TRIAL

OF

CHARLES DE REINHARD,

&c.

REPORT AT LARGE

OF

THE TRIAL

OF

CHARLES DE REINHARD,

FOR MURDER,

(COMMITTED IN THE INDIAN TERRITORIES,)

AT A COURT OF OYER AND TERMINER,

HELD AT

QUEBEC, MAY 1818.

TO WHICH IS ANNEXED,

A

SUMMARY

OF

ARCHIBALD M'LELLAN'S,

INDICTED AS

AN ACCESSARY.

BY WILLIAM S. SIMPSON, ESQUIRE.

MONTREAL:

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FOR THE REPORTER.

1819.

PREFACE.

ALTHOUGH the *substance* of the incipient proceedings which took place, is diffused over the following pages; it may, perhaps, be advantageous (particularly to the *European* reader,) to offer, by way of introduction, a condensed outline of them.

The manner in which *Charles De Reinhard* was delivered over to the custody of the constituted authorities of *Lower Canada*, (after a knowledge of the murder had been obtained) agreeably to the Act of 43*d* GEO. III. *cap.* 138, is fully exhibited in the testimony of *Mr. Coltman;* it is, therefore, only requisite, in endeavouring to attain completely the object of this preface—namely, that of the reader's having a knowledge of the entire progress of the prosecution—that this sketch should present a succinct narrative of occurrences in that province.

In *March*, 1817, an indictment was preferred in the Court of *King's Bench*, for the district of *Montreal*, against *Charles De Reinhard*, *Archibald M'Lellan*, *Cuthbert Grant*, and *Joseph Cadotte*, was returned by the Grand Jury, *a true bill.* At *this* time it will be recollected, that neither of the accused, were within the *ordinary* jurisdiction of the Court; but the whole arrived in the course of the year, from the *Indian* Country, and were severally committed to prison in *Montreal.*

A Commission of *Oyer and Terminer* having been issued, by *Sir John Coape Sherbrooke*, was opened at *Montreal*, on the 2t0h *February*, 1818; and an indictment, for the same offence, was preferred and found against *François Mainville*, and *Jean Baptiste Desmarais*, two Half-breeds; and against *Neganabines*, an *Indian*, known throughout these trials, as *José*, *fils de la Perdrix Blanche.* Of these persons, *Mainville* made his escape, at *Pointe au Tonnère*, in Lake *Superior*, from those who were conveying him to *Lower Canada*, and has not been since heard of; *José* had been brought down by the Commissioner, at the expense of government, under an idea of his becoming a witness, (*see page* 328, *et seq.*) but, upon the officers of the Crown judging it proper to include him among the accused, notice was given, that he could not be received as a *King's* evidence, and what *then* became of him is not very apparent; whilst of *Desmarais* the accounts are still more deficient, all that has transpired relative to *him*, being contained in the examination of *Mr. Coltman*, (*page* 147.) The Court of *Oyer and Terminer* adjourned without the persons in custody being put upon their trials, and in the ensuing *March* term of the Court of *King's Bench*, the Crown officers declared, that the prejudices on the subject of the differences between the *Hudson's Bay* and *North-West* Companies, were so strong, that they considered it would be alike an act of injustice to the Crown, and to the individuals accused, to allow their trials to take place in *Montreal*, where they considered it impossible to select impartial Juries.

The Prisoners being removed to *Quebec*, indictments were preferred against them in the Court of *King's Bench*, for that district, the returns upon which, by the Grand Jury were, *a true bill* against *De Reinhard*, and *M'Lellan*, and *no bill* against the others. In consequence of this finding, the two were jointly put upon their trials on the *30th March*, and the proceedings continued during that, and the following day.—Towards the close of the *31st*, (as had been anticipated the day before by the Court,) it became evident that, so far from the trial being completed by twelve o'clock at night, the period when the functions of the Court must of necessity terminate, (the *Provincial Act* of *34th* GEO. III. *cap.* 6, commonly called the "*Judicature Act*," limiting the sessions to the last ten days of the month of *March*,) not even the evidence on the part of the Crown would be gone through. Thus situated *Mr. Attorney-General* proposed, with the consent of the Prisoners' counsel, that a Juror should be withdrawn, which was done, and thus in the language of the *Chief Justice*, the case "reverted exactly to the same situation in which "it would have been if the trial had never commenced."

In addition to the foregoing compendium, a still more particular notice of some circumstances which took place in *March*, but did not recur upon the trials in *May* and *June*, is perhaps desirable, and even necessary to constitute this the complete report of "the most important "legal investigation ever witnessed in *Canada*," which its *prospectus* promised that it should present.

Upon the arraignment of the Prisoners, they pleaded "*not guilty*;" and it was immediately moved by *Mr. Vanfelson*, that all the witnesses should be ordered to withdraw, which being objected to, by the *Attorney-General*, as a proposition to which the Prisoners were not entitled, *Mr. Stuart* replied, that they were entitled to it, and, it being their *right*, he *must* avail himself of it, as it was no time for courtesy. *Mr. Attorney-General* denied its being a matter of right, or, that the granting or refusing the application, could at all affect the case, and stating there were in Court, *magistrates*, and other gentlemen, whose *official* situations would render them witnesses in this case, asked, "Can it be "necessary for the *justice* of the case, that *they* should be ordered to "withdraw? I can see no reason for it." Reverting to the question of *right*, he said, "It is a right inseparable from the Crown, and when "applied for on behalf of prisoners, usually assented to, as it should be "in the present instance if the justice of the case would be one tittle "promoted by it. The witnesses in Court are principally *Lord Selkirk*, "and other gentlemen, to whom it could not be imputed that the jus-"tice of the case would be influenced by their remaining in Court." *Mr. Stuart* replied, "that being most interested upon that point, *they* "must be permitted to judge; and they considered it *essential* to the de-"fence, that *no* witness on the part of the Crown, should be present in "Court during the examination of the evidence."

The *Attorney-General* still resisted the motion upon the same grounds, and the *Chief Justice* enquired, whether those gentlemen, and *Lord Selkirk*, were to prove the facts connected with the murder, or the locality of the place? The *Attorney-General* intimated, that he should use *Earl Selkirk*, as a magistrate, before whom depositions had been taken, and perhaps, to prove other circumstances of the case; but questioned, whether he was bound to state for what purpose, he might produce *Lord Selkirk*, or any other witness. *Mr. Stuart* insisting that where the objection *was* made, the *uniform* course in criminal practice was to exclude witnesses; the *Chief Justice* observed, that he could not say that it was the uniform practice to put *magistrates* out of a Court of justice; to which *Mr. Stuart* repeated, his own conviction that it was, and expressed his surprize at its being objected to, in the present instance, asking, "what benefit can it be to the Crown, that its witnesses remain in "Court?"—The *Chief Justice* suggesting—"that is a point upon which "they must judge;" *Mr. Stuart* said, the evidence to be proved by these gentlemen, consisted of *documents* of the most important nature—that the innocence, or supposed impartiality of the persons, before whom they were taken, or by whom they were obtained, might be contradicted; or, it might be made to appear, that they were entitled to no credit, being obtained under hope of reward, from promises; or under fear, from threats; adding, that if ever there was a case in which it was requisite that all witnesses should withdraw, *this* was it; "A case (*said* "*Mr. Stuart*,) with which the feelings of another district are so con-"nected, that the public prosecutor has declared, he cannot try it with "safety. Documents the most important have been taken before *Lord* "*Selkirk*, who cannot be separated from the case, and we ought not to "be placed in a situation to increase the difficulty of proving any part "of our case." The *Chief Justice* would be sorry that the Prisoners should be deprived of any *right*, nor, if their *interests* were ever so remotely affected by it, would the Court hesitate about granting the application; but he really did not see, that evil could result from withholding it. *Mr. Stuart* then asking it "as a matter of *right*, on behalf of the Prisoners;" the *Chief Justice* said, "I cannot do so, *Mr. Stuart*."—It was suggested, by *Mr. Justice Perrault*, that *Lord Selkirk* might be the first witness examined, and he supposed there could be no objection to his *then* remaining in Court; to which the *Chief Justice*, was expressing his approbation, when *Lord Selkirk*, accompanied by a number of gentlemen, left the Court. His Honour added, "the gentlemen have "most judiciously, retired of their own accord, and there the matter "ends."

It being intimated that *Mr. Gale*, (*one of his Lordship's private counsel*,) had not retired; he addressed the Court, observing, "I have not, "nor do I intend to retire; I came here to witness the proceedings, and "am not under subpœna as a witness; though from a communication

" the *Attorney-General* has made to me, it is probable I may be exa-
" mined to prove the jurisdiction. I have no desire to be examined, as
" I came here *only* to witness the proceedings, and can depart or stay,
" just as I think expedient."—The *Attorney-General* begged to put *Mr. Gale* under recognizance, not to leave the Court, or to be in attendance when called; to which, *Mr. Gale* remarked, that as an *Advocate* of this province, he had certain privileges, and he claimed the *right* of remaining in Court during the trial; which he thought could not be refused, or denied him; " I am not (*said Mr. Gale,*) a witness, and therefore, " shall *not* leave this Court unless I think proper; and if I *do*, I con-
" ceive I have a *right*. I came here to witness *this* trial, and I intend
" to *do* so."—The *Chief Justice* intimated, that the *Attorney-General* might put *Mr. Gale* under recognizance if he thought it necessary—observing that, the curiosity of an *Advocate*, (any more than any other person,) was not to impede the public administration of justice; though if *Mr. Gale* was not going away, it would not perhaps be required, nor, as it was merely to *jurisdiction* that he was to be examined, would his leaving the Court be insisted upon. *Mr. Gale* informed the *Attorney-General*, that he was not going away—who stated he was satisfied—but added: " in examining *Mr. Gale*, I do not *confine* myself to jurisdiction,
" for I *may* use him to prove the state of the country generally."

The *Attorney-General* then opened the case to the Jury, and was followed by the *Solicitor-General;* it being claimed as a privilege, to which the Crown was at *all times* entitled, and its exercise, justified in the *present* case by its magnitude, for both to address the Jury.

The geographical position of the *Dalles*, and the boundaries of *Upper Canada*, were then proved by the *Honourable W. B. Coltman*, *Colonel Bouchette*, the surveyor-general of the province, and *Samuel Gale, junior*, Esquire; *Hubert Faille* was the next witness, and his examination lasted the greater part of the day. At its close, *Jean Baptise La Pointe* being called, the *Chief Justice* observed, that if any other witness was examined, it must be one whose testimony would be short, (which he supposed would not be the case with *La Pointe's,*) as neither the Bench nor the Jury, could sustain at that late hour the fatigue of a long examination.—Upon sending for another witness, it was found that hearing *La Pointe* called, and knowing that his evidence would occupy a very considerable time, the whole had gone away, (having been in attendance since morning,) to get some refreshment. This being stated to the Court ——

Chief Justice Sewell.—We cannot take this witness, for if we *begin*, we cannot avoid *finishing* his evidence. We will also mention that, it will be desirable for the gentlemen engaged in this cause, to be prepared to shew us, in the event of its proving incapable of being finished by twelve o'clock to-morrow night, what course is *then* to be taken. We mention it to all concerned, the gentlemen engaged on the defence, as

well as the officers of the Crown, that the point may be taken into consideration by them, and they may be prepared. It *may* appear that the Prisoners have rights in that case as well as the Crown. We mention it thus early, for the reason I have stated, that our functions terminate at twelve o'clock to-morrow night. The Court then adjourned.

On the 31*st*, *La Pointe* was examined: The material differences between his, and *Faille's* testimony, on the first and second trials, are noticed in the examination of *Mr. Justice Perrault*, (*page* 154, *et seq.*)—to which being added, those I have pointed out in the notes accompanying the *Summary*, it is believed the whole are brought into view.—My examination, (*page* 162,) leaving the point which I was called to prove, completely *in statu quo;* it perhaps is due to my own reputation, to assert most positively, that the description of *French* spoken by *De Reinhard*, was, in *March*, depicted by *La Pointe* in these words: "*Il parloit "François, comme un Meuron,*" or in other words, that he did not speak *good* French. The decision upon the question proposed by the Prisoner's counsel to *Mr. Brewer*, in connection with this subject, (*page* 157, *et seq.*) determining that—in a *legal* point of view—his capacity in that particular, was *unimportant;* the expression, if inserted upon the *judges'* notes, would have been "mere surplusage," and for that reason it was probably "rejected as unnecessary." My confidence that it *was* used, arises from the impression instantaneously forced upon my mind, that the confession which I had previously read, could not possibly be the production of *De Reinhard's* pen, if he only spoke French "*like a Meu-*" *ron*," as fully as from finding the expression upon my notes; and I trust, without incurring the guilt of presumption, I may add, that I consider it a circumstance well calculated to weaken the claim of the confession to credit, *actually*, though not *legally*—that from ignorance of the language, the Prisoner was incapable of drawing it up.

But returning from this digression—the examination of *Captain D'Orsonnens* succeeded to that of *La Pointe*. Nothing material appeared, during its progress, beyond what is given in the present report, nor any additional circumstance, if we except the production to, and acknowledgment by, *Captain D'Orsonnens* of the requisition to *Mr. Dease*, which on the present trial was not allowed to be gone into, as it was dated *subsequent* to the confession. (*page* 79.) A copy of it is, however, given below,* as it was frequently referred to, as being at variance with *Captain D'Orsonnens'* description of himself.

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* TRANSLATION.

"*From the Portage of Lake la Pluïe,*
"*the 6th October* 1816.

"SIR,

"The personal safety of His Majesty's subjects, requires, for "fear of surprise or accident, that you should deliver to me all the arms, "ammunition, powder, shot, &c. &c. &c.—which you have in your pos-

Proof of this paper not being allowed—*Mr. Stuart* closed his examination on the *voire dire*, and the trial was immediately terminated in a mode which, if not unprecedented, is certainly novel in *criminal* cases. The minute taken of these proceedings follows:

Attorney-General.—As it will be impossible to close the trial by *twelve* o'clock, I propose, and the proposition is assented to on the part of the *Prisoners*, that a Juror be withdrawn.

Chief Justice Sewell.—There must be a motion made, so that the subject may be brought regularly before us, and our decision be made of record. It may be made a precedent.

Attorney-General.—I shall move, that the last Juror sworn be withdrawn. I believe that to be the usual course. (*Having written his motion.*) I move "that *Pierre Roi*, a Juror, sworn in the case of *Dominus* "*Rex, versus M'Lellan* and *De Reinhard*, be withdrawn from the box."

Chief Justice Sewell.—State some cause for the motion—either from the number of witnesses *yet* to examine, or any other which you think proper, so that it may appear, on a future occasion, for the justification of the Court.

Attorney-General.—I will move, viz: "That *Pierre Roi*, a Juror, "may be withdrawn, because it is impossible *to receive the verdict* by "twelve o'clock."

Chief Justice Sewell.—It being impossible "*to close the case on the* "*part of the Crown*," would be better, and it certainly *will* be impossible. The charge *alone*, upon the evidence *already* received, would occupy three hours.

Attorney-General.—I will then make the motion as follows: "That "it being impossible to close the evidence on the part of the Crown be-"fore twelve o'clock, and the functions of the Court then terminating, "it is moved by the *Attorney-General*, that *Pierre Roi*, the Juror last "sworn, be withdrawn," which is consented to on the part of the Prisoners.

Chief Justice Sewell.—*Archibald M'Lellan* and *Charles De Reinhard*, —on the part of the KING it is proposed that—as the Crown officers cannot close their evidence before *twelve* o'clock at night, at which period the authority of this Court terminates—*Pierre Roi*, the Juror last

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"session at the fort, and which belongs to the North-West Company.—"The arms that are private property, will alone be respected, for your "own safety.

"I have the honour to be,

"Your very humble and obedient servant,

"CAPTAIN P. D'ORSONNENS,

"*Commanding the advance guard of the Voyageurs of*
"*the Hudson's Company, &c. &c. &c.*

"*P. S.*—The pickets will be cut down by my people, yours may as-"assist them, if you deem it expedient."

sworn, be withdrawn from the box. The *effect* of this motion will be that the cause will revert exactly to the *same* situation in which it would have been, if the trial had *never* commenced. Do you consent or not?

The Prisoners severally consenting, the *Chief Justice* addressing the Jury, returned them the thanks of the Court, and discharged them.

In *May* following, a Court of *Oyer and Terminer* was held at *Quebec*, and an indictment being preferred against *Charles De Reinhard*, and others, (*page 3,*) for the Murder of *Owen Keveny*, was returned "*a true bill*," against the whole. Of the accused *two* only appeared—viz: *Charles De Reinhard*, who had remained in close custody, and *Archibald M'Lellan*, who after the *March* proceedings, had been admitted to bail. The absence of *Mainville* and *Desmarais*, is in some degree accounted for, in a former part of this introduction; whilst with reference to *Grant* and *Cadotte*, it is only necessary to state, that upon the Grand Jury, in *March*, returning no bill against them, they were set at liberty.

Having traced the preliminary measures, the following pages are offered to public notice, with confidence that the "REPORT (*at large*) of the trial of CHARLES DE REINHARD" contains an accurate representation of that important legal investigation in all its stages; and that "the SUMMARY of ARCHIBALD M'LELLAN'S," exhibits an impartial and sufficiently comprehensive statement of the proceedings which terminated in his acquittal. Upon the disputes so frequently referred to in the progress of these trials, contrariety of opinion will undoubtedly exist, though all must deplore a contest which has exhibited scenes of bloodshed, from which humanity recoils. The connection of the case of *Mr. Keveny* with the *general* differences that have unhappily pervaded the *Indian* Country, has been strenuously asserted by *Lord Selkirk* and as positively contradicted by the *North-West* Company, who refer to the acquittal of their partner, after an arduous trial, as furnishing a triumphant and honourable refutation of the heavy but unfounded accusation of inciting their servants to the perpetration of the crime. The validity of this appeal is denied, and the result unequivocally attributed to inefficiency in conducting the trial, arising from "the assumption by the "*Attorney and Solicitor-General*, of the exclusive management of the "prosecution." It was hardly to be anticipated, from the animosity which characterizes the conflict, that *any* course of investigation would secure an united approval. Whether the *most* eligible was selected in the first instance, and whether vigilance and efficiency characterized the management of *these* prosecutions, are questions which have been answered in the affirmative and in the negative. The opinion of *Lord Selkirk* on these proceedings, *ab initio ad terminationem*, may, perhaps, be accurately inferred from the following remark on the Crown officers consenting to liberate *Mr. M'Lellan* on bail; "To accept of bail in "such a case, and, under such circumstances, was a proceeding unprecedented in a British Court of Justice, and betrayed the determina-

" tion, already taken, to throw the whole guilt of the murder on *De*
" *Reinhard*, a foreigner, in order to screen his accomplice, a partner in
" the *North-West* Company."

On these opposing sentiments I offer no opinion at present. To friends, whose expectations and wishes will incline them to disapprove this determination, I can only offer the assurance that, though complying with the solicitations of those I respect is at all times peculiarly grateful, had I done so in this instance, I should most probably have sacrificed an esteem which is personally too flattering to seek for justification beyond the partiality which dictates it. I would also add, that considerable deliberation has led me to doubt the propriety of commenting upon a case which is still under the consideration of the supreme authority, in whose hands is vested the fate of the unfortunate individual, most interested in its decision. At a future period, should no abler pen, guided by a judgment equally impartial and capable, obviate the necessity, I propose to submit, through the same medium, a concise narrative of occurrences (in connection with the disputes) which have taken place in the *Indian* territories, the provinces of *Canada*, and at *home*, since the year 1812; and, assisted by the additional information which, it is to be hoped, the investigation by the *British Parliament* will afford, I shall, uninfluenced by prospects of pecuniary advantage—indifferent to the frown as to the smile of " the powers that be" —and (a much more difficult task) unbiassed by the endearing, but seductive, sympathies of friendship, add those reflections which shall have satisfied my own mind, where culpability attaches. The encouragement given to the present publication appeared to demand this explanation, and, I trust, that in giving it, I shall escape the charge of egotism.

The volume will, it is trusted, realize its prospectus. In endeavouring to attain this object, my obligations to the *Court*, commenced with the proceedings, and have been continually augmenting, up to the moment I am writing; whilst to the professional gentlemen, on either side, I am equally indebted. The facilities afforded—by the accommodation of a convenient seat, during the trials—the liberal access to libraries, with permission to take therefrom the various authorities, and the revision and correction afforded to the MSS.—render me deeply their debtor, and although the obligations should *never* be cancelled, they shall be *always* remembered and gratefully acknowledged.—If its fidelity should constitute it a work, which may be advantageously consulted for legal reference, I have accomplished the object sedulously aimed at, and the gratification I shall experience, will amply reward the anxiety I have felt to entitle it to that distinction.

WILLIAM S. SIMPSON.

QUEBEC, *28th October*, 1819.

DISTRICT OF QUEBEC.

Special Session of OYER *and* TERMINER, *and* GENERAL GAOL DELIVERY.

ON Monday the 18th May, 1818, a special Session of Oyer and Terminer, and General Gaol Delivery, for the District of Quebec, was opened with the customary formalities at the Court-house, in the city of Quebec. The commission in addition to authorising the trial of persons accused within the district, extended the power to the trial of offences "*committed within any of the Indian Territories, or parts of America not within the limits of either of the said Provinces of Upper or Lower Canada, or of any civil Government of the United States of America.*" Although the cases from the Indian Territory were expected to form the principal business of the Session, in his charge to the Grand Jury, the Chief Justice did not advert to them, unless the following remark may be supposed to refer to that part of the Sheriff's Calendar.

"*Gentlemen,*

"Upon perusal of the Sheriff's Calendar, we do not perceive "that it exhibits any commitments which require particular notice at "this moment, it may however happen, that in the progress of your "enquiries, some points of law may occur, upon which you may be desirous to take the opinion of the Court, and, if this should be the case, "you will find us at all times ready and desirous to afford you every "assistance, in the execution of your duty, which it is in our power to "give."

On Wednesday the 20th May, the Grand Jury returned as true a Bill of Indictment, charging various persons with the Murder of OWEN KEVENY, on the 11th day of September, 1816, at the *Dalles*, on the river Winnipic, in the Indian Territories. Mr. Attorney-General imme-

diately moved that *Charles De Reinhard* be put to the bar for the purpose of arraignment. The prisoner was then arraigned in the usual form, and having pleaded NOT GUILTY, fixed Friday the 22d instant, as the time at which he should be ready to enter upon his trial; to which day the Court was adjourned; his honour the Chief Justice having previously intimated to the gentlemen summoned to attend as petty Jurors, the absolute necessity of their punctual attendance at eight o'clock in the morning, that the prisoner might have the full benefit of the right of challenge, given him by the laws of his country; and, "*Gentlemen*," (added his honour,) "*the Court, to ensure this right in its "fullest extent, will feel itself obliged, in justice to the Prisoner, to im- "pose a fine upon every defaulter.*"

FRIDAY, *22d May*, 1818.

PRESENT.

His Honour CHIEF JUSTICE SEWELL.
The Honourable MR. JUSTICE BOWEN.

Counsel for the Crown.

MR. ATTORNEY-GENERAL, UNIACKE.
MR. SOLICITOR-GENERAL, MARSHALL.

Counsel for the Prisoner.

GEORGE VANFELSON,
ANDREW STUART,
J. R. VALLIERE DE ST. REAL, } *Esquires.*

THE Prisoner, *Charles De Reinhard*, being put to the bar, the pannel was called over, and after various challenges on his part, as well as on that of the Crown, the following gentlemen were Sworn as a Jury:

Thomas Levallée,	*Ralph Brewer,*
Stephen Curtis,	*Jean Laforme,*
Laurent Audy,	*Simon Le Comte,*
Joseph Miville,	*Joseph Prevost,*
Olivier Trahan,	*Daniel Thompson,*
Roger Sasseville,	*Jean Desnoyes.*

The Prisoner was then given in charge to the Jury by the Clerk of the Crown. It is not considered necessary to set forth the whole of the very long indictment, consisting of eight counts, abounding with technicalities; indeed it might perhaps be sufficient to state, that the whole indictment charged that Owen Keveny was killed on the 11th September, 1816, by Charles De Reinhard, with a sabre or with a gun, or with both, or that one François Mainville killed him with a gun, and that the present Prisoner was present, aiding, assisting, &c. &c.; but to enable the reader fully to understand the case, the first count is given at length together with a skeleton of the remainder of the indictment.

DOMINUS REX,

versus

CHARLES DE REINHARD,
ARCHIBALD M'LELLAN,
CUTHBERT GRANT,
JOSEPH CADOTTE,
FRANCOIS MAINVILLE,
JEAN BAPTISTE DESMARAIS.

On an Indictment for the Murder of Owen Keveny, on the 11th day of September, 1816.

QUEBEC, TO WIT.

THE Jurors for our Lord the King, upon their oath, present, that Charles De Reinhard, late of a certain place in the River Winnipic, not known by any name and not comprised in any parish, or county, but situated in the Indian Territories, or parts of America not within the limits of either of the Provinces of Upper or Lower Canada, or of any civil government of the United States of America, labourer, Archibald M'Lellan, late of the same place, gentleman, Joseph Cadotte, late of the same place, gentleman, Cuthbert Grant, late of the same place, gentleman, and Jean Baptiste Desmarais, late of the same place, labourer, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the eleventh day of September, in the fifty-sixth year of the reign of our Sovereign Lord George the Third, by the Grace of God, of the United Kingdom, King, defender of the Faith, with force and arms, at the said place in the River Winnipic, not comprised in any parish or county, but situate in the Indian Terriries, or parts of America not within the limits of either of the Provinces of Upper or Lower Canada, or of any civil government of the United State of America, and being within the jurisdiction of this Court, in and upon one Owen Keveny, in the peace of God and of our said Lord the King, then and there being, feloniously wilfully and of their malice

aforethought, did make an assault, and that the said Charles De Reinhard, with a certain sword called a sabre, made of iron and steel, of the value of five shillings, which he the said Charles De Reinhard, in his right hand, then and there had and held, him the said Owen Keveny, in and upon the back of him the said Owen Keveny, under the left shoulder-blade of him the said Owen Keveny, then and there, feloniously, wilfully and of his malice aforethought, did strike, stab, thrust, and penetrate, giving unto him the said Owen Keveny then and there, with the sabre aforesaid, in and upon the back of him the said Owen Keveny, under the left shoulder-blade of him the said Owen Keveny, two mortal wounds, each of the breadth of two inches, and of the depth of six inches, of which said mortal wounds, he the said Owen Keveny then and there instantly died; and that the said Archibald M'Lellan, Cuthbert Grant, Joseph Cadotte and Jean Baptiste Desmarais, feloniously, wilfully and of their malice aforethought, were then and there present, aiding, helping, abetting, comforting, and maintaining, the said Charles De Reinhard, the felony and murder aforesaid, in manner and form aforesaid, to do, commit, and perpetrate. And so the Jurors aforesaid, upon their oath aforesaid, do say, that the said Charles De Reinhard, Archibald M'Lellan, Cuthbert Grant, Joseph Cadot, and Jean Baptiste Desmarais, him the said Owen Keveny then and there, within the jurisdiction aforesaid, in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, against the peace of our said Lord the King, his Crown and Dignity.

Second.—De Reinhard killed Owen Kenevy *with a gun;* M'Lellan, Grant, Cadotte and Desmarais, being *principals* in the *second* degree present aiding, &c.

Third.—De Reinhard killed Owen Keveny *with a gun and sabre, conjointly;* M'Lellan, Grant, Cadotte and Desmarais, principals in the second degree.

Fourth.—François Mainville killed Owen Keveny *with a gun;* De Reinhard, M'Lellan, Grant, Cadotte and Desmarais, being principals in the second degree.

Fifth.—De Reinhard killed Owen Keveny *with a sabre.*—*Sixth.* He killed him *with a gun.*—*Seventh.* He killed him *with a gun and sabre, conjointly;* and each of these counts charged M'Lellan, Grant, Cadotte and Desmarais, with being *accessaries before, and after, the fact.*—The *Eighth* and last count, laid that François Mainville killed Owen Keveny *with a gun;* De Reinhard being a principal in the second degree, and the remaining four persons accessaries before, and after, the fact.

Mr. Attorney-General then opened the case to the Jury, in nearly the following terms.

Gentlemen of the Jury,

You have been sworn to try the Prisoner at the bar, named Charles De Reinhard, who is accused of having made on the 11th day of September, in the fifty-sixth year of the reign of his Majesty, an assault upon one Owen Keveny with a sabre, and giving him therewith two wounds, which caused his death. There are, gentlemen, various counts in the indictment, but they all arrive at the same conclusion.—(*The Attorney-General then detailed to the Jury the nature of the different counts, as exhibited in the abstract given above, remarking, that the evidence to be produced, would prove that the deceased met his death principally by the wounds given by the Prisoner with his sabre.*)—This, gentlemen, is one of the cases brought from the Indian Territory, and will, I am confident, receive that patient investigation, to which, from its importance, it is entitled. From the evidence we shall produce, there can exist no doubt of the death of Keveny, and I fear as little, that he came to it by the hands of De Reinhard. The deceased was a native of Ireland, in the service of the Hudson's Bay Company; and the Prisoner at the bar, was formerly a serjeant in the regiment De Meuron, but at the breaking up of that *corps*, entered into the service of the North-West Company.—It appears that Mr. Keveny having arrived in the Indian country, with a number of persons under his charge, complaints were made against him by some of them, and he was arrested by the Prisoner at the bar, in virtue of a warrant issued by a Mr. Archibald Norman M'Leod. The deseased was a man of high spirit, and did not for some time submit to the warrant, but I believe opposed its execution with considerable violence. Whether this circumstance did not give rise, in the mind of the Prisoner, to that degree of malice which eventually caused the death of this man, Owen Keveny, it will be for you to determine.

[The Attorney-General then narrated the particulars of the evidence given by *Faille* and *La Pointe*, up to the period of their finding the deceased *en haut des Dalles*, for which their testimony is referred to.]

It is here, gentlemen, that the evidence begins to affect the prisoner, in the strongest manner. After staying some time in this place, De Reinhard took Keveny in charge; and, with Mainville and the Indian José, was to follow M'Lellan and the others who went away in his (M'Lellan's) canoe;—when they had proceeded a few miles, it will appear to you in evidence that the deceased having occasion to be put on shore, it was determined, by Mainville and the Prisoner at the bar, that the place was suitable to carry into effect the design (which it will

be shewn had long previously existed) of taking away the life of Owen Keveny. The deceased had returned from a short distance, whither he had gone for his necessary occasions, and was in the act of re-embarking in the canoe when the prisoner at the bar gave him a thrust in the back with a sabre, and subsequently another. Mr. Keveny, notwithstanding he was wounded, made such resistance that it was not improbable but he would have succeeded in wresting the sabre from the Prisoner, but that he counselled the *Métif* Mainville to fire at him, which he did, and Keveny falling into the canoe, instantly expired.

[The Attorney-General then stated succinctly the occurrences, as detailed by *Faille* and *La Pointe*, from the time of the canoe with the Prisoner, Mainville and José arriving at M'Lellan's encampment, up to the period of dividing the *butin* of Keveny, remarking, that from this chain of corroborative evidence—and, from the nature of the crime, it was scarcely ever possible to exhibit positive testimony—he feared the Jury would not be able to doubt of the guilt of the Prisoner at the bar, although *that positive* evidence of the murder should not be introduced, which it was always desirable should precede a conviction, and, which, on accusation of all other crimes, the Crown officers were enabled to produce.] In conclusion, the Attorney-General observed,

Gentlemen,

Another very strong proof we shall produce, will be the Prisoner's own confession, made to an officer of the same regiment to which the Prisoner had formerly belonged, a captain D'Orsonnens, whom he met some time after, and to whom he voluntarily confessed that he had killed Keveny; and, on various other occasions, he also freely confessed it. Indeed, I believe, he never denied it. We shall also produce a confession in the Prisoner's own hand-writing, made before a magistrate, in which the whole of the circumstances are detailed, as I have related them. Upon this chain of evidence I apprehend you will have little difficulty in returning a verdict for the Crown. The people to be produced before you are the traders of the Indian country, canoe-men and *engagés;* of a lower order of men, certainly; but, I believe, every way entitled to credit; that, however, gentlemen, as I mentioned just now, is peculiarly your province to determine. The case is one of those which have arisen from the unfortunate disputes between the Hudson's Bay and North-West Companies, relative to which we have heard so much, through newspapers and pamphlets, but, to which, I am sure, gentlemen, you will pay no attention; otherwise, I would beg of you, to allow nothing to have the slightest influence on your judgments, but what is produced before you in evidence. We do not know what is the

defence the Prisoner will set up; if he can convince your consciences that he did not commit the crime he is accused of, you will acquit him: If, on the other hand, the Crown establishes the case I have detailed to you, it will be your duty, by the oaths you have taken, though a very painful one—yet your duty will be to say, He is Guilty. He has put himself on God and his country for his trial, and you, as that country, are to decide upon his guilt or his innocence.

The Attorney-General having addressed the Jury to the same effect in the French language, called Mr. Sax; *the other witnesses being ordered to withdraw, with the exception of* Messrs. Coltman, Gale *and* Bouchette.

WILLIAM SAX, *Sworn.*

I am a surveyor, and I know from a map which I have here, as well as from others, the limits of the Province of Upper Canada, and of the ancient Province of Quebec. Its western limit is a line drawn northward from the mouth of the Ohio, which is in 37° 10′ north latitude, and 88° 50′ west longitude, from Greenwich. A line drawn *due* north from this point, towards the Hudson's Bay territory, would strike Lake Superior, at about a degree to the east of Fort William, or three quarters of a degree; *i. e.* it would leave Fort William about three quarters of a degree to the west. I am acquainted with the River Winnipic by maps, and it is between the 50th and 51st degree of north latitude. The spot called *Portage des Rats* is, by this map, in 49¾° northern latitude, and in longitude 94° 6′ west of Greenwich. The River Winnipic is about five degrees west of a line running north from the mouth of the Ohio River, at its junction with the Mississippi, and certainly without the limits of the old Province of Quebec. I now speak of a *due* north line, and not a *northward* line ——

[This explanation of Mr. Sax's meaning gave rise to considerable discussion between the Chief Justice, the Crown officers, Prisoner's counsel, and the witness, as to the import of the terms *due north* and *northward*. The Bench and Crown officers considering the terms *north* and *northward* as synonimous. Mr. Sax and the Prisoner's counsel contended that a *north* line must be *astronomically* north, whilst a line might be drawn having an inclination to some other point of the compass, yet gaining upon the north in its progress it would in the *parlance* of surveyors, be denominated a *northward*, *northwestward* or *northeastward* line, as the case might be. It is not thought necessary to give the whole of the discussion, or rather altercation, that ensued, as the following questions and answers sufficiently exhibit the distinction drawn by the judges and witness.]

Chief Justice Sewell.—If a line is to be drawn from a given point of the compass, say from the west, in a northward direction, to say that such a line would not be a due north line appears to me to be a contradiction to the plainest principle of common sense, and totally irreconcileable. I will put the question to you again, sir. Do I understand you to say, that a line drawn from a given point *northward*, is not a *north* line?

Mr. Sax.—Surveyors usually call lines running ——

Chief Justice Sewell.—I am not asking you what *surveyors* usually call. I want to know whether in point of fact, a fact that any man can tell as well as a surveyor, whether a line from a western or eastern point of the compass drawn northward, is, or is not, a north line? Just answer that question, yes or no; and then you may explain that answer in any way you think proper.

Mr. Sax.—It certainly must be, to a certain extent, a north line, but not a *due north* line.

Chief Justice Sewell.—Why not?

Mr. Sax.—A line drawn from any point between two cardinal points of the compass, direct to any cardinal point, is a due north or west line, as the case may be; but a line may be so drawn between two points, as to be called by surveyors a northward or southward line, as it may chance to gain in the course of running it upon that point of the compass to which it is approaching; as I might draw a line from a point north-westardly, but gaining in a northerly direction in its course, so that at its termination it would be a line northward, from having more northing there than at the point from which I started.

Attorney-General.—If you were directed to draw a boundary line *northward*, would you qualify it in any way by drawing it to the east or west, or would you go as nearly in a direct north course as possible.

Mr. Sax.—If I had to draw a line northward without any other instruction, I should draw it due north, or magnetically north, according to my directions. The variations, in some places, between an astronomical and magnetical north line extend from twenty to thirty degrees, whilst, in other places, they agree. I should draw such a line magnetically north if there were variations, and astronomically if there were not; an astronomical line would be a true parallel.

[The Attorney-General having requested the Court to take that down, the examination was continued with reference to the line of separation between the Province and the United States of America.]

Mr. Sax.—A line drawn due west from Portage des Rats, which, by English and American maps, is the most north-western part of the Lake of the Woods, would never strike the River Mississippi. A line

drawn due west from the most north-western point of the Lake of the Woods, would leave the whole of the River Winnipic to the north of it; and, were a line to be drawn from that point to any part of the River Mississippi, the whole of the River Winnipic would be to the north and west of it.

Melish's map of the United States produced.

Mr. Sax.—This map leaves it wholly to the north-west, excepting, perhaps, a particular elbow, where the river runs into the lake. The proper point of departure is at the very point where the river and lake unite, and this is in conformity with the best charts or maps, both English and American.

Cross-examined by Mr. Vallière de St. Réal.

Mr. Sax.—I have seen many charts and maps, and it is from them I derived my knowledge of the latitudes and longitudes of which I have spoken. According to the maps of Jeffries and Bouchette, the western limit of the old Province of Quebec, from the junction of the Ohio with the Mississippi, is the course of the latter river to its source in Turtle Lake, which is in latitude 47° 38′ north, and longitude 94½, or, more correctly, 95° degrees west from Greenwich. From the source of the Mississippi in Bouchette's map, the line is drawn *due* north to the Hudson's Bay territory; Jeffries' map takes the line no further than Turtle Lake. According to this boundary, the whole of the Lake of the Woods and that part of the River Winnipic called the Dalles, would be to the east of such line. Jeffries was an English geographer, but I do not know when his map was published.

MR. JOSEPH BOUCHETTE, JUNIOR, *Sworn.*

Examined by the Attorney-General.

Mr. Bouchette.—I am deputy to the Surveyor-General. The western limit of Upper Canada, is formed by a line running north from the junction of the Rivers Ohio and Mississippi, to the southern limits of the Hudson's Bay. The junction of these rivers is in latitude 37° 10′ north, and the longitude is 88° 53′ west, from the meridian of Greenwich; and this line will leave the whole of the River Winnipic to the west. Portage des Rats is in latitude 49° 51′ north, and longitude 94° 10′ west, from Greenwich. The place called *the Dalles* is twelve miles to the north of Portage des Rats, according to Arrowsmith. The most north-western point of the Lake of the Woods

is in latitude 49° 28′ north, and longitude 94° 25′ west, from Greenwich. A line drawn from the most north-western point of the Lake of the Woods to any part of the River Mississippi, will leave the whole of the River Winnipic to the north; and the same thing will happen if a line be drawn due west; and consequently that river is without the boundaries of the United States of America. The Dalles are to the north of the Lake of the Woods, and also of Portage des Rats, and consequently not within the United States.

Cross-examined by Mr. Stuart.

Mr. Bouchette.—I am nineteen years old. I never was at the mouth of the River Ohio, nor at the Lake of the Woods, nor at the River Winnipic. I do not speak from any personal observation. My knowledge of the latitude and longitudes is derived from my father's map, now before me, and Mr. Arrowsmith's, published in 1795. The green line upon the manuscript map before me, prolonged from longitude 88° 58′ west, and running due north, was copied from a map of Emanuel Bowen in 1775, at London. It runs due north from the confluence of the rivers. In other maps the western limit of Upper Canada, is drawn as running from the mouth of the River Ohio in the Mississippi, until its source in Turtle Lake.

The map was here handed to the Court.

Chief Justice Sewell.—Here is a line on 49° of latitude.

Mr. Bouchette.—That is from Emanuel Bowen also, and drawn by the Commissioners under the treaty of Utrecht, and the line coloured violet is the southern limit of the territory of Hudson's Bay, according to Emanuel Bowen's map.

WILLIAM BACHELOR COLTMAN, Esquire, *Sworn.*

Examined by the Attorney-General.

Mr. Coltman.—I am a magistrate of this district, and one of the Commissioners of the Indian Territories. I was last year in the Indian Territories, and passed through the Lake of the Woods. My mind being much occupied by the business of my mission, I did not make any particular local observations, but I always understood the Portage des Rats to be the most north-western point of the Lake of the Woods, and according to what I remarked, I consider it so myself; but I had no opportunity of making exact observations on the spot. The River Winnipic runs out of the Lake of the Woods and into Lake Winnipic.

I do not know exactly the distance between the two lakes, but I should think it is from eighty to an hundred leagues. The general course of the River Winnipic, I should consider to be north-west, or about that course; but in speaking of it I beg to repeat that I had not time to make particular observations; but assuredly I think no part of that river can be *south* of a line drawn due *west* from the most north-western point of the Lake of the Woods, or if any, a very small portion. Undoubtedly a line drawn from that point to the Mississippi, would leave the whole of the River Winnipic to the north-west of it; for a line so drawn must be almost *due south*.—I have knowledge of a place called *the Dalles*, which I have passed twice; it is a part of the River Winnipic. I cannot say with accuracy what distance the Dalles are from Portage des Rats, for when travelling in the Indian Country, I was always accustomed to read, but I should think it to be about five or six leagues, in a course running north, with a little inclination to the west.

[The Attorney-General then asked Mr. Coltman "whether he was "acquainted with the place where Owen Keveny was killed, or said to "be killed?" to which MR. STUART objected, on the ground that the place having a name, must be identified before any question could be put relative to any occurrence which it might be supposed had taken place there.—In noticing the objection his Honour the Chief Justice remarked, that it could be of no consequence to put the question; but although enough was known of the case to manifest that if the murder had been committed at all, it was committed at (or very near to,) the Dalles, "yet, (he added,) it is necessary for the Crown officers first to establish "THE FACT."]

Cross-examined by Mr. Stuart.

Mr. Coltman.—I speak of the boundary lines, and other places I have mentioned in my examination in chief, only according to my belief; for, while travelling in those parts, I was generally engaged in reading law-books, and I had not an opportunity of making particular observations on the localities of the River Winnipic.—When I said the Portage des Rats formed the most north-western point of the Lake of the Woods, I spoke from the same belief; but a belief, likewise founded upon this circumstance—I had been told that it was the most north-western point, and when I passed it, I saw nothing that could make me doubt the correctness of the information I had received; I cannot say where it was that I was told this, nor whether before, or after, passing by it, but I *was* informed whilst in the Upper Country, that Portage des Rats was the most north-western point of the Lake of the Woods, and that from

thence was taken the boundary line between the United States and British Territory, agreeably to the treaty of 1783.—I did not make any astronomical observations, or any other, so as accurately to ascertain the latitudes and longitudes, my only observations were those of the eye in passing.

Mr. Stuart.—Is not Fort William generally reputed to be in the province of Upper Canada?

Mr. Coltman.—Yes, Fort William is usually considered to be within the province of Upper Canada, and I understand it to be so.—It is a matter of public notoriety, that writs issued by the magistrates of the Western District of the province of Upper Canada, are executed at Fort William.

[Mr. Solicitor-General submitted to the Court that this evidence did not apply to the case; to which *Mr. Stuart* answered that it was *a fact* and therefore evidence, and that he was not bound to shew its application at present.—The Solicitor-General in reply, contended that Mr. Stuart ought to shew how he intended to apply evidence, which *primâ facie*, had no bearing on the case, before he should be entitled to proceed in such a course of examination—and that therefore he had thought it right to check it in its commencement.]

Chief Justice Sewell.—All that Mr. Stuart has obtained is the naked fact that Fort William is, according to general repute, in Upper Canada. Whether any or what use he may propose to make of it we cannot say; as a fact it is evidence.

SAMUEL GALE, Esquire, *Sworn.*

Examined by the Attoney-General.

Mr. Gale.—I was in the Indian Territory last summer, and I went down the River Winnipic —I know Portage des Rats. The course of the River Winnipic from Portage des Rats to Lake Winnipic is the same as before north of north-west——

Chief Justice Sewell.—North, tending a little to the west?

Mr. Gale.—Yes; nevertheless, less to the west than to the north—but I should not like to speak positively, yet I believe that a line drawn from the beginning of the River Winnipic, in Lake Winnipic, would be to the north of the north-west, but as a lawyer I would not say that such a line was a *north* line.

Attorney-General.—Are you, sir, acquainted with the Hudson's Bay Territory, and its line of seperation from the province of Upper Canada, by map or any other way?

Mr. Gale.—I have never seen a map in which they were correctly delineated, according to my idea.

Attorney-General.—By the treaty of Utrecht was not the boundary established?

Mr. Gale.—I know by the treaty of Utrecht, no line was given, nor any boundary fixed as to the Hudson's Bay Territory, south, or on the side of Upper Canada. I have examined that treaty for the purpose of ascertaining. I do not know that any line has been drawn between the territories of Hudson's Bay and Canada, in pursuance to the treaty of Utrecht, and that treaty did not describe a southern boundary line.

Cross-examined by Mr. Stuart.

Mr. Gale.—I perhaps do not know precisely where the River Winnipic commences. I considered that I entered it at Portage des Rats, and I do not think that any part is more south. I should not like to be positive, but I will mention why I think I am correct as to its course. I had a small compass before me, and I observed that the general course of the River Winnipic is as I have said; for a short distance, perhaps about ten or twelve leagues form the Portage des Rats, the course is more northerly than afterwards.

HUBERT FAILLE, *Sworn.*

Examined by the Solicitor-General.

Faille.—I am a voyager—and in 1816, I was in the service of the North-West Company. Towards the end of that year I left Lake la Pluie in a canoe to go towards Red River, and on the fourth or perhaps the fifth day, we met two canoes in the River Winnipic, in which were five *Métifs* or *Bois-brulés*, some gentlemen and a prisoner of the name of Keveny, who was hand-cuffed. Mr. Cadotte, a clerk of the North-West Company, had the command of our canoe. We landed, as well as the people out of the other canoes, and M'Donell and Cadotte gave the prisoner in charge to us to convey to Lake la Pluie.—There were in the canoe with me one La Pointe and a guide called *José*, *Fils de la Perdrix Blanche*, (son of the white Patridge,) who is an Indian, and we went away to return to Lake la Pluie, but Mr. M'Donell and Mr. Cadotte remained on shore.—Some days after (perhaps three,) we met two other canoes, belonging to the North-West Company, in the Lake of the Woods. I recognized Mr. Stuart, Mr. Thomson and Mr. Ferries, on board of them. Mr. Stuart asked where we were going, and I answered

him we were going to Lake la Pluie with a prisoner. He said he should like to see him, and he saw him. They conversed together several times. Afterwards Mr. Thomson advised us to return, as there would be no canoes going down to Montreal. We, however, continued our route, and on the same day we met a brigade of canoes belonging to the North-West Company, under the charge of one Joseph Paul. I requested *José*, the Indian, to let us return with Paul, but he did not consent. We afterwards determined to go back with him, being in want of provisions—and as I did not know the way or route to go to Lake la Pluie, neither La Pointe, nor the Indian, any more than La Pointe or myself. We followed Joseph Paul's brigade for a day, but on the following day we lost sight of it because they sailed, and our little canoe could not follow them, so we put ashore.—On the same evening that we landed, the Indian played with his gun, putting it to his shoulder and saying *puff*, *puff*, and by his gestures I understood he wanted to kill Keveny. I do not know whether he cut any sticks, and asked us to help him. I do not recollect that he did.

[Here Mr. Vanfelson objected that the Prisoner was not answerable for the conduct of the Indian, and that the course of examination the Solicitor-General was pursuing, was not only irregular but one which, at the late sessions the Court had most decidedly rejected.

The Chief Justice observed, that he thought the evidence, if admitted, would rather make for, than against, the Prisoner, but that at present he could not be affected by it, as he stood apparently unconnected with these people, and that if there were any circumstances which connected De Reinhard with them, the most regular, as well as the shortest and surest method was, as a *substratum*, to shew the connection before admitting evidence of occurrences in which, as the Prisoner was absent, he *primâ facie* did not participate.

Mr. Solicitor-General stated, that he had a chain of testimony to introduce, which would shew that there had existed a settled design to take away the life of Keveny, and that persons were employed in the execution of this design with whom he should afterwards associate the Prisoner, and therefore with great deference he submitted to the Court that the shortest (and an equally regular,) method would be first to prove the alleged facts, and subsequently by connecting the Prisoner with the agents, shew that although he was not at the moment actually present, yet in the eye of the law he was a participator.

The Chief Justice repeated, as the impression on his mind, that as the circumstance now appeared, were it admitted to be evidence, it would be rather a service to the Prisoner than otherwise, as from the conduct of the Indian, perhaps others might be suspected.—Then addressing the

Solicitor-General he added: On the point before us we are clearly of opinion that you must connect the Prisoner with this Indian before you can be permitted to adduce evidence of transactions occurring when he was not present.]

Examination resumed by the Solicitor-General.

Faille.—We slept on shore that night, and the next morning when I went to wake Mr. Keveny, he said he was ill, and that he could not go then. He wanted hot water, and asked me to go and fetch him some water from the beach, and I went; but I did not bring him any because I then saw that the Indian and La Pointe had put off in the canoe into the stream. I called to them to come on shore, and La Pointe pushed to land, and I embarked with them. We set off for Bas de la Rivière, leaving the Prisoner below the Dalles, and on the same island where we had encamped the night before. We went down the river intending to go to Lake Winnipic, but a few days afterwards we turned back in order to purchase provisions from the Indians. I bought some from them both above and below the Dalles.—The Indian and La Pointe quarreled and fought together the day after we had left our Prisoner. José ran away into the woods, and La Pointe and I embarked again and ascended the river with an intention of getting to Lake la Pluie. We ascended it a certain distance, perhaps twelve *arpents;* but having lost our guide, and not knowing the way, we came to a determination to land on a small island and wait there till some canoes should pass. I do not recollect the distance between the island where we had left Keveny, and that where we stopped to wait for canoes; but the island where we waited for canoes, is lower than that where we had left Keveny.—Some days after we were on the island, (perhaps five or four days,) we saw a canoe approaching, in which were Mr. Archy, (Mr. ARCHIBALD M'LELLAN,) Mr. De Reinhard, (the present Prisoner,) Mr. Cadotte, Mr. Grant, and one named Jean Baptiste Desmarais; with others whom I did not know.—Mainville, the *Bois-brulé*, was there; also a Canadian of the name of Rochon, and men for working the canoe, which was ascending the river towards the Lake of the Woods. They came to the island, and part of them landed, but not all; De Reinhard, the Prisoner, did not land, but he saw what passed, or if he did not, it was because he did not look.

Solicitor-General.—Now tell the Court and the gentlemen of the Jury all that passed.

Faille.—The party who landed asked me what I had done with the Prisoner Keveny; and I answered, that he had been left on a small is-

land; that the Indian who had been given us for a guide, had *himself* left him there, and that afterwards he had left us. We likewise said, that the Indian wanted to kill Keveny.—When Mr. Archy landed he beat me with a canoe-pole, and La Pointe then fled into the woods, but Mr. Archy made him come back and beat him also, saying, " that it was not our business." At that time De Reinhard was in the canoe; I cannot say that he did hear what passed, but I should thing he was near enough to have heard. I cannot speak positively as to the distance; the canoe laid from the shore; but had I been in it, I think I should have heard what passed.

Solicitor-General.—What did you understand by the words " it was not your business."

[Mr. Vallière de St. Réal objected to the witness being questioned as to what he understood by the words, though as they were not proved to have been uttered within hearing of the Prisoner, they could not affect him, let them be what they might. To which the Solicitor-General remarked, that it was in proof that he was in a situation to see, and therefore certainly to hear, every thing.

The Chief Justice observed, that it by no means followed that because he *saw* certain actions, that he must necessarily have *heard* a conversation; and as the witness only said that perhaps he *might* have heard, it was surely as fair to suppose that perhaps he did not.

Mr. Solicitor-General submitted to the Court, that in a case like this it was impossible ever to go farther—that the witness proved the Prisoner was in a situation where he might have heard, by saying all that with certainty can be said, namely, that had he himself been there *he* should have heard; and that upon this evidence it was a question for the Jury to say, whether the Prisoner did or did not hear the conversation.

Mr. Attorney-General called the attention of the Court to Faille's extreme caution—remarking, that although he was so very clear as to events actually taking place, yet not an inch, if it was a question of distance, or a moment, if one of time, would he speak with any degree of certainty to;—and submitted that the Crown had gone far enough to entitle it to put the question proposed by the Solicitor-General.

Chief Justice Sewell said, that the Court were at present without any *substratum*, upon which the question itself could be founded, or a right to put it insisted upon, for that at present no connection had been shewn to have existed between these people.

Mr. Solicitor-General considered, that after what had been shewn, the degree of connection formed a question for the Jury.

The Chief Justice allowed, that every thing that came before the Jury, would undoubtedly be decided by them; but said, the question at

present was whether enough had been proved to justify the Court in admitting certain circumstances to be brought before them. Had De Reinhard been present, participating in the conversation, it would (his Honour remarked,) have been another thing, but as yet it does not appear in evidence, that he heard what passed, or even knew these men: It was probable that he did, but the Crown has not shewn it.

The Attorney-General submitted, that having proved that when this witness told Mr. M'Lellan that the cause of his quitting *José*, was his manifesting an intention to kill Keveny, and also that M'Lellan's reply, "*that it was not his business*," was made when the Prisoner was in a situation that he *might* have heard, the Crown had shewn enough to entitle the Solicitor-General, to pursue the course of examination he has proposed, as it was impossible absolutely to prove that a man hears a thing.

The Solicitor-General proposing to ask the witness whether he told M'Lellan why they quarreled with the Indian, it was suggested by Mr. Justice Bowen, that he had better be permitted to relate his story in his own way, and the Court would then see whether any, and what part of it was evidence.—To this Mr. Stuart objected, except as he proved De Reinhard was present, alleging that the Prisoner's counsel had a very serious duty to perform, and feeling its weight, they could not consent to his relating any thing which was not evidence—positive and undeniable evidence according to the strictest rules for its admission.

The Chief Justice stated, that the indictment was one for murder, alleging also on the part of the Prisoner, M'Lellan and others, a conspiracy to commit it, as well as the actual murder. To sustain that allegation, a participation by act, word, or deed, must be shewn; but (he continued,) you have done neither, and yet you wish to be permitted to go into a conversation in which, you do not even *assert* that the Prisoner *shared*, which you do not *prove* that he even *heard*, and if he did, you bring no evidence to shew that he *approved*.]

Solicitor-General.—It is no matter to *me* whether he approved——

Chief Justice Sewell.—But to *us* it is, and a very great matter too, for we cannot allow you to pursue an examination upon a conversation that the Prisoner did not share in, and which, till you prove he heard, you certainly cannot be prepared to shew he approved.

Solicitor-General.—Did you embark in Mr. Archy's canoe?

Faille.—Yes, I embarked, and La Pointe also, in Mr. Archy's canoe.

Solicitor-General.—Then I am to understand that your Honours think I cannot question him as to the conversation on shore?

Chief Justice Sewell.—Most certainly; that is my opinion, unless you shew by some evidence that he heard it and approved of it. I do

not know whether Mr. Justice Bowen concurs with me or not, but that is my opinion.

Mr. Justice Bowen.—An opinion in which I perfectly coincide. You cannot by this witness prove that he even heard the conversation; and if you did you must go farther before I should consider it admissible evidence against the prisoner: You should demonstrate by some act of his that he *approved* as well as heard it. I consider the question as totally beyond the rules of evidence.

Solicitor-General.—Then I return to the general examination, abandoning, as is my duty after your Honours' decision, any question relative to this conversation. Did you perceive the Indian in the canoe?

Faille.—Yes, I did perceive him. Before I embarked I saw that the Indian, that is to say, Joseph Fils de la Perdrix Blanche, was in Mr. Archy's canoe. We set off for Lake la Pluie, and the same day we met other canoes; I do not know the hour exactly, but it was the same day—we had before sought for the island where we had left Keveny, but without finding him. Some one belonging to our canoe (but it was not me) asked the people whether they knew any thing of Keveny, and they answered that he was a little further on above the Dalles. The distance between the island where we had left Keveny, and that where we found him, was, perhaps, five or six leagues. The island where we left him was below the Dalles, and that where we found him was above the Dalles. Mr. Archy asked the Swan River people how Keveny managed to live, and some one, but I do not know who, answered "he purchases when he can, and sometimes he steals;" he is above the Dalles.

[Mr. Stuart objected to the questions as irregular; he stated his objection was merely *professional* to the mode of examination; and did not arise from any appreheusion of the consequences to the Prisoner.

The Chief Justice concurred with Mr. Stuart, saying, why not, Mr. Solicitor, bring forward the unexceptionable part of your testimony? Why introduce a man the witness himself does not know who he was, and, therefore, cannot prove a connection between the Prisoner and the person speaking.]

Solicitor-General.—What did De Reinhard say; do you recollect?

