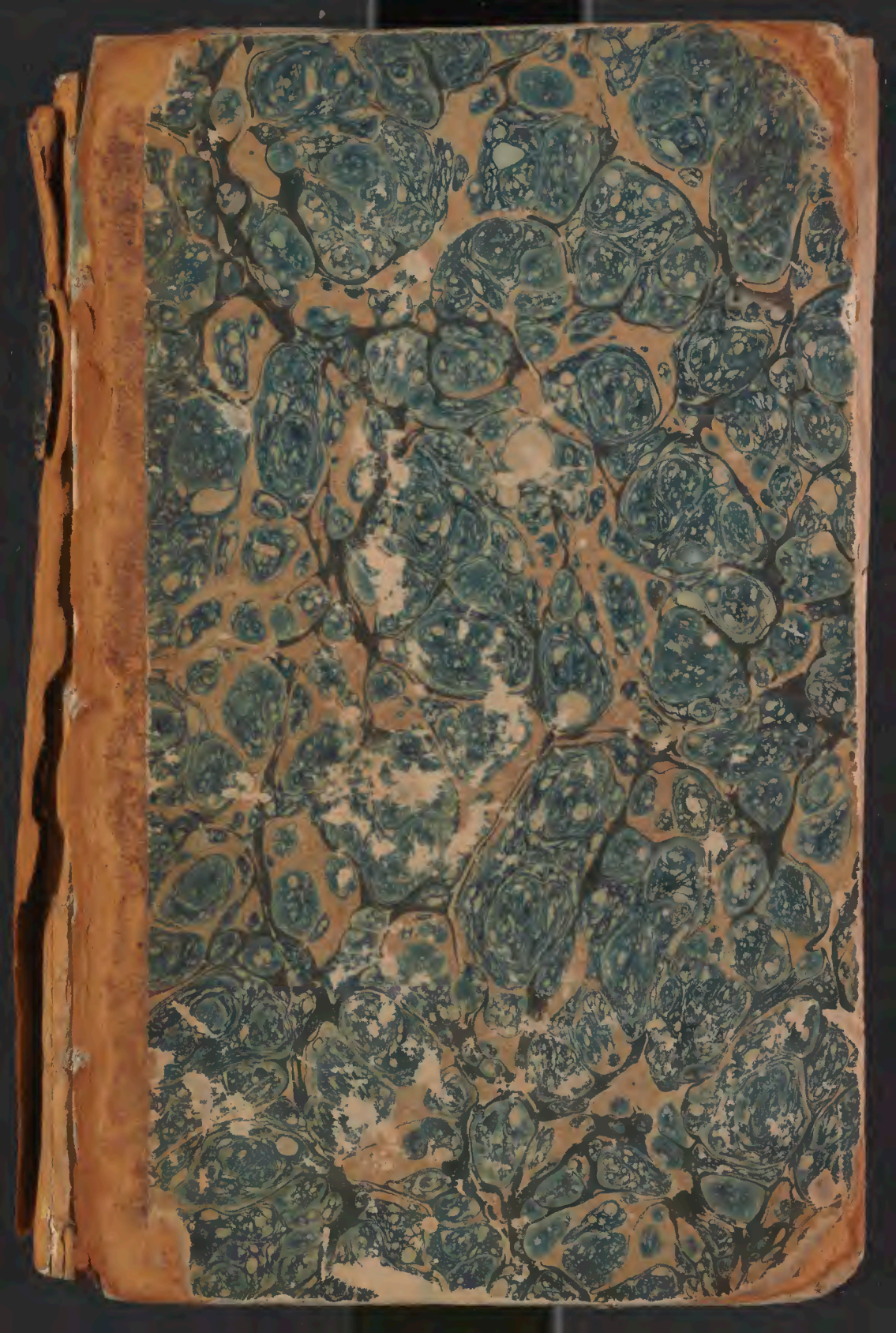

Capt. Joseph Lovering for Trial by

Court Martial

Capts Sam.l Watson & David Livermor

Lieut. Wm. Prouting tried by

Court Martial

Trials of Alpheus Livermore and

Samuel Singer for

Murder

Lives and confessions of John Wilkin

Francis Frederick Gehn & Peter

Peter Patterson — Pirates

Defence of Maj.r Gen.l Lord Rawdon

Defence of Lt. Col. Gardiner Baillie

Trial of Joseph S. Cruikshank for

Libel

MINUTES AND PROCEEDINGS

OF A

Division Court Martial,

BEGUN AND HOLDEN AT BOSTON, ON TUESDAY, OCTOBER 29, 1805,

AS THEY RELATE TO THE TRIAL

OF

CAPT. JOSEPH LORING, JUN.

ONE OF THE OFFICERS ORDERED TO BE TRIED BY SAID COURT.

Boston:

PRINTED BY E. LINCOLN, WATER STREET.

1806.

TO THE

OFFICERS

OF THE

FIRST DIVISION OF MASSACHUSETTS MILITIA.

GENTLEMEN,

THE discharge of those duties, which devolved on me on the trial of Captain Loring, was attended with many circumstances peculiarly unpleasant. I could not but severely regret the finding myself compelled to differ in opinion from the Court, on the judgment they were pleased to pronounce. But the wanton impeachment, and base misrepresentation of the motives, which governed me on that occasion, have been the sources of deeper affliction. For, although I am, and ev-

er have been, solely actuated by a sincere and conscientious endeavour to perform all parts of my duty with the strictest impartiality and the utmost correctness, and have all the support to be derived from a full conviction of my having acted on all official occasions according to the best of my ability and understanding, yet I do not pretend to be unaffected by calumny. I am not totally insensible to the aspersions and calumnies even of the worthless; for such aspersions and calumnies may reach those, to whom my character, and those of their authors, are unknown. Consequently the reproaches, which some have seen fit to cast on me, cannot be permitted to be passed entirely unnoticed. I have therefore deemed it not only to be proper, but a duty, to submit to your consideration, and that of the public, a copy of the record of all my proceedings, and those of the Court, relating to the trial of Captain Loring, that

not only you, but the world, may have a fair and full opportunity of examining my conduct, and judging how far such reproaches and calumnies have been merited by me.

With the warmest wishes for your happiness, collectively and individually,

I am,

Gentlemen,

Your humble Servant,

SIMON ELLIOT, *Major General.*

BOSTON, May, 1806.

MINUTES AND PROCEEDINGS

OF A

Division Court Martial.

Minutes and Proceedings of a Division Court Martial, begun and holden at Boston, in the County Court House, on Tuesday, the twenty-ninth day of October, in the year of our Lord one thousand eight hundred and five, by order of the Honorable SIMON ELLIOT, *Esquire, Major General of the first Division of the Militia of the Commonwealth of Massachusetts, so far as the Minutes and Proceedings relate to the trial of Capt.* JOSEPH LORING, *jun. one of the officers ordered to be tried by said Court.*

Present.

LIEUT. COL. JOHN BARKER, 2d Reg. 1st Brig. 1st Division, PRESIDENT.

Members.

Major BARNABAS CLARK, 3d Regiment, 1st Brig. 1st Div.
Major OLIVER JOHONNOT, Sub Legion Artil. Legion. Brig. 1st Division.
Capt. WILLIAM BARNES, 1st Reg. 1st Brigade, 1st Division.
Capt. HENRY PURKITT, Cavalry Legionary Brigade.
Capt. ADAM KINSLEY, 2d Reg. 2d Brigade, 1st Division.
Capt. MICHAEL HARRIS, jun. 1st Reg. 2d Brigade, 1st Div.
Capt. JOHN ROBINSON, Bat. of Artillery, 1st Brig. 1st Div.
Lieut. JOHN PRATT, 2d Regiment, 1st Brigade, 1st Division.
Lieut. DAVID SHEPARD, 3d Reg. 2d Brigade, 1st Division.
Lieut. ELISHA FRENCH, jun. 3d Reg. 2d Brigade, 1st Div.
Lieut. LEWIS FISHER, Squadron of Cavalry, 2d Brig. 1st Div.
Lieut. WILLIAM TURNER, 1st Reg. 1st Brigade, 1st Div.

Capt. CHARLES DAVIS, of the Sub Legion Light Infantry, Legionary Brigade, *Judge Advocate.*
Lieut. GEORGE BASS, Adjutant to the Sub Legions of Infantry in the Legionary Brigade, acting as *Marshal* to the Court.

The following orders were produced and read by the Judge Advocate :

DIVISION ORDERS.

Boston, Sept. 23, 1805.

A Division Court Martial will be held at the County Court House in Boston, on Tuesday, the 29th of October next, at 10 o'clock A. M. for the trial of Lieut. John J. Valentine of the Infantry Legionary Brigade, charged by Capt. Jacob Canterbury of the Infantry of said Brigade with disobedience of orders at various times : Also for the trial of Lieut. Nathan Bacon, of Infantry of the Legionary Brigade, charged by Capt. Samuel Curtis with disobedience of orders at different times.

President.

Lieut. Col. JOHN BARKER, 2d Regiment, 1st Brigade.

Members.

Major BARNABAS CLARK, of 2d Regiment, 1st Brigade.
Major OLIVER JOHONNOT, of Artillery Legionary Brigade.
Capt. HENRY PURKITT, of Cavalry Legionary Brigade.
Two Captains and three Subalterns of first Brigade.
Two Captains and two Subalterns of second Brigade.

Judge Advocate.

CHARLES DAVIS, Esq. Capt. Sub Legion of Light Infantry Legionary Brigade.

Adjutant BASS will attend the Court. Brigadier General WINSLOW will cause all concerned to be seasonably notified, and the Judge Advocate to be furnished with the necessary papers.

By order of the Major General.
(Signed) JOHN T. SARGENT, *A. D. C.*

Brigade Orders of Sept. 25th ; Infantry Orders of October 1st ; two Sub Legion Orders of October 7th ; all predicated on the above Division Orders of Sept. 23d, were then read ; all of which relate to the trials of Lieutenants Valentine and Bacon.

Division Orders of October 10, 1805, were read, in the words and figures following :

DIVISION ORDERS.

Boston, October 10, 1805.

Brigadier General Winslow, commanding the Legionary Brigade, having transmitted to the Major General, a complaint against Captain Joseph Loring, jun. of the Sub Legion

of Light Infantry of said Brigade, for disobedience of Brigade Orders of the 9th and 16th of September last past, and for unsoldierly and unofficer like conduct on Boston Common, on the 30th of the same month; likewise the said Brigadier states, that he has reason to believe, that the said Captain Loring did connive at, if not abet and procure the men under his command to mutiny, and to neglect and refuse to appear on said parade, and did not make use of all his influence as their commanding officer that they might appear: All which conduct tends to the subversion of good order and military discipline in said Brigade, and is a bad example to all others to offend in like manner; wherefore the complainant prays and requests, that such proceedings may be had in the premises, as the law directs, and that the said Captain Joseph Loring, jun. may be held to answer to the charges exhibited against him in the complaint, and such others as may be legally proffered against him, and be dealt with according to law.

A Division Order, bearing date the 23d September last, appointing a Court Martial to be holden at the County Court House in Boston, on Tuesday, the 29th day of October next, at 10 o'clock A. M. whereof is President, Lieut. Col. John Barker of the second Regiment of the first Brigade; the Major General hereby appoints the same Court for the trial of the said Captain Joseph Loring, jun. upon the charges exhibited against him by Brigadier General Winslow.

Gen. Winslow will cause the Judge Advocate to be furnished with all the necessary papers, and all concerned to be duly and legally notified.

By Order of the Major Gen. First Division.

JOHN T. SARGENT, *A. D. C.*

BRIGADE ORDERS.

Boston, October 12, 1805.

The Division Orders above copied are communicated for distribution.

Per Order of the Brigadier General.

CHARLES CLEMENT, *B. M.*

The Circuit Court of the United States was in session, and occupied the Court Room of the County Court House; and the Jury Lobby, in which the Court Martial (owing to that circumstance) convened, not being of sufficient size to accommodate the several parties, witnesses, &c. a removal of the Court to some more commodious place became necessary. An adjournment to the Representatives Chamber in the New State House was therefore ordered, to which place the

President, Members, and Officers of the Court forthwith proceeded. The Marshal having been first directed to give notice to all concerned, of the intention of the Court.

Representatives Chamber, New State House, Boston, October 29, half past 12 o'clock, P. M.

The President, Members, and Officers, ordered on this Court Martial, were all present. Then the President and each of the Members of the Court, and the Judge Advocate in open Court, and before the Court proceeded to the trial of any officer, respectively had the oaths administered to them, as directed by the 35th Section of an Act passed June 22, 1793; which Act is entitled, "An Act for regulating and governing the Militia of the Commonwealth of Massachusetts, and for repealing all laws heretofore made for that purpose, excepting an Act, entitled an Act for establishing rules and articles for governing the troops stationed in Forts and Garrisons within this Commonwealth, and also the Militia, when called into actual service."

Lieutenants Valentine and Bacon were called, &c. Captain Joseph Loring, jun. another of the officers complained against, upon being called, observed to the Court, that he had not been legally notified of the *time* and *place* appointed for his trial; that he did not appear before the Court in his official capacity; and observed to the Judge Advocate, he did not wish his being present, and stating those facts to the Court, should be considered an appearance on his part, arising from his having had official notice of the *time* and *place* appointed for his trial. He further observed, he had written a letter to the Major General on the subject, and he considered himself and wished to be considered by the Court, merely as one of the spectators.

A letter from the Major General of the first Division was then read as follows:

Lieutenant Colonel John Barker, President of a Division Court Martial, sitting at the County Court House in Boston.

SIR,

Herein you have enclosed a letter to me from Captain Joseph Loring, jun. the officer in arrest under charges exhibited by Brigadier Gen, Winslow. You will observe, that he states in the letter, that he had not received the Division Orders of the 10th of October, appointing his trial by a Court Martial to be holden at Boston, on Tuesday, the twenty-ninth day of October. If after a due examination, the Court should be satisfied of the fact as by him stated, they will direct the Judge Advocate to furnish the said Loring with a copy of those orders, and notify him of the time and place the Court

shall adjourn to, and summon him to appear, allowing legal notice to him and all concerned.

Yours. SIMON ELLIOT, Major General first Division.

Dated Boston, October 29, 1805.

The paper enclosed in the above, was then read as follows :

Major General Elliot.

SIR,

Having received a Brigade Order of the 8th instant, putting me under arrest, for certain charges made by Brigadier Gen. Winslow, and presuming you must feel, that an officer remaining in this situation is greatly injured, not only as a soldier, but as a citizen ;—therefore am satisfied you will have the goodness to order a Court Martial by whom I may have a prompt and impartial trial. I have been informed by some officers, that a Division Order has been issued for my trial at the County Court House on the twenty-ninth instant, by the Court that sits on that *day ;* but as I have no official information agreeably to the Militia Law, dated June 22, 1793, Section 35, which says, " Every Officer to be tried, shall have ten days notice given him of the time and place appointed for his trial ; also every Officer shall have a copy of the charges exhibited against him ten days before the sitting of said Court," &c. &c.—presume it is countermanded, otherwise, there is inattention to your orders some where. Charges have been exhibited against me, and ten days have elapsed ; but the time and place, I have no information by authority agreeable to law. Therefore I am satisfied you will discharge me from this arrest, or grant my above request, by appointing a Court Martial as scon as possible. The latter I should prefer, as every officer ought, who has endeavoured to do his duty for the good of the State, as I wish to have a full and perfect investigation of my conduct when it is done agreeably to law.

With due respect, your most obedient and very humble servant,

JOSEPH LORING, *jun. Capt. of Light Infantry, per General Order.*

Audience of evidence was then moved for by the Judge Advocate, and granted by the Court.

Brigadier Gen. John Winslow, of the Legionary Brigade, was adduced as a witness on the part of the government, was sworn by the Judge Advocate, and was interrogated and answered as follows :

Question. Do you or do you not know, that Capt. Loring was furnished with a copy of the complaint exhibited against him ten days prior to the convening this Court?

Answer. I do not know of my own knowledge; I presume he was; Major Clement was directed to furnish it.

Question. Do you, or do you not know, that ten days previous to the convening this Court, Captain Loring had legal notice of the time and place appointed for his trial?

Answer. I do not know. I rather suspect he had not.

Brigade Major Charles Clement, of the Legionary Brigade, was adduced as a witness on the part of the Government; was sworn by the Judge Advocate, and was interrogated and answered as follows:

Question. Do you, or do you not know, that Captain Loring was furnished with a copy of the complaint exhibited against him, ten days prior to the convening this Court?

Answer. He was. I went to his house, and waited until nine o'clock in the evening. I left his house, not being able to find him. On my return home, I met him on the Turnpike Road, and handed him the Brigade Order.

Question. By Judge Advocate to same. What Brigade Order do you refer to?

Answer. The Order which placed him under arrest.

Question. Same to same. Did that order contain a copy of the charges?

Answer. Yes Sir.

Question. Same to same. Do you, or do you not know, that ten days previous to the convening of this Court, Captain Loring had notice of the *time* and *place* appointed for his trial?

Answer. The order containing notice of the time and place I handed down, but not particularly to Captain Loring.

Upon the Judge Advocate's repeating the last question to Major Clement, he replied, he could not answer that he had.

As it did not appear in evidence, that Captain Loring had been legally notified of the *time* and *place* appointed for his trial, the Court upon consultation agreed upon an adjournment until Tuesday, the 12th November, 10 o'clock, A. M. then to meet at the Representatives Chamber; and directed the Judge Advocate to furnish Captain Loring with a copy of the Division Order, dated the 10th October; also to give him legal notice of the time and place appointed for his trial.

The Court was ordered to be adjourned to the time and place above determined upon, which was done in due form by the Marshal.

Pending the adjournment, the following notice was delivered by the Judge Advocate to Adjutant Bass, to be handed according to its direction.

Boston, Oct. 29, 1805.

Captain Joseph Loring, jun.

SIR,

I am directed by the Court Martial, now in session in this place, to forward to you a copy of a Division Order, under date of the tenth instant, which copy is enclosed. I am further commanded to notify you of the time and place appointed for your trial, on the complaint, which has been exhibited against you by Brigadier General Winslow. In obedience to which last mentioned command, you are hereby notified, that the aforesaid Court Martial stands adjourned until Tuesday, the twelfth day of November next, at ten o'clock, A. M. then to meet at the Representatives Chamber in the new State House, of which *time* and *place* I do hereby notify you, and you will please to govern yourself accordingly.

Your humble servant,

CHARLES DAVIS, *Judge Advocate of said Court Martial.*

Tuesday Morning, Nov. 12, 1805.

The Court met pursuant to adjournment. On the names of the President and Members being called, they all answered in their places. The Court was ordered to be opened, which was done in due form by the Marshal.

Capt. Loring appeared in Court, in his proper person.

The Judge Advocate then read all the proceedings of the Court, as they stand recorded.

Adjutant George Bass, of the Sub Legions of Infantry in the Legionary Brigade, was sworn by the Judge Advocate, was interrogated, and answered as follows:

Question, by Judge Advocate. Did you hand the several notices, which were given you pending the adjournment, to Captain Loring?

Answer. Yes, I did.

The complaint exhibited against Captain Joseph Loring, jun. was read to him in the words and figures following.

To Simon Elliot, Esq. Major General of the first Division of the Militia of the Commonwealth of Massachusetts.

John Winslow, Brig. Gen. of the Legionary Brigade in the first Division of the Militia of this Commonwealth, complains against Captain Joseph Loring, jun. of the Sub Legion of Light Infantry in the Legionary Brigade in the Division aforesaid, for disobeying a Brigade Order of the ninth September,

ordering a parade on Boston Common, for review and inspection on the thirtieth of the same month ; also for disobeying a Brigade Order of the sixteenth September, directing the Sub Legion of Light Infantry to appear on the said thirtieth, with sixteen sporting cartridges, both of which orders the said Capt. Joseph Loring disobeyed ; and in an unsoldierly manner came on said parade, without any of his soldiers, and there entered a protest against said orders, by delivering to Captain John Brazier, senior officer of the Sub Legion of Light Infantry, a paper, containing statements, as facts, which were untrue, and unofficer like for him to state, and containing objections to said orders totally contrary to their true intent and meaning. And the said Winslow further states, that he has reason to believe, that said Captain Joseph Loring, jun. did connive at, if not abet and procure the men under his command to mutiny against said orders, and to neglect and refuse to appear on said parade to discharge their duty as soldiers on said day, agreeably to the spirit and intent of said orders, and did not make use of all his influence as their Commanding Officer, that they might appear ; all which conduct tends to the subversion of good order and military discipline in said Brigade, and is a bad example to all others to offend in like manner. Wherefore your complainant prays and requests, that such proceedings may be had in the premises, as the Law directs ; and that the said Capt. Joseph Loring, jun. aforesaid, may be held to answer to the charges exhibited against him in this complaint, and such others as may be legally proffered against him, and be dealt with according to Law.

(Dated) *Boston, Oct. 8th*, 1805.

(Signed) JOHN WINSLOW, *Brig. Gen. Leg. Brig. 1st Div.*

The Judge Advocate then asked Capt. Joseph Loring, jun. whether he were guilty or not guilty of the charges alleged against him in the above recited complaint ; Capt. Loring asked, if Gen. Winslow intended, that the latter part of the complaint, to wit, that part or clause beginning in these words, " And the said Winslow further states, that he has reason to believe," &c. would be considered as one of the charges. Gen. Winslow observed, he meant and intended that part to be a charge against Capt. Loring, and he expected to support that part as a charge by evidence.

Capt. Loring then handed a paper, containing as follows :— To the first charge I answer, I am not guilty. To the second charge I answer, I am not guilty. To the third charge I answer, I did make a protest against the arrangement of the day, so far as it respected my rank in placing me below

certain Captains, the dates of whose commissions was posterior to mine. But I utterly deny I am guilty of making in that protest any statement, false, or unsoldierlike for me to make. To the fourth charge, I answer, I am not guilty.

Capt. Loring was then asked by the Judge Advocate, if he had any objection to make against any one or more of the Officers intended to compose the Court Martial for his trial, why he or they should not sit as members. He answered, that he had. He was then directed to produce his cause of challenge in writing, that, that part of the Court, not objected to, might decide thereon. Capt. Loring produced a paper, which was read as follows: I object to Capt. Henry Purkitt's sitting on my trial; because he has prejudged my cause without hearing evidence, and has expressed his conviction out of Court, that I ought to be found guilty. I respect him as a Soldier, but cannot consent on this occasion to accept him as my Judge. If the Court require it, I will produce evidence of Capt. Purkitt's having prejudged my cause.

JOSEPH LORING, jun. *Captain.*

The Court directed Capt. Loring to adduce what evidence he had in support of his challenge. Mr. James Liswell was adduced as a witness by Capt. Loring, was sworn by the Judge Advocate, was interrogated and answered as follows:

Question, by Capt. Loring. Did you hear Capt. Purkitt say, that I behaved improperly on the parade of the 30th Sept. in going on without my men?

Answer. He did not say any thing about that.

Question, same to same. Did you hear Capt. Purkitt say I had done wrong, and ought to be broke?

Answer. Yes Sir, I did.

Mr. Samuel Duncan, Hallowell, was adduced as a witness by Capt. Loring, was sworn by the Judge Advocate, was interrogated and answered as follows:

Question, by Capt. Loring. Did you, in conversation with Capt. Henry Purkitt, respecting my arrest and conduct on the 30th Sept. last, hear him say, I had done wrong and ought to be broke?

Answer. I heard him say these words as nigh as I can recollect, that was, that Capt. Loring had done wrong, and he said furthermore, that if so be such doings were allowed, he hoped there would be a standing army.

Question, by Judge Advocate, to same. Did Captain Purkitt say, he *hoped* or *expected* a standing army would be necessary, if such proceedings were allowed?

Answer. He hoped—I think those were the words.

The Court observed, it would take the cause of challenge, and the evidence adduced in its support, into consideration.

Capt. Loring then observed to the Court, that he had some objections reduced to writing, against the Judge Advocate, which, as they affected that gentleman, he would with permission read himself. With the consent of the Court and Judge Advocate, he read the paper, which is as follows :

To the President and Members of the Court Martial, now sitting at Boston.

I object to Charles Davis, Esq. as Judge Advocate ; because I consider him *interested* in the event of my trial. There is a competition for rank between him and myself, which must be settled favourably for him, if the result of this trial is unfavourable to me. By the Court's leave I will state, that Charles Davis, Esq. Captain of the Boston Light Infantry, was elected and commissioned to the command of that company many months subsequent to the date of my election and commission, as Captain of the Washington Infantry, then so called, and that accordingly whenever our respective companies paraded in the line together, I took the undisputed precedence of him. Notwithstanding this, an order from the Executive has been issued, whereby Capt. Davis has been ordered to take rank from a period a few months previous to the date of my commission, and about two years previous to the date of that, by virtue of which he now commands. Against this order I have in the most respectful manner remonstrated to his Excellency the Commander in Chief, and I will not permit myself to doubt, but I shall be reinstated in my rank, and that an order from the Executive will soon be issued, that in obedience to the Militia Law—*all Officers shall take rank solely from the date of their commissions*, except when two commissions are of equal grade and date, in which case their precedence shall be determined by lot. Although I believe Capt. Davis, in cases where he is totally disinterested, to be as impartial as other men, yet in this case I cannot but consider him as Judge and Advocate in his own cause. JOSEPH LORING, jun. *Captain.*

Boston, Nov. 12th, 1805.

BOSTON, Nov. 12th, 1805.

The Court then took Capt. Loring's challenge of Captain Henry Purkitt, together with the evidence adduced in its support, into consideration, and after full and mature deliberation, decided that the challenge was not supported, and that Captain Henry Purkitt should retain his seat as one of the Members of the Court.

Boston, Nov. 12th, 1805.

The Court having taken into consideration the paper offered by Capt. Loring, containing objections against the Judge Advocate, are of opinion, that it is not a paper for them to act and determine upon. They therefore direct the Judge Advocate to give Capt. Loring notice of their opinion, and further to suggest to him, that the application should have been made, or should now be made to the Major General, under whose orders the Court is convened.

The Court was ordered to be adjourned until Wednesday, the 13th inst. at 10 o'clock, A. M. Then to meet at this place, which was done in due form by the Marshal.

Representatives Chamber, Wednesday, Nov. 13th, 1805.

The Court met agreeably to adjournment, and all answered in their places, when their names were called. The Court was ordered to be opened, which was done in due form by the Marshal.

Capt. Loring appeared in Court in his proper person.

The following proceedings were then had respecting him.

Boston, Nov. 13th, 1805.

It appearing to the Court here, that Capt. Loring has received official notice [of its opinion and direction respecting his objection to the Judge Advocate] the Court does direct the Judge Advocate to inform him, that it will not proceed to his trial until he has had a reasonable opportunity to make application to the Major General concerning his objection to the Judge Advocate. All which direction, &c. was immediately complied with, and Capt. Loring was furnished with the directions and information in writing, by the Marshal's giving them to him in Court.

Thursday, Nov. 14th, 1805. The following proceedings relating to Capt. Loring were had.

Capt. Loring appeared in Court in his proper person. A letter, of which the following is a copy, was handed by the President to the Judge Advocate, with a direction to read it to the Court. It was read as follows :

To Lieutenant Colonel John Barker, President of a Division Court Martial, sitting at the State House in Boston—

SIR,

I have received a letter from Capt. Davis, the Judge Advocate, and herein enclose it, in which he informs me, that a cer-

tain paper has been handed the Court from Capt. Joseph Loring, jun. containing certain allegations and statements tending to shew his opinion and objections against Capt. Davis' acting as Judge Advocate on his trial, and that the Court did not deem it a proper subject for them to act upon, and referred him to me. No communication has been made to me by Capt. Loring on the subject.

It appears by the enclosed, that Capt. Davis is very desirous to be excused from performing the duties of Judge Advocate. If the Court upon inquiry shall find that Captain Loring still retains his objections, you will please to give me information thereof, that I may adopt such measures as the nature of the case may require.

(Dated) *Boston, Nov.* 14, 1805.

(Signed) SIMON ELLIOT, *Major Gen. 1st Division Massachusetts Militia.*

The letter enclosed in the above was then read, and is as follows;

Boston, Nov. 14, 1805.

Hon. General Elliot,

SIR,

Captain Joseph Loring, one of the officers ordered for trial by the Court Martial, now in session, has offered certain objections against my acting as Judge Advocate on his trial. The objections appear to be founded upon a *supposed* interest I have in the event of his trial. He alleges "there is a competition for rank between him and myself." I know not of such competition; at least, there is none on my part. The paper, containing Capt. Loring's reasons, and objections was considered and decided by the Court, not to be a subject on which it was authorized to act. The Court, however, referred him to you, as the officer, by whose orders and authority the Court was convened, and gave him reasonable time to make his application, and offer his objections to you. I am sensible the statements, which Captain Loring made in the paper he offered the Court are *incorrect*; yet am I very desirous of being excused from serving as Judge Advocate on his trial. And although nothing has heretofore occurred between him and myself, which can add to or diminish from the innocence or criminality of the conduct imputed to and charged against him, still I cannot, with a proper regard to my own feelings, omit to urge my request, that you would excuse me from the duties of Judge Advocate on his trial, that my hon-

our may not be attempted to be sullied by ill founded and groundless suspicion.

Yours, most respectfully and obediently at command,

CHARLES DAVIS, *Judge Advocate.*

Immediately upon the above papers being read, Captain Loring produced the two following papers, which were read as follows :

Mr. President, and *Gentlemen of the Court*,

Having been called on by the Judge Advocate to make any reasonable objections to any of the Court, I have availed myself of the privilege, which I thought was intended me. I made objections to Captain Purkitt on the ground of his having prejudged my cause *out of Court*, before he had in a judicial manner heard the evidence on both sides the question.

I produced, what I deemed sufficient to support my objection ; but as the Court have overruled it, and determined that Captain Purkitt shall sit, it only remains for me to bow submissive to their decision, knowing that this Honorable Court are bound to consider me innocent, till I am proved in *Court* by legal testimony to be guilty, and confident that no evidence can be produced, by my prosecutor, sufficient to convict me ; provided his evidence against me is weighed in that impartial scale, which is becoming this Honorable Court.

(Dated) *Boston*, *Nov.* 14, 1805.

(Signed) JOSEPH LORING, jun. *Capt.*

Mr. President, and *Gentlemen of the Court*,

Having been called on by the Judge Advocate to make objections to any of the Court, I have availed myself of that privilege ; and having (as I conceived it my right) made objections to Charles Davis, Esq. as Judge Advocate ; and it having been determined by the Court, that they cannot with propriety take those objections into consideration, so as to act definitively upon them ; but having been referred to the Major General, by whom the Court and Judge Advocate were appointed ; I feel compelled to observe to this Honorable Court, that the competition for rank between Captain Davis and myself, which was the reason of my objection, must have been known to the Major General as well before the Judge Advocate was appointed, as it can possibly be now. I therefore wave the privilege proffered me, by this Honorable Court, of applying to the Major General on the subject. I bow submissive to the decision of the Court, and am ready to meet the charges exhibited against me, hoping that the event

of my trial may do away any improper prejudices, that may exist on the minds of any individual against me.

(Dated) *Boston, Nov.* 14, 1805.

(Signed) JOSEPH LORING, jun. *Capt.*

The Court ordered the following question to be asked Captain Loring.

Do you still retain your objections against the Judge Advocate?

To which question Capt. Loring answered in writing as follows:

Capt. Loring submits to be tried by the Court, as it is now composed, and with the present Judge Advocate.

The Court was adjourned until Friday, Nov. 15, 1805, 10 o'clock, A. M. then to meet at this place.

Representatives Chamber; Boston, Friday, Nov. 15, 1805.

The Court met pursuant to adjournment. On the names of the President and Members being called, they all answered in their places. The Court was ordered to be opened, which was done in due form by the Marshal.

Captain Loring appeared in Court in his proper person.

The Court not being satisfied with the answers Capt. Loring had made to questions relating to his objections to the Judge Advocate, considering them as not being *explicit*, directed the following question to be asked him.

Capt. Loring—The Court direct the following question to be asked you; you will give an *explicit* answer one way or the other. Do you, or do you not withdraw all the objections you have made against the Judge Advocate's acting in that capacity on your trial?

To which Capt. Loring answered in writing as follows: *To the President and the Court*—I am anxious for my trial as soon as possible without any further delay. I consider my objections are overruled by the Court, and I presume every preliminary is settled. It is not for me to withdraw objections, which the Court have overruled.

(Dated) *Boston, Nov.* 15*th*, 1805.

(Signed) JOSEPH LORING, jun. *Captain.*

The Court took the above answer into consideration, and made the following communication to the Major General on the subject.

Boston, Nov. 15th, 1805.

Hon. Gen. ELLIOT—

SIR,

The Court Martial now sitting, not being satisfied with Capt. Loring's answers to the questions asked him respecting his objections to the Judge Advocate; considering them as not being so explicit as they ought to be, upon consultation and full deliberation, this morning directed the following question to be put to him, accompanied with a direction to him to give an *explicit* answer one way or the other.

Friday, Nov. 15th, 1805, 11 *o'clock, A. M.*

Capt. Loring—The Court direct the following question to be asked you. You will give an *explicit answer* one way or the other. Do you or do you not withdraw all the objections you have made against the Judge Advocate's acting in that capacity on your trial?

Capt. Loring answered in writing as follows.

To the President and the Court.

I am anxious for my trial as soon as possible without any further delay.

I consider my objections are overruled by the Court, and I presume every preliminary is settled. It is not for me to withdraw objections, which the Court have overruled.

(Signed) JOSEPH LORING, jun. *Captain.*

The Court would observe, that they *have not overruled* the objections Capt. Loring offered; that *in truth* they did not act upon them any further than to *suggest* to him to apply to you with the objections. The Court have taken the above answer of Capt. Loring into consideration, and are of opinion, *as he refuses to answer in any other manner*, that he does not withdraw his objections to the Judge Advocate. The Court would further observe, that under these circumstances it is the anxious wish and desire of Capt. Davis to be excused from acting as Judge Advocate on Capt. Loring's trial. The Court wait your decision on the above.

In behalf and by the unanimous request of the Court,

(Signed) JOHN BARKER, *President.*

To which communication the Major General replied as follows.

To the President of the Court Martial sitting at the State House.

SIR,

Your communication to me upon the subject of certain questions, put by the Court, this morning, to Capt. Loring, relative to his objections to Capt. Davis' acting as Judge Advocate on his trial, and his answer thereto, I have duly considered, and deeply regret that the progress of the Court has met with such impediments. Agreeably to Capt. Davis' anxious wish and desire, and under existing circumstances, I am induced to excuse him from acting as Judge Advocate on Capt. Loring's trial.

I shall immediately appoint a person to act in his place. The Court will adjourn, giving a suitable time, and notify me thereof.

(Dated) *Boston, Nov. 15th,* 1805.

(Signed) SIMON ELLIOT, *Maj. Gen. 1st Div.*

The Court upon consultation agreed upon an adjournment until Tuesday the 19th November, at 11 o'clock, A. M. then to meet at this place. To which time and place the Court was adjourned in due form by the Marshal.

Tuesday morning, Nov. 19th, 1805.

The Court met agreeably to adjournment, and all answered in their places. The Court was opened in due form by the Marshal. Captain Loring appeared in Court in his proper person.

Henry M. Lisle appeared in Court and produced a Division Order, by which it appeared he was appointed to act as Judge Advocate on the trial of Capt. Loring, in the place of Captain Davis, who was discharged at his own request from being Judge Advocate on Capt. Loring's trial.

I certify, that the within are true copies of the proceedings of the Court Martial, so far as they have been had, relative to the trial of Capt. Joseph Loring, jun.

CHARLES DAVIS, *Judge Advocate.*

Boston, Nov, 19th, 1805.

We certify, that the above and foregoing are true copies of the proceedings had by the Court respecting Capt. Loring's trial, so far as they have been had to this day.

JOHN BARKER, *President*, BARNABAS CLARK, OLIVER JOHONNOT, WILLIAM BARNES, HENRY PURKITT, ADAM KINSLEY, MICHAEL HARRIS, jun. JOHN ROBINSON, JOHN PRATT, DAVID SHEPARD, ELISHA FRENCH, jun. LEWIS FISHER, WILLIAM TURNER.

Representatives Chamber, Boston, Tuesday, November 19, 1805.

The Court met agreeably to adjournment, and on being called, all answered in their places. Captain Joseph Loring, jun. appeared in his proper person, and on being called answered.

The Court was then opened in due form by the Marshal. Henry M. Lisle, Adjutant of Cavalry in the first Brigade of the first Division, then produced to the Court an order from the Major General of the First Division appointing him Judge Advocate to act, vice Charles Davis, Esq. excused, on the trial of Captain Joseph Loring, jun. in the words and figures following.

DIVISION ORDERS.

Boston, November 15, 1805.

Henry M. Lisle, Esq. Adjutant of the Squadron of Cavalry in the first Brigade, is appointed to act as Judge Advocate, vice Charles Davis, Esq. who at his own request is excused from acting in that capacity on the trial of Captain Joseph Loring, jun. The Division Court Martial, whereof Lt. Col. John Barker is President, having adjourned to meet at the State House in Boston, on Tuesday the nineteenth instant, at eleven o'clock, A. M. Henry M. Lisle, Esq. is required to give his punctual attendance at the time and place of adjournment.

(Signed) SIMON ELLIOT, *Major General first Division.*
Brigadier GEN. BADLAM.

(*COPY*)

Transmitted by order Brigadier General,

S. M. THAYER, *B. Major 1st Brigade.*

To HENRY M. LISLE, Esq.

Dan. Tenney

Henry M. Lisle was then sworn as Judge Advocate, agreeably to law, by the President of the Court.

The proceedings of the Court were then read, as they respect Capt. Joseph Loring, jun. so far as they have heretofore been had.

The Judge Advocate then inquired of Captain Loring whether he had any challenge to offer against any of the Court, as it then stood composed ; to which he answered, No, excepting what I have heretofore done.

The Judge Advocate then demanded of Captain Loring whether he had any desire to commence his trial anew, or preferred it as the records now stood by the former Judge Advocate's certificate, viz. those of Charles Davis, Esq. making them a part of the record in this case.

To which he replied : I prefer going on with the trial, as it stands, making the records of the former Judge Advocate a part of it.

The original Brigade Orders of the 9th and 16th of September last were then produced by General John Winslow : thereon,

Question, by Judge Advocate to General Winslow, (being sworn.) Are the Brigade Orders at this time produced by you, the original orders at the 9th and 16th of September last?

Answer. They are.

Those orders were then read by the Judge Advocate to the Court in the words and figures following, viz.

BRIGADE ORDERS.

Boston, September 9th, 1805.

Captain Brazer will order the Sub Legion of Light Infantry under his command to parade on Boston Common for Review and Inspection, on Monday the 30th of September, the line to be formed at 10 o'clock, A. M. at which time the inspection will commence, and be attended to with the strictest scrutiny. It is expected that both Officers and Soldiers will be equipped in every respect according to law. The duty of the day will be communicated in after orders. The Brigadier requests the Officers under your command to meet him at James Vila's, on the 20th instant, at 7 o'clock, P. M.

Per Order Brigadier General.

CHARLES CLEMENT, B. M.

Capt. John Brazer, Sen'r. Capt. Sub Legion of Light Infantry.

BRIGADE ORDERS.

Boston, September 16th, 1805.

The troops for duty under your command, the 30th instant, will appear without any cartridges with Ball; in lieu thereof they will each man furnish himself with sixteen sporting cartridges in addition to what will be furnished by the town.

Per Order of the Brigadier General.

CHARLES CLEMENT, B. M.

Capt. John Brazer, Sen'r. Officer
Sub Legion of Light Infantry.

Question, by Judge Advocate to General Winslow.

Were those orders issued and transmitted by you to Capt. Brazer?

Answer. They were.

Question. Same to same. By whom did you transmit them?

Answer. By the Brigade Major.

Question. Same to same. Who is your Brigade Major?

Answer. Charles Clement. I delivered them to him myself, and directed him to pass them down.

Charles Clement, the Brigade Major, was then sworn, and interrogated, and answered as follows:

Question, by Judge Advocate. Did you receive orders of Brigade from General Winslow of 9th and 16th of September last, to hand down?

Answer. I did.

Question. Same to same. Do you recollect the purport of those orders well enough to say whether they were a copy of those just read?

Answer. I do; they were.

Question. Same to same. To whom were those orders directed?

Answer. They were directed to Captain Brazer, as senior Captain of Sub Legion of Light Infantry.

Question. Same to same. Did you deliver said orders to said Captain Brazer?

Answer. I did.

Captain John Brazer was then sworn, interrogated, and answered as follows:

Question, by Judge Advocate. Did you receive Brigade Orders of the 9th and 16th of September last, from Brigade Major Charles Clement, issued by Brigadier General Winslow?

Answer. I did.

Question. Same to same. Were those orders such as have been just read by me from the original manuscript ?

Answer. Yes, Sir.

Question. Same to same. Did you hand those orders down to Captain Joseph Loring, jun. ?

Answer. I sent them down by an Officer. I presume he delivered them.

Question. Same to same. What Officer did you send them by ?

Answer. Having no Adjutant, by an orderly Sergeant, James Ridgway, by name.

The original Brigade Order of duties for the 30th of September last was produced by General Winslow : thereon,

Question, by Judge Advocate to General Winslow.

Is this order for the duties of 30th September last, the original ?

Answer. It is.

The order was then read by the Judge Advocate to the Court in the words and figures following.

BRIGADE ORDERS.

For 30th September, 1805.

Lieutenant Col. Badger will order one gun from the Artillery at 10 o'clock, at which time the line will be formed immediately ; the several Officers will take care to preserve a proper distance between their commands ; on signal of two guns from the Artillery the whole Brigade will wheel by Companies to the right for inspection, and have their rolls ready for delivery. Lieutenant Col. Badger has leave to dispense with the Chelsea Company's appearance in town on that day. After the review has taken place, the troops will be dismissed for refreshment ; no man, neither Officer nor Soldier, will be allowed to be at a greater distance from the Common, than within hearing of the long roll. At a signal of one gun from the Artillery, every man, both Officers and Soldiers, will take their places in the line. Captain Davis' Company of Light Infantry, one Company of Artillery with their pieces, the third Sub Legion of Infantry under Major Stodder, with Captain Dean's Company of Infantry from the Sub Legion will march under the command of Lieut. Col. Badger for the Heights of South Boston. The remainder of the troops will tarry on the ground and proceed as ordered, as it is intended to represent an engagement. The Officers commanding Platoons will be very attentive to their men, and not allow them to hurry in any of their movements, and be very particular in obeying the orders they may receive from their superior Officers, as every thing

depends on attention. The Brigadier flatters himself that such perfect attention and good order will be observed, both by Officers and Men, that they will receive his most hearty thanks, as well as the applauses of those who may he spectators, among whom there will be probably many judges of military discipline.

By Order of the Brigadier General,
CHARLES CLEMENT, *Brigade Inspector.*

To Lieut. Col. Badger, Major Johonnot, Capt. Brazer, Capt. Purkitt.

Question, by Judge Advocate to General Winslow. As this order bears no date, when was it issued, and for what purposes?

Answer. It was issued seven or eight days prior to the parade of 30th September last, as an order of duties for that day.

Question, by Judge Advocate to Captain John Brazer. Did you receive this last order?

Answer. I received from the Brigade Major, an order similar to the one last read; but I think it was either the day before, or the morning of the parade.

James Ridgway was then sworn, interrogated, and answered as follows:

Question, by Judge Advocate. Did you receive orders of the 9th and 16th Sept. last, from Captain Brazer, to communicate to Captain Joseph Loring, jun.?

Answer. I received a paper from Captain Brazer for Captain Loring. I don't know the contents of it.

Question. Same to same. Did you receive it as orderly Sergeant, and did Captain Brazer inform you it was orders to be delivered to Captain Loring?

Answer. I received it as orderly Sergeant, with other papers, directed to Captains Messenger, Davis, and Loring. Captain Brazer did not tell me they were orders. I delivered all but Captain Loring's, and left his as I was directed, at his father's house.

Question. Same to same. Were those papers sealed?

Answer. Yes, Sir.

Question, by Judge Advocate to Captain John Brazer. At the time you delivered Captain Loring's order to James Ridgway, did you at the same time give him others for Captains Messenger and Davis, and were those orders sealed?

Answer. Yes, Sir.

Captain Charles Davis was then sworn, interrogated, and answered as follows:

Question, by Judge Advocate. Did you receive your orders of 9th and 16th Sept. from James Ridgway?

Answer. I did.

Question, by Judge Advocate to Captain John Brazer. Did you pass down the orders for the duties of 30th September?

Answer. I did not.

Question, by same, to Captain Charles Davis. Did you receive your orders for duties of 30th September?

Answer. I cannot at present say positively that I did.

Captain John Brazer here stated, that he had misconceived what order had been referred to, supposing allusion was had, not to the one intended, but another, which was issued on the very day of parade; he therefore now says he regularly received the order for the duties of the 30th September last. And Captain Joseph Loring, jun. also acknowledges the regular receipt of that, and those of 9th and 16th September last, in open Court.

The Judge Advocate therefore observed, that having exhibited the original orders and evidence of the regular reception of those orders, he should proceed to show the disobedience of those orders, and the unofficer and unsoldierlike manner in which Captain Loring came on to parade the 30th of September last, as charged in the complaint.

Question, by Judge Advocate to Captain Brazer. Were you on the field on 30th September last, when Captain Loring came on parade?

Answer. I was.

Question. Same to same. In what manner did he come, and by whom was he attended or accompanied?

Answer. He came on the field with one Lieutenant, four Sergeants, drum and fife. His other commissioned officer acted as Adjutant for the day to that Sub Legion.

Question. Same to same. Did you order him to fall in the line?

Answer. I did.

Question. Same to same. What reply and observations did he make to you?

Answer. He went into the line, but made no reply or observations, as I recollect.

Question. Same to same. Did Captain Loring hand you his commission before he went into the line?

Answer. He did.

Question. Same to same. Did he make any remark at the time he handed you his commission?

Answer. He demanded of me a shew of commissions of the officers in the Sub Legion, and I ordered them to produce

them, which they did, and I read them to Captain Loring and others.

Question. Same to same. Do you recollect when Brigadier General Winslow came on parade?

Answer. I do.

Question. Same to same. In what situation was Captain Loring then?

Answer. Captain Loring was then in the front of the line, which was then forming.

Question. Same to same. Do you recollect any conversation, which then passed between Captain Loring and General Winslow?

Answer. I do. When the Brigadier came on the field, he asked me whether the line was formed. General Winslow asked me how Captain Loring came to come on the field in the manner he was. I told him I had received a note from Captain Loring, stating the reasons why he come on in the manner he did. He in that note excused himself for coming on the field so late, by saying he had waited half an hour longer on his parade, but none of his men came; and he came with non-commissioned officers, and drum and fife. General Winslow ordered me to call him up to us out of the line, which I did. When he came up, General Winslow asked him how he came in that manner. He replied much the same as he did to me, I presume; I don't recollect the words. General Winslow told him he had no further service for him. Then Captain Loring went out of the line, and fell back into the rear; after which he brought me a paper, which I delivered to General Winslow, and which is set forth in the complaint as a protest.

Question. Same to same. At what time of the day did you hand that protest to General Winslow?

Answer. About half past ten o'clock, I think.

Question. Same to same. Don't you recollect handing it to General Winslow at dinner time in the house?

Answer. I do not; it strikes me I handed it to him on the field. I may be mistaken; I believe General Winslow read it while we were at refreshment at the house.

The protest was then shewn to Captain Brazer by Judge Advocate, with this question, viz. Is this the protest you mean?

Answer. I know the paper; I have no doubt of its being the same.

The protest was then read by the Judge Advocate to the Court, in the words and figures following, viz.

I, the subscriber, commanding a company by voluntary enlistment in the Legionary Brigade, do present this protest against the Orders issued for the arrangement of this day's review and inspection of the Brigade, so far as they degrade my commission and rank, by placing me under the command or rank of Captain Daniel Messenger and Captain Charles Davis.

1st. Because the Constitution says, Mass. law, folio 34, "And no officer duly commissioned to command in the Militia, shall be removed from his office, but by the address of both houses to the Governor, or by fair trial in Court Martial," &c.

2d. Because, being duly commissioned to command, the date of said commission must demand a higher station in rank, than is now appointed me; for the law expressly says, that every officer shall rank by the date thereof. And my *election* to the *volunteer* company I now command being regular, and returns made agreeable to law, received my commission, dated August 15, 1803, signed by his Excellency Caleb Strong, Esq. Governor of the State, agreeable thereto. Therefore I have a right to claim a higher rank than said Captain Daniel Messenger, and Captain Charles Davis, who ought to rank under commissions dated when *elected*, or those dated June 20, 1805, as all others of a superior date to mine the law does not contemplate, as they are not agreeable to said officers' elections and returns made by the companies they now command. And in my opinion it is contrary to the United States and State laws for any commission to give rank above mine, except by their date, and those dated agreeable to elections made by the company the officer commands. Therefore, do now, for the above, among many other reasons, protest against the orders that command me to take a station or rank contrary to what my commission, dated August 15, 1803, claims for me and my company, and against all proceedings of any officer whatever that degrades me, or my officers' rank, in any one point or manner derogatory to the honour of officers, who have done their duty for the good of the State.

JOSEPH LORING, jun. *Captain Light Infantry, per General Order.*

Boston, September 30, 1805.

To the officer, who commands this 30th September, 1805, this is respectfully sent.

Question, by Defendant to Captain John Brazer. What was the station you ordered me to take in the line of the Light Infantry?

Answer. I ordered you to take the station that the General Order placed you in; that was, below Captain Davis and Captain Messenger.

Question. Same to same. Was not the station into which you ordered me inferior to that to which you assigned me a year ago on parade?

Answer. It was.

Question. Same to same. Did not my commission bear a date earlier than that of Captains Messenger and Davis, below whom you ordered me to take station?

Answer. Captain Loring's commission, in the eye I look on commissions, was dated earlier than either of theirs.

Question. Same to same. Did I send up the protest till after I was ordered below Captain Davis?

Answer. He did not.

Question. Same to same. Was not the Sub Legion of Light Infantry composed of the same companies this year, that it was the last year?

Answer. It was.

Question. Same to same. Did I offer my protest against the place you had assigned me, till after General Winslow had ordered me to quit the parade?

Answer. No.

Question. Same to same. Did I not march out of the line with silent music, and halt in the rear of the line before I sent the protest?

Answer. You did.

Question. Same to same. Did I not come on the parade in as soldierly a manner as the smallness of my company would admit; and did I not quit it in as respectful a manner as possible after the Brigadier General had ordered me to leave the parade entirely?

The Judge Advocate objected to the last question being asked in the manner stated, because it required not facts from the witness, but his opinion and judgment on one of the charges exhibited against Captain Loring in the complaint, on which the Court are to give judgment, and not a witness.

The President of the Court observed, it would be necessary to new modify the question, if Captain Loring wished to ask it. Captain Loring then desired leave to withdraw it.

Question, by Judge Advocate to Captain Brazer. Do you know that Captain Messenger has done duty as a Captain under you in the Light Infantry before Captain Loring's company was raised?

Answer. He was in the line with me before Captain Loring's company was raised. I was the senior officer; I have been about ten years, he I presume about five years.

Question. Same to same. Have you always commanded the Sub Legion when on the field, since the Cadets left it?

Answer. I believe not.

Question. Same to same. Who did, when you did not?

Answer. That is a kind of mixt business; General Winslow I presume did, when I did not.

Question, by the President of the Court to General Winslow. How long have the Cadets been detached?

Answer. I think it was in 1800.

At fifteen minutes before 3 o'clock, P. M. the Court adjourned until 10 o'clock, A. M. on the morrow.

Representatives Chamber, Boston, Wednesday, Nov. 20, 1805.

The Court met agreeably to adjournment; and on being called, all answered in their places. The Court was then opened by the Marshal. Captain Joseph Loring, jun. on being called, appeared in his proper person, and answered. The proceedings of the preceding day were read to the Court by the Judge Advocate.

General Winslow then informed the Court, in answer to the question last asked him yesterday, that he had ascertained that the Cadets were detached from the Sub Legion of Light Infantry on the 18th October, 1799.

Captain John Brazer again interrogated, and answered as follows:

Question, by Judge Advocate. If in the eye you look on commissions, Captain Loring's commission was dated earlier than either Captain Messenger's or Captain Davis's, why did you not give Captain Loring his rank as supposed by you in the Sub Legion?

Answer. Because I had a General Order to the contrary.

Question. Same to same. Did you inform Captain Loring that you had that General Order?

Answer. I did.

Question. Same to same. When did you first inform Captain Loring you had that order?

Answer. About the time I received it.

Question. Same to same. When did you receive it?

Answer. I received it on the sixth day of July last. It is dated on that day, and I passed it down on the tenth to Cap-

tain Loring. I presume it might have been the eighth when I received it.

The original order was then produced by General Winslow.

Question, by Judge Advocate to General Winslow. Is this the original order last mentioned by Captain Brazer, a copy of which he says he received and passed down to Captain Loring?

Answer. It is the original, which I received.

The order was then read by the Judge Advocate to the Court, in the words and figures following, viz.

COMMONWEALTH OF MASSACHUSETTS.

GENERAL ORDERS. *Head Quarters, June* 20, 1805.

The Commander in Chief, being authorized to complete the organization of the Legionary Brigade in Boston in the first Division of the Militia, orders that the Sub Legion of Light Infantry hereafter consist of the aftermentioned four light companies, raised at large in Boston, viz. the Company commanded by Captain John Brazer, the Company commanded by Captain Charles Davis, the Company commanded by Capt. Daniel Messenger, and the Company commanded by Capt. Joseph Loring, junr. the said Captain Davis, to receive a new Commission as Capt. of Light Infantry, and to take rank from the date of his former Commission, as Captain in the Legionary Infantry; Captain Messenger will also receive a new Commission, as Captain of Light Infantry, and to take rank from the date of his former Commission as Captain in the Legionary Infantry, and Captain Loring will also receive a new Commission as Captain of Light Infantry, and to take rank from the date of his present Commission. And the Major General will issue his orders agreeably to Law for the election of a Major to command said Legion of Light Infantry.

By Order of the Commander in Chief,

(Signed) WILLIAM DONNISON, *Adj. Gen.*

FIRST DIVISION.

DIVISION ORDERS.

Boston, July 4th, 1805.

Brigadier General Winslow will take due notice of the General Orders above copied, also to augment the number of companies of Infantry agreeably to the General Order of 1798,

and cause all vacancies in his Brigade to be filled up, and returns made on or before the seventh of August next.

Per order Major General, 1st Division,
JOHN T. SARGENT, *A. D. C.*

BRIGADE ORDERS.

Boston, July 6, 1805.

In pursuance of General Orders of 20th June, and Division Orders of 4th July, the Brigadier General orders the Officers of the following Companies to meet him at the house of James Vila, Court Street, on Monday, the 22d instant, at 8 o'clock, P. M. viz. Boston Fusilers, Winslow Blues, Boston Light Infantry, and the Washington Infantry, in uniform, for the purpose of choosing a Major to command said Sub Legion.

By Order Brig. Gen. Legionary Brig.
CHARLES CLEMENT, *Brig. Maj.*

To Capt. John Brazer.

Question, by Judge Advocate to Captain Brazer. Are the orders I have just read the same as were received by you, and handed down to Captain Loring ?

Answer. It is.

Question, by Judge Advocate to General Winslow. Is the Brigade Order of July 6, 1805, now produced by you, the original which was predicated and issued by you upon the General Order last read ?

Answer. It is.

Question, by one of the Court to General Winslow. Did Captain Loring receive his Commission agreeably to the General Orders ?

Answer. I suppose the Brigade Major delivered it to Captain Brazer ; Commissions go through his hands ; I don't know.

Same question by same to Captain John Brazer, who answered. I presume he did ; I sent them down to him, Capt. Messenger, and Capt. Davis.

Question, by Judge Advocate to Captain Brazer. Had you not several conversations with Captain Loring respecting the parade of 30th September last, prior to that day ?

Answer. I don't recollect that I had any conversations with him at all ; but I received a letter. The letter was then handed to the Judge Advocate, who read it to the Court in the words and figures following :

Captain JOHN BRAZER—

Boston, September 18th, 1805.

Sir,

Having received Brigade Orders of the 16th inst. handed down by you, dispensing with Powder and Ball on the 30th instant, the day of Review and Inspection of the Brigade, and ordering 16 cartridges for sporting besides what the law grants: I therefore wish to be informed if it is meant by this order for my men to use the powder of the ball cartridges (which the law says they shall constantly be provided with, and which they had at the last muster) for this extra purpose; and if not, presuming the men don't furnish themselves, what fine must I demand, as I find the law don't contemplate any thing of the kind, for such deficiency? I will also thank you to inform me if Espontoons must be brought in the field.

With respect, I am your most obedient,

JOSEPH LORING, junr. *Capt. Legionary Regiment.*

Captain John Brazer, Sen. Officer Sub Leg. Light Infantry Legionary Brigade.

Question, by Judge Advocate to Captain Brazer.

Have you received any other communications, either oral or written, from Captain Loring on the subject of the parade of 30th September last?

Answer. I have not.

Question, by Defendant to same. Did you ever return me an answer in any way to the letter which has been just read, dated 18th September last?

Answer. I did not.

Question, by same to same. What was the reason you did not?

Answer. Because I consulted with General Winslow, and he advised me not; he said the order spoke for itself, and if Captain Loring did not obey it, he must take the consequences.

Question, by Defendant to General Winslow. Did I not at the meeting of the Officers at James Vila's, July 22d, 1805, present a protest against being ordered to the Sub Legion of Light Infantry, contrary to my enlistment, and because I considered myself degraded in rank?

Answer. Captain Loring handed me a paper that evening; I told him our meeting was for the election of a Major, and that I should receive no papers of any kind. He then requested me to take it, and look it over; I did so, and handed it to the Major General the next day.

Question. Same to same. What orders do you refer to in your charge in the complaint exhibited against me by the phrase "said orders"?

Answer. The orders of the 9th and 16th September last.

Question. Same to same. Is the protest handed from me by Captain Brazer to you, after I was dismissed from the parade, on the 30th September, the same which you refer to in your third charge against me?

Answer. It is.

Question, by same to same. Do you mean to declare in your complaint against me, that the protest, which has been read, is against your orders of the 9th and 16th September last, ordering the parade, &c. on the 30th?

Answer. The charge will speak for itself. I expect the Court will determine that, not me.

Question. Same to same. Is there any thing contained in that protest making objections to the orders of the 9th and 16th?

The Judge Advocate queried as to the propriety of the question being asked, because the Court, and not the witness, should properly decide such a question, it being in fact, if answered, a judgment on one of the charges exhibited against the Defendant. The Court overruled the objection, and on the question being asked, General Winslow replied, that the Court would determine that.

Question. Same to same. What are the statements in the protest, which are untrue, and unofficer like for me to make?

The Judge Advocate objected to asking the question, for the same reasons he objected to the last, and thereon the Court determined that the question should not be asked.

Question, by same to same. Although I protested on the 30th September, after I was dismissed, against the arrangements of placing me in a station below what I conceived to be my right, did I not obey the orders to march into the line under Captain Messenger and Captain Davis?

Answer. I don't know what orders Captain Loring received from Captain Brazer; I conceive he did not obey mine, and should not have arrested him if I thought he had.

Question. Same to same. Did you not order me through Captain Brazer to come out of the line to meet you, and did you not dismiss me at that time?

Answer. I ordered Captain Loring to come to me by the Adjutant of the Sub Legion, Mr. Munroe, and after some conversation, I dismissed Mr. Loring out of the line for the day.

Question. Same to same. What was my station at that time in the line?

Answer. When I saw Captain Loring in the line, he had the station of the third company.

Question. Same to same. Was I not placed on 30th of October, 1804, on the left of the Sub Legion of Light Infantry?

Answer. I rather think you were.

Question. Same to same. Who was the Officer of the day on the 30th October, 1804?

Answer. I think I was.

Question. Same to same. By whose order was I placed on the left of the Light Infantry on 30th October, 1804?

Answer. I suppose by Captain Brazer's.

Question. Same to same. Were Captain Brazer's orders conformable to yours in this respect?

Answer. There was some dispute on the field that day about rank between Captain Davis and Captain Loring. Captain Brazer had determined the rank before I came up, and it was agreeably to my opinion. Captain Davis came forward, and said he would consent for that day, to avoid difficulty, and went on to do duty, but that he never would consent after that to the decision. I replied, that I thought the field was not a place to dispute rank, that they must apply elsewhere, and I did not doubt he would have justice done him.

Question. Same to same. Was you informed by Captain Brazer that I made any dispute, or that I said any thing about rank on that day?

Answer. Captain Brazer informed me there was a dispute; I did not think it could be with one.

Question. Same to same. Did you not settle my rank with Captain Brazer some time before you came on the field, 30th October, 1804?

Answer. I rather think I gave my opinion to Captain Brazer a day or two before. Captain Loring was only detached for that day.

Question. Same to same. What was that opinion given by you to Capt. Brazer before you went on the field?

Answer. That Captain Loring would outrank Captain Davis.

Question, by Judge Advocate to General Winslow. When you came on parade on 30th September last, in what situation did you find the line, and what then took place respecting Captain Loring?

Answer. On parade, the 30th September last, on Boston Common, on my coming up Winter street, found the line nearly formed, saw among a number of people who were opposite the line on the right six or eight men in uniform; on my nearer approach, and on my entering on the right of the line,

found them to be Captain Joseph Loring, jun. Lieut. Ezra Davis, with four Sergeants, and a drum and fife ; Captain Loring in a very short time came forward to Captain Brazer, who commanded the Sub Legion of Light Infantry, and handed him a paper, which I supposed was a Commission, and asked Captain Brazer some questions which I did not distinctly hear ; Captain Brazer gave him his directions, on which he marched with his Officer, four Sergeants, and drum and fife, and took post in the line. I then directed Ensign Munroe, who was doing duty as Adjutant to the Sub Legion of Light Infantry, to request Captain Loring and Lieutenant Davis to come to me. On their arriving where I could speak to them, I asked Captain Loring what orders he had received for the parade of the day. He replied, he had received the orders directing him to appear on this day, and to form the line at 10 o'clock, A. M. on the Common. I then asked Captain Loring where his men were. He said he did not know, he had ordered them to appear at 9 o'clock, and he had waited on his company parade a half an hour, but none of them appeared, and he did not choose to wait any longer for them. I then asked Captain Loring whether he commanded his men, or his men him. He answered, that he commanded his men. I replied, that I should have supposed it was directly the reverse ; that it was very extraordinary conduct, and he would hear more of it in a few days. I then told him I had no further service for him for the day ; that I did not stand in need of officers without men ; he would therefore retire out of the line.

Question, by Defendant to same. Did I not, when you dismissed me, inform you that I had my inspection roll, if you wished it ?

Answer. I believe not, I have no recollection of it.

Isaac Rhoades was then sworn, interrogated, and answered as follows.

Question, by Judge Advocate. In what capacity are you in the Militia ?

Answer. Orderly Sergeant of Capt. Joseph Loring, jun.'s company.

Question. Same to same. Where was Captain Loring's company ordered to parade on the 30th of September last ?

Answer. In front of the Green Dragon tavern.

Question. Same to same. Is that their usual place of parade ?

Answer. We have no usual place of parade. At the South End Gun house when we can have it ; we could not that morning ; sometimes at the Ropewalk.

Question. Same to same. Did you ever before parade at the Green Dragon?

Answer. The company have met at the Green Dragon, but we never were ordered to parade there before.

Question. Same to same. What have the company met there before for?

Answer. On evenings to do company business.

Question. Same to same. Did Captain Loring order the roll called on the 30th of September last?

Answer. The roll was ordered to be called by Lieutenant Davis.

Question. Same to same. Was it called?

Answer. It was.

Question. Same to same. At what time?

Answer. At the time the notification specified.

Question. Same to same. Was Captain Loring there when the roll was called?

Answer. He was not; he came one or two minutes after.

Question. Same to same. Did Captain Loring continue any time before he marched his non-commissioned officers off?

Answer. He did; an half an hour, or near.

Question, by Judge Advocate. Did Captain Loring express any surprise at finding no men there?

Answer. Captain Loring asked, when he came, if any men had been there, and if the roll had been called, and said he would wait half an hour. Did so. then said he could not make men, and must go on the field as he was.

Question. Same to same. Was not Captain Loring's company out about the 16th September last?

Answer. It was.

Question. Same to same. What was the number of rank and file?

Answer. Forty-six, I think, but won't be certain.

Question. Same to same. By whose order were they then out?

Answer. Captain Loring's.

Question. Same to same. Were they then informed that an order was out for the 30th September last?

Answer. I can't recollect that; the order was read to the company, but when I can't recollect.

Question, by same to same. Was not Captain Loring's company also out on the 17th or 18th of October last?

Answer. It was out on the 17th of October.

Question. Same to same. How many rank and file were there then?

Answer. I can't recollect.

Question. Same to same. By whose order were they then out?

Answer. Captain Loring's.
Question. Same to same. When was that order issued ?
Answer. I can't recollect.

Josiah Bacon, jun. sworn, interrogated, and answered as follows :

Question, by Judge Advocate. In what capacity do you serve in the Militia ?

Answer. As Clerk, and Sergeant to Captain Joseph Loring, junior's company.

Question. Same to same. Where was Captain Loring's company ordered to parade, on 30th September last ?

Answer. At Green Dragon Hall.

Question. Same to same. Is that their usual place of parade ?

Answer. They have no usual place of parade ; the company has paraded at Fanieul Hall, at the South End Gun house, and in front of the Rope Walk.

Question. Same to same. Can Captain Loring's company be drawn up in Green Dragon Hall ?

Answer. I don't know.

Question. Same to same. Where were they drawn up ?

Answer. In the Street front of the Hall.

Question. Same to same. Was the roll called ?

Answer. Yes, Sir.

Question. Same to same. How many of the company attended ?

Answer. The Captain, Lieut. and four Sergeants.

Question. Same to same. Was Captain Loring present when the roll was called ?

Answer. No, he was not.

Question. Same to same. Did Captain Loring express any surprise at finding no men there ?

Answer. He came and inquired if no men had been there, and directed the Drummer to go down and beat the roll.

Question. Same to same. Did you or did you not, generally attend the meetings of the company, of which you are a member, previous to the parade of the 30th September, 1805 ?

Answer. I did.

Question. Same to same. Did Captain Joseph Loring, jun. attend any meeting of the company when you was present, previous to the parade of 30th September, 1805 ?

Answer. He did.

Question. Same to same. Did you at any meeting of the company, or other time, when Captain Joseph Loring, jun. was present, hear him make any observation intimating a wish that the privates of his company might absent themselves on the 30th of September, 1805, the day of parade ?

Answer. I did not.

Question. Same to same. Did you ever hear any of Captain Loring's company say any thing respecting their wish or intention not to come out on 30th September last, in the prescnce and hearing of Captain Loring ?

Answer. I heard some members say they should not come out, at a mecting of the company at the South Gun house ; but I bclieve it was not in the hearing of Captain Loring, he being at another part of the Hall ; and they gave as their reason, that they were so engaged in business, they preferred paying their fincs.

Question. Same to same. Did not the company, or a part of it, meet and vote not to come out ?

Answer. Not to my knowledge.

Question. Same to same. Have they met since the order of the 9th September without your being present ?

Answer. Not to my knowledge.

Question. Same to same. Did you not hear it said or determined that the fines of those who should not attend on the 30th September should be appropriated to pay for a dinner, and was Captain Loring present ?

Answer. I did not.

Question. Same to same. Have you collectcd fines from those who did not attend on the 30th September last ?

Answer. I have collected fines from forty-one.

Question. Same to same. When did you begin to collect them ?

Answer. In about eight days after the parade.

Question. Same to same. Was the fine from each and every individual alike, and the same the law exacts ?

Answer. It was.

Question, by Defendant to same. Have you accounted with me for those fines, or have you paid them to any one by my order ?

Answer. I have not. They are still in my possession.

Question, by same to same. Has not the dinner for the Anniversary of the company been paid for, by an assessment for that purpose ?

Answer. An assessment has been laid for that purpose ; I prcsume it has been paid for ; it is the Treasurer's businces to settle those bills.

Question, by the Court. When was that assessment madc ?

Answer. On the 9th of October an assessment was laid for two dollars each.

Question, by Judge Advocate. What was the amount per head for said dinner ?

Answer. I do not know.

Question, by same to same. By what calculation of expenses did you make out the bill or assessment on each member ?

Answer. We had no bill ; two dollars was deemed sufficient.

Question, by Defendant to same. Did the Company vote to dispose of thirty tickets to the members for their friends ?

Answer. Yes, Sir.

Question, by Judge Advocate to same. Did they dispose of that number ?

Answer. I do not know.

Andrew Green was then sworn, interrogated, and answered as follows :

Question, by Judge Advocate. In what capacity do you serve in the Militia ?

Answer. As Sergeant to Captain Loring's Company.

Question. Same to same. Did you at any meeting of the Company when Captain Loring was present hear him make any observation intimating a wish that his Company might absent themselves on 30th September last ?

Answer. No, Sir, never.

Question. Same to same. Did you ever hear any one or more of Captain Loring's Company say any thing respecting their wish or intention not to come out on the 30th September last in the presence and hearing of Captain Loring ?

Answer. No, Sir.

Question. Same to same. Did not the Company or a part of it vote not to come out ?

Answer. Not to my knowledge.

Luther Lapham was then sworn, interrogated, and anwered as follows :

Question, by Judge Advocate. Did you at any meeting of the Company, or other time, when Captain Loring was present, hear him make any observation intimating a wish that the privates of his company might absent themselves on the 30th of September, 1805, the day of parade ?

Answer. I did not.

Question. Same to same. Did you ever hear any one or more of Capt Loring's company say any thing respecting their wish or intention not to come out on 30th September last in the presence and hearing of Capt. Loring ?

Answer. I did not.

Question. Same to same. Was you at the meeting at the South Gun House, and did you hear any of the company say they should not come out, but would pay their fines ?

Answer. I did not Sir, but was there.

Question. Same to same. Had Captain Loring's Company any meetings respecting turning out on the 30th September last ?

Answer. Not to my knowledge.

Question. Same to same. Have you ever heard Captain Loring say any thing respecting his company not turning out on 30th September last ?

Answer. No.

Question. Same to same. Did you ever hear Captain Loring say any thing previous to the 30th of September respecting his intention of protesting against the order of the 9th of September ?

Answer. I don't recollect that I did.

Question. Same to same. Did you ever hear Captain Loring reprimand his Company for their not attending their duty on the 30th Sept. last agreeably to orders ?

Answer. I never heard him reprimand the Company.

Question. Same to same. Has not Captain Loring, since the 30th of September last, dined with his company at Charlestown ?

Answer. He has.

Question, by Defendant to same. Have I commanded the company since 30th of Sept. last ?

Answer. No, Sir.

Question. Same to same. Did I not dine with the company as a private citizen ?

Answer. Yes, Sir.

Question, by Judge Advocate. Was it by invitation Capt. Loring dined with the company ?

Answer. I have no doubt of it.

Question, by Defendant to same. Did I not come late to the place where the company dined ? and did not the company leave it before I did ?

Answer. Yes, Sir.

Question. Did Captain Loring come in uniform ?

Answer. No, Sir.

Isaac Rhoades again interrogated.

Question, by Judge Advocate. Has not Capt. Loring issued an order for parade of his company since the 30th of Sept. last ?

Answer. Yes, Sir.

Question. Same to same. Did he in that order, reprimand his men for prior misconduct or neglect of duty ?

Answer. Not in the order, but previous to giving the order at Mrs. Marean's Hall, at a company meeting for business. I think the 8th of October in the evening.

Question. Same to same. How did Captain Loring reprimand them?

Answer. He stated to them the situation he was placed in, in consequence of their not coming out; that he had done his duty, and if they had neglected to do theirs, they must take the consequences. He had ordered the Clerk to collect the fines, and if not paid, he should put them in execution.

Question. Same to same. What was the date of the order, which Capt. Loring issued since 30th Sept. last?

Answer. He ordered the Clerk to fill up notifications the same evening he gave orders for the turning out for the anniversary, which was the 7th, 8th, or 9th of October last.

At fifteen minutes past 3 o'clock, P. M. the Court adjourned, to meet at this place on the morrow, at 10 o'clock, A. M.

Representatives Chamber, Boston, Nov. 21, 1805.

The Court met agreeably to adjournment, and on being called, all answered in their places. Captain Joseph Loring, jun. on being called, answered in his proper person. The Court was opened in due form by the Marshal.

Samuel S. Green was then sworn, interrogated, and answered as follows:

Question, by Judge Advocate. In what capacity do you serve in the Militia?

Answer. As a private and Treasurer in Capt Loring's Company.

Question. Same to same. Did you at any meeting of Capt. Loring's Company, or at any other time, hear Capt. Loring make any observation, intimating or expressing a wish that the privates of his Company should absent themselves from parade on the 30th of Sept. last?

Answer. I did not.

Question. Same to same. Do you know whether Capt. Loring was informed by any person, that his men did not intend to come out on the 30th of Sept. last?

Answer. I do not.

Question. Same to same. Did you ever hear any of Capt. Loring's Company say any thing respecting their wish, intention or determination not to come out on the 30th of September last?

Capt. Loring objected to the question being asked in the words and figures following:

Capt. Loring objects against calling any of his men to prove against him a mutiny, in which themselves are considered as

involved, because this man must be considered as a partaker in his guilt, and no man ought to be called on to accuse, or in any manner implicate himself in any criminal offence ; in this objection he conceives himself to be supported by the 12th article of the Bill of Rights in our State Constitution.

The Judge Advocate in reply observed, that it was very true no witness could be introduced to give testimony against himself, whereby he would be criminated and subjected to punishment ; but that the privates of Captain Loring's Company were called not to give evidence against themselves individually, but against Captain Loring, and that there was to his (the Judge Advocate's) knowledge, no Militia Law of this Commonwealth by which *privates* were liable to punishment, even on a voluntary confession, for mutiny, unless when in actual service ; the law only subjected them to a fine for absence, which has already been incurred by their non-appearance on parade, and which was a subject for the Clerk of the Company to prove elsewhere. A Court Martial had no cognizance over the privates, nor could they be tried by any Court Martial whatever, under the existing laws of the Commonwealth.

The President ordered the Court to be cleared of spectators, which was done ; and the Court then decided, that the privates in Captain Loring's Company should be admitted to prove any mutiny in the Company, but that no individual was bound to accuse himself.

The doors were then opened, and Captain Loring entered.

The same question by Judge Advocate to same witness, to wit : Did you ever hear any of Captain Loring's Company say any thing respecting their wish, intention, or determination not to come out on the 30th September last ?

Answer. I have heard some of them mention that they could not come out on account of their business.

Question, by Judge Advocate. Did you ever hear any of them say they would not come out because the Company had not their proper rank ?

Answer. I do not recollect any such thing.

Question, by Judge Advocate. Do you know whether it was determined that the fines which should be incurred by the absence of any of the Company should be appropriated towards an entertainment ?

Answer. I do not.

Question, by Judge Advocate to same. Did you ever hear Captain Loring say any thing respecting his Company's not coming out on the 30th September last ?

Answer. I do not recollect of ever hearing Captain Loring say any thing.

Question, by Judge Advocate to same. Do you know whether Capt. Loring was informed by any person, that his men did not mean to come out on the 30th September last?

Answer. I do not.

Question, by Judge Advocate to same. Did you ever hear Captain Loring reprimand his Company for not doing duty on the 30th September last?

Answer. I recollect hearing him say he was placed in an awkward situation by his Company not appearing; that he had done his duty, and that they must abide by the consequences of their not having done theirs.

Question, by Judge Advocate. Where did Captain Loring say this?

Answer. I think at Mrs. Marean's.

Question. Judge Advocate. When?

Answer. I can't tell exactly the time, it was after the 30th September.

Question, by Judge Advocate. Did Captain Loring's Company, or any of the members, sign any paper agreeing not to come out on the 30th September, or in any wise determine not to do so?

Answer. I believe some of them, or a part of them, agreed not to come out, but I don't recollect the particulars, how they agreed to it.

Question, by Judge Advocate. Do you know whether Captain Loring in any manner had any information of that agreement?

Answer. I do not.

Question, by Judge Advocate. Did you receive any orders, or request, not to appear on parade on the 30th September?

Answer. I did not.

Question, by Judge Advocate. Who engaged the music for the 30th September?

Answer. I did.

Question, by Judge Advocate. Why were not two Drummers and two Fifers engaged as usual?

Answer. Because I could not get them.

Question, by Judge Advocate. Had the Company any meetings respecting turning out on the 30th September last, either before or since that day?

Answer. I think some of them had, before.

Question, by Judge Advocate. Where did they meet?

Answer. I believe at the Green Dragon.

Question, by Judge Advocate. What did they then determine to do?

Answer. Some of them proposed not coming out, and some of them proposed drinking punch.

Question, by Judge Advocate. Was Captain Loring present at that meeting?

Answer. He was not.

Question, by the same. Was he informed of the proposals you mentioned, which then took place?

Answer. Not that I know of.

Question, by the same. What number was present?

Answer. I cannot tell.

Question, by the same. Was it a general meeting of the Company?

Answer. It was not by any order, but a social meeting of some members.

Question, by Defendant. Did you dispose of thirty Tickets to the members of the Company for their friends, and did you receive the cash for them, for the use of the Company, in addition to the proceeds of the assessments made on the members of the Company?

Answer. I did not. I disposed of eighteen Tickets, and received the pay for them.

Question, by Defendant. Was there not an additional assessment of two dollars laid by the recommendation of Lieut. Davis, to make up the deficiency of the first assessment of two dollars to defray the expenses of the anniversary dinner on the 17th October?

Answer. It was mentioned that there was money enough to pay for dinner and liquor, but not for music, and it was necessary there should be another assessment of two dollars to pay for music and old debts.

Question, by Defendant. When you told me you could not procure the customary music, did I not observe to you, the law required only one drum and fife, and if we could not get more it would answer?

Answer. You did.

Question, by Defendant. Was not the music in this town and in the neighbouring towns in very great demand on the 30th September, so that it was very difficult for the various Companies in the Brigade to have a drum and fife apiece?

Answer. I believe it was; I believe it was difficult, and could procure no more.

Question, by Judge Advocate. Have you any papers in your possession or keeping of the doings of the Company on the evening you mentioned they met at the Green Dragon?

Answer. I have not.

Question, by Judge Advocate. Had you not some time ago?

Answer. I never had.

Question, by Judge Advocate. How are the fines of your Company appropriated ?

Answer. All that I have received go to pay the debts of the Company, as far as they will go.

Question, by Judge Advocate to same. Were the fines of the Company appropriated to the defrayment of expenses for dinner, or other entertainments ?

Answer. They were not.

Question, by Defendant. Were not the fines generally used for candles and paying for men who opened the hall for the exercise of the Company ?

Answer. I can't answer for that ; I don't know ; they were generally appropriated for that ; whether they were enough or not I can't answer.

Question, by Judge Advocate to General Winslow. Did Captain Loring, or any one by his order, make known to you the situation of his Company, on the morning of the 30th September, previous to his coming on parade with four Sergeants, the Lieutenant and two Musicians ?

Answer. He did not, Sir.

Question, by Judge Advocate to Captain John Brazer. Did Captain Loring, or any one by his order, make known to you the situation of his Company on the morning of the 30th September last, previous to his coming on parade with four Sergeants, the Lieutenant and two Musicians ?

Answer. He did not, previous to his coming on.

Question, to General Winslow by Defendant. Was I not under the immediate command of Captain John Brazer, Senior Officer of the Sub Legion Light Infantry on the morning of the 30th September, 1805 ?

Answer. I take it he was till I came on to the field ; while Colonel Badger was on the field, I take it all the troops were under his command till I arrived there.

Question, to Captain Brazer by Defendant. Was I not ordered by you to parade before the New State House on the 30th September, at 9 o'clock in the morning, and is this the order ? (which was read to the Court in the words and figures following.)

BRIGADE ORDERS.

For 30th September, 1805.

Sir,

Colonel Badger will order one Gun from the Artillery at 10 o'clock, at which time the line will be formed immediately ; the several Officers will take care to preserve a proper distance between their commands. On signal of two Guns from the Artillery the whole Brigade will wheel to the right by Compa-

nies for Inspection, and have their Rolls ready for delivery. Colonel Badger has leave to dispense with the Chelsea Company's appearance on that day. After the Review has taken place, the Troops will be dismissed ; no man, neither Officer nor Soldier, will be allowed to be at a greater distance from the Common, than within hearing the long roll. At a signal of one Gun from the Artillery, every man, both Officers and Soldiers, will take their places in the line. Captain Davis' Company of Light Infantry, one Company of Artillery with their Pieces, the third Sub Legion of Infantry under Major Stodder, with Captain Dean's Company of Infantry, from the second Sub Legion, will march under the command of Lieut. Col. Badger for the heights of South Boston ; the remainder of the Troops will tarry on the ground, and proceed as ordered, as it is intended to represent an engagement. The Officers commanding Platoons will be very attentive to their men, and not allow them to hurry in any of their movements, and be very particular in obeying the orders they may receive from their Superior Officers, as every thing depends on attention. The Brigadier flatters himself that such perfect attention and good order will be observed, both by Officers and Men, that they will receive his most hearty thanks, as well as the applause of those who may be spectators, among whom there will be probably many Judges of Military Discipline.

Per Order Brig. General,

(Signed) CHARLES CLEMENT, B. M.

Capt. JOHN BRAZER, *Sen. Officer Sub Legion Light Infantry.*

SUB LEGIONARY ORDERS.

For 30th September, 1805.

Capt. Loring will observe the preceding Brigade Orders ; and it is further ordered, that each Commanding Officer in the Sub Legion have his Company on the Common in front of the State House at 9 o'clock, on the 30th inst. as the Sub Legion of Light Infantry will be formed at that time. Ensign Munroe is appointed Adjutant for that day, and will be obeyed accordingly. JOHN BRAZER,

Sen. Officer Sub. Legion Light Infantry.

Answer. You was. It is the order.

Question, to General Winslow by Defendant. Was not Capt. Brazer the Officer *immediately* over me, to whom, and through whom all communications from me ought to be made ?

Answer. No doubt of it.

Question, to Captain Brazer by Defendant. Did I not make known to you, as my Commanding Officer, the situation of my Company on the 30th September, immediately on my coming into the parade?

Answer. You did.

Question, by President of the Court to Capt. John Brazer, Did Capt. Loring form with the Sub Legion?

Answer. He did not. The Sub Legion was not formed before the line was formed.

Question, by Defendant to Capt. Brazer. Did I not go into the place you ordered me?

Answer. You did.

Court adjourned to ten o'clock to-morrow.

Representatives Chamber, Friday, Nov. 22, 1805.

The Court met agreeably to adjournment, and the Members on being called all answered in their places. Capt. Loring, on being called, appeared in his proper person. The Court was opened in due form by the Marshal.

William Howe sworn and interrogated.

Question, by Judge Advocate. Had you any conversation with Samuel S. Green previous to the parade of 30th September last, respecting the intention of Capt. Joseph Loring's Company not to come out on that day?

Capt. Loring objected to the question being asked in the words following: The Government must not impeach their own Witnesses. If any person has a right to impeach the Witness of Government, it is myself.

The Court was cleared, and the Court decided, that testimony to impeach the credibility of Witnesses may be introduced, and that Capt. Loring's objection be overruled.

The Court was re-opened, and Capt. Loring appeared. The last foregoing question was therefore asked, and the Witness answers:—I can't say it was previous to the 30th of September, but I had some conversation with Samuel S. Green at his shop. I said to him, You had a row at the Green Dragon, had you not? He said some of them met, and agreed not to come out, unless they had their rank; and said if Capt. Loring would *resign, or was broke*, they would choose old Eben Pratt, of Chelsea, and he was the oldest Captain in the line, and according to the idea, that Capt. Davis had taken

rank of Capt. Loring, he would take the right on Boston Common. I mentioned to him, that if Capt. Loring knew of their meeting at Green Dragon Tavern, whether it would not break him; he said that Capt. Loring did not know of it two or three times, and clapp'd his hand to his pocket, and said, I could shew by a minute I have in my pocket, that Capt. Loring did not know of it. We after that had some conversation, and he took the Militia Law from the shelf, and shewed me a Section respecting taking rank from date of Commissions, and said it was singular that Capt. Davis' Commission and Capt. Messenger's should be dated on the same day, and Capt. Loring's a year or two years before, and yet Davis take rank of him. I told him Messenger was an older Captain than Davis, and did not believe it.

He said the Company meant to come out on their Anniversary. He said he could shew me that they would not come out (unless they had their rank) in a Brigade Muster on 30th September last. I asked whether they would come out on their Anniversary. He said they would; and if they could not come out with their Captain, they would with their Lieutenant; and if they could not come out with him, they would with a Corporal. I said, I shall win my ticket, and then went off.

Question, by Defendant. Are you not a Member of Winslow Blues, commanded by Capt. Daniel Messenger?

Answer. Yes, Sir.

Question, by Defendant. When did Green say the meeting was at the Green Dragon?

Answer. He did not tell when it was; this conversation was not many days after the meeting at Green Dragon, to explain that I heard of it in carrying a Notification to Dr. Wakefield.

Question, by same to same. When was that Notification dated?

Answer. I don't know.

Capt. Abraham Butterfield sworn and interrogated.

Had you any conversation with Capt. Joseph Loring, jun. prior to the 30th September last, respecting the parade which was ordered for that day?

Answer. I had, Sir. In the course of our conversation, the sudden death of Major Hatch of Boston was mentioned; some observations on the character of the man, together with the circumstance of his being deprived of his Commission by Court Martial took place; immediately on which Capt. Loring observed, in a jocose manner, as I then thought, that I might have the opportunity of seeing him tried by a Court

Martial within six months. I made some light reply to it, observing, I hoped he would be broke, or something like that, and asked him what he had done, or meant to do, to subject himself to a trial by Court Martial. He replied, that in consequence of certain arrangements having been made respecting the date of his Commission and of Captain Davis', Capt. Davis would now take rank of him, whereas last year he took rank of Capt. Davis. He proceeded to observe, that if he could not be allowed the rank which he took the last season, he should *march his men off the field*. There was nothing further in particular, that I recollect. This was at Capt. Loring's house, on the 14th of September last, I believe.

Question, by Judge Advocate. When you told Captain Loring you hoped he would be broke, did you say it from any inclination or wish you had that he might be deprived of his Commission, or as a jocose reply to what you have said you at the time the conversation took place conceived a jocose observation of his ?

Answer. I made it as a jocose reply to what I then conceived his jocose observation. I would further observe, that our conversation was very unguarded ; we were disposed to pass a jovial hour.

Question, by Captain Loring to same. Did I not receive you at my house as an old acquaintance, and did I not treat you with the hospitality of a friend, and was not my conversation with you open, candid, and without restraint ?

Answer. Yes, Sir.

Question. Captain Loring to Butterfield. Did I not observe to you, that no Officer in my opinion was obliged to obey orders if contrary to the Constitution and Militia Law ?

Answer. I recollect his making such an observation.

John I. Rea sworn and interrogated.

Question, by Judge Advocate. Do you know any thing respecting any intention or determination of Captain Joseph Loring, jun.'s Company not to come out on the 30th September last ?

Answer. I do not.

Question, by Judge Advocate. Did you not have a conversation with Mr. Samuel Jenks on that subject ?

Answer. Not to my recollection.

Question, by Judge Advocate to same. Were not you a Member of Captain Loring's Company previous to 30th September last, and on that day ?

Answer. Yes, Sir.

Captain Loring, on the Judge Advocate asking the above question, in writing observed as follows : I wish the Court would

grant me a copy of that part of their records, wherein they have decided that the Government has a right to produce witnesses on its own side, and immediately produce other witnesses to invalidate their own testimony.

The Court said they would defer the consideration of this request.

Ensign Samuel Jenks sworn and interrogated.

Question, by Judge Advocate. Have you had any conversation with John I. Rea, the Witness last produced, respecting the intention or determination of Capt. Loring's Company not to come out on the 30th of last September?

Answer. I have, Sir. It was in consequence of a conversation I had with Ensign James Alexander. I conversed with Rea, at the house of Mr. Richard's Tavern, near the Market, on 17th September last. After mentioning what had transpired between Ensign Alexander and myself, which was this, whether I had heard the news that morning of the determination of the Washington Light Infantry Company, commanded by Captain Loring; I immediately replied I had not; asked him what it was; he said that they agreed one and all not to come out, excepting the Officers and Music. Furthermore, he said the privates were to pay their fines, and that was to be deferred to defray the expenses of the Anniversary Celebration, and that the Officers only were to come out with the Music. I mentioned this the same day in presence of Mr. Rea, Jonathan Willington, William Chandler and several others. Mr. Rea said he did not care, it was none of his doings, but a plan of their Officers. I then asked him whether it was first instigated by their Officers; he told me it was; I called the attention of the Company present, as I expected at a future day an investigation would take place, and feeling it my duty, made a written communication to General Winslow. Mr. Chandler said he had heard that the Company had taken a vote not to come out on the 30th of last September. Mr. Rea said nothing, but nodded his assent to it.

Question, by Defendant. At what time of day was this conversation with Rea?

Answer. About three o'clock in the afternoon.

William Chandler sworn and interrogated.

Question, by Judge Advocate. Was you present at the conversation testified to by Ensign Samuel Jenks?

Answer. I believe I was.

Question, by Judge Advocate. Did you hear the same conversation between him, the company, and John I. Rea?

Answer. I don't know that I heard the whole of it, but Mr. Rea and myself have had other conversation previous to that time on the same subject. Mr. Rea told me in my shop, that Captain Loring's Company, which he belongs to, had met at the Green Dragon Tavern, and agreed not to come out on the 30th September last. At the same time I believe Mr. Jeremiah Sprague was there, belonging to the same Company. I told them I guess'd they would come out; the Captain would not be so unwise as not to fetch his Company out on that day. Rea said he did not suppose the Captain wished them to come out, to be degraded, as they should not have the same rank they had last year.

Question, by Defendant to Mr. Chandler. Did he say the Officers were with the Company at the Green Dragon Tavern, at the meeting referred to?

Answer. He said they were not. I asked whether the Officers knew whether they were met there. He said they did not know whether they did or not.

Question, by Defendant. Did you hear Jenks say he would go any lengths to have me broke?

Answer. No, Sir.

Col. Thomas Badger sworn and interrogated.

Question, by Judge Advocate. Had you any conversation with Captain Loring, or any of his Company, respecting the intention of his Company not to turn out on 30th September last?

Answer. I had no conversation with Capt. Loring. I had with some of his Company. I believe Mr. Lincoln. It was something general of a conversation, and reported about considerably, that Capt. Loring's Company did not mean to come out. I heard of it and talked to Mr. Christopher Lincoln and others of the Company. I told them I had heard such a thing, and hoped they would think better of it.

Christopher Lincoln sworn and interrogated.

Question, by Judge Advocate. Do you know any thing relative to the intention or determination of Captain Joseph Loring, junr.'s Company not to come out on 30th Sept. last?

Answer. I know something relative to it. I heard several of the members say they would not come out. I know more, but won't tell it, unless I am asked particular questions.

The Court was cleared on the Witness Christopher Lincoln's answering as above, and determined that the Court will oblige the Witnesses to give evidence of all matters relative to the charges exhibited against Captain Loring, and connected

therewith ; but as the Court decided yesterday, no Witness is obliged to mention his own name, or criminate himself individually. The Court look upon the conduct of Christopher Lincoln as highly contemptuous to themselves and the Judge Advocate, by his refusing to give evidence, unless by answers to particular questions, and the Court will exercise their powers towards the punishment of any Witness who may hereafter be guilty of similar conduct before them.

The doors of the Court were then opened, and Captain Loring entered, when the foregoing determination was read.

The Witness then proceeded as follows :

I know, that part of Captain Loring's Company did meet at Green Dragon ; I don't recollect the evening ; there was considerable conversation concerning turning out ; the Company there agreed not to come out. I don't recollect any thing being said about the appropriation of fines. I don't know that Captain Loring had intimated to the Company that it would be agreeable they should not come out. Captain Loring was not, to my knowledge, informed of the determination of the Company. I don't wish to have my answer stand so as related to the words " particular questions" above.

Question, by Defendant to Christopher Lincoln. Was I at the meeting of the Green Dragon ?

Answer. You was not.

Question, by Defendant to Christopher Lincoln. Do you know of my conniving at, abetting, or procuring the men under my command, not to turn out, the 30th September, 1805 ?

Answer. I do not.

Question, by Judge Advocate. Was there more than one meeting at the Green Dragon, respecting the 30th Sept. last ?

Answer. I don't know of more than one.

Question, by Judge Advocate. Who warned that meeting ?

Answer. All the members ; one warned another ; I mean all that were there ; all the Company did not come.

Jeremiah Sprague sworn and interrogated.

Question, by Judge Advocate. Were you present at the meeting of members of Captain Loring's Company at Green Dragon Tavern respecting turning out on 30th September ?

Answer. I don't recollect any thing that took place there ; I can't recollect any thing that was said ; I didn't expect to be called in the case.

Question, by Defendant to Mr. Jeremiah Sprague. Did you drink the punch, or did you agree not to come out ?

The Judge Advocate objected to asking the Witness this question upon the very grounds which Captain Loring had yesterday urged, that it related solely to the Witness, and he could not be obliged to criminate himself, and also upon the decision of the Court. The Court determined that the question could not properly be put to the Witness.

Ezra Hawks sworn and interrogated.

Question, by Judge Advocate. Do you know any thing respecting Captain Loring's Company, or a part of them having met to determine on not coming out on 30th September last?

Answer. Some of them met at Green Dragon Hall, I can't recollect the time, it was before the 30th September last; I heard many of them saying they had determined not to come out on 30th September. I don't recollect any thing being said of any part of the Company intending to come out. Captain Loring was not, as I know of, informed of their determination.

Court adjourned to 1st Tuesday, 3d day of Dec. 11 o'clock.

Representatives Chamber, Tuesday, Dec. 3d, 1805.

The Court met agreeably to adjournment, and on being called, all answered in their places. Capt. Loring appeared in his proper person. The Court was then opened and the proceedings of the last day's sitting read by the Judge Advocate.

Question, by Defendant to Ensign Jenks. Did Brigade Maj. Clement and Capt. Messenger advise you to make inquiries respecting the mutiny in my Company, and to give information thereof to General Winslow?

Answer. They did not, it was from a conscious discharge of my duty.

At Captain Loring's request, the following letter is recorded, from Ensign Samuel Jenks to Gen. Winslow.

Boston, September 20th, 1805.

RESPECTED SIR,

Ever ready to discountenance disloyalty and insubordination, more especially in military matters, and being informed of the mutinous spirit prevalent in the Washington Light Infantry Company, (so called) commanded by Captain Loring, I think it my duty to commit it to writing, and give the earliest notice of the same to my Superiors, not doubting but that an investigation, at some future day, will take place, and that I may be called to evidence the same, if circumstances should make it necessary and my information be correct.

In the first place, that on or about the 17th instant, being then in the cabinet maker's shop of Ensign James Alexander, he asked me, if I had heard the news about the determination of the Washington Light Infantry Company. I told him I had not, and inquired what it was. He said "they had agreed, one and all, not to come out on the 30th instant, excepting the Officers and Music, and that the privates were to pay their fines and reserve them to defray their anniversary expenses, as they did not like the new arrangement of rank, given to their Captain." In the afternoon following, happening to fall in company with several persons, I related the above, and was making some observations thereon, till interrupted by a reply from Benjamin Hallowell of the Fusiliers, when some words then ensued, in presence of Mr. Jonathan Willington, Mr. William Chandler, Mr. John Rea and others; I answered that if such conduct should be transacted by the Company, it would in my opinion have a tendency to dissolve the Company, and break the Officers; which drew the following further information and confirmation of the above from Mr. John Rea, (a member of the Company aforesaid) that he, the said Rea, said he did not care, it was none of his doings, but it was a plan of their Officers. I asked him if it was first instigated by their Officers. He said it was.

Mr. Chandler then said, he had heard that the Company had taken a vote so to do; which was assented to by Mr. Rea.

I then called the attention of the Gentlemen present, to bear in mind what had passed, as I expected if Captain Loring and his Company should put in practice what they had threatened, that the present conversation would not be the last we should hear of it, to which they consented. Accordingly last evening, after the meeting of the Mechanic Association had dissolved, I communicated the above to Maj. Clement, Capt. Messenger and Capt. Phillips, at the same time informing them, it was my intention to commit it to writing and communicate it to your Honor, as I thought it my duty; they agreeing with me in opinion, and wishing I would. I hope your Honor will have the goodness to excuse my troubling you with so circumstantial and lengthy a detail, which I cannot but hope, for the honour of the gentlemen concerned, may never be wanted, and that it may appear that the Company mentioned are not in that state of Insurrection and Mutiny, which the present report would lead us to believe, but that they would reconsider their rashness, and turn out, and do themselves as much honour by due subordination to their Superiors, as they have acquired by their former soldierly discipline and appearance.

I have the honour to be, Sir, with esteem, your Honor's most obedient and very humble Servant,

SAMUEL JENKS.

Hon. John Winslow, Esq. Brigadier Gen. of the first Division of the Commonwealth of Massachusetts.

Captain Daniel Scott sworn and interrogated, and answered as follows :

Question, by Judge Advocate. Had you any conversation with Capt. Loring prior to the parade of 30th September last, respecting that parade, or any thing appertaining to or connected with it ?

Answer. Yes. But I wish for time to recollect the conversation ; I could not under a week or ten days, to give the whole.

Question. Same to same. Did you hear Capt. Loring say any thing respecting the intention of his Company not to come out on the 30th September last ?

Answer. Not before the parade, but since he has repeatedly told me that he never knew any determination of theirs not to come out, but that he heard they were not coming out on Saturday evening, or the day before the Parade, by one of his Wife's Brothers or Sisters, as I understood it, having mentioned it at his house. Captain Loring begged leave to correct the Witness, by saying it was his Wife's Brother ; the Witness therefore adds, " brother or sister" to his answer.

Question, by Defendant to same. Are you not my confidential friend, and is it not known that I am in the habit of conversing with you in the most free, unreserved and confidential manner ?

Answer. Captain Loring can best answer the first part of the question ; to the latter part, I say, Yes, I presume so.

Question, by Defendant to same. Did you ever in all my intercourse with you, hear me utter any insubordinate or mutinous sentiments towards General Winslow, or any body in authority over me ?

Answer. No, Sir.

Lewis Glover sworn, interrogated and answered as follows :

Question, by Judge Advocate. Had you any conversation with Captain Loring prior to the parade of 30th September last, respecting that parade, or any thing appertaining to, or connected with it ?

Answer. I don't recollect any particular conversation before, but I have since.

Question, by same to same. What conversation have you had since, with Capt. Loring ?

Answer. I asked if he was knowing to his men not coming out; he observed he was at Portsmouth at the time their meeting took place, and was unwell there.

Question, by Defendant to same. Did you see me within ten days of 30th Sept. 1805, the day of parade?

Answer. I don't recollect.

Question, by Judge Advocate to same. Have you not had a conversation with James Elliot on this subject relative to Capt. Loring?

Answer. I believe I have since the parade, nothing more than my opinion.

Question, by Defendant. Who is James Elliot?

Answer. A man, born of a woman, I presume.

The Judge Advocate then informed the Court that there were many more Witnesses on behalf of the Government, but being all to the same points already inquired of, he should not introduce them, but, if during the trial any new testimony should be presented, he should offer it to the Court.

The Judge Advocate then called upon Capt. Loring to introduce any testimony he might have in his defence.

Josiah Bacon was introduced and interrogated, and answered as follows:

Question, by Defendant. Did I not give you orders, as Clerk of my Company, to warn my Company to appear on parade for Review and Inspection on the 30th Sept. 1805?

Answer. Yes, Sir.

Question. Same to same. Did you, or did you not obey those orders?

Answer. I did.

Question. Same to same. What was the form of the Notification, by which my Company was warned?

Answer. This is; which was handed to the Judge Advocate, and read in the words and figures following:

COMPANY ORDERS.

Boston, September 23, 1805.

Mr.

SIR—You, being a Member of the Company, commanded by Capt. Joseph Loring, junior, are hereby ordered to meet on Monday, the 30th inst. agreeable to Brigade Orders of the 9th and 16th inst. at the *Green Dragon* Hall, at

8 o'clock, A. M. with uniform, arms and accoutrements complete, including Knapsacks, Canteens, and 16 sporting Cartridges.

The Roll will be called at 9 o'clock, A. M. precisely.

By Order of the commanding Officer,

Clerk.

Question. Same to same. What was the form of my orders to you predicated on the 9th September?

Answer. This is; which was read in the words and figures following:

COMPANY ORDERS.

Boston, September 18, 1805.

Agreeably to Brigade Orders and Sub Legionary Orders of September 9th, 1805, you will order the Officers and Members of the Company, which I command, to parade for Review and Inspection, on Monday, the 30th September, 1805, at 8 o'clock. *Roll* to be called at nine o'clock, at Green Dragon Hall. It is expected both Officers and Soldiers will be equipped according to law.

Yours, JOSEPH LORING, jun.
Captain Sub Legionary Brigade.

Mr. Josiah Bacon, jun. Clerk of Washington Infantry, so called.

N. B. Knapsacks and Canteens must be brought, with Cartridges and Balls complete.

Also, request a meeting on Friday eve, at the Gun House, say 27th Sept. 1805, at 7 o'clock, with arms.

Received on the 18th inst.

Question. Same to same. Did you not send me your Notification to correct, and did I not as usual alter it from Ball Cartridges to 16 Sporting Cartridges?

Answer. You did, and I received it corrected.

Question. Same to same. Did you know me directly or indirectly say any thing to connive at, abet and procure you or the men under my command to mutiny against the Brigade Orders of the 9th and 16th September, for the Review and Inspection of 30th September, so as to neglect and refuse to appear on said parade, to discharge your and their duty as Soldiers on said day, agreeable to the spirit and intent of said orders?

Answer. I did not.

Question. Same to same. Did I not, in preparing for this parade, show at the meeting of the 28th September, as much anxiety as usual about the parade, and did I not appear much dissatisfied to find so few men as 24 with arms that evening ?

