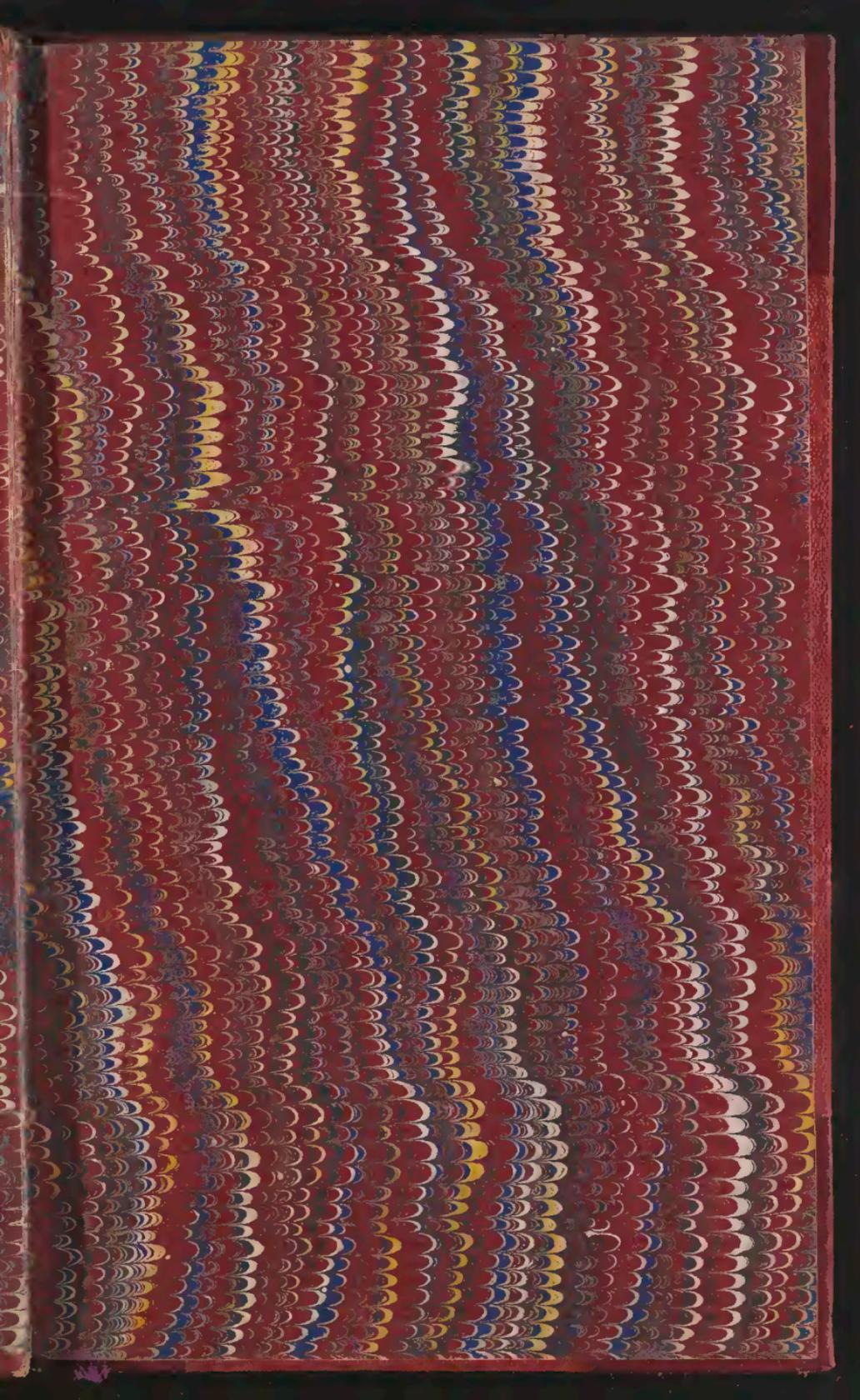


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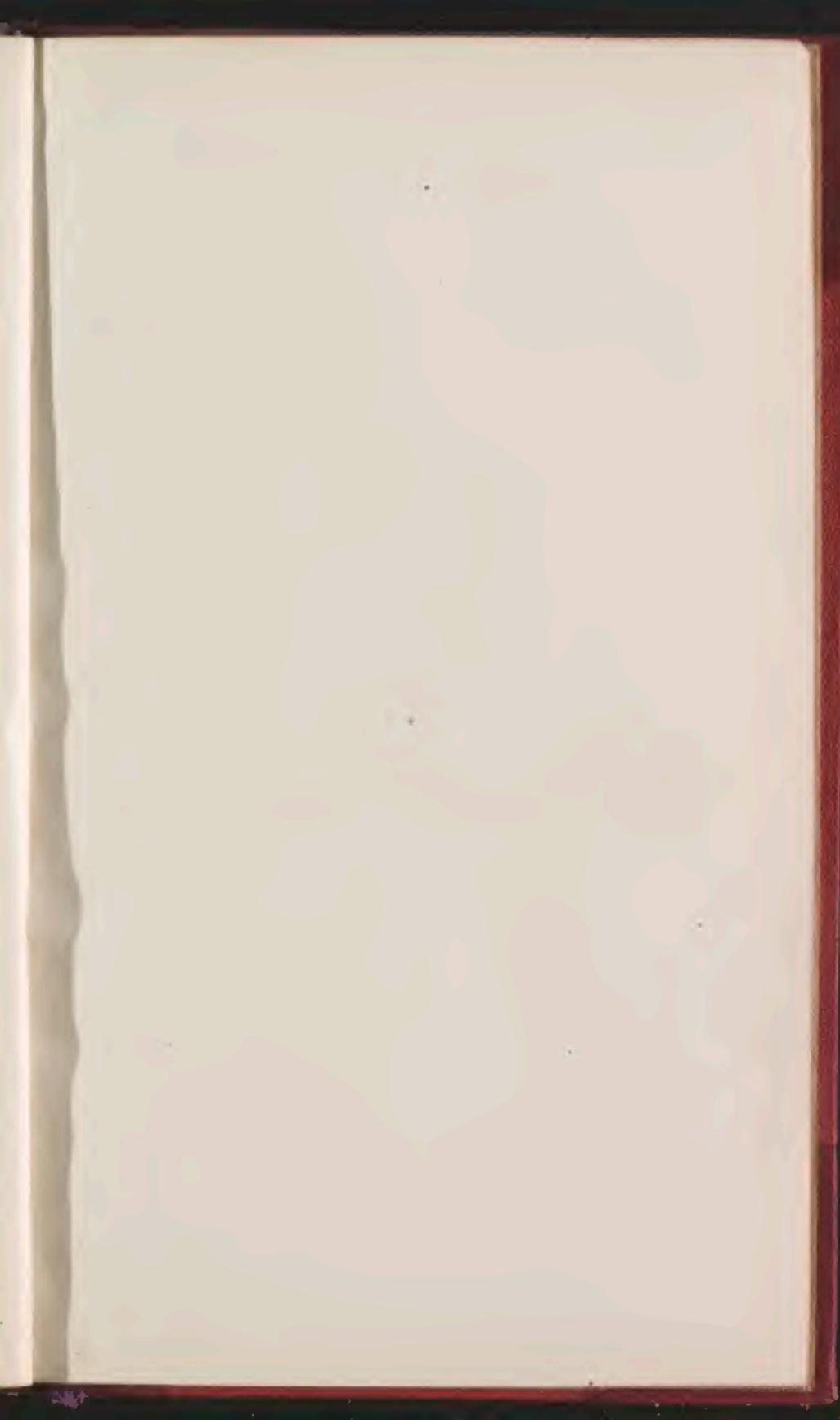
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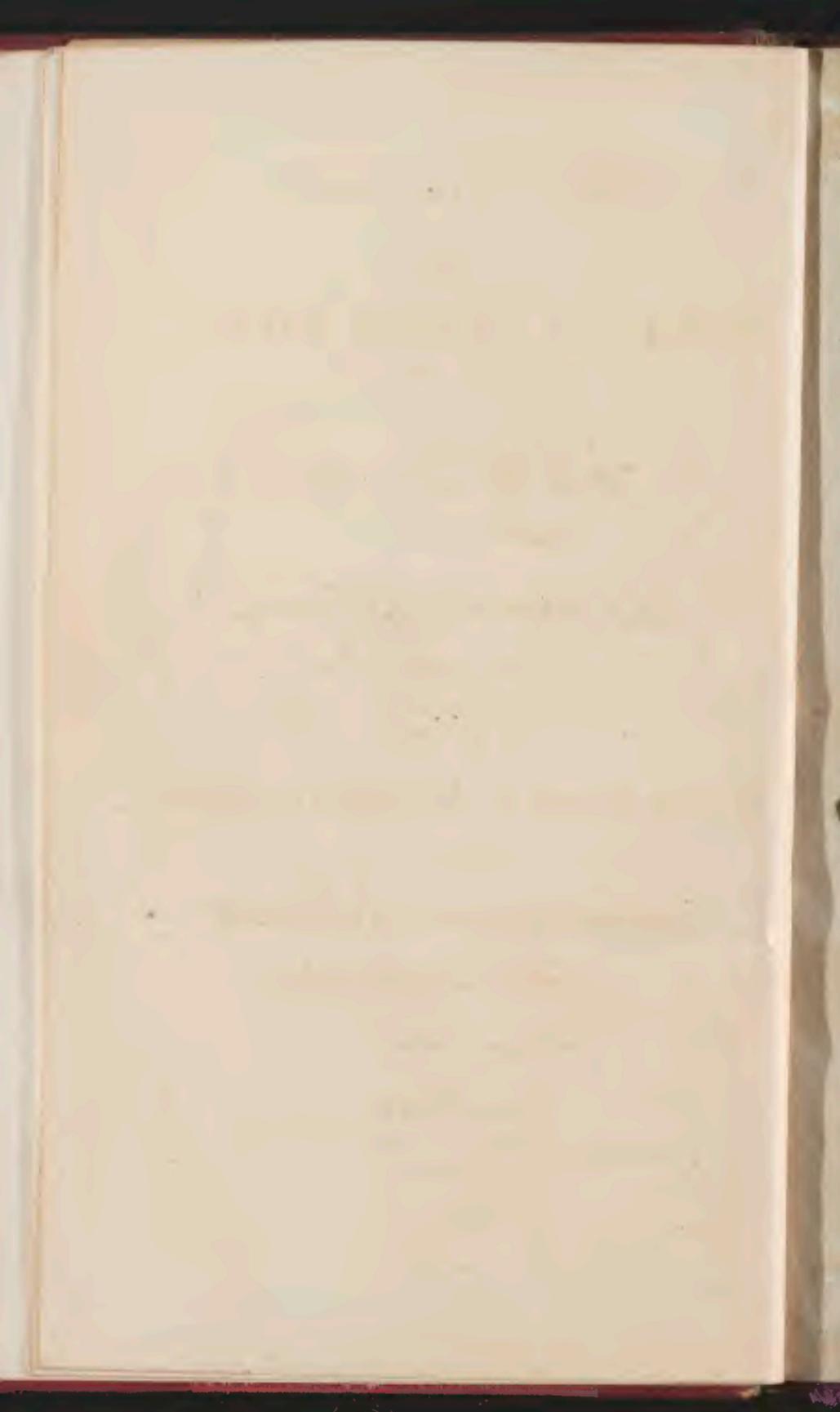












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CORRECT REPORT

OF THE

Trial of Josef Perez,

FOR

PIRACY,

COMMITTED ON BOARD

THE SCHOONER BEE,

OF CHARLESTON, S. C.