Faille.—I do not recollect what De Reinhard said; I do not recollect having heard De Reinhard say any thing in going to the island where we had left Keveny before meeting the Swan River canoes, but upon their answering that he was above the Dalles, he (De Reinhard) said—"*that he had taken him prisoner, and if he was found again, he would "not take care of him.*" I do not know whether he said it by way of threat or not.

Solicitor-General.—Repeat the words he made use of.

Faille.—He said " *It was I who took him prisoner, and if he was found* " *again, I will take care of him.*"

[The Solicitor-General enquiring if " he heard him say any thing else," and the witness answering that " he did not there," Mr. Stuart requested that answer might be taken down.]

Solicitor-General.—How did you understand the words " *that he would* " *take care of him.*"

[Mr. Stuart, in objecting to the question, remarked, that it was extremely unpleasant to be compelled by professional obligation, as well as by imperious duty to the Prisoner, so frequently to oppose the mode pursued in the examination, but it could not be supposed, as counsel, they could sit still, and allow such a question to be put.

Mr. Solicitor-General urged that words have force and meaning according to the manner in which they are uttered; and unless a witness were permitted to explain what he understood, it would be impossible when (as in the present instance) an equivocal expression was made use of ever to attain the real meaning of the speaker.]

Mr. Justice Bowen.—The words made use of here, I think, sufficiently explain themselves, " *I took him prisoner, and, if I find him, I* " *will take care of him.*"

Mr. Stuart.—I believe the words of the witness were " *Si on le retrouvoit qu'il n'auroit pas soin,*" which certainly bear a very different import to " *I'll take care of him.*"

Mr. Justice Bowen.—I have taken it down, and I am confident he " did say *c'est moi qui l'avoit pris prisonnier, et si on le retrouvoit qu'il en* " *auroit soin.*" " *It was I who took him prisoner, and, if he was found* " *again, he would take care of him.*"

Mr. Stuart.—He said the other too, and I do wish that the whole of his answers may be taken just as he gives them.*

Solicitor-General.—Did you hear any other person say ——

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* The reporter has, several times, upon his notes *both* the expressions attributed to the witness, although so different in their meaning. On this and many other occasions during the examination of the *Voyageurs*, had *Briareus* been a Stenographer he would have found sufficient employment for his heads and hands in attempting to follow the explanations of these witnesses; given with a rapidity peculiar to themselves, and in a *patois* or jargon almost unintelligible, except to the Indian Traders.—Candour also demands that the reporter should admit, that his limited knowledge of the idiom of the French language, led him at the moment, to affix rather a different import to that which he now finds a correct translation of the expressions require. W. S.

[Mr. Stuart objected, and expressed surprise that a course so contrary to all principles of law, should have been suggested by the Crown officers; and still more, that it should be renewed after the Court had on the present, as well as the former trial, decided such questions to be inadmissible.

Mr. Solicitor-General, after noticing that Mr. Stuart had objected to a question which he had not even heard, contended that they ought not to be bound so strictly as if the affair had taken place in the district, where proof would have been easily within reach; but that every thing bearing on the justice of the case, might, and ought to be admitted; and whilst the Crown were only desirous to exhibit the whole of the facts, he trusted he was pursuing, in the production of them, the method best calculated to save the time of the Court.

The Chief Justice admitted that the case had its difficulties, but not any that could call upon the Court to invert the order of receiving testimony, by allowing evidence to be given of a conspiracy for a particular purpose, before the fact itself was proved. Supposing for a moment that the evidence is admissible, still (he said,) there was nothing to distinguish this case so as to justify an exemption from the general rule; first prove a fact, and then strengthen it by corroborative testimony, as much as you can.]

Attorney-General.—I wish on this point to put merely one question to the witness, which I think is not liable to objection. Did you hear De Reinhard say, after the death of Keveny, "that he had done his business."

Faille.—Yes, I did hear De Reinhard say so.

[Mr. Stuart expressed his conviction that the Court would not take down the witness's answer, or permit the Attorney-General to put such a question, as it was losing sight of the very first principles of the law on evidence for leading questions to be proposed on an examination in chief.

The Chief Justice stated the rules for the examination of witnesses, to be three: first, that on an examination in chief, leading questions are not to be put; second, on a cross-examination *that* restraint is not imposed, because the witness is not supposed to be friendly; a third rule is where your *own* is an unwilling witness and manifests an hostile disposition to the party who makes him a witness; the examination in chief is permitted to assume the shape of a cross-examination; but this (said his Honour with marked emphasis,) must be in consequence of a manifest indisposition on the part of the witness, amounting to an impracticability of obtaining, in the usual mode of examination, those facts which he is in possession of, and which it is essential to the justice of the case should be exhibited in evidence. These being the rules there can be no difficulty in applying them. Most certainly you cannot be permitted

to put leading questions on an examination in chief; for, with the exception I stated, there exists no right to put them.

Mr. Justice Bowen remarked, that the question, "did the witness hear any thing said, and by whom, and when?" might be put, and if he answered affirmatively, he might then be examined as to what was actually said; to which Mr. Stuart assented.]

Solicitor-General.—Did you hear De Reinhard say nothing else?

Faille.—Not then; but I remember that after Keveny was dead he said he had done his business.—Before we got on shore I heard Mainville say, that if he were found he would kill Keveny; and that he would have his hat and boots, and others said they would take his clothes, his coat and shirt. De Reinhard said nothing, and I cannot tell whether he heard the conversation. He was sitting in the canoe on the same bench with the gentlemen, and was as near as I was, and I heard it; but I do not know whether De Reinhard heard or not.

[Mr. Stuart begged that the words, "I do not know whether De Reinhard heard or not," might be taken down; to which the Solicitor-General replied that the witness was in his hands, and as they formed no part of an answer to any question put by him, he thought it completely unnecessary, and was proceeding with the examination when Mr. Stuart objected, remarking, that with all his respect for the Crown bench, they stood in that Court upon equal terms, that he did not understand dictation, nor would he submit to it, and he thought he saw something very like it. He added, that he should be unworthy of the gown he was honoured with, if he admitted any thing like the conduct of which he complained—conduct, in his humble opinion, equally incompatible with good manners and the accustomed practice of the Court.—To these observations the Solicitor-General rejoined, with some warmth, that it was not the first time that interruptions had been made whilst he was putting questions, and to apply no harsher epithet to them, they were certainly very irregular, and being equally irreconcilable to good manners as to the practice of the Court; he trusted his learned friends would abtain from them.—Mr. Stuart conceived that he had not deviated from the rules of politeness or of practice in insisting that the witness' answer should be taken down entirely as he gave it.—The Chief Justice said, the answer is taken down entirely; I have taken every word of it.—Mr. Stuart begged pardon, saying, that was all he wanted.]

Examination resumed by the Solicitor-General.

Solicitor-General.—Did you land where you were told that you would find Mr. Keveny?

Faille.—Yes: when we arrived where Keveny was, we landed, and Mr. Grant shook hands with Keveny. We were afterwards at an Indian encampment: after which Mr. Archy told La Pointe and myself to embark in his canoe, saying at the same time, that he had no room to take Keveny in his canoe. De Reinhard said that if he had a canoe he would not care to take him to Lake la Pluie. I embarked with Mr. Archy and we all took our departure, with the exception of De Reinhard, Mainville and José, whom we left on shore with Keveny; we proceeded about two or three leagues, and then we landed and we slept there. Some time after we had landed I heard a gun go off in the quarter whence we came. At that time we were between the Dalles and the Portage des Rats, but I do not know whether we were nearer to the Dalles or to the Portage des Rats. Some time after, I think half an hour, I saw a canoe approaching the shore where we were. There were in it De Reinhard, Mainville and José: Keveny was not there. Mr. Archy, Mr. Cadotte, Mr. Grant, and another man came forward; and it was asked, and I heard it, but I cannot tell by whom—"what they had done with the prisoner Keveny?" Some one in the canoe answered, "he is well hid where we have put him;" but I do not know which of them it was who gave this answer. At that time De Reinhard was in the canoe. I do not think it was the Indian who said so, as I do not believe that José speaks French enough to have answered in that way; but I cannot say which of them (that is to say, of Mainville and De Reinhard,) it was who said, "he is well hid where we have put him."* The canoe was full of blood, and I saw Keveny's clothes in the canoe covered with blood. I knew them from having before seen him wear them. I did not observe who landed first, but they all three came on shore. It was Mainville who landed the clothes, and I then asked Mainville, "what had been done with the prisoner Keveny," and Mainville replied, "that he and De Reinhard had killed him." De Reinhard was then in the same place at the distance of half the length of this room. We were encamped all together, but I do not know whether De Reinhard heard or not. De Reinhard said and I heard him, "it is a service I have rendered to that man Keveny." De Reinhard never told me that *he* had killed him. It was most certainly Mainville only, who told me "that it was he and De Reinhard who had killed him."

Mr. Stuart.—I trust the Court have got these answers of the witness for we consider them very important.

Chief Justice Sewell.—I will read to him his evidence as I have taken

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* *Il est bien caché ou nous l'avons mis.*"

it, I think I have it correctly; if he wishes then to explain or qualify any part of it he can.

The Chief Justice then read the witness' testimony, beginning at "the canoe was full of blood," and witness admitted it to be correct.

Solicitor-General.—There is one little word which I think your Honour has mistaken the witness in, and which occasions a considerable difference from what the witness I believe intended to say——

Chief Justice Sewell.—Yes, a very little word will certainly make all the difference; whether he said *I* or *he* is certainly a very material point; but I have read to him his testimoney, which he admits to be correct, and I believe it is, for I have strove to take all he did say; I will, however, read it to him again, and he may add to or explain it how he likes, but I cannot alter what I have already taken.

The evidence was read by the Chief Justice, and the witness again admitted its correctness.

Examination resumed by the Solicitor-General.

Faille.—I saw De Reinhard wipe his sword which was bloody, and he then said the words, "*it was a service which he had rendered.*" We were then altogether at the fire. Keveny had three or four trunks, and De Reinhard opened them. I recognized the trunks to be the same which I had before seen in the possession of Keveny. There were three or four which De Reinhard opened in my presence, with the keys which he had in his hand. De Reinhard took the clothes and things out of the trunks and divided them. The best of the things he chose himself, and hid them in the woods. The bad ones he put on one side. The *Métifs* wanted to have some fine shirts; but he would not give them any, saying that it was not then necessary, but that when he arrived at the post, he would give them good cotton shirts. The *Métifs* said to De Reinhard that if he would not give them fine shirts, they would not have any at all;—and De Reinhard hid them all in the woods. There was some white sugar and some tea; Mr. Archy would not have the tea, but the white sugar was put in his tent.

Solicitor-General.—Did you see Keveny's clothes in the canoe?

Faille.—Mainville shewed me Keveny's coat. It had the hole of a ball and of a sword.

The coat was here offered to be produced.

[Mr. Stuart felt himself called on by a sense of professional duty, to object to any evidence being admitted of occurrences subsequent to the

supposed death, till that fact was proved, and to which at present there was not a tittle of evidence. This objection was not made to benefit the Prisoner, by keeping any thing from the Jury—for his counsel were anxious that the whole truth should be brought out—but with a view to conducting the proceedings in that regular way, which we consider indispensable; viz: to first demonstrate the actual death of the person charged as having been murdered, and then adduce what corroborative testimony you can; were any other course to be allowed, the whole business (said Mr. Stuart,) may perhaps end in smoke after three or four days examination of witnesses as to facts supposed to be connected with a death, which is not even proved to have take place.

The Solicitor-General expressed surprise at Mr. Stuart's opinion, contending that under the circumstances of the case, it was hardly possible to adduce stronger evidence of the death, than that which had been exhibited. To substantiate a charge of murder, it is desirable that the body should have been seen, but it is not indispensable. In looking at this case, it will be seen that better evidence of the death could hardly have been produced. It is not as if there had been a coroner to have viewed the body, and assisted by the opinion of a surgeon, as to the immediate and actual cause, had by his jury returned a verdict of how the deceased came by his death; and it is competent to the Crown, in the absence of that positive evidence, which the body having been seen would enable it to exhibit, to adduce that secondary evidence to which, from the circumstances of the case, we have been compelled to resort.

Mr. Stuart observed, that the Solicitor-General had mistaken the nature of his objection to the admission of the proposed evidence, which was not to the *method* by which it was proposed to prove the death, but because *no* evidence had been offered to establish that fact, which must form the *substratum* of all the subsequent evidence. From the evidence as it now stands, for aught we know, the man may be alive, for nothing has been shewn to the contrary; although doubtless the Crown officers have in their hands irrefragable evidence of the death. Then why not produce it? My objection is, that evidence of occurrences *subsequent* to the death ought not to be introduced till the *death itself* has been proved. At the same time that he made these observations for the sake of regularity, Mr. Stuart trusted that his learned friends the Crown officers, would believe him incapable of entertaining, for a moment, an opinion so unwarrantable as that the Prisoner had been brought to trial, on an indictment for murder, without their being in possession of the most satisfactory evidence of the actual death; but when without one title of evidence from which it could even be inferred—not so much even as the body having been seen—his learned friends proposed to go into evidence

as to circumstances which they allege took place subsequent to it. I object to the course, because it cannot be regular. On behalf of myself and my learned friends, who concur with me as to the validity of the objection, I assure the learned Crown officers that it is purely professional, and not made with the most remote idea of excluding testimony; but on the contrary, to urge upon them the necessity of producing what we fear they have overlooked, namely, evidence of the death of the man.

Mr. Attorney-General contended, that they were shewing by very strong and perfectly admissible evidence, that the man was actually dead. He referred to Mr. Chitty, who gives the authorities which support the opinion, that to establish a charge of murder, although desirable, it was not indispensable that the body should have been seen; and argued that if ever there was a case in which this secondary evidence were admissible, certainly the present was such a case.

The Chief Justice remarked, that the general rule had been never to convict for murder or manslaughter, unless the fact were proved, or the body at least found; this doctrine, he observed, had been supported by *Hale* and others, but as it is sometimes impossible that this can be done, we must resort to secondary evidence of that which cannot be proved by the more positive testimony, or in many cases, conviction never could take place. In the present instance, from the impossibility of exhibiting the primary or more positive testimony, the Crown officers contend they have a right to produce secondary evidence of the death, and they most certainly have; though I confess, I consider the order inverted by the course that is taken. It might probably have been as well if the confession of the Prisoner, mentioned by Mr. Attorney-General in his opening, had been proved, as perhaps it would have established the fact which Mr. Stuart contends ought to be established, and then this evidence would have been merely confirmatory; but, as all the facts were in possession of the Crown officers, they had undoubtedly selected according to their judgment the course best calculated to attain the ends of public justice, and the Court had not the slightest wish to interfere with it, or in the smallest degree to intrench upon their rights as public prosecutor. It would merely hint, that if consistent with their plan of conducting the prosecution, to prove the confession first, it might perhaps save time. Relative to the objection itself, the Court do not at the present think it good. The coat is produced as that which the deceased wore at the time the witness last saw him, rather than to prove any thing that took place after the alleged murder. What the subsequent evidence might be, it was not for the Court to anticipate, but at present they considered it to be perfectly competent evidence.

Mr. Stuart remarked, that the course suggested by his Honour, appeared to him to be, not only the most advantageous, but in reality the only regular one, though to the Prisoner's counsel, except for the sake of regularity, it was a matter of complete indifference what course was adopted, and therefore he should not press (as indeed after his Honour's decision it would be highly improper for him to attempt to press,) the objection he had submitted.]

Examination resumed by the Solicitor-General.

Faille.—I believe the coat which is now shewn to me to be Keveny's coat. It is the coat which he used to wear when he travelled. The coat was in the little canoe in which the Prisoner, Mainville, and the Indian, came on shore. Mainville carried it on shore with the other clothes and things. It was he who took on shore all that was on board, and not Mr. De Reinhard. Mr. De Reinhard was a clerk, and clerks do not work. Mr. Keveny used to wear this coat when he was with me. Mainville pointed out to me in this coat the holes which he said were the cuts of a sword, and the hole made by a musket ball.

Mr. Stuart.—What Mainville may have said certainly cannot be evidence against us. Indeed I do not see what effect this old coat is to have upon the case at all.

Solicitor-General.—I will state why this evidence is adduced, and it is offered simply for this reason, and the Jury will judge what weight it ought to have upon the case. Here is a coat which we prove he was in the habit of wearing when travelling—that he had it when this witness was with him—and it is found in the canoe in which the Prisoner arrives, without Keveny, though the last time Keveny was seen, it was in the company of the Prisoner. We simply prove the fact, the Jury will infer from it what they think proper.

Examination resumed by the Solicitor-General.

Faille.—It was De Reinhard who divided the effects which were in the trunks; and Mainville took the coats and other things which were not in the trunks of his own accord.

[In answer to a question from the Chief Justice, as to how Keveny was dressed the day witness left him with De Reinhard, Mainville and José, Faille said he was well dressed in a blue coat.—De Reinhard forbade me to speak of this business. When we went away from Lake la Pluie, about a month and a half after, to go to Fort William, he told me, if met by the people of Lord Selkirk, not to speak of the death of Keveny. He forbade me to say that he had killed Keveny.]

Chief Justice Sewell.—That he had *killed* Keveny, or of the *death* of Keveny?

Faille.—Of the *death* of Keveny, and of the matter that had happened in the River Winnipic. De Reinhard did not then come down with me from Lake la Pluie.

Solicitor-General.—I submit to your Honours that there is now evidence sufficient to entitle us to go into the conversation between the witness and M'Lellan, relative to the treatment experienced by witness for having prevented Joseph, Fils de la Perdrix Blanche, from killing Keveny. The first piece of evidence to entitle us to do so is, that it took place within the hearing of the Prisoner; and, if we do not do it now, we shall, after we have proved his confession, have to call this witness again, as in the confession he relates the conversation to have taken place in his hearing.

Mr. Stuart.—I must still object to such evidence—as to the pretended confession, of which my learned friend speaks, it is the same, I suppose, as a printed paper which I hold in my hand, a paper which it would add more to the credit of persons of a certain rank, if it had never appeared, for I cannot refrain from saying, that I consider its publication as disgraceful, and calculated only to prejudice the public mind and endanger the safety of a fair and equitable trial.

Solicitor-General.—I really must interrupt the learned gentleman. We are making no reference to a printed paper: when I speak of a confession, I speak of a confession in the hand-writing of the Prisoner, and I may be permitted to remark on the subject of printed papers, or any desire to prejudice the public mind, that my learned friend the Attorney-General most distinctly told the Jury, in his opening speech, that they were totally to dismiss from their minds every thing which they might have heard upon the subject. I therefore trust that we shall hear no more on the subject of endeavours to prejudice the public, or of interrupting the regular and pure course of public justice.

Mr. Stuart.—When I make these observations I do not apply them to the learned Crown lawyers. I could not, for I know them to be incapable of meriting such an accusation, as an endeavour to pervert the pure stream of national justice; but when I see in a printed publication, on a subject connected with the interests of the private prosecutor, that very confession which in the exercise of his official duty as a magistrate he had taken, I cannot refrain from saying that it is to be feared he has overlooked his duty, and has published it, for how else could it have got to the world? and I am not to be restrained by any consideration for the elevated rank of this magistrate, on the contrary, that ought to have operated as a security for the most accurate fulfilment of the duties

imposed upon him, particularly as from the peculiar delicacy of his situation, one would have imagined he must have felt most anxious that no part of his conduct should be exposed to the shadow of suspicion; but the motives for such a publication are too glaring to be misunderstood; and, I repeat, that it would have been more consistent with the distinguished rank of the magistrate if it had never appeared. As to the conversation it cannot be evidence; when this pretended confession is offered we shall have an opportunity of meeting it, and, therefore, till then I refrain from taking notice of it.

Examination resumed by the Solicitor-General.

Solicitor-General.—What did Mainville say at the time you met the Swan River people?

Faille.—Mainville said ——

Mr. Stuart.—That wo'nt do indeed—what have we to do with what Mainville, or any body else has said. I really did hope my learned friend would not have attempted this course again.

Solicitor-General.—It was said in his hearing, and I beg leave to contend that it entitles me to introduce it as evidence against the Prisoner.

[Mr. Stuart replied that every thing said in his hearing was not necessarily to belong to him. If a man chooses to talk high treason in my hearing, I am not necessarily to be hung for it; but if this doctrine is sound, I should be.

The Chief Justice said, that did not follow, but if you heard a man say, "you helped me to cut another man's throat, they might prove what you said upon hearing it, and according to what that proved to be, would be the effect such language in your hearing would have upon you.]

Solicitor-General.—What did Mainville say?

Faille.—I heard him say, that he would kill Keveny. He spoke of his intention to kill Keveny the same day, and it was the day before the death of Keveny.

Mr. Stuart.—That assuredly is not evidence against us.

Chief Justice Sewell.—No, certainly—but it may be for you, and very strong too, and therefore I take it.

Cross-examination conducted by Mr. Vanfelson.

Faille.—The first time I saw Keveny, was in the River Winnipic. He was in irons, with some *Bois-brulés* in a canoe. I was then in a

canoe commanded by Mr. Cadotte, a clerk of the North-West Company. Mr. M'Donell was in company with us in another canoe. Mr. M'Donell caused the irons to be taken off from Keveny, and he breakfasted with Mr. M'Donell. I do not know that Mr. Keveny complained to Mr. M'Donell, nor that the Bois-brulés had said that Mr. Keveny had killed three men. Mr. M'Donell is one of the gentlemen of the North-West Company, and he gave Mr. Keveny a bottle of wine and a bottle of rum, and put him in the canoe with me and La Pointe. We did not like to go, because the Métifs had told us he was mischievous or wicked; but we were ordered to go, and the Indian was given us to serve as a guide for Lake la Pluie. On the way, the second or third day, Keveny was uneasy, because the Indian had endeavoured to kill him. The Indian did not speak French, and I do not speak the Indian language.—The Indian made signs that he wanted to kill him, and Keveny was angry at us. The Indian said that Mr. M'Donell would be pleased if he killed him. He said in French, "In killing *Saguenash* Mr. M'Do-"nell will be pleased." I understood by "*Saguenash*," an "*English-man*," but I did not then know Keveny's name. I know that Joseph the Indian frequently wanted to kill Keveny, while he was under the charge of La Pointe and me. I do not recollect having seen La Pointe and the Indian at Keveny's tent with stakes. I have no knowledge that the Indian with La Pointe and another were at the tent, saying, at the same time, that they would kill Keveny.

Mr. Vanfelson.—Did you ever relate to any one that La Pointe and another had provided themselves with stakes to help the Indian to kill Keveny?

Faille.—I do not recollect having said so; perhaps I did; I do not remember it. I was sometimes a good deal beside myself, (*demonté.*)

Mr. Vanfelson.—Did you ever say to any one that La Pointe's heart was black enough to have killed Keveny, if you had listened to him?

Faille.—No. I do not recollect having said so. In the course of our route we met Mr. Stuart and Mr. Thomson. Mr. Thomson advised me to return, but we did not, and afterwards the Indian left us; before which he had a quarrel with La Pointe, who wounded his thumb in wielding a paddle. The Indian ran away and we left him. He was almost naked, but he had provisions; he had sold his blanket before for a capot. We kept his gun, and he had no canoe. We left Keveny a little while before in another island. At the time we left him, he had laid down, but was not asleep. He had no arms. We were encamped upon an island farther on, waiting the arrival of canoes, when Mr. Archy and others met with us. It was I who called to them to land.

I know Mr. Cadotte well, and he asked me what had become of the Indian, and I answered that La Pointe had beat him, and that he had run away into the woods. I had not touched him myself, and I do not know that La Pointe and I quarreled as to who had beat him, or that La Pointe said it was I who beat him, and that it was on that account that Mr. Archy had struck me. The question was asked what had been done with the prisoner, and I answered that he had been left on another island. Thereupon Mr. Archy said " there " was no occasion to beat the Indian or to have abandoned the prisoner," and he beat us with the paddle. Mr. M'Lellan enquired if I could point out the island where we had left Keveny, and I answered I could, and I embarked in the canoe with Mr. Archy to go there. Afterwards we met other canoes belonging to the people of Swan River, and from them we learnt that Mr. Keveny was above the Dalles, and we went up and found him there. Mr. Keveny was then dressed very neatly, like a gentleman, and he had not the clothes on which have been shewn to me here, nor those which he wore when we left him on the island, but was in very good trim, and dressed like a gentleman; like a very well-dressed gentleman. Mr. Archy said Keveny could not embark with him, because the canoe was too much loaded, having ten men and five gentlemen, making fifteen in all. The usual complement for such a canoe is ten, that is to say, eight working men and two gentlemen. Mr. Grant was there, and Mr. Keveny did not appear to be angry with him. He was satisfied, I believe; but he spoke in English, and I do not understand English—but he did not seem to be vexed. When we went away, I left Keveny with De Reinhard, Mainville, and Joseph Fils de la Perdrix Blanche; but I cannot tell whether Keveny embarked with them. I am quite sure that I heard two guns go off that evening. We were on shore, and encamped, when I heard both the reports; one gun was fired at a bustard, and the other I heard before we had encamped, and the people might have heard it as well as me. In that quarter it is usual to hear the reports of guns, and where there are Indians and people. Keveny once tried to overturn the canoe, when we turned back to go to Bas de la Rivière, and if he had succeeded, we should have been drowned. I have heard that Mainville has since absconded; and I saw Fils de Perdrix Blanche at Montreal this spring. I saw him at a distance, and I did not speak to him. The clothes were partly washed by Joseph and Mainville. There was blood upon them, and I saw washed, a coat, waistcoat, and a striped cotton shirt of Keveny's; but I saw none of the things in the canoe which he had on when we left him on the little island, excepting his hat. Those clothes were a blue cloth coat and waistcoat: but these in the canoe were the old

clothes in which he travelled. The last gun which I heard go off was fired at a bustard, as Mainville told me, and there was a bustard which they had killed and thrown into the canoe. I am sure of it, because I plucked it myself. The next day we took our departure for Lake la Pluie. I afterwards saw De Reinhard a prisoner at the Fort of Lake la Pluie. It was the people of Lord Selkirk who were in search of me and La Pointe. Both De Meurons and Canadians came after us, but they had no muskets. There were, perhaps, five or six of them, and I was taken prisoner and La Pointe also. Captain D'Orsonnens appeared to be master, and he sent us to Fort William. Captain Matthey and another received our depositions, and the next morning we swore to them before Lord Selkirk. After I had made my deposition, I was perfectly at liberty. When I went up, Fort William was in possession of the North-West Company; but when I came there, after being sent thither by Captain D'Orsonnens, I found it in the possession of Lord Selkirk's people. I did not enter into my lord's service, but I was made to work seven or eight days, in order to go a wintering. I am not in the service of my Lord Selkirk, but I worked a few days in the canoes and bateaux. I would not go to Montreal, without being paid the arrears due to me by the North-West Company, and they were paid me; I received them by a letter. They promised to pay me for the time I should remain here, and to keep me, and to make me a recompense.

Saturday, 23d May, 1818.

PRESENT AS YESTERDAY.

The Jury were called, and being present

JEAN BAPTISTE LA POINTE, *Sworn.*

Examined by the Attorney-General.

[As La Pointe's testimony was to the same facts throughout as Faille's, it is not thought necessary to do more than exhibit any additional circumstances that were brought forward, and any variations in his account of the same facts. His detail of occurrences up to losing sight of Paul's brigade was almost verbatim the same as Faille's. He then proceeds.]

La Pointe.—In the evening we landed on an island, and encamped for the night. It blew too hard, and the Indian would not proceed, being aware of the danger. That evening the Indian cut two stakes, and wanted us to take them making signs at the same time with his gun that he wished to kill Mr. Keveny, saying in French that "Mr. M'Do-"nell will say it is good," shewing with his gun as if he would kill him. The next morning, perceiving that the Indian was very much vexed and angry with us, because we had not approved of it, and that he wanted to leave us, we were desirous of going away. We left Keveny on an island below the Dalles because he was too ill.

[Mr. Valliere requested the Court to take that answer.]

La Pointe.—After leaving Keveny we proceeded down the River, but we ascended again to an Indian village above the Dalles, José saying that he had lost his way, and did not know the route. We were very angry and dissatisfied, having but a very small quantity of provisions. The Indian was angry, and in his rage he broke the canoe, and was forced to buy another with a blanket of Keveny's, and his kettle, and having got a birch-bark map from the Indians, we continued our route back from the River Winnipic. On the way we had a quarrel for he would not let us take our meals nor boil our kettle. We were then on shore at the place called Portage des Esclaves (Slave Portage.) We fought together, and the Indian run away into the woods, and we left that place without him. We went up the river to find the place where we had left Keveny; but, fearing to lose ourselves, we made for the shore, and landed on an island to wait the arrival of canoes. The fifth day we saw a canoe coming up from Bas de la Rivière; and in that canoe were De Reinhard, Mr. Archy, Grant, Cadotte, and some *Bois-brulés;* Mainville and Desmarais were there among the Bois-brulés. The Indian José was there, one named Le Vasseur, and another called little Joseph Lorrain. They asked us "what we were doing there?" and "what we had done with the Indian?" (they were then in their canoe.) It was Cadotte who asked this, and "why we had beaten the "Indian?" I answered him that we had a quarrel, and that the Indian wanted to shoot Keveny. Cadotte replied, you were told to do nothing and that he was your guide. I said to him, "Mr. Cadotte, you did "not tell us to leave, or to kill Keveny." Cadotte then answered, "that was not your concern; you are rascals and blasted blackguards, "and you both deserve a threshing; you have nothing to do with the "Indian." It was Mr. Cadotte who said this, and thereupon Mr. Archy landed quite in a rage, and he first beat Hubert Faille. I tried to get away, but he caught me and beat me too.

Mr. Valliere de St. Real.—I do not perceive that this can be any

evidence against the Prisoner, nor do I conceive that it is at all regular to enter upon an investigation of circumstances, which, although not direct evidence against the Prisoner, may have a tendency to impress the minds of the Jury unfavourably.

Attorney-General.—I shall immediately connect the Prisoner with all these transactions, my very next question associates him with the whole.—Was De Reinhard at this time as near to Cadotte as you were?

La Pointe.—De Reinhard was nearer to Mr. Cadotte than I was for they were both in the canoe together. Mr. Archy did land; that is quite certain; and afterwards we embarked to go in search of Keveny. Mr. Archy asked us "where it was that we had left Keveny," and we answered that we had been endeavouring to find the place again, but that we were not sure where it was. He replied, "we have got the Indian and he knows where to find him," (Keveny.) Grant said, "you want to conceal him, try to forbid now, (*essayez à le defendre,*) you will be well received—you shall swallow the contents of my gun." We pursued our route and the next day we came to the place where we had left Keveny.——[*Witness here related the conversation of the Métifs, and the Swan River people, as given by Faille, page* 18.]——Before coming to the island, I heard De Reinhard say, "I will take good care of him; it is I who will kill him." When they landed they were all armed, De Reinhard had a dagger; it was neither a sword nor a bayonet for certain, but a dagger as long as eighteen inches. Keveny was found above the Dalles with the Indians. We learnt from the people of the Swan River canoes, whom we met below the Dalles under the conduct of Ducharme the guide, that he would be found there, and we consequently repaired thither. Some body asked, but I cannot tell who, "how does he do to live," and they answered, (that is to say, the Swan River people,) "some times he steals, and some times he purchases," and the *Métifs* of our canoe replied, "he shall not steal long;" but I do not know whether De Reinhard was near enough to hear it.—When we found him again, Mr. Grant shook hands with Keveny and they conversed together.

Chief Justice Sewell.—Did Mr. Keveny and the gentlemen dine together?

La Pointe.—No, they did not eat together.

Examination resumed by the Attorney-General.

La Pointe.—We went to fetch Keveny's baggage—they put it on board of Mr. Archy's large canoe; not all of it, but a good part. We

remained two hours on shore; and I, and all the others, excepting Keveny, De Reinhard, Mainville, and Joseph the Indian, embarked with Mr. Archy, and we went away leaving the three with Keveny.

Chief Justice Sewell.—Why did you leave these men?

La Pointe.—They stopped behind to follow in a small canoe, which the Indian women were about gumming.

Examination resumed by the Attorney-General.

La Pointe.—We continued to go on before and lost sight of the others. We proceeded afterwards for three leagues or thereabouts, when we disembarked and encamped for the night. Before arriving there, and while we were on the water, we heard the report of a gun. We had proceeded about half way, and one of the *Bois-brulés* in the canoe then said, "did you hear that report of a gun? the man is killed."

Chief Justice Sewell.—Did *you* hear it or the others?

La Pointe.—When we had landed I heard the report of a gun. I did not hear the first report when the canoe was on the water, but the others heard it; and when I said before that we had heard the report of a gun upon the water, I never meant to say that I had heard it myself, but that the people in the canoe said that they had heard it. I heard but one report; Mainville heard two. When Mainville was about coming on shore, some bustards flew past, and Mainville fired his gun and killed one of them. I was then on shore, perhaps I had been an hour on shore before I saw the canoe, but I saw the canoe at the time of the second report. It was perhaps an hour, more or less, between the two reports which I heard. It was Mainville who killed the bustard, and I saw it. Just as the canoe arrived, some one on shore asked "what they had done with Keveny?" and De Reinhard, who was then in the canoe, answered, "he is well hiddcn, he wo'nt come back again." While I was conversing with Mainville, Reinhard landed, and the whole party mixed together, and Reinhard was amongst them. One of the Bois-brulés asked Mainville whether Mr. Keveny had made a great deal of resistance when he was killed. The party were then round a fire and De Reinhard was nearer to Mainville than I was. I cannot tell the distance exactly; perhaps he was as near as you are to me, or from the witness box to the Judges' Bench, but De Reinhard was certainly nearer to Mainville than I was myself. Mainville replied to the question of the Bois-brulés, that Mr. Keveny said he was ill and desired to go on shore; and that he had been put on shore, and on re-embarking De Reinhard had stabbed him in the back with a dagger or sword, that Keveny was crushed and doubled himself down upon the stroke, and

that De Reinhard attempting to give him a second cut with the sword, Mr. Keveny, in rising, seized hold of De Reinhard's dagger or sword with his hand, and that thereupon De Reinhard called to Mainville to kill him, and that Mainville then fired his gun, and sent the ball through his neck, and that Keveny fell upon the canoe; and Mainville added, that if he had not been quick in firing, Keveny would still have had strength enough to wrest the dagger or sword from De Reinhard.

Chief Justice Sewell.—What did De Reinhard say when Mainville related this?

La Pointe.—He said nothing, but conversed with the others; but I do not know what he said.

Chief Justice Sewell.—Did Mainville speak as in common?

La Pointe.—He spoke loud enough for me to hear very well, and I did hear him very well.

Examination continued by the Attorney-General.

La Pointe.—I saw Reinhard's sword afterwards, but I did not observe whether it was bloody or not. I saw Keveny's things, and Mr. De Reinhard began to divide the baggage and the clothes. I saw the things in the canoe all bloody. Mainville and the Indian brought the things on shore. They were full of blood and I saw them washed the same evening by them. There was a great deal of blood in the canoe at the bottom; and certainly more than the blood of a bustard. Ten bustards would not have given so much blood. I do not believe that the bustard was ever in the canoe, for I saw it fall in the water, and I believe, it was thrown on shore, without having been put in the canoe at all. De Reinhard divided Keveny's things and I saw it, When he begun he said, " as it was I who killed him, I will have the first choice " of his things; and as Mainville was with me, and assisted me in kil- " ling him, he shall have more than the others." There were two small boxes of papers, one was a round box covered with skin, and a small thing or writing-box (*une boîte pour écrire.*) [Witness here explained that " *la boîte pour écrire*" was similar to a portable writing desk which Mr. Justice Bowen had before him.] I saw some money in the writing box, and it was Mainville who had the money. After De Reinhard had opened the boxes he began himself to divide the things. He put the best in a box for himself, but when the *Bois-brulés* saw that De Reinhard wanted to take possession of the best things, the fine shirts and so on, they would not take any thing, excepting Mainville, who got some of the clothes. De Reinhard said, " I will give you *cotton* " *shirts* when we get to Red River," and that vexed them. The next

day De Reinhard said the things must be left here, and they can be got again on our return. I saw the things concealed (*caché*) by a party of *Bois-brulés* belonging to the same canoe as we. I do not know whether De Reinhard was with them then or not; but I know that De Reinhard gave orders to conceal them. I received orders " not to talk " of this."

Mr. Justice Bowen.—Who was it gave you these orders?

La Pointe.—It was Mr. De Reinhard; he told me " not to speak " about it," and I asked about what, and De Reinhard answered " of " the murder of Mr. Keveny." He said likewise, that " if it were " talked of, it would not be him, but we (the others) who would be " punished for it."

Chief Justice Sewell.—Are you sure, quite sure, that it was De Reinhard who said those words, and not Mainville, or any other person?

La Pointe.—I am quite sure that it was De Reinhard said it; and Mainville said, that " if I spoke of this murder I should be hung," and I am quite sure of that.

The coat was here produced.

Attorney-General.—Have you seen this coat before?

La Pointe.—Yes. I have seen a coat like that, of the same colour and of the same kind of cloth, but newer, and certainly a little longer. I received it in exchange from Mainville for a capot. I took it because I was going to winter at Lake la Pluie, and I had nothing but a shirt. All my clothes had been left at Bas de la Rivière in Mr. Cadotte's canoe, at the time that Mr. Keveny was given to me in charge.

Chief Justice Sewell.—Did you give that coat to any other person?

La Pointe.—Yes. I parted with it to Hubert Faille.

Examination resumed by the Attorney-General.

La Pointe.—At Lake la Pluie I had no things, nor any clothes, none at all but only one shirt; I was almost naked. When De Reinhard, Mainville, and Joseph, arrived, I saw a bloody coat in the canoe, which I had before seen upon Keveny, at the period he was under our charge. I recollect it very well, and I saw there were holes in it in the neck and in the back; one large one, and one smaller one. I can certainly take my oath that the coat I saw in the canoe was Mr. Keveny's coat. I did not take the coat in my hands, but I saw it was pierced by a ball.

Cross-examination conducted by Mr. Vallière de St. Réal.

La Pointe.—It was below the Dalles that Mr. M'Donell met with Keveny. He did not appear to have any animosity against him; but, on the contrary, he caused his irons to be taken off. Mr. M'Donell belongs to the North-West Company; he is a partner as I have understood. They ate together, and he gave him two bottles of liquor, and some small biscuit. Mr. Keveny spoke English, and I never heard him say any thing in French. José Fils de Perdrix Blanche did not speak French; he spoke a few words, he could utter a few words, but I do not know whether he even understood them himself. I do not speak the Indian language, and the Indian could speak but a very few French words, yet the signs which he made at the same time, made him to be understood. Faille once quarreled with Keveny. Keveny wanted to strike him. It was at the Portage des Rats, or at the Portage des Bois, and about the time we met Mr. Thomson, who advised us to turn back. Mr. Keveny did not choose we should turn back, and he endeavoured to upset the canoe. I was afraid that he would have upset it. I have no knowledge that Faille ever was about assisting Joseph with a stake, or in any other way to kill Keveny, nor that any other man ever set about cutting a stake, and went with it to the door of Keveny's tent with the Indian, in order to kill him if Joseph missed him. We left no arms with Keveny; we had none ourselves; excepting Joseph, who had a gun. He had no fire. It was upon an island that we left him, and he had no canoe, nor any other means of leaving the island, but by swimming, (the mainland was not far off,) or by making a small raft, or by waiting for a canoe going by to take him off. The reason why we left Keveny on the island was because we had no more provisions than a kettle (*chaudiere*) or two; and, also, that we might go and get some provisions from the brigade, and because the Indian did not know the way, and would not take him on board. Keveny had no axe nor any thing to cut wood with. I did not know at the time whether he had materials for striking fire or not. When the Indian Joseph went away from us, that is after we had left Keveny, he had been for a long time in the habit of maltreating me; he struck me with the paddles. He kept possession of the bar of the canoe, and was eating while we were paddling, and could not eat; and the next day being at Portage des Esclaves, he would not let us take our meals, he would not give us any thing for breakfast. We landed our things, and he took his gun and pointed it at me, but Faille snatched it from him. The gun had no flint; I am quite convinced that the gun had no flint. He left us there,

and I did not see him again, till after I was beaten by Mr. Archy, when he had a Scotch cloak about him. At that time his hand was wounded. The answers which I gave to the people of Mr. Archy's canoe were given before Mr. Archy beat me, and before I was aware that Joseph was in the canoe. I said I had fled from the Indian after I had fought with him. I cannot recollect exactly all that was said; I was then very much frightened, and scarcely knew what I was about, but I was not mad, although I said just now that I was half-mad when we were upon the island. We were, I believe, fifteen in number in the canoe when we left the island. I did not dispute with Faille when I saw the Indian saying that it was him and not me that had beaten him; Faille said that it was me, and that was true. I did not accuse Faille of having beaten him. Mr. Archy when he flogged me did not say why he struck me, but the same day in the canoe, he told me it was because the Indian should see it; and I said to him, that he ought not to have flogged so hard. In the canoe the people sometimes changed seats. The day that I embarked with Mr. Archy, there was sometimes one man, and at other times two, between me and the gentlemen. I do not recollect whether I was next the steersman or near the steersman. Lorrain paddled behind the gentlemen, and there were no other gentlemen on board but Mr. Archy, Mr. Grant, Cadotte, and De Reinhard, and they did not paddle, nor did the Indian José. I do not know, for certain, that all the people in the canoe heard me when I related that the Indian wanted to kill Keveny. I believe that the canoe was under way at the time, but if it had been lying still they would have heard me. It was the same evening, I believe, that I recounted the occurrence between the Indian and Keveny. I never said, nor I never heard Faille say, that he and another repaired with the Indian Joseph to the entrance of Keveny's tent with stakes to finish him, or to kill him, if the Indian missed him; but I said that the Indian had cut stakes, and that he brought them to us, shewing us with his gun, and by his signs, giving us to understand that if he missed his aim, we were to do it with the stakes. I do not remember having said, nor having heard Faille say, that the reason why Keveny had not been killed was because the Indian had done nothing. Faille did not say, to my knowledge, and certainly not before me, " if we had not besought La Pointe, Keveny would " have been killed; La Pointe would have struck the blow, his heart " was black enough to do it;" and, I am also certain, that he never uttered in my presence any other words to the same effect, as far as I heard. I do not know whether the others who were in the canoe heard Mr. Grant, when he said to me, " come, come; try to forbid him now, " you shall be well received; I would make you swallow what I have

" got in my gun. He said it in the canoe, in the place where he sat.

Mr. Justice Bowen.—Was the canoe then under way?

La Pointe.—I do not recollect whether the canoe was at the time lying still, or whether it was going on. Le Vasseur, Mainville, and some other Bois-brulés spoke quite loud, properly so, of killing Keveny, and all in the canoe made a jest of it, and they spoke loud, properly loud (*haut comme il faut*). It was in the canoe, before we came to the island where we found Keveny, that De Reinhard spoke of killing Keveny, and he said it in the same manner as he generally spoke, not aside or secretly, but aloud, and the words were, " I will take good care of " him, it is I who will kill him." It was at the time that the Bois-brulés were expressing themselves about killing Keveny, and dividing his clothes and things, that De Reinhard said this. The last time I saw Mr. Keveny, and that was at the period when we left him with De Reinhard, Mainville, and Joseph, he was better dressed than I had before seen him. The clothes which were in the canoe were not the same as those which he had on when we left him, because Mainville told me he had changed his dress before he embarked.

Mr. Vallière de St. Réal.—The Court, I hope, are not taking down the latter part of this answer, it forms no part of an answer to any question I have put to him.

Chief Justice Sewell.—I most certainly am, Mr. Vallière, and feel myself bound to do so.

Mr. Vallière.—I must then, with great submission to the Court, object to its being taken; it is at the best but mere hearsay evidence.

Solicitor-General.—I must submit to the Court that there cannot be a doubt, but that the whole of a witness's answer should be taken. He is asked a question, the object of which cannot for a moment be concealed; the witness, in the former part of his answer, appears to meet the wishes of my learned friends, but when he offers to account for this apparent weakening of the evidence on the part of the Crown, then he is to be immediately stopped. I trust that the Court, thinking us fully entitled to the answer as the witness gives it, will insert it entire on their notes.

[Mr. Vallière de St. Réal urged that the mild spirit of British law considering the strength of the Crown in its character of public prosecutor, is inclined to extend, rather than limit, to the prisoner the exercise of every privilege to which he is by the laws entitled—he contended that it was the undoubted right of particularly the defendant to have the entire answer taken down, because the witness adduced with all that bias on his mind, which the freedom allowed in cross-examination presupposes him to have towards the party bringing him before the Court,

had himself benefited the prisoner by his testimony; but, if, under a cross-examination, it was permitted to a witness to introduce, in answer to a direct question, any extraneous observation of his own, or, as in the present instance, mere hearsay evidence, of what some other person had told him, and the officers of the Crown to insist on taking it down, we are then so completely at the mercy of the malice or ignorance of either a wicked or an uninformed witness, that the great and extensive benefits, which are the usual consequences of a cross-examination are done away, and the freedom allowed in them is only likely to be a fruitful source of danger to the unfortunate prisoner.]

Mr. Justice Bowen.—If no evidence had been offered to prove a connection between these two persons, I should certainly concur with you in opinion, Mr. Vallière; but, unfortunately, evidence has been introduced, which most clearly, and distinctly, connects De Reinhard with Mainville, and, till that evidence is rebutted, I certainly think the Crown are entitled to have inserted on our notes any proofs that may be extracted from a witness at any period of his examination, of acts done by either, in the presence of the other. As the case stands, it has arrived at this point as I take it. A coat is produced, it is identified as having been in the canoe in which Mainville, De Reinhard, and José, the three persons with whom the deceased was in company the very last time he was seen, arrived a few hours after the witnesses had so left him in their company; it is sworn to as being a coat belonging to Keveny, and, upon examination, it proves to be pierced in two places, so as to have a corresponding appearance to that which, from the manner the indictment alleges that Keveny met his death, it might have been expected the coat he then wore would have presented. To remove the effect, or weaken the impression, of this secondary evidence, corroborated by other parts of the testimony, you ask him how Mr. Keveny was dressed at the time he left him, and he answers that he was habited like a gentleman (*monsieur*) and better dressed than the witness had ever seen him before; there appears to be a doubt thrown upon this testimony, by the difference between the coat produced, and that which we might, from the former part of his answer, have expected to have had exhibited; but explaining what, if left unexplained, might seem to be an impeachment of his own evidence, he says. "Mainville told me that before "embarking he changed his dress;" and, I clearly think that a connection at present being in evidence between Mainville and De Reinhard, that what Mainville said may be adduced in evidence.

Mr. Vallière de St. Réal.—Not, I hope, to make him answerable for what it is not attempted to be proved was said in his hearing.

[Mr. Justice Bowen said—in my opinion it is admissible evidence to go to the Jury, and the Chief Justice expressing his concurrence —]

The cross-examination was resumed by Mr. Vallière de St. Réal.

La Pointe.—When De Reinhard divided Keveny's things, and said that he would have the choice because he had killed him, all the others were present, as I believe, excepting Mr. Archy (M'Lellan.) In going to Lake la Pluie, it was on the right hand (or, reckoning by the banks, the south bank) of the River Winnipic, where I saw Mr. Keveny for the last time. I was sent with Faille by Captain D'Orsonnens to Fort William. Since the last trial I have conversed with several people, who told me to tell the truth, and even to take the sacrament, and to go to confession before giving my testimony here. I am not engaged in the service of the Hudson's Bay Company, nor of Lord Selkirk. I was served with a writ by Mr. Coltman at Red River to come down, and he admonished me to speak the truth. It is Mr. Gauvin, the Sheriff's officer of Montreal, who pays for our board at present, I believe. My Lord Selkirk told me, that when the Court and all was over, I should be well paid. He gave me a little money when I was in the north. I received no more from the North-West Company, during the six months I was with them, than twenty-five dollars, but I expect to get the remainder from them. Mr. Forrest, Lord Selkirk's agent, has given me sums of five dollars at different times; perhaps thirty dollars, perhaps forty, I cannot say exactly; but I have not received more than fifty dollars from him. I reside at present at l'Assomption.

LOUIS NOLIN, *Sworn.*

Examined by the Solicitor-General.

Mr. Nolin.—I was in the Indian Country in 1816, and before getting to Lake la Pluie, I heard the Indians speak of a murder committed at the River Winnipic, but at that time I did not know upon whom. After I received this information, I continued my route towards Lake la Pluie, and met with a canoe in which were Mr. Dease, La Pointe, and three or four others; and from them I learnt that a murder had been committed. Afterwards I continued my route, and arrived in the beginning of the month of October at Lake la Pluie. I had received orders from Captain D'Orsonnens to desire De Reinhard who was at Lake la Pluie to wait Captain D'Orsonnens' arrival; but I had no orders to detain him by force, or to take him prisoner, but to endeavour

to obtain information of what had occurred at Red River. On my arrival at Lake la Pluie, I slept that evening with two freemen, and from there, on the next day, I went to the Fort. I entered Mr. Sayer's room. Mr. Alexander M'Donald went into De Reinhard's room, and in a short time after, all the five, that is to say, myself, Sayer, Roussin, M'Donald, and another, entered another apartment. De Reinhard had in his hand a note or letter, and, walking in the room, said that he was much surprised that Captain D'Orsonnens wanted him to give information about Red River. Captain D'Orsonnens arrived three or four hours afterwards, and he walked with De Reinhard out of doors. I followed them, and walked with them. I did not hear the beginning of their conversation; they were some time together before I went to join them.

Mr. Justice Bowen.—Did you yourself, or did you hear any other person make any promises or threats?

Mr. Nolin.—No your Lordship.

Solicitor-General.—Relate the conversation.

Chief Justice Sewell.—Stop, if you please, Mr. Solicitor-General; we must know the commencement of this conversation.

Mr. Stuart.—Will the Court just allow me to ask the object of producing this conversation. Is it to prove a confession?

Solicitor-General.—Yes; it is.

Mr. Stuart.—Then to this course of the Crown lawyers I most certainly object, it is an attempt to call a witness to corroborate what is not proved. The fact of the death, according to our judgment, is not proved; but, waving that for the present, it is now proposed to support, by way of a corroborating testimony, a fact to which no evidence whatever, that can be received for a moment, has been ever offered. What may be the result of such a course? why, that when Captain D'Orsonnens is called, his evidence may prove, and (if not wrongly instructed) it will prove that every thing connected with this pretended confession is totally inadmissible. If I am not wrongly instructed we shall prove it to result from a fear amounting to absolute terror, produced by a series of unheard of aggressions and violence, such as never was before seen on this continent, and such as, for the sake of humanity, it is to be hoped will never again disgrace it.—I should be wasting the time of the Court to attempt to establish the inadmissibility of a confession obtained under such circumstances,—circumstances, which in their nature are without a parallel, and of a description, that to avoid their effects, the most innocent man might be induced to confess, or even accuse himself of crime. The authorities which prohibit the admission of a confession under even the slightest expectation of reward, or apprehension of pun-

ishment are as numerous as they are familiar to every lawyer.—*Mr. Stuart taking a book in his hand, and opening it* ——

Chief Justice Sewell.—I do not, Mr. Stuart, see any necessity for your troubling yourself to adduce authorities, for if you can shew that the confession was improperly obtained, doubtless it cannot be received as evidence; but unless we have the commencement of the conversation which prefaced the confession, we are in the dark as to the circumstances which induced it. Captain D'Orsonnens, with whom it commenced, is here, why not examine him, and we shall then immediately and satisfactorily decide whether it can be permitted to go to the Jury.

[The Attorney-General stated, that in laying the case before the Court he intended to produce the witnesses in the order of time in which events to which they had to testify took place, but to save the necessity of calling the same person twice, to let him testify at once to all he knows. This witness (Nolin) first saw the Prisoner, therefore he had better examine him, because it was consistent with the order of time in which the circumstances occurred.]

Chief Justice Sewell.—To whom was this confession made that you are desirous of proving? to Captain D'Orsonnens whom you do not bring forward, but endeavour to prove it by a witness who sets out by telling you that he was not present at the commencement of the conversation in which the confession was made. Certainly not at this bar, or in any other English Court can a confession be admitted till it shall be placed beyond even the possibility of suspicion, that it was voluntary, free, and spontaneous; whether it was or was not cannot certainly be proved by a person who sets out by saying, that he was not present at the commencement of the conversation in which it was made, having joined the parties afterwards.

Attorney-General.—We can call Captain D'Orsonnens first, if the Court thinks that the preferable course. Our only reason for introducing Nolin was that he first saw De Reinhard, but we have no objection to call Captain D'Orsonnens if the Court think proper.

Chief Justice Sewell.—You, certainly, cannot by this witness get the confession admitted, because he is incapable of proving the indispensable preliminary, that it was freely and voluntarily made. He can, however, answer for himself whether he did any thing, the effect of which would be to destroy it, and then, if he answers in the negative, you can call Captain D'Orsonnens and the examination can go on.

Did you, Mr. Nolin, make De Reinhard any promise of advantage in case he confessed, or any threat of punishment, if he made no confession?

Mr. Nolin.—No, Sir; not any.

Chief Justice Sewell.—Neither the one nor the other?

Mr. Nolin.—No, Sir; I neither made any promises nor any threats to the prisoner to induce him to make a confession nor otherwise.

Captain PROTAIS D'ORSONNENS, *Sworn,*

Examined by the Attorney-General.

Captain D'Orsonnens.—I am a half-pay Captain of the Regiment of Meuron. I know the prisoner at the bar, Charles De Reinhard, and on the second or third of October, 1816, I met him at the Fort of Lake la Pluie.

[Captain D'Orsonnens here intimated that he could wish the Attorney-General to commence at an earlier period, as there were some circumstances, which, as they were favourable to the prisoner, and might be of benefit to him, he was desirous of stating; they had occurred anterior to the period to which the Attorney-General had directed his attention. After some remarks by Mr. Stuart on the singularity of a witness wishing to suggest to the Crown officers a course of examination, and disclaiming any desire to profit by the offer, the examination was continued.]

Captain D'Orsonnens.—When I came to Lake la Croix, a small lake between Fort William and Lake la Pluie, I met several Indians, and from them I learnt that the Métifs, together with the people of the North West Company, watched for us in the River Winnipic to destroy us, and they described to me a military man, white, like one of those who formed our guard, and, by the description, I had no doubt that it was De Reinhard. On the following day, I believe it was, I met Mr. Dease, and I asked whether De Reinhard was at Lake la Pluie, and he told me he was. In consequence, I sent Mr. Nolin and Mr. M'Donald forward to carry a letter from me, together with Sir John Coape Sherbrooke's proclamation of the 16th July, 1816, the whole directed by me to Mr. De Reinhard. In the letter I requested him to wait for me, as I desired to receive information from him, as to what had passed at the River Winnipic. On the second or third of October I reached the fort, to which I proceeded by land, and Mr. Dease made the trip by water. I arrived the first, and De Reinhard came forward to meet me; he shook hands with me, saying, he was extremely sorry to see me in that country, that my life was in danger, as well as the lives of those who accompanied me. That there were Métifs and several engagés of the North-West Company, who, being determined to destroy my Lord Selkirk's establishment, would wait for his people in the River Winni-

pic; and that he himself had fortified the fort at Bas de la Rivière with five or six pieces of cannon, to fire upon the English when they should come down. At that moment Mr. Dease arrived, and desired me to walk into the fort, and we entered it and De Reinhard entered with us. Before we went in, De Reinhard said to me " that at some time when " we might be alone, he would take the opportunity, in pursuance of " the proclamation, to tell me all he knew of what had happened relative to Red River, and at the River Winnipic." Some time afterwards, half an hour I think, I went out of the fort, and De Reinhard followed me. He told me that " he had been left by Mr. Archibald M'Lellan at " Lake la Pluie, for the purpose of apprising him of our arrival, and " that they, the Bois-brulés or Métifs, as well as the people of the " North-West Company, had determined upon waiting for us at some " rapids in the River Winnipic in order to destroy us."