Answer. You did.

Question. Same to same. Did Brigadier General Winslow, or Brigade Maj. Clement inspect me or my Officers on the 30th September, 1805, agreeably to order of 9th and 16th September, or the Inspection Roll which you signed ?

Answer. Not to my knowledge.

Question, by Judge Advocate to same. When had you the first information of the determination of the Company not to parade on 30th September last ?

Answer. I don't know ; I don't know the Company ever made such a determination.

Question. Same to same. When you went on parade at Green Dragon Hall, 30th September last, did you expect the soldiers would be present for duty that day ?

Answer. I had no reason to expect they would not be there, meaning, I expected they would be there.

The Court adjourned till to-morrow.

Representatives Chamber, Wednesday, Dec. 4, 1805.

The Court met agreeably to adjournment, and on being called, all answered in their places. Captain Loring on being called, appeared in his proper person. The Court was opened and the proceedings of yesterday read.

Mr. Lewis Glover, a Witness interrogated yesterday, came into Court and stated, that he misconceived the question of " who is James Elliot ?" [asked by the Def.] and now additionally answers thereto, that he is a Gentleman of his acquaintance, who belongs to the Corps he does.

Question, by Captain Loring to General Winslow. What are the statements or facts in that paper which are untrue, and unofficer-like for me to state ?

The Judge Advocate observed to the Court, that in his opinion, that was a question which ought not to be asked a Witness, because the Complaint contained the charges which Capt. Loring alluded to, and the Court were to decide what the statements of facts were by the regular course of the testimony and the paper itself.

The Court determined that the Defendant might ask the question.

Answer. The papers are before the Court, and they will be the judges.

Josiah Bacon again interrogated and answered as follows:

Question, by Defendant. Did I not inform you, by a communication delivered by Mr. Thompson, after giving you the Warrant for warning the men of my Company conformable to the Brigade Order of the 9th September, that the Cartridges with Balls were dispensed with?

Answer. You did.

Question, by same to same. Did you see me in Boston between the 18th and 28th of last September?

Answer. I did not.

Ezra Davis sworn, interrogated and answered as follows:

Question, by Defendant. In what capacity do you serve in the Militia?

Answer. As Lieutenant in the Washington Infantry, commanded by Captain Joseph Loring.

Question, by Defendant. What took place on Saturday evening, the 28th September, at the South End Gun House?

Answer. On that evening I arrived at the South End Gun House at the time set by the Notification for the Company to meet; had the Company formed, and was going through the manual exercise, when Capt. Loring came in. After the men had gone through the manual exercise, I delivered the Company up to him. He then went through the exercise, after which he let the Company rest, during which time I inquired respecting his health, &c.: he then informed me I must act as platoon Officer, as he should go through the manœuvres, which he would probably have to go through on the 30th. After exercising the men about an hour, the Gun House was cleared of spectators, telling them the exercise of the evening was over. He then requested the men to be very punctual in appearance on parade, on Monday, 30th September, as he should be obliged to be on the Common by half past nine, by an order which he had received from Capt. Brazer; and requested me to be at the Green Dragon before nine, if possible, or by nine, in order to have the Company formed by nine o'clock, as he lived at Chelsea. I don't recollect any other particulars respecting Company business.

Question, by Judge Advocate to same. Had you not heard, prior to the 28th September last, that your men were generally not coming out on the 30th?

Answer. I never heard it, either directly or indirectly, from any member of the Company; some of General Winslow's friends, the week previous to the 30th September, asked me if the Washington Infantry were coming out. I answer-

ed them I presumed so, as I had heard nothing to the contrary from any of the members. I heard it mentioned in common conversation with some of General Winslow's friends.

Question. Same to same. When you went on parade at Green Dragon Hall, on the 30th September last, did you expect the soldiers would be present for duty that day?

Answer. I had no reason to doubt. It was their duty to obey their orders, as I did mine.

William Munroe sworn, interrogated, and answered as follows:

Question. In what capacity do you serve in the Militia?

Answer. I have an Infantry Commission, and act as Ensign to the Washington Light Infantry (so called).

Question, by Defendant. Did I not treat you as Adjutant on the 30th September, in all my communications with you as a Gentleman and Soldier?

Answer. Yes, Sir.

Question. Same to same. Was you not at the meeting of my Company as Ensign thereof on Saturday evening the 28th September, 1805?

Answer. I was. When I went into the Hall they were marching in Platoons, and Captain Loring told them that was the way they would march in the salute; he told them he expected they would be equipped, and be on the field.

The Judge Advocate observed, that for his own reputation, and lest, by the face of the Record, it should appear that he had sanctioned the whole testimony of Lieutenant Ezra Davis and Ensign Munroe, he would here state, that he had informed the Court, previous to their introduction, that Captain Loring could not legally introduce Witnesses to prove any thing which he himself had said in his own favour; that the confession of a man against himself, voluntarily made, was the highest evidence against him; and if in the course of examination of a Witness to prove a confession of guilt, a conversation should be mentioned by the Witness between a Defendant and himself, there the Court ought to receive the whole, or no part of it, that by a proper connexion it might be justly interpreted and construed; but this is not the case where a Defendant himself brings forward Witnesses to relate his own conversations in his own favour, and no Court ought to admit such testimony.

Question. Same to same. Do you know of my conniving at, abetting or procuring my men to mutiny against the or-

ders of the 9th and 16th September, for review and inspection the 30th September ?

Answer. I do not.

Question, by Judge Advocate. Did you expect to see, on 30th September last, Captain Loring's Company on the Common, as a Company ?

Answer. I did expect to see them, as I knew they had their orders. I was informed they were not coming out, but their orders confirmed me in my opinion that they would.

Question. Same to same. How long prior to the 30th did you hear the Company did not mean to come out ?

Answer. Some time in the latter part of the week before, it might be as early as Thursday.

Question. Same to same. Did you inform Capt. Loring of their intention ?

Answer. Yes Sir. the Saturday evening, going home, I told him I had been told so, and he observed he did not believe any thing of it.

Sylvester Thompson sworn, interrogated, and answered as follows :

Question, by Defendant. Do you know that I left Chelsea, the place of my residence, to go to Portsmouth, on Saturday, 21st September last ?

Answer. I do, Sir.

Question. Same to same. How long was I gone, and on what day of the week and month did I return ?

Answer. You returned on Friday the 27th in the afternoon.

Question. Same to same. Did you not remain, till 11 o'clock on Saturday evening, in Charlestown, waiting for me ; and did I not go with you to Chelsea, and remain there till Monday morning, the day of Parade ?

Answer. Yes, Sir.

Andrew Dunlap sworn, interrogated and answered as follows ;

Question, by Defendant. Did you see me at Portsmouth on Wednesday the 25th September last, at Mr. William Neil's house ? and what was my situation ?

Answer. I went down to Mr. Neil's house on the evening of that day, and was informed that Mr. Loring was in the Compting-Room. I went to the Compting-Room, and found Mr. Loring sitting on a chair, apparently very much exhausted. I found from inquiries that Mr. Loring had been taken with a cramp in the stomach, and in about ten minutes after, he was taken with another. He appeared to be in great pain, and it took two or three persons to hold him down. In the course of two hours he had frequent returns of the spasms.

Dr. Pierpont was sent for, and recommended to Captain Loring not to move for a day or two.

William Jennings sworn, interrogated, and answered as follows :

Question, by Defendant. Are you a member of the South End Artillery, and do you not take charge of South End Gun House ?

Answer. I do, Sir.

Question. Same to same. Was you not at the Gun House, Saturday evening, the 28th September, when my Company met for exercise ?

Answer. I was, Sir. I opened the house, and the men met there as usual. Lieutenant Davis took the command, and went through the exercise. Then Captain Loring came. He gave up the command to Captain Loring, and he went through the exercise again ; he told them 'twas very necessary to pay all the attention they could, for they should have a great deal of duty to do on Monday ; then he dismissed them for a few minutes ; then the men were talking, as they commonly are ; *some of them were talking of not coming out ; not in hearing of the Officers*. I asked them why they were not coming out, and told them it was a pity ; they said they understood the Officers and Company were going to be degraded, and it would be a hard day's duty, and would rather pay their fines, as they were busy. *Captain Loring then heard them talking*, and ordered them to fall in, told them that they know'd their orders for Monday ; some of them wished to have them read again, and it was ; he told them then if there was any doubt in their minds about rank, it was not for them to decide it, and he expected to see every man in uniform for the duty of the day ; if there was any dispute, they were to come on the field as Soldiers, and have it decided there, or afterwards ; he told them he expected to see them all there ; if there was not five men, he would march on to the field at the time set.

Question, by Judge Advocate to same. What number of men were present at the Gun House, 28th September ?

Answer. About thirty.

Question, by Judge Advocate. Was Lieutenant Davis present all the time you were there ?

Answer. I won't pretend to say ; I believe he went out a few minutes, I an't certain.

Question. Same to same. Was Ensign Munroe present all the time ?

Answer. He came about 8 o'clock ; he was not there in the first of the evening.

Brigade Major Charles Clement again interrogated.

Question, by Defendant. Did you inspect my Company on 30th September last?

Answer. I did not.

The Judge Advocate then read the 30th and 36th Sections of the Militia Law of this Commonwealth, passed June 22d, 1793, as relative to the present case. Capt. Loring then handed the Judge Advocate a paper containing the words and figures following :

The Judge Advocate having been good enough to point out to me the Statute on which the Complaint against me is founded, I think proper to apprise the Court and Judge Advocate, that I shall have occasion to refer in the course of my defence to the 8th Section of the United States Law, passed 8th May, 1792, which says, "all Commissioned Officers shall take rank according to the date of their Commissions." Upon the 29th Section of Massachusetts Militia Law, passed 22d June, 1793, which also says, "that all Officers when on duty shall take rank according to the date of their Commissions."

Upon the 31st Section of the same Law, which says, that at any muster, the several Companies shall form in Regiment, according to the Rank of the Officers ; which was read to the Court.

The Court was then ordered to be adjourned to 11 o'clock to-morrow, A. M. before which, Captain Loring having observed he had no more Witnesses to introduce, he was directed to be ready with his Defence.

The Court was adjourned accordingly.

Representatives Chamber, Thursday, Dec. 5, 1805.

The Court met agreeably to adjournment, and on being called all answered in their places. The Court was then opened by the Marshal. Captain Loring appeared in his proper person and answered.

The whole proceedings of the Court to this day, from the commencement, respecting Captain Loring, were read. Capt. Loring then, by leave of the Court, read his Defence, which is as follows :

Mr. President, and *Gentlemen of this Honourable Court*,

The time that has been occupied in examining the multitude of Witnesses, who have been produced by Gen. Winslow, in order to support the prosecution, induces me to dispense with the examination of many Witnesses, whom I should have sum

monied, were it not for my belief that your patience, as well as my own, has already been put to a pretty severe trial.

It is now about two months since I was put under arrest; during which time I have laboured under the anxieties inseparable from my situation, and have been entirely interrupted in my attentions to any other business.

Upwards of twenty Witnesses have been interrogated to furnish evidence against me; and after all, what can there be collected from this mass of testimony, that can satisfy your minds beyond a reasonable doubt, that I am guilty of any particle of the charges exhibited against me?

I am charged by Gen. Winslow with disobeying his Brigade Order of the 9th September, ordering his Brigade to appear on Boston Common, on the 30th of September for Review and Inspection.

I am also charged with disobeying another of his Brigade Orders, issued on the 16th September, requiring the Soldiers of the Legionary Brigade to appear with sixteen Cartridges for sporting, and dispensing with the twenty-four Cartridges with Balls, with which the Law requires that every Soldier should be constantly provided; and without which he is not in a condition to pass a legal Inspection.

I am also charged with coming on to the parade without any of my Soldiers.

If I did come on, without any of my Soldiers, it is highly probable I came on without the requisite number of sporting Cartridges: but it by no means follows, nor has it I trust been satisfactorily proved to you, that I have disobeyed either his Order of the 9th, or his Order of the 16th of September.

On the contrary, it appears by the testimony of the Clerk of my Company, a young gentleman of unimpeachable truth and integrity, who has been produced as a Witness in support of the Prosecution, that he did, in conformity to my warrant and command to him, notify and warn the members of my Company to appear in Arms and Uniform complete at the Green Dragon, at 9 o'clock in the morning of the 30th September, with sixteen sporting Cartridges. Notifications to this effect, were given to every individual of my Company, as seasonably as the Law requires. My notifications were at first predicated solely on the Brigade Order of the 9th; they bore date of the 18th September; they were printed, and required my men to appear with Cartridges with Balls; but after they were printed and before they were distributed to my men, I received the Brigade Order of the 16th September, requiring the troops to appear with 16 sporting Cartridges instead of 24 Cartridges with Balls.

I immediately, on the receipt of the Brigade Order of the 16th September, altered my notifications in such a manner as to make them conform to the last received Order of the 16th September. I erased with my pen the printed words "*Cartridges with Balls*," and inserted as well as I could, "*sixteen sporting Cartridges*."

Notifications of this kind were delivered by my Clerk to all of my Company, and seasonably received by them.

I am conscious that I have done in this particular all that could reasonably be expected from me, or from any other Officer; and all I ever did or can do in similar circumstances. I issued my Orders in obedience to the two Brigade Orders, which have been so often mentioned, and I put them in train (as I thought) to be faithfully obeyed. Perhaps it is true, as the General says, I did not make use of all my influence as Commanding Officer over my men, in order to induce them to obey the Order I had thus issued. But, gentlemen, I know of no influence that is *necessary* or *becoming* for any Commanding Officer to use, in order to induce his men to obey his Orders: I have never been in the habit of using any influence, except what my positive Orders carry on the face of them. My Orders had always been punctually obeyed; and I had no reason to suspect that they would not be obeyed in this instance, as they had always been before. But whatever might have been my belief or suspicions on this head, it was utterly out of my power to have done better, or in any degree different, from what I have done: for I left Boston on Wednesday the 18th September, the day I issued my orders in the manner I have described.

I tarried at my house and with my family in Chelsea, from Wednesday the 18th till Saturday the 21st of September, employed about my own personal and commercial concerns. On Saturday the 21st September I left Chelsea, and set out on a journey to the eastward on business, which absolutely required my attention, and of a nature which could not admit of any further delay.

On this journey to the eastward I was employed from Saturday the 21st, till Friday afternoon, the 27th September; when I arrived, weary and in precarious health, at my house in Chelsea, where I continued till Saturday afternoon, the 28th September. I then came to Boston, and arrived here on Saturday evening, at 7 o'clock; attended with my Company at the Gun House at the bottom of the Common, for the purpose of instructing them in the duties, which they would probably be called on to perform on the Monday following. I spent about three hours with them, endeavouring to put them in a condition to make their best appearance on the day of parade.

Every thing I said or did was in public before all those of the Company who were present, and the numerous spectators that thronged the Hall during the time I was with them.

I left Boston that evening, and went to Chelsea, where I remained till Monday morning, the much famed 30th September; and during the three hours I spent in Boston, I held no secret converse with any individual on earth; I neither said, or did any thing, but in the presence of all my Company, and of other disinterested witnesses, who did not belong to it.

Thus, Gentlemen, you perceive that for twelve days previous to the parade, viz. from the 18th to the 30th September, I was not more than three hours in Boston, and that during those three hours, all my conduct was open and aboveboard; that I was on a journey a whole week during those twelve days absence from Boston, a part of which week I was at Portsmouth in New Hampshire, confined to my bed with sickness, and in no condition to use influence over my men to prevail on them to obey my orders; much less could I be plotting the subversion of harmony and good discipline in General Winslow's Legionary Brigade.

This, Gentlemen, is all I shall offer in vindication of myself against the charges for disobeying the General's two Brigade Orders aforesaid: and I leave it with you to find me innocent or guilty, according as the General's charges on these heads are supported or unsupported, or the statement I have thus far made shall appear to you to be true or false. With regard to my coming on to the parade in an unsoldierlike manner, and *without any of my soldiers*, as the General alleges I did, I will not waste time in endeavouring to refute a charge, which a thousand spectators know to be untrue; and which the prosecutor himself has invalidated by the abundance of oral and written testimony which he has offered in the course of my trial. He himself has declared, that I appeared on parade with *six* or *eight* of my men; which is as many as some other Captains did, who have not been arrested. The Court know, that I appeared with six men in complete uniform and discipline; and I could, if I pleased, call every field officer in the Brigade to testify to the soldierly deportment with which I marched to that parade.

With regard to my conduct on the 30th September, having been at Chelsea from Saturday evening until Monday morning, I arrived at the Green Dragon, the place where I had ordered my Company to assemble, not quite so early as I had assigned for my Company to meet. When I arrived I inquired with surprise, "*Where are the rest of my Company?*" The Lieutenant informed me that the roll had been called agreeably to the order, precisely at 9 o'clock; that himself,

four Sergeants, and two musicians, were all that had appeared, and that they were ready to obey my orders. I then ordered the drummer to beat the long roll up and down the place of my Company parade in front of the Green Dragon. After a while, finding no more of my Company make their appearance, I said I could not *make men*, and instantly marched in an orderly and soldierly manner at the head of those, who had obeyed my orders, on to the Common, the place of the general parade. I arrived there in sufficient season before the line was formed. I sent a billet to Captain Brazer, acting as Major, Commandant of the Sub Legion of Light Infantry, informing him of my unpleasant situation, and my readiness to obey his further orders in the best manner I could. He ordered me (through my Ensign, Mr. Munroe, who had been detached from my Company to act as Adjutant for the day) to stay where I was till further orders; and shortly after, on Capt. Messenger's coming into the Common, at the head of the Winslow Blues, Capt. Brazer ordered me to march into the line, and form with the rank of the third Company, which was below Captain Messenger and Captain Davis.

Believing my Commission, which bears date the 15th August, 1803, and which is the only Commission I ever qualified or acted under, to be of earlier date than that of Capt. Messenger or that of Capt. Davis, and knowing that I had outranked the latter gentleman a year before, I did not conceive I had my proper place in the line, although I took that which was assigned me, with all due submission and respect.

Thus, doubting the propriety of the order, which I thus submissively obeyed, I requested of my commanding officer that he would indulge me with a view of Commissions of those gentlemen, under whom he had placed me; at the same time I offered him mine, in order to its being compared with theirs; and then I obeyed his orders as punctiliously as he could wish, and marched into the line, when he ordered me, and where he ordered me.

Was it criminal? was it unsoldierlike to demand a view of Commissions? if so, why was it granted? Why does every Officer carry his Commission in his pocket, except to be used as occasion shall require? The Law says, every Officer with a Commission shall rank according to the date of his Commission; and how is he or any body else to know the date of his Commission, unless he has it ready to produce when called, and to combat the rivalship of those, who make claims to go above him? Why are the Officers required to take rank according to the date of their Commissons, unless there is to be some direct and instant mode of deciding by inspection and comparison of Commission, which is the oldest.

The act of Congress, which provides for the uniformity of the Militia throughout the United States, which was passed May 8, 1792, expressly says, in the eighth section of that act, "That all commissioned Officers shall take rank according to the date of their Commissions; and when two of the same grade bear an equal date, then their rank to be determined by lot."

The Militia Law of this State, passed June 22, 1793, is in exact conformity to the provision of the act of Congress which I have just read. Its requirements are in these words, (Sect. 30,) "At any Regimental Muster, the several Companies shall form in Regiments according to the rank of the Officers commanding them." And in a previous section it says, "that the rank of all Officers of a similar grade shall be settled according to the date of their respective Commissions."

Gentlemen, although my Commission bears date on the 15*th August*, 1803, the Commissions of Captains Messenger and Davis bear date *June* 20*th*, 1805, and although I had, in conformity with the *opinion* of General Winslow, formerly *outranked* Capt. Davis, and although the Law was expressly in my favour, yet I peaceably and respectfully obeyed all orders coming from my superior Officers; I went into the place assigned, and at the time assigned, after the view of Commissions. I went peaceably and respectfully, because I knew that an *Order* of *Council* had been issued; on which a General Order was formed, and sent down, authorizing Captains Messenger and Davis, with Commissions posterior to mine, to take a rank superior to me.

This, Gentlemen, is an arrangement, which I have ever considered as injurious to my rights and my rank as an Officer; and ever since it has taken place, I have never ceased to bear testimony against it. I have taken every legal and respectful step in my power to be restored to a rank which I once held with honour, and which I trust I have never forfeited by any unmilitary conduct or neglect of duty.

I have sent a memorial to the Governor and Council, stating my complaint, and I sincerely believe that matters are in a train to replace me in my rank; and until I knew the event of my application to Head Quarters, I considered it my duty to protest against any and all arrangements which degrade me from that rank which I have been accustomed to hold in the line, and to which I am entitled by the date of my Commission.

With these principles, and with these motives, I did, on the 30th of September, forward to my commanding Officer the protest which has been read to you, and which General Winslow seems to consider as a Protest against his Brigade Orders,

ordering the parade and ordering the sporting cartridges. But you, Gentlemen, are to decide whether or no the General has not mistaken its true intent and meaning. It speaks for itself; it is merely a protest against what I conceived my degradation. It was not offered with any view to subvert the good order and discipline of the General's Brigade. It was not offered until I had been ordered peremptorily and rudely to quit the Parade. It was not signed nor forwarded until after I had left the Line. It was not read by the General until after he had withdrawn from the Parade, although he said immediately on receiving it, and before he knew its contents, that *that Protest would be my destruction.* Like Jonah at the city of Nineveh, he has indiscreetly prophesied my destruction, and I really believe like Jonah he wishes me destroyed.

I rely with confidence upon the impartiality and the firmness of this Hon. Court, to save me from the powerful effects of his superior rank and influence against me.

I deny that there is any statement in that protest false or unofficer like for me to state. I have called on the General to point out the statements in that paper, which he alleges are false and unofficer like for me to state. He has not thought proper by his answers to my questions to give me an opportunity to evince my innocence; and I rely upon you, Gentlemen, to consider me innocent, until I am proved to be guilty.

The oath I take, when I accept my Commission, obliges me to execute the duties of my Commission, according to the Constitution and Laws. Indeed my Commission, on the very face of it, requires the same thing. I should have considered myself as culpably neglectful of my duty and my oath, had I done different from that which I have done. I declare I have acted from a conscientious endeavour to discharge my duty.

Perhaps all of you, Gentlemen, would in similar circumstances have acted different; perhaps you would have conducted better; but I trust you will not impute to me any criminality of intention, in an embarrassing situation, where every man, and even the best of men, is liable to err.

I believe it is unnecessary for me to say much on the last grand charge, containing the General's suspicions, that I was abetting and procuring my Company to mutiny against his two Brigade Orders.

I believe you are all men of candour, and that you cannot attach the smallest degree of credit to a charge so utterly destitute of proof. I declare, upon the honour of a soldier and a gentleman, that I was not, directly or indirectly, privy to the private determination of my Company, and cannot make myself accountable for any measures which they had taken during my absence from Boston, and absence from the State.

I believe the Court to consist of gentlemen of too much candour and liberality of sentiment to be biased by any vague rumours, that some men for their own private views and interest have been willing to circulate to my disadvantage. I presume you will judge merely according to the law and the evidence, and pass such sentence as your own honourable feelings shall dictate to be just.

I have thus, Mr. President and Gentlemen, committed to writing in a hasty manner, but as fully as the time allowed since yesterday's adjournment would permit, such a vindication of my conduct, as I trust will secure me an acquittal, *and an acquittal with honour*, from all the charges exhibited against me.

I believe every thing I have said is supported by the evidence which your records contain, and most of which has been drawn out on cross examination, even from the prosecutor, and the other witnesses who have been adduced in behalf of the government.

I do not rest my defence merely on the positive proof I myself have adduced in my own favour ; I rely chiefly and with the greatest confidence on the insufficiency of the evidence against me to support any article or particle of the General's complaint.

I could, if permitted, bring testimony to prove that General Winslow and his associates have long meditated my destruction and removal from command ; and that he said that protest *should* be my destruction, even before he had read it, or could possibly know what it contained. I could prove that this prosecution is set on foot with motives and designs very different from that of a wish to promote the harmony and good discipline of the brigade. But as the Court think it improper for me to go into General Winslow's motives and intentions, I have contented myself not to attempt direct proofs of a point which the Court deem immaterial ; and I leave it to be inferred from the whole manner and course of the testimony, which has been adduced against me. The sanctuary of friendship and the rites of hospitality have been violated ; my bosom friends have been converted into spies and informers. They have been reluctantly compelled to appear before this Court, and relate conversation which took place between them and myself in my own house, in the bosom of my own family, at my own table, during the most convivial and jocular hours I have ever passed in my life, and when their own hilarity and cheerfulness laid open the most hidden recesses of my heart to their free inspection.

Many of the members of my own Company have been called on to furnish evidence to *convict their Captain of participat-*

ing in their own transgressions. And because Mr. Ray, one of my Company, would not (for he could not) tell any thing that could involve me with himself, one of General Winslow's private confidential friends and correspondents, has been adduced to invalidate the testimony of Mr. Ray. With regard to Mr. Jenks (the associate and secret adviser of General Winslow) I leave the Court to judge of his testimony as they please, and to make the inferences that must be obvious to every honourable and impartial mind.

Gentlemen, my cause is now with you ; and I leave it with that confidence which my own conscious innocence inspires.

If any individual of you had any prepossessions against me, I know you have by this time laid them aside, and I do not doubt but the severe scrutiny, which my conduct has sustained, will effectually do away the vague rumours that had by my enemies been put in circulation against me, and prove to me an ample consolation for the long and painful anxiety with which I have waited the decision of this honourable Court.

JOSEPH LORING, JUN.

Capt. of Light Infantry, per General Order.

BOSTON, DEC. 5, 1805.

After the foregoing Defence was read, the Court was cleared, and adjourned to the morrow, 10 o'clock, in order to give judgment in the trials of Lieutenants Bacon and Valentine. The Judge Advocate on the trial of Captain Loring was desired to attend on the day after.

Representatives Chamber, December 7, 1805.

The Court met agreeably to adjournment, and on being called all answered in their places. Captain Loring appeared in his proper person, and answered. The Court was opened by the Marshal.

The Judge Advocate summed up the evidence both for and against Captain Loring, and read his defence to the Court. The Court was then cleared of spectators, and the following question was put by the Judge Advocate to each of the members, beginning with the lowest in grade.

From the evidence which has been adduced, both for and against Captain Joseph Loring, jun. and from what he has offered in his defence, are you of opinion that he is guilty or not guilty of the first article or specification of charge in the com-

plaint of Brigadier John Winslow, exhibited against him? The Court decided that of the first specification of charge the said Joseph was not guilty. Upon the question being put in the same form upon the second article or specification of charge in said complaint, the Court decided, that of the second specification of charge in said complaint, the said Joseph was not guilty. Upon the question being put in the same form upon the third specification of charge in said complaint, the Court decided, that of the third specification of charge the said Joseph was not guilty. Upon the question being put in the same form on the fourth specification of charge in said complaint, the Court decided, that of the fourth specification of charge the said Joseph was not guilty. Upon the question being put in the same form, whether said Joseph was guilty or not guilty of *any part* of the last, or either of the preceding specifications of charge in said complaint, the Court decided, that the said Joseph was in no part guilty thereof. It was therefore declared to be the opinion of the Court, that Captain Joseph Loring, jun. be acquitted of all and singular the charges or specifications of charges exhibited against him.

JOHN BARKER, *President.*
HENRY M. LISLE, *Judge Advocate.*

The Court adjourned until the morrow at 10 o'clock.

Tuesday, Dec. 10, 1805.

The Court met agreeably to adjournment, examined the records and copies of the Judge Advocate, certified the same as below, and then adjourned without day.

COMMONWEALTH OF MASSACHUSETTS.

We do hereby certify that the above and foregoing are true copies of the proceedings of the Court, of the evidence offered to it, and of its opinions and judgments.

Boston, Dec. 10, 1805.

JOHN BARKER, *President,*
BARNABAS CLARK,
OLIVER JOHONNOT,
WM. BARNES,
HENRY PURKITT,
ADAM KINSLEY,
MICHAIL HARRIS, jun.
JOHN ROBINSON,
JOHN PRATT,
DAVID SHEPHARD,
ELISHA FRENCH, jun.
LEWIS FISHER,
WILLIAM TURNER.

HENRY M. LISLE, *Judge Advocate.*

On the 24th December, the following orders were issued.

DIVISION ORDERS.

Boston, Dec. 24, 1806.

The Division Court Martial, whereof Lieut. Col. John Barker is President, is hereby ordered to convene at the County Court House in Boston on Wednesday, the 5th of February next, punctually at 11 o'clock, A. M.

Per order of the Major General 1st Division.

JOHN T. SARGENT, A. D. C.

Boston, Feb. 5, 1806.

The Court met agreeably to orders, and on being called, Capt. Adam Kinsley was found to be absent, and on ascertaining he was very sick, the Court adjourned to Tuesday the 25th instant.

On the 17th of Feb. 1806, the following orders were issued.

DIVISION ORDERS.

Boston, Feb. 17, 1806.

The Division Court Martial, whereof Lieut. Col. John Barker is President, ordered to convene, and having met at the County Court House in Boston on Wednesday, the fifth inst. and then adjourned to Tuesday the 25th, in consequence of the absence of one of its members by sickness; the said member still remaining under severe indisposition, the meeting of the Court is hereby suspended until further orders. The Brigadier will cause this notice to be given to the several members of the Court with the utmost dispatch.

SIMON ELLIOT, *Major General of 1st Division.*

On the 20th of March, the following orders were issued.

DIVISION ORDERS.

Boston, March 20, 1806.

The Division Court Martial, of which Lieut. Col. John Barker of the second Regiment of first Brigade is President, is hereby directed to convene at the County Court House in Boston on Wednesday, the 2d day of April next, precisely at 11 o'clock, A. M.

SIMON ELLIOT, *Major General of 1st Division.*

Wednesday, April 2, 1806.

The Court met agreeably to orders, and on being called all answered in their places. The following communication was received from the Major General.

To the President and Members of the Division Court Martial, appointed for the trial of Capt. Joseph Loring, jun. on certain charges exhibited against him by Brigadier General Winslow, of the Legionary Brigade, First Division.

Gentlemen,

I have attentively perused, and carefully examined the record of your proceedings on the trial of Capt. Loring, together with the papers, which accompany the same. After such examination and mature consideration, I feel it incumbent on me to declare to you, that from the evidence adduced on the trial, I should have expected a decision, different from the one you have seen fit to make.

The complaint against Captain Loring charges him with an offence of a most dangerous tendency; an offence, subversive in its effects of all subordination and discipline. But, Gentlemen, I do not by any means intend to be understood as saying, that because the complaint alleges offences of an aggravated kind, that it ought to operate as an inducement for conviction: on the contrary, our disbelief of the guilt or criminality of an officer ought, in some degree, to be proportionate to the enormity of the offence charged against him. But we ought not, in any case, to permit our disbelief to be so strong, as to resist that conviction, which is produced by legal and uncontroverted testimony.

The utility of the militia to the defence, security and dignity of our country, essentially depends on its discipline. In this opinion I feel persuaded the Court will concur with me. With this impression, and impelled by an imperious sense of duty, I have deemed it necessary to convene you again to submit to your consideration some of the most forcible and prominent reasons, arising from the testimony offered you, which irresistibly compel me to form an opinion contrary to the one you have expressed in your decisions. I am further impelled to do this, that you may have an opportunity of reviewing your proceedings. I shall therefore proceed to lay before you some of the most operative reasons and objections, which influence my mind on this occasion. This will be done with all the respect due to your opinions, and with the hope you will allow my observations and objections their proper weight, and no more.

The complaint against Captain Loring is, that he disobeyed Brigade Orders of the 9th and 16th Sept. 1805 ; and for unsoldierly and unofficerlike conduct on the parade, the 30th of the same month ; and that he there presented a protest, containing false statements against the orders of his superior officers ; and that he did connive at, if not abet and procure the men under his command to mutiny, and to neglect and refuse to appear on said parade.

I view the whole of the conduct imputed to Captain Loring, and charged against him in the complaint, as connected with the mutiny of his men, so much so, that with the strictest propriety it may be considered as a charge against him, *of conniving at, if not abetting and procuring his men to mutiny.*

After examining the record, and finding that the Brigade Orders of the 9th and 16th Sept. 1805, were proved to have been regularly issued to and received by Captain Loring, I proceeded to examine if the mutiny of his men were proved. For unless the mutiny were proved, it would be useless to inquire if Captain Loring had any concern with it. The result of that examination has been such, that no hesitation is felt in declaring to you, that I conceive the *mutiny* of the men to be fully and clearly proved. As mutiny is a crime generally planned in secret, it is often difficult to prove, and it is seldom such clear and satisfactory evidence of its existence is brought to light, as appears on the face of the proceedings of the Court.

Among the most obvious evidence of the *mutiny*, I would refer you to the testimony of *Samuel S. Green*, *Christopher Lincoln* and *Ezra Hawks*, three of the privates of Captain Loring's Company. They prove a meeting of the Company at the Green Dragon, and that an agreement was there made not to come out on the 30th Sept. as ordered. Other strong evidence of the *mutiny* arises from the various confessions, declarations, and conversations of a number of the Company made to and with others (not members of it) respecting the agreement and determination not to appear on the parade on the 30th Sept. These declarations, conversations and confessions derive additional force from the circumstance of their having been made some time *previous* to the 30th September. They are sworn to and described by Col. Badger, Messrs. Jenks, Chandler, Howe and others, as will appear on a recurrence to the record of those gentlemen's testimony. It also appears in evidence, that both of Capt. Loring's Subalterns, *previous* to the 30th Sept. heard of the determination of the Company not to come out on that day. And one of the Subalterns (Ensign Munroe) expressly swears, that he told Captain Loring that he had received such information, and that

he informed Captain Loring of this on the Saturday evening previous to the parade. There is further evidence of the *mutiny* in the testimony of Mr. William Jennings, who swears, that he was at the South End Gun House on Saturday evening, the 28th Sept. while Capt. Loring was exercising his men; *that he there heard the men talking, and that they said, they did not intend to come out on the 30th*, because they understood the officers and men were going to be degraded; that Capt. Loring *heard them talking*, and ordered them to fall in, and told them it was not their business to settle rank; that he expected to see every man in uniform on the morning of the 30th; but added, "If there were not *five men*, he would march on to the field at the time set."

Having been fully satisfied, from the testimony before alluded and referred to, that the *mutiny* was fully proved, it became my duty to examine if there were any evidence of Capt. Loring's participating in it.

To form a fair and correct opinion how far, and wherein Capt. Loring may be judged to have *connived at*, if not *abetted* and *procured* his men to mutiny, the *whole of his conduct*, and the different declarations and confessions, made by him, as they appear in evidence, ought to be taken into view. But before doing this, I think it proper to give my idea of the word *connivance*. As I understand it, it means *voluntary blindness, pretended ignorance, forbearance, &c.*

It now becomes necessary to lay before you some of the most prominent facts and circumstances, which appear in evidence, evincing the *intentions*, which Capt. Loring entertained, and the *declarations* of those intentions, he made prior to the 30th Sept. last, respecting the measures, he meant to adopt on that day. These *declarations* ought to have great weight, they being *indicative* of the *determinations* he had formed.

It appears by the testimony of Capt. Butterfield, that Capt. Loring, on the 14th Sept. last, had an opinion, that the conduct he meant to pursue, on the 30th of the same month, would expose him to a trial by a Court Martial. Capt. Butterfield swears, that Capt. Loring said to him, "That if he could not be allowed the rank, which he took the last season, he would march his men off the field."

Capt. Loring was then in possession of the General Order of the 20th of June, 1805, which decided the relative rank of the Captains in the Sub Legion of Light Infantry. Does not this threat, together with his subsequent conduct; the protest he brought with him to the parade; and the conduct of his privates, which so well coincided with the declarations he made to Capt. Butterfield, plainly shew there was an in-

tention, both on his part and on the part of his privates, to manifest his and their disapprobation and contempt of the orders which had been issued?

I cannot see what inducement, comporting with innocence and duty, Capt. Loring could possibly have, in providing himself (*before he came on the field*) with the paper he calls a protest. The subject and tenour of that paper perfectly coincide with the conduct of his men, and the determinations he had declared to Capt. Butterfield. The protest could not be calculated for any *good* purposes. It could effect nothing less than *embarrassment* and *insult* to his superior officers. *He did not deliver it until he was ordered from the parade, and had quitted the line.* It could not therefore be intended to operate against his being assigned any *particular grade* in the line. The protest was not offered, as appears by Capt. Brazer's testimony, until *after* his place had been assigned to him, and he ordered into it, and had taken it, during all which time he kept it in his own pocket. It was totally unnecessary, in point of *precaution*, for by his own confession he had before that time memorialized the Commander in Chief on the subject of the General Order of the 20th June, 1805.

It was unquestionably the duty of Captain Loring, and every other officer, peaceably to acquiesce in that order. There had been differences in opinion respecting the relative ranks of three Captains in the Sub Legion of Light Infantry. It was necessary that the rank of those officers should be determined, before the Sub Legion could be properly organized. Captains Messenger, Davis and Loring had commanded companies *under Captains' commissions*, which companies did not belong to the Sub Legion of Light Infantry. Neither of them had ever resigned those commissions. All three of them were placed in the Sub Legion of Light Infantry. The question was, How ought they to rank? It was decided and ordered, that all of them should receive new commissions, as Captains of Light Infantry, and that all of them should take rank from the respective dates of their former commissions, which last commissions, as I before observed, neither of them had resigned. By this arrangement, they held the same relative rank with each other *in* the Sub Legion of Light Infantry, as they did when *out* of that Sub Legion. Neither of them, by that arrangement, could gain or lose any rank by being placed in or transferred to the Light Infantry. He, who was the oldest Captain, was to continue the oldest; and he, who was the youngest, was to continue the youngest. I have been induced to be thus explicit on this head, as the General Order of the 20th June, either from not having been properly understood, or from design, has been much misrepresented.

I would now, Gentlemen, request your attention to the other parts of Capt. Loring's conduct on the parade on the 30th of September. The way and manner in which he came on to the field on that day, is shewn by the testimony of General Winslow and Capt. Brazer; both of whom swear that he appeared with one Subaltern, four Sergeants, one drum, and one fife. It appears, however, that his other Subaltern was on duty that day, acting as Adjutant to the Sub Legion of Light Infantry. It must of itself be considered a very singular and suspicious circumstance, that on a particular day not an *individual private* of a large Company should appear on parade. This is rendered more striking by the testimony of Isaac Rhoades (the orderly Sergeant of the Company) who swears that the Company paraded on the 16th September last by order of Captain Loring, at which time, he says, 46 rank and file turned out. He also swears that the Company paraded again on the 17th October last, by order of the Captain, but the precise number of men, which appeared on that day, he did not recollect. It therefore conclusively follows, that Captain Loring's Company did not mutiny *against* him. The Court will judge from the evidence, whether the men did not mutiny *for* him, and at his *instigation*, or with his *connivance*.

I would here, Gentlemen, turn your attention to some further testimony, which forces upon my mind the belief of Captain Loring's conniving at the mutiny. It is the testimony of General Winslow, Capt. Brazer, Capt. Scott, and Ensign Munroe. The two latter gentlemen both testify to Captain Loring's being informed of the intentions of his men not to parade on the 30th September last, and that this information was given him two days previous to the parade. It appears from the evidence both of General Winslow and Captain Brazer, that Captain Loring did not make any communication to either of them on the subject. And that neither of them knew the situation of Capt. Loring's Company on the morning of the 30th, until he appeared before the Brigade, on the day of the review, in the manner he did. It appears from this part of the record of the evidence, that Capt. Loring knew of the intentions of his men prior to the 30th. His duty undoubtedly was, to communicate the information, either to Capt. Brazer, under whose immediate command he was, or to General Winslow. If Capt. Loring had any doubt that his men would *not* conduct, on the 30th, in the manner he was informed, before that day, they intended to, he could not have had any doubt remaining on the morning of the day of the parade. Not an individual private was present at the Company parade. His not communicating the situation of his Company to either General

Winslow or Capt. Brazer fully satisfies my mind that he was accessary to and did connive at the mutiny.

It further appears in evidence, that Capt. Loring, notwithstanding he issued orders to his Company after the 30th Sept. yet he never did reprimand his men in orders for their conduct on that day. As to his telling the men that "their conduct had placed him in an unpleasant situation, but that he had done his duty, and if they had not done theirs they must take the consequences, &c; that he should order the Clerk to collect the fines;" all of it is certainly very far from amounting to a reprimand, expressing that resentment and indignation at their mutinous conduct, which an officer would express and shew unless he participated in it. It appears from the testimony of Samuel S. Green, that fining the men does not operate as punishment upon them. He swears that the fines are appropriated to defray the expenses of the Company. If there should be no fines, the expenses must be defrayed by assessments. If the fines are sufficient to meet the expenses, no assessment is necessary. So that it is quite the same to the men, in a *pecuniary view*, whether they pay for expenses in the way of fines, or assessments.

There is, Gentlemen, on the record a great deal of testimony connecting a long chain of circumstantial evidence in support of the complaint, which could be readily pointed out; but as my sole object in bringing the Court together again, is, that you may review the evidence for yourselves, I deem it quite unnecessary for me to be more minute, than I have been. I have generally alluded to some of the most leading and commanding part of the evidence, and given you to understand the impression it makes on me. But I hope and trust, you will not permit any of my remarks to have any effect on your minds, further than those remarks are supported by the evidence contained in the record of your proceedings.

I cannot, Gentlemen, rest satisfied that I have discharged the duty incumbent on me on this occasion, if I should conclude this communication without any observation on Captain Loring's mode of defence during his trial. It seems to have been his design, through the whole of his trial, to impress the Court with an idea or sentiment, that he had not been fairly treated, and that the question of rank between him and others was still in discussion and in a train for settlement. The rank of the officers in the Sub Legion of Light Infantry was settled and fixed by a principle which was practised upon in our army during the revolutionary war, and extends throughout the whole militia of this Commonwealth. The principle is this, "That an officer transferred from one corps to another in the

same rank should retain the seniority of rank, which he held prior to the transfer." But the subject of relative rank has nothing to do with the trial, and ought not to have any bearing in the investigation of Capt. Loring's conduct, as it respects the complaint made against him. *Courts martial* do not sit, nor are they ordered to *determine rank*. They are ordered and sit for the trial of military offenders. The rank of the officers of the Sub Legion of Light Infantry was determined on the twentieth of June, 1805, by the highest authority, and that determination is binding upon all. The General Order of that date establishes the point, and it has the same force and efficacy wherever and to whomsoever it applies, as any law of the country.

In any event, whether you see cause to adhere to your former opinion, or to revise and alter it, you are not obliged, nor will it be proper for you to give any reasons. And you will be careful not to divulge your own individual opinions, nor those of others (belonging to the Court) unless you are called upon by that authority whose right it is, under the law, to investigate and know them.

Your humble Servant,

SIMON ELLIOT,

Boston, Jan. 6th, 1806. *Major General First Division.*

The foregoing communication from the Major General was read and considered by the Court. The Judge Advocate then inquired of each and all the members, whether they were possessed of any reason to induce them to alter the judgment of the Court heretofore set forth on record.

The Court then decided, that they had not any reason to alter their former opinion and judgment. The Court then adjourned *sine die*.

COMMONWEALTH OF MASSACHUSETTS.

We hereby certify the foregoing to be a true record of the proceedings of the Court.

JOHN BARKER, *President.*

HENRY M. LISLE, *Judge Advocate.*

On the 10th April, 1806, the following Division Orders were issued :

DIVISION ORDERS.

Boston, April 10th, 1806.

The Division Court Martial, which was ordered to convene at Boston, on Tuesday, the twenty-ninth day of October last, did then and there meet, and after going through the trials of Lieuts. Valentine and Bacon, procceded to the trial of Captain Joseph Loring, jun. of the Sub Legion of Light Infantry in the Legionary Brigade, upon certain charges exhibited against him by Brigadier General Winslow, viz. " For disobeying a Brigade Order of the ninth of September, ordering a parade on Boston Common for review and inspection, on the 30th of the same month ; also for disobeying a Brigade Order of the 16th September, directing the Sub Legion of Light Infantry to appear on the said thirtieth, with sixteen sporting-cartridges ; both of which orders the said Captain Loring disobeyed, and in an unsoldierly manner came on said parade without any of his soldiers, and there entered a protest against said orders, by delivering to Captain John Brazer, the senior officer of the Sub Legion of Light Infantry, a paper containing statements as facts which were untrue and unofficerlike for him to state, and containing objections to said orders, totally contrary to their true intent and meaning : and that General Winslow had reason to believe that the said Capt. Joseph Loring, jun. did connive at, if not abet and procure the men under his command to mutiny against said orders, and to neglect and refuse to appear on said parade, to discharge their duty as soldiers on said day, agreeably to the spirit and intent of said orders, and did not make use of all his influence as their commanding officer, that they might appear. All which conduct tends to the subversion of good order and military discipline in said Brigade, and is a bad example to all others to offend in like manner."

Captain Loring appeared in Court and plead not guilty to the several charges above recited ; and after examining divers witnesses and documents offered in evidence both for and against him, the following question was put by the Judge Advocate to each member, beginning with the lowest in grade :

" From the evidence which hath been adduced, both for and against Captain Joseph Loring, jun. and from what he has offered in his defence, are you of opinion that he is guilty or not guilty of the first article or specification of charge, contained in the complaint ?

"The Court decided that of the first specification of charge, the said Joseph was not guilty.

"The same question, applied to each specification of charge, was put in the same manner to the Court, and the Court decided that of the three other specifications of charge, the said Joseph was not guilty.

"Whereupon it was declared to be the opinion of the Court, that Capt. Joseph Loring, jun. be acquitted of all and singular the charges or specification of charges exhibited against him."

On the 24th December last, the Major General, having satisfied himself of the correctness of the decision of the Court, as it respected the trials of Lieutenants Valentine and Bacon, gave his approbation to the same, and ordered it to be carried into effect; but not being satisfied with the decision on the trial of Captain Loring, he was under the necessity of ordering the Court to meet again, that it might review its proceedings.

The Court for that purpose was ordered to convene on the 5th of February; but owing to the sickness of Captain Kinsley, (one of its members) it could not act upon the communication the Major General had prepared. The Court adjourned itself to the 25th of February, in expectation that Captain Kinsley's health would permit his attendance at that time; but on the 17th of February, in consequence of information from Doctor Samuel Danforth, who had visited the sick member at Canton, and had given his opinion that he would not be able to attend the Court at the expiration of its adjournment, the Major General suspended its meeting until further orders.

On the 20th of March, information being received that Capt. Kinsley would probably be enabled to attend by the 31st, orders were issued for the Court to meet at Boston, on Wednesday, the 2d of April, when and where it did convene, and the opinion of the Major General was communicated. The Court then reviewed its proceedings, and saw fit to adhere to its decision.

The Major General has attentively perused and carefully examined the record of the proceedings of the Court, together with the papers, which accompany the same, all which have been transmitted to him for his approbation or disapprobation.

And, although it is a painful duty, yet after mature consideration, he feels it incumbent on him to declare, that from the evidence, which appears on the record, he should have expected a different decision; and he cannot, consistently with

his oath of office, give his approbation to the judgment and decision of the Court.

The Major General therefore *disapproves* of the same.

The Court, whereof Lieutenant Colonel John Barker is President, is dissolved.

Capt. Joseph Loring, jun. is discharged from his arrest.

By order of the Major General of the 1st Division,

JOHN T. SARGENT, *A. D. C.*

FINIS.

TRIALS

BY

COURT MARTIAL

OF

CAPT. SAMUEL WATSON, 2d, DAVID LIVERMORE, DANIEL KENT, AND WILLIAM PROUTY,

OF THE

1ST REG. 1ST BRIG. AND 7TH DIVISION OF

MASSACHUSETTS MILITIA.

1810.

PUBLISHED UNDER THE INSPECTION OF THE JUDGE ADVOCATE.

WORCESTER:
PRINTED BY HENRY ROGERS,
1811.

COMMONWEALTH OF MASSACHUSETTS.

SEVENTH DIVISION OF MILITIA.

RECORDS of the proceedings of a Division Court Martial, begun and holden at the County Court House in Worcester, in the County of Worcester, on Monday the twelfth day of November, in the year of our Lord, One Thousand Eight Hundred and Ten—by order of Jonathan Davis, Esq. Major General of the Seventh Division, for the trials of Captains *Samuel Watson*, 2*d*. *William Prouty*, *David Livermore* and *Daniel Kent*, of the 1st. Reg. 1st. Brig. and 7th Division upon the complaints of Lieut. Colonel John Brigham, of the aforesaid Regiment.

County Court House, Worcester, Nov. 12*th.* 1810, 3 *o'clock*, P. M.

THE Judge Advocate and Marshal appeared in their places, when the Judge Advocate directed the Marshal to make Proclamation for those Officers detailed and ordered on a Court Martial by the Honorable the Major General of the 7th Division, to answer to their names, which proclamation was accordingly made, and thereupon the following Officers were called and answered in their places.

LT. COL. JOSEPH FARNSWORTH,
MAJ. WILLIAM LOVE,
MAJ. SALEM TOWN, JR.
MAJ. HACKALIAH WHITNEY,
MAJ. WILLIAM MOORE,
MAJ. DANIEL TENNEY, JR.
MAJ. WARREN RAWSON,
CAPT. WARREN SNOW,
CAPT. JESSE ALDRICH,
CAPT. JOHNSON LEGG,
CAPT. MICAH REED,
CAPT. OLIVER HOOKER,
CAPT. ELI WARREN.

The Judge Advocate then directed the Marshal to make Proclamation for those Officers detailed as Supernumeraries to attend the organization of the Court to answer, which proclamation was accordingly made, and thereupon the following Officers were called and answered.

CAPT. JOEL CHENEY,
CAPT. JOEL FAY.

The following orders were then produced and read by the Judge Advocate.

Division Head Quarters, Oct. 22, 1810.

Major Levi Lincoln, Jr. Judge Advocate of the 7th Division.

SIR,

You are hereby informed that the Major General of the 7th Division has appointed a Court Martial to be holden at the County Court House in Worcester, on Monday, the twelfth day of November next at ten o'clock in the forenoon, for the trials of Capt. Samuel Watson, 2d. William Prouty, David Livermore and Daniel Kent, for disobedience of orders fully set forth in the Complaints of Lt. Col. John Brigham which accompany this paper, at which time and place you will hold yourself in readiness to discharge the duties of Judge Advocate as they are prescribed by law.

By order of Jona. Davis, Esq. Maj. General of the 7th Division.

ESTES HOWE, A. D. Camp.

Also the following Division Order.

Division Head Quarters, Oxford, Nov. 10, 1810.

DIVISION ORDER.

Major Levi Lincoln, Jr. Judge Advocate of the 7th Division, of the Militia of Massachusetts.

SIR,

The following is a return of Officers detailed from the first Brigade and Division aforesaid, to serve as President and Members of a Court Martial, to be holden at the County Court House in Worcester, for the purpose and at the time mentioned in a previous order.

PRESIDENT.

Lieut. Col. JOSEPH FARNSWORTH, of the 5th Reg.

MEMBERS.

Major WILLIAM LOVE, 4th Reg.
Major SALEM TOWN, Jr. 4th Reg.
Major HACKALIAH WHITNEY, 2d Reg.
Major WILLIAM MOORE, 5th Reg.
Major DANIEL TENNEY, Jr. Cavalry.
Major WARREN RAWSON, 2d Reg.
Capt. WARREN SNOW, 5th Reg.
Capt. JESSE ALDRICH, 2d Reg.
Capt. JOHNSON LEGG, 2d Reg.
Capt. MICAH REED, Cavalry.
Capt. OLIVER HOOKER, 4th Reg.
Capt. ELI WARREN, Cavalry.

Capt. JOEL CHENEY, 4th Reg.
Capt. JOEL FAY, 5th Reg.

MARSHAL.

Enfign JOHN W. LINCOLN, 1ft Reg.

Notice of the arrests and service of the complaints, with an order communicating a Court Martial, and the time and place when the same would be in session, can be proved by Adjutant William Munroe, of the 1st. Reg. who served the same upon Captains *Prouty*, *Watson*, 2*d*. *Kent* and *Livermore*.

By order of the Major General of the 7th Division, &c.

ESTES HOWE, A. D. Camp.

The Court was now ordered to be opened, which was done, by Proclamation thereof, by the Marshal.

The Marshal was also directed to make proclamation for order during the proceedings of the Court, *upon peril of confinement*, which in due form was done by him accordingly.

Captains Samuel Watson, 2d, Daniel Kent, and David Livermore, were severally called and answered. Capt. William Prouty was called, but did not appear.

Introductory to the Trials before this Honorable Court, the Judge Advocate begged leave respectfully to submit the following remarks :

AS greatly to the honor of the Militia of this section of the Commonwealth, Trials by Court Martial are rare, and of novel impression, it will not be thought obtrusive, that I occupy a few moments of your time in a cursory view of the objects and the procedure of this tribunal, and the duties of those officers who compose it. That confidence should be placed in the mode of trial, and satisfaction derived from its results, is of the highest importance. Accustomed as we are to the free and unrestrained investigation of civil rights before the Courts of civil Judicature, to the ingenious and elaborate examination of testimony, to the interesting and oft-times splendid discussion of principles and explanation of evidence, and to the argumentative and eloquent appeals of counsel to the *heart* as well as to the *understanding*, in which parties are there indulged ; the stiff and formal rules, which trammel all proceedings here, but too frequently produce disappointment to expectation, and create distrust in the issue. Yet has the system, antiquity for its origin, and the experience of ages for its sanction. Trials by Courts Martial have been substantially known, though under different modifica-

tions, in all countries, where the physical force of the people has been the subject of military organization. In that country, from whence came our ancestors, and with them most of the principles of civil society, by which we are connected, this species of tribunal is of high consideration in the view of both government and people. Military law is there a science, to the acquisition of which is devoted the best talents of the country. An uniform course of legislation by the British Parliament on this subject, has given to the nation a settled and well digested system, by which trials are regulated with as much precifion, and decisions had of as high authority, as has stamped the character of her civil jurisprudence. In our more happy country this mode of trial is recognized by the constitution, and provided for with much wisdom by the Legislature. Yet as in the ordinary course of justice, many of the details are to be gathered from precedents abroad, and from the sound principles and known usages of other enlightened nations.

Courts Martial are eminently distinguishable from those of civil jurisdiction, in that, they have cognizance only of the conduct and not the property of individuals. With the custody of the person ultimates their custody of a cause. They have in charge, principles not recognized by the civil courts, feelings and passions, to which, in evidence, the ear of the magistrate is inaccessible. True, the heart expands not here to tales of charity, nor can the sympathies and affections of humanity melt it to compassion ; but with a sterner, it may discharge a nobler office. To enforce duty, and to vindicate honor ; to chastise baseness, and to reward valor, is the province of the military judge. He passes between treachery and its accuser, and affixes infamy to merited conviction, between fidelity and its assailer, and bestows, by acquittal, on injured character, a higher lustre.

The present occasion furnishes but a *second* instance of a military court within this extensive Division, since the creation of the office, which I have the honor to sustain. Little opportunity has therefore been afforded by observation or experience, to familiarize the arduous and responsible duties which by law & usage are devolved upon the Judge Advocate. So far as an unbiassed and impartial temper, a candid and patient attention to the evidence, a full and fair summary of the cause, and a correct record of the proceedings constitute a

faithful discharge of office, they are pledged as well to the Defendants as to the Commonwealth. This is at best, but an ungrateful trust. If supported by the intelligence of the Court, and the confidence of the accused, it may be executed with satisfaction; deprived of these, there remains to the office, but labor, and vexation, and sorrow.

In the organization of the Court the late law of the Commonwealth has directed with clearness the mode of procedure. The right of challenge, important in all trials, but hitherto of questionable extent in military cases, is formally secured. This right, however, should be reasonably exercised. The cause of challenge must be stated in writing, and can be received but to a single member at once; it must be supported by evidence, and promptly decided by the rest of the intended members of the Court. Causes which would exclude a juror from the pannel, are unquestionably sufficient to remove a member from the Court. Affinity, strong bias and prejudication are the most usual objections, and whenever supported, are considered conclusive. Others may exist: But, as on the one hand, the Board should ever be purified of all inducement to error, so on the other, caution should be had, lest a spirit of jealousy, or the captiousness of opposition, exclude firmness and intelligence from their place in the trial, and the right of challenge, common to the prosecutor and the accused, be abused to the delay of justice, and to the perversion of the very object of its security.

Upon the organization of the Court, follows the arraignment of the accused and the investigation of fact. It is here the patience of the Court is most severely exercised. The authority by which a Court Martial is appointed has the revision of its proceedings. Hence the necessity of minuteness in the record; that every question with its correspondent answer be fairly noted; for idle would be the provision for an examination of the result, without a view of the evidence upon which it was predicated.

The duties of the Judge Advocate are multifarious and complicated. By the militia law they are defined generally to consist in administering oaths, impartially stating the evidence both for and against the accused, taking accurate minutes both of the testimony and of the proceedings of the Court, collecting the votes of the members, giving written opinions on questions of law made at the trial, and in

remitting the records to the officer ordering the Court. But the details of his duty, explained by an eminent writer on the subject of military law, required indeed by necessity, and sanctioned by immemorial usage, are more varied. "When directed to attend a Court, and furnished with the articles of accusation, he is to instruct himself in all the circumstances of the case, and by what evidence the charge is to be proved. He is to see that the accused has proper knowledge of the complaint against him, and that he is indulged in a reasonable opportunity to object to any appointed to be his judges. He is to issue summons for necessary witnesses when applied to therefor, and to guard against the introduction of improper testimony. When the Court is met for trial, and the members regularly sworn, the Judge Advocate, after opening the prosecution by a recital of the charges, together with such detail of circumstances as he may deem necessary, (if the case is circumstantial and complicated) proceeds to the examination of witnesses in support of the charges, while at the same time, he acts as the Recorder or Clerk Register of the Court, in taking down the evidence in writing at full length, and as nearly as possible in the very words of the witness. At the close of the business of each day, and in the interval before the next meeting of the Court, it is the duty of the Judge Advocate to make a fair copy of the proceedings, which he continues thus regularly to engross to the conclusion of the trial. On every occasion, when the Court demands his opinion, he is bound to give it with freedom and amplitude, and even when not requested to deliver his sentiments, his duty requires, that he should put the Court upon their guard against every deviation, either from any essential or necessary forms in their proceedings, or a violation of material justice in their final sentence and judgment." The Judge Advocate is the counsel of the accused. "It is a duty," says the learned and elegant writer to whose authority I have before referred,* "which has the sanction of general and established practice, that he should assist the prisoner in the conduct of his defence. But it is not to be understood, that in discharging this office, which is prescribed only by justice and humanity, the Judge Advocate should in the strictest sense consider himself as bound to the duty of a counsel, in exerting his ingenuity to defend the prisoner, at

* Tytler on Courts Martial.

all hazards, against those charges, which in his capacity of prosecutor, he is on the other hand, bound to urge and to sustain by proof; for understood to this extent, the one duty is utterly inconsistent and incompatible with the other. All that is required is, that in the same manner as in the civil courts of criminal jurisdiction, the Judges are understood to be of counsel with the person accused, the Judge Advocate in Courts Martial, shall do justice to the cause of the prisoner, by giving its full weight to every circumstance or argument in his favor; shall bring the same fairly and completely into the view of the Court; shall suggest the supplying of all omissions in the leading of exculpatory evidence; shall engross in the written proceedings all matters either directly, or by presumption tending to the prisoner's defence, and finally, shall not avail himself of any advantage, which superior knowledge, ability, or influence with the Court may give him, in enforcing the conviction rather than the acquittal of the person accused." The observance of this part of duty is of high importance, and will ever be attended with cheerfulness and satisfaction. The accused cannot be indulged with that assistance from professional counsel which is permitted in courts of law. "Courts Martial," observes my ingenious author, "being, in general, composed of men of ability and discretion, but who from the nature of their profession and general mode of life, are not to be supposed versant in legal subtleties or abstract and sophistical distinctions, and the cases coming before them giving rise to few questions of law, it has been considered as founded in established usage, that counsel or professional lawyers are not allowed to interfere in their proceedings, or by argument or pleading of any kind to endeavor to influence either their interlocutory opinions or final judgment. This is a most wise and important regulation, nor can any thing more tend to secure the equity and wisdom of their decisions, for lawyers being in general as utterly ignorant of military law and practice, as Courts Martial are of civil jurisprudence and the forms of the ordinary courts, so nothing could result from the collision of such warring and contradictory judgments, but inextricable embarrassment, or rash, ill-founded and illegal decisions." In the spirit of this reasoning has been the invariable practice of Courts Martial throughout this Commonwealth. At the

trial of Capt. Howe, in the first division, in January last, it was solemnly decided, "to be the uniform custom of Courts Martial not to allow the admission of counsel to plead openly before them, and the Court directed it to be entered upon the record, that in their opinion, no defendant can thereby be deprived of any advantage, because all the evidence and the defence must be *in writing*, and a defendant could have all the aid and assistance, which could be necessary or useful to him, by the private advice of a friend sitting by, though unrecognized by the Court." The subsequent law of *March* the *sixth*, in requiring a defence in writing, has sanctioned the correctness of this custom. Nor is it to be complained of by the accused, for were it otherwise, those arguments which addressed to the Court might persuade to acquittal, would be lost to the record, and the approval of the revising authority denied to the issue. That in the present cases, the defendants may thereby be deprived of no advantage, must be the duty, as it will be the study of the Judge Advocate.

Such is the trial and such are the duties now before us. That they will be discharged by the Court with ability and fidelity, I cannot presume to doubt. In the execution of my office, I rely upon their aid, and I appeal to their indulgence; and in the issue of our joint exertions, may the majesty of the laws be vindicated, and the honor of the Soldier preserved.

LEVI LINCOLN, Jr. J. A. 7th Div.

Worcester, Nov. 12, 1810.

As the complaints were several against the Defendants, containing distinct and independent charges, and by law not capable of investigation in a joint trial; the Judge Advocate selected the case of Capt. *Samuel Watson, 2d*, for the attention of the Court first; and by the permission of the Court, Capt. Samuel Watson, 2d, was called, and answered. Captains Kent and Livermore were directed to hold themselves in readiness for their trials respectively, upon the pleasure of the Court.

The Judge Advocate then proceeded to administer to the President and each of the first twelve aforementioned members, singly, and the President to the Judge Advocate, the respective oaths prescribed in and by the 31st section

of an act of the Legislature of the Commonweath of Massachusetts, *passed March* 6, 1810, entitled " An act for regulating, governing and training the Militia of the Commonwealth." Captains Joel Cheney and Joel Fay, supernumeraries, and were not sworn.

The Judge Advocate informed Capt. Watson, that the Court was constituted, and the members sworn to pass upon his trial, and demanded of him, if he had any objection against, or challenge to either of them, he should produce it in writing, that the rest of the Court might hear and decide thereon. Captain Watson thereupon answered, that he had no objection to offer against any *member* of the Court, but had a motion to make, which he produced in writing in the following words :

" Captain Samuel Wason, 2d, moves, that the question whether the *President* has a right to vote in the ultimate decision of his trial, be determined at this time."

The above question of Capt. Watson being of a nature to require a confidential communication with the *Members* and *Judge Advocate*, on the construction of law, as well as secrecy in the votes upon its decision ; the room was ordered to be cleared, which was done, and the doors closed by the Marshal.

The Court then decided, that, as by the law of the sixth of March aforesaid, in the 31st section, it was enacted, that " all Courts Martial shall be constituted of a President, a Judge Advocate, twelve *Members*, and a Marshal ;" " that the Judge Advocate should administer to the *President* and *Members* singly the following oath," &c. ; " that on questions of challenge the *President* may vote with the *Members*," uniformly and carefully preserving a distinction between the *President* and *Members ;* and had expressly provided, that " at all Courts Martial, unless two thirds of the *Members* agree that the accused is guilty, the Judge Advocate shall record his acquittal," *it is the opinion of this Court, that the President has not a right to vote in the ultimate decision of this Trial.*" The doors were then opened, and Capt. Watson was informed of the foregoing opinion of the Court by the Judge Advocate.

Lieut. Col. John Brigham, the prosecutor, who appeared in Court, was enquired of by the Judge Advocate, if he had

any objections or cause of challenge to either Member of the Court, and thereupon answered he had not.

Captain Watson was now called to plead to the complaint of Lieut. Col. Brigham against him, which was read by the Judge Advocate in the words and figures following, to wit:

To Jonathan Davis, Esquire, Major General of the Seventh Division of the Commonwealth of Massachusetts.

RESPECTFULLY complains John Brigham, Lieutenant Colonel Commandant of the First Reigiment of the First Brigade of the 7th Division of the Militia of Massachusetts, against Captain Samuel Watson, *the second*, of the aforesaid Regiment, for unmilitary conduct, neglect of duty, and disobedience of orders, of all which offences your complainant alledges, that the said Samuel Watson the second has been guilty, in many and divers instances, particularly in the specifications of charge herewith exhibited:

Specification 1st. For that your Complainant in the month of July last past, having received certain Brigade Orders, directing him to call out the Regiment under his command, for Regimental Review and Inspection, on Wednesday the 12th day of September, in the year of our Lord eighteen hundred and ten, which orders were directed to him as Lieutenant Colonel Commandant of the aforesaid Regiment, that your Complainant having predicated his Regimental orders thereon, bearing date the first day of August, eighteen hundred and ten, regularly transmitted the same to the said Captain Samuel Watson the second, whose duty it was to receive the same, directing the said Captain Samuel Watson the second, to call out the company under his command, to meet at the South Meeting House in Worcester, on Wednesday the 12th day of September, eighteen hundred and ten, at nine of the clock in the forenoon of said day, and there to wait for further orders: and the said Captain Samuel Watson the second, having received said orders to call out his company, he then holding a commission in the Militia of this Commonwealth, did on the said 12th day of September refuse and neglect to obey the said orders, inasmuch as he did neglect to issue any orders for the meeting of his company for any of the purposes aforesaid, and did refuse to appear himself, as by said orders directed.

Specification 2*d.* For that the said Captain Samuel Watson the second, holding a commission in the Militia of this Commonwealth, regardless of his duty as an officer, and apparently with a design to destroy that harmony, subordination and faithful obedience to orders, among the officers and soldiers of the said Militia, on which depend the respectability and usefulness of our military establishments, did connive at, abet and procure the men under his command to mutiny against and disobey said orders, and to neglect and refuse to appear on said parade, to discharge their duty on the said 12th day of September, agreeably to the spirit and intent of said orders, and did not make use of all his influence, as their commanding officer, that they might appear, all which conduct tends to the subversion of good order and military discipline in said regiment, and is a bad example to all others to offend in like manner.

Specification 3*d.* For that the said Captain Samuel Watson the second, has aided, abetted, countenanced and combined with other officers holding commissions in the Militia of this Commonwealth, in a determination to oppose the orders of their said commandant, by a refusal to obey them, to the manifest injury of the organization, discipline and improvement of the said Regiment, for all which unmilitary conduct, neglect of duty and disobedience of orders, in Captain Samuel Watson the second, your Complainant requests that he may be put in arrest, and subjected to answer to the aforesaid complaint, and such other or others as may be legally exhibited against him, and that such proceedings may be had in the premises as to law and military usage appertain.

JOHN BRIGHAM, Brigh

Lieutenant Colonel Commandant of the first Reg. first Brig. in the Seventh Division of the Commonwealth of Massachusetts.

Which being read, the Judge Advocate demanded of Captain Samuel Watson the second, whether of the charges in the aforesaid complaint, he was Guilty or not Guilty. To which Captain Samuel Watson the second, answered, that thereof he was *not guilty.*

The Court here directed an adjournment to 10 o'clock tomorrow morning, and the Marshal adjourned the Court in due form accordingly.

Tuesday morning, Nov. 13, 1810, 10 *o'clock.*

The Court met pursuant to adjournment, and was opened in form by the Marshal. The President and Members on being called, all answered in their places. The Prosecutor and Defendant appeared and answered in their proper persons. The record of yesterday's proceedings was read, and approved by the Court. Audience of evidence was moved for by the Judge Advocate, granted by the Court, and proclamation thereof made by the Marshal. In this stage of the proceedings, Captains Jesse Aldrich, Johnson Legg, and Oliver Hooker, Members of the Court, demanded their rank, observing that other officers of later commissions were placed above them. The Judge Advocate remarked to the Court, that he had pursued the roll furnished by the Division order, which he had supposed was taken from the Brigade roster. If there was any incorrectness in the places of the members, it could be determined by a shew of commissions; and by leave of the President, he would then require the officers complaining, to produce their commissions, as also the commissions of Captains Warren Snow and Micah Reed, supposed to have mistaken places. Capt. Jesse Aldrich then produced his commission, which was read by the Judge Advocate to the Court, and found to be dated on the 24th day of Feb. 1808—as also Capt. Johnson Legg's commission, dated March 31st, 1808, and reciting an election on the 29th day of Feb. 1808—also Capt. Oliver Hooker's commission, dated Aug. 20th 1808, and reciting an election on the 13th day of Aug. 1808—also Capt. Micah Reed's commission, dated April 11th, 1809, reciting an election on the 30th of March, 1809. All which being duly considered, the Court decided that Captains Jesse Aldrich should take rank of Captains Johnson Legg, Warren Snow, Oliver Hooker, and Micah Reed—that Capt. Johnson Legg should take rank of Captains Warren Snow, Oliver Hooker, and Micah Reed—that Capt. Warren Snow should take rank of Captains Oliver Hooker and Micah Reed—and that Capt. Oliver Hooker should take rank of Capt. Micah Reed; and that the Judge Advocate should alter the court roll accordingly; and thereupon the members changed places according to the rank aforesaid.

Lieut. Col. John Brigham, the complainant, was now cal-

led, sworn and interrogated on the part of the government, by the Judge Advocate.

Q. Is Capt. Samuel Watson the 2d, a commissioned officer under your command ?

A. He is, sir.

Q. Had you Brigade orders in the month of July last, for the muster of your regiment ?

A. I received such orders from the Brigadier General.

The Judge Advocate then handed a paper to the Colonel and enquired if it contained those orders ; to which Colonel Brigham replied, that those were his orders : whereupon the Judge Advocate read them in the words and figures following, viz.

Sutton, June 28, 1810.

Col. JOHN BRIGHAM,

SIR—By virtue of an order of Major General Jonathan Davis, the first Regiment of Infantry in the first Brigade and Seventh Division, will turn out for review and inspection on the 12th day of September next. As commandant of this Regiment you are required to comply with the requisitions of this order. It is expected your Regiment will be ready for review precisely at eleven o'clock, A. M. You will feel yourself authorized to make such requirements of the officers and soldiers under your command, with regard to equipments, ammunition, &c. as shall legally comport with the honor of the Militia, and the purposes of review and inspection. The Brigadier General flatters himself that nothing on your part, or that of your Regiment, will be wanting in aid of those exertions, which will conduce to the honorable appearance of the same, and consequently to the happiness of our common country. Be good enough to give seasonable notice to the Brigade Inspector of the place which you shall assign for the purposes aforesaid.

By order of Brigadier General Caleb Burbank,
SUMNER BASTOW, *Brigade Inspector.*

Question to Col. Brigham. Did you issue Regimental orders predicated upon the Brigade order, just read, to the several Captains under your command, and particularly to Capt. Watson.

A. I did, and Captain Watson received his order.

Q. How do you know that Captain Watson received the order ?

A. By information of my Adjutant, and afterwards in conversation with Capt. Watson, he acknowledged it to me.

Q. Have you the original Regimental order in your possession ?

A. I have, sir, and produced the following :

Regimental Orders, Paxton, Aug. 1, 1810.

Adjutant MUNROE,

SIR—You are hereby directed to give legal notice to every Captain belonging to the first Regiment, first Brigade and seventh Division, and order them to notify their subalterns of of the time and place to call out their respective companies under their command. on Wednesday the twelfth day of September next, to be at Worcester at nine o'clock in the morning, for the purpose of a Regimental review and inspection, each with good fire arms, bright and clean, and other articles as the law directs, with twelve blank cartridges, each suited to his fire arms, with one day's provision, and order each Captain to provide a baggage waggon for the use of the occasion.

N. B. Notify all the Staff officers of the time and place, and notify all the troops to meet on the common at the South Meeting House.

JOHN BRIGHAM, *Lt. Col. Commandant.*

Question to Col. Brigham. Did Captain Watson, or the company under his command, appear at Worcester on the the 12th day of Sept. in compliance with your order.

A. Neither Capt. Watson nor his company appeared.

Q. Have you any knowledge that Capt. Watson did connive at, or abet a mutiny amongst his men, against your order, as in the 2d specification of charge against him.

A. *Personally*, sir, I do not know it.

Q. Do you know that Capt. Watson combined with other officers, in a determination to disobey your orders, as in the 3d specification of charge against him ?

A. I have no *personal* knowledge thereof.

Adjutant Reuben Munroe, sworn and interrogated by the Judge Advocate.

Q. Are you Adjutant of the Regiment under the command of Lt. Col. John Brigham ?

A. I am, sir.

Q. Did you communicate to Capt. Samuel Watson, the

2d. the Regimental order of Colonel Brigham for the Muster and Review on the 12th of September last ?

A. Yes, I did.

Q. In what manner did you communicate Col. Brigham's order ?

A. By a copy in writing left at his house.

Q. Do you know that Capt. Watson received the order ?

A. A few days after, he told me that he had.

The Judge Advocate handed to Adjutant Munroe the Regimental Order produced and sworn to by Col. Brigham, enquired if that was the original, a copy of which he left at Capt. Watson's house, and which he afterwards acknowledged he had received—to which Adjutant Munroe replied that it was.

Q. Did Capt. Watson appear with his company in pursuance of those orders ?

A. Neither he nor his company appeared at the Muster.

Q. Have you heard Capt. Watson assign any reasons for his neglect of orders ?

A. In conversation previous to the Muster I asked him if he had not received the order. He answered that he had. I then enquired if the orders were correct. He replied they were, but he did not think he should attend the Muster. He observed that he was as willing to be mustered at Worcester as at Leicester, if he could think the Colonel had any right to order him there—He did not consider it a hardship to go to Worcester, but in his opinion the Colonel had no right to appoint the Muster at any place, but in the *centre* of the Regiment.

Q. Do you know that Capt. Samuel Watson the 2d, "did connive at, abet and procure the men under his command to mutiny against and disobey the Regimental order of Colonel Brigham and to neglect and refuse to appear in pursuance of that order ?"

A. I do not, sir.

Q. Do you know that Capt. Samuel Watson the 2d, has "aided, abetted, countenanced and combined with other officers holding commissions in the Militia of this Commonwealth in a determination to oppose the orders of their commandant, by a refusal to obey them ?"

A. I do not, sir.

Question by the Complainant. Did Capt. Watson previous to the issuing the orders, declare, that he supposed the Muster would be at Worcester and he was willing to go there ?

A. In conversation with him and Capt. Kent, previous to issuing the orders, I think I heard him say, he expected the Muster would be at Worcester.

Question by Defendant. Did I not observe, I thought the orders contrary to law, and that I was not bound to obey them ?

A. I think you did, but cannot answer in particular.

The Judge Advocate observed to the court that having proved by Col. Brigham and Adjutant Munroe the orders to Capt. Watson, his receipt thereof and neglect to attend the Muster ; though many other witnesses were summoned to the same facts ; he did not think it necessary to occupy the time of the court with their examination, unless rendered proper by the production of contrary testimony by the defendant—and the court concurred with the Judge Advocate therein.

Major James Estabrooks sworn and interrogated by the Judge Advocate.

Q. Are you a Major in the Regiment commanded by Lt. Col. Brigham ?

A. I am.

Q. Have you had conversation with Capt. Watson on the subject of the Muster of the Regiment *in September last*, and if so, please to repeat it ?

A. I think subsequent to the issuing the orders and prior to the Muster, in conversation with Capt. Watson, at Leicester, he told me he should not attend, he thought the order illegal, and that the Colonel had no right to appoint the Muster in any other place than in the *centre* of the Regiment, and he was as willing the question should be tried now, as at any other time.

Question by Complainant. Did you hear any conversation between Capt. Watson and Capt. Kent and others on court week, and what was it ?

Upon Major Estabrooks answering that the conversation was in June, the Judge Advocate suggested to the court the impropriety of enquiring into any conversation antecedent to the issuing the orders, for the neglect, disobedience, and

combination to resist which, *only*, the Defendant was charged ; and thereupon the court decided that it was improper.

The complainant proposed in writing the following question to the court, which was read by the Judge Advocate.

"*Question to the Honorable Court.*"

"Has the complainant a right to interrogate the other Defendants on the trial of Capt. Watson, as witnesses ?"

The court deliberated thereon, and the President returned the question to the Judge Advocate with the following underwritten request.

"Upon the foregoing question the court require the opinion of the Judge Advocate.

J. FARNSWORTH, *President.*"

To which the Judge Advocate returned the following answer in writing :

Upon the question submitted to the court, "whether the complainant has a right to interrogate the other defendants as witnesses in the trial of Capt. Watson ?"—the Judge Advocate gives his opinion, that as the other Defendants have only been called, but not arraigned, and as the complaints and trials are *several*, it is competent for the complainant to call them as witnesses, but that they are not bound to answer any question which may implicate their own conduct, or connect with the charges against them, *upon their trials*.

LEVI LINCOLN, Jr. *Judge Advocate.*

The President directed the Judge Advocate to collect the votes of the Members upon the question, and thereupon it was decided by the court, that the other Defendants might be examined as Witnesses under the restriction contained in the opinion of the Judge Advocate—Capt. Daniel Kent was then called sworn and interrogated.

Question by Complainant. Did not Capt. Watson *to your knowledge* combine with other Officers (other than yourself) to persuade and encourage his men not to appear, in pursuance of orders, and did he not agree with other Officers, that *he would not attend* ?

A. There was a Meeting of Officers.

Question by Judge Advocate. Did Capt. Watson with other Officers agree not to attend the Muster as ordered by Colonel Brigham ?

A. Capt. Watson said he should not attend, and other

Officers, at the same time, said they should not attend, and there was no otherwise any agreement; Capt. Watson said the orders were illegal, and he conceived they were no orders.

Question by Defendant. Has it not always been customary in every instance of a Muster to have a meeting of Officers on that subject?

A. It has been the general practice.

Question by Defendant. In this meeting of Officers did I advise any one not to attend?

A. Not as I heard.

Question by Complainant. When has there ever been any meeting of Officers previous to the muster, before the last?

A. I have understood it has been customary to have meetings of Officers, but I have no personal knowledge of it.

Question by Judge Advocate. Were those meetings confined to the Officers of *one town*, or did they embrace Officers in different towns?

A. I have not long been in commission, and have not attended Officer's meetings. The custom is an old one, and before I held a commission, which is about five years.

Major Estabrooks again called, and the following question put to him by the Defendant:

In my conversation with you at Leicester, did I not express my regret at the necessity I felt myself under of disobeying the orders of the Colonel; and observe, that I always took pride in obeying the legal orders of my superiors?

A. I do not recollect the word *legal*.

Question by same. Did I not say, that it was important it should now be settled, whether the Colonel had a right to parade his Regiment where he pleased, as it was the first order under the new law?

A. I heard you say, that you was willing the question should now be tried, as the muster was not appointed in the centre of the Regiment, and the order was against law.

Lt. Harry Sargent sworn, and interrogated by the Judge Advocate.

Q. Did Capt. Watson, to your knowledge, enter into an agreement with any other Officer or Officers, to disobey the order of Col. Brigham, in refusing to attend the muster in September last?

A. I do not know.

Q. Do you know of any meeting of Officers at which Capt. Watson was present, previous to the muster ?

A. I know that Spencer Officers were at Leicester, and Captains Watson and Kent, with one of their Ensigns and myself were with them. I know not how the meeting happened. Capt Watson asked me to attend.

Q. Was this meeting previous or subsequent to the muster ? A. It was subsequent.

Q. Do you know, or have you been informed, by Capt. Watson, that there was a meeting of Officers, at which he was present previous to the muster ?

A. I do not recollect.

Question by Complainant. Were you not present at a meeting of Officers previous to the muster, and did you not hear Capt. Watson say he would not obey the orders of Col. Brigham ?

A. I have been present at a meeting of Officers, belonging to Leicester, before the muster, but did not hear Capt. Watson say he should disobey the orders of Col. Brigham ; I have heard him say, that he should not attend the muster, and that he had informed Colonel Brigham in writing, and assigned his reasons.

Q. Did Capt. Watson issue any orders to his company, for their appearance at the time and place of muster ?

A. He did not.

Question by Judge Advocate. Was there any agreement between Capt. Watson and his subalterns, or other Officers, that he should not issue such orders.

A. Not to my knowledge.

Question by Complainant. At those meetings of Officers, when there was conversation about the muster as you have said, did not Capt. Watson say he should not obey Colonel Brigham's orders, attend the muster, or himself issue orders ?

A. I do not recollect precisely. In our first conversation on the subject, Capt. Watson said, that he considered the orders illegal, but had not determined whether to attend the muster or not. He considered it a hard thing to disobey, but he regarded the principle. He was as willing to meet at Worcester as at Leicester. But if it was once done, it would be construed into a precedent, and though he did not consider the order as any hardship upon him, it was a great one upon the Spencer Officers. He thought that the law

had directed that the muster should be in the *centre* of the Regiment ; and if so, as there had been great division among the Officers on this subject, it would now be healed.

Question by Defendant. Has it not been usual for the Officers to have meetings previous to muster ?

A. It has been usual with Leicester Officers, and I have been told with Spencer Officers also, but of this, I have not personal knowledge.

Question by same. Did you ever hear me advise any Officer not to attend the muster ? A. I never did.

Question by same. Are you not a Lieutenant in my company ? A. I am.

Question by Complainant. Was it usually by request of the commandant of the Regiment, that these meetings have been held previous to the muster, and where, and in what instances, have they been held ?

A. I know of no meeting, by order of the Colonel—It has been usual at Leicester for the Officers to meet before trainings and muster.

Colonel Ignatius Goulding, Jr. of the Cavalry, was then called on the part of the Government, and on being sworn, said, he knew nothing relative to the cause, except from the information of others, and much had been said on the subject. He was willing to answer any interrogatories.

Question by Complainant. Have you ever known an instance when the commandant of this Regiment has requested a meeting of the Platoon Officers, previous to any muster ?

A. I have not. As I am not in the line of Infantry, I have little knowledge of its customs.

Question by same. Do you not know of a meeting of Platoon Officers in Leicester previous to the last muster, and did you not hear Capt. Watson say he should not obey the Regimental order ?

A. I do not know of such meeting, nor have I heard any such declaration from Capt. Watson, but I have understood, that the Spencer Officers were at Leicester, and that Capt. Watson considered the order *illegal*, and would not comply with it ?

Question by same. Do you not know, that there was an agreement among the Officers of *Leicester* and *Spencer*, that they would not attend the muster, and have you not said, that you did not give your opinion, until after such agreement ?

A. I do not know of such agreement, but understand as I have before said, that there was one, and I did afterwards give my construction of the law.

Question by Defendant. What reason did I assign for not being willing to muster at Worcester ?

A. That the law had lately been altered in providing, that the muster should be as central as in the opinion of the Colonel convenience would admit—that the Colonel had said in strong language, that while he had the command, the troops should never again be dragged to Worcester to muster—that it was a *great hardship* upon Spencer Officers, and it had better be decided now whether the law was altered or not.

Capt. Thomas Drury, sworn and interrogated by the Judge Advocate.

Do you know of any meeting of Platoon Officers at Leicester subsequent to issuing Regimental orders and previous to muster ? A. I do not.

Q. Have you heard Capt. Watson say, that the Officers of Leicester and Spencer had agreed not to attend the muster ?

A. I heard him say, that he should not attend himself, and he did not think they would.

Q. Since the muster have you not heard him say there had been such agreement ?

A. No sir, I have not.

Question by Complainant. Did not Capt. Watson advise you not to attend, or converse with you to that effect ?

A. Capt. Watson asked me, *if I was going to obey the orders of the Colonel.* I replied that I thought I should—He said *if I stood out,* WE shall *have a better chance !* and added, that he thought the Colonel's order was illegal and he wished to have it tried.

Question by Judge Advocate. Did Capt. Watson use the expression, WE *shall stand a better chance*, and from the conversation whom did you understand he meant ?

A. He said WE, and I understood he meant the *Spencer Officers* and *himself.*

Question by Defendant. Did I mention *Spencer Officers* in the course of the conversation ?

A. I do not know that you did.

Question by Complainant. Did Capt. Watson tell you that Spencer and Leicester Officers had a meeting, and what you have testified, of was the result ?

A. He never told me of such meeting.

Question by Defendant. Did I advise you in the least degree not to attend the muster yourself?

A. You said, *the more Delinquents there were, there would be the better chance to determine the right of the Colonel to muster the Regiment out of the centre*, and also, that you was willing *to stand the test of a Court Martial* to have the right decided—but did not, as I recollect, advise me to it.

Capt. David Livermore, sworn and interrogated.

Question by Complainant. Did not Capt. Watson to your knowledge, combine with other Officers to persuade and encourage his men not to obey the Regimental order for muster *in September last*, and did he not agree with other officers that he would not attend the muster himself?

A. Not that I know of.

Question by Judge Advocate. Was there a meeting of Platoon Officers in the first Regiment, previous to the last muster?

A. There was a meeting at Spencer, and Capt. Watson attended.

Question by same. At this meeting, was there an agreement, that the Officers should not attend the muster, in Worcester, the last fall.

A. I am not knowing to such agreement: Capt. Watson asked if I was going to muster, and said he was not.

Question by same. Was there an understanding between the Officers of the Spencer and Leicester companies, that *neither* would attend the same?

A. There was no agreement on the subject. The Officers enquired of each other if they were going, and it was generally answered they should not.

Question by Defendant. Is it customary to have these meetings of Officers, previous to musters?

A. We often meet; Leicester Officers go to Spencer, and Spencer Officers to Leicester.

Question by Defendant. Was there any formal vote or agreement among the Officers not to attend?

Answer. There was not.

Question by Defendant. Was not Capt. Kent present, and did *he* not say he thought he *should* attend?

Answer. He did.

Question by Defendant. Did you meet the Leicester Offi-

cer or a part of them at *Leicester*, and was there not a conversation respecting going to muster ?

A. I did meet those Officers there, and had some conversation on the subject, which I do not now particularly recollect.

Question by Defendant. Was it not a general enquiry among the inhabitants of *Leicester* and *Spencer*, whether the companies were going to Worcester ?

A. It was.

Question by Complainant. Was there no agreement, at the conversation in Leicester, about not going to muster ?

A. There was no such agreement.

Lieut. Harry Sargent, again called and interrogated.

Question by the Court. Did you hear the observation made by Captain Watson, to any other Officers, that if *they* did not attend the muster, *he* would not, or any thing to that effect ? A. Nothing like it.

The Court having continued its session to a late hour, directed an adjournment to 10 o'clock to-morrow, of which Proclamation was made by the Marshal.

COURT ROLL AS CORRECTED.

PRESIDENT.
Lt. Col. JOSEPH FARNSWORTH.

MEMBERS.

Major WILLIAM LOVE,	Capt. JESSE ALDRICH,
Major SALEM TOWN, Jr.	Capt. JOHNSON LEGG,
Major HACKALIAH WHITNEY,	Capt. WARREN SNOW,
Major WILLIAM MOORE,	Capt. OLIVER HOOKER,
Major DANIEL TENNEY, Jr.	Capt. MICAH REED,
Major WARREN RAWSON,	Capt. ELI WARREN.

Wednesday morning, 10 *o'clock*, *Nov.* 14*th*, 1810.

The Court met punctually upon their adjournment, and was opened in proper form by the Marshal. The President and Members upon being called, answered in their places. The complainant and the defendant appeared in their proper persons, and answered. The record of yesterdays's proceedings was read, and some minute alterations being made, was approved by the Court, and its correctness agreed to by the Complainant and Defendant.

Ensign Oliver Morse was called on the part of the Government, sworn and interrogated by the Judge Advocate.

Q. In what Company do you hold a commission ?

A. In the south company in Spencer, commanded by Captain David Livermore.

Q. Do you know of any meeting of the Officers of the Leicester and Spencer companies previous to the last Regimental muster ?

A. I know there was a meeting of the Captains of the Leicester and Spencer companies with some other Officers at Esq. Draper's, in Spencer, just before the muster, but how the meeting was appointed I do not know.

Q. What was the business of the meeting ?

A. I do not know on what business they met. They generally spoke of the propriety of training on muster day, as it was said *three* companies would not attend the muster. The Captains did not think it proper to order their companies on that day, but to give the troops an invitation to do company duty.

Question by Complainant. Was there any conversation with regard to the muster by the Officers of Spencer or Leicester while you were present, and what was it ?

A. Mr. Demond, who came in, asked if the Officers would attend the muster, and Capt. Watson, among others, said, he thought he should not.

Question by Judge Advocate. Was there any Moderator of the meeting or any vote taken ?

A. Neither.

The Judge Advocate addressing Ensign Morse, observed to him—That to prevent the necessity of incumbering the record with longer examination, he would put to him a general question, to which, *in its spirit*, he required a full and explicit answer.

Question by Judge Advocate to Ensign Oliver Morse. At a meeting of Officers at Spencer, was there, to your knowledge, any agreement, or expressed understanding, that those Officers or their Companies should not attend the muster ?

A. There was not to my knowledge.

Question by Complainant. Has it been customary for the Officers of Leicester and Spencer to have a meeting before muster ?

A. They frequently have meetings before trainings, as well as before muster.

Question by Judge Advocate. Do you mean that the Officers of both towns met together, or the Officers of each town respectively ?

A. I know of no appointed meetings, the Officers of the different towns met at trainings accidentally, or upon invitation.

Question by same. Was the meeting at Spencer an appointed or an accidental one ?

A. I think it was accidental.

Question by Complainant. Why do you think so ?

A. Because Capt. Watson said, that he had business with Mr. Demond, of Spencer ; and Capt. Livermore, who is a *Carpenter*, was engaged in measuring some Pews in the Meeting House.

Question by Defendant. Did you hear that Leicester Officers were expected at Spencer, until you saw them there ?

A. No sir, I did not.

Ensign Samuel Watson 3d, sworn and interrogated by the Judge Advocate.

Q. Was you present at a meeting of Officers at Spencer, previous to the last muster, or was you notified to attend such meeting ?

A. I was not ; nor did I know of such meeting.

Q. To what company do you belong ?

A. I hold the commission of Ensign in the Company commanded by Capt. Watson.

Q. Did you know of any agreement or understanding between the Officers of Spencer and Leicester companies, or either of them, that they should not attend the last Regimental muster ?

A. I do not, but it was a common report, that they were not going.

Ensign Samuel Watson, Jr. sworn and interrogated by the Judge Advocate.

Q. In what company do you hold a commission ?

A. In Capt. Kent's of Leicester.

Q. Was you present at a meeting of Officers in Spencer, previous to the last muster, or was you notified to attend that or any other meeting of the Spencer and Leicester Officers ?

A. I was not notified, but happening on business at Spencer, I was at the meeting and saw the Captains of all the companies, with other Officers there.

Q. What was the purpose and business of that meeting ?

A. There did not seem to be any particular business—the meeting appeared to be an accidental one.

Question by the Complainant. What was the conversation among the Officers, while you were with them, in regard to muster ?

A. I do not recollect particularly—I heard some of them say, they should not attend the muster, among whom was Capt. Watson.

Question by Defendant. Is not Landlord Draper, where the meeting was, your Brother in law, and are you not frequently at his House ?

A. Yes sir.

Question by Judge Advocate. Do you know of any agreement, at any time among the Leicester and Spencer Captains not to issue orders for the warning of their companies for the muster ?

A. I do not.

Question by the Court, to Ensign Oliver Morse. At the meeting of the Leicester and Spencer Officers, at Spencer, was it agreed between them, to turn out and train their respective companies in the towns of Spencer and Leicester, on the day of the muster and did they turn out on that day ?

A. At the meeting at Spencer, the subject was mentioned, but postponed until the company trainings in Leicester—to which the Spencer Officers were invited—It was afterwards found, that Lieut. Sargent had given Capt. Watson's company an invitation to train, the day prior to the muster, and as it was thought improper for this company to train two days in succession—*the plan was given up.*

Question by Complainant to same. What did you understand was to be done at the meeting at Leicester ?

A. To determine whether the companies should *train* on muster day—It was thought that *three* of them would not go to Worcester, and it had been mentioned by some of the Inhabitants, that they should like to see them train together on that day.

Lieut. Joshua Sprague, called and sworn.

Q. In what company are you a Subaltern ?

A. In Capt. Kent's.

Q. Do you know of any meeting of Officers in Spencer or Leicester, on the subject of the muster, or any agreement or understanding between them, that they, or their Companies should not attend the muster in compliance with Col. Brigham's order?

A. I know nothing of the kind.

The Judge Advocate observed to the Court, that several witnesses were present to prove more directly the neglect of Capt. Watson to issue orders for warning his company to appear at the muster, some of which, if the Court thought it necessary, he would proceed to examine. When Capt. Watson, in open Court, said he did not deny the fact. Upon which the Judge Advocate remarked to the Court, that he had finished the examination on the part of the Government, unless the Court directed to further enquiry; and with the leave of the Court he would read extracts from the law applicable to the subjects of complaint, and then attend to the exculpatory evidence which should be produced by the Defendant. The Judge Advocate then read from the Act of the 6th of March last, entitled "An act for regulating, governing and training the militia of the Commonwealth of Massachusetts," the following parts:

Section 34th, Art. 1st—Every commissioned Officer, who shall be guilty of *any unmilitary conduct, neglect of duty, or disobedience of orders*, or who shall on duty behave himself in an unofficerlike manner, or who shall wilfully oppress or injure any under his command, *or who shall at any time set on foot, or join in any combination to resist or evade the lawful orders of any commissioned Officer*, shall be liable to be tried by Court Martial.

Same sect. Art. 7th—Every Captain or commanding Officer, who shall either neglect or refuse to call out his company as often as, and at the times required by this act, *or at any other time, when thereto required by his superior Officers*, or who shall at any time excuse any under his command for unnecessary absence or deficiency, shall be liable to be tried by a Court Martial.

The Judge Advocate then demanded of Captain Samuel Watson the second, if he had any thing to offer to the Court in his defence—if so, the Court were now ready to attend to it. Capt. Samuel Watson the 2d, handed to the Judge Ad-

vocate a paper, which was read by him to the Court, in the following words :

" *Mr. President, and Gentlemen of the Court,*

In my defence I shall briefly state the grounds I shall take, and then, by leave of the Court, call witnesses to substantiate my statement.

I shall endeavor in the first place, to shew that Worcester South Meeting House is far from the centre of the Regiment, and also from the centre of the troops composing the Regiment. I shall in the next place, make it appear, that in Col. Brigham's opinion, the Regiment ought never to be paraded in Worcester, because it was uncentral and discommoded the men, and then shew the reasons which Col. Brigham assigned for not meeting in the centre, and the inducements he had for coming to Worcester. And lastly, shall shew, that near the centre there is as good parade ground as in Worcester. SAMUEL WATSON, 2d."

Upon the reading of which, the Complainant handed to the Judge Advocate a paper, in objection to the statement made by Capt. Watson, and which, at his request was read to the Court, and is in the following words :

" The Complainant, protesting that no such declarations can in *form* and *substance* be proved as are alledged, still conceives it his duty to object to the admission of any evidence of the nature of that tendered—That unofficial declarations of an Officer in command, should be introduced to excuse disobedience of his official and formal orders, he conceives to be improper, illegal and unmilitary. Subordination and obedience of orders are the first duties of Soldiers—Should inferior Officers be allowed to form their constructions of the previous language of their superiors, and because they have *impressions* that he expresses opinions with regard to what he might afterwards *order*, different from the tenor and purport of his actual *order ;* and should this loose, irresponsible *impression* be a justification for *actual disobedience*, the whole system of military subordination, at once, must sink. The Private may dispute his Captain on the propriety of his arrangements of the manual exercise—The Captain dispute his Field Officer on the propriety of his Field evolutions—The Field Officer quote his recollection of the previous conversation of his Brigadier, as an excuse for neglecting his regular

commands—The Brigadier parley in the same way with the Division Commander, and the Division Commander with the Commander in Chief. *Every principle of obedience would be outraged, and Military discipline would be another name for legalized disorder !*

Against such a precedent as the admission of the tendered evidence would introduce, the Complainant feels it his most imperious duty, solemnly and respectfully to protest and object—and craves the determination of this Honorable Court Martial on the question.

JOHN BRIGHAM, *Lt. Col. Commandant.*"

Which being read—The Defendant presented this replication in writing :

" The Commander of every Regiment is bound to exercise his judgment in pointing out the place to parade his Regiment, and if in case, it can be shewn, that he wantonly abused his power in this respect, and was not governed by any judgment, *in good faith*, it is competent for the Defendant to shew it. SAMUEL WATSON, 2d."

To which the Complainant rejoined :

" If any Commander of a Regiment is guilty of ill-faith or misconduct, he is amenable to Martial Law. The duty of an Officer or Soldier is to *obey orders*.

JOHN BRIGHAM."

And the Defendant surrejoined :

" It is the duty of both Officer and Soldier to obey all *legal* orders ; but the question is, whether Col. Brigham's orders were, or were not *legal*, and in order to shew that, witnesses must be introduced, to shew that he did not exercise that judgment which the spirit and meaning of the law reposed in him. SAMUEL WATSON, 2d."

All which having been read by the Judge Advocate to the Court, and the Complainant and Defendant having observed that they had nothing further to offer on the subject, by order of the President, the room was cleared of Spectators and the doors closed ; the Court then came to the following determination and ordered the record thereof to be made, and to be communicated by the Judge Advocate, when the doors were opened and the Complainant and Defendant both appeared and answered.

" Upon the statement exhibited by Capt. Samuel Watson

2d, with his motion for the introduction of testimony in its support, and to which the Complainant objects.

The Court have deliberated thereon, and having fully considered all the reasons in favor and all the objections against the admissibility of the evidence, with the 25th section, and the 1st art. of the 34th section of the law of the sixth of March last, as applicable thereto. The President directed the Judge Advocate to put to each of the Members singly the following question, which was done by the Judge Advocate accordingly, beginning with the youngest in rank :

What say you Sir, "Is it your opinion that Capt. Samuel Watson, 2d, should be permitted to introduce evidence in support of his statements now before the Court"—Whereupon the Court decided, "that the facts stated by Captain Watson, if proved, could not form a justification to him for a disobedience of the orders of Col. Brigham, and that this be entered upon the record as the *unanimous* opinion of the Members of this Court ; but the Court further decide, that as it has jurisdiction of another question of great importance to the Defendant ; *the punishment to be affixed to the offences with which he is charged, should a conviction follow upon the trial ;* it will permit him, to this point, to examine witnesses to prove, that Colonel Brigham was influenced, in the issuing of his Regimental order, by considerations of prejudice towards *him* or *his company*, or by unworthy inducements of advantage to himself, to appoint the Muster at a place against the *centrality* of which he had previously expressed to *Capt. Watson* his decided opinion ; and also to prove that Col. Brigham, at any time subsequent to his order, and previous to the muster, had declared, that the place appointed was not as central as in his judgment the convenience of the Regiment would admit, and the Court further decide, that Col. Brigham, on the other hand, be permitted to prove, that the place had a preference, from any advantages of superior accommodation to the troops, or the parade of the day."

The Court having continued its session until 3 o'clock, P. M. now directed an adjournment until 10 o'clock to-morrow morning, of which Proclamation was made by the Marshal.

Thursday morning, County Court House,
Nov. 15, 1810, 10 *o'clock.*

The Court met pursuant to adjournment, and was opened by Proclamation by the Marshal. The President and Members upon being called, all answered in their places. The Complainant and Defendant appeared and answered in their proper persons. The record of yesterday's proceedings was read and approved by the Court—and its correctness agreed to by the Prosecutor. The Defendant objected to the record of the testimony of Oliver Morse, and appealed to the Court, it was decided, that it corresponded with his testimony of yesterday, and the record was ordered to stand.

Oliver Morse was then called by the Judge Advocate, and said, that he did not mean to be understood to say, that there was any *plan* among the Leicester and Spencer Officers for the training of the Leicester and Spencer troops on the day of muster, but that the thing was mentioned in the meeting at Spencer, by some of the inhabitants of the town, and upon the proposition of a Mr. Demond, delayed until the training at *Leicester*, and when the circumstance of the invitation of Lt. Sargent to Capt. Watson's company to train the day preceding, was known, *the subject was not again mentioned.*

William Denny called by Defendant, and sworn by the Judge Advocate.

Question by Defendant. Where is the centre of the Regiment, in your opinion?

A. Not far from Leicester Meeting House, a little *North.*

Q. Is there in that place good parade ground?

A. The Regiment has frequently been mustered there.

Q. How far is the parade ground in Leicester from the field on which the Regiment was paraded on the twelfth of September last?

A. About seven miles.

Q. How far do the troops from Spencer have to march to attend the muster at Worcester? To this question of the Defendant, the Judge Advocate excepted, as being wholly irrelative to the merits of Capt. Watson's defence, and referred to the decision of the Court yesterday, in support of his opinion of the inadmissibility of the evidence—Whereupon Capt. Watson, handed in writing the following motion, to be read to the Court.

Motion of Samuel Watson, 2d.

"The whole record is to go to the Major General, and any thing, that will shew the Colonel's orders were oppressive, ought to go on record, that the Major General may judge of the whole matter, he therefore prays he may be permitted to shew the distance *any men* would have to travel to comply with his orders.

SAMUEL WATSON, 2d."

The Court overruled the motion as irrelative to the defence of Capt. Watson, and decided *unanimously*, that the enquiry ought not to be pursued.

Question by Defendant to William Denny. Did you not hear Colonel Brigham say in my presence, that Leicester was the centre of the Regiment, and that he never would call the troops to Worcester?

A. I did hear him say in a conversation, at which you was present, in 1808, that Leicester was the most convenient place for Regimental muster, and that he would never call the troops to Worcester. This is according to my recollection, and I have no doubt but I am correct.

Capt. Benjamin Sweetser called by Defendant and sworn.