BEFORE THE

Circuit Court of the United States,

FOR THE

SOUTHERN DISTRICT OF NEW-YORK.

ON TUESDAY, SEPT. 9th, 1823.

New-York :

PRINTED AND PUBLISHED BY J. W. BELL,
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1823.

THE NEW YORK

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1855

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TRIAL, &c.

CIRCUIT COURT OF THE U. S. For the Southern District of N. York, IN THE SECOND CIRCUIT.

SEPTEMBER 3d, 1823.

PRESENT,

THE HON. SMITH THOMPSON, and } JUSTICES.
THE HON. WILLIAM P. VAN NESS, }

ROBERT TILLOTSON, Esq. United States' District Attorney,
JAMES DILL, Esq. Clerk.

The Grand Jury came into Court, and presented the following Bill of Indictment against JOSEF PEREZ, for PIRACY, viz.—

United States of America, }
Southern District of New-York. } ss.

The Jurors for the United States of America, within and for the Circuit and District aforesaid, upon their oath do present, that *Josef Perez*, late of Cadiz, in the Kingdom of Spain, and now of the City of New-York, in the Southern District of New-York, aforesaid, mariner, on the fourteenth day of August, in the year of our Lord one thousand eight hundred and twenty-two, in a certain place called a Haven, two miles and a half distant from St. John de Remedie, in the Island of Cuba, and without the jurisdiction of any particular State, and within the jurisdiction of this Court, did piratically and feloniously, set upon, board, break, and enter a certain Merchant vessel or Schooner called the *Bee*, then and there being the property of one Edward Johnson, a citizen of the United States, and then and there piratically and feloniously did make an

assault in and upon the said Edward Johnson, and Manuel Fernandez, James Debau, Joseph Porter, and James Thompson, Mariners, in the same Schooner, in the peace of God, and of the said United States of America, then and there being, and then and there piratically and feloniously did put the said Edward Johnson, Manuel Fernandez, James Debau, Joseph Porter, and James Thompson, so being mariners of the same Schooner, in the Schooner aforesaid there being, in corporal fear and danger of their lives, then and there in the Schooner aforesaid, at the place aforesaid, and out of the jurisdiction of any particular State, and within the jurisdiction of this Court, as aforesaid, and piratically, and feloniously, and against the will of the said Edward Johnson, Manuel Fernandez, James Debau, Joseph Porter, and James Thompson, did then and there steal, take and carry away four barrels of rice, of the value of twenty-five dollars—forty-five barrels of flour, of the value of five hundred dollars—sixteen boxes Codfish, of the value of twenty dollars—twenty barrels of small crackers, of the value of one hundred dollars, and twenty-four gold watches, of the value of three hundred dollars; the goods and chattels of the said Edward Johnson, then and there, in the place aforesaid, and out of the jurisdiction of any particular State, and within the jurisdiction of this Court, being found in the aforesaid schooner, in custody and possession of the said Edward Johnson, Manuel Fernandez, James Debau, Joseph Porter, and James Thompson, mariners aforesaid, of the said schooner, and from their custody and possession, then and there, at the place aforesaid, and out of the jurisdiction of any particular State, and within the jurisdiction of this Court, as aforesaid, against the peace and dignity of the said United States of America, and the form of the Statute in such case made and provided.

[To provide for any inaccuracy in the foregoing Indictment, two additional counts were added; a repetition of the first part in all respects, excepting, that in the one, the offence was described to have been committed in a "bay;" and in the other, "on the high seas."]

It appearing that the prisoner was unacquainted with the English language, the Court directed that a Spanish translation of the Indictment should be furnished to the prisoner, preparatory to his arraignment; and that another copy should be furnished to JOSIAH OGBEN HOFFMAN and GEORGE W. NIVEN, Esquires, whom the Court had assigned as counsel for the prisoner, upon his allegation that his circumstances would not enable him to employ counsel in the usual way.

Friday, the 5th of September,

The prisoner was brought into court, and arraigned, upon which he pleaded NOT GUILTY.

G. W. Niven, Esq. then observed to the Court, that he had conferred with the prisoner repeatedly upon the subject of his imprison-

ment—that these conferences had resulted in his entire and perfect conviction that, notwithstanding the allegations to the contrary, the prisoner was not the individual whom the complainants supposed him to be. That the prisoner, unasked and unsought for, had furnished a statement, which upon its face bore evidence of its truth, of the manner in which he had been employed, for the last nine years. That commiseration for the prisoner, whom fortune had cast upon our shores, friendless and forlorn, had induced him to extend an attention, which as his council merely, could not have been asked from him—that instead of the cruel and ferocious Pirate, with the characteristic features of such an employment, which he had pictured to his imagination, and which he had been taught to expect; he had found mildness and ingenuousness—instead of guilt, his plain unvarnished tale, and the recollection of the case of Parker, raised something more than a suspicion, that in the prisoner's identity, the complainants were mistaken. The counsel then enlarged upon the case of Parker, in the identity of whom so many witnesses were mistaken, and concluded by submitting to the court the following affidavit, which he made the ground of an application to obtain testimony from Buenos-Ayres, at which place the prisoner swears he resided, at the time the offence for which he is indicted, is alleged to have been committed.

Prisoner's Affidavit.

Southern District of New-York, ss.

Josef Perez, being duly sworn, doth depose and say, that he was born in Cadiz, in the year 1800, and brought up with his father to the occupation of a Shoe Maker, until at the age of fourteen years he was compelled by ill health to relinquish that pursuit and go to sea. That his first voyage was performed in the Phillipine Company's Ship St. Joseph, alias King Ferdinand, to Calcutta and the neighbouring ports, which occupied one year and seven months—that upon their return to Cadiz they remained two months, and then substituting Captain Don Alonzo De Riba for their Captain, proceeded for Lima, where they arrived in about five months—that after her arrival he remained on board two months and then went ashore, where he was employed in a boarding house for four months and a half, and subsequently for two months and a half without employ. That being then taken ill, he was carried to the Hospital St. Andres, where he continued one month and three days, when being somewhat better he lived in the house of Chola Paublo about fifteen days and then shipped on board the Spanish Ship Cas-

tillo, on board of which he worked for two weeks previous to her sailing. That in about four months and a half they reached Cape St. Maria, where they were captured by a privateer, after an action of three quarters of an hour, in which he, together with seven of the crew, were wounded, four mortally. That in three months and twenty-one days they arrived at Buenos-Ayres, when he was taken to the hospital called "of the Residence," and remained 27 days, and from thence he was taken to *Retiro*, the depot of prisoners, and detained about one year and seven months. That through Lieut. Col. Don Bernard Ansuotige he was taken out of prison, and kept in his service one year and nine months, who then procured him employment as a shoemaker, with Manuel Balquero, who is a native of Cadiz, and married at Buenos-Ayres—that he continued in the employment of Manuel Balquero for eight months and a half, when he returned into the service of Don Bernard Ansuotige, who resided at a place called St. Joseph de Hores, about two leagues from Buenos-Ayres, with whom he remained nearly nine months. That he then shipped in a French Corvette for Rio Janeiro, where he arrived in twenty-nine days, and lived ashore ten days at Don Antonio's an Asturian, who procured him employment on board a Spanish Brig Polacre bound for Gibraltar, at which place they arrived in three months and twelve days—that remaining three days at Gibraltar, they again sailed for Cadiz, landing the owner of the cargo (Manuel Grimanez) at Algeiras, and arrived there in two days. That he continued ashore in Cadiz for the period of three months, and there shipped in the Corvette *Tarantula*, on board of which vessel he worked for seven days previous to her sailing. That the said Ship having her limited complement of men, he entered on board as a supernumerary, and was by agreement to have been regularly entered on the Roll upon her arrival in the port of New-York. That they took their departure in May last, five days after the day of the Holy Cross, and arrived in this port after a passage of about one month and a half. That in consequence of refusing to place his name on the roll of seamen, he, together with Jose Cueneo, and Jose, both boys, who were born in Cadiz, & six others, left the said vessel, three days before her departure for Havana; from which time until put into prison, and a period of fifty-three days, when he saw his counsel. That the said Jose Cueneo and Jose, have since then, as deponent understands, left this port for Liverpool.—

And this deponent further saith, that he never was at the Island of Cuba, or engaged or associated directly, or indirectly, on board of any piratical vessel, and never until the day of his arrest saw Joseph Porter, or Captain Edward Johnson until subsequently.

And this deponent further saith, that at the period when the offence was committed, which deponent is alleged to have participated in, and for a long time before and after, he was ashore and in the actual daily service of Lieutenant Colonel Don Bernard Ansuotige, who is now, as deponent verily believes, an Inhabitant of the city of Buenos Ayres.—

And this deponent further saith, that he is poor and altogether unable through want of means to procure the testimony of Lieutenant Colonel Don Bernard Ansuotige and other persons, through whom he could prove conclusively, the fact of his being on shore at the time the offence charged against him was alledged to have been committed.—

And deponent further saith, that he has applied to the Spanish Consul for assistance, but by reason of the present unsettled state of Spain, and his being out of funds, the said Consul could render him none. And this deponent further saith, that until his arrival at this port in the Spanish Ship Tarantula, he was a total stranger; and is now altogether unacquainted with the English language. And that the clothes he now wears were charitably given to him; he not having the means to purchase them.

And this deponent further saith, that he, the said Lieutenant Colonel Don Bernard Ansuotige is a material witness for this deponent on the trial of this cause, without whose testimony he cannot safely proceed to trial, as he is advised by his counsel, and verily believes to be true.—

JOSEF PEREZ.

Sworn before me in open Court, after having been interpreted in the Spanish language by Anthony Rapallo, Esq. sworn interpreter, this 5th day of September, 1823.

