *fi. fa.* against lands for residue was issued on the 10th of November, 1863, and was received by sheriff Fortune on the 16th of that month.

There were two writs against lands, at the suit of the Commercial Bank, issued on the 23rd July, 1861, received by sheriff Fortune on the 25th of the same month, renewed on the 27th of June, 1862, and returned by sheriff Fortune, "no lands," on 3rd Sept., 1863, one of which was against both these defendants, the other against one of them only.

On the 5th September, 1863, the Commercial Bank delivered to sheriff Fortune two writs of *alias fi fa* against lands, which were renewed on the 30th of August, 1864.

Before the return of "lands on hand" there had been no advertisement of lands by the sheriff in which this cause was named, but an advertisement purporting to be under the two writs of the Commercial Bank, was inserted in the "*Cobourg Star*," a newspaper published in Cobourg, on the 17th of June, 1863, giving notice that the defendant's lands would be sold on the 12th of September, 1863, This advertisement was continued weekly in the "*Cobourg Star*" until the 5th of September, 1863, and it was published in the *Canada Gazette* on the 25th of July, 1863, and continued until the 12th of September following. No sale, or attempt at sale was made on the 12th of September, 1863, in pursuance of the advertisement, nor was the sale adjourned to any future day.

Sheriff Fortune was superseded in his office on the 9th of March, 1864: Sheriff Waddell, the present applicant, was appointed sheriff on the 10th of March, 1864.

The plaintiff's writ of *ven. ex.* and *fi fa.* residue was transferred by sheriff Fortune to the present sheriff on the 9th May, 1864, without any return of what had been done thereon, together with the two writs of *alias fi fa.* at the suit of the Commercial Bank.

The plaintiff's attorney in this case sent to sheriff Waddell on the 30th of May, 1864, a list of lands to be advertised under the writ of *ven. ex*, with money to pay for the advertisements; upon which the sheriff inserted in the *Canada Gazette*, on the 18th June, 1864, and also in the "*Cobourg Star*," the said lands, being those before advertised at the suit of the Commercial Bank, to be sold on the 10th September, 1864, under the *ven. ex.*, but not naming any other writ. These advertisements were regularly continued until the 10th of September: the sale was adjourned until the 26th of November, 1864.

On the 29th of August, 1864, the sheriff advertised the same lands, under the *alias* writs of the Commercial Bank, for sale on the 26th of November; and on the 16th day of September following, a rule to return the plaintiff's writ was served on the sheriff on behalf of the plaintiff.

English for the plaintiff shewed cause.—The advertisement in the *Star*, the local newspaper, while the plaintiff's writ was in force, and while also the Commercial Bank writs were in force, was a sufficient seizure of the lands, although no advertisement was published in the *Gazette* until after the Commercial Bank writs had expired. This advertisement in the *Star*, although it professed to be at the suit only of the Commercial Bank writs, operated as well to the benefit of all other writs which the sheriff had then in his hands to be executed: *Bank of Montreal* v. *Munro*, 28 U. C. Q. B. 419. The advertisement, therefore, was in law a seizure in fact made under the plaintiff's writ. The subsequent publication of the 25th July, 1863, being made while the plaintiff's writ was still in force, was consequently available to the plaintiff's writ, although it professed to be only a publication under the Commercial Bank writs, and although these writs had then run out: *Rowe* v. *Jarvis*, 13 U. C. C. P. 495. Any act, such as taking a list of lands by way of seizure, is a sufficient seizure: *Doe d. Tiffany* v. *Miller*, 6 U. C. Q. B.

426; and the C. L. P. Act, sec. 268, has made no change in the law in this respect: it does declare what acts shall be a seizure, but it does not confine it to these acts only, nor does it assume to alter the law as it stood before. The writ was properly assigned by the old to the new sheriff, which the latter was bound to complete, and the plaintiff was entitled to rule the sheriff to return the writ.

C. S. Patterson for the sheriff.—The plaintiff's writ was never properly acted on by the old sheriff. There can be no seizure of lands now but by an advertisement in the *Gazette*, and all the advertisements should be completed before the expiry of the writ, which was not the case as to the plaintiff's writ. And so, also, as the advertisement is the seizure, the discontinuance of the advertisement is an abandonment of the seizure; there should be regular adjournments to preserve the lands in the custody of the law: *McKee* v. *Woodruff*, 13 U. C. C. P. 583; *Muir* v. *Munro*, 23 U. C. Q. B. 139; Impey on the Office of Sheriff, Edn. 1817, fo. 90. The present sheriff should not have been ruled: *The King* v. *The Sheriff of Cornwall*, 1 T. R. 552.

A. Wilson, J.—The plaintiff's writ of *fieri facias* against lands, which issued on the 30th of August, 1861, was in full force by renewal until the 13th of August, 1863. The defendants lands were advertised as seized by publication in a local paper on the 17th of June, 1863, and in the *Gazette* on the 25th of July, 1863: these advertisements did not specify the plaintiff's writ, but described the seizure as having been made upon the writs only of the Commercial Bank. This latter circumstance has been decided to be of no consequence, for, as it is a seizure, it is a seizure under all the writs, according to their priority, which the sheriff has then in his hands to be executed. This may be, perhaps, on the principle, that it is not what the sheriff "declares, but the authority which he has, that is his justification:" *Crowther* v. *Ramsbottom*, 7 T. R. 654.

The advertisements were first made while the plaintiff's writ of *fieri facias* was in full operation: the advertisements were, therefore, in law a seizure under his writ.

The former sheriff, then, on the 29th August, 1863, a few days only after the expiry of the plaintiff's writ of *fieri facias*, returned the writ that he had "lands on hand," &c. This, it is contended, he could not do, in addition to the fact that he had not advertised in the name of this writ specially, because all the necessary advertisements had not been made before the time the writ had expired; but we think there is no force in this objection: a seizure of goods made at the last moment of the operation of a writ against goods would be a valid inception of execution to enable the sheriff to complete the writ after it had expired. It is not necessary that all the advertisements should have been completed of a seizure and intended sale of lands before it could be held that these lands were seized. There are numberless answers to the validity of this objection; but the statute itself is very plainly expressed upon this point: "The advertisement * * * during the currency of the writ * * shall be deemed a sufficient commencement of the execution to enable the same to be completed by a sale and conveyance of the lands after the writ has become returnable." It is the "commencement" of seizure that is the important act, for that commencement is the *seizure*: after that the advertisement is continued, not for the purposes of seizure but of sale, and after that, by reason of such commencement, the execution may be completed by sale and conveyance, "after the writ has become returnable."

We see no objection to the return which the former sheriff has made to this writ of "lands on hand," and we see no other return upon these facts which he could properly have made to it.

The plaintiff upon this return issued the *venditioni exponas* and *fi. fa.* for residue, on the 10th of November, 1863, and delivered it to the sheriff on the 16th of the same month. In strictness it was not necessary, for the mere purpose of a sale of the lands, to issue the *venditioni exponas* at all, as the sheriff could, as well without it as with it, have proceeded to sell the lands then in his hands.

The day of sale, which was fixed for the 12th September, 1863, was allowed to pass without a sale, or an attempt to sell without any adjournment being made of the sale; and so matters remained until the *ven. ex.* was transferred by the old to the new sheriff, on the 9th May, 1864, and until the new sheriff, on the 18th June, thereafter, advertised the lands for sale, under the plaintiff's writ of *ven. ex.*, on the 10th September following: and it is contended that because no sale was made on the 12th September, 1863, the day appointed, and no adjournment was made then of any intended sale, that the whole proceedings by advertisement, and the first result and effects of them, fell utterly through—that the seizure ceased, and the lands were in effect abandoned; but that, as we think, is to confound the preliminaries of a sale with the act, fact, and object of a seizure.

The seizure has been made or has been evidenced by the advertisement: it does not cease to be less a seizure because the sheriff has accidentally omitted to continue the notice that he will sell the lands on a particular day, or because the printer has forgotten to publish it, or because the newspaper or Gazette may, from fire, failure, civil commotion, or any other of the many causes that might be mentioned, been suspended or destroyed. This would lead to the most serious and obvious evils, and would in some of these instances be making superior agency and inevitable accident the offence, rather than the excuse, of the person who was alone injured by it.

The difficulty, no doubt, arises from the fact that the seizure of lands cannot be so visibly and tangibly made as of goods, nor so visibly and tangibly abandoned; and although no positive rule can be laid down as to what shall constitute an abandonment of lands once seized, for it must be a matter of fact arising very much from intention, we are quite satisfied that the non-adjournment of the intended sale on the 12th September, 1863, and the publication of a new and apparently unconnected notice with the former one, made in the June afterwards are not such facts which constitute necessarily and conclusively an abandonment of the seizure, which was lawfully made under the *fi. fa.*

The plaintiff's writ, it is admitted, was duly transferred to the present sheriff, who advertised under it the lands which had been before seized by his predecessor, as he was justified in doing under section 269 of the act. We do not see why, then, the plaintiff may not call upon the sheriff to return the *ven. ex.*

The present rule should, therefore, be discharged with costs.

Rule discharged with costs.

COMMON LAW CHAMBERS.

(*Reported by* R. A Harrison, Esq., *Barrister-at-Law.*)

EXTRADITION CASE.

In re Bennet G. Burley.

Extradition of criminal fugitives—Ashburton treaty—Rules for its interpretation—British subjects within the treaty—Charge may be originated in Canada—Acts of war not to commenced or concluded on neutral territory—Where acts admitted matter of defence to be tried in the foreign country—When magistrate bound to commit—Right of judges of superior courts to review decision of magistrate on the evidence—Form of certiorari to bring up depositions—Effect of different charge made in foreign country — Duty of government receiving the fugitive—Form of warrant of commitment—Form of adjudication.

1. Judges are bound to construe the Ashburton treaty, made between Great Britain and the United States of America for the extradition of fugitives from crime, in a liberal and just spirit, not laboring with legal astuteness to find flaws or doubtful meanings in its words, or in those of the legal forms required for carrying it into effect (per Hagarty, J.)
2. A British subject committing one of the crimes enumerated in the treaty within the jurisdiction of the United States, and afterwards fleeing to Canada, is subject to the provisions of the treaty, which provides for the surrender of "all persons" who being charged, &c.
3. It is not necessary to the jurisdiction of a magistrate in Canada, acting under the treaty and the Canadian statutes passed to give effect to it, either that a charge should be first laid in the United States, that a requisition should be first made by the government of the United States upon the Canadian government, or that the Governor General of Canada should first issue his warrant requiring magistrates to aid in the arrest of the fugitives; in other words, the charge may be originated before the magistrate in Canada.
4. Lawful acts of war against a belligerent cannot be either commenced or concluded in neutral territory.
5. Where the accused, on his examination before the magistrate, admitted the acts charged, which *prima facie* amounted to robbery (one of the crimes enumerated in the treaty), and alleged by way of defence matter of excuse which was of an equivocal character, *Held* that the magistrate could not try the case, but was bound to commit the accused for trial before the tribunals of the foreign country.
6. If the magistrate sitting on a similar charge if committed in Canada would commit for trial, he is equally bound to commit for trial in the foreign country when the offence if any has been committed there.
7. The judges of the superior courts in the country where the fugitive is found may, on a writ of *habeas corpus* and *certiorari*, consider if there was sufficient evidence before the committing magistrate to justify the committal, and so may review the decision of the magistrate on the evidence (per Richards, C. J.; *sed qu.* per Hagarty, J., and John Wilson, J.)
8. The writ of *certiorari* to bring up the depositions cannot properly be issued in vacation, returnable before a judge in Chambers (per Draper, C. J.)
9. The fact that the person is charged with piracy committed in the foreign country, ought not to prevent the government of the country where the fugitive is found surrendering him on the charge made and proved in the latter country (per Richards, C. J.)
10. When surrendered to the government of the country from which he fled, the government of the latter are bound to try him for the offence for which he is surrendered, and not for any other or different offence (per Richards, C. J.)
11. The warrant for committal till surrendered under the treaty need not set out the evidence taken before the committing magistrate, nor show any previous charge made in the foreign country, or requisition from the government of that country, or warrant from the Governor General of Canada, authorizing and requiring the magistrate to act.
12. The adjudication of the committing magistrate as to the sufficiency of the evidence for committal may be by way of recital in the warrant of commitment.

[Chambers, January 24-27, 1865.]

A writ of *habeas corpus* was granted on 23rd January last, by Mr. Justice Hagarty, addressed to the keeper of the common gaol of the city of Toronto, commanding him to bring before the presiding Judge in Chambers, Bennet G. Burley.

It was granted upon an affidavit verifying a copy of the warrant of the commitment of the prisoner granted by the Recorder of the city of Toronto on January 20, 1865. To this affidavit were attached a copy of a duly certified copy of the information laid against the prisoner in the United States, and a copy of the warrant for his apprehension issued thereon, which the affidavit states were produced and proved before the Recorder, and that on the argument before the Recorder the prosecutor withdrew that information and warrant from the consideration of the Recorder, though it was objected for the prisoner that the same could not be so withdrawn, as it showed a different charge in the United States, and though the investigation in the Province could only be of the matter charged in the United States, and not of a new charge based on the same circumstances.

The writ was granted also on the petition and affidavit of the prisoner.

The information charged that the prisoner, on the 19th September, 1864, on board the *Philo Parsons*, a vessel belonging in whole or part to Walter O. Ashley, a citizen of the United States, such vessel being then upon the high seas, to wit, upon Lake Erie, feloniously made an assault on the said Ashley, and feloniously put in bodily fear and danger of his life, and one promissory note issued by the Secretary of the Treasury of the United States of the denomination in value of twenty dollars, and in general use as currency, and being the property of the said Ashley and other persons, from the person and against the will of the said Ashley, feloniously did steal, rob, &c., contrary to the Act of Congress, approved April 30, 1790, commonly called the Piracy Act. The warrant set out the foregoing information, and commanded the officer to whom it was addressed to arrest the prisoner to be dealt with according to law.

Upon this *habeas corpus* the prisoner was, on 24th January last, brought before the Chief Justice of Upper Canada at Chambers. The keeper of the jail returned that the prisoner was in his custody upon a warrant of commitment annexed to the writ signed by the Recorder.

The warrant was in the following form:

Province of Canada, City of Toronto, To wit: } To the chief constable and all other constables of the city of Toronto, and Province of Canada, and to all or any of the constables or peace officers within the United Counties of York and Peel, in the said Province,

and to the keeper of the common gaol of the said city of Toronto.