Mr. Stuart.—These questions of the Crown lawyers I consider as far, very far, beyond the limits of evidence. The simple question before us is to ascertain whether the Prisoner at the bar is guilty or innocent of the charge preferred against him in the indictment, instead of which, by the mode pursued by the Crown lawyers, we are getting into a wide story, that it is impossible to see where it may lead us. What have we to do with Métifs, Bois-brulés, or the North-West Company, or my Lord Selkirk, or any individual, except the Prisoner at the bar. This wholesale method of casting imputations on other persons, on persons who have no opportunity of repelling them, is certainly a practice as unjustifiable as it is novel. It may be, perhaps, of little consequence in some quarters whether this Prisoner is acquitted or convicted, provided his trial furnishes an opportunity for giving vent to those feelings of animosity, which a great commercial rivalry has probably given rise to. The conduct of this witness I consider extraordinary in the extreme. Under the semblance of giving evidence against a single individual upon a specific charge, in which the time, the means, and every other particular that is connected with or calculated to produce the alleged death is most explicitly set forth in the very long indictment before the Court—What is the course this witness is endeavouring to pursue? why, to charge in the lump the whole North-West Company with murder, or an intention to commit that crime. This may, perhaps, be considered a sure and safe way of propagating libels, which, if published in any other mode, would subject the slanderers to prosecution; but, it is probably calculated, that, in the shape of testimony given in a Court of Justice, publicity will with impunity be afforded to calumnies, which in no other way would sufficient temerity be found to hazard. As well might this witness libel any gentleman in this Court, the

spectators, the bar, the Jury, or even the Court itself, as those whom he is thus indiscriminately calumniating. How are they to meet these charges? what method shall they take to vindicate themselves, and rescue their honourable characters from these aspersions? He sets out by volunteering something which which he says will be of service to the Prisoner; and, manifesting a degree of anxiety to benefit him, directs the Crown officer in what manner to conduct this examination. As it is the first, so I trust it will be the last, instance of a witness directing or dictating how his examination shall be carried on; it is quite sufficient, in the discharge of the duty every individual owes to the country of giving evidence in its public Courts, to give that testimony which is sought for by those, who, from their official situations, are best acquainted with what will be conducive to the attainment of justice. My suspicions were immediately excited when the witness stepped forward in this manner. Notwithstanding the boon which was proffered, I did not believe in the sincerity of the offer, and I rejected it. We were not thus to be lulled into confidence, and the justice of our resolution I think is now sufficiently apparent. But, relative to this unwarrantable attack upon gentlemen, who have no opportunity of meeting these gross libels, for no softer term can I use to correctly designate these slanders, I shall, once for all, say, that whenever the private prosecutor in this case may think proper to become so against them, the North-West Company will not shrink from any investigation into their conduct; so far from it, they will hail the day that enables them before the world to vindicate their characters from aspersions, calumnies, and libels, which have for a length of time been circulating with an avidity and industry, proportioned to the rancour and falsehood which gave them birth and currency. But I do most sincerely trust, that the Court will oppose its authority, and prohibit this most unwarrantable and dangerous stride under the guise of giving evidence of a pretended confession, made by the prisoner, for, I repeat, that it is not impossible but it may be a matter of indifference to some whether this prisoner is acquitted or convicted, if, by the trial, they are enabled to give publicity to calumnies with safety, from the consequences that, in any other way, would inevitably attend the propagation of libels.—I object, indeed, to the evidence being received.

Chief Justice Sewell.—You will, certainly, assign to us some reasons for so doing. I confess I do not at present see what is to prevent its being gone into. If the witness asserts that the confession was made without any promise or menace being used to induce or influence the Prisoner to make it, I do not see to what end the objection is made. These questions have not as yet been put, perhaps they might as well, as it will immediately decide the question of admissibility.

Mr. Vanfelson.—In order, if it please the Court, that this witness may not be permitted to accuse others. The charge at present before the Court is a charge of murder against the Prisoner at the bar. My learned brother, the Solicitor-General, now proposes to bring forward the confession of the Prisoner, but the testimony of Captain D'Orsonnens is not confined to the confession of the murder, and we take the liberty of submitting to the Court that this course is irregular.

Chief Justice Sewell.—The Attorney-General proposes to introduce here a confession made by the Prisoner himself to Captain D'Orsonnens, to which you object, nor do I at all wonder at the opposition, as, if the confession be admitted, the effect it must produce upon the case cannot but be of the utmost importance. [The Chief Justice then noticed the remarks of Mr. Stuart on Captain D'Orsonnens, saying, no doubt they had been dictated by a sense of duty, but (he added) that *he* had seen nothing in the conduct of Captain D'Orsonnens, that exposed him to the slightest imputation of impropriety, or the shadow of blame.]—Although a little out of the regular course, I think, as it was a voluntary offer of benefit you might have availed yourself of it. It could certainly have done you no harm as he was not your witness.

Mr. Stuart.—Yes, but your honour knows " timeo Danaos et dona ferentes."

Chief Justice Sewell.—With respect to where we are now, the question appears to be, supposing that the circumstances under which this confession was made do not preclude its being admitted as evidence to go to the Jury, whether the *whole* or a *part* of that declaration shall be received. On this point I am decidedly of opinion that the declaration once admitted, it must be taken from beginning to end. It is his own statement of his own conduct, and, whatever it may be, it can affect nobody but himself. The Crown, most undoubtedly, are entitled to have it, and any part that does not directly apply to this case, cannot at all affect or bind others, because it is merely an assertion, and completely ex parte, but it is not, therefore, to be excluded. It forms a partof what he did say, and, therefore, must be given in evidence, otherwise we might do him or the Crown an injustice.

[Mr. Justice Bowen in concurring in the opinion delivered by his Honour the Chief Justice, remarked, that it might be an act of the greatest injustice to the Prisoner, to separate or keep back any part of his confession.

Chief Justice Sewell.—Captain D'Orsonnens, I wish to know whether before the Prisoner made his declaration you used any promise or threat to induce him to make it.

Captain D'Orsonnens.—No, not any—he related it as a matter of conscience.

Examination continued by the Attorney-General.

Captain D'Orsonnens.—The Prisoner then spoke to me of an assassination that had been committed in the River Winnipic, and he added, that he believed himself bound as an honest man, and in pursuance of this proclamation, to reveal the circumstances of the assassination that had taken place, for the information of his Majesty's government.

Chief Justice Sewell.—Excuse me Captain D'Orsonnens, but I would again ask you if you are certain that you neither made any promise nor any threat?

Captain D'Orsonnens.—Yes, your Lordship, I neither made him any promise nor any threat; I said nothing to him either for or against.

Attorney-General.—Relate what he told you.

Mr. Stuart.—It is now proposed to prove this pretended confession. I am in time therefore to object to its being admitted. There are two courses I believe open to me; first, to object to it now; secondly, to wait till the cross-examination. I propose, however, as the safest and at the same time as the shortest method, to put a few questions to the witness, under a belief that his answers will prove that this pretended confession is not evidence to go to the jury at all, for that the circumstances under which it was made, were such as completely to exclude it. These questions I apprehend will be very few, and they will be in the nature of an examination on the *voire dire*, to which course I believe I am fully entitled.

Mr. Justice Bowen.—Will you, Mr. Stuart, state the circumstances which you consider as entitling you to this examination, or what you propose to prove.

Mr. Stuart.—I intend to prove the existence of a private war—a war against the North-West Company—and that in the prosecution of that war this unfortunate individual at the bar who was in the service of that company, fell into the hands of his enemies, and ——

Attorney-General.—I really must interrupt my learned friend, for I do not understand what he means by, a private war. Were it even proved to have existed in the fullest sense my learned friend contends for, it could not, certainly, be offered as any justification for a murder, nor as a legal cause of influencing the mind of the prisoner.

Mr. Stuart.—I admit that it is, and certainly ought to be, a matter of regret, that such a war did exist, and it may hereafter be a suitable enquiry why it was not prevented; but, at present, we have nothing

to do with that. I will prove, by the most positive testimony, that a private war did exist, and that, in its progress, the Prisoner fell into the hands of the party belonging to the Earl of Selkirk. This party was in reality a military force, who had already captured, and were then retaining, by force of arms, the principal station of the North-West Company. I say that it was a military force, because it was provided with every thing that would constitute it one, arms, accoutrements, ammunition, cannon, in short, equipments of every description. It was composed chiefly of men who had been trained to war; they had been soldiers in the regular army. The witness now in the box was at their head, and he tells us, that he is at this moment a half-pay officer of the Regiment De Meuron. This force was in the pay of the private prosecutor in this case, raised and equipped at his own expence to promote his own views of private advantage, and the witness now in the box had the command of this military force, or rather, from its illegality, this armed banditti. I remark again, that it is not now a question whether this was a legal or an illegal force; whether it is not extraordinary, that, with his elevation of rank, the private prosecutor should, in the promotion of schemes of secular advantage, the gratification of inordinate ambition, or to accelerate the destruction of a commercial rival, have not only forgotten what was due to those laws which his rank enabled him to assist in enacting, but actually have put himself at the head of a force to levy war, at his will and pleasure, against those, whose only crime was, that, in the peaceable pursuit of a lawful commerce, they interfered with his gigantic, and, perhaps, equally visionary, prospect of an exclusive sovereignty over an immense and scarcely explored country; or, whether it is not to be lamented that the government either did not possess, or did not exert, a power adequate to the prevention of this private war; all we have to do with at present is the fact, that it *did* exist, and the consequences of its so existing. The causes which originally led to it, the means by which it was supported, and the reasons for which it was not, or could not, be prevented, are topics for discussion probably in another place; but most certainly at another time.

Attorney-General.—The statement of my learned friend is certainly one that completely surprises me. As to *private war*, I really know of no such thing, nor can it, according to my opinion, exist. If the statement I allude to is founded on fact, it constitutes the crime of high treason; but, surely, the gentleman does not consider an accusation of high-treason, though susceptible of the clearest proof, can be admitted as exculpatory evidence on a charge of murder.

[The Chief Justice expressed his astonishment that it could for a mo-

ment be thought necessary on the defence, to exhibit an unqualified allegation of high treason, against a number of persons of whom the Court were bound to know nothing.

The Solicitor-General said, that the officers of the Crown could not, from any apprehension of the effect it might have, be at all times anxious to exclude the proposed evidence, though, perhaps, it might be a consideration how far it was right to permit a witness, who is certainly under the protection of the Court, to be exposed or made liable to accuse himself, by his evidence in a Court of Justice, of high treason.—*To which*

The Chief Justice most pointedly observed, that, it could not for a moment be supposed that a witness, whom, by every obligation of duty and office, the Court were bound to protect, would be allowed to implicate himself, by admitting that he has been guilty of high treason.

The Solicitor-General remarked, that, if, at the time of making this confession, the prisoner was in a state of illegal duress, the result must be that the confession must fall through; but it was a most extraordinary and novel proposition to say, that this private war, if it did unfortunately exist between these two companies, should be given in evidence, as a reason on an indictment for murder, against receiving a confession made by the accused. He concurred with the Attorney-General that, if its existence were proved, the law would denominate it *high treason*, and punish it as such.

The Chief Justice stated, that any course of examination, which had for its tendency to draw facts from Captain D'Orsonnens, bearing ever so remotely on the case, might be pursued. If it was thought proper to enquire whether, at the time of making his confession, the Prisoner was in a state of duress, it is a question that must be answered; but, if the *nature* of the restraint should be investigated, this witness *may* be in a situation that he cannot be compelled to answer (I do not say that he *is*, far from it) any questions on that point. If it should in any way affect himself he certainly may refuse to answer, and we shall protect him in his resolution. His Honour added that, it could not be expected that Captain D'Orsonnens should prove that De Reinhard was a prisoner of war, because, if he did, it might involve himself, and repeated his astonishment at the broad unqualified way in which the war and Captain D'Orsonnens had been spoken of.

Mr. Stuart did not want Captain D'Orsonnens to prove that *he* made this unfortunate man a prisoner. That this force was headed by him, and raised and paid by the Earl of Selkirk, for the purpose of overturning his commercial rivals, was a matter of such public notoriety that there could be no difficulty in adducing testimony to substantiate it.—

Mr. Stuart again, in energetic language, adverted to the attack made upon persons not before the Court, and concluded, that were it even admitted that his confession ought to be put on their Honours' notes, it should be confined to that part which strictly relates to the charge laid in the indictment against him, and that the witness ought not to be permitted to relate any part of the conversation, not immediately bearing upon the question of the guilt or innocence of the prisnrer.

Mr. Gale.—I would humbly submit to the Court that ——

Mr. Stuart and Mr. Vanfelson.—Mr. Gale is not, assuredly, going to address the Court.

Mr. Gale.—As *Amicus Curiæ* I certainly must beg permission, and, conceive it being a very customary practice, I shall be allowed to offer a few words. The impropriety of traducing characters will be freely admitted, but, I think, it has been but little avoided by those who complain of being attacked. As *Amicus Curiæ* I conceive, relative to the confession, *a part* certainly ought not to be received; but that, if admitted at all, it must be admitted as a *whole*. Relative to the Earl of Selkirk, having a perfect knowledge of the steps he has taken, and of the motives which actuated his conduct, I confidently affirm, that no man, disposed to act with any degree of honour, could do any other way than take the measures he did. All he has done has been in the upright and conscientious, but fearless, execution of his duty as a magistrate. Having had the honour to be employed on various occasions as leading counsel on behalf of the Earl of Selkirk, I feel it my duty to protect his character when I hear it attacked, and, more particularly, as no circumstance in the case renders it at all necessary that it should be adverted to.

Chief Justice Sewell.—I feel it my bounden duty to interpose, and beg of you gentlemen, to let no warmth of feeling, though dictated by a sense of professional duty, added perhaps to personal esteem, lead us into forgetfulness. We also know the parties individually, and privately respect them all; but *here* I know nobody, God forbid that I should.—Whilst sitting here, I have, in conjunction with my learned brother at my side, a duty, a serious and bounden duty to perform, that of administering with fairness and impartiality, strict justice to all parties that enter this Court. The Crown and the Prisoner are entitled to this strict justice from us, and according to the light we have each shall have it. We have no other aim than to secure to each party, the public prosecution on the one hand, and the defendant on the other, the fullest advantages afforded to them by the law, and to the counsel on both sides we are disposed to preserve their privileges to the utmost extent. In the various applications which have been made to the Court, what-

ever has been granted either to the Crown or to the Prisoner, has been given because in our consciences we believed them entitled to it. The abstract question between the Crown and the Prisoner, is this, has he or has he not been guilty of the crime of which he is accused? Every thing connected with this question has a right to be brought forward, but I do not see the most remote connection or bearing upon this abstract question in the state of the Indian Country, or that it can furnish evidence to invalidate a confession of the crime of murder, nor can there be the least necessity for referring to the conduct of persons not before the Court, on the one side or on the other. I repeat to you, gentlemen, the charge is a charge of murder; that is the question between the Crown and the Prisoner, and in ascertaining his guilt or his innocence, let the law take its course fairly, purely, and honourably. It is our anxiety that it should do so, and we trust that the ends of justice will be attained without deviating into a course that cannot tend to do us any credit in the eyes of the world.

Mr. Stuart regretted that any thing should have fallen from him calculated to excite a warmth of feeling that called for the interference of the Court; but (said Mr. Stuart,) the life of that man is put into my hands, in conjunction with my learned friends, and I feel I cannot do justice to him without proving the state of the country, as I shall then shew, that this pretended confession was made under circumstances of restraint and fear, and coming, in the words of M'Nally, page 43, " in so questionable a shape that it must be rejected."

Mr. Justice Bowen feared that he had been the innocent cause of this misunderstanding by asking a question: in reply to which, difficulties had been stated, which he imagined would never occur, for even admitting that apprehension existed, as one unlawful act could not be set up as a justification of another, so neither could apprehension of consequences that might result from an illegal act, be received as a reason for rejecting the confession.

Mr. Stuart.—It is one thing for an illegal act to be committed in the lower-town of Quebec—and another for it to be committed in the Indian Territory, where there was no law but the will of the private prosecutor, and where all who did not submit to his authority, were treated as rebels and traitors. We know if this had been done in Quebec, the remedy was at hand; an appeal to the law would have immediately set him at liberty; but to whom, when in the power of the private prosecutor, was he to apply for redress? I am sorry to affect the feelings, unnecessarily, of any man, but I cannot help it. In the performance of my duty, no consideration of rank or consequence can for a moment restrain those observations which I feel myself compelled to

make. I cannot, from motives of delicacy to any man, however high his rank, consent to any course that might have a tendency to sacrifice the interests of the Prisoner, whose life indeed is the stake we are endeavouring to preserve. By proving the state of the country, we think we shall prevent the pretended confession from going to the Jury, or should your Honours permit it to go to them, that they will, in the exercise of a sound discretion, consider the circumstances under which it was obtained to be such as to warrant them in giving no credit to it. I will, with permission of the Court, proceed with my questions—and I shall first ask, had Fort William been captured by Lord Selkirk before you saw the Prisoner, De Reinhard, at Fort Lac la Pluie; and when was it so captured?

Captain D'Orsonnens.—No; but Lord Selkirk took possession of it on the thirteenth of August.

[Mr. Stuart's next question being to the *manner* in which the fort was taken possession of, the Chief Justice remarked, that he had taken the last answer down merely as a fact, but, if Mr. Stuart intended to follow it up, and to prove how it was taken possession of, he thought, in justice to the witness, he ought to strike it out, and he should do so.

Mr. Stuart disclaimed any wish to ask this witness any question that would implicate him by answering, but conceived that he had a right to prove that Fort William was captured, and to go on and shew that it was retained forcible possession of, and, from that circumstance combined with others, as the prisoner was under that restraint which the clemency of English law deems sufficient to exclude a confession from being received as an evidence of guilt. He referred again to Macnally, rule 9th, page 43.]

Chief Justice Sewell.—If I understand you, it is intended, by an examination in the nature of one on the *voire dire* to prove, that, by a military or armed force, Fort William was taken possession of, and to follow up that by evidence of a similar taking of the Fort of Lac la Pluie, and thence to infer that the confession, offered on the part of the Crown, ought not to be permitted to go to the Jury, because it was extorted by the restraint which the Prisoner was subject to. I apprehend that these will be found too remote circumstances to invalidate the confession, and, particularly, as it stands at present in evidence, that possession was not taken of Fort Lac la Pluie, till *after* he had made it, and was so taken in consequence of information which he associated with his confession.

Mr. Stuart.—I must still, with great submission to the Court, contend that the doctrine on which I rely, for the exclusion of this pretended confession, is correct, and is sanctioned by authorities equally respecta-

ble as numerous. The rule in Macnally, which I just now submitted to the Court, is supported by Gilbert on Evidence, page 137, " these rules reflect the brightest lustre on the principles of the English law, which benignly considers that the human mind, under the pressure of calamity, is easily seduced, and liable in the alarm of danger to acknowledge, indiscriminately, a falsehood or a truth, as different agitations may prevail." What can be more applicable to the present case, for, if even it were contended that the circumstances *ought* not to have had that effect, were they not such as might easily be supposed to produce the state of mind which is described as leading, indiscriminately, " from the alarm of danger" to the " admission of either falsehood or truth, as different agitations prevailed." This able writer goes on to exhibit, in language equally forcible, the reason upon which this humane construction of law is founded, therefore, he adds, " a confession, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant by the impression of hope or fear, however slight the emotion may be planted, is not admissible evidence. For the law will not suffer a prisoner to be made the deluded instrument of his own conviction." Having thus set forth the rule and descanted on its propriety he subjoins an illustration of its wisdom in these words " the wisdom of this doctrine was fully illustrated in a case at Glocester. Three men were tried for the murder of Mr. Harrison at Cambden, and one of them, under a promise of pardon, confessed himself guilty of the fact. The confession, therefore, was not given against him, and a few years after it appeared that Harrison was alive (M. S. note cited in Leache's Cr. Ca. 2d. edit. 223—3d edit. 298.) Mr. Phillips in his Treatise on Evidence maintains the same doctrine, after stating in sect. 5th, page 81, the weight of a voluntary confession, he describes the circumstances that are necessary to justify its admission against a prisoner. " But the confession must be voluntary, not obtained by improper influence, nor drawn from the prisoner by means of a threat or promise, for, however slight the promise or threat may have been, a confession so obtained cannot be received in evidence, on account of the uncertainty and doubt, whether it was not made rather from a motive of fear or of interest than from a sense of guilt."

[The Chief Justice observed, that facts which immediately surrounded the case might be proved, whether they ought or ought not to have produced the effects which followed them was another question, but the facts themselves they had a right to lay before the Jury, because they might account satisfactorily for the effects. Thus if proved that the Prisoner was suddenly taken possession of by a body of armed men, and under fear of consequences, was induced to make a confession, though it

might not, from its being an illegal restraint, set the confession aside, so as to prevent it from going to the Jury, yet it might form a solid ground for examination with them as to what degree of credit was due to it. But (he added) *remote events* such as the capture of a fort at a distance of probably a hundred leagues, or circumstances not bearing immediately on the question which the indictment brings before the Court, I certainly consider you are not entitled to go into.

Mr. Justice Bowen intimating his acquiescence in these opinions of his Honour the Chief Justice—

Mr. Stuart observed, then I will narrow my questions so as to meet the decision of the Court, *and commenced his examination on the* voire dire.]

Mr. Stuart.—Did you go into the Indian country, or to Lac la Pluie, in a civil or military capacity at the time you have mentioned?

Captain D'Orsonnens.—I proceeded to Lake la Pluie in October, 1816, as a simple individual, and not in a military capacity.

Mr. Stuart.—How many persons were there under your charge?

Captain D'Orsonnens.—Seventeen colonists, discharged men of the regiments of Glengary, Meuron, and Watteville, destined for Red River; and, also, eighteen Canadians, voyageurs, in the service of the Hudson's Bay.

Mr. Stuart.—Did you stop at Lake la Pluie, and why?

Captain D'Orsonnens.—We stopped at Lake la Pluie in consequence of the information which I had received from De Reinhard of the danger which awaited us in the River Winnipic.

Mr. Stuart.—These people were they armed, and was it with hunting guns, or with American guns?

Captain D'Orsonnens.—The colonists were armed, some with hunting guns, and some with small American guns; the Canadians were not armed.

Mr. Stuart.—And, as it was your intention to proceed to Red River, you had no intention of taking the fort at Lake la Pluie?

Captain D'Orsonnens.—My orders were to proceed to Red River if I could, and, if not, to build a house at the Portage of Lake la Pluie. Assuredly, I had not any intention of taking the fort of Lake la Pluie.

Mr. Stuart.—And you considered yourself as a simple individual, without any military command or authority?

Captain D'Orsonnens.—I was a simple individual. I was not there with any military command whatever, and I do not remember having given orders to any one, excepting to my colonists and Canadians.

Mr. Stuart —You did not give any order excepting to the colonists? nor any as "the chief of the advanced guard of an army."

Captain D'Orsonnens.—I was not there as the chief of the advanced

guard of any army. I was the chief of a party of *voyageurs*, in the Hudson's Bay service, and there was no order issued by me but to my colonists and voyageurs, excepting one directed to Mr. Dease, and that was with his own consent.

Mr. Stuart.—At what time and how did you issue that?

Captain D'Orsonnens.—I represented to Mr. Dease the danger to which we should be exposed, if the *Métifs* came, and I demanded of him to lodge us in the fort, offering at the same time even to pay him a rent. He refused me, saying, that it was impossible; and I then, as a measure of precaution, demanded the arms and ammunition. The exigency of the circumstances obliged me to make this demand, and I represented it in that way to Mr. Dease. Mr. Dease delivered the arms and ammunition to me, and I drew up a receipt for them, in the terms which he dictated to me, for his justification.

Mr. Stuart —This receipt how did you sign it?

Captain D'Orsonnens.—I signed it " Captain D'Orsonnens, commanding the advanced guard of Hudson's Bay voyageurs."

[The Attorney-General objected, that although in the latitude allowed in cross-examination, this course might perhaps be admitted, it had nothing to do with an examination on the *voire dire*; to which Mr. Stuart replied, that, without deviating at all from the rules which govern an examination on the *voire dire*, he had nearly shut out this pretended confession, by shewing that the Prisoner was under constraint, and that of the most arbitrary kind.

The Attorney-General rejoined, that all this took place in consequence of information given by the Prisoner at the time he made his confession. Was not that the case captain D'Orsonnens?]

Captain D'Orsonnens.—De Reinhard's declaration was made on the third of October, and I received the arms on the sixth; and it was in consequence of the information I got from him, that I demanded them.

Mr. Stuart.—How did you sign the receipt?

Chief Justice Sewell.—It is of no consequence how it was signed, it could not influence his confession.

Mr. Stuart.—His answer might, perhaps, affect his credibility, as we shall, on his cross-examination, shew, that all this resulted from the private war, which I shall then demonstrate did exist between these commercial rivals.

Examination resumed by the Attorney-General.

Captain D'Orsonnens.—When I held the conversation with De Reinhard, he was not a prisoner; I explained to him how much I was ver-

ed to find myself in such difficulties. He knew before making his declaration, that I was only a simple individual, (*simple individu.*) He told me that he had been sent in August, by Mr. Archibald Norman M'Leod, in the capacity of constable, with a warrant to arrest one Owen Keveny, and that he had taken him prisoner and carried him to Bas de la Rivière. That some days afterwards a council was held, at which were present Mr. Alexander M'Donell, Mr. Archibald M'Lellan, Joseph Cadotte, Cuthbert Grant, and several other *Métifs*, whose names I have forgotten. De Reinhard told me he was present (not as one of the council) and that it was resolved, that Keveny was a man of too great consequence, and that he ought to be killed, but not there among the Indians; and that he had in consequence been sent in a canoe to Lake la Pluie. That by dint of the solicitations of a man named Mainville, who had consented to kill him, he (De Reinhard,) agreed to see that Mainville did do it. Being come to a place called the Dalles in the River Winnipic, Keveny required to go on shore, which De Reinhard granted, and when Keveny came to re-embark, he (De Reinhard,) said that it was the proper time. Mainville immediately discharged his gun and wounded him in the neck, when, as an act of humanity, seeing that he could not live, he run his sword twice through his body to prevent him from suffering, and according to all he had heard from his masters, (*bourgeois*,) he was in the belief that he would have done a meritorious act even had he killed him himself, and that he should have done the same to any other Englishman, having, at a council of war some time before, heard the Indians solicited to make war upon the colonists and the English of Red River, whom he considered as enemies to government from the representations of Mr. M'Leod. I was not a magistrate and I have no knowledge that the Prisoner's declaration was taken by a magistrate, or any how, in writing. I have not received any *pay* from *any* person since the regiment has been disbanded, except from his Majesty; but besides that, I possess my own income-rents, paid to me by the Swiss.—De Reinhard described Keveny to me as a handsome young man, tall, with light hair, inclining to red. He likewise told me that they dragged his body some distance along the beach and left it there; and of his effects, that he (De Reinhard,) had given a part to some, and a part to others, and kept a part himself, amongst which was his writing desk. He told me that he looked upon him as most certainly dead—for being mortally wounded, to save him a few moments of pain he (De Reinhard) had run his sword through his body. He also told me that his body had been left quite naked, having been stripped even to his shirt.

Cross-examination conducted by Mr. Stuart.

Captain D'Orsonnens.—I left Montreal on the 27th of May, 1816, with eight men, formerly Meurons, engaged as voyageurs to Kingston, and fourteen, sixteen, or more men, formerly Watteville's. At Kingston we were joined by Captain Matthey, Mr. Graffenreith, and Lieutenant Fauche, with fifty or sixty, and the whole number might then amount to eighty or ninety men. Fort William was in the occupation of my Lord Selkirk and his people at the time I had the conversation with the Prisoner already mentioned. All these men, those with me, in the first instance, and the others, were engaged under the direction and in the name of my Lord Selkirk, and of the Hudson's Bay Company, to undertake the voyage to Red River, and to take lands there if they desired it, or, if not, to return to Europe by Hudson's Bay. I never received any money from my Lord Selkirk, nor from the Hudson's Bay Company, and I do not mean to receive any. We had cannon, (but not any mounted, nor any tackle) (*gremens*) intended for the defence of the colony, and (as I believe) to replace other cannon which had been stolen the year before. I have no personal knowledge that these cannon were stolen, but I believe they were.

Mr. Stuart.—This very answer demonstrates I should humbly submit that we should be permitted to go into evidence of the *general* state of the country, for, if not allowed to do so, the prisoner is deprived of his principal ground of defence. I have no wish to enquire whether my Lord Selkirk was right in taking possession of Fort William with an armed force, and in pushing his conquest to Fort Lac la Pluie, or whether the witness was not at the head of that army which took the forts, and whether the whole were or were not in the employ and pay of the private prosecutor. I do not want to mention the name of my Lord Selkirk in the examination, but, I do humbly contend, that every thing material to the defence ought to be admitted. We consider that we should be allowed to shew the general state of this unfortunate country torn to pieces by a war, emanating from a great commercial rivalry, and bounded only by the interest or ambition of those engaged in the conflict, but, from the peculiar situation of that country, involving personally in its consequences all who, from any circumstance, were found within its wide and extended range. Widely different is that immense wilderness to a civilized country;—an immense territory known, in part only, to the fur-traders—in possession of the aborigines, the native lords of the soil—tracked only by the hunters in pursuit of the beaver—with no habitation but the cabin of the Indian, except the posts

which commercial enterprize has established. Widely different is a confession made in a territory remote from every thing like the semblance of magistracy or judicial authority, where to be accused was to be convicted; nay, to be suspected only was to be exposed to punishment, and where the only avenue to the protection which the law afforded being in the hands of the enemies this man—*his* enemies because they were at war with his *employers*—was, therefore, closed against him; different, indeed, is a confession thus made, to one made in our police office, where it may be reasonably esteemed, the disburdening a conscience troubled by a sense of guilt, there it may be only a self-accusation under the hope of some advantage. *Mr. S. again referred to the case of Harrison.* If allowed to prove the general state of the country I should demonstrate, perhaps, that self-accusation was this prisoner's *only* security for the preservation of life. Nothing, after what I have witnessed of the lawless violence practised in this unhappy country, can excite my astonishment. The preservation of the interests, nay, the life of that man is entrusted to our hands, and from no motive of delicacy to any individual, let his rank be ever so high or elevated, will we consent to sacrifice the one or endanger the other. In the discharge of professional duty, I dare not; whilst, as a man, I should scorn it.

The Chief Justice enquired what effect this could have upon the case as it now stands. He should (he said) be sorry to prevent any thing being adduced in defence of this unfortunate man, but there must be shewn a connection between the charge and evidence, which *prima facie* did not appear to have the least bearing upon the case, before it could be admitted; for, supposing the whole substantiated, does the state of the country alter or justify a deliberate murder?

Mr. Stuart.—I am not *arguing* upon any of the circumstances I specify; they have been only mentioned as matters of public notoriety; but the point I have the honour to submit to the Court is, that this pretended confession ought to go for nothing, as it was made at the time that the Prisoner was in the possession of an armed force, and, to substantiate that fact, I wish to go into the state of the country generally, as, if permitted, I shall then shew that he was, although apparently free, as actually a prisoner as if confined within the four walls of the common gaol.

Mr. Justice Bowen briefly recapitulated the points which Mr. S. had stated he wished to prove, and concluded his remarks thus—The circumstances of the country generally (although undoubtedly of a very peculiar nature, and deeply to be regretted) appear to me to be *too remote* a cause from which to infer that a man would not only confess himself to be a participator in offences, but also accuse himself of murder. I

fully agree with the opinions delivered by my learned brother the Chief Justice, previous to the examination on the *voire dire*, that the circumstances were too remote, as they appear at present, to prevent the confession being received, and submitted to the Jury.

Mr. Stuart expressed himself rather glad of the decision of the Court, as it would afford him an opportunity of putting the questions, and of having a formal objection made to them, and, by that means, of obtaining a solemn decision of the Court. After its opinion, intimated just now, I shall only as matters of fact (said Mr. S.) I presume be permitted to shew that Fort William *was* taken possession of by an armed force, and prove that, *previous* to the confession, the fort of Lac la Pluie had been taken possession of by Captain D'Orsonnens. If I establish the fact that Fort William being taken was in the knowledge of the prisoner, I consider that the *res gesta* of the affair is settled; for the influence upon his mind must necessarily have been stronger when he witnessed a small division of that force, detached from the main body, to pursue the same course at the fort of Lac la Pluie, which had previously put them into possession of Fort William. The moment they took possession of Fort William I consider that they had a complete command of the country and all who were within its boundaries were subject to their will, to which any opposition was completely unavailing, as it must be nugatory. These facts, I presume, I *shall* be permitted to prove; I purpose simply putting one or two questions, which, I trust, we shall be able to satisfy the Court are questions essential to our defence, and such as we are entitled to put. My questions will be " whether Fort William was not taken possession of or captured by persons in the service of the Hudson's Bay Company previous to the pretended confession of De Reinhard, and that to De Reinhard's knowledge;" and " whether the fort of Lac la Pluie was not also taken by persons in the service of the Hudson's Bay Company previous to the said confession?"

The Attorney-General intimating that he objected to the questions, the Court was ordered to be adjourned till Monday the 25th May, at eight o'clock, A. M.

Saturday, 25th May, 1818.

COURT PRESENT AS ON SATURDAY.

The Jury having been called, and found to be present, the Attorney-General was commencing his observations when the Chief Justice suggested that Mr. Stuart had better be heard in the affirmative. The Attorney-General stated that the objection coming from the Crown officers he conceived the more regular way would be to allow Mr. Stuart to reply to them. *Mr. Stuart expressed a wish to state the grounds on which he conceived himself entitled to put the questions, adding, that, unless permitted to do so, the Crown officers could not know the purpose for which they were put.*

Attorney-General.—I object to the questions being put *at all*; the motive for putting them is sufficiently apparent from the questions themselves. They are "*whether Fort William was not captured by per-*" *sons in the service of the Hudson's Bay Company, previous to the con-*" *fession of the prisoner, and that to his knowledge,*" and also, "*whether* " *the fort of Lac la Pluie was not also taken by persons in the service of the* " *Hudson's Bay Company, previous to the said confession?*" If they were so even, it would not, in point of law, invalidate this confession, for there are only two circumstances which can destroy the evidence of a confession, namely, that promises, or menaces, were made use of to obtain it. Now a mere knowledge of the fact that Fort William had been taken can not certainly operate either as the one or the other. I humbly contend, and consider it unnecessary to detain the Court to support the proposition by argument, that nothing but a promise of reward or advantage, or a menace of punishment, is sufficient to destroy a confession. For a moment admitting it to be a fact, that the fort was taken and kept possession of, in the manner stated by my learned friend, it is not exactly apparent how such a circumstance is to operate to preclude a confession being good evidence. I submit two points only have that power, promises or menaces being resorted to to obtain it.

Solicitor-General.—I shall make my objections rather more general than my learned friend the Attorney-General has done, but without trespassing long upon the time of the Court. And if I should be able to cut down a long chain of testimony which I perceive my learned friends are desirous to introduce, and which I think I shall be able to

satisfy your Honours, is in no way relevant, I trust it will be occupying a few minutes in a way that may hereafter save hours. The proposition appears to me to resolve itself into two questions: *first*, Whether the Prisoner was *actually* in a state of confinement, in a state of actual *imprisonment*, at the time of making the confession, and necessarily under fear; or, *second*, Whether, from the state of the country, owing to a system of unlawful warfare, he was under *constructive restraint*, and from that circumstance, under the impulse of fear, so as to extort from him a confession. In proof of the existence of this unlawful warfare, it is proposed to prove that Fort William was taken. But my learned friends do not propose to prove this as an isolated fact, it is intended only to form the introduction, or ground work, to a long chain of testimony, which my learned friends are desirous should go to the Jury. I therefore oppose the admission of the introductory testimony, though it *is a fact*, because it is a fact no way bearing upon the case, and intended only to pave the way to a history that will consume a great deal of our time, and to no end, because it cannot be brought to bear at all upon the charge against the Prisoner, who now stands at the bar to answer to a charge of murder.--The points for your honours consideration, I consider to be two—Whether the Prisoner was in absolute custody, and also in a state of fear, and *secondly*, if not in actual confinement, whether the state of the country were such, that a constructive restraint operated on his mind to such an extent, as to induce a fear that shall be considered as an adequate reason for rejecting this testimony. With respect to the first, what does captain D'Orsonnens say? He answers positively that he was *not*, that the fort of Lac la Pluie was not taken possession of, at least that it was not at that time, but that in point of fact, the Prisoner was as free as I am at this moment. But, if he had been in custody, I contend that it would not be sufficient to invalidate the confession made. Do we not daily see confessions made by persons is custody? Confessions made in our police-office by persons with a constable at their elbow? but is that ever adduced as an evidence against the validity of the confession? most certainly not. This part of the subject I consider to be completely answered, and that the objection must fail. On that branch of the objection, which is founded on the unfortunate state of the country, the doctrine of my learned friend, the Attorney-General, I consider to be perfectly correct, that it is only a direct promise, or a threat, that can destroy a confession, and I perfectly agree with that opinion, and consider it as unanswerable in law. I might perhaps be disposed to admit that, if by legal or illegal restraint, a confession was extorted, though no direct promise or menace was apparent, that it might perhaps be a subject of fair consideration to go to the Ju-

ry, for them to say whether or not the confession had been made under circumstances of imprisonment or restraint that entitled it to no credit. I do not know whether in admitting even this, I am not going too far, but it cannot, at all events, apply to the present case, for there are no such circumstances proved; the evidence goes directly to contradict it, for captain D'Orsonnens says expressly, that he was not in confinement or duress of any kind. If any thing of the kind did exist, it must be most clearly proved; and it is incumbent on the Prisoner most distinctly to shew the circumstances to be of a nature so strong, that they actually led him to accuse himself of crime, to escape from the dangers with which he was surrounded, and which threatened to destroy him.—But the circumstance of restraint alone, could it be admitted to have existed, is not of itself sufficient to object to a confession. Your Honours will recollect a case much stronger than any that have been hinted at here, which existed not long ago in England, that of restraint by a military force, which the intemperance of misguided persons rendered it necessary, by way of precaution, to employ. In that time of tumult, a man in the commission of excesses was immediately seized by a party of dragoons, examined before a magistrate, or the secretary of state, or the privy council, and his examinations made evidence against him on his trial. I am aware that it may be objected that this was a *legal*, though an imposing force, and that any confession made under its fear, was admissible—because it was created by a legal body opposing an illegal force. But your Honours will see immediately that this argument tells just the other way, for he had no right to suppose that he would be confined if he did not confess. He was not invited even to confess. If a defendant is permitted to say that he made a confession because he was afraid of going to jail, I am apprehensive we shall never have a confession read. What is the common practice in London? A man commits some offence, a nocturnal one for instance, he is taken up, carried to a watch-house, or lodged in the compter, if the circumstance occurs in the city, till the morning, when he is taken before a magistrate, or the sitting alderman, as the case may be. Having for some time before, and then remaining under restraint from the custody of the law, he confesses his guilt from some motive or other, perhaps, if others have been concerned with him in the infraction of the law, from a hope of being received as a witness on the part of the Crown. On his trial his own confession is produced against him. No doubt, having misled himself in his expectation of being received as a witness for the Crown, he would be glad, on his trial at the Old Bailey, when his confession is produced in evidence against him, to object to its being received, and would assign, as my learned friends do on the present occasion, that at

the time of making it he was in a state of duress, and was afraid of the consequences, or in other words was afraid he would be sent to jail.—But we all know that would not prevent the confession from being received, because he must most distinctly shew, that he was not only *in duress*, but that his imprisonment was used to screw out of him a confession. Neither can the Prisoner at the bar be allowed, on the other hand, to plead that he thought it might be to his *advantage* to confess, and that *therefore* he made his confession. The answer to that is, if he did think so, he has thought erroneously, and his erroneous conclusion cannot invalidate a substantial confession. In answer to that part of the argument which we have before heard, relative to the *nature* of the duress under which the Prisoner alleges he suffered, and the *operation of it on his mind*, we make the same observation, that, if even true, it furnishes no objection to the reception of his confession. It is merely an erroneous conclusion of his own mind, and we add further, that as there is always redress for an illegal act, it is quite impossible that he can be permitted to allege that he was apprehensive of his personal safety at the time of making it, and that therefore, the confession ought to be set aside. His thoughts as to the consequences of what, (if it existed,) was an illegal restraint, cannot certainly exclude the testimony we offer as to his confession. We think it wrong that our learned friends should be allowed to go into proof of what, in their own words, is denominated a private warfare; because supposing indeed that they proved its existence, is could not, for many, very many, reasons, and among them, for those I have had the honour to submit to the Court, be received, either in justification of the act charged against the Prisoner at the bar; (for which purpose my learned friends would not think of presenting it,) nor (as I submit to the Court,) to invalidate the testimony of the Prisoner's confession, already before the Court, and which we propose, if permitted by your Honours, to strengthen by various other witnesses. I think it unnecessary to offer additional arguments, indeed I ought to apologise to your Honours for the length at which I have occupied the time of the Court.

Mr. Stuart.—The question now in argument before the Court, is one of infinite importance to the Prisoner, being in effect no less than whether he is to be permitted to exhibit a defence or not; for, if not permitted, either by cross-examination of the witnesses on the part of the Crown, or by the testimony of those we have to produce on the defence, to bring before the Court and the Jury the situation of the country denominated the Indian territory, he is, in point of fact, excluded from his principal defence; and what period is so proper as the moment when a pretended confession is attempted to be introduced as evidence against

the prisoner? I ask, what time is so proper as this moment, to bring before the Court and Jury those circumstances, which, if the confession even should have been made, as is related by the witness now under examination, would immediately shut it out as completely inadmissible evidence against him, from their producing a constraint incompatible with that freedom which the wisdom and humanity of the law, unite in declaring absolutely necessary and indispensable to the validity of a confession. In producing these circumstances it is impossible not to touch upon the difficulties which unfortunately existed between the Hudson's Bay Company and the Earl of Selkirk, on the one hand, and the North-West Company on the other. In so doing, however, I shall most studiously avoid introducing any thing calculated to excite the feelings of any person, and shall refrain from mentioning the name of the private prosecutor, or any other persons who may be supposed to be interested on the other side of the question, excepting when, in detailing matters of public notoriety, it is completely unavoidable. It is a matter of public notoriety, which it is indispensably necessary to prove, *that an armed force, under the orders, and in the pay, of the Earl of Selkirk, took possession of Fort William by* FORCE. I do not want the witness to acknowledge that he was at the *head* of that force, as I shall prove it by other testimony. All I shall question *him* to, will be the general state of the country.

Attorney-General.—I am compelled to interrupt the learned gentleman. The course he is pursuing is that of an address to the Jury, which certainly cannot be permitted, nor do I consider that the circumstances stated are any way relevant to the case before the Court.

Chief Justice Sewell.—I certainly wish Mr. Stuart to confine himself strictly to points which, according to the acknowledged and established rules laid down to regulate the admission of testimony, he is entitled to insist upon offering, and we are bound to receive. I repeat to you, gentlemen, that the Court are equally sensible with yourselves, that a variety of difficulties distinguish this from *ordinary* cases, but there are none that render it either necessary or expedient to depart from *every acknowledged principle* upon which criminal proceedings are uniformly conducted. I do sincerely hope that the gentlemen on both sides will shape their course in that way, and should any point arise, involving in it a difference of opinion, the Court will enforce that exposition of the law which it is their duty, according to the best of their judgments, to furnish. Perhaps it is impossible strictly to confine gentlemen on a case like this—it may be inconvenient, and even unfavourable to one or other of the parties, parties equally entitled to the protection of the Court,

but I do not see that it can be entirely avoided—indeed on cross-examination at all times considerable latitude is allowed.

Attorney-General.—If the Jury were permitted to withdraw, I should not object to the argument being pursued, as it was not from any apprehension that eventually it will at all weaken the case on the part of the Crown, that I interrupted, but because it is not relevant to the matter under our consideration, and my learned friend's argument being in fact an address to the Jury, their minds might, by his eloquence, be led away from what really forms the only subject for their consideration and decision, namely, is, or is not, the Prisoner guilty of the crime whereof he is accused, and for which he is receiving his trial? If the Jury can be allowed to withdraw, we are prepared to meet my learned friend, otherwise we object to the course he is taking.

Chief Justice Sewell.—The Jury unquestionably cannot be permitted to retire. They are entitled to hear every point of law discussed, as well as the evidence. Every thing must take place before them, that they may form a correct opinion.

Mr. Stuart.—I will, in submitting my argument to the Court, state nothing that I do not mean to prove.

Attorney-General.—That I dare say, but that is the very objection we make. My learned friend is desirous to enter upon a long chain of circumstances, which (if true) do not at all bear upon this case, and cannot in any way be made evidence, although they might, aided by his talents, impress erroneously the minds of the Jury, and lead them away from the only subject that ought to occupy their attention.

Mr. Stuart.—I conceive I may state an outline of what I intend to prove; for, unless I am permitted to do so, I do not see how the officers of the Crown can object, or the Court determine whether I am within or beyond the pale of cross-examination. I have no wish to address the *Jury*, because I know I cannot be permitted to do so, but I must, as I conceive, be allowed to state to the *Court* an outline of what I am desirous of proving, and my reasons for believing that I am offering nothing inconsistent with the accustomed course of proceedings.

Mr. Justice Bowen.—We sit here, I take it, at the present moment, to decide whether the questions proposed and objected to are, or are not, such as might be allowed to be put. The learned Crown officers have been heard in support of their objections, and the counsel for the Prisoner are now desirous of answering them, and of evincing that they *are entitled* to put the questions. Perhaps, before the Court can satisfactorily decide that point, it is desirable clearly to comprehend the object of the gentleman in proposing them. If I understand the intention or design of these interrogatories, they are to commence a series of questions

relative to a supposed *duress* of the prisoner at the time of making the confession. This being proved, he expects the Court will decide that the confession cannot be permitted to go to the Jury at all. It is *our* peculiar province to decide upon the admissibility of testimony in the *first* instance, but, *when* admitted, to the *Jury alone* belongs the power of determining the credit that is due to it. The Court perhaps may be assisted in forming its decision, if the supposed bearings of the testimony which it is wished to introduce are pointed out.

Mr. Stuart.—I mean to prove, that an armed force, which this witness accompanied to Fort William, took possession of, and retained it by force, against the inclinations of the North-West Company; and that the partners and servants of that Company were arrested and sent prisoners to Montreal, upon charges of having committed murders, high treason, and a variety of other offences. I mean to prove that this force, and particularly those who commanded it, represented that these measures of unheard of outrage and violence were perpetrated under the sanction of the government, to which it was represented the whole of the North-West Company were rebels and traitors. I mean to prove, that, in the prosecution of this system of lawless terror, a division from the same army captured and razed Fort Lac la Pluie, appropriating to their own use the property, and ——

Chief Justice Sewell.—I must stop you there, Mr. Stuart: all that took place at Fort Lac la Pluie (and what it was we do not wish to know) happened four days after the confession was made, and therefore cannot be evidence.

Mr. Stuart.—From the peculiarity of the case, it is not *absolutely* impossible but the effect might, even under these circumstances, have been produced, or I may, perhaps, prove this statement to be incorrect.

Chief Justice Sewell.—That will be fair again—you certainly are entitled to do that, but I cannot admit an action done four days before a certain occurrence could, by possibility, be influenced thereby.

Mr. Stuart.—We further mean to prove, that it was at the time in his knowledge that Fort William had been taken forcible possession of by the Earl of Selkirk, and a force to all appearance of a military description. This force raised, equipped, and maintained, at the cost of the Earl of Selkirk, and under the more immediate command of captain D'Orsonnens, to whom it is said the confession was made, and who, at the very moment he is represented to have received this confession, was actually at the head of a division of that force, prepared to renew at Lac la Pluie the scenes of Fort William. We intend to prove, that to his knowledge the partners, clerks, and servants of the North-West Company, were by this military force treated as rebels and traitors, and

that this usurpation of authority was represented to be under the countenance of the government, that it was constantly held out that all who did not agree to the terms offered by this armed body, would be treated as rebels and traitors, in corroboration of which it was urged that the leading persons engaged in the commerce of the North-West Company were sent to Montreal to be hanged. If we make out this case, what effect can a confession have when resulting from such circumstances? it is the right of the Prisoner to shew, at any rate, every circumstance which may make in his favour. But, quitting the line of argument I have had the honour of submitting to the Court, let me solicit their attention for a moment to the nature of the evidence, which, in a *legal* point of view, is furnished by a confession. It is universally considered by all writers on the nature of evidence as the weakest that can be exhibited, although at first blush persons might suppose that it was the strongest. In support of this doctrine I might advert to *Blackstone* who, with his usual eloquence, in volume 4, page 256, speaking of confessions, says, " and indeed they are, even in cases of felony at the " common law, the weakest and most suspicious of all testimony; ever " liable to be obtained by artifice, false hopes, promises of favour, or " else menaces, seldom remembered accurately, or reported with due " precision, and incapable in their nature of being disproved by nega- " tive evidence." I might with confidence rely upon the single authority of the eminent judge I have cited, but the same doctrine is maintained by *Mr. Justice Foster*, and in terms peculiarly applicable to the pretended confession upon which we are arguing. This humane and learned judge, page 243, says, " for hasty confessions made to persons " having no authority to examine, are the weakest and most suspicious " of all evidence." The very case that is this moment before the Court; this pretended confession, how was it made? (admitting for the sake of argument that every thing we have heard relative to it is incapable of contradiction)—was it not a *hasty* confession? to *whom* was it made? to a person unquestionably having no authority to take a confession, and, from peculiar circumstances, exposing it to all that suspicion which the learned judge describes, as the inseparable attendant of confessions obtained " in a hasty manner by persons having no " authority." In assigning the reasons upon which the opinion I have read is founded, he proceeds to state, " proof may be too easily pro- " cured, words are often misrepresented, whether through ignorance, " inattention, or malice, it mattereth not to the defendant, he is equally " affected in either case, and they are extremely liable to misconstruc- " tion."—He adds to all this, what cannot fail to strike every person as the distinguishing characteristic of the unfortunate situation of this

defendant, " and withal this evidence is not, in the ordinary course " of things, to be disproved by that negative sort of evidence by which " the proof of plain facts may be, and often is, confronted." It is almost needless for me to urge that, if this sound opinion is correct and applicable in cases which occur in the ordinary course of criminal jurisprudence, that it applies itself with tenfold force to that at present before the Court. How, I might ask, is it possible to bring in *this* case negative testimony? the difficulty would of itself amount to a prohibition. I might advert to a great number of cases in which the authorities record erroneous convictions, arising from the exercise of extra-judicial authority by persons having no qualifications, but my learned friend who follows me, will have an opportunity of pointing them out. The case of Harrison stands as a beacon on this subject, associated as it is with others of a similar description, so familiar to every gentleman in the law, that it would be trifling most unwarrantably with the time of the Court, and the understanding of the Crown officers, to attempt to refer to them. What weight then, I ask, can be anticipated to follow such a confession? a confession loaded with all those suspicious circumstances, which the humane and enlightened judges to whom I have referred, describe as the ordinary characteristics of confessions, but more especially of " hasty ones to unauthorised persons," and our own *daily* experience, I was going to say, confirms the doctrine, that such confessions are " indeed, the weakest and most suspicious of all evidence." Let me again draw your Honours attention to the circumstances under which Fort William was captured, and the representations circulated throughout the interior of that country by the captors, for purposes too glaring not to be immediataly appreciated. Let it be remembered that the partners and servants of the North-West Company had been sent to Montreal for trial, upon charges which it was confidently asserted would terminate in the whole of them being hung, and that all who did not submit to this usurpation, masking itself by pretended authority from the government, were to share a similar fate with the rebels and traitors of Fort William. Let it be remembered that a portion of this force proceeded to Fort Lac la Pluie, under the command of the same officer, and previous to the confession, (as I expect by the cross-examination of this very witness, to prove incontestibly,) arrested the Prisoner at the bar.

Solicitor-General.—I presume that my learned friend will not be permitted to lead a witness to convict himself of an offence, by which his own safety might be endangered.

Mr. Stuart.—Does my learned friend, the Solicitor-General, intend to say, that I cannot sift the accuracy of any statement the witness may

have made? for example, if Captain D'Orsonnens should, on his examination in chief, testify that De Reinhard was not in custody, may I not, by cross-examination, sift whether that is the *truth* and the *whole* truth? If I may not, I have yet to learn in what cross-examination consists. It is only by a most rigorous exercise of this right, appertaining in the most extensive sense to prisoners, that we can expect to extract evidence of events which occurred at a distance of twenty-five hundred miles from any Court in which redress could be obtained for injury, and the only avenue even to that, in the hands of his enemies. Once in the possession of Captain D'Orsonnens, or the Earl of Selkirk, in vain would the Prisoner look for any relief, for where was the Court to which he could apply for his writ of habeas corpus? where the judge to whom he could petition for the protection of the law, to have an examination instituted whether the restraint he was suffering was a legal or an illegal confinement? When he heard of the outrageous violence committed at Fort William, that his employers, those to whom he had been accustomed to look up with respect, and from whom, in consideration of faithful services, he had a right to receive protection and assistance in difficulty, were prisoners, and threatened with ignominious deaths, whilst their property was retained possession of, he must have considered himself in the hands of his enemies; *his* enemies because *he* was in the service of the commercial rivals of that individual who, most unaccountably, when we reflect on his elevated rank, had raised and equipped at his own expense, the force which carried on the siege, and, to crown the whole, superintended in person, the execution of the lawless enterprize. My learned friend, the Solicitor-General, has compared this to a case to which I consider it by no means analagous—the case of the riots in England, which induced the legislature to suspend that safeguard of personal freedom, the habeas corpus act; but, although for the security of the government, it was necessary to strengthen their arm by withholding from the subject that great barrier against the attacks or encroachments of arbitrary power, yet the examination a person so taken up underwent, was before a *disinterested* magistrate. Widely different was the case of any person in the Indian territory; the magistrate, before whom his examination must be taken, was at the head of that very force, which, by its lawless violence, had produced all those evils which we this day deplore. Such a case as the Prisoner's never has occurred in the course of law proceedings, and, it is to be hoped, will never again disgrace a Court. Sincerely do I trust that no part of his Majesty's dominions may again witness such unparalleled outrage as desolated, under a semblance of magisterial authority, that unfortunate country. The ground we take is this, that we ought to be permitted to shew the

state of the country, because it is a part of our defence, is a part of the *res gesta* upon which we stand, and that the Court and the Jury have a right to be made acquainted with it, as a fact essential to the correct administration of justice between the Crown and the Prisoner. The Court and the Jury will, respectively, give what weight to it they think proper; but, if we are deprived of an opportunity of so doing, we lose the main prop of our defence. I shall not trespass further on the time of the Court as my learned friend who follows me will go fully into that part of the argument, and in so doing, will, I am confident, satisfactorily prove that De Reinhard's mind, at the time of making this pretended confession, was not free, but that it was under the influence of fear that it was extracted from him, and, therefore, ought not to be received in evidence.

Mr. Vanfelson.—My duty towards the Prisoner is to shew that, according to law, the pretended confession now offered cannot, from the circumstances of the case, be given in proof, and this is very important to him. The officers of the Crown are desirous of putting in proof a confession which they themselves say was made to an individual, not invested with any public authority to receive the confession of a criminal. Under this circumstance this confession is void and cannot be received agreeably to the English authorities. The principal question for consideration at the present moment is this, was the Prisoner free at the time he made this declaration to Captain D'Orsonnens? I say that he was not, in person, and, also, that his mind was not free. He was a prisoner, and had no means of escaping from those whom he considered as his enemies. Let us observe for a moment the respective situations of De Reinhard and Captain D'Orsonnens, and also consider the situation of the Indian country at that period. De Reinhard was a clerk, in the service of the North-West Company, and Captain D'Orsonnens was in the service of the Hudson's Bay Company.

[The Solicitor-General objected to the statement that Captain D'Orsonnens was in the service of the Hudson's Bay Company as incorrect, to which Mr. Vanfelson remarked, that if he had not admitted it himself *he* (Mr. V.) should satisfy the Jury, from Captain D'Orsonnens' own hand-writing, that in point of fact he was so. The note sent by M'Donald and Nolin with the Proclamation, telling De Reinhard to wait his arrival, was signed by Captain D'Orsonnens as *Captain of Voyageurs in the service of the Hudson's Bay Company;* and, if (said Mr. V.) he was a simple individual (*simple individu,*) why should he direct De Reinhard to wait for him. Mr. Justice Bowen hinted that Captain D'Orsonnens *advised* or counselled, rather than *directed*, him to stop, and having read a part of the evidence as taken by himself ending, " In the

" note I *requested* him to wait for me, as I wanted him to give me in-
" formation of what had occurred in the River Winnipic."] *

Mr. Vanfelson.—I proceed then to consider the real situation of De Reinhard at the period of this conversation, in the course of which my learned friends say that he made a confession of the murder. Fort William had been taken by, and remained in possession of my Lord Selkirk. Captain D'Orsonnens had come to Lake la Pluie with seventeen armed men, and eighteen Canadians, although, as he has told us, he was only a simple individual, or private person. I now solicit your Honours to favour me with your particular attention for a moment.—I beg you will remember that Fort William had been taken by Lord Selkirk, and that at the time of this conversation De Reinhard knew that fact. This circumstance is highly important, for, in my humble opinion, it will have the effect of wholly destroying this pretended confession. The argument, founded on this fact, which I have the honour to submit to the Court, is this,—The outlet from this country being in the possession of Lord Selkirk and his people, and a part of the same force having, at the very moment of the confession, also surrounded the fort of Lake la Pluie, where De Reinhard was, and whence he was not at liberty to depart, nor had any means of so doing—the confession that was made was not the confession of a person that was free, and therefore cannot be received as evidence against him. The circumstances in which he was placed could not but excite fear in his mind, and I therefore submit, that, his mind being under the impression of fear, the confession was not free and voluntary; and, before a confession can be received as evidence against a prisoner, I contend, it is necessary that the Crown officers establish, that it was made freely and voluntarily. The rule is a *general* one, and, if there are any exceptions to this rule, it is the duty of the Crown officers to produce them. I refer to M'Nally on Evidence, cap. 6, rule 9, page 43. " A " confession forced from the mind by the flattery of hope, or the torture " of fear, comes in so questionable a shape, when it is considered as " evidence of guilt, that no credit ought to be given to it, and therefore " it ought to be rejected." In the present case, then, the confession ought to be rejected, for De Reinhard was not a free agent at the time of this conversation. He could not escape from the hands of his enemies, because Fort William, the only outlet from the interior country, was in their possession; and, if this was the case, how can it be said that he was free. If he was not in the possession of freedom, then, no avowal

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* " Dans le billet je lui *priois* de m'attendre, desirant d'avoir de lui
" des informations sur ce que s'étoit passé dans la Rivière Winnipic."

that he may have made can be produced as evidence against him, agreeably to English law. It is dangerous, extremely dangerous, to admit as evidence against a prisoner, what he may have said under an impression of fear. I refer again to M'Nally, the same chapter and section. "These rules (says Mr. Loft, in his commentary upon Baron Gilberts' "Evidence) reflect the brightest lustre on the principles of English law, "which benignly considers that the human mind, under the pressure "of calamity, is easily seduced, and liable in the alarm of danger, to "acknowledge indiscriminately a falsehood or a truth, as different agi- "tations may prevail; and, therefore, a confession, whether made upon "an official examination or in discourse with private persons, which is "obtained from a defendant by the impression of hope or fear, *however* "*slight* the emotion is planted, is not admissible evidence," and the reason for that (he says) is this, "for the law will not suffer a prisoner "to be the deluded instrument of his own conviction." In conclusion, I submit to your Honours that Fort William having been taken by the Hudson Bay people, to the knowledge of the prisoner, and a part of the same force being in possession of Lac la Pluie, where De Reinhard was; a place whence it was impossible he could escape—he was under constraint, being in the hands of his enemies. Thus situated, I contend, finally, that not being a free agent, no confession which, under such circumstances, the Prisoner may have made, can be now received as proof against him.