J. DILL, Clerk.

The Court took the subject of the foregoing Affidavit into consideration, but being unadvised, and the District Attorney suggesting that the fact of the prisoners arrival at this port in the Ship Tarantula, was not only untrue, but on the contrary, that he had arrived on board of a suspicious vessel, which upon his arrest had slipped her cables and went to sea, deferred the case until the next day, for affidavits confirming the prisoner's statement.—

On the 6th of September, Mr. Niven produced the additional affidavits of Don Thomas Stoughton and others, placing the fact of the arrival of the prisoner at this port in the Ship Tarantula beyond all doubt, and renewed his motion, that the Court would furnish the prisoner with the means of procuring the testimony of his witnesses at Buenos-Ayres—after consultation on the Bench, the Court determined that the testimony of those witnesses could not be taken upon a commission—that the Court had not the power to compel their personal attendance, nor had they the funds at their disposal to pay the expenses of their transportation to this Country—that a postponement therefore would not avail the prisoner any thing, and that the prisoner must be prepared for trial by Monday, the 8th inst.

On Monday, the 3th of September, the Court met, but adjourned on account of the death of John Wells, Esq. and the absence of Counsel, until

Tuesday, September 9th, 1823,

When the Court met pursuant to adjournment, proclamation was made, and the regular pannel called, when the prisoner availed himself of his constitutional right of challenge, by objecting, as they were severally called, to twenty persons. The marshal selected from among the by-standers, the number deficient on the regular pannel, when the following, who were deemed unexceptionable, were regularly sworn.—viz:

THOMAS BLANCH, Junr.
WILLIAM P. RATHBONE,
SAMUEL DIXON,
WILLIAM ELLET,
JONATHAN D. STEVENSON,
JARED W. BELL,
SAMUEL H. ROGERS,
CHARLES JONES,
SMITH LANE,
DAVID SHERWOOD,
DANIEL BANVARD, Junr.
JOHN GANTZ.

The Jury were charged by the Clerk, as is usual in capital cases, when the District Attorney opened the case in behalf of the prosecution, to the following effect:

Gentlemen of the Jury,

This is a cause of great and paramount interest, both to the Prisoner at the Bar, charged with having committed one of the greatest crimes of which a human being is capable, and to this as a great commercial country, protecting her maritime rights and laws. Under the peculiar situation and circumstances of this case, you should give it that careful examination, which the violated laws of our country require, and which is due to the prisoner, particularly situated as he is.

Accident has thrown an individual on our shores, who has been recognised, as having committed a crime, which, by the law of nations, will deprive him of his life. And, gentlemen, I shall endeavour to show that this offence was committed within the jurisdiction of this court, upon an American vessel tranquilly prosecuting her commercial pursuits. The testimony which I shall adduce in the progress of this trial, shall be such, as will conclusively prove

to you, that the crime of Piracy was actually committed on this vessel, that she was plundered of her cargo, that her crew were sent adrift on the wide ocean in a small boat incapable of containing them, that she was burnt and totally destroyed by fire; and finally, I shall show that the prisoner at the bar was one of the crew of that piratical vessel, and that he assisted and was active in the commission of this piracy.

The defence, gentlemen, that will here be set up by the counsel for the prisoner, will be, that this individual is not one of that piratical crew, and that he will not be sufficiently identified for you safely to convict him. But how is it possible I ask, ever to convict a pirate of a crime, unless it is upon the testimony of the injured party, and by those upon whom the offence was committed.

Captain EDWARD JOHNSON—*Sworn for the prosecution.*

Examined by Mr. Tillotson.

Q. Are you a citizen of the United States?

A. I am.

Q. What is your occupation?

A. I am a sailor bred.

Q. Was you owner of the vessel or schooner called the Bee?

A. I was sole owner of the Schooner, and some of the cargo.

Q. What was the vessel laden with?

A. Flour, Rice, Butter, Lard, Soap, Tin Ware, Watches, &c. &c.

Q. What time did you leave Charleston for the Island of Cuba?

A. The 20th of July, 1822—and on the 14th of August, saw a schooner under the land, which seemed to be a Baltimore built vessel of about 30 Tons, and was schooner rigged.

Q. Where did she come from?

A. She came from under the land from Cuba Shore, and hailed us with Buenos-Ayers' colours flying, directed us to heave to, when we let go an anchor.

Q. Did the Piratical vessel send her boat on board?

A. I don't know whether it was his boat that came on board, or the boat of the Bee. The first thing that I knew after letting go the anchor, was, that as I was paying out cable, I was struck several times across the shoulders with a cutlass by one of the Pirates, who exclaimed, "Ah! American Captain," and they kept beating me till Captain Fernandez came forward and begged for me.

Q. What then took place?

A. They got our gun, a six pounder, into their boat, colours, and every thing they could find about deck; after they had done that, they got the Bee under way and took her in shore, within

about half a mile of the land, then brought us to anchor, when the pirate came along side.

Q. What happened after she came along side?

A. The Piratical crew generally came on board of us, broke open the hatches, and began to take out the cargo.

Q. What number of the Pirates do you think came on board?

A. About twenty might be on board.

Q. Where did you first see Josef Perez?

A. I first noticed him when he was in the act of attempting to break open the main hatch with a crow-bar, an axe was immediately called for, and before it was brought, they put me by force on board of the Pirate.

Q. How long was this after the capture?

A. About two hours.

Q. What took place on board of the Pirate?

A. They set me to throwing the ballast out of their vessel which they replaced with my cargo. They got considerable of the cargo out, then I was ordered on board my vessel again and put along side the takle-fall with Debau, one of my hands. They beat me most cruelly with a two-inch rope. I then hoisted away considerably. After this I was ordered into the hold of my vessel to assist in breaking out the cargo. In the hold there was a man that beat me severely with a rope upon my back. I then told Fernandez to tell him in Spanish, that if they were going to kill me, to do it at once; but the man replied, "*No! you American Captain,*" and with another blow told me to work. When the Pirates had got every thing they chose, they hauled off the distance of a biscuit throw.

Q. Who was this Captain Fernandez you speak of?

A. My Sailing Master, a Portuguese;—he could speak Spanish very well, and often dissuaded them from beating me and my crew.

Q. Did they take out all your cargo?

A. Their vessel would not hold it all.

By Mr. Tillotson—Well! Proceed.

I then asked leave to go into the cabin, which was granted.—Night coming on, ten or twelve hands armed with pistols, knives, &c. came on board the Bee, and sent all of us into the cabin and confined us there during the night. In the morning they opened the cabin and let us come out, or remain, as we pleased.

Q. What transactions then took place?

A. They commenced selling the cargo to the people on shore. They took the cargo out of the Bee, and put it on board of boats which came along side, and sold it.

Q. How long were you detained by the Pirates?

A. From the 14th to the 22d. About the 17th an elderly Gentleman came on board from the shore to see a passenger, and he begged for us. The 20th a British Providence Schooner came from under the point. The Pirates shut me up and all the crew of the Bee in the cabin.

Q. Where was the British Schooner when you were shut in?

A. She was lying at a distance. They hauled the British Schooner along side of the Bee, and hoisted out the balauce of her cargo into the British Schooner. They came too at night, all the Bee's cargo was then out. On the 21st they beat up to the Keys; at night they haul'd the boat up along side of the Bee, and set a sentry of two men armed with pistols and cutlasses.

Q. Where was the Piratical vessel?

A. She lay inside during night.

Q. Where were the crew of the Bee?

A. On board of the Bee. 22d in the morning got under way, the Pirate being inside.

Q. Where were you at this time?

A. Between the Keys, 5 or 6 miles from the main land. The Pirate hail'd the Prize Master. The Prize Master said they were going to run the vessel ashore, and they did it.

Q. Where were you run ashore?

A. Upon the west salt Keys. The Pirates sent us an old leaky boat with one sail, one oar, and half of an oar. I was ordered into the boat, and then back again on the deck of the Bee. Josef Perez, the prisoner at the bar, pulled off my clothes and searched me for money; he took off my shoes to see if there were any money in the soles, and he cut the lining out of my hat, and to the best of my knowledge, he made the passenger strip.

Q. Who was the passenger?

A. He was a Portuguese who sailed with us from Charleston, and owned a part of the cargo—he cried considerably at the time, and could not speak a word of English. The prisoner came up out of the cabin, with a two dollar gold piece, and holding it up said—“*dis for you; dis for you!*” I answered, no gold in America.

Q. Who presented you the piece of gold?

A. This same Josef Perez.

Q. How much money did they get on board?

A. About \$7, two of which were out of my pocket.

Q. What became of the money that was on board?

A. It was put away and nobody knew but myself where it was.* As I was standing by the gunwale, I saw the prisoner at the bar, with a long knife in his hand, with which he cut the standing part of the fore-peak-halyards, with an intention as I then thought and now believe to hang the cook for not telling where the money was, but the Prize Master said no! no!—They sent us all into the boat, and ordered me out again, and then again in the boat. Captain Fernandez said if they caught us in shore they would kill all hands.

Q. What number of you were in the boat?

A. Five in number. After we left the Bee we saw her on fire, and she was entirely burnt.

Q. Where did you go?

A. We got in about forty miles to the westward of Matanzas.

Q. How long were you on your passage?

A. From the 22d in the morning to the 27th, before we got into Matanzas.

* Thirty-seven Doubloons, &c. were concealed in the kelson.

Q. What induced you to believe that the prisoner at the bar was going to hang the cook?

A. The prisoner cut the standing part of the peek-halyards with his knife, and by his actions I concluded that was his determination; he seized him by the collar, and gave every indication of it.

Cross-examined by J. O. Hoffman Esq.

Q. When was the first time that you saw the prisoner?

A. When he took the crow-bar to open the main hatch.

Q. Have you any recollection of the prisoner being on board from the 14th to the 22d.

A. He was on board several times.

Q. Did the prisoner appear to be a common sailor or an officer?

A. There was no officers.

Q. What part of the cargo was yours?

A. The Rice, Flour, and gold Watches were mine.

Q. Is it not possible that you may be under a mistake, and that the prisoner at the bar is not the man?

A. I believe him to be the man, but cannot swear right down that he is. He was dressed in rough sailor clothes.

Q. Will you swear to the man?

A. I will not swear right down to the man, but I think it is the same man that searched me for money on board the Bee?

Q. Was there any particular mark upon him by which you knew him?

A. There was no mark but his features.

Q. Did you ever hear the prisoner speak a word of English?

A. Never, only "dis for you" when he presented the gold piece to me.

[Here Mr. Niven, for the prisoner, moved that the other principal witness for the prosecution (the sailor who arrested Perez in the street) be excluded from the room, that there might be no understanding between the witnesses. The Court overruled the application, if made as a matter of right. If there was any foundation for the slightest suspicion that there was any plot or understanding between the witnesses, then the application would be a proper one. This the Counsel disclaimed; and the Court, as the prisoner was a stranger, granted the indulgence as a matter of favour merely.]

Q. When did you first arrive in this city?

A. I arrived here two weeks last Saturday. I was sent for at Charleston?

Q. When you went to see the prisoner in Bridewell did the Turnkey ask you if he was the man?

A. He did not, as I remember.

Q. How long was you with the prisoner?

A. About five minutes.

Q. *By Mr. Tillotson*, What was your impression when you saw the prisoner?

A. His countenance was familiar.

JOSEPH PORTER—*Sworn for the prosecution.*

Examined by Mr. Tillotson.