Whereas on the thirtieth day of November, in the year of our Lord one thousand eight hundred and sixty-four, at the city of Toronto, in the Province of Canada, complaint upon oath was made by one Walter O. Ashley, before me, George Duggan, Esquire, then and from thence, hitherto, and still being Recorder in and for the said city of Toronto, charging that Bennet G. Burley, on the nineteenth day of September, in the last mentioned year, on board the steamboat *Philo Parsons*, an American vessel owned by citizens of the United States of America, the said steamboat then being near Kelly's Island, in the waters of Lake Erie, in the State of Ohio, one of the United States of America, and within the jurisdiction of the United States of America, with force and arms in and upon the said Walter O. Ashley did make an assault, and him the said Walter O. Ashley did put in bodily fear and danger of his life, and one promissory note issued by the secretary of the Treasury of the United States of America, of the denomination and value of twenty dollars, and in general use as current lawful money of the said United States of America, and being the property of the said Walter O. Ashley, Simon Fox, Peter Fox, Henry G. Fox, and George L. Caldwell, from the person and against the will of the said Walter O. Ashley, did then and there feloniously and with violence steal, take, rob and carry away; and that the said Bennet G. Burley was at the time of the making of the said complaint in the city of Toronto, in the Province of Canada: and whereas before and at the time of the making of the said complaint upon oath as aforesaid, the said Bennet G. Burley was and still is within the said city of Toronto: and whereas upon such complaint upon oath being made before me as aforesaid, I did, at the said city of Toronto, issue my warrant for the apprehension of the said Bennet G. Burley, so charged as aforesaid, that he might be brought before me at the said city of Toronto: and whereas the said Bennet G. Burley was brought before me at the said city of Toronto under the said warrant, and I have examined upon oath taken before me at the said city of Toronto the said Walter O. Ashley and other persons touching the truth of the said charge, and I have taken the evidence upon oath aforesaid of the said Walter O. Ashley and the said other persons touching the truth of the said charge in the presence of the said Bennet G. Burley: and whereas it is proved before me by the said evidence that the offence so charged in said complaint against the said Bennet G. Burley is and constitutes the crime of robbery in the said United States, where the said offence was committed, the said crime of robbery being one of the crimes mentioned in the Treaty hereinafter mentioned: and whereas the said evidence so taken before me on oath as aforesaid is such as according to the laws of the Province of Canada, and according to the laws of that part of said Province called Upper Canada, would justify the apprehension and committal for trial of the said Bennet G Burley, the person so accused, if the said crime, of which he is so accused had been committed in the said Province of Canada.

These are therefore to command you, the said chief constable and all other constables and peace officers aforesaid, and each and every of you, and any one or more of you, in Her Majesty's name, forthwith to take the said Bennet G. Burley, and him safely convey to the common gaol aforesaid, and there deliver him to the keeper thereof, together with this warrant, and I hereby command you the said keeper to receive the said Bennet G. Burley into your custody in the said common gaol, and there safely keep him, there to remain until surrendered according to the stipulation of the Treaty between Her Majesty the Queen and the United States of America, for the apprehension and surrender of fugitive felons, signed at Washington on the ninth day of August, in the year of our Lord one thousand eight hundred and forty-two, and recited, or in part recited, in chapter eighty-nine of the Consolidated Statutes of Canada, or until discharged according to law.

Given under my hand and seal this twentieth day of January, in the year of our Lord one thousand eight hundred and sixty-five, at the City of Toronto, in the Province of Canada.

(Signed) G. Duggan,
Recorder of the City of Toronto.

The return having been read and filed, a writ of *certiorari*, tested the 23rd of January, 1864,* was produced, addressed to the Recorder, commanding him to send all informations, examinations, and depositions taken before, or submitted to him, touching the commitment of Bennet G. Burley, charged with robbery or piracy before the Chief Justice of Upper Canada or other of the Justices of the Court of Queen's Bench presiding in Chambers at Osgoode Hall, immediately after the receipt of the writ.

This writ was issued by the clerk of the Court of Queen's Bench, and was tested in the name of the Chief Justice. It was returned under the hand and seal of the Recorder with "all and singular the informations, depositions and evidence had and taken before me against the within named" Burley annexed thereto.

The information was laid by Walter O Ashley, of the city of Detroit, State of Michigan, one of the United States of America, who swore that on the 19th of September, 1864, on board the steamboat *Philo Parsons*, an American vessel owned by citizens of the United States of America, the same steamboat then being near Kelly's Island, in the waters of Lake Erie, in the State of Ohio, one of the United States of America, and within the jurisdiction of the said United States, one Bennet G. Burley, and one Capt. Bell, with force and arms in and upon one Walter O. Ashley, informant, did make an assault, and him, the said Ashley, did put in bodily fear and danger of his life, and one promissory note issued by the Secretary of the Treasury of the said United States of the denomination and value of twenty dollars in use as current lawful money of the said United States, and being the property of Walter O Ashley and other persons named, from the person and against the will of the said Ashley did then and there feloniously and by force and violence steal, take, rob, and carry away.

* A clerical error for "1865."

The depositions of Walter Oliver Ashley, of Dewitt Clinton Nicholls, and of Alfred Russell against the prisoner, and of John Murray Price, of Stephen Frick Cameron, of Frank Alfrey St. Lawrence, of John Morrison, of Robert Kennedy, of Wm. L McDonald, of Arthur S Barnes, and of Wm. W Cleary, witnesses examined on behalf of the prisoner, were annexed to the writ of *certiorari*.

These depositions showed that the steamboat *Philo Parsons* was owned by the informant Ashley and other citizens of the United States, that this vessel was a licensed passenger and freight boat, and was plying between the city of Detroit in the State of Michigan, and the city of Sandusky in the state of Ohio, and was accustomed to touch in this route at the Canadian port of Amherstburg, and occasionally at Sandwich, and sometimes at Windsor in Canada. Ashley was clerk on board the steamer. On Sunday evening, the 18th September, 1864, she was lying at the city of Detroit, and the prisoner came on board and said to Ashley that he intended to go down in the morning, that three of his friends were going with him, and requested the boat might stop at Sandwich to take them. Ashley told the prisoner that if he took the boat at Detroit and his party were ready, the boat would call for them at Sandwich. The prisoner came on board the next morning and reminded Ashley of his promise. The boat was stopped at Sandwich, and three persons came on board without baggage or freight They were well dressed in the "Canadian style." The prisoner said his friends were taking a pleasure trip, and would probably stop at Kelly's Island. At Amherstburg twenty men or more came on board, roughly dressed, and paid their fare for Sandusky. The only baggage taken on board at Amherstburg was a large old trunk tied with cord. In the ordinary course the steamer should have reached Sandusky about five, p.m. Neither the prisoner nor his three friends apparently recognised the men who came on board at Amherstburg. The boat reached Kelly's Island about four, p. m., and proceeded south from the island towards Sandusky, Kelly's Island being in the State of Ohio, and about five miles from the main shore of the United States After proceeding about two miles three men came up to Ashley drawing revolvers, saying he was a dead man if he offered resistance. Two of them, as Ashley thought, came on board at Sandwich. At this time the prisoner came forward with a revolver in his hand, followed by from twenty-eight to thirty-five men, and levelled the revolver at Ashley, ordering him into the ladies' cabin, where Ashley immediately went, and from which he saw these parties arm themselves from the trunk broughton board at Amherstburg, most of them having two revolvers, and some having hatchets. The prisoner ordered a sulky and some pig iron which was on deck to be thrown overboard, which was partly done. Two men guarded Ashley, and they told him they intended to capture the United States steamer *Michigan*, a war vessel. The prisoner acted as one having authority. His commands were obeyed Another steamer called the *Island Queen* was seized by the same party at Middle Bass Island, and the passengers were brought as prisoners on board the *Philo Parsons*. A person named Capt Bell was of the prisoner's party and gave some orders. He told Ashley he wanted him in the office. Ashley went there with him and the prisoner. Ashley requested permission to take off the boat's books They refused. Ashley then said he had some private promissory notes amounting to about two thousand dollars. The prisoner took them, looked at them, and said he could not collect them, and returned them to Ashley Bell then said to Ashley "We want your money." He and the prisoner then had revolvers in their hands. Ashley swore he was in bodily fear, but did not consider his life in danger, if he did their bidding He opened the money drawer. There was very little money there. The prisoner then said "you have got more money; let us have it." Ashley took a roll of bills from his vest pocket and laid it on the desk. Bell took part and the prisoner took part, and they took the money in the drawer (about $10) between them. In the roll of bills taken by them there was a twenty dollar note of the United States, commonly called greebacks, issued by the Secretary of the Treasury It was in use as lawful current money of the United States at the time. It was legal tender for twenty dollars, and was the property of the owners of the boat. The prisoner took this money, as Ashley swore, against his (Ashley's) will. He was put in bodily fear and danger of his life at the time. Directly after the money was taken Ashley was put on shore at Middle Bass Island by the prisoner and Bell, and the boats steered for Sandusky with the *Island Queen* alongside, which last boat was cast adrift in about half an hour. Some of the party said they intended to release the prisoners on Johnson's Island, which is in the State of Ohio, about two miles from Sandusky. The *Michigan* was lying off Johnson's Island, supposed to guard it. There are about three thousand prisoners of war there, soldiers of the Confederate States Ashley stated there was a rebellion going on by the Southern States. He could not tell how many states. Captain Bell appeared to be in command of the party on board the *Philo Parsons*. He did not say in Ashley's hearing he was in any service, nor for what purpose he took the boat. There were about twenty-five United States soldiers on board the *Island Queen*, who were captured. The passengers were not prevented from taking their baggage. Nicholls confirmed Ashley's testimony in most of the material particulars. He said that Bell came to him in the pilot house, and said he was a Confederate officer, and seized the boat, and took him (Nicholls) a prisoner. But he also said the prisoner seemed to be the leader of them He did not see the money taken, He heard the prisoner say, when the *Island Queen* was set adrift, that they had cut her pipes, so that she would sink. They had taken every person from on board her. Afterwards the *Philo Parsons* was steered back towards Detroit. Before this, however, it seems that some of the passengers who were made prisoners were put on shore, on the American territory. When, on the return, they had reached the mouth of the Detroit river, some of the party asked Nicholls where they were, and he told them "in Canadian waters;" and some of them said, it was well for some of the vessels near them, or they would board them; and they enquired if a certain

banker did not live at Grosse Isle, in the Detroit river, and being told by Nicholls that one Ives lived there, they replied if it had not been so late they would go and rob him. A short distance above Amherstburgh two men landed in a boat on the Canadian side. At Fighting Island, Nicholls and others, part of the crews of the *Philo Parsons* and *Island Queen*, were put on shore, and the boat proceeded to Sandwich. Nicholls followed her, and in two hours got to Sandwich, and found her there deserted by the whole party, and a pianoforte, a mirror, and some other articles of the furniture belonging to the boat had been landed. Some of Nicholls clothing was also taken away. One of the party wore Nicholls' India rubber coat. The male passengers who were taken were, before they were landed, sworn to keep silent as to the transactions for twenty-four hours. The females were asked to promise to do so, but it was not said in Nicholl's hearing why this was done. When the *Island Queen* was cast adrift, they were about fourteen miles from Johnson's Island as the boat would have gone. When coming up the Detroit river some of the party said they had not made much by coming down. They had intended to take the *Michigan* if they could. They had a Confederate flag, and compelled Nicholls to assist in raising it on the *Philo Parsons*, when the boat was on Lake Erie, returning towards the Detroit river. It was put about half-way up the flag-staff.

The evidence of Mr. Russell proved certain papers or documents which were not returned to the writ of *certiorari*, and were, it is presumed, those which were offered in evidence before the learned Recorder, but to the reception of which the prisoner's counsel objected, and were withdrawn on the part of the prosecution. Mr. Russell stated that he was an attorney and counsellor of the Supreme Court of the United States. He said the offences charged against the prisoner in the United States and now in this Province are the same, and are created by the municipal laws of that country, and are triable in the Erie county court of the State of Ohio, and also in the circuit court of the United States at Detroit. That the crime, if tried in the Erie county court in the State of Ohio, would be robbery, and nothing else; if tried in Detroit would then be the crime of robbery on the lakes. That in his opinion this offence, if tried at Detroit, would be municipal piracy, arising upon the lakes within the territory of the United States, and the offence in such case would be a statutory offence. The crime of robbery, if committed on land within the State of Ohio, could not be tried at Detroit. That if the acts charged here were done by the prisoner and others, claiming to be, or being Confederates, as some of the Southern States people are called since the civil war in furtherance of a hostile design against the government of the people of the United States, these acts might be treated as acts of robbery, and would not merge in the offence of treason He knew no doctrine of merger as to crimes similar to that in real estate. He would regard as robbery the taking of the money from the party on the boat, although they professed and had civil war objects in view, and although the other acts done were in furtherance of these objects.

On the part of the prisoner, evidence was given that in February and March, 1864, the prisoner was seen in Richmond, in Confederate uniform, wearing a badge of military rank. He was also in Richmond in May, 1863. It was proved that he was born either at Greenock or Glasgow, in Scotland. He was in Canada about the beginning of August, 1864, and also in the month of October following. He had been a prisoner of war in a fort belonging to the United States and had escaped. It was also proved that at Johnson's Island there is a military prison of the United States, and that there are about two thousand six hundred prisoners there, consisting principally of Confederate officers. The witness (Robert Kennedy) stated that he had been a captain in the Confederate States, and had escaped from this prison, and he was aware that an attempt was to be made sometime in September last to release the prisoners; that there is a Federal military force at the Island, and a gunboat called the *Michigan*. That he was in uniform when taken, and was treated, not as a rebel but as a prisoner of war.

Evidence was also adduced to prove the authenticity of the documents hereafter set out. They were received *sub modo* by the Recorder, and were the following:

[COPY.]

"CONFEDERATE STATES OF AMERICA,
"NAVY DEPARTMENT,
"RICHMOND, Sept. 11, 1863.

"SIR,—You are hereby informed that the President has appointed you an Acting Master in the Navy of the Confederate States. You are requested to signify your acceptance or non-acceptance of this appointment; and should you accept, you are to sign before a magistrate the oath of office herewith forwarded, and forward the same, with your letter of acceptance, to this department. Registered No. The lowest number takes rank.

"S. R. MALLORY,
"Secretary of the Navy.

"Acting Master BENNET G. BURLEY,
"C. S. Navy, Richmond, Va"

On this there was the following indorsement:

"CONFEDERATE STATES OF AMERICA.
"RICHMOND, 22nd Dec, 1864.

"I certify that the reverse of this page presents a true copy of the warrant granted to Bennet G. Burley, as an Acting Master in the Navy of the Confederate States from the records of this Department. In testimony whereof I have hereunto set my hand and affixed the seal of this Department on the day and year above written.

(Signed) "S. R. MALLORY,
"Secretary of the Navy." [L. S.]

[MANIFESTO.]

"CONFEDERATE STATES OF AMERICA.