Attorney-General.—This argument involves in it two questions; whether certain places were taken to the knowledge of the Prisoner, and what influence that circumstance produced on his mind. My learned friends, in arguing on the former enquiry, assume as a fact that Fort *Lac la Pluie* was then taken; whereas it stands in evidence that it was not taken till four days *after* the confession, and instead of influencing the Prisoner to make it—was taken possession of from the circumstances disclosed *in his confession*. This I conceive does away with considerable part of the arguments of both gentlemen, but more particularly Mr. Stuart's. But my learned friends say, that because *Fort William had been taken*, therefore we ought to lose the benefit of this confession; I really cannot see how that circumstance can operate to the exclusion of this evidence. In what way could it lead him to make a confession? did it create a fear that he would lose his life, or that he might be put to the sword, if he did not confess? I should think he took the most ready way to sacrifice his life, to accuse himself to his *enemies*, (as they are called by the learned gentlemen,) of a crime which, from the proclamation he had just read, would compel them to make him a Prisoner. One of the learned gentlemen argued that he was *not free* at the time of

making the confession; supposing that he *was* under restraint, are not confessions generally made by persons in custody? But he was perfectly free, and I do think that if ever a strong case was made out, this is it. The Prisoner meets a man with whom he has formerly served in the army; upon meeting they shake hands, enter into conversation, and, under perhaps the influence of conscience, he voluntarily confesses the perpetration of a murder. If this is not a free confession, I do not think it will ever be possible for one to be offered as evidence against a Prisoner. Relative to the letter and proclamation about which so much has been said, I do not perceive that they weigh at all on the case. The proclamation contained no *general pardon*, on the contrary, it called upon all persons to be aiding and assisting in bringing to justice those who had committed offences. We think the arguments of our learned friends abundantly shew the danger of departing from what I had the honour to enforce, in opening as the leading, and indeed the only principle on which the confession could be invalidated, and I again offer it to the Court. The only circumstances that can prevent the confession of a prisoner from being made evidence against himself, are, that it can be shewn to have been made under hope, or fear, from direct promises of benefit, or menaces of danger. On this opinion, we think, we may firmly rely as law; and it being distinctly proved that *this* was a *free* and *voluntary* confession, it must be allowed to go to the Jury. It may be said, *he thought* it would make in his *favour* if he confessed, or that he imagined it would be *worse* for him if he did *not*, but his imagination is not to destroy this evidence. He might choose to imagine the world would soon be at an end—there is no answering for a man's imagination—but that is not to set aside a deliberate act. Once admit this to be sufficient to set aside a confession, and there never will be another proved, for all that a prisoner will have to say, on his trial will be, that when he made his confession, he *imagined it would be better for him.* Your Honours know that persons are frequently prosecuted upon their confessions, destitute of any corroborating circumstance, yet it being satisfactorily proved to have been made freely, conviction has followed; but, that never would occur again, if a prisoner were allowed to turn round and set his confession aside by saying, that at the time of making it he thought it would be better for him. But even this was not the case of De Reinhard, it does not appear that he thought it would be better for him. On the whole, considering the circumstances under which it was made, we contend it is a good confession in law, and that we are entitled to have it received by the Court, and submitted to the Jury, who will give that weight to it which they, in their consciences, consider it to deserve.

Chief Justice Sewell.—On all testimony offered in a Court of justice,

either in civil or criminal cases, two questions arise: *first*, whether the Court can legally receive and permit it to go to the Jury; and, *second*, whether the Jury ought to believe it; and this is applicable to confessions in criminal cases. We have at present to enquire as to the first point, and, that the decision of the Court upon it may be clearly understood, I will, before I go further, state a case. A highway robbery was committed, but it was uncertain by whom; a man in company with some others, dropped some words which excited their suspicion, and they took him before a magistrate, before whom he admitted himself to be the felon, and related the circumstances of the robbery; he was committed to gaol, to await his trial; upon the trial, his confession was proved, and it being voluntarily made, without either promise or menace, it went to the Jury. Upon his defence, however, it was satisfactorily proved that at the time the robbery had been committed he was at a great distance, and that he had made this confession to enable his brother, who had actually committed the robbery, to make his escape. Now in this case it is plain that the confession was lawfully evidence for the Jury, although it was destroyed by subsequent evidence, proving an *alibi*, for that was the result of the Jury giving credit to the additional testimony which directly contradicted the confession. Let us exemplify the distinctions of the present case. Had the question been, whether testimony to contradict his confession could be received, we should say, yes. If it was whether the confession, after being disproved, or rather negatived, should yet go to the Jury, we should say yes, for we, sitting as judges, have no power to prevent the confession from going to the Jury, if there is no proof of a direct influence having been resorted to by some person in company with the accused, such as holding out an expectation of punishment, if not made, or an expectation of benefit, if made. It is in such case a question of *credibility* upon *contradictory* testimony, and who are to decide? why unquestionably the Jury. But when a direct influence has been clearly proved, upon an examination, or on the *voire dire*, judges have said, this shall not go to the Jury at all, because it is not evidence, and they shall not be exposed to the influence of statements, which are not admissible as evidence; but the influence has been apparent before any judge has exercised his authority to that extent, and neither myself nor my learned brother know any case in which the principle has been carried farther. We admitted the confession in the present case to be gone into, for what else could we do with that which was evidence according to the strictest rules of a Court of law. Yet we do not, by admitting it, say that it is to be conclusive, or that it cannot be contradicted. If you have evidence which goes to that, it must be admitted; the case I have cited clearly proves it must

be admitted, it is *your right* to have it received, and that right shall be preserved to you. When testimony is offered to do away a confession that is already in evidence, if it be asked who are to be the judges of that evidence? who are to decide what is the effect produced by it? we answer the *Jury*, the *Jury* undoubtedly, but if the evidence offered is that of a direct and immediate influence on the mind of the Prisoner, the confession *not yet* being in evidence, then the Court are to decide. The evidence you offer to prove (from a supposed influence upon his mind) that his confession ought not to go to the Jury, is remote, very remote, indeed; too much so for us to say that it ought not to go to them; they will give what credit to it they think it merits, but it is trenching infinitely too far upon their rights, indeed it would be usurping the peculiar province of the Jury for us to decide upon the merits of the confession, which we consider we should be doing if we acceded to the desires of the Prisoner's counsel. The last time this subject was before us, you went no farther than to the general enquiry, whether the Prisoner, at the time of making the alleged confession, knew of the capture of Fort William, and, upon that question being answered, the compromise, (if I may use the expression,) was entered into by which the trial closed. Let me beg the gentlemen concerned for the Prisoner to recollect, that to facts which bear in any way upon this case there can be no objection, but a detail of all the facts connected with this lamentable quarrel between the Hudson's Bay and North-West Companies, we can not allow. As a fact, (though I do not see that it can in any way affect the case,) you may prove, if you wish it, that Fort William was taken possession of, and that De Reinhard knew it before he made his confession. But as to Fort Lac la Pluie, you can not give evidence that it was taken, till you contradict the present witness, who swears that it was not taken possession of until four days *after* the confession of the prisoner, and that his information given at the time of making the confession, suggested the necessity of its being taken as a measure of self preservation, as is alledged.

Mr. Justice Bowen.—The argument we have been attending to has arisen from two questions which the counsel for the prisoner consider it their duty to insist on putting to the witness, Captain D'Orsonnens.

We considered the circumstances under which the confession was made as so fair, that we were bound to admit it, and accordingly received it as evidence proper to go to the jury. A fact has come out in the cross examination, namely, that Fort William was *before*, and *at the time*, the prisoner made his confession, in the possession of the Earl of Selkirk, it therefore only remains to enquire whether it was so to the knowledge of De Reinhard, and how did it influence his confession? the

fact is clearly and distinctly in evidence, and the inference the counsel for the Prisoner wish to draw from this fact, in conjunction with what passed at Fort Lac la Pluie, (which I shall presently advert to,) is, that it ought to exclude his confession. By the gentlemen engaged in the defence, the question does not appear to have been seen in *two* points in which, I confess, I have, from the first, seen it. *First*, That the circumstance of Fort William being taken was not strong enough to influence him to confess, and *second*, that, in the nature of things, if all is true that has been asserted, by being silent he had another chance of escape, for it appears to me to be an act of madness to imagine, that by confessing to his enemies, (as they are described in the argument to be,) his condition would be bettered. Relative to his being a prisoner, the evidence of Captain D'Orsonnens positively contradicts the assertion. Captain D'Orsonnens says that *he* was there as a simple individual, and that an armed force followed him at a distance, but did nothing for four days after the confession had been made by the Prisoner, and that what was then done, so far from *influencing* the confession, was *suggested by it*, and that De Reinhard confessing he had committed a murder, induced him, in obedience to the proclamation of the governor, to make him a prisoner. Except you mean to say that the events passing in that country were such, that a rational being would confess, or rather accuse himself of a crime that he never committed, I do not see the bearing of your questions. It will be for the jury to determine whether they were so, and upon a cross examination it would be wrong to shut out any facts which may lead to that conclusion; but it is only facts that can be admitted, and those only that took place previous to the confession, and I am free to confess that I do not see the bearing even of them. I do not see what effect the capture of Fort William is to have on this case, but it is a fact, and you are entitled to have it noticed if you think it important.

Cross-examination continued by Mr. Stuart.

Mr. Stuart.—Did Lord Selkirk and his people take possession of Fort William and *when?*

Captain D'Orsonnens.—Lord Selkirk and his people took possession of Fort William the thirteenth or fourteenth of August, 1816. It was on the thirteenth that his people entered the fort.

Mr. Stuart.—Did he take it with the *consent* of the people who occupied it, or by *force?* You speak of *possession* as if it had been voluntarily given to my Lord—tell us the fact, just yes or no.

Captain D'Orsonnens.—I consider that he took it by *necessity* in the execution of his duty as a magistrate.

Mr. Stuart.—I want a direct answer to a very plain question as to a matter of fact.—*Question repeated.*

Captain D'Orsonnens.—I consider that he took it by force, of right (*avec raison*) or by necessity.

Mr. Stuart.—We do not, Captain D'Orsonnens, ask your opinion of the *justice* of the capture, but a simple direct answer to a matter of fact. *Was*, or *was not*, Fort William taken possession of *by force?* just say yes or no, according to your knowledge.

Captain D'Orsonnens.—On the fourteenth of August, or about that time, Lord Selkirk took possession of Fort William.

Mr. Stuart.—I wish that to be taken down, I will now ask him,—Was it taken by *force* or *voluntarily* given up? answer just yes or no.

Captain D'Orsonnens.—I consider that he took it by *force*, but by *necessity*, in the execution of his duty as ——

Mr. Stuart.—We do not want your opinion as to *why* it was taken. I beg that the witness' answer to the fact, namely, that "*he* considered the fort to have been *taken by force*," may be inserted on your Honours' notes. His opinion as to the *necessity* for so taking it, is not evidence, and, of course, will not be taken down.

Chief Justice Sewell.—Is it of your own knowledge that you say this?

Captain D'Orsonnens.—Yes; I say of my own knowledge that the fort was taken possession of by my Lord Selkirk. I was there in the execution of my duty, and ——

[The Chief Justice apprized the witness that he was not bound to answer any questions implicating his own conduct, and that the Court would protect him in refusing to do so, and added,—I do not, Captain D'Orsonnens, mean to intimate that answering *would* expose you to any unpleasant consequences; but that you may not be taken unawares, I shall put the question again, and, in the exercise of your own discretion, you will either answer it or decline doing so as you may think proper.] (*The question being repeated*)

Captain D'Orsonnens.—I say that from my own personal knowledge.

Solicitor-General.—I beg the Court's pardon, but I do not think the witness understood the question. In point of fact he did not see Fort William taken, he only *heard* of it, and therefore it cannot be evidence. Might I beg of your Honour to put the question to the witness, whether Fort William was taken possession of by force, or even at all to his *own proper knowledge.*

His Honour the Chief Justice again put the question, and Captain D'Orsonnens commencing his reply "I consider" was interrupted by —

Mr. Stuart.—I have repeatedly put a very simple question, you have answered it by giving your opinions as to what you call the *necessity* that existed for taking it; I want merely the fact—you may decline answering the question if you think proper, but if you answer it, let me beg of you simply to say yes or no. Do you know that Fort William was taken possession of by force by the Earl of Selkirk? simply yes or no.

Captain D'Orsonnens.—No.

Mr. Stuart.—Let the answer be taken down if your Honours please, for, upon the defence, we shall have occasion to refer to it.

Chief Justice Sewell.—The simple point is, did or did not Captain D'Orsonnens *see the fort taken by force?*

Captain D'Orsonnens.—I could not say simply yes or no, considering that if I had so answered, the criminals might perhaps appear to be innocent, and the innocent might appear guilty. I consider that the fort was taken by force, but by necessity, that is my belief according to what I have heard.

Chief Justice Sewell.—We must have the fact, whether of your own knowledge, you speak of its having been taken by force. Did you, Sir, *see* it taken, or is it merely from what you have *heard* that you speak of Lord Selkirk's mode of obtaining possession?

Captain D'Orsonnens.—I did not see it taken possession of.

Cross-examination resumed by Mr. Stuart.

Captain D'Orsonnens.—I remained there till the 10th September, and Lord Selkirk and his people were then in possession of Fort William, but what length of time they remained after that I know only by hearsay, because I did not return thither. I dispatched Nolin and M'Donald before me to Fort Lake la Pluie, with a note addressed to De Reinhard. By this letter I requested him to wait for me to give me information, or intelligence, of what was going on at Red River and in the River Winnipic. My letter was signed as I always signed my name "*Captain D'Orsonnens.*" It is probable, and I believe that I added "*commanding the advanced guard of the voyageurs of the Hudson's Bay Company,*" or something similar. I wish the Prisoner would produce the note.

Mr. Stuart.—Was the paper to Mr. Dease of the 6th, signed in the same way?

Chief Justice Sewell.—The Court are decidedly of opinion that it is impossible that they can permit you to go into an examination of what took place *subsequent* to the confession.

Mr. Stuart.—I should imagine I might put it as a question to credibility. Captain D'Orsonnens has said that he went there as *a simple individual.* If I can, by these questions, substantiate that he acted throughout in a *military* capacity, I establish the principal part of my defence, for I prove the influence upon the mind of the Prisoner to be sufficient to do away the pretended confession.

Chief Justice Sewell.—Any thing *antecedent* to the confession that by possibility can bear upon it, certainly must, and shall be received; but we cannot on the other hand permit you to adduce evidnce of what might have taken place afterwards. You must remember that on Saturday I opposed it by remarking, that it was no manner of consequence *how* the receipt given to Mr. Dease was signed, as it was given *subsequent* to the confession.

Cross-examination resumed by Mr. Stuart.

Mr. Stuart.—Did you tell Mr. Nolin or Mr. M'Donald to *arrest* the Prisoner?

Captain D'Orsonnens.—No; not at all. I told them to detain him, I think.

Mr. Stuart.—Detain or arrest? (*Detenir ou arrêter.*)

Captain D'Orsonnens.—Not to arrest (*arrêter.*) I cannot say whether the note was, to *request* him to wait for me, or, to *order* him to remain for me, as I was hurried at the time. When I gave them the note I told them to induce De Reinhard to remain there and wait for my arrival; and, as I knew the good disposition of the Prisoner, I was convinced that when he saw the proclamation of *Sir John Coape Sherbrooke*, and received my note, he would remain. When I was going to talk with De Reinhard at the fort, there were some men who followed out of curiosity. I arrived at the fort of Lake la Pluie with two men, who were armed, and I was armed myself. The others followed a good way off, and I cannot say whether they were armed or not. I never said to any person that I expected a remuneration from my Lord Selkirk nor from the Hudson's Bay Company. I advanced money to Lord Selkirk's people and to those of the Hudson's Bay Company, on account of wages out of my own funds, and I have since received back the amount, thirty-nine pounds from Mr. *Garden*, in one payment by a check on the bank. I did not say before I came to the Portage of Lake la Pluie, that I had taken Fort William, or that I had taken other forts, and that I would also take that. I do not *remember* to have said at Red River to any person that I was not my own master, and that my departure depended upon Lord Selkick, but I *may* have said so. I had a flag

hoisted before my tent at Lake la Pluie. I had no artillery mounted till after De Reinhard had made his declaration. On the 5th or 6th of October, Mr. Vitchie brought me two small pieces of artillery from the Portage, which is a mile and a half distant from Lake la Pluie. I fully explained to De Reinhard that the men who were with me were not engaged in a military capacity, but as colonists for Red River; and, if they declined taking lands at Red River, they had the right of returning to Europe by way of Hudson's Bay, or of Canada, at their option. I said to the Prisoner *after* his declaration, (and it is very possible *before* the confession,) and to Mr. *Dease*, that I considered that the people of the North-West had committed a great crime in destroying the Red River colony, and that I considered the people who had been active in destroying it like rebels, or even that they were in fact rebels, and that *that* could not pass without punishment. In the same conversation I *may* have said that I expected reinforcements of colonists to go up to Red River, but I *did not* say that *Government* was going to send a large force there.

LOUIS NOLIN, *Sworn*,

And his examination continued by the Solicitor-General.

Mr. Nolin.—When I went to join Captain D'Orsonnens and the Prisoner they were alone, and outside of the fort, at which time De Reinhard spoke of a murder that had been committed at the River Winnipic, and named the person murdered *Owen Keveny*. He said that "Mainville fired a gun at Mr. Keveny, and wounded him in the breast "or neck, and that he (De Reinhard) had finished him by passing his "sword once or twice through his body." On the following day De Reinhard was walking alone with me on the brow of a hill; we were walking arm in arm in a friendly way, and he spoke of the death of Keveny.

[Mr. Nolin was now questioned very closely as to inducing the Prisoner to make a confession; he most positively declared that it was perfectly voluntary.]

He told me that "when he was at Bas de la Rivière he heard Mr. "M'Lellan several times ask both Mr. Grant and Cadotte to kill Mr. "Keveny, but that they refused, and that he also asked the same thing "of him, but that he too had refused. That after this Mr. Keveny "was sent away as a prisoner up the River Winnipic. That some

" days after he himself embarked with Mr. M'Lellan, Grant, Cadotte, " and other persons, to the number of ten or twelve, in a canoe, and " that they also ascended the River Winnipic. That on arriving at a " place situated a short distance from the spot called the Dalles they " stopped, and afterwards that he (De Reinhard) with Mainville, and " the Son of the White Partridge, had embarked from there in a little " canoe to go where Keveny was, and that their going there was with " the intention of killing Keveny, because at that time Mainville had " come to a determination to kill Keveny. That they went to where " he was and made Keveny get into their canoe, and that when they " had got a little distance, Keveny asked to land or to go on shore, and " when he was going to re-embark, Mainville fired his gun at Keveny " and wounded him in the neck, and that he (De Reinhard) seeing that " Keveny was mortally wounded, ran his sword once or twice through " his body and finished him,"—the words were " and I finished him." (*Je l'ai fini.*) In 1817, I encamped about the distance of an arpent from the place where, as De Reinhard had told me, they had left Keveuy's body.

[In reply to a question from the Chief Justice, Mr. Nolin said, that having passed through the Winnipic once or twice before, he was able, from De Reinhard's information, to form at the time a good idea of the spot, * though he also admitted that De Reinhard did not tell him at what distance above the *Dalles*, nor on which side of the river they left the body.]

Solicitor-General.—Did you speak with the Indians about that place?

Mr. Stuart objected that no conversation with a third person in the absence of the Prisoner could be made evidence; to which the Solicitor-General replied, he meant to ask him, whether, according to *general repute*, this was not the spot where *Keveny was killed*; and then shew that *at this very spot the remains of a body were found*, which he thought were circumstances proper to go to the Jury.

Chief Justice Sewell.—You certainly may ask him on which side of the river the remains of a human body were found; but, upon the vague testimony of a parcel of wandering savages, it is hardly worth while to have an altercation about general repute, for what can it possibly amount to?

Solicitor-General.—I submit to your Honour's decision, as on all os-

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* The place where the body was left, according to the Prisoner's statement, was a small stony or rocky point; but Mr. Nolin's testimony on this point being considered as not sufficiently precise, the Chief Justice put the question referred to above.

casions it is my duty to do, but I considered it a strong corroborative circumstance, that at the spot where, according to general repute, Keveny met his death, and was, according to the Prisoner's confession, left, the bones of a human being were found. I shall proceed to examine the witness relative to the bones.

[Mr. Stuart objected that the evidence wished to be produced by Mr. Solicitor-General was inadmissible as it was, that sort of evidence which might prejudice, but could not enlighten those who were ultimately to decide the point at issue. Till (said Mr. S.) evidence is offered that these are positively the remains of Keveny, which, I imagine, with all the ingenuity which my learned friends possess, they will not be able to do, I should hope that your Honours will not suffer them to go into evidence which, I repeat, is only calculated to prejudice without enlightening, and therefore, in my humble opinion, ought to be most scrupulously kept from the Jury.]

Solicitor-General.—I think we have shewn quite sufficient to entitle us to go into this evidence. The confession being admissible evidence, I imagine that any thing having a tendency to corroborate that confession, must also be admissible.—The question then is, does the finding the bones of a human being at the spot where the Prisoner stated that Keveny was left by those who committed the murder, and which common repute fixed as his burial place, do so. I contend it is admissible evidence; and, I believe, there will be but one opinion what weight it ought to have.

Mr. Vanfelson said, the officers of the Crown ought to prove that Mr. Keveny is really dead before talking of his bones. The first question ought to be,—" Had you any knowledge of Mr. Keveny? do you " know whether he is dead?" If the witness answers yes, then, if you can, prove that this is in fact the body of Keveny, for the confession is not sufficient, and I produce the authority of Judge Hale, P. C. 284, in confirmation of this maxim. " I have often known the prisoner disown " his confession upon his examination before the Justice, and be some- " times acquitted against such his confession".—There is a case exactly in point: in the hope of pardon a confession had been made of a murder, and upon this the accused were unfortunately executed, whilst some years afterwards the man was found to be alive. If the Indians told the witness that Keveny had been buried here, I submit that these Indians would be the best evidence, and that secondary evidence should not be admitted until the officers of the Crown make it appear that these Indians are not within the jurisdiction of this Court.

The Chief Justice remarked, that every case of law must necessarily turn upon its own peculiar circumstances; for example, a murder hav-

ing been committed in a populous city, it would certainly be a very suspicious circumstance if there was not produced that positive testimony of the death which results from the body having been seen and recognized subsequent to the death, but, in a forest, remote and extensive like this, we ought not to expect that exactitude of proof; and, thus situated, we are compelled to resort to secondary evidence and abandon the primary. His Honour proceeded, the rule undoubtedly is that *secondary* evidence shall not be admitted if it can be fairly inferred that *better* might have been produced, but here is no probability shewn on the part of the defence that these savages were known to the officers of the Crown, or that by any exertion made by them, they could have been found. After three separate confessions of murder to three different persons, the Prisoner at last points out the spot where he says the body was left. It is wished to identify that at a place, which, at the time De Reinhard described where the body was deposited, the witness *supposed* to be the spot, he subsequently found a dead body. If the body so found can be proved to be of the size of Keveny, or that there are any other circumstances leading to a belief that it was the remains of Keveny, they may at the back of these several confessions perhaps be considered as strengthening the case. Though the Jury should infer from the evidence offered by the Crownofficers that *Keveny is dead*, it does not necessarily follow that the *Prisoner at the bar killed him*. The evidence, at the utmost, can go for nothing more than perhaps to lead the Jury to infer that Keveny is dead. Here is a fact that a body *was* found; what additional circumstances connected with the finding there may be, it is not for us to anticipate, but the present is, I think, a fair question, and my learned brother agrees with me in opinion.

[The Examination was resumed by the Solicitor-General, and Mr. Nolin detailed the finding at the spot, which De Reinhard had described, (on the left hand of the River Winnipic, in going towards Lake la Pluie,) a quantity of bones, which to the best of his knowledge were those of a man. He stated that he saw the arm and leg bones, and part of the scull, but he could not say whether they were those of a large man: Also at the place, there was a small wooden cross to denote that the body of a *white man* was there.

The Attorney-General wished to be permitted to go into evidence and shew that according to *general report*, these were the bones of Keveny, but it was overruled by the Court as being neither proper nor necessary.]

The Court adjourned for half an hour, Mr. Nolin's word being taken that in the interval he would not communicate with any one on the subject

of this trial. The Court having re-assembled, the Jury were called and being present, Mr. Nolin was again called and cross-examined by Mr. Vanfelson.

Mr. Nolin confirmed the former testimony relative to being sent on by captain D'Orsonnens and in company with M'Donald, and continued: In the canoe with me and M'Donald, there were five others, of whom three were armed with American guns, which are of a larger bore than hunting or trading guns. It was Mr. M'Donald who delivered captain D'Orsonnen's letter or note to De Reinhard at the fort of Lake la Pluie, and I was with him. I entered the fort accompanied only by Mr. M'Donald having left our men where we had passed the night. I did not see in the fort and about it, more than seven or eight men, perhaps nine. I arrived in the morning, and Captain D'Orsonnens arrived (as I believe,) in the afternoon of the same day.—I went with De Reinhard, Sayer, and Roussin, to meet him. I was then in the service of the Hudson's Bay Company, and M'Donald also. I do not know that Captain D'Orsonnens always said that he was not in the service of the Hudson's Bay Company, or of my Lord Selkirk. I believe that he was there to view the country, as a companion to my Lord Selkirk, and that his idea was to go no farther than Lake Superior. I believe he wore his sword. He had no uniform—it was a grey great-coat that he wore—an old military great-coat. Captain D'Orsonnens came to the fort alone, but from the fort we could see the persons who had accompanied him encamped at some distance. Mr. Sayer and I talked in De Reinhard's presence of the differences between the companies. I recollect having heard De Reinhard say, before the arrival of Captain D'Orsonnens, "that he was sorry my Lord Selkirk had "taken Fort William, because his equipment was there." I remember that when Captain D'Orsonnens arrived he said, that several gentlemen of the North-West had been taken and sent to Montreal to undergo their trials, but I do not recollect that he spoke of treason, or of rebels. I never knew Keveny, and I never heard him mentioned before that time. There are several graves on the banks of the River Winnipic distinguished by crosses to indicate that they are the graves of the whites. Where I saw the bones I saw only that single cross. There are no falls there, and they are generally in places where there are rapids or falls. The body was not interred, because there was no soil there, it was only covered with branches and leaves in the Indian fashion.

In answer to a question from Mr. Justice Bowen.

The Indians generally bury their dead very deep in the ground, five or six feet.

JACOB VITCHIE, *Sworn.*

Examined by the Attorney-General.

Jacob Vitchie.—I have been in the Indian Territories. I arrived at the portage of Lake la Pluie three days after Captain D'Orsonnens.—At the time of my arrival, De Reinhard told me, that he was a prisoner on account of the death of Keveny. In the evening I heard him myself say to the men of our brigade, that he knew of the death of Keveny, and he related how that event had taken place, that he had received orders from Mr. Archibald M'Lellan to kill Keveny.

[The Chief Justice remarking, that this evidence was not admissible as it was impossible the witness could say that no undue influence had been used. The Attorney-General observed, that he thought it sufficient that the witness made no promise or used any undue influence.]

Chief Justice Sewell.—If you go to any particular conversation held between a witness and a prisoner, it would be all that could be required; but I cannot allow a witness to go into evidence of a *general* statement inculpating the Prisoner, made before such a number of people that it is quite impossible the necessary preliminary questions can be answered.

Examination continued by the Attorney-General.

Jacob Vitchie.—The next day I had a particular conversation with him myself. He told me that he had been instigated by Mr. Archy.

[Mr. Stuart objected that he was a prisoner at the time of the conversation, and consequently not in a situation to make any thing he might say evidence against himself.

The Chief Justice overruled the objection and the examination proceeded.]

Jacob Vitchie.—De Reinhard was not under arrest, he took his meals and slept with me, he went and came like the others, but Captain D'Orsonnens told us to watch De Reinhard so that he might not escape.

Chief Justice Sewell.—Mr. Vitchie, did you make any promise or any threat to induce him to make the declarations which you are going to relate to us.

Jacob Vitchie.—No, Sir, not any; the Prisoner and I belonged formerly to the same regiment, and we were walking together and I asked him how it had happened (speaking of the death of Keveny.)

[Mr. Stuart wished the decision of the Court, whether a confession of murder, made under a state of illegal duress, was proper evidence to go to the jury.

The Chief Justice remarked, that after a confession of having committed a murder, it could not be *illegal* to secure his person, which would put him undoubtedly in a state of duress or surveillance, but that *this* case was abundantly stronger under the proclamation of *Sir John Coape Sherbrooke*. The Court had got the whole down and it must go to the jury, who would give to it whatever degree of credit they thought it merited.]

Jacob Vitchie.—De Reinhard told me that he had received orders from Mr. Archy to kill Keveny or to cause him to be killed—That Keveny was embarked with him, (De Reinhard) one named Mainville, and an Indian, in a small canoe in the river Winnipic, and that when they had come to a certain place where Keveny went on shore, Mainville fired his gun, and that he, De Reinhard, had finished him with his sword to hinder him from suffering; and he told me likewise the body was left on the beach. I saw on going up the river Winnipic, near the spot which is called the Dalles, a cross on some rocks, and our guide told us "that was Keveny's cross."

Cross-examination conducted by Mr. Vallière de St. Réal.

Jacob Vitchie.—I saw several crosses on the river Winnipic, they occur from distance to distance, but not *here*. In the place which is called "*above the Dalles*," I saw but one. De Reinhard told me that Captain D'Orsonnens had sent a note to him, but he did not tell me what the contents were. He told me that he *was* a prisoner, but did not say *when* he had been taken. Captain D'Orsonnens told me that he intended to go to *Switzerland* by the way of Hudson's Bay. He told me that he travelled out of curiosity alone; he did not tell me that he had the title of chief. Every body was in the service of my Lord Selkirk and Captain D'Orsonnens commanded them. The Prisoner, on the third or fourth day after I saw him at the portage of Lake la Pluie, told me that "*he believed he should be received as King's evidence*, that "he had confessed the whole to Captain D'Orsonnens, and that he was "going *to do the same to my Lord Selkirk, hoping to be received as King's* "*evidence*, but he did *not* tell me that he had had any conversation with "Captain D'Orsonnens relative to such expectation." De Reinhard always took his meals with us and Captain D'Orsonnens. At table the gentlemen of the North West were frequently spoken of. The usual conversation of Captain D'Orsonnens and the others was, that their

trade was ruined and that their people were going to be sent prisoners to Montreal to take their trials.

Chief Justice Sewell.—Was this said in the presence of De Reinhard.

Jacob Vitchie.—Yes, I remember that it was said in the presence of the Prisoner. The Prisoner was known to be a North West Clerk at the time. De Reinhard knew that Fort William had been taken by my Lord Selkirk at the time when we arrived at Lake la Pluie. One is not *forced* to pass by Fort William in going from Montreal to Lake la Pluie, but it is the *usual* route; one *may* go by *Fond du Lac* without passing by Fort William. I knew the person named *Heurter*, who was then an engagé of the North West; he was supposed to be at Red River. Captain D'Orsonnens said before de Reinhard that it was a pity such a good fellow as Heurter should be amongst rebels, and that he ought to be brought over. I do *not* know that Captain D'Orsonnens *gave orders* to De Reinhard to write a letter to Heurter, but I know that De Reinhard *did* write to him. Captain D'Orsonnens told *me* to write at the bottom of De Reinhard's letter to let him know that I was there, *and for him to come to us as soon as we got to Red River.*

Chief Justice Sewell.—What is this testimony to tend to?

Mr. Vallière de St. Réal.—I intend to prove that similar conduct was also adopted to other persons, and that a part of the system by which the commercial rivals of the private prosecutor were attacked was by seducing their servants, and that the witness, Captain D'Orsonnens, was principal agent in so doing.

The Attorney-General objected and said,—Admitting for a moment, what I by no means allow to be really the case, that he succeeded in proving that Captain D'Orsonnens was a man calculated to seduce the servants of what the learned gentleman very ingeniously calls a commercial rivalry, what would it amount to? How would it rebut a charge of murder? how set aside a confession made, confirmed, and repeated over and over again by the Prisoner? If it cannot be made evidence, why should the time of the Court be taken up in going into it? for what would it amount to if my learned friends proved that the whole of the servants, of this commercial rivalry had been seduced by Captain D'Orsonnens?

Mr. Justice Bowen.—I think a nearer way of accounting for the conduct of Captain D'Orsonnens might be found. An old fellow soldier had, in his opinion, got into a scrape, and he causes a letter to be written, apprizing him of his danger, and recommending him to avoid the consequences by leaving the service of those who, in Captain D'Orsonnens opinion, would involve him in difficulty; a very natural thing, in my judgment, for him to do towards a fellow soldier, for whom he

cherished sentiments of respect, an act very far indeed from being censurable.

Mr. Stuart.—We are charged with the defence of the unfortunate Prisoner, and are conducting it to the best of our humble abilities. I am sorry that the more elevated situation of the learned judge deprives the unfortunate man of the advantage which he might have derived from his talents; but, as he cannot avail himself of that assistance, I do hope the defence will be left in our hands, and that we may be permitted, without interruption, from *any* quarter, to conduct it in our own way, as it is a duty sufficiently arduous, without his case being prejudiced by unfavourable remarks from the Bench.

Chief Justice Sewell.—Don't say so, Mr. Stuart; there can be no greater odium thrown upon a judge than to charge him with prejudicing the case of an unfortunate prisoner. I beg of you not to repeat such a remark, a remark as unwarranted as it is unbecoming. I cannot sit and hear such observations, and do not, I beg of you, Mr Stuart, attempt any thing similar.

Mr. Stuart.—I was going merely to state that I *do* think it *extremely essential* to shew to the Jury that this was the conduct of the agents of the private prosecutor on all occasions. Captain D'Orsonnens tells you that he was there *a private gentleman, a private traveller* no way interested in the affairs of the Hudson's Bay Company, or the Earl of Selkirk's views. We now wish to let the Jury know that this private gentleman, merely travelling for his amusement, employed himself in seducing and debauching the servants of the rivals of that company who, whether he was connected with it or not, he was, by his own account, employed in assisting, by superintending the progress of nearly a hundred persons to their settlements. It is, in my humble opinion, *extremely important;* they are *facts*—what weight they may have on the Jury I know not, but, to my mind, they are facts completely at variance with the testimony of Captain D'Orsonnens, who most explicitly asserted that he was in that country a simple individual, no way connected with the Earl of Selkirk or either of the rival companies, but in fact, a private gentleman, travelling merely for amusement. As evidence affecting the credibility of Captain D'Orsonnens' testimony, I cannot but consider that we are fully entitled to pursue the course adopted by my learned friend.

Chief Justice Sewell.—To a certain extent you certainly may pursue it, but not into a history of all the circumstances of this unfortunate business. You may ask him did Captain D'Orsonnens give orders to De Reinhard to write to Heurter. I will put that question to him.—*The interrogatory being put* —

Jacob Vitchie.—I do not know whether Captain D'Orsonnens gave orders for writing to Heurter, but he told *me* to write at the bottom of De Reinhard's letter for him, to come to us and to be at Red River.

Cross-examination continued.

Jacob Vitchie.—I was at Fort William at the time of the capture, on the thirteenth of August, 1816.

Juryman.—What rank did you hold?

Jacob Vitchie.—I was a clerk in the service of my Lord Selkirk. The fort was taken by force, because they turned us out with our warrant and all. There was in our party one man with a bugle, and some men who were armed with muskets and bayonets. Some had red coats being soldiers lately discharged. I believe that De Reinhard knew that Fort William had been taken, but I do not know whether he was acquainted with the *manner* in which it was taken. In the conversations of our people, they often spoke of the manner in which it had been taken before De Reinhard, but I cannot say for certain whether this was before or after the declaration which he made to me.

[Mr. Vallière was about asking the witness whether it was not taken with *cannon*, to which the Chief Justice remarked, that as yet it was not brought home, that their conversations took place before De Reinhard made his declaration, and that although it might be material to prove that the fort was *in possession* of Lord Selkirk at the time, it could not be necessary to shew that it was taken with *cannon*, or *how* it was taken.

Cross-examination resumed by Mr. Vallière de St. Réal.

Jacob Vitchie.—Captain D'Orsonnens said before De Reinhard, that in consequence of the disputes between my Lord Selkirk and the North West Company, or in order to settle those disputes he was, if it was necessary, to have troops from government, but I do not know whether he mentioned any number, or whether it was before or after the declaration which De Reinhard made to me. I have known De Reinhard for a long time, he was much esteemed in our regiment.

MILES MACDONELL, Esquire, *Sworn*,

And examined by the Attorney-General.

Mr. M'Donell.—I have been in the Indian territory, and I knew *Owen Keveny*; he passed the winters of 1812 and 1813 with me at Red

River. I never knew but one person of that name, nor indeed of that of Keveny, I do not know that it was exactly *Indian territory* where I resided, I considered it to be the territory of the Hudson's Bay Company. I was at Red River from 1812 to 1815, and I knew the gentlemen generally residing there. As I went every summer to Hudson's Bay I was particularly acquainted with all between the River Rouge and York Fort. In the autumn of 1813 Mr. Keveny went to England, but I have not seen him since.

Mr. Stuart.—The witness, I believe, does not *know* that he was in England.

Mr. M'Donell.—I had a letter from him, saying he was on the point of embarking, and I heard afterwards that he had been in England, and that he had returned to the southward.

Mr. Stuart.—That will not do, he only *heard* it.

Attorney-General.—Was *you* in England afterwards?

Mr. M'Donell.—In 1815, I was taken prisoner by the North-West Company, and sent to Fort William, and afterwards I went to England, and from the gentlemen at the Hudson's Bay House I heard that Mr. Keveny had returned. Mr. Keveny was a slender but very active man, about 5 feet 10 inches or 11 in height, of a fresh complexion, about thirty (I should suppose) with light brown hair. I know the passes on the River Winnipic and the Dalles. Last July, or the beginning of August, I landed at the place above the Dalles, where I was told that the murder of Mr. Keveny had been committed. It was on the left side of the river coming towards the Lac des Bois. We were shewn at a few yards distance from the shore on a point of rock the skeleton of some person covered with stones and a few branches. The bones were asunder, and there was no flesh, but I have no doubt it was a skeleton of a human being. The bones were put up together, those of the legs and body together in a heap. We buried them more by putting more stones above them. I saw nothing that could lead me to think that they were not the bones of Keveny, on the contrary ——

Mr. Stuart.—This is mere *negative* testimony, founded on *opinion*, and not admissible, I conceive.

Chief Justice Sewell.—I don't know *that*, Mr. Stuart. It is a *fact* that bones *were* found. Were they, Sir, the bones of such a man as Keveny was, of a slender man five feet ten or eleven high?

Mr. M'Donell.—They were small bones. Mr. Keveny was a slender man, but tall, and I have no doubt that they were his bones. Mr. Keveny was easily managed, he was a man possessed of a high spirit and a quick sense of honour; he was quick to resent an insult, but did not give them. I should think *one* man might easily manage him. I sup-

pose the Prisoner to be superiour to Mr. Keveny in point of strength. I have heard that he quarrelled with the Hudson's Bay people he brought out, but I saw nothing of it. He was not, I think, more likely to quarrel than other people. I never had any difference with him. I put up a cross at the place where I found the bones; there had been a stick with a wisp of straw across it according to the Indian manner. Crosses are generally put at rapids where people, meeting with accidents, are buried; but here are no rapids, and I saw no other cross hereabouts.— I left Fort William to go to Red River on the 15th October, 1816, and about three days after, the Prisoner joined us where we were encamped. He came to my tent and we spoke together about affairs in general relating to the North-West. He told me *afterwards* that he was a *Prisoner*, but he did not appear like one, as he had a gun and ammunition and a shot bag on. We spoke of the affairs of the Savage Territory generally, and amongst others of the massacre in which *Governor Semple* fell, together with his people, by the North-West Company. He then said that *he* also had committed some crime, and was then a prisoner on his way to submit himself to Lord Selkirk. I told him that he had not much to apprehend, as I supposed he had not been guilty of such heinous crimes as the massacre at Red River, upon which he said that he also had killed a man belonging to *us*, and asked me if I would permit him to name him; I said yes, certainly, and he named *Mr. Keveny*. He said Keveny, not *Owen* Keveny. He said that Keveny had come from Hudson's Bay, (he appeared to speak with regret for what he had done,) and that *he* went with a warrant from *Mr. Archibald Norman M'Leod* to arrest Mr. Keveny, and having done so, he brought him to the mouth of the River Winnipic, where Mr. M'Leod issued the warrant, but he had previously departed for the north. He said, that at the time of taking him, Mr. Keveny refused to obey the warrant, and there had been a scuffle, and that the *Bois-brûlés* who were with him would have killed Mr. Keveny, but that he prevented them, saying, that he could manage Keveny himself. He went on to tell me that Keveny was afterwards sent off for Fort William, and that some days after his departure they received news at *Bas de la Rivière*, that *Fort William* had been taken possession of by Lord Selkirk, that thereupon a council was held, at which it was resolved to despatch Mr. Keveny rather than he should join Lord Selkirk. He (De Reinhard,) said that he was present at this council with Mr. M'Lellan, Mr. M'Donell, Joseph Cadotte, Cuthbert Grant, and some others, whose names I do not now recollect, and that they divided his effects between them at this council, but he did not mention what part of the effects *he* had. He further said, that they represented to him that the deceased was a rebel and that all the persons

employed under my Lord Selkirk were rebels, and were acting against the government, and that the greatest mischief might be expected, as he (*Keveny*) had with him papers and plans which might, and would be, ruinous to the North-West Company. He afterwards mentioned being in a canoe with Keveny, in company with a man named Mainville, and a Savage commonly called José, fils de la Perdrix Blanche.

Attorney-General.—Have the goodness, Sir, to relate to us what he stated to have passed in the canoe.

Mr. M'Donell.—He said that, *en haut des Dalles*, they landed, and that Mr. Keveny, for some natural occasion, left them, and went a little distance into the woods, and that, during his absence, he spoke to Mainville, saying, that if he, (Mainville,) was desirous, ("*si vous avez envie*,"*) of killing Keveny, that this was a favourable place; upon which, as Keveny was approaching the canoe to re-embark, Mainville discharged his gun, shooting him in the neck, and that he, (the Prisoner,) ran him twice through the back with his sword to finish him. He also said that, after being wounded, Keveny tried or attempted to speak, but that all he could say was, "*you*," adding that he did not suffer long, for that he, (De Reinhard,) immediately put him out of pain. He told me a great deal more which I do not now recollect, but I have related the principal parts of our conversation.

Attorney-General.—Did he appear penitent, and express sorrow for what he had done, or account for his conduct?

Mr. M'Donell.—He appeared *very penitent* for what he had done, expressing great sorrow, saying that he had been misled, and that it was through ignorance that he had done it.

Attorney-General.—Did he tell you where Keveny fell, and what they did with the body.

Mr. M'Donell.—He told me that Mr. Keveny fell just by or upon the canoe, just as he was going to embark, and I do not recollect that he told me what they did with the body; I think he did not.

It being six o'clock, the Court was adjourned until to-morrow at eight, A. M. The Chief Justice admonishing Mr. M'Donell that he must not hold communication with any person on the subject of the trial.

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* If you have a wish.

Tuesday, 26th May, 1818.

PRESENT AS BEFORE.

The Jury were called over, and being all present, Miles M'Donell, Esquire, was cross-examined by Mr. Stuart.

Mr. M'Donell.—I cannot *swear* that the bones I saw *en haut des Dalles* were the bones of Keveny, nor am I sufficient anatomist to know the bones of a man five feet ten or eleven inches, or to distinguish the bones of *a man* from those of *a woman*. I could distinguish the bones of a very *large* man from those of a *small* one; these appeared the bones of a man rather above the middle size. I do not recollect that De Reinhard said *where* it was held, but he told me who were at the council—viz: Mr. M'Lellan, Mr. M'Donell, Mr. Grant, Mr. Cadotte, and others, together with himself. By Mr. M'Donell, I mean *Mr. Alexander M'Donell, a partner of the North-West Company*. And I am sure the Prisoner told me that he (Mr. M'D.) was at it.

Chief Justice Sewell.—Are you sure, Sir, that the Prisoner told you it was *Alexander* M'Donell.

Mr. M'Donell.—He told me it was Alexander M'Donell, a partner in the North-West Company. I was made a Prisoner by the North-West Company in 1815, and taken to Montreal. Mr. Keveny went to England in the autumn of 1813, and I have not seen him since. I never considered myself in the service of the Hudson's Bay Company. I held a commission for judicial purposes in a tract of land ceded by the Hudson's Bay Company to the Earl of Selkirk, it being a right they have reserved, and I was *Governor* there. The Hudson's Bay Company have also reserved the *judicial* authority over this ceded territory to themselves. I am principal agent to Lord Selkirk in the Indian territory, and have been so since the 10th or 12th of June, 1811, which is the date of my commission. I *had* in my possession (but have not at present) a warrant for the arrest of Keveny, which I found at Fort Douglas, I sent it with other papers to my Lord Selkirk.

FREDERICK DAMIEN HEURTER, *Sworn,*

And examined by the Attorney-General.

Heurter.—I was in the Indian territories in 1816, in the service of the North-West Company. I was formerly a sergeant in the Meuron regiment. I saw Keveny's baggage at the fort at Bas de la Rivière; I received it from a Canadian named Wells, and an Indian called Joseph. The trunk which was marked " Keveny" ——

[Mr. Stuart interrupted the witness, saying, this was not evidence, the Chief Justice replied he had not taken it down.]

Heurter.—I received a letter from the Prisoner, but I have not got it here.

Ceoss-examination conducted by Mr. Vanfelson.

Heurter.—I was engaged to the North-West Company for three years, but I left before my engagement was completed. I did not enter into the service of the Hudson's Bay Company, nor of my Lord Selkirk. I never was employed in the service of any other company.

Mr. Vanfelson.—In what service have you been since you left the North-West?

[The Chief Justice doubting whether this was a proper question, Mr. Vanfelson said he considered it one which he was bound to answer, for if made to acknowledge that he deserted before his engagement was finished, and went into the service of others, no worse consequence could attend it than a civil action of damages; and upon a cross-examination he hoped he was not exceeding the limits. The Chief Justice said, upon a *cross-examination* perhaps it was not beyond bounds, but not seeing any effect which it could produce to the benefit of the Prisoner, he thought he should save time by stating his difficulty on the subject, and recommended Mr. Vanfelson to put the direct question to the witness, which was done.]

Heurter.—I have never been employed in the service of the Hudson's Bay Company or of my Lord Selkirk, or of any other person, and I have not received any salary from any one whatever. After De Reinhard was in prison at Montreal I went to see him I believe two or three times. I do not remember any message which I carried to him; and, as far as I can recollect, I did not tell him that I was entrusted with any message.

Mr. Vanfelson.—I have done with this witness.

Attorney-General.—You left the North-West: Give us your reasons for so doing.

Chief Justice Sewell.—You must not go into that. You have the fact, and I cannot permit you to go farther.—Call the next witness.

Doctor Allan was about being sworn.

Chief Justice Sewell.—Mr. Justice Bowen has reminded me of a circumstance which renders your question perfectly admissible, Mr. Attorney-General; you certainly are entitled to ask it, so that your witness may account for what *at present* appears unfavourable to his reputation, namely, that he left the service of his employers before he had completed his engagement. I did not recollect the circumstance, but upon my brother Bowen's suggesting to me *his* reason for thinking the question was a fair one, I referred to my notes and certainly am of the same opinion.

Mr. Stuart.—It is with the greatest deference that I beg to submit a contrary opinion to that just intimated, but I presume your Honour did not intend to prevent us from stating that we had an objection, which your Honours overruling the question, rendered it unnecessary to produce. We *now* beg leave to contend, that the question is perfectly inadmissible in *law*, and perfectly unnecessary for the sake of *justice*. The question of the *Crown* on the examination in chief was, were *you* in the service of the North-West Company? and the answer of the witness was, *Yes*. *We* ask, have you *left* that service? and he answers, *Yes*—There the facts end, and it is quite unnecessary to go farther.

Chief-Justice Sewell,—For *you* perhaps it is.

Mr. Stuart.—And equally so for *justice* also.

Chief Justice Sewell.—That I deny—Justice to the witness who has just left the box requires it.

Mr. Stuart—I still must beg to contend that all the purposes of justice are obtained by the question of the Crown, which led to evidence that he had been in the service of the North-West Company, and, by our own on the cross-examination, proving that he had left it. We have imputed no object to the witness, we therefore consider that the question should not be entertained, for it can be of no possible benefit, nor do I see any end which it can answer, unless to engraft a civil action on a criminal process. Our only object in putting our question was, that we thought it necessary to know, and that the jury should know, what service the witness is in at the present moment, because there is an influence arising from circumstances, which we are not always capable of divesting ourselves of, nor indeed, from its subtleness, do we always detect its operations. Had his answers to my learned

friend's subsequent questions been different to what they were, though they might not have invalidated his evidence, would it not have been a fair circumstance to excite their caution, and therefore proper to be before the jury, that he was in the employ of the private prosecutor. Upon his saying that he was *not*, we left him, and we do not consider that the Crown are entitled to re-examine the witness.

Chief Justice Sewell.—It is really painful when first principles of law are opposed, by solemn argument, from gentlemen for whose abilities we entertain the highest respect, and, as painful flatly to deny them, and, without hearing them, to decide contrary to their wishes, but it is an absolute waste of time to hear an argument on this question. Had I recollected the *extent* of the question you had put to the witness, I should not have hesitated a moment as to the right of the Crown to put the question proposed by Mr. Attorney-General. Let us for a moment look how the case stands. You ask Vitchie, a former witness, whether he did not write to Heurter, the present witness, recommending a certain course, and you support the testimony given by Vitchie, by making Heurter acknowledge, that *he did* that which was recommended to him. The inference you wish to draw is evident. To obviate the supposed influence which the jury would infer from the circumstance of his leaving his employers without finishing an engagement; I say to remove any unfavourable impression as to his credibility, which this, (to use your own term,) desertion might create, the Crown officers wish to ask him the manifest question: *why* did you leave the North-West Company? and in my opinion it cannot be refused.

Mr. Justice Bowen.—In concurring with the Chief Justice, I remark, that I suppose the object of our sitting here is to see justice done between the parties, and to fairly take the evidence, as it is adduced on both sides, and, in the performance of this office, that it is my *duty* to put any question, or make any observation, that strikes my mind as important, either to the Crown or to the prisoner; and I trust, so long as I have the honour of a seat on this bench, I shall never be so wanting in my duty to the public justice of the country, or to myself, as to abstain from doing so. In the present instance, I refrained from putting the question, though I saw the propriety of it, but when it *was put* and was about being overruled, I felt it my duty to point out to the Chief Justice that he had, in my opinion, overlooked the part of the evidence which the Attorney-General, by that question, was desirous of clearing up to the jury. It was a sense of duty that prompted me to do so *now*, and a similar sense has urged any former remarks I have made, and not a wish to *conduct this prosecution* as was yesterday so *ungenerously intimated by Mr. Stuart.*

The question was then put by the Attorney-General.

Heurter.—I left the service of the North-West Company, *because I received orders to join the Half-breeds to take possession of Fort Douglas by force.*—It was in 1816, at the time Captain D'Orsonnens was there.

Attorney-General.—Call Doctor Allan.

DOCTOR JOHN ALLAN, *Sworn,*

And examined by the Attorney-General.

Dr. Allan.—I know the Prisoner at the bar. I first saw him in November, 1816, at Fort William.

The Attorney-General produced a paper.—

Mr. Stuart.—What is that paper?

Attorney-General.—I am going to ask the witness what it is.

Chief Justice Sewell, addressing the Attorney-General.—What is that paper?

Attorney-General.—Witness! what is that paper?

Chief Justice Sewell.—Give me the paper. [*The paper being handed to, and examined by the Court.*] It purports to be a confession of Charles De Reinhard before Thomas, Earl of Selkirk, one of his Majesty's Justices, &c. &c.

Mr. Stuart.—Let Lord Selkirk be produced.

Attorney-General.—I proceed with the examination, and when I produce the paper to make it evidence, the learned gentleman can object.

Dr. Allan.—I attended the Earl of Selkirk as a surgeon. I never acted as clerk to him. Lord Selkirk was a magistrate in the Indian Territory at that time. I was present when De Reinhard signed a paper drawn up with his own hand. I understood three days before, that he was drawing up one, and he told me at the time of signing it, that it was his own hand-writing. I was present when the Prisoner gave the paper to Lord Selkirk, and there was not any promise or threat made use of. De Reinhard signed the paper, and then delivered it to Lord Selkirk, and when it was delivered, Lord Selkirk asked him whether he wished to add or take away any thing from that paper, and he said no.

Mr. Stuart.—I object to this as going to prove the contents of a paper by evidence that is not legal. Let the paper be produced regularly. Dr. Allan says distinctly that he was not *clerk* but *surgeon* to Lord Selkirk, who, as I understand, signed this paper as a *magistrate;* produce him or his clerk.

Solicitor-General.—For all the purposes of this confession I should

contend that the present witness was a *clerk*. Did you, Sir, act as *surgeon* to Lord Selkirk in witnessing the paper?

Dr. Allan.—I came out as a medical attendant to Lord Selkirk's family. I had never heard of Red River at that time. I was present when the paper was signed. Nothing was altered; he said the prisoner did not wish to alter any thing. Three or four others were also present.

Mr. Stuart.—I hope the Court are not taking this; surely till the paper is put in, this cannot be evidence.

Chief Justice Sewell.—It is evidence as a recapitulation of what took place at the delivery of a certain paper, which if *not* produced, or *if* produced and found *inadmissible*, will go for nothing. If found to be evidence, we then have the whole attendant circumstances before us.

Mr. Stuart.—It would be more frank of the Crown officers to state explicitly what it is they are going to prove by this paper.

Solicitor-General.—We mean to prove *a voluntary confession of this murder* on the part of the Prisoner.

Mr. Stuart.—Is it that?

Attorney-General.—Certainly it is, and have we not a right to do so?

Mr. Stuart.—Then the Crown officers intend to prove a deposition taken before a magistrate by a *by-stander*—I object to such proof.

Attorney-General.—My learned friend is, I think, a little premature. We have produced no paper. He cannot, therefore, make an objection to the mode of proof.

Chief Justice Sewell.—It is of no very material consequence *when* the objection is made. According to strict etiquette, the time for objecting would be when the paper is put into the hand of the witness, and the question is asked—is *that* the paper you saw signed and delivered by the Prisoner at the bar to the Earl of Selkirk? and you had better reserve your objection to that stage of the examination.

Attorney-General.—Did Lord Selkirk send for any person to witness the Prisoner sign the paper?

Dr. Allan.—Lord Selkirk sent for a gentleman belonging to the *North West Company*, named *Dease*, to see De Reinhard sign the paper. *Mr. Dease* read the paper himself in my presence and signed it as a witness.

Attorney-General.—Did he make any remark on reading it?