Question by Defendant. Did you ever hear Colonel Brigham say in my presence, that Leicester was the centre of the Regiment, and the most convenient place for muster, and that he would never call the Regiment to Worcester?

A. I have Sir, in 1808.

Lt. Harry Sargent was called, and the same question put to him by the Defendant, to which he answered, that at Mr. William Denny's in Leicester in the fall of 1808, and soon after the muster of the Regiment that year, he heard Colonel Brigham speak of the Worcester Artillery having refused to muster with his Regiment, and say, that Worcester troops were very willing to have the muster in their town, and I think he said, *he would be damn'd* if the troops, while under his command, should be mustered at Worcester. I do not recollect that he said any thing about the *centre*. He seemed a good deal put out with Worcester people, on account of the conduct of their Artillery.

Question by same. What was the conversation last June, at Col. Brigham's house, in presence of Capt. Watson, respecting the muster?

A. In conversation with Col. Brigham, he mentioned he

had been at Worcester in company with some gentlemen of that town, and I think he said, *by God, we drank a chimney full of Punch*, and he was requested to have the muster at Worcester, and told, that it used formerly to be there, but had not for several years past. Col. Brigham then asked Captains Watson and Kent, if all things being considered, they did not think it had better be there, but immediately observed, that on the 6th or 9th of August, he should convene the officers of the Regiment, and wherever they said it should be, he would appoint it.

Question by Complainant. Did Captain Watson say, at the time you mention, that they expected the muster would be at Worcester, and he had no objection, or to that effect ?

A. He did not, sir, in my hearing.

Question by the Court. What was Capt. Watson's answer when Col. Brigham asked, all things considered, would it not be best to muster at Worcester ?

A. I think I made some reply first ; Capt. Watson then said to Col. Brigham, it was his duty to appoint the place ; after parting from the Colonel, he said to me, he hoped Col. Brigham would convene the Officers of the Regiment, for then the muster would be at *Leicester*, as the majority were in favor of it.

James Draper, Esq. called by Defendant, and sworn by the Judge Advocate.

Q. Do you know where the centre of the Regiment is ?

A. By common report, about 3-4ths of a mile North East of the Meeting House in Leicester, and such is my opinion.

Q. Did Col. Brigham ever parade his Regiment near the centre ?

A. Yes sir, about half a mile North of Leicester Meeting House, where there is a good parade ground.

Q. Is Col. Brigham acquainted with the situation of that ground ?

A. He must be, as he was once upon it, at the head of his Regiment.

Q. How far is the parade ground from the field on which the Regiment was paraded in September last ?

A. About 6 1-2 miles, at least that.

Colonel Brigham, in open Court, acknowledged, upon the suggestion of the Judge Advocate, that the parade of the

Regiment in September last, was not, *geographically*, in the centre of the territory embracing his regiment.

Lt. Col. Ignatius Goulding, called by the Defendant.

Q. Do you know where the centre of the Regiment is ?

A. I have always understood near Wait's tavern, in Leicester. The Regiment have twice been mustered there.

Q. Was not that the common opinion, before part of Holden was set off to West Boylston ?

A. It was frequently so spoken of while the Regiment was commanded by Col. Davis, and Col. Brigham a Major under him.

Many questions were asked Col. Goulding by the Defendant, as to the relative centrality of Leicester and Worcester, and the march of the troops to either for muster, to which the Judge Advocate objected, as directly against the letter and spirit of the decision of the Court yesterday, which he considered as directing to the proper enquiry to be made on the subject. Proof of mere error in judgment by the Col. on a subject, *by law left to the exercise of that judgment*, could not avail in the defence, but under the decision of the Court, as it was understood by the Judge Advocate, the Defendant might give in evidence, that the Col. had expressed to him personally a decided opinion, against the centrality or convenience of the place of muster in Sept. last. The Court directed the Judge Advocate not to make record of any questions or answers repugnant to a fair construction of the opinion of the Court yesterday.

The Judge Advocate then put to Col. Goulding the following questions :

Question 1st. Do you know that Col. Brigham, in issuing his last Regimental order, was influenced by considerations of personal prejudice to Capt. Watson or his Company, or by unworthy inducements of advantage to himself, to appoint the muster at Worcester ?

A. I do not.

Question 2d. Do you know, that Col. Brigham appointed the muster at a place, against the centrality of which he had previously expressed his decided opinion ?

A. I do not.

Question 3d. Do you know, that Col. Brigham, at any time previous to the muster, but subsequent to his order, declared, that in his opinion, the place appointed was not as

central as in his judgment the convenience of the Regiment would admit.

A. I do not.

Question by Complainant. Have you not given an opinion, that Worcester was as convenient for a muster of the Regiment, as any other place within the Regiment, all things considered.

A. I do not particularly recollect that I have; but I have said that, all things considered, I expected the muster would be at Worcester, and it would not be a put-out to me. I have also given my decided opinion, that by the late law, the Colonel had no right to muster the Regiment out of the centre, as there is a convenient place in the centre.

Question by same. Do you know of any agreement among the Spencer Officers, or of Capt. Watson with any other Officers, or any expressed understanding not to attend, or not to warn his company to attend the muster?

A. I do not know any thing of the kind.

Q. By Judge Advocate. Do you live in Leicester?

A. I do.

Capt. Benjamin Sweetser, called by Defendant.

Q. What reasons did Col. Brigham assign for not mustering the Regiment at Leicester this year?

A. In August last, I had a conversation with Col. Brigham; he said he had received a Brigade order for muster, and had not determined upon the place, but should that day see and consult with his Majors. I told him I had understood that he intended to consult the Platoon Officers of the Regiment; he said he had talked of it, but the time was then so short, he thought he should not have opportunity. He enquired if the ground on the hill in Paxton was in good order for the troops to parade on, from which I inferred, that he intended the muster should be *there*, and observed to him that Leicester Officers would expect it in their town, and that it would be more central. He answered that he would not go to Leicester, for Landlord Hobart had at the last muster charged *Three Dollars* for setting the table, and he meant to go where he could get it set for nothing.

Q. Are you Captain of a company in the Regiment?

A. I command the company in Paxton.

Lieut. Willard Snow, called by the Defendant and sworn.

Q. What reasons did Col. Brigham assign for not mustering the Regiment at Leicester, the last fall ?

A. I once heard him say, that he had not determined, whether to muster the Regiment at Paxton or at Worcester, and nothing further, that I recollect, except I think I heard him say, at another time, that he should call his Captains and Subalterns together, before appointing a place.

Question by Complainant. Did you not at the same time express to me your opinion, that Worcester was more, or as convenient as Leicester ?

A. Not that I recollect.

Question by Defendant. Have you not heard Col. Brigham say, that Leicester was the centre of the Regiment ?

A. Yes, I think I have.

Lieut. Josiah Q. Lamb called on the part of the Defendant and sworn.

Q. Have you not heard Col. Brigham say, that Leicester was the centre of the Regiment ?

A. Yes Sir, at Jenks' tavern in Spencer, in March 1809, I heard him say that Leicester was the place where the Regiment ought to be paraded, and always should be, while he had the command, and that it was an unjust thing to call the Regiment to Worcester. It was in a company of Officers at a meeting requested by Col. Brigham.

Lieut. Sardine Muzzy called and sworn on the part of the Defendant.

The same question was put to this witness, and the same answer returned as by the last.

Major James Estabrook of the 1st Regiment called by the Defendant.

Question by Defendant. Had Col. Brigham at any time offers made to him, of having his expence *gratis*, if he would muster his Regiment at Worcester ?

A. Some offers of the kind were made to him *two years since*, which he did not accept, but mustered the Regiment at *Leicester*. I know of no others.

Question by same. Will you relate what you know respecting Col. Brigham's parading the Regiment the last fall, at Worcester ?

A. Previous to appointing the place, Col. Brigham called upon me to go with him to Worcester to attend to the sub-

ject, I accordingly accompanied him, and he *there* appointed the place.

Question by Complainant. Were there offers made by people in Leicester two years since, to have the table set, as in the last instance in Worcester ?

A. I do not know of it.

Q. Did Colonel Brigham appoint the place ?

A. He did.

Q. Did Colonel Brigham in appointing the place for the last muster, express his opinion where the Regiment would be best convened, or any personal dislike to going to Leicester ?

A. He expressed his opinion, that the Regiment would be best accommodated at Worcester, and I have heard him say, that he had been ill used at Leicester.

Q. Is it *your* opinion, that the Regiment would be best convened where the last muster was appointed at Worcester, or where the Regiment was last mustered in Leicester, taking into consideration the situation of the Troops ?

A. I do not know the situation of the ground at Leicester, not having taken any admeasurement—I do not know the facts on which to form a correct opinion—if the ground is as good at Leicester as it was two years since, I think Leicester geographically nearer the centre, but from information am of opinion the greater number of troops are on this side.

Question by Complainant. Do you think Leicester as convenient for the troops to muster at, as Worcester ?

A. I do not ; judging by the returns of the troops I think Worcester as a place of muster would accommodate best.

Adjutant Reuben Munroe of the Regiment, was now called and produced and testified to the truth of the following Certificate of the number of troops in the Regiment.

" I hereby certify that the muster roll from the returns of the Captains in the several towns in May last are as follows :

WORCESTER,	162	HOLDEN,	69
PAXTON,	46	SPENCER,	117
WARD,	49	LEICESTER,	83

Exclusive of the Artillery in Worcester, and the Cavalry in Holden and Worcester.

REUBEN MUNROE, *Adj't.*"

Nov. 16, 1810.

Major Enoch Flagg of the Regiment, called by the Defendant, and sworn by the Judge Advocate.

Question by Defendant. Do you know of any offers made by any persons to Col. Brigham, that he should have his private expences *gratis*, if he should muster his Regiment in Worcester last Fall, or any thing of the kind ?

A. Nothing of the kind.

Question by same. Do you not think the parade ground in Leicester, as convenient for the muster of the Regiment, as where the muster was in Worcester, last Fall ?

A. I do not, and for these reasons—the distance from the two extremes as I learn it, is from Holden 12 1-2 miles and from Spencer 17 miles—both numbers making 29 1-2 miles —the difference in which distances being divided, brings Worcester within 2 1-4 miles of the centre, the greater distance being from Spencer—and from a view to the numbers and situation of the troops, I think, that except 117 men, belonging to Spencer, the rest of the Regiment would be as well accommodated at Worcester as at any other place.—396 are accommodated there as perfectly as they could be elsewhere—while but 117 are at all more incommoded, and but in the difference of 2 1-4 miles in the travel—my calculation is upon the present state of the Regiment.

Question by Complainant. Did I appoint the last place of muster and assign the reasons for preferring Worcester ?

A. You did both.

Question by same. What reasons did I assign ?

A. At a meeting on the subject of arrangements for the muster with Major Estabrook and myself, there was no disagreement in opinion about the place. The Colonel consulted us, but made the appointment himself, and assigned as his reason for fixing upon Worcester, that taking into consideration the conveniences of the place, and the situation of the troops, it would best accommodate the Regiment.

Question by Defendant. To which town is Paxton nearest, Leicester or Worcester ?

A. I should judge the difference in distance was not great, but nearest to Leicester.

Q. How far are Spencer, Worcester, Holden, Paxton and Ward respectively from Worcester ?

A. I cannot determine these relative distances, but I think

the aggregate of travel by the whole Regiment less to Worcester than to Leicester.

Question by Defendant. Did Col. Brigham object to going to Leicester, because Landlord Hobart had, at the last muster charged 3 dollars for setting the table?

A. I do not recollect, that Col. Brigham objected to Leicester or any other place.

Capt. William Sprague called by the Defendant and sworn by the Judge Advocate.

Question by Defendant. In your opinion, where is the ground that would best accommodate Col. Brigham's Regiment for muster, taking into consideration the situation of the troops?

A. It has generally been said, that the centre of the Regiment was not far North of the Leicester Meeting House, and I am of that opinion; the ground there has been improved for the parade, and not complained of to my knowledge. I was once present in a meeting of Field and Platoon Officers before Colonel Brigham had the command of the Regiment, when a calculation was made in favor of the centrality of Leicester.

Q. How far is Paxton from Leicester and from Worcester?

A. Five miles from the former, and eight from the latter.

Capt. Samuel Watson, 2d, observed to the Judge Advocate, that he had nothing further to offer in evidence to the Court, but wished for indulgence until to-morrow afternoon, to prepare and present his defence in writing to the Court. The Court directed the Judge Advocate to inform Capt. Watson, that he should be indulged until Saturday morning, when he would be prepared to exhibit in writing, whatever he had to offer in his defence to the Court; of which direction Capt. Watson was forthwith informed by the Judge Advocate. Lt. Col. John Brigham, upon being enquired of by the Judge Advocate if he had any thing further to submit to the consideration of the Court, in support of the charges in his complaint against Capt. Samuel Watson the 2d, presented to the Judge Advocate, in writing, the following motion:

"The Complainant prays this Honorable Court, that some order may be taken, by which he may have an opportunity to reply to the defence of the Defendant."

And thereupon the Court decided, that the defence of a Defendant was within his control, until presented to the Court, and then immediately became part of the Record, and that this Court cannot with propriety take any order upon the request of the Complainant.

The Judge Advocate observed to the Court, that at present, he had nothing further with which to trouble them, in reference to the Trial of Capt. Watson, and with their leave would now proceed to the arraignment and Trial of Captain David Livermore, another Officer in arrest, and to which this Court Martial is also ordered. The Court directed accordingly.

Saturday morning, Nov. 17th, 1810, half past 9 o'clock.

The President and Members of the Court all answered in their places. Lieut. Col. John Brigham, the Complainant, and Capt. Samuel Watson the second, the Defendant, appeared in their proper persons. The Judge Advocate then demanded of Lieut. Col. John Brigham, and Capt. Samuel Watson, 2d, respectively, if they had any thing further to offer to the consideration of the Court. Capt. Samuel Watson, 2d, presented to the Judge Advocate, and requested him to read in his behalf, the following *defence* :

Mr. President and Gentlemen of the Court,

UNWILLING for a moment to rest under the suspicion of being guilty of unmilitary conduct, neglect of duty, and disobedience of orders, I am happy in having my conduct receive an open and public investigation before this Honorable Court. It has been the pride of seven years of my life, to do my duty as a faithful and obedient officer, and to promote the respectability and usefulness of our military establishment. Notwithstanding this, I am charged with unmilitary conduct, neglect of duty, and disobedience of orders, of conniving at, abetting and procuring the men under my command to mutiny against and disobey orders, and of aiding, countenancing and combining with other officers in a determination to oppose the orders of our Commandant.

This is the black Catalogue of Offences with which I stand accused, before this Honorable Tribunal. They are couched in three Specifications, the *first* of which charges me with

"unmilitary conduct, neglect of duty and disobedience of orders," in as much as I refused to obey the orders of Col. Brigham, which he issued to me, bearing date the first day of August, 1810, directing one to call out the company under my command, to meet at the South Meeting House in Worcester, on Monday the twelfth day of September, 1810, at nine o'clock A. M. and there to wait for further orders; which orders the specification states I received, but neglected to issue any orders of my own for any of the purposes aforesaid, and neglected to appear myself. The *second* specification charges me, with being regardless of my duty as an Officer, designing to destroy that harmony, subordination and faithful obedience to orders among the officers and soldiers of the militia, on which depend the respectability and usefulness of the military establishment, and with conniving at, abetting and procuring the men under my command to mutiny against and disobey said orders, and to neglect and refuse to appear on said parade, to discharge their duty on the said 12th day of September, agreeable to the spirit and intent of said orders. The *third* Specification charges me with aiding, abetting, countenancing and combining with other officers holding commissions in the militia of the Commonwealth, in a determination to oppose the orders of their said Commandant, by a refusal to obey them.

The charge contained in the *first* specification, I agree is *true*. I agree, I did receive Col. Brigham's orders to call out the company under my command, to meet at the South Meeting House in Worcester, on the 12th day of September, 1810, and that I did neglect and refuse to obey said orders. Against this accusation, therefore, I will undertake to defend myself by shewing that the orders of Colonel Brigham were against the meaning, spirit and intent, and even *letter* of the law, by which the Militia of the Commonwealth are now regulated and governed, and therefore I was not bound to obey them. In doing this, I have undertaken to shew, *first*, that the Statute confines the Commanders of the several Regiments in this Commonwealth to parade their men as near the centre of their Regiment, as convenience will admit. In the second place, that Worcester South Meeting House is not only in fact far from the centre of the Regiment, but also it is uncentral in the opinion of Col. Brigham himself and

unrighteous that the Regiment should ever be paraded in that place.

In a former Statute by which the militia of this Commonmonwealth were regulated and governed, which passed June 22d 1793—in the 29th Section, it is enacted " that every Regiment of Militia in this Commonwealth shall be assembled in Regiments once in two years for Review, Inspection and Discipline, on such days as the Commanding Officers of the several Divisions or Brigades should order—*the Commanding Officers of Regiments to point out the place.*" This provision has been retained in every Statute until the one, under which the Militia is now regulated and governed, which passed March 6th, 1810. It is therefore very clear, that Commanders of Regiments have always had the right, until the operation of the present Law to muster their men in what place they pleased. In many instances, this power was abused, it became a subject of complaint, and it is perfectly in the recollection of every member of the General Court, that while the merits of the present Law were under discussion, it was agreed, that the authority given to Commanders of Regiments by the old Law was much abused and in some places had become a grievance to society—All seemed inclined to remedy the evil, and engrafted a clause upon the present Law to that effect, which is contained in the 25th Sec· where it is enacted, " That all the Troops in " each Division shall be paraded once in each year for Re- " view, Inspection and discipline, either in Brigades, Regi- " ments or Battalions of Regiments (regard being had to the " scattered or compact situation of the Troops) at such times " as the Commanding Officers of Divisions may order." And when a Brigade review or inspection is ordered, the Commanding Officer of the Brigade shall appoint the place and give notice thereof to the Commanding Officer of the Division—And when a regimental review or inspection is ordered, the Commanding Officer of the Regiment shall appoint the place and give notice thereof to the Commanding Officer of the Brigade. *And the places to be appointed for review or inspection as aforesaid shall always be as central as in the judgment of the Officer pointing out the place, convenience will admit.*

I shall contend, that this means as near a geographical centre as convenience will admit, and that the Officer point-

ing out the place is *bound* to *exercise* his judgment in appointing the place as near the central point as convenience will admit, and not, after he has appointed a place quite on one *side* of his limits for his Regiment to parade, to stultify *himself* and say, in my opinion, this is as near the centre as convenience will admit—This would be making the law a mere dead letter, without meaning and without force. It may also be inferred, that this is the meaning of the Statute from another clause in the same section, which is "that no non-commissioned Officer or Soldier shall be obliged to march a greater distance than fifteen miles from home at any *Brigade* review." Will it be contended then, that if one Officer, non-commissioned Officer, or Private, should refuse to march more than fifteen miles from home at a Brigade Inspection, when ordered by his superior Officers, it would be disobedience of orders! And will it be contended, that if the Commanding Officer of a *Brigade* cannot compel his men to march more than *fifteen* miles from home, that the commanding Officer of a Regiment can. Surely I should think not, because in that case, it would be giving greater authority to a Colonel than to a Brigadier General; besides it would be introductory to the dreadful absurdity, that while a Private Soldier might with impunity refuse to obey the commands of a Brigadier General, when ordered to march *sixteen* miles from home, he should be compelled to obey the commands of a Colonel if ordered to march *thirty*.

By referring to the minutes of the Judge Advocate, it will be found that many men would have to march *seventeen* miles from home, to arrive at the place pointed out in Col. Brigham's order of the first of August last.

It may be said perhaps, that altho' the men, from Spencer, who lived more than fifteen miles from the place of parade were not obliged to obey the Colonel's orders of the first of August last, yet the men in the town of Leicester *were* bound to comply with them. But to this I would answer, that an Officer has no authority but what he derives from the Statute, which is now under consideration, and the moment he leaps over the bounds prescribed therein, that moment his orders are a mere nullity, and it is no crime to disobey them; and if the orders of the first of August 1810, were illegal in this point, as it respects one company, or one single

man, they were illegal as it respects the whole Regiment—they were void, and not binding on any one.

Under this construction of the Statute, it is necessary I should shew where the centre of the Regiment is—And by referring to the records, it will be found to be in Leicester, at least *seven* miles distant from the place where the Regiment mustered on the 12*th of September last.* Then another question would arise, was it convenient to muster near the centre? The records will shew, that very near the centre there is as good ground, as that on which the Regiment was paraded.

Were these facts unknown to Col. Brigham? Surely not. He has mustered on the centre ground, he knew where the centre was, he has in strong language declared it to be unjust and unrighteous to drag the men to Worcester; he has impiously swore they never should be mustered there during his command of the Regiment, he has said *Worcester* was *not*, but that *Leicester was* the centre of the Regiment. Did he exercise his judgment then, in good faith, in issuing his orders of the first of August, 1810?

But it may be contended perhaps, that the words (regard being had to the scattered or compact situation of the troops) would authorize the several Commanders mentioned in the section, to parade their men in the centre of the body of troops. But I believe a careful examination of that section would convince any one, that this cannot be the rightful construction, It is there said, that all the troops in each Division shall be paraded once in each year, for Review, Inspection and Discipline, either in Brigades, Regiments, or Battallions of Regiments, *(regard being had to the scattered or compact situation of the troops.)*

The obvious construction of this part of the section is, as I contend, that whether all the troops in each Division are to be paraded once in each year, either in Brigades, Regiments or Battallions of Regiments depends on the scattered or compact situation of the troops. In the town of Boston, for instance, the Brigadier General has a right to parade his Brigade once a year, and the Colonel his Regiment, because the troops are compact. But a Brigadier General or a Colonel in some of the Eastern Counties cannot claim the same right and authority from the same clause, because their troops are scattered. The words, *regard being had to the scattered*

or compact, &c. are contained in a parenthesis, and have no sort of connection with the preceding sentences.

But whether the first or last construction be the rightful one, still the Colonel's orders of the first of August, 1810, were illegal and had no binding force, because they were to assemble the troops in a place far distant from the centre of the men as well as from the geographical centre of the Regiment, as will be seen by one moment's reflection upon the local situation of the troops, to which I will now attend.

Holden is almost eight miles from Worcester, and nine from Leicester ; Paxton is eight miles from Worcester, and five from Leicester ; Ward is five miles from Worcester, and the same distance from Leicester. It therefore follows, that there would be no difference whether Holden, Paxton and Ward, paraded at Worcester or Leicester. The only question then is, where is the centre between Worcester and Spencer. To determine this, the whole distance must be taken. The extreme of Spencer is *eleven* miles from Leicester ; the extreme of Worcester is *ten*. The centre then would be half a mile west of Leicester Meeting House ; but as there are more troops in Worcester than in Spencer, it may fairly be implied that Leicester Meeting House is the centre both of ground and men, and it has been abundantly proved, that near the centre there is as good parade ground as in Worcester.

I have evidently shewn that Leicester is not only the centre of men and ground, *in fact ;* but also it is so in the opinion of Col. Brigham himself. It therefore remains, that I should look for some moving causes, some vital principle, some great and powerful motive that influenced Col. Brigham to drag the Troops, as expressed it, to the town of Worcester—Our minds are stretched upon Tenter Hooks with earnest expectations of having some noble and magnanimous cause for his determination—And behold, what is it ? Why that Landlord Hobart charged him *Three Dollars* for setting the Field Table the last time he mustered his Regiment at Leicester, and now he meant to go, where he could have it done for nothing—Wonderful display of the greatness of soul ! *Three Dollars !* What a worthy motive for dragging his troops to Worcester. This is the reason why he has disregarded the inconvenience of his Men, and contemned the Laws by which he ought to be governed.

It seems to be the opinion of some, that every Officer is bound to obey the orders of his Superior Officer, whether legal or illegal, and after the act of obedience by the validity of the orders. But in answer to this it need only be asked, if it would be disobedience of orders for an Officer or non-commissioned Officer to refuse to comply with orders that might be issued contrary to the 26th Section of the present Militia act, which is " no Officer non-commissioned Officer " or private shall be *holden* to perform any military duty on " any day, on which the Selectmen of the Town and Dis- " trict in which such Officer, non- commissioned Officer or " Private resides shall appoint a meeting for the election of " a Representative to the General Court, nor shall there be " any military parade on the day pointed out by the Consti- " tution of this Commonwealth, for the elections of Govern- " or, Lieut. Governor, Senators, &c." Orders issued contrary to this section would evidently be illegal and have no binding force—and so in all other cases where they are illegal they have no binding force, and it is not criminal disobedience to refuse to obey them.

This principle is also recognized in the 34th section of the same statute, under Orders for the government of the Militia when not in actual service. Art. 1st. " Every commission- " ed Officer, who shall be guilty of any unmilitary conduct, " neglect of duty or disobedience of orders, or who shall set " on foot any combination or join in the same at any time " to resist or evade the *Lawful* orders of any commissioned " Officer, shall be liable to be tried by a Court Martial." This evidently implies, that they are not even liable to be *tried* by a Court Martial, if they combine to resist or evade the *unlawful* orders of any commissioned Officer.

The opinion stated, therefore, must have arisen in ignorance and inattention to the law, and must vanish upon the slightest examination.

If troops were bound to obey the illegal orders of their superior Officers, a Military Despotism would be established in this County, such as never disgraced the annals of the most barbarous despot. The property, liberty and lives of our Fellow-Citizens would be jeopardized upon the altar of relentless *Tyranny*, and the will of an unprincipled Officer would become the scourge of a miserable people. Such an

idea cannot for a moment be entertained by any one, who wishes to enjoy the blessings of liberty and independence.

It is supposed by some, that the commanding Officers of Regiments still have the right to parade their troops in what places they please. In answer to this opinion, I would make the remark as heretofore, that the old Statute makes use of these words, " The commanding Officers of Regiments to " point out the place" this was found to be an evil ; a new Law was made ; and for what purpose ? To leave the power just where it was before ? This is the language of Gentlemen who entertain this opinion. And if this be the rightful construction, why did not the Framers of the last Statute make use of the same words as were used by the former, and not say any thing about the centre ? It undoubtedly had a meaning different from the former Statute, and its meaning evidently is, that the regiment should be paraded as near the centre as convenience would admit. And if orders are issued different from this construction of the Statute, I contend, they are unlawful and have no binding force. Apply this reasoning thus, to the orders of Col. Brigham, of the first of August 1810, and see if they were conformable to this Statute. Where the Regiment paraded in Worcester is at least seven miles distant from the centre of either men or ground ; and near the centre, there is as good parade ground as in Worcester. Were his orders then conformable to the Statute or not ; lawful or unlawful ? If unlawful, I have shewn they have no binding force, and therefore it is not criminal disobedience to refuse to obey them.

It is true, the orders of a Colonel may be of a doubtful nature, and the only mode of trying their legality is by *Court Martial.* If the Court having the jurisdiction of a question of this kind should determine against the legality of such orders, the accused must stand acquitted ; or if they should determine, that the orders were so doubtful as to justify a well grounded doubt in the mind of the Delinquent, they would be cautious in affixing a punishment, that would deprive the Militia of a faithful Officer, even if they themselves should be of a different opinion, as to the legality of the orders.

Nothing prior to this has been suggested against my strict adherence to military discipline, but on the other hand, it

has been proved, without asking the question, that I have always taken pride in obeying the *lawful* orders of my superior Officers. Had I tamely submitted to an order, which I considered conscientiously unlawful, the question would have remained undecided, and a difficulty always have existed in the Regiment. For this cause, I chose to appeal to this Honorable Court, and abide the consequence of their decision. Should I suffer by this act, I have this consolation left to me, that what I have done, I did in the uprightness of my soul, and the Regiment to which I belong will reap the advantages of having an important question decided.

Thus far for my defence against the charges in the first specification. I shall now make a few remarks on the second and third specifications, blending them together, because in their nature and tendency, they differ very little from each other.

They charge me with procuring my men to mutiny against and disobey the Colonel's orders. Also with combining with other Officers in a determination to oppose said orders; charges, as unfounded as they are unsoldierlike and uncharitable.

No less than *fourteen* witnesses has the Complainant caused to be examined to prove a crime against me, of which he himself has been guilty in the same Regiment. What has been the result of the examination? A perfect acquittal! Not a single witness out of the whole *fourteen* has testified to any guilt of mine. But so far from this, among all the conversation had upon the subject of the muster, amidst the commotion of the people, who thought the Colonel's orders outrageous, I never advised any one not to attend the muster, I never combined with any one to oppose his orders.

The second and third specifications therefore had better never have incumbered the record. But now they are there —let them remain as monuments of the direful revenge and malice of my accuser. Let them speak forth the purposes of his dark designs, and remain as a record, not of *mine*, but of *his unworthy combinations!*

GENTLEMEN—I leave my cause with you; with a perfect reliance in the rectitude of your decision, and with a firm belief, that you will protect the honor of an Officer, who is conscientiously contending for his right.

SAMUEL WATSON, 2nd.

The above being read by the Judge Advoeate, Lt. Col. Brigham the Complainant desired him to communicate to the Court the contents of a paper, which he presented, and which is in the words following :

" The Complainant respectfully submits to the Court the following observations on the trial of Capt. Watson. Considering the neeessary prolixity of the record, he will study brevity in this case as a duty.

" Having proved the issuing and service of the orders and the disobeyment of them by the Defendant, he supposes *he has made out his case.* He is supported in this opinion by an interlocutory Judgment of the Court, that the evidenee offered, in defence, was admitted upon the ground, that the Court had custody of the question, *respecting the degree of punishment.* Having instituted the prosecution, without a personal feeling with respect to the result, except a wish to perform his duty, in preserving the correctness of military subordination and vindicating the necessity of *obedience to orders*, his duty is discharged and he is satisfied. While he is compelled with all due respect to the *Judge Advocate*, and with perfect reliance on the impartiality and integrity of the Court, to state that the *exculpatory* evidence has taken a range wider than he had anticipated—he is sensible the Court must be aware, that it was impossible, he should have anticipated the course the defence has taken, or prepared himself to meet questions, with respect to which he could have no previous notice, nor opportunity for preparation. He had supposed *the Defendant to be on trial*, but with a knowledge of charges and a chance for preparation, he would be perfectly willing to submit his *own conduct* to the determination of this honorable Court.

" JOHN BRIGHAM."

The Judge Advoeate summed up the evidence, and read the Records to the Court, which was then cleared of Spectators and the Doors closed by the Marshal. The Court thereupon proceeded to render Judgment upon the Trial.

Opinion and Judgment of the COURT *on the* TRIAL *of Capt.* SAMUEL WATSON, 2d.

THE Court having been cleared of Spectators and the Doors closed—The Judge Advocate put to each of the *Mem-*

bers singly, the following question, beginning with the lowest in grade.

What say you, sir, from the evidence which has been adduced, both for and against Capt. Samuel Watson, the 2d. and from what he has offered in his defence, are you of opinion that he is *guilty* or not *guilty* of the *first specification* of charge in the complaint of Lt. Col. John Brigham, exhibited against him.

The Court decided, that of the *first specification* of charge in said complaint, the said Capt. Samuel Watson, the 2d. is *guilty*.

Upon the question being put in the same form and order upon the *second specification* of charge in said complaint,

The Court decided that of the said *second specification* of charge, the said Capt. Samuel Watson the 2d, is *not guilty*.

Upon the question being put in the same form and order, upon the *third specification* of charge in said complaint,

The Court decided that of the said *third specification* of charge, the said Capt. Samuel Watson, the 2d, is *not guilty*.

The Court having taken into consideration the offence of which it has adjudged Capt. Samuel Watson, 2d. *Guilty*, as contained in the *first* specification of charge in the complaint of Lt. Col. John Brigham, exhibited against him—do sentence the said Capt. Samuel Watson, the 2d to be *removed from office*, and do adjudge the said Capt. Samuel Watson, the 2d to be disqualified for and incapable of holding any Military Office under this Commonwealth, for the term of *One Year*.

JOSEPH FARNSWORTH, *President.*

LEVI LINCOLN, JR. *Judge Advocate.*

The Court having concluded the Trial of Capt. Samuel Watson, 2d. the doors were opened, and Capt. Watson was dismissed from any further attendance upon the Court, unless required thereto by a new order.

At 3 o'clock, P. M. the Court adjourned until Monday, the 17th day of December next, at 10 o'clock, A. M. at the same place, of which Proclamation in form was made by the Marshal.

TRIAL OF CAPT. DAVID LIVERMORE.

County Court House, Worcester, Thursday, Nov. 15, 1810, 2 *o'clock, P. M.*

The Court Martial on the trial of Capt. Samuel Watson, the second, having indulged him in a delay until Saturday Morning, to prepare and present his defence—proceeded forthwith to the trial of Capt. David Livermore another of the Officers under arrest and for whose Trial this Court was also ordered by the Major General of the Division.

Capt. David Livermore was called and answered in his proper person. The names of the President and Members constituting the Court in the Trial of Capt. Watson were called. The Division Orders of the 22d of October and of the 10th of November, which form part of the record of the proceedings in the Trial of Capt. Watson were again read by the Judge Advocate—and in the hearing of the Defendant.

The Judge Advocate then proceeded in this trial to administer to the President and to each of the Members singly, and the President to the Judge Advocate, the respective Oaths prescribed in and by the 31st section of and Act of the Legislature, entitled "an Act, for the regulating, governing and training the Militia of this Commonwealth." Captains Joel Cheney and Joel Fay also attended as Supernumeraries and were not sworn.

The Judge Advocate informed Capt. David Livermore, that the Court was constituted, and the President and Members sworn to pass upon his trial and demanded of him, that if he had any objection against, or any cause of challenge to, either *member*, he should produce it in writing, that the rest of the Court might hear and decide thereon. Capt. David Livermore answered that he had no objections or cause of challenge to offer. The same information was given to, and the same demand was made of Lieut. Col. John Brigham, the Complainant, who appeared in his proper person before the Court, to which he returned the same answer.

The Judge Advocate then directed Capt. David Livermore to hearken to the complaint exhibited by Lt. Col. John Brigham against him, which he read in the words and figures following, to wit.

[*The Complaint against Capt. Livermore, being precisely the same as that against Capt. Watson, it is deemed useless to insert it in this place.*]

Which being read to the said Capt. David Livermore, the Judge Advocate demanded of him, whether of the charges contained in the said Complaint of Lieut. Col. John Brigham against him, he was *Guilty* or *not Guilty !* To which Capt. David Livermore answered that thereof he was *not Guilty*. The Judge Advocate enquired of Capt. Livermore if he was ready for his Trial, to which he replied in the affirmative.

The Court having continued its sitting from ten o'clock in the morning to half past three in the afternoon, now directed an adjournment until ten o'clock to-morrow—-of which proclamation was accordingly made by the Marshal.

Friday Morning, November 16, 1810.

The Court met on their adjournment and the President and Members being called, answered in their places. The Complainant and Defendant were present and answered in their proper persons.

The Judge Advocate informed the Court, that he had proposed with a view to the saving of expence in the attendance of the Supernumeraries, to arraign Capt. Kent, another Officer, to whose trial this Court had been appointed—and again to call Capt. Prouty for *his* arraignment, preparatory to his trial, to which also *this* Court was directed, that if no challenge should be offered to either member of the Court, the Supernumeraries might be discharged ; and thereupon Capt. Daniel Kent, by order of the Honorable Court, was called, and appeared and answered in his proper person.

Capt. William Prouty was then called by the Judge Advocate for his arraignment upon the Complaint of Lt. Col. John Brigham, but did not answer.

The Court having deliberated upon the subject of an adjournment, satisfied that the trials of Captains Watson and Livermore would occupy the residue of the week, and informed of an adjournment of the Supreme Judicial Court to the next week, from the session in Sept. last, and of the

approaching term of the Court of Common Pleas, by which several of the Officers of this Court would be engaged, and the Court deprived of the accommodation of the Court House for several weeks successively, determined that when they adjourn, it should be to *Monday the 17th day of December next, at 10 o'clock A. M. at the same place.* The Judge Advocate immediately thereupon dismissed the witnesses in the trials of Captains Kent and Prouty, to attend again punctually upon the adjournment, and then proceeded in the trial of Captain Livermore.

Upon the suggestion of the Judge Advocate, the Complainant, to expedite the business before the Court, conceded that the town of Worcester is not geographically central upon a map of the Regiment, and that part of the town of Leicester was *more so*, but not *central.*

Capt. Livermore then presented a paper containing his concessions, as copied below :

" *Mr. President and Gentlemen of this Honorable Court Martial,*

" In order to expedite the progress of this trial, now pending between the Commonwealth and myself, I am willing to admit, that Col. John Brigham is Lt. Col. Commandant of the First Regiment, First Brigade, and Seventh Division of the Militia of the Commonwealth, and that he received Brigade Orders directing him to call out the Regiment under his command, for Review and Inspection, on the 12th day of September last past, and that he in obedience to such orders, did make out and regularly transmit to me certain orders, directing me to call out the company under my command, to meet at the South Meeting House in *Worcester*, on Wednesday the 12th day of September aforesaid, for Review and Inspection. And I do likewise admit, that I did not issue any orders to the company under my command, in compliance with the aforesaid direction from Col. Brigham, nor did I appear myself, at the aforesaid time and place.

DAVID LIVERMORE."

The Judge Advocate moved the Court for the introduction of evidence on the points in issue, and to facts not conceded, and called Lieut. Josiah Q. Lamb, who was sworn and interrogated.

Question by Judge Advocate. In what company are you an Officer ?

A. I am a Lt. under Capt. William Prouty, of Spencer.

Question by same. Do you know of any agreement between Capt. Livermore and any other Officers holding commissions in the Regiment, commanded by Col. John Brigham, to disobey or neglect his last Regimental order, or not to warn their companies for the muster ?

A. I do not.

Question by same. Was there any meeting of the Officers belonging to Spencer, at which Capt. Livermore was present, previous to the muster and subsequent to the order ?

A. Not that I know of, I never heard of or attended such meeting.

Question by same. Was there any agreement by Capt. Livermore with other Officers, that his Company should train in Spencer on muster day, or any proposition for such agreement ?

A. Not to my knowledge.

Question by Complainant. Previous to the muster, had Capt. Livermore any conversation with you, on the subject of my Regimental Order ?

A. Not that I recollect.

Question by same. Previous to the muster was you at any meeting of Officers, at which Capt. Livermore was present, and the subject of the muster spoken of ?

A. I do not remember any such meeting.

Ensign Eli Prouty, Jr. called on the part of the Government, and sworn and interrogated by the Judge Advocate.

Q. In what company are you commissioned ?

A. I am an Ensign under Capt. William Prouty.

To this witness the same questions were put, and the same answers were received as in the examination of the last witness, except that he testifies, that after the Regimental Order was issued, he once asked Capt. Livermore if he should attend the muster, to which he replied in the negative.

The Complainant added the following question to Ensign Prouty. Was you ever present with Capt. Livermore at a meeting of the Leicester Officers and what was the conversation ?

A. I never was in company with the Leicester Officers when Capt. Livermore was present, not to my recollection.

Lieut. Sardine Muzzy, called, sworn and interrogated on the part of the Government.

Question by Judge Advocate. In what company are you commissioned ?

A. I have the commission of Lieut. in Capt. Livermore's company.

The Judge Advocate repeated to this witness the same questions as to a meeting and agreement by Capt. Livermore, with other Officers, on the subject of the muster, as were asked Lieut. Sardine Muzzy, to which the witness returned similar answers in the negative.

Question by Judge Advocate. Had you any consultation with Capt. Livermore on the subject of the muster, previous thereto, and subsequent to his receipt of the Regimental order ? A. I had.

Judge Advocate. Please, sir, to repeat it.

Witness. A short time before the muster, as I had previously heard abroad, that Capt. Livermore was not going to attend, I asked him if it was true. He said he believed that he should not. He was very sorry things were so circumstanced ; he was very glad to obey all orders, but he contended for the principle ; he had tried to get discharged last fall, but did not then succeed ; and as he was so near out of the line of this business, he should rather go to muster this time, but as it was so far from the centre, it would set a bad precedent.

Question by Complainant. Was you present at any meeting of Officers with Capt. Livermore, previous to the muster ? A. No, sir, I was not.

Ensign Oliver Morse called, sworn and interrogated by the Judge Advocate.

Q. In what company are you commissioned ?

A. In Capt. Livermore's, I am an Ensign.

Q. Do you know of any meeting of Officers previous to the last muster, at which Capt. Livermore was present ?

A. Previous to the muster I saw the Spencer and Leicester Officers together, at Landlord Draper's.

Q. What was the object and business of the meeting ?

A. I do not particularly know, the meeting appeared to be an accidental one.

Q. Was there any agreement or proposition for an agree-

ment, that the companies should train in their respective towns on muster day ?

A. Not by either of the Captains, but it was mentioned by some of the Inhabitants of the town.

Question by Complainant. Was there any conversation about attending the muster among the officers present ?

A. I do not recollect that there was, in particular.

Question by same. What was the reply of Capt. Livermore to the proposition of the Inhabitants to train on muster day ?

A. I cannot be positive, but I think he said it would not be proper, or something to that purpose.

Question by Defendant. Did I train my company in Spencer, on that day ?

A. No, sir.

Ensign Samuel Watson Jr. called, sworn and interrogated by the Judge Advocate.

Q. Do you know of any agreement by Capt. Livermore, with other Officers, to disobey or neglect the Regimental Order of Col. John Brigham for the last muster ?

A. I do not.

Q. Was there any meeting of Officers at which Capt. Livermore was present, previous to the muster ; and for what purpose ?

A. The Captains of Spencer and Leicester companies met at Spencer, but it appeared accidental, and nothing particularly, relating to the muster, was transacted or proposed by either of them. There was considerable conversation on the subject of the muster, both with the Officers and other people present.

Q. In that conversation did Capt. Livermore *in the hearing of other Officers*, say he should not attend ; and *they in his hearing*, say they should not attend the muster ?

A. Capt. Livermore said he should not attend—and other Officers said they should not attend, but whether Capt. Livermore heard them, or they him, I cannot say.

Question by Complainant. Was Capt. Livermore in hearing ?

A. I cannot tell—there was passing in and out of the room, and I was not particularly attentive.

Question by the Court. Why do you think the meeting at Spencer was an *accidental* one ?

A. I went to Landlord Draper's with Capt. Kent, Capt. Watson was there, and they did not behave as if they had expected to meet, and Capt. Watson, I think said, he had business with Mr. Demond.

Question by Judge Advocate. Do you know what occasioned Captains *Livermore* and *Prouty*, to be there ?

A. I do not, except I heard Capt. Livermore say he was engaged in measuring some Pews in the Meeting-House.

Question by Complainant. Did you expect when you went to Landlord Draper's, to see any of those Officers there ?

No, sir, excepting Capt. Kent, who was in my company.

Question by Defendant. Did not Landlord Draper and Capt. Kent marry your Sisters ?

A. They did.

Question by Complainant. What other persons than the Officers, were present, when the conversation relative to the muster took plaee ?

A. I don't recollect *how many*, nor *who* were present, except Mr. Demond and Esq. Draper, whom I saw in the room.

Capt. Daniel Kent, called, sworn and interrogated on the part of the Government.

Question by Complainant. Did not Capt. David Livermore, to your knowledge, agree with other Officers, to persuade and encourage his men not to attend, and not to attend himself, the last Regimental muster, by order of Col. Brigham ?

A. He did not at any time, or in any manner, that I have knowledge of.

Question by same. Did you hear Capt. Livermore say any thing about the muster, and what, in your hearing ?

A. I heard him say, that he thought he should not go, and that is all I have heard him say on that subject.

James Draper, Esq. called, sworn and interrogated on the part of the Government, and to whom the same questions were put as before to Capt. Kent. To the *first*, Esq. Draper replied, that he knew of no sueh agreement ; to the *second*, that he had heard much conversation on the snbject. When Capt. Livermore first was informed of the appointment of the place, he said *he thought he should not attend ;* he did not object on his *own*, but on account of his *company*. Afterwards he told me, the more he considered of it, the

more *he thought he should not attend ;* and just previous to the muster, he said, *that he should not attend ;* he had talked with a great many people, who concurred in an opinion that the orders were not binding, but no person had advised him, and he had advised no person not to attend. At the time testified of by other witnesses, at my house, Captain Livermore and other Officers, with several inhabitants of Spencer were together. Mr. Alpheus Demond addressed all the Officers, and enquired if they should go with their companies to muster. Capt. Prouty answered, that he should *not ;* he had made up his mind when he received the orders. Capt. Livermore said, he was uncertain and had not determined. Capt. Watson made the same answer, and Capt. Kent said, he thought he should attend ; and then that subject subsided. There was afterwards some conversation about training on muster day, and Mr. Demond asked if they had trained as often as the law required ; they answered, they had, without going to muster. It was then said, that some of the inhabitants would like to see the companies train together, if they did not go to Worcester, but no one seemed to approve it.

The Judge Advocate informed the Court, that he had completed the examination of the evidence in support of the prosecution, and by permission of the Court should now call upon the Defendant for his answer to the charges against him. The Judge Advocate then demanded of Capt. Livermore, if he had any thing to offer to the Court in his defence. Capt. Livermore presented to the Judge Advocate, who read to the Court, the statement following :

" *Mr. President and Gentlemen of the Court,*

" In my defence, I shall endeavor first to prove that Worcester is not the centre of either men or ground, and that this is the opinion of Col. Brigham. I shall also shew, that near the centre there is as good ground for parade as in Worcester ; and lastly shew that unworthy motives of personal advantage influenced Col. Brigham to appoint the muster out of the centre, and in the town of Worcester. I now, therefore, pray the Court for the introduction of witnesses to prove this statement. DAVID LIVERMORE."

The Judge Advocate communicated to Captain David Livermore the opinion of the Court, deliberately and solemnly made in the trial of Capt. Watson, upon the admissibility of evidence to the points made by Capt. Livermore, in his

defence, and hoped that a strict adherence to the spirit of that opinion, would prevent an unpleasant necessity for interruption and interference in objecting to improper testimony.

James Draper, Esq. was then called on the part of the Defendant.

Question by Defendant. In your opinion, what is the relative distance which the several towns composing the Regiment bear to each other from Worcester and Leicester, and what the aggregate of travel to each of these towns ?

A. Considering the number of Troops and the Geographical situation of the Regiment, in my opinion, all the Troops composing the Regiment, except the Spencer companies, might with equal convenience be mustered at Worcester or Leicester—but considering those companies, the difference is in favor of Leicester to the amount of their travel. It is five miles from Spencer to Leicester and from Spencer to Worcester twelve miles.

Question by Defendant. Would not Holden, Paxton and Ward companies meet at Leicester as conveniently as at Worcester ?

A. I should think there would not be much difference. Holden is one mile further from Leicester than from Worcester, Paxton three miles nearer to Leicester than to Worcester, and Ward half a mile nearer—I reckon from the centre of the towns to the *parade ground* in Worcester ; and to the *Meeting House* in Leicester ; and the parade ground there is *one fourth* of a mile from the Meeting House.

Lieut. Sardine Muzzy, called and interrogated by the Defendant.

Q. Has not Col. Brigham declared to you, that Leicester was the centre of the Regiment ?

A. He has told me, that he thought Leicester was the most convenient place, and the Regiment ever ought to be mustered there, and that he thought it *unjust* that the troops ever should be *dragged* away to *Worcester*. This conversation was at Spencer, after an election of Officers, when Col. Brigham requested those present to convene in a room. He said, I think, he would be *damn'd* if the Regiment ever should muster at Worcester, while he had the command !

Lt. Josiah Q. Lamb was called by the Defendant, and interrogated and answered as the preceding witness above, and further,

Questioned by Defendant. Is the parade ground in Leicester good and convenient for the muster of a Regiment ?

A. Yes, sir, since I have been in commission, the Regiment has been twice paraded there, and had good accommodations.

Question by Complainant. Is it good this year ?

A. I have understood so, except about an acre had been ploughed, across which the Regiment marched, but not where it was paraded.

The Judge Advocate appealed to the Court against these enquiries. There were unquestionably many fields well accommodated to Military parade, but the issue before the Court could not depend upon an election of the *best*. Such investigation was an undignified consumption of time, and directly contravened the previous decision of the Court. He should sooner have objected, but in the hope of an interference by the Court. The Court approved of the objection of the Judge Advocate, and enjoined a strict compliance with their previous direction as to the enquiry to be had on this subject.

Capt. Daniel Kent called by the Defendant and interrogated.

Have you heard Col. Brigham say, in presence of Capt. Livermore, that Leicester was the centre of the Regiment ? Capt. Kent answered, that he confirmed the representation made by Lieut. Muzzy of the declaration of Col. Brigham.

Upon motion of Col. Brigham, the muster roll of the Regiment was produced by Lt. Reuben Munroe, his Adjutant, and exhibited to the Court by the Judge Advocate, in the following Certificate.

" I hereby certify, that the Muster Roll formed from the returns of the Captains in the several towns in May last, is as follows :

WORCESTER,	162	SPENCER,	117
HOLDEN,	69	WARD,	49
PAXTON,	46	LEICESTER,	83

Exclusive of the Artillery in Worcester, and the Cavalry in Holden and Worcester and other towns, most of which, however, belong to Holden and Worcester.

REUBEN MUNROE, *Adjutant.*

November 16, 1810."

Lt. Wm. Caldwell, sworn by the Judge Advocate and interrogated on the part of the government.

Lt. Caldwell testified, that he was Adjutant of a Battalion of Artillery, in the 1st Brigade, comprehending a company in Worcester; that this company was full, and at the last return bore 55, rank and file, on its muster roll. He had not the roll with him, but the correctness of his testimony not being questioned, he was not required to produce it.

The examination of testimony here closed; the Defendant and Complainant observing that they had no further evidence to produce to the Court. The Judge Advocate enquired of the Defendant, if he had any thing more to offer in his defence. The Defendant replied, he had nothing further in his defence to submit to the Court, except some remarks, in writing, upon the legality of the order of Col. Brigham, and upon the evidence in the trial, to the preparation of which he wished an indulgence of further time. Lieut. Col. John Brigham, upon being enquired of by the Judge Advocate said, he might wish, should Capt. Livermore be allowed time for further defence, a like opportunity to prepare his observations upon the trial for the consideration of the Court.

The Court deliberated upon the request of Capt. Livermore and considering the assignment of the morrow for the defence of Capt. Watson, and for judgment in his case, directed the Judge Advocate to inform Capt. Livermore, that he was allowed until the meeting of the Court upon its adjournment on the 17th of December next at 10 o'clock, A. M. to prepare what he desired to submit to the Court. Lieut. Col. John Brigham was also informed, that the Court would then receive any observations upon the trial from him.

At half past 3 o'clock, P. M. the Court directed an adjournment to 10 o'clock to-morrow morning, then to proceed in the trial of Capt. Watson, of which Proclamation, in form, was made by the Marshal.

County Court House, Worcester, Monday, Dec. 17, 1810.

At half past eleven A. M. the Court met upon its adjournment. The President and Members on being called, all answered in their places. Lt. Col. John Brigham, the Complainant, and Capt. David Livermore, the Defendant, appeared and answered in their proper persons. The Supernume-

raries, Capts. Joel Cheny and Joel Fay, also attended. Ensign Gardner Burbank, of the 1st. Regiment, acted as Marshal, in the room of the former Marshal, Ensign John W. Lincoln, discharged upon his own request, and in pursuance of the following orders :

" *Division Orders, Head Quarters, Oxford, Dec.* 10, 1810.

Ensign John W. Lincoln,

The Major General, in consideration of your request, and the reasons urged by you, resulting from the state of your business, consents to your discharge from the Office of Marshal of a Court Martial. whereof Lt. Col. Joseph Farnsworth is President, and you are accordingly discharged therefrom. *By order of the Major General,*

ESTES HOWE, *A. D. C.*"

" *Division Orders, Head Quarters, Oxford, Dec.* 10, 1810.

Ensign Gardner Burbank, of the 1st Reg. 1st Brig.

The Major General having great confidence in your talents and character as an Officer, has seen fit to appoint you Marshal of a Court Martial, whereof Lt. Col. Joseph Farnsworth is President, to be holden by adjournment at the County Court House in Worcester, on Monday the 17th day of December current, at 10 o'clock A. M. of which you will take notice and govern yourself accordingly. Ensign John W. Lincoln, the former Marshal of the Court, has been excused upon his own application.

By order of the Major General,

ESTES HOWE, *A. D. C.*"

By order of the Court, the Judge Advocate repeated to Lieut. Col. John Brigham the Complainant, the enquiry made before the adjournment, whether he had any thing further to offer the Court, in support of his charges against Capt. David Livermore ; Col. Brigham answered that he had nothing further to offer. The Judge Advocate made the same enquiry of Capt. David Livermore as to his defence against the charges of Lieut. Col. Brigham—Capt. Livermore thereupon handed to the Judge Advocate, with a re-

quest, that he would read to the Court, a paper in the following words :

" *Mr. President and Gentlemen of this Court,*

" The charges exhibited against Capt. Samuel Watson, 2d, and those exhibited against me, being precisely the same, and the evidence adduced both on his trial and mine, having proved very little more in the one case than in the other, and both trials having been before the same tribunal, and it being the duty of the same Major General to revise both, I need do very little more than refer you to his defence for arguments to justify my own conduct on the present occasion. But the duty I owe to the community, both in my private and public capacity, induces me to submit a few remarks for your consideration, in addition to those in Capt. Watson's defence, which are applicable to my own.

It is admitted on my part, that John Brigham is Lt. Col. Commandant of the first Regiment, first Brigade, and seventh Division of Militia of the Commonwealth of Massachusetts, that he did receive Brigade orders for mustering his Regiment on the 12th day of September last, and that I received orders from him to that effect, but did not comply with them nor appear myself. No other charge is proved against me, altho' vigorously attempted by my accuser.

It is admitted on the part of Col. Brigham, that Leicester is more central than Worcester for the Regiment. This point having been abundantly proved on the trial of Captain Watson, yea more, that Leicester is the centre, it is now admitted by Col. Brigham, without any qualification. He now agrees to what he has uniformly said, " that it was unjust and unrighteous to drag the men to Worcester," because Leicester is more central. He does not tell you, that notwithstanding Worcester is far removed from the centre, yet it is more convenient and more in the centre of the troops than Leicester. No ! But upon the general enquiry where is the most convenient, central place, he tells you Leicester is more so than Worcester, where he mustered his Regiment. He ought then to have some strong reason, paramount to the law itself, to justify his conduct.

After having told the Captains where the centre was, and where the Regiment ought always to be mustered, and after

the law made it his duty to occupy the most central ground on such occasions, if he had not told you himself the reason for deviating from his known duty, you would have been at a loss to assign one for him. But to save you the trouble, Gentlemen, of conjuring up a reason for his oppressive order, he has told you, it was to save the expence of *Three Dollars* in setting a field table. This was a motive, sufficient in his mind, for dragging the troops from Spencer to Worcester, seven miles, at least, from the centre of the Regiment.

I need not go into an argument to shew, that orders issued from so unworthy motives, without exercising a sound judgment, and without regarding the law, are without force; because, in a case of which you have already adjudged, this point was fully considered, and as you then decided, so you will undoubtedly decide in the present trial.

I need not bring into view the language of my accuser as respects the centrality of his Regiment; this you have already heard, and I am sure your feelings would revolt at a second rehearsal. Your only enquiry need be, is Worcester the most central and convenient place for the whole Regiment, and is it so in the sound judgment of Col. Brigham himself. From his own concession and from the plenary evidence adduced upon the subject, I think these questions must be answered in the negative. And if so, it necessarily follows, that his orders were not binding, and of course, no criminal disobedience to refuse to obey them.

The law does not require subordinate Officers to yield passive obedience to their Superiors. If this were the case, no Court Martial would be necessary; the disobedient Officer need have no trial, but be punished without Judge or *Jury*—the solemn trial by Court Martial would be a mockery, a mere *farce*. No! Gentlemen, passive obedience is not required by the law; but when a subordinate Officer undertakes to judge for himself of the legality or illegality of the orders of his Superior, and chooses to disobey, upon the ground of their being illegal—this Court is instituted to enquire and determine whether he has judged *right* or *wrong*, if wrong, you inflict a punishment, if right, he must stand acquitted, as the necessary result of investigation and the necessary distinction between right and wrong.

During the whole course of my life, from sixteen years

old, to the present time, I have been compelled to march from my own town to Regimental musters, and often further beyond the centre than from Spencer to the centre. Eight years I have been under the disagreeable necessity of giving orders to my company to the same effect.

This I considered an evil, but an evil which I had no right to oppose, and of which I had no right to complain, because it was justifiable by law. I patiently endured it, hoping and expecting redress of grievances by the Legislature. When the Law by which the Militia are now regulated and governed passed, I did think and do still think the evil of which I am now speaking, was meant to be remedied; Commanders of Regiments were bound to exercise their judgment in good faith in appointing the places for their regimental musters as near the centre as possible for them to parade a Regiment. I was satisfied with the *Law*. To meet in the centre I was perfectly willing, although it was not in the town of Spencer.

But the first time I was commanded to meet in the Regiment under the wise and salutary Law, to my astonishment, I was ordered to march my company *one mile* further than ever before on a similar occasion, and seven miles at least beyond the centre of the Regiment. This order I considered a violation of the Law, that was designed to grant my company relief, and therefore I was not bound to obey it.

But if the doctrine of *non-resistance* and *passive obedience* is to be established, I must meet the reward of my temerity. Although I do not believe, that Honorable Gentlemen are yet ready to subscribe to this doctrine, I do not believe, the people yet base and blinded enough to advocate a principle so destructive to our liberty, independence and forms of Republican Government. This is the climax of unlimited monarchy. Establish it by your decision, and you say we are no longer worthy the name of Freemen. Our Courts of Justice may be abolished and our forms of Government *lit up as a Taper*, to usher us into eternal darkness. Then may we emphatically say, as has been predicted. "The glory of America hath passed away."

Here Gentlemen I leave my defence, by repeating, that considering the Orders in relation to the law and considering the declarations of my accuser, *that it was* unjust and unrighteous ever to drag the men to Worcester, I conscien-

tiously believed, I was not bound to obey them, and that they had no binding force whatsoever upon me. On this ground, I refused to obey them, and on this ground, I am willing to stand or fall, as you in your wisdom shall think fit and proper.

DAVID LIVERMORE."

The Judge Advocate having read the foregoing Records from the commencement of the Trial, with the Defence of Capt. David Livermore to the Court, made a brief summary of the evidence adduced, both in support of the prosecution and in favor of the Defendant. After which the Doors were closed by the Marshal, and the Court proceeded to give Judgment upon the Trial.

Opinion and Judgment of the Court *upon the* Trial *of Capt.* DAVID LIVERMORE.

The Court having been cleared of Spectators, the following question was put by the Judge Advocate to each of the Members singly, beginning with the lowest in grade.

From the evidence which has been adduced, both for and against Capt. *David Livermore*, and from what he has offered in his defence, are you of opinion that he is *Guilty* or *not Guilty* of the *first specification* of charge in the complaint of Lieut. Col. John Brigham, exhibited against him ?

The Court decided that of the first specification of charge the said Capt. David Livermore was *Guilty*.

Upon the question being put, in the same form, upon the *second* specification of charge in said Complaint—The Court decided that of the said *sesond* specification of charge, the said Capt. David Livermore was *not Guilty*.

Upon the question being put, in the same form, upon the *third* specification of charge in said Complaint. The Court decided, that of the said *third* specification of charge, the said Capt. David Livermore was *not Guilty*.

The Court having taken into consideration the offence of which it has adjudged Capt. David Livermore *Guilty*, as contained in the *first* specification of charge in the complaint of Lt. Col. John Brigham, exhibited against him ; do *sentence* the said Capt. David Livermore to be *removed from Office*, and do adjudge said Capt. David Livermore to be

disqualified for, and incapable of holding any Military Office under this Commonwealth, for the term of *One Year*.

JOSEPH FARNSWORTH, *President*.

LEVI LINCOLN, Jun. *Judge Advocate*.

The Doors were opened, and the Complainant and Defendant appeared and answered in their proper persons. By order of the Court, the Judge Advocate informed Capt. David Livermore, that the Court had passed upon his Trial, and that he was discharged from any further attendance upon the *Court*, unless required thereto by a new order.

At a quarter past Three in the afternoon, the Court adjourned until 10 o'clock tomorrow morning, then to proceed in the trials of Captains Daniel Kent and William Prouty—of which the Marshal made proclamation in form accordingly.

County Court House, Worcester, Tuesday, December 18, 1810.

Upon the meeting of the Court for the trial of Capt. Kent, Lt. Col. John Brigham presented a paper in the following words:

"The Complainant having heard the written defence of Capt Livermore, in which it was asserted, that he made admissions, which he never did make, declines compromitting his cause by rendering it possible for such misapprehensions to take place.

JOHN BRIGHAM."

The Court having heard the above read by the Judge Advocate, decided, that the Court could not *now* take further order thereon, except to direct its insertion in the Records.

TRIAL OF CAPT. DANIEL KENT.

County Court House, Worcester, Friday Morning, November 16, 1810.

Upon motion of the Judge Advocate, the Court Martial appointed for the Trials of Captains Samuel Watson, 2d, Daniel Kent, David Livermore and William Prouty, proceeded to the arraignment of Capt. Daniel Kent, who was thereupon called by the Judge Advocate and answered in his proper person.

The names of the President and Members ordered upon the Court, were called and all answered in their places. The Division orders of the 22d of October, and of the 10th of November, as recorded in the trial of Capt. Watson, were again read by the Judge Advocate, and in the hearing of the Defendant.

The Judge Advocate then proceeded, *in this trial*, to administer to the President, and to each of the Members singly, and the President administered to the Judge Advocate, the respective Oaths prescribed in and by the 31st section of an act of the Legislature, entitled, "an act for the regulating, governing and training the Militia of this Commonwealth," passed March 6, 1810. Captains Joel Cheney and Joel Fay, Supernumeraries, were present, but not sworn.

The Judge Advocate informed Capt. Daniel Kent, that the Court was constituted, and the President, Members and Judge Advocate sworn to his trial, and demanded, that if he had any objection against, or any cause of challenge to either *member*, he should produce it in writing, that the part of the Court not objected to, might hear and decide thereon. Capt. Kent, thereupon, handed to the Judge Advocate a paper, which was by him read to the Court, in the words and figures following, viz.

"*November* 16, 1810. At present I have no cause of challenge against any Members of the Court, but as it is probable my trial will be postponed for some time, I wish not to

be precluded the right of challenge when my trial comes on, if then I should have good cause.

DANIEL KENT."

The Judge Advocate stated to the Court, that his motive for the arraignment of Capt. Kent at the present time, was the unnecessary expence to the government in the attendance of the Supernumeraries, should there appear no challenge to either member of the Court. He was sensible that the other trials already commenced would preclude the possibility of proceeding in this, until after an adjournment, but a decision of the present question would prevent the necessity of the attendance of the Supernumeraries at that time.

The Court took the request of Captain Kent, and the remarks of the Judge Advocate into consideration, and decided thereupon, that Capt. Kent should be permitted the right of challenge upon the adjournment, on the 17th day of Dec. next, at 10 o'clock A. M. at this place; to which the Court postponed his trial, and of which he and Lt. Col. John Brigham, the Complainant, were informed by the Judge Advocate.

The Judge Advocate then moved the Court in behalf of the Government, that the Supernumeraries might be dismissed until the adjournment above mentioned, and by leave of the Court the Judge Advocate dismissed them accordingly.

County Court House, Worcester, Dec. 17, 1810.

At half past eleven o'clock A. M. the Court met upon its adjournment, and the President and Members upon being called answered in their places. Lt. Col. John Brigham, the Complainant, and Capt. Daniel Kent, the Defendant, appeared in their proper persons. The Judge Advocate repeated to the Complainant and Defendant the enquiry made previous to the adjournment, whether either of them had any objection or cause of challenge to any Member of the Court, to which each replied in the *negative*. The Judge Advocate then directed Captain Daniel Kent to hearken to the Complaint exhibited by Lieut. Col. Brigham against him, which he read in the words and figures following:

[*The Complaint against Capt. Kent being precisely the same as that against Capt. Watson, it is deemed useless to insert it in this place.*]

Which Complaint being read to Capt. Daniel Kent, the Judge Advocate demanded of him, whether of the charges therein contained he was *Guilty* or *not Guilty;* to which Capt. Daniel Kent answered, that thereof he was *not Guilty!*

The Court having received the plea of Capt. Daniel Kent, postponed his trial to the morrow, and proceeded to render judgment in the trial of Capt. David Livermore.

County Court House, Worcester, Tuesday, Dec. 18, 1810, 10 *o'clock A. M.*

The Court met. The President and Members answered, upon being called, in their places; when the Court was opened by the Marshal. The Complainant and Defendant appeared and answered in their proper persons. The record of yesterday's proceedings relating to this trial were read by the Judge Advocate, approved by the Court, and agreed to be correct by the Complainant and Defendant. Audience of evidence in support of the prosecution, was moved for by the Judge Advocate, and directed by the Court; and thereupon Capt. Daniel Kent *in open Court, admits the Brigade order, and the Regimental Order for the muster on the twelfth day of September last past, and that he received the said Regimental order, but that neither his company nor himself appeared in pursuance of said order.* Alpheus Demond was called by the Judge Advocate on the part of the government, sworn and interrogated.

Question by Judge Advocate. Have you knowledge of any agreement by Capt. Kent with the Officers of other companies in the Regiment not to attend the muster in pursuance of Col. Brigham's Regimental order?

A. I have not.

Q. Do you know of any meeting of Officers, at which Capt. Kent was present, previous to the muster and subsequent to the last Regimental Order, and if so, what took place at such meeting?

A. There was a meeting of all the Captains under arrest, with other Officers, as I think, in August last, at Esq. Draper's. They were in a room by themselves; late in the evening some one came for refreshment into the room where I was with Esq. Draper, who then invited me into the room with the Officers. I went in, and addressing myself to the company, said "*Gentlemen Officers, have you concluded to go*

to the muster ?" Capt. Prouty replied he *should not.* Capt. Kent said he *should*, and if I recollect right, added, it would not do to disobey orders. Some time after and before the muster, I happened at Leicester, and there saw the Captains, and was by them invited to supper, but did not hear any particular object of the meeting.

Question by Defendant. Was not the last meeting on training day ?

A. Yes, Sir, it was.

Question by same. How do you know the Captains were in a room by themselves at Spencer ?

A. All I know is, that some one came out of the room, and when I immediately thereupon went in, I saw none but Officers present, to wit. Captains Prouty, Watson 2nd, Livermore and Kent, and Ensign Oliver Morse, and Samuel Watson, Jun.

Lieut. Joshua Sprague a Subaltern in Capt. Kent's company, sworn and interrogated on the part of the Government by the Judge Advocate.

Q. What do you know concerning Capt. Kent's orders to his company for the last muster ?

A. I know nothing about it—I never heard him say he had received any Regimental orders, and had no conversation with him particularly on the subject.

Q. Has he never spoken to you about going to the Muster ?

A. At a training before muster I heard him say, that he should go to Worcester and should warn his company to go, and this is all, I have heard him say.

Question by Complainant. Was you ever notified in any way by Capt. Kent, to attend the muster ?

A. He told me at the Training, that he should expect me to attend the muster. I had ever told Capt. Kent, that I should consider any notice to me for training or muster, as sufficient.

Question by same. Were Capt. Kent's orders which you received to attend the muster, ever countermanded.

A. They were not ; I saw him afterwards, and he told me, that he was sorry he was so situated, as his *Company* were not going, but *he should go* without his uniform, and asked me to go with him.

Ensign Samuel Watson, Jr. of Capt. Kent's company, was sworn and enquired of by the Judge Advocate, if he was ever notified by Capt. Kent to attend the muster, and answered, that Capt. Kent, previous to the muster, told him he had received the Regimental Order, and should direct him to attend. The witness had heard it said, that Capt. Kent was not going to the muster, and enquired of him, if it was time; Capt. Kent replied, that no person ever had heard him say so, that he did mean to attend and directed me to speak to some of his men to be provided with *Knapsacks*.

Q. Did Capt. Kent ever give you notice not to attend muster?

A. A short time before muster, I saw Capt. Kent, he told me his Orders for warning his company were made out, and I then saw him give some papers, which I concluded were the orders to his orderly Sergeant. He afterwards told me, that the Company had not been warned by the neglect of the Sejeant, he was very sorry, but as the company should not attend, he should go without his uniform.

Question by Judge Advocate. Did not Capt. Kent know of the neglect of his Serjeant, in season to have issued a new order?

A. I do not know, he did not mention it to me until it was too late.

Question by Defendant. Was I not absent from home on a journey, until it was too late to issue new orders?

A. I do not know.

Question by Complainant. Did you not know previous to the last training before muster, that the men were not warned?

A. I did not hear so from any Officer, I knew that some of the men were not warned who lived near me.

Question by same. Do you know of any understanding between Capt. Kent, and his non-commissioned Officers, that they should not attend?

A. I do not.

Question by Judge Advocate. Do you know of any agreement or understanding between Capt. Kent and any Officer or Soldier under his command, that an order should be issued by him, and disobeyed with impunity by them?

A. I do not, any thing of the kind.

Question by Defendant. Did I not tell you, that I was absent, and did not know but my *men* were warned, until the Sabbath previous to the muster ?

The Judge Advocate objected to the question as improper and incompetent to the Defendant, and appealed to the Court for a decision upon its propriety. The Court decided that the question should be asked the witness.

Ensign Samuel Watson upon the question being repeated, answered, that he did not recollect such conversation. He remembered however that Capt. Kent was absent about that time.

Isaac Southgate, called, sworn and interrogated by the Judge Advocate.

Q. In what capacity do you serve in the Militia ?

A. I am orderly Serjeant in Capt. Kent's company.

Q. Did Capt. Kent issue orders to you to warn his company for the last Regimental Muster ?

A. He issued *two* orders, one to me and one directed to Corporal Otis Sprague which I was to hand to him, the next training—but I did not do it, nor did I execute his order to me.

Q. Has Capt. Kent ever called you to an account for this disobedience of his orders ?

A. He demanded of me a fine—I asked him how much, he said he could exact *Twenty* Dollars—I requested that he would shew me some lenity ; and after considering of it, he said he would take *Fifteen* Dollars, which I paid him.

Q. Did Capt. Kent ever tell you, he should enter a complaint with the Colonel against you, or has he ever done it ?

A. He has told me he should do it, and I think it was at the time I paid my fine, but I cannot precisely recollect.

Question by Complainant. Do you know that Capt. Kent was informed of your disobedience of his orders, in season to have issued new orders to his company for the Muster ?

A. I do not think that he was—for I purposely kept it from his knowledge—*as I had determined when I received the orders not to obey them !*

Question by Judge Advocate. Have you the orders of Capt. Kent with you ?

A. I have sir—and produced them to the Judge Advocate, and are in the words and figures following :

MILITIA OF MASSACHUSETTS.

WARRANT.

To Isaac Southgate, Serjeant.—Greeting.

You are hereby ordered and required to notify and warn all the non-commissioned Officers and Soldiers belonging to the company under my command *East* of the road from William Denny's to Timothy Sprague's, to meet at Capt. Cutting's in Leicester, on Wednesday the twelfth day of Sept. inst. at 7 o'clock in the forenoon, with one day's provisions in order to march to Worcester South Meeting House, at nine o'clock forenoon, with arms and equipments as the law directs, for the purpose of Regimental Review or inspection, and there wait for further orders—Also to be furnished with twelve blank cartridges—Hereof fail not and make due return of this warrant with your doings thereon unto myself, four days before the day of appearance as aforesaid.

Dated at Leicester, the sixth day of September, 1810.

DANIEL KENT,
Captain or Commanding Officer.

MILITIA OF MASSACHUSETTS.

WARRANT.

To Otis Sprague, Corporal.—Greeting.

You are ordered and directed to notify and warn all the non-commissioned Officers and Soldiers belonging to the Company under my command *west* of the road from William Denny's to Timothy Sprague's, to appear at Capt. Cutting's, in Leicester, on Wednesday the twelfth day of Sept. instant, at seven o'clock in the forenoon, with one day's provisions, in order to meet the Regiment at Worcester South Meeting House at nine o'clock in the forenoon, with arms and equipments as the law directs, for the purpose of Regimental review and inspection, and there wait for further orders ; also to be furnished with twelve blank cartridges—Hereof fail not and make due return of this warrant with your doings thereon unto myself, four days before the day of appearance as aforesaid.

Dated at Leicester, the sixth day of September 1810.

DANIEL KENT,
Captain or Commanding Officer.

Question by Defendant to Isaac Southgate. Did I not use my influence to get the company equipt and uniformed before the muster ?

A. You did. At the trainings previous to the muster and particularly on the 29th of August, you used your influence with the men in persuading them to procure Knapsacks.

Question by the Court. Is it usual for Capt. Kent to issue his orders to his *Clerk*, or to others to warn his company to trainings ; and if to others, how many ?

A. It has been usual to issue his orders to two of his *non-commissioned* Officers. He once before issued his orders to me to warn part of his company, and proposed it again, but I begged him to excuse me.

Question by Defendant. How many Corporals are there in Capt. Kent's company ?

A. I think but two.

Question by Judge Advocate. Do you know of an agreement or understanding on the part of Capt. Kent, with any Officers or Soldiers under his command, that he should issue his orders to you, which you were to neglect, and that the *fine* which should be exacted of you, should be refunded by *him* or the *Company ?*

A. There was no such understanding between Captain Kent and *myself*, and I have no such knowledge as to an understanding between *him* and the *Company*, or any part of it.

Question by same. On your oath, was the fine paid by you *in good faith*, and to the uses appointed by law ?

A. It was paid by me in *good faith* and with a *clear conscience !*

Lewis Cutting called, sworn and interrogated by the Judge Advocate.

Q. Do you know that Capt. Kent issued any order to his company for the last muster ?

A. I do not.

Question by Complainant. How long before the muster was you informed that Capt. Kent's company was not warned ? A. Four or five days.

Question by Judge Advocate. How long before the muster was Capt. Kent informed of this ?

A. I do not know.

Question by same. Do you know of any agreement or understanding on the part of Capt. Kent, with his company or

any part of it, that his orders should be neglected, or that a fine for the disobedience of his orders by his *Sergeant*, should be refunded by them or him ?

A. I know nothing of the kind.

Question by Defendant. Did I use my influence to have the company uniformed, and provided with knapsacks on muster day, and did I not direct you to procure them, and if the Serjeants would not take them, I would take them myself ?

A. You did ; and I asked you afterwards where the Company were to receive their equipments on muster day ; you said you should call the company together that morning, either at Capt. Cutting's or Mr. John Sargent's.

Joseph Warren called, sworn and interrogated by the Judge Advocate.

To whom the *three* first questions were put as before to Lewis Cutting, and to which he gave the same answers, except to the second question, instead of *four* or *five*, the witness answered *three* days.

Question by Defendant. Did I tell you that you must be prepared for muster ?

A. You did not. I do not recollect seeing you about that time.

The Judge Advocate informed the Court, that altho' other witnesses were attending on the part of the government, he should, upon the suggestion of the Complainant, rest the prosecution with the evidence adduced ; and with the leave of the Court, now attend to the defence of Captain Kent ; of whom the Judge Advocate enquired if he had evidence or statements to offer to the Court. Capt. Kent presented a paper in the words following :

" *Mr. President and Gentlemen of the Court,*

I shall rest my defence principally upon the insufficiency of the proof attempted by Government against me ; and shall only attempt to excuse myself for not appearing in my uniform on Muster day. For this purpose, I beg leave to introduce a few witnesses.

DANIEL KENT."

Lt. Colonel John Brigham called on the part of the Defendant, and sworn by the Judge Advocate.

Question by Defendant. Did I not give you an excuse previous to the muster for my inability to attend in uniform,

A. On the Monday previous to the Muster, I was at Leicester, when I saw Capt. Kent, who told me he was sorry he could not attend the muster. I enquired the reason; he said his company were not warned. I asked how it happened; he answered, he did not know, he had issued his orders to his Clerk, who had neglected them. I then asked whether it was usual to issue his orders to his Clerk, he answered, that *it was not*, he commonly issued orders to his other non commissioned Officers—He told me he should appear at the Muster himself; I asked him if he should not feel disagreeable to be posted in the Regiment without any men under his command, he replied that he should, and here the conversation ended.

Question by the Court. Has Capt. Kent ever complained to you of the disobedience of Isaac Southgate, with a view of having him reduced to the ranks?

A. He has never complained to me against Southgate's conduct for any purpose.

Capt. Kent informed the Judge Advocate, that he should not trouble the Court with further evidence in his defence, but that he wished an opportunity until to-morrow morning, to prepare and present to the Court his remarks in writing, upon the facts in the case, and in justification of his conduct.

Lt. Col. Brigham was then enquired of by the Judge Advocate if he had any thing further to offer to the Court in support of the charges in his complaint against Capt. Daniel Kent. Col. Brigham handed to the Judge Advocate in reply, the following note.

"The Complainant upon so irrelevant and indefinite a paper as the statement of Capt. Kent seems to be, can only submit the case to the Court.

JOHN BRIGHAM."

The Court having considered the request of Capt. Kent to be allowed time until to morrow morning to prepare and present his defence in writing to the Court, granted the same, of which Capt. Kent was informed by the Judge Advocate—Thereupon Col. Brigham made the following motion in writing;

"The Complainant moves the Court, that he may have time to *hear*, and opportunity to *reply* to the defence of Capt Kent.

JOHN BRIGHAM."

One of the Court enquiring how long a time Col. Brigham wished, he replied *an hour* after hearing the defence of Capt. Kent.

The Court considered the request of Col. Brigham, and directed the Judge Advocate to read this decision—*That the Court granted to the Complainant the same opportunity as to the Defendant, to prepare and present his observations and arguments upon the evidence and upon the trial, but considering it improper and unprecedented, that he should be permitted to comment upon the written defence ; the Court denied to him an opportunity for that purpose.*

Col. Brigham was informed of the above opinion of the Court on his motion.

The Court having granted until to-morrow morning, for the defence of Capt. Kent, and the written observations of the Complainant (should he see fit to offer any to the Court,) upon the trial, *at half past one*, directed the Judge Advocate to proceed in the trial of Capt. William Prouty.

Worcester County Court House, Wednesday, Dec. 19, 1810, *half past* 10 *o'clock*, A. M.

The Court met pursuant to its adjournment, and was opened in due form by the Marshal. The President and Members upon being called, answered in their places. The Complainant and Defendant also appeared and answered in their proper persons. The Judge Advocate again repeated to the Complainant the enquiry if he had any thing now to offer the Court in support of the charges in his complaint against Capt. Daniel Kent, to which he replied in the negative ; the Defendant having the same enquiry made of him, answered that he had nothing other than his defence in writing, which he presented to the Judge Advocate, and which was by him read to the Court :

" *Mr. President and Gentlemen of the Court !*

As I stated in the opening of my defence, it rests upon the insufficiency of the proof attempted by Government against me, and upon the excuse, I am ready to offer for my not appearing *in uniform* at the Regimental Muster on the twelfth day of September last in conformity to the orders of Col. Brigham.

It is needless for me to consume one moment's time in re-

capitulating the evidence in support of the charges exhibited against me. The only one, that is supported, I voluntarily acceded to, which is, that I did not appear myself; against this charge, therefore, I must defend myself, and rely upon your candor for an honorable acquittal.

Upon the promulgation of Col. Brigham's orders of August the 15th, directing his Captains to muster their several Companies at the South Meeting House in Worcester, on the twelfth day of September last, there was a general consternation among Officers, Soldiers and Citizens; all seemed willing to crush the monster before it did any further injury. However right this general oppugnation might be, I felt disposed to obey the orders of my Superior Officer; my feelings revolted at the idea of disobedience. In all cases and on all occasions, my language has been, *I mean to obey the orders of Col. Brigham, I mean my Company shall muster with the Regiment.* That was my mind from first to last, and my feelings have been very much wounded, that I could not carry into effect, my honest intentions.

After receiving Col. Brigham's Regimental Order, I happened in company with other Officers, at divers times and places, and instead of combining with them in a determination to oppose the orders of my commandant, by a refusal to obey them; I always firmly adhered to my first determination, that I would obey, notwithstanding the popular opinion was much against me; I was therefore bold in my assertion at Spencer, that I should attend the muster, altho' a large assembly of Inhabitants were trying to dissuade me from my determination.

Taking pride in the Martial appearance and good organization of the Militia, after receiving Regimental Orders for mustering my Company at Worcester. I used all the influence of which I was capable to uniform and equip my men for the occasion. I even directed one of my Serjeants to procure Knapsacks at my expence, if they were not willing to take them.

After having disciplined my company, and as I thought, prepared them for public inspection, I did on the sixth day of September last, issue my orders, *in good faith*, to one of my Serjeants, and one of my Corporals, to call out the company under my command, to meet at the South Meeting House in

Worcester, on Wednesday the 12th day of September last, at nine of the clock in the forenoon of said day, and there wait for further orders. The day after I issued said orders I was called from home on a journey, and did not return until it was too late to issue new orders. And indeed, had I kept myself at home, I should not have known, but my Serjeant had executed my orders, for he tells you, he intentionally kept from me his design, until it was too late for me to remedy the evil. I verily believed my orders would be obeyed, and therefore took no further thought on the subject until the time for warning had expired.

Three days only previous to the muster, I found myself in this wretched dilemma, either I must stay at home, or appear on the muster ground without my command. I communicated my situation to Col. Brigham, conferred with him on the subject, and as I thought, took his advice thereon. He asked me, if I did not think I should feel disagreeably in taking my place without any command—thereby intimating to me, as I thought, that I had better stay at home, as it would be no use for me to attend. Most assuredly if he had suggested to me a wish for my attendance, disagreeable as it was, I certainly would have complied with his wish. But so far from this, I took his suggestions to be the reverse, and governed myself accordingly.

Colonel Brigham was pleased to say upon the stand, "it was not my usual practice, as I said to issue orders to my orderly Serjeant, for calling out my company," but you, gentlemen, will please to recollect that the orderly Serjeant himself says, he has twice before had orders given him to the same effect. At this time I was at a meeting of the Music; no non-commissioned Officer was present except my orderly Serjeant; to him I gave my orders, with a firm intention and purpose of heart, to have them faithfully executed. But in this I was disappointed, and for this my Serjeant is responsible, and not myself.

It was my intention to have entered a Complaint to the Colonel against my Serjeant, for disobedience of orders, but immediately after the muster I went a journey into the State of Vermont, and did not return until about the time I was arrested. After my arrest, having no command, I could not complain of him, and there the subject has rested until the present time.

I have done all, in my power to do, for the purpose of carrying into effect the orders of my commandant. For the disobedience of my Serjeant, I fined him *Fifteen* Dollars, and altho the Judge Advocate suggested he was not a fit subject of compassion, I hope my clemency will not be construed into a crime.

I could have taken of my Serjeant *Twenty* Dollars; I might have taken as small a sum as *Twelve* Dollars, and kept within the purview of the law. Had I then known, what I now know of him, that he intentionally kept my orders suppressed, I certainly should have gone to the extent of the fine. But considering him young, and swayed, as I suppose, by popular opinion, I was induced to consider him neither the greatest nor smallest offender, and took the middle way. In this I thought I did right, although it has turned out in evidence that I was deceived.

Certain I am, I have been guilty of no intentional crime. I did not undertake to judge of the *legality* or *illegality* of the Colonel's orders ; I chose rather to obey them, and leave this question for others to decide. If I have been guilty of any thing, it was my misconception of the meaning and wishes of Colonel Brigham, as it respected my taking a place in the Regiment without a command. If I erred in this, it was a mere error of the head, and not of the heart, and for which I am confident you will say, I am not *Guilty*.

DANIEL KENT."

The Judge Advocate having read the foregoing defence of Capt. Kent to the Court, was presented by the complainant with a paper, upon the propriety of receiving which, *at this time*, he requested the opinion of the Court.

The Court, after consideration, directed the Judge Advocate to receive and read the paper offered by the Complainant, which was done by him in the words following :

" The Complainant has merely to observe in answer to such a paper as the defence just read, protesting and declaring, that he deeply commiserates the situation of the Defendant, when partaking in the " *consternation*" produced in his mind upon so dread a " *monster uncrushed*" as legal orders, that the Court must for themselves decide, whether the " clemency" of the Defendant to his orderly Serjeant,

is such a good natured breach of orders as the Court will excuse.

JOHN BRIGHAM."

The Judge Advocate summed up the evidence upon the trial, (after reading to the Court the record from its commencement,) in the course of which he stated to the Court, that he felt it his duty, without intending the observations for an impression upon the trial, thus publicly to express his most pointed reprehension of the conduct of *Isaac Southgate*, orderly Serjeant of Captain Kent, who had in the presence of the Court, exultingly avowed his disobedience of the orders of his Commanding Officer; a disobedience which had been productive of the two-fold mischief of depriving the Regiment of the appearance of a large portion of troops on a day of public parade, and had subjected ed their Commander to the reproach of an arrest and public trial. He added many more remarks upon the unjustifiable nature and tendency of such conduct.

The Judge Advocate having concluded his remarks and summary of evidence to the Court, the room was cleared of spectators, the doors closed by the Marshal, and the Court proceeded to render Judgment upon the Trial.

Opinion and Judgment of the COURT *upon the* TRIAL *of* CAPT. DANIEL KENT.

THE Court having been cleared of spectators, and the doors closed, the Judge Advocate put to each of the *Members* singly, beginning with the lowest in grade, the following question:

What say you, Sir, from the evidence which has been adduced both for and against Captain Daniel Kent, and from what he has offered in his defence, are you of opinion that he is *Guilty* or *not Guilty*, of the *first* specification of charge in the Complaint of Lieut. Col. John Brigham, exhibited against him?

The Court decided that of the *first* specification of charge, as to that part which alledges, *a neglect to issue orders for the meeting of his Company*, the said Capt. Daniel Kent is *not Guilty*—and of that part which alledges *a refusal to appear himself*, the said Capt. Daniel Kent *is Guilty*.

Upon the question being put in the same form and order upon the *second* specification of charge in said Complaint—

The Court decided, that of the said *second* specification of charge the said Capt. Daniel Kent is *not Guilty*.

Upon the question being put in the same form and order upon the *third* specification of charge in said Complaint,

The Court decided, that of said *third* specification of charge, the said Captain Daniel Kent is *not Guilty*.

The Court havingconsidered the offence of which it has adjudged Capt. Daniel Kent *Guilty*, as contained in that part of the *first* specification of charge in the Complaint of Lieut. Col. John Brigham, exhibited against him, which alledges *a refusal to appear himself at the Regimental muster in Worcester, on the twelfth day of September last, in compliance with the orders of said Lt. Col. John Brigham*, do sentence the said Capt. Daniel Kent *to be reprimanded in orders*.

JOSEPH FARNSWORTH, *President*.

LEVI LINCOLN, JR. *Judge Advocate*.

The doors were opened, and Lt. Col. John Brigham, the Complainant, and Capt. Daniel Kent, the Defendant, entered, and were severally informed that the Court had passed upon this trial; Capt. Kent was also informed by the Judge Advocate, that he had the leave of the Court to depart. Lt. Col. John Brigham was requested to attend upon the further proceedings of the Court, in the trial of Captain William Prouty.

TRIAL OF CAPT. WILLIAM PROUTY.

County Court House, Worcester, Monday, December 17, 1810.

The Court Martial ordered for the Trials of Capts. Samuel Watson, 2nd, David Livermore, Daniel Kent and William Prouty, directed the Judge Advocate to call Capt. William Prouty for his Trial ; and thereupon Capt. William Prouty was solemnly called, but did *not appear* or *answer*. The Court directed the Judge Advocate to record his default and to proceed to the organization of the Court for his Trial. The Judge Advocate then read to the Court, the Division Orders of the 22nd of October, and of the 10th of November, as recorded in the Trial of Capt. Samuel Watson 2nd, and by which this Court was appointed and constituted. The oaths prescribed in and by an act of the Legislature, entitled, " an Act for the regulating, governing and training the Militia of this Commonwealth," passed March 6, 1810, were administered by the Judge Advocate to the President and each of the Members singly, and by the President to the Judge Advocate. Lt. Col. John Brigham, the Complainant was enquired of by the Judge Advocate if he had any objection against, or cause of challenge to either *member* of the Court in this trial, to which he replied in the negative.

The Judge Advocate now moved the Court, that as the Supernumeraries could not be wanted in the residue of the business before the Court, they might be discharged *without day*. The Court so directed ; of which, Capt. Joel Cheney and Capt. Joel Fay, the Supernumeraries, were informed by the Judge Advocate.

This business having been thus far attended to by the Court, and for which, the trial of Capt. Livermore had been interrupted, the Court resumed, and proceeded therein, postponing this trial to further opportunity.

Worcester, County Court House, Tuesday, Dec. 18, 1810, *half past* 1 *o'clock,* P. M.

The President and Members in their places, and the Complainant attending in his proper person. The Court upon a suspension of the Trial of Capt. Daniel Kent, directed the Judge Advocate to proceed in this trial. The Judge Advocate read to the Court, the complaint against Capt. William Prouty, as follows, viz.

[*The Complaint against Capt. Prouty being in substance precisely the same, as that against Capt. Watson, its insertion is here omitted.*]

The Judge Advocate having read to the Court the foregoing complaint exhibited by Col. John Brigham against Capt. William Prouty, stated an apprehension of his duty, to prove that Capt. Prouty had been arrested and notified of the appointment of this Court for his Trial, and had been furnished with a copy of the charges agreeably to the provisions of Law, that it might appear on the Records, that Capt. Prouty's *default* was *correctly recorded.*

The Judge Advocate then produced to the Court the following correction of the Division Order, *in the name of the Officer*, who made the arrest, and served a copy of the complaint upon captain Prouty.

Seventh Division, Head Quarters, Oxford, Dec. 10, 1810.

Major Levi Lincoln, Jr. Division Judge Advocate, &c.

You will observe, that Lt. William Caldwell of the Artillery of the 1st Brigade, is the Officer upon whom you will call, for evidence of the arrest and service of complaints upon the Officers upon Trial by Court Martial, instead of Adj. William Munroe, named by mistake in a former order.

By order of the Major General,
ESTES HOWE, *A. D C.*

Lt. William Caldwell, Adjutant of Artillery, was then called by the Judge Advocate, but neglected to appear.

The Court directed an enquiry by the Marshal, as to the absence of Adjutant Caldwell. The Marshal informed the Court, that he had been told and understood, that Adjutant Caldwell left town the last evening, for Boston, and was not expected to return until *Wednesday evening*. The Judge Advocate moved the Court, that the testimony of other wit-

nesses attending on the part of the government, might now be received, in order to their discharge from a further attendance upon the Court, leaving the disposition of the testimony to the decision of the Court, upon the order they might take in reference to the absence of Adjt. Caldwell, and by leave of the Court, James Draper, Esq. was called and sworn.

Question by Judge Advocate. Do you know of the arrest of Capt. William Prouty, upon the complaint of Lt. Col. John Brigham?

A. I was present some time in the former part of the month of October, when Adjt. Caldwell called upon Capt. Prouty, and informed him that he had an order from the Major General for his arrest, which he presented him, with a paper annexed, purporting to be a copy of Col. Brigham's complaint. After Captain Prouty had read the same, I requested to see them. Capt. Prouty permitted me to read the papers, and I do recollect that one was an order of the Major General, directing his arrest, with notice of the time and place appointed for his trial by Court Martial, and annexed was a paper, purporting to be a copy of the charges of Colonel Brigham, and in language as nearly as I can remember, precisely like the complaint I have heard read by the Judge Advocate. I afterwards heard Captain Prouty say he should not attend his trial.

Adjt. Reuben Munroe called and sworn by the Judge Advocate.

Q. Do you know of the arrest, and service of a copy of Colonel Brigham's complaint upon Captain Wm. Prouty?

A. The day before Captain Prouty sailed for the Southward, I met him at Stone's Tavern, in Boston; he told me, that he had been arrested by Adjt. William Caldwell, but that he could not attend the trial; he added, that he should return in the Spring and if there was any thing done which was incorrect, he could have a new trial—he supposed, however, it would be all the same, as though he was here, and if the other Officers were broke he should share the same fate.

The Judge Advocate having given this evidence of the arrest and notice of the complaint, which he observed he did not *rely upon* as stricly correct or supplying the place of the testimony of Adjt. Caldwell, who did the service, and which

in its nature was better evidence of the fact, yet would, with the leave of the Court, and with a view to the ultimate saving of time and expence, call a few witnesses on behalf of the government, in support of the merits of the prosecution. The Court consenting,

Alpheus Demond was sworn, and testified, that he had repeatedly heard Capt. Prouty, subsequent to the issuing of the last Regimental order, declare his *determination not to attend the muster*, and assign as his reasons, that Worcester, the place appointed, was not central, or convenient for the Regiment, and that Col. Brigham had expressed to him such an opinion, and that the Regiment should never be mustered there while he commanded it. Mr. Demond further testified, that at a meeting of the Leicester and Spencer Officers, at Esq. Draper's subsequent to the issuing the orders, and previous to the muster, he heard Capt. Prouty say he should not attend, and *that he so made up his mind when he received his orders.*

James Draper, Esq. again called and interrogated by the Judge Advocate.

Q, Do you know of any agreement by Capt. Prouty, with other Officers to neglect, or disobey the Regimental order of Col. Brigham for the muster, on the twelfth day of Sept. last, or of any determination not to attend himself ?

A. I know of no such agreement. Previous to the last muster, the Leicester and Spencer Captains, among whom was Capt. Prouty, were at my house with some other Officers, and were in a room together. I then heard Capt. Prouty say, he should not attend the muster, he had made up his determination when he received the order. I often after heard him say, that he should not attend, and assign the reasons testified of by Mr. Demond.

Q. Was the meeting at your house an appointed or an accidental one ?

A. I apprehend *accidental*, from the manner in which the Officers came there, and the business which some of them had in the neighbourhood.

Adjt. Reuben Munroe, of the 1st Reg. was again called.

Question by Judge Advocate. Did you serve on Captain William Prouty an order of Colonel Brigham for the last Regimental muster ?

A. Yes, sir, I served him with a copy of the Regimental order, which I produced upon the trial of Captain Watson.

The Judge Advocate then read from the files the Regimental order of the first of August, 1810, as recorded in the trial of Capt. Watson, 2d, and which Adjt. Munroe, upon inspection, identified as the order served by him upon Captain Prouty.

Q. Did Capt. Prouty attend *personally*, or did his company attend, in compliance with the order of Col. Brigham ?

A. Neither Capt. Prouty nor his company appeared at the muster.

This last question being put to Majors Estabrooks and Flagg, of the 1st Regiment, who were previously sworn—they each returned the same answer as was made by Adjt. Munroe.

The Judge Advocate observed to the Court, that from the course pursued by the other Defendants, charged with similar offences, he was led to an enquiry, in justice to what might be *apprehended* the defence of Capt. Prouty, as to the circumstances under which the orders issued from Col. Brigham.

The Judge Advocate then enquired of Major Flagg his opinion of the centrality and accommodation of the place appointed for ths last muster. Major Flagg answered, that taking into view the numbers and situation of the troops, at that time, the place appointed had a preference over any other, and that this opinion was expressed by the Colonel, when he issued his order, after consultation with Major Estabrooks and myself.

Major James Estabrooks, was also enquired of by the Judge Advocate, as to the opinion expressed by Col. Brigham, at the time he issued his orders, and concurred in the representation of Major Flagg ; but said, that after *he* went to Worcester to consult with Col. Brigham, he was informed of a difficulty which was threatened by the *Leicester* and *Spencer* troops, in case of the appointment of the muster at Worcester, and on that account, was himself in favor of some other place, though otherwise he was of opinion that the number of troops with their situation being considered, the Regiment might as conveniently muster at Worcester as elsewhere. The weight of the Regiment was nearest Worcester.

Ensign John W. Lincoln, of the Light Infantry, in the 1st Regiment was called and sworn.

Question by the Complainant. What is the situation of the town of Worcester to the centre of the Regiment, and what would be the difference in travel to the troops between mustering at Leicester or Worcester ?

A. I am not particularly acquainted with the geography of the Regiment, but I have made a calculation of the relative distances of travel to each town, by which, in the aggregate, I find the difference in favor of Worcester by 157 miles. I date from the Meeting Houses in the respective towns, to the Meeting Houses in *Leicester* and *Worcester*. An exhibit of the calculations I have made, I have now with me, to submit, if the Court please, to their consideration.

Judge Advocate—Please to produce it. Ensign Lincoln handed a paper of which the following is a copy :

☞ SEE NEXT PAGE.

WORCESTER REGIMENTAL MUSTER ACCOUNT CURRENT WITH LEICESTER.

Troops.	Towns.	Men.	Distance.	No. of Miles.	Total.	Towns.	Men.	distance.	No. of Miles.	Total.
Cavalry.	Holden	20	who march each	172½		Holden	20½	9½ miles	218½	
	West-Boylston	3	7½ miles			West-Boylston	3			
	Worcester	7	0	0		Worcester	7	6 miles	42	
	Leicester	1	6 miles	6		Leicester	1	0	0	
	Paxton	1	8 miles	8		Paxton	1	5 miles	5	
	Spencer	8	11 miles	88	274½	Spencer	8	5 miles	40	305½
		40		whole distance	whole travel		40			
Artillery.	Worcester	55	0	00		Worcester	55	6 miles	330	330
Infantry.	Holden	69	7½ miles	517½		Holden	69	9½ miles	655½	
	Worcester	162	0	00		Worcester	162	6 miles	972	
	Leicester	83	6 miles	498		Leicester	83	0	00	
	Paxton	46	8 miles	368		Paxton	46	5 miles	230	
	Spencer	117	11 miles	1287		Spencer	117	5 miles	585	
	Ward	49	5½ miles	269½		Ward	49	6 miles	296	
		526			2946		526			2736
				Total Miles	3214½				Total Miles	3371½
									Deduct	3214
									Difference	157

Difference in favor of Worcester, 157 Miles.

The number of Men are taken from the Returns of Adj. Reuben Munroe, of the Infantry.——Adj. William Caldwell, of the Artillery, and Capt. John Read, of the Cavalry.

Capt. Daniel Kent, called and sworn.

Question by Judge Advocate. Have you heard declarations from Col. Brigham, to Capt. Prouty, on the appointment of the muster in *Worcester ?*

A. At the election of Capt. Prouty, some time since, Col. Brigham declared, that Leicester was the most central place for muster, and that it was a *cruel* and *unjust thing* to call the Troops to Worcester. He added, with an *oath*, that the Muster never should be at Worcester, while he had the command. In my opinion, Leicester is both more central and convenient than Worcester, for muster. It is in the middle of the towns composing the Regiment, and *there*, at *Leicester*, are superior accommodations from the Meeting House, Taverns and Sheds in case of bad weather. The ground is as good, and I think better, than where the Regiment was last paraded. The Regiment has twice been paraded at Leicester, since I have been in commission.

Major Isaac Lamb, called and sworn, and testified, that in 1808, Col. Brigham told me, that he had then been solicited by some Officers in Worcester, to appoint the muster there, and he supposed the ground would be prepared without expence to him ; yet, said he, *they have not got me to agree to it, for Worcester is not convenient for a Muster of the Regiment.* Col. Brigham has also frequently said, in my hearing, that Worcester was not central, and that Leicester was near the centre ; this also is my opinion.

Question by Judge Advocate. Did Col. Brigham muster the Regiment in Worcester, in 1808 ?

A. He did not, Sir.

Question by Complainant. Where is the centre of the Regiment ?

A. It has always been said in Leicester.

Question by same. How far is the centre of the Regiment, as you have stated, from the Meeting House in Leicester ?

A. Not far from *two* miles.

Q. Was it not the opinion of the Officers of the Regiment, when you was in commission, that the centre was near Colonel Newhall's, on the County Road from Leicester to Worcester ?

A. Somewhere not far from there.

The Judge Advocate stated to the Court, that in going thus far with the testimony, he had been influenced by a

consideration of the absence of Capt. Prouty, and by a wish that it should appear upon the record, that the enquiry before the Court had been directed by a strict regard to justice —but, that unless otherwise advised by the Court, he should pursue it no further. The Court suggested to the Judge Advocate, that they were satisfied with his discharge of duty in this respect, and that the examination as to the charges in the Complaint, should terminate.

At one quarter past *four o'clock* in the afternoon, after an uninterrupted session from the Morning, the Court directed an adjournment until 10 o'clock to-morrow, A. M. whereof Proclamation was made by the Marshal.

County Court House, Worcester, Wednesday, Dec. 19, 1810, *one o'clock* P. M.

The President and Members all in their places and the Complainant present in Court in his proper person. The Court having this morning completed the trial of Capt. Kent, enquired of the Judge Advocate, if he was ready further to proceed in the trial of Capt. Prouty. The Judge Advocate replied, that nothing remained for him in this Trial to offer the Court, but the testimony of Adj. Caldwell, as to the service of the arrest upon Capt. Prouty, and notice of the time and place appointed for his trial, with a copy of the Complaint exhibited by Col. Brigham against him, without which, the evidence would be incomplete. He thereupon, directed the Marshal to call Adj. Caldwell to attend upon his summons, to testify in behalf of the Commonwealth. Adj. Caldwell upon being called, did not appear. The Judge Advocate then remarked to the Court, that his duty demanded of him, a very unpleasant task in submitting a motion on the subject of the absence of Adj. Caldwell to the consideration of the Court—which he presented in writing and in the words following :

" The Judge Advocate most respectfully represents to this Honorable Court, that Adj. William Caldwell, of the Artillery of the first Brigade, is an important witness on behalf of the government in the trial of Capt. William Prouty, before the Court—That he was duly and regularly summoned to attend as a witness by a subpœna issued by the Judge Advocate of this Court, and served upon him by Adj. Reuben Munroe of the first Regiment of Infantry—that without

the knowledge of the Judge Advocate, or the permission of this Honorable Court, the said Adj. William Caldwell has departed, and as the Judge Advocate has been informed and verily believes, is now absent on a journey to Boston, *in contempt of the said subpœna and the authority of this Court*— Wherefore the Judge Advocate moves the Court for an *attachment* against the said Adj. *William Caldwell*, or such other order as the Court in their discretion may direct.

LEVI LINCOLN, Jr. *J. Advocate.*

Upon further motion of the Judge Advocate, Adj. Reuben Munroe was called and testified, that he had received a Subpœna from the Judge Advocate for Adj. William Caldwell, requiring his attendance as a witness to testify in behalf of the Commonwealth before this Court, which he had personally served upon him before the commencement of the session.