"Whereas, it has been made known to me that Bennet G. Burley, an Acting Master in the Navy of the Confederate States, is now under arrest in one of the British North American Provinces, on an application made by the government of the United States for the delivery to

that government of the said Bennett G. Burley, under the Treaty known as the Extradition Treaty, now in force between the United States and Great Britain. And whereas it has been represented to me that the demand for the extradition of the said Bennett G Burley is based on the charge that the said Burley is a fugitive from justice, charged with having committed the crimes of robbery and piracy in the jurisdiction of the United States; And whereas, it has further been made known to me that the accusations and charges made against the said Bennett G Burley, are based solely on the acts and conduct of the said Burley in an enterprise or expedition made or attempted in the month of September last (1864), for the capture of the steamer *Michigan*, an armed vessel of the United States, navigating the lakes on the boundary between the United States and the British North American Provinces, and for the release of numerous citizens of the Confederate States, held as prisoners of war by the United States at a certain island called Johnson's Island; And whereas, the said enterprise or expedition for the capture of the said armed steamer *Michigan*, and for the release of the said prisoners on Johnson's Island was a proper and legitimate belligerent operation, undertaken during the pending public war between the two confederacies, known respectively as the Confederate States of America and the United States of America, which operation was ordered and sanctioned by the authority of the government of the Confederate States, and confided to its commissioned officers for execution, among which officers is the said Bennett G. Burley.

"Now, therefore, I Jefferson Davis, President of the Confederate States of America, do hereby declare and make known to all whom it may concern, that the expedition aforesaid, undertaken in the month of September last, for the capture of the armed steamer Michigan, a vessel of war of the United States, and for the release of the prisoners of war, citizens of the Confederate States of America, held captive by the United States of America at Johnson's Island, was a belligerent expedition ordered and undertaken under the authority of the Confederate States of America, against the United States of America, and that the government of the Confederate States of America assumes the responsibility of answering for the acts and conduct of any of its officers engaged in said expedition, and especially of the said Bennett G. Burley, an acting master in the navy of the Confederate States.

"And I do further make known to all whom it may concern, that in the orders and instructions given to the officers engaged in said expedition, they were especially directed and enjoined to 'abstain from violating any of the laws and regulations of the Canadian or British authorities in relation to neutrality,' and that the combination necessary to effect the purpose of said expedition 'must be made by Confederate soldiers and such assistance as they might (you may) draw from the enemy's country.'

"In testimony whereof I have signed this manifesto, and directed the same to be sealed with the seal of the Department of State of the Confederate States of America, and to be made public.

"Done at the city of Richmond, on this 24th day of December, 1864.

"Jefferson Davis.

"By the President,

"J. P. Benjamin, *Secretary of State.*"

The case was, on 24th January last, argued before the Chief Justice of Upper Canada sitting in Chambers, aided by the Chief Justice of the Common Pleas, and Justices Hagarty and John Wilson, representing a majority of the judges of the two superior courts of common law for Upper Canada.

M C. Cameron, Q C., moved for the discharge of the prisoner, Bennett G. Burley, on the *habeas corpus*.

The Chief Justice directed the return to be read, and the writ and return filed, which was done.

Mr. Cameron—The return shows a warrant from the Recorder of the city of Toronto, setting forth an information against the prisoner for robbery, on the oath of Walter O. Ashley, by virtue of which he (the Recorder) had issued his warrant, and had the prisoner brought before him; that the said Walter O. Ashley and other witnesses had been examined before him, in the presence of the prisoner; and that it was proved that the offence was robbery by the law of the United States; and then the warrant sets forth, "That whereas the said evidence [which is not set out] was such as, according to the laws of this Province, would justify the apprehension and committal for trial of the person so accused, if the crime of which he was so accused had been committed in this Province—therefore he commanded the constables, &c., to convey the said Burley to gaol, and required the gaoler to keep him till surrendered, under the provisions of the treaty of extradition, or until discharged by due course of law." This warrant he (Mr. Cameron) submitted was illegal and void, on the grounds,

First.—It did not show that any charge had been made against the prisoner in the United States, nor was it shown that a requisition had been made by the United States Government for the extradition; that one or other of these proceedings was necessary, because the treaty only provided for the extradition of persons charged with the crimes mentioned in the treaty, and the 10th article of the treaty provided that the Government asking the extradition must pay the expense of apprehension, keeping and surrender, and unless some proceding was taken in the States to show that the charge would be prosecuted and the expenses paid, the authorities in this country would be incurring unauthorised expenditure.

Second.—The commitment should have set out the evidence, which it did not do. Under the Act, chap. 89, of the Consolidated Statutes of Canada, passed for carrying the treaty into effect, the magistrate was made judge of the sufficiency of the evidence—the words there being, "And if on such hearing, the evidence be deemed by him [the magistrate] sufficient to sustain the charge according to the laws of this country, he shall," &c. But by 24th Vic, chap 6, sec. 1, this provision is repealed and the following substituted: "It shall be lawful for such judge or

other officer to examine upon oath any person or persons touching the truth of the charge; *and upon such evidence* as according to the laws of this Province would justify the apprehension and committal for trial of the person accused, if the crime of which he shall be so accused had been committed here, it shall be lawful for the judge or the officer to issue his warrant of commitment" &c. Now, why was this change in the language of the statute made unless to avoid the consequence of the doubt raised by the Court *In re Anderson*, in 11 U. C. C P. 1, as to their power to review the decision of the magistrate. There was no form of commitment given by the Legislature, and the old practice was to set out on the face of a conviction or a commitment the evidence given; then the warrant should show the evidence, in order that the Court on *habeas corpus* should be able to see whether the evidence was such as by the law of the Province would warrant the committal of the accused for trial.

Third.—The commitment should have shewn an adjudication by the magistrate as to the guilt or innocence of the accused, which it did not, but by way of recital only alleged that the evidence was sufficient to warrant his apprehension and committal. According to the form provided by the English Act 8 & 9 Vic, chap. 120, which commenced like a formal conviction, there was the expression of the magistrate that the accused was guilty of the charge. This Act is not in force in this country; but the form showed the view of the Imperial Legislature as to what the magistrate should find. He referred to *Reg.* v. *Tubbee*, 1 U. C. Pr. R. 103; *In re Kernott*, 1 U. C. Cham. R. 253; the case of the *Chesapeake* in New Brunswick; and *Reg.* v. *Tinan*, 10 L. T. N. S. 499.

Then as to the merits, he contended that the prisoner claimed that the act charged was committed while engaged in an act of hostility, duly authorised by the Confederate States, against the United States; that this appeared from the evidence on the part of the prosecution in part, and completely in the evidence for the defence. That assuming that the private property of any citizen of a belligerent state was not liable to be seized by an enemy—that such seizure, if made while engaged in an act of war, authorised by the State to which he owed allegiance, or in whose service he was, he would not be liable, criminally, for such excess, but would be amenable to his own State, and the party injured would, perhaps, have a right to call upon the government of the offending party to make compensation; or if the act was not in strict accordance with the usages of w[illegible], then he might be punished by the military authorities of the enemy, and denied the right of being held as a prisoner of war, but he could not be held in any manner responsible to the criminal courts of the enemy's country. He contended, however, that when a declaration of war was made by one State against another, it arrayed each individual of the one power against the other, and though civilians were not bound to undertake any act of hostility, yet when the enemy or his property fell into their hands, their duty to their country required them to retain it, and that a commissioned officer was bound by his duty to despoil the enemy; that the *Pilo Parsons* became a lawful prize; that it was captured in the waters of the United States, and there was no infraction of any neutrality, but if there had been it was only the neutral power that could complain and not the belligerent enemy—that the boat becoming a prize all on board of it must be regarded in the same light. That on behalf of his client he repudiated the imputation that the expedition was a plundering expedition, and denied that his client was guilty of taking the money at all, the witness Ashley having mistaken the person; that his description of the dress and appearance of the person that he said was the prisoner differed so much from the evidence of Nichols, the mate, that it was manifest they did not clearly know or recognize the prisoner, and the person who took the money was really a different person; but this he (Mr. Cameron) admitted, would be a proper question for the consideration of the jury, and he only alluded to it because his client felt more deeply the imputation that he was guilty of the low, vulgar robbery, as it had been termed, than he did the prospect of being extradited. He contended that if it were admitted for the sake of argument that the parties engaged in the enterprise had violated the right of asylum, and were guilty of a breach of the law of neutrality, they could only be made responsible to the laws of this country; that the offence would only be a misdemeanour for which they could be punished here, and not a felony; and that they could in no manner be responsible either to the civil or military authorities of the United States for so acting. He referred to the following authorities to sustain the position assumed by him in the above points: *The United States* v. *Palmer*, 3 Wheatn 610; Twiss on International Law, vol. 2, pages 84, 390, 492, 441 and 502; *Brown* v. *United States*, 8 Cranch, 132-3. He also contended that the prisoner, as a British subject, could not be extradited against his own will, as the law did not in express terms apply to the subject of the party affording asylum; that a subject returning to his own country could not be treated as seeking asylum; that that was his place of domicile as a birth-right, and he was entitled to the protection of the law of the country against which he had not offended—crime in a foreign country not being a crime against his own; that the Crown could not by its prerogative or power banish a subject, and it could not by treaty acquire a power that it did not possess before, and as the Act was made merely to carry into effect the provisions of the treaty, it could not be taken as an enactment permitting the expatriation of a subject. That Wheaton laid it down at page 179, "In the negotiation of treaties, stipulating for the extradition of persons accused of crime, certain rules are generally followed, and especially by constitutional Governments. The principal of these rules is, that a State should never authorize the extradition of its own citizens or subjects, or persons accused of political or purely local crimes." That it was lawful for a nation to commission the subjects of a neutral nation, or of the enemy, and that the persons so commissioned had all the rights of the native born subjects of the government granting the commission—Twiss, vol 2, p. 350 That the law was the same whether the belligerents were independent nations or the sub-

jects of nations engaged in civil war (the case of the *Invincible*, 2 Twiss, page 502) That the language of Blackburn, J., in the case of Tivnan, 10 L. T. N. S. 499, was clear that if the act was a belligerent act the accused could not be tried at all, and the case was not one that could be regarded and decided by the same rules that govern in the time of peace. That here was not the mere right of the accused but of the State he was serving, and to extradite him would be a most flagrant breach of our neutrality, as Her Majesty's proclamation was as much a contract with the South and North respectively as the treaty was with the North, and if one man could be given, then ten thousand might be with equal reason and propriety handed over, and thus the British Government would be most efficiently serving the North by placing within their contro the soldiers of the South.

Richards, Q. C., for the private prosecutor. As to the forms of the warrant and other proceedings, he submitted that they were drawn in strict accordance with the provisions of the act and of the English practice. As to the 2nd and 3rd points, he argued that it is quite sufficient that it appears that the complaint was made here. If our courts had to await such actions in the States before moving, the main object of the treaty, to secure the speedy arrest of suspected persons, would be frustrated. He contended that the word "any" in the treaty, means any person whosoever, and of course it included British subjects, and all others who might commit offences provided for in the treaty. If it were interpreted in any other way in order that British subjects might not be included, it would destroy the effect of the treaty. Mr. Richards then proceeded to review the evidence adduced before the Recorder for the prosecution, from the commencement to the final mooring of the *Philo Parsons* at the wharf on the Canadian side. He argued from the evidence that the strongest possible proof of robbery had been brought against the prisoner: as clear a case as had ever been proved against highwaymen; and consequently the case was strong enough to go to a jury. He then proceeded to show that the Court had no power to review the judgment of the Recorder, but should allow the matter to be decided by the American tribunals. With regard to the belligerent character of the prisoner, he contended he had failed to establish that fact satisfactorily. Warfare must be carried on by the Sovereign of a State, and not by banditti, who upon being arrested would be liable to be executed. As to the document purporting to be a commission, signed by R. S. Mallory, Secretary of the Confederate States Navy, produced by the prisoner to prove that he was a duly commissioned officer in the service of the Confederate States, it had not been legally proved to be genuine, as no person had come forward to testify to their having seen him sign his name to it. Witnesses had stated that they believed the handwriting to be his, but that was not sufficient. He applied the same argument to the manifesto of President Davis, assuming the act of Burley. No person had seen him sign it, but merely believed the signature to be his, which was not sufficient evidence in law. Mr Richards continued to argue that the robbery committed by the prisoner and those who acted with him was not a belligerent act, or one acknowledged to be such by the law of Christian nations. Under these circumstances the prisoner should be delivered up to the United States, in order that he might be brought before a jury for trial. He was not prepared to say, however, that if it could be proved that the steamer *Philo Parsons* had been seized for the express purpose of assisting the raiders in capturing the United States war steamer *Michigan*, in order that an attempt might be made to liberate the Confederate prisoners on Johnson's Island, that the prisoner should not be tried as a belligerent. But it had not been proved that that was their intention. He also argued that during times of war those engaged in it had no right to make descents upon private citizens and despoil them of their goods.

The CHIEF JUSTICE said that it might as well be contended that a soldier who took a prisoner in battle had no right to strip him of his clothes in order to clothe the soldier who might have none, and in such a case as that, that the soldier might be tried for robbery, on the ground that such a proceeding would not be a legitimate act of war.

Mr. Justice HAGARTY thought that was what the Counsel for the prosecution was endeavouring to show.

Mr. Richards said that a soldier belonging to an to an army that was passing through an enemy's country had no right to leave the ranks for the purpose of plundering private citizens, and referred to cases in which the Duke of Wellington had some of his men shot for such acts.

The CHIEF JUSTICE here remarked that it appeared to him that the case was about to turn on the point whether those holding commissions had a right to commit acts which were not recognized as legitimate acts of warfare by civilized nations; and he asked, who was to decide upon the case?

Mr. Richards replied, a jury, as a matter of course. He next proceeded to argue that, according to the ruling of the English courts, belligerent acts could not be originated on neutral territory, and consequently, as the Lake Erie raiders had initiated the attack in Canada, they were not entitled to be treated as belligerent. (*Two Brothers*, 3 C. Rob. 162.) It was absurd to imagine that twenty or thirty men at the most could entertain any idea of capturing the war steamer *Michigan*, and subsequently rescuing the Confederate prisoners on Johnson's Island, when it was known that there was a regiment of United States soldiers there prepared to resist any such attempt. He admitted, however, that an equal number of men might leave Lee's army and operate against the enemy in the neighbourhood of Richmond, and be considered as engaged in legitimate acts of war, because war was known to exist there

He referred to Wheaton, last edn., part 4, pp. 626, 627: Vattel book 3, cap. 15, s. 226; Wheaton, part 4, cap. 2, s. 8: 3 Phillimore, 145: Halleck, 386. He conceded that the prisoner was a British subject, and so contended that he was bound to shew authority to make war, and whether he had authority or not was a question for a jury. The proof offered that he wore a uniform in Richmond in 1863—500 miles from

Detroit—does not prove his status in Detroit in 1864. The learned counsel next read the copy of Burley's commission, dated 11th Sept., 1863, and argued that it was conditional only, and it was not shewn that the condition had been fulfilled. Besides, he drew attention to the fact that the certificate proving the commission was not under the seal of the Confederate States, but of the Navy Department of that State. He next adverted to the manifesto. If prisoner had a commission, it was only in the navy, and that did not authorise him to make war on his own account. He also argued there was no sufficient proof of the seal to the manifesto, and that the evidence of the handwriting of Jefferson Davis was for the jury. Besides, he contended that the manifesto was not an adoption of the act with which Burley was charged by the robbery of Ashley: (3 Phillimore, 138.) But waiving this he argued there was no sufficient evidence that the expedition ever was undertaken, made or attempted or commenced to capture the *Michigan*, and for the release of the prisoners at Johnson's Island, and the statement of Jefferson Davis that "it had been made known to him," afforded no evidence of the fact, though it was further stated that the operation was ordered and sanctioned by the authority of the Confederate Government, and confided to its officers for execution, of whom Burley was one; and that while the manifesto attempted to assume responsibility for the act, it expressly provided that the officers engaged were enjoined to abstain from violating any of the laws and regulations of the Canadian or British authorities in relation to neutrality, an injunction which was not observed, and so the adoption could be of no avail: (Wheaton, part 4, cap 2, ss. 4, 5) There was nothing to show that the taking of the money from Ashley was in aid of the operation. The conduct of the prisoner and those with him was inconsistent with the pretence of their doing a belligerent act. At all events, there was so much doubt about it that the case should be sent for trial, and cannot be tried here. They were no part of an army. They were far from the theatre of military operations. There was not the preparation necessary honestly to attempt the capture of a war vessel having 14 guns, like the *Michigan*. The prisoner must be sent for trial to the foreign country, and we must assume that he will be fairly tried there, and if entitled to an acquittal will be acquitted: (*In re Anderson*, 20 U. C. Q. B. p. 124)

Robt. A Harrison appeared for the Crown. He would first address himself to the argument that the prisoner, as a British subject, did not come within the treaty.