Dr. Allan.—Mr. Dease asked the Prisoner "*if the contents* were *true?* De Reinhard said "*yes they were true,*" and signed it, and Mr. Dease signed it as a witness.

Attorney-General.—Is *that* the paper, Sir, which you speak of?

Mr. Stuart.—I object to that question.

Attorney-General.—Is that the paper?

Chief Justice Sewell.—Now is the time certainly for Mr. Stuart to tender his objection, and to be heard in support of it.

Mr. Stuart.—The officers of the Crown produce a paper purporting to be a confession taken before *a magistrate*, and they propose to prove the signature of Charles De Reinhard by the gentleman now in the box. To this course *we* object, and I shall have the honour very briefly to submit to the Court the grounds upon which our objections are founded.—We object to this paper or confession being proved unless by the magistrate before whom it was taken, or that magistrate's clerk. It is a confession which on its very face shews that it was taken under the statute of *Philip and Mary*, on a charge of felony and the question is, can it be received in evidence? We say *no*, except the magistrate or his clerk is produced according to the provisions of the statute of *Philip and Mary*. Without reference to authorities upon the subject, the necessity for a strict compliance with this provision of the act must, I conceive, be apparent to every one. At the time of making the confession, he was in the magistrate's hands, who according to his judgement might liberate or imprison him, for the statute of *Philip and Mary* gives that discretion to the magistrate. It also provides a check against magistrates *inducing* prisoners to confess, by rendering no other evidence sufficient to prove a confession, but their own oath, or that of their clerk, who was present at the time of its being made. The reason for this is apparent, because it is the magistrate alone who can give what the law invariably demands, the *best evidence* of any fact that it is wished to prove. Apply it to this case, and it is obvious that this gentleman, who was in the room a short time, five minutes perhaps, cannot give us that information which the magistrate could before whom the confession was made, and who must necessarily know whether any promise or undue influence was resorted to. Upon the great and leading principle of criminal law, that *the best possible evidence must be brought before the Court*, this confession is inadmissible. Who can give the best possible evidence in *this* case? why indubitably that person who knows all about it, from beginning to end, and who is able to give a *legal quality* to the confession by answering those *introductory* questions, which it is indispensable shall be put, previous to any such examination being read in evidence. M'Nally, page 41, in a few words, lays down the rule, which it is impossible to evade—" Before such examinations can be read in evidence, it must " be testified that they were made freely, without any menace, or ter- " ror, or any species of undue influence imposed upon the prisoner."—Who, I say, but the *magistrate, or his clerk*, can satisfactorily prove this? Here we have a confession attempted to be proved, without a justice being brought before the Court, or his clerk; and a confession not writ-

ten down at the moment, when it might be supposed that a sense of guilt burdening the conscience, led to a full developement of all the circumstances connected with the crime. What certainty have we that threats and menaces were not made use of, or what certainty, on the other hand, have we that promises were not resorted to, to induce the confession. If my instructions are correct, *promises* must have been held out, for *previous* to the confession, I believe, we shall be able to prove that *De Reinhard was confined closely and treated with rigour*, but that *after* he had delivered this paper, *he was liberated and treated with kindness*. This circumstance alone is sufficient to excite *suspicion*, and to dictate the absolute necessity of most strictly scrutinizing every thing connected with this pretended confession. The *peculiar* situation of the *magistrate* who received this confession, forms also a reason for examining into this case (more than any other,) with the utmost minuteness. Fort William, where the Prisoner at the bar was in a rigourous confinement, previous to making this confession, had been taken by, and then remained in possession of, this very magistrate. A justification for all the violence and aggression which characterized the capture of that fort was, we are told, that it was indispensible to enable this magistrate to bring to justice a band of criminals, who had thought themselves above the law. This is the story that had, by every possible means, been circulated in that country, and that all in opposition to this magistrate were rebels and traisors. That story not answering, except in the wilderness, where information could only be obtained, through the channel, and under the observation, of this very magistrate, recourse was had to the press, to enable the actors in these scenes to stand clear in the public opinion. I hold in my hand a publication, in which *this very confession is given to the public, and not the confession alone, but with comments calculated to inflame the public mind, and deprive this unfortunate man, and every other person any way connected with these transactions, of a fair and impartial trial.* Most sincerely do I hope as this is the *first*, so it may be the *last* time, we shall hear, I will not say of a *British subject*, but of *any* man being deprived of a fair and impartial trial, upon a charge affecting his life. Of this *first right of every human being*, the magistrate before whom the confession was taken, has, as far as in him lay, deprived the person at the bar, by poisoning against him, in a long and studied pamphlet, the public ear, by daring to reveal the King's counsel which he was bound to keep secret, and thus disturbing the pure fountain of national justice. Such conduct I trust in God we shall never again witness. But we are not driven to the necessity of exhibiting the deformity of this conduct, it is sufficient that we rest upon a *principle of law*, and say, that till the *best* evidence, which the nature

of the case will admit of, is produced, this confession *cannot be permitted to go to the Jury*. It may perhaps be urged, that the number of witnesses to the signing of this confession, excludes all idea of its being obtained in any other than the most open and honourable manner; on the contrary, I should contend that the number witnesses adds no strength to the confession, but rather the reverse, indeed *that circumstance alone* renders it saspicious, and would, though unattended by any of the strong points to which I have alluded, suggest to my mind that all was not fair. If it *was*, why deviate from the *usual* course? No reason, I think, can be assigned that will satisfy either the Court, or the Jury, that any necessity existed for such a step. In conclusion, I contend that Lord Selkirk, as the magistrate, ought to be produced, so that the Prisoner may have the benefit of examining him. It is positively required by *law*, that the magistrate *shall* be produced previous to the confession being received as evidence. I have no wish to trespass further on the time of the Court, being confident, that till the necessary compliance with the statute takes place, it will not be permitted to be given in evidence against the Prisoner. Reason, as well as law authorities unite against such a confession being received.

Mr. Vanfelson.—I have the hoonur, in the first place, to submit to the Court that this pretended confession of the Prisoner ought not to be received, because the magistrate before whom it is said to have been made is not called before the Court to prove it, and secondly, that on account of the conduct of the magistrate who received it, this confession ought not to be admitted. The magistrate, the Earl of Selkirk, (of whom I shall say nothing but as a magistrate) has so deviated from his duty, in the present instance, as to endeavour to poison the public mind, by giving to the whole world this paper, which the Crown officers now produce as the Prisoner's confession made to him as a magistrate.—Not confining himself alone to the printing of it, this magistrate equally forgetful of his elevated rank in society, and the duty which, as a magistrate, he owed to his Sovereign, has even dared to comment on his confession. Yes, your Honours, this magistrate not content with having published, contrary to his duty, this confession, he has not been ashamed to comment upon it, for the purpose of exciting the public opinion against the unfortunate Prisoner at the bar. I do not, therefore, object to this confession, as being the result of an understanding with the officers of the Crown, no, not at all, but upon the principle that it is not *equally certain* that it does not result from some understanding between the *private prosecutor* and the Prisoner, which does not at present appear. I submit to the Court, that the law always requires, and indeed exacts the best evidence that the nature of a case will

will permit. Then I ask, what in the present case is the best evidence of this confession? Assuredly it is not the testimony of a bye-stander; not the testimony of a gentleman who tells you, that he did not even see the Prisoner write it; not that of Doctor Allan, *his Lordship's physician*; but the best evidence to produce, is, that of the magistrate before whom this pretended confession was made, or of his clerk, and not that of a person who, by pure accident, happened to be present. Let us consider this confession and the testimony which Doctor Allan gives on the subject. This confession had been prepared before-hand, which is certainly not a very usual circumstance; moreover, at the time that the Prisoner delivered it to the magistrate, it is in evidence that Lord Selkirk asked him whether he wished to alter it, or to add any thing to it. Certainly my learned brethren, the Crown officers, will not pretend to say that this conduct is perfectly usual. Then, I would ask, for what reason has the magistrate thus acted? what particular circumstance justified him in departing in the present case from the usual and regular course? I most respectfully submit, may it please the Court, that the moment we see a magistrate depart from the regular and usual course, from that moment there is ground for suspicion that the whole has not been conducted with that degree of regularity and integrity which is necessary to produce confidence in such proceedings; and, looking at the manner in which this confession was made, and, also, at the mode of its production before this Court, I feel myself authorized to say, that the circumstances are extremely suspicious. Another circumstance which renders the presence of the magistrate very important in this case is this, the confession was ready written when it was delivered to Lord Selkirk in the presence of Doctor Allan; and, unless his Lordship is called here, it is impossible to know whether any threat or promise was made to the Prisoner, to induce him to confess. Let us look for a moment at the confession itself. What is it? the history of a murder which is alleged to have been committed in the Indian territories, and it is particularly set forth in the paper that this confession is the Prisoner's own hand-writing, and that he made it before Lord Selkirk, one of the magistrates for the Indian territories, who also signed it in his official capacity. I hope, with confidence, that this honourable Court will not introduce a rule so novel and so dangerous, as to allow of proving a confession without the magistrate before whom it was made being produced; indeed, I am certain, your Honours will not allow this confession to be received. Again, this confession ought not to be received unless the magistrate before whom it was taken be present, because, if he were in the witness-box, perhaps he might suggest something favorable to the Prisoner, or the Prisoner, during the examination of the

magistrate, might draw out some favourable circumstances, which are unknown to any other person. Perhaps it might appear that the magistrate had seen the prisoner before, and then a circumstance might be explained, which at present it is very difficult to understand, namely, *how* it happened that this confession should be prepared beforehand; we should ascertain *how* it was obtained, and the reasons which induced the Prisoner to prepare it. The Prisoner, undoubtedly, has the right of examining the magistrate before whom the Crown officers say the confession was taken. The law ordains that before a confession can be received against a prisoner, it shall be established, that it was not obtained by means of promises or threats, and that this circumstance shall be proved. By *whom*? not certainly by an individual who, by chance or accident, happens to be in the police office, or in the apartment of a magistrate at the time that a Prisoner is making his confession. On the contrary, it is expressly required that it shall be done by the magistrate before whom it was made, or by his clerk who had written it, and *why*? for this reason, certainly, because the magistrate, or his clerk, could furnish the *best* evidence which the case would admit, and the law always requires the best evidence. Were it possible to allow a confession to be received against a prisoner, in the absence of the magistrate or his clerk, he is deprived of a material part of his defence. It is the duty of the Crown officers to produce the best testimony possible, and I ask them, do they produce it in calling Doctor Allan? I maintain they do not, most assuredly not. If my learned friends, the officers of the Crown, say that Doctor Allan signed it as a *witness*, that might be a plausible reason for admitting his testimony, but it would not be sufficient; for the law enacts, that the magistrate or his clerk shall be the *witness*. Again, I submit to the Court that this confession is inadmissible, because the Prisoner would be thereby deprived of his right of cross-examining the magistrate.——[*The Attorney-General remarked*, "*The Prisoner can call the Earl of Selkirk.*"]——I ask pardon of my learned brother, but it is *his* duty to produce the best possible testimony to establish his case, and if, on the contrary, as in the present instance, he offers testimony of another nature to the Court, it is not sufficient for him to say, that *we* may produce it. It is absolutely necessary before this confession can be received, for the magistrate or his clerk to tell us, that it was made voluntarily, freely, and equally without promise of benefit, or menace of harm. I admit that if the magistrate and his clerk were both dead, then the present witness would be the best evidence, but, under the actual circumstances of the case, he is not so, and I consequently maintain, with confidence, that it is no answer to my argument to say, as Mr. Attorney-General has done, that we are

at liberty to produce it. It is not for us to prove his case; it is *his* duty to do it, by producing the best evidence possible, and since the rule is such, I say, that in producing Doctor Allan, the officers of the Crown have *not* produced the best evidence in their power, and, it necessarily follows, that this confession ought not to be received as evidence for the Jury. It is not our business to contradict the confession, before it has been put in proof, and, to put it in proof, it is absolutely necessary to produce the magistrate; and when *he* is in the witness-box, if we cannot prove, that the circumstances under which it was made prevent it from being received, the blame will be with us. But, having reasons to believe that this confession would be offered, we expected the Earl of Selkirk would be called, and we were prepared to meet him, but his Lordship not being here, we submit, with great confidence, that your Honours will not admit it.

Attorney-General.—The paper offered as evidence on the part of the Crown, I beg leave to contend, is entitled to be received, either, as a confession taken before a magistrate, or as a paper in the hand writing of the prisoner. I admit, that the rule is to produce either the magistrate, or his clerk, to prove the confession of a prisoner; but, there was no clerk present, and as the magistrate is not before the Court, I submit, with great deference, that, having proved that no menace was used, nor any promise made, to induce the confession, that we are entitled to prove it. That no inducement *was* made use of, or resorted to, is, I think, clear, and I conceive, it to be no matter how that circumstance is brought before the Court, so that it be but clearly and undeniably established. This paper, I submit, does not set forth that it was an examination under the statute, but is much in the form of a letter, narrating the circumstances of the murder of Mr. Keveny, and must, if not as a confession under the statute, be received as an authenticated paper in the hand writing of the prisoner, made by him freely and voluntarily, from a sense of guilt, and therefore, in the words of M'Nally, deserving of the highest credit. As a confession or examination under the statute, I contend, that, having proved there was no clerk, and the magistrate being absent, we produce the best evidence; but if the Court are against us in that particular, and think, as such it is not sufficiently proved, yet, as an authenticated paper, in the Prisoner's own hand writing, delivered by him in the presence of the witnesses, after the most fair enquiries whether he wished to alter any thing contained therein, it must be received, and handed to the Jury as evidence for them to decide on.

Solicitor-General.—Upon this question I shall very shortly trouble your Honours. The first objection of my learned friends to the intro-

duction of this confession is, that it is not the *best* evidence, but that to make it so, the magistrate, or his clerk, must be produced: another objection is, that this confession has been *published.* With respect to the first, I perfectly agree with my learned friends, that the best evidence in all cases ought to be produced; but, agreeing in the principle, I draw a different inference from the proposition; I contend, in opposition to my learned friends, that we *have* produced the best evidence which the case admits of, indeed the strongest that can be produced; we produce an acknowledgment, in the Prisoner's hand writing, that he committed the crime for which he is now at the bar. My learned friend, Mr. Stuart, says that authority and reason combine to oppose any confession being received, unless proved by a magistrate, or his clerk. The reason of such a rule is not very obvious. A magistrate cannot authenticate *all* depositions made before him; that would be impossible. Absence, sickness, and a variety of circumstances, may prevent the attendance of a magistrate. Indeed, in the present instance, we could prove that the magistrate is ill; but we take a wider course, and contend that we do all, that, from the circumstances of the case, can be required of us. We produce a confession in the hand writing of the Prisoner at the bar, and we prove his signature by a witness who saw him sign it, and heard him acknowledge that the confession was true. This confession differs from a confession taken under examination before a magistrate at a police office, inasmuch as it was *prepared* by the *Prisoner himself.* We know the practice at home is this; a prisoner is taken to Bow Street, to undergo an examination, in the course of which he makes a confession; on his trial at the Old-Bailey, the clerk of the office attends, and produces the confession; but this case is placed under such circumstances, as to render it impossible almost, strictly to follow the general practice. But, when I cite the treatise of Mr. Chitty, upon the subject, I think I shall set the question at rest. I refer to page 571. In support of the position for which I am contending I might also refer to 2d Hale, to Sixth State Trials, to Hawkins, to Philips on Evidence, and many authorities, but your Honours will find it stated fully in Chitty, page 571, where he mentions the authorities on which it is founded. My learned friends have found out a very ingenious reason for not permitting the witness to prove the confession, viz. he was not, strictly speaking, *a clerk,* (though, were it necessary, I might be disposed to contend that for all the purposes intended by the statute of Philip and Mary, the witness was so,) and they proceed to argue, that, a stranger accidentally or purposely, in the room at the time of the confession being delivered, could not so completely prove the fact as the magistrate, or his clerk. Were I to advert to the remarks that have

been made by my learned friends on the magistrate, before whom this confession was made, were I to recall to their recollection, the view they have taken of his conduct, I think I should have sufficiently answered their argument; for taking *thier own* character of him, surely a stranger would be more likely to prove candidly the circumstances attendant upon the confession, than such a magistrate as they have depicted. There is another point which, though supported by authority, my learned friends appear completely to have overlooked, namely, that confessions are to be presumed free, till the contrary is proved. In Sixth State Trials this doctrine is supported, but is it so clear a principle of law, that it is needless to cite authorities to sustain it. M'Nally has been cited to shew that the best evidence must always be produced, and looking at this confession, I contend we have complied with the rule; for, although Dr. Allan was not *retained* as a clerk in the service of the Earl of Selkirk, yet, in this instance, he acted *as such*, and, for all the purposes for which the provision of the statute of Philip and Mary was enacted, he was a clerk. The object of that statute is to identify a confession by the signature of the magistrate, or the hand writing of his clerk. Dr. Allan does this fully. Another ingenious argument of my learned friends will with equal facility be overset. They have argued that as there was no clerk present at the examination, and as the confession is not the hand writing of the magistrate, the statute has not been complied with, and therefore the confession ought not to be admitted. My learned friends appear to forget that the paper does not purport to be an examination, it is a voluntary confession, and certainly much stronger from being entirely in the hand writing of the Prisoner, because it is impossible that any misrepresentation can exist, which, though not likely, yet might creep in, if written by another person, such as the magistrate, or his clerk. The case is so clear and so fair, that doubt, I think, cannot exist upon the subject, that this was a free and voluntary, and therefore a good, confession against the Prisoner. He relates the same circumstances to Captain D'Orsonnens, to Nolin, to Vitchie, to Mr. M'Donell, adding that he was going to Fort William to submit himself to the Earl of Selkirk, and to make a disclosure of all he knew under a hope, (which was not warranted certainly,) that he would be admitted to give evidence for the Crown. Arrived at Fort William, he employs himself in preparing this statement. Having finished it, in the presence of the witness and others, amongst whom was Mr. Dease, a person belonging to the company to which he himself was a clerk, (who read the paper, and asked De Reinhard if the contents were true, to which he answered they were) the Earl of Selkirk enquires if he wishes to add, to take away, or to alter, any thing

in the paper, and after saying he did not, he deliberately signs it and delivers it to Lord Selkirk ;—the witness, together with Mr. Dease and others, testing the act by putting their names to it. Surely then we are producing the best possible evidence when we tender this same paper, and prove its identity by producing Dr. Allan, who witnessed the signing and delivery. The observations relative to the *publication* had I think better have been withheld, as I cannot see that they were at all called for, as we have nothing to do with printed publications.—[*The Solicitor then referred to the Attorney General's observations on this topic, and deprecated any attempt to prejudice the public mind.*]—In conclusion, I beg to submit: 1st. that the confession is most distinctly proved and authenticated; 2d. if it should be thought necessary to produce the magistrate, we may be permitted to prove, (which we should do by this witness,) that he is incapable of leaving Montreal, owing to sickness; and 3d. that if a witness is necessary, then that Dr. Allan is a competent witness; he was present at the time, he heard neither menace nor promise; he heard the Prisoner tell Dease the contents were true, he heard him asked if he wished to make any alterations, and heard him answer, that he did not; he saw him sign it; he himself put his name as a witness, and he saw him deliver it to Lord Selkirk. What can be stronger evidence against him? what can be better evidence? I contend that it must be admitted.

[Mr. Vallière de St. Réal briefly contended in reply, that as Dr. Allan could not prove *all* the circumstances connected with the confession, it ought not to be received. Referring to the position of the Crown officers, that supposing it not to be good in *criminal* law that it was a good confession at *common* law, he asserted that common law equally with criminal, required the best evidence; the Earl of Selkirk ought to prove the confession. He also argued that the confession could not be produced as evidence, as De Reinhard did not enjoy freedom at the time of making it, nor was his confinement a *legal* duress. In conclusion, Mr. V. said, he was a prisoner in a fort which that same magistrate had taken by a military force, and retained by the most abominable violence, and I therefore submit that from its commencement, during its progress, and until its completion, his confession is not the best evidence, and therefore ought not to be admitted against the Prisoner.]

Chief Justice Sewell.—Notwithstanding all the exertions of the gentlemen who are counsel for the Prisoner, notwishstanding all we have heard from them, we are most dictinctly of opinion that this confession *must* be received as evidence proper to go to the Jury. I shall proceed to shew that, upon sound legal principles, this is the *only* conclusion we

can arrive at. I shall first take up *Philips on Evidence*, sect. 5, page 18, " since an admission," says he, " is evidence against a party in *civil* " suits, with much stronger reason is the voluntary confession of a pri- " soner evidence against him on a *criminal* prosecution, for it is not to " be conceived that a man would be induced to make a free confession of " guilt, so contrary to the feelings and principles of human nature, if " the facts were not true."—Then, adverting to a late case, (the case of Lambe,) he says, " it seems now to be clearly established that a free " and voluntary confession by a person accused of an offence, whether " made before his apprehension, or after, whether on a judicial examina- " tion, or after commitment, whether reduced into writing or not, in " short, that any voluntary confession made by a prisoner to any per- " son, at any time, or place, is strong evidence against him, and, if sa- " tisfactorily proved, sufficient to convict, without any corroborating " circumstances;" and this doctrine was supported by my Lord Kenyon in Wheeling's case, 1 Leach Crown Cases, 349. Under these general principles, who can doubt that this paper is a good confession at common law;—if a confession made at any time, and to any person, is evidence, this being in writing, and signed by the Prisoner, (indeed the whole is the writing of the Prisoner,) is certainly so. A confession reduced to *writing*, though not *signed*, according to a late decision, is good evidence. Mr. Justice Grose in delivering the opinion of the twelve judges in Lambe's case, stated that a majority held that such a confession would have been evidence at common law, and that it is not rendered inadmissible by any provision in the statutes of *Philip and Mary*, respecting examinations and informations before justices of the peace, " for," he adds, " if a prisoner's confession, even when not reduced into " writing, be evidence against him, *a fortiori*, it must be admissible " when taken down in writing, for the fact confessed, being thus ren- " dered less doubtful, is of course entitled to greater credit, and it would " be absurd to say, that an instrument is invalidated by a circumstance " which gives it additional strength and authenticity." Now, this being the case, as to the paper offered by the Crown, what is the principle by which its admissibility is to be tried? This principle is stated by Hawkins and M'Nally, but very clearly in M'Nally, rule 11th, page 47. " Confessions are received in evidence, or rejected as inadmissible, " under a consideration whether they are, or are not, entitled to cre- " dit." And, this being the rule, in what shape does the paper before us present itself? But before entering upon the examination on this point, I would remind the Prisoner's counsel of that remarkable piece of testimony, given in evidence by Vitchie, that the Prisoner told him " that he had acknowledged all to Captain D'Orsonnens, and that he

" was going to do the same to Lord Selkirk, hoping to be received as a " witness for the Crown."* Here we have his verbal determination to make a disclosure of the murder, I beg pardon, of what he knew of the *death* of Mr. Keveny, and we must not, in considering the admissibility of this confession, lose sight of this evidence, that he had previously avowed his intention of making a confession to a magistrate, because M'Nally says again, rule 10th, page 45. " It has been determined that " where the accused makes a confession in conversation, and afterwards " makes another confession before a magistrate, acting judicially by " taking the same in writing, the conversation, or parole confession, " may be given in evidence," but not if it has not been given freely and voluntarily. The statute of *Philip and Mary* requires that a magistrate shall proceed to examine any person brought before him on a charge of felony, by putting such questions to the prisoner, and to those who brought him before the justice, as, in his legal discretion, shall seem necessary, and that this examination shall be taken down in writing, and old writers say, shall be signed. Hence the necessity of producing the magistrate. He puts the questions, his clerk, if he has one, writes down the answers, therefore M'Nally says, page 41, rule 7th, that on the principle " that the best evidence the nature of the case affords is the " only evidence that can be received, the proof of such examinations of " the prisoner must be made either by the justice of the peace, or the " coroner, who took them, or his clerk who wrote them down, that they " are the true substance of what the prisoner confessed." The necessity for producing the magistrate is not, according to the vulgar opinion, to prove the identity, of the paper offered on the trial in evidence, but that it contains the substance of what the prisoner had confessed before him in the examination previous to commitment or bail. But this is quite a different case; this is not the act of a magistrate, not the act of the clerk to a magistrate, it is the act of the Prisoner himself, following up the intention he had antecedently expressed to Vitchie, of making a confession of all he knew relative to the death of Keveny. It is *he* who writes the declaration with his own hand, which is now produced in evidence against him. There cannot therefore be any necessity for either magistrate or clerk to be produced, for we have the very best evidence possible. We have the evidence of the Prisoner himself of what he really meant to say. Proceeding to the evidence of Dr. Allan, what can be stronger? the Prisoner hands the paper that he had been, (as Dr. Al-

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* " Qu'il avoit tout avoué au Capitaine D'Orsonnens, et qu'il alloit " faire autant à Milord Selkirk, esperant être reçu témoin de la Cou- " ronne."

lan had heard or understood,) some days previously engaged in preparing, to the Earl of Selkirk, who, before De Reinhard signed it, sent for Mr. Dease, a clerk in the same employ as the Prisoner, the paper is given into the hands of Mr. Dease, who reads it, and then asks " De Reinhard is this true? are the contents of this paper true?" and he answers, " they are true," and signs it, and then Mr. Dease and Dr. Allan, and others, who were present, signed it. Under such circumstances, can the credit of the paper be for a moment doubted? can it, flowing, as I have shewn it does, from the highest possible source, *himself*, and made agreeably to a determination he had previously communicated to his old comrade Vitchie, be rejected, or can it, for one moment, be a question whether or not the Crown is entitled to the benefit of offering it to the Jury as a piece of testimony? I think not. There is no necessity to produce Lord Selkirk, or his clerk, or for any further proof, because we have already the highest possible proof, viz: his own confessions, *viva voce*, completely substantiated by the fulfilment in this confession, written with his own hand, of his avowed determination to Vitchie of making a confession to Lord Selkirk. On what ground can we reject this confession? I beg the gentlemen engaged in the defence, to recollect that this was his declared intention, to recollect that he was brought into the room prior to signing it, to recollect that by one of his own fellow-servants he was asked if it was true, to recollect that neither menace nor promise was made to him, to recollect that, on the contrary, he was asked if there was any thing he wished to change, any thing to add, any thing to take away, and therefore that it is, *primâ facie*, a confession voluntary made. If it is intended to set up the contrary, it *may* be proved, but certainly it does not *appear*, that there was either menace or promise made at the time of signing it. I repeat, let it be recollected that he had before expressed his intention of making a confession to Lord Selkirk, and that he signed this paper, containing a confession before his Lordship, and in the presence of one of his own party, who asked him at the time, " are the contents of this paper true?" and that he answered, " they are true." Let these circumstances be recollected, and, I ask, is it possible that, under such a continuation of evidence, we can reject the confession, as a confession at common law.—Lord Selkirk, as far as we see, took no examination, the Prisoner had prepared a detailed statement of the transactions as they occurred, which he delivered to Lord Selkirk, who certified it to have been so delivered by the Prisoner, as his account of the transaction. In my judgment it is a manifest continuation of his original intention of making a confession. Wherever we find him, from the moment he arrived at the encampment, as testified by the two voyagers, whenever we meet him in

conversation with his friends, we find he persists in the same story, down to Vitchie, to whom he explains the motive for his conduct. He comes at last to Lord Selkirk, and reduces the *viva voce* narrative to writing, and the whole is finished with more than usual caution, four persons being present, one of whom, who might reasonably be supposed to be favourable to the Prisoner, Mr. Dease, reads the paper, asks him, "Reinhard, is "this true?" as if he had said, "did you so kill Mr. Keveny?" and he says, "yes it is, I did." He then deliberately signed it, and the others witnessed the signing. As a confession made before these persons it must be received. Had it been made only *viva voce*, it would have been a good confession at common law, and it cannot be invalidated by a circumstance that clothes it with additional strength. It is not received as an examination under the statute of Philip and Mary, taken before a magistrate, but as the Prisoner's confession at common law, made in his own hand writing, and that part of it which is in his hand writing is so received. The remainder of what appears on the paper, in another hand, we have nothing to do with, we only take his *own* act, that which is in his *own hand writing*, as evidence to go to the Jury

[Mr. Justice Bowen very shortly expressed his entire concurrence with the Chief Justice, remarking, that nothing could be stronger evidence than a confession written by the Prisoner himself, but the admission of it did not preclude the Prisoner's counsel from shewing, from circumstances which had not *yet* appeared in evidence, that it was not entitled to credit. He observed that his writing it himself, and Doctor Allan knowing three days before that he was engaged upon it, might open the door to shew those circumstances, but at present it was a good confession, and legally entitled to be received.

Mr. Stuart remarking that it was certainly made under the hope of pardon, the Chief Justice remarked, that was merely his own statement, and repeated, that receiving the confession *now*, did not preclude them from destroying it *hereafter*.]

Examination resumed by the Attorney-General.

Attorney-General.—Is this the paper which the Prisoner signed in your presence?

Dr. Allan.—It is; I saw the Prisoner at the bar sign it. It is in his hand-writing, and is signed in two places; in the one Charles Reinhard, and in the other Charles De Reinhard.

[The confession, in the French language, of which a translation follows, was then put in and read, the Chief Justice directing the Clerk of the Crown to read only that which was the Prisoner's own hand-writing,

and not the appendage or certificate beginning "*Before me, Thomas, "Earl of Selkirk.*"]*

TRANSLATION.

I, the underwritten, Charles De Reinhard, having surrendered myself prisoner to Captain D'Orsonnens at Lake la Pluie, the 2d of October, 1816, in consequence of the various circumstances that have happened, during the time, I have been in the service of the North-West Company, and with regard to the death of Mr. O. Keveny, I voluntarily make the following declaration.

My time of service being expired, as colour-serjeant in the regiment of Meuron, I was recommended by Lieutenant de Mesani, commanding my company, to Messieurs William M'Gillivray and M'Leod, as clerk in the North-West Company, and I afterwards obtained my discharge from the regiment on the 24th April, 1816, in consequence of a special application made to His Excellency the Governor, Sir Gordon Drummond.

I engaged myself with the highest opinion, with which I had been impressed by Mr. Mesani, to serve with all posssble zeal, a society of

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* The *Certificate*, which the Court rejected, follows:

BEFORE THOMAS, EARL OF SELKIRK, *one of his Majesty's Justices assigned to keep the peace in the Western District of Upper Canada, and also in the Indian Territories, or parts of America not within the Provinces of Upper or Lower Canada, appeared,* CHARLES DE REINHARD, *charged with the crime of Murder, who being examined, confessed that he had assisted in murdering* MR. OWEN KEVENY, *and gave in the annexed statement, written with his own hand, on the seven preceding pages and signed with his name, declaring that the same contained a true account of the transaction, and of the reason by which he was misled to participate in such a crime.*

(Signed) CHARLES REINHARD,
Commis de la Compagnie du Nord-Ouest.

Declared before me, at Fort William,
on the 3d day of November, 1816.

(Signed) SELKIRK, *J. P.*

In presence of

J. MATHEY, *Capt. late D. M. Regt.*
JOHN WILLIAM DEASE,
JOHN ALLAN,
ALEX. BRIDFORD BECHER,
} *Witnesses.*

the most honourable nature, and under the protection of government, and I was much pleased when I took my departure for the North, in company with Lieutenants Mesani and Brumby, who had six months' leave of absence from the regiment, at the desire of the North-West Company, in order to render an impartial account to Government of all that might occur in that country.

On the journey I often heard an opposition talked of, without understanding where or what it was, till we had arrived at Lake la Pluie, where Mr. Mesani informed me that Mr. M'Leod wished me to put on my military coat, as likewise my comrade, Heurter; Messieurs M'Gillivray, M'Leod, and Mesani, having recommended us to take them with us before we left Moutreal, in order to appear in a council of Indians, which took place in the audience hall, where Messrs. Mesani and Brumby were introduced as Captains, and I and Heurter at their side, as people belonging to the King. Mr. M'Leod dictated the speech to the interpreter, and caused to be explained to the Indians what had occurred at the Red River, where Mr. Robertson had taken the fort like a robber, maltreated the prisoners, and after pillaging, burnt the whole, and that, because there was reason to be apprehensive of other violences, government had, on that account, sent those gentlemen, the officers, to see that justice was done, and Mr. M'Leod invited the Indians to take part with the North-West Company, and to render them assistance for the defence of their rights. Upon which one of the chiefs, and twenty-four of his young men, after having received presents and ammunition, took their departure the following day, with the brigade, half of them in their own canoes, and half in those belonging to the brigade.

On his arrival at Bas de la Riviere, Mr. M'Leod caused the cases of arms to be opened, and armed the Canadians; two brass pieces of cannon were embarked, and the brigade moved on to Deadman's River, in order to wait for more canoes from Athabasca, which arrived the next day. On the 22d of June, the brigade proceeded along Deadman's River, and met with two barges with colonists, all whose boxes, trunks, &c. Mr. M'Leod examined, and kept a great many papers: he took no one prisoner but Mr. Pritchard, from whom the first accounts of the occurrences that had taken place at the Red River were obtained. Upon returning back to the preceding encampment with the colonists, Mr. Bourke, who was wounded, and three other servants of the Hudson's Bay Company, were made prisoners, and put altogether in a tent, the overseeing of which was committed to me.

On the following day Mr. M'Leod and the other partners present, together with several clerks, took their departure in light canoes for the Forks, and in same manner, Messrs. Mesani and Brumby, immediately

after their return and that of the other gentlemen from Deadman's River, departed with Mr. Hughes for Fort William to convey the news to Mr. M'Gillivray, and thence to repair forthwith to Montreal. After the brigade was reassembled, I was sent with the prisoners to Bas de la Riviere, and the brigade went to the Grand Rapid, fearing that Mr. Robertson might intercept the Athabasca loaded canoes, and Messrs. Macdonell and M'Lellan arrived at Bas de la Riviere four or five days after I did, with fifteen *Brois Brulés*, three pieces of cannon, two of which were brass, and one iron, two wall pieces, and about fifty guns, musquets of the old army model. On the return of the brigade from the Grand Rapid, the prisoners were embarked for Fort William, and I received instructions under the orders of Mr. M'Lellan to put the fort in a state of defence, as well against Mr. Robertson, who was supposed to have it in view to take possession of that provision post, where there were four or five hundred bags of pemican, as for the purpose of giving a reception with the cannon, and forty musquets in reserve, which were kept always loaded, to any canoe of the Hudson's Bay Company that might attempt to pass the post.

Having learnt that My Lord Selkirk had arrived at the Sault with a great number of men, artillery, &c. double vigilance took place at the fort, M'Lellan making all the people believe, that my Lord was their greatest enemy, degrading his character in every way, and representing Mr. Strachan's pamphlet as speaking of my Lord with too much moderation, publishing the opinion of three lawyers in order to prove the invalidity of the charter, and representing Lord Selkirk as acting without authority, and making laws according to his own good liking; that the government was decidedly in favour of the North-West Company, since they had sent two officers to see that every thing was in order: that all that Lord Selkirk did was without the knowledge or approbation of government.

In the beginning of August, intelligence was received at Bas de la Rivière, that a barge or boat with a few men, English, from Hudson's Bay, had arrived at Lake du Bonnet. By the first loaded canoes from Athabasca, a man belonging to that barge, arrived, who said that he could not continue any longer with Mr. Keveny, who commanded that barge, and that his comrades would equally desert the first opportunity. A few days afterwards, four other men belonging to that barge, arrived with other Athabasca canoes. Two or three days after, Mr. M'Leod having arrived from Fort William, examined these men, one of whom, of the name of Hay, made oath, that Mr. Keveny had cruelly ill-treated him and his comrades, upon which Mr. M'Leod granted a warrant against him, and nominated me, and one of his own men of the name of

Castalo, as constables, to go and arrest him at the portage where his people had abandoned him. Mr. M'Lellan ordered six *Bois-brûlés* to accompany me to assist; when I came there, about ten o'clock in the morning, I found Mr. Keveny in his tent, and I apprised him of my mission, making a prisoner of him in the King's name; he was much surprised, and seized hold of his pistols to defend himself. Having represented to him that his immediate death would be the inevitable consequence of his opposition to the law, he became quiet and required to see the warrant upon which he was arrested. Having read it, he again became outrageous, and it was with difficulty I prevented the *Bois-brûlés* from dispatching him. Mr. Keveny was conveyed as a prisoner to Bas de la Rivière, I left Primeau, the interpreter, to take care of his property which was already under the charge of his clerk, named Cowly, and his servant, an Irishman. Having arrived at the fort with the prisoner, he had a violent altercation with M'Lellan, pretending not to be under the jurisdiction of Canada, being upon the Hudson's Bay Company's territory, he pretended to be independent of the law of Canada.—On the following day, about ten o'clock, he was embarked for Fort William, in company with five *Bois-brûlés*, to whom Mr. M'Lellan gave irons in order to make use of them in case the prisoner should resist. I was afterwards informed by the *Bois-brûlés*, that when they came to the portage, the prisoner behaved in such a way as to force them to bind him and to hand-cuff him. Mr. Keveny's clerk, (Cowly,) being left by himself, came to the fort, and requested Mr. M'Lellan to receive against an acknowledgment, the barge with its loading, and to grant him his liberty, together with one man to return in a small canoe to Albany Fort, whence they came. An acknowledgment was given for four calves, a still, a case of arms, quarters of salted beef, flour, &c. &c. On Primeau's return to the fort he delivered Mr. Keveny's papers to Mr. M'Lellan, and he kept for himself the clothes which he (Mr. Keveny,) had left on going away for Fort William; he besides made presents to Mr. M'Lellan, of a book, a case wine bottle, candlesticks, tea cups, and other small articles.

Amongst the papers there were printed instructions from Hudson's Bay. I was informed that Mr. Macdonell, having met the prisoner and the five *Bois-Brûlés*, replaced the five *Bois-Brûlés*, by two young Canadians and an Indian, as guide, to convey the prisoner to Lake la Pluie. Messrs. Stuart and Thomson, having, three or four days afterwards, met this canoe, caused it to turn back. The Canadians and the Indians having quarrelled, they separated, and the Canadians, being ignorant of the way, were no longer able to pursue their route, abandoned the prisoner in a small island, and stopped themselves at another island not far from

him. Mr. Stuart having arrived at Bas de la Rivière with the news of the taking of Fort William, Mr. M'Lellan dispatched a light canoe for Athabasca to apprise Mr. M'Leod, and another to Red River to apprise Mr. Macdonell, who arrived at Bas de la Rivière, on the 4th of September, in the night, with the *Bois-brûlés* and Indians. All this time Mr. Keveny was expected, who did not arrive, and conjectures were formed either that the Indian had killed him, or that the Canadians had lost their way, or that the canoe had been lost. On the 5th of September, Mr. Macdonell and Mr. M'Lellan convoked all the people at Bas de la Rivière to hold a council; the capture of Fort William was stated in a proclamation, and the danger represented which would be incurred by allowing the enemy to penetrate farther; and those who chose to volunteer their services to go to Lake la Pluie were desired to declare themselves. The greatest number having refused and preferring to defend their lands at Red River, Mr. M'Lellan took a light canoe with Mr. Grant, Cadotte and me, his *Bois-brûlés*, and his servant, a Canadian, with the intention of proceeding to Lake la Pluie, in order to obtain intelligence, and at the same time to endeavour to discover what had became of Mr. Keveny. On the voyage the general tenor of the conversation was, that if he was found, he ought to be dispatched, as being a determined enemy of the Company, and capable of doing much harm at Red River, if after a while he should have the opportunity of taking revenge. After four hours march, the Indian was found near a small river, a few hours afterwards the Canadians were perceived, upon whom M'Lellan bestowed much abuse, and a good many blows with a canoe pole, for having beaten the Indian, and abandoned the prisoner. The *Bois-brûlés* abused the Canadians for having prevented the Indian from killing the prisoner, who said he ought to be put to death the moment he was taken. Mr. M'Lellan having enquired where he might meet the prisoner, took the Canadians in his canoe, the Indian being there already, covered over with a Scotch cloak, that he might not be recognized. Mr. M'Lellan became enraged when he came to the island where the prisoner had been left and he did not find him, believing that he had escaped towards Hudson's Bay, and he searched amongst all the Indians, until he found him out by his tent, which was pitched near an Indian family, to whom M'Lellan made a present of rum and tobacco, and traded a small canoe, in order to embark the prisoner with me, and a *Bois-brûlé*, and the Indian, saying to me, " Make the prisoner believe " that he is going to Lake la Pluie. We cannot kill him here amongst " the Indians. We will wait for you farther on, and when you come to " a suitable place you know what you have got to do." Upon which he went away. About three quarters of an hour afterwards, when the

Indian women had finished gumming the small canoe, I caused the prisoner to embark with all his baggage, with the exception of a trunk and a portmanteau, which were put into Mr. M'Lellan's canoe, and about a quarter of a league from there, where the river makes an elbow, and Mr. Keveny having asked to go on shore for his necessities, I said to Mainville (the *Bois-brûlé*)—"We are far enough from the Indians, you "may fire when he comes near enough to embark," the Indian held the canoe fast by the bow, and I was also on shore. Upon Mr. Keveny's approaching, in order to embark, Mainville fired his gun at him, the contents of which went through his neck, and as I saw that the wound was not mortal enough, and that Mr. Keveny still attempted to speak, having fallen forwards upon the boat, I run my sword behind his back through his heart in two thrusts, in order to put him out of his pain.—Being quite dead, they stripped the body, and carried it into the wood. Having got to Mr. M'Lellan's camp, who, when he saw the small canoe arrive, he sent Mr. Grant and Cadotte, to ask me whether Mr. Keveny was killed. Having replied in the affirmative, they told me that Mr. M'Lellan had sent them to give me orders not to say he was killed, upon which I said, that he was killed, and that I would not conceal it, as it had been done by his orders. When we came to the camp M'Lellan required to know the details of the murder, which I gave him as above, and I gave up to him his tent, his bed, and all his baggage. During the night he examined all the papers, burning some and keeping others, and the rest he left to my discretion: I distributed amongst the *Bois-brûlés* some clothes that had been worn. Mr. Grant asked for the tent, and Mr. Cadotte for sundry articles, and I reckoned upon keeping a box with good clothes for my share, but the whole was left concealed, (*en cache,*) till we should come back from Lake la Pluie. On the 13th of September in the evening, we arrived at Fort Lake la Pluie, where, finding that the fort was not in the occupation of Lord Selkirk's party, Mr. M'Lellan proposed so proceed on to Fort William to procure intelligence, but the *Bois-brûlés* having refused to do so, he proposed to me to go down in a small canoe, with two or three Canadians, but Mr. Dease, having his family at the fort, asked and obtained leave to go in my stead. Mr. M'Lellan took his departure for Bas de la Rivière, on the seventeenth, and I was to remain at Lake la Pluie, till Mr. Dease's return: on the 2d of October, very early in the morning, I received a letter from Captain D'Orsonnens, who had learnt from the Indians that I was there; he admonished me not to fly from the place, that he positively must have some conversation with me about the Red River affairs, sending me at the same time a copy of the Governor's proclamation. Captain D'Orsonnens having arrived about two o'clock, with

Mr. Dease, and having explained to me the situation of the two companies, and that those who belonged to the North-West who were at the Red River, would be considered as rebels by government, if they persisted in their conduct. I was much surprised at this intelligence, and above all I shuddered with horror at the dreadful crime in which those gentlemen of the North-West had caused me to participate, a few days before, upon the person of Mr. Keveny—having till that moment conceived that I had been acting in conformity with the wishes of government—whereupon I gave myself up as a prisoner to Captain D'Orsonnens, and gave him all the above mentioned details.

(Signed) CHARLES DE REINHARD,
Clerk of the North-West Company.

Fort William, the 28th October, 1816.

Attorney-General.—That is the case on the part of the Crown.

[A Juryman asked the witness whether, before the Prisoner signed the paper, he read it?]

Dr. Allan.—Yes, I read it; not *to the Prisoner*, but to myself, and it is now in the same state except the endorsement.

Cross-examination conducted by Mr. Stuart.

Mr. Stuart.—Was Lord Selkirk, at the time of this confession being made, in possession of Fort William?

Dr. Allan.—Lord Selkirk was then, and had been, for some time in possession of Fort William. De Reinhard had been about a week at Fort William previous to his signing the paper. He lived in a room with another fellow-sergeant of the same regiment—there were no sentinels over him. The paper was signed and delivered to Lord Selkirk, in the evening about seven o'clock. It was dusk I recollect. I had not seen either this paper, or any other like it, previous to the 28th of October. I knew a few days before that he was writing something, and I may possibly have spoken to Captain Mathey about it, but I did not see, the paper till I saw it on the 28th of October. I do not know that the original of *this* paper was written by Captain Mathey and copied by De Reinhard, nor any similar paper. Captain Mathey regulated the affairs at Fort William. This paper was laid before the Earl of Selkirk, as a magistrate. I do not know whether the Prisoner was taken before Lord Selkirk, at the time of his arrival at Fort William. I was not there at that time. I should not think he could be so long as a week at Fort William without seeing Lord Selkirk, but I cannot give evidence to that point, as I was not there at the time. I left Fort William on

the 17th of May, 1817. I generally resided there from 1816 to that period, but I was sometimes a good many miles distant.

Attorney-General.—Where is Captain Mathey, Sir, at present?

Dr. Allan.—Captain Mathey is at Montreal.

Mr. Stuart.—I have done with Dr. Allan.

DEFENCE.

Upon the prosecution being closed, and the Prisoner's counsel asking the indulgence of the Court for a short time to enable them to arrange the course of their defence, the Court was adjourned for an hour and a half. Having re-assembled, and the usual forms being gone through, Mr. James C. M'Tavish was about being sworn, when it was intimated that one of the Jury feared he should be unable from sickness to proceed with the trial. A physician was sent for, and (being sworn (Dr. Hacket) to hold no converse with the Juror but on the subject of his health) examined the state of it, and represented to the Court that he did not doubt but the Juror would be able to attend to the proceedings.

JAMES CHISHOLM M'TAVISH, *Sworn,*

And examined by Mr. Stuart.

Mr. M'Tavish.—I was a clerk of the North-West Company in the month of August 1816, resident at Fort William. I know that on the 13th of that month, Fort William was taken possession of by an armed force under the immediate command of Captain D'Orsonnen's. The Earl of Selkirk was not at Fort William on the 13th of August. The persons composing this force were all armed, some doubly armed. The officers were armed with swords and pistols; the muskets, generally speaking, had bayonets attached to them, and the force had altogether the appearance of a military force. Captain D'Orsonnens was at the head of the first party that entered by force into Fort William. On the evening of the 12th of August, we distinctly saw the men on the other side of the river, belonging to the late De Meuron regiment cleaning their arms, and observed them plant a cannon against Fort William. At the moment of their arrival at Fort William, a bugle was sounded, and the

men huzzaed crying, " aux armes, aux armes et aux canons" (to arms, to arms, and to the cannon), and then rushed into the fort. They seized two pieces of cannon, loaded them, and planted them in the middle of the square, which was a position commanding the entry into the fort. The men were exceedingly outrageous and abusive, and Captain D'Orsonnens behaved in a very violent manner. I heard him threaten Mr. John M'Donald, a partner in the North-West Company, and saw him seize him with one hand, and in the other he had a pistol which he put to the ear of Mr. M'Donald.

Solicitor-General.—This surely cannot be evidence to repel a charge of murder, nor do I see that it can have any effect upon the case.

Chief Justice Sewell.—Nor can it, unless clearly brought up to the knowledge of the Prisoner, and then it will form a question for the Jury what influence it might have on his mind.

Mr. Stuart.—From Captain D'Orsonnens' testimony it might be inferred that the fort was given up voluntarily. It will, I am sure, be in the recollection of the Court, that, in his examination, Captain D'Orsonnens described himself as a simple individual. I wish to prove that he was at the head of a military force; that he was not there, as from his representation we might be induced to imagine, *solus cum solo*. I shall exhibit such evidence, as to the conduct of Captain D'Orsonnens, that it must materially affect the credibility of his testimony. I will put the direct question. Was Captain D'Orsonnens armed, and did he act as the head of a militaty force?

Mr. M'Tavish.—Captain D'Orsonnens was armed; he had a sword and pistols; he commanded as the head of an armed body. The officers were dressed in the uniform of the late De Meuron regiment, and Captain D'Orsonnens wore a grey military great-coat. Some time after the fort had been taken possession of, (but the same day,) a reinforcement arrived with Captain Mathey, who then took the chief command; about twenty with Captain Mathey kept possession of the fort that night. On the arrival of Captain Mathey, and before the arrival of Lord Selkirk, sentinels were placed over the fort.

Solicitor-General.—I believe at this time Captain D'Orsonnens was not there, and as this evidence is intended to destroy his credit, it is necessary that we have nothing brought forward except when Captain D'Orsonnens was present.

Chief Justice Sewell.—You have obtained the substantive fact that Fort William was taken by force, (I am speaking to the gentlemen engaged in the defence,) what do you wish for more? It is taken by armed men, cannon are planted, sentinels are placed; what more complete possession could be obtained of a place than this?

Mr. Stuart.—We consider it necessary to shew, not merely that it was taken possession of forcibly, but that it was retained possession of, for a considerable time.

Chief Justice Sewell.—Well put the general question then: How long was it kept possession of—and you come to the point at once.

The question being put.

Mr. M'Tavish.—I am not able to say how long Lord Selkirk retained possession of Fort William. I left it on the 4th of September, and at that time it was in possession of the armed force, together with the whole of the property. Fort William is the grand depôt of the North-West Company. All the equipments for the interior, and all the returns, pass through Fort William. From the 13th of August till the 4th of September, the day I left, there was no communication with the Indian Territory for the North-West Company, it was entirely cut off.

Cross-examination conduc.ed by the Attorney-General.

Mr. M'Tavish.—At the time Fort William was taken, there were upwards of a hundred men there, perhaps in and about the fort, there might be upwards of two hundred men. They were not armed, neither were the cannon loaded. There was no resistance made, nor any opposition further than this: One of the gentlemen belonging to the North-West Company said, that they could not think of admitting so many armed men into the fort, till they knew what had been done with Mr. M'Gillivray, and the other gentlemen who had gone across the river; and no violence was used, except by Captain D'Orsonnens. I was standing at the door of the gate, only a few paces from Mr. M'Donald, and I did not see him shut the gate at the time Captain D'Orsonnens arrived. I did not know that Lord Selkirk acted as a magistrate in the Indian Territory, nor that the principal partners of the North-West Company went out to meet Lord Selkirk in his capacity of a magistrate. I had not heard of any warrant being issued, before the taking of the fort, not did I see a constable. At that time Mr. M'Gillivray and other gentlemen *were* out, but I did not know *why* they had gone out, nor even that they were out. I have *since* heard that they went across the river, in consequence of a warrant. I did not know of a warrant against Mr. M'Gillivray.

Chief Justice Sewell.—You can make Mr. M'Gillivray a witness if necessary. This witness tells you that he knew nothing of any warrant before the fort was taken.

Solicitor-General.—I want to prove that a process was issued, and that its execution was opposed. I could not anticipate the defence, but

I now wish to shew, that no violence was used beyond what was necessary to enforce the execution of a civil process, which had been resisted.

Chief Justice Sewell.—We wished to keep this out upon the examination in chief, it was insisted upon being gone into, and now I suppose must be permitted in cross-examination.

Mr. Stuart.—We thought it very material evidence, and so we still think. As to the warrant Mr. Solicitor-General is enquiring for, I care not a straw about it. It can be no justification for the conduct pursued, on the contrary, it greatly enhances the crime. What! is a warrant issued against A. B. C. D. E. and F. to justify an appropriation of property, a seizure of guns, and an occupation of stores belonging to the great commercial rivals of the very magistrate who issued it, and whose conduct has so largely contributed to all the evils we have to deplore.

Attorney-General.—The line of defence taken is certainly very singular. It would induce us to believe that terror was produced, similar to that occasioned by the sacking of a town. My learned friend's statement is perfectly terrific. Pistols to heads, the taking of cannon, and planting it so as to command the gate, and all this to people, who according to his account of the matter, made no resistance whatever.

Mr. Stuart.—That *is* our defence, and we will prove that all these outrages were well known to De Reinhard.

Cross-examination resumed by the Attorney-General.

Mr. M'Tavish.—*After* the fort was taken, I knew of a warrant to arrest some persons on a charge of conspiracy. It was signed SELKIRK, and was against some of the partners of the North-West Company. I *then* saw some persons acting as constables, but not previously. Captain D'Orsonnens' men seized Mr. John M'Donald and Mr. Allan M'Donald, two of the partners of the North-West Company, and put sentinels over them, and the day after, I understood they were taken before Lord Selkirk. His Lordship did not tell me that he was acting as a magistrate. Two days after the fort was taken, I was forbid by Captain Mathey, at my peril, to go out of it, or to speak to any of the servants of the North-West Company. I considered myself as a prisoner to a military force, as guard was regularly mounted in the fort. We were treated like military prisoners, and with every indignity. I was confined to limits in the fort, which I was forbid by Captain Mathey to leave. I slept in the same bed and eat in the same room as I had previously done. This force consisted principally of foreigners, and I took them for soldiers. If they had been dressed in black clothes, or not in

uniform, I should have considered them well trained to the use of arms, and very expert in military manœuvres. Fort William is the principal depot of the Nort-West Company. The correspondence and principal Books of the company are kept there. I know of an express arriving at Fort William with the proclamation of Sir John Coape Sherbrooke, on the 22d of August; there were a number of them addressed to gentlemen holding commissions as magistrates in the interior, and a number of blank ones. I asked Lord Selkirk for men and canoes to send them forward, but I was refused. I do not know whether Lord Selkirk sent them or not. I know Mr. Pritchard left Fort William about that time, but I do not know that he took the proclamations. I do not think our gentlemen received theirs from him. The proclamations specially addressed to the gentlemen of the Hudson's Bay Company, were taken by Lord Selkirk; those to the gentlemen of the North-West Company, were handed over to me, but I was not permitted to send them, nor were they forwarded when I left the fort in September. I did not refuse to send them by Mr. Pritchard, for I did not know of his going till after he had gone, and then I found it out by a steersman of ours, named Wells, having deserted.

Attorney-General.—Are you confident you never refused to send them by Pritchard, or by any other person?

Mr. M'Tavish.—I am upon oath, and I know what I am saying. I was not allowed, though I asked permission, to forward them; and I swear positively that I did *not* refuse to send them by *Mr. Pritchard*, or *any body else*, for I was *never* applied to, to send them. Mr. M'Gillivray and the other gentlemen, who went over the river, returned the same night, and had sentinels placed over their doors.

CLAUDE BLONDIN, *Sworn.*

Examined by Mr. Vanfelson.

Blondin.—I was in 1816, in the service of the North-West Company at Fort William, and know that it was taken on the thirteenth of August. There were fifty or sixty men armed with muskets and cannon, and dressed in soldiers' clothes of different colours, some in red, some in green, some in blue. I know Captain D'Orsonnens and it was he who commanded this force. They pushed open the barriers, entered the place on a run, seized the cannon, and formed themselves in the square. No resistance was made. The gates were not shut, nor the the barriers. After having taken possession, they searched all over the

fort, and placed sentinels at people's doors. The following evening Captain D'Orsonnens came to my lodging and blamed me on account of a fire which he had seen in the canoe yard.

Solicitor-General.—I am sorry to interrupt, but really this is not evidence; this sort of testimony has no bearing on the case.

Mr. Vanfelson.—The objets of the defence are two;—first to shew that the confession was extorted from the Prisoner by particular circumstances; and secondly, that Fort William was taken by force, and that Captain D'Orsonnens was not a simple individual. I take it, the more I prove that is calculated to invalidate the strict correctness of that assertion of Captain D'Orsonnens', the more I destroy his evidence, and in proportion as I destroy that, I weaken the case on the part of the Crown, and strengthen the defence of the Prisoner.

Examination resumed by Mr. Vanfelson.

Blondin.—He told me he would hold me answerable, at the peril of my life, if fire or accident should happen in the canoe yard. On the following day I saw him again, and in consequence of the remarks I made, I was sent to the other side of the river.

Mr. Vanfelson.—Is it within your knowledge that Captain D'Orsonnens said to the persons in the service of the company, that it would be best to leave them, or that the gentlemen of the North-West were rebels, or that their trade was at an end?

Blondin.—He said that they were rebels, and——

Solicitor-General.—I object *in toto* to this line of evidence.

Mr. Vanfelson.—My learned friend is too late, for the witness's answer is taken down.

Solicitor-General.—I beg my learned friend's pardon, but I am in time sufficient; I object to this answer being on your Honours' notes, for it is not only inadmissible, but absurd to say, that any private individual's misconduct can be evidence to exculpate the Prisoner. My learned friend says, that he pursues this course to impeach the credibility of the witness on the part of the Crown, but he must be well aware that his credibility cannot be attacked in that way. There are various ways of impeaching the general credit of a witness, but proving that a fort was taken, or that servants were seduced by him, is not one of them.