Q. What is your profession?

A. Sailor or Labourer.

Q. Did you sail on board the Schooner Bee?

A. I was one of the crew.

Q. Are you a native of this country?

A. I am not, I am an Italian, a native of Trieste.

Q. How long have you been in this country?

A. Eight or nine years.

Q. How far were you from land when you were first boarded by the pirates?

A. We were about two and a half miles from land when the pirates first boarded us.

Q. Where were you going?

A. We were going into the harbour.

Q. Which way was the main land from you?

A. It was ahead of us.

Q. Were there any islands near?

A. There were islands all around us, and stakes were placed on both sides of the channel to make it out.

Q. How far was the channel staked out from the main land?

A. The channel was staked out two or three miles from the main land.

Q. What took place when you first saw the pirate?

A. They hailed us, and told us to heave to,—they asked us where from, and where bound, and then said, "*heave-to you d***d b*****s quick.*" They hailed us to come on board the Pirate. James Debau and myself went on board by order of the Captain. They detained us on board the pirate, and six or eight of her crew went from the pirate to the Bee.

Q. How long did you remain on board the strange vessel?

A. Till some time in the afternoon. Then the pirate hauled along side of the Bee.

Q. What was then done?

A. They got the things out of the cabin. Some one got a crow-bar, and broke the hatch open.

Q. Where did you first see the prisoner at the bar.

A. I first saw the prisoner when they came along side. I was sent into the hold to assist in taking out some cider, the prisoner at the bar, was there with others of the piratical crew.

Q. What did they do then?

A. After they had got the cider and taken what they thought proper, out of the cabin, they went aboard of their own vessel to get their dinner. They had some fresh pork. When they had

done dinner they came on board and asked for can-hooks to hoist out the flour,

Q. What day did this take place?

A. The same day that they boarded us.—

Q. Where was the vessel at this time?

A. She had been taken beyond a little island towards the land. After they had loaded their own vessel, they brought small boats a long side the Bec. Night coming on they put the hatches on.—They ordered me to dance yankce doodle, on deck, for their amusement.

Q. Did you see the prisoner among them?

A. Yes.

Q. What did he do?

A. He was as busy as the rest.

[By a Juror.

Q. Did you see the prisoner drive the crow bar into the main hatch?

A. The prisoner was not the person who broke open the main hatch.]

Q. Was the tarpawling off when you saw a man break the hatch.

A. Yes, sir.

Q. How long was it after you were boarded when you saw a man break the hatch?

A. It was the same day.

Q. How many days after you were taken before they drove the schooner ashore?

A. It was the last day.—The prisoner at the bar came on deck and shewed the crew a \$2 gold piece, which he had found in the cabin.

Q. Do you speak Spanish?

A. A little.

Q. Did Josef Perez speak Spanish?

A. Yes, sir. He told his own shipmates that he had found the piece of gold in the captain's state room.

Q. Do you believe this was the man?

A. Yes, I believe Josef Perez was the man.

Q. Where did you pick up this man?

A. The same day that I arrived here from Havre-d'Græce coming from the ship, I met him a little above Trinity church, in Broadway.

Q. What day was it?

A. It was on Friday.—The prisoner was in company with two other Spaniards.

Q. Did he know you?

A. He pretended not to know me. I offered him my hand; he changed colour; I took him by the wrist, and took him up, and brought him to the police.

Q. Did he attempt to make his escape?

A. He did not.

Q. Had the man you saw on board the Bee, any marks about him?

- A.* He had a mark on his left hand.
Q. What kind of a mark was it?
A. It was a whitish scar.
Q. What did you think the scar was caused by?
A. I don't know whether it was burnt or scalded.
Q. Where was the scar?
A. On the back of his left hand.
Q. When did you first observe it?
A. At the time they were gambling for money, on board their own vessel.
Q. Who were gambling?
A. The crew were gambling with the proceeds of the Bee's cargo, and I stood and looked on.
Q. How long did you see them?
A. It might be half an hour.
Q. Do you know that Josef Perez was one of them?
A. I had good reason to know him, I was along with him and messed with him eight days.
Q. Was he more active than the rest of the crew?
A. He was not very busy till the last day.—He was the man that cut the peek halyards.
Q. Were they all dressed alike?
A. No.
Q. Had this man on jacket and trowsers?
A. I do not recollect.
Q. What did he do when he cut the peek-halyards?
A. He made a knot,—called the cook and took hold of his shoulder and threatened to hang him, the prize master stopped him and told him that there was no money on board.
Q. Did he declare his object in hanging the cook?
A. Yes, to make him tell whether there was any money on board.
Q. Did he say let us hang the cook?
A. Yes.—They did not know that I understood the Spanish language.
Q. Did you observe any other scar but that on the left hand?
A. No, I did not.

Cross-examined by Mr. Hoffman.

- Q.* Do you speak the Spanish language?
A. I speak it broken.
Q. What was said concerning the gold, was it in Spanish?
A. Yes.—It was in Spanish.
Q. Did you ever hear him speak one word of English?
A. No, I never heard him speak a word of English.
Q. What meals did you eat with him?
A. I don't particularly remember.
Q. Did he always eat with you?
A. No. Sometimes he was in the boat and sometimes on board.
Q. Did he always take you with him in the boat?
A. Sometimes, but not always.

Q. Who did you eat with?

A. We set down like sailors, all round the dish.

By Judge Thompson. Q. How often do you suppose, during the eight days, you eat with him out of the same kit?

A. Three times, perhaps more.

Q. Can you undertake to say, positively, that you know this man to be the same individual?

A. Yes, sir; positively.

By a Juror.

Q. Should you know any of the others were you to see them.

A. Yes, I saw two or three on board of the British ship Tyne, in Providencce, Nassau, an English Island.

Cross-examined by Mr. Hoffman.

Q. When you was carrying the prisoner to the police, had you any conversation with him?

A. No, sir.

Q. Had he a scar on his right hand?

A. I never saw any mark on his right hand, he had a scar on his left.

Q. Did you never think of this scar till the day after he was in Bridewell?

A. No, sir.

Q. Was it not common for the Spaniards to have their sleeves up?

A. Some have, and some have not.

Q. Did you ever discover any mark on his right hand?

A. No, sir.

Q. Have you any doubt but in the course of the time you say you were in company with him, he had his shirt sleeves up?

A. He might have had his shirt sleeves up, but I did not take particular notice.

By Mr. Tillotson.

Q. In which hand did he hold the cards, in the right or left?

A. I do not know.

Q. Did he take up the cards at all?

A. He had no occasion to take them up.

Q. Was not the pack of cards held in the left hand?

A. I do not know.

By a Juror.

Q. What position was the man's hand in when you saw the scar?

A. Not any particular one; I saw it several times while he was playing.

By the Judge. Q. Did you frequently see them playing cards?

A. Only once.

Q. *By a Juror.*—You took particular notice of the scar on his left hand?

A. Yes.

By Mr. Tillotson.

Q. Did you look at those men with a view to recognize them hereafter, if you should be an evidence against them.

A. Yes, sir.

By a Juror. If you looked at these men for the purpose of being afterwards enabled to identify them, did it not occur to you, that marks and scars would be of great service?

A. Yes, sir.

Q. How does it happen then, that you never observed the scar on the prisoner's right hand, which appears to be as reasonable as the one on his left.

A. I don't know.

Q. *By the Judge.* Did you ever hear the prisoner speak English.

A. No, sir. I intentionally kept them from knowing that I spoke Spanish, that I might give notice of any danger.

Q. You was to apprise the captain and crew, if they said any thing about putting them to death.

A. Yes, sir.

Capt. Johnson called again.—Examined by Mr. Tillotson.

Q. Do you recollect what day the man broke open the hatch with the crow-bar, or drove it between the hatches?

A. The 14th. He struck the hatches with the crow-bar, but did not drive it through. He gave one or two strokes and then they took me away.

Q. Where was the Pirate?

A. The pirate was along side.

Q. Was there a plank to pass on from one vessel to the other?

A. I did not notice whether they had any plank or not.

Porter called again.—Examined by Mr. Hoffman.

Q. What was the man's name that drove the crow-bar into the hatch?

A. I don't know—he was a stouter man than the prisoner at the bar.

Q. Were there light complexion'd men on board?

A. No.

Captain Johnson called.

Q. Were there several other Spaniards on board as dark as this man?

A. I think so; they were all of a dark complexion.

Q. Is the prisoner the man that you saw take the crow-bar to break open the hatches?

A. Yes.

Q. Was you present when the cook's axe was brought?

A. I was put on board the boat before the cook's axe was brought.

Porter called.

Q. Did you see Capt. Johnson when the man took the crow-bar to open the hatches?

A. No.

Capt. Johnson called.

Q. Did you see the hatches broken open?

A. I did not—I was then on board the pirate.

Porter called again.

Q. Was you present when the hatches were broken open.

A. Yes, sir.

Capt. Johnson called—by the Judge.

Q. Do you believe the prisoner is the man you saw?

A. To the best of my knowledge, he is the man.

By Mr. Tillotson.

Q. Did you know the man in jail, as the man who cut the fore peak halyards, and struck the crow-bar into the hatch?

A. He is the man.

Richard Grant, sworn.—Examined by Mr. Niven.

Q. Mr. Grant, are you one of the turnkeys of the city prison?

A. Yes, sir.

Q. When was the prisoner committed?

A. He was committed the 18th of July.

Q. Was you the turnkey who was with capt. Johnson, when he saw the prisoner?

A. Ycs, sir.

Q. What impression had it on capt. Johnson, at the time he came into the prison?

A. I called the prisoner out, and asked him if he was the man; Capt. Johnson when he saw him, made no remark—only enquired where Mr. Porter was.

MR. MORRIS.—Sworn.

Mr. Tillotson observed, that in offering this witness, he intended to shew, that on the day of the prisoner's arrest, a vessel of a very suspicious character slipped her cables and went to sea—that from her manifest, she was evidently bound on some illicit voyage, and from the size and character of the vessel, was the identical vessel that captured the Bee. He would also shew, that a few days previous to his arrest, the prisoner was on board of her—thereby connecting the prisoner with the vessel.

The court, upon the District Attorney stating his intention, of proving the connexion between the prisoner and that vessel, with the suspicious circumstances under which she left here suffered him to proceed.

Q. Did you discharge a vessel on or about the 6th of July.?

A. Yes, sir.

Q. What was the tonage?

A. About 30 or 40 tons. She arrived on the first and cleared on the 18th of July.

Q. Did you notice the crew of the vessel.

A. No, sir, I did not notice them particularly.

Q. What was her name.

A. As near as I can remember, she was called the Esperanza. She was a schooner rigged, and of about 30 or 40 tons burden;

apparently a southern built vessel. Her cargo was 30 ceroon of Spanish tobacco, with a few hides and segars. One man on board somewhat resembled the prisoner—about his size. Witness was very busy, and could not take particular notice—witness was on board on the 7th or 9th—did not go on board daily.