Chief Justice Draper said he thought it was unnecessary further to discuss that point, as he had made up his mind upon it.

Mr. Harrison understood by that that his lordship thought the prisoner was within the treaty. (Chief Justice Draper assented) Then as to the three objections to the warrant First, that it was defective, because it did not set forth the evidence upon which the extradition of the prisoner was demanded. Neither the treaty nor the statute gave any form of warrant, and if the judges had no power to weigh the evidence, he (Mr. Harrison) failed to see any reason for setting forth the evidence in the warrant. Mr. Cameron had quoted the Imperial Act, 8 & 9 Vic. c. 121, but that does not require the evidence to be set forth in the warrant, it merely gives the form to be used when the magistrate committed a prisoner, and the Governor was called upon to act on his decision. Next, it was objected to the warrant that it does not show any warrant antecedent to the action of the magistrate. He (Mr. Harrison) would direct the attention of the Court to the fact, that the treaty made no reference to any antecedent authority. By the treaty the magistrates of the respective countries had power to hear evidence and commit. The Imperial Act 6 & 7 Victoria created something that was not in the treaty, and gave colour to the argument of Mr. Cameron; for it provided that it should be lawful for one of Her Majesty's Chief Secretaries of State to require magistrates to act, and thereupon it should be lawful for the magistrates to act. But this statute gave our Legislature power to devise machinery for the purpose of carrying out the treaty, and the judges would remark, that in the recital of our Act, 12 Vic. cap. 19, it was set forth that to require the action of the Governor-General (equivalent to the action of a Secretary of State) before an accused person could be arrested, would, by reason of the delay, enable fugitives to escape, and so defeat the treaty. Then it was contended that it should be shown there was a charge laid in the United States. That point has already received adjudication. (*In re Anderson*, 11 U. C. C. P. p. 63) In that case Chief Justice Draper said it was plain that the proceedings for the arrest of a party, with a view to his surrender, might be commenced in this Province. Something had been said about a charge laid in the United States which differed from the one here. His learned friend objected to the evidence, and it had been withdrawn. (Mr. Cameron disputed this assertion, and proceeded to read the evidence given before the Recorder by Mr. Russell, the U. S. attorney.) Mr. Harrison contended that this fully bore out his assertion. There was no evidence that a different charge had been preferred, but even if there were, it would not alter the case here, because we had power to initiate proceedings under the statute. The next question was as to the right of the Court to read the evidence taken before the Recorder. On *habeas corpus* the Court may say if there is *any* evidence, but if any, the Court will not weigh it. That was the deliberate decision of the Court in the case of *Emily Munro*, 23 U. C. Q. B. p. 50. In *ex parte Bessett*, 6 Q. B., the court decided that they had no power to look at the evidence to see whether in it there was authority to commit. He referred to Chief Justice Robinson's judgment in the *Anderson* case, 20 U.C. Q. B. 164, &c.; to the language of Crompton, J. in the *John C Gerity* case, 10 L. T. N. S. 501; and to the *Chesapeake* New Brunswick case, p. 46. But suppose the Court were to look at the evidence, for the purpose of seeing whether the magistrate came to a proper conclusion the treaty and the statute merely provided that he should receive the evidence of criminality, and not evidence of exculpation. The moment the Court went into this latter, the question of intent was raised, which a jury alone could decide. The learned

counsel had submitted this objection to his honor the Recorder, and he begged to submit it to this Court. He contended that the only evidence the Court could look at was the evidence for the prosecution, because the statute spoke only of evidence of "criminality," and because the statutes spoke of nothing but this particular kind of evidence. The moment the Court went into the consideration of evidence for the defence, they began a trial of fact, to which they were not competent. But did the facts show an act of war or an act of robbery? He started with this axiom, that no use could be made of neutral territory for the purposes of war, and that if any use were made of it for offensive purposes, that was not an act of war. Mr. Richards had shown by authorities that if the act of capture were commenced from neutral territory, there had been no legal capture; that in fact there had not been an act of war.

Mr. Justice Richards—You must not lose sight of the fact that all that is said on that question is for the purpose of determining what the consequences of that act in a neutral territory are.

Mr. Harrison.—But it shewed that under these circumstances, there was not an act of war. If it was, then the responsibility was shifted from the individual to the State. But he contended that these cases of capture decided that where any act was commenced on neutral territory, it was not an act of war. (See *Santissima Trinidad*, 7 Wheaton 283; also 9 Trench 359; *Santa Maria*, 7 Wheaton 490; *Grand Pere*, 4 Wheaton 471; *Diana Astora*, 4 Wheaton 571.) What constituts an act of war, is a question of law. In this case the prisoner took upon himself the responsibility of shewing that what he did was an act of war. He must do that beyond all question. Now, when a man acted under authority, this other question also arose—did he do so honestly or not? That being settled in the affirmative, we must then find whether the acts he did were acts of war. But the question *quo animo* is peculiarly a question for a jury. (*Reg* v. *Hare*, 1 Leach C. C. 270; *In re Anderson*, 11 U. C. C. P. 60, Draper, C. J.; *In re Kane*, 11 How. U. S. 110, Catron, J.; *In re Collins* (the *Chesapeake* case) p 35; Opinions of the Attorneys-General of the United States, 204, 211; *In re Barnett*, 11 L. T. N. S. 488). He (Mr Harrison) laid down this proposition—that taking property by force from the person of another was robbery. The exception was when it was taken for purposes of war. The Duke of Wellington, when in Spain, hanged men who committed robbery. They were tried by court-martial; but this did not prove that they would not have been amenable to the civil tribunals of the country. Although a man had a commission he might still commit an act of piracy, for he might act dishonestly (*United States* v *Clintock*, 5 Wheat. 141). It is not enough for those representing the Southern Government to say that such things were done at Savannah and New Orleans by the United States officers. We had to look at these things as neutrals. There was no reason if they did wrong there why we should countenance wrong here. But he (Mr. Harrison) begged again to call the attention of the court to the fact that the moment we got into this discussion, we found ourselves trying a question of fact. Next referring to the manifesto of Mr. Jefferson Davis, the learned counsel contended that it did not prove an antecedent authority; that it merely said an authority for a certain expedition had been given. But accepting it for what it was worth, it said to the prisoner "You must not violate neutral territory." Plainly then, he had exceeded his authority. He was authorized to do a certain act, provided he did not violate neutral territory. But he did violate neutral territory, therefore he was not authorized. Having exceeded his authority, he was a wrong-doer *ab initio*. But however this might be, the laws of war exempted private property. (See *Lucas* v. *Bruce*, 4 American Law Register 98; *Mostyn* v. *Fabrigas*, Cowp. 180). As to the question of ratification, he (Mr. Harrison) contended that the Southern Government could not discharge the prisoner from his obligations. The ratification might make the Southern Government responsible as accessories after the fact, but it could not relieve the prisoner of his responsibility if he had committed a criminal act. The learned counsel concluded by referring the court to the result of *McLeod's* case (6 Webster's Works 247; 25 Wendell 483) to shew that we have no reason to doubt but that prisoner will get a fair trial in the United States, and argued that so long as the treaty existed we are bound to believe he will; for the treaty is based on the confidence which each nation places in the honest and impartial administration of justice by the other.

Mr. Cameron briefly replied, and in answer to the remarks of Mr Richards with regard to the sinignificant force that pretended to attempt the capture of the steamer *Michigan*, said that the number of outsiders who were ready to assist in the enterprise had not been ascertained, and that Mr. Richards appeared to forget that there were also on the island no less than twenty-six hundred Confederate prisoners ready to assist their friends, and that they knew the attempt was about to be made to liberate them. He contended that the belligerent character of the prisoner had been fully proved, and said that the British Government was bound as firmly to uphold the Confederate States in their belligerent rights as it was to carry out the provisions of the Ashburton Treaty with the United States of America. He cited Twiss 441, 442.

Draper, C. J.—Mr. Cameron objected to the sufficiency of the warrant and to the sufficiency of the evidence adduced before the Recorder to justify or sustain the warrant.

As to the warrant, he contended that it ought to set out the evidence upon which it was issued; that it should show that the Governor General authorized and directed the Recorder to take proceedings against the prisoner, or that a proceeding against him had been originated in the United States.

I think none of these objections are sustainable. The authority of the Recorder is derived from and under the second section of chap. 6 of the Provincial statute 24 Vic, which enacts that "upon complaint made upon oath or affirmation (in cases where affirmations can be legally taken instead of oaths) charging *any person* found within the limits of this province with having com-

mitted within the jurisdiction of the United States of America any of the crimes enumerated or provided for by the treaty, it shall be lawful for any (certain judges and officers, among whom is the Recorder) to issue his warrant for the apprehension of the party so charged, that he may be brought before such judge or other officer, and upon the said person being brought before him under the said warrant, it shall be lawful for such judge, &c., to examine upon oath any person or persons touching the truth of such charge and *upon such evidence as according* to the laws *of this Province would justify the apprehension* and committal for trial of the person so accused if the crime of which he shall be so accused had been committed therein, it shall be lawful for such judge or other officer to issue his warrant for the commitment of the person so charged to the proper jail, there to remain until surrendered according to the stipulation of the said treaty, or until discharged according to law, and the judge shall thereupon forthwith transmit or deliver to the Governor a copy of all the testimony taken before him, that a warrant may issue upon the requisition of the United States for the surrender of such person pursuant to the said treaty."

Nothing in this act contained requires that the evidence adduced against the accused should be set forth in the warrant of commitment, and referring to the forms in use or directed by statute to be used in other cases of alleged crime, they do not contain the evidence by which the charge is so far supported as to justify a committal. The form given in the act of the Imperial Parliament 8 & 9 Vic. chap. 121, does not render it necessary; and as to this branch of the question, it states, "forasmuch as it hath 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, &c., entituled, &c., that the said A. B is guilty of the said offence." The present commitment runs thus: "And whereas, the said evidences so taken before me upon oath as aforesaid, is such as according to the laws, &c. (following the language of the statute) I take it that the word "forasmuch" is as much a word of recital as the word "whereas." Each word as used involves the assertion of the fact as recited, and that fact is that such evidence as the law renders necessary has been adduced before the officer issuing the warrant.

The statute itself affords a complete answer to the other objections—for it gives the authority to arrest and commit without the previous intervention of the Governor General and without requiring any previous proceedings in the United States.

Then, upon the sufficiency of the evidence to justify the apprehension and committal for surrender of the prisoner.

Before discussing this, I must observe that I know of no authority—nor of any practice so established as to be deemed recognized as authority—for issuing a writ of *certiorari* in vacation, returnable before a judge in Chambers. The writ is, I believe, one which must be returnable before the court in *banc.* and the form of it, as given in the books, at which I have looked, is always so, and in criminal cases in England it formerly, and I apprehend still, issues only out of the court of Queen's Bench, and is made returnable on a day in term, "before us at Westminster," or "before us, wheresoever," &c. I mention this to prevent this case being drawn into a precedent, so far as I am concerned. No objection is raised by the counsel for the prosecution, and they have discussed the evidence as if regularly brought under consideration. I have no doubt writs of *certiorari* have been issued in a similar form before, in this Province, without objections—but they are not warranted by English practice. The teste of the present writ is also erroneous (1864 for 1865), but the mistake becomes of no consequence.

The first point taken was that it appears that the prisoner is a native-born subject of Her Majesty, and therefore does not come under the extradition treaty, or the statute passed to give it effect. Reference was made on this subject to statute 31 Car. 2, ch. 2, sec. 12. This objection was disposed of during the argument. The statute 24 Vic. is large enough to embrace all persons, subjects, denizens, or aliens, who have committed the crimes enumerated, in the United States and who are found in this Province. It is sufficient to read the 12th section of the 31st Car. 2nd, to see that it can have no application to a proceeding like the present

It was further objected that the prisoner is proved to be an officer in the service of the Southern Confederacy; that there is an existing state of war between that Confederacy and the United States of America; that this state of war gives rise to, as between the belligerents themselves, certain rights acknowledged by the law of nations, and among them an immunity as regards all acts of hostility done either in the enemy's country or against the lives and property of the enemy's subjects and citizens; that the act charged as robbery was an act done in the prosecution of lawful hostilities—and though committed within the territory of the United States, was not a crime against the municipal laws of that country; that Great Britain has recognised this state of war, and has, by a declaration of neutrality, admitted the existence in each, of those rights which belong to belligerents. Hence it is argued that the judicial authorities of this country cannot treat such acts, as the prisoner is charged with committing under the circumstances, as appearing as crimes such as the extradition treaty was intended to apply to.

Such, concisely stated, I understand, are the grounds of the application for the prisoner's discharge, for the purpose of a decision. I assume, though I do not adjudge, that the evidence is properly before us, and that a decision must be founded upon a careful examination and consideration of the whole of it.

It is established that the alleged state of war exists. The Queen's proclamation puts the question at rest, while it recognizes and declares the obligations arising from the neutrality to be observed by the Queen's subjects towards the belligerents.

Then the particular facts set forward appear to be that the prisoner is a British-born subject, who, by entering into the naval or military service of one of the belligerents has contracted engagements at variance with his proper duty as a British subject. It is asserted on his behalf,

that, having been a prisoner of war, in the United States, he made his escape; he is proved to have been in this province in August, 1864; and in September of that year he was in the city of Detroit, within one of those States in an apparently civil character While there, and receiving the protection of the laws of that country, he owed, according to our law, a temporary allegiance, and might, by violating it, have been guilty of treason. He cannot, I think, be heard to say that he was not in that situation while living peaceably in Detroit for a greater or less time.