The Court having considered the motion of the Judge Advocate, *ordered*, that an attachment for a contempt issue against Adj. William Caldwell, directed to the *Marshal*, and returnable at the sitting of the Court to-morrow morning— The Judge Advocate thereupon issued an attachment as aforesaid and delivered the same to the Marshal to be immediately executed.

At 3 o'clock, P. M. the Court was adjourned by proclamation of the Marshal, until 10 o'clock to-morrow morning.

Worcester County Court House, Thursday, Dec. 20, 1810, 10 *o'clock*, A. M.

The Court met, and the President and Members in their places, answered to their names. The Complainant appeared and answered. The records of the proceedings in the trial of Capt. William Prouty were read. The Judge Advocate called upon the Marshal for a return of the attachment against Adj. Wm. Caldwell, which he thereupon returned.

The Judge Advocate read to the Court the *writ* and return in the words and figures following, to wit.

"COMMONWEALTH OF MASSACHUSETTS,

County of Worcester, 7th Div. 1st Brig. and 1st Reg. of Militia.

To Ensign Gardner Burbank, Marshal of a Court Martial, whereof is President, Lt. Col. Joseph Farnsworth, now in

session at Worcester, in said County—by order of the Major General of the 7th Division, GREETING.

(L. S.) WHEREAS it has been made to appear to the Court here, that Adj. William Caldwell of the *Artillery*, in the first Brigade and Division aforesaid, has been duly served with a subpœna, from the Judge Advocate to attend this Court, to give evidence in behalf of the Commonwealth, and has departed therefrom without license, and neglects to obey said subpœna, *in contempt thereof and of the authority of this Court*—You are hereby commanded to take the body of the said Adj. William Caldwell, (if he may be by you found within this Regiment,) and him forthwith have before this Court to answer for the contempt aforesaid, and to do and receive whatsoever the Court shall order. Hereof fail not, and make return of your doings herein, by the sitting of this Court to-morrow morning. Witness Joseph Farnsworth, Esq. President of said Court, this nineteenth day of December, eighteen hundred and ten.

LEVI LINCOLN, JR. *Judge Advocate.*

The Marshal's return hereon was in the words and figures following, to wit :

WORCESTER, SS.

In obedience to the within order, I have made diligent search for the within named Adj. William Caldwell, but cannot find him within this Regiment.

GARDNER BURBANK, *Marshal.*

20th Dec. 1810, 10 *o'clock* A. M.

The Court attended to the pay roll and then adjourned for *half an hour*. *At one o'clock* the Court met and was opened by the Marshal—The Judge Advocate moved the Court for an order upon the absence of Adj. William Caldwell. The Court directed the Judge Advocate to record their pointed disapprobation of the conduct of Adj. William Caldwell in absenting himself from the Court, and not to allow upon the cost of the Trials before the Court, any tax for his previous services.

The Judge Advocate upon the evidence before the Court, which, from the absence of Adj. Caldwell, was the best which the nature of the case would admit, moved the Court for judgment upon the trial of Capt. William Prouty.

The Court decided, that upon the summary of the trial by

the Judge Advocate, they would proceed to render Judgment therein.

The Judge Advocate then summed up the evidence—after which the Court proceeded to render Judgment, as follows, the room having been first cleared of spectators, and the doors closed by the Marshal.

The Judge Advocate put to each of the members singly, the following question, beginning with the lowest in grade:

What say you, sir, from the evidence which has been adduced both for and against Capt. William Prouty, by the Judge Advocate, on this trial, are you of opinion that he is *Guilty* or *not Guilty* of the first specification of charge in the Complaint of Lieut. Col. John Brigham, exhibited against him?

The Court decided that of the said *first* specification of charge in said Complaint, the said Capt. William Prouty *is Guilty*.

Upon the question being put, in the same form and order upon the *second* specification of charge in said Complaint,

The Court decided that of the said *second* specification of charge, the said Capt. William Prouty *is not Guilty*.

Upon the question being put, in the same form and order on the *third* specification of charge in said Complaint,

The Court decided that of the said *third* specification of charge, the said Capt. William Prouty *is not Guilty*.

The Court having taken into consideration the offence of which it had adjudged Capt. William Prouty *Guilty*, as contained in the said first specification of charge, in the Complaint of Lt. Col. John Brigham, exhibited against him, do sentence the said Capt. William Prouty *to be removed from Office*, and do adjudge the said Capt. William Prouty to be disqualified for, and incapable of holding any *Military Office* under this Commonwealth for the term of *one year*.

JOSEPH FARNSWORTH, *President*.

LEVI LINCOLN, JR. *Judge Advocate*.

The Court was now opened, and thereafter the Marshal was directed to adjourn this Court without day; which was done by him in form accordingly.

Commonwealth of Massachusetts!

We do hereby certify that the foregoing are true copies of the Proceedings of the Court, of the Evidence offered it, and of its Opinions and Judgments.

Dec. 20th, 1810.

JOSEPH FARNSWORH, *President.*
WILLIAM LOVE,
SALEM TOWN, Jun.
HACKALIAH WHITNEY,
WILLIAM MOORE,
DANIEL TENNEY, Jun.
WARREN RAWSON,
JESSE ALDRICH,
JOHNSON LEGG,
WARREN SNOW,
OLIVER HOOKER,
MICAH REED,
ELI WARREN, *Members.*

LEVI LINCOLN, Jun. *Judge Advocate.*

SEVENTH DIVISION OF MILITIA.

Worcester, Dec. 20, 1810.

Honorable Jonathan Davis, Esq.

The Judge Advocate lose's no time in the honor of transmitting for the disposal of the Major General, the Records of the Proceedings of a *Division Court Martial*, holden by his order, for the trials of Captains Samuel Watson, 2d, David Livermore, Daniel Kent and William Prouty, of the 1st Reg. 1st Brig. and 7th Division, which closed its session this day.

LEVI LINCOLN, Jr. *J. Advocate.*

On the fifteenth day of January, A. D. 1811, the following Division Order was issued to the Judge Advocate.

Division Order, Oxford, Jan. 15, 1811.

Levi Lincoln, Jr. Esq.
Judge Advocate, of the 7th Division, &c.

Sir,

The Honorable Jonathan Davis, Esq. Major General of the Division aforesaid, has ordered the Court Martial whereof Lt. Col. Joseph Farnsworth is President, to convene at the County Court House in Worcester, on Monday, the

fourth day of February next, precisely at eleven of the clock, A. M. of which meeting, time and place, you are hereby directed to take notice and govern yourself accordingly.

By order of the Major General aforesaid.

ESTES HOWE, *A. D. C.*

Worcester County Court House, Monday Feb. 4, 1811, 3 *o'clock*, P. M.

The President, Judge Advocate, Marshal and seven Members of the Court, appeared in their places. Majors Daniel Tenny, Jr. Warren Rawson, Hackaliah Whitney; and Captains Jesse Aldrich and Johnson Legg, upon being called, were found to be absent. The President thereupon directed an adjournment until 10 o'clock to-morrow morning, of which Proclamation was made by the Marshal.

Tuesday Feb. 5, 1811, 3 *o'clock*, P. M.

The President, Judge Advocate, Marshal and Members present yesterday, appeared in their places. The absent Members having been delayed as was believed by the severity of the storm, and the obstruction of the roads by snow, and their attendance expected as soon as was practicable, the President directed an adjournment until 10 o'clock, to-morrow morning. Before adjourning, the Judge Advocate informed the Court, that he had not yet received from the Major General any communication for the attention of the Court, had all the Members been present, and that a special Messenger, had been dispatched with a letter to the Major General on the subject. The Court directed that a Messenger be sent also for the absent Members. Proclamation of adjournment was then made by the Marshal.

Wednesday, Feb. 6, 1811, 3 *o'clock*, P. M.

The President, Judge Advocate, Marshal, the Members present yesterday, together with Major Daniel Tenney, Jr. heretofore absent, appeared in their places. Majors Whitney and Rawson, and Captains Aldrich and Legg, still absent. The Judge Advocate informed the Court that a messenger had been sent to the absent Members requiring their immediate attendance. The President also informed the Court that *last evening*, he received by the hands of Major Tenney, a Communication from the Major General for the

attention of the Court, and being of a confidential nature, he directed the room to be cleared of Spectators, and the doors closed, after which it was read by the Judge Advocate, as follows :

" *To the President, Judge Advocate and Members of a Division Court Martial, appointed for the trial of Captain Samuel Watson, 2d, and others, to be convened at the County Court House, in Worcester, on Monday, the fourth day of February, A. D.* 1811.

GENTLEMEN,

I have received the Papers and Records of your Proceedings on the trials of Captain Samuel Watson, 2d, and others, charged in a Complaint exhibited against them, by Lt. Col. John Brigham, and have diligently and candidly examined the same. I can truly say that I am highly pleased with the mode and manner of your proceedings, and am fully persuaded that they will reflect great honor on Courts Martial in the Commonwealth, and in particular on the one now under consideration. But, Gentlemen, there is one consideration that lays heavy on my mind, and *but one*, in the decision of the Court, and that is the degree of punishment on Watson, Livermore and Prouty. It is of vast importance, that punishments should be in proportion to the aggravation of the crime. It has, I believe, almost universally been the case, in the Supreme Courts of this Commonwealth, to which we look as our guide, in all solemn and important trials, that when the Law has left it discretionary with the Court to determine the quantity of punishment, if it appears on trial, that the accused acted under a misconception of the law, or were led into the crime by bad advice, or were not actuated by vicious motives, and especially if the person accused had always before that time maintained a good moral character, I say, in this case, I believe it has been the invariable rule of the Court, to inflict the least punishment that the law provides in such case.

By the Militia Law which past in March last, there are three kinds of punishment specified, which are left to the discretion of Courts Martial, viz. reprimand in orders, removal from office ; and if removed from office, disqualification for a term of years, or for life. The least punishment then, that you could have adjudged, was a reprimand in or-

ders. It may be said, that a reprimand in orders is no punishment, or at any rate, very small; and it might with almost equal truth be said, to be removed from office, is not any punishment—For say some, who have very little feeling of honor about them "that I should have no objections to be removed from office, for then I should get rid of a great burthen and expence! But, Gentlemen, my feelings are as far from this, as East is from West, for I believe that a Soldier or an Officer that is worthy the name of an Soldier, values his honor more than he would the riches of all the Indies, ah, far more than his life, and such I believe are the feelings of the Honorable Court to whom I am addressing myself; and permit me to say further, that my impressions are the same of the unfortunate Officers arraigned before you. I shall not go into a particular detail of evidence, for I presume we do not materially differ in our opinion, if we had, you would not have given your decision as you did. In respect to the the second and third charges in the Complaints, I think you have justly judged, that the Defendants were not guilty of that turpitude, which in my opinion greatly operates to mitigate the degree of punishment, which otherwise ought to be inflicted, and it does appear to me that the crime arose more from an error of the head, than from the depravity of the heart. And as there were many aggravating circumstances which did appear in the course of the trial, on the part of the Complainant, together with the ambiguity of the law respecting the power of Commandants of Regiments, to appoint Regimental Reviews from the centre of their Regiment, when convenient ground can be obtained at or near the centre; and altho' I agree with you in your determination, that it could not justify the Defendants in disobeying orders, yet I solemnly think, that it ought to mitigate the degree of punishment, and that a reprimand in orders would contribute to the peace and good order of the Regiment to which they belong, and to the Militia generally, more than any other. I therefore, Gentlemen, wish you to candidly review your proceedings, and if you can see cause to alter your sentence so as to conform to my feelings, and not to hurt your own, it would be pleasing to me, but I am far from supposing, or even wishing you to hurt your own feelings, to please me or any other person. I am truly apprised of the responsibility devolving upon me in making up my decision on this sub-

ject, and I can safely declare, that in doing which, I have had a fingle eye to the restoration and preservation of good order and harmony among the militia under my command.

I am, Gentlemen, with great esteem,

Your humble servant,

JONATHAN DAVIS,

Major General of the Seventh Division of Massachusetts.

Oxford, January 28, 1811.

The Court not being competent until full, to act upon the foregoing Communication of the Major General, the President directed the doors to be opened, and an adjournment until nine o'clock to-morrow morning, whereof Proclamation was made by the Marshal.

Thursday Morning, Feb. 7, 1811, 10 *o'clock* A. M.

The President, Members, Judge Advocate and Marshal present. The President and Members upon being called, all answered in their places. The Court was opened by the Marshal. The Judge Advocate read the Records of the preceding days. After which, by order of the President, the room was cleared of Spectators and the Doors closed; when the Judge Advocate again read the communication from the Honorable Major General to the Court as recorded with the proceedings of yesterday, and submitted the same to the consideration of the Court.

The Court having deliberated thereupon and expressed a readiness for decision, the Judge Advocate put to each of the members singly, beginning with the lowest in grade, the following question. "*What say you, Sir, upon revision of your opinions heretofore in the Trials before this Court, and upon consideration of the communication of the Honorable Major General, do you see cause to alter your opinion upon the Judgments or Sentences, or either, or any part of them there recorded?*" And thereupon it was decided, *that the Court do adhere to the Judgment and Sentences, and all and every part of them, in each of said Trials heretofore set forth upon the Records*—and that it be now recorded, that the Court had paid all that attention to the communication of the Honorable Major General, which the high respect for his character and station, and the importance of his sentiments eminently demand. And while the Members of this Court deeply

regret the difference of opinion which exists between them and the Honorable Major General on this subject, they feel bound by their oaths, to a conscientious and independent discharge of duty, according to their own apprehensions of it, in the opinions and judgments they have expressed.

JOSEPH FARNSWORTH, *President.*

LEVI LINCOLN, JR. *Judge Advocate.*

The Doors were then opened and the Court adjourned without day.

We certify the foregoing to be correct copies of the proceedings and decision of the Court.

JOSEPH FARNSWORTH, *President.*

LEVI LINCOLN, JR. *Judge Advocate 7th Div.*

SEVENTH DIVISION.

Worcester, Feb. 7, 1811.

Hon. JONATHAN DAVIS, Esq. Maj. Gen.

I do myself the honor to remit the records of the Trials of Capt. Watson and others—with the further records of the proceedings of the Court Martial, reassembled by your order of the fifteenth of January last. They will be under seal and entrusted to the care of Major William Moore, a Member of the Court.

I have the honor to be, Sir, with high considerations of respect, your obedient Servant.

LEVI LINCOLN, JR. *Judge Advocate.*

Division Orders, Head Quarters, Oxford, Feb. 9, 1811.

The Major General of the 7th Division, having maturely considered the several allegations and charges exhibited against each and all of the aforenamed Defendants and deliberately weighed the evidence produced on the part of Government, in support of the charges therein exhibited against them, is constrained to persevere in his opinion, that the offence, under the peculiar circumstances in which it was committed, was not in proportion to the degree of punishment inflicted by the Court. Under these impressions, he deemed it his indispensable duty to reassemble this Hon. Court, in order to lay before them such communication as corresponded with his opinion on the subject. This Hon.

Court having been reassembled pursuant to his order on the 4th inst. and decided that they will adhere to their former decision, he is compelled to enforce his own opinion. The Maj. Gen. most sincerely regrets, that a necessity for a variance in opinion between this Hon. Court and himself should exist: But impelled by his oath of office, and an imperious sense of duty, he feels himself compelled and does hereby *disapprove* of the same.

The Court Martial, whereof Lieut. Col. Joseph Farnsworth is President, is hereby dissolved—and the foregoing defendants, Captains Samuel Watson, 2nd, David Livermore, Daniel Kent and William Prouty, are also hereby discharged from their arrest.

By order of the Major General of the Seventh Division.

ESTES HOWE, A. D. C.

NOTE.

THROUGH the hurry in which the foregoing Records paſſed the Preſs, and the profeſſional engagements of the Judge Advocate, which prevented his conſtant attention to their correctneſs, many *literal* and *verbal* errors eſcaped a feaſonable notice. The moſt material are pointed out in the ſubjoined *errata*. *Each* Trial is preſerved entire, by itſelf, altho' the Court frequently, on the ſame day, were engaged in more than one trial. This mode was adopted with a view by the Judge Advocate to the continuity of the Records, while the courſe of procedure by the Court, was induced by a regard to the diſpatch of buſineſs, and the economy of time. During the whole of the Trials, the Complainant was *moſt ably* and *faithfully aſſiſted* by the advice and inſtructions of WILLIAM E. GREEN, and SAMUEL BRAZER, JUN. Eſquires, and the Defendants who appeared, by the *ingenious* and *unremitted* exertions of NATHANIEL P. DENNY, Eſquire; and to each of theſe Gentlemen, the Judge Advocate expreſſes his acknowledgments for a great relief from the laborious and perplexing duties of his office.

ERRATA.

PAGE 9, 12th line from top, for *or* read *of*. Page 13, the name of the Complainant, is miſprinted BRIGMAM. Page 16, at the end of the 8th line from top, dele *of*. Page 20, 2d line from top, for *Bapt.* read *Capt.* Pape 34, 14th line from bottom, for *Drury's* read *Denny's*. Page 36, in the middle of the page and laſt line of a paragraph, inſert *of*, to read *of* the Court. Page 43, 4th line from top, for *one* read *me*. Page 47, 12th line from bottom, inſert *be* after *as*. Page 48, 2d line from top, for *by* read *try*, 5th line from bottom, for *County* read *Country*. Page 53, 4th line in the third paragraph, for *and* read *an*. Page 74, 8th line from top, for *time* read *true*. Page 80, 5th line from top, the word *read* ſhould be *record*.

THE

TRIAL

OF

ALPHEUS LIVERMORE AND SAMUEL ANGIER,

BEFORE

THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS,

UPON

AN INDICTMENT

FOR THE

Murder of Nicholas John Crevay, an Indian,

COMMITTED NOVEMBER 23, 1813.

Containing the Evidence at large, the Arguments of the Solicitor General, and of the Counsel for the Prisoners, the Charge of the Hon. Judge SEWALL to the Traverse Jury, and his Address on pronouncing Sentence of Death.

[*FROM MINUTES TAKEN AT THE TRIAL.*]

BOSTON:
PUBLISHED BY WATSON & BANGS,
No. 7, State-Street.
1813.

TRIAL.

AT the Supreme Judicial Court held at Cambridge, on the third day of December, 1813, the Hon. Charles Jackson, one of the Justices thereof, then presiding, the Grand Jurors returned a bill of indictment against Alpheus Livermore, Samuel Angier, John Winch and Mark Packard, for the murder of Nicholas John Crevay, on the 23d November, 1813—which indictment, on the motion of D. Davis, Solicitor General of the Commonwealth, was filed of record. On the day above mentioned, Livermore, Angier and Winch then confined in the Commonwealth goal in Cambridge, (Packard having absconded before the finding of the indictment) were ordered to be brought to the bar, and they were thereupon informed by Judge Jackson, that they were all indicted for the crime of murder ; that as there were not three Judges then present, they could not be arraigned upon the indictment ;* but that they might be made acquainted with the nature of the crime of which they were accused, and have ample opportunity to prepare for their trials, he should order the indictment to be read to them—which was accordingly done by the Clerk of the Court. The prisoners were then further informed that a day convenient to them and to the Court, would be assigned for their trial, to which the prisoners answered that they should be ready for trial at any time subsequent to the present week.

On the fifteenth of December instant, the Court,—viz. the Hon. Judges Sewall, Parker and Jackson, convened for the trial of the prisoners. Livermore, Angier

* 2 Mass. Term Reports, page 303. Comm. *vs.* Hardy.

and Winch were then brought to the bar, and at their request, Mr. Hoar of Concord, and Mr. Rogers of Charlestown, were assigned for their Counsel. The prisoners were then arraigned upon the indictment in the usual form, which indictment is in the following words, viz.

COMMONWEALTH OF MASSACHUSETTS.

Middlesex ss.

At the Supreme Judicial Court, begun and holden at Cambridge, within and for the county of Middlesex, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and thirteen, and continued in session from day to day, until the third day of December, in the year aforesaid.

The Jurors for the Commonwealth of Massachusetts, upon their oath present, that ALPHEUS LIVERMORE of Malden, in the said County of Middlesex, labourer, SAMUEL ANGIER of said Malden, in said County of Middlesex, labourer, JOHN WINCH of said Malden, in said County of Middlesex, labourer, and MARK PACKARD, of Malden, in said County of Middlesex, labourer, not having the fear of God before their eyes, but being moved and seduced by the instigation of the Devil, on the twenty-third day of November, in the present year of our Lord one thousand eight hundred and thirteen, with force and arms, at Stoneham, in the County of Middlesex aforesaid, in and upon Nicholas John Creway, otherwise called Nicholas John Crevay, in the peace of God and of the Commonwealth aforesaid, then and there being, feloniously, wilfully, and of their malice aforethought, did make an assault, and that said Alpheus Livermore, Samuel Angier, John Winch, and Mark Packard, certain muskets of the value of ten dollars, then and there loaded and charged with gunpowder and iron nails; which muskets, they the said Alpheus Livermore, Samuel Angier, John Winch and Mark Packard, in both their hands, then and there, had and held to, against, and upon the said Nicholas John Creway, otherwise called Nicholas John Crevay, then and there feloniously, wilfully, and of their malice aforethought, did shoot and discharge: and that the said Alpheus Livermore, Samuel Angier, John Winch, and Mark Packard, with the iron nails aforesaid, out of the muskets aforesaid then and there by force of the gunpowder discharged, and sent forth as aforesaid, the said Nicholas John Creway, otherwise called Nicholas John Crevay, in and upon the upper part of the belly of him the said Nicholas, then and there, with the iron nails aforesaid, out of the muskets by the said Alpheus Livermore, Samuel Angier, John Winch, and Mark Packard, so as aforesaid discharged and sent forth, feloniously, wilfully, and of their malice aforethought, did strike,

penetrate and wound; giving to the said Nicholas John Creway, otherwise called Nicholas John Crevay, then and there, with the iron nails, aforesaid, so as aforesaid discharged and sent forth out of the muskets aforesaid, in and upon the upper part of the belly of him the said Nicholas, one mortal wound of the length of half an inch, of the breadth of half an inch, and of the depth of two inches, of which mortal wound the said Nicholas John Creway, otherwise called Nicholas John Crevay, from the said twenty-third day of November, in the year aforesaid, until the twenty-ninth day of November, in the same year, at Stoneham aforesaid, in the County of Middlesex aforesaid, did languish, and languishing did live; on which said twenty-ninth day of November in the year aforesaid, the said Nicholas John Creway, otherwise called Nicholas John Crevay, at Stoneham aforesaid, in the County of Middlesex aforesaid, of the mortal wound aforesaid died; and so the Jurors aforesaid, upon their oath aforesaid, do say, that the said Alpheus Livermore, Samuel Angier, John Winch, and Mark Packard, the said Nicholas John Creway, otherwise called Nicholas John Crevay, in manner and form aforesaid, feloniously, wilfully and of their malice aforethought, did kill and murder, against the peace of the Commonwealth aforesaid, and against the form of the statute in such case made and provided.

DANIEL DAVIS, *Solicitor General.*

A true bill,

ROYAL MAKEPEACE, *Foreman.*

The prisoners being then severally asked whether they were guilty or not guilty, severally said that they were not guilty, and that for their trial they would put themselves upon God and their country—to which the Clerk replied, "God send you a good deliverance."

The prisoners were then asked if they would join in their challenges. To which Mr. Hoar answered that they would, provided that the wife of one of the prisoners could be permitted to testify on the trial, to a fact which did not in any respect relate to the husband. The Solicitor General refusing to consent that the wife of one of the prisoners should be admitted to be a witness in the cause, for any purpose whatever, Winch the husband of the woman offered as a witness was remanded, and the trial proceeded against Livermore and Angier, they having agreed to join in their challenges.—Whereupon after peremptory challenges of sixteen of

the panel, the following gentlemen were sworn "well and truly to try, and true deliverance to make, between the Commonwealth of Massachusetts and the prisoners at the bar, according to their evidence." The gentlemen of the Jury were

SAMUEL P. WHITING, *appointed Foreman.*
GIDEON P. WELD,
NOAH SPALDING,
ISAAC RICHARDSON,
JEREMIAH PATTERSON,
MOSES PRICHARD,
JONAS MANNING,
PHINEAS HOLDEN,
BENJAMIN S. HEMMENWAY,
MATTHIAS COLLIN,
CALVIN BROOKS,
NATHAN BRYANT.

The cause was then opened nearly as follows, by the Solicitor General.

May it please your Honours, and
you gentlemen of the Jury,

The prisoners at the bar stand indicted by the Grand Jury for the body of this County of Middlesex, for the murder of Nicholas John Creyay. The indictment alleges this offence to have been committed on the 23d day of November last, at Stoneham, in this County, and particularly states the manner in which this horrid and atrocious murder was perpetrated. It is my duty, gentlemen, to conduct this prosecution on the part of the Commonwealth, and you will readily conceive of the painful nature, as well as of the great responsibility of this duty. I am conscious, however, of no feelings upon this interesting occasion, but such as may conduct me to a faithful and impartial management of this cause, both towards the Government and the prisoners. I shall endeavour as far as my feeble talents will enable me, that in the progress of this trial, the justice of the government be not dishonored or disgraced. The re-

sult of the investigations of this day, to the prisoners at the bar, will be most awful and tremendous. If the evidence against them shall be sufficient to satisfy you of their guilt, the laws of God and your country sentence them to a violent and ignominious death. It is not for us, gentlemen, to question or doubt of the wisdom of these laws; and I entertain too high an opinion of your integrity and understanding, to permit me to doubt for a moment that if the evidence shall satisfy you of the guilt of the prisoners, you will hesitate to do your duty to your God, your country and yourselves, by pronouncing a verdict against them.

Before I proceed to state to you what I expect will be the purport of the evidence on the part of the State, I will explain to you the nature of the crime of murder, so far as may be necessary for a correct understanding of this case. The most modern, and I think the best definition of this crime, is this—"the voluntary killing "of any person under the peace of the Commonwealth, "with malice aforethought, either express or implied "by law." The facts in this case are of such a nature as to require no particular explanation of this definition, excepting that part of it which relates to the term, "malice aforethought." It is this malice which constitutes the essence and the detestable nature of this offence. The motive which dictates it must proceed from a heart of the deepest and blackest malignity: the act which proceeds from it must be done *malo animo*, and carry with it the plainest indications of "a heart regard-"less of social duty, and fatally bent upon mischief." It may be manifested as well towards a particular individual, as by an evil, careless or malevolent disposition towards all mankind. The evidence of this malice is usually exhibited in acts of secret hostility and fell revenge; by previous threats, or concerted schemes to destroy the deceased, or do him some bodily harm.

In the present case, you will find that the death of Crevay was accompanied with all the savage and brutal circumstances which constitute the crime of murder, in its grossest and most atrocious character. Whoever

took the life of the deceased, there will be no question in this case but that he was cruelly and barbarously *murdered.* I will therefore now proceed to state to you the facts and the evidence against the prisoners.

The deceased was an Indian. But it will not be forgotten that he was our fellow mortal, and that he was the offspring of the same Almighty Father and Preserver as ourselves ; who is "*no respecter of persons,*" and who has "*made of one blood all the nations of the earth.*" He was a native of the Penobscot tribe ; but for some time had resided in Canada at a place called St. Francis, where he married ; and after the breaking out of the present war, he returned within this state with his wife. He was known to, and had traded with many people within the American lines ; and fearing he should be considered as hostile to his native country and tribe, he obtained a recommendation or passport from a Militia Officer of rank, in the interior of New Hampshire, with which he came with his wife into the town of Stoneham, some few weeks before he was murdered. He had erected a small hut or cabin upon the borders of Spot Pond in Stoneham, and it is to be lamented, had rendered himself obnoxious to the people in that vicinity, by repeated instances of ill conduct, when in a state of intoxication. On the day on which the murder is alleged, he was found in a state of intoxication at Malden, where he was severely chastised by some of the people in that neighborhood. Towards the close of the day he returned to his hut. About ten o'clock in the evening six guns were discharged in and about the hut, Crevay and his wife then lying upon their bed of hemlock boughs. The scene became too shocking for the powers of description. Perhaps in point of cruelty and barbarity it was never equalled in any country savage or civilized. Crevay was most shockingly mangled by a charge of iron nails of the largest and common size, which were shot into the different parts of his body—One of them of the largest size entered his body upon the lower part of his ribs, and passed between the ribs and flesh into his side, about the distance of six inches.

Three other nails of smaller size entered his left arm, were shot into the bone, which they fractured, and from which they were extracted. Another wound was discovered upon the upper part of his belly, which proved to be mortal, and is described in the indictment.

The Woman was shot through the body by one or more musket balls; the muzzle of the gun from whence they were discharged, must have been placed directly to her body, as her clothes and skin were burnt by the blaze, to the size of the palm of your hand. To the astonishment of every person who witnessed the scene on the subsequent morning, it was ascertained that these miserable and mangled wretches had escaped from their hut, in this wounded and agonizing condition, into the woods, where they remained during the night, and where they were traced in the morning by their cries and groans. They were immediately carried to the house of a Mr. Howe, in that vicinity, where they were provided with every thing that humanity required for their comfort and relief. A Physician was sent for, by order of the Selectmen of the town of Stoneham, which Physician has done every thing for the unhappy wretches in his power;—with the woman his efforts have hitherto proved efficacious; but the man, after languishing for six days, during which time he endured the most excrutiating tortures, died of his wounds.

The morning after this unheard of and shocking massacre, several charges of shot, nail and bullets were found lodged in different parts of the hut. The traces of blood, which had flowed copiously through several layers of the hemlock boughs, upon which the Indians slept, were discovered. Fragments of cartridges, partly consumed, and bearing evident marks of having been discharged from muskets, were picked up about the hut.

I will now state to you, gentlemen, the evidence on the part of the government, upon which I shall rely, to support the present prosecution.

The prisoners were native citizens of this State, and for some time previous to the murder of Crevay, were employed in a nail factory belonging to the Messrs.

Odiorne's. For several days preceding the evening of the 23d of November, as well as on that day, they had manifested a disposition to "rout" or drive off the Indians. On the evening of the 23d, they, with several others, assembled at the shop of Mr. Bancraft, where they drank freely of spirituous liquor. They left Bancraft's shop about 8 o'clock in the evening, returned to to the Factory, where they remained till a few minutes before 9. In the course of this hour, which they passed in the Factory, they avowed to their fellow workmen, their intention of attacking the Indians that evening. Livermore was seen in the act of loading a kings-arm, which had remained some time in the Factory for his particular use, and declared his intention of going armed. Angier procured four cartridges of powder, from George Dexter, made up in blank cartridges. He fixed the flint of his gun in such a manner, as (to use his own expression) "it would go completely."—The cartridges thus procured, were made (two of them at least) with common writing paper—the other with brown paper, corresponding precisely, with the paper of the fragments of cartridges afterwards found at the Indian hut. After these preparations they avowed the object of their enterprise, which was to "*rout the Indians.*"—They invited several other young men belonging to the Factory, to accompany them, and upon being refused, Angier reproached one of them for proving a coward. It will also appear in evidence that Winch, one of the accused, but not now on trial, told Livermore, "that if he went to rout the Indians, he should fire nothing lighter than lead."

After these deliberate preparations, and with "hearts regardless of social duty, and fatally bent upon mischief," Livermore, Angier and Packard, (another of the accused who has since absconded), left the Factory about 9 o'clock, declaring their intention to attack the Indians that evening. The distance from the Factory to the hut is about two miles, and at the hour and minute, when the prisoners might have conveniently arrived at the humble dwelling of the unfortunate deceased, harm-

less and defenceless as was his condition, he was attacked and fired upon in a manner at which humanity shudders, and which will continue to be an indelible reproach upon the character of a Christian country and society, so long as the memory of it shall be preserved. The deceased, together with his wretched, wounded and dying companion, were immediately deserted by their ruffian assailants, and left to perish upon the spot, where the blood of Crevay *"still cries from the ground for vengeance."*

I shall now with the leave of the Court, call the witnesses to prove the facts.

Doctor Francis Kitteredge, sworn.

Sol. Gen. State the situation of the deceased when you first saw him.

Ans. I was requested by the selectmen of Stoneham to visit the Indians, and found them lying at the house of Mr. Howe, on the morning of Wednesday the 24th, in a most shocking condition. I examined their wounds, but not thoroughly. I began with the left arm of the man, and found it much lacerated: in the thick of the fore arm I discovered a hard foreign substance, made an incision, inserted my fore finger, and felt what I supposed was the point of a nail: with the assistance of my other fore finger, I extracted a clapboard nail. I continued my examination, and found that the small bone of the arm was fractured badly, and from the centre I drew out a shingle nail, which was completely imbedded in the marrow. His arm was much torn by the passage of a double ten, which penetrated through his arm into his body, across which his arm probably lay as he slept, and from whence I extracted it. This nail penetrated to the cartilages of the two lower ribs, by which it took a new direction, and was concealed in the cellular substance. I discovered, about half way between the breast bone and the navel, and a little to the left of the former, another wound, which, on probing, proved to be of a circular form, about half an inch in diameter, and from an inch and a half to two inches deep.

Sol. Gen. Was this last wound caused by a nail?

Ans. I cannot say positively; but from appearances afterwards, I think it must have been caused by some iron substance.

Sol. Gen. What was the state of this wound?

Ans. Gangrenous and mortified.

Sol. Gen. Did you examine the body after his decease?

Ans. I did; and from the last mentioned wound, there came a considerable quantity of black matter, of an offensive, fœtid smell. I dissected away the muscles and cellular substance, and observed a small perforation through the peritonæum.

By the Court. Are you sure that you did not make that perforation with your knife?

Ans. I am; as I was particularly careful to lay bare the membrane before examination, and I found the orifice in a state of mortification. I did not search further, as I expected a jury of inquest to be summoned; the body lay in the same room with the squaw, where the family were cooking.

Sol. Gen. How long did he live?

Ans. He died on Monday, the 29th.

Sol. Gen. Are you confident he died of this wound?

Ans. It is beyond all dispute.

By the Court. Was this wound when you saw it first, as fresh as the others?

Ans. It was.

By Mr. Hoar, on cross examination. What was the declaration of the Indian; did he accuse any body of the murder?

To this question the Solicitor General objected, observing, that the dying declaration of the deceased might be legal evidence for the government, but not for the prisoners, unless such evidence was offered on the part of the government. The Court overruled the objection. The Doctor's answer was, that the Indian said he believed it was Joe Hill that shot him.

By Court, on the cross examination of Doctor Kitteredge. At what time did the Indian make this declaration, and what were they?

Ans. While I was examining his wounds aud dressing them, he said it was Joe Hill that had shot him.

By Court. How could he tell; did he have a fire in his cabin? *Ans.* It was said he had.

Court. Did any man by the name of Joe Hill live there? *Ans.* I know one of that name.

Court. Was there more than *one* gun fired?

Ans. The Indian said that some persons came into the wigwam, saying, We are going to kill you; and shot his wife through the body, and that he was immediàtely wounded, and then he crawled out into the woods.

Court. Was it after this he said it was Hill?

Ans. The next day.

Sol. Gen. Did you inquire the hour of the night?

Ans. I did not.

James Hill, sworn.

By Sol. Gen. Do you live near the Indian's hut?

Ans. Yes, sir, about ten rods from it.

Sol. Gen. When did they first come there?

Ans. About five or six weeks before they were shot.

Sol. Gen. Were you at home on the evening they were shot? *Ans.* I was.

Q. Did you hear the report of muskets that evening, and how many?

Ans. I heard three in succession, just long enough apart to be counted, and in about ten minutes from the first three, I heard three more.

By the Court. What was the time of night?

Ans. About quarter before ten.

Q. How did you judge of the time?

Ans. I have a watch; I looked at it about half past eight; about an hour afterwards I went to bed, and soon after heard the first three guns fired.

Sol. Gen. Did the sound come from the hut?

Ans. I thought it did.

Q. Did you hear any other noise from that quarter?

Ans. I put my head out of the window, but heard nothing.

Q. Did you see any light in the wigwam?

Ans. I saw one, but not so bright as usual.

By the Court. Was this after all the guns were fired?

Ans. After the first three.

Q. Did you see the wigwam that evening?

Ans. No, sir.

Q. Did you hear any persons passing before you went to bed?

Ans. No, sir.

Betsy Hill, sworn.

By Sol. Gen. Were you at home on the evening of Tuesday, the 23d?

Ans. Yes, sir.

Q. You live with your brother?

Ans. I do, sir.

Sol. Gen. State what you know to the Court.

Ans. I heard three guns fired, one after another.

By the Court. In what space of time were they fired?

Ans. In about a minute or two.

Q. What time was there between the first guns and the last?

Ans. About ten minutes between the first three and the fourth; and about two minutes between the fourth, and fifth and sixth.

Sol. Gen. What time of night was it?

Ans. Somewhere betwixt half past nine and ten o'clock.

By the Court. Did you look at the watch?

Ans. My brother did.

Sol. Gen. Did you see or hear any person?

Ans. I did not get up at first.

Q. Did you get up when you heard the guns?

Ans. I did when the last three were fired.

By the Court. Did you see any light?

Ans. I saw none then, but afterwards I saw two firebrands carried from the hut, to the mill pond hard by, where they were put into the water. This was after all the guns were fired.

Sol. Gen. Where was your brother, (Joseph) that evening?

Ans. At home at work in the shop.

Q. Was he at home all the evening?

Ans. He went out about six o'clock to do an errand for me, and returned before seven.

Q. What time did he go to bed?

Ans. About ten minutes before nine o'clock.

By the Court. How do you know that he went to bed?

Ans. He left me in the room, and said he was going to bed.

Q. Whom does your brother sleep with?

Ans. With his brother.

Q. Did you see them after they were in bed?

Ans. I did not: I heard them talk.

Q. Did your brothers hear the guns, or get up?

Ans. I could not say that they heard the guns, or got up. I thought I heard my brother James in the entry.

Ebenezer Bancraft, sworn.

Sol. Gen. State what you know took place at your shop.

Ans. I recollect nothing particular.

Q. At what time were the men at the shop?

Ans. About eight o'clock.

Q. Were you there yourself? *Ans.* I was.

Q. Was Angier there?

Ans. I cannot say positively.

Q. Was Livermore there?

Ans. I do not recollect.

Sol. Gen. Mr. Bancraft, recollect yourself; I ask you to state, unequivocally, whether Angier was there or not?

Ans. I do not know.

Q. I ask you upon the oath you have taken, whether the prisoner, Angier, was not at your shop that evening?

Ans. I believe all the hands were there.

Q. Do you mean by "all the hands," the workmen of the Factory? *Ans.* Yes, sir.

By the Court. You say that all the hands were at the shop. *Ans.* Yes, sir.

Sol. Gen. Angier and Livermore were there then?

Ans. Yes, sir.

Q. For what object were they there?

Ans. To drink a little spirit. Osgood, one of the workmen, quit work that day.

Q. How many were there?

Ans. Nine or ten.

Q Have you any doubt whether the prisoners were there?

Ans. No doubt.

Q. How much liquor did they have?

Ans. About a quart.

Q. What sort was it?

Ans. Gin.

Q. Was it all drank?

Ans. Yes, sir.

Q. Did they say any thing about routing the Indians?

Ans. Not to my knowledge.

Q. How long did they stay there?

Ans. Long enough to take their grog.

Cross examined by Mr. Hoar. What time did they leave your shop?

Ans. Near eight o'clock.

Q. Were you in the shop all the time the company was there?

Ans. Yes.

Q. Had any thing been said about the Indians, would you have heard it?

Ans. I should.

Q. You heard nothing?

Ans. Not at that time.

Sol. Gen. Did you at any time?

Ans. Not from any person I can recollect.

Enoch Huntress, sworn.

Sol. Gen. Where do you lodge?

Ans. At the Factory for these two months.

Q. You lodged at the Factory on Tuesday evening, the 23d? *Ans.* Yes, sir.

Q. Did Angier work at the Factory, and Livermore?

Ans. Yes, sir.

Q. Do they lodge there ?

A. Livermore has lodged with me ever since I was in the Factory.

Q. Were you at Bancraft's when Osgood treated ?

A. I was.

Q. Was Angier there ?

Ans. The probability is, that he was there.

Q. Don't you know certainly ? *Ans.* I do not.

Q. Do you recollect whether Livermore was there ?

Ans. No, sir.

Q. Whom do you recollect were there ?

Ans. I recollect John Winch was there, and I was there.

Q. Did you hear Angier and Packard tell about routing the Indians in the Factory ?

Ans. I was at work, and did not pay much attention to their conversation. I heard them say something of routing the Indians.

Q. Was it on the day of the murder ?

Ans. It was, sir, on Tuesday.

Q. Where is Packard ?

Ans. I don't know, he has left the Factory.

Q. Was his time up ?

Ans. He worked by the hundred ; his time was up every night.

Q. Do you not know that he was engaged to work for two or four months ? *Ans.* I do.

Q. What time did you leave your work in the Factory that night ? *Ans.* About ten o'clock.

Q. Did you see Angier and Livermore in the Factory after leaving Bancraft's shop ? *Ans.* I did, sir.

Q. How long did they remain there ?

Ans. I cannot say.

Q. What time did they go away ?

Ans. About nine o'clock.

Q. How far is the Factory from the hut ?

Ans. As near as I can judge, about two miles.

Q. Did Angier and Livermore leave the Factory together ? *Ans.* They did.

Q. Was Packard there ? *Ans.* He was.

Q. Did he leave the Factory with them *?*

Ans. I think he did.

By the Court. How long did you remain at work *?*

Ans. Till ten, which is the usual hour.

By Sol. Gen. Did Angier or Livermore return to their work that evening *? Ans.* Not to my recollection.

Q. What time did Livermore come home *?*

Ans. Between ten and eleven.

Q. Nearest to ten, or nearest to eleven *?*

Ans. I cannot say positively ; it might be later than half past ten.

Q. Did Livermore go to bed then *? Ans.* He did.

Q. Did he say where he had been, or speak of the Indians *? Ans.* He did not.

Q. Did you expect the Indians were to be attacked *?*

Ans. I did not.

By the Court. He did not say where he had been, or mention the Indians *? Ans.* No, sir.

Q. Had he been requested to join in routing the Indians *? Ans.* I don't know.

Cross examined by Mr. Hoar. Did you observe any thing particular in his going out or coming in *?*

Ans. Nothing.

Q. Did he appear fatigued or agitated *?*

Ans. Not that I saw.

Q. Did he return that evening as usual *?*

Ans. As soon as on particular occasions.

Nathan Robinson, sworn.

Sol. Gen. State what you know concerning this case to the Court.

Ans. I saw Angier near Odiorne's house, not far from ten o'clock. I walked some way with him, and we had some conversation together. He asked me if I had any inclination to go and rout the Indians. I told him I would not go for ten dollars. After this we walked together as far as Mr. Winch's gate.

Q. Do you know what time you left the Factory *?* was it not about quarter past nine *?*

Ans. I do not know but that it was.

Q. Did not Angier ask you in plain terms to go up and rout the Indians?

Ans. He asked me to go and pull down the wigwam and burn the boards.

Q. Do you know that Angier had any quarrel with the Indians? *Ans.* No, sir.

Q. Did you hear him in conversation damn the Indians?

Ans. I heard him say something about falling over the drunken Indians, and saying, The Devil take the Indians, or damn the Indians.

Q. Did you see Angier go into the house of Winch?

Ans. I cannot say I saw him go in, it was dark.

Gilbert Haven, sworn.

Sol. Gen. State what you know of this case.

Ans. Tuesday evening the 23d, Angier came to me and spoke to me in these words, "Haven, you had better go."

Q. Had there been no previous conversation?

Ans. I had heard something of routing the Indians a day or two before. I left my machine at which I was at work, and passed across the Factory, where he told me *you had better go.*

Q. Do you say upon your oath that he said nothing about where he was going?

Ans. If he said any thing I do not recollect it.

By the Court. Do you mean to say there was nothing previous to this, no request to join them? according to your present answer, you might not have known whether you were going to the next room, or elsewhere.

Ans. I heard something about routing the Indians. I heard nothing particular.

Q. Was this previous conversation carried on by Angier, or in his presence? *Ans.* Not that I recollect.

By Sol. Gen. Were you at Bancraft's shop?

Ans. I was.

Q. Who was there? *Ans.* I don't know.

Q. Was Angier there? *Ans.* I can't say.

Q. Was Livermore there? *Ans.* I can't say.

Q. Do you know who were there?

Ans. Winch and Bancraft were there, and I presume

all the hands of the Factory were there ; they commonly meet upon such occasions.

Q. Do you recollect whether there was a musket in the Factory ?

Ans. I saw Livermore have one that evening.

Q. Did he go away with it ?

Ans. I did not see him.

Q. Did you see it again that evening ?

Ans. I did not.

Q. What was he doing with the musket ?

Ans. He was ramming it down.

Q. Did you ask him what he was going to do with it ?

Ans. I asked him if he was going armed, and he said he was.

By the Court. You say that he was going armed ?

Ans. He said he was.

By Sol. Gen. You can tell when a man is loading a gun ?

Ans. I can if I am paying attention.

Q. What was this ramrod made of ?

Ans. Of iron.

Q. Did you see him put any powder into the gun ?

Ans. I did not.

Q. Nor any thing else ? *Ans.* I did not.

Q. Was he amusing himself with it ?

Ans. I was not paying much attention—I thought it sounded as if something was in it.

Q. *by the Court.* Had you any previous conversation about routing the Indians with Livermore ?

Ans. No, sir.

By Solic. Gen. What time did Livermore leave the Factory that evening ? *Ans.* About nine.

Cross examination by Mr. Hoar. Was this conversation about routing the Indians general ?

Ans. I can't say with certainty.

Q. Where did you hear it, at Mr. Bancraft's or at the Factory ?

Ans. I think I heard it most at the Factory.

George Dexter, sworn.

Solic. Gen. You will state circumstantially what you know.

Ans. On Tuesday evening there was something said about going up to drive away the Indians. I heard Angier say he should like to go, and Livermore said something about it.

Q. Did Angier say he *would* go?

Ans. I am not positive as to that.

Q. Were you at Bancraft's shop? *Ans.* I was.

Q. Was Angier there?

Ans. I am not very certain.

Q. You say Livermore was there? *Ans.* Yes, sir.

Q. Are you not positive that Angier was there?

Ans. Yes, Sir, pretty positive.

Q. Had you not some spirit?

Ans. Yes, about a quart of Gin, I got it myself.

Q. How many were they to drink it?

Ans. About nine.

Q. Did the men return to the Factory?

Ans. Some of them.

Q. Did not Angier ask you positively if you would go and rout the Indians?

Ans. He asked me if I would go.

Q. Did he get any powder of you?

Ans. He told me that I owed him some powder, and that he wanted it then. I was then at work, and he said if I would get the powder for him, he would tend my machine. He said I must be quick, because he wanted to go home and put a flint in his gun.

Q. What time of the evening was this?

Ans. Between seven and eight.

Q. Did you get the powder for him?

Ans. I got four cartridges for him, two or three of which were done up in common writing paper; the other in brown paper. He went home to put a flint in his gun, and when he came back, said he had got it to go completely.

Q. Did you hear Livermore say any thing of routing the Indians?

Ans. He said in the fore part of the evening, he was going to rout the Indians.

Q. Did he ask you to go *?*

Ans. He did not. Mr. Winch said he would go. Livermore said that Winch declared if he went he would not fire any thing lighter than lead.

Q. Did Livermore and Angier go out together *?*

Ans. I saw them washing together about ten minutes before nine.

Q. Did they have any conversation when there *?*

Ans. Angier was talking of routing the Indians.

Q. Did he say nothing else *?*

Ans. He asked me if I was going. I answered him no. Packard asked Huntress if he was going—who told him no. Packard says to him, you said you would go. I never said I would go, says Huntress. Angier said, Dexter is a damned coward.

Q. Do you recollect if Mr. Odiorne came to the Factory *?*

Ans. Mr. Thomas Odiorne came to the Factory, after they went away.

Q. Did Wheeler inquire for the hands *?*

Ans. Yes, sir.

Q. Angier and Livermore were then gone, were they *?*

Ans. There was nobody there, but Huntress and myself.

Q. Do you recollect of a gun's being in the Factory *?*

Ans. There was one there.

Q. Who carried it out *?* *Ans.* I don't know.

Q. Where is Packard *?* *Ans.* I don't know.

Q. When did you next see Angier and Livermore *?*

Ans. The next morning. I did not see them that night again.

Q. By Court. When did you first know the Indians were shot *?* *Ans.* Wednesday afternoon.

Q. When did you first see Angier *?*

Ans. The next morning before breakfast.

Q. Did they afterwards say any thing about routing the Indians *?* *Ans.* Nothing.

Q. What time did they come to the Factory *?*

Ans. About sunrise.

Q. *By Mr. Hoar.* How did they appear?

Ans. They did not say much.

Q. *By the Court.* After it was known the Indians were shot, did you hear them say any thing further?

Ans. Nothing.

Robert Gerry—sworn.

Sol. Gen. State to the Court and Jury the circumstances of visiting the hut of the Indians.

Ans. I went to the hut the morning after they were shot, sun about half an hour high. The Indians were gone. There was an appearance of two or three charges of shot having been fired into the hut. I discovered a small hole in the northern part of the hut, through which a ball appeared to have passed, and penetrated into the ground, making an angle of about 15 or 20 degrees with the horizon. I dug out this ball from the ground. I discovered a perforation made by another ball, which did seem to have passed entirely through the hut, but was lodged in a post in one corner of the hut. From this post very near where the ball entered, I cut out two shingle nails, with my penknife. The nails and balls appeared to have been directed to the same object, by their meeting almost at a point in the post. I saw what appeared to be the remains of a cartridge, of coarse writing paper, on the top of the hut. I did not preserve it at the time, it was partly burnt, and had the appearance of gun powder on it. Some of the paper was considerably doubled, it might have been the remains of a wad. I delivered it to Mr. Aaron Hill. Some of the fragments I preserved (which the witness produced, and they were handed to the Solicitor General) I picked them up on the northern side of the hut, about ten feet from the hut.

Q. *by the Court.* Was this the same day?

Ans. No, sir, I think it was the next day.

Ques. Were they in the same situation that you first saw them? *Ans.* They were not.

Ques. Did you take them for the remains of cartridges when you found them?

Ans. I thought they had that appearance.

Ques. by Sol. Gen. Did you examine the floor of the hut?

Ans. There was no floor to the hut. I examined the ground, and observed appearances of blood. There were several layers of hemlock upon the ground which apparently answered the purpose of a bed, the blood had passed through them to the earth.

Q. Was there blood enough to run upon the ground.

Ans. I do not know. I saw considerable marks of blood.

Q. Did you see the Indian the morning after he was shot? *Ans.* I did.

Q. Did you ask him who shot him?

Ans. I did, and he told me he did not know.

The Solicitor General observed to the Court that this inquiry was made to counteract the testimony of a former witness concerning the declarations of the Indian before his death.

Cross examined by Mr. Hoar. When did you ask him who shot him? *Ans.* Wednesday.

Ques by Sol. Gen. When did you see the Indians?

Ans. About nine o'clock on Wednesday morning.

Q. Did you see their wounds?

Ans. I did not. The man's pantaloons were bloody. They were sighing, and groaning.

The examination of the witnesses for the government here finished, and Mr. Rogers, one of the prisoners' counsel, opened the defence nearly as follows.

May it please the Court, and
you gentlemen of the Jury,

You are called upon to perform one of the most important, solemn, and awful duties which can devolve upon human beings, to decide upon the lives of your fellow creatures—whether they shall continue members of the same community, enjoying all the rights and privileges of citizens in common with yourselves, or whether they shall see all their future hopes blasted in a moment. Whether they shall continue to exist, or be consigned in the prime of life, to an ignominious death—Your verdict, which you shall give in this case is pregnant with the most dreadful consequences to the prisoners at the bar—you are to decide whether they shall quit this state of existence,

covered with the pall of infamy, for a crime of the deepest dye; or whether they shall be restored to their friends and society, acquitted of the nefarious act laid to their charge in the indictment—you and each of you as good men and true, will weigh well the verdict you are to give.—You will carefully examine your own hearts, and expel therefrom every improper feeling and prejudice against the prisoners from whatever source it may have been derived, you will purify your minds from all bias for or against them, before you venture to examine and weigh the testimony, which has already or may be given to you—that you may give such a verdict as your consciences would approve when the solemn hour of death shall overtake you, and you shall be called to stand and be judged at that bar, where all of us will receive that sentence from which there can be no appeal.

The nature and aggravation of the crime which the prisoners stand charged with having committed, calls loudly and imperiously upon the government to prove clearly and explicitly by such testimony as shall leave no reasonable doubt upon the candid mind fully impressed with the awful responsibility of its decision; such testimony as, unsupported by prejudice or any feelings which the public impression respecting this nefarious act, may have inspired, shall indubitably ascertain the alleged offence to have been committed by the prisoners. Unless the government do this, you are bound by your oaths to acquit them—It is a humane principle of law, that it is better that ten guilty persons should escape punishment, than an innocent should suffer—and only the most plenary evidence should obtain your verdict, when that verdict is to take away the life of a fellow creature. You will remember that this crime having been committed, the public indignation has been excited to an extreme degree, and demanded vengeance on the perpetrator—you are aware when, from any circumstances, there is a great degree of excitement in the public mind, how easily individuals are denounced, and once denounced, how difficult it is to remove suspicion. You will cautiously guard against being influenced by any thing of this nature. You are now to try the pris-

oners upon such evidence only, as has been and shall be produced to you this day since you have taken your seats on this panel, wholly disconnected from any extraneous circumstances, and wholly uninfluenced by public sentiment, or any prejudice that may exist in your own bosoms.

You have already heard the testimony on the part of the government, which as we apprehend is not that full and plenary evidence which will justify a sentence of condemnation.—and if we increase those reasonable doubts of the prisoners' guilt, which we are confident already exist in your minds, by the testimony of witnesses as respectable for their integrity and veracity as any produced by the government—we feel the utmost confidence you will acquit the prisoners of the foul offence with which they are charged, and restore them again to the bosom of their families and friends. Believing that we shall be able not only to increase these doubts of their guilt, but to satisfy your minds beyond all reasonable doubt, that the prisoners could not have been guilty of the crime charged in the Indictment, we will with the leave of the Court, call the witnesses on whose testimony we rely.

Examination of the witnesses in behalf of the Prisoners.

Daniel Townsend, sworn.

Q. *by Mr. Hoar.* Do you know any thing of a quarrel with the Indians.

Ans. I know of no quarrel—the Indians were very saucy. I saw them in the lower Parish of Malden, near Mr. Cutler's store. They were drunk, and used ill language.

Q. What time was this?

Ans. Tuesday—the same day they were wounded.

Q. Did any body threaten to kill them?

Ans. Not to my knowledge.

Q. Where they troublesome?

Ans. They threatened because they could get no more rum. They threatened me, and called captain Cox a damned rascal.

Q. Were there any inducements for their conduct; were they threatened?

Ans. There were no inducements—no threats against the Indians.

Q. Did you see Livermore that evening?

Ans. I did not. I was not at the Factory. I was at the store all the evening.

Hepzibah Winch, wife of the remanded Prisoner, sworn.

Q *by Mr. Hoar.* Did Mr. Angier board at your house? *Ans.* Yes sir.

Q. What time did he come home in the evening?

Ans. About ten minutes before ten, and went to his bed.

Q. *by Court.* What evening was this?

Ans. Tuesday evening before Thanksgiving.

Q. The evening the Indians were shot?

Ans. Yes, sir.

By Mr. Hoar. Did he go to bed, and what time?

Ans. He got some cider, and went to bed at ten minutes before ten.

By the Court. What makes you so positive of the hour?

Ans. I had a watch and looked at it, it hung over the fire place.

Q. Do you commonly look at the watch when he comes in? *Ans.* I don't know that I do—I did then.

Q. Had you no suggestions from him?

Ans. None.

Q. How came you to bear it in mind?

Ans. I dont know—but yet I have.

Q. When did you first hear of the Indians being wounded? *Ans.* Not before next night.

Q. *Sol.* When did you hear that Angier was charged?

Ans. Thanksgiving afternoon for the first time.

Q. Have you never been requested to recollect the time? *Ans.* Never.

Q. Is John Winch your husband? *Ans.* He is.

Ebenezer Odiorne, sworn.

Q. *by Mr. Hoar.* Did you examine the gun that Livermore had, at the request of the Solicitor General?

Ans. I did. I made inquiry after it, found it to be an old king's arm.

Q. Was the gun by Livermore's machine ?

Ans. I found it there.

Q. When ?

Ans. I examined it three days after the prisoners were taken.

Q. What time were the prisoners taken ?

Ans. On Monday, I think. I examined it the week after Thanksgiving ; it appeared rusty, and looked as if it had not been charged.

By the Court. Would not a gun appear rusty, that had been fired some time before ; say ten days ?

Ans. I do not know.

Sol. Gen. Do you know that that was the gun Livermore had ? *Ans.* I do not. It was said to be it.

By Mr. Hoar. Did it appear to have been fired ?

Ans. It did not.

Sol. Gen. Do not the works of your Factory go by the water ? *Ans.* They do.

Q. Did you examine to see if the gun were loaded?

Ans. I did not.

By Mr Hoar. Did you find any scratches, or marks of nails upon the gun ? *Ans.* I saw none.

Q. Was there any powder in the pan ?

Ans. There was none ; it was rusty.

Mr. Huntress was called to the stand by *Mr. Hoar.*

Q. *By Mr. Hoar.* How long was the gun standing by the machine of Livermore ?

A. It had been standing there for two months past.

By the Court. Do you mean the same gun that you before spoke of as being there ? *Ans.* The same.

Sol. Gen. Do you know that Livermore ever shot the gun ? *Ans.* I do not.

Q. Did he ever use it ?

Ans. He was in the habit of going after ducks with it.

The Solicitor General called upon *Mr. Odiorne* to say if he knew of Livermore's having shot the gun ?

Ans. I don't know that he ever shot ; I believe he kept it for ducks ; I don't know that he shot it.

Mr. Gerry was again called to the stand.

Q. *By Sol. Gen.* Where are the balls you found in the hut?

Ans. They are both in the custody of Mr. Hill.

Q. What sized balls were they?

Ans. The larger was an ounce ball, and had the appearance of being fired with nails. The lesser one was of a size that would give twenty or more to a pound.

Mr. Hoar called upon Mr. *Robinson*, witness for Government.

By Mr. Hoar. How far is it from the Factory to the hut? *Ans.* About two miles.

Q. Do you often pass that way? *Ans.* I do.

Q. How long do you think it would take you to walk it?

Ans. When we were walking briskly, we have calculated it would take about forty-five minutes.

Q. What is the distance from Odiorne's Factory to Mr. Winch's house? *Ans.* Forty or fifty rods.

The Solicitor General, by leave of the Court, had Major *Abraham Moore* sworn.

Q. *By Sol. Gen.* From your experience in military affairs, what sized ball should you suppose a king's arm would carry?

Ans. I believe a king's arm not to be very common amongst us. All that I have ever seen, carry an ounce ball. The guns used in our ranks have, generally, small bores, from the size of a fowling piece, upwards. They none of them, except the king's arm, are large enough to carry an ounce ball.

Mr. Robinson was again called.

Q. *By Sol. Gen.* What kind of weather was it on Tuesday evening?

Ans. The evening was fair enough.

Q. Was it a foul or damp evening?

Ans. It was neither foul or damp.

The witnesses for either side being all examined, Mr. Hoar arose to defend the prisoners, and addressed their

Honours and the Gentlemen of the Jury, in a judicious and well connected argument, of which the following is the substance :——

May it please your Honors,

THE business in which you, gentlemen of the Jury, are now employed is of the most interesting nature. Your verdict will decide whether these young men shall retire from that bar to their respective families and friends, or be carried from it to the dungeon from which they were brought, there to await an ignominious death. I do not urge this as a reason for their acquittal. The importance of your verdict furnishes no argument either for or against the prisoners. But it certainly is a sufficient inducement for your giving the closest attention to the evidence.

I well know that the Solicitor General, as he has said, feels no enmity to the prisoners. But I also know, and I confess to you, I dread his powers. They are ample by the gift of nature; disciplined and matured by education and a long course of professional and official practice. These powers his sense of duty will bring into full exercise against the prisoners. I should have undertaken the task of defending them with even greater reluctance than I did, had I not felt assured, that the Court will be counsel for the prisoners, and guard against their suffering beyond the demands of justice, and that you gentlemen will be unwilling to convict them without clear proof of their guilt.

The evidence presented to you by the government, none of it directly charges the prisoners with the crime for which they are indicted. It is all circumstantial and remote. Evidence of this nature, may, I admit, be equally conclusive ; equally satisfactory to the mind as that of an eye witness to the fact charged. When evidence thus strong and satifactory is adduced, a verdict founded on it must be safe. Is the evidence now before you of this character? This is the important question for you to decide. [*Here Mr. Hoar stated at large the testimony on the part of government.*]

Now may all this be true, and the prisoners be innocent. If so, you must acquit them. You are not merely to inquire whether the evidence be consistent with their guilt. You will not first suppose them guilty, then examine whether all that the witnesses have told you can be reconciled to this supposition, and if so, convict them. But does this evidence force your minds to the conclusion that they are guilty. To me it seems to fall far short of what is necessary to produce this effect. You find here no motive for this atrocious crime. It has been stated to you by the Sol. General, that the deceased was harmless and inoffensive. To the prisoners he was so. To others it seems his conduct had been different. Is it not incredible, that any man having had no previous quarrel with another, not even a slight misunderstanding, should coolly and deliberately murder him ? To induce a belief of this the clearest, the most unquestionable evidence is necessary. I am not contending, that circumstantial evidence may not be so strong as

to produce conviction of guilt. I have already admitted that it may be sufficient. But in almost every case where this has been holden sufficient, some motive, some quarrel, some grudge on a prospect of gaining something by the act, has been shown, and relied on as one of the strongest indications of guilt. Consider for example the cause often mentioned in which circumstantial evidence has been holden sufficient for conviction. A man is seen running from a house with a bloody sword in his hand. The witness enters the house, and finds a man weltering in blood, issuing from a wound, which in shape corresponds with the sword. This has often been considered sufficient evidence of the guilt of him, who was seen flying from the house. But if in this case, the person thus seen flying, had been the neighbour and friend of the person stabbed; a man of fair character, and no motive for such a deed proved, would you convict him? Would you not rather conclude, that he, who had done the act, had concealed himself where he could not be detected, or that the deceased had committed suicide? I think you would.

We cannot judge of the operations of the minds of others, but by observing what passes in our own. But I would sit with a jury until my limbs should become decrepid with age, before I would agree to convict a man of murder under such circumstances. I should consider myself guilty of murder, if I were to do it. Do the circumstances proved to you in this case, furnish evidence nearly as strong as those just stated? Neither of the prisoners was seen going towards towards the dwelling of the deceased, or returning from it. You are requested to convict them of murder because they had threatened to frighten the Indians, drive them from the neighborhood and burn the boards of their wigwam. The prisoners had no previous quarrel with the deceased. Others in the neighborhood, it is proved, had quarrelled with him. Is it not quite as probable, that those whom the deceased had abused and insulted, avenged their own quarrel, as that the prisoners have murdered him without any provocation? The threats uttered by the prisoners, I presume will be much relied on to prove their guilt. But what were their threats? Not to do them the least bodily harm. The threats themselves, appear to me, to prove that the prisoners did not intend materially to injure the deceased. It is incredible that any person, not a madman, should openly avow his design in the manner the prisoners are stated to have done, if at the time he intended to commit so atrocious a crime. If such an intention had been harbored, it would have been cautiously concealed.

But it has been testified before you that Angier was at home, more than two miles from the alleged scene of murder, at the very hour the crime was committed. Will you discredit this testimony? It comes from a source, at least apparently as pure, as any of the testimony furnished by the government. I know no reason why full credit is not due to it. It does not contradict the testimony of any witness. It is consistent and probable. If this be true, Angier cannot be guilty. One of the government

witnesses, Huntress, told you that Livermore was in his work shop, before half past ten o'clock; that he then exhibited no appearance of fatigue; that there was nothing striking or unusual in his appearance or conduct. This you must consider as true, or reject the whole of this witness' testimony. For it is a rule of law, by which you are bound, that if you believe a witness has told a wilful falsehood in any part of his story, you must reject the whole as unworthy of credit. The reason is this, credit is generally due to a witness, testifying on oath, because he is presumed to venerate the character and authority of Him on whom he has called to attest the truth of his assertions. If the witness in any part of his story wilfully lies, he proves his contempt for the authority of God. You cannot therefore trust him. These remarks I mean soon to apply to several of the witnesses, to Haven, Robinson, and Dexter, as well as to Huntress. The government must take Huntress' story as true. If it be true, would Livermore have been present at the murder? Can you believe that he travelled nearly five miles, carried a heavy musket, staid a quarter of an hour near the wigwam, and assisted in the perpetration of this murder, in less than an hour and a half, and on his return appeared as if he had been employed in no unusual business?

It is further testified, that Livermore was seen in the afternoon of that day with a gun in his hand. This testimony is overbalanced by that of Mr. Odiorne, who says that he since carefully examined the gun, and is confident from its rusty appearance, that it could not have been discharged within a month. The testimony respecting the paper used for wadding and the other materials for loading the guns appear to me to deserve little attention, because, they are of a kind so common, that any other persons would have been as likely to use them as the prisoners.

But, gentlemen, will you consider the stories told by Haven, Robinson, Dexter, or Huntress, as proved? You have seen them on the stand; you have observed their hesitation; their broken sentences; their apparent caution lest they should commit themselves by something they might say. Is it not apparent to you by what they have said, that if they know *any thing* of the subject, they know *much more* than they have told? If so, I hope you will adopt the rule I have stated, and reject, as unworthy of credit, their whole story. If you do otherwise, you must incur the hazard of convicting the innocent.

If you do believe the whole of the testimony adduced before you, still let me ask, is there such full and satisfactory evidence of the prisoners' guilt, as will remove all reasonable doubt? You ought to require such evidence, before you convict the prisoners, as will enable you to rest easy and satisfied with your conduct, if at any future period, you should find that the prisoners were innocent, and your verdict erroneous. I may be deceived, as to the weight of this testimony; but to me it seems, that as no motive for this blackest of crimes is proved; as neither of the prisoners was seen going toward the wigwam, or returning from it, it is insufficient to warrant their conviction. I believe no instance of a

conviction of a capital crime, is within the knowledge of any of us, on evidence so slight as that now under consideration. If you doubt respecting their guilt, you will surely acquit them.

You ought to be apprised, gentlemen, of some important disadvantages under which the prisoners labour in their trial. The Solicitor General, as is usual, attended before the grand jury, when the witnesses against the prisoners were examined. All the circumstances of the case have been in his knowledge for several weeks. He has had full opportunity to arrange the evidence in perfect order. Every minute circumstance you will find placed in such a light, as to produce the strongest effect on the mind. On the other hand, the prisoners' counsel were perfectly ignorant of the testimony to be brought against them, until it was given this day before you. Without opportunity to make any arrangement of the evidence, they have been obliged to submit to you, only the disconnected remarks which the moment suggested. But, I entreat you not to permit this circumstance to produce an undue effect on your minds. Before you convict the prisoners examine carefully whether you perceive their guilt, by the light of truth, beaming from the testimony of the witnesses on the stand, or are deluded into that belief by the glare of the Solicitor General's eloquence. In this case, there is no review, no appeal. Should you, hastily, pronounce the prisoners guilty, while your imaginations are heated, while your minds are wrought up by indignation at their supposed crime, you may regret it in your cooler moments, but your regret will be unavailing.

The cause was then closed on the part of the government by the Solicitor General.

May it please your Honours, and
you gentlemen of the Jury,

I am now to close this important cause on the part of the Commonwealth. Without troubling you with introductory remarks, I shall proceed immediately to take such a view of the evidence as will establish the two points upon which this prosecution depends, which are,

1st, That the deceased was murdered, and

2dly, That the prisoners are guilty of this murder.

I did not expect, after what we have heard from the witnesses, that there could exist a doubt, that the deceased was barbarously murdered; but as this is not admitted by the prisoners' Counsel, it is necessary that I should call your attention to the evidence relative to that fact.

The *death* of Crevay is proved by Dr. Kitteredge. The description of his wounds, and of the shockingly mangled condition of his body, are proofs that he came by his death by a violent and savage attack. No reasonable man can believe that these wounds and this death were occasioned by *accident:* they must have been the effect of inhuman and brutal force. That this was the

case is fully proved by the testimony of James and Betsy Hill. from which it appears that six guns were discharged in and about the Indians' hut at a late hour in the evening. The blood found in the hut, under the bed of the Indians is a further and melancholy proof of this murder; and if any further testimony could be demanded, you have it in the dying declaration of the deceased, who declared explicitly, that he and his wife received their wounds in their hut, and on their bed, by the discharge of muskets.

If, after proof of the above facts, you can hesitate for a moment to believe, that these unhappy wretches were assailed in their dwelling by ruffians, who came there for the premeditated and avowed purpose of taking their lives; I am certain, that no language I am capable of using, can remove your doubts. Indeed, the fact is so clearly established, that you might justly accuse me of wasting your time, in the few observations I have now submitted to you.

The great, and, to the prisoners, the important question is, are they guilty of this atrocious murder?

In discussing the evidence relative to this question, I shall consider it as it applies to each of the prisoners.

It is true that this evidence is of a circumstantial or presumptive nature. Before I proceed to state to you its purport and effect, I shall submit to you a few observations upon the nature of this species of evidence.

It is a rule of law, that presumptive evidence, should be received and weighed, with great caution. But this rule is not to be *perverted;* or permitted to have such an operation, as to destroy the natural effect, which the proof of facts inconsistent with the innocence of the accused, ought to have upon your minds. It is the opinion of the best writers, upon the nature and theory of evidence, that strong circumstantial proof, in cases of crimes committed in secret, may be the most satisfactory, and that, upon which a Jury may most safely proceed. Men may be seduced to perjury, and testify to facts wholly unfounded: but it can seldom happen, that circumstances, over which the accuser can have no control, forming the links of a transaction, should concur to fix the presumption of guilt upon an individual, and yet the conclusion be erroneous. See East's P. C. 2 vol. p. 223.

Of this nature was the case of a man, seen running from a house, with a bloody sword in his hand; and, upon entering the house, a man was found recently wounded, in a manner corresponding with the weapon, no other person being found in the house. In general, it would be impossible for the mind of man to resist the effect, which the proof of these circumstances force upon the mind. Yet it was possible, in this case, that the man might have been wounded by another person, who might have escaped from the house, leaving the sword in the body of the sufferer, and that the person seen coming out of the house with the bloody sword, might have been a friend, who drew the sword out of the body, and who ran out of the house with it, with a view to discover the murderer.

There are other cases, occurring almost every day, in which presumptive evidence is admitted, and considered as plenary proof, and in which the presumption is not, in my opinion, stronger than that which arises in the present case, against the prisoners. I refer to the variety of cases of burglary and larceny, where the stolen goods are found upon the accused. In these cases, it has never been doubted, if the stolen goods are found upon the prisoners, and they are unable to shew that they came honestly by them, that the presumption arising from such proof, was sufficient to justify a conviction; and, during the time that burglary was a capital offence in this State, and since it has been punished by confinement to hard labour in the State's prison for life, I have known repeated convictions upon such evidence; and know not that the wisdom of the law, in allowing convictions upon such evidence, was ever questioned.

In estimating the value and effect of evidence of every kind, in a court of justice, your duty, Gentlemen, is perfectly plain. You have only to open your hearts to the fair and natural impressions of truth. If you proceed in this manner, you may be assured, that you are following a safe and correct guide, and, therefore, will not be likely to err. If the result shall be, a conviction of the prisoners' guilt, you may rest satisfied, that a verdict in conformity to such conviction, will be a *just* verdict. Dismiss all artificial or capricious doubts or fears; follow the honest and natural dictates of your hearts and minds.

It is a most absurd opinion, that *as men*, you may be convinced by the evidence; but that as *Jurors*, you ought to remain in doubt. Many a guilty man has escaped the punishment his crimes have merited, by this idle and groundless distinction. In the course of my official services, I have seen the laws trampled under foot, and the tribunals of public justice made a mockery, by refinements of this nature.

I therefore would persuade you, by all that the friends of order and law can hold dear, that if you shall be brought honestly to believe, that the prisoners are guilty of the murder of the deceased, you will have the magnanimity to pronounce them so.

You have heard much from the prisoners' counsel, upon the subject of *reasonable doubt*. This term, so often used and abused, in criminal prosecutions, contains nothing *mysterious*. The use commonly made of it, creates capricious and unnatural, instead of reasonable doubts. If, upon a candid examination of your hearts, you find yourselves, seriously and honestly, doubting of the guilt of the prisoners, I admit that it is not only your duty to acquit them, but that their conviction would be most unjust in its nature, and tremendous in its effects. But, on the contrary, if you cannot, as honest men, raise a doubt of their guilt without an effect first to create it, and then to form it into the mind, you may rest assured, that every consideration of duty and conscience, require you to convict them.

I shall now state to you the evidence against the prisoner Livermore, and submit to you such remarks upon it, as may occur to

me, with a view to convince you that he is guilty of the murder of which he is charged.

The evidence warrants me in saying, that he *discovered a disposition to commit this horrid deed, and that he prepared himself for the perpetration of it.* He associated with others charged with this murder, at Bancraft's shop; he partook of the spirituous liquor there provided, and thus prepared and steeled his heart for the execution of the nefarious purposes of himself and associates. Perhaps we may state the origin of the shocking scenes which ensued, from the moment when this poison of the body and of the mind was swallowed. If any thing changes the nature of man, and renders him infuriate, it is ardent spirit; he may be changed by it, in an instant, from a humane and benevolent being, to a ferocious brute.

I do not say that this was the case with Livermore; but if from his former habits and disposition he wanted courage or malignity of heart, to commit a deliberate murder, he adopted the most effectual means to remove these obstacles, by resorting to a vulgar and intoxicating liquor at the hour of preparation for the commission of an atrocious offence.

Livermore returned from Bancraft's shop, to the factory, at 8 in the evening with liquor fuming in his head, and revenge against the Indians rankling in his heart. He there avowed his intention of routing them that evening. The 'note of preparation' accompanied his declarations. He was closely associated with Angier and Packard during the whole time he remained in the factory that evening. He explicitly declared he was going to rout the Indians that evening; he invited others to join him, in that enterprise. He heard Winch declare that if he went, he would fire nothing lighter than lead; he declared he was going to the Indians *armed;* he took a king's arm, and in the presence of all the workmen in the factory, was seen in the act of loading it; he went out of the factory with Angier and Packard, a little before nine o'clock, all of them declaring where they were going, and what they intended to do. Precisely at the hour when they might have arrived at the dwelling of the Indians, the guns are fired, and the Indian murdered!

In addition to these facts, which are reluctantly testified to by the friends of the prisoners, there is no account given of Livermore from nine to nearly eleven o'clock. Where was he? At nine, he was surrounded by his numerous friends and fellow workmen. At half past ten he returned to the factory and lodged with Huntress. I ask again, where was he during this interval? If he were any where in Malden, he can prove it, and would readily do so. Gentlemen, no man in the exercise of his senses can doubt of Livermore's guilt from these circumstances. What stronger circumstances can you require? Suppose you were at the hut, at the moment of the murder, and seen the discharge of the muskets, and immediately entered, and saw the wounded Indians; would you doubt then? yet the evidence in that case would be presumptive,

as it is in this, and perhaps not more satisfactory than that which the evidence now referred to is capable of affording you.

Further it is in evidence that one of the balls found about the hut, was an ounce ball; and it appears from the testimony of major Moore, that a ball of that size is used only for a king's arm; and it has been proved to you, that the musket which Livermore carried out of the factory with him, was a king's arm. Is not this a most extraordinary concurrence of circumstances? Can you devise any possible means, by which these events should have happened, unless it were by the agency of Livermore? On the contrary, is it not most natural, and does it not comport most minutely with the supposition, that this ounce ball was discharged from the king's arm, which Livermore carried out with him?

The effect of this part of the evidence has been attempted to be lessened by the testimony of Mr. Odiorne, who states that at my request he examined the piece which it is supposed Livermore had with him; that he found the pan of it *rusty*, and the piece in such a situation, that in his opinion it had not been discharged for a length of time before.

You will recollect, gentlemen, it was nearly ten days after the murder was committed, before the musket was examined by Mr. Odiorne; that during that time, it had remained in the factory; and that the operations of that factory are carried on by water. After these remarks, I leave you to decide, whether a musket, which had been discharged in the dampness of the night, had remained in a damp apartment, for ten days in a factory where the whole machinery is moved by water, would not become thoroughly rusty, especially in the pan of the lock, after it had been discharged. I say, I leave you to decide; but in my opinion the pan of a musket in this situation would become rusty in less than half the time.

Such is the evidence against Livermore—Weigh it deliberately and impartially; and after a most candid examination of it, with all the predisposition which the law allows you to entertain and cherish in favor of innocence, I think it will be impossible for you to doubt that he is a guilty man.

I shall now state to you, gentlemen, the evidence against the prisoner Angier.

You recollect, that he was at Bancraft's shop, and associated and drank with the others—that he returned with them to the Factory, and remained there till about 9 o'clock, when he left it with Livermore and Packard, declaring his intention to attack the Indians. The observations upon this evidence which I have submitted to you respecting Livermore, are equally applicable to Angier, and for that reason, need not be repeated; but other facts are proved against Angier which require particular notice.

He appears from the testimony of Robinson, to have been exasperated against the Indians; he expressed himself hastily and profanely when speaking of them to this witness. He invited Dexter and Haven to go with him, and appears to have been active in raising the party against the Indians; probably more so, than either of the parties accused. He reproached Dexter as a

coward, for refusing to go. After the proof of this fact, you may safely conclude that his mind was fully prepared to go to any lengths in the accomplishment of his cruel purpose.

To these circumstances are to be added the facts of his preparing his flint, and obtaining the powder from Dexter. For what purpose were these preparations? What enterprise can you suppose Angier to be engaged in, that required him to prepare a musket and obtain ammunition *for immediate use* at an hour of the night when sober and discreet young men usually go to their beds? In answer, you have it from his own mouth; he declared it was for the express purpose of attacking the Indians; and if these preparations were intended or used for any *other purpose*, the prisoner can prove it, and if it were so, undoubtedly would prove it, for he had numerous friends and companions about him the whole evening, and was at work with them early the next morning.

The proof against Angier, arising from the resemblance of the paper with which the cartridges furnished him by Dexter, to that found upon and about the Indian's hut, is very strong, and when combined with the other facts and circumstances in the case, can leave no reasonable doubt upon your minds of his guilt. You recollect these facts and I shall not repeat them. If the paper found at the hut, could be proved, by any particular mark upon it to be the same that Dexter's cartridges, were made of, would you doubt then? Certainly not; for in that case the presumption of guilt would be violent and irresistable. You will judge for yourselves, under the direction of the Court and from the rules of law, whether the extraordinary facts that paper of an unconsumed cartridge found at the hut, bearing a perfect resemblance of that of which Dexter's cartridges were made, and which were delivered to the prisoner, not only for immediate use, but for the particular purpose of being used in an attack upon the Indians, especially when taken in connection with the other facts proved against Angier, does not amount to *plenary proof of his guilt*. It is *possible* notwithstanding this train of circumstances, that he may be innocent. It is *possible* that he might have been arrested in his cruel and guilty career, by a fit of the apoplexy, and have recovered and returned to his lodgings at 10 o'clock. And I think you will agree with me that the one supposition is as rational as the other. In either of the two cases, he might and can if he pleases give you entire satisfaction, by proving to you, where he was, and what he was about between the hours nine and ten of this fatal night.

A few observations are due to the evidence produced by the prisoners. That part of it which relates to the ill conduct of the Indians, cannot amount to any justification or excuse for this detestable murder. Yet something of this nature must have been anticipated, or it would not have been produced. The language of it, if it amounts to any thing, is this: the Indians were saucy, and therefore we shot them; not in the ordinary *decent* manner, with bullets, but with nails of the largest size, so that their bodies should be sufficiently mangled; we shot them, not in the manner we would destroy a white man, but in a manner better suited to the

condition of a savage! Such language and such conduct, admits of no comment. There is no condition of human life, however savage, that is not disgraced by it. In a christian country, it is not to be endured for a moment.

I have already answered the suggestions, which Mr. Odiorne's testimony hath given birth to—I will only add, that when he examined the gun, which it is supposed Livermore used, he did not even ascertain whether it were then loaded. The whole of his testimony is of this unsatisfactory nature, and does not favor the prisoners in any respect.

The proof of an *alibi*, by Mrs. Winch, is all that now remains to be considered. The defence, founded upon the proof of an alibi, is both dangerous and stale—If fully proved, indeed it leaves no doubt of the prisoner's innocence, for he cannot be in two places at the same time. But the evidence of it particularly in this case, is to be received and examined with great caution.

Mrs. Winch, the witness relied upon, is the wife of one of the prisoners. You must weigh her credibility with reference to that fact. If she had sworn that on the evening of the 23d she saw the prisoner in New-York, no doubt of his innocence can be entertained, if the witness is believed. But when she is reduced to the necesssity of swearing to a minute, in order to save the prisoner, it is my duty, gentlemen, to examine her testimony with great exactness.

She testifies that she noticed the time by a watch, when Angier went to bed. She had no motive, as she confesses, for noting the time. It has since become of the greatest importance to the prisoner, that she should determine it in such a manner as to comport with his innocence. If under these circumstances she swears from a particular recollection of the fact, I should say that her testimony is of no weight. Ask her at what hour and minute Angier went to bed the night before, or the night after, or any other night before or since, can you believe it possible that she could recollect; if not, how came she to recollect so precisely, as to the night of the 23d? It is because she *has been told* that the prisoner's life may depend upon it. The *opinion* of witnesses as to the particular moment of time when a fact took place, in most cases, is of little weight; but if that opinion is given *by the friends of the accused*, testifying under the strongest feelings and motives in favor of the prisoner, and with a view to bring him off, how frail must be the reliance upon such testimony! The witness in such case, swearing to what he calls "the best of his knowledge," takes a latitude which is always calculated to mislead; he is in no danger of incurring the guilt or the penalties of perjury. The mind is discharged from the obligations which a consciousness of these, impose upon it, and all evidence given under these impressions, is void of legal and moral sanction.

How does this testimony of Mrs. Winch comport with the other evidence in the case? No account is given of Angier, from nine to ten o'clock; yet his lodging was within forty rods of his place of business, and if he had remained about home he can shew it. The

result of the whole taken together is, that this murder might have been committed between the hours of nine and ten o'clock, and all the witnesses may have testified honestly, making a very small allowance for difference *in opinion* only, and that as it respects the hour and minute when the murder was committed. This difference may be perfectly reconciled by the consideration that all the witnesses both for and against the government, are the particular friends and companions of the prisoners, and testify against them with the greatest reluctance.

I have thus, gentlemen, endeavoured to do my duty to the government in this important trial. Yours remains to be done, and is of a high and responsible nature. If you believe in your consciences, that the prisoners are guilty, let no idle and unfounded fears or apprehensions deter you from pronouncing them so. You owe this duty to your country and to yourselves. A foul and most aggravated murder has been committed. If the prisoners are guilty of it, the great Legislator of the Universe speaks to you in this language: "You shall take *no satisfaction for the life of a* MURDERER, *but he shall surely be put to death; for the land cannot be cleansed of the blood that is shed* therein, *but by the blood of him that shed it.*"

The Hon. Judge Sewall then delivered the Charge to the Jury, nearly as follows :——

After some introductory remarks, the Judge proceeded to observe :——That an indictment, though found by the Grand Jury, was not to be regarded as affording any evidence of guilt ;—that the Grand Jury proceed *ex parte*, in the absence of the party accused, and have before them such evidence only, as the Solicitor General or those who prosecute for the Government, may think proper to introduce ; and their decision upon it, is an opinion, that the accused is probably guilty, and that the charge preferred in the indictment has been established upon such sufficient evidence as to render just and necessary a public inquiry and trial ; but that this opinion was to have no weight or operation, with the jury impannelled for the trial, who were to attend altogether to the evidence immediately before them, in which the witnesses for the deceased, as well as for the government, had been heard ;—that these observations were directed to an argument of the Solicitor General, and had been occasioned by it, in which he had expressed himself, as deriving from the indictment, and the opinion of the Grand Jury, some evidence and ground for a conviction of the prisoners at the bar ;—that it was not evidence, and the Jury selected for this trial, were to determine for themselves.—

That their first inquiry would be, whether there was satisfactory evidence of a murder, committed by any person, in the manner stated in the indictment ? and, if that was proved, then the second inquiry would be, whether the prisoners at the bar, both or either of them, (for one might be acquitted and the other convicted) were actors or parties therein, so as to be chargeable with the crime, as it is alleged in this indictment.—

That, to satisfy them upon the first inquiry, the Jury had the testimony of Dr. Francis Kitteredge; that having been called by the Selectmen of Stoneham, he found the deceased and his wife, the Indian woman, at the house of a Mr. Howe, lying there dangerously wounded; and the witness had described more particularly the wounds, as he then discovered them, upon the body of the Indian man, since deceased; the small bone of his left arm was fractured; a shingle nail had entered it, and was extracted from the marrow; a nail of a larger size, which had probably passed through the arm and entered the left side, had been glanced by the cartilage of the ribs, and lodged under the skin of the belly, where it was extracted;—that another wound was then observed, which the witness probed and examined, and, at the time, thought it not dangerous, but which, in the opinion of the witness, had since proved the immediate cause of the death of the Indian man. This wound had been described as an orifice, or opening, upon the upper part of the belly, towards the left side, which, after some days, had put on a very morbid appearance; symptoms of a mortification came on, and, in this state, the Indian man died on the 29th November;—that, after death, a further examination of the last mentioned wound was had, when it appeared that it extended to the peritonæum, or covering of the bowels, which had become gangrenous; and the black matter, discharged from the orifice of the wound in considerable quantity, evidently contained a solution of iron. Dr. Kitteredge had further testified, that he noticed this wound at the first examination; that it was as fresh as the others, and he had no doubt had been received and inflicted at the same time, and in the same manner.—

That James Hill and his sister had certified as to the residence of the Indian man and woman, in a wigwam or hut, which they had erected, about ten rods from the house where the witnesses resided;—that, at a quarter before ten o'clock, or as near that hour as they could ascertain, in the evening of the 23d November, they had noticed a discharge of guns, heard in the direction of the Indian's hut, first of three, in a succession which made the number plainly distinguishable, though quick, and then of three more, after an interval of ten or fifteen minutes,—that the witnesses were in bed at the time, but they got up, and looked from their window towards the Indian hut, and noticed a small light there, but heard no further noise; and the sister saw, after the last discharge of guns, the appearance of fire carried from the hut to a mill pond near by, as of two firebrands taken up and carried by some person, but only the fire in motion was discerned, and not any person carrying it.

That from other witnesses who had been examined, particularly Robert Gerry, the Jury had been informed of the state of the Indians' hut on the morning of the 24th;—that it was then deserted; the hemlock boughs, which covered the ground enclosed by the hut, had appearances of blood which had passed through them, and the ground underneath was stained with blood, and the boards forming the sides of the hut had been pierced with bullets and

nails, and shot and nails which had been discharged from muskets, had been found in the boards, appearing to have been lodged in them by the force of gunpowder.

That the testimony of Dr. Kitteredge, and of another witness, to prove the declarations made by the deceased, had been admitted; but these declarations were not competent evidence in this trial, unless the Jury were satisfied, that the Indian man in making them, spoke under an impression of present danger to his life, from the wound he had received; that ordinarily in criminal prosecutions the declarations of witnesses examined in open court at the trial, under the sanction of an oath or affirmation, were the only competent testimony which can be received; but that the law regards apprehensions of approaching death, as equivalent to the sanction of an oath administered in Court. That it was now certain from the event that the deceased when he made the declarations which have been stated in the testimony, had received a mortal wound, and was in fact, nearly at the close of his life, and then in an agony of pain; but nothing was said of his danger, and at the time, indeed, the physician thought no one of his wounds was mortal—that if the declarations of the deceased might be received and then should be credited, the Jury had direct testimony of the place where the deceased and his wife were, when they received their wounds under which they were suffering; and of the manner in which these had been inflicted, and their house attacked. That supposing these declarations were to be rejected as incompetent evidence, the Jury would then consider, the circumstances proved by the witnesses, if they were credited; and whether the state of the bodies of the Indian man and his wife, on the morning of the 24th, when they implored the aid of their compassionate neighbour, and were received into his house; and the nature of their wounds, under which they were then suffering; the condition of the place then deserted, which had been their habitation; the nails and bullets found there, and the testimony of the Hills, as to the discharges of guns, and the appearances seen from their house, in the evening of the 23d, were not sufficient and satisfactory evidence, not only that the Indians, and particularly the deceased, had been wounded by iron nails discharged from a musket—this was but too visible; but as to the scene and time of this mischief and outrage, that these poor creatures had been attacked in the place of their dwelling, and that there their wounds had been inflicted sometime in the evening of the 23d, and probably at the hour testified to by Mr. Hill and his sister. That these last mentioned circumstances, of the time and the place, were important in the inquiry, which was meant to be pursued; and were therefore to be previously established beyond any reasonable doubt; because of the bearing and relation which these would have in the other part of the evidence adduced, more immediately affecting the case of the prisoners at the bar.

That before entering upon the other inquiry it might be necessary to observe, that the beings thus assaulted and mangled, in their lowly dwelling and retreat, if those facts had been proved, were, though Indians, of the human species, of the great family of

mankind, and had derived, as we ourselves have, the capacities and rights of human creatures, from that God who created of one blood all the nations of the earth. That in this community an Indian has the same protection as a white man, the same title to the security of his person and life; and the murder of an Indian is to be inquired of and punished by the same rules which would apply in the case of the murder of a white man, however high his rank and condition in society may have been. That there is not any difference, in this respect, to be collected from the circumstance that this community are now engaged in a war, in which certain tribes of Indians have arranged themselves with the public enemy, and are to be considered as hostile to the people of the U. S. That had the deceased been a member or native of a hostile tribe, or a prisoner of war, when received among us, into the bosom of our society, his person and life were to be regarded as in safety, under the protection of the laws.

That the other inquiry which the Jury might find it incumbent upon them to pursue, was indeed a solemn question, as it concerned the prisoners at the bar, whether if a murder is proved to have been committed in the manner alledged in this indictment, the persons now on trial were guilty therein, as actors or parties in the transaction? that this inquiry was not without its difficulty. That the Jury had evidence, from the testimony which had been examined on the trial, applying to both the prisoners at the bar.

That for some time previous to the attack upon the Indian hut, the deceased Indian man and his wife, had become obnoxious to the people of the Factory, where the prisoners at the bar had, at the time, their daily employment, and in or near which, they had their lodging and board; an aversion to the Indians, and dislike of them, had become general in that neighbourhood, and a desire of their removal had been very commonly expressed;—that on the day preceding the day when the Indian hut was attacked in the evening, and on that day, the prisoners at the bar were parties in conversations, with some of the witnesses, and with others, in which intentions of routing the Indians, of driving them away, of frightening them, were frequently, and openly spoken of, and avowed.—That it might be necessary to observe, in noticing this part of the evidence, and supposing only intentions of driving away the Indians by frightening them, that if prosecuted with dangerous weapons, as with loaded muskets charged with iron nails or leaden bullets, which had been afterwards used in any manner, so as to put the persons, or lives of the Indians in danger, those who had been immediately concerned in the transaction, and present at it, must be answerable for all consequences that ensued, though these had happened altogether beside or beyond their intentions, with which they had set out. That intentions of mischief, prosecuted in the manner supposed, when the event proves to be the death of the person attacked, would render the persons chargeable with the homicide, guilty of murder; the homicide ought to be considered in law as perpetrated with malice aforethought: for

no one would be safe, if the health and life of one man might be in this manner put at hazard, and sported with by another.

That from the testimony of Robinson, and Huntress, and Haven, and particularly of Dexter, the Jury had evidence of the design in which the prisoners at the bar were engaged and employed in the course of the day and evening of the 23d Nov. and the Jury would consider, whether from some parts of the same testimony, there did not result evidence of further intentions, approaching nearer to the dreadful consequences which ensued. That, as applying to Angier, his demanding and receiving the powder due to him from Dexter, and Angier's care to provide his gun with a good flint; and as applying to Livermore, his having the gun belonging to the Factory, distinguished as a king's arm, and having been seen in the act of loading and ramming it, were circumstances to be considered by the Jury; and upon the general question of the agency of the prisoners at the bar, in the transactions at the Indian hut, the Jury had had the testimony of Dexter particularly, that Livermore, Angier, and Packard, left the Factory together, about nine o'clock in the evening, with the professed design of going to rout the Indians; and with this might be considered the reproaches of cowardice, made to Dexter the witness for his refusal to accompany them.

That the circumstance of white paper, or coarse writing paper, by which two or three of the cartridges, received from Dexter by Angier, were distinguished; and the circumstance of the size of the king's arm, which Livermore was supposed to have taken from the Factory, had been too strongly urged against the prisoners at the bar, in the argument of the Sol. Gen. That the remains of a cartridge formed with coarse writing paper, found at the Indian hut according to the testimony of Robert Gerry, was not to be considered as identified with any cartridge which Angier might be supposed to have used. That upon such a subject, proof of identity was hardly to be imagined; and could only result from some artificial mark, by which one cartridge might be distinguished from every other, if the mark should remain after the cartridge had been exploded. And that as to the ounce bullet, it had been testified that a king's arm carried an ounce bullet, and was an unusual size; and an ounce bullet or two had been found by Rob. Gerry at the Indian hut on the morning of the 24th, but these circumstances had no tendency to identify the gun or fire arm that had been seen with Livermore, which, though unusual, was not singular; and that all which could be said to result from these circumstances was, that their concurrence with other circumstances proved was remarkable, and the direction of these to the conviction of the prisoners, might be considered as corroborated by this concurrence; but there was nothing in it conclusive. That the evidence was altogether presumptive, the result of circumstances testified by the witnesses, upon which the government relies for the conviction of the prisoners at the bar, and that as much had been said by the counsel for the prisoners, and by the Solicitor General, respecting the nature and effect of presumptive evidence, it might be necessary to observe upon it.

That the Jury are to be convinced and satisfied beyond any reasonable doubt; which satisfaction may be the result, and sometimes is, of what is called positive and direct evidence; as where the witness or witnesses produced on the trial, in a case of murder for instance, had seen the assault and the fatal blow given by the prisoner accused, and the dead body of the murdered person, and if fully credited, their testimony must be satisfactory—but, that evidence of this nature is rarely to be had in any case of an atrocious offence, which is generally to be proved, if at all, by what is called circumstantial or presumptive evidence; that is, a number of circumstances are proved which in their concurrence, are so inconsistent with the innocence of the party accused, as to produce a necessary inference of his guilt—that what had been stated abstractedly, might be explained by the example commonly stated in the books; as when a man is seen and arrested in his flight from a dwelling house, with a bloody sword in his hand, and there is immediately found in the house, the dead body of a person recently wounded, and no living person in the house, and the mortal wound discovered upon the dead body is found to agree in size and shape with the bloody sword; circumstances of this nature, supposing no evidence to avoid the presumption necessarily arising from them, have been considered sufficient to convict the person, thus arrested in his flight, of the murder of the person slain. And yet every possibility of innocence is not included; but every reasonable doubt is removed, where the person accused under such circumstances is entirely unable to account for the appearances against him.

That the circumstances testified to in the case at bar, might be compared, and would be found to have some resemblance, in the conclusion to be drawn from them, with the case supposed as an example of presumptive evidence. That the Jury had evidence of an assault upon the deceased in his hut, of wounds, and a mortal wound there received, about 10 o'clock in the evening of the 23d; wounds which must have been inflicted by the discharge of a musket, charged with gunpowder and iron nails; of intentions previously expressed, and of a design in which the prisoners at the bar had that evening engaged, of routing the Indians; and of their having set out with Packard upon that design about 9 o'clock of the evening in which the mischief happened to the deceased and his wife, and this after the prisoners of the bar had been seen preparing themselves with muskets, one of them in the act of loading a musket which carried an ounce ball, the other having a gun in which he fixed a flint, and having provided himself with several cartridges of gun powder.

That the Jury would consider whether the circumstances material in this inquiry, had been not only testified by the witnesses but had been proved satisfactorily, and whether the circumstances proved, and their concurrence were so inconsistent with the innocence of the prisoners at the bar, as to warrant a necessary inference of their guilt.

That the Jury were at liberty in this inquiry to make supposi-

tions, by which they might determine how far the circumstances, which they should find to be proved, were inconsistent with the innocence of the prisoners at the bar; suppositions reconcileable with the evidence, and at the same time affording a reasonable ground of acquittal.

That for instance, it might be supposed, it was certainly possible, that the prisoners at the bar, one or both of them, after setting out with a design against the Indians, had relented, given it up, and gone home: and some other persons, without the knowledge or participation of the prisoners, had been concerned in the assault upon the Indian's hut—or that a number of persons, besides those accused in the indictment, had set out together with them upon the design of routing the Indians, and the prisoners had returned without pursuing their design, and had not been parties present at the assault.

That if these suppositions, or either of them, should be not only possible, but in any degree probable, then the Jury would have reasonable cause of doubt.

That the facts, suggested by these suppositions in behalf of the accused, are to be considered as proved, if the testimony produced for them should be believed: and if the evidence resulting therefrom, and from the testimony of some of the witnesses examined for the government, is not to be reconciled, as to the contradictory positions, and opinions of the hours and times in the evening, when several circumstances and events as testified by the witnesses had happened.

That for instance, as to Angier. Robinson saw him when coming from the Factory, and was with him until he saw him enter the gate at Winch's, and Robinson is positive, that it was near 10 o'clock, and Angier then talked of going to rout the Indians; and in point of time, Robinson in his testimony agrees with Mrs Winch, who had testified that Angier came into her husband's house, where he boarded, at 10 minutes before ten, and went presently after to his room.

That supposing the witnesses as correct as they are positive in their opinions of the time in the evening; and James Hill and his sister had been also correct as to the time when the Indian hut was attacked, then it had been proved that Angier was not there; but the Jury would consider, if satisfied upon the other evidence, how far the opinions and testimony of witnesses, as to hours and minutes in an evening, were to be reconciled by the rational presumption of mistakes and errors in judgments and in watches.

That as to Livermore, the suspicions against him, which might arise upon the evidence already detailed, had not been counteracted by any testimony as to where he was after he left the factory, until he returned there to sleep with Huntress, the witness, about half-past ten o'clock, as he judged—he had testified, however, that Livermore, when he returned, discovered no appearances of agitation, and said nothing of any transactions, in which he had been engaged; and it might be thought unnatural for any man to be at ease, who had been concerned in so cruel a transaction, as the attack which had been then made upon the Indian's hut.

That the Jury might feel some degree of indignation excited at the relation they had heard, of the sufferings of the deceased and of his wife, and a strong desire to discover the offenders, that they might be brought to punishment; but that feelings of this kind were not to be yielded to, so as to create any prejudice against individuals, who may have the misfortune to be suspected, or accused of the offence—until proved guilty, the law presumed every person, even when accused by the grand Jury, to be innocent; and if upon trial, the evidence should give occasion to strong suspicions, still if reasonable doubts remain, these are to operate in favour of the accused, and with the general presumption of innocence.

That human tribunals see but imperfectly, and therefore are to be cautious, not to condemn those who may be innocent, though suspected to be guilty. That the prisoners at the bar, if indeed guilty to the extent of the charge in the indictment, would not, by a verdict in their favour, be acquitted to their own consciences; the worm that never dies would continue their punishment, so long as the intellectual and moral being should remain.

Immediately after the Charge, the Jury retired, and in about an hour returned into court, and pronounced a verdict that both the prisoners were GUILTY.

The prisoners were then remanded, and on Thursday the 16th of December, were again ordered to be brought to the bar. The Solicitor General then moved the Court, "*that sentence of Death be now passed upon the prisoners at the bar.*" Whereupon the Hon. Judge then inquired of the prisoners, if they had any thing to say why the sentence of the law should not be awarded against them? Mr. Hoar then submitted a motion in arrest of judgment, grounded upon the following facts, viz. that the name of Fitch Hall was first drawn from the Jury Box of the town of Medford, and returned into the Box by the Selectmen, and the name of Nathan Bryant drawn out, and that Bryant was returned as one of the traverse Jury, and was one of the Jurors who tried the prisoners. It was contended by the Counsel for the prisoners, that the Selectmen had no right to return to the box the name of a Juror, and draw out another Juror, except in the cases particularly mentioned in the statute, and that the situation of Mr. Hall did not bring him within either of those cases.

The Solicitor General objected to any inquiry respecting the selection and return of the Jurors, prior to the *venire facias*. The Court were unanimously of opinion

that judgment be not arrested. The Prisoners' Council also submitted and argued to the Court, a motion in the nature of a motion for a new trial, upon the ground that the Jury had been misdirected, relative to a rule of evidence, viz. that if any witness for the government had testified unwillingly or been guilty of a suppression of the truth, his whole testimony should be rejected. This motion after argument was also overruled; when Judge Sewall delivered the Address and Sentence of Death, nearly as follows—

After calling the attention of Alpheus Livermore and Samuel Angier, observations of the following purport were made by the Judge:

THE unhappy prisoners at the bar are now to be regarded in the character of convicted criminals; convicted of the crime of murder, for which the punishment by law appointed is Death!

The indignation, which a knowledge of their crime naturally excites, will not exclude from our minds sentiments of pity. These unavoidably arise, in anticipating the sentence that awaits them. To these prisoners, to each of them, a day will be appointed, when his life on earth will terminate in a violent and ignominious death; when the grave will receive him, as it has already received the unfortunate Crevay, who fell by their hands.

The guilty perish in their crimes. The removal of the violent and cruel becomes necessary, for the safety and peace of the community; not only because such persons are in themselves dangerous, and ever beheld with fear and abhorrence; but their example is pernicious. Then impunity would be a wide spreading mischief, by its tendency to increase offences, to tempt and encourage offenders.

There are, however, in the case before us, some circumstances rendered probable from the evidence, which in a moral view may seem to extenuate, in some degree, the crime of which the prisoners stand convicted.