The manifest was then shewn of the Esperanza's cargo, consisting of brandy, beans, flour, mackerel, beef, pork, herring, lard, codfish, 1000 bottles of wine, crackers, &c. &c. shipped by L. & C. De Forest.

Witness had no suspicions of the vessel, only from her shipments. She had no powder, cutlasses, or such things, on board.

By the Judge.

Q. Have you any recollection of seeing a man that looks like this man.

A. I saw a man that had some resemblance to this man.

GEORGE MILLS.—*Sworn.*

Q. Do you belong to the Health Office department?

A. I do.

Q. Did you visit the Spanish schooner Esperanza?

A. I visited her the 7th or 8th of July. Three or four days after, she came up to Brooklyn. I went on board the vessel again, and found the crew to consist of six or seven Spaniards, who could speak no English. The one who answered to the name of Captain, spoke Spanish altogether. I understood the vessel was consigned to L. & C. De Forest, who paid the fees of examination.

Q. What was the size of the vessel?

A. She was a small vessel of 70 or 80 tons—next day after this man was apprehended, I was at Brooklyn—I enquired what the vessel was about there—was told they did not know what to make of her. Next day she disappeared, and as witness believes, went to sea in ballast; was told she had not been taking in any cargo; she was a Baltimore built schooner.

The manifest was then shewn to the witness, who was asked by Mr. Hoffman, whether in his opinion a vessel of 30 or 40 tons could carry the cargo therein specified? To which the witness answered, that he had been a captain and owner out of this port a number of years, and that a vessel of 40 tons could not, in his opinion, carry such a cargo as enumerated in the manifest.

(Here the prosecution rested.)

Mr. NIVEN opened the defence for the Prisoner, the substance of which is contained in the following pertinent remarks, on the destitute and unfortunate situation of the prisoner—in a strange land—ignorant of our language and our laws—pennyless—unable to send for testimony—imprisoned from the hour of his unexpected arrest down to the present moment. If a case could be presented which might be complained of as a hard one, surely this was that case. The question of identity was always of a loose and dangerous kind. The most solemn warnings existed within the bounds of

our own community, to teach the necessity of the most extreme caution. He would ask the attention of the jury to a simple case. It was that of Parker, a man arraigned for the crime of bigamy, whose person had been sworn to by a host of the most respectable witnesses—by a Judge and a Senator who had him for weeks in his family, and at his table, who declared he was as certain of the prisoner's identity as he was of his own—who was sworn to by a woman who took him for her own husband—whose identity was evinced by three different scars, and to whom thirteen witnesses swore pointedly, without even a shadow of doubt, as being one Thomas Hoag. In vain did the captain of the watch swear that he knew him to be of the city-watch—his fellow watchmen swear that he had constantly taken his turn of duty, and never knew him absent from the city; in vain did a host of witnesses swear as confidently, that they had known him all his life—nothing could shake the confidence of the others, that he was Thomas Hoag. And what saved him? Positive testimony that Hoag had a large scar on the bottom of his foot; and Parker, when examined by Court and Jury, had none at all! All must remember the late case in Vermont, where a man was actually convicted for murder, and the day of execution had nearly arrived; and yet the man alleged to be murdered, passed alive through this city, and went to Vermont to confute the report. He had no doubt of the sincerity of the witnesses in this cause, but he thought the sailor too incautious in swearing. He had not identified the prisoner from comparing his scars with those he had seen on the hand of the pirate, for he himself declares that he has not looked at the hands of the prisoner. You will find that however upright his intentions may be, he is mistaken. *Mr. Niven* here mentioned generally, the leading facts they should establish by testimony, and then concluded with expressing his entire confidence of the prisoner's safety. He rested on a jury of Americans, who, in the midst of a general horror of the crime of piracy, and themselves feeling that horror in its strongest degree, could, nevertheless, exert so much strength of mind, as to divest themselves of prejudice—to separate the crime from the person accused of it, and judge with a dignified impartiality as to his guilt or innocence. If the prisoner was guilty, he would be the first that had ever deceived him.

DON THOMAS STOUGHTON.—Sworn.

Don Thomas Stoughton, a witness called in behalf of the Prisoner, testified that he was the Spanish Consul for New-York—that from a memorandum kept in his office, the *Tarantula* arrived from Cadiz on the 15th of June, and departed for Havana on the second of July last. That she was a Spanish Corvette of 356 tons burthen, carrying 18 guns and 56 men, 23 of whom were supernumeraries; that being supernumeraries their names were not on the Roll of Equipage, and consequently could receive no wages—that she came here consigned to Peter Harmony, Esq.—That he remembers very distinctly the name of Josef Perez being one of the supernumeraries who left her previous to her departure—that he

left her with six or eight others, whose names he endorsed by the Captains request, on the roll d' equipage—that they came to his office, and entered a complaint against the Captain for refusing to pay them, and for refusing also, to place their names on the roll—that Perez might have gone out in the Tarantula had he chosen to do so—that having been brought from Spain in her, he had a right to insist upon his being taken back—that he does not know positively that the prisoner is the identical Josef Perez who left the Tarantula—that the name is a very common one in Spain.

Nicholas Clemments, a witness for the Prisoner, testified, that he knew the prisoner—that he boarded at the witness's house—witness keeps a sailor's boarding house in Cherry-street—prisoner came with two others to board at his house about the beginning of July—never spoke to the prisoner before that time—that those two persons who came with the prisoner, and the prisoner himself, arrived here in the Tarantula—they wanted witness to get them births, though did not particularize any particular place they wished to go to, or any particular vessel—they wanted employment—they said they left the Tarantula because the captain would give them no money—prisoner remained at his house two or three weeks—he behaved with great propriety, and believed him a very honest man—witness first saw the prisoner on board the Tarantula working at light jobs about the deck—witness went on board to see an acquaintance of his, who had formerly boarded at his house—that prisoner staid at his house about a fortnight, when witness heard of a vessel at Brooklyn that wanted hands, and gave prisoner a shilling to pay his passage across the ferry, in order to see the captain—that in the evening he returned and said that he had got a birth on board of her, but the captain would only advance \$5—that he would give the five dollars to witness towards his bill, and that his comrades would make up the balance—witness saw the schooner—observed nothing remarkable—she was deeply laden—next day the schooner sailed, and witness supposed that prisoner had gone in her, without paying his bill—about a fortnight after he was surprised to learn that the prisoner had been put in prison, on a charge of piracy—knew nothing of it until Mr. Niven called at his house to enquire of him whether prisoner had not boarded with him—that the prisoner was here before the sixth of July, he is positive of that.

Raphael Di Dalgo, a witness on the part of the prisoner was sworn and deposed substantially as follows, which was translated by *Anthony Rapallo, Esq.* into English. That he arrived at this port in the Spanish ship Tarantula from Cadiz, that the prisoner is Josef Perez, and also arrived here in the same ship—that he knew the prisoner four or five days antecedent to their sailing from Cadiz—that witness came out as a passenger, and so did the prisoner—(being told to explain what he meant by being a passenger he stated, that the Tarantula had her compliment of men on board when he shipped, but that the captain promised upon her arrival at this port to place them regularly on the roll d' Equip-

age, and that in the mean time they were to act as supernumeraries) that after her arrival here the captain refused to make good his promise in placing them on the roll of the ships company, in consequence of which, he, the prisoner, and others left her—has been a sailor fourteen or fifteen years—was in Havana about ten months since, on board the Tarantula, on board of which vessel he shipped at Vera-Cruz—from Vera-Cruz he went in her to Havana, and from thence to Cadiz—that he there left her for four months to visit his mother, and on his return to Cadiz found her compliment full, and therefore shipped as a supernumerary as before related.

Anthony Rapallo, a witness for the prisoner, stated that he had seen the prisoner a number of times in prison where he had conversed with him, and that all his stories were consistent—in answer to a question by a juror, he said, that he had no doubt there was a mistake in supposing him to be the person who was engaged in the piracy—does not believe the prisoner can speak a word of English.

The parties on both sides having here rested the case, *George W. Niven*, Esq. one of the counsel for the prisoner addressed the jury. Inasmuch as the comments on the testimony occupied a very considerable proportion of the address, the limits of the present work will only permit the compiler to present a summary merely, having regard to the points raised, and that as near as possible in the language of the counsel.

George W. Niven, Esq. proceeded to sum up the cause on the part of the prisoner; and after a few introductory observations, read to the jury a printed report of the case of *Parker*, to which he had referred when opening the defence. He commented upon the case as he went on, and after concluding it, observed, that it had a very solemn bearing upon the duty of every jury empanelled to try a question of identity. That was always, and necessarily a loose question, and one peculiarly dangerous. He regretted that there had appeared on the part of the prosecution so great a degree of anxiety to convict the prisoner; he had hoped that in a case like the present, the maxim of Lord Hale would have impressed every mind, that it was better that ninety-nine guilty should escape, than one innocent man should suffer. Before the jury proceeded to take away the life of that unfortunate man at the bar, ought they not to have some moral certainty on which to found their decision? Had they heard any evidence of his guilt of such a nature as absolutely to shut out all doubt of it? Could they place their hands upon their breasts and say they had no rational doubt upon the point? And if not, if they felt any lingering doubt upon their minds, it was their solemn duty to acquit the prisoner. If they should err on the side of severity, the error was remediless; no regret could restore the life once taken away; but if, on the side of mercy, no very serious injury could result—what could a little two-penny fellow like him, do against the safety of the community? If indeed he had been charged with arson, his personal fee-