Dressed as a civilian he comes on board an American steamboat, which was engaged in private trade. If he came armed, his weapons were concealed. At his request, the vessel is stopped at a port within British territory, where three other persons come on board and join him. They, too, like himself, appear to be travellers, and were secretly armed, if they were armed. The steamboat touched, in her usual course, at another British port, where twenty or thirty more men in the dress of private citizens, and unarmed, came on board, bringing with them a chest, or trunk, in which, as subsequently appeared, there were fire-arms and hatchets.

When the vessel had proceeded some distance within the United States territory, the prisoner, aided by the parties who came on board from the British territory, seized the steamboat, and then the prisoner and one of his associates, by force and terror, took from Ashley property belonging to him and his co-proprietors of the boat. These parties also took possession of another steamer, from which they removed every person, and took her with them a short distance and cast her adrift, having, it is said, scuttled her. They did not approach Johnson's Island, where the prisoners taken from the Confederate forces were confined, and off which the United States steamer *Michigan* was said to be within some miles, how near not appearing, but turned back towards Detroit and landed on the Canada shore, keeping the property they had taken from Ashley, and removing from the boat some other property belonging to its owners. Some of the parties had declared their intention of capturing the *Michigan* and releasing the prisoners—but these are the acts done by them, while some of them made inquiries and spoke of what they would desire to do, in a manner indicating views of private pillage, other than of warlike enterprise.

But, conceding that there is evidence that the prisoner was an officer in the Confederate service, and that he had the sanction of those who employed him to endeavor to capture the *Michigan* and to release the prisoners on Johnson's Island, the manifesto put forward as a shield to protect the prisoner from personal responsibility, does not extend to what he has actually done—nay more, it absolutely prohibits a violation of neutral territory or of any rights of neutrals. The prisoner, however, according to the testimony, was a leader in an expedition embarked surreptitiously from a neutral territory—his followers, with their weapons, found him within that territory, and proceeded thence to prosecute their enterprise, whatever it was, into the territory of the United States. Thus assuming their intentions to have been what was professed, they deprived the expedition of the character of lawful hostility, and the very commencement and embarkation of their enterprise was a violation of neutral territory, and contrary to the letter and spirit of the manifesto produced.

This gives greater reason for carefully enquiring whether, looking at the whole case, the alleged belligerent enterprise was not put forward as a pretext to cloak very different designs.

Taken by themselves the acts of the prisoner himself clearly establish a *prima facie* case of robbery with violence—at least according to our law. The matter alleged to deprive the prisoner's acts of this criminal character are necessarily to be set up by way of defence to the charge, and involve the admission that the prisoner committed the acts denying their criminality. Assuming some act done within our jurisdiction, which, unexplained, would amount to robbery—if explanations were offered, and evidence to support them were given at a preliminary investigation, the accused could not be discharged—the case must be submitted to a jury. This case cannot, from its very nature, be investigated before our tribunals, for the act was committed within the jurisdiction of the United States. Whether those facts necessary to rebut the *prima facie* case, can be proved, can only be determined by the courts of that country. We are bound to assume that they will try and decide it justly.

I do not, on the whole, think the prisoner is entitled to be discharged.

I should add, that, considering the nature of the questions to be determined, I requested the learned Chief Justice of the Common Pleas, and my brothers Hagarty and John Wilson, who were all, at the moment, within reach, to sit with me and aid me with their opinions. They very kindly complied with my request, and are prepared to express their views. I am sustained by their concurrence in the conclusion at which I have arrived.

Richards, C. J.—I fail to see anything in the statute requiring that the evidence should be set out in the warrant. It says: "Upon such evidence as according to the laws of this Province would justify the apprehension and committal for trial of the person accused, if the crime of which he was so accused had been committed herein, it shall be lawful for such judge or other officers to issue his warrant for the commitment of the person so charged to the proper gaol." The warrant in effect states that the Recorder had examined certain persons on oath touching the charge of robbery, and the evidence was such as according to the laws of this Province would justify the apprehension and committal for trial of the prisoner, if the crime had been committed within this Provinc.

I see no reason why the evidence should be set out in a warrant of this kind more than in any other warrant. If the court before whom the prisoner is brought should require the evidence in order to see if there is enough to justify his committal, they may direct it to be brought before them. If enough be stated in the warrant to show that the Judge had jurisdiction to enquire into the offence, that is all that is necessary. It is not contended that in any other respect the warrant is defective, except in not setting out the evidence or showing an adjudica-

tion as to its effect The recitals I think sufficiently state the effect of the evidence and the decision of the Recorder thereon.

There is no doubt that under the Imperial statute passed to carry out the provisions of the treaty, very different proceedings are necessary to arrest a person who may have committed a crime in and fled from the United States. The proceedings required by that act had been found to be so inconvenient that it became desirable to substitute other enactments in lieu of the Imperial statute. The preamble of our statute, 12 Vic., cap. 19, refers especially to the inconveniencies of requiring the warrant to issue by the Governor, to signify that a requisition had been made by the authority of the United States for the delivery of the offender, and to require all justices, &c, to govern themselves accordingly, and to aid in apprehending and committing to gaol the person accused, for the purpose of being delivered up to justice, according to the provisions of the treaty. After further declaring it expedient to make provision for carrying the treaty into complete effect within this Province by the substitution of other enactments in lieu of the Imperial Act, the Legislature proceeded to pass the statute of 1849, which was amended by the act of 1861, and by both these enactments the initiatory proceedings to arrest a fugitive from justice from the United States may be taken without any warrant from the Governor.

The effective words of the last Act are that upon complaint, made under oath, charging *any person found* within the limits of this Province with having committed within the jurisdiction of the United States of America any of the crimes enumerated in the treaty, it shall be lawful for any Judge, &c., Recorder of a city, &c., in this Province, to issue his warrant for the apprehension of the person so charged, that he may be brought before such Judge or other officer, and upon the said person being brought before him under the said warrant, it shall be lawful for such Judge, &c., to examine upon oath any person or persons, touching the truth of such charge, and upon such evidence as, according to the laws of this Province, would justify the apprehension and committal for trial of the person so accused, if the crime of which he shall be so accused had been committed herein, it shall be lawful for such Judge or other officer to issue his warrant for the commitment of the person so charged to the proper gaol, there to remain until surrendered according to the stipulation of the treaty, or until discharged according to law, and the Judge, &c., shall thereupon forthwith transmit to the Governor a copy of all the testimony taken before him, that a warrant may issue on the requisition of the United States for the surrender of such person, pursuant to the said treaty.

By the Imperial Statute, on the requisition being made by the authority of the United States, the Secretary of State or person administering the government in any colony of Her Majesty, by a warrant under his hand and seal, is to signify that such requisition has been so made, and to require all justices, &c., to govern themselves accordingly, and to aid in apprehending the person so accused. The act then proceeds —"and thereupon it shall be lawful for the justice, &c., to examine persons under oath touching the truth of the charge, and upon such evidence as would justify the apprehension and commitment for trial of the accused, to issue a warrant for the apprehension of such person, and also to commit the person so accused to gaol, there to remain *until delivered pursuant to such requisition* as aforesaid."

Mr. Justice Richey, in the *Chesapeake* case, whose able judgment I have perused with great interest, decided on the effect of the English statute, which is very different from ours, on this point. By the English Act the requisition is necessary to authorise the warrant of the Secretary of State or Governor, and that warrant is a condition precedent to the issue of a warrant by the justice to apprehend or to commit the party accused, and when committed he is to remain in custody until delivered pursuant to the requisition.

Our statute on the contrary, was intended expressly to render the warrant of the Governor unnecessary; and when the person is committed by the judge, &c., in this Province, he sends a copy of the evidence to the Governor, that a warrant may issue upon the requisition of the United States government for the surrender of such person pursuant to the treaty. It does not necessarily follow from the words of our act that the requisition must precede the arrest or committal of the person accused.

If it were necessary to make the requisition by the authority of the government of the United States before arresting a person who having committed a crime there, flies to this country, he might escape entirely before he could be arrested. The delay in obtaining the requisition might be so great that the criminal would have left the Province, and perhaps this continent, before he could be arrested, though the most clear and positive evidence could be procured on the spot to show that he had committed the offence. I think our Legislature intended to remedy this evil, and that the act they have passed has done so. The provision of the treaty for the payment of the expenses of the apprehension and delivery of the fugitive by the party making the requisition and receiving the fugisive, can be literally carried out by calling on the United States government to pay such expenses when they make the requisition and receive the fugitive. By making the requisition they assume the responsibility of paying the expenses of apprehending as well as delivering him.

I do not see sufficient reason to hold that the arrest or warrant of commitment is bad for not showing a requisition from or on behalf of the United States government for the delivery of the prisoner, as a person charged with the offence. If the evidence shows he has committed the offence under our statute, he may well be committed until surrendered.

This brings me to another objection, that the prisoner was charged in the United States with the offence of piracy, and that he cannot now be committed for the crime of robbery The charge made in this Province, under which the prisoner was arrested, was robbery. If the requisition on behalf of the United States government be for his extradition for the crime of piracy, I have

no doubt that he cannot be surrendered under the warrant of committment before us. He may have been guilty of the crime of piracy in the United States, but as this charge is one of robbery, the fact that he was charged with piracy there, cannot prevent his being surrendered for robbery, if such an offence be charged and proved against him here as having been committed there.

When the requisition is made, if his surrender is demanded for any other offence than the one charged against him here, and for which he is committed, as already remarked, it must be refused; and when surrendered, I apprehend that the United States government would, in good faith, be bound to try him for the offence upon which he is surrendered.

As to the merits, I think the judges of the Superior Courts may consider if there is sufficient evidence to justify the committal of the prisoner. The cases referred to by Mr. Cameron are, in my judgment, authority for this point, and the words of the statute of 1861 are more in accordance with this view than those in the act of 1849. By the act of 1849, it is provided, "if on such a hearing, the evidence be deemed sufficient by him (the magistrate) to sustain the charge," he was to commit the offender. Under the act of 1861, the words used are, "and upon such evidence as, according to the laws of this Province, would justify the apprehension and committal for trial of the person so accused," he is to issue his warrant.

I think the right of the court to review the decision of the officer who issues the warrant to the extent I have stated, is sustained by general principles of law as well as by the authorities referred to, and it is one which it is not desirable should be taken away. The sending of any man out of the country under a constitutional government is a grave exercise of power, and ought not to be permitted unless the right to do so is established in the clearest manner. And when this right extends to delivering over any of the Queen's subjects to a foreign power, though charged with a crime, as I am satisfied it does under our statute, it is not going an unreasonable length to assert that the subject has the right to have it placed beyond reasonable doubt that the evidence given to sustain the charge is sufficient, in the judgment of the superior tribunals of the country, to warrant such proceedings being legally taken against him.

As to the ground taken by the prisoner's counsel that he, being a natural born subject of Her Majesty, does not come within the provisions of the treaty, and therefore cannot be surrendered, I think it would manifestly frustrate, in many instances, the object of the treaty, if such a doctrine were allowed to prevail. Suppose any one of the many British subjects domiciled in the United States were to commit the crime of forgery or arson, and then to fly to this country, ought we not to surrender him on proper evidence of his guilt? As we have no means of punishing him here for such an offence, it would seem like affording impunity to crime to say that he should not be surrendered. Then take the case of American citizens domiciled here (though not so numerous a body as British subjects resident in the United States) if they committed any of the crimes in this country mentioned in the treaty, they might equally escape punishment if they could merely pass over what in many parts of the country is an imaginary line. When the intercourse between two countries is so great as between Great Britain and the United States—countries having a common language and laws, and institutions in many respects similar, it may well be considered that the executive governments who negotiated the treaty, and the legislatures which have passed laws giving effect to it, intended what the treaty and those laws affirm, namely, that *all* persons who commit certain crimes in one country, and fly to the other, shall be surrendered on a proper demand, and that *any* persons whose extradition shall be demanded, who shall be found within (the limits of this Province) the territories of Her Majesty, shall be committed to jail, &c., to be surrendered.

Whatever may be considered to have been the general rule in relation to a government surrendering its own subjects to a foreign government, I cannot say I have any doubt, that under the treaty and our own statute, a British subject who is in other respects brought within the law, cannot legally demand that he ought not to be surrendered merely because he is a natural born subject of Her Majesty.

As to receiving evidence on behalf of prisoners against whom charges are made as fugitive offenders, I do not see why the same course should not be pursued as in the ordinary examination of persons charged with offences committed in this Province. In Wise's Supplement to Burn's Justice, edition of 1852, it is recommended that such evidence be taken, if offered. The observations of various judges are therein referred to as recommending it, and the opinion of the present Chief Justice of England, when at the bar, in favor of that course, is given. One ground on which he based his recommendation was that the Imperial Act then in force, relative to duties of Justices of the Peace out of Sessions, similar to our Provincial Statute of Canada, cap. 102, sec. 30 directed the magistrate to take the statement on oath or affirmation of those who know the facts and circumstances of the case, and to put the same in writing. The words of our statute 24 Vic. cap. 6 are, "to examine upon oath any person or persons touching the truth of such charge." This language would, in my judgment, authorize the examination of the prisoner's witnesses as much as that used in the section quoted from the Con. Stat. Can. cap. 102.

It does not follow, however, that because the magistrate receives the evidence of the prisoner he must try the case and decide upon it from the weight of evidence, or in any such view. It may be that the evidence produced will satisfy all parties that the accused is innocent, and it may not be considered as at all favorable to him. After receiving the evidence, the magistrate can then decide whether in his judgment the prisoner ought to be committed for trial or not.

I believe I have expressed my opinion on most if not all of the preliminary questions raised in the discussion of this matter, and the most important one for the prisoner yet remains to be disposed of, viz.: Is there such evidence touching the charge of robbery against the prisoner as would justify his apprehension and committal for

trial if the crime of which he is accused had been committed here?

Taking the evidence adduced against the prisoner, there seems to have been sufficient to warrant his committal. Then, has he shown by evidence what ought to relieve him from the charge?

Assuming, for the present, the position taken by the prisoner's counsel to be correct, that we, as belonging to a neutral nation, who have acknowledged that those who are contending against the recognized government of the United States are belligerents, by such acknowledgment have placed them as to all hostile acts against the United States government in the same position as if they were a recognized government; and, further, assuming for the present, that an enterprise to capture the steamer *Michigan* and release the prisoners confined on Johnson's Island, undertaken by twenty-five or thirty men, would, in the then *status* of affairs on Lake Erie and its vicinity, be a lawful and proper belligerent act, does the evidence on behalf of the prisoner show that he was engaged in such an enterprise?

The facts urged on his behalf, as appearing from the evidence, I understand are these:

That there was a large number of prisoners, between two and three thousand, confined on Johnson's Island, in Lake Erie, at the time the *Philo Parsons* steamer was captured by the party with which the prisoner was said to have been connected.

That the steamer *Michigan* was also stationed in the vicinity of that island.

That two of the party who guarded one of the witnesses told him that they intended to capture the United States steamer *Michigan*, to release their friends on Johnson's Island.