The murdered Indian man had excited, in the neighborhood where he had placed his hut, a degree of ill-will, of apprehension and dislike, a general desire of his re-

moval, which are not to be accounted for, but upon the supposition of offensive conduct on his part. Untutored, wild, sunk in poverty and wretchedness, he had been, especially in the drunken fits which were frequent with him, troublesome, unruly, saucy as the witnesses expressed it, and disposed to irritate and abuse the people of the neighborhood. Unhappily, the resentment conceived against him, general as it was, was also accompanied with contempt, with a most erroneous prejudice and delusion. It seems to have been an opinion, adopted and talked over there, that Indians were not to be regarded as human beings; but were exposed as wild beasts or vermin, to be hunted and destroyed.

The prisoners and their accompliees, if any there were, may be thought to have been sincere in trusting to this opinion, and to have acted under the strange infatuation: for without fear of consequences almost openly and boastingly, they armed themselves with loaded muskets, which were then charged, or the prisoners were prepared to charge them, with iron nails and leaden bullets. In this manner they set out to rout and drive away the Indians; and their rights as human beings, and the protection to which the laws enabled them, in the society whereby they had fixed their abode, were thus ignorantly despised and violated.

The opinion alluded to, is too absurd to be argued against, and at this time, it can hardly need to be contradicted. But in charity to the prisoners, it may be believed, that the degree of cruelty which they exhibited in the event, had not been conceived of by them at the commencement of their enterprize. Probably inflamed with gin, which it appeared they had drank in some quantity, their minds clouded with the effects of this poisonous liquor, a number of persons acting together, and mutually exciting each other, proceeding in the dark, they came upon the dwelling of the Indians. The muskets of this unruly band were discharged upon it; the nails and bullets sent forth, were not to be directed, or stayed in their course. Resentments originating in provocations comparatively slight, became aggravated by a contempt of the duties and feelings of humanity; and an expedition begun perhaps in purposes of inhuman sport, concluded in an act of deliberate and atrocious murder.

Let this dreadful event be a lesson of caution to all who are at any time disposed to steel and harden their hearts against their fellow creatures, either in contempt of them or in the heat of anger and resentment. Particularly let it be observed, that purposes of cruel sport, if such was the fact, have had in this instance, all the consequences of an act of deliberate revenge; have proved equally fatal, to the victims, and to the actors.

Alpheus Livermore and *Samuel Angier*,

Convicted as you are, we indulge towards you the pity your condition requires.

We are willing to believe, that your intentions were not so utterly depraved and wicked as your conduct, on this one dreadful occasion, would appear to indicate. Your offence is murder, aggravated in the circumstances; and your punishment is death.

The interval, which may be allotted you, employ in repentance, in the duties of religion, in obtaining the aid and counsel of pious ministers. Your time on earth may be short; your death, violent; but mercy and forgiveness may be obtained beyond the grave. Prepare yourselves, then, with earnest and deep repentance; and may you find faith and acceptance in the all-prevailing merits and intercession of our gracious Redeemer and Saviour.

We have the painful duty of awarding against you the sentence of the law.

ALPHEUS LIVERMORE, The Sentence of this law is, that you be taken hence to the place from whence you came, and from thence, to the place of Execution, where you shall be hanged by the neck, until you be dead, dead, dead—and may God have mercy on your soul.

The same awful Sentence was then pronounced upon SAMUEL ANGIER.

Second Edition.

LIVES AND CONFESSIONS

OF

JOHN WILLIAMS,
FRANCIS FREDERICK,
JOHN P. ROG,
AND
PETER PETERSON,

WHO WERE TRIED AT THE UNITED STATES CIRCUIT COURT IN BOSTON, FOR

MURDER & PIRACY;

SENTENCED TO BE EXECUTED JAN. 21, 1819; AND AFTERWARDS REPRIEVED TILL

Feb. 18, 1819.

Justice, in compassion to mankind, cuts off *the offender;* by one such example to secure thousands from future ruin.

GEORGE BARNWELL.

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PREFACE.

The infrequency of trials for capital offences renders them doubly interesting whenever they occur. The trial and conviction of four persons at once for so flagrant a crime as that of piracy and murder, it is believed, was till now unprecedented in New-England. The circumstance has produced great excitement in the public mind, and every one is curious to know something of the origin, education and lives of the unhappy convicts. This is a curiosity which ought to be gratified. When a human being has forfeited his life by violations of the laws of God and of man, the best, and indeed the only, recompense he can make to society, is to leave behind him a monument of caution to others; and, by exhibiting to survivers and posterity, his own entrance and progress in scenes of vice and wickedness, admonish them to beware of the most distant approach to those paths which inevitably lead to destruction. It is presumed that no argument can be necessary to enforce this position, at the present time, when the perpetration of murders and robberies, both by sea and land is prevailing beyond all former example.

The reader may be assured that the sketches given in the following pages were taken from the declaration of the persons themselves, whose lives they purport to be; and that they have been compared with documents transmitted from the civil authority in Denmark, where three of the prisoners had undergone severe examination. There will undoubtedly be perceived a slight discrepancy in the relations of these men, relative to the transactions on board the Plattsburg; but probably no more than would arise from the narratives of any other persons, respecting such a scene of tumult and guilt, in which all were partakers, or likely to be involved. It is believed that there is no wilful concealment or violations of truth in any of them. They were made at a time when such con-

concealment or violation could afford no prospect of benefit, and when the practice of fraud could only increase the terrors of future punishment.

It is hoped that the melancholy, the shocking spectacle of three human beings, cut off from the world by the hand of justice in the maturity of life, and one who has not yet reached that period, will be a salutary warning to others. If their example and their fate should arrest the progress of any who may, from natural inclination or accidental circumstances, be led into the downhill path of perdition, they will not perhaps have suffered in vain.

JOHN WILLIAMS.

I, JOHN WILLIAMS, was born at the village of Chazee, in New York, the 10th of August, 1789. I remained at home till eight years of age, when my father sent me to Montreal, and put me under the care of a merchant named Fitzgerald, who sent me to school. After three years instruction in English, I was taught the French and Latin languages. I remained at this school or college, as it is there called, till I was seventeen years of age. My father then asked me what profession I would follow. I replied, I should like that of a Lawyer. Accordingly I was placed in the office of a lawyer, named John Ross. The agreement was, that my father should find me clothing and lodging, and that I should attend in his office as a clerk, from 8 in the morning till 6 in the evening, for six months, on trial; after which a new contract was to be made.

At the end of the six months, I was accordingly articled to Mr. Ross for seven years, he engaging to teach me the business of his profession, and my father to find me board and clothing. I attended to my studies and did every thing in my power to satisfy him. After I had been there a year and a half, Mr. Ross told me he heard that I frequented bad company, and after reprimanding me severely, threatened to acquaint my father. He did so, and about three weeks after my father came to Montreal to see me. I denied the accusation; and my father thrashed me with a horsewhip till he was quite exhausted. I refused to do any more duty in Ross's office, in consequence of which I was thrown into gaol.

The next day my father and Ross came to see me and offered to release me if I would return to my employment. I replied, that I would sooner stay seven years in prison. They went away, and I saw no more of them for three weeks. As I constantly refused to return to Ross's office, I was at length liberated, and went with my father to Mr. Fitzgerald, where I was again reprimanded.

With the approbation of my father and Mr. Fitzgerald, I entered as a clerk in the store of a merchant by the name of M'Ky. I gave satisfaction for about six months; when Mr. M'Ky told me he heard that I frequented bad company and kept a prostitute. Three days after I went on board a brig

called the Mayburn, with the mate of which I was acquainted, and requested a passage to Quebec. I prepared myself for starting that night; took my clothes; and then went to Mr. M'Ky's bureau and took from it 550 Spanish Dollars, being all it contained. Having got on board the brig, and secreted by the mate, we sailed next morning at 10 o'clock.

I arrived at Quebec in four days, and boarded with a Mr. Barsaloux, for three weeks. Feeling a desire to go to sea. I went on board the brig Betsey, bound to London. I agreed to wait on the cabin, and my services were to pay my passage. On the passage the brig sprung a leak, and all hands were obliged to work at the pump, and with great difficulty we made the port of Grecnock in Scotland. Here the brig was unloaded, repaired, reloaded, and sailed for London again in two weeks. Being at anchor near Gravesend, the brig was boarded by a press-gang. One of the gang, Mr. Scott, asked me what countryman I was. I replied, an American. He asked for my protection, and finding I had none, said, "Mr. Independent Gentleman, get your things and go into our boat." Two of the gang then put me into their boat, and took me to their rendezvous, at Gravesend, after which I was put on board of a receiving ship, called the Enterprize, in London. For some rude language to the officers, I was stripped and received three dozen with a cat o'nine tails. After staying here three weeks, I was put aboard a tender, carried to Sheerness, and put aboard a guard-ship called the Namur.

Two or three weeks after, I was draughted on board his majesty's brig Zenobia, commanded by Capt. George M'Kenzie, 18 guns, bound on a cruise to the North Sea. We had, during our cruise, an action with a large French store-ship, coming out of the Texel and bound to the Isle of France. The action was bloody and lasted about an hour, when the store-ship was captured. Her name was La Haine, Joseph Victor commander, 28 guns, 110 men. We sailed for the Downs with our prize, and arrived there in 48 hours.

Our treatment, on board the man of war, was very disagreeable to me. I was soon put on board a jolly boat, as one of the crew; and agreed with a young man, called Thomas Parker, to run away. We went ashore with the boat and started from the Downs for London. We arrived at Maidstone, unmolested. Being much fatigued with 10 hours' travelling, without refreshment, we called at a public house. Three mariners soon came in disguised in the dress of countrymen, and began to question us, as to what ship we belonged, &c. Three others soon entered in their full uniform, and did the same. I told them I left a merchant ship at the Downs, and was going to London. One of them said, that I was a runaway from a man-of-war, and must go with them to their Captain of Marines. I was very strictly examined by the Captain, who

told us that it was his duty to send us, either to Chatham or the Downs. I told him, I chose to go to Chatham, as it was nearer to London ; that I was an American, and never on board a man-of-war. We were hand-cuff'd, conducted to Chatham, and put on board a Hospital ship. Having no protection, I was kept on board 5 days, with my companion, when we were draughted on board the Spitfire, lying at Sheerness. Three days after, we went on a cruise of six weeks to the North Seas ; then were relieved, came to Portsmouth, and cast anchor at Spithead. I was put on board the second Cutter, and, a fortnight after, deserted with one Thomas Gregory, and left Portsmouth for London. Gregory had about him between 50 and 60*l*. Having travelled about 7 miles, we took seats in a baggage waggon, and arrived in London, unmolested, and went to Wapping, to a boarding-house, kept by a Mr. Pierson. I remained in London 5 weeks ; then shipped on board the schooner Zephyr, bound to St. Michael's. Four months after, I returned to my former boarding house, in London, and staid two days ; then went in the stage to Liverpool, and put up at a boarding house, kept by William Cook, with a very small stock of money in my possession. As the press-gangs were very busy at this time and place, I confined myself to the house 4 or 5 days.

Being very impatient of this confinement, and understanding the French language perfectly, I determined to assume the character of a Frenchman, change my name to Joseph Antoine, and venture abroad. I, accordingly, made an agreement with my landlord, who could speak French ; that, if I should be pressed, he should come to the rendezvous, peak to me only in French, and assert, that I was ignorant of the English language. I did this, prefering a French prison to an English man-of-war.

I went out at 7 o'clock in the evening ; and passing along George's Dock, was siezed by the jacket, surrounded by 14 men, and accosted with, "what countryman are you ?" I spoke to them in French. With many threats, they ordered me to speak English. I still persisted in speaking French only. They took me to the rendezvous, where I was kept in a small room till morning.

In the morning my landlord came to see me, and said they could do nothing with me. At 10 o'clock, I was brought before the regulating Captain and Doctor, who spoke French, and questioned me very closely. I told them, in the same language, that I belonged to the Isle of France, and gave them a very correct account of that place. The Captain told me he would try me by law, to see whether I should go on board a man-of-war or to a French prison. I told him that I understood that their king had issued a proclamation that foreigners might be employed in merchant vessels, and that I would not fight against my country.

I was taken back to my former room ; and next morning two constables took me to the coal-hole of the Exchange of Liverpool. Next day a appeared before the court, who employed an interpreter to converse with me. They told me they must write to the Admiralty in London. a was then put down again into the coal-hole, where a remained 10 weeks and 3 days, without any bed or covering, except my great coat. a remained here 5 weeks, without speaking a word of English. An Irishman, who had broken gaol, was now brought to this, as a place of safety, and he was the only company a had during my imprisonment.

At the expiration of 10 weeks and 3 days, a was called up before the court, and the Lord Mayor, Drinkwater, told my interpreter to tell me, that the Admiralty had granted my freedom ; and that the honourable regulating Capt. George Jones, should pay all my expences, and give me 20*l.* beside ; which he was obliged to do, to the amount of 34*l.*

Six weeks after a shipped in the Susanna of Liverpool, Capt. Ross, bound to Buenos Ayres. After being at sea 10 weeks, our bread and meal was all expended ; but the Captain, being a Scotchman, did not forget to take on board a plenty of oatmeal ; so we lived on *Bargo* alone, 4 weeks, when we arrived at our place of destination, after a long passage of 14 weeks and 5 days.

Next day Capt. Taylor, commander of the patriot brig Laheine, came on board, and asked, if we would volunteer for his vessel, at $25 a month, and a share in any prizes, he might capture. Six of us enlisted, took our clothes and wages from the Susanna, and went on board the Laheine.

Three weeks after the Commander appointed me Captain of the Forecastle, and added $5 a month to my wages. The agreement was, that we should be paid every 3 months ; at the end of which, a asked the Captain for my wages. He told me the President had no money at present, but we should be paid at the expiration of 5 months. This term being elapsed, and receiving no money, I went to the Captain and told him I would not go on board the brig any more. He gave me a note to carry to the Secretary, who told me he could not pay me, and that ought to think myself well off. Some altercation ensuing between us, he called a guard of soldiers, and sent me to prison, where I remained 3 weeks ; at the end of which the keeper told me to go about my business. This is all a got for my service on board the patriot brig.

Three weeks after, I shipped on board the Ann, of and for Baltimore, Capt. Brush, at $40 a month. Three days after came out of the inner roads, and anchored in the outer, 7 miles from land. Here his Britannic Majesty's ship, Laurestinus, sent her boat on board to press hands. When I was questioned, I spoke in French. The officer of the boat asked

our Captain if I could speak English. The answer was, that I could not. "Then," said the officer, "we will teach him;" so I was dragged into their boat, and put on board the Laurestinus. After 3 weeks, we were relieved by his M. S. Nereus, and made sail for England. We arrived at Portsmouth, after a passage of 7 weeks, and anchored at Spithead.

After remaining here 10 days, we took under convoy 7 sail of merchantmen, bound to Lockerin bay, in Scotland, where we arrived, in 8 days, with our convoy. Two days after, I was called on board the barge, to go on shore for water. After reaching the shore, I took the first opportunity to escape. I started, and the Master's Mate after me. He soon came up with me. I knocked him down and jumped on him; went off with flying colours; and walked, in 10 days, over hills and through vallies 156 miles, to a place, called Weaktown, where I remained 3 days.

I took passage from hence for England, in a Lime Sloop, and arrived at White Haven, the next day. I had then about 17*l.* in money. I went into a public house, where I met with an old fisherman, named Peter Peterson, going to Liverpool, the next day. I agreed with him for my passage to that place. We sailed accordingly. Our company consisted of old P. his wife, myself, and a boy. We had pleasant weather for about 8 hours, and were very successful in fishing.

A gale now sprung up from the land, and we endeavored to put in to Lancaster. We beat about four hours, when the vessel struck on the edge of the bank, and stuck fast, for half an hour; then was adrift for 10 minutes; then struck again, several times, every 2 minutes. The water, in the vessel, gained upon us rapidly. We let go an anchor. The sea washed over us. In half an hour the cable parted. I took off the hatchway, went into the hold of the vessel, which was more than half full of water, dove, and brought up a grapling. Having no cable, we cut the trunnel rope, bent it to the grapling and let it go. The vessel thumped; and, as we checked her, the rope broke. We soon heard the cry, "I am drowning." I took off the hatchway, jumped into the water, up to my chin; found the old woman struggling in the water; and *saved her life.*

We now took the compass from the binnacle, and leaped into a two oared boat; about 3 miles distant from land. Consigning ourselves to Providence, with scarcely a ray of hope, that we should reach the shore; through indescribable dangers, we landed all alive, in about 2 hours.

Next day I took leave of the fisherman, went by land to Liverpool, and put up at my former boarding house. Here I remained 8 weeks; then shipped on board the Barton of Liverpool, Capt. Lucus, bound for Barbadoes. Having been at sea, a fortnight, we were boarded by a boat from H. M. S.

Bucephalus, Capt. Polly. Having no protection, I was pressed. Three weeks after, we went to Spithead. An expedition was fitting out for Flushing. Ten days after, we sailed for that place. We were ordered to Zerexie, as a look out ship, and came to anchor there.

Three days after, all our boats were sent to take a French Cutter, 3 miles up the river from Zerexie. We went up and had a battle of above an hour's duration, when Monsieur hauled down his colours. We boarded the prize of 12 guns and 60 men. We landed at Zerexie for a short time, and then returned to our ship. On going aboard, the Captain told me that I should have a flogging, next day, for disobedience of orders; which I and 5 others received, being a dozen lashes apiece. This was my prize money. Two days after arrived at Spithead.

Seven days after we sailed for the East Indies, having on board a Judge, three lawyers, and their families. We arrived at the Cape of Good Hope, after a passage of 10 weeks. Here we remained a fortnight to take in provisions and water. At the expiration of this, we were ordered to be ready to sail for India in 48 hours. I belonging to the Captain's Gig, determined to escape, at the risk of my life.

Next day, I went on shore, in the gig, to bring the Captain on board. I took this opportunity to escape to the mountain, which, with great difficulty, I ascended, through briars, and many other obstacles, and sat down on the top. Here I had a fine view of the shipping, that lay in the harbour. I had with me two pounds of bread and two handfuls of grapes. Soon after, walking in a thicket, I heard a terrible howling, and looking round, perceived a very large tiger coming towards me. I lay flat on the ground, and committed myself to Divine Providence. The tiger passed within 10 or 12 yards without noticing me.

I remained on the mountain 3 days, when I saw the frigate, to which I belonged, under sail, which to me was an extremely pleasant object. On the 4th day I went down to the town, and remained 8 days, at the boarding house of one Dowson: then shipped on board the brig Rattler, Capt. Gambler, at 8*l.* a month, bound to Rio Janeiro, in Brazil. We arrived there, after a passage of 5 weeks.

I went on shore for water, fixed my hose, reaching from the spring to my boat; when a black slave came with a bucket for water, and cast off the hose, which I had fastened. Being not at all pleased with this, I shoved him away. A soldier, who spoke Portuguese, immediately came up, and struck me with a cane. I knocked him down with my fist into the mud, which did not a little soil his white dimoty. He rose, and sung out for the guard, who instantly took me to the guard house, where I remained till next day; when I was tried before a justice,

and sent to prison for 5 weeks, to be kept on bread and water. I was confined in a large room, with a number of black slaves, and passed the most disagreeable part of my life.

My term being elapsed, I was liberated, and went to the house of one Waddle, where I enquired after the brig, and was informed, that she had sailed 5 days before. I asked, if the Captain had left any clothes for me, and was answered in the negative. Thus I was left destitute of money, and no other clothing, than what I then had on. This gentleman, pitying my situation, invited me to stay with him, till I could find employment in another vessel. I, accordingly, remained with him ten days; then shipped on board the brig, Nimrod, Captain Thompson, at 5*l*. a month, bound to Buenos Ayres, where we arrived three weeks after.

A fortnight after the brig was sold, I got my discharge, and went on shore with no more things, than a stocking would hold. Here I boarded three weeks with a Frenchman, named John Joseph; when passing along the street, somewhat intoxicated, I accidentally touched an officer or soldier with my shoulder, and a little dirty water was spattered on his white pantaloons. He immediately began to beat me with his cane with all his might. I endeavored to excuse myself, declaring it was an accident; but the more I spoke, the more he beat me. I then thought it time to defend myself; so tripped up my opponent, who fell into the mud; siezed his cane, and returned the beating with interest.

A guard of soldiers now rushed upon me, took me to the guard house, and put me in the stocks, neck, hands, and feet, for two hours. I was then taken to gaol, by order of Court, where I was confined five weeks, without money, clothes, or friends.

There were two sailors in the same room with me, who wrote to a Captain of Artillery offering to enlist under him. The next day he called at the prison, and I offering myself for the same service,—we were all three accepted, released from confinement, handsomely clothed, furnished with a sword and $28 each, as advanced pay for two months.

Recollecting how I had been treated before, in their service, I determined to desert: so agreed, a fortnight after, with Capt. Thompson of the Dorset, for Liverpool, to ship myself under him, at $30 a month. Three days after I went on board, sailed, and arrived at Liverpool in ten weeks, and put up at my old boarding house three weeks.

I then shipped again on board the Barton, Capt. Lucus, for Barbadoes, where we arrived, after a passage of four weeks. Here the boat of H. M. Brig Swagger, boarded us, for the purpose of impressing. Having no protection, I with nine more were pressed on board the brig.

Two months after this, war was declared between the U-

nited States and Great Britain. Upon this, I and three more went on the quarter deck, told Sir George Evans, that we were Americans; that we would not fight against our country; and begged him either to discharge us, or consider us, as prisoners of war. With much abusive and profane language, he ordered us forward. I persisting in pleading our cause, he seized his speaking trumpet, and struck me with it seven or eight times about the head. I saying a few words more, all hands were called up to witness punishment. I was seized up to the gangway, and received five dozen lashes on my naked back, with a cat o' nine tails; then ordered to my duty again.

Our station was to cruise to windward of Barbadoes. Ten days after my punishment, two armed schooners came down upon us before the wind. One of them fired a Long-Tom, and both hoisted U. S. colours. I went to the Captain, told him that was the flag of my country, and that I would not fight. With much profane and threatening language, he ordered me to my quarters. I refusing to go, he ordered the first Lieutenant to put me below, betwixt decks. The schooners proved to be the Comet and Saucy Jack. They came within pistol shot, and gave us a volley of musketry, and five or six large guns. The Swagger gave them a broad side, which they returned: then hauled aft their foresheets, and went away. In the course of an hour, they were out of reach of shot. The Swagger lost two men killed and five wounded. Her main shrouds were shot away, and her mainmast a little damaged by a round shot. We bore down for Barbadoes to repair damages.

Six days after we were ordered to Trinidad. On our passage we made prize of a small smuggling schooner. I and four more were ordered to go in the prize, with the second Lieutenant and a Midshipman, to Martinique, where we arrived in seven days. The Lieutenant and Midshipman boarded on shore, leaving the prize under the care of an old man, by the name of James Thompson. Our prize was loaded with brandy and almonds.

Thompson and I went on shore and agreed with an old widow to let her have as much of the brandy, as she pleased, at $1 1-2 a gallon. We got into the hold by loosening two planks from the bulkhead forward. A boat came alongside in the night; we took out the brandy, filled the casks with salt water, and replaced them. This trade we carried on for a fortnight, receiving cash on delivery; at the end of which time my dividend was $160. Two days after I took French leave of my companions; and, with my clothes and prize money, went off in a small coaster, bound to St. Thomas's, which place we reached, after nine days' run, where I put up at a baording house.

Here lay between 400 and 500 sail of vessels, many of which were men of war. The convoy was under sailing orders, seamen in great demand, and wages uncommonly high. Two days after, I shipped on board the schooner Flying Fish, Capt. Moore, bound to Bermuda, for 17*l.* by the run. We arrived in ten days, and I went to a boarding house. Here I was employed six weeks, as a rigger, at $2 1-2 a day, and board. The vessel being rigged, and ordered to Halifax, with king's stores, I shipped on board, under Capt. Morris, for 18*l.* by the run; and arrived in thirteen days. As there was a very hard pressing of seamen, at this time; I confined myself in my boarding house three weeks; then shipped in the brig Butterfly, Capt. Snider, for Quebeck, where we arrived in twenty-two days.

As pressing was going on very briskly, I thought best to enlist in the British navy to go to lake Champlain, where I might stand a chance to escape to my own country and family. I accordingly enlisted, as a seaman, for six months, at $11 a month. I went to Isle of Nord, commanded by Capt. Pring, where I remained four months. I then ran away, and arrived at my father's house in Chazee, after an absence of almost eight years.

Having remained at home about five weeks, I grew tired of an inactive life; so went to Plattsburg, and requested to be introduced to Commodore McDonough, and my request was granted. I told the past sufferings and abuses, I had experienced, on board the British men of war; and stated my present feelings, which led me to desire satisfaction and revenge, even at the expense of the last drop of my blood. The Commodore answered me as I wished; praised the brave and manly spirit, which I exhibited; and enlisted me on board the Saratoga, under his command: adding, that if it pleased God to spare his life and mine, and give us victory in the battle, which was expected, in about five weeks, he would then discharge me.

I remained on board the Saratoga two months. On the 6th of September our look-out boat brought word, that the English fleet was lying at anchor off Chazee, thirteen miles from Plattsburg. This was very pleasant news to all our men, who seemed willing to spill their heart's blood, in defence of their country's rights. All hands were called to quarters, where we remained, all that day, and the following night.

Next morning, being Sunday, at 7 o'clock, the British fleet hove in sight, and approached us with great courage. As they came round Cumberland's head, we began to fire at them. In a quarter of an hour, they were becalmed, and cast anchor in a circular line, between 3 and 4 hundred yards from us. The bloody battle commenced, at five minutes after 8 o'clock, and lasted till forty-two minutes after 10. The event of this battle is well known.

Four days after, I waited on the Commodore for my dis-

charge, which he readily gave me, together with $10 to drink his health. Having staid four days longer at Plattsburg, I took passage in a steam-boat for White Hall; then went to Albany, and took passage in a sloop for New-York, where I remained five weeks. This port being strictly blockaded by the British, I took the stage for Philadelphia Three weeks after, I shipped on board a schooner, lying at Egg harbour, bound for Salem, commanded by Capt. Wilson, for $65 by the run.

The same day that we set sail, we were obliged to cast anchor on a bar of sand in shoal water, and take a sloop alongside for the purpose of lightening our vessel, which was loaded with flour. The following night we experienced a very severe gale, which parted our cable and threw our vessel on her beam ends. At 4 o'clock in the morning, she struck several times, and then stuck fast. In about two hours, it became calm, and we were left high and dry, a mile and a half from the water's edge. Having had our run, we were discharged, and I went to Philadelphia.

I here shipped at $45 a month for the schooner Eutaw, of Baltimore, William Dawson, Captain, bound to St Bartholomew's, and, two days after, went on board. The night we were to sail, it froze so hard, that the vessel could not be released from the ice, under two months and a half. During this time, we heard the news of peace, between Great Britain and the United States. We then proceeded on our voyage, and five months and a half after, returned to Baltimore. Here I boarded with one John Hutson, in Bond Street, for two weeks: then shipped on board the ship Virgin, Capt. William More, bound to London: returned to Baltimore in the course of six months and a half, and staid at my former boarding house five weeks.

I next shipped in the schooner, Swift, Capt. William Hacket, for Buenos Ayres. On our passage, many quarrels took place, between the Captain and crew. At the expiration of ten weeks and three days, we arrived at our place of destination. Five days after our arrival, the crew swore they would land and not return in the vessel: that if they could not have better usage, they would heave the Captain overboard, if they did conclude to return with him, &c.

The next day some of the crew fell out with the mate, Mr. Spiers, of Baltimore, eight of whom took their things, put them into the long boat, and notwithstanding all the attempts of the mate to stop them, went to the town of Buenos Ayres.

The Captain, though he might easily have procured more, took only three hands, in room of the eight who had left us; and after thirteen weeks and two days we sailed for Baltimore After being at sea seven or eight days, he began to treat us as before—as slaves; and even to strike us. About six weeks after we were out, I was reefing the foretop sail, when he began to damn us, on all quarters, and calling us a

parcel of soldiers. When we came down he began to curse us again. I, being high spirited, told him that I had seen a little of the world ; had been on board schooners and ships, before now ; and that this was the first time I was ever called a soldier. He called me a damn'd rascal, bade me hold my tongue, or he would knock my brains out with a handspike. In the mean time he took hold of the maintopsail clue line and struck me. I told him, if he struck me again, I would resent it, for I was not an apprentice, and thought myself as good as he. He instantly jumped into the cabin, loaded a pair of pistols, came on deck and swore he would shoot me or any other man, who offered to say another word. I stood by the mainmast, opened my waistcoat and said to him "fire,damn you ; do'nt be a coward; hut mind, if you miss me, I will not miss you." This appeared to intimidate him ; so, saying a few words, he returned to the cabin, and there was no more difficulty that day.

Next day, as I stood at the helm, the Captain asked me why I wished, to aggravate him. I answered that I did not ; that he ought not to let his passions so overpower him, as to threaten to shoot people ; that one man's life was as sweet, as another's, &c. He told me I was a good man, as ever belonged to the vessel ; that, upon reflection, he liked me the better for my good spirit ; and ordered the steward to give me a glass of grog to drink his health, which I did, and felt not the least grudge against him. I know I am of a hasty temper ; but I cannot long harbour a grudge, even against my worst enemy. We arrived at Baltimore without any more disturbance

Nine days after this, Captain Hacket sent for me and a seaman, called Daniel Went. We accordingly called on him. He told me he had got the command of a fine schooner, called the Plattsburg, bound up the straits to Smyrna, and wished to engage me to go with him. I, at first absolutely refused to go, reminding him of his former treatment, &c. He acknowledged his passions were quick, but soon over, and after many compliments and persuasions, seconded by the request of Went, I signed the articles, and put my things on board.

On the 1st of July, 1816, we set sail from Baltimore, with a cargo of coffee and about $ 40,000 ; the Captain promising to give the sailors protections directly. We anchored several times, between this and Black River ; from which we got under way the 3d, and went out side Cape Henry. The chief mate, Frederick Yeizer, ordered John Smith to sweep the deck, which order was obeyed Yeizer told him that was not the way to sweep. Smith answered that he had never learned or seen any other way. The mate then said "I will learn you how to speak to me, and how to sweep better :" then struck him about the head with a broomstick, and knocked him down

on deck. Smith rose, and asked him what he meant by striking him in that manner. Yeizer then seized him by the breast, and swore that he would knock his brains out. This produced a struggle; Yeizer fell, with Smith upon him. I went to take Smith by the shoulder; and asked him what he was about. The Captain seized a broomstick and struck me athwart the shoulder. I turned and asked what he struck me for. He told me to hold my tongue, or he would knock my brains out. I replied, if he struck me again, I would resent it. Here the pilot left us, and sail was made on the vessel, without any murmur, whatever. We left Cape Henry on the 6th and received our protections from the chief mate, who addressed us as follows. "Men, one and all, if you do your duty, as men ought to do, you will be treated, as men. But if I hear the least grumbling or murmur, whatever; I will take the trouble, myself, of making a can-o' nine tails, seize up the first man among you to the main rigging, by the two thumbs; and flog him, as long as I can stand over him. Go forward now; you know what you have to depend upon."

I kept my eyes fixed on him, during this harrangue; and then replied. "Well, Mr. Yeizer, I have been in many different kinds of vessels before; but never have heard such expressions, from any Captain, or any other person till now. But I will tell you, my good sir, that if you, or any one else, does seize me up to the main rigging, and flog me; that it will not be good for the health of that person. I tell you, like a man; remember well, what I do tell you."

He answered, "go forward, for the present; let me have none of your jaw, or I will begin now." I replied, "begin as soon, as you like."

I went forward, and never heard one of the sailors say a word, respecting ill usage, till the 7th, when Daniel Went came to me, in the evening, and told me that he had been listening, at the fore hatchway; that Stromer, Smith, and Stacy were talking together of not standing this ill usage any longer, and of taking the schooner from the officers. I told him that I could not believe it; that it was all nonsense.

I then went forward myself to listen, and heard them talk of throwing the officers overboard. Upon this, I walked the deck with Went; told him, if they asked him to join them, to refuse; that I did not like the plan myself, and would have nothing to do with it. I told him moreover I had a great mind to inform the Captain of it. To this he objected, saying that the crew would know I was the informer, and would not think much of taking my life.

Soon after, at 8 o'clock in the evening, Stromer and Stacy said to me, "Williams, are you a man or not?" I asked what they meant. They replied, "if you are a man, will you join us and take the vessel from the officers? we are determined

to bear this ill usage no longer. They are a set of damned rascals, and we will heave them overboard." I answered, "I will never agree to take any person's life in cold blood." Stromer called me a coward. I replied, I was not a coward, but as good a man as ever stood in his shoes, or any one's, on board the vessel. I heard no more from them that night.

Next day, seven or eight of us being down in the forecastle, Stromer, Stacy, and Smith told me, they had found out another plan; which was, that when the officers took an observation of the sun, at noon, we should be ready with seizens of spun yarn; go slily aft; seize and confine them; steer for Cape Verd Island; run near the shore; hoist out the boat; give them provisions and water; put them into the boat; leave one man's hands at liberty, that he might untie the rest; and then we would take the vessel to Norway. Stromer produced letters to prove, that he had sailed, as Captain, five years out of England, and four years, out of New-York. He also exhibited charts, a quadrant, and books.

Having all of us drunk pretty freely, I, disliking our usage, joined in the plot. Smith produced a ball of spunyarn, and each man, according to my recollection, took two seizens. At twelve we all started to go aft. I went abaft the mainmast. I was just in the act of springing upon the Captain, when, looking round, I saw all the rest hanging back. I returned to Stromer; called him a coward; and threatened, if he said a word, to give him a hiding. All then went on very quiet till the 15th.

At this time Stromer came to me about 7 or 8 o'clock, in the evening, and said, "I am determined to take the vessel, this night, if you like it. In five or six days, we shall make the St. Mary Island, and set the officers on shore. Smith, Stacy, and White were present. I got in a passion, put my fist to his nose, and swore, that I would hide him, if he offered to say another word to me on the subject; that he wanted to be the downfall of me and my shipmates; and, if he said another word, I would inform the Captain. He said no more.

All was quiet, till the 22d, when it was agreed and resolved, that the murder should be committed, as it has happened. In this plot all the crew agreed, except the cook, and Samberson, who were ignorant of it. Nathaniel White, indeed took part in the first plan, but uttered nothing. Afterwards he said that he would not take part in it, but would assist in working the ship, and betray nothing. Concerning the portion of the money nothing was agreed, as nobody rightly knew how much there was on board.

The agreement was, that there should be cried out from the head, "A SAIL;" and I, by the foremast was to repeat it, which should be the signal, and oblige the officers to come forward. Rog was to attack Yeizer; and, if he failed, Frank was to

knock down Rog. The reason of this was, that there was not much reliance placed on Rog ; as the agreement was only made by Stromer in the German and Danish languages.

At the time appointed Peterson cried A SAIL, which I repeated. Both the mates came forward ; and Yeizer, as I afterwards heard was thrown overboard by Rog and Frank, and as he was entangled in the jib guy, Stromer cut the rope, as he expressly told me afterwards Tippo wounded Onion with an axe. As he fell at my feet, I seized him. I had in my hand a wooden handle of an axe, which I lost.

At this moment the Captain came on deck. I left Onion and struck him, the Captain, on the breast. He asked what the matter was. Upon this, Smith struck the Captain with a handspike, so that he fell on the gunnel, and was immediately thrown overboard by Smith and Johnson. My intention was to beat the captain with the axehandle, if I had not lost it.

I know not who murdered the supercargo ; but am sure that Stromer had a part in it ; and had a stocking with a stone in it for a weapon. No other weapons were used but this, and handspikes. I had previously to this been a little intoxicated ; but had slept, and at the time was sober, as were all the rest of the crew. I believe Frank to have been the most violent of the instigators, as I slept that night opposite to him, in the forecastle, and heard him say, several times, that he could not sleep quietly, for thinking constantly on the money ; and speaking with the greatest indiffcrence of killing a man.

Onion was before addicted to drinking, and had provided himself with a bottle of whiskey, in possession of which he was found in the bread locker. When Onion was found, I addressed myself to Stromer, begging that his life might be saved, which he left wholly at my disposal

About twenty minutes after, I saw Onion was intoxicated, and advised him to go below and sleep ; promising to call him, if he should be wanted. I did not call him, till next morning, at 8 o'clock, when all hands were turned up. Stromer, myself, and Onion went to breakfast together ; and Samberson waited on us. Onion asked Stromer, if he knew how many boxes of money were on board. Stromer said no. " I do," said Onion ; " and what is the reason you did not let me know that you meant to take the vessel ? for I would have helped you with all my heart. The Captain and Mate have used me very ill ; and they are rightly served. Let me have some hands, and I will go down under the cabin floor, in the run, and hand up the money."

After breakfast Stromer ordered some hands to assist Onion in getting the money. Onion handed the boxes out of the run to Rog; Rog handed them to Samberson, on the ladder, who placed them on deck. Onion came up, took an axe,

broke open the boxes, nineteen in number, and we shared the money equally, about $3000 apiece. I saw every man take his share, without any objection. When Stromer, myself, and Onion were at dinner, Stromer observed that he had some poison in his chest, bought in Baltimore, on purpose for this business, and that he had dropped some into the Coffee kettle, which had no operation. He asked, if I had been acquainted with the Captain before. I answered "yes, to my sorrow;" for I felt in the bottom of my heart, that this was my downfall. I, however, endeavored to appear in good spirits.

We now agreed, that I should alter the Log Book, which I did upon Onion's showing me how to do it. Onion sustained little injury, from the blow he had received; did as much as any one on board; and shared in the clothes and watches of the Captain, mate, and supercargo. Stromer took the name of Hacket and I that of Yeizer, for eight days, when I resumed my own, and Onion that of Yeizer and took his protection. Three or four days after Onion altered two letters from Mr. McKim, one to Capt. Hacket, and the other to a merchant in Smyrna, which he made out for a merchant in Bremen.

We arrived at Norway, twenty-two days after taking possession of the vessel, and anchored at Cleveland on the 13th, August. The custom house boat came alongside, and Stromer went on shore with the papers. I could not prevent the crew from going on shore, when they pleased. Next day I received a letter from Stromer, stating that he had agreed with the American Consul, Gascar, to let him have the whole of the Coffee, which was to be smuggled. We made the custom house officer drunk, and, a little after midnight, one Capt Tiesland came with a boat and letter for fifty-six bags of Coffee. Onion assisted in getting out the Coffee. Next day a sloop came alongside, with a letter from Stromer, and took 300 bags of Coffee and twelve casks of bread.

All went on well, till the 23d, when a police officer came on board, with eight men, from Christiansand, seized the vessel, and warped her round to the American Consul's wharf, at Mandal. I immediately went on shore, in search of Stromer, but could not find him; so returned on board Onion and myself, fearing the crew on shore might be the means of our being detected, agreed to get off, as soon as possible. We took passage that night in a sloop for Copenhagen, Capt. Roulson, and arrived there in four days. As we had no passes, we agreed with Capt. R. to apologize for us to the police officers. Onion, myself, and Samberson went on shore with Capt. R. waited on the police master, who told us, there was nothing out of the way; so we went to board at the house of one Capt. Nelson.

We then told Samberson to look out for another house; for it was not customary, in America, for whites and blacks, to

mess together. He went away, not very well pleased. Next day he came to us and asked us to come to the American Consul with him. After some conversation, we agreed to go. We told the Consul we had followed the seas; but were now merchants. He observed that they were very strict, in that country; and asked for our papers. We showed our protections, and, at his request, left them with him, to show his father, who was chief consul and he a deputy. Samberson then left us, and I never saw him afterwards, till we were arrested.

A few days after, Onion and I, fearing news might come from Norway respecting us, agreed to charter a small vessel, endeavour to smuggle a cargo into some port of Norway, and then steer for England. We agreed with one Captain John Nelson accordingly, and put on board his sloop $ 2000 worth of Rum and Sugar, agreeing to pay him 3000 rix dollars.

Every thing being ready, we went to the consul for our protections. He received us very politely, gave us a letter, and told us our protections were inclosed; and that it was his duty to send a letter to the police, to prove that we were Americans. I fearing some trick, proposed to Onion to open the letter; but he objected, and we delivered it to the police. Onion was taken into a separate room and questioned for half an hour; when he came back, I went through a similar examination. The police master told me that my story did not agree with my partner's; and it was his duty to see us arrested for the night. We were accordingly confined in separate rooms. Next day I was called up before the police master. The first question was, "Where is Captain Hackct, and where is Mr. Yeizer, and the supercargo?" I answered, that I left them in Norway. After a few words more, Samberson was called in. He was asked, if I was a man that belonged to the vessel Plattsburg. He answered yes. I denied it. Onion was then called in, and asked the same question. At first he denied it; but in a few minutes confessed the whole. I then owned the whole, that I had done.

I was kept in prison in Copenhagen, a little over two years, most of the time in irons; when the United States ship Hornet came and took us on board, August 29th, 1818. After about three months' passage, we arrived in Boston. I was in irons, during the passage, hands and feet; confined, like a bird, in a cage; and half starved. After our arrival, I lay in gaol nearly a month, when I received my trial; was found guilty; and sentenced to suffer death, on the 21st of January 1819.

The foregoing Narrative was abridged, in some degree, from a M S. in Williams's own hand writing. His chirography is very handsome; but his language, punctuation, &c. needed considerable correction. On the 21st of January 1819,

the day first appointed for execution, he and the compiler read and examined it carefully together. Having gone through with it, he thanked the compiler for his assistance, and solemnly declared before witness, as a dying man, that it was substantially true. He then spoke nearly in the following words; which he requested might be published.

"This is the day, on which I was to have been executed. My feelings are such, that I know not whether to thank the President of the United States or not. I had made up my mind to die. I render my sincere thanks to the Right Reverend Bishop Chevereux, and Reverend Phillip Larrassay for their pious labours, in my behalf. I do the same to Messrs Knapp and Hooper, my counsel on the trial; for their able pleas in my favour: to Marshal Prince, Sheriff Bell, Mr. Jackson, the jailor, Mr. Bailey, and all others, who have shewn me kind treatment, and afforded me consolation, in this my unhappy condition."

FRANCIS FREDERICK,

Was born in the island of Minorca. He cannot precisely tell the year of his birth, but supposes himself to be about the age of thirty-two. His father has been dead about ten years. He was the youngest of five sons, all of whom were living a few years since.

Frederick had no education, (being unable either to read or write,) but was brought up to the profession of a mariner When only eight years old, he went aboard an English ship, called the Alligator, as servant to the captain, where he remained for six months. He was afterwards on board the brig Economy, captain Cook, in the same capacity.

It is needless, and would be tedious to the reader, to follow him, while a mere boy, from ship to ship. The only portion of his life which can interest the public, is that of his manhood; when he may be supposed to have formed his character, and been at full liberty to follow the bent of his disposition.

He was a common sailor on board the British ship La Hogue, 74 guns, when stationed off the harbour of New-London, during the late war between Great Britain and the United States. About ten months before the peace, the La Hogue went to Halifax and thence to England. Frederic was transferred to the sloop of war Frolic, and was again sent to Halifax. Here he left the Frolic, shipped on board the schooner Mary, bound to Martinique, loaded with cod-fish and flour. On their passage, they were taken by the U. S. privateer Portsmouth, captain Shaw, and sent into Salem, where he was detained in the Aurora prison-ship, till an exchange of prisoners took place.

After the peace, Frederick shipped on board the Sampson, a merchant ship, bound to New-Orleans. Having some difficulty with the captain, who refused to give him his clothes and other property, he left the Sampson, and shipped on board the schooner Dolphin, at 22 dollars per month, which immediately sailed for St. Thomas in the West Indies, where the owners lived—where the cargo was delivered and the whole crew discharged.

Frederick then went on board the hermaphrodite brig Decatur, captain Chase, of which Stephen B. Onion, was second mate, and a Mr. B. of Boston, first mate. The brig sailed for Trieste, returned with a cargo to Baltimore, and the crew were discharged.

After being ashore six days, Frederick shipped aboard the schooner Romp, whose crew consisted of sixteen men, at sixteen dollars per month.

The Romp sailed down below fort M'Henry, and received from a shallop, guns, ammunition, and 40 men. The captain ordered all hands upon deck, read to them his orders, hoisted the Patriot flag, and told them the schooner was to be called "San Ofone, Gun Boat No. 6, of Buenos Ayres." He informed the crew that a Spanish brig was coming out of Philadelphia, laden with specie, and that they must take her Their cruise for her was unsuccessful, and they proceeded for Cadiz. They shortly after touched at the isle of Flora, one of the Western Islands, under the American flag. Frederick states that the American consul came on board, and was well received. They took in water and provisions and sailed directly for Cadiz. He also related to the writer the circumstances of their meeting, overhauling, and distressing several Portuguese and Spanish vessels, but from which it does not appear that they took any thing of much value.

When the privateer arrived off Cadiz, they took a fishing boat, into which 16 men were put, with Bass, the first lieutenant of the privateer, as commander, with orders to go in shore and examine the harbour. Before the return of Bass, who was absent about 24 hours, they fell in with a Spanish brig loaded chiefly with salt; and took from her several bags of money, amounting to about 5 or 6000 dollars; they also took her compass, chopped her sails and rigging to pieces and otherwise distressed her. The next day they fell in with two Spanish brigs, loaded with brandy, silks, &c.; one of which they let go, after taking what they wanted: the other was manned with a part of the privateer's crew, and went off upon a cruise. They then steered again for the Western Islands, and took a lugger, loaded with fruit, wine, silks, &c. which they also manned. Off Teneriffe, took a polacca schooner, 160 tons, loaded with Irish beef and pork. Some acts of violence were committed on board the polacca; the captain was stabbed in the arm and otherwise injured. From an English passenger in the polacca, bound to Madeira, they took 15,000 dollars. The polacca was then dismissed, and the captain threatened with death, if he should be found out of his course.

Soon after this, but for reasons which Frederick is ignorant of, the second lieutenant, boatswain, and sailing master of the privateer were turned before the mast and others put in their places. The sailing master told the crew that he had seen all the ship's papers, that she was cruising without orders, and that, if taken they should all be hung as pirates. A plan was laid to take the privateer, and every thing in preparation at 9 o'clock in the evening. The crew all assembled on deck: the captain and first lieutenant, were first secured without difficulty by having a rope flung over their shoulders and drawn in a noose. The officers were all put in irons. Next day fell in with an English sloop going to the West Indies, on board of which they put the officers,

giving them their trunks, share of prize money, provisions, &c. and steered for Baltimore. The privateer shortly after arrived at Norfolk, where the crew left her. Frederick went in a pilot boat to Baltimore, where he remained several days, living with a man by the name of Samuel Grace. His share of money was 300 dollars, besides a considerable amount in silks, &c.

At Baltimore Frederick became acquainted with a man by the name of Durfey, who, knowing that he had money, proposed buying a coasting schooner of 60 tons, in partnership, to which Frederick consented, and paid 300 dollars, as his share. Hearing of some of the crew of the Romp being taken up, he became alarmed, and, after having given Grace a power of attorney to act for him, went on board the Plattsburgh, as a passenger, agreeing to work for a passage to Gibralter. On the first of July, 1816, Frederick, Onion, and White carried their things on board together.

Frederick related to the writer in presence of witnesses the circumstances relating to the quarrel between Smith and the chief mate, which does not differ materially from what was stated by Onion on the trial. With regard to his participation in the murder of the captain, mate, and supercargo, he declared unequivocally, as the testimony of a dying man, that he is innocent—that, he knew nothing of any preconcerted scheme to commit murder or piracy, (though he acknowledges that, Williams, Stromer and others were often in close conversation, which they always broke when he approached them)—that having been on his watch till twelve o'clock, and just gone down into the forecastle with White and the cook, he heard a noise upon deck, and the chief mate cry "Murder." He ran up, together with White, and received at the same time a blow over the hand which made it bleed. Being on deck, he saw Yeiser, a few steps from him, thrown overboard by Smith, and some others, but he cannot positively say who they were. In the same moment captain Hacket came on deck and asked what the matter was, whereupon Williams, Stromer and Reineaux threw him overboard. The supercargo then came on deck and was likewise thrown over. He says that the captain and mate were heard to cry "Murder," after they were in the sea.

His account of the subsequent transactions will appear best in his own mode of relating them. The following is the substance of his story, and almost his own language.

After the supercargo was thrown over, (he was thrown over the starboard quarter,) I ran into the cabin, and Jonas Smith sings out, "*Upon deck there.*" I was in the cabin at this time. I found a musket on the locker. I took it for the purpose of defending myself. Jonas Smith and the steward went on deck. At this time Onion was in the bread locker. Williams and Stromer come into the cabin, and say, "Frank, what are you going to do with the musket?" I say, "I do not know myself." Williams and Stromer say, "Where is Onion?" I said, I think he is in the

bread locker. Williams opened the bread locker, and called Onion to come out, and he did. Stromer, Williams, Smith and Rog say, "What shall we do with Onion?" I cannot say that Peterson was in the cabin at this time. I said, Onion was a very good man, though tipsey.

At 8 o'clock Onion came on deck. I was ordered by Williams and Stromer to go aloft and repair the main top sail. While up aloft, I saw Onion break the box of money with the cook's axe. The money was divided, I received two thousand five hundred dollars, and fourteen doubloons and a half in gold. I took the money and carried it to the forecastle and put it in my cabin.

When we came to the coast of Norway, Stromer says, "Has any body been to Norway?" J. P. Rog said "Yes. I was brought up there." Stromer says, "What is best to do?" Rog said, "Go to Cleveland, and make it appear the vessel is in distress." Stromer ordered the main boom to be carried away, and the top-mast studensail halliards on deck. By Stromer's order I and one other took the halliards, and lashed the boom to the ring bolt in the deck—then hauled taught the main stays, to try to carry away the boom, but could not do it.

Stromer ordered me to bring an axe on deck. Rog took the axe and gave the boom three or four cuts. Then Smith did the same, and the boom was carried away. The rigging was saved.

A pilot came off from the Naze, on the coast of Norway—said he could not take her in till morning. Another pilot came from Cleveland—took possession and carried her into Cleveland and anchored.

Stromer says, "Any one wishing to go ashore, may; I can get people enough in this country, to ship on board." The first day I went ashore I staid till night—then went to the vessel, took my money and trunk, and carried them to the pilot's house. I staid at Cleveland five days. The cook and I lodged in one house—then went to Miller's J Smith came to the same house. I brought the money from the pilot's house. I took passage for Aberdeen in Scotland, with Smith; and from thence to Fort William, in a schooner, capt. Hans. I gave 100 dollars to Mr. Alson, and sent 1400 dollars to Mr. McAlpy, at Glasgow, to buy goods. Mr. Alson staid at Fort William till the goods were smuggled ashore. I returned to Mandahl, and never received a farthing from this concern.

At Mandahl, the police came on board and said, "Is Frank here?" I said, yes. They said I must go ashore. I told them I would not, but was obliged to go. All the money they found about me was four dollars. I never had any part of the clothing of either captain, mate or supercargo. I was sent to prison, and my hands and feet put in irons. Next day carried to Christiansand—put into prison. After 5 days I was called to court—understood nothing. I confessed to the consul that the pilot at Cleveland had 500 dollars; Mr. Maier in Mandahl, 400, and Mr. Mark, 100. [It will be observed that these sums, with the 100 dollars

given to Mr. Alson in Mandahl, and the 1400 laid out for goods at Glasgow, make up the sum which Frederick states was given to him at first.] The fourteen and half doubloons I spent for my expenses at Christiansand. When I was carried to court, the American consul questioned me. The police officer said, "Let me look at the watch." He took it, and I have never seen it since. I was sent back to prison and stripped; thence to Copenhagen in irons. I was 14 days in the hold of the vessel, chained to an anchor, with nothing to cover me. My feet were frozen. The captain pitied me—took me to the cook's room and ordered my irons taken off. I arrived at Copenhagen in 16 days, and was confined in prison without irons. When I was called before the judge and questioned about the money, I said as above."

Frederick, with the others, was delivered by the police of Copenhagen, to Capt. Reed of the Hornet, and brought to Boston for trial. Since his conviction and sentence, he has been attended by the same clergymen as the others, and expresses his thanks for their kindness and solicitude for his welfare. The circumstances attending the piracy for which he suffers death, he repeated to the writer at several times, but with no variation. His story has also been compared with his examination before the police court of Copenhagen and found to be consistent.

JOHN PETERSON ROG.

I, JOHN PETERSON ROG, was born in Christiansand, Denmark, July 24th 1789; sent to school, at an early age, and received a tolerable education. My parents were born in Bornholm. When I left them, in 1801, my father's age was 69, my mother's 50 years. I shipped in a Swedish vessel, bound to Stockholm: sailed thence to Konningsburg: thence back to Stockholm. Then shipped on board a Dutch vessel, bound to Copenhagen. Left the ship there, and went home for about four months. Was then bound apprentice to a sail maker for five years; at the end of which took up my indentures.

I then shipped on board a Danish brig bound to the West Indies. In passing St. Kitts was kicked by a boy, from the fore top gallant yard into the sea, and picked up by an English man of war's boat. Arrived at Santa Cruz, where I was put in prison for leaving the vessel. Afterwards released, and sailed in the same vessel for Copenhagen. Went on board a ship bound to the West Indies. In the North Sea, in a heavy gale, cut away our three masts, put into Norway and remained till spring. Sailed thence to the West Indies, and thence for Copenhagen.

About 500 miles from England, being becalmed in the night, a boat came along side, enquiring if we had seen any French privateers, and was answered in the negative. At the same time another boat came along side, and a French officer came on board, enquiring for English vessels. The English officer told him to go on board his boat, and he would do the same, desiring us not to stir, till the engagement should be over. This soon took place, and the English took the French lugger, and next morning told us to make sail; which we did and arrived in Copenhagen.

I was engaged in short coasting voyages till 1807; when war broke out between the Danes and English. I went on board a gunboat, ordered, with six others to the Great Belt. In passing the point of Maine, we fell in with the British seventy-four, Europe; received two shots in our hull; and I was wounded in the head by a grape shot. The seventy-four receiving heavy damage, sheered off; and we arrived at Couseur, according to our orders.

Two months after fell in with the brig Tickler, took her, and carried her into Nassau. Two months after fell in with the brig Tygress and brought her into the same place. One month after, fell in with two brigs and a gun boat; took the gun boat, sunk one brig, and returned to Couseur. I was then ordered to Copenhagen, put on board the Prince Christian seventy-four, and sailed for the Belt.

The day after we left Elsineur, we fell in with an English Frigate and had an action, during which two seventy-fours and another frigate bore down upon us. We continued the action, having a seventy-four on each side of us, and two frigates on our stern, about an hour and a half, when our ship grounded and we were obliged to strike. Our Captain, three officers, and 194 men were killed, and 200 wounded. Our whole number was 700. The wounded were sent on shore; the others drafted among different vessels; and our own ship blown to atoms. After I recovered from my wounds, I was paid off and remained in Copenhagen till 1815.

I next went on a voyage to the West Indies and returned. In 1816, I shipped in a brig, bound to America. In a heavy gale, we lost our fore top mast, and put into Norway. While riding at anchor, a gale sprung up, our cable parted, and we stuck fast upon a rock from 9 in the evening till 6 in the morning, giving ourselves over for lost. In the morning the wind changed, we cut our cable, got out to sea, with nine feet of water in the hold, and ran ashore in Norway.

After necessary repairs, we again set sail for America; encountered a heavy gale in the Gulf of Florida; and arrived at Baltimore. Here I shipped on board the schooner Plattsburg. During our run from Baltimore to Black River, Francis Frederick got drunk. The chief mate ordered him to go to work with the rest; to which he made no reply. Upon this, the mate beat him with a broom stick, and knocked him down.

[Rog's account from this time, till the 21st July, is substantially the same,as Williams's. It then proceeds as follows:]

I belonged to the chief mate's watch, which was from 8 to 12, at night. My watch being out, I went down in the forecastle, heard a noise on deck; but not being called, remained in my birth till 4; then went on deck, and was told by Stromer that he was captain now, and asked, if I would do duty as before, respect him as Captain, Williams as chief mate, and Onion as second mate; promising me a share of the money on board, and giving me a glass of grog. I enquired where the other Captain was He said it was none of my business.

[He then mentions going into the cabin with Onion; assisting in getting the money out of the run, and dividing it, together with the clothes of the deceased; and other circumstances, till the arrival in Norway, in much the same manner as Williams.]

The morning before we reached Norway, Stromer ordered the main boom to be lashed to the ring bolts, and me to take an axe and cut it; which orders were obeyed. We put into a place, called Kleven, were put under quarantine two or three hours, the papers sent to the American Consul, and custom house officers sent on board. Stromer passed for Captain Hackett, Williams for Yeizer, and Onion retained his own name. Stromer gave leave to all to go on shore, and return at day break. I went and returned accordingly, and remained on board that day and night. Onion called me, Peterson, and some others to assist in getting coffee out of the main hold, which we refused to do. I remained on board the next day and night; and still refused to assist in taking out the coffee.

Next day I left the schooner; went in a small boat to Christiansand, put up at a boarding house, two days and one night, went to the police office for a pass to Jutland, arrived next morning at Nostrand; went by land to Flastrand; got a pass for Copenhagen; and went thither in a fishing boat. Here I remained twelve days; when walking in the king's market, I saw Samberson and took him home with me. About three days after, Samberson who had been taken up sometime before, came with some constables, who took me to the police office, where I saw Williams and Onion. The police master asked if I knew them. I answered, yes; but they denied me. I was questioned respecting the Plattsburg; and gave the same account, as I have related above.

My money was taken from me, and I was sent to prison, where I remained nearly two years and a half, most of the time in irons. August 29th 1818, was put on board the Hornet and brought to Boston for trial. For three weeks of our passage we were allowed but a half pound of potatoes, half only of which was eatable. December 28th 1818, our trial came on, and I was condemned to die January 21st 1819. God will judge the witnesses according to their deserts. I am conscious of my own innocence, and shall meet my fate, with fortitude, devoting my soul to God.

I have embraced the Roman Catholic religion, in which I find great comfort and happiness of mind. My good Priest, Father Larrecy visits us once, and often twice a day. His prayers and injunctions have so tranquilized my mind, that I feel, that by sincere repentance, I shall die happy, in the full belief, that God

will have mercy on my soul, through the merits of our Saviour, Jesus Christ.

The Right Rev Bishop Cheverus has been to see me and my unhappy companions, who are also of the Catholic faith I was confirmed by the Bishop on Friday, January 8th 1819, who gave us the sacrament immediately after. The Bishop was much affected at our situation; gave us much consoling advice; and prayed so fervently with and for us, that I thought it the happiest day, I had ever experienced. He will come again, before our execution, to give us the sacrament, and pray with and for us, with the assistance of our good priest. I cannot sufficiently express my feelings and thanks for their constant and pious attention. I most heartily forgive all my enemies, as I hope to be forgiven. I pray for the Bishop and Priest, who have taught me to repent of my sins, and to seek the mercy and grace of our Redeemer and Saviour, Jesus Christ; who with the Father and Holy Ghost, liveth and reigneth one God, world without end. Amen.

I would here most gratefully thank Mr. Bell, who has been particularly kind and attentive to our wants, during our confinement under him; has expressed the most affectionate feelings towards us; and favoured us with fatherly advice: and I most humbly pray to God, that he may have health and prosperity in this world, and eternal happiness in the next. J. P. R.

PETER PETERSON,

OTHERWISE CALLED

NILS PETERSON, AND NILS PETERSON FOGEL-GREEN.

I, PETER PETERSON, was born in Gottenburgh, Sweden, May 12th 1799, and sent to school by my parents, till I was nine years of age. I then went to sea, with my uncle, bound to Revel, in Russia, thence to Narva, in Russian Finland; thence to Gottenburgh; thence to Liverpool, England, and back to Gottenburgh. I was then paid off, and staid on shore about a fortnight, when I shipped with Capt. Crowsy of Stockholm, and sailed for Liverpool. I was cabin boy; and the Captain using me very ill, I left the vessel, and bound myself apprentice to a merchant, in that place. I was in his employ six months, when he failed and I was paid off.

I then shipped in an English vessel, bound to Buenos Ayres; arrived there, and staid two months; then returned and was paid off in Liverpool. In abouta week shipped on board an English brig bound to Salem, in Massachusetts, where we lay a month, when war was declared between the United States and Great Britain. I then shipped in the American privateer, Grand Turk, Capt. Breed; set sail from Salem; and was out on a cruise four months. We fell in with two letters of marque off Buenos Ayres, from Liverpool. The action lasted half an hour. Our sailing master and a boy were killed, and one man wounded, when both vessels struck to us. We had the prizes in tow 48 hours, when an English ship bore down, thinking we were a British man of war brig; but finding her mistake, she immediately struck her colours. An English man of war brig came cruising round us, at the same time, but soon sheered off. We manned the prizes and sent them to the United States. We then set sail ourselves for the same; and, in the Gulph of Florida, took an English schooner, loaded with dry goods, fish, and oil, and sent her into the United States. She arrived in Portland before us.

We were chased into Portland, by an English frigate and schooner, where we remained a fortnight, and sold our prize.

We next set sail for Salem; and being becalmed off Cape Ann, a pilot came on board, thinking us to be English; said he had a brother on board a British seventy-four; and, if we wanted any fresh provisions, he would supply us. He said, moreover, he would help us to cut out a prize, belonging to the Grand Turk, of Salem, little thinking he was on board the Grand Turk. The Captain gave orders to the first lieutenant to go down to the doctor and tell him to mix a glass of brandy and jalap; which was given to the pilot, and he drank it without suspecting any trick. The crew wished to tar and feather him; but the Captain would not permit it. The pilot (or fisherman) then left us to go ashore; when the Captain of the main top hove down stones or other heavy substance, for the purpose of staving the boat, but was ordered to desist.

We then put in to Salem, and all hands were discharged. I received my prize money, came to Boston, received a Swedish protection from the Swedish consul, and shipped on board an American schooner, under Swedish colours, Capt. Charles Masters, bound to Antigua. On our return from that place, were reduced to an allowance of one meal a day of flour and water. The Captain observed that, unless we discovered land soon, we must cast lots. We discovered land the same day, put into Wooden Island, took a pilot on board, went into Castine, and were paid off.

I next went passenger on board the Cossack, letter of marque, to Portland, and thence by stage to Boston

Having remained here a fortnight, I shipped in a Swedish brig for Antigua; and after being out 24 hours, we were taken by the British seventy-four, La Hogue, and went on board. Being questioned as to my country, &c. I answered I was born a Swede, but some one on board declared I was an Englishman. The Captain asked me to enter under him; but I refused. He then ordered the gunner to put me in the coal hole; where I was kept 24 hours, without food or drink. Being brought again on deck and refusing to enlist, I was threatened with two dozen lashes, but still refused. My protection was produced from the Swedish consul in Boston, when the Captain said he could buy such for a cent a piece. He had taken eleven fishing boats, one of which he gave to the prisoners, who, with eight of her own crew, came safe into Boston.

I then shipped on board an American schooner, under Swedish colours, at New Bedford, bound for Bermuda, in ballast. At the expiration of two months, we went as a Cartel to carry prisoners to New London. Here I was paid off, took stage to Boston, shipped in the David Porter, Capt. Ware, went on a

cruise of three months, during which we took an English brig, loaded with rum and sugar, under the Western Isles Fell in with a privateer, Capt. Clark, took an English brig between us, loaded with hides, divided the cargo, gave her up to the prisoners and parted company. A frigate chased us, which we escaped.

Some time after fell in with an English ship, at midnight; and thinking her a man of war, did not go along side till day light. Then fired a gun, hoisted our colours, and she hoisted English colours. We fought at long shot, for about half an hour, when our cartridges being expended, it was agreed to board her. We ran along side, gave her one gun and she surrendered. Her cargo consisted of hides and tallow. We sent her for America, steered for the same ourselves; and after some difficulties and dangers, arrived in a small harbour, near N. Bedford, where I left the vessel, went with the first Lieutenant Fish, to Boston, and remained there a fortnight.

I next shipped again on board the David Porter, Capt. Fish. Took a British brig, laden with fish and lumber; another with rum and sugar, and sent them to America. Chased a letter of marque near Lisbon, but could not overtake her. Were informed by a Portuguese fishing boat, that an English brig lay in Lisbon, laden with money. Waited for her two days, when she came out, and we gave chase. Six men of war heaving in sight, we gave up the chase, and cleared them all. Took a schooner from West Indies, laden with rum; also a brig, off Halifax, with salt, dry goods, new rigging, and three boxes of watches. Took out the cargo, gave up the vessel, and arrived safe at Boston, where we staid one week.

After this, put to sea again.—Were chased by an English Frigate four hours, in a gale of wind, in the Gulph of Florida.—Took the English brig Flying-Fish, off the Western Isles.—Steered for the Brazils and took a schooner, with mahogany, which we gave up.—Set sail for home, and on the way, took a brig with fish and oil.—Arrived at New York, and heared the news of peace. —Worked my passage to Boston.—Shipped with Capt. Paul Post, in a merchant ship for New Orleans.—On our passage, were near being cast away; but got safe up to English Town.—Ran away from the vessel, on account of bad usage.—Went to New Orleans and staid a month.—Shipped in a schooner for Baltimore, Capt. Holmes, arrived, and was paid off.—Shipped in the schooner Chippewa, Capt. Clark; arrived at St. Jago, and remained two months.—Were ordered one sabbath, by the mate, to *holy stone* the deck, which the crew all refused to do. The mate sent a letter on shore to the Captain who immediately came on board, with six other Captains armed with cutlasses. We

were all put in irons, and two sent to prison till the vessel should sail.—Were afterwards released and went to sea in ballast. Stopped at an island where an English brig was cast away and assisted her.—In a gale, lost our mainmast, had our stern knocked out, a man at helm badly wounded, and, two days after, a man killed by a fall, from the fore top sail yard.—Arrived at Baltimore, was paid off, shipped on board the schooner Plattsburgh, Capt. Davies, took a cargo of flour to St. Salvador, and lay there two months. —Took a cargo of sugar to Naples, remained there three months, returned to Baltimore, and was paid off. Here shipped on board the Plattsburgh again, under the command of Captain Hackett.

Peterson's account agrees with Williams's, till the 21st July He then proceeds:]

On the day previous to the murder, I saw Stromer and Stacy conversing together, heard them say there was a cowardly set of men, and saw them throw three handspikes down into the forecastle, but knew not for what purpose. At twelve at night, Stromer and Williams called me out of the forecastle; threatened to take my life, if I did not come on deck; and said all the rest of the crew had agreed to come at that time. Williams, at a quarter past twelve sung out "*a sail!*" Yeiser ran forward and asked where abouts. Stromer and Williams cried out, "*strike!*" John Johnson and John Reineaux took hold of the mate and hove him overboard. He had hold of the jib boom guy, and cried out, "Lord, have mercy and save me!" Frederick answered, "Yes you rascal, I will;" and cut away the guy. Meantime the Captain came running forward, and asking what was the matter, Stromer, Williams and Smith said, "We will let you know in a minute, you rascal;" took hold of him and hove him overboard. After this, Stromer asked me if I would do duty, as usual. I answered yes. I know nothing respecting the supercargo.

[The rest of his narrative, till the arrival in Norway, corresponds with Williams's and Rog's.]

Stromer, Williams, and Onion, not being able to get any of the crew to assist them, were employed in smuggling coffee ashore for four nights, and kept the money to themselves. I left the schooner and went to Christiansand; got a passport for Gottenburgh; went passenger in a boat to Flastrand, in Jutland; thence in a Swedish boat to Gottenburg; went to the seaman's house and police office, and delivered my pass. I was asked what vessel I came to Norway in, and answered, an American schooner. They questioned me no further.

On the 6th of September, I was taken up by the American Consul in my father's house, search was made and the money

found. Being asked how I obtained the money, I answered, I had it of Stromer and Williams. Being questioned about the murder, I declared I knew nothing about it. I was imprisoned, with a block about my legs, weighing thirty pounds. Next morning, was taken to the police office, and questioned respecting John Johnson. I replied I did not know where he was gone; I did not keep company with any of them. Two sailors were brought before me to ascertain, if they were part of the crew I answered I never saw them before. The consul threatened to punish me to the last minute, if I did not tell the truth; and I was sent back to prison.

Next morning was taken to the office again; two blacks were brought before me, whom I did not know. The consul ordered me to a blacksmith; had my block taken off; irons put all over me, weighing 135 pounds; then taken back to prison; put into the dungeon; and kept on bread and water 26 days. I was then taken out; my irons taken off; and had a fit of sickness of 3 months, so that the physicians gave me over. I recovered, however, and had the liberty of the yard four months.

I was afterwards carried up to the court for trial; but nothing was found against me. The papers were sent to the king's court, called the Overett; where the consul tarried three weeks trying to get me convicted, but could not. He asked the Judge if he could not send me to Denmark; but was told he could not, without applying to the king. The papers were sent to the Gottenburgh court, announcing my acquittal. The consul stopped me, till he wrote to the king; I was again put in irons; a block of 50 pounds weight about my legs; and remained in that situation six months, till the papers and answer came from the king. I was then sent to America, and arrived in Boston, October 3, 1817.

An account of my trial is before the public. Onion turned State's evidence, and swore, that after the murder, I was in the cabin and said, "throw the damned rascal overboard," and that, the next morning, he heard me, in conversation with Smith, say, that the Captain had hold of my jacket, and was going to haul me overboard along with him; both which assertions are false. Samberson said nothing against me, knowing me to be innocent. I was sentenced to be hung by the neck, till I should be dead, on the 21st January, 1819. I was taken back to jail, and put in irons, so to remain till execution.

In my country, Sweden, when a man is sentenced to death, he is not put in irons, but permitted to have all the comfort he can. But I forgive all my enemies and persecutors, as I hope to be forgiven; having nothing now to do, but make my peace with God, through the merits of our Saviour and Mediator, Jesus Christ,

who, with the Father, and Holy Ghost, liveth and reigneth one God, world without end. I shall die content if it is God's will, as I know myself to be innocent of the crime, I am charged with; and may the Lord have mercy on me. P. P.

[Peterson expresses the same belief, sentiments, and feelings, on religious subjects, as Rog; and returns thanks to the Rev. Bishop and Priest for their attentions, in similar though not the same, language. He concludes as follows:]

I sincerely thank the Marshal for his civility and kindness in giving good advice, and sending provisions frequently from his own house: also, Mr. Bell for making our prison as comfortable as possible; giving us good advice to prepare ourselves for the awful moment of dissolution; and persevering in preventing intruders, who might wish to convert us from the faith, which we believe to be true, and disturb us in our moments of meditation and prayer. I pray for them, and hope we may meet together in everlasting bliss. Amen.

To the world at large I bid farewell. May all pray to God to give them timely repentance, open their eyes, enlighten their understandings; that they may shun the paths of vice, and follow God's commandments all the rest of their days. Amen.

APPENDIX.

EXECUTION.

On Thursday, Feb. 18, the Sentence of death on *John Williams*, *Francis Frederick*, *Niles Peterson*, *alias Niles Peterson Folgreen*, and *John Rog*, convicted of Piracy and Murder on board the schooner Plattsburg of Baltimore, was executed near the Burying Ground at Boston Neck.

The Procession was formed in the following order :—

Officer of Police, mounted ;
Mr. Sprague, Deputy Marshal, mounted ;
Messrs. Billings and Baldwin, mounted ;
Surgeon, and Superintendant of Police, in a carriage :
Coroner Stevenson, mounted ;
Marshal and Sheriff, in a carriage ;
Two Constables with Badges ;

Constables. { PRISONERS, And Deputy Marshal BELL, and Catholic Clergyman, in a waggon. } Constables.

Two Constables with Badges ;
CART WITH COFFINS ;
Two Aids, mounted.

At the time appointed by the Marshal, quarter past eleven o'clock, the procession moved from the Court House to the place of execution, where, after prayer and religious conversation until near one o'clock, at that hour the prisoners were executed. The day was cold, but fair. A very large concourse of spectators were assembled, to behold the awful ceremony. Mr. Bell, who assisted the Marshal in his duties, called upon the spectators, and read the following address :

"*My Friends*—The Execution of the pains and penalties annexed to the violation of the laws of God and our country, is a scene so awful, that it must at once banish every appearance of levity, and command our highest attention and consideration.

"As the organ of the Marshal, whose important duties require his uninterrupted attention, I expect from this numerous assembly that silence and decorum, which this solemnity requires.

"Need I ask for your quiet attention, while, as the Minister of Justice, he reads the warrant, in which he is compelled to consign to the World of Spirits, the trembling, penitent Malefactors.

"Need I solicit your silence while their Reverend Pastor addresses the Throne of Grace for their Pardon and Peace.

"No—your sense of propriety will ensure the one, and your best feelings will be engaged in the other.

"When the curtain drops which separates the convicts from terrestrial objects, may every aspiration be a prayer to the Throne of Grace for their eternal rest."

After this addsess, the Marshal read the Death Warrant, and concluded with the following remarks :

"I have now read to you fellow citizens, the precept, which, while it authorizes, requires I should deprive these four unfortunate men of their earthly existence, and transport their immortal spirits into the Eternal World. It confides to me a solemn authority and imposes an awful duty. And, fellow citizens, if their crimes, since their fatal commission, or their sentence, may have made their beds, beds of thorns, the delegation of this high authority, and the requirement of a discharge of this painful duty, has not placed me on a pillow of roses.

"But amid the multitude of thoughts which have encompassed me, I have derived consolation from a reflection, that the command of Society is in exact accordance with that high order of Heaven, which directs that "whosoever sheddeth man's blood, by man shall his blood be shed."

"Whatever may be the motives which have brought many of you to witness this sad scene of death, sure I am, that it cannot but awaken in every breast, those pious and solemn feelings so justly due to the occasion ; and that, while, as citizens, you rally round the Officers intrusted with the execution of the laws, you will not hesitate to look, with piety and reverence to Him who is above all, and to join with fervency and true devotion, the Minister of our Holy Religion, in imploring the God of all grace and supplication, in behalf of these unfortunate men, now about to be ushered into the eternal world, and the immediate presence of their God, and to enter on the morning of eternity.

"They are indeed strangers among us, far from kindred, friends or affectionate relatives, and in a foreign land ; but it must be gratifying to you to know, that though the stern hand of Justice hath overtaken them, its corrections have been administered with mildness and sympathy ; as it is a consolation also to believe that from every region there is a pathway to immortality, and that the spirit which Religion has purified and refined, will, when "freed from the body, find its native country ;" for Christianity has assured us, that God is no respecter of persons—but of every nation, sect and people, they who fear him and penitently confess and repent of their sins and rely on his mercy shall find grace to help them in time of need."

At the termination of this Address, the Rev. Father Larrasey addressed the Throne of Grace in a fervent and holy prayer, and the scene was closed.

About ten minntes after they were executed, the Marshal read that part of the warrant which ordered their bodies to be delivered to the Surgeons, if they were called for.—Several Surgeons appeared to take them.

REFLECTIONS.

Public executions are not frequent among us, and when they do occur considerable excitement is visible. Our people are taught, from their earliest childhood, to commiserate the wretch who has committed a crime, while they abhor the deed. Such is the sensibility generally shewn towards those whose lives are forfeited by the laws, that if there are any ameliorating circumstances in the case, the power whose prerogative it is to pardon, is assailed from every quarter with humble petitions and entreaties for mercy. Many think this feeling has been too much indulged in our community, and that clemency has too often been shown to criminals, but we are not of this opinion. This pity to the wretched and guilty, these strong feelings of abhorrence at the frequency of public executions, are proofs of public virtue, for much of patriotism and purity of morals grow out of the affections.—Strike dead the sympathies of the heart, and the head is but a miserable guide. Generous sentiments, often, in the abandoned, counteract erroneous reasoning and prevent bad deeds. Whatever may be the necessity of cutting off the offender the public should never be outraged by the manner. The delicacy of public feeling should be preserved at almost any expence, and therefore no unnecessary form of ignominy or disgrace should accompany a public execution; for the mind, disgusted with brutality, turns with pity from the fate of the sufferer, and vents its indignation at the wantonness and barbarity of power.—There has not been an execution in this Commonwealth for many years that the public mind has not been so perfectly satisfied with the justice of the condemnation that no guard was necessary Every spectator felt as if he had sat in judgment upon the offender, and was perfectly convinced that the sentence was just. No murmurings, no hissings at a public execution ever disgrace the people here. They generally go out to see the dismal spectacle with subdued and religious feelings, and they return deploring the hard necessity that any of their fellow beings should so shamefully die, still reverencing the justice which decrees the expiation. These men were ready to die, and earnestly hoped their deaths would be a solemn warning to others. They were humble, penitent and resigned, full of contrition at their deeds of wickedn ss, but wanted no mercy of man; they had

sought it with prayers and tears at the source of Eternal Mercy, and indulged the hope that they were heard. They acknowledged, with gratitude, the kind treatment they had received from the Marshal, the Keeper of the prison and his attendants —but above all they were thankful for the advantages they had received for religious instruction.

The Priest who attended them was indefatigable in his exertions to bring them to a proper sense of their situation.— He labored day and night to explain to them the nature of crime, the necessity of its being punished by human laws, and the hopelessness of the criminal in another world without contrition and repentance, and cheered them with the promises of the gospel through Jesus Christ, if they were humble and sincerely penitent before God. He instilled into them, day by day, hopes on this basis, and at length had the happiness of seeing the obduracy of the sinful heart yield, and the hardened disposition of the murderer soften. Never did men pass through, in so short a time, a more thorough course of moral and religious discipline It was constant, pure, and we trust effectual The good confessor never left them until they were launched into eternity, and had the satisfaction of knowing that their firmness lasted with their breath, and that their last look on this world was brightened by well-founded belief in their being happy beyond the grave.

Instead of calling in a wretch stamped with ignominy and steeped in guilt to act as executioner, men of the first respectability perform that service here.—Public executions are considered as a dire necessity, and when they must happen they are to be done in all decency and order. The Marshal, and Mr Bell the prison keeper, have treated these unfortunate men with much kindness and delicacy, having frequently fed them from what was prepared for their own tables, and constantly attended to their reasonable and lawful requests—so that they were ready to kiss the hands that tied the fatal cord.

A public execution has, from the earliest history of our country, been conducted with solemn and religious rites.— The people here have never denied the rule from holy writ, "that whoso sheddeth man's blood by man shall his blood be shed"—but still have thought it a solemn and deplorable necessity, and have humbled themselves before God whenever it has occurred.

DEFENCE

OF

MAJ. GEN. CALEB BURBANK,

AND

The Argument of the Complainants,

BEFORE

THE GENERAL COURT-MARTIAL, WHEREOF MAJ. GEN. NATHANIEL GOODWIN WAS PRESIDENT, HELD AT WORCESTER, ON THE 8TH DAY OF SEPT. 1818,

AGAINST

CHARGES PREFERRED AGAINST HIM,

BY

COL. PRENTICE CUSHING AND OTHERS.

Worcester:

PRINTED BY WILLIAM MANNING.....JAN. 1819.

INTRODUCTION.

THE surprise created by the extraordinary result of the trial of Major-General BURBANK, has awakened a strong desire in many to see some account of it laid before the publick.

A publication of the entire records, as made up by the Judge-Advocate during the investigation, would, at first view, seem to be most acceptable—and the General himself, to remove all grounds for even a suspicion of unfairness, would prefer this course ; but the prolixity of the testimony, and the long and multifarious documents spread upon that record, would swell the publication into a large book, which would be both unnecessarily *tedious* and expensive to the reader.

It has, therefore, been deemed advisable to publish only the following sheets, which contain the defence and the remarks of the Complainants, as read before the Court, with some additional notes. It is believed the evidence is so fully taken up and examined in these papers, that the reader will feel no want of a formal and verbal transcript of the testimony and documents, as developed upon the trial.

All who witnessed the trial, or, from day to day, heard the records read, will be satisfied that the defence contains a *full* and *fair* statement of all *material* evidence, without any attempt to shun or pass over in silence any part, that was in any way material to establish or prove the charges.

The reader will, therefore, have a more concise, but as complete and authentick a history of all the material facts in the case, as if he waded through from one to two hundred pages of questions, answers, and *tedious* documents.

Should any one, after reading the trial, inquire how the Court came to the extraordinary result which has long since been made publick—it would be difficult to give a satisfactory answer, without developing facts which will shock the manly, generous feelings that ought to warm the heart of every soldier—facts which, though fully consistent with honest and upright intentions and deportment on the part of the Court, yet might, and probably did operate very unfavourably towards the General, by creating prejudices in their minds against his character and reputation.

It is but justice to declare that the enemies of General BURBANK had long, industriously *sought* after matter of accusation against him, and had been forward, on all occasions, to misrepresent his conduct and calumniate his character.

About the time, and incessantly after these complaints were preferred, it is a notorious fact that exertions of this kind were *redoubled*, and a publick news-paper made the herald of much of the vulgar abuse and scurrility that was heaped upon him without mercy, and frequently without the slightest regard to decency. That the object in reiterating, and in giving a wide circulation to calumnies, was to prejudice him in publick opinion, and create unfavourable impressions

in the minds of those who might sit on his trial, is too apparent to require any proof. And it is but a poor justification of those who act from such low, unworthy motives, that men of sense ought to be proof against calumny. It is too evident that an insensible bias is often created in the most discerning minds, by the slander of those who have neither character nor influence in the community. Is it surprising, then, that the judgment of intelligent and honest men should be warped by the false colouring and misrepresentations of those who claim the character and influence of gentlemen? Indeed, it would be astonishing, if such were not the effect.

That the General has been grossly abused and misrepresented, is a fact so notorious in his Division, that it is difficult to find an impartial man who does not censure the conduct of those who have done it. That he took no measures to counteract the effect produced, is a fact equally notorious. That the design of misrepresenting his conduct and character was to mislead publick opinion, and create unfavourable impressions in the minds of the Court, by encouraging a belief that he was at variance with the officers of the Division, and that harmony could not be restored, except by his removal—is also an undeniable truth. How far this, though false in point of fact, has produced the effect designed, the publick will judge, after examining the complaints, the evidence adduced in support thereof, and the defence made to the same.

It is not the design of the General to impeach the *motives* of the Court; for however erroneous their decision, he does them the justice to say, he believes their intentions were upright. He has, however, deemed it an act of justice due to himself, to lay before a candid publick the foregoing facts, as connected with the issue of his trial, that that publick, with whom he is willing to entrust his character and reputation, may decide whether he has not been treated with *too much severity*. If he were alone in the opinion, that such is the fact, he might distrust his own judgment; but he does not hesitate to say, that the sentiments of a great number of highly respectable and intelligent men concur with his.

COMPLAINTS.

To His Excellency JOHN BROOKS, *Governour and Commander in Chief of the Militia of the Commonwealth of Massachusetts.*

THE undersigned officers in commission within the Seventh Division of the Militia of said Commonwealth, inform and complain against Caleb Burbank, Esq. Major-General of said Seventh Division, for Neglect of Duty and Unmilitary Conduct in his said office, as follows, viz :

NEGLECT OF DUTY.

Specification 1*st.*—That the office of Judge-Advocate within said Division, having been vacant more than one year, and the said Major-General Burbank, knowing of such vacancy, did, during the last year, neglect to nominate any person to fill said office of Judge-Advocate until on or about the 12th of January last.

Specification 2*d.*—That Gardner Burbank, oldest Aid-de-Camp to the said Major-General Burbank, has not, during the last year, kept a correct Roster of said Division, as is required by the 35th article of the 34th section of a law of said Commonwealth, passed March 6th, 1810 ; yet the said Major-General Burbank, well knowing such neglect has not, during the time aforesaid, required the said Gardner Burbank, Aid-de-Camp as aforesaid, to keep such Roster as is required by the law aforesaid.

UNMILITARY CONDUCT.

Specification 1*st.*—That the said Major-General Burbank, on or about the 12th day of January last, the office of Judge-Advocate of said Division then being vacant, intending and attempting to assume authority vested in His Excellency the Commander in Chief, and in contempt of his rights, did presume to *appoint*, and then did *appoint* Austin Denny, Esquire, to be Judge-Advocate of said Division, and requested His Excellency the Commander in Chief to commission the said Austin Denny, pursuant to such appointment.

Specification 2*d.*—That the said Major-General Burbank, after the said Major-General had acknowledged that the said Austin Denny was an unsuitable person to fill such of-

fice, to wit, on or about the 18th day of January last, nominated the said Austin Denny to His Excellency the Commander in Chief, as Judge-Advocate of said Division, and requested him to approve of said nomination, and to commission the said Austin Denny accordingly, in great contempt of His Excellency the Commander in Chief.

Specification 3d.—That the said Major-General Burbank, after he had nominated the said Austin Denny as last above set forth, and after His Excellency the Commander in Chief had disapproved of said nomination, and had notified the said Major-General Burbank thereof, instituted a Division Court-Martial, to be held at Gregory's Inn, in Westborough, within said Division, on Tuesday, the 3d day of March instant, for the trial of Lieutenant Zenas Brigham, of a company of Infantry, within said town of Westborough, and appointed the said Austin Denny Judge-Advocate, pro tempore, to said Court, in contempt of the disapproval of the Commander in Chief as aforesaid, disrespectful to said Court, and to the great injury of the said Lieutenant Zenas Brigham, in taking from him the privilege of a fair trial by Court-Martial, assisted by a proper Judge-Advocate.

Specification 4th.—That the said Major-General Burbank, after the disapproval of the nomination of Austin Denny by the Commander in Chief, as aforesaid, for the purpose and with the intent to keep the office of Judge-Advocate of said Division vacant, that he might appoint Judge-Advocates pro tempore to any Courts-Martial which he might institute or had instituted within said Division, and thereby defeat the power of the Commander in Chief to negative his nominations, if improperly made—and with intent to revenge the disapproval of the said Austin Denny, by the Commander in Chief, as aforesaid, on the 24th day of February last, nominated the Hon. Solomon Strong as Judge-Advocate of said Division, having good reason to believe that he would not accept of said office, nor qualify himself to perform the duties thereof, and never having consulted him about such nomination—he the said Strong then being a member of Congress, and at the seat of government, and unable to attend to the duties of Judge-Advocate at the Court-Martial in the Third Specification above-mentioned.

Specification 5th.—That the said Major-General Caleb Burbank instituted a Division Court-Martial, whereof Col.

Prentice Cushing, of the 5th Regiment, 1st Brigade, of said Division, was President, to be held at Child's Inn, in Mendon, within said Division, on Tuesday, the 3d day of March instant, for the trial of Captain Ezra Nelson, of a company of Artillery, belonging to the Battalion of Artillery, within said First Brigade, upon the complaint of Major Samuel Graves, commandant of said Battalion of Artillery; and the said Court met pursuant to Division orders, and continued in session until Thursday, the 5th instant, when they adjourned to Tuesday, the 24th instant, for the purpose of completing the business of their appointment; and the said Major-General Burbank, in *contempt* of the law, and in *defiance* of the powers vested in Courts-Martial, did, on the 21st of March instant, by his Division orders of that date, attempt to discharge the officers detailed to serve on said Court, and the President thereof, from any further attendance upon the duties for which they were detailed and appointed, and by said order did order them discharged accordingly, they not then having finished the business of their appointment.

All which is to the great confusion, disorder, and disorganization of said Seventh Division. Wherefore the undersigned pray that said Major-General Caleb Burbank may be held to answer to this Complaint, and dealt with as to law and military usage appertain.

Dated this 25th day of March, A. D. 1818.

PRENTICE CUSHING, Col. 5th Reg. 1st. Brig. *Pres.*
SAMUEL DAMON, Lt. Col. of Cavalry, 1st Brig.
JOHN W. LINCOLN, Lt. Col. 6th Reg. 1st Brig.
PETER HOLMES, Maj. 6th Reg. 1st Brig.
ELISHA RICH, Capt. 5th Reg. 1st Brig.
ARNOLD ADAMS, Capt. 5th Reg. 1st Brig.
AMASA WOOD, Capt. 5th Reg. 1st Brig.

Members of a Court-Martial convened at Mendon, for the trial of Captain Ezra Nelson, upon the Complaint of Major Samuel Graves, Commandant of the Battalion of Artillery, in the 1st Brigade and 7th Division of Massachusetts Militia.

THOS. CHAMBERLAIN, Col. 6th Reg. 1st Brig.
SAMUEL GRAVES, Maj. Art. 1st Brig. 7th Division.

Adjutant-General's Office,
Boston, August 13, 1818.

A true Copy.—Attest,

WM. H. SUMNER, *Adjutant-General.*

To His Excellency JOHN BROOKS, *Governour and Commander in Chief of the Militia of the Commonwealth of Massachusetts.*

THE undersigned officers in commission within the Seventh Division of the militia of said Commonwealth, in addition to the Specifications of Charges, as set forth in a Complaint bearing date the 25th March, 1818, do further inform and complain against Caleb Burbank, Esq. Major-General of the said Seventh Division, for Unmilitary Conduct, as is more fully described in the following additional Specifications of Charge, viz :

Specification 1*st.*—For that the said Major-General Caleb Burbank, did, on the 10th of September last, receive a Complaint, preferred by Lot Furbush, Captain of a company of Infantry, in the town of Westborough, in the Second Regiment and Second Brigade of said Seventh Division, against Zenas Brigham, Lieutenant elect of said company of Infantry, and did also, on the 1st day of December last, receive a Complaint, made by Major Samuel Graves, commandant of a Battalion of Artillery, in the First Brigade of said Seventh Division, against Ezra Nelson, Captain of a company in the town of Milford, in said Battalion of Artillery. The said Major-General Burbank, regardless of publick convenience, and without good and sufficient reasons therefor, did, on the 16th day of February last, by his Division orders, order that *two* Division Courts-Martial be convened on the 3d day of March, then next, for the trials of the above-mentioned officers, and by said orders directed that one of said Courts be held at the house of Mr. Gregory, in Westborough, the other at the house of Mr. Child, in Mendon, those places not being more than thirteen miles distant from each other, thereby creating a great additional and unnecessary expense to the Commonwealth, inasmuch as both trials might, with greater accommodation to the 'publick, have been had before the same Court.

Specification 2*d.*—For that the said Major-General Caleb Burbank, assuming to himself a power not vested in him, by virtue of his said office as Major-General as aforesaid, did appoint *two* Judge-Advocates, pro tempore, to attend the Courts-Martial, which were ordered to convene on the same day, at Westborough and Mendon, as is more particularly mentioned in the foregoing Specification.

Specification 3d.—For that a Brigade order, bearing date 21st February last, having been forwarded to Colonel Prentice Cushing, of the Fifth Regiment of the First Brigade and Seventh Division of the militia of said Commonwealth, the same being under seal, the said Major-General Caleb Burbank, in violation of a sealed letter, and having good reason to believe the same an official letter, in contempt thereof, intercepted the said letter, so far as to break the seal thereof, to open and to read the same.

Specification 4th.—For that Major Samuel Allen, jun. having, on the 23d March last, written a letter, and having signed the same as Brigade-Inspector, and addressed to Colonel Prentice Cushing, in his official capacity, and the said letter having come into the possession of the said Major-General Burbank, for the purpose of being forwarded as directed, the said Major-General Burbank, in violation of his honour as an officer, did break the seal thereof, and for the gratification of a childish curiosity, did read the same, which is an evil example to others in like manner to offend.

All which unmilitary conduct tends to destroy all good order and discipline in the militia, and to the disorganization of the Seventh Division. Wherefore the undersigned pray that the said Caleb Burbank, Esq. Major-General of the said Seventh Division, may be held to answer to the aforegoing Specifications of Charge, as in addition to the several Specifications of Charges for Unmilitary Conduct, as set forth in the Complaint, dated as before mentioned—and that he be dealt with as to law and military usage appertain.

Dated this 8th day of April, 1818.

PRENTICE CUSHING, Col. 5th Reg.
JOHN W. LINCOLN, Lieut. Col. 6th Reg. 1st Brig.
ARNOLD ADAMS, Capt. 5th Reg. 1st Brig.
SAMUEL DAMON, Lieut. Col. of Cavalry, 1st Brig.
THOS. CHAMBERLAIN, Col. 6th Regt. 1st Brig.

Adjutant-General's Office,
Boston, August 13, 1818.

A true Copy.—Attest,

WM. H. SUMNER, *Adjutant-General.*

To His Excellency JOHN BROOKS, *Governour and Commander in Chief of the Militia of Massachusetts.*

Humbly Shews,

EZRA NELSON, Captain of a company of Artillery, in the Battalion of Artillery, within the First Brigade and Seventh Division of militia, and complains against Caleb Burbank, Esq. Major-General of said Seventh Division, for unmilitary conduct, and oppression of his inferior officers, as follows, viz :

That the said Major-General Burbank instituted a Division Court-Martial, whereof Colonel Prentice Cushing was appointed President, to be holden at the house of Daniel Child, innholder, in Mendon, on the 3d day of March last, for the trial of the said Ezra Nelson, upon the complaint of Samuel Graves, Esq. Major of said Battalion of Artillery. That said Court met on said 3d day of March, pursuant to their appointment, and the said Nelson appeared before said Court, pursuant to Division orders, issued and transmitted to him for that purpose, and attended the sittings of said Court, from time to time, according to their adjournments, until the 5th day of the same March, when said Court, not having completed the business of their appointment, adjourned without day, subject to be re-assembled by competent authority, and immediately gave notice to said Major-General Burbank of their proceedings, and furnished him with a copy of the Records thereof. On the 4th of April instant, the said Major-General Burbank instituted another Division Court-Martial, whereof Colonel Samuel Mixter, jun. is appointed President, to be holden at the house of Mr. Child, jun. innholder in said Mendon, for the trial of the said Nelson, upon the same complaint of Major Samuel Graves, which was submitted to, and is still under the cognizance and sole jurisdiction of the Division Court-Martial, of which Colonel Prentice Cushing was appointed President, and to which Court alone the said Ezra Nelson is responsible for the offences therein alleged against him ; which Court was ordered to be holden on the 28th day of April instant, and which Court the said Nelson, by Division order of the 4th of April instant, was directed to attend, to answer to said Complaint.

By means of all which, the said Nelson is rendered liable to be twice tried for the same alleged offence, and has been put to great trouble and expense in defending himself against said Complaint before both of said Courts, and has been grievously oppressed and injured, by said illegal and unconstitutional conduct of the said Major-General Burbank. Wherefore the said Ezra Nelson prays that the said Major-General Caleb Burbank may be held to answer to this Complaint, when and where he may be ordered to answer to the Complaint of Colonel Prentice Cushing and others, which has been made to His Excellency against the said Major-General Burbank, and that the Charge above made may be considered as an additional Specification of Charge, and Supplementary to said Complaint of Colonel Prentice Cushing and others.

Dated at Milford, this 30th day of April, A. D. 1818.

Adjutant-General's Office,
Boston, August 13, 1818.

A true Copy.—Attest,

WM. H. SUMNER, *Adjutant-General.*

JUDGMENT OF THE COURT.

THE Court having heard and considered the evidence which has been adduced, both for and against Major-General BURBANK, and what he has offered in his defence, are of opinion and decide, that, as to the Second Specification of the Charge, "for neglect of duty," and the Second Specification of the Charge, for "unmilitary conduct," the Major-General *was not holden to answer :*—that of the 1st and 4th Specifications of the Charge, for "unmilitary conduct," and of the 3d additional Specification of the same Charge, Major-General BURBANK *is not guilty :*—that of the 1st Specification of the Charge for "neglect of duty,"—of the 3d and 5th Specifications of the Charge for "unmilitary conduct,"—of the 1st, 2d, and 4th additional Specifications of the same Charge, and of the Specification of the Charge for "unmilitary conduct, and of oppression of his inferior officers," as stated in the complaint of Capt. Ezra Nelson, Major-General BURBANK *is guilty.*

DEFENCE.

Mr. President, and Gentlemen of this Honourable Court,

THE Defendant asks the indulgence of your patience, while he explains his views of the Complaints against him, as briefly as the nature and character of the numerous charges will permit. He feels all that solicitude which is incident to the peculiarly unpleasant and humiliating situation in which he is placed. To labour even under the imputation of crime is, to honourable feelings, exceedingly aggravating; and whatever may be the result of the deliberations of this Court, it will ever be a source of regret with him, that the most captious officer could find sufficient error in his conduct, to furnish matter for a plausible complaint. He, however, will always have this consoling reflection, that his own motives have been pure, and that he has not wantonly violated the law of his country, nor knowingly trespassed upon the rights of others. His case, this honourable Court will perceive, is of a peculiar character, and has required much attention, and much investigation, to free it from the mysticism in which the Complainants have involved it, and to redeem it from the factitious circumstances, which have been thrown around it, to give the alleged offences an imposing aspect. Crimes and misdemeanours are ordinarily of such a palpable character, as not to require the subtle logick of the schools to make them fully comprehended and understood; and the fact, that these complaints require not only volumes of records, but the aid of *many* ingenious men to prop them up, furnishes the strongest proof that they cannot be supported upon their own merits. To the suspicious character of the numerous Specifications, (some of which have already received their quietus, and others must fall to the ground because they contain accusations wholly unfounded) add the unbecoming zeal of the prosecutors, the assistance they have received in doors and out doors, to procure the conviction of the Defendant, and it is difficult to resist the truth which rushes on the mind, that a spirit of vindictive persecution has prevailed throughout the whole transaction. The Defendant is rejoiced that he lives under a government of laws, and not of men, and that by the wise provisions of these

laws, this honourable board of impartial and intelligent officers is assembled to pass between him and the country. To their decision he will cheerfully submit, having received from them the fullest assurance during this investigation, by the patience and candour they have uniformly evinced, that they can be actuated by no other motives than an earnest desire to discharge their duty, in conformity with the solemn oath they have taken. He will not take up the time of the Court by extending his remarks, but proceed to examine the several Specifications in the *order* in which they succeeded each other at the trial.

The first Specification charges the Defendant with neglect of duty, in not nominating a Judge-Advocate.

The Defendant admits, (and this is the only proof) that he knew the office was vacant about the middle of April, 1817, and did not nominate until the 10th of January following, a period of somewhat less than nine months. It also appears in evidence that there were *no specifick duties* to perform until after the 10th of January, except the trial of Adjutant Jonathan Knight, upon whom a Court was ordered before the vacancy occurred, and the trial was had immediately after. It is also in evidence that many peculiar and perplexing embarrassments attended the nomination.

It is undoubtedly known to the Court that the power to nominate a Judge-Advocate is vested in the Defendant by law, and that he is not limited in *time*, but is left to act according to his own *discretion*. The Court, after having heard the evidence, must be sensible that the ground taken in support of some of the subsequent Specifications, necessarily implies that the Defendant must exercise this discretion in a *judicious* manner, or he will expose himself to be arraigned and punished by a military tribunal. If this doctrine of the Complainants is correct, the Court will perceive that the Defendant, in justice, ought to have, and it would be unreasonable not to allow him, as much time to make a selection in, as the circumstances of the case may require.

Let us then see whether more time has been employed than the peculiar circumstances will justify. It is in evidence that the Defendant was very solicitous that Major Lincoln, the late Judge-Advocate, should continue in that office, and that he, with great reluctance, signed his resignation. It is also in evidence, that after Major Lincoln

was discharged, the subject pressed with additional force upon the mind of the Defendant, as he could not select a person in his Division, the appointment of whom would repair the breach occasioned by the loss of such eminent talents and peculiarly happy qualifications. Add to this the embarrassments and perplexities which have been shewn to exist, viz. that there were several applicants of respectable character, pressing for the office—that having fixed his attention upon one of the candidates who was highly recommended, he found, after much inquiry, that publick sentiment would not justify a nomination—that his views were then directed to another, and upon consultation with his Staff, he ascertained that if he nominated this person, a member of his Staff would take umbrage, and the peace and harmony which had hitherto prevailed, would be interrupted. Add to this the fact, that the Defendant's acquaintance with professional men was very limited; and another important fact, that there were no *specifick duties* to perform, until after a nomination was made—and can this honourable Court adjudge that nine months is an unreasonable term of time? Do not all these facts shew, conclusively, that if the Defendant erred at all in keeping the office vacant, it was rather from anxiety to discharge his duty faithfully and honourably, than from any disposition to abuse the discretion reposed in him by law? Indeed, it seems apparent from the evidence spread upon the record, that he had no selfish feelings to gratify—that he conducted honestly and fairly—and that he was not actuated by any other motives, than a sincere desire to make such a nomination as would do honour to the militia, and give satisfaction to the publick. It must also be apparent to the Court, from the embarrassments already shewn to exist, that it was no easy task to select a person to fill the office of Judge-Advocate, who would give satisfaction to a people that had been accustomed to witness the interesting and happy qualifications of the former incumbent. When we add to this, that many persons were considered as candidates, whose qualifications, though dissimilar, yet were respectable, but none of them, in all respects, what was desired—the task of selecting became both delicate and difficult; as when made, it must be such as to justify the *preference*, or the Defendant would have been subjected to the imputation of a want of discernment, or of partiality and favouritism. Indeed,

in view of all these peculiarly embarrassing and perplexing circumstances, he solemnly avers that he acted with all the promptness, that a due regard to his own reputation and to publick good would justify. It is unnecessary for him to refer the Court to the numerous precedents of offices of much higher trust and responsibility being kept vacant for as long or a longer term of time, where difficulties of a like character have occurred.