Chief Justice Sewell.—The question relative to the *fort*, Mr. Solicitor, is not to general credit, but to a specific declaration as to a matter of fact, which Captain D'Orsonnens has been examined upon.

Mr. Justice Bowen.—Captain D'Orsonnens swore distinctly that he *did not* know that Fort William was taken by an armed force, because

he *did not see* Lord Selkirk take it. This witness swears the contrary, for he swears that *he headed the force by which it was taken.* I think the question relative to seducing servants ought not to be allowed. If it has been asked, and was answered in the *negative*, perhaps it ought.

Mr. Vanfelson.—I shall not press it.

Cross-examination conducted by the Solicitor-General.

Blondin.—I saw the people of my Lord Selkirk enter, and Captain D'Orsonnens (whom I knew,) with them I am sure. I thought that the noise arose from people fighting, and I ascended the stairs where I was working, and saw the people take the fort quite distinctly. I do not know that he has been a captain in the regiment of Meuron, or that Captain D'Orsonnens entered as a constable. He looked liked a soldier.

LOUIS LABISSONIERE, *Sworn,*

And examined by Mr. Valliere de St. Réal.

Labissoniere.—In the month of August, 1816, I was at Fort William, a voyageur, employed by the North-West Company. On the 13th of August, there were in and out of the fort sixty or eighty men, perhaps less, perhaps more. We were taken prisoners in Fort William by Captain D'Orsonnens and Captain Mathey and their people, who ordered us not to stir out, and placed sentinels at each gate to prevent us from going out. I can not say positively who commanded, but it appeared that Captain D'Orsonnens and Captain Mathey did. Lord Selkirk came to that part before the fort was taken, but he did not enter the fort till two or three days after. They were well armed with musquets and fixed bayonets. After the others had joined, there were perhaps two hundred men or more. The greatest part of them were dressed in red, and appeared like soldiers.

I was very much afraid and there was a general panic. I know that some of our people were put in prison. I have no knowledge as to when our people who were imprisoned by Captain D'Orsonnens departed for Montreal, but I know that Captain D'Orsonnens proposed to take the fort of Lake la Pluie. Some days before he went, I heard him say that he was going to winter at Lake la Pluie, that there were plenty of provisions in that fort, and that he would be well off there. At the time he talked of his intention of taking that fort he said—"I can "take it without any danger; my men are clever fellows, and I have "got cannon." I saw Captain D'Orsonnens take his departure for

Lake la Pluie with his people, *and he took with him two pieces of cannon, mounted*, which had been taken from Fort William, and belonged to the North-West Company. I heard him say, that the gentlemen of the North-West were sent to Montreal, and that the most favourable sentence they could expect would be, to be hung.

Cross-examination conducted by the Attorney-General.

At the time Captain D'Orsonnens entered Fort William, I was in it. I do not know that he had a warrant to execute. I saw Captain D'Orsonnens depart with his people for Lake la Pluie, and the cannon were embarked. Captain D'Orsonnens did not mount them, they were ready mounted.

It being past Six o'clock, the Court was adjourned till to-morrow morning at Eight o'clock, A. M.

Wednesday, 27th May, 1818.

PRESENT AS BEFORE.

The Jury were called over, and

MR. WILLIAM MORRISON, *Sworn,*

And examined by Mr. Valfelson.

Mr. Morrison.—I was at Fort William, in the service of the North-West, in 1816, and I was there when my Lord Selkirk took possession of it. It was taken by a party of men, who appeared to be soldiers, armed with musquets and fixed bayonets. The first approach was made in a barge, which carried fifteen or twenty men, but when all together there were sixty or eighty men. There were officers, and amongst them Captain D'Orsounens, who was at the head of an advanced party, which entered the first. There was one Mr. M'Pherson and Mr. M'Nabb, but I do not know whether they were officers. When they entered, I was close to the gate of the fort. I did not hear Captain D'Orsonnens say any thing, but I heard Mr. M'Donald, one of the North-

West partners, request him to go back, as he had nothing to do there, and the agents of the Company were absent. Captain D'Orsonnens thereupon turned round, and spoke to his men in a language which I did not understand, and they sounded the bugle, and the force advanced immediately into the fort in double quick time, charging with their musquets and bayonets. Mr. M'Donald made no resistance. Captain D'Orsonnens placed guards at the gates, and the North-West people could not either go in or out; this continued for three or four hours. I was imprisoned for four or five days. There was a sentinel placed over me, and one day when I looked through the window Captain D'Orsonnens advanced towards the sentinel, and asked him, "how is it that you "suffer your prisoners to look through their windows? make them keep "within their bounds, and blow their brains out if they are obstinate." A few days afterwards Captain D'Orsonnens having assembled all the people of the North-West then in the fort, gave us the choice of three things; first, to enter, (for my Lord Selkirk I suppose,) on the same terms as we had with the North-West, and to go and winter in the interior; secondly, to go a voyage to Lake la Pluie; or, thirdly, to go two voyages to the Thousand Lakes, and afterwards return to Montreal.

Mr. Vanfelson.—What did you say to Captain D'Orsonnens, when he gave you the choice of three things?

Mr. Morrison.—I asked him whether he insisted upon that, and he answered, "I command it you in the King's name," also "that we "should never see our bourgeois again." I am very certain that he said to me, "I command it you in the King's name."

Cross-examination conduced by the Solicitor-General.

I was one yard from the gate at the time that they entered. They entered as much as they could by force. The gate was not shut. I went up to the Red River afterwards, but I never told the half-breeds, nor any one whomsoever, that Lord Selkirk was in irons, nor that he was chained at Fort William. I simply said, that I had seen him there.

I never told the half-breeds that the Great Chief, the Governor, had sent officers to put Lord Selkirk in irons, but I said that a Constable was coming up with a warrant to take Lord Selkirk, as I had heard, and nothing else.

Attorney-General.—Look at this gentleman (*Dr. Allan*)—do you know him?

Mr. Morrison.—I know him from having seen him, but not his name. I have heard him called Allan. Dr. Allan was not present, to my knowledge, when the fort was taken.

JEAN CREBASSA, *Sworn,*

And examined by Mr. Stuart.

Jean Crebassa.—I am a clerk of the North-West Company, and my post in 1816, in the months of August and July, was at Bas de la Riviere Winnipic.—Mr. Archibald M'Lellan came down from Athabasca some time in July, and remained at that fort part of the summer. I know that a warrant had been issued against one named, Oliver Keveny, at Bas de la Rivière by Mr. Norman M'Leod, in the month of August, 1816, upon the complaints of some persons who were under his command, and I afterwards saw Keveny at Fort Bas de la Rivière.

Mr. Stuart.—Keveny, was he taken to the fort in consequence of his arrest, in virtue of the warrant which Mr. M'Leod had issued?

Jean Crebassa.—I heard De Reinhard spoke to, to execute a warrant with three men, and he was brought in a prisoner by De Reinhard the same day I believe.

Chief Justice Sewell.—Where was Mr. M'Leod?

Jean Crebassa.—Mr. M'Leod went away the same day, after he had issued the warrant, for Athabasca. He was gone before De Reinhard returned.

Examination resumed by Mr. Stuart.

Jean Crebassa.—I do not know the Christian name of *that* Keveny, but his people called him *Oliver* Keveny. Mr. M'Lellan was at the time at the fort of Bas de la Rivière. Mr. M'Lellan, and all the people of the fort, received Keveny in a friendly way, Keveny was sent to Fort William as a prisoner on the following day. A few days afterwards we learned that Fort William, the principal depot of the North-West Company, had been taken by Lord Selkirk. De Reinhard was there at the time, and was acquainted with this intelligence as well as myself. Mr. Alexander M'Donell was then at Red River, and a letter was sent to inform him of the capture of Fort William, and he came down immediately in consequence to Bas de la Rivière. After his arrival a consultation was held as to what ought to be done in consequence of the capture of Fort William; and, in consequence of this consultation, Mr. M'Lellan took his departure in a canoe with the prisoner, (De Reinhard) Mr. Cadotte, Mr. Grant, and other persons, to see whether the communication between Fort William and the interior was open or not. We were afraid that, Fort William being taken, our

equipments which were then expected to arrive might not come, and it was a matter of very great consequence to us. In that country, the meetings which are held, in order to consult on matters of business, are called " councils," in imitation of the Indians. It was the only council held there at that period to my knowledge; and, as I was the principal clerk, I believe they would have had sufficient confidence in me to have called me to any council held there. I have no knowledge that any person said any thing about Keveny, and if they had spoke of Keveny, I must have known it. When he went away I heard Mr. M'Lellan say to the people who conducted him " to take good care of him," and " not " to give him any offence." Four or five days after the council, Mr. M'Donell returned to Red River, and, on going away, he told me that it was expected that, in consequence of the capture of Fort William, Mr. Keveny would come back to Bas de la Rivière, and that, in that case, I should do right in sending him to Red River, as a more convenient place for him, and also one where there were more provisions than at our fort.

Cross-examination conducted by the Attorney-General.

Jean Crebassa.—I never saw the warrant of which I have spoken, nor can I say against whom it was issued. The Prisoner brought to the fort by De Reinhard answered to the name of *Keveny*. I never heard him answer to his *Christian* name. I saw Keveny and spoke to him, but I do not know what countryman he was; he was a tall man, and of a fair complexion. He was sent from Bas de la Rivière in the care of one Louis Lacerte, a guide and interpreter. Lacerte is a Bois-brûlé, or Half-breed, and four or five others went with him, all Half-breeds or Bois-brûlés. He was not to my knowledge in irons; he was not in irons when he went away, and I never at any time saw him in irons. We *had* none at Bas de la Rivière. I never saw any there.—When Mr. Keveny was brought to Bas de la Rivière he had no baggage. After the departure of Keveny his barge with some baggage came, and his clerk (Mr. Cowly) asked leave of Mr. M'Lellan to put it in an outhouse. He took an inventory of it, and it was put in. I did not see the word Keveny on the baggage, nor engraved on a writing desk, nor did I see a writing desk.

Chief Justice Sewell.—Then I understand you, that you did not see the name of Keveny on the baggage, neither printed, written or engraved on a writing desk.

Jean Crebassa.—Yes.

Attorney-General.—Did you see any calves?

Jean Crebassa.—Yes, there were four calves which were killed and eaten by the Indians. I swear that I did not eat any. I was present at the Council of which I have spoken as a member of it—but I did not vote. Mainville, I believe, was present, and there were other Bois-brûlés. The object of this Council was *solely* to send canoes forward, to know whether the canoes with the equipments were coming from Fort William or not, because if there is a want of goods to trade with the Indians, and of seines (fishing nets) we should absolutely be starved to death.

Mr. Stuart.—I beg that may be taken, that, unless they received the supplies they were exposed to absolute starvation.

Attorney-General.—I must ask you, upon the oath you have taken, had this Council *no other object* than merely to send off a canoe?

Jean Crebassa.—The only object of this Council of trade was that. I cannot say it is the custom of the half-breeds to sit in a council of trade, but I know they were called upon on this occasion. I have no knowledge of any opposition to the measure of sending a canoe. The proposal was made by Mr. M'Lellan and Mr. M'Donell, and nobody opposed it. Mr. M'Lellan enquired who would volunteer to go in the canoe. This was all that was done. Some of the half-breeds refused to go from idleness.

Attorney-General.—Are you quite sure that nothing but idleness prevented them going? Did they not some of them assign a reason?

Jean Crebassa.—I think it was nothing but idleness, because they none of them gave any reason. I do not know that a Bois-brûlé, named La Pointe, refused to go, or that he gave his reasons for not going. I do not know of his making a speech at the Council, nor did I hear him say that he would not fight against the King's troops. I do not know his father, or that he was tried by a court-martial for advising his son not to go. Mr. Archibald M'Lellan, Mr. Reinhard, Mr. Grant, and Mr. Cadotte, together with Mainville, and seven or eight other Bois-brûlés went in the canoe. Each man had his gun, as is customary in that country. They had ball with them. Shot is the general ammunition, but ball is also taken in case of meeting with large animals. To my knowledge there was not more ball or ammunition than ordinary. I did not see any war pieces.

Attorney-General.—Did you hear any thing at this Council about a war?

Mr. Stuart.—I object to that question, as totally inadmissible.

Attorney-General.—It is a most unusual Council I think attended by *Bois-brûlés*, who are not in the habit of attending councils of commerce, though councils of war I believe they always do attend. My

learned friend must really permit me to know something more of this most extraordinary Council held to determine whether a canoe should be sent off. What could the canoe do if it went? could it bring the thing that they expected any faster? or, if they were not coming would a canoe being sent off make any alteration in the situation of those who were at Bas de la Riviere? It really appears to me a very mysterious business to call a council and invite the Bois-brûlés to it, merely to deliberate whether a canoe should be sent off or not.

Mr. Stuart.—I think it was very natural when they heard that the great line of communication was cut off, that they should be anxious whether they were to receive any supplies, for what does the witness say—" that unless they had merchandise to trade with the Indians, or " nets to fish, that in that country they must inevitably starve."—The object for which the council assembled was a very natural one, and the witness most unequivocally says, that it was confined exclusively to the consideration of the proper steps to be taken in consequence of the outrage which deprived them of their principal depot, and not to devise a retaliation of the aggression, or even to deliberate upon any means of regaining that which was rightfully theirs.

Chief Justice Sewell.—Suppose at this council there had been a proposition of the kind your questions are hinting at, Mr. Attorney, how would it bear on the case?

Mr. Justice Bowen.—Admit they determined to fight their way through, how can it affect this case?

Attorney-General.—I wish to prove that this council was not that innocent assemblage that it has been represented to be. Did you hear any thing at that council relative to war?

Jean Crebassa.—No; not to my knowledge. The council was held ten or twelve days after Keveny had been sent from Bas de la Rivière, and the canoe with Mr. M'Lellan and the others, followed on in the same track, indeed there was no other communication. Two or three days after Mr. M'Lellan's departure, I saw a trunk and a box brought to the fort at Bas de la Rivière, by Joseph, fils de la Perdrix Blanche, and a man named L'Allemand, but I did not see the name of Keveny upon them, or I do not recollect that I saw it. I saw them at the water side, and I do not know what became of them. I do not know whether it was a week or a fortnight after Mr. M'Lellan went away that the things came. I do not think it could be so long as a fortnight. I cannot say that it was not five or six days, but I do not believe that it was fourteen; but I cannot swear that it was not ten; I think that it was near upon five or six.

Chief Justice Bowen.—Did De Reinhard go with the warrant the

day it was given, and return the same day? and how happened it that Mr. M'Leod was not there?

Jean Crebassa.—He had gone away to another post, to Athabasca after granting the warrant, and before De Reinhard returned.

Attorney-General.—Could not Keveny have been kept at the fort, till a better opportunity offered of sending him to Fort William?

Jean Crebassa.—That was not my business, I had nothing to do with sending him.

Attorney-General.—I want to know if he could not have been kept at Bas de la Rivière. You have represenred that Keveny was treated with friendship. If you and I were there and I should send you to Fort William with five Bois-brûlés, would you call it friendly? Is it usual to send men of his rank with Bois-brûlés?

Chief Justice Sewell.—I think it is not put in the power of the magistrate to exercise a descretion upon that point.

Attorney-General.—I merely want to know whether or not he could have been kept, or whether, according to witness' opinion, it was an act of friendship to send a man of Mr. Keveny's rank with Bois-brûlés?

Chief Justice Sewell.—His opinion goes for nothing. You may ask him whether he could have been kept.

Attorney-General.—Well, I will put that question to him. Could Keveny have been kept at Bas de la Rivière? was De Reinhard there?

Jean Crebassa.—There were houses there, so that he might have stopped. De Reinhard was there.

[In answer to a Juror, Mr. Crebassa said, he knew that Mainville, De Reinhard, and Perdrix Blanche, went in the canoe with Mr. M'Lellan, but had no knowledge that they were sent in the small canoe with Keveny, as he was not in the upper part of the river; also, that at the time the council was held, there was no report of the existence of a war in the country below Bas de la Rivière, with the exception that intelligence had been received of the taking of Fort William.]

MICHEL CHRETIEN, *Sworn,*

And Examined by Mr. Vallière de St. Réal.

Chretien.—In the summer of 1816, I was *an éngagé* of the North-West Company, and was at Lake la Pluie at the time when Mr. Alexander Stuart arrived there from Athabasca. About perhaps ten days after he came, we heard that Fort William was taken by the people of my Lord Selkirk. I know that towards Michaelmas, on the second

of October, Captain D'Orsonnens came, and that before his arrival Mr. M'Donald, one named Bonaire, and Mr. Nolin, arrived at Fort Lake la Pluie, and took Mr. Sayer prisoner. Mr. Sayer was in bed and they took him prisoner, saying, " we take you prisoner in the name of the " King." I was outside of that room, but at the door where I could see, and I saw them take him, and heard the words, " we take you pri- " soner in the name of the King." Mr. M'Donald asked where Mr. De Reinhard was, but I did not hear the answer. He immediately went in the house where De Reinhard was. I afterwards went into De Reinhard's house, where I saw Mr. M'Donald, with his arms, guarding Mr. De Reinhard. At that instant, I did not know that a force consisting of the people of my Lord Selkirk, was at the fort at Lake la Pluie, or at the portage. In the afternoon *Guillaume* arrived with perhaps twenty Meurons. Before, and in the course of the day, about three o'clock, three or four Meurons had made their appearance, and afterwards, at sun set, or thereabouts, the others came to join Mr. M'Donald. I did not hear these three or four speak in a threatening way to De Reinhard, but there were Meurons there, and I heard them make use of threats against De Reinhard, and I think that De Reinhard heard them. I believe that he did.

[The Solicitor General remarked, that as on a former occasion the Crown was not permitted to go into evidence of a conversation in the presence of Mr. M'Lellan, because the witness would not *swear* that M'Lellan heard it, he did not think this was evidence; to which the Court observed, that this might not be a parallel case, but till the time was fixed when this took place, the Court could not determine.]

Mr. Vallière de St. Réal.—When did the *twenty* Meurons arrive?

Chretien.—It was in the evening towards sunset, and they were partly at the door and partly in the house. Captain D'Orsonnens came in the afternoon, about two o'clock. The twenty men *were with* Captain D'Orsonnens. It was mid-day or one o'clock, when the four Meurons first arrived, or about an hour before Captain D'Orsonnens came. The twenty men came with Captain D'Orsonnens in the *evening*, but I do not know whether they came with him the first time, that is, at two o'clock.

Chief Justice Sewell.—You said, " that it was *with* Captain D'Orsonnens they came."

Chretien.—The twenty men accompanied Captain D'Orsonnens in the evening, but I did not understand that they had come at two o'clock.

[The Chief Justice remarked, that there must be some mistake, or contradiction, as the witness had just before said, that these men came *with* Captain D'Orsonnens. The Prisoner's counsel after his Honour

had read his notes* observed, that they believed the witness (although his answers were not very distinct,) had not intended to say, that the twenty Meurons arrived with Captain D'Orsonnens at two o'clock.—The Chief Justice observed, that Mr. Bowen's notes agreed with his. What the witness meant could only be known from what he said, and he had said that. Some of the Jury intimating that they had not so understood the witness, the Chief Justice enquired of the reporter if his notes accorded with those which he had read? Mr. Simpson observed, that they did not exactly, and read his. The difference appears to be this, the reporter, in the former part of his testimony, represents the witness as saying merely, that these twenty men were *with* Captain D'Orsonnens, without any specification as to *time*, and latterly that they *came* with him towards evening, which was the *second* time of Captain D'Orsonnens' coming according to his comprehension of Chretien; whilst the Court understood him as fixing the *first* visit of Captain D'Orsonnens, viz: at two o'clock, as the time when they accompanied him. The Jury and the Prisoner's counsel observing, that they understood the witness as the reporter had taken his evidence, the Chief Justice said, that he certainly had stated that they arrived with Captain D'Orsonnens at *two* o'clock, and being on both the judges notes he could not strike it out.]

Examination continued by Mr. Vallière de St. Réal.

Chretien.—I heard the Meurons (who were all armed) say, that they had entered the fort to seek for one De Reinhard, and "that if he did "not got go to the Portage of Lake la Pluie, where their camp was, "of his own free will, they would take him by force." This was at dusk, about sunset. "We have him now," said they, "formerly he "took care of *us* in the regiment, he made *us* smart, but now we are "going to take care of *him*." They took him to the portage that same evening, but did not say *why*. I cannot say whether De Reinhard heard it, because I do not know it for certain. They were all in a

* In the afternoon, the person named *Guillaume*, a Meuron, arrived at the fort, with a score of men; and before, about two o'clock in the afternoon, three or four Meurons had arrived with Mr. M'Donald.—They came to join Mr. M'Donald at the fort in the evening, at sunset, or thereabouts. I heard threats made use of by the Meurons against De Reinhard. They were then at the door and in the house where De Reinhard was. The twenty men came with Captain D'Orsonnens, about two o'clock in the afternoon.

troop, and De Reinhard was in his room with the door open. I was in the kitchen, and I heard, and I believe in my conscience, that De Reinhard heard them. He was as near to them as I was. I have not any knowledge of a quarrel between Captain D'Orsonnens and De Reinhard. All went out together, De Reinhard, Captain D'Orsonnens, and all of them, went away together to the Portage of Lake la Pluie. De Reinhard appeared to have a melancholy air. These Meurons seemed to be seriously irritated against him, and by their language it appeared to me that they hated him.

[The Chief Justice intimating that they were not trying twenty Meurons, Mr. Vallière said his object was to shew the disposition of the Meurons towards De Reinhard, and that they threatened him. The Chief Justice reminded Mr. V. that he had *previously* made his confession to Captain D'Orsonnens, and, upon it, had been taken up as a murderer. Mr. Vallière pursuing the same course by asking if they were prohibited from leaving the fort, the Chief Justice said it could not be admitted, as subsequent events could not be brought to bear on this question. Mr. Vallière stated his object to be to rebut the evidence of Captain D'Orsonnens, by shewing that he uniformly appeared in a very different manner, from that of a disinterested person, which, as affecting his credibility, he considered very material.]

Examination resumed by Mr. Vallière de St. Réal.

Chretien.—The next day, or the day after, Captain D'Orsonnens called us all together, and ordered us not to trade with the natives, nor to go on the water to fish, nor to go out a hunting; and that, if we did so, the first shot he would fire would be in the air, and the second to sink us. Captain D'Orsonnens constantly wore a grey great coat with a sword by his side. I did not see him wear a red uniform. I know that Captain D'Orsonnens took the ammunition, and all the liquor there was in the fort. He gave for a reason that the fort did not belong to the gentlemen of the North-West, but to his Majesty, and to the government. He offered to give us lands there, and told us that he held the freehold so that he could give them. He also said that part of the gentlemen of the North-West would be hung, and the other part driven from the country, "but (said he) you will be well off with *us*." Captain D'Orsonnens told me, also, that formerly there were no laws in that country, but that every one did as he liked, but that it would not be the same now, because he had come to establish laws. He sent to fetch me, while, by order of Mr. Dease, I was burning some old papers which had been lying about for a long time in an outhouse.

He commanded me to tell the truth, saying that he had as much power as a magistrate, and that, if I did not speak the truth, he would run his sword through my body, that he would cut off my head, or that I should be hung. A few minutes after, he ordered a tent to be pitched, into which he put me, saying " you shall remain " there until you take your departure for *York*, and, if you do not de- " clare the truth there, you will be hung," that I did not know the consequence of burning those papers. He let me remain there till the following evening, with a sentinel at my tent. During the time that I was imprisoned, I saw two pieces of brass cannon, mounted upon their carriages, landed at the camp at the portage. I had seen them before mounted upon the vessel of Fort William, and I perfectly recognized them to be the same. There was a pile of balls placed at the camp, next to the cannon. Afterwards Captain D'Orsonnens took possession of all the effects which were in the fort, of which he took an inventory. The next day I went away for Fort William. De Reinhard went down several days before, with Faille and La Pointe. When I arrived at Fort William, I found De Reinhard a prisoner, guarded by a Meuron placed at his door and armed. At the end of two or three days he was enlarged, and permitted to go and come at large within the fort. The sentinel was taken away from his door. There were still sentinels at the *outside* door of the fort. During the course of the winter De Reinhard went out once with one of his comrades to the other side of the river. I know that he kept a school during the winter, and that Lord Selkirk was master of the fort at the time.

Mr. Vallière de St. Réal.—Have you any knowledge that Mr. Dease was taken by force before my Lord Selkirk to sign a paper?

Solicitor-General.—The course my learned friend has taken to disprove a confession, is very singular, namely, to prove that the conduct of the magistrate may have been wrong in other cases. Can this be admitted? that a magistrate's *general* conduct can be examined into, or his conduct even in any particular act, however connected with the transaction, is a proposition, I think, completely untenable. Mr. Dease did sign it, and whether he did so voluntarily or by force, cannot alter the confession itself. That was the deliberate act of the Prisoner, previously prepared in his own hand writing, its delivery to the Earl of Selkirk, as his confession of the part which he had taken in the murder of Mr. Keveny, is witnessed by four persons. What possible difference can the manner in which they became witnesses, make as to the contents of the confession? not a particle.

Mr. Justice Bowen.—In admitting this confession, it should be recollected, that we excluded that part beginning, " Before Thomas,

Earl of Selkirk." There are no witnesses to the confession as we received it; the four witnesses are to a part which the Court disallowed. That, at a certain day, De Reinhard was a *prisoner*, and that at another, he was *free*, is a fact proper for you to lay before the Jury, and *they* may, if they think proper, connect this liberation with the confession. But what possible use can it be, to go into an examination, as to the manner, in which rejected testimony might have been obtained?

Mr. Stuart.—We submit, as we are bound to do, to the judgment of the Court, though at variance with our preconceived opinions, but, in illustration of *why* we thought this question to be within the limits of evidence, the Court will perhaps indulge me with the liberty of making two or three observations. Dr. Allan stated that Mr. Dease, attended at the delivery of this paper to the Earl of Selkirk by De Reinhard.—From that want of candour, fairness, and frankness, which runs through the entire transaction, from the total absence of any thing like candour in those who are at the back of this prosecution, the natural inference which the Jury would draw would be, that Mr. Dease attended *voluntarily*. The additional weight given to the paper, by the signature of a confidential clerk to the North-West Company, attesting, that in his presence this confession was made, cannot for a moment be overlooked, for if such a person was voluntarily present, making no objection, the evident presumption would be that every thing, being perfectly fair, the testimony was irresistable. If, instead of this, we prove he was dragged there by four Meuron soldiers, in the pay of the very magistrate before whom the confession was made, we, I think, account for the finding of a clerk of the North-West Company's name to a confession, made before the Earl of Selkirk, and at the same time destroy any supposed validity attached to such a paper by that circumstance. We *now* wish to prove that this pretended examination, which is detailed on the paper received by the Court, is not entitled to credit, and that the pains taken to give it the semblance of extraordinary fairness, is nothing more than a part of that plot of which the machinery was already prepared. The mine was ready to be blown, the train was laid, nothing was necessary but to apply the torch, nothing required, but to have the paper already manufactured, signed by the unfortunate De Reinhard. His power of refusing, and freedom of mind, may be well estimated, if we prove, that those who witnessed the delivery, were not there accidentally, or voluntarily upon an invitation, *but were dragged before the noble Earl of Selkirk, the private prosecutor, by four Meuron soldiers in his own pay.*—We think, that, as such a circumstance cannot fail to involve the voluntariness of the confession in doubt, we might be permitted to prove it,

and considering that it would produce an essential benefit to the Prisoner, we felt bound to urge the question to the Court.

Chief Justice Sewell.—For my own part, I can not see it. Dr. Allan says he was present *before* De Reinhard signed or delivered the paper to Lord Selkirk, that Mr. Dease was also sent for and upon his arrival the paper was handed to him. He read it to himself, and asked the Prisoner, "if it was true," De Reinhard answering that "the contents were "true." He is further asked, "do you wish to add to, or take away "from, or alter, any part of the contents," and he answers, "no, I do "not." Now, had the attestation been admitted, what difference could it make to what De Reinhard did, that one of the witnesses went with, or was even taken against his inclination by, four soldiers? we should be happy to receive any thing, gentlemen, which you, in the exercise of your judgments, may thing proper to offer, but our inclination must be limited, by rules of law.

Mr. Justice Bowen.—The Crown officers objected to your question, because you were going to shew, that Dease was himself a prisoner, and from that to lead the Jury to infer that the magistrate, acting wrong in one instance, he would do so in another, and upon that point I consider the objection good. But, if you only wish to prove that Mr. Dease was not a *voluntary* witness, as it is in evidence that he was present, I think you can; but no farther than just that fact do I think you can use the question.

Mr. Vanfelson.—We have no wish to use it farther. We merely wish to prove, that such was the system of lawless violence and outrage carried on in that country, that every thing was done by force, and that opposition was useless, as military authority awed it down.

Chief Justice Sewell.—I do not see what benefit is to result from the enquiry. Acts of violence, of military aggression, *are* proved, indisputably proved, and so, unless some very strong circumstances appear to change our opinion, we shall charge the Jury. There therefore can be no necessity to go any farther.

Mr. Stuart.—Under this view of the subject taken by the Court, we have done with this witness,

Attorney-General.—After what has fallen from the Court, we shall certainly feel it our duty to prove that this was not a military force, and that no greater violence was used, than, what opposition to *legal* measures rendered necessary; therefore the defence, had better perhaps at once prove it, if they can, because we are prepared to overturn it.

Chief Justice Sewell.—To prove what, or overturn what? what possible difference can it make to the abstract fact of the confession, whether

Deâse was a voluntary witness or otherwise? it does not influence my opinion in the smallest degree.

Cross-examination conducted by the Attorney-General.

Chretien.—The conversation of the Meurons was amongst themselves. De Reinhard was not bound. I was not lower down than Fort William. I first saw Captain D'Orsonnens at Fort Lake la Pluie, about one or two o'clock in the afternoon.

RUDOLPH HALLER,* *Sworn,*

Examined by Mr. Vanfelson.

Haller.—I was at Fort William on the nineteenth of October, 1816. De Reinhard was then there, a prisoner under the guard of a sentinel, and he remained so for ten or eleven days. I cannot say that it was thirteen or fourteen. After that, he was no longer confined, but could go out and in the fort as he chose. I left the fort the sixteenth or seventeenth of November of that year, and the people of Lord Selkirk were in possession of the fort, and were so during all the time that I was there. The party was armed and commanded by Captain Mathey, but at first Captain D'Orsonnens had had the command.

Attorney-General.—We have no questions to put to Haller.

JEAN BEAUER, *Sworn,*

And examined by Mr. Stuart.

Beauer.—I was employed the fifteenth of this month to serve an order of subpœna upon Mr. John M'Nab, at Montreal, on behalf of the Prisoner, but I could not meet with him. I am a constable at Montreal. I went to his lodgings, at Mr. Williams', the post office at Montreal. They told me that he had gone away for ten or twelve days, but had left his things there. I was afterwards at Longueil, where he sometimes went, and was informed by the Curate, that he had not seen him for three weeks. I cannot say, whether, he is in the service of my

* The witness being a German, and not speaking English or French, Jasper Brewer, Esq. was sworn to act as interpreter.

Lord Selkirk or not. The sixteenth of this month I likewise served an order upon a man named Jean Baptiste St. Pierre, as a witness for the Prisoner, and he told me he would go; but that he had received money from Lord Selkirk, and was engaged to depart for Fort William, but that he would go to Mr. M'Kenzie, and speak to him. We were in consequence at Mr. M'Kenzie's office; he related his concerns to Mr. M'Kenzie, and thereupon Mr. M'Kenzie said to him, that he would do well to apprise his employer, that he had received an order to set off for Quebec. Thereupon St. Pierre said, " go with me," and on going out of the door we met one Harnois.

[The Attorney-General objected to this course of examination, but the Court held, that the Prisoner having subpœnaed witnesses, was entitled to shew *why* he could not bring them forward.]

Beauer.—On going out of Mr. M'Kenzie's office, one Harnois, a voyageur, said there was, at the top of the street, a friend or a comrade, " who wants to speak to you." He answered, that he could not go, that he was going to his employer's office to settle his concerns, and Harnois told him that Mr. Forrest was not there. Being gone a little farther than the market, we met Mr. Heurter. St. Pierre told *him*, that he had received a subpœna, and he asked to look at it, and took the order, upon which I told him that he had nothing to do with it, and he returned the order to St. Pierre, and we afterwards went to the office of Mr. Gale, who is, I believe, of counsel for my Lord Selkirk.

St. Pierre was called upon his subpœna, and not appearing the default was entered.

Mr. Gale observed, that his name having been introduced, in a manner that might create an unfavourable impression, as to the non-appearance of St. Pierre, he was desirous of explaining his conduct, to the Chief Justice and Court. The Chief Justice remarked that, though his name had been introduced in the course of the trial, yet it had never been mentioned but with the greatest respect, and that, if thought necessary, the Crown officers might call Mr. Gale, but he (the Chief Justice,) did not suppose that they would. Mr. Gale rejoined, that had his being called, rested with himself, he should not have interposed any observations, but as it was with the Attorney-General, he had felt himself bound to protect his own conduct.

Mr. Stuart intimated, that the chain of evidence the Prisoner's counsel had proposed to pursue, was here broken. They were desirous of shewing a variation, between the testimony given, by certain witnesses at the proceedings in March on this subject, and that, during the present trial. No more commissioners being in Court, than required by the patent, he did not know

what course the Court might approve, to enable him to attain this point, which he considered important. The Chief Justice enquired, (Mr. Stuart here hesitating,) whether it was the wish of the gentlemen to examine him, *and being answered affirmatively, stated that the difficulty was :* " If I come " down from this bench how am I to get up again, for it is as yet an " unsettled point, whether a judge can retire from the bench, be exa- " mined, and resume his seat on the same trial." *After some colloquial conversation between the bench and the bar, in the course of which his Honour the Chief Justice, recognized as sound law,* " *that if the interest of* " *the Prisoner was to be promoted by the examination of himself, however* " *inconvenient it might be, it was a paramount right which his counsel* " *were entitled to insist on. In the present case, perhaps, no difficulty might* " *present itself, as Mr. Justice Perrault sat in March, and was not on the* " *bench on the present trial.*" *It was agreed to obtain the judge's attendance for examination to-morrow.*

WM. BACHELOR COLTMAN, Esquire, *Sworn,*

And examined by Mr. Stuart.

Mr. Coltman.—I was last year at Fort William, and farther in the Indian Territories, in the quality of His Majesty's Commissioner for enquiring into the troubles in those parts. I arrived at Fort William on the twelfth of June, 1817, I believe ; and I found that fort then in the possession of the North-West Company. When I got as far as Sault St. Mary, (before crossing Lake Superior,) I received a letter from Lord Selkirk, dated at Fort William the 28th April, 1817.

Mr. Sturat.—Have you, Sir, got that letter?

Mr. Coltman being some time in examining a large collection of papers which he had in Court.

Mr. Justice Bowen.—The Crown will perhaps admit that Lord Selkirk had possession of Fort William.

Mr. Stuart.—We have not proved the *length* of time that he *retained* possession of it, which we are desirous of doing by Mr. Coltman.

Chief Justice Sewell.—What difference is that to make, what if he kept it for ever? the question is not at all varied, whether, the duration of the possession was for an hour, or for twenty years. The fact, that it was in the occupation at one time of Lord Selkirk, and that to the knowledge of De Reinhard, at the time he made his confession, you have proved, as well as that, previously to that period, it was occupied by

the North-West Company, and is at present in their possession. It then cannot be essential to obtain more testimony on that point.

Mr. Stuart.—With great deference I beg to submit, why I consider it essential, to put before the Jury, the length of time Fort William was in possession of Lord Selkirk. Let it for a moment be supposed that Lord Selkirk, as a magistrate, entered Fort William in search of, or to arrest, imaginary culprits, that he got them, sent them, in conformity to the act under which the warrant issued and was executed, to Montreal, and had then gone away. There, every thing might have been justified, because it was the legal exercise of legitimate authority. Let it, on the other hand, be supposed (it is an imaginary case only that I am putting,) but let it be supposed that, from very different motives, not to take alleged culprits, not to execute a legal warrant, not to pursue a legitimate and authorized course, that of forwarding those whom he might arrest, to a Court, where they would receive protection or punishment, according as they merited; let it, I say, for a moment be supposed that a magistrate could be found, so lost to all sense of duty, so insensible to his own honour, so regardless of those laws which he was bound as a magistrate to enforce, and as a subject to obey, that, under pretence of executing a legal process, he should array a military force, lay siege to, and carry by assault, houses and stores, seize and appropriate to his own use their contents, arrest, and confine indiscriminately, the proprietors, their clerks, and their servants, tamper with them in their confinement, liberating such as came into his views, and confining more rigourously such as opposed them; I say, if such a magistrate could be found, would the legality of the instrument, from its having his seal and signature, be a justification for the outrageous course of procedure I have been imagining? surely not. What ground is there then, in the present instance, to say that the Earl of Selkirk, as a magistrate, made a legal entry, that in first issuing, and then in the mode he adopted to execute, his own warrant, he had no view but that of the upright and enlightened magistrate, that no private, or interested suggestion warped the impartial and disinterested justice of peace, into a partial and interested rival. There is no ground whatever, for such a conclusion, the whole transaction proves the contrary. After entrapping the leading partners, and getting into the fort, he instantly changed characters and threw off the cloak. Instead of culprits, it was property, he wanted, and having got possession of it, together with the fort, there he staid as suited his convenience, six, eight, or ten months. To say that this excess of violence and aggression was necessary, is contrary to common sense. To say that it was not such an aggravated abuse, if not prostitution, of the magisterial character as to merge the magistrate

in the hostile rival, is, I think, impossible. The language, not only of common sense, but of the law also, (for I might multiply authorities without end,) is, that the moment authority is abused, authority ceases, and the magistrate, or officer, becomes only a private individual. I might instance the entry of a sheriff upon a writ of execution; if refused admission, the entry although forcible, is a legal entry, and he might proceed to levy, according to sound judgment, sufficient to cover the amount specified in his writ, but if, instead of demanding admission by virtue of the authority of his writ, he proceed to break in the premises, or if, having obtained entry, instead of levying to cover the hundred pounds specified in the process, he should wantonly or malevolently seize property to the amount of thousands, is his office of sheriff or writ of execution to protect the abuse? No. Then I contend, that it is essential for me to prove the subsequent conduct of the Earl of Selkirk; because, I contend, that the moment he exceeded the necessary power to secure obedience to the law, that he changed from the magistrate to the private individual, on this sound and general principle, that authority abused, ceases to be authority. In adverting to the Earl of Selkirk, it is not to influence the Jury as to these disputes, nor is it to address the passions on the conduct of the noble Earl, and the other great commercial company; I should be unworthy of the gown I have the honour to wear, did I attempt it, but I cannot do justice to the Prisoner, except I prove that the Earl of Selkirk, by his subsequent conduct, lost his character of a magistrate. This I intend to do by shewing, that at the date of the letter I have asked for, his Lordship remained in possession of Fort William, and must necessarily, from that circumstance, have acted as a private individual, and De Reinhard being therefore, in a state of illegal duress, his confession is good for nothing.

Mr. Vanfelson briefly went over the same argument.

Chief Justice Sewell.—Let us see how the question comes before us. and the grounds of our decision will be evident to every man of common sense. The unfortunate individual at the bar, is accused of the crime of murder, and it is yet in suspense, whether, he is guilty or not guilty. He is now on his trial before his country, and we are bound to receive every thing offered in evidence for and against him, as far as is consistent with sound legal rules. These cannot be broken in upon to accommodate either party. How then stands the case, at the present moment? I have made, (says the Prisoner,) it is true, a series of confessions, but I will shew, such an influence on my mind, at the time of making them, (arising from the hope of benefit, or any thing you choose,) that they ought to be destroyed. Prove then the circumstances producing this

influence; this you do not attempt. Again, supposing the confession, signed the 28th October, had been delivered to a gentleman acting as a magistrate and received as such, what can occurrences taking place in the succeeding April by possibility have to do with it? certainly nothing. By no possibility can they affect or alter the act finished on the 3d of the previous November. You contend that we ought to allow the question, because the confession was taken by a magistrate. We decided, and we traced authorities to convince you, that we could not reject it as a confession at *common law*, and we received it as a paper delivered by the Prisoner to the Earl of Selkirk as an *individual*, and not in his capacity of *a magistrate*. Had it been delivered to any body else, or been a *viva voce* confession to any other person, we should have received it, as we did his previous verbal confessions to Captain D'Orsonnens, Vitchie, and others. Under this view, which my learned brother as well as myself takes of the subject, I am decidedly of opinion your question cannot be received.

[Mr. Justice Bowen very briefly expressed his opinion of the impossibility of entertaining the question.]

Mr. Stuart.—I would request your Honours to insert my question together with the decision of the Court thereon upon your Honour's notes, that we may be able hereafter to refer to them, should we see occasion, as I think probably we shall.

Chief Justice Sewell.—You wish us to admit evidence of the 27th April, 1817, to a fact which transpired on the 3d November, 1816, *prima facie* the thing is impossible. Next, you object that Lord Selkirk was not acting as a magistrate, that we have decided is no matter, for that we have admitted the confession at common law; so much you may certainly have down if you think proper.

Mr. Justice Bowen.—We have taken it thus. Mr. Stuart, for the Prisoner, being called upon to state what he meant to prove by this letter, answered, "I mean to prove that his Lordship retained posses-"sion of Fort William up to that time, and *secondly*, that he (Lord Sel-"kirk,) did not act as a magistrate in receiving the confession of De "Reinhard."

Mr. Stuart.—I beg the Court's pardon, but I am not so fortunate as to be clearly understood. I intended to prove by the witness the retaining possession of the fort by Lord Selkirk; that I consider a question of *fact*; the other is a conclusion of *law* arising from the argument I have had the honour of submitting.

Chief Justice Sewell.—I will read the opinion of the Court upon your proposition, as we *now* understand it. Your question to Mr. Coltman, was, "have you got the letter?" Mr. Stuart being called, stated to

to the Court, that he wished by this question to prove two points:— "*first*, that Lord Selkirk had remained in possession of Fort William, "until the month of April, 1817, and, from thence to infer, that he did "not act as a magistrate when he received the Prisoner's confession, "and, therefore, that it is not entitled to credit, the Prisoner being in "duress." The Court decided "that the letter cannot be read for either "of these purposes: *first*, because Lord Selkirk's possession on the 28th "April, 1817, could not, by any possibility, have influenced the decla- "ration of the prisoner De Reinhard, made on the 3d November pre- "ceding, and *second*, that the Court have rejected the examination said "to have been taken by the Earl of Selkirk as a magistrate, because it "was not proved either by Lord Selkirk or his clerk; and received the "paper written by De Reinhard, and then delivered by him to Lord "Selkirk, as a piece of evidence by confession at common law."

[Mr. Stuart explained that he did not call Mr. Coltman to prove that Lord Selkirk acted as an individual, and not as a magistrate, adding, that he should be extremely concerned, if the Court thought he would attempt such an irregularity, as to question Mr. Coltman, upon the capacity in which the noble Earl acted.]

Mr. Justice Bowen.—I have made this minute. Mr. Stuart, for the Prisoner, being called upon to state what he meant to prove by this letter, answered, "I mean to prove that his Lordship retained posses- "sion of Fort William up to that period, and from thence to infer that "he did not act as a magistrate, but as a private individual, when he "received the pretended confession of the Prisoner, and that it was not "entitled to credit, the Prisoner being in duress." This the Court overruled, because it is immaterial, upon the present issue, whether his Lordship retained possession of the fort for six months, or six hours, and because the Court did not admit yesterday the examination of the Prisoner, said to have been taken before his Lordship as a magistrate, it not being proven, but admitted the written declaration of the Prisoner, signed on the 28th October, and afterwards delivered to his Lordship, in the presence of the witness, Dr. Allan, as evidence at common law.

Mr. Stuart.—My object was to shew, from this letter, a fact, and thence to infer, as a legal deduction, that the pretended confession could not have been taken by the noble Earl, as a magistrate, because he had divested himself, by his conduct, of the qualities of a magistrate: also, that, if received by the Court as a confession made to the Earl of Selkirk as a private individual, it is not entitled to credit, because it was written and taken at a time that the Prisoner was in a state of illegal duress. I wish the Court to notice that my objection is twofold. [Mr. S. again stated the branches of it.]

Chief Justice Sewell.—I will add these words, and then I believe I shall state explicitly our decision, and also meet your ideas; after the words, "as a piece of evidence at common law," I will annex, "as a "paper of the Prisoner's own composition and writing, delivered to his Lordship by him, and the capacity in which his Lordship received it at common law, being therefore immaterial."

* * *

Examination resumed by Mr. Stuart.

Mr. Coltman.—I left Quebec last year, and, on my route to Red River, at Drummond's Island, in Lake Huron, I saw the Prisoner for the first time. It was the thirtieth of May, or the first day of June, 1817, as I believe; he appeared to me to be at liberty. He was not confined, but was *with* one Murphy, whom I understood to be a constable, and, I believe, under his *surveillance*. I addressed (conjointly with Mr. Fletcher) a warrant to Murphy to convey De Reinhard to Montreal, and to commit him to prison, and the warrant commanded the gaoler to receive him. I know Jean Baptiste Desmarais, and I saw him there.

In answer to a question from the Chief Justice, Mr. Coltman stated that at that time it was a matter of public belief that himself and Mr. Fletcher were the only magistrates of the Indian territory.

Mr. Coltman.—I saw Desmarais afterwards at Lake la Pluie. He was brought before me, on the 25th June, by one Michael M'Donell, I believe, as a man in the service of my Lord Selkirk, from whom it would be right to receive some evidence. I know an Indian from Red River, commonly called *Fils de la Perdrix Blanche*. I have seen him several times in this province, and I saw him about February last, in the district of Montreal. He could not speak French, as I understood. I think he knew a few words; he could pronounce perhaps some words. I know one M'Nab, and I have seen him write.

Mr. Stuart.—Look at this letter and have the goodness to say whether it is the writing of John M'Nab.

Mr. Coltman.—I have no doubt but it is his writing. I have seen this letter before at Fort William. From the state it is in now, it is evident that it has been destroyed and pasted together.

[Mr. Stuart moving that the letter be read, the Attorney-General objected, on the ground that there could be no way of proving M'Nab's knowledge of any circumstance but by producing him.]

Chief Justice Sewell.—It is now half-past six o'clock. The Court will therefore adjourn till eight o'clock to-morrow morning, when we will hear you in support of your objections.

Court adjourned till that time.

Thursday, 28th May, 1818.

PRESENT AS BEFORE.

The Jury were called over, and being all present.

Attorney-General.—A piece of evidence is offered by my learned friends, to which, though it is very immaterial whether it be read or not, I feel it my duty to object, because it is not the best evidence, which, from the nature of the subject, might be produced. Another objection is, that it is not a deposition of M'Nab's, such as, if my learned friends proved that the deponent was beyond the jurisdiction of this Court, they would be entitled to have let in. That it is totally inadmissible is evident in a moment, for, admit letters as evidence, it would put it into the power of any two persons to destroy any confession. As to this letter, it never came into the Prisoner's hands, how, therefore, could his conduct be affected by it? I will not trespass further on the time of the Court. I contend, it cannot be admitted on the general rule that the best evidence must be produced, which in this case is M'Nab; and also, that it is a document not made on oath, I might add, and never was in possession of the Prisoner.

Solicitor-General.—It is hardly necessary to occupy the attention of the Court, on a point I consider so very clear. The evidence tendered is, I contend, contrary to every principle, though its admissibility is urged on the ground that secondary evidence may be resorted to, in the absence of the primary; undoubtedly it may, a legal impossibility to produce the primary, being proved. Have my learned friends subpœnaed M'Nab? if they have, and he has not appeared, where is their writ of attachment? If even they had taken these indispensable preliminary steps to the introduction of secondary testimony, and after all, could not have found him, it would be a misfortune for the Prisoner; but could form no ground for taking as evidence a document not supported by oath. Suppose there should be occasion to indict M'Nab for perjury, how can it possibly be done upon a document not substantiated by oath? It is unnecessary to remark, that letters pretended to be written to a defendant, might be made to prejudice his case, or to benefit him, though I do not see that this letter can do either. This case, however, is much

stronger, it is not a letter to the defendant, but to a third person, and which, I believe, it is not pretended the Prisoner ever saw. I really consider I should be trifling with the time of the Court, were I to argue further on this business.

Mr. Stuart.—I have the honour to submit, that the evidence I tender, is clearly admissible. This is not a letter fabricated a week or ten days ago, to give a colouring to our defence. It was made in the country where the pretended confession took place, and being found long ago, mutilated and torn, was put into the Commissioner's hands. A letter of this tenor, being so found, might of itself furnish strong grounds of suspicion, and be at the same time powerful evidence of its genuine character. We did not subpœna Lord Selkirk, not doubting but he would be brought here on the part of the Crown. This confession was a matter of such public notoriety, from its having been printed and circulated with the greatest avidity, that we never questioned but his Lordship would himself have felt it his duty to attend, though not served with a subpœna. In the absence then of the noble Earl, from whom, were he in the box, we might draw the most important information relative to this confession, I submit, that we may consistently with the rules of evidence, introduce this letter. *From* whom is this letter, and *to* whom is it addressed? it is a letter from M'Nab, in the service of Lord Selkirk to Captain Mathey, also in the service of Lord Selkirk, relative to De Reinhard. I should contend, as a positive fact, from which the Jury can draw what inferences they please, that we have a right to prove that at about the time this pretended confession was made, a letter was written from M'Nab, in the service of Lord Selkirk, to Captain Mathey, who was in command. This letter will shew that measures *were resorted to, to obtain a confession.* It will then be for the Jury to say, whether it is that free, that voluntary, declaration which it has been represented to be, whether the circumstances we have proved do not contradict such a supposition, and therefore destroy its credibility, corroborated as they will be by this letter.

Mr. Vallière de St. Réal, in a very few words, submitted to the Court, that, although it might not be that strict evidence which would be required against a prisoner, yet as it was a part of a circumstance favourable to the Prisoner, the Court would not refuse it, as the constant practice of criminal Courts, was to relax the strict rules of law in favour of the accused, if necessary to let in testimony on his behalf.

Chief Justice Sewell.—The Court are under the absolute necessity of refusing to receive this letter, inasmuch as it is not possible to bring it within any rule for the admission of testimony. The argument for re-

ceiving it, is completely broken down by the circumstances which belong to the letter. Here is a letter from a Mr. M'Nab, to a captain Mathey, of whom we have not heard till the present moment, and of the other only incidentally during the trial. Is it then to be said, that merely because Mr. M'Nab is not able to be produced, (I do not mean to say that it is any body's fault that he is not,) that therefore we could receive any thing he said or wrote, merely because he could not be so produced? most assuredly it will not, unless it was something that had passed upon oath. It has been suggested that admission might be given to this testimony, under the rule that where the *primary* evidence could not be produced, the *secondary* might be resorted to. This is the general rule, not only as to written testimony given under oath, but also in *viva voce* evidence. It is also urged, "that, as Lord Selkirk is not "here, therefore it ought not to be admitted;" but the question immediately presents itself, "why is he not here?" have any measures been taken to *secure* his attendance? it is not enough to say that you expected, from the nature of the case, he *would* have been here. If he was an important witness for the defence, it was certainly the duty of those entrusted with it to have taken the requisite steps to secure his attendance. Having failed to do so, you can not certainly avail yourself of your own *laches*, as they are termed in law; nor is it competent to you to say that you relied upon his being produced by the Crown. If De Reinhard wanted the Earl of Selkirk as a witness, *he* should have summonsed him; he is within the jurisdiction of the Court, and his attendance might have been secured, or his absence accounted for in a satisfactory manner, so as perhaps to admit testimony, to prove that promises were made by him, according to what you allege. A third reason therefore for refusing your application, is, that as the witnesses were called over on the 22d instant, the Prisoner as well as his counsel, knew, or might have known, that the Earl of Selkirk and Captain Mathey were not called by the Crown, and consequently they might *then* have subpœnaed them, if they had not before. This letter can not be made evidence. What can occurrences in May, 1817, have to do with what took place in November, 1816? If it is alleged that the letter has no date, for what reason are we to suppose that it was written *before*, any more than *after*, the confession. Indeed the very face of the letter warrants a *contrary* conclusion. What can that part of it refer to which speaks of the *promise* of De Reinhard, if it does not refer to the confession? Does not this very uncertainty shew the necessity of better evidence being produced. If we are to *presume*, we may presume unfavourably as well as favourably, for if we evade the rule all is hazard and uncertainty. For these reasons I am compelled to say it can not

be received as evidence, however unpleasant it is to do so. It is not only unpleasant but very much so, to decide against, or exclude, any thing which the Prisoner's legal advisers consider essential to the defence, but in the performance of our duty, we can not help it, and called to decide, I am bound to say it is totally inadmissible.

Mr. Justice Bowen.—I am perfectly of the same opinion, but for many reasons, I hope it will be admitted to be read after the case is closed, so that nothing which the Prisoner or his counsel may have thought important, may have been kept from the Jury, though to me, it does not appear that it can make either for or against, either the one party or the other. We are called upon to legally decide the question, and we can not but refuse to receive the letter, for this obvious reason, that the letters of third persons, never having come to the possession of the Prisoner cannot be evidence. A prisoner loses nothing by this, for if letters of third persons were to be admitted as evidence *for*, they must also be admitted *against*, him. That no benefit could accrue from the admission of letters of third persons, will be evident in a moment. Suppose such a letter to state correctly the circumstances, and to prove the innocence of the accused, then it would be in the power of any fourth person, to accuse by letter, and although the prisoner had nothing to do with it at all, it might be made evidence against him, and thus reverse the whole preceding favourable testimony. The very same question occurred in the case of Colin Robertson recently tried at Montreal. It was wished, on the defence, to produce a letter from Cuthbert Grant, shewing from that letter, that they had reason to apprehend that the Boisbrûlés would come down upon them; but its admission was refused on this very ground, that letters of third persons could neither be evidence for, nor against, a prisoner. It is stated that its having been torn is a suspicious circumstance, because it manifested a wish to conceal its contents. This is mere presumption. May it not be presumed, on the other hand, that there could not be that great anxiety about it, or a more effectual way of destroying it would have been resorted to; it might have been burned. It was torn and scattered to the winds, where it might be, and indeed has been collected. If it was what it was wished should not be known by another, why not destroy it effectually? why not burn it? The letter is without a date, it is true, but there is a part of its contents which indicates about what time it must have been written; the breaking up of the ice of the river alluded to in the letter, plainly shews it could not have been written in November, but must have been penned about the time the indorsement specifies. It is however perfectly unnecessary to comment farther upon the subject, after the very clear exposition of my learned brother.

[Mr. Justice Bowen repeated, for the reason he before assigned, his wish that it might be read as well as the other letter although it was impossible to admit it as legal evidence.]

Attorney-General.—I have no objection to their being read. I consent to both letters being read.

Chief Justice Sewell.—Let it be entered thus: read by consent of his Majesty's Crown officers.

The letter from Mr. John M'Nab to Captain Frederick Mathey, was then read.

CAPTAIN FREDERICK MATHEY,

Dear Sir,

WILLIAM* is this moment expediting Charrith, and Morache. Reinhard refuses to come to Mr. Murphy's chambers. He says, neither his Lordship or you said any thing to him on that arrangement; that he is comfortable where he is, and that his determination is to perform the promises made to Earl Selkirk and to you. Be so good as to give Mr. Bourke a hint that when he requests any thing his lists may be correct, and signed by himself or Mr. Becher, as they will be kept for his Lordship's inspection. The ice is again driven to our shore in a very narrow line, the bay will soon be clear.

I am, Yours, very sincerely,

(Signed) JOHN M'NAB.

[ENDORSED.]

Letter from Mr. John M'Nab to Captain Frederick Mathey, regarding Reinhard.

May, 1817.

Chief Justice Sewell.—Do you wish to have the letter of the Earl of Selkirk read?

Mr. Stuart.—I do not know, as I cannot speak of a document that I have not seen.

Mr. Justice Bowen.—I thought you called for it yesterday, and that the argument was because the Crown objected to its production.

Mr. Stuart.—I very distinctly stated that my object was to prove that at a certain time Lord Selkirk remained in possession of Fort William, and, in endeavouring to attain that object, I enquired of Mr.

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* The mutilated state in which M'Nab's letter now is, from its having been torn and pasted together again, renders it uncertain whether the name is William or Willan.

Coltman if he, in conjunction with his brother commissioner, had received a letter from the Earl of Selkirk. If I saw the letter, and it proved that circumstance, I should certainly wish it to be read, but I cannot state, till I see the letter, whether I am desirous to have it read or not.

Chief Justice Sewell.—Upon that subject you must exercise your own discretion, and Mr. Coltman his own pleasure. We know nothing of Mr. Coltman's letters. If he likes to let you see them, we can have no objection, and, if the Crown officers consent to their being read, we shall present no obstacle, but we have no controul over Mr. Coltman's letters, nor do we wish to have any.

Mr. Stuart.—I will put the direct question, when did Lord Selkirk leave Fort William?