That the passengers of another small steamer called the *Island Queen*, captured by the party, were taken off and put in the cabin of the *Philo Parsons* under guard of armed men. That some of these passengers were United States soldiers. That subsequently the prisoner directed the men having the others in charge to march their prisoners down and put them into the hold, three at a time, and they were marched down under guard and put into the hold.

That when the boat was seized some one remarked they were Confederate States soldiers who were doing it.

That the prosecutor at the time told some of the lady passengers of the boat that she was captured by rebels.

That the pilot of the boat stated that Bell, who was in command of those who seized the vessel, asked him if he was in charge of the *Philo Parsons*, and then stated to him that he (Bell) was a Confederate officer; that he seized the boat and took him (the pilot) prisoner; that he would be obliged to submit to their doings; if not he had arms, producing them, to compel him to do so. That the lady passengers of the captured steamers were put on shore, under a promise that they would not give the alarm for twenty-four hours, and that the male prisoners were sworn to secrecy.

That no other passenger or person on board the steamer than the prosecutor was deprived of money or property, and that the captors acted on the view, that having got the boat as a lawful prize they were entitled to all that belonged to her, money as well as everything else.

That the men were officers and soldiers of, and acting under the orders of, the Confederate government, and that the acts and conduct of the prisoner have been assumed by that government.

And, that they hoisted the Confederate flag on the vessel after she had been captured.

On the other side, it was contended that having shown a taking of the money by force and violence, a *prima facie* case is made out. That so far from the facts set up showing that their enterprise was to capture the steamer *Michigan* and release the prisoners on Johnson's Island, they did not go within ten or twelve miles either of the steamer or Johnson's Island. That there is no reason given, nothing whatever shown, that if they ever really intended to embark in such an enterprise as is suggested, why it was abandoned.

That just before the prisoner or Bell took the money from the prosecutor, the latter asked them to permit him to take some promissory notes which were his private property, amounting to about $2,000; that prisoner asked to see them, and after looking at them said he could not collect them, and gave them back to the prosecutor, and Bell then said, "we want your money," both having revolvers drawn at that time. On being shown a small quantity of money in a drawer, prisoner then said, "you have got more money, let's have it," and prosecutor then took a roll of bills, containing about $90, out of his pocket and laid it on the desk, and Bell took part and the prisoner part—they took the money between them.

That some of the party on guard over the pilot of the vessel, asked him if a banker did not live on Grosse Isle, in the Detroit river. He replied that Ives lived there. They said, if it had not been so late they would go and rob him.

That the clothes of the pilot of the vessel were taken by some of the party, and that he wished one of them who had taken a coat of his to return it, but he refused to do so.

That when they arrived at Sandwich they took some of the furniture of the boat ashore.

That as to hoisting the Confederate flag, that was done after dark, and then only half-mast.

That the evidence to show that the prisoner was an officer of the belligerent power, as he contended he was, was not sufficient, and that the instrument called a manifesto does not show that this prisoner was directed to engage in the alleged enterprise, but rather that it was entrusted to belligerent officers generally, and that prisoner was one of those officers, but not that he was personally directed to undertake or engage in the enterprise. That the assuming of the act is equally equivocal. That the acts and conduct of all the officers engaged in the expedition, and especially those of the prisoner, are assumed, but it is a matter of doubt if they were engaged in the expedition, and they may have put that forward as a pretence, under cloak of which to commit robbery. That the instructions to the officers to undertake the expedition were to abstain from violating any of the laws of this country in relation to neutrality. That the prisoner, and those engaged with him, did not act on those instructions, but in disregard of our

laws, and, under the pretence of being peaceable citizens, embarked on board a vessel of, to us, a neutral friendly power, with concealed arms, and by force captured the vessel, and in violation of the laws of war took from the prosecutor, a private individual and a non-combatant, a considerable sum of money. That this act of robbery was not at all necessary for them in carrying out the alleged enterprise, if they really had intended to carry it out, and therefore, taking the justification set up by the prisoner himself, on the ground put by his counsel, it failed. It was further contended on the part of the prosecution that to attempt to carry on war or commit depredations which are to be dignified with the name of war, by the aid of only twenty-five or thirty men, hundreds of miles away from the scene of military operations, in the interior of the enemy's country, remote from the sea, and to suppose that acts of plunder committed under such a pretence, would ever be considered by neutrals as belligerent acts, was to extend the rule beyond reason, though such acts might have been undertaken under the direction of the belligerent authorities, or afterwards avowed by them.

If, on a similar matter occurring in this country, I were called upon to decide whether I would discharge the prisoner or commit him for trial, I should feel bound to commit him. I should say, looking at all the facts as they are presented on either side, that the conduct of the parties, and what they said and did during the time the vessel was in their possession, was of that equivocal character that it would, in the most favorable view suggested for the prisoner, be a matter for the consideration of a jury whether they were acting in good faith in carrying out a belligerent enterprise, or whether they were not cloaking an expedition for the purposes of plunder under pretence of a belligerent enterprise, thinking in that way more readily to escape detection.

I have no doubt that this is the view that would be taken of the case in England. In the case of *Tynan and others*, in 10 L. T. N. S. 499, referred to in the argument, Chief Justice Cockburn, after stating that if the acts the prisoners were engaged in were not done with a piratical intent, but with an honest intention to assist one of the belligerents, they could not be treated as pirates, observed: "But then it is not because they assume the character of belligerents that they can thereby protect themselves from the consequences of acts really piratical. Now, here it is true that the prisoners at the time said they were acting on behalf of the Confederates, and that was equivalent to hoisting the Confederate flag. But then pirates sometimes hoist the flag of a nation to conceal their real character. No doubt, *prima facie*, the act of seizing a vessel, saying at the same time it is seized for the Confederates, may raise a presumption of such an intention; but then the circumstances must be looked at to see if the act was really done piratically, which would be for the jury, and I cannot say that the magistrate was not justified in committing the prisoner for trial." Crompton, J., in giving his judgment, said:—"I cannot say that the magistrate, in his discretion, ought not to commit them on the ground that the act done was something like a belligerent act. For looking at the surreptitious way in which the prisoners went on board and took the vessel, there was evidence before the magistrate that this was piracy. Upon this I quite concur with my lord, because it is not for us to weigh the effect of the evidence, which is for the magistrate, and all we can consider is whether there is enough to justify a commital, and I agree with my lord that we cannot say that there is not." In conclusion, he said:—"If, therefore, this was a belligerent act, the prisoners are entitled to our judgment, but if not, and I think it was not, but piracy *contra jus gentium*, in my view the case is not within the statute." Mr. Justice Blackburn said:—"It strikes me that there was such an amount of evidence of its being piracy *jure gentium*, as, if the case had been before a jury, the judge would not have been justified in withdrawing it from them" "As to the evidence, its effect would be for the jury, and though the Confederate States are not recognized as independent, they are recognized as a belligerent power, and there can be no doubt that parties really acting on their behalf would be justified. But the case is one of piracy by the law of nations, in which case men cannot be given up, because they can be tried here, or it is a case of an act of warfare, in which case they cannot be tried at all."

Entertaining the opinion I have expressed, it is my duty to declare that the learned Recorder was warranted in deciding to commit the prisoner for the purpose of being surrendered. As long as the Extradition Treaty between this country and the United States is in force, it ought to be honestly carried out, and in all cases where the evidence shows that an offence has been committed, though there may be conflicting evidence as to the facts, or different conclusions drawn from the facts, yet in those cases where we would commit for trial under a similar state of facts in this country, we are equally bound to commit to be surrendered for trial under the treaty and our statute passed to carry it out. We must assume that parties will have a fair trial after their surrender, or we ought not to deliver them up at all, or rather ought not to have agreed to do so.

In conclusion, I will merely add that if it should be necessary to go into the question how far enterprises, such as it is now contended by the parties who seized the *Philo Parsons* they were engaged in, could properly (under the circumstances attending that seizure in the inland waters bordering on this country and the United States, wholly within the jurisdiction of the two countries) be considered a belligerent act, when undertaken by such an insignificant number of persons, and in the way it was conducted by them, I would require more time to consider and discuss the question than I have as yet been able to give to it.

Hagarty, J.—The evidence against the prisoner shows that a violent act of trespass has been committed on person and property that a man has been robbed within the United States jurisdiction and that the person charged with these acts is found here. The learned Recorder has found that the evidence sufficiently warranted his being arrested and committed to abide the action of the executive under the treaty. We are asked now to

say that there is no evidence legally warranting such action.

On the merits the defence is that the alleged robbery was simply an exercise of a belligerent right in taking money from a prisoner of war—that it was a mere subordinate incident in a lawful act of hostility, viz: the capture of an enemy's vessel on an expedition for the further capture of a war-ship and the release of Confederate prisoners.

In considering this plea I will assume that the documents from Richmond given in evidence are genuine. It becomes most important to consider whether the prisoner when he took Ashley's money was in good faith proceeding on the warlike enterprise in question, or was using it as a pretext to cover vulgar robbery. No act was done nor any attempt made on the United States steamer or the island, nor any reason apparent on the evidence why the alleged design was abandoned. It is consistent with all that appears that the warlike enterprise was a mere pretext and plunder the actual object. On the other hand it may be true that the prisoner was in good faith engaged on the alleged attempt. But would any judge or magistrate hesitate to say to a prisoner urging such a defence under such unprecedented circumstances, "Your defence may, perhaps, ultimately be established. I am not trying you, or deciding finally on your guilt or innocence. A *prima facie* crime is proved against you, and I must send you for trial; you can thus try to rebut the presemption arising from your acts." If we decide that this is not enough to warrant his commitment for trial, we assume, I think, a most serious responsibility of holding that the facts in evidence do not disclose any offence—that all the prisoner's conduct was a legitimate act of open war—that the money in the pocket of an unarmed purser of a Lake Erie commercial steamboat was lawful prize of war to twenty or thirty men coming on board in the guise of ordinary passengers at American and Canadian ports, with hundreds of miles intervening between them and the nearest spot where their alleged country's flag was flying, or a fellow soldier in arms.

No writer of repute seems to distinguish with a firm hand the point where war ends and murder begins—between lawful prize and petty larceny. Many jurists tell us how they think war should be waged in the light of improved civilization, but seem to shrink from the definition of settled principles governing its conduct. We are not referred to any case at all resembling that before us; it must, therefore, be judged on its peculiar facts.

I hesitate not to state my own opinion that such conduct as the prisoner's, under such circumstances, rebuts any clear conclusion that this was an act of war, and as such protected from the operation of the criminal law, so that the investigating judge should hold that a *prima facie* case was not established fully warranting the placing of the accused on his trial, and then leaving him to his defence, if he can maintain it. I consider the avowal or adoption of the alleged enterprise by the Confederate President as not affecting the duty of the Recorder in dealing with the case. The prisoner can have, I presume, the full benefit of that document on his trial. The alleged assumption of responsibility for his acts by his superiors, is rather a matter between them and the United States than between the latter and us. It might be a dangerous course for a neutral to accept as conclusive from a belligerent power, with whom it has no diplomatic relations, an avowal of acts so very equivocal as those of this prisoner, and so opposed to the ordinary ideas of modern warfare. It was in no way necessary, nor as far as the evidence indicates, conducive to the success of the alleged enterprise, for the prisoner and his friend to take the purser's money. I do not feel pressed by the suggestion of counsel that the United States can equally demand the extradition as a murderer of a Confederate officer or soldier killing a Federal in battle. The mere statement of this case, and the fact that a state of war is admitted to exist, would answer the demand. Either belligerent flying from the pursuit of the other is safe within our border, and no argument can torture his acts done in ordinary warfare (as it is well understood by the common sense of every man, but not so easily defined by reference to international law) into those of a criminal within the Ashburton Treaty.

Had this prisoner been arrested on the wharf in Detroit, as he stepped on board the *Philo Parsons* and avowed and proved his character of a Confederate officer, he would have been in imminent danger of the martial rule applicable to a disguised enemy. Had he been secretly joined there by twenty or thirty persons starting over from the neutral shores of Canada, and then by a sudden assault destroyed some national property, or seized a vessel lying at the wharf and taken the money from the unarmed crew, I think they would, if captured in the act, have great difficulty in maintaining their right to be treated as prisoners of war, with no further responsibility.

In the Russian war I think we should hardly have allowed such a mild character to a like number of Russians coming over stealthily from the friendly shores of Detroit to burn, slay and plunder in Windsor.

All the prisoner's conduct, while within our jurisdiction during this affair, repels the idea of legitimate warfare. A British subject, without the Queen's license and against her proclamation in the service of one of the belligerents, acting in concert with persons leaving her ports on the false pretence of peaceful passengers, to wage war on a friendly power—no act of his raises any presumption in his favor of his being in good faith a soldier or sailor waging war with his enemy.

I think the only just course open to a Canadian court is to decline accepting either the prisoner's statement or his alleged employer's avowal of his acts as conclusive of the proposition that his conduct was war and not robbery—it should accept the evidence offered as establishing a *prima facie* case of guilt sufficient to place the prisoner on his trial and to call for his defence.

The whole burden of proving that the transferring of the money from Ashley's pocket to that of the prisoner and his friend does not bear the complexion, that men of plain understanding must, under the circumstances, attribute to it, must be thrown upon the prisoner.

I think I am bound to construe a treaty so

made between my Sovereign and her ally in a liberal and just spirit, not laboring with eager astuteness to find flaws or doubtful meanings in its words, or in those of the legal forms required for carrying it into effect.

We are to regard its avowed object—the allowing of each country to bring to trial all prisoners charged with the expressed offences. Neither of the parties can properly have any desire to prevent such trial, or to shield a possible offender.

If the position of the case were reversed, and the prisoner had done the acts complained of in this country, and claimed to be a belligerent as against our Sovereign, I think any Canadian judge or magistrate would commit him to trial for robbery, leaving him to plead his belligerent position at his trial for what it was worth.

I have neither the desire nor the right to assume that he will not be fairly tried in the United States. The treaty is based on the assumption that each country should be trusted with the trial of offences committed within its jurisdiction.

I think the prisoner should be remanded on the Recorder's warrant, which I think is not open to any valid exception. Had I differed from the result arrived at by the Recorder, I should then have to consider a doubt more than once expressed whether any judge can review his decision.

John Wilson, J. — The prisoner is charged with robbery, which is "the felonious taking of money or goods of any value from the person of another against his will, by violence or putting him in fear of purpose to steal the same." That he is guilty *prima facie* has not been denied; and being here, his counsel says, 1st. He is a British subject, and cannot be sent beyond the kingdom for trial against his will, and the treaty is not broad enough to include a subject of the Queen. 2ndly. He says he is a belligerent, and claims his right as such; 1st, because he holds a warrant as acting-master in the navy of the Confederate States of America; 2nd, because the seizure of the steam vessel, the *Philo Parsons*, was an act of war undertaken with the intent to liberate certain Confederate prisoners of war, confined on Johnson's Island, near Sandusky, on Lake Erie; 3rd, because the act of robbery charged is at most an excess, and at all events is merged in the higher belligerent act; 4th, because he says that, although he can show no order directing what he did, he has a manifesto signed by the President of the Confederate States assuming the act by these States, and therefore he is not subject to committal for extradition under the treaty and the provisions of the 24th Vic. cap 6; and lastly, he says the warrant of commitment contains no adjudication that the evidence sustains the charge.