The Court will bear in mind, that when he did nominate, he had the counsel and advice of men distinguished for their talents and purity of character. All these facts fully confirm the testimony of the witness, who swears that the Defendant was constantly anxious to have the vacancy filled, and that it was his caution and prudence in endeavouring to select a candidate who would do honour to the office and give satisfaction to the publick, that occasioned the delay. This *caution* and *prudence*, which was exercised with a view to the publick interest, and with an honest intent to discharge faithfully the duty which devolved upon him, is now brought against him in the shape of an accusation. And it is for this honourable Court to decide whether he does not stand fully acquitted of the charge of neglect of duty, contained in this Specification.*

The next in order is the First Specification for Unmilitary Conduct—which charges the Defendant with having appointed, instead of nominating a Judge-Advocate. It has been shewn that it was a mere mistake, for which a suitable apology was made, at an early period, to the Governour, which His Excellency received as satisfactory: indeed, it appears that he declared no apology was necessary. The charge is in no way important, except as it discovers the officious zeal of the Complainants, in hunting

*The War Department of the United States was destitute of a Secretary for many months during the late conflict with Great Britain, in a most critical period, when the duties of that office were ardent and difficult beyond description. Mr. Madison took his own time to appoint a successor, as he and every other President have in supplying all vacancies.——The office of Judge-Advocate in the First Division of the Militia of this Commonwealth was vacant about thirteen months previous to the appointment of the present incumbent.——The office of Sheriff of this county remained vacant several months after the death of the late Mr. Caldwell.——The office of Justice of the Court of Sessions in this county has been vacant for many months, and still continues so.———Instances of this kind might be easily multiplied, as it has been the uniform practice of those who hold the gift of nomination or appointment to offices to take as much time as is necessary to make a judicious selection, whether it be much or little. The foregoing facts require no comment, as the doctrine maintained by the Complainants is repugnant to practice, and absurd in itself.

up misdemeanours, and torturing a mere clerical error into a criminal offence.

The Third Specification for Unmilitary Conduct, charges the Defendant with having appointed Austin Denny, Esquire, a special Judge-Advocate to attend a Court-Martial at Westborough, on the 3d of March last, after the nomination of Mr. Denny had been *disapproved* by the Governour, in *contempt* of the Commander in Chief, and to the great *injury* of Lieutenant Zenas Brigham, in taking from him the privilege of a fair trial by a Court-Martial, assisted by a proper Judge-Advocate.

The evidence spread upon the record, in point of fact, disproves the first part of the charge, as the Court will perceive by attending to the dates. It is alleged that Mr. Denny was appointed *after* the *disapproval* of the Governour. It appears, however, that the order appointing Mr. Denny was issued on the 16th of February, and the disapproval made known to the Defendant on the 24th of the same month. It also appears that the present Judge-Advocate was commissioned on the 27th of the same month. After this commission issued, (Major Strong then being out of the Commonwealth) an *additional order*, dated the 27th, was made to Mr. Denny, conforming to the facts, (the Division Judge-Advocate being *unable* to attend the Court) and with a view to obviate any objection that might be raised from that circumstance. It appears, therefore, clearly, that Mr. Denny was *not* appointed *after* the disapproval of the Governour, but on the 16th of February, during the *pendency* of the nomination, and while the Defendant was in *daily expectation* that he would be commissioned. It also appears in evidence that Mr. Denny, at the time of the disapproval, had in his possession all the papers in the case—that he had made all the previous arrangements for the trial, and that only *four days* intervened (one of which was Sunday) between the disapproval, and the 3d of March, the time appointed for the trial. It must, therefore, be obvious to the Court, that the Defendant could not have countermanded his order, and put another person in possession of the case in season to attend the trial, without adverting to the indelicacy of such a measure, and the violence that would be done to Mr. Denny's feelings by adopting it. It is, therefore, for this honourable Court to determine whether it was not more judicious to permit the

trial of Lieutenant Brigham to go on, than to give additional trouble to the parties and additional expense to the Commonwealth by an adjourned session of the Court.

But the Defendant has another answer to this charge; and while considering it, he will take into the account the declaration of Colonel Hall, by which the Complainants have laboured to fix upon him the imputation of improper conduct in his deportment towards the Governour. They endeavour to shew, and do shew by the *declarations* of Col. Hall, (if rightly understood by the witness) made about the 12th of January last, that the Governor had intimated an opinion unfavourable to the appointment of Mr. Denny on account of his *youth* and *recent admission* to the privilege of practising at the bar of the civil court. Let us now see what the Governour says himself at a period subsequent to this. On one of the last days of January last, Colonel Burbank called on His Excellency to leave the nomination then made, and in the conversation which there took place, His Excellency declared that *his opinion* was not made up as to Mr. Denny, but that he should give the subject all the consideration that its *importance* deserved: and we find that his subsequent conduct conforms to this declaration, for although Mr. Allen (an honourable member of the executive council, and *intimately acquainted* with the *character* and *qualifications* of Mr. Denny) was then in Boston, yet the nomination was not *negatived* until the 23d of February, nearly a month *after* it was made. During the whole of that month, and from that time to this, not a lisp of displeasure is heard from the Governour, either in his official act in negativing the nomination, or otherwise. What stronger evidence than this can the Defendant offer, that the Governour has never considered himself injured, or in the slighest degree disrespectfully treated. But the Defendant would recal the attention of the Court from this remote, unsatisfactory testimony on the part of the Complainants to the substance of the charge. If His Excellency the Governour has been treated *contemptuously*, as is alleged, why do not the Complainants (who seem to *volunteer* their services as the vigilant guardians of his honour) shew some direct, unequivocal token of *his* disapprobation—some evidence that his dignity has been wounded, or his rights violated? If the Court at Westborough has

been disrespectfully treated, as is alleged, why are not the *members* of *that Court* brought to this bar, that *this Court* may hear the story of their grievances from their own lips? Indeed, some of them have been present during this investigation; but the Complainants, aware of their views upon this subject, have cautiously avoided their testimony. If Lieutenant Brigham has been injured—if he has not had the privilege of a fair trial as is alleged—why is he not brought before you to make known wherein he has been injured—to tell what privileges of his have been *disregarded*, or what rights of his have been violated? He lives within a few miles of this place, and his testimony has also been cautiously avoided. If Mr. Denny was not a faithful, able, and impartial Judge-Advocate, why are not the *records* of the Court-Martial at Westborough (of which the government has furnished a copy) laid before *this* Court? This evidence is also cautiously suppressed. In short, during the progress of this trial, not a lisp is heard about the testimony of these persons, nor are these records introduced, which seem to be the only *direct*, and the only *proper*, as they furnish the best evidence to prove the allegations. That they were kept out of sight because they would refute the charges contained in the Specification, must be so manifest to the Court, that the Defendant will not trouble them with any further remarks upon this part of the complaint, as he is confident they must be satisfied that he has *not* treated His Excellency the Governour *contemptuously*—that he has *not* been guilty of *disrespect* towards the Court at Westborough—and that he has *not* in any manner *injured* Lieutenant Brigham, or disregarded his rights.

The Fourth Specification for Unmilitary Conduct, charges the Defendant with having *nominated* the Hon. Solomon Strong as Judge-Advocate, having good reason to believe that he would not accept the office, if the nomination should be approved. The Court will perceive that the Defendant is complained of because he *did* nominate, and because he *did not* nominate—and he is to be convicted, say the Complainants, because he *did nominate*, and also because he *did not nominate*. The Defendant feels that it is difficult to attempt seriously to defend himself against such preposterous, absurd and contradictory charges. He will, however, barely observe, that it is in evidence, from Major Strong *himself*, that the Defendant

urged *him* as far as was decent or proper to accept the appointment; and the Court are apprized that he did accept it, as he is now discharging the duties of that office. This charge furnishes another example of the inquisitorial zeal of the Complainants in attempting to give the most honest and upright conduct a criminal aspect: and the Defendant cannot withhold the remark, that it is trifling with the provisions of law that authorize the appointment of Courts-Martial to vex and harass an officer and a Court with such groundless and frivolous charges.

The next in order is the Fifth Specification, wherein the Defendant is charged with having attempted, by a Division order of the 21st of March last, to discharge from further duty certain officers detailed to serve on a Court-Martial at Mendon. The Court have probably already learned from the evidence in the case, that these officers were ordered to convene at Mendon on the 3d of March, for the trial of Captain Nelson—that they did so convene; and instead of entering upon the duties assigned them, they assumed to act independent of all authority—refused to permit a special Judge-Advocate to organize them into a Court, and forced that Judge-Advocate from the room in which they were assembled. After having made what they call a record of these high-handed proceedings (for they seem to partake more of the character of Bacchanalian orgies, than of that dignified deportment which inspires confidence in judicial proceedings) they adjourned to the 24th of March, and made *their resolution* not to recognize a special Judge-Advocate known to the Defendant. Under these circumstances (the Division Judge-Advocate being out of the Commonwealth) the Defendant issued his order of the 21st of March, *discharging* these officers from further duty; and they (for they are the Complainants) now require this honourable Court to offer *him* up as a victim to avenge the *violated* majesty of the law, because he defeated a repetition of this *solemn mockery*.

That the conduct of these officers was such as to merit severe reprobation, cannot admit of a doubt—that the measure adopted by the Defendant was mild and indulgent, is equally clear; and we will now see whether it is not fully justified by the law of the land, as well as by a sense of imperious duty.

The course of argument will be first to inquire what constitutes *a Court;* and secondly what power and authority a commanding officer, who institutes a Court-Martial, has over the officers detailed to serve on the same, before they are sworn.

I. What constitutes a Court? Does the detailing orders when issued and served? Does the assembling together of the members, and having their rank and places assigned to them? No:—none nor all these circumstances combined can constitute a Court, because they are only preliminary steps by which a Court is created, but do not qualify the members to discharge the duties assigned them.

To be qualified to execute these duties, they *must be organized;* and it is extremely obvious that there is but one mode of organization, and that is by *administering the oath* prescribed by law.

In this the authorities all concur. In Macomb, page 79, and in Tytler, page 230, it is said that the "oaths which are taken previously to the proceeding of a Court-Martial to any trial, form in fact the *essentials* by which the Court is *constituted;*" and it is believed that on careful examination, that whenever the terms organized and constituted are used in relation to Courts in these authorities, they uniformly refer to the act of administering the oath. In Maltby, page 146, it is said, that "when the members are *sworn*, they are *then* a *Court;*" clearly implying that previously they are not a Court. These writers are not introduced here under an impression that they are conclusive authorities, but to aid us in ascertaining what the law of this Commonwealth is upon this subject. There are several provisions in the statute of 1810 relative to the organization of Courts-Martial, the connected sense of which, it is believed, will fully support the doctrine already stated.

In the 31st section of this statute, it is provided that all Courts-Martial shall be *constituted* of a President, a *Judge-Advocate*, twelve members, and a Marshal—that in case there should be any vacancy or vacancies, the *Judge-Advocate* shall fill such vacancy or vacancies from the Supernumeraries—that *before* they shall proceed to the trial of any officer, the *Judge-Advocate* shall *administer* to the President and each of the members *the oath* therein prescribed—and that in no case shall a *challenge* be acted upon, until

the President, Judge-Advocate, and "the *intended* members are sworn."

From these provisions, all of which are contained in the 31st section, several deductions may be made, which will assist in defining the powers and in ascertaining the true character of Courts-Martial.

1. It is apparent from the language of the statute, that officers detailed are only "*intended members*" of a Court, until the right of challenge is either *waived* by the parties, or if claimed, determined in the *negative*.

2. That the Judge-Advocate is expressly made a constituent and an *essential* part of a Court—that *he* and *he alone* can *organize* the members into a Court; for none other has power to fill vacancies from Supernumeraries; and none other, not the President himself, has power to administer the oath.

3. That an organized Court does not exist until a sufficient number of the *intended members* or of the *intended members* and Supernumeraries, duly qualified by having been sworn, are directed to sit on the trial, after all questions arising upon challenge are determined. This must necessarily be the plain, practical construction of the statute; for *Supernumeraries* are directed to attend the *organization* of the Court; that is, they are to attend while the oaths are administered, and until all questions arising from challenges are administered, that vacancies may be supplied if any of the *intended members* should be rejected. It is thence clear that no *organized* Court can exist until these preliminary questions are settled; for until this is done, it is uncertain of whom it will be composed.

4. That the *intended members* are *not qualified* to *try* any questions until the oath is administered. The statute says, they shall not enter upon the trial of any officer until the *Judge-Advocate* has administered the oath to the President and each of the members singly, and the President to the Judge-Advocate. And that they shall not act upon any *challenge* until the President, Judge-Advocate, and intended members are sworn. Taking, therefore, the connected sense of these several provisions, it appears extremely obvious that the statute *prohibits* members from adjudicating upon any question, except under the solemn responsibility of an oath. It is also extremely obvious that what is usually denominated a Court, is only in an incipient state,

and is not either fully constituted or entitled to that appellation, until these provisions are all complied with; nor have they power before this is done to execute the duty assigned them.

Having, as is believed, shewn satisfactorily that no organized Court can exist till after the members are sworn, the Defendant will now proceed to the second inquiry, viz:

II. What power has an officer, who orders a Court-Martial, over the officers detailed to serve on the same, before they are sworn?

In Maltby, page 146, it is said, that the commanding officer has not the power to interfere with the proceedings of a Court when organized; and that when the members are sworn, they are to all intents and purposes a Court, and the commander has then no power to order an *adjournment* or *dissolution;* implying clearly that he may dissolve, adjourn or discharge the members at any time *before* they are *organized*, that is, before they are sworn; and this is conformable to usage and to the law of the land, if there is any law upon the subject, because it accords with good policy and sound sense.

All writers upon Courts-Martial that have been met with or consulted, make a wide distinction between an *organized* Court and officers *detailed* to serve on a Court before they are sworn. It is said that the commanding officer shall not interfere with the deliberations of the former, and the reason appears to be that he shall not hold a rod over them to influence their decisions—that he shall not be allowed so to interfere as in any manner to favour or prejudice the officer on trial. Now this reason does not hold as to officers *detailed* and *not organized;* nor can the force of it be made to apply to them, because no complaint is before them, no parties are before them, and they are not upon the trial of an *issue*. If, therefore, the commanding officer delays or hastens the trial by fresh orders, or discharges those detailed from further service, it cannot effect the final result of the trial, so as to favour or prejudice the parties. Therefore the reason which is given why he shall not interfere after they are organized, has no application before they are organized; and he may safely (as appears from Maltby) exercise his discretion as to discharging them.

It is a fact well known to this honourable Court, and is believed to be in conformity with the practice of officers in

this Commonwealth, that they have a *discretionary* power whether to order Courts upon complaints or not; that is, if they find the charges to be groundless, or there is any other good and sufficient reason why a Court should not be ordered, they are fully justified in refusing to do it.

Suppose, for example, that a complaint should be preferred against an officer for not attending a Brigade review, when by reason of sickness he is too infirm to leave his house, and knowledge of this fact should reach the commanding officer, would he not be *fully justified in refusing* to order a Court-Martial? or suppose a knowledge of the fact should not reach him until *after* he had issued detailing orders, would he not be justified in *discharging* the officers detailed from further duty? or must he, upon every frivolous and groundless complaint, subject the publick to the enormous expense of a Court-Martial? The doctrine last mentioned is too absurd and preposterous for even the Complainants to contend for.

The interest of the Commonwealth, and the interest of the militia require that he should exercise his discretion in all such cases—that the expense incident to such a course of proceedings may be avoided, and that officers may be protected against frivolous and groundless complaints. It is clear, therefore, that the commander of a Division may *order* or *refuse* to order a Court-Martial upon a complaint, and be *justified* in so doing. It is equally clear that he may discharge officers detailed to serve on a Court at any time *before* they are sworn to try the issue, and may be justified in so doing. Indeed it is questionable whether, if he did not, his own conduct might not be made the subject of investigation before a military tribunal; for it would be his duty to prevent a waste of the publick money, and an abuse of power in others under his command.

Having shewn that a Court is not organized until the "*intended members*" are sworn, and that the commanding officer may be justified (and that it frequently becomes his duty) to discharge officers detailed to serve on Courts-Martial at any time before they are sworn, the Defendant will now attempt to show that he is fully justified in issuing his order on the 21st of March last, discharging certain officers detailed to serve on a Court-Martial for the trial of Captain Ezra Nelson, from any further duty.

It is in evidence that these officers convened on the 3d of March, in pursuance of orders at Mendon.—It is also in evidence that the complaint against Captain Nelson was *never* before them—that they were *not sworn*, and consequently were *not organized* into a Court in conformity with the law. The Defendant had, therefore, a right to issue that order, and contends that the circumstances under which it was done will fully justify the measure.

The Court are already apprized that the Defendant took every measure in his power to secure to Captain Nelson a speedy and fair trial—that he selected officers of *high rank*, and authorised Mr. Merrick, a gentleman of more than ordinary promise, and of extensive legal attainments to attend their deliberations as a special Judge-Advocate, (the Judge-Advocate of the Division being out of the Commonwealth and unable to attend) that Mr. Merrick did so attend, produced his authority, and was about to proceed to *organize* the *intended members* by administering the oath, when he was arrested in his progress by the members, who refused to acknowledge his authority, or to recognize him as Judge-Advocate; and after a resolution to that effect, in a tumultuous manner forced him from the room in which they were assembled.

It is also in evidence that they adjourned to the 24th of the same month, and that they sent their *Recorder* (one of their number to whom they had given this *title*) to make known their proceedings to the Defendant. It also appears that the Division Judge-Advocate was out of the Commonwealth from the 3d to the 24th of March, and long after. This is the substance of the history of the doings of the celebrated Mendon Court as it is called, which now lies before this honourable Court, revised, corrected, and enlarged, with commentaries and illustrations, until it has swollen to the size of a folio volume.

The Defendant will now call the attention of the Court to the facts contained in this evidence, and requests them to bear in mind that the *first* order alluded to was dated the 16th of February, appointing Mr. Merrick a special Judge-Advocate, the Governour not having then decided upon the nomination which had been made; and that on the 27th of the same month (a commission having issued for the present Judge-Advocate, who was then at Washington) a second order, conformable to the fact, was issued to Mr.

Merrick, stating the *inability* of the Judge-Advocate to attend the session of the Court, and that Mr. Merrick laid both of these orders before the members. The Court will also recollect that Mr. Merrick had both the orders in his possession, and no direction or request from the Defendant to exhibit the first or to withhold the second, but the course he pursued was from the suggestions of his own mind. Here the Defendant would ask this honourable Court as high-minded, candid, intelligent men, who are vigilant in the protection of their own rights, and indignant at oppression, when exercised upon others, under colour of authority, as men who, under the solemn responsibility of an oath, are to decide upon the issue now before you—whether he did not adopt, in the execution of his duty, every measure which prudence could suggest, or the law of the land require? And whether the refusal of these officers to be organized into a Court, and their neglect in not entering upon the trial of Captain Nelson, is not to be imputed to their own rash, unjustifiable determination to resist the orders of the Defendant, and thus defeat the trial of Captain Nelson?

It appears from their own admissions, spread upon the record, that they *did refuse* to obey his order, and in a violent, unprecedented manner, refused to be organized into a Court; that they rejected Mr. Merrick, the Judge-Advocate, who, by the statute, is an *essential* and an *indispensable* officer of the Court, and virtually resolved not to permit any other person than the Judge-Advocate of the Division, (whether able or unable) to attend their deliberations, although they had already been apprised by the Defendant's order, that he was *unable* to attend. If this honourable Court take along with them these considerations, the Defendant believes they must be satisfied that these high-handed proceedings trampled under foot *his rights*—set at defiance the law of the land, and he regrets to be compelled to say it, were an outrage upon decency itself, and a pernicious example to others.

The Defendant need not describe the peculiarly unpleasant situation in which he was placed, as it needs only be mentioned to be fully comprehended.

It was obvious to him from the facts disclosed, that should these officers meet on the 24th of March, it would not be for the trial of Captain Nelson, but to act over the

same farce again—the same solemn mockery, under the colour of authority, and at the expense of the Commonwealth; for they had declared they would not receive a special Judge-Advocate, and none other could be sent them. And is it not apparent from the whole of their proceedings that nothing was less in their minds than an intention to proceed to the trial of Captain Nelson?

Under these circumstances the Defendant issued his order of the 21st of March, *discharging* them from further attendance; and he cannot doubt that he had a *right* in law, and that it was his duty so to do, as he would otherwise have subjected himself to the imputation of trifling with the rights of Captain Nelson, and of countenancing a waste of publick money. Indeed, he was apprehensive that no other course could justify his own upright intentions; for if he had permitted the officers to assemble from time to time at the publick expense, it would have furnished much more plausible grounds for reprehension than the *act* complained of.

Taking into view the whole history of this transaction, the Defendant feels the strongest assurance that this Court will consider his conduct as honourable, prudent, and lawful.

It is so apparent that he stands justified, that it seems unnecessary to make an additional observation. If, however, it is possible this honourable Court should differ from him in their views of the law, they must be satisfied from the evidence in the case, that no criminal intentions can be imputed to him—that he did not act rashly, but from the advice of men of high professional attainments, who were necessarily better qualified than he was to give an opinion upon an abstract question of law—and that he used his best endeavours to pursue a course which should most comport with the publick interest, and at the same time be justified in law. These considerations obviate all presumption of corrupt intentions, and shew conclusively that he did not act in *contempt* of law, and in *defiance* of the power vested in Courts-Martial, as set forth in the Specification.

CAPTAIN NELSON'S COMPLAINT.

The Defendant will now proceed to examine the Complaint of Captain Ezra Nelson, as it was investigated by the Court, in connexion with the preceding Specification. In this complaint the Defendant is charged with having

made Captain Nelson "liable to be *twice* tried for the same alleged offence, and of putting him to great trouble and expense in defending himself against the *same* complaint before *two* Courts, and also with oppressing and injuring said Nelson by illegal and unconstitutional conduct."

This honourable Court are already in possession of the history of the celebrated Mendon Court, which was ordered for the trial of Captain Nelson, and are aware that if the Specification the Defendant has just been considering falls to the ground, this Complaint is necessarily involved in the same fate.

The Defendant, however, apprehends that the charges in this Complaint can be shewn to be wholly unfounded. It is in evidence that the Defendant did every thing in his power to secure to Captain Nelson a speedy, fair, and honourable trial.

He had officers of high rank detailed to serve on the Court—he directed the members to sit in the neighbourhood of Captain Nelson, and appointed a special Judge-Advocate (the Judge-Advocate of the Division being unable to attend) to be present at their deliberations, whose ability and competency is not denied or questioned by the Complainant himself.

It has also been shown that the officers detailed *refused* to be *organized* into a Court on the 3d of March, and after conducting in a manner wholly unprecedented, adjourned to the 24th of the same month, without having entered upon the trial of Captain Nelson, or, as he says, in his own testimony, without having heard the complaint read, or attempting to arraign him.

Under these circumstances the order of the 21st of March was issued, discharging these officers from further attendance.

The reason and the necessity for issuing that order have already been discussed, and the Defendant thinks he has satisfactorily shewn that it is certain if the officers detailed had been permitted to meet on the 24th of March, that they would *not* have proceeded to try Captain Nelson, as the Judge-Advocate of the Division still remained absent, and they had resolved not to recognize a special Judge-Advocate. It therefore appears that it was *not* the *fault* of the Defendant that Captain Nelson was not tried by the officers

assembled at Mendon, on the 3d of March, but the fault of those officers in *refusing* to be *organized* into a Court.

He feels confident, therefore, that no misconduct can be imputed to him, as all blame rests upon them, and they alone are answerable for any trouble, inconvenience or oppression Captain Nelson may have been subjected to.

In view of these circumstances, and of the testimony under this complaint, the Defendant contends with great confidence that Captain Nelson has not sustained the injuries set forth.

He has been called as a witness, and upon oath swears that it was *immaterial* by which Court he should be tried, and that he was not at any *extra* trouble or expense by reason of being tried by the second rather than the first, except in procuring a plea to the jurisdiction of the second Court. And how is the Defendant answerable for this trouble and expense? He did not advise Captain Nelson to plead to the jurisdiction of the Court, for he had a Court detailed who had jurisdiction of the offence—a Court with whom Capt. Nelson declares himself satisfied, although they overruled his plea—nor did he request Capt. Nelson to take the advice of Attornies upon this subject. If, therefore, he has bought an unavailing, fruitless plea, it must be imputed to the injudicious advice of his counsel, and not to the misconduct of the Defendant; for nothing could be farther from his expectations, than that a plea of that description was to be filed. The folly of adopting such a fruitless measure was Capt. Nelson's, and the expense and trouble ought to be exclusively his. It is not even hinted that he did not have a fair and impartial trial, and one that resulted in a manner most satisfactory to himself.

It is also idle and absurd to contend that he is liable to be tried *twice* for the same offence. It is not pretended that the officers assembled at Mendon on the 3d of March *attempted* to try him. That he was tried afterwards, and honourable acquitted is certain; and it is equally certain that the records of that trial and all the papers are filed in the Adjutant-General's office—and that he can no more be held to answer to the complaint *again*, than any other officer whose case has been once adjudged by a competent tribunal.

It is equally apparent that he has *not been oppressed*; for the only colour of oppression contained in the case is a neg-

lect to discharge him from arrest at the time the officers already mentioned were *discharged* from further attendance; and it is in evidence that this arrest continued only two weeks.

The Defendant need not inform this honourable Court that in the militia an arrest is a mere fiction, or at least a matter of form which ordinarily in no manner affects the person arrested.

The Court will also recollect another fact, that Captain Nelson was not arrested by order of the Defendant, but by the order of Major Graves; and if it was not the duty of Major Graves to discharge him when he was notified of the order of the 21st of March, the most unfavourable construction that can be put upon the omission is, that it was a mere inattention; which can be, in no possible way, prejudicial to Captain Nelson, for this formal or fictitious arrest was continued only two weeks. From a view of the whole transaction, it is obvious that Captain Nelson has not been put to any *extra expense*, nor has he been *injured* or *oppressed* by any default or misconduct of the Defendant, as is alleged in the complaint.

The First Specification of the Supplementary Complaint charges the Defendant with instituting *two* Courts-Martial to be holden on the same day, regardless of publick convenience and without good and sufficient reasons therefor.

As the Legislature has vested Major-Generals with discretionary power to institute Division Courts-Martial, no question as to the legality of the act charged upon the Defendant can be made: indeed it is not raised by the Specification. The only question for the Court to determine, is whether the Defendant "did act" *regardless* of *publick convenience*, and without *good* and *sufficient* reasons. He hopes to satisfy the Court, if they are not already satisfied, that he *did not*.

In the first place he would call the attention of the Court to the circumstance that no attempt on the part of the Complainants has been made to shew any conduct of his tending to fix on him the imputation contained in the Specification.

They appear to rely principally upon the sufficiency of the act charged to be done, to shew the views and motives with which it was *done*.

They indeed have placed on the record a kind of *calculation* of the amount of travel of the officers appointed and detailed to serve on the Court-Martial at Mendon, and of the saving of travel which would have resulted by appointing the Court to be held at Grafton.

The Defendant regrets that it has become his duty to take up so much of the time of the Court as may be necessary in examining this singular production. This calculation purports to shew the distance that the officers detailed reside from the places therein mentioned from Mendon, Grafton, and Westborough. The Defendant has not thought it worth while to call witnesses to prove the various inaccuracies which it contains, because his defence does not rest upon the pitiful consideration whether Worcester is nineteen or eighteen miles from Mendon.

But to give the Court a sample of its inaccuracy, he will call their attention to the circumstance that Sutton is represented as being *nineteen* miles from Mendon, and *seven* miles from Grafton, making *twelve* miles from Grafton to Mendon. Yet the Complainants had before, by an admission upon the record, fixed the distance from Grafton to Mendon at *ten* miles. Surely, the Complainants must have forgotten their arithmetick. But the Defendant will not trifle with the time of the Court by dwelling upon this part of the subject. Admit the calculation with all its inconsistencies to be correct. What is the result? Why, if the Court-Martial at Mendon had been held at Grafton, there would have been an aggregate saving of eighty-one miles travel. And what does this saving of travel amount to? Why, having distributed to each member of the Court his proportion, by examining the pay-roll, it appears that this saving of travel, which, when *doubled*, is one hundred and sixty-two miles, would have saved to the Commonwealth an expense of *fifteen dollars and two cents!* The following estimate, predicated on the calculation in question, and shewing indisputably this result, is submitted for the inspection of the Court.

Names of the officers on the Court at Mendon.	Distance from Mendon.	Distance from Grafton.	Difference of travel.	Expense of the difference of trav.
	miles.	miles.		
Colonel CUSHING,	15	5	10	2:64
Lt. Col. DAMON,	26	15	11	2:39
Lt. Col. LINCOLN,	19	9	10	2:18
Major HOLMES,	26	15	11	2:00
Capt. ADAMS,	10	9	1	0:15
Capt. WOOD,	17	9	8	1:17
Adj't. MORSE,	19	7	12	1:50
Capt. RICH,	18	10	8	1:17
PLINY MERRICK, J. A.	18	8	10	1:32
	168	87	81	$15:02

Fifteen dollars and two cents! And to save this paltry sum to the Commonwealth of Massachusetts the Defendant was bound, (for this is the argument of the Complainants) to order an officer with his witnesses ten miles from home for his trial. To save *fifteen dollars and two cents*, Captain Nelson ought to have been made to endure *this* hardship and expense in addition to the necessary inconvenience of his situation. And has it come to this? that such high-minded men as the Complainants ought to be, or not prosecute before a Court of honourable officers, have employed one of their members, their agent (for they seem to be incorporated to hunt down the Defendant, and to do their business by an agent) in making out a laborious calculation to shew that the sum of fifteen dollars and two cents is of more consequence to the Commonwealth than the hardship and expense which the saving of that sum would have occasioned Captain Nelson? And do they, appearing here as the asserters of the dignity of the laws, and the guardians of the honour of the militia, expect this honourable Court will say that the Defendant ought to have been governed by such low and unworthy motives while deciding upon a measure of so much consequence to Captain Nelson? If indeed he had suffered himself to disregard the rights of Captain Nelson, and to oppress him for the purpose of saving fifteen dollars to the Commonwealth, *then* he would have merited the imputation which his *calculating* accusers endeavour to fix upon him.

If, then, it was proper that Captain Nelson should be tried at Mendon, even at the loss of fifteen dollars to the Commonwealth, the calculation of the Complainants may be laid out of the case; for it proves nothing as to the pro-

priety of trying Lieutenant Brigham at the same Court, nor does it tend in the least to show that in appointing two Courts, the Defendant acted "regardless of publick convenience and without good and sufficient reasons."

The Defendant will now call the attention of the Court to a more important portion of the evidence in the case—evidence of the honest and weighty inducements which actually operated upon his mind when he took the measure complained of into consideration. It is in evidence, and indeed the Complainants have admitted the same thing substantially, that the Court at Mendon was ordered to be composed principally of *field* officers; because of the importance of several questions which it was supposed would arise upon the trial, that the sitting of this Court was deferred for some time on account of the delay of the Governor to decide upon the nomination to the office of Judge-Advocate—that when the Court was finally determined on, it was ascertained that another officer was to be tried. The question then arose whether they should *both* be tried before the same Court.

Captain Forbush, the Complainant against Zenas Brigham, testifies that when the Defendant suggested to him that he should probably order Lieutenant Brigham to be tried before the Court about to be instituted for the trial of Captain Nelson, he objected to the measure, and urged reasons why it would be inexpedient and inconvenient—that among these reasons was the fact that there was no intermediate place between Mendon and Westborough where a Court could be held—and that he, Lieutenant Brigham, and all the witnesses lived in Westborough. It is in evidence also, from Col. Burbank, that soon afterwards in consultation between him and the Defendant concerning these trials, the reasons assigned by Captain Forbush were mentioned, and additional ones taken into consideration—that the additional reasons were the hardship to either of the Defendants to take them and their witnesses so far from home, as must have been done if both trials were had before the *same* Court—the expense which would arise from the travel and extra attendance of the Commonwealth's witnesses and the important fact that the expense of a distinct Court of a rank competent for the trial of Lieutenant Brigham would but little if any exceed the expense which would be occasioned by his trial before the Court at Men-

don, composed as it was of officers of *high* ranks. That this would have been a fact will appear to the Court from an estimate of the probable expense of the travel and attendance of the Court when members were to consist of four Captains and two Lieutenants, and of the probable expense of a trial of a second officer before a Court, whose members were two Lieutenant-Colonels, two Majors, and two Captains. From such an estimate it appears that the difference of expense in the two cases would have been but a few cents over a dollar. And this too without taking into consideration the great expense which would be occasioned to the *parties* and *witnesses* in one case by being obliged to attend away from home during the trial of the other Defendant. Such a calculation (and one predicated upon the same principle was made before the two Courts were appointed) has been gone into, and is subjoined for the inspection of the Court.*

* The members ordered to compose the Court at Mendon were two Lieutenant-Colonels, two Majors, and two Captains; and the Supernumeraries, one Major, and one Captain. Suppose, then, both trials were had before this Court, there would probably have been three days additional attendance of the members and supernumeraries, and of the parties and witnesses in one of the cases. The Court at Westborough was ordered to be composed of four Captains and two Lieutenants; the Supernumeraries were one Captain and one Lieutenant, whose pay for travel and attendance, together with the travel of the President, Marshal and Judge-Advocate, would but little exceed the expense of the extra attendance of the members of the Court at Mendon, as will appear from the following estimate. It will be noticed that it is supposed each individual of the Court at Westborough might travel 20 miles from his home; some in fact travelled more, and others much less; but in a previous calculation, this was a fair estimate It will be seen also that the attendance of the present Judge-Advocate and Marshal is not taken into the account on either side of the calculation; because, being of the same grade on both Courts, the only additional expense was their travel to one Court.

Members of the Court at Mendon.	Pay for 3 days.	Court at Westborough. 3 days.		Travel.
2 Lieutenant-Colonels.	19:52	4 Captains,	26:40	11:73
2 Majors.	16:44	2 Lieutenants,	11:22	4:94
2 Captains.	13:20		$37:62	$16:67
Supernumeraries. 1 Major,	8:22			
Supernumeraries. 1 Captain.	6:66			
Extra travel and attendance of witnesses.	10:00			
	$74:14			

That the hardships of taking a Defendant and his witnesses away from home to attend a Court during the *trial* of *another* officer was also a consideration entitled to great weight, will, it is believed, be admitted, when it is recollected how small is the consideration allowed by law to witnesses before Courts-Martial. Indeed, it would seem that the Legislature intended that this hardship should not, at least in ordinary cases, be imposed on them. Witnesses in civil Courts have just *double* the compensation of those in Courts-Martial, and *no good reason* can be assigned for this difference, unless it be that the trial of all civil actions are had before the *same Court*, and that the parties and witnesses are compelled to attend during the trial of other cases, while Courts-Martial are designed for the trial of particular cases; and therefore the inconvenience of a long attendance of witnesses, is not provided for by any adequate compensation.

In addition to the reasons already mentioned, which certainly, of themselves, go to negative the disregarding of publick convenience, which is imputed to the Defendant, the Court will recollect other facts which are testified of, or appear from a comparison of dates. It is in evidence that both trials could not probably be completed in a week before *one* Court; and therefore if there had been but *one* Court, an adjournment would have been necessary, because the Court of Common Pleas for the County was to be in session the next week, at which the Judge-Advocate, and probably some of the Court, parties or witnesses, would be obliged to attend.

If it be an objection to this reason in the mind of any, that the trials might be had at an earlier or later period, it

[*Continuation of Note from preceding page.*]

Total, for three days attendance,	37:62	Travel,	16:67
SUPERNUMERARIES.			
1 Captain, (1 day)	2:20		2:93
1 Lieutenant, (1 day)	1:87		2:49
President,			5:29
Judge-Advocate,			3:63
Marshal,			2:49
	$41:69		$33:52
	33:52		
	75:21		
Total of Court at Mendon.	74:14		
	1:07 difference of expense.		

will be removed when it is recollected that the Court at Mendon had been appointed at an earlier period, but had been postponed on account of the unexpected delay of the Governour in deciding upon a nomination to the office of Judge-Advocate, and that it had but just then been ascercertained that the trial of Lieut. Brigham was necessary.

That it would have been improper to defer the trial until after the Court of Common Pleas, is apparent from two reasons. Because a material witness in the case of Lieutenant Brigham was about to leave the Commonwealth, and because the approaching badness of the roads would render the assembling of the Court a great *publick inconvenience.*

Such are the reasons which it is proved were taken into consideration before the measure of appointing *two* Courts was resolved on. They shew beyond controversy that the Defendant was not regardless of the *publick convenience*, but was actuated by a sincere and earnest desire to consult the convenience of the parties and of such a portion of the publick as would be concerned in the trials, and also to promote the interest of the Commonwealth. The imputation, therefore, of acting regardless of publick convenience, will not, he is persuaded, be fixed on him by this honourable Court. Were not these reasons, by which it is proved he was influenced, "*good* and *sufficient*" reasons? The Defendant fears that the mere stating of this question may imply a distrust of the understanding and honourable feelings of this Court. Surely, if the reasons which have been shewn were not "*good* and *sufficient*," it would be difficult to imagine a case in which an officer could act upon good and sufficient reasons. But if to consult the convenience of such of the publick as may be compelled to attend a Court, and to avoid imposing hardships upon persons to be tried, while at the same time the publick interest is not disregarded, be good and sufficient reasons, the Defendant has a complete defence to the accusation against him.

The Second Specification of the Supplementary Charges, alleges that the Defendant appointed two Judge-Advocates pro tempore, to attend the two Courts already mentioned.

The fact is admitted by the Defendant, and he hopes that he has already satisfied this Court that he was fully justified in appointing *two* Courts, and if so, it must follow that he is justified in appointing two Judge-Advocates.

He will, however, explain his views of the law as to the power of appointing. It has been shewn that the Judge-Advocate of the Division was unable to attend; the statute then gave him power to appoint a speeial Judge-Advocate to any *particular Court-Martial*, (for sueh is the language of the statute "any particular Court-Martial.") If, therefore, these two Courts had been held on different days, and *one* person had been appointed to attend both, he must have been authorized by an order appointing to each *particular Court*. Now, if this appointment must be speeially to eaeh *particular Court*, it is obvious the Defendant had as good authority to appoint *two* persons to attend *two* different Courts, as he would have had to appoint *one* by two distinet orders to attend each Court. This seems so obviously to be the meaning of the statute, that the Defendant deems it unnecessary to offer any thing further in defenee of this Charge.

The Third Specifieation of the Supplementary Complaint charges the Defendant with having broken the seal of a letter when he had good reason to believe the same an offieial letter, whieh letter was direeted to Colonel Cushing.

It appears that the *letter*, as it is ealled, was a Brigade order directed to Colonel Cushing by Major Allen, the Brigade-Inspector, requiring him to detail eertain officers from his Regiment to sit on a Court, and delivered to the Defendant to forward the same to the person to whom it was addressed, informing him at the same time what the eontents were—that on his way to Millbury he ealled on Col. Burbank to take another order whieh he had directed to the Colonel as his Aid-de-Camp to make out, appointing Col. Cushing President of the Court-Martial to be holden at Mendon—that the name of the innholder was not inserted in the last-mentioned order, nor eould the Defendant or the Colonel, if they ever knew, recollect what it was—that the Defendant said he had a Brigade order delivered him by Major Allen, whieh contained the name, and as it had become important to ascertain what it was, he would open that order. He did open it, and read to Colonel Burbank the name, and requested the Colonel to insert it in the order to Colonel Cushing, appointing him President. It is also in evidence that this eireumstanee took place while the Defendant was sittting in his sleigh, and that the Colonel went from the sleigh into the house, and as appears in-

serted the name of H. Child, whereas the true name is Daniel Child. It is also in evidence from Major Allen, that *he* did not insert the Christian name of Child in the Brigade orders, and that the same must have been inserted since it went from his hands.

From this testimony the Court must be satisfied that the Defendant was made acquainted with the contents of that order before or at the time he received it from Maj. Allen. They must also be satisfied that he had no other motive or design in opening it than that of ascertaining the innholder's name, to enable him to insert it in his own order, which it was necessary should be delivered to Colonel Cushing without delay. When the Court take into consideration these facts, and add the fact that orders are of a character widely different from private letters, and a kind of publick property among military men, especially those who belong to the same corps of troops, the Defendant cannot persuade himself that this honourable Court will view his conduct as in the slightest degree criminal. Indeed, the urgency of the reason which induced him to open the order, seems fully to justify the act.

The Fourth and last Specification charges the Defendant with opening and reading another letter from Major Samuel Allen, jun. to Colonel Cushing, in violation of his honour as an officer, &c.

It is in evidence by the admission of the Defendant, that he did open this letter as it is called, (which was also a *Brigade order*, dated the 21st of March last) and that it was enclosed in an envelope to the Defendant, *informing* him of its *contents*, and requesting him *to see* that it was *delivered in season*. It appears also that the Defendant requested Mr. Bond, a person who lives with him to read this order so critically as to be able to recollect its *contents*, and to deliver it to Colonel Cushing, which was executed by Bond.

It is most apparent here also that the Defendant *knew* what were the *contents* of this order before he opened it, which obviates all presumption that it was done from an idle curiosity, or from any improper motive, especially when we take into connexion with this the fact that he has for many years held a commission in the militia, and had probably seen and made out thousands of orders. Indeed, he could have been actuated by but one motive, as appears from the testimony of Bond, and this motive was to

be able to prove that Colonel Cushing *received* the order in season; and for this reason Bond was desired to *recollect* its contents and to deliver it. Take in connexion with this the testimony of General Davis, who swears that it has generally been the custom in this Division to transmit orders unsealed, that *those persons* who deliver them may be able to *testify* as to their contents, if it ever becomes necessary to make such *proof*—and the motives of the Defendant stand fully justified.

Indeed the charge itself does not impute any criminal conduct to the Defendant; it is not there suggested, nor does it appear in testimony that Colonel Cushing received the slightest injury or inconvenience from the alleged "unofficer-like conduct."

From all the circumstances connected with this transaction, it cannot be doubted that the Defendant had no other motive that induced him to open either of the Brigade orders, than an earnest desire to promote the interest of the publick and of the militia, by removing all grounds for future controversy.

The Defendant will despatch these two pitiful Specifications, (for he has no more time to bestow upon them) by remarking that they furnish another example of the industry and zeal of the Complainants in perverting upright intentions into misdemeanours.

The Defendant has now gone through with an examination of all the charges exhibited against him, and asks the indulgence of the Court but for a moment longer, if their patience is not already exhausted.

He begs them here to pause, and review the roll of charges which have been exhibited against him, where trifles light as air are made to assume the aspect of crimes and misdemeanours. Some of these charges have been found to rest on loose, inoffensive conversations, cautiously noted by spies upon his words and his actions, and carefully assorted for the present purpose. Others, upon matter equally unimportant, collected with inquisitorial secrecy, and the whole have been prosecuted with a zeal better suited to the violence of a star-chamber court, than to the forbearance of one constituted of high-minded, independent freemen, who, he trusts, have no feelings or resentments to gratify at the expense of justice.

It was not enough that the government had furnished able, independent and intelligent council to conduct the prosecution : it would not answer the views of the Complainants to entrust the trial to his hands, lest a conviction should not be the result ; but they have procured aid out doors and in doors to prop up and support complaints that would fall from their own weakness, if not upheld by factitious circumstances.

The Complaints, and Supplementary Complaint, in which are embraced the *numerous* charges, purport to be a history of the *same* acts, divided, subdivided and *amplified*, until they have furnished materials for a *book* which has been put to the press and published. There has been time and opportunity to examine it, and the Defendant does not hesitate to declare his firm belief, that the Court must be fully satisfied that these complaints themselves exhibit as strong evidence of a gross attempt to harass and vex an officer with frivolous accusations as ever was witnessed by a military tribunal in this Commonwealth. And in connexion with this he entreats the Court to consider the uniformly hostile conduct of some of the prosecutors, their unabated zeal, and the important fact which should never escape recollection, that *one* of them was *directed* to *withdraw* the complaints, if the Defendant would *resign* his commission—and he believes they cannot for a moment be at a loss how to account for the deep interest which has on *all* occasions manifested itself to *procure* a conviction.

Indeed it is most manifest that it is no part of the *plan* of the prosecutors to redress a violation of the law of the land, or bring a publick offender to justice; but either to remove an obstacle in the way of inordinate ambition, or to gratify personal and unprovoked resentments.

The Defendant, however, has no time to extend his remarks ; and he believes it will be unnecessary, as the Court will supply any omissions in this hasty and imperfect view of his case. He cannot, however, dismiss the subject, without making known his sincere acknowledgments for the candour and patience they have evinced during this long and tedious investigation ; and he believes the result of their deliberations will be such as will accord fully with the solemn responsibility under which they act.

CALEB BURBANK.

REPLY OF THE COMPLAINANTS.

Mr. President, and Members of this Honourable Court,

THE patient and devoted attention paid by the Court for many successive days to the investigation of the charges exhibited against Major-General Burbank, has rendered a minute discussion of the merits of the trial both unnecessary and improper. To address you, gentlemen, upon the *character* of the complaint, and the *effect* of the evidence in its support, would be either grossly to arraign your intelligence, or unjustly to distrust your judgment.

Yet, although it would be disrespectful to obtrude upon your attention an elaborate argument in support of the prosecution, it may be expected that we should consider the objections taken, and the defence offered by the accused.

Unfortunately for the Defendant, he has submitted to this Court the opportunity of observing with what difficulty the means of justification are obtained, and with how great inconsistency and absurdity they are at different times attempted to be applied.* The path of honour is direct: the resort to truth for protection is obvious. The soldier, above all men, should place his security in the honest sincerity of his motives, and the open and artless display of his actions. In the spirit of his appropriate character, he courts inquiry, and covets the scrutiny of investigation. When, therefore, concealment is the refuge of the officer, and objections to the *form* of accusation, his reply to imputations of guilt, his motives may be examined with severity, and his conduct judged without indulgence.† Gratifying, indeed, to the Complainants, is the reflection that there are those in commission, high in rank, and held in honour in their own commands, wearing the insignia, and feeling the responsibility of soldiers, to constitute a tribunal, before whom the imputed offences will be brought

* The following pages will enable the reader to determine with what grace the charge of inconsistency and absurdity comes from the mouths of the Complainants.

† The same overbearing disposition manifested itself from the commencement to the end of the prosecution. The Complainants, during the trial, seemed to be incensed, because the Defendant took measures to shew the groundlessness and injustice of the charges preferred against him. The publick will be able to infer from this and other circumstances, whether the accusations sprung from personal hostility to the Defendant, or a regard to the publick good.

to strict but just account. It is not our office to aggravate guilt, or to urge to conviction. Duty, the soldier's law, impelled to the exhibition of charges against the Defendant, believing that he had conducted unworthily, as the head of this Division, we felt that acquiescence in the *continuance* of his *authority* would reflect disgrace upon our own stations, and therefore complained against him. In thus making an appeal to military men, we sought rather their judgment upon the honour of our own commissions *under him*, than the sentence of a Court for his removal.* Judge then, men of honour, between him and us. Determine if his command does justice to the character of those who are subordinate in situation. Can he longer continue to wear his sword without reproach to this Division? Is it compatible with the feelings of the soldiery of our Commonwealth, of the distinguished and high-minded officers of our militia, to recognize in him a superiour, and to exercise the duties of office under him? If so, it shall be decided by this Court. The Complainants will not object that he shall remain *their* commander; for by the same judgment he is worthy to be your fellow officer, and in turn perhaps *your judge*, if, unfortunately, you also may be unjustly accused as military offenders.†

To the First Specification of Charge of Neglect of Duty, in not nominating to the Commander in Chief a suitable person to fill the office of Judge-Advocate, vacant for the period of one year,‡ the Major-General has urged a two-fold reply:—First, that there were several candidates, and a difficulty in the selection—and, secondly, that there were no duties to render the services of that officer necessary. It is certainly a subject of curious remark, that an officer who so frequently resorts to the precise and technical rules of the civil Courts, in objection to the *form* of the complaint, should be satisfied with so vague and indefinite testimony as is produced by him in exculpation from the

* It is a well known fact, that in the onset the Complainants never contemplated the removal of the Defendant from office, so little confidence had they in the *weight* of accusation, if the charges had been proved as alleged.

† How far such *insinuations* as are contained in this paragraph are justified by any thing disclosed on the trial, the reader will judge when he is informed that several members of the Court declared, that it was the *unanimous* opinion of that body, that no moral guilt attached to the Defendant; and some of the Complainants, at least, have been heard repeatedly to make similar declarations.

‡ The Defendant nominated a successor in about nine months after he was acquainted with the vacancy.

charge. It is reasonable to inquire, who were these numerous candidates, and what were their pretensions to the office ?*

The Court are informed by Colonel Burbank, that immediately upon the vacancy, one candidate offered, who was recommended, and whom the Major-General inclined to favour ; but on inquiry, he was informed that this candidate had not " the peculiar talents suited to the office." Another presented himself, but his pretensions were dismissed—because his appointment would not be agreeable to a member of the Division Staff ! And the Major-General then indulged himself "*for the residue of the year*" in taking time to inquire and ascertaining qualifications. The only testimony in the case, coming from Colonel Burbank, that "*fac totum*" of the Major-General's confidence, and the only person with whom there is any evidence that he advised, proves *but two* candidates for the vacant office, whose qualifications so distracted the judgment, or whose pretensions so exclusively occupied the attention of the Major-General, as to prevent a preference of either, or the nomination of any other person, whom pride or modesty might have restrained from applying for the appointment. And where else, except in the testimony of Colonel Burbank, is the proof of any inquiry by the Major-General into the " qualifications of candidates ?" The two alluded to were soon disposed of. Who they were, it is neither *necessary* or *proper to inquire.* No names are given by the witness, and no other witness is adduced to testify to inquiries made of, and recommendations given by him. And to whose qualifications does Colonel Burbank allude when he speaks of the Major-General "*taking up the residue of the year in ascertaining qualifications ?*"—Surely not to those of Mr. Denny, whom he afterwards did appoint. For the Major-General will hardly admit that he considered him an *eligible* candidate before his admission to practise at the bar of the inferiour Court. This did not take place until the second week in December ; and the discharge of the former Judge-Advocate was on the 20th of March preceding. For more than nine months the office

* This the Defendant was very desirous of doing, and offered testimony for that purpose, which was objected to by the Complainants and the Judge-Advocate, and precluded by the Court ; so that, at the instigation of the Complainants, he was prevented from showing what they would here intimate, is left uncertain.

was vacant, without a suggestion that more than two persons applied for it; against one of whom the objection, "that *he* had not peculiar talents for the office," is not made, but merely *that his appointment would not be agreeable to a member of the Division Staff!* Who this member of the Division Staff was, is not now left to conjecture, from the circumstance that the *witness* is the only one of that Staff who knows of the existence of that objection. Is it, then, true that there was a difficulty in supplying the vacancy, arising from the number of candidates; or is the Major-General necessarily restricted to a selection from *applicants?** The office is now honourably and satisfactorily

* It has already been observed in the defence, that the law only makes it the duty of Major-Generals to nominate to the office of Judge-Advocate, but points out no *limitation* or *restriction in time*, leaving them to act according to their own judgment and discretion, when vacancies occur in their respective Divisions. That this is the plain meaning of the statute cannot be denied; and that this provision is wise and salutary, is extremely obvious, when it is considered that time and opportunity for inquiry and reflection are essentially necessary in the discharge of this duty. Indeed it is most manifest that selecting a suitable person is so exclusively an exercise of reason and judgment, that if a given time were assigned by law, unless very ample, the most pernicious consequences would flow from it, by compelling officers to nominate, when *unprepared*. This truth is so apparent that it is believed an instance cannot be pointed out, either in the civil or military departments of this Commonwealth, or of the United States, where an officer is not left to act according to his own discretion and judgment, and to employ as much time as he deems expedient, when, in the course of his duty, it becomes necessary to nominate or appoint persons to officiate in subordinate stations. The practice of all on whom this duty has devolved, has been predicated upon this interpretation of the law; and it accords so fully with publick sentiment, with reason and with justice, that it is believed the propriety and legality of taking ample time to deliberate was never questioned before this trial. The tendency of compelling the Governour to nominate Judges of civil Courts, and of compelling Major-Generals to nominate Judge-Advocates, before they have had time and opportunity to make a judicious selection, would be to tarnish the bright character of our judicial institutions, and corrupt the fountains of justice, by elevating to these important stations unsuitable persons. The requisite qualifications of candidates are almost exclusively of a moral and intellectual character—a knowledge of which is sometimes derived from personal acquaintance, but more generally through the medium of publick opinion, or of the opinions of impartial, intelligent individuals. The method, therefore, by which the information necessary to a judicious selection is acquired, implies that time and opportunity for inquiry and reflection is absolutely essential. When we add to this the competition which frequently exists between candidates, and the influence of distinguished men, which is often exerted to favour the pretensions of one and another, we need not be surprised at the long delays which frequently occur. That considerations of this kind have great weight whenever they exist, is evident, as delay has almost uniformly been the consequence. The examples are numerous, and we shall, to illustrate the position, cite one or two which are familiar to the recollection of many.

The highly important and responsible office of Sheriff of this County was kept vacant for many months after the death of the late Mr. Caldwell, because there was a competition for the office. The office of Judge-Advocate of the First Division was vacant after the decease of Major Richardson more than thirteen months. The office of Justice of the Sessions for this County was vacated by the death of

filled ; and yet it might have remained vacant forever, had the Major-General indulged in the idle expectation that the present officer would have solicited his nomination.* As if aware, however, of the folly of relying, in his justification against the charge, upon any difficulty in selection from the number of candidates, the Defendant takes another position, independent and inconsistent, *as a motive of conduct*, with the former matter of excuse. He alleges that there were no duties to be performed by a Judge-Advocate, which rendered the appointment of that officer necessary.

the late Colonel Crosby, whose place has not as yet been supplied, although the Court has held two Sessions since. Precedents of this kind might easily be multiplied, but it is unnecessary ; and these have been selected only because they are familiar to the people of this County. It may not be amiss, however, to show that the Executive of the United States has practised upon the same principles. During the late conflict with Great-Britain, the War Department was destitute of a Secretary at a most critical period for many months ; and the present Executive, then Secretary of State, discharged the duties of both offices. It is, perhaps, unnecessary to observe, that the Secretary of War, from the character and duties of his office, directs, controls and governs the military affairs of the United States.

It cannot be necessary to multiply these examples. Vacancies in the offices here mentioned are filled upon the same principle, and in much the same manner, as that of Judge-Advocate. Yet neither the Executive of this Commonwealth, nor of the United States, has been impeached for mal-administration, or neglect of duty, or abuse of power, in omitting to supply vacancies. Indeed, the rancorous zeal of party spirit, in times of the greatest political animosity, never alleged this as an offence, or breach of law, against either.

The position, that an officer who holds the right of nomination is free to act according to his own judgment and discretion, and that he is not bound to discharge that duty when it devolves upon him, until his mind is prepared, seems to be well established.

Nine months' delay, then, of itself, furnishes no proof of neglect of duty in the Defendant, as his mind might or might not have been prepared to act ; for the selection of a candidate may be easy or may be very difficult. The Defendant must necessarily be the sole judge of the period when he is prepared to execute this duty ; as he alone can tell when his judgment and reason assent to his acts.

The only possible question, therefore, which can be raised, (and perhaps to grant this is entirely gratuitous) is whether the Defendant did nominate as soon as his own mind was made up upon the subject. The evidence shows that a competition of respectable persons existed for the office, and was supported by the recommendations of distinguished men. It also shows that the Defendant was constantly and sincerely anxious to have the vacancy filled, from the time it occurred, until he nominated. It therefore shows all that is necessary to exculpate him from the charge of neglect of duty, as set forth in the Specification ; for it shows that he did all any person could do in like circumstances, consistent with integrity. It shows further, that no specifick duties for a Judge-Advocate occurred during the vacancy ; and therefore that the publick suffered no inconvenience from the delay.

It shows in fine, that his conduct conformed to the practice of other officers who have similar duties to perform ; that it was conscientious and honourable, and that the accusation is unfounded. As such is the fact, it may not be improper to add, that the records do not furnish the slightest evidence that he acted from any but the purest and most upright motives.

* The reader will bear in mind that the Defendant was complained of for nominating the present Judge-Advocate, the person here alluded to.

The evidence disproves this attempt at justification. Adjutant Knight was actually tried by a Court-Martial more than a month after the discharge of Major Lincoln. A complaint was preferred against Lieutenant Brigham on the 10th of September, upon which the Defendant, some time afterward, ordered his trial by Court-Martial. The testimony of General Town proves that not long after this, and while the office continued vacant, the Defendant expressed his opinion that Captain Nelson ought to be complained of for trial.* There, then, *is* evidence, that not only there were immediate and repeated occasions to supply the office of Judge-Advocate, but that these were known to the Defendant at the time. His excuses are, therefore, without foundation; and in urging them upon the Court, he admits the necessity of exculpation, but wholly fails to produce it.

To the Second Charge, of Unmilitary Conduct, as alleged in the First Specification, the Defendant urges in excuse his ignorance at the time of the positive provision of the statute, in reference to the appointment of a Judge-Advocate. It is humbly apprehended that this attempt at apology is rather an aggravation of guilt. His relation to the office of Judge-Advocate is learnt on the very page of the statute book, which restricts him to a *nomination* of the officer. Shall it be permitted to him to plead ignorance of the militia law, the authority from which he derives his office, and by which he discharges its functions—the directory of conduct alike to him, and to those under his com-

* It is necessary to correct the erroneous impression which this statement, if taken as it stands, would make on the mind of the reader. It is true the trial of Lt. Knight was had after the discharge of Maj. Lincoln; but by reason of delay in forwarding the discharge, a Court was detailed and the time appointed for the trial, so near at hand, when a knowledge that a discharge had been granted reached the Defendant, that it was impossible for him at that late period to supply the vacancy. He therefore appointed Major Newton a Judge-Advocate *pro tempore*, to officiate at that Court; and the duties were accordingly discharged by him. The Complainants were so well satisfied with the propriety and legality of this measure, that no mention is made of it in the complaints. In regard to Brigham's case, it appeared in evidence that a consultation was held by the Defendant with his Staff, a member of which was particularly acquainted with the facts, and it was considered to be inexpedient to order a Court. A Court was, however, afterwards ordered, upon a further representation of Captain Forbush, the Complainant, which representation was made long after the nomination of Mr. Denny. The nomination took place immediately after the complaint against Capt. Nelson was made. All these facts appear on the record, supported by the testimony of witnesses, and show conclusively that there were no specifick duties for a Judge-Advocate to perform during the vacancy, and therefore that the publick was in no manner injured by the delay.

mand, beyond and without which *he* can neither exercise power, nor *they* be compelled to obedience! More reasonable would it be, to admit the private soldier to allege, in excuse for neglect in an article of equipment, that he did not know the requirement of law, than that his commanding officer, with the law put into his hands by the government, and at the expense of the soldier, should be admitted to prevail on this ground of justification. Let it be put to the Defendant to decide upon the excuse of a man, that he was ignorant that the law required him to be supplied with a *priming-wire* and *brush;* and upon his decision of the merits of such a plea, the Complainants would cheerfully rest the decision of this part of the Major-General's defence. Ignorance and inadvertence are but paltry excuses in the mouth of an officer; and he, who has occasion to resort to them, must be unjust to his station, or consent to wear his commission at the expense of military character. But it is said that for the impropriety of attempting an "*appointment*," an apology has been offered to the Commander in Chief. Be it so: the feelings of the Commander in Chief may be thus satisfied that no indignity was *designed* to *him;* but the office of the Major-General is not the less degraded by the blunder.*

The imputation of Unmilitary Conduct, as alleged in the Third Specification of Charge, is attempted to be repelled by proof of the qualifications of Mr. Denny for the office of Judge-Advocate; and witnesses and letters of recommendation are introduced in vindication of the propriety of his appointment. It is readily admitted, if Mr. Denny was qualified at that time to sustain the office of Division Judge-Advocate, no censure can attach to the Major-General, and no prejudice was done to the rights of Lieutenant Brigham, by his special appointment to the Court at Westborough, as alleged in this Specification. In support of one charge, we are thus compelled to an examination of his qualifications; and reluctantly do we approach this most delicate subject.

Mr. Denny, upon the engagement of the Major-General, and by his own voluntary consent, is placed before the observation of this honourable Court, through this trial, and

* It is only necessary to remark, that notwithstanding all this invective, the Defendant was acquitted of the Charge contained in this Specification.

is present at this discussion.* On the one hand, the Complainants could not willingly wound his feelings by a precise examination of his qualifications for the office; nor, on the other hand, will they do themselves the injustice to admit that he has any just pretensions to precedence over others of like age, education and advancement in his profession.

The recommendations so ostentatiously displayed in his support, are but *miserable*† *auxiliaries* to the cause of the Major-General. Ignorant as he confessedly was of the merits of the candidate, to whom should he have resorted for advice on this subject? Assuredly it was to have been expected by the officers of his Division, that they should have been of his Council, if advice was to have been sought in the nomination. Was it decorous, that in relation to an office of immediate interest to the militia of the Division, rank and station, and military responsibility, should be passed by, and private friendship and favouritism alone consulted? With whom is the Judge-Advocate connected in his official station? Not with the civil magistrate or the private citizen, but with those in commission, whose Counsellor and Advocate he is appointed to be; for whose benefit the office was instituted, and in whose presence its duties are to be discharged. Was it not, then, *degrading* to the character and feelings of the officers of the Division, that in this nomination not a single one of any rank should be consulted, but the *recommendation* of *men* should be preferred, who, however distinguished as citizens, are themselves exempt from the hazard of suffering by an improper appointment, and who, *even now*, will not profess the most superficial acquaintance with the "peculiar qualifications suited to the office?". We appeal to the members of this honourable Court; to you, Mr. President, to the Brigadiers and officers of high rank who compose it, for just sentiments on this subject.‡ Which of you,

* Mr. Denny had no reason to shun the observation of the Court, or to avoid being present at the discussion.

† Those "*miserable auxiliaries*" were letters from the Hon. Judge Paine, the Hon. Joseph Allen, and the Hon. Oliver Fiske, recommending Mr. Denny to the attention of the Defendant, as a person qualified to discharge the duties of Judge-Advocate.

‡ This ludicrous idea (it is difficult to make use of a milder expression and do the argument justice) was frequently lugged in during the trial; and here again it occupies a page. It amounts to nothing more nor less, than that men, however distinguished for their talents and discernment, if

if on trial, would not feel indignant at such marked disregard of your rights* and character? Let the Major-General, either in the independent spirit of his station, make the nomination upon his personal information and knowledge of the individual, and manfully take the responsibility of its propriety, or let him seek the advice and support of those associated with him in duty, and who may be alike affected by the character of the person designated to the office. But the demerit of the Major-General, in relation to this *special* appointment, is not to be tested only by the sentiments of honour and propriety. There is proof direct, and palpable proof, of his persistence in errour, and of his own consciousness of misconduct. Did he not acknowledge the impropriety of such an appointment before he had the temerity to make the nomination to the Commander in Chief? Will this honourable Court but advert to the testimony of General Town, who swears to the confession of the Defendant, in the Adjutant-General's office, that the candidate whom he attempted to appoint, and whom he afterwards nominated, was *unqualified for the office*, and to like declarations subsequently made to Col. Cushing? Will this Court but permit an allusion to facts of notoriety, in further proof of this positive want of qualification? It surely cannot be just occasion of offence to any, that they are barely mentioned. When the appointment of Mr. Denny as Judge-Advocate *pro tempore* was made, he had given no exhibition of military talent, by the previous discharge in the course of his life of a single military duty.† In his person, also, by the providential infirmity of his right arm, he was disabled from the *appearance* of a soldier; and although it be far from the hearts of the Complainants to reproach him with misfortune, they do claim that his in-

they have never been honoured with a military commission, are incapable of determining who has suitable qualifications for the office of Judge-Advocate, the duties of which are not materially dissimilar from the ordinary routine of business in a Court of civil judicature.

If one could set himself down seriously to refute such an idle, far-fetched argument, it would be easy to show that it proves too much; as the Governours of this Commonwealth, who have the right of *negativing* nominations, and our Legislators who *elect* to the highest military offices, are generally mere magistrates, or private citizens, as the Complainants are pleased to call the honourable gentlemen who recommended Mr. Denny.

* What rights are disregarded? It cannot, surely, be contended that the Defendant was under obligations to consult any one in or out of commission.

† This is an errour. The fact is, Mr. Denny constantly did duty in the militia, until his arm became infirm.

firmities shall not be received as recommendations for appointment to office.* At that time, also, he was but just admitted to practice ; the very junior member of the profession in the county, who had given no earnest of capacity as counsel, nor talent as an advocate, in a single issue before a civil Court ; who had not enjoyed the opportunity of exhibiting himself upon a publick occasion, or of justifying the confidence of a private engagement.† Let the Court mark, also, the sense of the qualifications of this gentleman, entertained by the Defendant at the present moment. He, whom he could have appointed military counsellor to a whole Division, and special Judge-Advocate in the trial of an officer under his command, is now, with more experience and better preparation, but *one third* of his own reliance for military counsel on this occasion. What greater injustice could be done to the pretensions of Mr. Denny, in the view of this Court, than for the Major-General to exhibit such distrust of his competency to manage his defence, as to call to his aid the talents of *two* professional gentlemen, whom he had passed by in his nomination to the office of Judge-Advocate ? If Mr. Denny is satisfied with the *compliment*, the Defendant is welcome to the *proof* it furnishes of sincerity in the opinion of his qualifications at the time of the appointment.‡

* It was in evidence that Mr. Denny's physician certified that the infirmity was temporary, and one that would probably soon be removed.

† Mr. Denny must plead guilty to the charge of being young in years and in practice ; but until it can be shown that a *young* man is *incompetent* to discharge the duties of Judge-Advocate, because he is *young*, this argument cannot be admitted as having any weight. The present Secretary of War, who is at the head and the principal director of military affairs in the United States, never held a commission, and is not far from 30 *years* of age.

‡ It has been already remarked by the Complainants that the office of Judge-Advocate is now "*honourably and satisfactorily filled.*" It was the duty of this officer to conduct the prosecution on the part of the government. The reader will probably be surprised, after perusing the above *triumphant* argument, to learn that the former Judge-Advocate, and Major Newton, were associated with this gentleman, as the counsel of the Complainants. It therefore appears that *they* were unwilling to trust the management of the prosecution to a Judge-Advocate with whom they *voluntarily* declared themselves *satisfied*. The Defendant intends nothing reproachful to either of these gentlemen ; but he feels it a duty he owes to himself and Mr. Denny, to disclose the above fact, and pay the Complainants in their *own coin*, for the *compliment* and *proof* of *sincerity* introduced, with so much ostentation, into their argument.

It is but justice to Mr. Denny to add, that his conduct and deportment was such as to win the confidence, and gain the unqualified approbation of the Court before whom he officiated. Indeed, if he had been deficient in the requisite qualifications, his records of the proceedings of that Court must have contained evidence of the deficiency. But the Complainants

The Fourth Specification was made by the Complainants before the acceptance of office by the present Judge-Advocate was known to them. The propriety of the designation of that gentleman is not questioned. The Complainants are among the last of the officers of the Division who would regret it. The *motives* only of the Major-General are arraigned, and they are proper subjects for investigation, so far as they are obvious from the facts proved. To do that which in its issue may prove well, avowedly from bad or improper influence or inducement, is not less a moral or military offence, than the act itself, which is unworthy and reprehensible in its character. It cannot be disguised that the Major-General had no reasonable expectation of the acceptance of Major Strong, at the time of his nomination of him as Judge-Advocate. He was then absent at the seat of government, and had never been consulted on the subject. His health was known to be too infirm to admit of the parade duties which the Major-General had been in the habit of requiring of that officer ; and it was well understood that his inclination had never prompted him to seek military distinction. Besides, it was immediately necessary to command the services of a Judge-Advocate in the trials which were ordered to take place. The designation of Major Strong under these circumstances, and in the situation of the Major-General, could only be with a view to gain time to himself for future arrangements, and to devise measures to renew and to enforce the previously rejected nomination. To be consistent with the defence against the First Specification, the Defendant must admit, that in the nomination of Major Strong, he for the first time thought fit to wander from the lists of applicants—or that in the neglect of that gentleman to apply, he had reason to expect his refusal of the office. The allegation is not that he nominated for the office a person who would not accept, but one whom *he had reason to believe* would decline ; thus making the office subservient to his unworthy views, and rendering those who, upon trial, were entitled to the aid of the talents, and experience, and servi-

were cautious enough to keep these records out of sight, as they were aware that they would refute the presumptive evidence by which they attempt to support the charge. These records are now in the Adjutant-General's office, and the Defendant does not hesitate to appeal to them, as furnishing a most convincing proof of the talents and legal acquisitions of Mr. Denny, and of his happy facility in discharging the duties of Judge-Advocate.

ces of a commissioned, responsible officer, subject to the consequences of the indulgence of his caprice in occasional and temporary designation of inexperienced and irresponsible citizens.*

In illustration of the views of the Complainants upon the subject of the Fifth Specification of Charge in the Complaint, and in refutation of all the argument which may be urged by the Major-General, in vindication of his supposed rights, and the merits of his conduct in issuing the order of the 21st of March last, we respectfully beg permission to refer this Court to the records of the proceedings of the Court, of which Colonel Samuel Mixter, jun. was President, from page 60 to 65 inclusive, and from 66 to 78 inclusive, which have been read in evidence upon this trial. The right of a Major-General to dissolve a military Court, in the extent for which he contends, is both monstrous in principle, and alike subversive of all security to the publick and to an officer on trial. Admit his position on this subject, and this honourable Court may be at this very moment driven from their places, and the Defendant on trial meet from this tribunal neither punishment or acquital. It may confidently be contended, that an officer by whose authority a Court is constituted, has no more authority to its dissolution, than has the civil Judge before whom a Jury has been empannelled for a criminal trial, to discharge the Jury without consent and before a verdict. Grant this right to the Major-General, and how dangerous its power and hazardous its abuse? If a favourite be upon trial, and in the progress of the cause, there is fear of conviction, he may be saved by the mandate of the Major-General. If the unfortunate object of official resentment be subjected to the jurisdiction of the Court, and there is a manifestation of intelligence and independence in his protection—the Court may be dissolved, and the supposed offender be offered a victim before more willing instruments of oppression. Those who contend for this tremendous power in a free country and under a government of laws, should be held to exhibit the very letter of authority for its existence. This honourable Court, by their sense of duty and of right in their present situation, can best judge of the force and application of these principles and arguments, by which the

* A judgment of acquittal upon this Specification of Charge refutes this tissue of *conjectures* and *surmises*.

Defendant, on this point of the case, attempts to support his defence.*

In the first additional Specification of Charge, the Defendant is substantially charged with Unmilitary Conduct, in unnecessarily subjecting the Commonwealth to expense, by convening two Division Courts-Martial at the same time, in neighbouring towns, for the trial of two officers of the Division.

The merit of novelty in this proceedure will not be denied to the Major-General. We defy the united ingenuity of himself and his counsel to furnish a precedent for such a measure. But the objection is not so much to the novelty, as to the expense incurred by the order of the Major-General. It was, indeed, attempted to be proved, that by the organization of two Courts, an expense was saved to the Commonwealth. And although it did appear most extraordinary that such should be the fact, from the acknowledged consideration that by far the greatest proportion of cost in the constitution of military Courts, results from the distribution of orders and the travel and daily pay of the members, the excuse might have been held plausible to this Court, ignorant of our local situation, had not the table exhibited by the Complainants clearly demonstrated the glaring falsity of such pretence.† The opinion of Captain Forbush is introduced also, in justification of the Defendant's order, appointing the Court and the place of trial at Westborough. The peculiar situation and interest of that witness in the measure recommended, should have induced to some distrust of the correctness of his advice. Without reproach to the honesty of the opinion he expressed, it may be urged with propriety, that if the Major-General here again needed advice, there were those more responsible and better informed than Captain Forbush, whom he should have consulted. Captain Forbush was an inhabitant of Westborough, and may fairly be presumed prepossessed by his own convenience or advantage in favour of that town as a place of trial. No other person

* This is all sheer declamation. The Defendant never contended for any such *doctrine* or *power*, as will be perceived by examining his Defence. He only claimed the right of discharging members detailed to serve on a Court, before they were organized. To interfere with their deliberations, after they had entered upon the trial of an issue, is a power he never claimed or exercised.

† For a refutation of this argument, the reader is referred to the Defence against this Specification, and the calculation contained in the same.

appears to have been consulted; and it is distinctly testified by Major Newton, then of the military family of the Major-General, that in the last conversation he had with him on the subject, it was understood that no Court for the trial of Lieutenant Brigham was to be ordered.

But it is in reference to the next Specification of Charge, that the guilt of the Major-General in appointing *two* Courts is most manifest. If two Courts, it must of necessity have occurred to him, that there must be also the appointment of *two* Judge-Advocates. And is it possible that on this subject any indulgence in charity can screen him from the charge of wilfully offending? The authority of the Major-General is as precisely defined in the statute as language will admit. The words are, "it shall be in the power of the Commander in Chief, or the Major-General, or commanding officers of Divisions, to appoint a Judge-Advocate *pro tempore* to any particular Court-Martial or Court of Inquiry, in case of inability of the Division Judge-Advocate, or in case of any legal impediments to his acting." Independent of this provision of the statute, the Major-General had no power to appoint a Judge-Advocate to a particular Court. In looking, therefore, for his authority, he must, in the very line of it, have been instructed in the circumstances under which it might be exercised. Can it with any propriety be said that there is *inability* in the Division Judge-Advocate, and *legal impediment* to his acting, when there is no Judge-Advocate to act? Can disqualification be predicated of an officer who has never had existence? In any sense of language, can *legal impediments* or *inability* be imputed to the Division Judge-Advocate, when there is no such officer in commission? As well might it be created before the office was created. The orders of the Defendant, complained of in the charge, were issued during a vacancy in the office of Judge-Advocate; and were, therefore, wholly illegal. In further illustration of this position, we again beg leave to refer the recollection of this Court to the records of the proceedings of the Court of which Colonel Samuel Mixter, jun. was President, from page 46 to 51 inclusive, and to the reasoning and opinion of the Court of which Colonel Cushing was President, there recorded. The Defendant, however, attempts to bring himself within the letter of the law, by proof of the receipt of a commission for a Division Judge-Advocate,

and a renewal of the orders predicated upon his absence, re-appointing the special Judge-Advocate. Even so considered, his orders were not warranted by law. The Legislature have made a provision for one permanent responsible office. If it be admitted that the Major-General may institute *two* Courts, and appoint *two* Judge-Advocates to attend them, the object of the law is defeated; and he may, for the very purpose of preventing the attendance of the Division Judge-Advocate upon any particular trial, institute at the same time two Courts, either for trial or inquiry, and by thus creating an artificial *inability* in the Judge-Advocate at his pleasure, to deprive both the government and the soldier of the benefit of the talents, experience and military responsibility which it was the very design of the office to secure. What would have been the complaint of the Major-General, had the Commander in Chief instituted a second Court for the trial of Colonel Burbank, to sit at the same time, and by assigning the present Judge-Advocate to that trial, deprived *him* of the aid of his faithful, patient and able discharge of duty on this occasion? By the construction of law for which he contends, this might legally have been done. And a *third* Court, and a *third* Judge-Advocate, might also have been appointed to the trial of Major Graves. The reason, too, might have been precisely the same with that now urged in excuse by the Defendant—the expense of delay, and the detention of parties and witnesses, in one cause, until the other is investigated. The consequences which might result from the establishment of this principle, demonstrate its astonishing absurdity; and if the Defendant will still persist in it, for his justification before this Court, it would seem his hope of escape here is predicated on the consciousness of that incapacity to commit crime, which, in exempting weak men from punishment by a Court-Martial, refers the community for relief from the evils they may occasion, to an application for removal by address of the Legislature. To suppose this, would be to do equal violence to the rank of the Major-General, and to our own views of the character of his actions.*

* The whole of this argument is deduced from false premises. The former part of it is answered and refuted by the Complainants themselves, where they *acknowledge* that the orders appointing two Judge-Advocates *pro tempore* were issued *subsequently* to the appointment and commissioning of Maj. Strong, the present Judge-Advocate, who was then absent from the

One charge yet remains for examination under the 3d and 4th Supplementary Specification, to which we entreat a further indulgence of the candid attention of this Court. The offence imputed is of that nature which alike degrades the character of the man and of the officer; and by the apology which is offered for its commission in the last instance partakes of uncommon meanness. The violation of the sanctity of sealed papers can admit of no palliation. Regard but the excuse for opening the letter of the 23d of March last, addressed to Col. Cushing. It was after the collision between the Court of which that officer was President and the Major-General;* and the seal of the letter

Commonwealth, and unable to attend the trials. No such doctrine as is set forth in the latter part was ever contended for by the Major-General. He only contended that, in conformity with the provisions of the statute as cited by the Complainants, he had a right to appoint Judge-Advocates *pro tempore*, when the Judge-Advocate of the Division was unable to officiate. Maj. Strong, it will be remembered, was a member of Congress, and at the seat of government, when these trials took place, and therefore *unable* to attend. The statute, then, gave the Defendant express authority to appoint some one to supply his place. As he obviously had a right to appoint *one*, (and this is conceded by the Specification of Charge itself,) the only question which can be raised is, whether he had a right to appoint *two*, having ordered two Courts. Upon a careful examination of the law, it is believed nothing will be found repugnant to such a measure. The statute authorized him to appoint a Judge-Advocate *pro tempore* to *any particular* Court-Martial, or Court of Inquiry, in case of *inability*, &c. Now, suppose two persons are to be tried, who live so remote from each other, (as is not unfrequently the case in this Division,) that it becomes expedient to order *two Courts*, and the Division Judge Advocate is *unable* to attend *either*. His place must be supplied according to the provisions of the statute. But the language of the statute is, that the Major-General, &c. may appoint a Judge-Advocate *pro tempore* to *any particular Court*, &c. obviously restraining him from appointing the same person a special Judge-Advocate to attend more than *one Court* by the *same order*. Now, if it should become necessary, as has already been supposed, to appoint *two Courts*, under the circumstances mentioned, the Major General could not appoint the *same* person, by *one* order, a special Judge-Advocate for *both* Courts; but if he would have *one* person officiate at *both*, he must be appointed by *two distinct orders*, one designating him for *one particular Court*, and and the other for the *other particular Court*—for such is the sense of the statute. Now, it may be asked, what is the difference in law between appointing *two* special Judge-Advocates, one to attend *each* Court, and appointing one by two *distinct* and *separate* orders, designating him for *each particular Court*, as the statute requires? The answer is obvious—that there is none at all, as there must be two appointments in either case. The Defendant never claimed the authority, as is supposed in the argument of the Complainants, of appointing a special Judge-Advocate to attend a Court, under any circumstances, when the Judge-Advocate of the Division was able to attend.

* This fact of itself furnishes a sufficient justification, if any is necessary, for opening the order. The *collision* here spoken of was unprovoked on the part of the Defendant. Col. Cushing had a few days previously disobeyed his orders, by refusing to put Capt. Nelson upon trial, when appointed President of a Court detailed for that purpose; and from his conduct and deportment, the Defendant had no reason to believe he was over anxious to promote harmony in the Division, or to obey an order, which, by directing him to discharge the officers whom he had detailed to serve on the same

was broken avowedly for the purpose (as proved by Mr. Bond) of procuring evidence in proof of a contempt of the authority of the *latter*, of which his jealousy anticipated the *former* might intend thereafter to be guilty. The seal of the letter of the 21st Feb. was violated for the alleged purpose of obtaining from it the name of an innholder, to be inserted in a Division Order; yet, as if to manifest the baseness of the act by the folly of the excuse, this very Division Order, upon examination, is found to contain a different name from that inserted in the sealed paper.* It is said, however, that these papers were military orders. But can that alter the character of the act? From what authority, we entreat the Major-General, does he derive his right to break the seals of orders, addressed to officers of his Division? Is it an incident to his office? The statute law does not permit it. Col. Cushing, of the United States' army, was tried and convicted by a Court for a similar offence. But if it be pretended that this authority exists, by what limits is it defined? If the Major-General of the Division can open orders not addressed to himself, the right also extends to officers in every station; and sealed papers may be violated with impunity from military censure. If those papers contain orders, because they are subject to this disposition; and if they prove to be private communications, because military Courts have no jurisdiction of the private affairs of individuals. The Complainants appeal to the feelings of this honourable Court for their justification in strenuously urging this charge against the Major-General. Col. Cushing is not more injured by the indecorum

Court, might prevent him from obtaining their assistance in accomplishing his ulterior objects—unless proof could be made of the service of that order upon him. That the Defendant was right in this conjecture, was verified by a subsequent disobedience of this order. When he received it, it was necessary that it should be immediately communicated to Col. Cushing; and if communicated sealed, proof of the service could not be made, as the person delivering it could not swear to the contents. He therefore considered it expedient and proper to break the seal, that Mr. Bond, who afterwards delivered it to Col. Cushing, might know the contents. This is the head and front and full extent of his offending.

* Language seems too *poor* and too *barren* to express the *high-minded sentiments* of the Complainants. One is constrained to believe that "*baseness, meanness* and *folly*" never found an abiding place in minds so *pure*, so *honourable*, and so *destitute of art*. Alas! poor human nature is sometimes frail; and those who are loudest in reprobating the vices of others, not unfrequently neglect themselves to practise virtue. The reader, to duly estimate the imputation attempted to be fixed on the character of the Defendant by the above scurrilous paragraph, needs only be informed that he was honourably acquitted of the charge contained in the specification there alluded to.

of this act, than by the motives assigned for its commission. To the Major-General he had never granted authority for such liberties. The state of society accords no such license. It was at best officious and unmanly, and upon honourable minds can produce but one impression, of the existence of a weak and pitiful curiosity, or of a base and cowardly design. Let this act of the Major-General be accompanied by the record of the opinion of honourable men, as the *seal* of his disgrace, upon it.

To the consideration of the Court is referred the complaint of Capt. Ezra Nelson against the Major-General. The legality of the orders in relation to his trial has been before fully considered. That Capt. Nelson was *twice* arrested upon the same charges—that he was called *twice* to plead, and before different military Courts—that he was subjected to unusual and unreasonable expense, and suffered oppression, were but the inevitable consequences which resulted from those arbitrary and illegal orders.* His acquittal of guilt, without having answered to the merits of the complaint against him, is a still further illustration of the influence and motives under which the Court for his trial was appointed. Had the Major-General been more regardful of the rights of the Commonwealth, and less disposed to a display of his assumed authority, to multiply Courts and create officers to attend them, the accused would have been held responsible for misconduct, or the government be saved the expense of his trial.

For all the injuries of which complaints are made before this Court, whether to the publick or the individual, the Defendant is now justly answerable.

The Complainants having thus imperfectly, but with all the attention which the opportunity offered to them would permit, examined the charges and the merits of the Defence, so far as they are apprized of the latter by the course of the evidence, do now most confidently submit the disposition of their accusation against the Major-General to

* Capt. Nelson's testimony refutes the whole of this declaration. He was never called to plead before the first Court, and was subjected to no extra expense, except in procuring a plea to the jurisdiction of the second Court, which was both unnecessary and fruitless, having in fact nothing to do with his trial, but was a mere attempt on his part to prolong the trial by delaying the proceedings of the Court. It also sufficiently appears, from his own testimony, that he suffered no oppression; for he expressly declares, that it made no difference with him by which Court he was tried.

the intelligent decision of this honourable Court. In the language, however, of their remarks before the Court of Inquiry, they will again most strenuously protest against the admission of "apologies for ignorance, and excuse for gross errours in judgment.* The first officer of the Division should be superior to the necessity of resorting to such humble means of justification. If he has conducted uprightly, with intelligence, and in the appropriate spirit and sound discretion of his station, he should find protection, and be acquitted with honour; but if a series of unfortunate mistakes and stupid blunders have lost him the respect of those under his command, weakened his authority, and reproached his title, justice exacts the forfeiture of his commission, and men of honour will not hesitate to adjudge it." Before courts of this jurisdiction, appeals to *clemency* must yield to obligations of duty. The interests of the militia are paramount in consideration to the feelings of an offender. The discharge of military office is neither hard or hazardous. Good intentions and ordinary intelligence are all that is requisite to the safe and honourable exercise of authority.

Before military Courts, men must be brought to strict account. If the law expressly denies *excuse* to the humblest private of the ranks for accidental and inadvertent omissions in preparation for duty, how can the officer of highest station claim indulgence and lenity upon conviction of a catalogue of deliberate transgressions? The state of our Division requires a striking example in merited punishment. Look to its degraded character. Confusion and disorganization pervade all its departments; Courts Martial, by their frequency, have lost their terrour, and soldiers, by the conduct of those first in commission, their respect for office. To this honourable Court it is now given to apply the only correction.

With the management of the trial, the complainants beg leave to express their entire satisfaction; to the fidelity in duty of the Judge-Advocate, to the candour, patience, and dignified attention of the Court, through this painfully laborious investigation, they owe the highest acknowledgments.

* The publick, by examining the Defence, can determine whether any such apologies were offered, or found necessary, to justify the conduct of the Defendant.

May the issue be as just, as the hearing has been fair, faithful and impartial.

For and in behalf of the Complainants,
JOHN W. LINCOLN.

I CERTIFY, that the foregoing sheets contain a true copy of the Reply of the Complainants in the trial of Major-General Caleb Burbank.

SOLOMON STRONG, *Judge Adv.*

Adjutant General's Office,
Boston, Dec. 23, 1818.

I HEREBY certify, that the afore-written sheets are a true copy of the Reply of the Complainants against the late Major-General Caleb Burbank, as extracted from the records of the proceedings of the Court-Martial which was instituted for his trial.

WM. H. SUMNER, *Adj. Gen.*

The Defendant will, with a few additional observations, take his leave of the reader. He has put to the press the preceding pages in compliance with the wishes of many gentlemen, who are desirous of seeing an account of his trial. He regrets that the evidence does not accompany the arguments; but it has been omitted for the reasons already assigned.

He now appeals to a candid, impartial publick to do him that justice which his conduct and character deserves. If the opprobrium which has been lavished upon him in the most unsparing manner is undeserved, he trusts it will be placed to the account of those who on all occasions have been free to do him injustice.

He hopes, in estimating his character, broad assertions, couched in the most harsh, ungentlemanly language, will not be mistaken for proof of guilt. Indeed, he cannot persuade himself, that any facts disclosed on the trial, can by possibility fix on him the imputation of "*meanness, baseness, or a disregard of the rights of others.*" His conduct has not in any instance been rash or equivocal, but at all times open, sincere, and, as he conceived, in strict conformity with the requisitions of law. If he has erred at all,

it is in solving questions of great legal difficulty, relative to which he conferred with many eminent men, who, one and all, after hearing the facts, as they appear in evidence, advised to the course which was ultimately adopted. These positions are so well established, that he does not hesitate to declare his firm belief, that the publick must be satisfied he did his whole duty, and had his life depended on the issue, could not have acted differently without violating his own conscience. Indeed, is it not manifest, when, in the execution of duty, a doubtful question arises, that an officer can do nothing more than decide it according to his own conviction, or call to his aid the counsel and advice of eminent men, and adopt their opinions, if not repugnant to his own judgment? He must on such occasions act judicially; and if his motives are pure, he is no more responsible for the correctness of his decision, than the Judges of the Common Pleas are for such judgments as are reversed or overruled by the Supreme Court. It is, however, for an alleged offence of this description, that the Defendant has been removed from office; and the publick will judge whether he has not cause to complain of unreasonable severity. The Court could not have been blind to these considerations, and must therefore have been influenced to decide in the manner they have, from the causes already mentioned. The Complainants demanded "a *striking example of punishment*," to *correct* the disorders themselves had created; and the Defendant has been sacrificed, to atone for their misdeeds.

The Defendant will add but a word more. If it does not manifestly appear, from the whole trial, that the accusations against him sprung from unworthy motives, there is no want of proof; and if occasion requires, it shall be adduced.

ERRATA.

Page 21—26th line from top—for "administered," read *decided.*
P. 31—11th line from top—for "members," read *number.*
P. 33—4th line from top—for "when," read *whose.*——In *note*—14th line from top—for "present," read *President.*——In revising the calculation subjoined to this page, several numerical errours have been detected; which, however, as they do not materially affect the result, it is not worth while particularly to point out.
P. 34—5th line from top—for "consideration," read *compensation.*
P. 36—29th line from top—erase "*to*" before "the."
P. 37—28th line from top—for "21st," read, 23*d.*
P. 39—2d line from top—for "council," read *counsel.*

NOTE.

The publication of Lieut. Col. Burbank's *Defence* took place under circumstances which prevented the necessary revision of the proof-sheets. Several errours therefore occurred, one of which it is thought important to notice, even at this time and in *this* manner.—In page 32d of that publication, in the *sixth* line from the top, the sentence, beginning with the words, "*Are these,*" &c. should read thus:—*Are,* THEN, *the Complainants possessed of* KEENER *discernment and finer sensibility,* &c.

DEFENCE

OF

LIEUT. COL. GARDNER BURBANK

BEFORE

THE GENERAL COURT-MARTIAL, WHEREOF MAJ. GEN. NATHANIEL GOODWIN WAS PRESIDENT, HELD AT HATHAWAY's HALL, IN WORCESTER, ON THE 8TH SEPTEMBER, 1818,

AGAINST

CHARGES PREFERRED AGAINST HIM,

BY

COL. PRENTICE CUSHING AND OTHERS.

TO WHICH IS PREFIXED

An Extract from the Records of said Court,

CONTAINING

ALL THE EVIDENCE ADDUCED UPON HIS TRIALS.

WORCESTER:

PRINTED BY WILLIAM MANNING.....JAN. 1819.

INTRODUCTION.

IN order to a correct understanding of the subject of the following pages, something more is necessary than can be found either in the *Defence* of Colonel BURBANK, or in the *Record* of the evidence adduced on his trial. The principal charges against him had their foundation in certain transactions which took place at Mendon, in relation to several officers who were there assembled on the 3d and 4th of March last, claiming to act as a Division Court-Martial.

In the 2d Specification of the Second Charge, it is alleged that Col. Burbank was called, sworn, and examined, as a witness "before a Court-Martial, whereof Col. Prentice Cushing was President, then and there held for the trial of Capt. Ezra Nelson." But it does not appear from the record of the evidence whether any such Court did or did not exist. Col. Lincoln, to be sure, testifies that he "was a member of the Court-Martial mentioned in the Specification;" but the only proper evidence to prove that fact, viz. the *Record* of that Court, was not offered. The reason was, that no such record and no such Court ever existed.

It will be seen, however, that in the *Defence* mention is made of evidence of the assembling of certain officers under orders instituting a Court-Martial; and the proceedings of those officers are commented on at considerable length. This variance between the *recorded* evidence, and the facts stated in the *Defence* is to be accounted for in this manner.

Upon the trial of Maj. Gen. Burbank, which preceded that of Col. Burbank, the evidence alluded to was introduced. It consisted of a journal of the proceedings of the officers before mentioned, kept by one of their number, who styled himself their "*Recorder*," and of minutes of their early proceedings, taken by the gentleman who had been appointed Judge-Advocate, *pro tempore*, of the Court which those officers were to have constituted. But, upon the trial of Col. Burbank, this evidence, although understood to be in his case, was, by some inattention, not introduced into the record of this trial. It becomes necessary, therefore, in this publication, to detail, as concisely as possible, the circumstances alluded to in the *Defence*, and proved in the manner above stated.

In February last, certain officers, of whom Lieut. Col. John W. Lincoln was one, were detailed, in pursuance of Division Orders of the 16th of February, to serve as members of a Court-Martial to be held on the 3d of March, for the trial of Capt. Nelson. Of this Court Col. Prentice Cushing was appointed President, and Pliny Merrick, Esq. Judge-Advocate, *pro tempore*. Upon the assembling of these officers, and when the Judge-Advocate was about to organize the Court according to law, Col. Lincoln, objected to the legality of Mr. Merrick's appointment, on the ground that the Major-General had no power to appoint a Judge-Advocate, *pro tempore*, while that office was vacant. This objection prevailed, and Mr. Merrick was not permitted to organize the Court. He then produced a second appointment as Judge-Advocate, dated after Mr. Strong, (who was then out of the State) had been commissioned to that office, assigning as the reason for the appointment, that the Judge-Advocate of the Division was unable to attend the Court. Upon the production of

this appointment, these officers held a secret consultation, the result of which was, that, at all events, they would not recognize Mr. Merrick as Judge-Advocate; and upon his endeavouring to proceed in the execution of the duties for which he had been appointed, they ordered their "Marshal" to force him from the room where they were assembled.

It was during the secret consultation before mentioned, that Col. Burbank was called before them, and sworn and interrogated, as is stated in the following record. And this collection of officers, acting under the circumstances that have been related, composed the "*Court*" of which Col. Lincoln, in his testimony, says he was a member.

These facts *were all in evidence* on the trial of Gen. Burbank; and they will enable the reader to understand that part of the *Defence* relating to the 2d Specification of the Second Charge, which, otherwise, would appear to be unsupported by any evidence.

It was after these unparalleled and high-handed proceedings, that the words which are made the foundation of two other charges, were spoken by Col. Burbank.

It may be asked what induced this extraordinary conduct of Col. Lincoln and his associates? The answer is—that it is now beyond all doubt that a combination had been formed, to defeat, if possible, the orders of the 16th of February. For this purpose an attempt was made on the day before the time fixed for the sitting of the Court, to induce Mr. Merrick not to act under his appointment. This effort failing of success, the only alternative was, at all events, to *prevent* his performing the duties of his appointment. The ulterior object was well understood. It was, even then, no secret what were the designs of Col. Lincoln, urged on as he was by personal hatred to the Major-General, and to Col. Burbank, and by the *disappointed expectations of a friend*.

If it be inquired how it should happen that Col. Burbank was convicted upon several charges, altogether against the weight of evidence, the answer is more difficult. When, however, it is considered that previous to the trial, unremitted efforts were made to prejudice the publick mind against him, and no attempt made to counteract it—that during the trial, a systematick plan of personal attentions towards the members of the Court was put in operation by his enemies, while the utmost reserve was, from a sense of decorum, observed by his friends—it will be less difficult to believe, that men, although unconscious of any bias or want of impartiality, might render such a judgment as those who have been altogether aloof from the *influence* alluded to would think unwarranted by the evidence.

In submitting this publication to the publick, it has been an object to avoid troubling them with any matter unnecessary to a full understanding of the *Defence*, and to show that it was warranted by the *evidence*. With this view, nothing of the *Record* of the Trial is published but the *evidence*, from which the publick will be able to judge of the validity of the *Defence*.

Prefixed to the whole are the Charges against Col. B. followed by the Judgment of the Court, as approved by the Commander in Chief, in the General Order of October 21.

COMPLAINTS.

To His Excellency JOHN BROOKS, *Governour and Commander in Chief of the Militia of the Commonwealth of Massachusetts.*

THE undersigned Officers in Commission within the Seventh Division of the Militia of the said Commonwealth, inform and complain against Lieutenant-Colonel Gardner Burbank, Division Inspector and Aid-de-Camp to Major-General Caleb Burbank, of said Seventh Division, for unmilitary conduct and neglect of duty in his said office as Aid-de-Camp, as follows, viz.

UNMILITARY CONDUCT AND NEGLECT OF DUTY.

Specification.—For that the Major-General of the Seventh Division having, on or about the 12th day of January last past, written an official letter to the Adjutant-General of the Militia of this Commonwealth, and having entrusted the same to the care of the said Lieutenant-Colonel Gardner Burbank, to be forwarded as directed—the said Gardner Burbank, in violation of the sanctity of an official letter, wholly regardless of his duty, and in neglect thereof, and in contempt of his Superior, did intercept the said letter addressed as aforesaid, and did suppress the same, and substituted therefor a letter written by himself.

UNMILITARY CONDUCT.

Specification 1*st.*—For that the said Lieutenant-Colonel Gardner Burbank, wholly regardless of the honourable feelings of officers, and with intent to injure them, and for the purpose of creating dissatisfaction, did, on the 12th day of January last past, write and did send to Rejoice Newton, Esq. then an Aid-de-Camp to Major-General Caleb Burbank, an official letter, containing much improper matter, which contained many sentiments extremely unmilitary, and which were highly inconsistent with the honour of officers—all which tends to bring the service into disrepute.

2*d*.—For that the said Gardner Burbank, at Mendon, within said Division, on the 4th day of March instant, was called as a witness before a Court-Martial, whereof Colonel Prentiee Cushing was President, then and there held for the trial of Captain Ezra Nelson, upon the eomplaint of Major Samuel Graves, and the said Gardner Burbank was then and there sworn before said Court to tell the truth, the whole truth, and nothing but the truth ; yet the said Gardner Burbank, upon being interrogated by said Court, respeeting certain faets, relative to the appointment, eommissioning, and qualification of a Judge-Advocate of said Division, of whieh he had knowledge and which were important for said Court to know, for the purpose of a eorrect decision of the question then before them, utterly refused to answer some of said questions, and wilfully evaded others by giving equivoeal and indireet answers thereto, in eontempt of said Court, regardless of his oath aforesaid, and in evil example to others in like cases to offend.

3*d*.—For that the said Gardner Burbank, at Mendon, within said Division, on the 4th day of March instant, the Court-Martial ordered and convened for the trial of Captain Ezra Nelson as set forth in the aforegoing Specifieation, then being in session, the said Gardner Burbank, in utter contempt of the Court so assembled, publiekly threatened to issue an order to dissolve said Court—whieh tends to destroy all confidenee in Courts-Martial, and is subversive of the dignity thereof.

NEGLECT OF DUTY.

Specification.—For that the said Gardner Burbank having been from the time of his appointment to the offiee, oldest Aid-de-Camp to Major-General Caleb Burbank, has wholly negleeted, from the time of said appointment, to wit, for one year last past, to keep a eorreet Roster of the Division, as is required by the 35th artiele of the 34th seetion of the Militia Law of this Commonwealth, passed 6th March, 1810.

All whieh is to the great confusion, disorder, and disorganization of said Seventh Division, and tends to destroy the respectability of the Militia.—Wherefore the undersigned pray the said Lieutenant-Colonel Gardner Burbank, Division-Inspector, and Aid-de-Camp as aforesaid, may be

held to answer to this Complaint, and be dealt with as to law and military usage appertain.

Dated this 25th day of March, 1818.

PRENTICE CUSHING, Col. 5th Reg. 1st Brig. *Pres.*
SAMUEL DAMON, Lt. Col. of Cavalry, 1st Brig.
JOHN W. LINCOLN, Lt. Col. 6th Reg. 1st Brig.
PETER HOLMES, Maj. 6th Reg. 1st Brig.
ELISHA RICH, Capt. 5th Reg. 1st Brig.
ARNOLD ADAMS, Capt. 5th Reg. 1st Brig.
AMASA WOOD, Capt. 5th Reg. 1st Brig.

{ Members of a Court-Martial convened at the house of Mr. Child, in Mendon, for the trial of Capt. Ezra Nelson of Artillery, upon complaint of Major Samuel Graves.

THOS. CHAMBERLAIN, Col. 6th Reg. 1st Brig.
SAMUEL GRAVES, Maj. Art'y, 1st Brig. 7th Division.

Adjutant-General's Office, Boston,
August 13, 1818.

A true Copy.—Attest,
WM. H. SUMNER, *Adjutant-General.*

To HIS EXCELLENCY JOHN BROOKS, *Governour and Commander in Chief of the Militia of the Commonwealth of Massachusetts.*

THE undersigned Officers in Commission within the Seventh Division of the Militia of the said Commonwealth, in addition to the specifications of charges as set forth in a Complaint bearing date the 25th day of March last, do further inform and complain against Lieutenant-Colonel GARDNER BURBANK, Division-Inspector and Aid-de-Camp to Major-General Caleb Burbank, of the said Seventh Division, for unmilitary conduct, as is more particularly described in the following Specification of Charge, viz.

For that the said Lieutenant-Colonel Gardner Burbank, at the house of Mr. Child, Innholder, in Mendon, on the 4th day of March last, the Court-Martial ordered and convened for the trial of Captain Ezra Nelson, upon a complaint preferred against him by Major Samuel Graves, Commandant of the Battalion of Artillery, in the first Brigade of the

said Seventh Division, then and there being in session—did openly, and in the presence of several officers, and for the purpose of injuring the official reputation of the members of said Court, and in great contempt of said Court, publickly charge the said Court with *corruption*, and declared that they were then acting as members of said Court in a *corrupt manner*.

All which tends to destroy good order and diseipline in the Militia, and respect towards the officers thereof, and is an evil example to others in like ease to offend.—Wherefore the undersigned pray that the said Lieutenant-Colonel Gardner Burbank, Division-Inspector and Aid-de-Camp as aforesaid, may be held to answer to this Complaint, as an additional Specification of Charge for unmilitary conduct, as set forth in a Complaint bearing date as before mentioned and be dealt with as to law and military usage appertain.

Dated this 8th day of April, 1818.

PRENTICE CUSHING, Col. 5th Reg. 1st Brig.
JOHN W. LINCOLN, Lieut. Col. 6th Regt. 1st. Brig.
ARNOLD ADAMS, Capt. 5th Reg. 1st Brig.
SAMUEL DAMON, Lieut. Col. of Cavalry, 1st Brig.
THOS. CHAMBERLAIN, Col. 6th Reg. 1st Brig.

Adjutant-General's Office, Boston,
August 13th, 1818.

A true Copy.—Attest,

WM. H. SUMNER, *Adjutant-General.*

THE Court having heard and considered the evidence which has been adduced, both for and against Lieutenant-Colonel BURBANK, Division-Inspector, and first Aid-de-Camp as aforesaid, and his Defence, are of opinion, and decide, that of the Specifications of the general Charge, for "unmilitary conduct and neglect of duty," and of the first and third Specifications of the Charge for "unmilitary conduct," the said Lieutenant-Colonel BURBANK is *not guilty*. That of the second Specification of the Charge, for "unmilitary conduct," the Specification of the Charge for "neglect of duty," and the additional Specification of the Charge for "unmilitary conduct," Lieutenant-Colonel BURBANK *is guilty*.

EVIDENCE.*

Adjutant-General's Office,
Boston, Nov. 24, 1818.

Extract from the Records of a General Court-Martial, of which Major-General NATHANIEL GOODWIN *was President, which was begun and holden at Worcester, on the eighth day of September last, and continued, by adjournment, to the 19th day of the same month, containing all the evidence relating to the charges against Lieutenant-Colonel* GARDNER BURBANK, *Division-Inspector, and senior Aid-de-Camp to* CALEB BURBANK, *Esq. who was then Major-General of the 7th Division of the Massachusetts Militia.*

THE Judge-Advocate stated to the Court that he should not introduce any evidence in support of the Specification of Charge for unmilitary conduct and neglect of duty.†

The Court proceeded to the consideration of the First Specification of the Second Charge.

The Complainants and Defendant agree to admit in evidence the Records of the Court of Inquiry in the case of Lieutenant-Colonel Gardner Burbank, according to a paper signed by them, and annexed, marked 12, as follows.