Mr. Coltman.—I was not there when he went away.

Cross-examination conducted by the Attorney-General.

Attorney-General.—Have you got Captain D'Orsonnens's deposition among your papers?

Mr. Coltman.—I have such a variety of papers that I can not say at the moment, but I know that I took his deposition. There are amongst my papers, I believe, declarations of persons upon oath to certain facts, which contradict the declarations of Captain D'Orsonnens, made also upon oath. I have no right to judge which of them deposed the truth, but I have, without doubt, no personal reason to doubt Captain D'Orsonnens's credibilty.

Attorney-General.—Do you consider Captain D'Orsonnens entitled to credit upon his oath?

Mr. Coltman.—Undoubtedly, I believe that Captain D'Orsonnens is worthy of credit upon his oath in a Court of Justice. Captain D'Orsonnens acted in the Indian territory with a strong spirit of party, and with some prejudice; but, according to my judgement, always with honour and propriety as it appeared to him.

[Mr. Coltman's evidence being read over to him, he explained that he did not intend to say that *De Reinhard was at liberty*, but he was usually with, and under the surveillance of *Murphy*, who seemed to treat him with *confidence*, as if he (Murphy) was not afraid that he would escape.]

Attorney-General.—Was not Murphy a constable?

Mr. Coltman.—I believe we swore him in as a constable before sending him to Montreal with De Reinhard.

Attorney-General.—Is it necessary to guard a prisoner in bringing

him through the Indian territory in the same manner as in a civilized place?

Mc. Coltman.—There is no occasion for the same precautions in the Indian country, because there is no danger of a prisoner's absconding, for, if he were to escape, he must, of necessity, perish from hunger in the woods; but, when arrived at Drummond's Island, it is necessary to make use of more precaution.

Re-examined by Mr. Stuart.

Mr. Stuart.—What distance is it from Drummond's Island to the American shore? I mean the United States of America.

Mr. Coltman.—It is about fifteen leagues, as I imagine, from Drummond's island to Michilimackinac. I do not know the distance from Drummond's Island to the nearest American shore, but it is not great; and, I considered at the time, that he might have escaped if he had liked.

Mr. Stuart.—I have one question more. Has Mr. Coltman been for a long time on terms of personal intimacy with Captain D'Orsonnens? I will first ask you, Sir, how long you have been acquainted with Captain D'Orsonnens?

Mr. Coltman.—I have known Captain D'Orsonnens since the month of July last, and, since that time, have seen him only occasionally. I do not recollect having been in his company more than half a dozen or a dozen of times, except on business.

THE HONBLE. OLIVIER PERRAULT, *Sworn.*

And examined by Mr. Stuart.

Mr. Justice Perrault.—I am one of the judges of the Court of King's Bench for the district of Quebec, and I sat during the whole of the last criminal term of that Court. I remember the commencement of a trial in that term, upon a bill of indictment for the murder of Owen Keveny, against the present Prisoner, and Archibald M'Lellan; and I have a knowledge that Hubert Faille, Jean Baptiste La Pointe, and Captain Protais D'Orsonnens, were examined as witnesses upon oath on the part of the Crown. I took notes of their testimony. I have them here before me. They contain, I believe, all the facts which appeared to me to be of importance at the time of the examination; and, I am certain, that I wrote down nothing in my notes than what those three persons stated respectively in giving their evidence. Hubert Faille deposed that

he and La Pointe being upon an island in the River Winnipic, in the summer of 1816, the fifth day after the departure of Joseph, who is called Fils de la Perdrix Blanche, they saw a canoe which came from the Lake of the Woods, in which were M'Lellan, De Reinhard, Cadotte, seven Half-breeds, one Canadian, and Joseph Fils de la Perdrix Blanche, who had a Scotch plaid clock over him, and he deposed that Mr. Cadotte said to him in the presence of M'Lellan, " what have you done with " the prisoner Keveny?" and he also swore " that M'Lellan caused " the same question to be repeated, and that he answered, ' perhaps he " ' will be found again. We have left him on a small island." ' He swore also, " that when Cadotte spoke to him M'Lellan was very near " him, and after that he (Cadotte) had abused us (La Pointe and me) " for rascals, and that he had said a good many things to us, which I do " not now remember." He likewise deposed that M'Lellan did not say any thing to him relative to the Indian Joseph.

Mr. Stuart.—Is it within your knowledge that Jean Baptiste La Pointe deposed " that at the time Mr. M'Lellan struck him they did " not mention Keveny ?"

Mr. Justice Perrault.—Jean Baptiste La Pointe, being sworn, deposed " that he had received at the same time and place blows with a " canoe pole, from Mr. M'Lellan. That he (Mr. M'Lellan) sprang " on shore from the canoe, and struck him with a perch, and that at " that time, he did not mention Keveny, but that Mr. M'Lellan told " him that he beat him for having beat the Indian." I have not got on my notes that he said that he had not related to M'Lellan the behaviour of the Indian towards Keveny, till after he had embarked in Mr. M'Lellan's canoe. He deposed that, being in Mr. M'Lellan's canoe, the Half-breeds said " that they would kill Mr. Keveny," that Mainville said, " he would have his hat ;" Le Vasseur, " that he would have his " boots." That they made a jest of this in the canoe, and that at the time the gentlemen said nothing, but laughed, and made a joke of it. Upon his cross-examination he deposed, " when we heard the two guns " fired we were encamped, and, the weather being calm, one could " hear at a great distance." He likewise deposed on his cross-examination, " whilst Mainville related the manner in which Keveny had been " killed De Reinhard was busy, but that he made use of two expressions, " ' that he took him for a monster," and that ' it was an act of charity " ' he had done to him.' " I have not got on my notes that he spoke French like a Meuron. I have taken it that De Reinhard spoke French pretty well. I have not taken, that on the arrival of the small canoe in the evening after the death of Keveny, Faille said that " he did not " know whether M'Lellan went to look."

WILLIAM SAX, *Sworn,*

Examined by Mr. Vallière de St. Réal.

Mr. Sax.—I am a sworn surveyor. I am well acquainted with the line of division between the two provinces of Upper and Lower Canada, according to the proclamation of 1791. The place called the Dalles on the River Winnipic is much to the eastward of a line drawn due north from Lake Temiscaming to the territory of the Hudson's Bay Company.

The Chief Justice enquiring what it was proposed to effect by this evidence—

Mr. Vallière de St. Réal said,—To support by authorities deduced from history and law, that all to the south and west of that division line, Mr. Sax has been speaking of, which is known by the name of Canada, is Upper Canada, and then to contend that the offence, if committed at all, must have been committed in *Upper Canada.*

Chief Justice Sewell.—I clearly understand your object; and, as it is a point of law you intend to argue, we do not require Mr. Sax's assistance. As to any matter of fact, I am glad of evidence to assist me, but my conscience must be, on points of law, my sole guide. We will hear you with pleasure, as long as you like, in support of your position; but we do not want, as at present advised, any informatiou as to the limits of ancient Canada. The fact of where the Dalles are situated, with respect to any line, you are at full liberty to obtain from Mr. Sax, though I think their locality is pretty fully established.

JASPER BREWER, Esquire, *Sworn,*

Examined by Mr. Vanfelson.

Mr. Brewer.—I know the Prisoner at the bar, and I have known him for seven years. I was a lieutenant in the Regiment of the Meurons, and De Reinhard was in it four years. He was a sergeant, and latterly a colour-sergeant. He was colour-sergeant for considerable part of the time. He bore an excellent character in the regiment, extremely civil and quiet. He could express himself in French, but not well, very indifferently. I had occasion to see several of his reports, they were reports of not much consequence, such as guard reports, nevertheless they contained several mistakes in the language.

Mr. Vanfelson.—Look at this paper—(*the confession.*)

Chief Justice Sewell.—Why? What is Mr. Brewer to prove about this declaration?

Mr. Vanfelson.—I propose to ask the witness whether, with the knowledge he has of the Prisoner, and of his acquaintance with the French langaage, he considers it possible for him to have written this declaration.

Attorney-General.—I submit that my learned friends cannot be permitted to put such a question.

Mr. Stuart.—The question is, whether the evidence proposed to be gone into by my learned friend, Mr. Vanfelson, is, or is not, admissible. I think it is, and should like to know on what grounds it is to be resisted. What effect it may produce, is not the question. Another gentleman may think differently to what I do as to that point. I submit that, upon such proof as we have adduced, of the circumstances under which this pretended confession was made, and when we recollect that it is as much an accusation of those whom his Lordship considered his enemies, as a declaration of guilt on the part of the Prisoner, I think it comes before us in so questionable a shape, that we ought to be permitted to shew *any thing* calculated to weaken its claim to credit. But confining myself to the naked question of law, I contend the evidence is perfectly admissible. It is to shew that the Prisoner was incapable, (from his ignorance of the language in which the paper is written,) of drawing up this pretended confession. I repeat that the question is not, what weight this may have with the Jury, but whether we have, or have not, the right to put this strong circumstance in evidence before them. I shall wait with some anxiety to hear what objections the Crown lawyers can make, and as I shall have the honour of replying to them, I abstain from urging any thing in addition to what I have submitted.

Attorney-General.—The legal objection I make to the introduction of this testimony, is, that it is not the best evidence which the nature of the case affords. It is in proof upon your Honour's notes, that the confession is in the Prisoner's own hand writing. Admit, for a moment, that it was drawn up by another, still he must have known the contents, and if he copied and signed them, he made them his own. That the confession he delivered to Lord Selkirk is in his own hand writing, and that, acknowleding the contents were true, he signed it, and delivered it to Lord Selkirk, we have incontestibly proved by a witness, in whose presence the occurrence took place. It is a misapprehension on the part of my learned friends who conduct the defence, when they suppose that any thing done by Lord Selkirk or Captain Mathey, relative to its being drawn up, can invalidate the confession. If there is any thing, Cap-

tain Mathey or Lord Selkirk should be produced. If it is to be staggered at all, it must be by legal testimony, aimed directly at the facts we have proved, and not by asking the opinion of this, or any other gentleman, as to the supposed capability of the Prisoner to do that which it is in evidence he did.

Solicitor-General.—The question proposed by my learned friend, I contend, is perfectly irrelevant. I agree with my other learned friend, Mr. Stuart, that, in deciding upon it admissibility, what weight it may have upon the Jury, ought not to form any part of the consideration, but that its claim to be made evidence should be estimated only by legal rules. But what would be the weight if every thing they offer to prove were admitted? What would it prove, but that some time ago the Prisoner could not write so well as he does at present, or did when he drew up this confession? What effect is the circumstance, that in his military returns there were some few mistakes, to have on this trial? It is, however, of no consequence to go into an examination of these circumstances, as it is a matter of complete indifference who guided the pen in the making, or preparing the confession, which we have given in evidence, inasmuch as we have satisfactorily proved that he knew the contents, and before he signed it, acknowledged to one of his fellow servants that they were true. I, therefore, oppose the question; *first*, on the ground taken by the Attorney-General, that it is not the best evidence; and *secondly*, because it is totally irrelevant, and therefore inadmissible.

Mr. Stuart.—My learned friends state indistinctly, or rather misapply, the point that we do not produce the best evidence. For the purpose we have in view, I contend, that in producing Mr. Brewer, we do exhibit the best testimony. In producing Mr. Brewer, we examine a person, from whose situation in the same regiment with the Prisoner, we are able to obtain a satisfactory account of the point we are desirous of establishing, namely, that this paper was not drawn up by the Prisoner at the bar. We are not asking whether Captain Mathey drew up the declaration, though, if I looked to my instructions, I might be tempted to suspect that he was the author of it, but, for our present purpose, it is unnecessary. His copying, signing it, and afterwards delivering it to Lord Selkirk, my learned friends contend, made it De Reinhard's own, though it might not be originally written by him.—The manner in which the witnesses, or some of them, were compelled to see him sign this paper, gives us a pretty good idea of the voluntariness of the whole transaction. Had this confession been in the Swedish or Turkish language, and signed by the Prisoner, and delivered to Lord Selkirk, do the learned gentlemen intend to argue, that, unless I brought the person who actually penned it, that I could not be permitted by

other witnesses, who, (like Mr. Brewer,) had abundant opportunities of knowing his incapacity, to prove that a Swedish or Turkish confession could not be his own production, inasmuch as he was totally ignorant of the language? and what is the difference between such a case and that we are discussing? We mean to prove that the individual at the bar is not able to produce such a paper, that he is not sufficiently acquainted with the language in which the paper is written, to have been capable of drawing it up, and to prove this, whom do we produce? why, an officer, under whom he served for four years, and who has known him seven, and this officer tells us that such was his limited acquaintance with the language in which this elaborate paper is written, that he could not even make out his report, as sergeant of the day, without its being full of errors. It is a fact, I consider the Jury have a right to be acquainted with, and I submit it with great confidence that the Court will maintain the same opinion.

Chief Justice Sewell.—The question we are called upon to decide ought not to be complained of by the Court. The counsel for the Prisoner, from a sense of duty offer it, and the Court have no disposition to slight, or disapprove, their exertions. Counsel on the one side, and on the other, have necessarily a certain bias. We are to hold the balance, and to decide, whether their several propositions shall, or shall not, be admitted, and in arriving at this decision, we can have but one principle of action, however unpleasant the enforcing it may be, and frequently is. The principle is: If the proposition is not according to law, we can not admit it, but if is, we must. Now, what is the question proposed to be put to the witness? "Is it your opinion that the Pri-"soner ever composed this paper?" If he answers, not, is it not mere matter of opinion? and are we not bound to reject opinion? Is it clear, that if the contrary were to be allowed, we should be left in the wide field of presumption, all would be hazard as to whether it was wrote by somebody else: whether forced upon him, or voluntarily adopted by him, or, whether it was first written by De Reinhard, and the language being corrected by another, then copied by him; would not every thing be conjecture and uncertainty? Is it not an undoubted fact upon evidence, that it was his own production? Who is to say, that, if it was not the work of his own head and hands, that he did not, in the most solemn manner, adopt it and make it his own? *Primâ facie*, it was his own, and, till it is proved by positive evidence, that it was illegally put upon him, whether it was first written by some one else and then copied by him, or not, still it must remain his own act. An act evidently done in furtherance of the declaration made to the witnesses who have deposed to that point, and signed by himself, and then delivered by

himself to the magistrate as the declaration of what he knew of, and what share he had taken in, the melancholy transaction. All this is done in the presence of a number of witnesses, one of whom, at least, could not be supposed to be unfriendly, and to him he particularly acknowledged the truth of the paper. After signing it, he deliberately put his ultimatum to the business, by delivering it to the magistrate as his own confession, stating that he had no desire to add to, take away, or alter any part of it. What difference, under these circumstances, is it to make if even it had originally been written by another? he copied it, he must, therefore, have necessarily known the contents, and if any misstatement existed, he could have corrected it. It is manifest that he was not taken by any surprise, but must have been well aware of what he did. With his motives for so doing, we can have nothing to do, but you may, if you can, prove an undue influence to have been used towards him, but to go farther than this, or to admit such a question as you now propose, would be to open the door of a labyrinth, to which there would be no clue by which to escape. If you want to remove this confession, attack it broadly, openly, and legally. You should begin by proving, if you can, that it was forced upon him *in toto*, or that it resulted from an undue influence exercised over his mind, but the one or the other must be substantiated by positive evidence. Before that is done, you ought not to expect us to tell the jury that they are bound to put this confession altogether out of their consideration, for we can not do it. Relative to Mr. Dease, I consider your argument to make against him. You say he was a witness by compulsion; a witness to what? to De Reinhard being *forced* to sign this paper against his will. Where is Mr. Dease? Whose duty was it to bring him here? Certainly the Prisoner's. But what if Mr. Dease was an unwilling, or compulsory, witness; what if Lord Selkirk said, this man is about making a confession, and you, as one belonging to the same employ, *shall* see him make it; you *shall* be present, and see all that passes, *shall* yourself read his confession, *shall* witness that every thing is done fairly on the one side, and voluntarily on the other side? If it is said that Mr. Dease was not sent for till the whole machinery had been prepared, still the fact returns that with the Prisoner is the knowledge of who was present. The same thing occurs relative to the writing. If he did not write it himself, must it not evidently lie within his knowledge who did write it? and, yet, without proving that any effort has been made to bring these persons here, you ask to go into evidence to prove that the Prisoner did not write it. I am sorry, at all times, to exclude any thing in the shape of testimony brought forward by a Prisoner, or his legal advisers, but, when compelled by duty to do so, I

can not help it. I am decidedly of opinion this question can not be admitted.

[Mr. Justice Bowen summarily stated his concurrence with the Chief Justice.]

Examination resumed by Mr. Vanfelson.

Mr. Brewer.—I never saw any writing of the Prisoner's so correct as this declaration; his writing was always full of errors. I know Captain Orsonnens, and I have often seen him write. The signature to this paper, now produced to me, is the proper hand-writing of Captain D'Orsonnens, and the qualifications which follow the name, resemble it, and I have no doubt that the words "captain commanding the fort of "Lake la Pluie," are in the proper hand-writing of him, Captain D'Orsonnens.

The Capitulation between Captain D'Orsonnens and Mr. Dease was put in and read as follows;

(TRANSLATION.)

The alarming circumstances under which the post of Lake La Pluie is, at this moment, placed, have compelled Capt. P. D'Orsonnens to seize the arms and ammunition of the fort occupied by the North-West Company, for the safety of His Majesty's subjects who are on the spot; this measure, indispensable for the tranquility of the public, depriving Mr. J. Dease, chief of the post, of the means of trading with the Indians, who might make a bad use of the arms and ammunition they might receive.

Besides, Capt. P. D'Orsonnens having it in his power, to assure upon his word of honour, that he is every moment in expectation of a regular order, conformable to law, for the quitting of the fort occupied by the North-West Company, Capt. P. D'Orsonnens, and Mr. J. Dease chief clerk of the North-West Company at Lake La Pluie, have deemed it expedient for the security of every individual involved in the present circumstances, to take an inventory of all the effects belonging to the North-West Company in the place, including the *Caches of provisions** which may be announced until the end of the year, in order that

* Caches are hiding places, either dug in the ground, or placed upon scaffolds in the interior of the woods, where provisions and other articles, are secreted during the winter, or during the absence of the proprietors, to be fetched away in the spring or on their return. The Caches alluded to here were depots of wild rice collected by the Indians and others for the use of the North-West Company.

the whole may be faithfully delivered up to the clerks of the Hudson's Bay Company, who are present on the spot: that Company will render an exact account, according to law, of all the matters which will have been delivered to their clerks by those of the North-West Company, Capt. P. D'Orsonnens rendering himself responsible for the execution of this arrangement.

(Signed) P. D'ORSONNENS,
Commanding the post of Lake La Pluie.

(Signed) JOHN W. DEASE,
Chief Clerk for the North-West Company.

WITNESSES.

JACQUES CHASTELLAIN,
Clerk for the Hudson's Bay Company.

LOUIS NOLIN,
Clerk for the Hudson's Bay Company.

Cross-examination conducted by the Attorney-General.

Mr. Brewer.—I left the regiment before De Reinhard, in 1814, towards the end of the summer. When I spoke of his knowledge of the French language, I spoke of his knowledge at the time, as I have not seen him since.

MR. WILLIAM S. SIMPSON, *Sworn,*

And examined by Mr. Vallière de St. Réal.

Mr. Simpson.—I was present during the trial of Charles De Reinhard, and Archibald M'Lellan, in the Court of King's Bench in the term of March last. I was present during the whole trial, being employed by the Earl of Selkirk, to take the proceedings stenographically, which I did. I remember that Captain Protais D'Orsonnens was examined, as a witness on the part of the Crown, in that case.

Solicitor-General.—I do not know what my learned friends intend to prove by this gentleman, nor, indeed, do I conceive they ought to be permitted to examine him, as, certainly, his notes of the trial are not the best evidence. If my learned friends wish to prove contradictions in the evidence given on the two trials, there are your Honours' notes, or the notes of Mr. Justice Perrault, taken under oath, which they can refer to.

Mr. Justice Bowen.—It is certainly a most extraordinary, not to say indecorous, proceeding to examine a short-hand writer, who is not

upon oath, to disprove the notes of two judges who take notes under their oath of office.

Mr. Vallière de St. Réal.—We were merely going to ask Mr. Simpson, whether or not Captain D'Orsonnens did, according to his notes, in describing the sort of French De Reinhard spoke, say, " *Il parle Fran-*" *çois assez bien, il parle comme un Meuron.*" His Honour Mr. Justice Perrault, probably thinking it of no consequence, did not take it, though Captain D'Orsonnens certainly *did* make use of that particular expression, in describing De Reinhard's mode of speaking French. It is, however, of no consequence. I believe the case on the part of the Prisoner, is now closed.

Mr. Stuart.—For form's sake, we wish to put in and have read, the Prince Regent's proclamation.

Attorney-General.—We have no objection.

A copy was then offered, but being printed at York, was objected to, as not being an official production. A copy printed at Quebec by his Majesty's law-printer was therefore sent for.

Attorney-General.—We shall now proceed to call witnesses, to rebut the allegations relative to the excess of force or violence, which has been so frequently adverted to in the defence.

Mr. Stuart.—I certainly object to any farther evidence being gone into. The Crown closed its case, and we entered upon our defence.—Nothing remains now but the argument, which we are ready to enter upon.

Attorney-General.—I beg my learned friend's pardon, but the matter is not quite so near settled. The necessity for our exhibiting additional testimony, arises from the nature of the defence they have set up. My learned friends have made their principal reliance, the state of the country, where we allege the murder to have been committed. They have represented, that a state of warfare, (called by them a private war,) existed, and that the confessions we have proved, all resulted from terror, inspired by the presence of a military force. Now, we desire to rebut this testimony, by proving that it was not a military force, but merely a number of persons supporting a constable, and enabling him to execute a legal warrant, which had been resisted. This is completely new matter. It was not alluded to on the part of the prosecution, so as to render it necessary for the Prisoner to disprove our statement. My learned friends have brought it forward, as their mode, of accounting for a series of *viva voce* declarations of guilt on the part of the Prisoner, terminating in a written confession made at Fort William. I should certainly think I might call the officer, who had to serve this warrant, to

shew that he was resisted in the execution of the process of a civil magistrate, and that the force that was used, was no more, than what was indispensibly necessary, to enforce obedience to the authority of a civil magistrate.

Solicitor-General.—I should contend, may it please the Court, that we have a right to impeach the defendant's witnesses, as well as the defendant those of the Crown, if not, we do not stand upon equal ground. If unfounded statements are made by witnesses on the defence, are we to be debarred from rebutting them, because we have said our case was closed? I should think not. If our witnesses are impeached, shall we not be permitted to rebut such impeachment? I do not mean to say, that the course we propose to pursue, is a usual proceeding, because it is not often that it is rendered necessary, but it is certainly a very justifiable one. I do not know that I can refer to any actual authority upon the subject, but the reasonableness of the proposition renders it unnecessary that I should. A defence usually consists of a negation of that which has been proved on the part of the prosecution, but the defence set up in the present case, is not a simple denial of the facts brought forward by us, and this denial supported by evidence, but they have gone into a long investigation of a number of witnesses to shew, that a state of warfare existed in the Indian territory, and that as it was under the influence of terror that the several confessions were made, therefore they ought to be set aside. We wish to shew, that no such thing existed, and that all the violence, (if any was resorted to,) was rendered necessary by the resistance of legal measures. We could not anticipate the defence, but as in it, they endeavoured to impeach our witnesses, we have a right to examine witnesses and produce evidence to rebut it.—Where authorities are silent on criminal subjects, the rule is to have reference to civil cases, and here we shall certainly find precedents to justify the course we are desirous of following. When the defence consists of an impeachment of a plaintiff's witnesses, the Courts at Westminister Hall daily present instances of the rebutting such evidence by the examination of additional witnesses, and if it is allowed in civil cases, why should it not be in criminal? We wish to prove that a warrant was issued to arrest certain persons, and that in consequence of its being resisted, it was necessary to employ a number of persons to support the constable, and thus rebut the charge of a military force having been employed.

Mr. Justice Bowen.—In M'Nally, 380, this point is considered. He says, "if prisoner's counsel examine witnesses to general character, "or to particular facts, then the witness for the Crown, thus impeached, "is entitled to rebut these facts, and call witnesses to his general cha- "racter."

Solicitor-General.—The same doctrine is laid down also by Mr. Baron Gilbert, and in Philips.

Mr. Stuart.—In reply to my learned friends, I beg to remark, that, *primâ facie*, a very strong presumption against them, is, that they are completely out of the regular course. We daily see criminal proceedings, but we never before heard such a thing asked by the Crown, as to be allowed, after the defence is gone through, to produce additional evidence against a prisoner. The officers for the Crown, after producing the evidence on the part of the prosecution, declared that they closed the case for the Crown; and then the Prisoner proceeds on his defence, and introduces his witnesses, for what purpose, but to rebut that which has been exhibited in evidence by the Crown? After his case is closed, are the Crown officers to rise again, and ask to produce more evidence, because they feel they are too weak, and that conviction will not follow? Certainly not. What was the case which the Crown had to make out? That the Prisoner at the bar had committed the crime of which they accuse him in the indictment. To do this, they examined a number of witnesses to support, by parole testimony, a written confession, and, when they thought they had fully established his guilt, and had ensured a conviction, they informed the Court they had closed their case. We were, accordingly, put on our defence. In the prosecution of it, have we produced any new facts? any facts unconnected with the case they made out? clearly not; but we have opposed to their evidence, testimony which contradicts it, and does not that occur upon every trial that takes place? How did the Crown prove its case? By getting admitted a number of confessions. How do we prove our's? We shew circumstances, which, we contend, will lead the Jury to give no credit to them. Are the Crown officers now to turn round upon us, and say, we did not know, or to use Mr. Solicitor's own words, "We "could not anticipate your defence," we must strengthen our case or you will escape? What was our object in meeting the case of the Crown officers? Our sole object was to prove that these confessions were not entitled to credit, but we did not do it by attacking the credibility of their witnesses. We produced a number of facts, which we thought well calculated to remove any unfavourable impression they might have made on the on the minds of the Jury. For example, we proved a capitulation between Captain D'Orsonnens and Mr. Dease, and that, in signing it, Captain D'Orsonnens styled himself, "Captain "commanding the fort of Lac la Pluie," for what purpose was this done? why, that the Jury might contrast this fact with the declaration of Captain D'Orsonnens that he was nothing more than "*un individu* "*simple.*" As a substantial fact, we offered evidence that Fort William

was taken by a military force, and that De Reinhard knew of it. Is not this the very substratum of our defence? are not these facts a part of the *res gesta?* and is it not in direct contradiction to that exhibited by the Crown? But is this impeaching their witnesses so as to entitle them to come to your honours, and ask permission to examine additional witnesses? Certainly not. The distinction between this case and that, is a marked, is a broad, distinction. Our impeachment of the witnesses on the part of the Crown has been by shewing facts, and nothing now remains, but for the jury to judge, on which side credibility preponderates. It is really painful to be obliged, at this late day, to argue first principles, but the request of the Crown officers compels me to trespass on the time of the Court. Allow me to advert to the every-day occurrences of our civil Courts, (as the learned Solicitor General remarked, "that, when criminal authorities were not to be found, reference should "be had to the practice in civil cases") and ask where I am to seek for the authority that allowed a plaintiff to say, after the defence, that the whole of his case had not been brought forward, and then permitted him to bring more testimony to strengthen his case? Such an authority can not be found, for the plainest of all reasons, because, if ever it has been asked, it never has been granted. If it were law, that whenever a witness was contradicted by positive facts being sworn to, that the case should, as it were, be re-opened to let in more testimony, we have all of us most miserably misunderstood the law up to this moment, and it is, indeed, high time that we desisted from practicing it. But, so far from being law, it is to subvert, to destroy, to overturn, the very fundamental principles, to root up the very foundation, on which the superstructure of law is raised. Admit this doctrine once to be law, where are we to stop? If the Crown is to rebut our testimony, it can not be denied to us to rebut theirs, and for how long is this rebutting to continue? What is the criterion by which its extent is to be limited? Who is to have the last blow? The Crown finished their case, and we began, and because we have shaken it, are they to step in and say, now we'll bring in more testimony? Because we have shewn, incontrovertibly shewn, that these pretended confessions were forced from the Prisoner by the peculiar state of the country, is it competent to the Crown now to bolster them up by additional evidence? It was a part, an integral part, of their case to have shewn, if they intended to prove the guilt of the Prisoner by his own confessions, that, at the time he was making them, he was free, that there was not even a shadow of suspicion that he was otherwise. This they did not do, but, seeing that we shew he was not free, not only not free, but that he was actually in a state of illegal duress, they say we have impeached the credibility of their witnesses, and,

therefore, they are entitled to go into evidence to support them, and to rebut our testimony. But it is a mere sophism, and not an argument, that my learned friends resort to. The sophism appears to be this,—"You have controverted what we advanced, and, by your witnesses, have shaken our credit, therefore we have a legal right to support our own witnesses." The sophism rests in an inaccuracy of language. We have not attacked the witnesses of the Crown upon any grounds which relate to them as individuals. We have not controverted Captain D'Orsonnens' general character. We have not said that he was an attainted witness. We have not endeavoured to prove, generally, that he was a bad character. We have not enquired whether his erroneous statements resulted from party spirit. We have not pretended to say that Captain D'Orsonnens acted from malicious motives, or that he was unentitled to general credit. All we say, is, that we have proved, and triumphantly proved it too, that particular facts, sworn to by Captain D'Orsonnens, turn out to be erroneous. With reference to the authority of M'Nally, referred to by your Honour, I beg permission to remark, that it refers only to cases very dissimilar to the situation in which this stands. Relative to witnesses to general character, we have examined none. I repeat it, we do not wish to impeach Captain D'Orsonnens' general character. As to particular facts, we have produced no insulated fact, not connected with the case, and such, I conceive any fact must be, to be a particular fact within the meaning of the authority cited, for, if a fact is connected with the case, it ceases to be a particular fact, and such is every one that we have exhibited in evidence. We are, therefore, without the rule altogether. To test the argument made use of on the other side, I would ask, where is the line to be drawn? If it is not where I put it, where shall it be put? If the Court decide, they may proceed to prove additional circumstances to rebut particular facts, I should like to know how many particular facts are to be rebutted? Is it five, ten, the half of what have been produced, or all? What is the whole, but a collection of particular facts? Where then is the line to be drawn? Where are we to stop? Admit this doctrine, and we launch ourselves on the wide sea of difficulty, doubt, uncertainty, and confusion. Let us suppose, for a moment, that all the principles of law could be overset, and the evidence admitted which the Crown asks to have let in; we must be allowed to reply to it, and where is it to end? The very object of offering evidence on a defence is to controvert that which has been offered on the part of the Crown, and cannot, therefore, furnish a reason for admitting additional testimony on the part of the Crown. In the present case again, there are many other points I might advert to. The

very nature of the evidence proposed is objectionable. *Who* is to prove it? why, the very persons of whom we complain; apart of this very force, who, from their peculiar situations, we could not cross-examine, because, if they told the truth, they must accuse themselves. Their only safety was in perjury or silence, and, to avoid the first, the humanity of the law allowed the last. I could not ask one of those witnesses, had you a musket? were you armed, and did you act like a party of moss-troopers? because, if they answered truly, they would be liable to be indicted; and, as the Court has done before, it would interpose its protecting arm were such questions attempted to be put, and tell the witness he need not answer them. Again, the very men who are to be witnesses, *are*, and *have been* during the defence, sitting on these benches. I do not mean to cast any imputation on any one of them, but, on this solemn occasion, it was thought necessary that every witness should leave the Court till his evidence was completed, and for *what reason*, except that he might not be exposed to any improper bias from hearing the depositions of other witnesses? If there were no other circumstance, I should think this alone were sufficient to exclude the proposal of the Attorney-General. He said he had closed his case, and, thinking he had finished, the Prisoner entered upon his defence. Confiding in the declaration of the Crown officers, he has produced his evidence, and the whole has been exhibited before *the very persons*, who are *now* to be called upon to prove the additional part of the case. It is a proceeding as novel as extraordinary, and, I feel confident, the Court will agree with me, that it is as inadmissible as it is unprecedented.

Attorney-General.—Upon consideration, we are not disposed to press our proposition, and particularly in consequence of the last observation which fell from the learned gentleman. The witnesses whom we proposed to examine, having been in Court during the defence leads us to abstain from pressing that, which, nevertheless, we consider ourselves legally entitled to, if we persisted in demanding it.

Chief Justice Sewell.—The very object of a trial by Jury is, between affirmation on the part of the Crown, and negation on that of the accused, to discover the truth. The Crown, in the first instance, (take a case of homicide, for example,) avers the guilt, the defendant brings affirmative testimony, and alleviates the offence from homicide to manslaughter, which has a tendency to abridge the punishment. The Crown says, I affirm, and am ready to prove the defendant stabbed him. A. comes into Court, on his defence, and says, I am not guilty; B. met me in the street, and drew his sword on me, and it was in self defence I wounded him. Here are two affirmations, one on the part of the Crown, that it

was homicide, and another on the part of the defendant, alleviating the killing to manslaughter. Shall not the Crown be permitted to prove this alleviation false? certainly it must. A word with respect to testimony. All persons brought before the Court are presumed to be honest, it is therefore not necessary that the Crown should *prove* its witnesses to be entitled to credit, because the presumption is that they *are* so. The defendant comes forward and discredits this testimony. Shall not the Crown be permitted to prove this derogation is not correct? certainly it must be allowed. These are principles which the Court has always held and acted upon, and it must continue to do so, till it gets better light upon the subject than at present it possesses. But, on the other hand, the Crown must invariably bring all its case forward at once, or how shall the Prisoner know what he has to answer? If the contrary were allowed, a Prisoner never could know what was necessary to his defence. Were it permitted to hold back any part of the case, then, neither party knowing whether the whole were finished, the defendant would proceed to build his case upon the other, and the Crown coming in with that which before it held back, would render a reply necessary, and thus the case would become involved in what may be called a complete *brouillerie*, a word I make use of, because I know none in English which so fully expresses my meaning.

The Prince Regent's Proclamation was then put in and read.

By His Royal Highness the Prince of Wales, Regent *of the United Kingdom of Great-Britain and Ireland, in the name and on the behalf of His Majesty.*

A PROCLAMATION.

J. C. SHERBROOKE.

Whereas by an Act of the Parliament of the United Kingdom of Great-Britain and Ireland, passed in the forty-third year of His Majesty's reign, entitled "An Act for extending the jurisdiction of the "Courts of Justice in the Provinces of Lower and Upper Canada to the "trial and punishment of persons guilty of crimes and offences within "certain parts of North-America, adjoining to the said provinces," it is "amongst other things, enacted, that all offences committed within any "of the Indian Territories, or parts of America not within the limits of "either of the said Provinces, or of any civil government of the United States of America, shall be, and be deemed to be, offences of the "same nature, and shall be tried in the same manner, and be subject to "the same punishment, as if the same had been committed within the "said Provinces of Lower or Upper Canada." And whereas, by the

said Act it is also enacted " that it shall be lawful for the Governor, or " Lieutenant-Governor, or person administering the government, for " the time being, of the Province of Lower Canada, by commission, un- " der his hand and seal, to authorize and empower, any person or per- " sons wheresoever resident or being at the time, to act as civil magis- " trates and justices of the peace, for any of the Indian Territories or " parts of America not within the limits of either of the said Provinces, " or of any civil government of the United States of America, as well as " within the limits of either of the said Provinces, either upon informa- " tions taken or given within the said Provinces of Lower or Upper " Canada, or out of the said Provinces in any parts of the Indian Terri- " tories, or parts of America aforesaid, for the purpose only of hearing " crimes and offences, and committing any person or persons guilty of " any crime or offence to safe custody, in order to his or their being con- " veyed to the said Province of Lower Canada, to be dealt with accord- " ing to law," and " that it shall be lawful for any person or persons " whatever to apprehend and take before any persons so commissioned, " as aforesaid, or to apprehend and convey, or cause to be safely con- " veyed, with all convenient speed, to the province of Lower Canada, " any person or persons guilty of any crime or offence, there to be de- " livered into safe custody, for the purpose of being dealt with accord- " ing to law :" And whereas, by the said act it is also further enacted, " that every such offender may, and shall, be prosecuted and tried in " his Majesty's Courts of the province of Lower Canada, in which " crimes and offences of the like nature are usually tried, and where the " same would have been tried if such crime or offence had been commit- " ted within the limits of the province where the same shall be tried un- " der the said Act; that every offender, tried and convicted under the " said Act, shall be liable and subject to such punishment as may, by " any law in force in the province where he or she shall be tried, be " inflicted for such crime or offence, and that such Court may and shall " proceed to trial, judgment, and execution, or other punishment, for " such crime or offence in the same manner in every respect as if such " crime or offence had been really committed within the jurisdiction of " such Court, and to proceed also in the trial of any person, being a " subject of his Majesty, who shall be charged with any offence, not- " withstanding such offence shall appear to have been committed within " the limits of any colony, settlement, or territory, belonging to any " European state." And, whereas divers breaches of the peace, and acts of force and violence, have lately been committed within the said Indian territories and parts of America mentioned and described in the said Act of Parliament, which have arisen from contentions between

certain merchants carrying on trade and commerce in the said Indian territories, under the names of the Hudson's Bay Company, and the North-West Company respectively, and other persons, their servants, agents, or adherents, of whom some have entered into, and seized, and occupied by force, and with strong hand, lands or possessions therein, taking, and, by force, retaining divers goods, wares, merchandize, and other property, and obstructing the passage of navigable rivers, and other natural passes of the country, and others have met together in unlawful assemblies, formed divers conspiracies and confederacies, committed murders, riots, routs, and affrays, and appeared, gone, and ridden, in companies in military array, with armed force, and have rescued themselves and others from lawful arrest and custody; We do, therefore, in the name and on the behalf of his Majesty, publish this proclamation, hereby calling upon the said merchants, so as aforesaid carrying on trade and commerce, in the said Indian territories under the name of the Hudson's Bay Company and the North-West Company, respectively, and upon each and every of them, and upon all other persons, their servants, agents, or adherents, and each and every of them, to desist from every hostile aggression or attack whatsoever, and, in order to prevent the further employment of an unauthorized military force, We do hereby require all persons who have been heretofore engaged in his Majesty's service as officers or soldiers, and, as such, have enlisted and engaged in the service of the said Hudson's Bay Company, or North West Company, or either of them, or of any of their servants, agents, or adherents, to leave the service in which they may be so engaged, within twenty-four hours after their knowledge of this Proclamation, under penalty of incurring our most severe displeasure, and forfeiting every privilege to which their former employment in his Majesty's service would otherwise have entitled them. And we do, under similar penalties, hereby require of all and every person and persons whomsoever, whom it doth, or shall, or may, in any wise concern, the restitution of all forts, buildings, or trading stations, with the property which they contain, which may have been seized or taken possession of, by either party, to the party who originally established or constructed the same, and were possessed thereof previous to the recent disputes between the aforesaid companies; and we do hereby require, in like manner, of every person and persons whomsoever whom it doth, or shall, or may, in any way concern, the removal of any blockade or impediment, by which any party, person, or persons, may have attempted to prevent or interrupt the free passage of traders or others of his Majesty's subjects, or of the natives of the said Indian territories, with their merchandize, furs, provisions, and other effects, throughout the lakes, rivers, roads,

and every other route or communication heretofore used for the purposes of the fur trade in the interior of North America, and full and free permission for all persons to pursue their usual and accustomed trade without hindrance or molestation, hereby declaring that nothing done in consequence of this Proclamation shall, in any degree, be considered to affect the rights which may ultimately be adjudged to belong to either or any party, upon a full consideration of all the circumstances of their several claims. And, whereas for the purpose of restraining all offences in the said Indian territories, and of bringing to condign punishment the perpetrators of all offences there committed, His Excellency Sir John Coape Sherbrooke, Knight Grand Cross of the most honourable military order of the Bath, His Majesty's Captain General and Governor in Chief, in and over the provinces of Lower and Upper Canada, Nova Scotia, New Brunswick, and their several dependencies, Lieutenant General and Commander of all his Majesty's forces in the said provinces, &c. &c. &c. by and with the advice of his Majesty's Executive Council of and for the said province of Lower Canada, hath nominated, constituted, and authorized, the honourable William Bachelor Coltman, one of the members of the said Council, a Lieutenant Colonel in his Majesty.s Indian Department, and one of his Majesty's Justices of the Peace for the Western district of the said province of Upper Canada, and John Fletcher, Esq. Barrister at Law, one of the principal police-magistrates, and Chairman of his Majesty's Court of Quarter Sessions for the district of Quebec, a Major in the said department, and one of his Majesty's Justices of the Peace for the said Western district of Upper Canada, to act as civil magistrates and justices of the peace for the said Indian territories, and parts of America aforesaid, as well without as within the said province of Lower and Upper Canada, under and by virtue of the said Act, and also his Majesty's special commissioners, for enquiring into, and investigating, all offences committed in the said Indian territories, and the circumstances attending the same, with power and authority for such purposes. And, whereas the said William Bachelor Coltman, and John Fletcher, are immediately about to proceed to the said Indian territories, in execution of the trust so reposed in them. We do, therefore, hereby strictly charge and command in the name and on the behalf of his Majesty, all sheriffs, bailiffs, constables, and other officers of the peace, and all others his Majesty's officers, servants, and subjects, civil and military, generally in their several and respective stations, to make diligent enquiry and search, to discover and apprehend all persons who have been, or shall be, guilty of any such crimes or offences as aforesaid, or any other crimes or offences whatsoever, within the Indian territories or parts of America in the

said act mentioned and described, whether without or within the said provinces of Upper or Lower Canada, and to cause them to be carried before the said William Bachelor Coltman and John Fletcher, or one of them, or such other magistrates as may hereafter be appointed for the like purposes, or otherwise be invested with competent jurisdiction in that behalf, to be dealt with according to law, and by all lawful means and ways whatsoever, to repress and discourage all such crimes and offences, requiring and directing them and each of them, as well within the said Indian territories, or parts of America, as elsewhere, to be aiding and assisting to the said William Bachelor Coltman and John Fletcher, in the execution of the duties wherewith they are charged as such magistrates and special commissioners as aforesaid, in all their endeavours for the repression and discouragement of all such crimes and offences wheresoever, or by whomsoever perpetrated or committed, for the detection and apprehension of all such persons as have been or hereafter shall be concerned or implicated in the perpetration thereof and for the maintenance and preservation of the peace and of the laws.

In faith and testimony whereof, we, by our express command, in the name and on the behalf of his Majesty, have caused the great seal of the province of Lower Canada to be hereunto affixed. Witness our trusty and well beloved Sir John Coape Sherbrooke, Knight Grand Cross of the most honourable military order of the Bath, Captain General and Governor in Chief of the said provinces of Lower and Upper Canada, Nova Scotia and New Brunswick, Lieutenant General and Commander of all his Majesty's forces in the said Provinces, &c. &c. at the Castle of Saint Lewis, in the City of Quebec, in the said province of Canada, this third day of May, in the year of our Lord Christ, one thousand eight hundred and seventeen, and in the fifty-seventh year of his Majesty's reign.

J. C. S.

By His Excellency's command,
JOHN TAYLOR,
Depty. Secty.

[The evidence on the part of the Crown, and of the Prisoner, being thus closed, the *Chief Justice* enquired what course the counsel proposed to pursue in the argument to be submitted to the Court. *Mr. Stuart* said, that he should open it with some general observations, and *Mr. Vallière* would follow him, and produce the authorities they were desirous of offering to the consideration of the Court. *Mr. Stuart* remarking, that he could not help adverting to some of the *facts*, which had appeared in evidence; the *Attorney-General* objected to *any* observations

being made on the evidence, alleging there was little difference between *addressing the Jury*, and *remarking on the facts of the case*. The correctness of this observation being assented to by the Court, *Mr. Stuart* continued, that from what had been shewn on the *defence*, he should contend, " that the confession is not *now* admissible evidence to go to the " Jury."

The *Chief Justice* stated, that the point having been *decided*, Mr. Stuart could not *now* be heard upon it; *Mr. Justice Bowen* observing, that in *arrest of judgment*, (should the proceedings unfortunately reach that length,) it might be argued.

The Prisoner's counsel not appearing to acquiesce in this decision, the *Chief Justice* explained, that in admitting it as fit evidence *to go to the Jury*, the Court did not deprive *them* of their right of deciding what *credit* was due to the confession. He reminded Mr. Stuart that it had been received, because—" after very fully hearing him on the subject, as well " as one of his colleagues—no case had been made out, that could justi- " fy the Court in *withholding it from them*;" and in conclusion observed, briefly, " that it went to the Jury accompanied by all the circumstances " which it had been contended, ought to invalidate its credit; and as " *that* was the tribunal which must decide the point, it was useless to " address the *Court* on the subject."

Mr. Stuart disclaimed any intention of arguing against the opinion of the Court, although he had not considered its former decision as completely debarring him from again adverting to the confession; especially after such strong *additional* circumstances had been proved. The *Chief Justice* remarked, that the Court could not resume the subject as it was finished, but intimated, that on the point which *Mr. Vallière* had stated they wished to argue, it would hear Mr. Stuart with pleasure.]

Mr. Stuart.—In excepting to the *jurisdiction* of the Court, I beg leave to remark, that it is an exception of the *counsel* of the Prisoner only. Our opposition does not arise from apprehension as to the verdict of the Jury ultimately being that *De Reinhard is innocent;* but your Honours know that even of *technical* objections, where the life of a defendant is at stake, it is the duty of his counsel to avail themselves; and although *we* entertain no doubt of the *acquittal* of the Prisoner, yet in the duty which, as his legal advisers, we have to perform, we feel ourselves compelled to neglect nothing that, by possibility, can lead to it. We, therefore, except to the jurisdiction of the Court. As I shall have the honour of being followed by a learned friend, who has bestowed considerable time and attention to the subject, and shall have an opportunity of again addressing the Court in reply to the Crown officers, I shall trouble it very shortly in opening. The first objection I shall

have the honour to submit, is that the offence charged in the indictment, (if committed at all,) *was not committed in the Indian Territory, as alleged, but in his Majesty's province of Upper Canada.*

Chief Justice Sewell.—If I understand you correctly, it is a *geographical* objection you make. You argue that this spot, "*en haut des* "*Dalles,*" is not in the Indian Territory, but in the Province of Upper Canada.

Mr. Stuart.—That is my proposition, and in support of it, I proceed to remark, that the first enactment relative to the management of this portion of His Majesty's dominions took place in 1763. It is known to all of us, that the conquest of this portion of North America, by the British arms, took place in 1759 and 1760, but, from that period to 1763, when the whole of the country called *Canada*, was ceded to the English, who have retained possession ever since, nothing was done to provide a government for, or to regulate, this conquered country. In that year, (1763,) a province called *Quebec* was created by proclamation; but the affairs of this territory, notwithstanding the proclamation, remained in a very unsettled state till the year 1783. According to the most respectable historians, we contend, that the portion of country thus ceded, was exceedingly extensive, going, agreeably to some writers, as far as the river *Ohio*. The pretensions of the French, as we gather from history, carried them into countries distant, remote, and in fact unconnected altogether with the province created in 1763. The people of *Montreal* and *Quebec*, we shall shew, had long traded into those wilds, which are now so fancifully called the *Hudson's Bay territory*, and from which, after an uninterrupted enjoyment of traffic for ages by the French traders, it is now sought to exclude enterprise and competition. It must be apparent to every one, that after the conquest, this immense tract of country required a government adapted to the change which had taken place in its circumstances, by becoming a province of another nation. Its remote situation from the parent-state, rendered it impossible, as well as unadvisable, to legislate hastily for its necessities, but the parliament proceeded to provide what it stood most in need of. Accordingly, by the 14th of the King, the province of Quebec was *enlarged*, and here let me remark, that a great deal of the misapprehension which exists on the subject, arises from confounding the province of *Quebec, as thus erected and enlarged, with what, under the French regime, was denominated Canada.*—Adverting to the 14th of the King; the act of 1774; it will be seen that the country, erected and enlarged thereby into the province of Quebec, was not commensurate to the country know by the name of Canada, as a French colony, and recognized as such by the French and British governments. The object

of this legislative provision was, *to provide a temporary government for that portion of his Majesty's province, whose necessities required it.* As settlements pushed themselves into the country now called Upper Canada, as civilization extended its stride, it became necessary to adopt a government for *the whole*, and the interval from 1774 to 1791, afforded time, to form and mature a suitable government for the immense territory known as Old Canada.

Chief Justice Sewell.—You are making a small mistake, it was not to provide a government for *Old Canada* that the act of 1791 provided, but for the *new provinces formed out of the old province of Quebec.*

Mr. Stuart.—I know the act of 1791 mentions the province of *Quebec*, and it speaks *also* of *Canada.* The proclamation issued in consequence of this act, I contend, must be construed *liberally.* It must be looked as, not as a deed of property, in which, only a minute survey can be taken; we must not look at it like lawyers in our study; we must not contemplate it as the act of an attorney, surrounded by his musty papers and parchments; but we must view it as the act of great and enlightened statesmen, legislating for the population of an immense and distant territory, with whose wants they were acquainted, and whose affections they were desirous of securing by a liberal and magnanimous policy. But, even looking into this proclamation, *strictly and minutely*, we shall find this country, where it is alleged the offence was committed, to be strictly and minutely the province of Upper Canada. The act of 1791, in providing for the more suitable government of the province, created by the former one of 1774, divided it into two parts, and, we think, even in a strict construction of the provisions of that statute, and the proclamation issued in consequence of it, that, if this offence has been committed at all, it has been committed in the province of *Upper Canada*, and, consequently beyond the jurisdiction of this Court. But let us look into this act and proclamation, with a broad, liberal, and enlarged disposition, and we arrive at the conclusion, that, this country *must* form a part of the province of *Upper Canada.* I am well aware, that in the *preamble* to this act, the province of *Quebec* is adverted to, but preambles of acts of parliament are never looked at as explaining the design of the legislature, except doubt arises in the construction of the enacting clauses. It is almost superfluous to remark that, for ascertaining the spirit of an act of parliament, we refer to its *enacting clauses;* if they are clear, there is no necessity for referring to the preamble, which is but an introduction, a sort of preface, setting forth the necessity for legislative provision on the subject of the act, but not making the provision. On the other hand, I freely admit, if the words of the act are uncertain, if different constructions may be put

on the enacting sections, then we ought to go back to the preamble for the intention of the legislature, but that should never be done except doubt and uncertainty prevail in the body of the act. Adopting this sound principle, let us take up the act we are at this moment considering, and we shall find it so clear that misunderstanding can not exist for a moment. In the proclamation issued in consequence of the 31st of the King, cap. 31, we find the boundaries of his Majesty's province of Upper Canada, set forth after a short introduction, stating that his Majesty had thought fit, by and with the advice of his privy council, by an order of council, to divide his province of Quebec into two distinct provinces, to be called the province of Upper Canada, and the province of Lower Canada.

Mr. Stuart read the boundaries and proceeded.

Now, what was "*the utmost extent of the country commonly called or "known by the name of Canada,*" we all know. It is that territory conquered by British arms in 1759, and ceded finally in 1763, to the British Crown. Canada recognized as such in treaties of peace, and other most important documents entered into between France and England. That is Canada, the *whole* of which, after the act of the 31st of the king, by the advice of his privy council, his Majesty declared it was his royal will and pleasure, should form the province of *Upper Canada*, with the exception of the comparatively small part situated to the north and east of those boundaries which constitutes the province of *Lower Canada*. The province of Quebec was quite another thing, and could not have been meant as designating the boundaries of Upper Canada. If that had been intended to form the limits of the new province, the course was simple and easy, it was to have said *the utmost extent of country commonly known as his Majesty's province of Quebec ;* but that is not the case, the boon was not so circumscribed. Let us now, for a moment, examine the fact according to rigorous municipal principles, and we shall, I think, arrive at a similar result. His Majesty's province of *Quebec* was always *defined*, whereas *Canada* was more *undefined*. Had the province of Quebec been intended as exhibiting the proposed boundaries of the about to be created province, a word could have sufficed to express his Majesty's pleasure. It would merely have been necessary to have referred to the royal proclamation of 1763, founded on the treaty of Paris, in conjunction with the act of 1774, and we should immediately have known the extent of Upper Canada, but it is manifest that, instead of *the then province of Quebec*, as established by the act of 1774, it was intended, as clearly expressed in the proclamation issued in consequence of the 31st of the king, that Upper Canada should in-

clude "all the territory to the westward and southward of the said line" (the line of its boundaries) "to the utmost extent of the country com-"monly called or known by the name of Canada." I am fully aware that I may be told that in the preamble of this act and of the proclamation the term, "His Majesty's province of Quebec" is made use of; it is almost unnecessary for me again to remark that the preambles of acts of parliament are, in general, loosely and vaguely drawn up, and ought to form no criterion by which to estimate the objects contemplated by the acts themselves. That this is the case is known to every lawyer and every legislator. It is to the enacting clauses of any statute that we must refer to ascertain with accuracy the provisions of the act. Adopting this certain rule for our guide, here we have a clear manifestation of the intention of parliament in the act of 1791; it was to create two provinces of Canada, and, in defining the limits of the Upper, it declares that it shall, in a certain direction, include "the utmost extent of country commonly called" What? the province of *Quebec?* No! It shall include "the utmost extent of country commonly called and known by "the name of *Canada.*" The utmost extent of that country, which I have before remarked, being the conquest of British valour in 1759, by force of arms, was finally ceded to Britain by the treaty of Paris of 1763. That immense territory, which has never by any treaty been since surrendered, which as *it is*, and has from the time of its *discovery* as well as its *cession*, been known as Canada, must be the territory which was intended by this municipal enactment to form the province of Upper Canada. That being the case (and I think it is the only construction, even in a minute point of view, that can with propriety be given to the statute,) we find that the *Dalles* are strictly within the province of Upper Canada, consequently out of the jurisdiction of this Court, and the offence is not cognizable under the act upon which the indictment is founded.

I come now to the more broad and liberal interpretation of the act, and I shall, as I apprehend, have no difficulty in shewing, that we cannot arrive at any other conclusion. The 14th of the King, was evidently intended to provide a temporary government for that part of the newly acquired territory, which stood most in need of it. It was passed at a season of great difficulty, when anxiety and alarm pervaded all classes of society in England, relative to the issue of the disputes between the parent state and those of the colonies which she has since acknowledged as the United States of America. At a period when the intercourse between the province and the mother-country was so limited, that it could hardly be said to belong to it, such was the moment in which the act erecting the province of Quebec was passed; an act whose temporary

nature may be clearly deduced upon a single reference thereto. This province was to subsist only, by the act of 1774, till the King should see fit to alter its limits. In 1791, the situation of affairs, relative to this portion of the British possessions, was widely different, and the British Parliament proceeded to form a government for a people, whose loyalty during a contest which had severed such numerous colonies from the dominion of Britain, had well entitled them to the distinguished and distinguishing privileges secured to them by the munificent act of 1791. Refer to the acts of 1774, and of 1791, and, surveying the difference, is it possible for a moment to imagine, that the government of 1791, intended only to legislate for *a part* of Canada? Is it, I would ask, reasonable to consider that the minister of a great nation, such as England, contemplating an extensive and valuable, though distant territory, belonging alike by conquest and affection to the mother-country, and entitled to protection in time of war from its superior strength, in time of peace from its extensive and unequalled trade, entitled to receive, and have secured to it, the due administration of justice, and the unrestricted enjoyment of religious freedom. Is it, I ask, reasonable to suppose, that the great men who presided over the councils of Britain intended at that period to propose a government for *a part of Canada?* To suppose so, is to suppose they were sleeping at their post. Can it, I ask, be imagined that a minister could be found so regardless of his duty, so ignorant of the necessities, so insensible to the loyalty, of this country, or so negligent to the interests of his master, as in 1791, to propose a government to a *part* of Canada? We cannot suppose it; they have not been so negligent. They have given us a government, and a constitution, superior to any on earth, excepting their own, after which it was modelled. A government, suited to our necessities, and gained by our unshaken and persevering loyalty, when revolution tore our sister provinces from their allegiance, and strove to associate us in the revolt. I ask again, is it for a moment to be believed, that such magnanimity would be tarnished by these advantages being confined to only a part of a people of the same blood, equally brave, loyal and grateful, and equally standing in need of, and equally entitled to all these privileges? If any should be found disposed to support, by argument, a contrary opinion, they ought to be confident, before they make so heavy a charge, that they can substantiate it beyond the power of contradiction. But there is no occasion to apprehend such an argument, for the proclamation is clear as the noon-day sun upon the subject. It tells us that the the act of 1791, has provided a liberal, an equitable, and a permanent government for the brave, the loyal, and grateful, population of an extensive tract of country, within certain latitudes and longitudes, "in-

" cluding all the territory to the westward and southward of a line " drawn due north from the head of the Lake Temiscaming, until it " strikes the boundary of Hudson's Bay, to the utmost extent of the " country commonly called or known by the name of Canada." What that country consisted in, I have had the honour of submitting to the Court, in the early part of the argument. In conclusion, I contend, on the broad and liberal construction of the act of 1791, that by *Canada*, must by meant *Canada as known to the French*, from whom it was taken, and who, in ceding this part of North America to the British Crown in 1763, actually, *as a part of Canada, ceded the Dalles.* Reverting to the whole question, I contend, that, whether the act of 1791, is construed according to strict, rigid, municipal rules, or contemplated, with a broad, liberal, statesman-like spirit, *the Dalles form a part of his Majesty's province of Upper Canada, and if the offence has been committed at all, it has been committed out of the jurisdiction of this Court.*

Mr. Vallière de St. Réal.—It appears to me that the statute of the 14th of the King (upon which the Crown officers rely) was evidently a temporary act, and never was intended to be a permanent one, as to the boundary of Canada. It is true that boundaries were given by this act to the old province of Quebec, but they were only to remain during the King's pleasure, which is clearly made known by the act of 1791. The principal objection of the counsel for the Crown, to our construction of that act, is, that in the preamble or title, it is only said " *to di-* " *vide the province of Quebec.*" It was well remarked by Mr. Stuart that it is not to the preamble, but, to the enacting clauses of an act that we must look to discover its spirit. We know, that in the preamble of an act of Parliament, it is usual to recite the title of the old act which is to be amended, and, perhaps, to this circumstance may be ascribed the introduction of the words " *the province of Quebec*" in the title of the act of 1791. Be that as it may, the proclamation of the King clearly gives to the province of *Upper Canada* " all the country to the west of a line " drawn due north from the head of Lake Temiscaming to the boundary " of Hudson's Bay, which was known as Canada."