bleness or insignificance would be no hindrance to his application of the midnight torch, and effecting the most extensive mischief, but as a freebooter he could perform nothing very terrible. The counsel asked the jury to put themselves in the prisoner's place and dwell upon the hardness of his circumstances. It was impossible a sea-faring man could always be furnished with documents for his defence, no man could always carry about his identity in his pocket. And if, without this, he must be liable to be seized, accused and condemned, where would be the safety of our sea-faring population! For his own part, he could never bring himself to set such a precedent; nay, did he even believe him guilty, he would acquit him for fear of the precedent. For what would be the consequence of the prisoner's condemnation? The Spaniards would retaliate, and we should have hangings of American citizens in Havana and Porto Rico, and, all over the southern waters—no seaman will be safe. He had no intention to reflect upon the witnesses for the prosecution—he believed them to be well-intentioned, but mistaken. The captain swore to the identity, but had no marks by which to tell. Had individuals of the jury never been deceived by resemblance? As to the sailor, he was an ignorant Italian, who could not write his own name—he found marks where his captain could find none—he had worked himself up into the belief that this was the pirate, and saw what his captain and owner, though more interested, could not see. Although with the pirate for eight days together, he never saw the mark but once, and yet the scar was one which might be seen across that court room. He saw it while the pirate was gambling, yet could not see it when he was eating or laboring—was this credible? He saw it on the back of the left hand, though in gambling, the back of that hand would naturally be out of view. He saw no scar on the right hand—yet prisoner has a scar on both his hands. It had, indeed, been suggested that one of these might have been inflicted since, and that the mark on his arm might have been purposely made, for the purpose of evading an identification. But was it charitable to believe this? Were not the scars apparently of equal date? The witness had seen the prisoner for eight days; yet Judge Coe had had Hoag four months in his own house, and yet mistook Parker for Hoag, and swore to him as Hoag. The public prosecutor had spoken in very confidential language of a certain suspicious schooner, and of her suspicious cargo. From his language, the counsel had expected an account of cutlasses, and muskets, and gun-powder; but the manifest had been produced, and what did it show? Something to eat—that was all. Her crew wanted eatables, therefore they must be pirates of course. But she is a schooner, and that is suspicious. She brings only tobacco, and that is very suspicious. Her crew are Spaniards, that is more suspicious still. However this might be, the prosecution had not connected the prisoner with that vessel; and his counsel had been able to show that he was in this city before she arrived here. This was one of those providential interpositions, which so often occur on capital trials, to preserve the life of the innocent. Must every

poor wretch, who landed unprotected on our shores, be hunted down by suspicions like this, and condemned because he is a Spaniard, without Judge or jury? What could the jury expect from the prisoner? Here he was, without a friend, or a penny in the world—or a witness to speak for him. Every effort had been made, but in vain, to postpone his trial, that he might send for witnesses. What situation could be more truly deplorable? Yet, he had done more than could be looked for—he had shown the jury that he came here in a Spanish national vessel, consigned to a respectable merchant; and that he had refused a passage to Havana, the very centre of piratical ground; that he came here poor, and authorised a keeper of a sailor boarding-house to procure him a berth in any ship, on any voyage. His statement had been corroborated by the Spanish Consul, and by his own ship-mate. This, surely, looked like any thing but piracy.

In conclusion, Mr. N. observed, that if ever there was a case, in which the hand of an overruling providence was manifested, this was such a case—prisoner had not only denied the charge, but helpless and friendless as he was, and charged unexpectedly, and in a strange land with a capital offence, had as unexpectedly been able to disprove the charge. With such exculpatory proof before them, could that Jury pronounce a verdict that must destroy his life? Would they say that it was necessary to punish piracy, and if the prisoner was entitled to compassion, the President of the U. S. had still the pardoning power? he trusted they would never presume on such a ground of proceeding, would never set so dangerous and pernicious a precedent; no, they would consider themselves as the only hope, the only deliverers of the prisoner, and if they had a solitary doubt of his guilt, would not only deliver him, but drop a tear of pity over an unfortunate and destitute stranger.

JOSIAH O. HOFFMAN, ESQ. in supporting the defence, said, that he had at first intended to address himself to the Court, on the question of law involved in the present case, but, on further reflection, he had concluded to submit the whole case to the Jury, reserving to himself the privilege, if they should, (which he could not suppose) be against him on the merits, of requiring them to settle the question, involved in the third count of the indictment, and determine whether the offence was committed upon the high seas. He did not intend, after the able and eloquent address of his learned associate, to travel the same ground, but merely touch upon a few facts, which established in his mind a perfect conviction of the prisoner's innocence.

If the prisoner was not a destitute foreigner, an unfortunate and helpless stranger, committed, by the act of the Court, to his protection, he should not have troubled the Jury with any remarks upon the present occasion—but it had become his duty to espouse the cause of an injured and innocent man, charged, most unexpectedly with an odious and capital offence, and cast, almost without any means of defence, upon the protection of our laws, and our sense of justice; he deceived himself most egregiously, if he did

not merely rouse in the minds of that Jury, a doubt of his guilt, but in the clearest and most triumphant manner, demonstrate his innocence. He conjured that Jury, to remember that they were trying the man and not the offence; they would be false to their oaths, to their country, to humanity, if they suffered their abhorrence of the crime to mingle in the slightest degree with the question, whether this individual had committed it. We all abhorred piracy; who could do otherwise than abhor it? nay, so entire was our abhorrence, and so strong our indignation, that perhaps there was not a man present who would not execute the sentence of the law upon it; but no hatred of piracy could prove that the prisoner was a pirate; and he had therefore regretted to hear any thing like declamation on this topic, from the counsel for the prosecution, the feelings of this community was already sufficiently strong; you had only to cry out "Pirate!" and instantly a hue and cry would be raised to hunt down the victim. The jury must separate all such feelings from their solemn duty on the present occasion. They must divest themselves of all national prejudice against the prisoner, as a Spaniard. They must view him as they would view an American placed in that box; and remember that they were trying him, not for his liberty, but for his life—that precious life, which many of the wisest and best of men had doubted all human right to take away. The prisoner's nation was, in this case, his greatest misfortune: was he any thing but a Spaniard, he was persuaded the jury would acquit him without leaving the box; there was not a particle of evidence that ought to detain them for a moment. They had had cases presented to them, which contained serious warning, he could refer to a still stronger case in which he had himself been engaged, but he needed no such aid, he threw himself boldly on the simple merits of the cause, and should argue it though it were the first case, in which personal identity had ever come in question. What was the evidence of the prisoner's identity? what did it amount to? There was not a simple witness whose testimony was not contradicted. He would concede the witnesses swore in good faith, but in order to convict, they must agree. But so often did these witnesses contradict each other, that the prosecution would have been better supported had one of them been removed altogether. They had completely destroyed themselves. Captain Johnson swears with absolute positiveness, that he believes this is the man who drove the crowbar through the hatch of the Bee. Porter swears as positively, that he is not the man; and when pressed, he owns that the man who did it, resembles the prisoner. Here, then, were two persons resembling each other. How could the jury be satisfied that the prisoner was the man? Porter swears that the prisoner could not speak a word of English. Johnson swears to the very English words he used. Now, to stop here, he asked that jury whether they dared to convict on such testimony as this? Both could not be true, so that, at the utmost, they had but a single witness. Besides, Johnson absolutely refused to swear with positiveness to the prisoner's identity;

yet said, he could have sworn positively to Fernandez. Surely, they must, under such circumstances, acquit, if it were only for precedent's sake. The jury must be sensible, that the counsel was influenced only by a conviction of truth. He was a perfect stranger to the prisoner, and had no interest in his acquittal; but from the circumstances on this trial, he would boldly say, not merely that his guilt had not been satisfactorily established, but that his innocence was made manifest. Yes, the prisoner would leave that Court proud of the name of a Spaniard, since, while his nation had but too much countenanced the crime of piracy, an American jury, after a candid hearing, had cleared him of all such imputation. The counsel too, would feel proud of his country, proud and glad to think, that in America, even under the strongest excitement of the public mind, a jury would always be found, who had sufficient self-command to separate between the offence, and the offender. The prisoner had surpassed his hopes; he had succeeded beyond his expectation; he had grown upon his confidence, and he would boldly aver before all the world, that the unfortunate individual in that box, was unworthy of the name of pirate.

An attempt, indeed, but a most feeble and fruitless attempt had been made to show that the prisoner came here in a piratical vessel—a piratical vessel consigned to L. & C. Deforest! one of the most respectable mercantile houses in this city; a house, too, one member of which, after being repeatedly in danger, had, at length fallen a sacrifice to pirates! a very probable story. This piratical vessel, too, after taking in a cargo, had landed it again and gone to sea in ballast! But when did she arrive? In July; and when did the prisoner arrive? In June. Had one of his assertions been disproved? He says he came here in the Tarantula, and he had proved it. He had proved, too, that when he might have had a passage, without expense, and in a national vessel, to the very scene of all piratical adventures, he refused the opportunity—was this like a pirate? They perceived he was a very young man—if he had ever been a pirate, it must have been when he was young indeed; but we all knew that where vice had early fixed its hold upon the juvenile mind, it retained and increased its power. Was it likely that one who was so early wicked, would, of his own accord, have abandoned the scene of buccaneering adventure, so captivating to the ardent mind of youth, unless he had met with disaster in the pursuit? But if the prosecution proved any thing, it proved success and not disaster. Besides, if he had been robbing Americans, would he come to America? Voluntarily run into the arms of danger—into the very jaws of death!

One topic more, and he was done. It had been attempted to identify the prisoner, by marks on his body—but while Porter saw marks, the Captain saw none—Porter saw a scar on one hand only, the prisoner had scars on both his hands—Porter saw a scar on the left hand. The prisoner had scars on both hands—and he appealed to the jury, whether that on the right hand was not the most conspicuous—(the prisoner had exhibited his hands on the

trial.) They had seen the large and peculiar mark made on his left arm with India ink—Porter saw no mark on the pirate's arm; was it credible that sailors, working under the burning sun of the West Indies, and in the month of August, would not uncover their arms as high as the elbow? and as to the gambling, he would leave it for the jury to say, which, in playing cards, would most expose a scar on the back of it, the left or the right hand? might he not now leave the cause in their hands? He would ask them to look at that prisoner—was that the countenance of a pirate? he might be deceived, but to him it appeared one of the most innocent and guileless faces he had ever seen; with what a childlike simplicity did he come forward to expose his hands to their inspection; those hands trembled, but not from guilty fear, it was from injury—an injury by gunpowder, which equally affected both, and had produced a contraction of the fingers, by which the man could be told among a thousand. Yet Porter saw nothing of this.

The learned and able counsel, then recapitulated in order the several grounds of the defence—and in conclusion, intreated the Jury, in their verdict, to declare whether or not, the capture had taken place upon the high seas, They were certainly competent to judge, whether an inlet so shallow, as to let a little schooner ground; whether a harbour marked out with stakes, was or was not “the high seas.”