The learned Recorder had equal jurisdiction with the judges of the superior courts of law to commit the prisoner for surrender under the treaty, according to the provisions of our statute to carry it into effect. Strictly speaking, the present application might have been disposed of, by simply examining the warrant under which the prisoner had been committed, to see whether on its face it contained a sufficient charge of crime to justify his detention for extradition.

All the proceedings in this matter are now before us on a writ of *certiorari*, issued irregularly perhaps, but at the instance of the prisoner. It is proper that a case of grave importance should be heard at length, so that all doubt should be removed, and it has been thus heard.

It has been urged that the prisoner, being a British subject, cannot be sent from the Province against his consent for trial in a foreign country, and that the language of the treaty ought not to be so construed as to give this power. In Vattel, book 2, ch. 6, s. 76, it is said, "that since the Sovereign ought not to suffer his subjects to molest the subjects of other States or do them an injury, much less to give open audacious offence to foreign powers, he ought to compel the transgressor to make reparation for the damage or injury, if possible, or to inflict on him an exemplary punishment, or finally, according to the nature and circumstances of the case, to deliver him up to the offended State, to be there brought to justice. This is pretty generally observed with respect to great crimes, which are equally contrary to the laws and safety of all nations. Assassins, incendiaries and robbers, are seized everywhere at the desire of the Sovereign in whose territories the crime was committed, and are delivered up to his justice." But the words of the treaty are "all persons" who shall be charged with any of the crimes mentioned therein shall be surrendered. There can be no doubt but that the words of the treaty include British subjects. for it was made in accordance with the comity of nations, as Vattel shows. A British subject ought to know that when acting contrary to his duty as a loyal subject, in violation of the Queen's proclamation, and against the Foreign Enlistment Act, he is not to be favoured in setting up the commission of any State, far less a State not recognized as a nation, to give him the rights of a belligerent in his own country, to escape the consequences of crime committed in the United States. The evidence returned to us shows *prima facie* that the prisoner committed a robbery in the State of Ohio, one of the United States. But it is answered, first, that he held a commission as acting master in the navy of the Confederate States. The holding of this or any other commission does not authorise him, under an order or *mero motu*, to wage war from a neutral territory on the unoffending and non-belligerent subjects of the country at war with the confederacy whose commission he holds. The evidence, however, does not prove such a commission, for he fails to show his compliance with its conditions. He says he seized the *Philo Parsons* as an act of war, with intent to liberate the prisoners on Johnson's Island, but for this act he produces no order of any superior officer, and the evidence does not show that he had any such order. He says this robbery was at worst an excess of a belligerent right, which was merged in the principal act Now, what was the principal act of war performed? Under the pretence of being a passenger, he went on board a freight and passenger steamboat at Detroit. As a favor, he requested the master to touch at Sandwich, a British port, to take in three persons as passengers, which was done. The boat proceeded on its regular voyage to Amherstburg, a town in this Province, near the

mouth of the Detroit river, about fourteen miles below Sandwich. Here about twenty men, dressed in the ordinary attire of the farming people of the United States came on board the steamer, with one rough trunk, tied round with a cord, and no other baggage. They were supposed to be citizens of the United States returning to their homes after an absence to escape the draft for the recruiting of their army. The prisoner and his three followers affected no knowledge of the last twenty. The course of the vessel to Sandusky, from the mouth of the river, was south-east. She had to pass a number of islands, the northerly are British, the southerly are American. The boundary line of this Province runs north of the Bass Islands, and thence between Pelo Island and Kelly's Island. Johnson's Island is said to be fourteen miles from this Island, and two miles from Sandusky. Nothing occurred to excite suspicion or cause alarm until the boat was clearly within the territory of the United States Suddenly the prisoner presented a revolver at Ashley, and drove him, at peril of his life, into the ladies cabin. Bell, one of his confederates, overcame the mate in a similar manner. The other twenty, more or less, rushed to their trunk, armed themselves with revolvers and hatchets which it contained, acted under the orders of Bell and the prisoner, and the boat became at once under their control. So far, neither of the leaders declared his reason for this proceeding. It was said by the two men who guarded Ashley, that their object was to liberate the prisoners on Johnson's Island. After some hours the boat landed at Middle Bass Island, having taken possession of a small steamboat, the *Island Queen*. At this island, just before Ashley was put on shore, Bell and the prisoner, with revolvers to enforce the command, demanded his money. After getting what was in his drawer, the prisoner insisted he had more, and Ashley took from his waistcoat pocket a roll of bills, about $80 he supposses, which the prisoner and Bell share between them. In the meantime, the mate with others were in the hold of the vessel, and she sailed. Before day the mate was called upon to sail the vessel for the Detroit river, which was reached about daylight. Enquiry was made as to whether a banker did not live on Grosse Isle, and it was suggested that but for the lateness of the hour they would have robbed him. The course of the vessel was continued up the river in the British channel to Sandwich, where the boat was stopped, some goods taken from it, and then abandoned. The actors in the affair at once dispersed. We are now asked to consider these proceedings, so mean in their inception and so ignoble in their development and termination, as acts of war, and to accord to the prisoner belligerent rights. What is there in all this which constituted the act of war? If the object were to release the prisoners, from all that appears they never were nearer than fourteen miles to Johnson's Island. Was the seizure of this unarmed boat *per se* an act of war?—for it has been argued that the robbery was merged in the higher act. The seizure of the boat, for whatever purpose, was one thing, the robbery of Ashley quite another, and in no way that we see, in furtherance of the design now insisted upon, or at all necessary for its accomplishment. But is not the good faith of the enterprise matter of defence which a jury ought to try? Such a trial can only be had where the offence was committed, and we cannot doubt but justice will be fairly administered there.

We are told that although the prisoner cannot show orders authorizing what he did, he has the manifesto of the President of the Confederate States avowing the act and assuming it, and therefore he is not at all subject to this charge. We accord to the Confederacy the rights of a belligerent, as the United States has done from the day it treated the soldiers of the revolted States as prisoners of war; but there is an obvious distinction between a belligerent act done in obedience to a military order and the recognition and avowal of such an act after it has been done. The one is an act of war, the other an act of an established government. The one is consistant with what Great Britain acknowledges, the other is not. For us judicially to give effect to the avowal and adoption of this act would be to recognize the existence of the nationality of the Confederate States, which at present our Sovereign refuses to acknowledge.

Giving for the moment to this manifesto its full force, it distinctly disclaims all breaches of neutrality; but it is clear that this expedition took its departure and shipped its arms from our port. But does it assume the responsibility of this seizure and all that was done upon it throughout? If not, it is neither justification nor excuse. I see no authority for the doing of the act, and no specific assumption of what was done, therefore the whole justification fails. Lastly, it is objected that the warrant does not charge an offence except by way of recital, and contains no adjudication upon the offence charged.

I think the warrant recites properly the offence charged, and the adjudication is "that the prisoner is, and stands charged with the offence," which is all that is required.

The attitude of the United States towards us is no concern of ours. Sitting here, while peace exists and this treaty is in force, we are bound to give it effect. We can look with no favor on treachery and fraud. We cannot countenance warfare carried on except on the principles of modern civilisation. We must not permit, with the sanction of law, our neutral rights to be invaded, our territory made the base of warlike operations, or the refuge from flagrant crime. Peace is the rule, war the exception of our times. Equivocal acts, criminal in their nature, must be taken most strongly against those who, under pretence of war, commit them.

For these reasons I think the prisoner must be remanded for extradition on the warrant of the earned Recorder.

CHANCERY CHAMBERS.

(*Reported by* Alex. Grant, Esq., *Barrister-at-Law, Reporter to the Court.*)

Evans v. Evans.

Garnishee order—Costs.

This case (reported in 1 U.C. L.J. N S. 19) was brought before the full court by way of appeal

from the order made in Chambers, and his Honor V. C. *Spragge* then said, that since giving his judgment, he had conferred with one of the Common Law judges, and had been informed by him that it was now the practice at law to grant the costs of a garnishee application when there was a sufficient fund out of which to pay them; and he accordingly, in conformity with his opinion, as expressed in Chambers, concurred with his Lordship the Chancellor in reversing his previous decision.

Order accordingly.

Crawford v. Bradburn.

Amendment of bill.

The court will not grant leave to amend a bill, where the proposed amendment would render the bill of a different nature.

This was an application for an order to amend the plaintiff's bill. The facts appear in the judgment.

Spragge, V. C.—The bill as it stands is by a mortgagee against a mortgagor to foreclose, it is now discovered that there was a conveyance by the mortgagor to his son, and the amendment asked is to impeach this conveyance, as void under the 13th Elizabeth, adding the son as a party, and making all the necessary allegations to bring the case within the statute; this seems to me more than a mere amendment, the added party would be the substantial party, and the bill would be of a different nature. See *Smith* v *Smith*, G. Cooper, 111; Smith's Ch Pr. 6 ed. 351.

Order refused.

INSOLVENCY CASES.

(In the Insolvent Court for the County of Wentworth.)

Re Stevenson, an Insolvent.

A creditor, although not named in the schedule annexed to the deed of assignment or composition made by the insolvent, may oppose the confirmation of his discharge.

The insolvent should be present when application is made for the confirmation of his discharge. Debts must be proved before the assignee, and not before the judge.

The insolvent applied for a confirmation of the discharge executed by a majority in number of his creditors for sums of $100 and upwards, and representing three-fourths in value of the liabilities mentioned in the statement annexed to the deed of composition executed by him and filed in court.

One James Watson appeared claiming to be a creditor, and to have a right to object to the confirmation of the discharge; his name did not appear in the statement of liabilities prepared by the insolvent, and annexed to the deed of composition. He also contended that the insolvent should be present in order that he might be examined pursuant to sub-sec. 3 of sec. 10.

Sadlier, for the insolvent, stated that he disputed the claim of Mr. Watson, and argued that Watson had no right to be heard in opposition to the application: that his claim, if he has one, would not be barred, as sub-sec. 3 of sec. 9 only discharges the insolvent from the liabilities which are mentioned and set forth in the statement annexed to the deed of assignment, or in any supplementary list of creditors, and as his rights are not affected in any way by the discharge, he has no right to be heard in opposition to the application.

Logie, Co. J.—I think the only question is, whether or not Mr. Watson is a creditor; if he is, he has a right to appear and be heard in opposition to this application, although not named in the statement of liabilities annexed to the deed of composition. By sub-sec 6 of sec 9 it is provided that "upon such application *any* creditor may appear and oppose the confirmation of the discharge," The right to appear is not limited to the creditors named in the schedule It *may* perhaps be the case that the insolvent is only discharged from those debts named in the statement annexed to the deed of assignment or composition, but that is not enough: every creditor has an interest in the estate of the insolvent, and a right to participate in any dividends that may be declared, and for that purpose is entitled to prove his account and rank upon the estate, and also to oppose the insolvent's discharge. The only method of proving debts given by the Insolvent Act is before the assignee, under sub-sec. 13 of sec. 5; the judge has apparently only an appellate jurisdiction in respect of the proving of debts.

In this case, on being satisfied by affidavit that a bona fide claim to rank as a creditor is made by Mr. Watson, I shall adjourn this meeting, in order to enable him to prove his debt before the assignee. I think, too, that the insolvent should be present when application is made for the confirmation of his discharge, in order that he may be examined, if any creditor desires to do so.

In the matter of Hamilton and Davis Insolvents.

A person summoned as a witness cannot refuse to give evidence respecting his own dealings with the insolvents by alleging that he is a creditor.

T. C M., a confidential clerk, and manager of the business of the insolvents, was summoned as a witness at the instance of the assignees, by a judge's order granted under the authority of sub sec. 4 of sec 10 of the Insolvency Act.

In the books of the estate he appeared as a debtor to a considerable amount, but claimed to be a creditor, alleging that he had a set off exceeding in amount his indebtedness to the estate.

After being examined generally touching the estate of the insolvents, he was asked about his own account, when he objected to produce it, or give evidence respecting his own dealings with the insolvents.

Sadlier, for the witness, contended that a creditor has no right to examine another creditor about his claim against the estate until he seeks to prove his account, and to rank upon the estate: that it would be unjust to compel the witness to give such evidence, as his statement might be used against him, while he could not use them in his own favour.

Logie, Co. J.—Under sub-sec. 4 of sec. 10, *any* person may be examined as to the estate or effects of the insolvents, but only on a judge's order granted upon petition; no judge acting in insolvency would allow a witness who claimed to be a creditor to be examined at this stage of the

proceedings touching his own account, unless it appeared to him necessary in the interest of the creditors that he should be so examined. In this case the witness was manager of the business of the insolvents; in the books kept chiefly by himself he appears to be largely indebted to the estate, and his claim, which is in the nature of a set off, arises out of his transactions with the insolvents; and I think it is necessary, in order to ascertain whether the debt apparently due by the witness is an asset or not, that he should answer the question put to him respecting his own account.

The witness then produced his account, and an adjournment was asked for and granted. At the next meeting, before resuming the examination,

Logie, Co. J., said—At the time of granting the adjournment. I was asked to look into the point raised by Mr. Sadleir; I have done so, and I am of opinion that my decision was correct. The cases of *Ex parte Gooldie*, 2 Rose, 330, cited in Deacon & DeGex Bankruptcy Law, 165, and *Ex parte Chamberlain*, 19 Ves. Jr. 481, are in point. In the last case, the Lord Chancellor (Eldon) said, "The Commissioners must proceed with the examination, as, although the witness thinks himself a creditor, he may not be so." *And again*, "The question whether the testimony will be useful or useless is very different from that of the right to examine; what may be the effect is for the commissioners to decide, *but the witness cannot set up the objection.*

ENGLISH REPORTS.

Regina v. Robinson and another.

On an indictment for feloniously receiving goods, knowing them to have been stolen, it is unsafe to convict a party as receiver on the evidence of the thief, unless it is confirmed.

On an indictment for stealing and receiving a mixture, it appeared that the thief had stolen two sorts of grain, and then mixed them and sold them to the prisoner:—*Held*, that the latter could not be convicted on such an indictment; and there being no evidence but that of the thief, the Judge would not amend.

[Hertford Crown Court—Spring Assizes, 1864.]

Indictment against one Saunders for stealing, and against Robinson for feloniously receiving. The indictment alleged that Saunders, "one bushel of a certain mixture consisting of oats and peas, the goods of his employer, feloniously did steal, take and carry away;" and that Robinson, "the goods aforesaid, so as aforesaid feloniously stolen, feloniously did receive, he then well knowing the said goods to have been stolen."

Second count, that Robinson feloniously did receive one bushel of a certain mixture consisting of oats and peas, of the goods, &c., which said goods had been stolen, he then well knowing them to have been stolen.

Saunders, the thief, pleaded guilty.