Aug. 15, 1818. In the case, Commonwealth against Lieutenant-Colonel Gardner Burbank, to be tried by a General Court-Martial, of which Major-General Nathaniel Goodwin is appointed President, to be held at Worcester, on Tuesday, the 8th day of September next—the Complainants and Defendant agree that a Copy of the Records of the evidence taken by the Court of Inquiry, of which Major-General Elijah Crane was President, shall be received as evidence upon said trial, with liberty to the parties to introduce new evidence if they think proper; and also to take the opinion of the Court upon the propriety of the admission of any evidence by said Court-Martial which was admitted by said Court of Inquiry, and if said Court-Martial shall be of opinion that any such evidence is im-

* The following is a copy of *all* the Evidence adduced in the case, obtained from the Adjutant-General's office.

† Here, in the very outset, we have a specimen of the disposition and feelings of the Complainants against Col. B. The reader is requested to recur to this Charge, and then to recollect that the only ground for the vile aspersion was the malevolence of "Colonel Prentice Cushing and *others*."

proper to be admitted, it is to be considered as stricken from the Record. JOHN W. LINCOLN,

For and in behalf of the Complainants.

GARDNER BURBANK.

I CERTIFY that the above is the original agreement for admitting the Records of the Court of Inquiry, as evidence in the trial of Lieutenant-Colonel Gardner Burbank.

SOLO. STRONG, *Judge-Advocate.*

The Judge-Advocate read the Records of the Court of Inquiry, from A. page 2, to B. page 3, of the case of Lieut. Col. Gardner Burbank, as follows.

"A. To prove this Specification, the Judge-Advocate read to the Court the following letter, which it was admitted was written by Defendant, and sent, by him, to Major Rejoice Newton.

Major R. NEWTON,

DEAR SIR—The Major-General has concluded to have the Court-Martial, on the complaint of Major Graves, on Tuesday, the 3d day of February next—Court detailed, as was concluded on, when I saw you last. The General has at length, after much delay, and much perplexity, appointed a Judge-Advocate. I did believe, some months since, that you was the person concluded on for that office; but new candidates have appeared, supported by gentlemen of the first standing in this town; among whom is Austin Denny, who has been successful. You will not, therefore, attribute his appointment to my influence. I have ever been desirous of promoting your interest and happiness, when it was not incompatible with my duty to others.

The General still maintains, as he did in your presence, that the office of Aid-de-Camp is the most honourable and the most important of the two offices; and that it is his first wish to have you his Aid and Counsellor. As you mentioned in your last conversation, that you thought that the pay of Judge-Advocate would be an object; as an equivalent for that, I will relinquish my proportion of the pay arising from the duties of our office, which will be for one equal to that of Judge-Advocate, if well husbanded. I think that Major How made more than fifty dollars every year from his office. He had all the pay, and managed it in his own way. Will you make the orders for the Court

above named? Have the goodness to return an answer by the bearer. I shall be in probably to-morrow, and will call on you. I am, with much esteem,

Your obedient Servant,
GARDNER BURBANK. B."

The Court proceeded to the consideration of the Third* Specification of the Second Charge.

The Judge-Advocate read from the Records of the Court of Inquiry, in the case of Lieutenant-Colonel Gardner Burbank, from C. page 10, and D. page 13, as follows.

" C. Pliny Merriek, Esq. called.

Quest. by Complainant. Did you hear the threat mentioned in said Specifieation?

Ans. I presume I did. I recollect after the decision by the Court upon my first appointment, and before the decision upon the second appointment, he appeared to be dissatisfied with their decision, and said he thought they were proceeding improperly; and said, in a light and unmeaning manner, as I then thought, smiling when he said it, that he had a good mind to issue an order to dissolve said Court. I laughed and joined in the amusement, as I then thought it. He afterwards asked me if I supposed that a general delegation of authority would authorize him to issue such an order. This conversation, as I think, was in the evening, when some of the members of the Court were present. I had more conversation with Col. Burbank in the afternoon than in the evening, and I am, therefore, not confident as to the time. It might be in the afternoon: I was unwell in the evening, went to bed early, and was not in company with the members of the Court, but a few minutes after supper. No members of the Court were present at the conversation between myself and Col. Burbank in the afternoon. The conversation of which I have testified might take place after the members came down from the Hall, and before supper; if so, some members of the Court were present.

Major Samuel Graves called, sworn, and examined.

Quest. by Complainants. Did you hear the threat mentioned in said Specification, at what time, and in what manner was it was uttered?

* The *Second* Specification of this Charge was not taken up in course, owing to an objection that had been made to it on account of its want of particularity.

Ans. It was in the afternoon, one half hour before the Court rose. It was below under the Hall. Mr. Merrick and Adjutant Knight were present, and several others. No member of the Court was present. I did not consider that the manner of making the threat was, as testified by Mr. Merrick. I saw no laughter, and thought Col. Burbank was serious in the proposition. The conversation on this subject was addressed to Mr. Merrick, if any one in particular.

Quest. by Complainants. Did Col. Burbank appear to be in a passion when he uttered the threat ?

Ans. I think he was not well pleased.

Quest. by Complainants. Was the observation made sufficiently audible to be heard by all in the room ?

Ans. It was.

Pliny Merrick, Esq. called.

Quest. by Judge Advocate. Can you state any other circumstances relative to said conversation ?

Ans. I remember very well that at the Court* in the afternoon, after Col. Burbank came down from the Hall,† he complained of the impertinence of the Court, and conversation took place which was at times pleasant, and other times he spoke rather severely of their treatment to him. I can say with Major Graves, that he was not well pleased with them. I confirm what I before said, that the threat was uttered in a light manner, although he appeared to be serious when he inquired of me as to his authority to issue the orders.

Adjutant Jonathan Knight called.

Quest. by Complainants. What do you know about this Specification of Charge ?

Ans. After Proclamation was made by the Marshal to clear the Hall, Col. Burbank observed that he hoped the Court would accept of Mr. Merrick as Judge-Advocate, as the General had taken great pains to get the Court together. If they should not, he said he had almost a mind to issue an order to dissolve them, and conceived he had an authority to do it. But he thought, at any rate, that the General would not suffer them to sit again, if they did not

* By the expression "*at the Court*," the witness means the *time* and *place* when the "*Court*" was held.

† This was when he had been examined as a witness under the circumstances mentioned in the *Introduction*.

receive Mr. Merriek as Judge-Advocate. I think Mr. Merriek was not present at this conversation.

Quest. by Complainants. Was this after Col. Burbank was examined as a witness ?

Ans. I do not recollect.

Quest. by Judge-Advocate. Was it immediately after you came down ?

Ans. I think it was. After this conversation of which I have testified, there was conversation upon the same subject by Colonel Burbank with Major Graves and Mr. Merriek. D."

Col. Prentice Cushing called, sworn, and examined.

Quest. by Complainants. Did you hear remarks made by Col. Burbank, on the evening of the third of March, respecting his right to issue orders ; and if so, what ?

The Defendant objected to this question as irrelevant. The Court decided it was a proper question.

Ans. of Col. Prentice Cushing. I heard him observe that he thought he had authority to issue an order to me to detail officers from my Regiment to supply the places of those detailed to serve on the Court-Martial, and who did not attend.*

Quest. by Complainants. Did he not say that he believed he had a right to issue any order that he thought proper, without the directions of the Major-General ?

Ans. He did say to that effect.

The Court proceeded to the consideration of the Specification of Charge for neglect of duty.

The Judge-Advocate read from the Records of the Court of Inquiry, in the case of Lieutenant-Colonel Gardner Burbank, from E. to F. page 6, as follows.

" E. The Defendant agrees that a part of the year preceding the exhibition of the Complaint, to wit, until March 1, 1818, he did not keep a correct Division Roster. F."

The Court proceeded to the consideration of the Specification of the Supplementary Charge.

The Judge-Advocate read the Records of the Court of Inquiry, in the case of Lieutenant-Colonel Gardner Burbank, from G. page 13, to H. page 15, as follows.

" G. Major Samuel Graves called.

* The reader will judge from this answer whether this question was not *irrelevant*, and whether the objection, that it did not tend to prove the "threat" charged in the Specification, was not well founded.

Quest. by Complainants. What do you know about the Specification ?

Ans. I heard Col. Burbank say on the 4th of March last, that he thought the Court corrupt in their proceedings; that it was no Court at all ; that they had no authority to summon or swear witnesses. No member of the Court was present. Mr. Knight and several others were present. I think Col. Rawson and Col. Bragg were present. The Court was then in session.

Quest. by Defendant. Did he not at the same time qualify his expression ?

Ans. I do not recollect that he did.

Adjutant Jonathan Knight called.

Quest. by Complainants. Did you hear the Charge mentioned in said Specification, and in what manner was it made ?

Ans. I do not recollect whether his expression was that they acted in a corrupt manner, or in an improper manner. He said they had no right to do what they did.

Pliny Merrick, Esq. called.

Quest. by Complainants. Did you hear the Charge mentioned in said Specification ?

Ans. I did. It was after Col. Burbank came down from the Hall, where he had been examined as a witness, sworn by Col. Cushing. No member of the Court was present. He was complaining of the manner in which they had treated him, and said he believed they were acting corruptly. He hesitated for a moment, when appearing to think he had expressed himself too strongly, he said, I do not mean that they have acted corruptly in the most extensive sense of the word,* but he believed they were proceeding under the influence of improper motives.

Quest. by Defendant. Did Col. Burbank predicate his charge of corruption or of improper conduct upon any thing *but* their proceedings on that occasion with respect to him as a witness ?

Ans. I cannot say positively. His remark respecting their acting corruptly, was made immediately after he spoke of his treatment in the Hall. H."

The Judge-Advocate read the Records of the Court of Inquiry in the case of Lieutenant-Colonel Gardner Bur-

* See Mr. Merrick's explanation of this answer, in his deposition, a few pages onward.

bank, from I. page 3, to J. page 6, and K. page 7, to L. page 10, as follows.

" I. Second Specification of Second Charge.

Licutenant-Colonel John W. Lincoln called, sworn, and interrogated.

Quest. by Judge-Advocate. What do you know relating to the Second Specification of the Second Charge ?

Ans. I was a member of the Court-Martial at Mendon, mentioned in said Specification.* There was then a question before said Court respecting the legality of the appointment of Pliny Merrick, Esq. as Judge-Advocate, pro tempore. For the purpose of obtaining further information upon this question before the Court, Lieutenant-Colonel Gardner Burbank was called as a witness.

Quest. by Judge-Advocate. Did Col. Prentice Cushing, acting as President of the Court, and pretending to an authority to administer an oath, administer an oath to the Defendant, and did he consent to take the same ?

Ans. Yes.

Quest. by Defendant. Did not Lieutenant-Colonel Burbank *object* to being sworn, and protest against the competency of Col. Cushing to administer an oath ?

Ans. Col. Burbank objected at first, but afterwards consented.

It is agreed by the Complainants and Defendant, that the following is a true account of the proceedings before said Court, relative to this Specification.

" Col. Burbank came in and was sworn by the President and examined.

Quest. by the Recorder. Are you the senior Aid to the Major-General of the Seventh Division ?

Ans. I am.

Quest. Who is the Judge-Advocate of this Division ?

Col. Burbank declined answering this question,† and

* See *Introducaion.*

† It is due to the reader that he be informed why Col. B. " *declined*" answering this question.——In the first place it will be noticed that he was under no legal obligation to answer. Neither Col. Cushing or his " Recorder," (who took the minutes of these interrogations) had any authority to swear and examine witnesses. The only obligation he was under, was that which is imposed upon every gentleman to answer questions which he deems to be not impertinent, and which it would not be improper to answer. That the question was impertinent, is clearly apparent from the facts stated in the *Introduction ;* for there could be no doubt as to the validity of Mr. Merrick's second appointment, it being made according to the express provision of the Statute. Any inquiries, therefore, after the production of that appointment, by Mr. Merrick,

declared that the Judge-Advocate who has been appointed is absent from this Commonwealth.

Quest. by President. Do you know whether he has been qualified under this Commission ?

Ans. I do not. I presume he has been, but of this, I have no certain knowledge.

Quest. by Recorder. How long has he been absent rom the Commonwealth ?

Ans. I cannot define the period precisely.

Quest. Has he been absent one month ?

Ans. I do not know precisely, but know that he is now absent.

Quest. Is his name borne on the Division Roster as the Judge-Advocate ?

Ans. I have his name on a piece of paper. In consequence of Commissions having passed through the hands of Major Newton, I have not now a complete Roster.

Quest. Have you any further information respecting the appointment of Judge-Advocate, that you can give this Court ?

Ans. I have. The Major-General of this Division made a nomination of Judge-Advocate, some more than a month since, which I think was disapproved of the 24th of Feb. He immediately made another nomination, which was accepted by his Excellency, and the person commissioned immediately. The facts relative to this person you have before you.

Quest. How long is it since Major Lincoln, the late Judge-Advocate was discharged from the duties of his office ?

Ans. As near as I can recollect, about a year since.

were unnecessary and impertinent.—That it would have been improper for Col. B. to answer the question, will appear from the following statement.

After Gen. Burbank had refused to nominate a particular friend of Col. Lincoln's to the office of Judge-Advocate, the latter, with his friends, determined to embarrass the Major-General in his attempts to fill the office. With this view they succeeded in defeating one nomination ; and it was understood that it was their intention to prevent, if possible, the acceptance of the office by any person who should be commissioned. Apprized of this intention, the Major-General having procured the appointment of Mr. Strong, directed Col. B. his Aid, not to disclose, unnecessarily, the name of Mr. Strong, until it should be ascertained whether he accepted the office. At the time these interrogatories were put, Mr. Strong's Commisssion could have been in his hands but a few hours, and it was unknown whether he had accepted the office. Col. B. therefore, knowing that the question was wholly unimportant to the "*Court* sitting for the trial of Capt. Nelson," and believing that it was asked by Col. Lincoln, in pursuance of the *intention* that has been stated, "*declined*" answering it. Upon his trial he offered to show the reasons for his declining, but the Court refused permission.

The Court having no further questions to ask Col. Burbank, he was permitted to retire.* J."

"K. The Second Specification of the Second Charge, under the consideration of the Court.

Major-General Caleb Burbank called.

Quest. by Complainants. At what time was the commission of Major Strong last in your hands?

Ans. I think on the morning of Saturday, February 28, 1818.

Quest. by Complainants. Was not the commission in your hands on the morning of the 3d of March, at the time that Col. Burbank was at your house, on his way to Mendon, and at the time you made out the last mentioned order, appointing Pliny Merrick as Judge-Advocate, pro tempore?

Ans. It was not. I told Col. Burbank on the morning of Saturday, the 28th February, that the commission ought to be sent on to Washington to Major Strong as soon as possible; but directed him to preserve the envelope to carry to Mendon, to give the Court full satisfaction that there was a Judge-Advocate commissioned.

Quest. by Complainants. On the morning of the 3d of March, did Col. Burbank tell you whether he had sent the commission to Major Strong, or has he since told you when it was sent?

Ans. I directed him, as I observed in the last answer, to send it on, and I understood him to say, on the morning of the 3d of March, that he had sent it on. Since that he has told me that on the 3d of March he expected it was sent, but had since ascertained that owing to the mistake of a boy in taking a wrong letter to the post-office, it was not sent on the 3d of March.

It is admitted that letters pass from Worcester to Washington, by regular course of the mail, in four days.

Quest. by Complainants. Has he not since informed you that on the morning of the 3d of March he left the letter at his father's house to be sent to the post-office?

Ans. On the 3d of March he called at my mill. I asked him if it had gone on. He told me it had. I do not recollect any other conversation upon the subject, except as testified in my last answer.

* The reader will understand that this is the language of the Journal, kept by Col. Cushing's "*Recorder*."

Quest. by Complainants. Did Col. Burbank name the boy ?

Ans. He did not.

Pliny Merrick, Esq. called, sworn, and interrogated.

Quest. by Complainants. Did Col. Burbank ever inform you of the facts about his sending Major Strong's commission to him ?

Ans. Yes. He told me before I went to Mendon, on the 3d of March, that Major Strong's commission had been sent to him. He also told me the same at Mendon.

Quest. by Complainants. Did he at any time inform you at what time he sent that commission ?

Ans. I always understood Col. Burbank that it had been sent several days previous to the 3d of March. I had conversation with him on the evening of the 2d of March, when he said it was then gone on.

Quest. by Complainants. Was it not a subject of publick notoriety, that Major Strong went in the fall or early in the winter to Congress ?

Ans. I do not know. I know that he *was* there, but did not know that he went at the commencement of the session.

Adjutant Jonathan Knight called, sworn, and interrogated.

Quest. by Complainants. What have you ever heard Col. Burbank say about his testimony before the Court-Martial at Mendon ?

Ans. After Col. Burbank came down from the Hall at Mendon, on the 3d March, 1818, I heard him say " Col. Lincoln has examined me very closely, but I have not told all I know.* L."

Col. Prentice Cushing called and examined.

Quest. by Complainants. What was the state of the travelling from the 28th February to the 5th March, inclusive ?

Ans. Very bad indeed. Col. Burbank said, when he arrived at Mendon, that he was obliged to go across lots.

Col. Thomas Chamberlain called, sworn, and examined.

Quest. by Complainants. What was the state of the travelling from the 28th of February to the 5th of March, inclusive ?

* This witness proves no more than already appeared on the Record. Col. B. did not tell " all he knew," and the reason of it has been explained at length in a former note.

To this question the Defendant objected, and requested the opinion of the Court.

The Court decided that it was a proper question.

Ans. of Col. Chamberlain. On the 28th February a thaw commenced: towards night it began to rain. There was a considerable quantity of snow on the ground at this time. It rained with intermission for three or four days, and occasioned a great flood: it swept away many bridges.

Quest. by Complainants. On what day did the rain cease?

Ans. I think it was on the third of March.

Quest. by Defendant. Was the travelling very bad before Monday morning, the 2d of March?

Ans. The roads had not broken up much before that time, although before that time, it was very wet, and horses, in travelling, slumped considerably.

Agreed by Complainants, that it could not be known at Worcester, on the 4th March, that the travelling between New-York and Washington was bad on the 2d and 3d of March.

Lieutenant-Colonel John W. Lincoln, called, sworn, and interrogated.

Quest. by Complainants. At what time in the day did the southern mail leave this town during last February and March?

Ans. From eight to nine o'clock in the evening.

Quest. by Defendant. Was the travelling on the post-road from Boston to Washington such as to impede the progress of the mail?

Ans. I have no doubt it was.

The Judge-Advocate, at the request of the Complainants, proposed to offer in evidence a news-paper, printed in Worcester, of the date of January 14, 1813, in which was published an account of certain transactions which took place in Congress on the first of January last, where the name of Mr. Strong is mentioned. It was proposed also to prove that Defendant, at the time of the date of said news-paper, was a subscriber for said paper, and usually took the same. This evidence was offered to prove that Defendant, when he testified at Mendon, on the 4th of March last, *knew** that Mr. Strong had been absent from the Com-

* The reader is requested here to advert to the nature of the Charge in the Specification. Col. B. was charged with giving equivocal and indirect answers. He was not

monwealth more than one month. The Defendant objected to this evidence, as having no tendency to prove the fact, for the proof of which it was offered—for even if it were proved that he received this very news-paper, it would not appear that he read the part referred to.

The Court, after mature deliberation, decided that the evidence proposed was inadmissible.

The Supplementary Specification of Charge under the consideration of the Court.

The Judge-Advocate read to the Court the Deposition of Pliny Merrick, Esq. which was admitted by consent of Complainants and Defendant, and is as follows :

I, Pliny Merrick, of lawful age, testify and say, that in using the words, " in the most extensive sense,"* when I was stating to the Court of Inquiry, of which General Elijah Crane was President, the expressions of Col. Gardner Burbank, when he stated that the Court-Martial at Mendon, of which Col. Prentice Cushing was President, " was acting corruptly," I did not mean to say that I remembered that these particular words were used by Col. Burbank.

After Col. Burbank stated he believed the Court were acting corruptly, he hesitated a moment, and then added a qualifying phrase of the term he had used, which phrase ended with these words, " that he believed they were proceeding under the influence of improper motives." I understood the qualifying language of Col. Burbank to explain what he intended by the word corruptly ; and then I understood his meaning to be, by the explanation which he added, that the Court were acting under the influence of improper motives.

Quest. by Lieut. Col. John W. Lincoln. Is your present impression as to the meaning of the qualifying phrase used by Col. Burbank as above stated, the same as it was when you testified of it before the Court of Inquiry ?

Ans. It is precisely, and I intended then to convey the same meaning as I have here above expressed, and thought I did.

Quest. by Lieut. Col. Burbank. Did you then attach any other importance to the words intervening between the

charged, (and if he had been, he could not have been tried before *this* Court on such a Charge) with swearing *falsely*—yet the evidence offered, and *all* the evidence admitted on this subject was designed exclusively to shew that he *did* swear falsely. A more extraordinary instance of a *departure from the Charge* cannot be found in the Records of any other Tribunal.

* See page 14.

words *corruptly*, and the words "acting under the influence of improper motives," than a necessary introduction to the explanation which was made ?

Ans. I considered the whole remark as an explanation how far Col. Burbank would have his hearers understand his meaning of the word corruptly, as he had used it.

Quest. by Lieut. Col. Lincoln. Did not Col. Burbank make an unqualified Charge of the Courts acting corruptly ; and did he make any explanation of the Charge, until there appeared a surprise in the countenances of the hearers at the expressions he had used ?

Ans. Col. Burbank used the word corruptly as I have mentioned : he hesitated a moment, and added the qualifying remark, I have above stated. I am not able to say that Col. Burbank noticed any surprise in the hearers. I was surprised myself, but the explanation was satisfactory to me.

PLINY MERRICK.

WORCESTER, *ss.* Sept. 3, 1818.

Pliny Merrick, the above Deponent, personally appeared, and made solemn oath to the truth of the above Deposition, by him subscribed, taken at the request of Lieut. Col Gardner Burbank, and by the consent of Lieut. Col. John W. Lincoln, the Agent of the Complainants, and so to be used in the trial of the said Col. Burbank before a General Court-Martial to be held at Worcester on the eighth day of September current, of which General Nathaniel Goodwin is President—before

WM. STEDMAN, *Justice of the Peace.*

Colonel Warren Rawson called, sworn, and examined.

Quest. by Defendant. Was you present at the conversation testified of by Mr. Merrick, and if so, what was it ?

Ans. I was present at the time, but I cannot recollect all the conversation of Colonel Burbank. When he returned from the Hall, he appeared to be displeased, and made use of strong expressions against the Court. He said at first the Court acted *corruptly*. Afterwards he said they acted improperly, and stated his reason, to wit, that they had no right to administer an oath, as they had no Judge-Advocate or Magistrate. From the whole conversation, I understood that he meant merely to say that the Court had acted *improperly* to him as a witness.

Quest. by Complainants. Did he not as much refer to the refusal of the Court to recognize Pliny Merrick, Esq. as Judge-Advocate, as to an oath being administered to him ?

Ans. In the afternoon he expressed himself very strongly against the conduct of the Court, in refusing to admit Pliny Merrick, Esq. as Judge-Advocate, but used no disrespectful language respecting the Court.

The Court proceeded to the consideration of the defence of the First Specification of the Second Charge.

The Judge-Advocate read from the Records of the Court of Inquiry, in the case of Lieut. Col. Gardner Burbank, from M. page 15, to N. page 16, as follows :

" M. Major-General Caleb Burbank called.

Quest. by Judge-Advocate. What do you know of a conversation between yourself, Major Newton, and Col. Burbank, respecting the office of Judge-Advocate ?

Ans. A short time previous to the date of the letter mentioned in the First Specification of the Second Charge, Colonel Burbank, Major Newton, and myself were together. At this time Major Newton owned that he should be pleased with the office of Judge-Advocate, because it was lucrative, and he should like the emoluments of it.

Quest. by Complainants. Did not Major Newton say that he wanted the office of Judge-Advocate, because it was *more lucrative* than the one which he then held ?

Ans. Yes. N."

Major Rejoice Newton called, sworn, and examined.

Quest. by Defendant. Did not Col. Burbank call on you the day after the date of his letter to you ; and if so, did you complain of any impropriety in the letter ?

Ans. He called on me within a few days after the receipt of the letter. The conversation was very short, and I have no recollection that I expressed any dissatisfaction at the time.

Quest. by Defendant. Did you *ever* express to Colonel Burbank any dissatisfaction on account of any impropriety in his letter to you.

Ans. I do not recollect that I *ever* did. I do not recollect that I have ever had any conversation with him upon the subject of the letter.

Lieut. Col. John W. Lincoln called.

Quest. by Defendant.* Did not Col. Burbank, when he declined to answer the question, "who is the Judge-Advocate of this Division?" say, that if the Court decided that the question was important to the inquiry before the Court, he would answer it?

Ans. I am certain he did not.

Edward D. Bangs, Esq. called, sworn, and examined.

Quest. by Defendant. Was it a matter of publick notoriety in this town, on the 4th of March last, how long Mr. Strong had been at Washington?

Ans. I do not know that it was. *I* did not know how long he had been there.

Quest. by Complainants. Did you not know on the 4th March last, that Mr. Strong had been in Washington more than one month?

Ans. I did not know it positively; but I should have thought that he had been, from the circumstance that Congress had been in session from the beginning of December.

Quest. by Complainants to the Judge-Advocate, the Judge-Advocate being first sworn by the President. At what time did you arrive in Washington last fall?

Ans. November 29th.

Levi Heywood, Esq. called, sworn, and interrogated.

Quest. by Defendant. Was the travelling on the post-road from this town to New-York materially injured, either on Sunday or Monday, the first and second of March last?

Ans. I cannot recollect. The snow went off principally on Monday. I do not know that the travelling was bad until Monday afternoon, the second of March.

Austin Denny, Esq. called, sworn, and examined.

Quest. by Defendant. Do you know the time of the arrival of the mail in this town from Boston, on the evening of the second of March?

Ans. I think it was not more than an hour after the usual time. I was waiting at the stage-office for the arrival of the mail.

Major-General Caleb Burbank called, sworn, and examined.

Quest. by Defendant. Did you not, on the morning of the third of March, understand, from Col. Burbank, that

* Second Specification of Second Charge being again under the consideration of the Court.

the commission of Mr. Strong had been put into the post-office on the Saturday previous, as you had directed ?

Ans. I had directed him to put the commission into the post-office on Saturday, the 28th of February. On the 3d of March, when I had conversation with Colonel Burbank on the subject, I understood him to say that he had put Mr. Strong's commission into the post-office, according to my direction.

Lieutenant-Colonel John W. Lincoln called.

Quest. by Defendant. Did not Col. Burbank, when he declined to answer the question, " who the Division Judge-Advocate was," state his objection to answer it ; and if so, what was it ?

Ans. He stated substantially that he was not obliged to answer it, and should not answer it—but I do not recollect his particular expressions.

Quest. by Defendant. What order did the Court take on his objection ?

Ans. The Court took no particular order upon the objection ; but attempted to obtain the information they wanted by asking other questions.

Colonel Reuben Sikes called, sworn, and examined.

Quest. by Defendant. Was there any interruption of the mails in consequence of the freshet of the 2d March last ?

Ans. There was some interruption. But according to my recollection, not enough to lose a trip. The mails were somewhat later at that time than usual.

Quest. by Defendant. At what time does the mail, which departs from town on Saturday evening, arrive in New-York ?

Ans. At 7 o'clock, Monday morning.

Colonel Samuel Damon called, sworn, and examined.

Quest. by Defendant. Did not Col. Burbank, when he declined to answer the question, " who is the Judge-Advocate of the Seventh Division," state that his reason was that he thought the question unimportant ?

Ans. He made some remarks intimating it was not important for the Court to know who the Judge-Advocate was. I do not recollect his words.

Quest. by Complainants. Were the observations you mention made before Col. Burbank was sworn or after, and when the question was put to him ?

Ans. I do not recollect.

Quest. by Defendant. Did not Col. Burbank consent to be sworn, in consequence of the Court's deciding that they had a right to swear him ?

Ans. He did. He observed that if it was the opinion of the Court that he ought to be sworn, he would consent to be sworn.

Colonel Reuben Sikes again called.

Quest. by Complainants. Have you examined your stage-books since your former examination, and what have you learned from them ?

Ans. It appears from my book that a trip *was* lost on the 2d of March, also on the 3d of March, in the arrival of the mail from the south.

Quest. by Complainants to Colonel Samuel Damon. Did Col. Burbank say, that if the Court considered the question of " who is the Judge-Advocate" important, that he would answer it ?

Ans. I did not hear him say so.

The Court proceeded to the consideration of the Specification of Charge for Neglect of Duty.

The Judge-Advocate read from the Records of the Court of Inquiry in the case of Lieutenant-Colonel Gardner Burbank, from O. page 16, to P. page 18, and from Q. page 19, to R. page 23, as follows :

" O. Major Levi Lincoln, jun. called, sworn, and interrogated.

Quest. by Defendant. What do you know respecting Col. Burbank's application to the Adjutant-General for a Roster ; and when was it ?

Ans. I recollect being, on some occasion, I think in the fall of 1814, in the Adjutant-General's office, when Col. Burbank requested of the Adjutant-General to be furnished with minutes for the purpose of making a Roster.

Quest. by Judge-Advocate. Did the Adjutant-General refer him to the Brigadier-Generals ?

Ans. I cannot say.

Major Samuel Allen, jun. called, sworn, and examined.

Quest. by Judge-Advocate. In what manner have Returns of Elections been made to the Adjutant-General's office from the first Brigade ?

Ans. I have in some instances sent them myself, after having obtained the signature of the Brigadier-General.

Quest. by Defendant. Did Lieut. Col. Burbank apply to you in the fall of 1814, for a copy of your Brigade Roster ?

Ans. I cannot state when. I recollect that he has more than once applied to me for a copy of the Brigade Roster. I think years since.

Quest. by Judge-Advocate. Has he made any application for a copy of the Brigade Roster, within a year previous to the exhibition of the Complaint ?

Ans. No.

Brigadier-General Salem Town, jun. called, sworn, and examined.

Quest. by Defendant. Have you not, during the year preceding the 25th of March last, transmitted directly to the Adjutant-General's office *Election Returns*, and received directly from the same office Commissions and Discharges ?

Ans. I have within the year transmitted Election Returns directly to the Adjutant-General's office. I have not within the year received any Commissions, but through the hands of the Major-General. I think I have once, or perhaps more than once, taken Discharges directly from the Adjutant-General's office within the year, with a request that I would give minutes to the Major-General, or one of the Aids. But I did not give notice to the Major-General or senior Aid ; but I think I did give notice to Major Newton, the junior Aid. P."

"Q. Brigadier-General Leonard Burbank called, sworn, and examined.

Quest. by Defendant. What do you know respecting the delivery of Military Papers belonging to the Seventh Division at the Adjutant-General's office to Brigadier-Generals ?

Ans. I know that Commissions and Discharges have been frequently delivered to me within a year past, with a request from the Adjutant-General that I would transmit minutes of the same to Col. Burbank. I did not, until very lately, transmit the minutes to Col. Burbank, nor until he requested me to do it, that he might correct his Division Roster. I have not yet rendered to him an account of all the Commissions and Discharges which I have received from the Adjutant-General's office, in consequence of having mislaid or lost some minutes which I took last.

Quest. by Judge-Advocate. Have not Election Returns from the Second Brigade been uniformly sent to the Adjutant-General's office, without passing through the hands of the Major-General ?

Ans. They have in my Brigade.

Quest. by Complainants. Have you not within a year previous to the exhibition of this Complaint, reminded Col. Burbank of the necessity of keeping a correct Roster ?

Ans. I do not recollect that I have. I recollect informing him last fall, that there was not a correct Division Roster, and inquiring of him why it was not kept.

Quest. by Defendant. Do you not know that Lieut. Col. Burbank has always registered the Commissions and Discharges which he has personally delivered to you ?

Ans. Yes.

Quest. by Complainants. When has Col. Burbank delivered you any Commissions or Discharges ?

Ans. Last week on Wednesday. This is the only time he has personally delivered any to me *within a year* previous to the exhibition of the Complaint.*

Quest. by Complainants. Have you not at any time told Col. Burbank that if he did not keep a correct Roster he would be complained of for such neglect ?

Ans. I told him so some time last summer or fall.

Brigadier-General Thomas H. Blood called, sworn, and examined.

Quest. by Judge-Advocate. Has Col. Burbank applied to you for a copy of your Brigade Roster, and have you furnished him with one ?

Ans. He applied to me about three years ago for such copy, and I gave him one.

The Judge-Advocate read to the Court the following :

To Lieutenant-Colonel GARDNER BURBANK.

Adjutant-General's Office, }
Boston, July 21, 1818. }

SIR—You must be sensible from the multiplicity of business in this office, that it is impossible for me to recollect dates. However, thus far I well remember, that about the time that Major-General Burbank nominated Mr. Austin

* The preceding question, " by Defendant," did not refer to any time *within the year*, as was supposed by the Complainants in putting the question last answered—but to a time when the witness was a Colonel, and received " Commissions and Discharges" for his Brigadier-General.

Denny as Judge-Advocate for the Seventh Division, and I think while it was under the consideration of the Commander in Chief, that you called at this office and requested a Roster of your Division; observing at the same time that Major Newton had been in the habit of receiving communications from this office for the Major-General, and forwarding Commissions, where destined, without correcting the Roster.

I then promised to forward you a correct Roster as soon as possible, which was done on the 10th day of March last. Gen. Burbank's nomination is dated on the 27th of January last, and the non-approval on the 23d day of February following. I am, respectfully, Sir,

Your obedient servant, FITCH HALL.

The Judge-Advocate then read the following:

Adjutant-General's Office,
Boston, Jan. 28, 1818.

Major-General CALEB BURBANK,

SIR—Discharges for Lieutenant-Colonel Stevenson and Aid-de-Camp Newton are enclosed.

I am, respectfully, your obedient servant,

For the Adjutant-General,

FITCH HALL.

Major Rejoice Newton called, sworn, and examined.

Quest. by Complainants. What do you know respecting the transmission of Commissions and Discharges in the Seventh Division?

Ans. The Discharges within the last four years, and almost all Military Papers sent from the Adjutant-General's office to this Division, were taken by me from the post-office in this town. This was done by me at the request of Col. Burbank, without any directions from him to keep minutes of them. I kept no other minutes than the covers of the papers transmitted. I have never furnished Colonel Burbank with any minutes, having never been requested by him so to do. R."

Major Samuel Allen, jun. called, sworn, and examined.

Quest. by Defendant. What is the effect upon the Division Roster of the transmission of Election Returns directly from Brigadier-Generals to the Adjutant-General's office?

Ans. When the Election Return is sent directly to the Adjutant-General's office from the Brigadier-Generals, the

office whose place is supplied still appears upon the Division Roster, although deceased.

Quest. by Complainants. Cannot an error in the Division Roster, such as you speak of, be ascertained as soon as it occurs, by an excess in the number of the officers ?

Ans. It may be corrected by inquiry, but not by any official paper.

Brigadier-General Salem Town, jun. called, sworn, and examined.

Quest. by Defendant. Have not Election Returns from your Brigade generally passed directly to the Adjutant-General's office ?

Ans. Yes. But sometimes through the hands of the Major-General.

Quest. by Complainants. Have you any recollection of an officer within the First Brigade having deceased between the 25th of March, 1817, and the 25th of March, 1818, and if so, how many ?

Ans. I do not recollect but one, to wit, Lieut. Lamb.

It is agreed by Complainants, that Major Newton, on the 13th of January last, informed General Burbank, by letter, that with that letter he sent all the papers belonging to the Department of the Major-General of the Seventh Division, and among those papers there were no papers or minutes from which a Roster could be made or corrected ; and that Col. Burbank, on the 16th of the same January, saw the letter and those papers. *For the Complainants,*

J. W. LINCOLN.

Major Rejoice Newton called.

Quest. by Complainant. What is the reason that you did not keep minutes of the Commissions, in addition to the envelopes which covered them ?

Ans. One reason among others, was, that I knew that Col. Burbank had not a correct Roster, and preserving the minutes of the papers passing through my hands, would not enable him to keep a correct Roster.

The Defence to the First Specification of the Second Charge under consideration of the Court.

The Judge-Advocate read from the Records of the Court of Inquiry, from S. page 24, to T. page 25, of the case of Lieutenant-Colonel Gardner Burbank, as follows.

" S. Major Rejoice Newton called.

Quest. by Judge-Advocate. What was the agreement between you and Col. Burbank as to the fees to which you were entitled as Aids-de-Camp to the Major-General ?

Ans. Soon after our appointment we agreed that the duties should be performed by either, as most convenient, and that the fees should be equally divided.

Quest. by Defendant. Do you not know that the Defendant never made but one account for his official services, and when was that account made ?

Ans. I have no knowledge that he ever made but one account for such services.

Quest. by Judge-Advocate. Had the Defendant, at the date of his letter to you, reason to suppose that you had made out more than one account for services as Aid-de-Camp ?

Ans. I do not know, *(that he knew)* that he knew that I had ever rendered but one account, and that about the same time with his account. This account included all my services up to that time. T."

Specification of Supplementary Charge under the consideration of the Court.

The Judge-Advocate read to the Court the following:

The Defendant agrees, that in his conversation at Mendon, testified of by various witnesses, when he spoke of the treatment towards him of the Court at that place, he alluded only to such of their proceedings as now appears upon the Records of this Court. GARDNER BURBANK.

The Defendant presented to the Court a written Defence, which was read by permission of the Court, by his Counsel.

The Complainants presented to the Court a written Reply, which, by permission of the Court, was read by their Attorney.

The Judge-Advocate read to the Court the whole Record, from the commencement of the trial.

The Judge-Advocate briefly summed up the evidence to the Court.

After which the Court directed the Marshal to clear the Hall of spectators, which being done, and the doors closed by the Marshal, the Court proceeded to render judgment and pass sentence in the case Commonwealth against Lieutenant-Colonel Gardner Burbank.

Adjutant-General's Office,
Boston, Nov. 24, 1818.

A true Copy—Attest,
WM. H. SUMNER, *Adjutant-General.*

DEFENCE.

Mr. President, and Gentlemen of the Court,

WITHOUT detaining the Court with preliminary observations, Lieutenant-Colonel Burbank proceeds to vindicate himself from the imputations attempted to be fixed on him by his accusers. With their motives for arraigning him, this Court have no concern. These would furnish no Defence before this tribunal to the Charges exhibited against him ; and they are too well understood abroad, to make it necessary to advert to them before the tribunal of the publick.

From the patience and urbanity already manifested by the Court, he is induced to hope for their further indulgence, while he examines the various Specifications of Charge.

The First Charge is wholly groundless, and is abandoned by the Complainants, because their want of evidence showed it to be such.

The First Specification of the Second Charge, alleges that the Defendant wrote and sent an improper letter to Rejoice Newton, Esq. with intent to injure the honourable feelings of officers. Does the letter which is spread on the Record substantiate this allegation ? In the first place, it is not an *official* letter, as is alleged ; but a mere friendly confidential communication. But let it be examined. What part of it, then, considering the circumstances with which it was connected, and the facts to which it alluded, was improper to be addressed to Major Newton ? What expression in it can fairly be considered as designed to give offence, or which naturally conveys an exceptionable meaning ?

The Defendant has been apprized that the word "*husbanded*" is the obnoxious expression. It is this word which wounds the delicate sensibility of the Complainants. That the word is sometimes used to convey an improper "*sentiment*," is readily admitted—and so is every other expression that could have been adopted. But the Defendant appeals with confidence to every unbiassed person of observation and experience, whether it is so used, ordinarily, in common conversation.

If this word obviously conveys the meaning which the Complainants would make it, would not the person to whom the letter was addressed, have so understood it ? and would

he not have resented the indignity offered him? Would he not, as an officer, have exhibited to the proper authority a complaint; or would he not, as a *gentleman*, have required of the Defendant an explanation? To suppose that he would not have done so, would be to suppose him insensible to what was due to his own honour. Are these the Complainants possessed of honour, discernment, and finer sensibility, than he, that they should assume the guardianship of his honour, and undertake to redress a wrong which he did not feel that he had suffered? Surely, unless we deny that Major Newton possesses an equal share of discernment and sensibility with the Complainants, we are bound to presume that the sense in which he must have understood the word, and in which the Defendant used it, is its proper and ordinary meaning.

But were it possible to believe that the Court would construe the letter to Major Newton as the Complainants would have them, the Defendant would have to regret only that his obvious meaning should be misunderstood. He would have nothing with which to reproach himself, and would have occasion to rejoice that *he* does not rest under the imputation of disclosing the private letter of a friend, to gratify his own or others' malevolence.

In answer to the Second Specification of the Second Charge, the Defendant takes two positions.—*First*, that it is not proved that he was sworn before "*a Court-Martial, whereof Colonel Prentice Cushing was President*," as is alleged.—*Secondly*, that admitting he was so sworn, it is not proved that he "*refused*" to answer any question "*concerning a fact important for that Court to know*," or that he "*evaded*" any such question, "*by giving an equivocal or indirect answer thereto.*"

The *Second* ground of defence is a sufficient answer to the Specification; but he deems it his duty, under the peculiar circumstances of this allegation, to insist also upon the *First*.

Courts-Martial, in this Commonwealth, are, by the statute of 1810, constituted of a President, Judge-Advocate, twelve Members, and a Marshal. The President and the "*intended* members," can no more constitute a Court without the Judge-Advocate, than can the Judge-Advocate and intended members, without the President. Without a Judge-Advocate, therefore, there can be no Court-Martial.

What, then, are the facts proved under this Specification? It is in evidence that certain officers were appointed and detailed to serve as President and members of a Court-Martial, and that these officers assembled. But they, of themselves, could not constitute a Court. A Judge-Advocate was necessary. But it is also in evidence that they refused to permit the Judge-Advocate to organize the Court, and forced him from their presence. When, therefore, they had separated themselves from the Judge-Advocate, they were not a Court. The Judge-Advocate, in an adjoining room, was as much *a Court*, "*then and there held for the trial of Capt. Nelson*," as were the President, and the *intended* members without him. No Court, therefore, was "then and there held" for Captain Nelson's trial.

Before these officers, so situated, it is proved that the Defendant was sworn by the officer who had been appointed to serve as President of a Court-Martial. Do these facts prove the allegation, that the Defendant was sworn before a "*Court-Martial, whereof Colonel Prentice Cushing was President, then held for the trial of Captain Nelson*?" It is not easy to see how, by any ingenuity, they can be made to support it. If, then, the Defendant's views are correct, the Specification falls to the ground, and the Court will not be obliged to go into any further inquiry under it. For even if it were true that the Defendant had refused to answer before a mere collection of officers, he could not be convicted, because he has not been tried on such a Charge.

But although here is a complete legal defence to the Specification, the Defendant will, with the permission of the Court, proceed to remove the imputation of dishonourable conduct, which the Complainants have endeavoured to fix on him, and to show that he did not "*refuse*" to answer any question, put to him by Colonel Cushing or Colonel Lincoln, concerning any fact which was important to be known by them, or the officers with whom they were associated; and that he did not "*evade*" any question, by giving an *equivocal* or *indirect answer*.

The Complainants have placed on the record an extract from the journal, kept by the officers before mentioned, containing the interrogatories put by them to the Defendant, and his answers to the same. They have, also, by the direction of the Court, pointed out, (which they failed to do

in the Specification) each particular answer, which they consider as *evasive*, or *equivocal*, or *indirect*.

Before the Defendant proceeds to consider the character of the questions and the answers, he will remind the Court of the very extraordinary circumstances under which he was sworn and examined. It is in evidence that here was a collection of officers, who had been ordered to form a Court-Martial; but had refused so to do—sitting in conclave, and consulting how to evade the orders of the Major-General. Before these officers was the Defendant called, and required to give evidence under oath. To this he objected, and protested against the competeney of Col. Cushing to administer to him an oath. Assuming to themselves, however, the character of a Court, they decided that he must be sworn; and the Defendant, knowing that they had at hand an officer who supposed himself bound to execute their orders, submitted to the necessity he was under of being sworn. He appeals to this Court, whether, under such circumstances, he had not reason to suspect that other motives induced his examination, than to ascertain any facts important to be known for the decision of any question which was properly under their consideration? Whether he had not *some* reason to believe there was a combination against *himself*, as well as against the Major-General; and that to accomplish the purposes of this combination was one object of his examination. This Court will judge, too, from the nature of several of the questions, which were put to him, whether such purposes were not actually in view. For what purpose was he questioned concerning his Roster, if it were not to obtain materials for a charge against him? And can this Court doubt that such *was* the purpose when they find these same officers preferring a complaint against him, for not keeping a correct Roster? For what purpose, also, was the Defendant asked if he was the senior Aid-de-Camp? This Court will recollect that he is Division-Inspector as well as Aid. That he was *senior* Aid, if at all an *Aid*, must have been perfectly well known to every officer before whom he was examined. But whether he had not ceased to be Aid, upon his being commissioned as Division-Inspector, might be a question. To obtain, therefore, from him an acknowledgment under oath, that he *was* senior Aid, was important for them, in order to support the charge for not keeping a correct Roster. He apprehends

that this Court cannot doubt such was the *sole* object of the question.

Such being the circumstances under which the Defendant was sworn, and such the purposes for which he was examined—he will proceed to consider the several interrogatories, and the answers given to them.

He is charged with refusing to answer the question, "who is the Judge-Advocate of this Division?" Here it is incumbent on the Complainants to prove two things, viz. that he "*refused*" to answer, and that the question was concerning a fact important for the officers before whom he was examined "*to know.*"

In the first place, did he so "*refuse?*" It is admitted on the record, that he *declined* answering the question; but he denies that he absolutely *refused.* From the testimony of Colonel Lincoln, to be sure, the inference *might* be that he *did* refuse. But Colonel Lincoln does not pretend to state the *words* used by the Defendant. He evidently testifies according to his present impressions. But if the Defendant did more than to *decline* answering the question; if he absolutely refused, why did not Col. Lincoln so record it in the journal which he kept? Why is it that he did not state in that journal that the Defendant *refused*, unless it is because he did no more than to express his *unwillingness* to answer?

In support of the presumption, that the Defendant only *declined*, and did not *refuse* to answer, is the testimony of Col. Damon, who swears that the Defendant *objected* to answering, and that he said he thought the question unimportant: and the further testimony of Col. Lincoln, who swears that "*the Court*" (the Defendant, to avoid circuity, adopts this term) took no order on his objection, but proceeded to attain *the information they wished for*, by putting other questions. Can it, then, be doubted, although these witnesses, who are, both of them, Complainants, seem not to recollect the fact, that the Defendant appealed, expressly, to the Court, for their decision on the question? But if there *be* doubt on this point, that doubt is in favour of the Defendant; because it is for the Complainants to make out the case *beyond* doubt. The fact, however, that he merely *declined*, and that the Court did not direct him to answer Col. Lincoln's question, does not admit of doubt.

But suppose he had refused to answer.—Was the question "concerning a fact important for the Court to know?" It is difficult to see how any of these questions were important to a Court-Martial sitting for the trial of Captain Nelson. But if any of them were, *this* obviously was not. The Court knew that a Judge-Advocate had been commissioned; and they were informed by the Division Order of the 27th of February, that he was unable to attend the trial. But it seems they had other business on hand, than the trial of Capt. Nelson; and they wished to ascertain whether the Judge-Advocate was qualified to act under his commission. To ascertain that fact of the Defendant, it was of no importance to learn the name of the Judge-Advocate. He could say, and did say, whether he knew him to be qualified, without disclosing his name. An answer, then, to the question, could give the Court no information which was necessary. Indeed, from Col. Lincoln's testimony, it appears that the Court, themselves, did not think it necessary; for he swears that they proceeded to put *other* questions for the purpose of obtaining the information they wished for. If, then, the Defendant had refused to answer, he might have been justified in doing so.

The *answer* to the next question put to the Defendant, the Complainants say is *equivocal* and *evasive*. He was asked if he knew whether the Judge-Advocate was qualified under his commission. His answer was, "*I do not.*" Is this equivocal or evasive? But the Defendant did more than to *answer* the question. He proceeded to inform the Court what he *presumed* to be the fact. The Complainants, therefore, have abandoned the allegation in the Specification, and have attempted to prove that he *did not presume* as he stated; in other words, that he perjured himself. An obvious remark here, is, that he has not been tried, and could not have been tried before this Court on a charge of *perjury*. Nevertheless, he is unwilling that the very extraordinary effort to prove him guilty of that crime, should go unnoticed.

What is the proof to support this vile imputation? Why that the travelling on the 2d and 3d of March last was very bad, owing to a heavy freshet? And the inference the Complainants wish to have drawn from that circumstance, is, that the Defendant must have known that the mail which left this town on the evening of February 28th, which was in New-York on the morning of the 2d of March,

and must have been in Philadelphia on the evening of the same day, could not have arrived in Washington at the usual time! And is such evidence, and such an inference sufficient to satisfy this Court that the Defendant has been guilty of perjury?

But it is not material to dwell on this part of the subject, as it is one on which the Court will not adjudicate. The simple point to be considered, is, whether the *answer*, which the Defendant deems to be as *positive* and *direct* as words can make it, *is* either *equivocal* or *evasive*.

The next answer is said to be *evasive* and *equivocal*. The question was, how long the Judge-Advocate had been absent from the Commonwealth? The answer is, "*I cannot define the period precisely*,"—in other words, *I do not know*. Is this *evasive?* Is it *equivocal?* It is a libel on the understanding of this Court, to assert that it is either the one or the other.

The answer to the next question is alleged to be *evasive*, *indirect*, and *equivocal*. The question was, "has he been absent one month?"—*Answer*. "I do not know precisely; I know that he is *now* absent." So far from this answer's being evasive, indirect, and equivocal, it is, if the Defendant understands the plain import of words, explicit, direct, and unequivocal. Surely, the Complainants must have made some new discovery in language. What! is it evasive, and indirect, and equivocal, for a person to reply to a question, that he has no certain knowledge of the fact inquired about?

But evidence has been offered in relation to this or the preceding answer. Here again we have something new. *Evidence* to *prove* an answer to be *evasive* and *equivocal?* *Evasion* and *equivocation* are *necessarily apparent*, if existing, and are not the subject of *proof*.

But the evidence may have been offered for another purpose—to prove the Defendant guilty of a crime for which he is not on trial—the crime of *perjury*.

What, then, is the evidence by which this second attempt to fix on the Defendant the imputation of false swearing, is supported. The Complainants have proved by the Judge-Advocate, that he had actually been absent three months previous to the 4th of March. And, to bring home the knowledge of the fact to the Defendant, they have called on Mr. Merrick, who swears that he does not know how long the Judge-Advocate had been absent, or that it was a

matter of *publick notoriety* how long he had been absent; but he merely knows that he was at Washington, at some time during the session of Congress. Another gentleman, Mr. Bangs, testifies to the same effect; adding, however, that he could not have said that Mr. Strong had been absent *one month:* he should merely have *conjectured* that he had.

If such gentlemen, who are in the habit of daily reading the news-papers, and of attending to the proceedings of Congress, are ignorant on this subject, how can it be said that the Defendant, whose occupation is so dissimilar to theirs, could not have been ignorant? Yet *this* is the evidence that he has been guilty of perjury, in giving the answer under consideration.

The next question is, "is his name borne on the Division Roster?"—*Answer.* "I have his name on a piece of paper. In consequence of commissions having passed through the hands of Major Newton, I have not now a complete Roster." This answer is alleged to be *evasive*, *indirect*, and *equivocal.* The Defendant admits that it is *indirect*, but denies that the question was "*evaded*" by it. An answer may be *indirect*, and yet the question be fairly answered; as the experience of every person, who has attended to the examination of witnesses, can testify. Indeed, so common is it in this part of the country to answer questions indirectly, and yet fairly, that this circumstance is spoken of abroad, as one of the characteristicks of the people of New-England. In this case, the answer clearly implies a negative to the question; and is the same as if the Defendant had said, "It is not borne on the Roster; I have his name on a piece of paper, &c." The Defendant feels that it would be a waste of time, and an impeachment of the good sense of this Court, to offer any arguments in support of a construction so obvious.

The next and last answer that is objected to, is alleged to be *indirect* and *evasive.* The question is, "have you any further information respecting the *appointment* of Judge-Advocate, that you can give this Court?"—*Answer.* "I HAVE." The Court will decide whether this answer is *indirect* or *evasive.*

The allegation concerning this answer, is so excessively ridiculous, even when coming from the Complainants, that the Defendant is willing to suppose it was meant to be ap-

plied to the "*information*" which he proceeded to give. But even upon this supposition, the Complainants will gain but little credit for sagacity; as the information is conveyed in terms as explicit as could well have been used; and they will not have the effrontery to pretend that a syllable of it was untrue.

The result, then, of this examination of the questions and answers, which are the subject of this Specification, is, that the question which was unanswered was *unimportant*—must have been so considered by the Court at Mendon—that the Defendant did not "*refuse*" to answer it—and that not a single question was "*evaded*" by an "*equivocal* or *indirect answer.*"

He regrets that it was made his duty to occupy so much time in replying to the illiberal and unfounded aspersions contained in this Specification. But he trusts that the Court, who may have noticed the eagerness with which his accusers have pursued the investigation of this Charge, will be inclined to excuse what might otherwise be deemed unnecessary prolixity.

The remaining Specifications he will endeavour to answer more briefly.

The *Third* Specification alleges that the Defendant threatened to issue an order to dissolve the *Mendon Court*, of which this Honourable Court have heard so much; which threat "tends to destroy all confidence in Courts-Martial." He would here remark, that even if the allegation were true, it would not constitute any offence. What if the Defendant *had* threatened to dissolve a Court-Martial by his own order? How could such an idle threat "tend to destroy all confidence in Courts-Martial?" The idea of such a *tendency* is ludicrous. Suppose he had threatened to transport the members of a Court-Martial to Botany Bay, *by his own order;* would this or any other Court consider such a *threat* as a proper subject for their adjudication? Yet the one *threat*, as much as the other, would "tend to destroy all confidence in Courts-Martial," for both would be regarded as idle wind.

But how is this singular accusation supported? The evidence, which is wholly on the part of the Complainants, is that, in one instance, the Defendant said he *had a mind* to dissolve the Court; and in another, that he said, laughingly, that he *would* dissolve it. Major Graves, indeed,

who is one of the Complainants, thinks that the Defendant was not "*well pleased;*" but Mr. Merrick, to whom the conversation was addressed, and who, therefore, was the better able to judge of its character, swears positively, and repeatedly, that what was said on the subject, was spoken in a *light, unmeaning manner.* And this is the *publick threat to dissolve a Court-Martial*, which is so formally charged upon the Defendant.

The next Specification of this Charge is contained in the Supplementary Complaint, and alleges that the Defendant "*publickly charged*" the same *Court at Mendon* with "corruption," and with acting "in a corrupt manner." This is a charge against the Defendant, of which, he apprehends, the Court will require positive and indubitable proof, before they would convict him upon it. But what is the proof? Why that, in conversation with Mr. Merrick, immediately, the Court will notice, after the Defendant had been improperly sworn as a witness by Colonel Cushing, he remarked that the Court were acting "*corruptly;*" but that he immediately recalled what he had said, and explained himself by saying he meant that they were "acting from the influence of improper motives." How far the remark, as explained, was justifiable, it is not necessary he should attempt to shew; nor, as he supposes, for this Court to inquire. If he should be put on his trial, for making the remark, he would then attempt to shew that Mr. Merrick misrecollects as to the particular words made use of by the Defendant. But the allegation on which he has been tried, is for charging the Court with "corruption." It is this allegation only against which he now defends.

If, then, he can be convicted on this Specification, it must be for uttering the word "corruptly." The question, therefore, is, whether that expression, immediately recalled and explained, was such a "*publick charge*" of "corruption" as is alleged in the Specification.

What is the testimony of the witnesses? From the tenor of Mr. Merrick's whole testimony, it is apparent that the Defendant meant to be understood, and was in fact understood, as saying that the Court had conducted *improperly.* This testimony is confirmed by Colonel Rawson, a gentleman of honour and intelligence, who testifies that the Defendant's remarks were confined to the conduct of the Court in swearing him as a witness, when they had no legal

authority to do so ; and that he understood the Defendant, although he was severe in some of his remarks, to mean nothing more than that they conducted improperly in administering to him an oath.

But the Complainants, not satisfied with this fair explanation of the Defendant's conduct, by a candid and intelligent witness, and willing to catch at a straw to save their sinking Specification, proceeded to cross-examine Col. Rawson. They inquired if the Defendant's remarks were not made as well concerning the refusal of the Court to recognize the Judge-Advocate, as their administering an oath. Colonel Rawson's answer is, that the Defendant did, in the course of the same afternoon, make some observations on that subject—but that his language was perfectly respectful concerning the Court.

The Defendant will trouble the Court with no comments on this testimony, for he cannot persuade himself that his conversation, as testified of by the witnesses, and as understood by them, can be so misunderstood by the Court, as that they can say he either *intended* to charge, or *did in fact* charge the Court at Mendon with such moral turpitude, as is implied by " corruption."

The last charge against the Defendant is for Neglect of Duty, in not keeping a correct Division Roster, as he is required by law. He has admitted on the record that he has not complied with this requisition, and has shewn that he has been *unable* to comply with it.

In order that a correct Division Roster may be kept, it is absolutely necessary that every election return, every discharge and every commission, should pass through the hands of the senior Aid-de-Camp. The failure to transmit either of these papers through his hands, prevents his conforming his Roster to the actual state of the Division. If, for instance, there is forwarded directly from a Brigadier-General to the Adjutant-General, the return of an election to fill a vacancy occasioned by *death*, the Roster officer has no means of knowing that any vacancy has occurred. When, therefore, he receives the commission for the officer elected to fill the vacancy, he can only *add* his name to the register of officers of the same grade in the regiment, in which he is commissioned, but cannot know what name to *erase* from his Roster—and thus it is incorrect at once.

So if a discharge fails to pass through his hands, the same consequence follows. It is unnecessary to state the effect of a failure to transmit commissions through his hands.

If, then, the failure to transmit through the hands of the Roster officer either election returns, discharges or commissions, puts it out of his power to keep a *correct Roster*, the Defendant has a complete excuse for not complying with the requisition of the law. It is proved that election returns, and discharges, and commissions, are *frequently*, and have been *repeatedly*, within the year preceding the complaint, transmitted to and from the Adjutant-General's office, without passing through the Defendant's hands, and without his being furnished with the minutes of such papers.

It has been suggested that he ought to have called on Major Newton, the junior Aid, for minutes of such papers as passed through his hands. To this he answers that the difficulties he has shown to have existed, did not arise from the transmission of papers through the hands of Major Newton, but through the hands of the Brigadier-Generals. When, however, Major Newton resigned, he would have called on him for such minutes, if it had not appeared, from his letter to the Major-General of the 13th of January last, that he had none.

It has been said, also, by the Complainants, that he might have kept a correct Roster, as well *formerly* as *now*. He answers that it does not appear that his Roster *is* now correct. Indeed, his Roster, although corrected only six months since, at the Adjutant-General's office, has already, as he has learned by inquiry, become incorrect, without his fault. Discharges and election returns, have, in some instances, since that time, been transmitted without passing through his hands, and thereby he has been unable to preserve his Roster correct.

If it be said that he might correct his Roster by the Brigade Rosters, his answer is, that it is not his duty to travel every week to the Roster officers of Brigades—nor is it their duty to submit their Rosters to his inspection. Should he do so, however, he could have no assurance that their Rosters are correct.

But it is unnecessary to pursue this subject. The Defendant is conscious of no neglect of duty; and he trusts

the failure to do what it has been impossible for him to do, will not subject him to the imputation of such neglect.

How, then, are the charges against him supported ?

The *First* is abandoned.

The First Specification of the *Second Charge* is wholly unsupported by the evidence, inasmuch as it relates to an "official" letter, while that offered in evidence is altogether private and confidential.—And even this private letter contains no such "*matter*" or "*sentiments*" as alleged in the Specification.

The Second Specification of the same Charge is also wholly unsupported, because it appears that the Defendant was *not* sworn before a "Court-Martial, whereof Colonel Cushing was President, then sitting for the trial of Captain Nelson;" but merely before a collection of officers, of whom Colonel Cushing was one. The imputation, also, endeavoured to be fixed on the Defendant of false-swearing and equivocating before those officers, is shown to be unwarranted.

The Third Specification also fails of being proved, because it appears that no such *threat* as is alleged, was made by the Defendant; and that all which was *said* on the subject by him, was spoken in a sportive, unmeaning manner, and not in the presence of any member of the Court.

The Supplementary Specification of the same Charge is no better supported than those which precede it. The evidence shows, beyond all reasonable doubt, that the Defendant merely spoke of *improper conduct;* that he did not *intend*, and was not understood by those who heard him, to charge the Court at Mendon with "*corruption.*"

The *Third* and last Charge rests entirely for its support on the failure to do what it was impossible should be done.

Such are the Charges upon which the Defendant is arraigned before this Honourable Court. After they have been prosecuted with a keenness and intensity which may become a vindictive enemy, but ill accord with the character of a publick-spirited high-minded prosecutor—after they have been bolstered up by all the strength of one, who, from his former connexion with the Defendant, is able to disclose his most unguarded actions, and who, it seems, is willing to hazard his own reputation, to procure the Defendant's conviction—after all this, of which of the Charges

is he proved to be guilty? Which of them is not show to be frivolous or groundless? Upon a review of them he feels a proud satisfaction, of which no possible occurrence can deprive him, arising from the consciousness of having, in *no* instance, been guilty of unmilitary conduct, or neglect of duty. To his own conscience he stands acquitted. To the honour and justice of this Court, he appeals for a publick vindication.

GARDNER BURBANK.

TRIAL:

Commonwealth vs. J. T. Buckingham,

ON AN

INDICTMENT FOR A LIBEL,

BEFORE THE

MUNICIPAL COURT

OF THE

CITY OF BOSTON,

DECEMBER TERM, 1822.

"The Liberty of the Press and the Liberties of the People must stand or fall together." HUME.

Boston:

PUBLISHED AT THE OFFICE OF THE NEW-ENGLAND GALAXY,
CONGRESS-STREET.

Advertisement.

The following may be received as an authentic Report of a Trial, which has been the cause of considerable public excitement, and which, it is hoped and expected, will result in some permanent public good.

The opinion of the Court on the right of a Defendant in cases of public prosecution for a Libel to give the truth in evidence, the charge to the jury, and the arguments of the Counsel, both for the prosecution and for the defendant, have been furnished by the respective authors. The report of the testimony as given by the several witnesses, was made out at first from the minutes of the defendant's counsel, and was afterwards compared with the minutes kept by the court and the notes of several gentlemen who were present during the Trial. The incessant and importunate calls of the public, however, for the publication of the Trial, have rendered it impossible to present, even at the present time, so full and circumstantial a Report, as was at first intended, and the arguments of the counsel particularly are much abridged.

The Depositions, procured by the Defendant, and to which frequent reference is made by his counsel, were not admitted by the court to be laid before the jury. They of course, form no part of the Trial. A few of them, which tend to substantiate some important allegations in the publication for which the prosecution was commenced, are added in an Appendix. The whole of them are on file at the Clerk's office, for the examination of those who may feel an interest to see them.

It having been unjustly suggested since the Trial, that Mr. Jones, jr. was a voluntary witness ; it is proper to state that this respectable clergyman was preaching at Hanover, in this state, at the time the Indictment was found--was immediately summoned. his fees tendered by the defendant, and he attended here in obedience to that summons.

☞ Since that part of this Report which contains the *introduction*, was printed, the following note has been received from the COUNTY ATTORNEY.

"There is an important and essential mistake in your introduction.

"The Attorney of the Commonwealth never assumed the right to let the Defendant give the truth in evidence—and did not state that as a fact either to the Jury or the Court.

"On the arraignment of the Defendant, he moved the Court for liberty to give the truth in evidence on his trial. The Attorney consented to waive any objection on his part; and it was then understood that such evidence would be received by the Court. At the opening of the trial he informed the Jury that if the defamatory piece described in the indictment had been published by the Defendant, he must be convicted, unless he could offer some justification or excuse. That it was understood he proposed to attempt to prove the charges to be true, and that no objection would be made on the part of the prosecution, to evidence of that kind."

The above explanation was made by Col. Austin to the Court, on one of the occasions, on which this question was under its consideration. We are happy, in this opportunity to rectify the omission. Our endeavor was to compress in our statement what was said by the Court on this point, on both those occasions.

The mistake occurred, not so much through forgetfulness, as through our not sufficiently appreciating the importance of that explanation; inasmuch as it makes no difference in the main question, which turned not upon the right of the Counsel, but upon the duty of the Court.

Some power was exercised by the counsel. Either the power to agree, or to concede or "*not to object.*" The responsibility of the Court depended on its acquiescence.

If by a course of *non-objecting by the Counsel, and acquiescing by the Court*, one defendant might be permitted to give the truth in evidence, and it might be denied to another, at the will of either Court or Counsel, the effect and public consequences are the same. A different rule would be applied to different defendants in similar cases, at the discretion solely of the Court or Counsel. A power, which if suffered to grow into precedent, might result, in corrupt times, in the most pernicious favoritism.

TRIAL.

CITY OF BOSTON.

Municipal Court, *December Term.*

MONDAY, December the sixteenth, having been appointed for the Trial of JOSEPH T. BUCKINGHAM, on an Indictment for an alleged LIBEL on JOHN N. MAFFITT, the Court opened at nine o'clock, A. M.

HON. JOSIAH QUINCY, Judge.

JAMES T. AUSTIN, Esq. Attorney for the Commonwealth.

Counsel for Defendant, Hon. STEPHEN HOOPER, of Boston, and BENJAMIN F. HALLETT, Esq. of Providence.

JURY empannelled and sworn.

JOSEPH TILDEN, *Foreman.*	BENJAMIN LORING,
JOSEPH F. BOARDMAN,	JOHN MILLER,
JOHN FARRIE,	EBENEZER NILES,
ASA HOLBROOK,	OTIS VINAL,
JOSEPH KIDDER,	LEVI WILLARD,
FREDERICK LANE,	DANIEL WISE.

The Indictment was read by the Clerk, as follows.

Commonwealth of Massachusetts.

SUFFOLK, TO WIT: At the Municipal Court of the City of Boston, begun and holden at said Boston, within and for the County of Suffolk, on the first Monday of November, in the year of our Lord one thousand eight hundred and twenty-two.

The Jurors for the Commonwealth of Massachusetts on their oath present, That Joseph T. Buckingham, of Boston aforesaid, Printer, on the eighteenth day of October, in the year of our Lord one thousand eight hundred and twenty-two, at Boston aforesaid, with force and arms contriving and intending to vilify and defame one John N. Maffit, a Preacher of the Christian religion according to the doctrines of a certain sect of Christians, called Methodists, and a Clergyman of that persuasion, usually preaching to a congregation of said sect in their Chapel in said Boston, and to bring him into public scandal, infamy and disgrace, did unlawfully and maliciously compose and publish, and cause and procure to be composed and published, a certain false, scandalous, malicious and defamatory libel of and concerning the said John N. Maffit, containing therein, amongst other things, the false, scandalous, defamatory and libellous words, and matters following, of and concerning the

said Maffit, and of and concerning his conduct as a Clergyman as aforesaid, that is to say,

We expect that he [meaning said Maffit] will relate all the particulars of his temptations: how he has been buffeted by Satan; how he [meaning said Maffit] has been accused of preaching the sermons of distinguished English clergymen; [meaning that said Maffit had frauduiently preached from the pulpit the sermons of other persons as for his own.] How he [meaning said Maffit] denied the charge and afterwards acknowledged its truth, [meaning that said Maffit had been accused of preaching sermons written by distinguished English clergymen, as sermons written by himself, and had denied that he had so done, and afterwards confessed that he had so done.] How he [meaning said Maffit] had endeavoured to 'sink the Tailor,' by denying that he was a journeyman of that honourable profession and afterwards allowed that he was, when proofs were too strong to be resisted; [meaning that said Maffit was guilty of falsehood concerning his former profession in life.] How he [meaning said Maffit] coaxed a young lady to look in his face and sing, 'Come to my heart thou stricken Deer,' [meaning that said Maffit was guilty of lewd and indecent behaviour to a female.] How he [meaning said Maffit] declared to a young clergyman of the Episcopal Church, who had been intimate with him, that he [meaning said Maffit] disbelieved the Christian religion, [meaning that said Maffit had declared that he disbelieved the Christian religion.] How he [meaning said Maffit] ridiculed the persons who came to his altar to be prayed for; [meaning that said Maffit ridiculed those persons who desired the prayers of Christians assembled for public worship in the aforesaid Methodist Chapel in said Boston.] How he [meaning said Maffit] disclosed facts and betrayed confidence when he had pledged his honour to observe secresy, [meaning that said Maffit had pledged his honour not to disclose facts and betray confidence, and in violation of said honour had disclosed facts and betrayed confidence.] How by cunning and malicious tattling he [meaning said Maffit] excited discontent and quarrels among persons before friendly, and even between members of the same family, [meaning that said Maffit had by his tattling and cunning excited discontent and quarrels among persons before friendly and among members of the same family.] How he [meaning said Maffit] procured two young ladies to watch with him during his pretended sickness, and how he contrived to send one of them out of the chamber that he might be left alone with the other; [meaning that said Maffit pretended to be sick when he was not sick, and that he then procured two young ladies to watch with him, and that he contrived to send one of them out of the room that he might be alone with the other for lewd and dishonourable purposes.] How by his [meaning said Maffit's] hypocrisy he contrived to make fools of a great many people, [meaning that said Maffit was a hypocrite:] If we [meaning said Buckingham] should be disappointed in these expectations, we, [meaning said Buckingham] shall procure the particulars from some other source (one perhaps entitled to quite as much credit) and publish them for the gratification of all those young ladies of Boston, who, overflowing with love are ready to sink into his arms, and for the comfort of all those silly old women, whether in breeches or in petticoats, who pay their adorations to the man because—his wife has had twins:

Which said false, malicious, scandalous and defamatory libel he, the said Joseph T. Buckingham, thereafter on the same day caused to be printed and published in a certain Newspaper, called, "The New-England Galaxy," by him there edited, printed and published, to the great scandal and disgrace of said Maffit, bringing into contempt the Holy Christian Religion, whereof he is a Minister; and against the peace of said Commonwealth.

A true bill.

JOHN BRYANT, Foreman of the Grand Jury.

JAMES T. AUSTIN, Attorney for Commonwealth, Suffolk County.

NAMES OF THE GRAND JURORS.

JOHN ADAMS,	EPH. HARRINGTON,
JAMES BARTLET,	LEWIS LELAND,
JOHN BROWN,	HAWKES LINCOLN,
CHARLES R. CODMAN,	ABBOT LAWRENCE,
JOHN COTTON,	JOHN C. PROCTOR,
PETER COFFIN,	SAMUEL SPRAGUE,
SAMUEL HOWE,	GEO. SUTHERLAND,
HENRY HOLMES,	JOHN WELLS,
JEREMIAH THORNDIKE,	MOSES WILLIAMS.

After the indictment was read, the Attorney for the County stated to the Jury that, by the Common Law of this country, it was not competent for the defendant to give the truth in evidence on an indictment for a libel; but in this case, he had agreed on the behalf of the Commonwealth, that the truth should be admitted. He stated that the true definition of a libel was a defamatory publication; to this point he cited Holt's Law of Libel, 221. He contended that whether this publication was true or false, was no part of the libel. The crime consists in the paper being a defamatory publication; malice is no ingredient in the offence; to this point he read from Holt, 187. The only case the government had to make out, was the publication by the defendant of a defamatory piece. But in the present case he had consented that the defendant should give the truth in justification. The publication was admitted by the defendant, without any witnesses being called to that point. The County Attorney then proceeded to take a general view of the publication. That its whole tenor was sneering and sarcastic; that it contained thirteen specific defamatory allegations, and that the defendant was bound to make out each specific allegation to entitle him to the verdict of the jury. 1. It charged the Rev. John N. Maffitt, with having preached the sermons of English divines as for his own. 2. That he had denied he had so done, and afterwards confessed he had so done—and had uttered a falsehood. 3. That he had been guilty of a falsehood as to his former occupation in life. 4. That he had requested a young lady to look in his face and sing an improper song. 5. That he disbelieved the Christian religion. 6. That he had ridiculed his converts, and those persons who according to the custom of religious people, had requested his prayers, when assembled for religious worship. 7. That he had betrayed confidence when he had pledged his honour to secresy. 8. That by cunning and malicious tattling he had excited quarrels between persons before friendly, and between members of the same family. 9. That he had feigned sickness. 10. That he had procured two young ladies to watch with him, and sent one out of the room for dishonourable purposes. 11. That he was a hypocrite. 12. That he is a notorious common liar. 13. That he had been guilty of gross sensuality and licentiousness, only surpassed by what we had read in the legends of the monks. He then referred to the religious excitement on this subject, and warned the jury against imbibing any prejudices on that account.

After the opening by the County Attorney, the Counsel for the Defendant stated to the Court, that they should have a motion to submit, that certain depositions taken in Providence, on due notice given both to the County Attorney, and to John N. Maffitt, might be used in the trial.

The Court inquired of the Attorney for the County,—if the law of Massachusetts denied the right to a defendant to give the truth in evidence in these cases, where he obtained the power to give that right?

The Attorney replied, That he deduced it only from the general power of parties, to waive, by a mutual agreement, any particular advantage the law gave to either.

The Court replied, that it had considered this subject with great care and anxiety, and it was satisfied, that, if the law of Massachusetts was, as the Counsel for the Government stated, the Court had no right to permit such an agreement. This case was not like the common cases of inadmissibility of evidence, arising out of the want of form, or the existing of interest, or out of the mere nature and relations of evidence, itself. The ground upon which, by the English Common law, the truth was denied to be given in evidence, in case of libel was, because, the truth or falsehood of the allegations was no constituent part of the crime. In other words, it is as much a libel if it be true, as if it be false; that is, it is as much a crime.

If the doctrine asserted be law, what then is the effect of admitting the truth in evidence? If it is to have any effect, the effect must be *to make that no crime, which previous to such concession was a crime.* Can the concession of the Attorney alter the nature of the thing? The language of such a course of proceeding would be —"True or false, this publication is a crime,—but the Attorney says that if the defendant can prove the truth, it shall he no crime. Yet the law says that although, it be true, it is a crime." Now can concession of Counsel make that no crime, which is a crime?

Besides, it is admitting a power to exist in the hands of the Counsel of the Government, with which, in the apprehension of this Court, the law entrusts no individual. For it is nothing less than the power, at will, of making an act a crime, or no crime. He can make "fish of one and flesh of another" at his election.

If, therefore it be true, as is asserted, that, by the law of Massachusetts, the truth shall not be given in evidence, in cases of libel, this Court has no doubt concerning its duty. In such case, it can have no question that it has no right to admit such evidence by agreement.

The Court, therefore, deems itself reluctantly compelled to examine the doctrine, of law, which is asserted by the Counsel for the Government.

The question concerning the admissibility of the truth in evidence, in cases of libel, has, on two recent indictments, been brought

under the consideration of this Court. In one case, the libel was against *the holders of public elective offices.* In the other, against *the public agent of a public elective officer.* Both came within the principle of the doctrine, laid down by Chief Justice Parsons, in the case of Commonwealth v. Clap. 4. Mass. Rep. 163. Both, also, were so undeniably within the principle of the liberties secured by our constitution, that this Court could have no hesitation, concerning its duty to adopt the doctrine of that case as applicable to those cases, without farther investigation.

The same question is now raised in a case differing materially in character, from both of the preceding. The libel, charged in the present indictment, is neither against the holder of a public elective office, nor against a candidate for such office, nor against any agent of such holder. In the present case the libel charged is against an individual, who, whatever may be his connexion with a particular religious society, stands, in relation to this question, on the same ground as every private citizen. And the question now to be considered is, the admissibility of the truth in evidence in the case of libels, occurring in the use of the press, against a private citizen.

The case of the Commonwealth v. Clap, has no conclusive bearing on the question, arising under the present indictment. That was a case of a public posting of another, for "a liar" and "a scoundrel." It did not occur, in the use of the liberty of the press. Neither the Counsel for the Government, nor those for the Defendant in their respective arguments, nor the Court in giving its opinion, in that case, allude to any such liberty. It had, apparently, no connexion with the question then before the Court. That, which is now under consideration, is strictly and necessarily, a question, concerning the nature and extent of the liberty, which the press, under our constitution, enjoys.

In other words, the question now to be considered is, whether the right to give the truth, in evidence, in all cases of public prosecution for publications occurring in the use of the press, does not necessarily result from the terms of the Constitution of Massachusetts.

Considered in relation to this Constitution, the question stated is a question of alleged repugnancy between a particular liberty secured by that Constitution, and a particular doctrine existing at Common Law.

The particular liberty, is the liberty of the press, which the Constitution declares to be "essential to the security of freedom" in a state, and that "it ought not therefore to be restrained in this Commonwealth." The particular doctrine of the Common Law is "that in public prosecutions for libel, the truth of the facts, alleged in the publication, shall not be given in evidence."

The alleged repugnancy is between the principles of this doctrine and the nature of that liberty.

The first question that now arises is—whether there be any such repugnancy?

If there be none, then there is an end of the whole inquiry. The liberty of the press is safe, and the principles of the doctrine are to be maintained.

If there be any such repugnancy, then the resulting question is, --which is paramount, the particular liberty, or the particular doctrine? In other words, if both cannot exist together, which must yield;--which shall be limited, the nature of the liberty by the principles of the doctrine, or the principles of the doctrine by the nature of the liberty?

Although this last question is in its nature subsequent to the other, yet, as I apprehend, there can be no division of sentiment upon it among lawyers, it will be useful now to state its nature and relations.

The 6th section of the 6th chapter of the Constitution of Massachusetts is that clause, under which the colonial and all antecedently existing laws derive their force and authority. And that clause contains an exception, which abrogates "such parts of those laws, as are repugnant to the rights and liberties, contained in this Constitution."

This is as express a constitutional declaration as can be uttered, that in all cases of such repugnancy the exception is to be made out of the principles, of the doctrine of the antecedently existing law, and not out of the nature of the constitutional liberty.

The only question, therefore, is whether there be any repugnancy between the nature of the liberty of the press, and the principles of the Common Law doctrine. If such repugnancy exist, there can be no question that, under our Constitution, the principles of that doctrine must be limited by the nature of the liberty.

Before entering upon the general question, it seems proper to state a rule of construction, applicable to all cases, *arising under the Constitution, of this nature*, which appears to this Court to be as clear and unquestionable as any conclusion of reason can be.

In all questions, touching repugnancy between a particular liberty, existing under the Constitution, and a particular doctrine existing under the antecedent law, the essential constituent character of that liberty is to be sought in its own nature, and not to be sought in the principles of the doctrine, alleged to be repugnant. For it would be absurd to take the principles of a particular doctrine as the limitation of the nature of a particular liberty, when the question, in controversy, is whether the nature of that liberty does not necessarily limit those very principles.

What the nature of the liberty of the press is, under our Constitution, must be sought therefore in its own nature and not in the principles of the antecedent law. The doctrine of libel is, in all countries, a doctrine of power. In England the object has been to draw questions of this class from the jurisdiction of the Jury to that of the Court. The means by which it has been effected are the assumption by the Court of three principles.

1st. That criminality in publications depends upon their general tendency and not upon the publisher's particular intention.

2d. That the tendency of the publication is a question of law, to be decided by the Court and not by the Jury.

3d. As the general tendency of a publication may be to public mischief, notwithstanding the facts alleged in it be true, that it follows in such cases, that the truth, or falsity, of those facts is indifferent; and that therefore the truth shall not be allowed to be given in evidence.

In the course of this argument, it will be attempted to be shewn that the first of these principles is false in nature;--the second, false in fact;—and the third, false in consequence.

The question however first to be considered is--

What is the liberty of the press?

When we have found what that is, we have attained that, which the Constitution declares, (part 1 art. 16) is "essential to the security of freedom in a state;"—and which "ought not therefore, to be restrained in this Commonwealth."—

"The liberty of the press," whatever it is,—courts of justice have no right to restrain.

The great question then is—what is that liberty?—

It is not becoming a court of justice to deal in popular declamation and flourishes concerning the liberty of the press.

Its business is to analyze every subject, and among the depths and mysteries of its nature to detect those fundamental principles, which, because they inhere in it, and are inseparable from it, constitute its law.

The question here raised concerning the liberty of the press, has nothing to do with public opinion, or popular excitement, it is a naked, abstract, inquiry, instituted for the purpose of satisfying ourselves concerning our own duties.

What then is the liberty of the press?

First. What is the press?

It is an instrument;—an instrument of great moral and intellectual efficacy.

The liberty of the press, therefore, is nothing more than the liberty of a moral and intellectual being, (that is—of a moral agent) to use that particular instrument.

The question therefore concerning what is the liberty of the press, resolves itself into two inquiries.

1. What is the liberty of a moral agent to use any instrument?

2. Is there any thing in the nature of the instrument called the press, which makes the liberty of a moral agent to use it, different from his liberty to use any other instrument?

As to the first inquiry, there can be but one opinion. As a general rule, the liberty of a moral agent to use any instrument, depends upon the motive and end he has in using it.

For a good motive and a justifiable end, he has a right to use it;—that is, he has a liberty to use it.

For a bad motive and an unjustifiable end he has no right to use it;—that is--he has no such liberty;--in other words such use of it is licentiousness.

Liberty is, in relation to every other instrument, characterized by, and coextensive with, the nature of its justifiable use. And this depends upon the quality of the motive and of the end.

If A. thrust B. through with a sword and he dies—A. has used an instrument over which he had power; whether in that, he was guilty of an act of licentiousness, for which he is obnoxious to punishment, or merely exercised an authorized liberty, for which he shall go free, depends not upon the fact, or the effect, but upon the motive and end, which induced the thrust.

If A. be indicted for the murder of B., A.'s guilt or innocence depends, not upon the conclusion of law to be declared by the Court, resulting from the fact of the blow given and the effect of death, which followed, but it depends upon the conclusion, concerning the intent, or motive, of the moral agent to be declared by the Jury.

If A. should be indicted for the murder of B. and the Counsel for the Commonwealth should contend, and the Court should decide, that the Jury had nothing to do with the intent, or motive, which was the occasion of the thrust,—but that their sole province was to decide, 1. The fact that A. made the thrust. 2. The effect that B. died by it—and that the intent, motive and preconceived malice was a conclusion of law from that fact and that effect, to be declared exclusively by the Court;—a doctrine so repugnant to common sense would not be endured one moment.

Yet this is the precise doctrine of the English Courts of Common Law, in the case of libel. It is that doctrine, on which depends, and solely depends, the other doctrine, that the truth shall not be given in evidence by defendants in public prosecutions for libel.

For if the liberty to use the press depended, like the liberty to use every other instrument upon the quality of the motive and the end,—and if the Jury, in deciding the guilt or innocence of the accused, had a right, in these prosecutions to take into consideration, the intent, motive, or end, as they have in deciding guilt, or innocence, in every other prosecution, then the right to give the truth in evidence would follow necessarily and of course. For the truth, or falsity, of the allegation is, in all such cases, an inseparable quality of the intent, or motive; and whatever jurisdiction has the power of deciding concerning the intent, or motive, must of necessary consequence have the power of considering and deciding upon such truth and falsity;—whether the object of the defence be to justify the act, or to excuse the malice.

It follows that by denying to Juries the right to decide on the intent or motive in making the publication, and by this only, have the English Courts of law deprived the defendant of the right of giving the truth in evidence. It also follows that, if, by the principles of our Constitution, Juries have the right to consider the intent, or motive, in deciding every question concerning guilt or innocence, then that the right of giving the truth in evidence is a necessary consequence.

Now this right of deciding upon the intent, or motive, is inherent in Juries, in every case of public prosecution, except in the case of libel.--Why this exception?

If A. uses the press to assail the reputation of B., he makes a thrust at the reputation of B. by the use of that weapon, called the press.--If A. make a thrust at B. with the weapon called a sword, in case of a public prosecution for that act he has the right to show the intent or motive, with which he gave the thrust.--Why shall he be denied the same right, when he makes a thrust at him, with the weapon called the press?

This brings us to the second and great inquiry in this case.

Is there any thing in the nature of the instrument, called the press, which makes the liberty of a moral agent to use it, different from his liberty to use any other instrument?

The liberty of a moral agent, in the use of every other instrument is, as has been shown, coextensive with good motive and justifiable end; the question therefore, resolves itself into this—

Is there any thing in the nature of the instrument, called the press, which makes the liberty of a moral agent to use it,--not coextensive with a good motive and justifiable end?

In other words,--Is it possible, that in a free country under a Constitution, which declares the liberty of the press is essential to the security of freedom, and that it ought not to be restrained—is it possible, that it is not the right of every citizen to use the press for a good motive, and justifiable end?

If this be, as I think, incontrovertible; if, necessarily, every citizen has such right, then if called in question for such exercise of right, has he not also, consequently, a right to prove the goodness of the motive and the justifiableness of the end? Can the Law, or Constitution, give a right to use an instrument for a particular purpose, or under a specific modification, and deny the right of proving that it was used for that purpose or under that specific modification?

If then he have a right to prove the motive and end, must he not have a right also to prove it according to its nature? That is to say, if from its nature the proof to be adduced be a matter of fact, can it be doubted that he has a right to prove it as a matter of fact, before that jurisdiction, which under our Constitution has the only cognizance of matter of fact,--the Jury?

Can it be questioned that motive,—end—intent, are in their nature, matters of fact?

Are they any thing else than qualities of the act of a moral agent? And if the act of such agent be a fact, can the qualities, which inhere in it, and are constituent parts of its nature be any thing else than facts?

If facts,--are they not cognizable by a Jury, and subject of proof like other facts?

In the opinion of this Court this right is as inherent in every citizen under our Constitution, and a Court of Justice have no more right to deny to a person charged with a malicious use of the press,

the liberty to show that its use was, in the particular case, for a good motive, and a justifiable end, than it has a right to deny to a man indicted for murder, the liberty to show that he gave the blow for a purpose which the law justifies. Both these liberties lie within the same reason, and are founded on that fundamental and universal law of moral nature, according to which, guilt or innocence in a moral agent, is solely qualified by motive, or intent.

If this reasoning be just, the liberty to use the press is, like the liberty to use any other instrument, coextensive with a good motive and justifiable end. The right so to use this instrument, necessarily includes the right to show such motive and such end, if prosecuted for it. And this includes the right of giving the truth of the facts alleged in evidence, as inseparable, in the nature of things, from the goodness of the motive and the justifiableness of the end. For such a motive and end falsehood can never be published. It follows necessarily that to prove the truth of the fact, is essential to the very existence and nature of such a defence.

It is in vain to say that the principles of the Common Law deny to a man indicted for a libel, occurring in the use of the press, the right to show his intent, motive, or end. For if, as has now been attempted to be demonstrated, the right to show the intent, motive or end, of the act done, in the use of the liberty of the press, is included in, and inseparable from, its very nature, then the denial of this right by the principles of the Common Law is repugnant to that liberty, and as such is abrogated by the terms of our Constitution.

The great reason, on which English Courts declare the Common Law excludes the truth in these cases is, that the Law punishes publications of a libellous character, on account of their public mischief; that is, of their tendency to produce breaches of the peace. Publications have this tendency, it is said, as well when they are true as when they are false: therefore truth, in such cases makes no difference.

Now these general consequences attending the unrestrained liberty of the press, were as well understood at the time of the adoption of the constitution, as they are at this day. The restraint upon the liberty of the press, effected by this principle, had been for years, even in England, the subject of complaint, clamour, and denial. Why did the framers of our constitution adopt, in relation to the liberty of the press, a breadth of expression, which necessarily includes the right of always using it for good motives and justifiable ends, if it was their intention that any citizen, so using it, should be made in any case, criminally responsible, without the possibility of producing his intent for his justification? If it had been their intention that the liberty of the press should be limited by the principles of the common law, would they have used expressions, which necessarily limited those principles, from their repugnancy to that liberty?

Touching the three principles, by the assumption of which English courts of common law have, as has been stated, effected

the withdrawing from the jury, the jurisdiction of intent and tendency in cases of libel, and on that raised the doctrine of the inadmissibility in such cases, of the truth in evidence ;—The first is —that criminality in publications depends upon their general tendency, and not upon the publisher's particular intention. Now this, in the apprehension of this court, is false, in nature.

In the nature of things the only foundation of criminality, in a moral agent, is—*intention*. By which is meant,—will to do either a particular mischief, or some general mischief.

If any act of a moral agent be of such a nature as to have, at one and the same time, a particular tendency, and a general tendency, the law often, and justly, considers such act a crime, because of the mischievous nature of its general tendency, although the particular tendency may have been innocent.

Thus if A. ride a horse, accustomed to strike with his heels,into a crowd, and a man be killed by him, it may be murder, or manslaughter in A, according to the circumstances. A crime of some kind it will be. Why ? Because, although the particular intention of A. might have been innocent, yet he, having been guilty of an act of general mischievous tendency, and the only evidence, in such case, of his general intent, being the nature, and general tendency of the act, the law, which is only elevated reason, admits and justly, the general mischievous tendency of the act, as evidence of a general mischievous intent. But here, as in nature, criminality consists in the intent. Tendency is the evidence of that intent.

But this doctrine would not answer the purpose of English courts of justice, because intent, being a fact, the jurisdiction of the question, as a fact, would be transferred to the jury, which it was the purpose of the court to keep, in their own hands. Therefore nature was contradicted ; criminality was made to depend upon the tendency of the act ; instead of the intent. It was now only necessary to make the tendency of the act, a question of law and the magic circle was completed ; the jury excluded from the cognizance of the question, and the whole power vested in the court.

Accordingly, this is the second principle adopted by English courts of justice. That the tendency of the publication is a question of law ; and of consequence to be decided by the court, and not by the jury. Now this, also, is false, in point of fact.

Tendency in the nature of things, is a fact, whether it be physical or moral. What is tendency ? It is direction of an act to an end. If A. aim, with an axe, a stroke, at a tree, and he kill B. the direction of the blow is a fact, upon which a jury will have to decide when considering the guilt or innocence of A.

So in morals, if a man be indicted for blasphemy, the tendency and meaning of the words are a question for the jury, as matter of fact ?

The same is true of general tendency as of particular tendency.

Tendency, by being general or particular, is only altered, in circumstance,—not in nature.

If A. throw down from a scaffolding, carelessly, into a crowded street, a piece of timber upon B, and he die ; it is a crime in A. in consequence of the general tendency of the act. Can any one doubt that the circumstances, on which the general tendency depends ; (that is—whether a street or not,—or frequented or not, or with precaution or not,) are not facts to be considered by a jury ?

Why is not the general tendency of a publication also a fact ?

The particular tendency of the terms is a fact ; for courts permit juries, even in England, to decide upon the applicability of the innuendoes. If particular meaning be a fact, why is not general meaning a fact ? In the nature of things there is no ground for the doctrine that the general tendency of publications, is not a matter of fact. As such it belongs exclusively to the jury. And of all facts, it is the last of which a jury, in this country, should be divested.

A constitution, which grants to the citizen the liberty of the press, secures to him also, from the very nature of that grant, the liberty of using language according to its common meaning, and ordinary acceptation.

If called into question for the use of that liberty, he has a right to have the meaning, acceptation, general tendency, or bearing of the words, decided by that tribunal, which, by our constitution, is the exclusive judges of fact, and who will decide upon that meaning, tendency, bearing, or acceptation, according to their general nature or effect ; judging by the use of common life and common sense, and not according to artificial skill, or any technical refinement.

For which reason, among others, in the opinion of this court, the third doctrine of the English courts—that the truth shall not be given in evidence in cases of prosecutions for libel is false, in consequence. For if the jury have a right to decide the intent and tendency, the right to have evidence of the truth follows necessarily and of course.

It is not to be denied that there are evils inseparable from the abuse of the liberty of the press, as from the abuse of every other liberty. But it is secured by our constitution, in terms, as this court apprehends, expressly devised, and certainly having the effect, to abrogate the asserted doctrine of the English common law, in this commonwealth.

The true language of the Constitution of Massachusetts is this—It is better for the public to take the risque of the evils, and for individuals to suffer the inconvenience resulting from a press without other restraints than those which are consequent on the obligations of good motive and justifiable end, than for the state to incur the dangers, resulting from any uncertainty in the tenure of a liberty, which, as it declares, is " essential to the security of its freedom."

It would be easy to extend this argument into one of a general and popular tendency, but sufficient, as is apprehended, has been urged to support the doctrine, that intent and motive is as much

an inquiry for the Jury in these, as in any other indictments, and that of consequence the right to give the truth in evidence in all cases of public prosecutions for libel, occurring in the use of the press, is the necessary result of the terms, in which the liberty of the press is secured by the Constitution of Massachusetts.

The Court has confined itself, to a strict and single deduction of the right in question, from the essential nature of the liberty of the press. Not that the question did not admit of being maintained by an argument drawn from precedents and authorities, arising under the English Common Law. But it is impossible for this Court to add any thing to the deep, learned, and conclusive arguments of Judge, now Chancellor Kent, of the State of New-York, and of the late Alexander Hamilton. Both of them among the greatest men and lawyers of the age. Their arguments, stated at large, in 3 Johnson's Cases, p. 337. are as complete as they are unanswerable.

The doctrine here maintained is deduced by them from the antient fountains of the Common Law as they existed in its early purity;—The modern doctrine of libels being, in the course of their analysis, satisfactorily proved to be "an usurpation on the rights of the Jury," not justified by the fundamental principles of the Common Law. To adopt the language of Chancellor Kent—"*The true rule of law is, that the intent and tendency of the publication, is, in every instance, to be the substantial inquiry on the trial, and that the truth is admissible in evidence to explain that intent, and not in every instance to justify it.*" The comprehensive and accurate definition of one of the Counsel at the Bar, (Alexander Hamilton), is perfectly correct:—"THAT THE LIBERTY OF THE PRESS CONSISTS IN THE RIGHT TO PUBLISH, WITH IMPUNITY, *truths, with good motives and for justifiable ends*, WHETHER IT RESPECTS GOVERNMENT, MAGISTRACY, OR INDIVIDUALS.—3 Johnson's Cases. 394.

This opinion of the Court having been delivered, rendering evidence of the truth admissible—the counsel for the defendant stated that they considered this the proper time to make known, that most of their principal witnesses resided in another state; that they had no means to compel their attendance; that they had requested the attorney for the Commonwealth; to consent to join in a commission to take their depositions; that the same request had been made to J. N. Maffitt. Both these gentlemen having declined to take any part in the examination of said witnesses, the defendant had then given them due notice that he should proceed to take the depositions of such witnesses—and had offered also to give notice to any persons whom they might select to attend on the part of the government, in the places where the witnesses resided. That this offer, also, having been refused, the defendant had proceeded to take the depositions of several witnesses residing in other states, before respectable magistrates—that the depositions so taken, where then in court—and the counsel moved the court, that under these circumstances the depositions might be ad-

mitted in evidence. This motion was opposed by the County Attorney. The Court decided that the depositions could not be admitted without consent. The attorney for the government said that he could not consent to admit them.

The defendant's counsel then moved, that the trial of the cause should be postponed, until the County Attorney should consent to join in a commission for the purpose of examining such witnesses, or that an opportunity might be afforded to procure their personal attendance; and in support of the right of the defendant to such continuance they cited, 1 Cowper, 174, Fabrigas vs. Mostyn—and U. S. Law Journal, the People vs. Hunt; both which authorities fully established it. This motion also, was opposed by the County Attorney. The Court decided that the motion should have been made before the jury were empannelled. The counsel for the defendant replied, that it could not have been offered with propriety before. That until the Court had decided that the truth should be admitted, it would surely have been improper to take for granted that opinion, and to offer a motion for the introduction of evidence showing the truth, which evidence was also taken under peculiar circumstances; and they stated also, that they had suggested before the opinion of the Court was delivered, that they should probably have a motion on this subject to submit.

The Court refused, notwithstanding, to grant a continuance. The counsel for the defendant then stated, that they could obtain, in three days, the personal attendance of two most respectable clergymen from Providence, who have been prevented by their official duties, from being here on the day of the trial, and requested, in case of the rejection of the depositions, that a postponement of the cause for three days might be granted. This also was objected to by the government, and refused by the Court.

The County Attorney then said, that he had no opportunity to examine the depositions, as they had not been put on file.

They were immediately filed, and submitted to his inspection.

The DEFENDANT then opened the Defence.

GENTLEMEN OF THE JURY,

I am indicted by the Grand Jury of the county of Suffolk, for an alleged offence against the peace and dignity of the Commonwealth. To this charge I have said that I am not guilty; I have appealed to my country, of which you are the legal representatives, for the truth of my plea; and now, under leave from this honourable court, I stand before you, in person, to assert my innocence, and to speak in its defence.

This is, to me, an awful moment—full of uncertainty, apprehension, and peril. I am oppressed with sensations and feelings never known before. I am conscious that I am travelling a new and untried path, where unexpected difficulties attend every step,—whose end is enveloped in obscurity and darkness.

It is not from the impulse of vanity or conceit, that I have assumed the responsibility of any part of this defence. No foolish desire to exhibit myself in a novel character, in which success could bring me no reputation, in which defeat must inevitably be attended with disgrace, has induced me to adopt this course. I have been urged by other reasons, not necessary for you to know, and which it would be painful for me to disclose, to reject gratuitous assistance which has been most generously offered by intelligent and respectable counsellors at this bar.

I expect from you, gentlemen, and from this honourable court, some little indulgencies in conducting this defence, which a professional man might neither expect nor ask; for I am unlearned in the science of Law, having never attempted to explore its uncertainties and secrets, or to unravel its dark though interesting mysteries.

I am also unused to public declamation. My profession and my labours from my childhood have been mechanical. No academic halls, devoted to letters, to eloquence and philosophy, have ever resounded with my voice. No groves, sacred to the muses, have ever whispered their airy responses to any poetical breathings of mine. The flowers of rhetoric never bloomed for me; and I have never been admitted to pass even the vestibule of the temple of science.

How then can I hope to win your favour? How expect to disengage myself from the net in which I am taken? How escape from the dangers of the thick and thorny wood in which I am entangled, where every step is pregnant with fear, and a single, false one may plunge me into irrevocable misfortune?

I depend for victory, gentlemen, on a single weapon, which the ignorant may wield as safely as the learned. This honourable court has placed in my hand that two-edged sword, which, I trust, will clear my way before me. The attorney for the commonwealth, with a magnanimity, a liberality, and a love of justice, which have ever characterised his official, as well as his private life, had previously given me a talisman, which will guide me through the darkest and most doubtful road. This talisman which is to guide, this weapon which is to guard, is *Truth;* before which the impostor, and the hypocrite, shrink and disappear like shadows beneath a vertical sun. Aided by this, and the justice of my cause, I rely, gentlemen, on your intelligence, your magnanimity, your love of virtue, your scorn of hypocrisy, your aversion to meanness and vice, your detestation of imposture and quackery, for a triumphant acquital.

> What better breast-plate than a heart untainted?
> Thrice is he arm'd, who hath his quarrel just,
> And he but naked, tho' lock'd up in steel,
> Whose conscience with injustice is corrupted.

I stand before you, gentlemen, as a criminal. The indictment accusses me of having written and published a false, scandalous, and malicious libel on the character of John N. Maffitt, a preacher

of the christian religion, of the methodist persuasion. The offence is stated in the indictment to have been committed with force and arms, against the peace and dignity of the Commonwealth. You will observe, however, that the real prosecutor in this case is Maffitt himself. The Commonwealth, by a fictitious and mischievous personification, *is likened to an individual, and endowed with character*, sensations and *feelings ;* while Maffitt, the prosecutor, and who in reality is as much on trial as I am, is admitted to be a witness in his own case. Are the peace and dignity of this Commonwealth, gentlemen, such airy and evanescent qualities, such frail and perishable possessions, as to be put in jeopardy by the mere exposure of the ignorance, the quackery and the folly of a single individual ? Are they so deeply involved in the uncertain and slippery reputation of an itinerant preacher ? No, gentlemen. This is the formal, technical phraseology of an indictment, as sublimely ridiculous, as it is profoundly absurd. Maffitt is the only person injured by the publication ; he and his friends are the prosecutors and the witnesses ; theirs will be all the disgrace and the shame unless they can convict me of a public and a criminal offence ; it is their peace and dignity (forgive me. for the inadvertent profanation of the term) it is their dignity which is offended ; and to appease their resentment, the liberty of the press is to be sacrificed, and I, one of its humblest advocates, am to be offered up as a victim to their offended *dignity*, on the polluted altar of justice.

It is not necessary to go into a discussion upon the justice or injustice of the law of libel. This court has given me leave to introduce testimony to prove that, in the publication alleged to be libellous, I have asserted nothing but what is true. If I can establish this point, or if I can satisfy you that I had good ground for believing what I published to be true, I shall be entitled to an acquital, and I trust that the court will instruct you to say that I am not guilty.

My defence is therefore predicated on the proposition, that I have published nothing but truth ; and that truth, and good intention justify the publication,--a doctrine, which, however novel in the practice of courts, is one which corresponds with the wishes, the feelings, and the good sense of every man in the nation. This day will form an era in the annals of American jurisprudence ; posterity will look back and hail it as the day when the last tattered remnant of the banner of monarchy was struck from the temple of justice, over which it had floated for centuries,—and the standard of truth, freedom and righteousness was planted in its place.

But it is not merely as a defender, gentlemen, of my own innocence that I now stand before you. I appear here as the advocate of order, religion, and morals ; the advocate and supporter of that very peace and dignity, which the indictment charges me with having violated. In the course of this defence, I shall attempt to prove, and I trust it will be proved to your satisfaction, that what

I have published is not an exaggeration of facts. I shall endeavour to prove to you that the conduct of the prosecutor is not that which becomes a follower of the humble Jesus, and a successor of the lowly fishermen of Gallilee--that instead of teaching the precepts of the gospel by his example (whatever he may do by his precept in the pulpit) he is scattering the infection and the seeds of vice ; his way, like that of the snail, is indicated by the filth and the slime which track his progress ; and when he stops, it is to revel and swelter in the rank atmosphere which envelopes the moving mass of moral putrefaction. I contend that it is the duty of every good citizen—it is the imperious duty of every honest man, to use his influence to stop the progress of this moral pestilence. Far from me be any attempt to magnify my cause by vain and ostentatious boasting ; but I feel, gentlemen, that in opposing this man, I have done no more than my duty. I feel a consciousness, and I am proud to avow it, that like the high priest of the Israelites, I have taken the censer of fire in my hand, and gone forth into the camp, and stood between the dead and the living, to stay the plague which raged among the people.