C. G. HAINES, Esq. followed as associate counsel on the behalf of the prosecution.

It was neither his duty or inclination, on such an occasion, to appeal to the passions of the jury. In one respect, this had been a proud day for our country. They had been told, when it was endeavoured to put off the cause, that the prisoner could not have a fair trial; but stranger as he was, that jury had witnessed an effort in his behalf, honourable to human nature, honourable to the human intellect, and to the American character. God forbid that he should attempt to destroy the effect of that effort in their minds. He was willing that the accused should have its full benefit. But they must remember that they had been sworn to convict if guilty, as well as to acquit, if innocent. All he should do would be to state the law and the facts in the case, and leave the decision to their enlightened responsibility. It had, indeed, (to his surprize) been insinuated by the opposite counsel, that his associate and himself were disposed to press the conviction; this was an imputation which they had not merited, and which they repelled with indignation. In commenting on the testimony, he observed that the two witnesses for the people had testified with caution and uprightness. When witnesses form a plan, and combine to establish a falsehood, they always take care to produce the most perfect coincidence, in every minute particular of their testimony; the slight discrepancies that had appeared in the present case, (all capable of being reconciled) went to establish rather than to weaken the testimony in their whole account of this piracy, and in all the circumstances of it, they perfectly coincided. They agreed in the time of sailing,

in the hailing of the Bee, in the boarding by the pirates, in the hauling the vessels in shore, the time of continuance, the running of the vessel on shore, the time, and all the circumstances of departure. They identified the prisoner as a man whom they had seen there again and again, for many days together; and of whose person, they had not a doubt. They relied, not on marks and scars about his body, but on that broad seal by which the Almighty had distinguished the works of his hands—the human countenance. Look at the prisoner! Was that a face easily to be forgotten? Was that a face, which any man living could not learn in eight days to recognize? Persons in danger of their lives, have all their senses animated by fear and resentment. Men under such circumstances, observe narrowly, and remember well. The faces, especially of those who have put them in fear for their life, are deeply fixed in their recollection. The sailor messed with this man for eight successive days; ate out of the same dish; drank out of the same cup: a man whom he had seen seize the cook, to hang him. And so strong is the impression, that he repeats to you, in Spanish, the very words which he used on that occasion. So deep, so indelible is that impression, that more than a year afterward, when walking the street, at a distance from all association of place, or person, not thinking about any thing but his family, which he had just met, and its wants, which he was then on his way to supply, the instant the prisoner meets his eye, he recognizes him; and that with such entire certainty, as to seize him. He no sooner set his eyes upon him, than he exclaims, “this is the man who captured me in the West Indies.” Consider the responsibility he assumed, by seizing a stranger, at noon day, and in the most public street of this city. The same is the impression on Johnson; no sooner does he see him in Bridewell, than without another word, he asks for the public prosecutor. Much stress had been laid upon an apparent contradiction respecting the crow bar. It would indeed be undeniable, that if the two witnesses spoke of the same act, and the same instant of time, there would be a contradiction. But they speak of two different acts at two different moments. When Johnson saw the action, he says Porter was not present;—when Porter saw it, he says Johnson was not present. What was more natural or probable, than that two different men should have used the same crow bar. Neither of them actually opened the hatches, but only struck it. As to the scar, there was no contradiction; nor was it at all impossible that Porter might have noticed the scar when he stood by, an idle spectator, while they were gambling, and yet not have noticed it when both he and they were engaged in working or in eating. The identity was made out more perfectly than it is in ninety-nine cases out of an hundred, where convictions ensue. As to the story of the Tarantula, grant it all to be true, and what it does it prove? The piracy was committed in 1822—the arrival in the Tarantula was in 1823. There was abundant time between, for a voyage to Cadiz. With respect to the question of law the counsel observed that the Congress of the

United States, experiencing the difficulty of proof where piracies had been committed near the land, had expressly provided for it by declaring all acts of robbery committed in basins, bays, harbors or roadsteads, to be piracy, equally with those upon the high seas. In conclusion, he enjoined the Jury to consider that they were, on the present occasion, the constituted guardians of a branch of law, for which all the nations of the earth had provided a common tribunal.

R. TILLETSON, Esq. the District Attorney, followed, on the part of the people. To meet the suggestion of the prisoner's counsel respecting the high seas, he would read a decision of the Supreme Court of the United States, which declared, that all places within a marine league of the shore, were to be taken, and considered as on the high seas. It was not disputed that the capture of the Bee, and the plundering of her cargo, took place within that distance; and, therefore, it would not be necessary that the jury should declare, in their verdict, the precise spot where those acts occurred.

He regretted that his public duty compelled him to address them in the character of a prosecutor in this case. He should regret extremely, that either the government, or its officers, should be considered as bearing hard upon the prisoner. He pitied his destitute situation as much as any man; but it was a circumstance of which the jury could not take notice. Their duty was plain; they must decide according to evidence—and then, even should the prisoner suffer unjustly his blood would not be on their heads, but on those of the witnesses. It was as much the jury's duty to convict, if guilty, as it was his to prosecute; and how painful to the feelings of both, they ought not to shrink from its performance. Could they conscientiously say, that they did not believe Porter when he swore that this was the man with whom he messed daily for eight days? One of those who stole their property, threatened their lives, burnt their vessel, and turned them adrift upon the sea in a leaky boat? After the lapse of a year, he had met three Spaniards in the street, and instantly picked this man out from among them. He declared then, swore at the Police, and swears still, without a shadow of doubt, that this is the man who said "let us hang the cook." The opposite counsel seemed to understand that he relied upon the scars. No—he relied upon a surer mark—the face of the prisoner. We all do so every day. We cannot minutely define the distinction between face and face—it is the work of God; but we all know, and feel the distinction. As to the alleged discrepancy between the witnesses, it amounts at the utmost to this: that the man who held the crow-bar did not appear to them both to be the same with the prisoner; but in another transaction, and one which more keenly excited their feelings and their notice, in the attempt to hang the cook, they have no such difference of opinion. When their observation was most excited, it is most harmonious. He had been accused of an insinuation

against the house of De Forest; nothing was farther from his thoughts. That house were in this case mere consignees. The brig might be suspicious—might even be a piratical vessel, and yet, they perfectly innocent. Every mercantile man knew this.

As to the voyage from Cadiz in the Tarantula, let it be remembered, that the Tarantula left Cadiz with the intention of going to Havana—the prisoner shipped in her with that intention, and would have gone there but for a quarrel with the captain. His shipping as a supernumerary, without pay, to go to Havana, looked, at least, as if he was no stranger to that colony. He admitted that the case of Hoag was a most extraordinary one—much too extraordinary to govern a jury in ordinary cases. But even in that case, would a judge who married a man be as likely to remember his person as one who was put in fear of his life by a pirate? How is the crime ever to be punished, if juries refuse to convict upon plain testimony of identity? Is every pirate to escape from justice because a jury cannot bring up their minds to do a painful duty? It was true we had a gallant corps engaged in putting down the foul offence; but their efforts would be in vain, if no jury could be found to convict the wretches when taken. He was free to say that his sympathies, as a man, were with the prisoner;—but such sympathy, however strong, was not to warp him from the path of duty, or stop the plain course of retributive justice.

His Honour, Judge THOMPSON, then proceeded to charge the jury.

The prisoner stood accused of a crime which had the highest penalty of the law. This of itself was sufficient to induce caution in judging of his guilt. But he deemed it unnecessary to caution an honest and intelligent jury in a case like the present. Piracy was a crime which excited a just abhorrence; it was one which all nations had united to punish; for pirates were justly considered as enemies of the human race. In applying the law, against this crime, to an individual offender, the jury were to be governed by the same principles as in other cases. No prejudice must be suffered to operate against this prisoner, as belonging to a nation, but too prone to tolerate the crime; nor, on the other hand, were a jury to indulge themselves by saying, "I doubt, therefore I will acquit;" the doubt which warranted such a conclusion, must be a doubt arising from solemn reflection, and after patient and candid investigation. There were in the present case three points on which the jury would have to make up an opinion. 1st, whether the offence had been committed. 2d, whether the prisoner was

guilty of committing it; and 3d, whether it had been committed within the jurisdiction of this court. The Constitution of the United States gave to Congress the power of defining and punishing the crime of piracy. They have declared that piracy, as defined by the law of nations, committed on the high seas, is to be punished with death. That which if committed on land would be robbery, when committed at sea became piracy; it was a forcible depredation on the property of another. That in this case, a piracy had been committed, there was no doubt—the great question to be decided was, whether the prisoner had been guilty of it. The cases which had been read, or referred to, for the purpose of putting the jury on their guard, were not, in his judgment, of any great importance in that view. In those cases there were two men proved to have resembled each other so closely, that they could scarcely be discriminated by their nearest relatives. In this case there was no evidence or presumption of any such thing. The case rested on the credibility of the witnesses—the intrinsic probability of what they testified, and the agreement of their testimony. When witnesses colluded or conspired together, they usually agreed in all particulars—slight discrepancies rather corroborated than impaired the weight of testimony. In the witnesses who had testified in this cause, he could see no reason to suspect such collusion; they appeared to be frank and honest in their declarations. In what they had testified respecting the crow-bar, if they were understood to speak to the same action, there was a disagreement—but it appeared they spoke of two different points of time. Capt. Johnson had been hurried away before the act was completed. He was present at the hatch when the tarpaulin was removed, but not when the hatches were removed. Porter was not present when the tarpaulin was taken off, and was present when the hatches were opened. Porter did not see Johnson, Johnson did not see Porter—it is probable therefore, that they speak of different moments of time. Capt. Johnson had reason to be strongly impressed by the prisoners countenance and appearance; the prisoner had deliberately stripped and searched him—he had both time and inducement to look closely at him. They concur about cutting the of the peak halyards, and the finding of a piece of gold coin by the prisoner. Johnson did not say the prisoner could speak English,

only that he used a gesture, and said, "dis for you," his object being apparently to enquire for more money. Porter had the best opportunity to identify the prisoner, and is most confident of his identity: he took pains to observe the pirates. After the lapse of a year he seizes him at first sight. He did not rely upon the scar to know him by, he never thought of the scar, nor did he mention it at the police office—and when he testified to its existence, he had had no means to know whether it was upon the prisoner's hand or not. The jury would see how by such testimony he exposed himself if it had turned out that the prisoner had no such mark. He might have seen but not noticed or remembered the scar on the right hand. It was not necessary to trace the prisoner to the suspicious brig—he believed that prisoner came here in the *Tarantula*; but ample time had intervened for a voyage to Cadiz. This was proved; for one of the witnesses had actually made the voyage from Havanna in the *Tarantula* within that period. He perceived nothing in the testimony at war with the prisoner's identity. Of that the jury would judge: if they believed him to be the same man who had committed the acts testified on board of the *Bee*, they must, however much against their feelings, pronounce a verdict of condemnation; if otherwise, they must acquit him.

With respect to the question of jurisdiction they were constituted judges both of the law and of the fact—they had authority to declare whether the place where this piracy was committed is on the high seas or not. Yet on such a question a prudent jury will take the advice of the court. If they should agree as to the prisoner's identity, they can declare where the fact was committed, leaving it for the court to determine whether such place be upon the high seas. The testimony declared it to have happened one mile and a half from the main land of Cuba, outside of the chops of the harbour of St. Juan de los Remedios. For himself he did not believe, and he felt confident the Supreme Court of the United States would not hold, that a marine league, or the usual range of cannon shot, determined what was to be held the high seas in relation to a question of crime, though it might as to questions of protection and international peace—and the excluding of warlike ves-

sels. Any place without a harbour, and where the flow of the sea had access, however near the coast, would be held to be the high seas in all criminal questions. With these observations he should commit the case to the jury, not doubting that the prisoner would receive at their hands impartial justice.

The jury thereupon retired, (it being near eight o'clock) and after being out one hour and an half, they returned into the court, and the judges who had left the bench, to procure some refreshments, were sent for. The foreman of the jury then stated to the court that they had not agreed upon a verdict, nor was there any probability that they ever should agree.