Robinson, the receiver, pleaded not guilty.

Abel, for the prosecution.

Codd, for the defence.

The prosecutor had known the prisoner Robinson for years and had recently sold him various sorts of corn. Before the theft the prosecutor had missed oats and peas, and his oats were peculiar. On the prisoner's premises, after the other prisoner had been arrested, were found a quantity of mixed oats and peas, and the prosecutor believed the oats were his, but could not positively identify them, mixed as they were. The only other evidence was that of Saunders the thief, who swore that the prisoner asked him to "get" him some corn, and afterwards bought it of him and gave him a shilling for it, and told him to "say nothing about it."

Pollock, C. B., advised the jury to acquit the prisoner; it being perilous, he said, to convict a person as receiver on the sole evidence of the thief. This would put it in the power of a thief from malice or revenge to lay a crime on anyone against whom he had a grudge. And here there was no adequate confirmation of the thief's evidence.

The jury, however, after consideration desired to return a verdict of guilty.

Pollock, C. B., however, declined to receive it or allow it to be recorded, and directed them to find the prisoner not guilty, as the evidence failed in point of law. The indictment charged a receiving of a mixture which had been stolen, knowing it, *i. e.* the mixture, to have been stolen; but the evidence of the thief, if believed at all, was that he stole pure oats and pure peas, and then mixed them and afterwards sold them to the prisoner, so that the one prisoner did not steal a mixture, and the other did not receive, as the indictment alleged, a "mixture" which had been stolen, for the mixture had not been stolen.

The jury, however, still declined to return a verdict of not guilty, declaring that they deemed that when the thief mixed the oats and peas it became a "mixture."

Pollock, C. B., with some firmness, told the jury that they were bound, on his direction in point of law, to return the verdict he directed. He explained that the facts only were within their province, the law was in his; and although he did not infringe on their province, he could not permit them to invade his. He peremptorily directed them, therefore, to return a verdict of not guilty.

The jury, after some hesitation and with great reluctance, at length, accordingly, returned a verdict of not guilty.

GENERAL CORRESPONDENCE.

Calls to the Bar — Improvement of the Profession.

To the Editors of the Law Journal.

Gentlemen,—Will you allow me to trespass on your space to make a few remarks as to the letter of "A Barrister," in the first number of your new and very convenient edition of your valuable paper.

I am not satisfied myself that our Law Society has shown quite enough pluck in dealing with some of the black sheep of our profession. No doubt their duty in this respect is very difficult, and requires great judgment for its proper discharge, but it is one of

most vital importance to us, and such an independant body as they are should act fearlessly, if necessary, in discharging it. They should ever remember, that the care of the profession is the most important trust confided to them.

As to numbers, a reasonable premium on articles will at once reduce the increase in that respect, so we have the remedy in our own hands. I believe the examinations reasonably good, if rigidly exacted, but no stipulations as to the amount of knowledge required are of any value unless they are acted up to strictly. The great advantage, to my mind, of the premium system is, that it will prevent a great many from entering the profession who are so utterly without means as to be unable to resist the great temptations offered them in a profession like ours. The question with these poor young fellows, after they are once floated in the profession, is one of *existence*. The fees, if proper ones only are charged, are low enough now, but they must get a living, and, if it can only be obtained by cutting down, that course must be resorted to. "Cutting down" is dishonorable, and dishonorable conduct in one of our profession, not only reflects disgrace upon the whole of us, but utterly does away with all hope of unity among us, as we can place no confidence of any kind in a man who is not aware of what honour is. When he has once set at nought the good opinion of his fellows in this respect, where is he to stop! He has forsaken the only guide to a respectable and respected career, and all hope of the position of the profession being upheld by him is at an end. With a premium system we should have no lack of good men. We don't want men without the education, and, as far as is possible, the habits of gentlemen, and young men of promise could easily obtain the money, either by their own exertions or through their friends. Besides this, by lessening the numbers it must be remembered that we should make the business more valuable to those in the profession, and consequently the inducements to enter it greater even in a pecuniary point of view. I will not intrude on you at greater length at preset, but remain,

Your obedient servant,

A Barrister.

February 7, 1865.

[We publish most gladly the communication of our valued correspondent, in the hope that owing to suggestions thus made and thus published, those who have the power and upon whom rests the duty of promoting the welfare of the profession, will be thereby guided to a right conclusion.—Eds. L. J.]

Garnishee costs.

To the Editors of the Law Journal.

Gentlemen,—The case of *Evans* v. *Evans*, in Chambers in Chancery, is of so much importance to suitors that I hope you will allow me to make a few remarks on it.

One might have hoped that a Judge in Chancery would have acted upon as well as taken a more equitable view of the question, as to allowing plaintiffs their costs in these cases, but as the Vice-Chancellor says, that court is bound by the decisions of Courts of Law, and we are remanded back to those courts for redress. I beg to suggest, through you, that the whole profession should unite in endeavouring to obtain an alteration of the law as at present acted upon in these cases. The present decision was made by the late Chief Justice Robinson in 1857, in Chambers. It does not appear whether there was any argument on the point or no, but the order for the judgment creditor to be allowed his costs was refused, "on the ground that this is a special provision for the accommodation of the creditor, and therefore it is sufficient for him to receive the designed benefit by paying for it. A judgment creditor is not entitled to put the debtor to additional cost by availing himself of a special provision of this kind instead of pursuing the ordinary method."

No one has more respect for any decision of the late Chief Justice than I have, but I submit that he has taken an utterly erroneous view of the duties of the court in this respect. He says that "this is a special provision for the accommodation of the creditor and therefore it is sufficient for him to receive the benefit by paying for it." But what benefit does he receive if he is absolutely prohibited from availing himself of this accommodation. And yet this occurs every day. A judgment debtor goes away to the States leaving nothing collectable behind him but a consiberable number of small debts, collectable only in the Division Court. The unfortunate creditor cannot discover all these debts at once so as to include

them in one order, and of course is not justified in delaying to secure the debt that he does know of till he has sufficient information as to the rest, so he is obliged to take out a number of successive orders—the expense of which probably amounts to nearly as much as the sums collected. This may, and probably does occur every day, and why are our Judges to say to the plaintiff, "Although yours is a just debt, and we give you full credit for having done no more than your duty to yourself in trying to collect it—and that by the only means in your power—and although it is wholly owing to the conduct of the defendant that you have been obliged to incur this expense, we leave you to pay the whole of it, even though it should exceed the amount collected."

We lawyers are not interested in it, because if we are called upon to act for the plaintiff we get our costs at any rate, and therefore are free from any charge of selfishness in urging this question, so let us see what the Statute says upon the subject.

Section 299 of the Common Law Procedure Act says, "The costs of any application for an attachment of debt under this Act, and of any proceedings arising from or incident to such application, shall be in the *discretion* of the court or judge." And yet what is the effect of all our courts and all our judges acting upon this decision, but to say, "It is true that the law expressly vests in us a discretion in each and all of these cases, but the late Chief Justice refused relief in *one* case, and therefore we set aside the words of the Act and refuse to exercise any discretion in *any* case for the future."

Hoping that our courts will be moved at some very early period to take a different view of their duty in this matter,

I remain, your obedient servant,

AN ATTORNEY.

[There is much force in the argument of "An Attorney." We have always felt with him that proper effect has not yet been given to sec. 299 of the Common Law Procedure Act. It is not usual to grant an order for the attachment of debts till the ordinary remedy by execution has failed to produce fruit. And to whom is the blame to be attributed for this result? Certainly not to the plaintiff. He has the *right* to realize the amount of his judgment, and when using the proper and necessary remedies in that behalf it is not fair that he should be obliged to pay nearly as much for the remedy as his claim is worth. Our correspondent will find, however, upon reference to another column, that the decision in *Evans* v. *Evans* has been reversed, and that the Court of Chancery has, very properly, placed the interpretation contended for by him upon the section referred to.—EDS. L. J.]

MONTHLY REPERTORY.

Q. B. ECHLIN v. BRADY.

Crim. Con.—Staying action till particulars given —Novel application.

In an action of *crim. con.* application was made on behalf of defendant to stay the action till plaintiff should give the particulars of the times and dates when the alleged criminal conversation took place with plaintiff's wife. The declaration was in the common form. The defendant's affidavit stated that he entirely denied the allegations, and had no idea or knowledge of the times and places when the alleged *crim. con.* took place, and that it was necessary for his defence that he should have intimation of particulars referred to. The Court was unanimous in refusing a rule. (9 S. J. 241.)

C. P.

FOY ET UX. v. LONDON B & S. C. R. W. Co.

Railway — Negligence — Injury to passenger.

When a train, in which A. was a passenger, stopped outside a station, at a place where there was no platform, A. was told by one of the railway porters to get out as soon as she could; and instead of stepping on the two steps of the carriage in succession, and from the lower one to the ground, she took a gentleman's hand and jumped from the top one and was injured; it was held by the court that there was evidence of negligence to go to the jury; and the jury having given a verdict for the plaintiff, the court refused to interfere. (13 W. R. 293.)

EX. BAKER v. LANE.

Interrogatories—Libel.

Interrogatories in an action of libel disallowed on the ground that the answers would tend to criminate the party interrogated. (13 W. R. 293.)

D. & M. RE MULOCK.

Letter threatening a suitor—Contempt of Court.

An attempt by a third person to prevent a suitor from laying his case before the court, by threats of bringing him into disgrace and disrepute, is a contempt of court, and subjects the offender to a heavy fine. (13 W. R. 278.)

DELIVERY OF JUDGMENTS.

Judgments will be delivered in the Queen's Bench on Monday, the 6th March next, at 10 o'clock, a.m., and on Saturday, the 11th March, at 2 o'clock, p.m. In the Common Pleas, on Monday, the 6th March, at 2 o'clock, p.m., and on Saturday, 11th March, at 10 o'clock, p.m.

SPRING CIRCUITS, 1865.

The Hon. Mr. Justice Morrison.

Kingston	Tuesday	21st March.
Brockville	Tuesday	4th April.
Perth	Monday	10th "
Cornwall	Monday	17th "
Ottawa	Tuesday	2nd May.
L'Orignal	Tuesday	9th "

The Hon. Mr. Justice Wilson.

Napanee	Monday	20th March.
Picton	Wednesday	22nd "
Belleville	Monday	27th "
Whitby	Tuesday	11th April.
Cobourg	Monday	17th "
Peterborough	Monday	1st May.
Lindsay	Thursday	4th "

The Hon. Chief Justice of Upper Canada.

Milton	Monday	13th March.
Hamilton	Monday	20th "
Barrie	Monday	3rd April.
Niagara	Tuesday	25th "
Welland	Tuesday	2nd May.
Owen Sound	Tuesday	9th "

The Hon. Mr. Justice Hagarty.

Guelph	Monday	29th March.
Brantford	Monday	27th "
Berlin	Monday	3rd April.
Stratford	Monday	10th "
Woodstock	Monday	17th "
Cayuga	Tuesday	25th "
Simcoe	Tuesday	2nd May.

The Hon. Mr. Justice John Wilson.

Goderich	Tuesday	21st March.
Sarnia	Monday	27th "
St. Thomas	Thursday	30th "
London	Monday	3rd April.
Chatham	Wednesday	12th "
Sandwich	Monday	17th "

The Hon. Chief Justice Richards.

Toronto City	Monday	20th March.
York and Peel	Monday	10th April.

INSOLVENTS.

P. S. Stevenson	Toronto.
Charles J. Houghton	Montreal.
Charles Larocque	Plantagenet.
A. Bunnell	Brantford.
Pierre Elzear Pothier	Three Rivers.
Peter Aylsworth	Demorestville.
Thomas Redner	Tp. Hillier
David Caldwell	Galt.
Thos. Mahoney	Peterboro'.
John Young	Montreal.
W. Muirhead	Hamilton.
John W. H. Schneider	Welland.
Wollaston F. Pym	Cobourg.
James M Swetman	Hamilton.
John C. Taylor	Belleville
John Taylor	Co Wentworth.
William Douglas & Co.	Montreal.
Arthur Macbean	Colburg.
William Rice	Perth.
Charles Latour	London.
Holmes & Davidson	Point Levi.
J. Craig	Brantford.
Henry Nicoll	St Thomas.
Cornelius Mitchell	St Thomas.
David P. Beattie	Montreal
Alexander F. Beattie	Stta Inny.
Godard & Co.	Grafton.
William Coyne	St. Thomas.
Clark Gordon	Sherbrooke.
J. Livingston	Montreal
Archd. McNeil	Centreville.
Hubert Gravel, sen.	Montreal.
B. Sinette	Montreal.
John Ashton	St. Hyacinthe.
Samuel Ashton	Darlington.
James McGuire	Cartwright.
Robert Evans	Kingston.
John Orr	Hamilton.
Gurd & Tarlton	Cainsville
T. & D. Brown	Montreal.
Turnbull Brodie & Co.	Montreal.
Paul T. Ware	Montreal.
Owen Murphy	Toronto.
Marois & Son	Quebec.
Wm. B. Whittier	Quebec.
Henry Snider	Picton.
John Tees	Picton.
D. A. P. Watt	Montreal
Noble C. Smith	Newtonville.
James Creed	Tp. Barton.

APPOINTMENTS TO OFFICE.

SPECIAL COMMISSIONER.

FREDERICK WM. TORRANCE, of Montreal, Esquire, Advocate, to be a Commissioner under Chapter 13 of the Consolidated Statutes of Canada, to inquire into the proceedings connected with the St. Albans offenders. (Gazetted January 28, 1865.)

NOTARIES PUBLIC.

WILLIAM U. BARRETT, of Port Hope, Esquire, Attorney-at-Law, to be a Public Notary in Upper Canada. (Gazetted January 21, 1865.)

CORONERS.

JOHN GEORGE McLEAN, Esq., M.D., Associate Coroner, County of Lincoln. (Gazetted January 21, 1865.)

JOHN H. ELLIOTT, Esquire, M.D., Associate Coroner, County of Welland. (Gazetted January 21, 1865.)

ISSUERS OF PASSPORTS.

A. J. PETERSON, of Berlin, THOMAS WILLS, of Belleville, THOMAS SPARROW, of Galt, SAML. S. SMADES, of Port Colborne, and THOMAS BURGAR, of Welland, Esqrs. (Gazetted January 7, 1865.)

MOSES SPRINGER, of Waterloo, THOMAS GORDON, of Owen Sound, JAMES McGIBBON, of Lindsay, and JAMES HOLDEN, of Prince Albert, Esquires. (Gazetted January 21, 1865.)

ANDREW DONNELLY, of Richmond, WILLIAM B. HAMILTON, of Collingwood, CHARLES ELLIOT, of Cobourg, WILLIAM WALLACE, of Simcoe, WILLIAM M. KING, of Oakville, LEWIS W. ORD, of Seaforth, JAMES THOMSON, of Goderich, and JAMES RIDDELL, of Port Dover, Esquires. (Gazetted January 28, 1865.)

TO CORRESPONDENTS.

"A Barrister"—"An Attorney"—under "General Correspondence."