I am here, too, gentlemen, in a still more important character, that of a champion for one of your dearest rights, and most valued privileges—a champion for the freedom of the press.--I am an advocate for a 'press free to discuss all subjects fit for the public eye--privileged to tell every truth, and every fact, which it concerns the public to know.' I contend for the freedom of that press which 'gives to individuals the power of exposing and punishing offences which no other power can reach, and which every individual has an interest in suppressing'—such as 'assaults upon our liberties by bad rulers'--frauds upon the public by corrupt and unprincipled agents--knaves, who dressed in a little brief authority, grow rich at the expense of honest men,--who hold the keys of the exchequer and rob its vaults. I contend for a press free to 'expose all inroads upon public morals, by daring and ostentatious innovators---insults to common sense and good taste by bad authors,' shameless quacks, and ignorant pretenders. These are crimes against the public, which no judicial tribunal can reach or punish. These are offences committed where civil authority has no jurisdiction. There is no domestic retreat so secure--there is no public sanctuary so holy, that it cannot be invaded by the unhallowed or lawless foot, or poisoned by the pestiferous breath of the hypocrite. Even the church--

> God's lovely temple, *sees the villain* there,
> With eye upturn'd, and aspect false as fair—
> Even at the Altar's very horns he stands,
> And breaks and blesses with polluted hands.

You will perhaps be told, that the liberty for which I contend, is the licentiousness of the press. It is fashionable to declaim about this licentiousness, and to whine and whimper, to storm and to threaten, about the mischiefs which flow from an unshackled freedom of discussion in the newspapers ; but this is mere declama-

tion. The licentiousness of the press is a bugbear which has no existence but in the imagination of those who are conscious of their own wickedness, and dread nothing but exposure—whose anxiety is not to leave a crime undone, but to keep its commission unknown ; who fear not the wrath of heaven, or the justice of the Almighty avenger, but tremble at the reproach of a satirist, and dare as soon beard the eternal devil on his throne, as to encounter in newspaper paragraph.

It is said to be difficult to draw the line between the liberty and the licentiousness of the press. This, too, is false. Public opinion has already drawn the line. It has placed metes and bounds, and said, thus far shalt thou go and no farther. It has thrown a spell around the upright, the virtuous, and the holy, which no licentious printer can invade, nor the shafts of his malice transpierce —and whenever such a one attempts to drag the pure and the honest from their sanctuary, he is instantly pursued, overtaken and punished by public indignation. What has virtue to fear from the licentiousness of the press? Whoever heard—is there an instance on record—is there one in the memory of man,—of a virtuous and upright person, who suffered the loss of property or reputation, by this imaginary licentiousness of the press? No, gentlemen ; the hypocrite, whose character is formed of such cobweb materials, that it cannot bear the hissing of a newspaper squib, may skulk behind an indictment for protection ; but the man whose heart is pure and whose hands are clean, has a character composed of more enduring qualities—the arrows of ridicule or of malice drop harmless at his feet ; the ingredients of the poisoned chalice which had been mingled for him, return to plague the inventor ; he stands upon a rock, 'unshaken, unseduced, unterrified;' an object of love, and admiration to men ; an object on which heaven itself may look down with reverence.

I shall now, gentlemen, bring before you such testimony as I have been able to procure, to substantiate the truth of the insinuations alleged to be libellous, and my counsel will offer to your consideration such comments thereon, and arguments, as I trust, will justify the publication. I regret that this testimony is not more complete ; and I wish you to bear in mind the fact that the witnesses who can most fully substantiate every particle of what is alleged to be false in the indictment, live in the state of Rhode-Island, and of course, out of the jurisdiction of the court. Many of them are females, and can with difficulty be persuaded to appear as witnesses in a court of justice, in any case. In the present case, this difficulty is increased by the prejudices of those witnesses, which are all in favour of the prosecutor. I have no power to compel their attendance ; but I have no fears that the testimony which I shall produce will be the less satisfactory because it is voluntary.

Gentlemen of the Jury, I am already in your *power*. And I commit myself (not to your *mercy*, for that is an attribute appertaining exclusively to the bench,) but I appeal to your *justice*. It

is for you to decide on my fate. It is for you to say whether I shall leave this place honourably and triumphantly, or covered with shame and degradation. It is for you to say, whether I shall go hence to my home, to enjoy the affections and partake of the sympathies of my wife, to meet the embraces and receive the kisses of my children ; or to the common gaol, that disgusting receptacle of infamy, pollution, and crime. It is for you to decide, whether I shall continue, for the little remiander of my life, to be a member of society, to unite with you in its pleasures, to share with you its honours, to suffer with you in its dangers, and to aid you in its defence ; or to have my name blotted from the catalogue of man, a reproach to the good and virtuous, a byword to the vulgar, and the vile ; while my person shall be buried alive in yonder prison,—that moral sepulchre, where many a man, (I tremble even to think of it) where many a pure and honest man has been despoiled of all the refined, and elevated, and ennobling qualities of his nature—where many a buoyant, and ardent, and elastic spirit has been degraded and plunged into the bottomless pit of corruption and depravity—where many a spotless spirit has imbibed the contagion of that moral disease, for which humanity has discovered no cure—where many a holy and immortal soul has suffered the agonies of that second death from which there can be no redemption till that awful consummation foretold by the apocalyptic prophet, when the sea and the earth shall give up their dead —when the voice of Archangel and the trump of God shall summon Death and Hell to give up the dead that are in them.

The Defendant then proceeded to call his witnesses.

Rev. ALEXANDER JONES, jun.—Became acquainted with John N. Maffitt, sometime in May or June last. Thinks it was in May. He was very intimate with him at his father's house. Maffitt at one time was to preach at North Providence. Witness rode with him to the place of appointment. On their way Maffitt shewed Mr. Jones the skeleton of a sermon, written loosely on a half sheet of letter paper, which he (Maffitt) declared was the whole of the sermon. Mr. Jones heard the sermon at North Providence, and was pleased with it. Afterwards he examined a sermon contained in a volume of Robert Walker's sermons, a colleague of Dr. Blair. He discovered that the sermon in Walker's was the same he had heard Maffitt preach at North Providence. He thought it was verbatim, interlarded with some of Maffitt's common expressions, which made the sermon longer than Walker's. Many expressions he recognized to be the same, particularly, "The loud rhetoric of God's mercy." The whole introduction to Walker's sermon was the same used by Maffitt. Jones accused Maffitt of having used Walker's sermon. He said he had used the thought ONLY of Walker. He afterwards met Maffitt at Rev. Mr. Wilson's, and accused him of having preached a sermon of Walker verbatim. He confessed he had committed a part of it, about two pages, and had delivered the sermon bunglingly, because he had committed it imperfectly. Maffitt allowed he had used the thought of one other sermon of Walker. He mentioned texts of two sermons in Walker, parts of which he had used. When I looked in Walker, one of the texts was not there.

I asked Maffitt if he had ever been a tailor, he replied he had never been a tailor more than he had been a play actor, and that he had never been a play actor in any way. Sometime afterwards he asked me if I had heard of a letter to Mr. Rivers, stating he had been a tailor, and had worked at the

trade in New York. He asked me what I understood him to mean when he told me he had not been a tailor? I replied, that he had denied to me, my sisters, and a hundred others, that he had ever been a tailor. He allowed that he had so denied it, and that it was a full denial. He asked me if a man could be a tailor if he were not a journeyman. I replied I did not understand him. I understood him then to state he endeavoured to learn the trade of a tailor when he was in New York. He admitted it. I then told him it was a prevarication and would not be received by the people.

On Maffitt's second visit to Providence, at my father's house, in conversation with me, he said the people did not know him. I replied, I thought I knew him and had studied his character. He said there was something that I did not know. He then stated he HAD NO BELIEF IN CHRISTIANITY. I think his precise words were I HAVE NO BELIEF IN CHRISTIANITY. I observed to him I had suspected it was so, but that he ought to believe it if he preached it. He requested me to give him a list of books on the evidences of Christianity. I gave him a list of the best books on this subject, Paley's Evidences, Chalmer's, &c. He said he did not read the scriptures. At the same time he spoke of two or three young ladies, of Mr. Edes's congregation, who had come to him to converse on the doctrine of the Trinity. He observed he knew nothing about the doctrine, and did not know what to say to them, but that he had patched up or hatched up some reasons which he believed satisfied them. He said he could not study, when he did his head became muddy.

Mr. Maffitt's practice at his meetings was to call persons to his altar to be prayed for. In this conversation he said he was induced to laugh in his sleeve when such sober men as Joseph S. Martin felt any thing from what he said. I observed to him that I did not think three quarters of his converts were genuine. He assented. In relation to these converts I mentioned some ridiculous circumstances that had occurred, when they came to the altar, and we laughed together. I mentioned an instance of Mr. Wood and Mr. Dunn kneeling in prayer, at one of his (Maffitt's) farewell meetings. I observed I thought it a solemn scene. He replied, HE FELT A CONTEMPT FOR THESE PERSONS IN HIS HEART. I believe he considered them as his converts. I was intimate with Maffitt. He told me every thing freely. I rode with Maffitt one evening to Mr. Crocker's. It was before he had made me the above confessions. (Note, the County Attorney asked if it was before these PRECIOUS CONFESSIONS.) I left him there and returned home. The next day I saw him in his chamber at Wood's. He observed he had something to tell me. He said that Mrs. —— had talked against our family and that he had warned my sisters against going to visit her; she would draw out their family secrets and then expose them. He said he had promised Mrs. —— ON THE HONOUR OF AN IRISHMAN he would not mention the conversation in relation to our family. He then said Mrs. —— took him out of the room, and that she made him blush. He said if he WISHED DEVILMENT with any woman he might have it with Mrs. ——. I mentioned to my father's family, some one had told me in whom they had confidence, that Mrs. —— had talked against the family, but did not say who it was had told me. The family previous to this communication from Maffitt to them were friendly with Mrs. ——; afterwards there was a coolness, and they became unfriendly. Mrs. —— was not invited to my sister's wedding, on account of what Maffitt had told the family she had said of them. Soon after this, I discovered Maffitt had played a double part, and I went to Mr. Crocker about it, for advice respecting what I ought to do. He said he thought the Rev. Mr. Wilson's family were low and vulgar, and that their attentions were disgusting and officious. The Methodists he said were a mean people, and he and his wife on that account visited but a very few families of them in Boston. He spoke of a committee in Boston, who furnished his house, and said he thought they were mean, because they refused to furnish him with liquors. That Mrs. Maffitt had given them a dressing down for it. He said he knew my father's sister, Mrs. King, was a fool from the first time he saw her. I believe she had

given him some advice he thought officious. He would frequently, when I was present, say God bless sister or brother ——, and then ridicule them on their leaving the room. There was a serious disagreement between Mr. Wood and Mr. Chase, my two brothers in law, on account of Maffitt.

He was at one time very sick, and apparently out of his head. On my proposing in a whisper to send for a physician, he directly understood it, and declined having a physician sent for. He then relapsed into insanity. His attentions to my sisters were very particular, and I thought improper for a married man. He was in the habit of calling one them little Jane, I was alarmed, because I knew she was artless, and had the most implicit confidence in his honor. One night two of my sisters watched with him. I sat up most of the night, lest Maffitt might insult them. I had the utmost confidence in my sisters, but was suspicious of Maffitt. In the course of the night I observed one of them went out to get something, I think some warm brandy.—He told me in conversation he had not slept with his wife for eleven months. He said that when he was in Connecticut, a young lady of a respectable family came to bed with him, and that he refused to have any thing to do with her. I told him I doubted it. I told Maffitt I thought he was carrying on a system to gain applause. He said that he could not preach without applause.

Cross Examined.—I became acquainted with Maffitt when he first visited Providence. Was intimate with him, and in habits of friendly intercourse. Maffitt resided for some time in my father's family. My opinion of Maffitt became gradually changed, as I learnt more of his character. I have no personal animosity to Maffitt. In my conversation with him at Rev. Mr. Wilson's, I shook hands with him, and observed that I had no enmity to him as a man, but that I did not consider him a Christian, and maintained all I had said against him. I do not recollect what time the sermon at North Providence was preached. The sermon Maffitt preached, was about an hour and fifteen minutes. I should think it would take three quarters of an hour to read Walker's sermon. My idea was at first he (Maffitt) had used Walker's sermon verbatim. I read the sermon in Walker about six weeks after hearing the one preached at North Providence. Maffitt said he had used a skeleton of Walker's sermon in Hartford.—It was Christianity in general that he denied—positively.—He expressed no concern at the time. I cannot say what induced him to say this. I thought it was to show he was above the vulgar prejudice of belief in Christianity. In relation to what he said to the young ladies about the Trinity, I understood him to mean he was prepared with no arguments on the subject. He often declined preaching where he had engaged to, and kept the people waiting some time. On one occasion, when the time arrived that he had engaged to preach, he went to bed—I told him the people would be expecting him, and that he ought to go. He said he must take a nap first. He did not appear to be sick. I did not tell to my father what Maffitt had told me Mrs. —— had said of our family, until some time afterwards. The suspicions of his attentions to my sisters were confined to me and my brother. I thought from his general conduct he might offer some insult to my sisters, which occasioned my sitting up the night my sisters watched with him. One of my sisters complained to me that Maffitt had requested her to look in his face and sing a song from Moore, "Come rest in this bosom," &c. The statement Maffitt made to me respecting his disbelief in Christianity, and also what Mrs. —— had said to him respecting our family, were confidential communications. I did not mention either of these facts until when several of my father's family were present; being urged to enter into a conversation with Maffitt on the subject of my change of opinion respecting him, I said that I knew things of Maffitt which would change their opinion of him. Upon this, Maffitt replied, with a sort of bravado, that I had nothing against him. I then made known the abovementioned circumstances.

William M'Elroy, examined.—I knew Maffitt in Dublin. He had a tailor's shop of his own, independent of his mother. I worked for him as a journeyman tailor. He paid me for my services. There was no other per-

son to direct the concerns of the shop or to do the cutting out. He was a master tailor. I have been six years in this country. I worked for Maffitt about eight years ago.

The counsel for the defendant now stated, that they had on the suggestion of the attorney for the government, caused the depositions from Connecticut and Rhode-Island, to be filed with the clerk. That they had had the satisfaction of observing Col. Austin engaged in reading them, one of them having been given by a reverend and respectable friend of his--and they now renewed the request with confidence, that the defendant might be suffered to avail himself of the important truths which they contained. Col. Austin seemed less inclined, if possible, than ever, to admit them.

The COUNTY ATTORNEY then called the witnesses for the prosecution.

ALEXANDER JONES, sen.—Witness observed that with permission of the Court, he wished to make a few remarks. He had been summoned on one side and had given his deposition on the other, and this was the reason of his being present. He come to support his son, and viudicate the character of his daughters.

The counsel for the defendant here observed, that it was not the intention of the publication, in the slightest degree, to implicate the young ladies, and that they believed them in the whole transaction, to have been entirely above suspicion, or reproach.

Mr. Maffitt was sick at my house. He appeared to be very sick indeed. His extremities were cold. He fainted away five times in fifteen minutes. He was recovered from his fainting fits, only by throwing cold water with violence in his face. He preached very often to large congregations—I should think as often as five times a week I never discovered any thing in his conduct that was in the least improper or indelicate. Maffitt told me that he had preached parts of two sermons of Walker; and that in the sermon at North Providence, he had used the sentiments of Walker. There had been a previous coolness between my family and Mrs. ——, and Maffitt's statements respecting what she had said of my family increased the difficulties. Maffitt told me several things that she had said against my family. Witness further stated that he did not know how long it would take to read the sermon of Walker, which it was said Maffitt had preached, nor exactly what is an octavo volume. On being shewn an octavo, however, witness said Walker's sermons were of that size.

CROSS EXAMINED.—Maffitt told him that he had used the *mind* of Walker's sermon and some of the language. I told him that I understood he had been a play actor and a tailor. He said he was neither, but that there was a mystery in his history, which he would explain at some other time. Maffitt said that he first told tho conversation which he had with Mrs. —— respecting my family to two of my family in confidence, in order to put them upon their guard against her. He afterwards told it to me and it became known to the whole family. Maffitt told me that Mrs. —— was a mischief making woman. He said that he did not recollect having said that Mr. Wilson's family were a vulgar family, but that if he did say so he meant nothing by it but that they were not so polished as some families. I accused him of having said that I was a HUMBUG. He said that if he did say so he meant nothing by it except that I was a little strange, which was the meaning of the word in Ireland. Maffit's conduct was very light and trifling. Once at the tea table, at my house, when Maffitt was present, there was a great deal of laughter and merri-

ment in which he joined with the young people. I checked them and said, that if any person were to come in he would not suppose any of them were Christians. Maffitt was very intimate and familiar in his manners in my family and was in the habit of calling myself and Mrs. Jones papa and mama, and my daughters sisters. I should not have thought it improper under these circumstances if he had kissed my daughters' hands. He told me that he had danced and played cards when at the Isle of May, dined at the Governor's house there, and was very gay, and considered himself at that time as a backslider. He also said, that he did not offer himself to preach in this country until he had been some time here. On one occasion at my house, when a clergyman was praying, Maffitt went out and got a glass of wine, as he told me, because he did not feel well. Maffitt had physicians at my house. The physicians in Providence, would probably attend on patients who are not sick, if they were paid.

Joshua B. Wood, called.—Knew Maffitt, he was domesticated at his house, and also at his father's. He admitted him (Maffitt) to all the familiarity of a brother. Never saw him do any thing unlike a Christian, in his own, or at his father's house. Never heard any complaints from the family about his conduct. On Maffitt's second visit to Providence, Mr. Jones, Jr. treated him with neglect. Believed he had not then heard Mr. Jones, Jr. say he (Maffitt) had denied Christianity. Never heard it until to day. Mr. Jones, Jr. never told him what Maffitt had confessed to him (Jones.) Maffitt officiated about five times a week, in Providence. His labours were very great, and witness told Maffitt his exertions would kill him. He was really sick at witness's house. Witness thought at one time he would die; physicians attended him. He fainted fifteen times in one night—only brought too by throwing cold water violently in his face.

Cross Examined.—Witness was most generally engaged in his buisness from home. Did not often see Maffitt during the day except at meals, rarely met him at breakfast. Saw him but seldom at his father Jones' house. Mr. Jones Jr. never told him what he knew about Maffitt. Witness never would hear a word against Maffitt. Maffitt satisfied witness he (Maffitt) had never been a tailor. When he fainted, the young ladies bathed his temples. Witness did not contribute to pay for an article in the Providence Journal in favor of Maffitt. Never saw it till he saw it in the paper. It was not published by his authority or approbation, but he approved of it when he saw it. Had some difficulty with two brothers in law, partly occasioned by Maffitt and partly by other circumstances. In his disagreement with his brother at his own house, Maffitt was present, but did not do or say any thing.

Mrs. Merritt.—Mr. A. Jones, Jr. called at her house one day; he left a message for her husband as he (Mr. Jones) was going away. He said he knew nothing against Maffitt except from report. Witness lives in Providence and is a Methodist. Her husband is the Methodist minister in Providence.

Cross Examined.—Thinks it was sometime in October, Mr. Jones called but does not know. Mrs. Turpin was present, and had a great deal to say to Mr. Jones. Mrs. Turpin did not recollect Mr. Jones' message to witness. Witness was busy in household affairs in the room, as Mr. Jones was talking with Mrs. Turpin. Cannot say as to what the message from Mr. Jones related, whether to the singing of the song, or the whole of Maffitt's conduct.

J. N. Maffitt.—I have always stated that I took only the skeletons of Walker's sermons. I showed Mr. Jones a paper that contained about two pages from Walker's sermons. I never read one of Walker's sermons through in all my life. I never committed a sermon to memory since I was born. I told Mr. Jones that I was as much a journeyman tailor as a play actor and no more. I had boen accused throughout Connecticut and elsewhere of being reared a journeyman tailor; this is false, plain up and down false. My father was a merchant tailor in Dublin, doing business on a large scale. On his death I conducted the business, kept the books, &c. in my mother's name, but was

never initiated into the trade.* If I may be allowed the expression, I have been TORTURED on this subject. I determined when I went to Providence to say nothing on this subject, as it would take up all my time to explain. I have always publicly avowed I worked at the trade, and do not consider it any disgrace. When I came to this country, to tell the plain truth, I had no money. I was naturally ingenious and rather than be dependant went into the shop of Scholfield, Phelps & Holmes, at New-York. And continued there some months. I sat upon the bench and tried to learn the trade, but found that I could not get my living by it and left it. Mr. Alexander Jones Jun. was my particular friend. I recommended him to take orders. I told him in confidence that I had doubts of the Christian religion, and that he did not know me. I meant that I had doubts of several of its doctrines, such as the Trinity, and the perfection of man. I had doubts of the experimental effect of religion upon the heart. Mr. Jones urged me to this conversation, and drew it from me. I never meant I disbelieved the Christian religion; I never disbelieved it. I told him that I wished to read books on the evidences of Christianity, not being furnished with the arguments of human learning on that subject. I have thought much about the Trinity, but was not furnished with any argument on that subject. I told Mr. Jones I had simply stated some reasons on the Trinity to the young ladies who enquired of me, but that I was not satisfied. I told Mr. Jones that I could not help doubting when I saw such a man as Joseph S. Martin affected to tears with what so young and unlearned a man as myself had said. I positively never said that I felt contempt in my heart for any persons who came to my altar, since God made me. I was converted before I left Ireland, and in my simple way tried to preach.

CROSS EXAMINED BY DEFENDANT'S COUNSEL.

Q. Were you converted in Ireland?

A. Yes.

Q. At what time were you converted?

A. I do not recollect.

Q. Did you enter a church in Ireland, prostrate yourself, and dedicate yourself to the service of God?

A. Yes, I did.

Q. What induced you to leave Ireland and come to this country?

A. My pecuniary embarrassments.

Q. Did your wife come with you?

A. No, she followed me.

Q. Did you leave orders for her to follow you?

A. No, I sent for her after I arrived in this country.

Q. How long after your arrival did she reach this country?

A. About seven months.

Q. Did you stop at the Isle of May, on your passage to this country?

A. Yes.

Q. Did you engage there in dancing, playing cards, and other scenes of dissipation?

A. I did, that is, my brother, who was with me, was very gay, and I joined him. One evening I was asked to play cards, and played about ten minutes. I did not know the game. I have visited in gay circles in Ireland, and 'tis customary to play cards there. Several of the gentlemen commenced a dance, and we had a European kind of a frolic. They requested me to join it; I did, and went down part of a dance.

Q. What part of Walker's sermons did you ever commit to memory?

A. About two pages.

Q. Do you write down always the heads or skeleton of your sermons?

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* Witness here went into a history of himself. Defendant's Counsel objected that the general character of the party said to be libelled could not come into the issue, and cited to this point. 1. Term Rep. 754. J. Anson vs. Stuart, and 2. Phil. Evidence, 117. The Court, however, partially overruled the objection, and the Attorney proceeded in his examination.

A. Yes, on a little piece of paper, half a sheet.

Q. Was this book (Tears of Contrition) published by your authority and written by you?

A. Yes.

Q. Was the poetry, headed Original, written by you?

A. Yes.

Q. Where were you when you wrote a hymn in this book, printed as original poetry, and commencing "Great High Priest, we view thee standing?"—

A. Oh, Sir, I shall tell you all about that. It was put in by the printer, without my authority; I wrote him a letter and requested him not to do it, before the book was published.

Q. How came you to suppose that he would print an old and well known hymn under your head of Original Poetry?

A. He wrote me he should do it, as I had been in the habit of singing it, and that as it was put among my poetic effusions it was best to let it go as original.

Q. Did you write to him, and desire him not to do so?

A. I did.

Q. Yet he persisted in printing it?

A. He did.

Q. Is there any other poetry here that is not yours?

A. Yes, one other hymn.

Q. How long was it after you arrived in this country before you offered yourself as a preacher?

A. Some months.

Q. How soon after you left Scholfield's shop did you commence preaching?

A. About three weeks.

Q. In this book you observe, that the morning after your arrival you presented yourself to Mr. Crowell as a candidate to preach. (See his Life, page 234.) Is that true?

A. Yes, I did, but I had no credentials, and Mr. Crowell declined admitting me.

Q. Did his refusal distress you at the time?

A. Yes, very much, but I did not blame him as I had no credentials.

Q. Did you preach a sermon from Walker, in Connecticut?

A. Yes, sir, I used the thought and general idea of a sermon from Walker.

Q. Did you before preaching request the indulgence of the audience on account of your being unprepared?

A. Yes, sir. The sermon I used from Walker was not a charity sermon, and as I had to preach on a charity occasion, I said I was unprepared. After getting through with the sermon from Walker, I attempted to apply it to this charitable occasion.

Q. Did you receive wages while in Scholfield's shop?

A. Yes, I did, and did not think it dishonourable.

Q. In your Book you speak of MY establishment, MY debts, &c. and that when you failed you drew on your mother for a balance to pay your creditors. How could this be, if you were in partnership with your mother?

A. Oh, sir, my mother had property of her own, independent of the firm.

Q. If your mother was in partnership with you, was she not responsible for the debts of the firm, and how could you draw on her?

A. Oh, I drew on her for my wife's portion.

Q. Did you have an establishment of your own, independent of your mother?

A. Yes, after this, about six years ago, I had an establishment of my own, hut not eight years ago, as Mr. M'Elroy testified. What he has said is utterly false.

Q. Did Mr. M'Elroy work with you in Ireland?

A. Not that I know of, I never saw him before.

Q. How many workmen did you have in your shop?

A. Sometimes fifty.

Q. Might not M'Elroy have been among them without your recollecting it?
A Yes, sir, he might.
Q What is the meaning of the word humbug in Ireland?
A. It means a singular person, or———a sort of a quiz.
Q. Did you tell Mr. Jones, senior, that it had this last meaning, when he accused you of having applied it to him?
A. I did not.
Witness further stated, that he was very fond of the song which had been mentioned, from Moore, and frequently requested it might be sung for him; but that he only liked the air and did not know the words. He understood that afterwards new words had been put to this air. He never read Moore's song. So help him heaven, he had never asked the young lady to look in his face and sing that song!

Hon. Wheeler Martin.—Soon after Mr Maffitt came to Providence, witness heard he had been a tailor, a play actor, a blacksmith, and one thing and another, a great many things said about him. Witness went to him, when an entire stranger, and asked him (Maffitt) if he was a tailor or a play actor. Maffitt replied, he had never been questioned in that way, and declined answering. Witness's object was to find out if Maffitt had never been a tailor or play actor, and if so, publish it in one of the newspapers for the good of the public.--Supposed Mr. Maffitt thought his question rather blunt for an entire stranger.

Rev. Elijah Heading.—Has seen Walker's sermons sometime ago. Clergymen frequently write out skeleton's of other people's sermons and preach them. There are books containing skeletons of sermons, particularly Simeon's skeletons of sermons.
Cross Examined.—Did not know but it might be improper to take the ideas and thoughts of a printed sermon and preach it as one's own, but ministers frequently did so. On being pressed, however, witness admitted it was hardly proper, and that he should not do so himself.

William Motley, testified that he was a member of Mount Lebanon Lodge; Mr. Maffitt having been proposed for initiation in that Lodge, he, with another person called on W. M'Elroy, to get information of Maffitt's character. M'Elroy told him he had worked for Maffitt's father—that he, (J. N. Maffitt) was in his father's shop—had the direction of it, kept the books, and paid the workmen. He offered himself as a witness, in consequence of hearing M'Elroy state the facts so differently in his testimony in the morning. Being cross examined, said it was Mr. Utley who went with him to see M'Elroy. He said he belonged to the Methodists.

Mr. Jones, Jun. called again.—I cannot tell how it happened that Mrs. Merritt misunderstood me. I called on Mr. Merritt, having understood he had said I had betrayed Maffitt's confidence, to assure him it was not the case, as it was not at that time. Mr Merritt not being at home, as I was going out I left the message with Mrs. Merritt, that I had told nothing of Maffitt he had said to me in confidence. Mrs. Merritt must have misunderstood me. It was impossible I should have said I knew nothing against Maffitt, except from report, as I had previously mentioned to others many things I knew against him, but had not mentioned the two circumstances he told me in confidence.

Mr. Maffitt called again.—Stated he had no credentials when he came to this country. That he had commenced preaching as a probationer at first, and had gone on in the usual way. Was licensed to preach three years ago last winter.

The defence was then closed by Mr. Hooper—in substance as follows:

MAY IT PLEASE YOUR HONOUR,

AND GENTLEMEN OF THE JURY,

It is under the oppression of severe indisposition, that I rise to address you in the discharge of a painful and important duty; a duty, however, from the fearless performance of which, no member of the profession, to which I have the honour to belong, is permitted to shrink, any more than you, gentlemen, are, from taking your seats in that box, or the honourable judge from presiding at the trial. I have said, a painful and important duty. The cause *is* important, as any thing can be, to the defendant, on this side of the grave; and it is not less so to the person, whose character has thus been subjected, by the zeal and infatuation of injudicious friends, to the ordeal of legal scrutiny. It is painful, also, most painful, to be obliged to urge charges of folly or crime against one, who, however unworthily, assumes the character of a disciple and preacher of that holy religion, which we all profess to believe and reverence, as our guide of life, and only and precious support in death. We are required to pursue our investigations cautiously as well as steadily; and, in striving to prevent religion from being injured in the house of its pretended friends, to take care, as has been well said, lest, in aiming the darts of censure and ridicule at the crimes and absurdities of hypocritical professors, and the shadows and visions of enthusiasm, we wound the venerable form, which always lies beyond them.

Prejudice, or partiality, may also be expected, in a trial between such parties, to mingle, with their baneful influences; and, in a cause like this, it will be your first duty, as I know it will be your desire, to guard against them. Upon one thing, however, I may congratulate both you and the public; that this trial, if it settles nothing else, will go far to settle the admissibility of the truth in evidence in cases of libel. The TRUTH, gentlemen, which those only are afraid of, who, for the reason given of old, *choose darkness* rather *than light*.

The defendant is indicted for having published a *false*, *scandalous*, *malicious*, and *defamatory libel*, on John N. Maffitt. A libel may be defined, in the words of a distinguished jurist,* "A censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistracy or individuals." Our defence is first, that the publication is *true*. The counsel for the government have consented, and the court have decided, that the defendant shall give the truth in evidence. THIS IS NO NEW DOCTRINE, although it has not, hitherto, in this state, been practised. It is as old as the rules of the common law, drawn from the highest and purest sources, and as they existed when our ancestors came to this country. Although the present decision of the court renders a very elaborate disquisition on the point unnecessary, it is fit that, on a question of this importance, it should be known, that the defendant rests his rights, not on any thing pe-

* Hamilton.

culiar to this cause, not on consent or favour, but on those settled principles, which cannot be shaken or overthrown, and which, if they are any where to be firmly asserted and vindicated, should be so in this land.

"The ancient English statutes have been always considered as the highest evidence of the common law; and the ancient English statutes and records make the *falsity* of the charges, a material ingredient in the libel."*

The doctrine that the truth could not be given in evidence, in cases of libel, has no better authority than the Star Chamber, a court, which, by its tyrannous and illegal proceedings, has been handed down to the indignation of posterity. It was not from such a court, or the men that sat in it, that the common law could be altered, or that we have derived its principles.† To the Star Chamber succeeded the *imprimaturs* of government, and the licensing control of the press, introduced by that wretched family, who seemed to be elevated to a throne and a sceptre, merely to show how unfit they were to wear the one, or to wield the other.‡ Ex-

* The statute of Westminster, 1st Edward I. cap. 34, enacts that none, thereafter, be so hardy as to publish any *false* news or tales. The same is found in the statutes of 2d Richard II. c. 5. 12, Richard II. c. 11, and 2d Philip and Mary, c. 3, which enacts that if any person be convicted of speaking maliciously of his *own imagination* any *false*, seditious, or slanderous news of the king or queen, he shall be, &c. Numerous instances are found of prosecutions at common law under these statutes, *Dyer*, 155. *Coke*, in his Commentaries on the Statutes of Westminster 1st, 2d *Institute* 226, describes the offence by the epithets *false* and *feigned*, and he further says, that no punishment was provided by this statute, but it was left to be punished by the common law. In his 3d *Institute*, 374, he gives the form of the record of conviction of *John de Northampton*, which record states that the libel was false *quæ litera continet*, *nullam veritatem*.—See Johnson's cases, vol. 3d, page 384, People vs. Croswell.

† The first case is that of *Breverton*, 2d James 1st, in which the truth was rejected, but Lord Coke, afterwards, even in that court, in the case of Lake vs. Hutton, Hob. 252, insisted, that, if the libel were true, the defendant might justify it.—See Johnson, People vs. Croswell.

‡ "The licensing act of Charles 2d, provides that no book on politics should be printed without the authority of the secretary of state: none on common law, without the license of the chancellor: no novels, romances, fairy tales, nor any work on sciences, physic, divinity or LOVE, without the license of the Archbishop of Canterbury! supposing him, no doubt, the most conversant on all these subjects, particularly the last."—See *Senator*, vol. 3d. In the case of the seven Bishops, 4 State Trials, "the counsel for the defendants, under the permission of the court, went at large into arguments and proofs to show that the allegation in the petition was *true*, and Mr. Justice Powell told the jury that to make it a libel, it must be *false*, it must be *malicious*, and it must tend to *sedition*. The jury were of his opinion, and acquitted the defendants." In the next case, that of Fuller, 5 State Trials, who was tried for a libel on government before Holt, perhaps the greatest lawyer that ever sat in Westminster Hall; he said, "*Can you make it appear that these books are true? if you can offer any matter to prove what you have written, let us hear it.*" In Franklin's case, 9 State Trials, 269, at *nisi prius* it was, indeed, decided the other way, but the counsel for the defendants urged the attorney general in vain to show any case, except the Star Chamber, where the defendant was not allowed to show that his publication is true. *He could not show any.* In the succeeding cases of Horne and Tooke,

cept the Star Chamber decisions, then, and the *nisi prius* opinion of Lord Raymond, there seems to be the whole weight of the English authorities for the doctrine for which we contend. "It may be added that all indictments formerly contained the word *false*, as well as *malicious*," and that too in times when the doctrine of right pleading had not grown into such disrepute, but that it was necessary to prove what it was necessary to allege. The present indictment does so. The doctrine is supported by the dictates of common sense, by the writers on common law, the civil law, and those laws of morals, which are the same every where, at Rome and at Athens, in the New World, and the Old.* Were it not so, however, the *evidence of truth is a necessary ingredient in determining the intent*, and that the juries have a right in all cases to bring in a general verdict on the law and the fact on the plea of not guilty, it is now too late to contend. All the English authorities admit that they have the power, and if they have the power they have the right.†

Lord Mansfield put the question upon the truth of the charges in the indictments. In 1792 Lord Camden declared, "that it ought to be left to a jury to decide, *whether what was called calumny was well or ill founded.*"—See Johnson, People vs. Croswell.

* The writers on the civil law declare that the truth shall excuse the libeller, if what he relates interests the public to know. *Veritas convitii excuset injuriantem, si id quid objicitur, tale est ut publice intersit illud sciri.* —Vinn, lib. 4, s. 5. The poet, also, of the Augustan age, says,

Si quis
Opprobriis dignum latraverit, integer ipse?
Solventur risu tabulae, tu missus abibis.—HOR.

See Johnson, People vs. Croswell.

There is, indeed, a case in the State Court of Massachusetts, 4th vol. Mass. Rep. Commonwealth vs. Clap, where the right to give the truth in evidence seems to be restricted to cases of public *elective* officers, on what principle it is not easy to see. If the report be correct, the question was not fully considered. Even there, however, Judge Parsons appears to agree with the civil law, that the truth may be published on subjects *respecting which the public are interested.*

"† It has been the practice of the English juries to exercise this right in cases where the court have denied it. In the cases of Shebbeare, Woodfall, and others, 5 Burr, 2661. 3 Term Rep. 430. the Dean of St. Asaph, 3 Term Rep. the eminent counsel, who appeared in these several cases claimed and exercised the right of addressing the jury on the whole matter of the libel."—See Johnson, People vs. Croswell.

Finally, in 1792, Parliament declared it to be the law. The doctrine was then supported by an array of talents such as has rarely been seen at any one time, on the same side of a legal question. It was fit that such men should support such a cause; and the names of Fox and Pitt and Erskine, of Camden and Grenville and Loughborough, appear properly associated with the doctrine that the truth is not a libel, and that juries have a right to judge of the law and the fact.

Lord Camden declared "that if the *twelve judges*, nay, if *twenty-four judges* declared that the juries had not a right to decide upon the criminality, upon the law, and upon any fact stated in the record, THEY WERE WRONG: they acted against the statutes: they acted against the known and positive law of the land, and the strongest and most convincing proof of this was, that the verdict of the jury was final against all the judge could say, and when they

But however the English law may stand, I should still contend that in a country whose independence was won by the freedom of speech and of the press, and whose constitution has declared that "Congress shall make no law abridging that freedom;" in a state, whose bill of rights declares, "that every subject shall have a right to produce *all proofs* that may be favorable to him," and that "the liberty of the Press is ESSENTIAL to the security of freedom in a state, and ought not therefore *to be restrained*"—there could be no doubt on the subject. On this point I cannot cite a more convincing authority than that of the People vs. Croswell, reported in Johnson's cases‡; and when I say that it was argued by Hamilton, and decided by Kent, I know not that it is in the power of any language, that I can use, to express more strongly my sense of its value—by Hamilton, who stood forth in the zeal and ardour of his exalted spirit, and in the matchless energy of his noble intellect, not merely as an advocate, but as a citizen, to vindicate the Liberty of the Press,—and by Kent, whose profound erudition, and splendid talents, adorned with all the graces of literature, have justly distinguished him as the Mansfield of America. His opinion that to "*publish the truth in all cases, with good intention and for justifiable ends*" is the right of every citizen, will not soon be shaken.

But even with this privilege, the system of bringing indictments for libels is itself a pernicious one. It often makes the arm of the Commonwealth an instrument to aid the purposes of personal animosity. A civil action is always open to the injured for redress, and it cannot be necessary to resort to indictments. The reason sometimes given that a libel tends to a breach of the peace, is a mere fiction of law, and a very absurd one. It no more tends to a breach of the peace than any other civil injury. Even if if it had that tendency, it would be a notable way of allaying irritation, and *keeping the peace*, to bring an offender into court, there to stop his mouth, and punish him unheard. The sort of quiet thus produced would augur no safety to the state. It is attended also, with the great, and in the case of libels, unnecessary evil, of making the party most deeply interested, a witness in his own cause, and to those who have seen its effects, in this regard, this day, I need not comment on the absurdity of dragging a reluctant *party* on the stand, when it can be avoided, and there leaving him to defeat his own cause. If a libel also tends to a breach of the peace, why admit the truth in the case of elective officers, where

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are pleased to acquit any defendant, their acquital will stand good, until the law of England is changed. If you mean to change the law, bring in a bill declaring that the subjects of this realm, shall not in future be tried by JURIES, but be tried by JUDGES." *Vide Senator.* He also declared "that the supporters of this doctrine, had every case of any sort of authority with them." *Vide Senator*, vol. 3.

‡ 3d. Johnson's Cases, 339. To this most learned and able investigation, we are indebted for most of the authorities and remarks in the preceding pages, of which indeed, they are but an imperfect abridgement. To the same admirable authority, we would refer for comments on the sedition law, the language of the first congress, our constitutions, &c. &c.

it has that tendency more than in any other case, if it has it at all. Let, then, according to the admirable maxim of the Roman law, *the truth be told of whatever it concerns the people to know.* Let the press continue, while it refrains from attacks on private vices or follies, to

"*Brand the bold front of shameless guilty men.*"

Let it examine, fearlessly, but in dignified and decent language—public institutions, characters and transactions; and whether the subject of its scrutiny be the bench, or the legislature, the cloister or the conventicle, the monk or the fanatic, it will confer a public benefit. On this subject, I will accept of no concession. I assert the right of full, uncontrolled, and animated discussion, and let those who think it will be safe for them, attempt to restrain it.

But it is said, if the truth is in all cases to be given in evidence, private vices and follies may be exposed. The answer is, in the first place, that as in such cases it cannot justify the offence, people will refrain from committing it, when they find it constantly punished by the verdict of a jury,—and in the second place, that such persons should resort like others, instead of procuring an indictment, to a civil remedy, for a civil wrong.

And what more interesting subject to the public can there be than the character of him, who asks our confidence as a minister of Christ; who comes to us with the 'book of the wisdom of God,' and the words of eternal life? His is no obscure or neutral station. He stands conspicuously before the people;—and if, instead of honouring, he disgraces, the cause of piety, the man, who unmasks the impostor by publishing the truth, deserves the thanks of the community. In considering this publication, as set forth in the indictment, you will observe that the effusions of fancy and figures of speech, which the county attorney has interspersed through it, under the name of *innuendoes*, are not for your consideration, any farther than you shall find them to be just explanations of the defendant's words. You will regard the text, and not his very fanciful commentary upon it. In the case of Astly vs. Yonge, 2 Burrows, 812, Lord Mansfield said, "as to the innuendoes in the declaration, they are immaterial, since the substantial part itself is justified."

(Mr. Hooper here entered into a minute examination and commentary upon the testimony, of which our limits permit only a brief sketch.)

What, then, are the charges, and how are they defended? The first charge is, the preaching Walker's sermons, denying the fact, and, afterwards, confessing it. Mr. Jones states "that he heard Maffitt's sermon, and afterwards read it in Walker; charged him with it, when he denied taking any thing but the "thought," and afterwards acknowledged having taken the skeleton, and some of the expressions, and delivered the sermon "bunglingly" because he had committed it imperfectly." It may be right, or it may be wrong, to have thus availed himself of Walker's discourses; but the question is, did he deny what was true? and of this you cannot doubt, if you believe the witness, a young man of a most unim-

peached and unimpeachable character, a clergyman of the Episcopal church, against whom malice breathes no whispers of reproach, who comes here to testify under the obligations of an oath, in obedience to the requisition of the court, and whose ingenuous and cautious manner of giving his evidence is alone sufficient to carry conviction with it. The elder Mr. Jones also testifies to his having taken part from Walker; and Mr. Maffitt himself acknowledges it upon the stand; declaring, on his cross examination, that he took nothing from Walker but the divisions of his discourse; that he always *wrote down* those divisions; and yet, that he committed about two pages of Walker to *memory!* leaving you to reconcile the contradiction as you may. Is not *this* falsehood proved? the rejection of our important depositions notwithstanding?

Did he try to "sink the tailor," gentlemen? The elder Mr. Jones tells you so, the younger tells you so, and the Hon. Wheeler Martin tells you so; the amount of whose testimony, indeed, seems to be, that he propounded to Mr. Maffitt a question on this subject which that reverend gentleman was pleased to deem impertinent. That he actually has been employed in this trade, he has been kind enough to tell you himself. He said, indeed, there was a *mystery* about it, but there was no *mystery* as to his own plain declarations. But it is no dishonour to be a tailor, said Mr. Maffitt, and no crime to be poor. No, gentlemen, it is no dishonour. We have no more respectable or valuable members of society than our industrious and intelligent mechanics, and poverty is the last thing which a *lawyer* would think of bringing before a Jury as a crime. It is the *lie*, and not the *trade*, the want of truth, and not the want of money, which we have charged, and which we have proved.

The coaxing a young lady to look in his face and sing, "Come to my heart, &c." the Government Counsel say in their indictment, means "that he was guilty of lewd and indecent behaviour before a female." If this be the true construction of his conduct, be it so--though to us it seems rather a severe one. But be it what it may, we have *proved* it; we have proved the request to sing the song by Mr. Jones and Mr. Maffitt himself in several instances, and the looking in the face, the learned gentleman was kind enough to prove for us, by drawing from the witness by dint of cross-examination, the declaration which he heard from his sister.

But he is accused of saying that he disbelieved the Christian religion; and Mr. Jones tells you "that he said to him he had no belief in Christianity; and when some of his deluded followers came to receive instruction, he did not know what to say to them, but patched up something, and believed he satisfied them!" This full and direct testimony on this most important point, excited exceedingly the curiosity of my learned friend. In some way it was to be got over, and accordingly he inquired of the witness, if he was not aware that there were many disputes among theologians? to which of course he replied in the affirmative. Had not then this denial of belief some reference to the subtilties of the schoolmen? Cannot you recollect that it related to the *Arian* controversy. Did it not refer to the *Athanasian creed?* was it not *merely*

some hesitation respecting the five points? Was it not *merely* some misunderstanding respecting the *perfection* of man?. To all these ingenious inquiries the answer was, No. It was *merely* his denial of his belief in Christianity, *merely* his own positive denial of his belief in it, plain, implicit, and direct; very insufficient evidence I grant you, Gentlemen, of the fact of his infidelity, but tolerably good proof of his having made the declaration.

And is it so, Gentlemen? Shall a professed minister of the Saviour deny his belief in his doctrines, at the very time that he is standing daily in his temple, reading his words, administering the Eucharist, and partaking and imparting the consecrated elements, and do you ask me to go any farther? Will you call my client *guilty* for having held *him* up to public scorn? In what new language, with what unknown force of words must that charge of impostnre be framed, which should be considered *false*, *malicious* and *defamatory*, respecting such a man? That he laughed at the worthy Joseph S. Martin's piety, that he expressed the contempt which he felt for Messrs. Wood and Dunn, after kneeling with them in solemn prayer, and honoured his patron Mr. Jones, with the title of a humbug, at the very time that he was living on his bounty; and betrayed the confidence of Mrs. ——; might all as naturally have been expected as they are clearly proved, from him who could practise such an impious and monstrous imposition on his deluded followers.—Are not these things true?

He is accused of having procured two young ladies to watch with him during his pretended sickness, and sending one out of the room that he might be left alone with the other. This is a subject of peculiar delicacy, and difficult in its own nature to be completely proved. The fact of the watching is however proved by the testimony of the elder and younger Mr. Jones, and by the latter, the fact of the occasional absence of one of them from the room. You will recollect the rejection of the depositions—the apprehensions of the younger Mr. Jones from his general manners, and the fact of Mr. Jones having watched to prevent any insult, and you will not deem this charge unsupported, nor even if it was so, convict my client, when all the rest are so fully established. In Holt on Libel, 279, it is said, 'defendant may show grounds of suspicion not amounting to actual proof.' Before I leave this topic permit me to say, that not a shadow of an injurious imputation rests on the respected character of these females, and that it must be either ignorance or delusion to consider them as implicated in the charge directed against him. But he is accused of pretending sickness, and his sudden returns from delirium and relapses at pleasure, must be considered together with the amazing celerity with which his fainting fits were conducted in support of it. He fainted five times in fifteen minutes, says the elder Mr. Jones; five times in fifteen minutes also on another occasion, I think Col. Wood testifies, and also fifteen times in an hour; and Col. Wood, Gentlemen, to say the least, seems to harbour no violent animosity towards Mr. Maffitt. *He* surely seems to be under the influ-

ence of no very rankling hatred or malice as respects him, and cannot be deemed other than a reluctant witness to any fact unfavourable to him. We live in the age of inventions, when steam, and gas, and all the elements submitted to the power of man, seem to annihilate at his bidding the old fashioned obstacles of time and space. But I submit to you that by nothing less than some such machinery—by no natural operations of the human system, could any man contrive to faint and recover with such almost incredible despatch.

But one stupendous charge remains, and a joke upon those who followed him, for certain reasons mentioned in the close of the publication, is construed by the learned gentleman, into an imputation on Mr. Maffitt of the most gross lewdness. By "what conjuration or mighty magic" this is discovered, we are unable to divine If it be so, let the licentious language which he used with regard to a respectable lady in Providence, the singular visit which he received in Connecticut, together with the other facts, testified to by the younger Mr. Jones, satisfy you of its justice.

I have now gone through, Gentlemen, as briefly as possible, the disgusting catalogue—proved, as we think completely, but at any rate sufficiently, to show you that the publication was made for a justifiable end, and with good and sufficient motives. And how is the proof met. By the testimony of those, who at some other times, and in some other places, did not see or hear the same things, which they could not have done, indeed, unless they had been repeated: reminding one, were it proper to treat such a subject with levity, of the unlucky Irishman, who thought it very hard, that he should be convicted of stealing a hoe, on the testimony of *three* witnesses, when he could bring *three and twenty* who at some other time, and some other place, *did not see him take it!*

I need scarcely speak to you of the attempted contradiction of Mr. Jones by Mrs. Merritt, which you cannot consider as any thing more than a misunderstanding; nor of the *voluntary* testimony of Motley against McElroy, as, if it proved any thing, it would show that Maffitt's evidence in this regard was also untrue. It is said, however, that Mr. Jones betrayed the confidence of this man. Did he so, and when? When seeking anxiously, to undeceive his deluded family, whom he thought were nourishing a viper in their bosoms, and still struggling to conceal his knowledge of him from them, he was told in a tone of audacity and defiance before his parents, and his sisters, that he had nothing against him. Judge you, gentlemen, whether he was not imperatively called upon to make the disclosure,—and then, and not till then, did he, in the honest indignation of his heart, *speak that he had known, and testify that he had seen.*

To the charge of having published a *false* libel, there we oppose its truth; a scandalous and *malicious* one—the justifiable end; a *defamatory* one—the imposture which we have exposed; and we ask you with confidence to say our charges are *true*, our ends

justifiable, and our motives good. The manner was sarcastic, we are told. But, gentlemen, we must assail hypocrisy and vice in the mode best fitted to detect it, and penetrate as we may, those "adamantine scales, which fear no injury from human hands."

GENTLEMEN,

Your decision this day will extend its influence far beyond the occasion, and affect many other parties than those who are now before you.

These are not times and this is not the land in which we are to manifest a cold and heartless indifference to the institutions or men who surround us. We are to call things by their right names, and examine without intemperance, but without fear, whatever affects the relations or the well-being of society. The institutions of religion, indeed, are to be approached and spoken of only with reverence. But, in proportion as it is our most precious possession, in proportion as its foundations are laid deep and broad in the principles of our nature, and it is connected with far stronger feelings, and points to higher interests, than any which relates to earth, in that degree are we to guard it from abuses, and expel from its temples those who would shelter their vices under its sacred name. Of all those, indeed, who are interested in the events of this day, none are more so than the respectable sect of christians, who have been, in the present case, the subjects of imposition. A body of men, who, for a long time in the old world, and, may we not say, in the new, have exhibited the zeal, the piety, and the meekness of the primitive disciples. It is not possible to speak otherwise than with respect of those, who, among their distinguished leaders have exhibited many men distinguished for piety and learning, and who can boast of the zeal and eloquence of WHITEFIELD, and the sanctity of WESLEY. Let them assemble undisturbed in their temples, and tread unquestioned their path of toil and suffering to the realms of light; but let them not suffer unhallowed hands *to be extended to uphold the ark of the* LORD, nor permit "strange fire" to mingle with the sacrifice kindled on their altar, which they hope will ascend to heaven a pure and acceptable offering.

Gentlemen, the cause is with you. Make such a decision as will protect, and not destroy, the peace, the order, and respectability of society, and declare, that those who ask for the public confidence shall be subject to the public scrutiny. Whatever may be the event of this scene of suffering, to my client, there are two subjects of congratulation, of which nothing can deprive him. The one, that the great principle of admitting the truth in evidence, has, in his case, been sanctioned: the other, that, however its light may be now obscured, or disregarded, even if he is to go convicted from your bar, he will carry with him, in this instance, the proud consciousness of having been A PUBLIC BENEFACTOR. But, gentlemen, I will not suffer myself to doubt that you will send him to his home in peace, and vindicate, by your verdict, the PURITY OF MORALS—THE LIBERTY OF THE PRESS—AND THE SANCTITY OF THE TEMPLE.

Mr. Austin commenced by observing that he felt no ordinary embarrassment in discharging the duty which was thrown on him in the present cause. By the course of the trial, the accused had become the accuser, and the party, supposed to be injured, was in truth the one who was placed on his defence.—This was a novel and unpleasant situation for the Attorney of Commonwealth. An individual claiming redress for past injury was in fact put on trial, on new accusations.; and was compelled to trust his cause to a stranger with whom he was wholly unacquainted, and who had no interest or connection with that large portion of the community who felt a strong solicitude for his fate. It was a duty, however, which he should permit no personal feelings to control; and it was relieved by a confidence that an intelligent and impartial Jury would compensate for any deficiency on his part by their own diligence and attention.

He was very sure that no prejudice arising from the connections of the cause, would prevent the fair exercise of official obligation. If the gentleman who had been denounced in the Defendant's Newspaper, and who was in fact on trial on the charges in the libel, looked in vain at their pannel for an individual of his own religious sentiments or persuasion, he would not on that account feel any alarm. In the temple of Justice there were no sectarian attachments. Passion, prejudice, and feeling slumbered at her altar, and the Genius of the place spoke like the voice of God to his prophet: Take your shoes from off your feet, for the ground whereon you stand is holy.

But with all their caution the Jury had to encounter another obstacle in the way of the cause, very likely to operate injuriously even on careful minds. The liberty of the press, it was said, was involved in the trial—and to vindicate this liberty, some proceedings had been had, and some opinions promulgated from the bench, which he might venture to call novel without being guilty of disrespect. For the true and safe liberty of the press, Mr. A. professed to yield in attachment to no one. But the liberty for which he would contend, was as far from its licentiousness, as, in his opinion, the ancient landmarks of the law were safer than the modern doctrines of the day.

Mr. A. had heard it suggested with some surprise, that indictments for libel were never to be countenanced; and that they in fact partook too much of the Gothic austerity of former times to be countenanced in this æra of liberty and refinement.

He could not yield to such impressions.—Was the paraphernalia of Justice assumed merely for the protection of property? Was the possession of a man's gold all that required the aid of the law? Or, was personal security considered the important object of regard? No. Great as were these high interests, society had done but half its duty when it secured these to its citizens. It was their good name and reputation in which the great body of the people were concerned. This was the inalienable and invaluable property which the humblest and the meanest, as well as the high-

est and the mightiest, had a right to retain. This was, perhaps, the only property which was above the reach of fortune, or accident; and could be deserved by a man's own actions. This was the legacy, which, in the wreck of all other blessings he could leave to his children as a compensation for their orphanage, and this he had a right to demand that society would protect and preserve from the inroads of slander, and the malice of detraction. Mr. A. did not contend for any novel strictness inconsistent with rational freedom. Discussion, inquiry, free examination, and able argument, however injurious to private feeling, were within the liberty of the press, and should never by his agency be interrupted. But malicious defamation, wanton scurrility, artful exaggeration, and contemptuous ridicule, were the unquestionable evidence of that licentiousness, which no liberality would sanction; and to pretend that it had any immunity under our institutions was in itself a libel on our Constitution and Government, which no morality or intelligence would venture to maintain.

But in the present case every thing is conceded to the Defendant, which the most strenuous advocate of a free press ever demanded. Right or wrong, with or without law, he is permitted to defend himself, by shewing that the matters published were true, and printed by him with good motives for justifiable ends.

The burthen of proof rests upon him. He is, by the very liberal interpretation which has been given of the law, permitted to do this if he can. If he cannot, he must be convicted. The publication of the piece is conceded. Its defamatory nature cannot be denied. It is a libel—and unless he is justified in its publication, he must be pronounced guilty.

Before considering the evidence offered to prove the truth, let it for a moment be considered what was the object and end of the publication.

The Rev. Gentleman, who is attacked, is a preacher of the Christian religion of no ordinary celebrity. He is enabled, by some peculiar power, to attract an immense concourse of people. His ministrations are exceedingly acceptable to that great and growing class of the community of his own religious opinion. There is the appearance of zeal and fervour in his devotions which has warmed and animated the public mind; and he appears to a great portion of our fellow citizens, an instrument in the hands of Providence, to give new influence to the Redeemer's kingdom, and bring sinners to repentance. He interferes not with other men's concerns; but as far as appears, pursues his own course, to the acceptance and delight of his friends, regardless of the enemies which eminence always creates. Yet, being eminent, he is an object of curiosity. What is said of him becomes interesting to a vast crowd of people. If any thing be written of him, it will be read. If any thing be printed, it will sell.

The Jury are to decide why it was written. Was it to give information? to extend correct opinions? Let its manner, its style, its correctness, its tendency determine. If it was fairly and

honestly done, then if it is true, it is not wrong. But was this its object? Was it written to gratify the prurient disposition of depraved minds? Was it provided to feed that cormorant appetite for slander which grows by indulgence, and craves more as more is obtained? These are dishonourable ends; and however true may be the facts, such a publication is injurious to the best interest of society, and cannot be defended.

With regard to the truth, Mr. Austin asked the Jury, whether any thing had been, whether any thing could be, urged to justify the intimations in the last clause of the libel.

The imputation conveyed in this paragraph set all truth, as it did all decency, at defiance. The idea, covered, but not concealed, in this language, could not be uttered before the mixed multitude in this Hall. The legends of ancient nunneries, the stories of profligacy and crime, which are recorded of the most abandoned monastic institutions in Europe, are faint and feeble in their immoralities, compared with the suggestions of this part of the libel. It is no defence that it libels the hearers as well as the preacher. It presents the whole community as the deluded and detestable worshippers of Belial, with the Reverend Prosecutor as their instructer and guide. It exhibits him attempting, under the pretence of religious duty, and the solemn services of public worship, to debauch and demoralize his deluded admirers; to make the forms of religion the vehicle for crime; and to poison the morals and the mind, as well as possess the persons of an infatuated crowd.

In proportion to the magnitude of the charge should be the evidence to support it. Such bold and unlimited accusations should not be suffered to rest on slender proof. Yet, of all this mass of corruption in the charge, what is seen in the evidence? No single fact of actual indecency is even attempted to be made out in evidence. Some foolish language, which, if it was all true, discloses no actual crime, is the whole foundation on which this atrocious accusation can be pretended to rest. No criminal intercourse is even suggested. It is all talk and nothing more. And even this talk, if believed, takes away any presumption of guilt. On one occasion, he says, he was beset with a singular temptation, and did not yield to it; on another, if he was disposed to have yielded, he might possibly find Potiphar's wife in the neighbourhood;—but he was not disposed. Idle language, unbecoming the seriousness of his profession, it may be granted to be, but who will say it warrants the inflamed and daring intimations on his morality which are uttered in the libel.

The indelicacy insinuated to have occurred at Providence, must also be set down as wholly unsupported. The brother of the young ladies suggests only his belief—(his belief merely) of Maffitt's intentions. He dares not surmise that these intentions succeeded. The father, and the brother-in-law, had no such suspicion. Neither of the reputable parents of these ladies had any such belief. One of the gentlemen was a man of the world—intimate in circles of fashion, and conversant with mankind. He

saw Maffitt domesticated in his own family, and permitted all the liberties of a son and a brother. He totally exempts him from conduct unbecoming a christian and a gentleman. The freedom of intercourse which daily association permitted, he asserts to have been the intimacy of respectful friendship and fraternal kindness; and not for a moment liable to any possible complaint.

The suggestion is monstrous when the character of the ladies is considered. They are admitted to be the daughters of most respectable parents; themselves well educated, intelligent, high minded, prudent, and above all suspicion of indecent levity. That such persons should have been the objects of cupidity is an extravagant supposition which derives no countenance from any evidence in the cause. Though the details of this intimacy have been stated, they give no support to the defence. But I object, said Mr. Austin, to this sacrilegious tearing of the veil, which covers the affectionate intercourse of domestic society. I object that the altars of the household gods should be violated, that private and confidential intercourse which renders home happy, and brightens the family circle, should be exposed; that the playfulness of youth, the ingenuous manners of artlessness and innocence should be brought before the public eye, and that every unguarded act, which looks for its protection to the paternal roof to a father's power and a mother's kindness, should be stripped from its shelter and presented to the gloating eye of impertinent curiosity. A course of defence which renders such measures lawful, is a noble commentary on the wisdom of the law by which, as I humbly conceive, they have hitherto been prevented.

All that indecency, Mr. A. said, which is imputed in the libel and calculated to catch the indelicate imagination of lascivious readers, is wholly unsupported by evidence.

But of some other matters charged in the libel, some evidence is undoubtedly given to the Jury.

The witness by whom these charges are to be supported, is Mr. Alexander Jones, Jr. This gentleman was, by his own account, the bosom friend and confidant of Mr. Maffitt. In the course of this close and continued intimacy, and in the trust of that sacred confidence which friendship always implies, and honour never ought to violate, the witness professes to have learned divers things of the conduct and character of Mr. Maffitt, which in his own way, and with such colouring as the Jury believe he has given, are to be considered in evidence.

Of such testimony from such source, Mr. Maffitt had a right to complain. He may well say with the Psalmist, "*Mine own familiar friend in whom I trusted, who did eat of my meat, hath lifted up his heel against me.*"

[Mr. Austin then examined the testimony of Mr. Jones, with a view to satisfy the Jury that it was partial, exaggerated, and unfair; and pursued a series of caustic and severe remarks to destroy the effect which his evidence was calculated to produce.]

The preaching a part of Walker's Sermon, Mr. A. argued, was justifiable by the practice of other clergymen, as testified by Mr. Heading, was almost necessary from the close and continual application of Mr. M. to his professional duties—and was in fact, but a small part of his exercise, as the printed sermon if read in whole, would consume less than half the time occupied by Mr. M.

The story about the Tailor Mr. A. considered quite insignificant. Much more was made of it in the libel, than was proved at the bar. He supposed the Defendant, (who had to-day opened in a very handsome manner a very important cause,) might very safely affirm he was no lawyer on the same ground that Mr. Maffitt, though he had once worked at the trade, asserted he was no tailor.

Other charges were more serious. Alexander Jones, Jun. testifies, that Maffitt said he had no belief in the Christian religion. Maffitt denies that he said so, and refers the matter to their antecedent conversation, and to the language connected with it. Mr. A. submitted to the Jury the propriety of this explanation, connected, as it necessarily must be, with the doctrines of the sect to which the Reverend Gentleman belonged.

By the influence of divine grace, according to their theory, Maffitt obtained his faith in Christ. This faith was lively, strong and immoveable. But he had no human learning, no literary acquirements, none of those arguments or book knowledge by which belief is obtained or preserved independent of the divine agency.

Jones testifies that some young ladies of Mr. Edes's society came to inquire of Maffitt as to the doctrine of the trinity. Maffitt said, he patched upon an argument as well as he could, and laughed at their credulity.

The explanation is on the same principles. Maffitt admits the interview, his ignorance, his efforts, and his surprise at their facility of conviction. But what Jones represents as the lightness of a scoffer, Maffitt explains in a way which good men will easily understand; and which reflects honour on the integrity of his principles, disclosed in strict confidence to his intimate friend.

He confesses himself unprepared to meet the human learning by which this mysterious doctrine is enforced or controverted. He uses to the inquirer the best argument he can command; and laments his inability to do more; with his surprise that it was so successful.

Jones represents him as laughing at the converts to his preaching.

Maffitt admits the conversation, and differs only as to the manner and design.

He says he felt it as a wonderful thing, that he, a young man, a stranger, with no education, and little talent, should be able to say any thing to affect the minds of the old, the learned, the respectable citizens of the town.

And Mr. A. asked, was it not wonderful? Was there not some mysterious power, some unaccountable charm? Might not a most serious and devout man make these inquiries in all the humility of

self abasement? This is an inquiry for the Jury. They must say if the Defendant's witness has not coloured the account, and made a different representation from the truth.

As to malicious tattling, Mr. A. contended that all the mischief resulted from the witness. That Maffitt revealed no more than in honour he was bound to do, to protect the people under whose roof he was sheltered. The mischief was of the witness's producing.

On the whole, Mr. A. contended that unless some new rule of evidence was adopted, the Defendant had not made out his justification. Of the thirteen specific accusations, he had offered no proof as to many—of the others, the proof was inadequate and defective.

Lightness, frivolity, and imprudence were one thing,—crime, guilt, wickedness, depravity, were another. The last had been charged by the Defendant; at most, he had proved only the former. This was not enough in law, as the law has heretofore been found in the books. A party, who accuses another of crime at the bar of public opinion, must be held to as strict proof as he who does the same thing at the bar of this Court.

Any other rule will break down the mounds by which reputation is preserved, and overwhelm all that is dear to us in one unbounded current of calumny and detraction.

When the County Attorney had closed his argument, at nine o' clock in the evening, the Court adjourned to ten o'clock on Tuesday morning.

TUESDAY, Dec. 17, the Court opened at ten o'clock.

The following CHARGE TO THE JURY was then delivered by the Court.

Gentlemen of the Jury,

Joseph T. Buckingham is charged with publishing a libel against the Rev. John N. Maffit, a preacher of the Methodist persuasion. It will not be necessary to enter, on this occasion, very minutely into the nature of libel. It will be sufficient to state, that for the purposes of this indictment, it may be defined, a false, and malicious publication, tending to injure a person, in his profession, and to hold him up to contempt or ridicule. It is not denied that the publication, in question, has all these tendencies.

The defence, is, that the publication contains the truth, and that it was made from good motives, and for justifiable ends. Before making any remarks upon the manner, in which this defence has been maintained, it is due to the subject, and will be useful in the subsequent illustration of it, to observe on its general nature.

By the Common law of England such a defence as this, is inadmissible. According to the construction of their Courts, a jury has nothing to do with the intent, nothing with the tendency of the publication.

Their inquiries are limited to the fact of printing, and publishing, and to the justness of the meaning attributed in the inuendos. The court reserve to themselves the power of deciding upon the tendency ;—the intent is matter of presumption ;—the truth is declared immaterial, and guilt is made a conclusion of law.

Now, it is impossible, in the opinion of this court, that such can be doctrines of the law of Massachusetts, under a constitution, making a specific reservation for its citizens of the liberty of the press,—a liberty unknown, as such, to the Common law,—and declaring, that all parts of that law, which are repugnant to that liberty, are not to be considered law under the constitution. The ground, on which the right to use the press is placed under our constitution is precisely the ground, on which the right to use any other instrument is placed, in nature, and by law ;—that is with a good motive, and a justifiable end.

It is not apprehended that this change of the doctrine of Common law, effected by our Constitution was occasioned by any less regard for private reputation, existing under a free government, than under a monarchy ; but resulted from this great and sound public reason, that it is better that individuals should be occasionally subject to injury, in consequence of the abuse of the liberty of the press, than that the state should he perpetually subject to danger, from any uncertainty in the tenure of that liberty. It results also from this principle, as consonant to reason as it is to the tenor of our Constitution, that the best security any citizen can have for reputation, as for every other right, exists in the integrity and intelligence of his peers. It is to the jury that the constitution confidently looks, at once for the maintaining the rights of reputation, and those of constitutional liberty.

To the exercise of this duty you are now, gentlemen, called by your country, and by your oaths, and you need no excitement from the Court to stimulate you to a firm and faithful performance of it.

The case, with which you are now charged, is one of no common interest, whether you consider the defendant,—or the person whose reputation is assailed, or the public. To the defendant it is of no light consequence either to his character, or prospects, to be found guilty on an indictment like this. He has, therefore, a right to expect of you a careful and a minute consideration of all the facts, on which he rests his defence. The person, whose reputation is assailed, stands in a relation scarcely less critical than the defendant, and his character, and prospects, are obnoxious to consequences scarcely less serious. He, also, has a right to claim, that nothing should be admitted, through prejudice, and nothing taken for granted, which is not proved. The public, also, has a deep interest, on the oue hand, that the just rights of reputation shall be vindicated ; and on the other, that the just rights of the press shall be maintained.

Amid these difficulties, with which the Court, as well as you, are beset, there is but one safe and honorable course, and that is,—regardless, who suffers, or who is satisfied,—to maintain a fixed resolution, to understand our duty, and a firm purpose to perform it.

The court, on its part, will endeavour to bring before you, the principal points, on which the prosecution and defence depend, and explain

the principles, by which, in its apprehension, your judgment concerning the facts should be regulated. It will no farther recapitulate those facts than may be necessary to illustrate, and give direction to those principles.

In truth, gentlemen, the government, in this case is in the position really of defence. The position taken by the defendant being that of justification, the burden of proof rests upon him. The task incumbent upon the government, is, only that of replying to, and repelling his proofs.

It is your duty, first, to understand the task the defendant has undertaken, and what he has to perform.

The task assumed by the defendant, is, to satisfy you, that what he has published is true ;—and not only so, but, that it was published from a good motive, and for a justifiable end. His defence fails, if he do not make out both the truth, and the goodness of the motive, or end.

The mere truth, is not here,—cannot be any where, in itself, a justification. No man has a right to publish every thing concerning his neighbour; nor any thing, merely because it is true. A contrary doctrine would justify every wanton and malignant attack. What the friends of liberty have every where maintained as the extremest limit of the liberty of the press, is, the right to publish the truth for good motives, and justifiable ends. He, who wants more, is no friend to liberty.

To this principle, and to both its constituent parts, it is your duty to restrict the defendant.

The objects for your inquiry therefore are:

I. Are the facts true ?

2. Were they published from good motives, and for a justifiable end ?

I. Are the facts true ?

1. What are the facts—

On this point, it is not necessary as the Court apprehends, for it to enter upon a minute recapitulation of all the particular charges into which the counsel for the government has divided those allegations. The original paper will be in your hands. It will be your duty to analyse it ; to compare what it asserts, with what the defendant has proved ; and according to the result to form your verdict, so far as the verdict may depend upon the truth, or falsehood, of the respective allegations.

For the purpose of generally remarking on the bearing, and nature of the evidence, the court will consider these allegations under five general charges, which are of principal importance ; observing, only, that if there be others, not included in this analysis, it is your duty to compare them with the evidence, and with the obligation, which the defendant has assumed, to maintain their truth. These charges are,

1. Falsehood. 2. Infidelity. 3. Betraying confidence. 4. Ridiculing persons coming to the altar. 5. Loose, light, and lascivious conduct.

1. Falsehood. 1. In first denying that he had preached other men's sermons, and then confessing it.

2. In denying that he had been a tailor, and then admitting it.

As to the denial of preaching other men's sermons—it rests chiefly, if

not solely, on the testimony of Alexander Jones, jun. In stating this, as in stating every other part of the evidence, which I shall recapitulate, I shall confine myself merely to its material points, without referring to time, manner, character of witness, or any other circumstances. My single object being to draw your attention to those great features of the evidence, and the principles resulting from them, which ought to arrest your attention.

On this point, Jones says, that "suspecting what he had heard at North Providence to be Walker's sermon, he accused Maffit of preaching it;—that his reply was, *that he had used the thought only.*" Jones testifies, that on examining Walker's sermon, he had no doubt "*that he had used the whole of the introduction of the sermon, without alteration,* and that he thought he had used the whole sermon, only interlarding it with thoughts of his own,"—that he again, at a Mr. Wilson's, charged him with it. *He then allowed, that he had repeated a part of it—but had done it "bunglingly"* (his own expression) "*because he had committed it imperfectly.*" Mr. Maffit's account of the matter is, that he "*used only the divisions and subdivisions of Walker, that he never committed a sermon to memory in his life, that he never read one of Walker's through in his life, that he preached from heads, not from memory.*"

On this point, you will consider, whether here is necessarily any contradiction,—whether Jones may not have been mistaken. Whether the fact is sufficient to justify such a charge of falsehood, as the publication contains.

The second specification under this head of Falsehood, is, his attempt, as it is termed, "to sink the tailor." That is, denying that he had been a tailor, and afterwards admitting it.

Jones, testifies, that he asked Maffit "if he had never been a tailor;" —He replied, "*I have never been a tailor, more than a play actor, and I have never been a play actor, in any way.*"

Alexander Jones, the elder, testifies—that "*Maffit told him, that he had not been a tailor;—that he was neither a play actor, nor a tailor; nor ever had been one or the other.*"

Joshua B. Wood, testifies, "*I had heard he had been a tailor and a play actor. Maffit stated to me he had been neither.*"

Thus much for the denial.

As to the fact of his having been a tailor. You have the testimony of McElroy. He says "*I worked for him in Dublin, eight years ago, he was a master tailor, had a shop of his own. I was his journeyman. He paid me himself.*"

You will consider this testimony of McElroy, in connection with that of Motley—who swears that McElroy told him a different story; viz. —*that he, Maffit, was in the employ of his mother, in his father's shop, and was not a tailor, only managed the business, and the accounts, and books.*

Jones, jr. testifies, that Maffit on his second visit to Providence, asked him what "*I understood him to say in relation to his being a tailor. I replied—that he had denied it to me, and my sisters, and a hundred of others. Moffit allowed that he had so denied it.*" Maffit then asked

me—"*How a man could be a tailor, if he had not been a journeyman; —that though he had worked at it, he did not deem himself a tailor.*" I replied, "*It was a prevarication; and would not be received by the people;* that it would have been more honourable for him to have acknowledged it."

Mr. Maffit's account of the matter, is—*that he had "been troubled frequently by such sort of inquiries;—had determined not to answer them, and used such sort of expressions as a man would naturally, in a case, he did not choose to answer, and which he thought impertinent—that as to the fact—he was not reared a journeyman tailor, that his father was a master tailor, that he had taken care of his shop, and kept his books, that, when he came to New-York, he had worked at it, for a livelihood. But that he did not consider himself, as having ever been, properly speaking, a tailor.*"

This the court understands to be the substance of Mr. Maffit's explanation.

Whether it is satisfactory, the jury must judge. The charge comes under the head of Falsehood. The sufficiency of the circumstances, in which Mr. Maffit was placed, to justify such a denial, it is the province of the jury to decide.

The second charge, is, infidelity;—or disbelief, or want of belief in the Christian religion.

Alexander Jones, jr. testifies,—that, on a certain occasion, "Mr. Maffit used expressions that conveyed to his mind that *he disbelieved in the Christian religion, or had no belief in Christianity. These last I suppose to be the true words.* I told him, I suspected it was so, and at his request, gave him a list of several works, such as Paley's evidences of Christianity, and the like, for the purpose of aiding his belief. These facts were indelibly impressed on my mind, because they led to an entire revolution in my mind," says Mr. Jones, "in relation to Mr. Maffit's character."

On being cross-examined, Mr. Jones said that—the idea he received, was, that "*Christianity, itself, was not his belief. I am sure it had no reference to particular doctrines, the idea was, not that he was an infidel, but that he had no evidence of the truth of Christianity,—that is—No argument, in his own mind, which convinced him of its truth.*"

Mr. Maffit's account of this matter is—that he had a great confidence in Mr. Jones;—that under its influence he had acknowledged the temptations and doubts, and serious trials under which his mind laboured, such as the world did not know—I acknowledged to him my disbelief in particular doctrines; *but never that I disbelieved, or had no belief in Christianity itself.*

The general explanation of Mr. Maffit as understood by the Court, is, that, although he might have used the expression that he had *no belief in Christianity*—that his idea was "*no perfect belief*"—that is as the court apprehends his explanation "*no belief perfect, in both species of evidence,*" *that is—evidence resulting from the operations of divine grace, and evidence resulting from the arguments of human reason.* That it was the last, in which he felt and acknowledged himself deficient; and therefore wanted to become acquainted with writers on that subject.

The other fact from which Mr. Maffit's infidelity in Christianity is attempted to be deduced is, from what he said concerning his discourse with certain ladies of Mr. Edes' congregation, who came to inquire of him touching the doctrine of the Trinity.—Mr. Jones testifies that Mr. Maffit said to him, "*I knew nothing about the doctrine,—I had preached against it;—but that I had hatched—or patched up some reasons, and they believed me.*"

Mr. Maffit's account is—that when those ladies came, I told him "that I had doubts about the doctrine, but that I gave them what reasons I could."

Concerning both these you will consider the time, circumstances, manner of the conversation, and consider, whether Mr. Maffit's explanation be, or be not sufficient, and satisfactory.

The confession is very extraordinary, considered as made by a clergyman to a clergyman, and will therefore require your very particular consideration, to all its aspects.

The third charge is—Betraying of confidence. Mr. Jones testifies, that on a certain occasion Mr. Maffit said "*he had something to tell me, which I must promise not to tell.* He said Mrs. ——— has been talking very much against your family. In consequence of what Mr. Maffit told me, I warned my sisters against going to her house, without telling the author of my information. *Mr. Maffit told me that he had promised Mrs. ——— not to mention what she told him, on the honour of an Irishman.*"

Mr. Maffit's account of the affair is—that *Mrs. ——— having made some censorious remarks on the manner of Mr. Jones' sisters conduct towards him*, had made him promise not to divulge what she had said. He thought, however, it was his duty to warn the ladies against her, and took that mode *without telling all the particulars of Mrs. ———'s conversation.*

On this point the Jury will consider, whether Mr. Maffit's account is, or is not, a justification. It is in substance, that he did not divulge the whole, but only so much as would effectually put the young ladies on their guard.

The fourth charge is—Ridiculing persons coming to his altar.

Alexander Jones, jr. testifies that "Mr. Maffit was in the practice of calling up persons to the altar—that on one occasion, Mr. Joseph S. Martin, a respectable m erchant of Providence was affected to tears;—that Mr. Maffit said to him," (Jones) "that *he laughed in his sleeve, when such sober men as Joseph S. Martin, felt any thing from what he said.*"—On being cross-examined, he states that "*his distinct impression was that, Mr. Maffit having no belief himself, laughed in his sleeve to think he could affect, by his preaching such a man as Mr. Martin.*"

Mr. Maffitt's account of the conversation is—*That what he expressed was his surprise that a man so young and so little gifted with worldly knowledge, as he was sensible he was, could affect such a man, so old and intelligent as Joseph S. Martin.*

These are the facts, how far they support the charge, how far they are fairly explained away, the jury are the judges.

The fifth charge is—loose, light and lascivious behaviour.

This charge is said by the counsel for the government to be a fair inference from the first and last paragraph of the publication. The counsel for the defendant deny there is any such fair inference.

It is the duty of the jury to consider whether from the language of those paragaphs such a charge is fairly to be inferred. The rule in such cases is—that they shall take the terms, according to their natural meaning—straining nothing—omitting nothing—supplying nothing.

If such charge be fairly to be inferred, the jury will then consider, what there is in the evidence to justify it. You recollect that evidence. It is of a nature, which, as it must impress itself upon your memories, the court, considering its character, does not choose formally to recapitulate.

The other charges the jury will easily collect from the publication, and they cannot fail also to recollect the evidence on one side, and the explanation, on the other, without any aid from the court. They will also take into their consideration any corroboratory, or contradictory, evidence, on the one side or the other, though not noticed in this charge.

The conduct of Mr. Maffitt, to certain young ladies, seems to have given great suspicion and anxiety to their brother;—none at all, to their father, mother, or brother-in-law—Was their blindness, infatuation in them? Or his fears, jealousy, in him?

As somuch of the defence, and so much of the reply to it, on the part of the government has depended on the testimony of Mr. Alexander Jones, jun. on one side, and of Mr. Maffitt on the other, it is the duty of the jury carefully, and severely to criticise their respective merits, motives, character, and credibility as far as can be gathered, from what has been testified concerning each, from what appears on the stand, and from the nature of their respective testimony. If any thing tend to strengthen, or weaken, the just credibility of either, you are to give it its due weight.

It is of the truth—the truth of the allegations, of which the defendant has undertaken to satisfy you. And it is your duty to hold him to a rigid performance of his undertaking. A Jury, under our Constitution, has always a right to give a general verdict. And on this point, of truth in the allegations, I think it necessary to make two observations, the one applicable to the party defendant,—the other to the prosecuting Commonwealth.

It was stated to you, in substance, that it was incumbent upon the defendant to satisfy you of every, the minutest, particular of the allegations, stated in the publication. I apprehend that the rule cannot be of that rigid character, in cases of this kind. The rule of every case results from its nature and relations. The nature of this case is that of one citizen, using the press, to destroy the public, moral influence of another citizen, which he assumes to say, or to believe, is working mischief to the community. Now if one citizen, deliberately and honestly, assume that task, from high public motives, and from no other, and if in pursuance of his design, he make various specifications of a solemn and weighty character, and he be brought into question for them by the law, I apprehend, that he has a right to acquittal, if

first,—he substantiate to a jury the truth of such of the charges either in nature, and number, as shall satisfy the jury that the facts proved, justified such an attack, on grave and weighty grounds of public interest; and if second,—he also satisfy the jury, with respect to those allegations, which he shall fail to prove, that he had reasonable ground for them; and that they were not made from base, and malignant motives. The great ground of defence is the right, growing out of the nature of the facts proved, to drag that individual to the bar of public opinion, and destroy his influence. He, who assumes that task, assumes a high and awful responsibility. It would be absurd to say, that if the assailant make out the great points of the charge to the satisfaction of a jury,—viz. that the facts proved are such as ought to be known, and ought to deprive such an individual of the rank and station, he fills in society,—it would be absurd to say that in such case a defendant should be punished criminally, because in some one of his allegations, he was mistaken, or in relation to it his evidence may be lost. What the jury are to require, is, that such of his allegations shall be proved both in nature and in number, as shall fully justify such attempt to destroy the moral influence of the person assailed.

But when the court considers this to be a just rule, applicable to the party defendant, there is another rule applicable to the prosecuting Commonwealth, equally clear, and equally obligatory upon a jury; and that is, that the defendant shall be holden to satisfy the jury, strictly, rigidly, and beyond all possible doubt, that such of his allegations, either in number or nature are true as justified such a public attack. In this, there is to be no compromise. Prejudice, suspicion, surmise are not to be taken for proof. The person charged has a right to require at your hands that the evidence to which you give credit is sufficient in its nature, to justify such allegation, and of a character such, by which you would be willing that your own reputation should be decided.

Thus much the court deem sufficient to state, in relation to the principal charges in the indictment, so far as the defendant's justification depends on its truth. If you are satisfied of the truth of the allegations, according to the rules now explained, you have yet another duty to perform. You are bound to look into the motive, or end. Mere truth, is not a justification. The liberty of the press essentially requires that the publication of truth itself, shall be limited, by good motive, and justifiable ends. The reason of which, is a plain inference from the nature of things, and the relations of man in society. Otherwise the press might be an instrument of cruel and wanton sport, with the reputation, of another, without other object, than mean, or light, or malignant purposes. Such a use of the press is as contrary to its just liberty, as it is to moral duty, and religious obligations.

He, therefore, who undertakes in the use of the great liberty secured to him, under our Constitution, to assail the reputation of an individual, is to be holden to prove that his motive was good, and the end justifiable, as much, as, that the facts were true.

Now motive, in this case, is to be gathered, as in every other, from the nature of the act, and the circumstances of it.

The allegations made, are against an admitted preacher of a very large, and respectable class of Christians. They are unquestionably of a most grave, weighty, and consequential character. Falsehood—Infidelity—Betraying of confidence—Ridiculing those, who came to the altar, and the like.

Now there can be but one good motive, or justifiable end, for such a publication ; and that is, the exposure of vice, and crime ; existing in one, who assumes the character of a Christian teacher.

This motive, if it exist, must be gathered among other circumstances from the character, or tenor of the publication, and from the nature of the allegations.

With respect to the tenor, or character of the publication, if the allegations are true, I apprehend, that the form, manner, or style, in which the writer has chosen to clothe his sentiment, diminish nothing of the right to make the publication ; unless indeed they are of such a light and loose character as necessarily to imply motives, other than those great and grave motives, which alone shall justify.

On the other hand, no form of expression, be it satirical,—interrogatory—by way of supposition—allegory, or insinuation, shall enable a writer to cloak a substantial allegation, which he does not dare to make openly. The jury must construe words, according to their natural import.

If, however, the truth of the allegations are substantiated to the satisfaction of a jury, and they are in their nature such, of which the publication is justified by good motives, a jury will hardly find a defendant guilty, merely, because the temper, or manner of the publication may be, in other respects, exceptionable.

For, after all, the nature, and truth of the allegations, must be, in the nature of things, the material considerations, from which the jury must deduce the motive. Now in relation to the nature of such allegations, as are here made, it can scarcely be said, that in a country, in which piety, virtue and morality lie at the foundation of society, and are declared, by its constitution, to be its hope and cement, that an exposure of crime, and vice, when they exist in such places, and influence, are not within the fair scope of the liberty of the press. But, in the use of that power on such occasions, and toward persons in those relations, the goodness of the motive must be made apparent, by the most unequivocal evidence. If from any thing in the publication, or in the manner, the jury are satisfied that the motive was not such as is avowed, but a different one ;—that instead of proceeding from public motives, and just indignation at crime, and imposture, it originated in unworthy motives, and from the gratification of a malignant temper, you are as much bound to convict, as though the publication was false.

He who assumes the solemn and responsible office of public accuser, is as much bound to make the goodness of his motive apparent to the jury, as he is the truth of what he has alleged.

The press, in this country, is constitutionally free. It has the right of bringing government, magistracy, and individuals, to the bar of public opinion. The right is given. But it is given, and given only for pub-

lic purposes, and for an honourable use. Satisfied of these, and of the truth, the defendant must be acquitted. Without the concurrence of both such truth, and such motive, no defendant can, in law, be justified.

After the charge the Jury retired, and at 4 P. M. they came into Court, and inquired, whether, if they found some of the allegations true, and others not proved, they might give a general verdict.

The Court replied—That the question was not without its difficulties. That it had anticipated such question might arise, and had stated in its charge its opinion, as to the limitations under which such verdict might be given. That it would recapitulate that part of the charge. Accordingly it restated that contained in two paragraphs, pages 51 and 52.

The Jury then retired, and in about Ten Minutes returned a verdict of—NOT GUILTY.

APPENDIX.

I GEORGE TAFT, of Providence, in the county of Providence, of lawful age, and engaged according to law, testify and say, that I am acquainted with Mr. John N. Maffit. I called upon him on Monday, I think it was the Monday of the week in which it is said he confessed in a conversation had at the Rev. Mr. Wilson's, that he had committed and preached a part or parts of Walker's sermons; my impression is very clear that this conversation I had with Mr. Maffit, was previous to the one had at Mr. Wilson's above alluded to. He voluntarily introduced the subject himself, and said he had never preached Walker's sermons, excepting that he had taken the same text and his (Walker's) division. After stating this he made a solemn appeal to the Deity for the truth of it. His statement being in direct opposition to the report on the subject, is the reason of my perfect recollection concerning it This statement at this time perfectly satisfied me that he had used nothing more of Walker's sermons than the text and divisions. I have known Mr. Alexander Jones, jr. for years and have the fullest confidence in his veracity; I have frequently conversed with him on the subject of his accusations against Mr. Maffit, and never discovered in him (Mr. Jones) any thing that appeared like animosity towards Mr. Maffit, and he appeared to be actuated by good motives. GEORGE TAFT.

I HEZEKIAH ANTHONY, of Providence, in the county of Providence, of lawful age, and engaged according to law, testify and say, that I am acquainted with Mr. John N. Maffit. Some time in June last, in a conversation at my house, myself and family being present, Mr. Maffit, speaking on the subject of some persons calling him *a church man*, and others saying *he was no Methodist*, he observed in the conversation, that *he was a Methodist to the back bone*, and that his attachment to them was great; yet his call was to preach the Gospel to others as well as to the Methodists; and at the different times he was at my house his conduct and conversation was as becomes a Gospel Minister. HEZEKIAH ANTHONY.

I MARY E. MARTIN, of Providence, in the county of Providence, of lawful age and engaged according to law, testify and say, that I am acquainted with Mr. John N. Maffit. He was conversing on the service of the Episcopal Church, at one time, and on the doctrines of that church, he said he was in heart an Episcopalian. I understood him to mean according to the Episcopalian Church, and not according to the Episcopalian Methodist Church. I am a member of the Episcopalian Church. MARY E. MARTIN

I JOHN PRENTICE, of Providence, in the County of Providence, of lawful age, and engaged according to law, testify and say, That I am acquainted with Mr. John N. Maffitt. I became acquainted with him soon after he came to Providence, and was much attached to him, as I considered him to be a sincere man and zealous for the cause of religion. *The second time* of his visiting Providence, I saw him frequently, and my former opinions were strengthened; he was taken ill while preaching one evening, at the methodist chapel: I was with him the same night, until twelve o'clock; I believe he was really sick; his limbs were cold and his pulse low; the next day I called at Mr. Wilson's to enquire after Mr. Maffitt's health; I went into his room and found him in bed, about ten o'clock, A. M. He appeared to be considerably recovered from his indisposition; I understood he had been previously invited to dine on that day at Mr. Jones's with a number of other clergymen. He told me he thought he should go; I advised him not to go; I told him that from the circumstance of his being so sick and having had watchers through the night, the public might suppose his sickness was feigned, from his so speedily recovering, and going out, to meet gentlemen to dine. He however went, and, as I understood, was taken sick immediately after dining. While he was at Mr. Jones's, and at Mr. Wood's, I heard of some things that were prejudicial to his character as a christian minister; from my opinion of Mr. Maffitt, I was disposed to doubt these things. At one time when I was with him at Mr. Jones's he received an invitation in a note which he read to me from Wm. H. Smith and his wife to come to his house with his wife and spend some time with them; he asked me who William H. Smith was; I told him he was one of his fastest friends; he replied, that they were no company for him. It struck me at the time that he felt himself above Mr. Smith, who I believe is a respectable and excellent man, and a lawyer in this town. In consequence of the unfavourable impression left on my mind from this circumstance and others, I determined to have a conversation with him in relation to the reports against him; but as he was sick, I could not see him. A few days after, understanding he was better; I wrote him a letter, stating the reports that were against him and wishing an interview, for the purpose of an explanation. I designed the letter should be private between myself and him, and never made it public, myself. Mr. Maffitt, after reading the letter, I understood, read it to several persons who were present; in consequence of this letter being made public, a prejudice was excited against me among my friends, from which I suffered in my feelings. Subsequent to this, I met Mr. Maffitt for the purpose of an explanation; he wished to know what I had against him; I told him I thought he had used me unfairly in exposing the letter I wrote him, as my motives were good, and that I expected it would be confidential; he asked me what further I had against him, which I stated; he said, he considered he had never been a Tailor, and that his explanation to Mr. Alexander Jones, on that point, was satisfactory; he admitted he had worked at the business of a Tailor in New York, from necessity. In this conversation, I told him I was dissatisfied respecting the report of his having denied his belief in the Christian religion, and at his being disposed to laugh at persons who came to the altar to be prayed for; he observed that he had stated to Mr. Alexander Jones jr. in confidence, that at times he laboured under great temptations; that sometimes he was tempted to disbelieve the Christian religion, and sometimes, when his mind was absorbed in religious contemplation, and he was engaged in preaching and exhorting, he was tempted to laugh; I considered this explanation as a palliative of the declarations which he had made. I heard Mr. Maffitt preach a sermon at North Providence, which, on examining a sermon of Walker's, I discovered to be the same in some of its ideas and sentiments, as I that I had heard him (Mr. Maffitt) preach. *I never saw any personal animosity discovered by Mr. Alexander Jones, Jr. towards Mr. Maffitt, and I frequently conversed with Mr. Jones on the subject of his accusations against Mr. Maffitt; I believe Mr. Jones fully entitled to credit and confidence.* JOHN PRENTICE.

I JOSEPH JONES of Providence, in the County of Providence, of lawful age and engaged according to law, testify and say, that I am acquainted with Mr. John N. Maffitt. I at one time heard Mr. Maffitt preach a sermon in this town; on examining one of Walker's Sermons, I recognised that he, Maffitt, had used the same divisions of the subject with Walker, and many of the best and most striking expressions, together with many of the ideas, and much of the same language. I once heard Mr. Maffitt say in my presence, that he had never been a tailor or a play actor. JOSEPH JONES.

I, NATHAN B. CROCKER, of Providence, in the County of Providence, of lawful age, and engaged according to law, testify and say, that I am acquainted with Mr. John N. Maffitt. I saw a letter of Mr. Maffitt's, written at Bridgeport, and addressed to Mr. Alexander Jones, in which he denied that he had ever been a journeyman tailor, although he confessed that he had worked at the tailoring business, I think in some shop in New York; he mentioned his pecuniary embarrassment as a reason for his edgaging in that employment. I have several particular reasons for believing that the present state of unpleasant feeling on the part of Mr. Alexander Jones's family, towards Mrs. Crocker, was produced by the officious and malignant communications of Mr. Maffitt, to that family. Judging from the general deportment of the family before, and since; it is impossible for me to avoid the conclusion. In a conversation with Mr. Maffitt respecting his application to the methodist General Conference, he told me they had appointed him a missionary-general, or some similar expression, with an income something like fifteen hundred dollars; I considered him as meaning a specifick sum of about that amount, and I thought it an unusually large salary for a missionary of that denomination. He never gave me any explanation on this subject. At a prayer meeting in the methodist chapel, while a methodist clergyman from Bristol was earnestly engaged in prayer or exhortation, (I think it was prayer) Mr. Maffitt came about half way up the broad aisle and entered a pew. After glancing his eyes around the audience, he fastened them on a party of ladies in the gallery behind whom I was sitting, and with a gentle bow of the head, *kissed his hand and waved it to them.* I never discovered any personal animosity in Mr. Alexander Jones, jun. towards Mr. Maffitt, and from frequent conversations with him, and from what I saw, I believe him to have been actuated by high and honourable motives. I believe him entitled to the fullest credit and confidence. N. B. CROCKER.

I ELIZA A. CROCKER, of Providence, in the county of Providence, of lawful age and engaged according to law, testify and say, that I am acquainted with Mr. John N. Maffit. In a conversation with Mr. Maffit at my house, I advised him to be cautious in his conduct lest he should give rise to reports that might be to his disadvantage and that of the Jones family. At the close of the conversation I observed to Mr. Maffit that I had had this conversation for my own satisfaction; it was with friendly views towards him and the Jones family; I requested him not mention the conversation; he replied, 'honour bright, depend upon the honour of an Irishman; nothing shall be said by me;' I afterwards renewed my request as he was leaving the house, that he would not mention this conversation; he again assured me that he would never mention it. This was the only evening that Mr. Maffit ever spent at my house. In another conversation at Mrs. Moore's, he spoke to me very disrespectfully of Mrs. King and also of Mr. Alexander Jones; he said that Mr. Jones was a vulgar and ignorant man, and he found it very hard to get along with him, and wondered how Mr. Crocker could get along with him. In these conversations with Mr. Maffit, he appeared to be anxious to vindicate his own conduct at the expence of the Jones family. During one of the above conversations, I observed to Mr. Maffit, that I had heard that he had said he

was *a Methodist to the back bone*, and that there was as much difference between the Methodist and Episcopalians, as between a hot and cold Jonney Cake. He replied *I never made use of such a vulgar expression* as to say that I was a Methodist to the back bone. He said that the anecdote of the hot and cold Jonney Cake, was one related of a clergyman.

ELIZA A. CROCKER.

STATE OF RHODE ISLAND, &c.

PROVIDENCE, ss. In Providence on the 9th day of Dec. A. D. 1822. personally appeared the aforenamed deponents George Taft, Thomas Wilson, James Wilson, Hezekiah Anthony, Alexander Jones and John Prentice, and on the 10th day of Dec. A. D. 1822, personally appeared Mary E. Martin, Joseph Jones, John B. Chace, Nathan B. Crocker and Eliza A. Crocker, and on the 11th day of Dec. A.D. 1822 also personally appeared Harriet F. Chace, who (excepting Mary E. Martin, Eliza A. Crocker and Harriet F. Chace, who were severally affirmed according to law) were sworn according to law to the respective depositions by them, in my presence subscribed, and by me in their presence reduced to writing, taken to be used in the trial of an Indictment now pending and to be heard and tried before a Municipal Court to be holden in the city of Boston, state of Massachusetts, on the third Monday in Dec. inst. between the Commonwealth of Massachusetts vs. Joseph T. Buckingham, for an alleged libel against John N. Maffit.

The said Deponents were respectively requested by Benj. F. Hallet Esq. Attorney to said Buckingham, to give their depositions relative to all facts within their knowledge respecting the alleged facts set forth in said Indictment; the said deponents declined giving their testimony in their depositions any further than they might respectively choose, to which said Hallet agreed. The Oath (and affirmation) was administered according to Law, to each of them under said agreement, between said Hallet and each deponent respectively. John N. Maffit was duly notified of the time and place of taking these depositions, but was not present.

WILLIAM, APLIN JUSTICE OF THE PEACE.

I JONATHAN BARNES, jr. of Middletown, in the county of Middlesex and state of Connecticut, of lawful age, depose and say, that I was present in the Presbyterian Church in this town, some time in the course of the last winter: the precise time I do not recollect:—but I should think it was in the month of December or January last, when the Rev. John N. Maffit of the Methodist persuasion, preached a sermon before the Female Charitable Society. Mr. Maffit did not arrive in town until some time after the hour appointed for the commencement of the service in the evening. Soon after he entered the pulpit, he made an apology to the audience for the imperfections which would probably appear in his performances, on account of the shortness of the time, which had been allowed him for preparation, but I cannot undertake to state the exact words of his apology. His text was the 6th, 7th and 8th verse, of the sixth chapter of Proverbs: "Go to the ant, thou sluggard, &c." I was unacquainted with Mr. Maffit, had never heard him preach but once before, and was pleased with his discourse. A friend happened to be at my room one or two evenings afterwards, and observed that he had a book at home, which contained the sermon of Mr. Maffit; and presently after he brought in a volume of sermons by the Rev. Mr. Walker, in which there was a discourse from the text above mentioned. I examined it, and found many sentences, which I should say were identically the same with those pronounced by Mr. Maffit. The similarity between the discourse of Walker, and that delivered by Mr. Maffit, was so striking, that it could hardly be the result of accident. Mr. Maffit made some concluding remarks, which were

adapted to the particular occasion ; these were not in the sermon of Walker, and appeared to me to be inferior to the other parts of the discourse. And further the deponent saith not. JONATHAN BARNES, Jr.

STATE OF CONNECTICUT,

Middlesex County, ss. December 14th, 1822. Personally appeared Jonathan Barnes, jun. Esquire, and being duly cautioned, subscribed tho foregoing deposition, and made oath to the same before me

GEORGE W. STANLEY, Justice of Peace.

I John Southmayd, of Middletown, in Middlesex county, in the state of Connecticut, of lawful age, depose and say, that I was present at the delivery of the sermon by the Rev. John N. Maffit, mentioned in the foregoing deposition of Jonathan Barnes, jun. Esquire. I recollect that Mr. Maffit made an apology for accepting the invitation of this society to preach, without more time for preparation, remarking, that he only had about ten minutes notice ; that, holding the Bible in his arms, he remarked, "That he had not long before preached at Boston, or at some other place on a similar occasion, and that his master always supplied him out of that book with enough to enable him to do the duty to which he might be called, and that he was always happy to lend his feeble efforts,"—or words to that effect. I had before heard Mr. Maffit preach four sermons, but was not edified in the least ; but was very much pleased with the sermon first mentioned, and thought that he had made very great improvements indeed ; this was the subject of conversation in my family, who were very much edified with the sermon. On the next evening, or soon after, I went with my family to hear him preach in the Methodist meeting-house ; and here again we were very much edified by the sermon there delivered by Mr. Maffit. The next evening I attended a meeting of a Female Missionary Society, at which several of the brethren were present. One of them had in his hands a book, and asked, if he should read any thing which they had before heard preached, they should recollect it ? and proceeded to read. The book and the object were then unknown to me ; but the text and the heads of the discourse, I at once recollected to be the same which I had heard from Mr. Maffit, on the occasion first above mentioned. As he continued to read, I recollected clearly many expressions and whole sentences to be the same as were delivered by Mr. Maffit on the above occasion. Two or more of those present, remarked on the expressions and sentences as they were read ; that they were the very same ; by which it appeared that their recollection and mine agreed. After a considerable part of the sermon had been read in this manner, I was satisfied that a fraud had been practised by Mr. Maffit on his hearers, on the above occasion ; and remarked that it could not be necessary to read more of it. I then took the book and found it to be a volume of Walker's sermons ; and on examination, soon found the same text from which the sermon delivered at the Methodist meeting-house as abovementioned was preached. I borrowed the volume and carried it home ; my wife and two daughters who had heard the two sermons before mentioned were together ; without reading the text I began to read the sermon delivered at the Presbyterian meeting-house ; but as the hour was late, about 10 o'clock, they were not inclined to hear ; and were suprized that I wished to read at that time ; but they very soon recognized the sermon, and wondered where I got Mr. Maffit's sermon ; I continued to read, and read nearly the whole sermon, and on a careful examination of the sermon, though I cannot pretend to remember the sermon delivered, verbatim, of this I am certain that the text, the heads or divisions of the discourse, the train of thought, and very many of the expressions, illustrations, and sentences were the same in the sermon delivered by Mr. Maffit at the Presbyterian meeting-house, and that read by me from Walker. I recollect that in the sermon preached by Mr. Maffit, in speaking of the sagacity of the Ant, he made two points which were so nearly alike, that it was

mentioned in the family, and thought to be a mistake, or a repetition; but on examining Walker's sermon afterwards, on the suggestion of my daughter, I soon found the same thing there. Indeed so strong is my impression as to the two sermons being the same, that had Walker's sermon been published immediately after the sermon delivered by Mr. Maffitt at the Presbyterian meeting-house, as the sermon of Mr. Maffitt, neither myself nor any person who heard the sermon,and was unacquainted with Walker's sermon, would according to my belief have doubted that it was the same. I further say that I particularly examined the other sermon, which was on the same text as the sermon preached by Mr. Maffitt, at the Methodist meeting-house as above mentioned. Of this sermon about two thirds were according to my best belief taken from Walker's; the remaining part evidently was not; and the difference between the concluding part of the sermon and the principal part of it was very plainly to be perceived; the first part being altogether superior to the close;—of this last sermon, and that in Walker's above referred to; the text and heads or divisions were precisely the same. And further the deponent saith not. JOHN SOUTHMAYD.

STATE OF CONNECTICUT,

MIDDLESEX COUNTY, ss. December 14th, 1822. Personally appeared John Southmayd, and being duly cautioned, subscribed the foregoing deposition, and made oath to the same before me

GEORGE W. STANLEY, JUSTICE OF PEACE.

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