Mr. Hoffman, in this situation of the case, and considering that there was a reasonable doubt as to the identity of the man, intreated the court to instruct the jury to find a verdict of acquittal.—Should the jury not agree, and the prisoner be remanded to prison for another trial, however innocent, it would be fatal to him, as his witnesses were transient persons, and probably could never be found here again.

Judge Van Ness.—Are the Jury equally divided?

Ans. Yes.

Mr. Justice Thompson then addressed the jury for some time upon the difficulty of their situation, under all circumstances, and intimated to those in favour of a conviction, if they could do it consistently with their own consciences, and the obligations they were under to the cause of public justice, to incline to the side of mercy.

Judge Van Ness also remarked to the jury, that he perfectly coincided in opinion with what had been expressed by the senior judge.

The jury were thereupon directed to retire.

About half after ten o'clock they again came into court, with the same report as before—viz. that they had not agreed, and it seemed utterly impossible that they ever should agree. After a short consultation between the judges, they were discharged.

Mr. Hoffman wished an entry made, on the records of the court, that the jury were discharged not only without the consent, but against the consent of the prisoner; and he wished the hour at which they were discharged, to be entered also.

On the following day, an application was made to the court for the prisoner's discharge, upon two points—*first*, That the court have no authority in cases of life and death, to discharge a jury; and that such discharge amounts to an acquittal—*second*, That if the court possess the power in any event, it can only be exercised in an extreme case—such as where the jury have been kept together for so long a time as to be unable from exhaustion farther to discuss the matter—a juror being seized with a fit, or otherwise disabled by sudden sickness to discharge the duty of a juror; or some such case, where there can be no other alternative.

The following affidavit was read and adverted to in the argument.

United States' Circuit Court.

Josef Perez,
ads.

United States of America.

City of New-York, ss.

Thomas Blanch, junior, Foreman of the Petit Jury on the Trial of Josef Perez for a Piracy, being duly sworn, saith—That when the Jury first came into the Court, after having the cause committed to them, they were equally divided—that is, six for the acquittal of the Prisoner, and six for his conviction. That on being sent out by the court, and deliberating again, there were, when they came in Court, seven for the acquittal of the Prisoner, and five for his conviction; upon which, the Court at about half past ten o'clock, discharged the Jury.

THOMAS BLANCH, Jun.

Sworn before me this }
11th September, 1823. }

JAMES DILL, *Commissioner.*

The points were argued by Mr. Niven for the prisoner, and Mr. Tillotson for the United States.

Mr. Niven contended, that with respect to the first point, there was no case in our own courts, where the right to discharge a jury in a capital case, had ever been granted; but on the contrary, that the cases determined which bore any analogy seemed to indicate a different doctrine.—That the most dangerous consequences would flow, were Courts permitted to adopt such a doctrine, as the one contended for in present case by the District Attorney. That his associate counsel, whom the pressure of business had called away to attend the Court of Errors, coincided with him in the position he had taken, which he was the more inclined to press, after an examination of the learned and elaborate opinion of Justice Duncan of Pennsylvania.

With respect to the second point; the case of Goodwin, the counsel contended, although not altogether analagous, (not being a case of life and death) went strongly to shew that the court were not warranted in discharging the jury in the present case, inasmuch as in that one, the court go expressly upon the principle, that it was *an extreme case*—that the jurors had been impanneled from Tuesday until Saturday night, at half after eleven o'clock, and that they were so far exhausted as to be incapable of further deliberation—and as another point in the case, the term of the court expired by law at 12 o'clock. A half an hour after the jury were discharged the power of the court would have ceased for that term.

The counsel then adverted to the case of the Commonwealth, vs. Cook and others, which was a case directly in point, decided

under like circumstances with the present one, by Chief Justice Tighman and Justice Duncan, in the supreme court of Pennsylvania on the 2d of December, 1822. The opinion of Judge Duncan, as published in the Democratic Press was read by the counsel, which, as he observed, was so elaborate and argumentative, in every point, which could possibly have any bearing upon the question, that he should content himself with submitting that case to the court, as containing an answer to every thing that could be said in favour of the power contended for by the United States Attorney.

The court took time to deliberate, when on Monday the 15th of September it appeared that no decision could be had, inasmuch as the court were divided in opinion, one of the justices being in favour of a new trial, and the other for discharging the prisoner in confirmation of the principle settled in the Supreme Court of Pennsylvania.

The operation of this division is, to postpone the matter until the principle can be settled by the Supreme Court of the United States, which will meet at Washington in February next.

As the circumstance of a division so rarely happens in this court, the reader is presented with an extract from the act of Congress regulating the judiciary, which points out exactly the course to be pursued.

“Whenever any question shall occur before a Circuit Court, upon which the opinions of the judges shall be opposed, the points upon which the disagreement shall happen, shall, during the same term, upon the requests of either party, or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the Supreme Court, at their next session to be held thereafter; and shall, by the said court, be finally decided. And the decision of the Supreme Court, and their order in the premises, shall be remitted to the Circuit Court, and be there entered of record, and shall have effect according to the nature of the said judgment and order: *Provided*, That nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, farther proceedings can be had, without prejudice to the merits; and provided also, that imprisonment shall not be allowed, nor punishment in any case be inflicted, when the judges of the said court are divided in opinion upon the question touching the said imprisonment or punishment.”

The court being divided in opinion, as to their authority to order another trial, the counsel for the prisoner, (Mr. Niven,) moved the court for the prisoners discharge from imprisonment.

Mr. Niven recited the last clause of the above section of the Judiciary Act, which states, that “*imprisonment shall not be allowed, nor punishment in any case inflicted, where the Judges of the Court are divided in opinion upon the question touching the said imprisonment or punishment,*” and contended; that in this case, as there had been no conviction, there could consequently be no punishment, and that this provision of the act, which relates to a suspension of

punishment, did not meet the prisoner's case. But that the other part of the provision, which alluded to *imprisonment*, met the case in question.

The question which had been argued, the counsel observed, arose upon a motion *for the prisoner's discharge*—now, the court were divided in opinion, whether the prisoner should be discharged or not and this is therefore a question *touching the imprisonment*, upon which the court is divided; and by the obvious operation of the provision, the prisoner must be discharged.

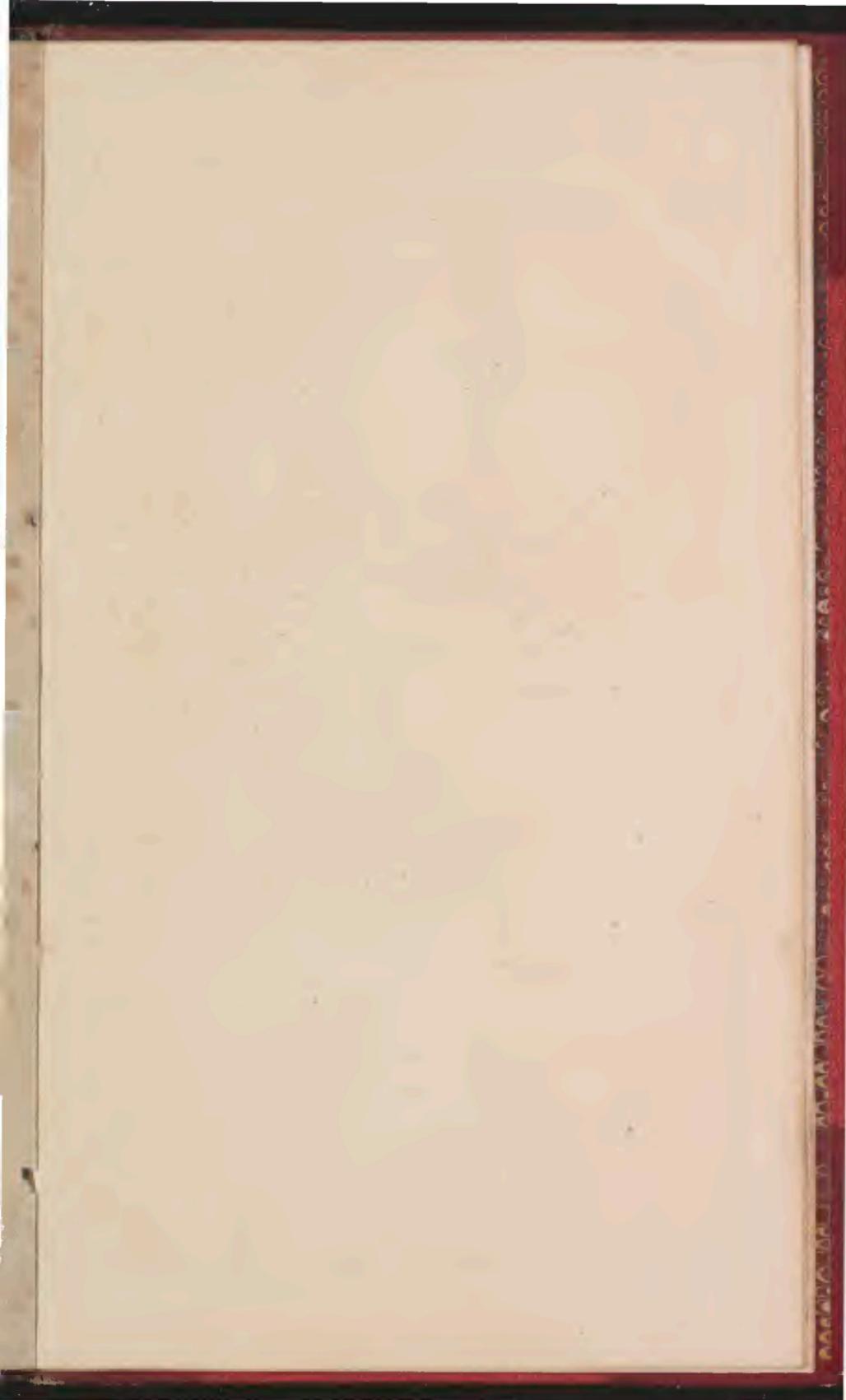
The counsel further contended that the principle was humanely introduced, to meet a case similar to the one now before the court, in which, should there be a doubt as to the propriety of *imprisonment*, that the prisoner should have the benefit of such doubt—that the spirit and genius of our institutions, were a regard for *personal liberty*, which the government prized too highly to take from a citizen, under circumstances where honest doubts were entertained as to the propriety of, or authority for, imprisonment.

The Court after deliberation, were unanimous in denying the motion—so the prisoner was remanded.

The disagreement of the judges having been certified under the seal of the Circuit Court; the question will be argued at the next Term of the Supreme Court, to be held at Washington, in February next.

Should the court incline to award a new trial, the prisoner will remain in confinement until the next term of the Circuit Court, which will be held in this city in April next, unless a special Circuit should be sooner ordered by the court.

C.







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