Mr. Vallière read from the act the line of separation and continued.

These limits are very well known, and they were so before the proclamation. My learned brother, *Mr. Stuart*, has well explained their extent, and has not taken too wide a view of it. The words of the proclamation are very remarkable. After describing the line which separates the province of *Upper* from that of *Lower* Canada, it adds, " *in-* " *cluding*, (" *renfermant*"—a very remarkable expression,) ALL the " territory to the *west* and *south* of the said line, to the *utmost extent* of

" the country commonly called or known by the name of *Canada*."—Let us consider these words—they are not " of the country commonly " called or known by the name of" *the province of Quebec;* not at all—but by " the name of *Canada*." The question, therefore, is, *what* is the *utmost extent* of the country known as *Canada?* The *Abbé Raynal*, in his " *History of the Indies*," speaking of this country, *vol.* 8, *page* 238, says, " the year 1764, beheld the rise of a new system. *Canada* was " dismembered of the coast of *Labrador*, which was added to *Newfound-* " *land;* of Lake *Champlain*, and the whole tract of land to the *south* of " the *forty-fifth* degree of latitude, with which *New-York* was augment- " ed; of the *immense territory* to the westward of Fort *Golette*, and of " Lake *Nipissim*, which was left without a government; and the re- " mainder, under the designation of the *province of Quebec*, was placed " under one governor." The description which this respectable historian here gives of the territory thus dismembered gives a *correct* idea of the country *known as Canada*. This new system, he says, gave *a part of Canada* to Newfoundland. New-York was encreased by another part, namely, the tract to the southward to the forty-fifth degree of latitude. " The immense territory to the west of Fort Golette and of " Lake Nipissim, was left without *any* government:" and (as my learned brother, Mr. Stuart, has well maintained,) it is this immense territory which the proclamation of the year 1791, gave to *Upper Canada*, as being a part of the country, " called or known by the name of *Canada*." I have the honour to submit that, looking at the words of the proclamation of 1791, and comparing them with this description of the *Abbé Raynal* of the territory left *without any government*, we shall find it to be the country which, by this proclamation it was proposed to make a part of *Upper Canada*, at the time when it was declared that the line should be " drawn from the head of the lake *Temiscaming due north* un- " til it strikes the boundary line of *Hudson's Bay*," (and moreover,) " *including* all the territory to the westward and southward of the said " line to the utmost extent of the country commonly called or known " by the name of *Canada*." This territory was *then* known by the name of *Canada*, and it *is* situated to the *westward* of that line, and therefore it proves to be a part of *Upper Canada*. Again, I beg the attention of the Court to the work of Mr. *Pinkerton*, a well known English geographer. This distinguished author, speaking of the extent of *Canada*, gives very large bounds to it. In *vol.* 3, *page* 234, he says, " this country" (*Canada*,) " is computed to extend from the gulf of *St.* " *Lawrence* and isle of *Anticosti* in the *east*, to the lake of *Winnipic* in " the *west*, or from longitude 64° to 97° *west* from *London;* thirty three " degrees, which, in that latitude, may be about twelve hundred geogra-

"phical miles. The breadth from the lake of *Erie* in the *south*, or lati-
"tude 43°, may extend to latitude 49°, or three hundred and sixty
" geographical miles, but the medial breath is not above two hundred."
So far he speaks of the absolute *geographical extent of Canada*, the subsequent observation, which he makes relative to the *original population* of the country, strongly supports the argument which we have the honour to submit to the Court, viz: that this country, described by the *Abbé Raynal*, as " *the immense territory left without any government*," is the very country intended by the proclamation of 1791, to *receive* a government, by becoming a part of *Upper Canada*. " The *original popu-*
" *lation*," (says Mr. Pinkerton,) " consisted of several Savage tribes,
" whose names and manners may be traced in the *early French accounts*,
" which may also be consulted for the progressive discovery, the first
" settlement being at *Quebec* in 1608.—During a century and a half that
" the *French possessed Canada*, they made many discoveries towards the
" *west*, and *Lahontan*, in the end of the *seventeenth* century, has given a
" tolerable account of some lakes beyond that called *Superior*, and of
" the River *Missouri*. *Quebec* being conquered by *Wolfe* in 1759,
" *Canada* was ceded to *Great Britain* by the treaty of *Paris* in 1763."
I confidently submit that this western territory which had been discovered by the French, and is described by Lahontan and other writers under the name of *Canada*, became, by the proclamation of 1791, a part of *Upper Canada*, and consequently does not form a part of the *Indian territory*, nor is it *within the jurisdiction* of this Court. The *Abbé Raynal* and *Mr. Pinkerton* agree in their description of the *western* boundary " of the country commonly called or known by the name of *Canada*;" and for its *southern* limits let us again again refer to the *Abbé Raynal's* work. This writer, in the same volume of his *History of the Indies*, treating of the extent, soil, and climate of *Louysiana*, says (p. 111.) " *Louysiana* is a vast country, bounded on the south by the sea, on the
" east by Florida and Carolina, on the west by New Mexico, and on
" the north by *Canada*, and, by unknown lands, which may extend to
" *Hudson's Bay*. It is not possible to fix its length with precision, but
" its medium breadth is two hundred leagues." Here we see that the northern limit of Louysiana is *Canada* and unknown lands which may extend to *Hudson's Bay*. With the proclamation of 1791 before our eyes, which tells us that the boundaries of *Upper Canada* include the whole of the country to the west and south known under the name of Canada, to the utmost extent of that country, it is impossible to say but that country which bounds Louysiana to the *northward*, according the *Abbé Raynal*, must at this moment form, in conformity with that proclamation, a part of *Upper Canada*, because the country known as

Canada extends to the *south* as far as Louysiana, and to the *west* as far as the ninety-seventh degree of longitude. There remains now for us to consider the *northern* limits of Canada, and here we have not the same certainty. In the maps of *New France* it is true that the whole of the River *Winnipic* is included in it, and the northern boundary line is drawn in conformity with the interpretation of the limits of *Canada* which we have submitted to the Court. That this interpretation is a correct one, and that it in effect agrees with the limits of *Canada*, as they were known to the French government, will be evident, if the attention of the Court is given to what we look upon as very strong authority. It is an act of the *Duke of Ventadour*, dated in 1625, and will be found in the "*Edicts and Ordinances*," *vol. 2. page* 11, under the title of "Commission of Commandant in New France of the 15th February, "1625, by his grace the *Duke of Ventadour*, who was viceroy of the "country, in favour of the *Sieur de Champlain.*" This instrument begins by reciting other patents of commission already obtained, and proceeds to declare, in the most precise manner, the view taken by the government of France of the extent of this part of their possessions. As all the territory which the *French* knew as being called by the name of *Canada*, to the south and west of the line so frequently mentioned in the course of my speech, is ordered, by the King's proclamation of 1791, to make part of the province of *Upper Canada*, let us look at this act, and we shall perceive from it, that the most extended powers were given to the *Sieur de Champlain*, powers which did not at the time awaken any doubts as to *the right* which *France* had to grant them, nor any impediment to their exercise, on the part of any other nation.

Mr. Vallière read the commission at length, laying great emphasis on the authority given by it "to cause to be made discoveries in the said "countries, and specially from the said place of QUEBEC, *until as far "as he may be able to penetrate beyond the same, within the lands and "rivers which discharge themselves into the River St. Lawrence, in order "to endeavour to discover a convenient way to go through the said coun-"try, unto the kingdom of* CHINA *and the* EAST INDIES," *and proceeded in his argument.*

Here, may it please your Honours, we behold powers the most extensive, granted by the government of France for all the objects which might require attention, to make peace and war, to spread the name, power, and authority of the King of France over a country, the bounds of which were not exactly known to the French themselves, to establish religion, to commission and establish military and civil officers, to treat for, and contract, peace, alliances, and good friendship, with other

nations and their princes, and, on their being in default, to wage open war against them; in fine, powers are granted by this commission which could not have been granted unless by a government which, by the law of nations, was *entitled to grant them*. These powers extend over all the lands and rivers which discharge themselves into the River *St. Lawrence*. It is true, perhaps, that the River Winnipic does not discharge itself into that river, but, let us recollect, that at the date of this commission, the *country* not being well known, the *course of its rivers* must necessarily have been less known, and that, to arrive at *China* and the *East Indies* by way of *Canada*, you must come to the Pacific Ocean. Also, let us remember, that the French always regarded their discoveries to the *west* as making part of *Canada*, and according to old maps, that river (*Winnipic*) is situated *within* the country known to the French as *Canada*. After this proof of what were, at the time, considered as the territories of *France*, it is only necessary to enquire, whether possession thereof, was *actually held* by that kingdom. The species of possession which the law of nations admits as a proof of actual sovereignty, will equally appear to have been maintained. We see that, by this commission, power is given to be erected and built such forts and fortresses, as may be wanting and necessary to him, the *Sieur de Champlain;* now, forts and fortresses *were* erected, and, to this day, there are remains of French forts in that country, which incontestibly prove actual possession. Upon these grounds we assume that the limits of Canada to the *north* and to the *west* have *never* been well known; neither at the time of the *actual possession* of the country by the *French*, nor since its *conquest* by the *English*. In support of this position, (which is especially true as regards the *northern* limits,) I submit that *Charlevoix*, the *Abbé Raynal*, *Mr. Pinkerton*, and all authors, agree in representing that the boundaries of *Canada* under the *French regime*, were not positively fixed or known. As an authority for saying that they are not fixed even at the *present* time, I produce the topography of *Mr. Bouchette*, the surveyor-general of this province, who has bestowed great attention to every thing that is interesting on this subject; and I flatter myself that, from his official situation, his work must be esteemed very strong authority. *Mr. Bouchette*, speaking of *Upper* Canada, says, *page* 590 of his topography, " On the *west* and *north-west* " no limits have been assigned to it." I pray the particular attention of the Court to the expression " *no limits* have been assigned to it, there- " fore it may be supposed to extend over the vast region that spreads " towards the *Pacific* and the *Northern Oceans*. The separation between " *it* and the *United States* is so vague and ill-defined, and the prolific " source of so many disagreements between the two powers, that it has

" long called for the revision which is now about to be performed, in " fulfilment of the fourth and fifth articles of the treaty of peace of 1615." Here we have the declaration of the surveyor-general of this province, that on the *west* and *north-west* no limits have been assigned to the country called *Canada*. Although *Mr. Bouchette* speaks at the time of the proclamation of 1791, yet his opinion is, notwithstanding, that the boundaries of *Canada* to the *north* and *west* are very uncertain, and since there are *no* precise limits *fixed*, we must enquire how those who were contemporaries, and who had a knowledge of the country, how the geographers of those days, understood the matter. Let us look at the maps, and we shall find that the whole of the river *Winnipic* is delineated as belonging to *Canada*. When *Mr. Bouchette*, speaking of this country in his Topography, says, that it has no limits assigned to it, and adds, " therefore it may be supposed to extend over the vast regions " that spread towards the Pacific and the Northern Oceans;" it is very certain, as it appears to me, that he had in view the proclamation of 1791, which bestows the whole country (" *to its utmost extent*") commonly *called or known* by the name of *Canada*, upon the province of *Upper* Canada. The Indian territories are to the *north* of the line specified in the proclamation of 1791, because the whole of the country to the *south* and *west*, is within Upper Canada. The principal point to consider seems to me to be, that the proclamation of 1791 did not give the boundary of the province of *Quebec*, as the limits of the two provinces, but that, in the actual words of the proclamation, the limits of Upper Canada extend on one side " from the head of the Lake Temis- " caming, by a line drawn due north until it strikes the boundary line " of Hudson's Bay, including all the territory to the westward and " southward of the said line, to the utmost extent of the country com- " monly called or known by the name of Canada."

These reasons, and many others, manifest beyond a doubt that the country, where *the Dalles* are situated, was in possession of the French, and, as we say, and as, I hope, we have proved by the best maps, and by the most enlightened authors, (with whom the surveyor-general of this province agrees) that the country to the southward and westward was called and known by the name of *Canada;* that the *French* knew the country as *Canada*, and that nothing certain to the contrary can be brought forward. In conclusion, if we do not produce *positive* evidence that the *Dalles* are within the limits of *Upper* Canada, we have proved that no fixed limits have been assigned to it, and, by the same authority (an authority well entitled to respect on account of the official situation held by the writer) that it extends over the vast regions to the west and north of the line of separation between *Lower* and *Upper* Canada. It

is for your Honours to decide whether the *Dalles* are *within* or *without* this vast extent.

Attorney-General.—The point before the Court appears to me so clear that it is almost unnecessary to argue it; a great deal of learning has been produced, and much ingenuity exercised, by my learned friends, to prove the point with which they set out, viz: that if the offence alledged in the indictment to have been perpetrated by the Prisoner at the bar, has been committed at all, it must have been in the province of *Upper Canada*, and consequently *out* of the jurisdiction of *this Court*.—In support of this position a variety of arguments have been resorted to, and numerous authors have been referred to; fortunately for us, standing in a Court of law, there is positive law upon the subject, there is therefore no occasion to have resource to the *Abbé Raynal*, or to *Charlevoix*, or any other of the speculative writers, (writers at the same time for whom I entertain great respect,) to whom my learned friend, who last addressed the Court, has referred as furnishing authorities upon the question. It is our advantage that we can proceed in this case, without referring to authors who, however respectable they may be, were exposed to the too common failing of endeavouring to secure the favour of their respective governments. I do not intend to throw the slightest imputation on the veracity of the very eminent writers whose opinions and works have been, with so much ability, brought forward, but merely to state that reference *to them* is completely unnecesary, as we have *positive acts of the British Parliament*, to guide both the examination and decision of the question. We do not differ at all with our learned friends as to the *extent* of territory formerly claimed by the *French* and which undoubtedly came into the possession of the *British* Crown at the treaty of *Paris* of 1763, but all we submit to the Court is, that the *whole* of the French possessions did not constitute *Canada*, but that the country known by that name, was much more circumscribed in its extent than my learned friends have described (and I doubt not very accurately too,) the old French possessions to have been. The argument of my learned friend who opened this question, is that in construing this and every other act of parliament we should proceed in a liberal and statesman-like manner to apply its provisions. If we trace the movements of the British government, we shall see the impossibility of that contruction which my learned friends contend for, being admitted to be correct. In 1760, these colonies were conquered, and capitulated to the British forces. By the treaty of Paris in 1763, the *whole* of the conquest was finally ceded to his Majesty. In 1763, *a part* of this conquest was, by proclamation, erected into a province, denominated the province of *Quebec*. By the act of 1774, the province of *Quebec was enlarged*.

By the treaty of peace with the United States of America, the situation and boundaries between the *late colonies* and the province of *Quebec*, and others of his Majesty's dominions in *North America*, were clearly defined, and in 1791, this series of legislative and diplomatic measures were completed by his Majesty *dividing* his then province of *Quebec* into his two provinces of *Upper* and *Lower Canada*. Let us, for a moment, look at what the act of 1791, proposed to effect, and every thing like difficulty disappears in a moment. It was *to divide a large* province, namely that of *Quebec*, into *two small* ones, to be called *Upper* and *Lower Canada*, and consequently the boundaries of these two provinces could only be commensurate to those of *Quebec*. *Upper Canada* must be a part of the former province, and of that only, otherwise the act, instead of being an act to *divide* the province of *Quebec*, ought to have been denominated an act to *enlarge* its boundaries, and, from its *extended* limits, to form the two provinces therein created. The error of my learned friend is this, that because *Canada* happens to be mentioned, therefore the avowed object of the act, namely, that of *dividing* the province of *Quebec*, must be abandoned, or give place to what my learned friend calls "the broad and enlightened policy of providing a govern-"ment for the *whole* of his Majesty's dominions in *North America*." I again take up the act, and looking at its title, I find it to be an act "*to* "*repeal certain parts* of an act passed in the fourteenth year of his Majes-"ty's reign, intituled an act for making more effectual provision for the "government of the province of *Quebec* in *North-America*." What the province of *Quebec* comprehended is as well known as the limits of this room; the act of the 14th of the King, commonly called "the *Quebec* "act," defines them precisely. How then did this act of 1791, amend that of 1774? Why, his Majesty, having been pleased to signify, by message to both houses of parliament, his royal intention to divide his provice of *Quebec* into *two* provinces, it was enacted, by this statute, that it should be so divided, and the two provinces should be created. If my learned friend's observations are correct, then the 14th of the King amounts to nothing, because, though the act of 1791 is professedly an act *to amend*, not to repeal, that of 1774, still it is indispensable to a correct interpretation of the act *to divide* the province of *Quebec*, (according to my learned friend's doctrine,) that you *add* a very considerable territory, to it, a *mode of division*, I confess, I am not acquainted with. The act, being to *divide* the province of *Quebec*, I contend that the limits of the *two* provinces must be fonnd in those which constituted the province out of which they were formed, and that, whilst on the one hand, they must together be commensurate to those limits, so on the other, they cannot exceed them. That more cannot be included in the

two than in the *one* province, and that being the case, that the province of *Upper* Canada can consist *only* of that part of the former province of *Quebec* which does not form the province of *Lower* Canada. This proposition I consider so clear, that a province, any more than any thing else, cannot comprehend or contain more, when divided into two parts, than it did when a whole, that I should feel myself very unjustifiably taking up the time of the Court, were I to pursue the argument farther If any other construction is to be given to the act, then the *14th of the King*, defining the province of *Quebec*, amounts to nothing, and the act of the 31st, instead of being an act *to divide*, would in reality be an act *to enlarge*, the province of *Quebec*, under the new titles of *Upper* and *Lower Canada*.

Solicitor-General.—I consider the point so extremely plain, that it is not only wasting, but almost trifling with, the time of the Court, seriously to argue whether the *division* of a province into *two* parts can, by any possibility, be construed to mean the *addition* thereto of a vast and almost (according as my learned friends contend) immeasurable territory. In support of this, apparently most novel and extraordinary, proposition, my learned friend, Mr. Stuart, contends that the expression in the designation of the boundaries, "the country commonly called or known "by the name of *Canada*," is conclusive that it was in this manner that his Majesty intended to divide the province of *Quebec*. The enquiry, and the only enquiry, upon the subject appears to me to be one extremely easy of decision. It is simply, whether that one sentence is to preclude or set aside the whole of the first clause of the act in which the intention of his Majesty and of parliament is so clearly expressed. The act of 1791, after reciting the title of the 14th of the King, assigns the reason which induced the legislature, to pass the act for the internal regulation of the two separate provinces, which his Majesty had signified his royal intention of forming, by the division of his then province of *Quebec*, namely, "that the said act, is in many respects, inapplicable to the *pre-*"*sent* condition and circumstances of the said province, and that it was "expedient and necessary that further provision should *now be made* for "the good government and prosperity thereof." It is not said, that it is necessary or expedient to *enlarge* the said province of *Quebec*, but that further provision should be made for the good government thereof; that is, of that province which had, by proclamation, been created in 1763, and whose limits had been extended to what they then were by the act of the 14th of the King, commonly called "*the Quebec act.*" My learned friend must most surely be driven to the last stage of despair, when he sets up a loose expression in a declaratory act, (which may be considered as the weakest act of the Crown,) as affording a just ground or

foundation for such an opinion. I know that it is not to *the preamble* of an act of parliament that we most generally look for a clear exposition of its objects, but, whilst I admit the correctness of that position, I would also remind my learned friend that there is a wide difference between the *enacting and declaratory* clauses of a statute, and that we ought not to set aside the obvious meaning, and overturn the avowed intention of an act of parliament, because of a loose expression in a declaratory clause. I cannot think that the French nation ever claimed these territories and wildernesses, as belonging to, or forming a part of, *Canada*. As to the *authorities* which my learned friend, who spoke last has advanced, they cannot in *a Court of law*, be styled *authorities*. I have a very great respect for the *Abbé Rayhal*, but his work is merely speculative and philosophical, and is no geographical authority upon a question of territory; the same remark will apply to *Pinkerton*, we may all esteem it, as a very useful work, but it forms no geographical authority in a Court.—Upon the whole I contend, with the *Attorney-General*, that the former province of *Quebec* must be found in the provinces of *Upper* and *Lower Canada*, and that *no more* can be included in *them* than what was contained in *that* province, for the act by which they were erected into provinces was nothing more than an act to divide *it* into two parts, hereafter to be designated *Upper* and *Lower Canada*. Again, the learned gentlemen say, that all to the *south* and *west* of this line, from *Temiscaming lake to Hudson's Bay*, must be esteemed *Canada*, what then was the use of this act of the 43d of the King? The legislature, if my learned friend's argument was correct, were idly passing an act that could have no object. Instead of *Indian* Territories it is *all Upper Canada*, according to my learned friend's statement. But it is a position completely untenable even for a moment. *Upper Canada* extends no farther *south* and *west* than the province of *Quebec* did, any more than does *Lower Canada* to the *north* and *east*. In the *two* provinces are now to be found that which, before the separation, constituted the province of *Quebec*, and *Upper* Canada consists of that part, and of that part thereof only, which is *south* and *west* of the province of *Lower* Canada. I refrain from entering on this subject, being confident that, in the view we take of it, we are correctly construing the intention of the legislature, and that we shall have our own opinion strengthened and confirmed by your Honours decision.

Mr. Stuart.—I confess I look in vain for those grounds of confidence on which my learned friends rely. If supporting opinions by confident assertions entitles them to the result they anticipate, they have certainly gone a good way towards obtaining it, but I look in vain for any thing that can be called argument, upon the question that is now before

the Court, in the observations that have been submitted by the officers of the Crown. If there was any thing that demanded attention, it was the remark of my learned friend, the *Solicitor-General*, on the act of the 43d of the king; but, if my learned friend had referred to the chart, he would perceive that *nine tenths* of the *whole Indian* territories, according to *his* description of them, lie *beyond* the boundary which *we* claim as that given to *Upper Canada* by the act of 1761. If my learned friend traced the parallel of 52°, he would perceive that *nearly* the whole of the North-West Company's stations, and *the whole* of those of the Hudson's Bay Company, are to the *north* of that line. Then surely it is obvious that this was not an act without an object. It was an act to extend the jurisdiction of the provincial Courts to the trial and punishment of offences committed in the *Indian* territories, and *they* are to be found in the immense and almost boundless wilderness to the *north and west* of the province of *Upper Canada*, as established by the act of 1791. The act of the 14th of the king was obviously *temporary*, the proclamation of 1791, defining the boundaries of the two provinces, was founded upon an act of a very different description. The former was merely a *temporary*, whilst this was a *permanent* act.

Mr. Justice Bowen.—From what part of the act of 1774, do you conclude that it was only temporary. I see no part of it that warrants such a conclusion, except with reference to the last clause.

Mr. Stuart.—The words there made us of are *general*, and, as I conceive, must be understood to refer to the *whole* of the act. I mean, however, independently to contend that the time at which that act was passed, and the situation of England with reference to her American colonies, concur to shew that this act was merely temporary. But it is needless to refer to the act of 1774, as it does not bear upon the case, being completely done away by the broad and liberal proclamation of 1791. I am surprised that the Crown officers should treat so lightly his Majesty's proclamation, it is certainly not the quarter from which we should expect it. How was the province of Quebec created? By proclamation; and surely my learned friends will allow as much weight to one of his Majesty's proclamations as another. They will not deny the same power to his Majesty in 1791 which he exercised in 1763. If *proclamations* are such *weak* acts, what are we to think of the proclamation that has been put in evidence on the present trial, and has been resorted to upon all occasions as a justification for all the apparent aggressions which have marked the progress of these unfortunate disputes? But I differ in opinion with my learned friends on that point; if, in 1763, his Majesty could *create* a province by proclamation, he, in 1791, could *divide* and *enlarge* a province in the same way. This he has been

pleased to do, and all we have to do with this expression of the royal will and pleasure is, to adopt it, as the rule by which we are to be governed. In considering and deciding the question of jurisdiction now before the Court, we contend that, looking at this proclamation, it is impossible to say that this offence was committed within the jurisdiction of this Court, If committed at all, it was perpetrated at *the Dalles*, which form a part of his Majesty's province of *Upper Canada*, as created by his royal proclamation of 1791.

It being now past six o'clock, the Court was adjourned till Friday morning at eight o'clock, A. M.

Friday, 29th May, 1818.

PRESENT AS BEFORE.

The Court having assembled, the Jury were called over and being all present.

Chief Justice Sewell.—The Court are most distinctly of opinion, on referring both to the act of 1791 and that of 1774, that the argument held on the defence must fail. What was the object of these acts? Amongst others, that of 1774 was to *enlarge* the province of *Quebec*, which had been created in 1763. That of 1791 was to *separate* or *divide* the province of *Quebec* into *two* provinces, to be denominated *Upper and Lower Canada*, and make each respectively independent of the other, by giving a legislature to each respectively, retaining within the *two* provinces the same extent of country, the same space, as the province of *Quebec* contained. What is the act of 1791? What is its object, its avowed object? To *repeal* certain parts of the act of 1774; and what is the part repealed? It is that part of it, which gives authority to the *council of the province of Quebec*, and *what* is the reason assigned for so doing? Why, that his Majesty had signified it to be his royal will and pleasure *to divide* his province of *Quebec*. To assert that he intended by this, that the limits of the province should be *extended* by the separation, appears to me repugnant to the plainest principles of common sense, and, therefore, I cannot assent to it. The short history of the act of

1791 is briefly this:—The King signifies to parliament his royal intention of *dividing* his province of *Quebec*, and he calls on the legislature to provide for this alteration by granting an act adapted to the change. The legislature pass an act providing for the due government of the *two* provinces, and under the authority of this act, and the royal proclamation, the province of *Quebec* was accordingly divided. The royal proclamation was an act of sovereign authority, by which his Majesty, by and with the consent of his privy council, declared that should be *the line of separation* between *Upper* and *Lower* Canada, and how much of the *former province of Quebec* should belong to the *one*, and how much to the *other*. The object of the act, and the object of the royal proclamation, are so clearly expressed, that we cannot, for a moment, doubt upon the subject. The act says, " His Majesty having been pleased to " signify his royal will and pleasure to *separate* and *divide* the province " of *Quebec*." And what says the proclamation? Why, the very same words. To *divide* the province of *Quebec*, not to *add to it*, any more than to *take away from it*. Therefore, *Upper Canada* could include only that part of the province so divided, which was not contained in *Lower Canada*, but it could not extend beyond those limits which constituted the province of *Quebec*, otherwise it would certainly have been an act to *enlarge* rather than an act to *divide*. In delivering this opinion, I am speaking our unanimous sentiment, for we have consulted our brother *Perrault* upon the subject, and he clearly concurs with us. According to our understanding of the act, and the royal proclamation, we are bound to say, that the argument of the gentlemen concerned for the Prisoner, though presented with great ability and ingenuity, must fail, because the *western* boundary of the province of *Upper Canada*, is, " *a* " *line drawn due north from the confluence of the Ohio and Mississippi ri-* " *vers till it strikes the boundary territory line of the Hudson's Bay.*" The question of *fact* will remain with the Jury. It is *they* who are to say, whether this place, *the Dalles*, IS, or IS NOT, to the *west* of the line which *we* now declare to be the *western boundary of his Majesty's province of Upper Canada*. If they are of opinion that it *is* within, or to the *east*, of this western line, then it is in the province of *Upper* Canada, and not within *our* jurisdiction; but, if they are of opinion that it is to the *west* of this line, then, I am giving you our *unanimous* opinion, when I declare, that *the Dalles are in the Indian Territory, and not within the limits of the province of Upper or Lower Canada*, but clearly within the jurisdiction of this Court, by the act of the 43d of the King, cap. 138, which extends our power to " the trial and punishment of persons " guilty of offences within certain parts of North America."

CHARGE TO THE JURY,

BY THE

HONOURABLE CHIEF JUSTICE SEWELL.

Gentlemen of the Jury,

THE Prisoner at the bar, is accused of having murdered *Owen Keveny* in the *Indian Territories*. The substance of this long indictment is this, that *Charles De Reinhard*, the Prisoner, and one *Mainville*, (who is not here,) killed him with *a gun*, or *a sword*, or *both*, and that the others, *M'Lellan*, *Grant*, *Cadotte*, and *Desmarais*, were accomplices, that is to say, that they did, before or at the time of the murder, aid in or advise the same, but at present it is only with *De Reinhard* that you have to do. The indictment comprehends several counts, which is usual, because the officers of the Crown do not always know to what part of the case they apply, or what proof they may be able to produce.—The charge is contained, generally, in eight counts, of which I will give you an abstract. The charge in the *first* count is, that *De Reinhard* killed Owen Keveny, with a *sword*, and that the others were present, that is to say, actually assisting in the murder, or ready to have assisted, if it had been necessary. By the *second*, he is accused of having killed him with a *gun*, instead of a sword, and the others, of having been present as in the first count. By the *third*, he is accused of having killed him, not with a gun nor with a sword *alone*, but with *both together*. The *fourth* count says, that *Mainville* killed him with a gun, the others being present, aiding and assisting him. The *fifth* count again says, that *De Reinhard* killed him with a *sword*, and that *M'Lellan*, *Grant*, *Cadotte*, and *Desmarais*, were accomplices *before* and *after* the fact. The *sixth* count accuses him of having killed *Keveny* with a *gun*, but, like the last, does not say, that *M'Lellan*, *Grant*, *Cadotte*, and *Desmarais*, were *present*, but that they *previously* counselled the murder, and that, *after* it was committed, they received and assisted the Prisoner to escape. The *seventh* count again says, that *De Reinhard* killed him both with *a sword and gun*, and that these same four persons were accomplices before and after the fact. The *eighth*, and last count, accuses

Mainville of having killed him with a gun, and says that *De Reinhard* was present, and assisting to kill him, and that *M'Lellan*, *Grant*, *Cadotte*, and *Desmarais*, were not present when the murder was committed, but that they were accessaries before and after the fact. These, gentlemen, are all the counts of this indictment. To this indictment the Prisoner has pleaded that he is in nowise guilty. The officers of the Crown say, that he is guilty. It is your duty, to declare, upon your oaths, whether the Prisoner is guilty or not. Upon this question, there are three points that require, and particularly deserve, your attention.

The *first* point is, to know *whether Keveny was really killed.*

The *second* is, to know whether he was killed by the hands of *De Reinhard or of Mainville*. and, if you find that he was killed by *Mainville*, to know *whether De Reinhard was present, assisting him to murder him;* and it is necessary I should inform you, as the law makes no distinction, that in such case, both are equally guilty. It is not necessary that both shall have actually helped each other to kill him, if they were *present*, and *abetting*, the one and the other, are equally guilty.

The *third* point which you must examine is this. If you find that the crime *has* been committed, it is for *you* to say, whether it has been explained by any circumstance that may diminish the crime, and reduce it to any degree of homicide inferior to murder. Upon this point it is my duty to tell you, that if you find that he was killed in the manner laid in the indictment, and by the Prisoner, there is no doubt but the Prisoner is guilty of *murder*, because the circumstances of his case, according to the evidence which you have heard, would not leave you the power of diminishing the crime, as there does not appear any excuse or any necessity for having committed it. You have, therefore, two questions principally to consider, *first*, whether *Keveny* is really *dead*, and *secondly*, whether he was *killed by the Prisoner*, or whether he was *killed by Mainville*, with the *knowledge* of the Prisoner, *he being present aiding and assisting.*

Before reciting the evidence, it will be necessary to take notice of the authority, by which the Court, possesses the right of deciding on the Prisoner's case. By the statute of 1803, power was given to the *Court* of *Upper Canada*, and to the *Courts* of *Lower Canada*, to try, and to punish, those persons who had committed crimes in the *Indian Territories*, and the statute clearly explains what was meant by the *Indian Territories.*—[*The Chief Justice read the preamble and first clause of the act.*]—It is in consequence absolutely necessary, to know, whether the place where the death occurred, and where the murder was committed, is *without* " the limits of *Upper* or *Lower Canada*, or of any civil go-" vernment of the *United States of America*," for if it *is* without those

limits we have the power of trying the Prisoner, and on the contrary, if it *is not so*, then we have not the right of trying him. It is a question therefore for *you* to determine, *where Keveny* met his death? and it was not in the province of *Lower* Canada certainly. There are, however, two other quarters which require your consideration. First, *Upper Canada*. The *western* boundary of *Upper* Canada is a line drawn *due north* from the junction of the rivers *Ohio and Mississippi*, in the latitude of 37° 10′ north, and 88° 50′ west longitude.—I am bound to tell you that it is the Court who are to decide upon the *law*, and *you* who are to judge of the *facts*, and, according to law, we heard the arguments of counsel on the subject yesterday, and to day, we have decided that the western limit of *Upper* Canada is the line, which I have mentioned; if then *the Dalles* are to the *east* of that line, they are in the province of *Upper* Canada, and consequently not within our jurisdiction. Let us now look at the evidence.

The first witness on the part of the Crown is *Mr. Sax*.—[*The evidence of Mr. Sax, vide pages 7 and 8, was read.*]—It is, therefore, manifest that a spot which is in the longitude of 94° 6′ *west*, must be much to the westward of the boundary of *Upper Canada*. There is another witness, *Mr. Joseph Bouchette*, who says the same thing.—[*Mr. Bouchette's evidence, page 9, read.*]—You see that *Mr. Bouchette* and *Mr. Sax* entirely agree. There was some other evidence to this point, but perhaps you have no doubt of *the Dalles* being to the *westward* of the line of which these gentlemen spoke.—Another matter for your consideration is, whether *the Dalles* are to the *north* of the line of separation between the *United States*, and the province of *Upper Canada*. It is of importance to ascertain this, because if the spot is to the *north* of that line, it is in truth in the *Indian Territory*, and if it is to the *south* of that line, it is in the *United States*, and consequently not within our jurisdiction. On this point the evidence is equally as strong as on the other. Mr. Bouchette's evidence is most distinct; but I wish now to refer to the evidence of *Mr. Coltman*.—[*The Chief Justice read Mr. Coltman's evidence, vide pages 10 and 11.*]—Mr. *Gale* who was examined afterwards, confirms *Mr. Coltman* in every particular. This is all the evidence with respect to our *jurisdiction*, and to the *locality* of *the Dalles*, and if it proves that *the Dalles* lie to the *west* of the boundary of *Upper Canada*, and to the *north* of that of the *United States*,—it proves, consequently, that they are in the country designated in the act of 1803, as *Indian Territories*.

Now let us look at the evidence as to the *facts* of the case. It is very long, but the Court does not complain of the Crown, nor of the counsel for the Prisoner, both have done their duty, and have done it well. But

although the evidence is *long*, very long, the facts of the case are but *few*. The Crown officers rest their case upon the various confessions of the Prisoner, confirmed by several circumstances, which, it is said, prove that it was his intention to kill the deceased, and by facts occurring in the execution of that intention; his *public* declaration that he had killed him, and his *tacit* confession that he had done it, proved by his silence, at the time when *Mainville* related the *mode* in which *Keveny* had been killed; his declaration when the things were divided, that the right to have the best belonged to him, because it was *he* who *had killed him*, and not only these words, but that at the same time, *he made* the division, keeping *the best* for himself.--This is the case on the part of the Crown.

On the part of the Prisoner it is said, " I have a defence to make, " on important grounds; and it is not an *ordinary* defence, although it " turns on the evidence. My defence is chiefly, that the situation of the " country was so extraordinary, that my supposed confession cannot be " noticed. The country above was in a state of warfare, and my con- " fessions were the effects of terror, and extorted by the circumstances, " and the occurrences by which I was surrounded. These confessions " do not relate to *real facts*, but were made under the pressure of cir- " cumstances, in order to put *my life* in safety." He has also attacked the *credibility* of the witnesses on the part of the Crown, particularly the testimony of *Captain D'Orsonnens*, of *Faille*, and of *La Pointe*. The officers of the Crown say, that the confessions of the Prisoner are *confirmed* by these men, *Faille* and *La Pointe*, and the Prisoner says, that he has *destroyed* their testimony, by shewing to the Court that they contradicted themselves. It is for *you*, gentlemen, to judge, and not for *us*.—My learned brother, *Mr. Justice Bowen*, will read to you the evidence, and you will give that attention to it which it deserves, in order that you may thoroughly understand it, and that your minds may be satisfied whether the officers of the Crown or the Prisoner have established their affirmation. After you have heard the evidence, I propose to myself to advert to some particulars in the evidence, which seem to me to require notice for your correct judgment, both with regard to the Prisoner, and with regard to the Crown.

The evidence was then read throughout by Mr. Justice Bowen.

Chief Justice Sewell.—Before I make my observations upon the evidence you have again heard, it is my duty to state that you must not, in the least degree, regulate your opinions by what I may say to you, but that you must bestow your entire attention upon the question to be decided, whether the Prisoner is guilty or not. I remind you again, that it is

you who are to judge of the credibility of the witnesses, and I must likewise make the further remark, that it is *you* who are to judge of the situation of the country, of the circumstances that relate to the *confessions*, as well as generally of the *degree of credit* to be given to the *whole* of the evidence. The foundation of the proof produced by the officers of the Crown is the *confession* of the Prisoner, confirmed by other witnesses, that *he* killed *Keveny*. This confirmation, the officers of the Crown say, will be found in the evidence of *Faille*, as to his conduct at the time they met the Swan river brigade, and when the people of those canoes said to the people of *Mr. M'Lellan's* canoe, that *Keveny* was above the *Dalles*, and, in the expressions of the Prisoner, "*that he would* "*take care, or that he would take good care, of him*, as *it was he who had* "*taken him prisoner*;" but, at the same time, you will recollect that *Faille* said, that "*he could not say whether the Prisoner had said so in a threatening way.*" (*see pages* 18 *and* 19.) They allege also that *La Pointe* relates the same conversation, but with a very important *addition*. *He* swore that, at the time this conversation took place, he heard *De Reinhard* say, "*I will take good care of him, it is I who will kill* "*him.*" (*pages* 33 *and* 39.) Another suspicious circumstance, say the Crown officers, is, that he was sent with five *Bois-brûlés*, and this fact has been confirmed by the witnesses for the Prisoner. Another part of the evidence against the Prisoner, is the conversation between the people of *M'Lellan's* canoe, at the time the report of the gun was heard *upon the water*, (of which I mean to speak again.) *La Pointe* says, that at that time one of the *Bois-brûlés* exclaimed, "*Oh, the dogs,** *they have killed him.*" (*page* 34.) and that the prisoner, De Reinhard, was *then* with *Keveny*. The officers of the Crown maintain that this expression, made use of on the *impulse of the moment*, demonstrates the *expectation* which all who were in the canoe had, that *Keveny would be killed.*

Another circumstance which demands your attention is this. *La Pointe* says, that he saw *De Reinhard's sword*, but that he does not know whether it was *bloody*; (*page* 35.) the other witness, *Faille*, says positively that he saw the sword in his hand, and that he saw blood on the sword. (*page* 23.) Both these men talk of *Keveny's clothes* which were in the *small* canoe on its arrival. One says that they certainly were not the clothes which he had on at the time they left him, but he says, upon his

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* The expression, "*Oh, the dogs,*" the reporter has not upon his notes of *this* trial. He remembers, from the impression it made on him, that upon *one* of the examinations of this witness *he did so testify*. He rather thinks it must have been in *March*, but he has not his report at hand to refer to. W. S.

oath, that they were *Keveny's* clothes, and that he had seen *Keveny* wear them during the voyage. (*pages* 26, 33, 39.) Both of them agree in saying that *De Reinhard* divided *Keveny's* things, and both of them speak of the misunderstanding with the *Bois-brûlés*, and they also agree in relating the conversation, which, they say, took place at the time of the division. *La Pointe* relates that the Prisoner said, " As it was I who " killed him, I will have my choice of the things, and, as Mainville was " with me and helped to kill him, he shall have more than the others." (*page* 35.) *Faille*, in speaking of this circumstance, says the same thing. *La Pointe* says, that " on the arrival of the small canoe, some one on " shore asked, what had been done with Keveny, and that De Reinhard, " being then in the canoe, replied, ' he is well hidden, he will not come " back again.' " (*page* 34.) *Faille*, in speaking of this conversation, says " that on the arrival of the canoe, *M'Lellan*, *Grant*, *Cadotte*, and another " came forward, and that *one* of the four asked, what they had done " with the prisoner Keveny," and he says, that *one* of the three who were *in* the canoe, but he does not say *which*, answered, " He is well " hid where we have left him." (*page* 24.) *La Pointe* has given a separate account, by which he says, that *Mainville* recounted the manner in which the murder had been committed by *De Reinhard*, and the resistance which *Keveny* made, (*page* 35.) and both agree in saying, that at that time *De Reinhard* was very near, but that he said nothing. *Faille* and *La Pointe* agree again in representing, that they were forbidden by the Prisoner to talk of this murder, and that they were told, that if they talked of the murder they would be punished. (*pages* 26 *and* 36.)

His confessions made to five people are, however, the strongest evidence against the Prisoner. He made the same confessions to all five, and we have (after hearing the arguments of counsel) decided that we could not reject them. The *first* he made to Captain *D'Orsonnens;* the *second* to *Mr. Nolin*, when they were walking together. (*page* 84.) Then there is his confession to *Mr. Vitchie*, formerly his comrade, in which he relates all the circumstances of the death of Keveny, adding, " that he " had confessed the whole to *Captain D'Orsonnens*, and that he was going " to do *the same* to my Lord Selkirk, *hoping to be admitted King's* " *evidence*, but he did not say that he had had any conversation with " *Captain D'Orsonnens* relative to that hope." (*page* 87.) Afterwards we find him in the hands of *Lord Selkirk*, with his declaration, made by his own hand, in his proper hand-writing. (*pages* 112 *to* 120.) You will, no doubt, consider these circumstances as *very strong*, but there is yet another, which, if it be not *stronger* even than the others, is *equally* worthy of remark. I allude to his declaration to *Mr. Miles Macdonell*. He *began* a conversation *himself* with *Mr. Macdonell*, and told him that

" he was a prisoner, and that he had killed a gentleman of the Hudson's " Bay Company," and added, " shall I name him to you?" and when *Mr. Macdonell* said " yes,', he then named *Keveny*. (*page* 92.) This is a circumstance very extraordinary of itself, but *Mr. Macdonell* says " he spoke of *Keveny* with regret, and with penitence for what he had " done." The law always considers a confession apparently produced by the compunctions of conscience as a circumstance of a very strong nature. If a confession be extorted by *hope*, or by *fear*, it is not evidence, but in this confession, made to *Mr. Macdonell*, he seems to think that he perceived *the force of conscience*. He related all the particulars, and Mr. Macdonell adds, " the prisoner, De Reinhard, appeared to me to " be very penitent for what he had done, and confessed that he had done " wrong, but that he had been led into error through ignorance." (*page* 93.) I am not willing to express any opinion upon this head. The first time that the witnesses say the Prisoner confessed, he was not *apparently* under the influence of fear, nor in expectation of benefit. This was at the time when the *small* canoe arrived, after the murder is charged to have been committed. If you believe that his *second* confession was influenced by the circumstances of the situation of the country; if you consider that, at the time of his recital to *Captain D'Orsonnens*, his mind was so agitated that you cannot rely on what he *then* said, then you will reject it; but it is for you to weigh whether his mind was, or was not so agitated, and, if you believe it was *not*, then you *cannot* reject it. It has appeared to me, gentlemen, that I was bound to make these remarks upon the evidence, produced to you, on the part of the Crown. His confessions have been frequent, besides that made to *Captain D'Orsonnens*. What he said to *Captain D'Orsonnens*, the same he said to *Mr. Nolin*, to *Vitchie*, and to *Mr. Macdonell;* and, assuredly, he said the same to the *Earl of Selkirk*.

On the part of the Prisoner it is my duty to state to you, that he has succeeded, in establishing the existence, of a most extraordinary state of affairs. If he has not proved that an open war existed in that country, a war known to the law as such, yet he has proved a state of actual warfare. The discrepancies between the evidence of *Faille* and of *La Pointe* on *this* trial, as also the difference between *Faille's* evidence on the *two* trials have equally been proved. *Faille* says, (in this trial,) " De Reinhard did not personally tell me that he had killed Keveny." (*page* 22.) In the other he said the contrary. There is likewise an apparent difference between the evidence of *La Pointe* on the two trials. In one he said that when he heard the *first* gun fired, he was on *shore*, and in the other, that he was on the *water*. I must now speak of that part of his evidence in which he says that a *Bois-brûlé* uttered the ex-

clamation, " Oh, the dogs, they have killed the Prisoner !"—It has appeared to me that there is a contradiction in this, but it is for you to judge, and I give no opinion. I will read his evidence as given on the former trial in the Court of King's Bench, as it was proved by *Mr. Justice Perrault:* " being cross-examined, he said, when we heard the re- " port of the gun, we were encamped, the weather was calm, we could " hear from afar off." On this trial he has given evidence quite contrary. My brother *Bowen* examined him on this point, and I will read his evidence to you on the present trial, and then you will decide whether there is an essential difference. " While we were yet on the water, " and before we arrived, we heard the report of a gun; it was perhaps " about half way; some one of the Bois-brûlés then in the canoe, said, " ' did you hear that gun, they have killed him.' " Certainly these narratives are not the same. On the one trial he swore that the report of the gun occurred when he was on shore, and in the present trial, that it occurred while he was on the water. But on the other hand, I must call your attention to the explanation which the witness gave of what he meant to say when he said, " *we* heard the report of a gun;" my brother *Bowen* will read to you the explanation he gave.

[*Mr. Justice Bowen read his evidence in answer to the Chief Justice's question, page* 34.]

Chief Justice Sewell.—You see that he still says, that he heard *two* reports, and there is no contradiction in that part of his testimony, but on the other trial, he said that he heard the first when he was upon the *water*, and now he says, that he heard it when he was on *shore*. I again say to you, gentlemen, it is for you to judge of the belief of which each witness is worthy, it is for you to determine whether *La Pointe* has or has not explained the variation. If, in your minds, you are satisfied with the explanation relative to the report of the gun upon the water, and on shore, it is your duty to believe him; but, I repeat to you, it is for *you*, and you *alone*, to judge. Your conscience must be your only guide in determining, but it is you alone who are to determine. I must tell you that *Faille* is guilty of a contradiction.

[*Mr. Justice Bowen read the evidence, page* 16, *relative to Mr. M'Lellan's beating him.*]

Chief Justice Sewell.—The difference between *this* evidence, and *that* which he gave before, is this: in *March* term he said, that the conversation took place *after* he had embarked in the canoe, and now you hear he swears that it was on shore, and *before* embarking. If you consider the contradiction so great as to destroy his testimony, to make you

wholly doubt his truth, then you will place no belief in it. There are other circumstances which the Prisoner, with much reason, says are very important to him. In the first place, he says, that *Joseph, fils de la Perdrix Blanche*, is not produced on the part of the Crown, and that he had reason to expect him, because he was taken by the commissioner for the Indian territories, in pursuance of the proclamation of his royal highness the Prince Regent, for the purpose, as *he* understood, of being a witness in this cause, and *Mr. Coltman* confirms this representation. Another circumstance is this. He says that *Captain D'Orsonnens* acted as an officer, whilst he (Captain D'Orsonnens) swore, that he was no more than "*a simple individual.*" I will avail myself of this opportunity to state to you that it has not appeared to the *Court* that *Captain D'Orsonnens* has committed himself. I make this mention of our opinion, not to direct your's, but because the Court thinks it due to *Captain D'Orsonnens*, to say that those circumstances, which the Prisoner's counsel believe to be contradictory, have not appeared in that light to the Court. At the same time, we say again that it is *you* who are to judge. The evidence of Captain D'Orsonnens as to that part of the case is confirmed by *Mr. Nolin*, who says, upon his cross-examination, "that he does not believe that Captain D'Orsonnens was "in the service of the Hudson's Bay Company, but that he was there "to see the country, as a companion to my Lord Selkirk." (*page* 85.) Another circumstance which the Prisoner has put in proof is the capitulation made between *Mr. Dease* and *Captain D'Orsonnens*. Captain D'Orsonnens has sworn that this capitulation was required by the particular circumstances of the interior country as well as by such as regarded himself and his people. There is some other evidence which the Prisoner says is very important. It is the evidence of *Captain D'Orsonnens*, of *La Bissonicre*, and of *Chretien*, on the subject of *Fort Lake La Pluie*, and of the intentions of *Captain D'Orsonnens* to take it *before* he left *Fort William*. Captain D'Orsonnens says, "that he had "not any intention nor any orders from any one whomsoever, to take "the fort of Lake la Pluie." *La Bissoniere*, one of the Prisoner's witnesses, says, on the contrary, that he spoke of taking that fort *before* he left Fort *William*, and he relates the conversation in which Captain *D'Orsonnens*, as the witness tells us, said "that he could easily take "the fort of Lake la Pluie, without any danger, my people are clever "fellows, and I have cannon." (*page* 126.) On the subject of these cannon there is a good deal of difference between the testimony of Captain *D'Orsonnens*, and that of *La Bissoniere* and *Chretien*; and the Prisoner. by his counsel, says there is a good deal of contradiction in Captain *D'Orsonens*' own testimony upon his examination *in chief*, and his

cross-examination. *La Bissoniere*, speaking of the cannon, says, " I " saw Captain D'Orsonnens go away with his people for *Lake la Pluie*, " and he took with him two pieces of cannon. *They were mounted on* " *wheels;* they belonged to the North West Company, and had been " taken from Fort William." In his cross-examination he says the same thing; " when Captain D'Orsonnens went away for Lake la Pluie, " the cannon were embarked, *and they were ready mounted.*" (*page* 127.) *Chretien*, speaking of this circumstance, says, " At the time when I " was in the tent at the portage of Lake la Pluie, I saw two pieces of " brass cannon, *mounted upon their carriages*, landed at Captain *D'Or-* " *sonnens'* camp. I had before seen these two pieces of cannon on the " vessel of Fort William, and I recollected them well." (*page* 137.) On this subject Captain *D'Orsonnens* says, " *I had no cannon mounted* " till after *De Reinhard's* declaration had been made. Mr. Vitchie " brought me two small pieces, on the fifth or sixth of October." (*page* 81.) He said that on his cross-examination. On his examination in chief he swore, " We went by the way of Fort William; we had can- " non, *but not mounted, nor any materials for so doing.* They were in- " tended for Red River, for the defence of the colony." (*page* 58.) This constitutes the difference between the evidence for the Crown, and that on the part of the Prisoner; and, also, the apparent variation between that of Captain D'Orsonnens on his examination in chief, and his cross-examination. It is for *you*, we must say again, to judge, but perhaps the apparent variation in Captain D'Orsonnens' testimony may be reconciled, when we consider that Captain D'Orsonnens always speaks of De Reinhard's declaration, that is to say, his evidence relates an occurrence as happening before, or after, his declaration; thus, when speaking of these cannon, he says, " that he had not any cannon *mounted* " till after De Reinhard's declaration." With regard to the variation between Captain D'Orsonnens and the witnesses for the Prisoner, it is your province to say to whom you will give credence. Another circumstance which the Prisoner's counsel have pleaded, is, that the *Meurons* had influenced him to make his confession to Captain D'Orsonnens, and that his mind was not free. But I fear that this circumstance will not avail him, because all the witnesses agree that the Meurons did not arrive till *seven* o'clock in the evening, and his declaration was made at *two* or *three* o'clock in the *afternoon*, or, at the latest, *four* o'clock.

Yet another circumstance in favour of the Prisoner, occurs in the evidence of *Mr. Coltman.* He was very near the *United States*, so near that *Mr. Coltman* says *he* was apprehensive he might escape, but he did not attempt to escape. He is entitled, gentlemen, to be considered as *not* guilty, until the moment when you are satisfied, and that you must

say, by your verdict, that he *is* guilty. To enable you to say whether he *is guilty or not guilty*, you will weigh well the evidence on one side and the other. If, when you have considered it, you set his confessions aside, and, with them, the evidence of *Faille* and *La Pointe*, you will say that he is *not guilty*. On the contrary, gentlemen, if you do not perceive sufficient grounds to satisfy your conscience that it is your duty to discard from your belief, as well his *confession*, as the evidence of Captain *D'Orsonnens*, of *Faille*, and of *La Pointe;* I say, that if you are convinced, according to his confession and the other evidence, that the Prisoner is *at all* guilty, I am bound to tell you, that he is *guilty* of the crime of *murder*. The evidence does not prove any excuse for the Prisoner. The crime, supposing you find that it has been committed, is the crime of *murder*, and of murder *alone*. The circumstances of his case have not left you the alternative of reducing the crime to any other degree of homicide. It is not possible to say, that it is *manslaughter*, *nor any other* degree of homicide than that of *murder*.

Gentlemen,—You are now to exercise your judgment upon the whole of the testimony which has been given, both on the part of the Crown, and on the part of the Prisoner, and, in so doing, I desire that no more attention may be paid to any thing, which I have stated to you relative to the facts and circumstances of the case, than so much as is necessary to conduct you to the consideration of the points which you are called upon to determine, as well *for* as *against* the Prisoner. Every verdict, ought to be *emphatically*, the verdict of the Jury sworn to return it; and, therefore, let the opinion, which you give, be entirely *your own*.

Reflect upon what you owe to the *Prisoner*, but do not forget what you owe to the community at large. Pay the most serious attention to the whole of the evidence which has been laid before you, in this long and very important trial, on *both* sides; and, when you have duly and conscientiously weighed it with deliberation, and have satisfied your consciences, give that verdict which shall enable you, at all times, to say, "We have well and truly tried, and true deliverance made, be-"tween our Sovereign Lord the King, and the Prisoner, *Charles De* "*Reinhard*, and we have given a *true verdict*, conformably to the evi-"dence and to our oaths."

[The Jury then retired under the care of constables, sworn in the usual manner; after they had been out of Court about an hour, a message was sent to ascertain if it was likely they would soon agree, the answer being in the negative, the Court adjourned till *seven o'clock*, *P. M.* Having re-assembled at that hour; shortly after the Jury entered, and being called over, were found to be all present.]

The usual formalities being gone through, the foreman, (*Mr. Lewis*

lée,) returned the following verdict: " *According to the evidence which* " *has been given, we find him (the Prisoner,)* GUILTY *of* HAVING AS- " SISTED *in the Murder, upon the* EIGHT COUNT."*

Chief Justice Sewell.—Gentlemen, I took the precaution of telling you this morning, if you recollect, that your duty would be to say, whether the Prisoner *is* or *is not* guilty of the crime of *Murder;* because the alternative was not, by the circumstances of the case, left to you of *reducing* the crime to any *other* degree of homicide. If he be at all *guilty* according to the indictment, he is guilty of the crime of *Murder*, and of *Murder alone.* If you find him guilty of *aiding*, *assisting*, &c. you in effect find him guilty of the crime of *Murder* upon the *fourth* count as well as the *eighth.*

The foreman of the Jury repeating the verdict in the same terms, the *Chief Justice* said, " *and on the fourth count also: How say you?*" On which *Mr. Stuart*, with some emotion, begged of the Court " *that* " *the verdict might be taken and entered just as the Jury gave it.*" The *Chief Justice* said, " *the Court could not enter a* CONTRADICTORY *verdict*, " *or one contrary to law.*" To which *Mr. Stuart* replied, that " there " was no danger of such an one being *returned*, if the Jury's understand- " ing of the offence was taken, and that it was *their* province to say of " what *they did intend to convict the Prisoner.*" *Mr. Justice Bowen* explained that *both* counts being precisely alike, the Court could not allow the Jury to *convict* on the *one* and to *acquit* on the *other*—" for" (said he,) " what would be the *consequence* of so doing?—The verdict be- " ing *contradictory* it would necessarily be *void.*"—*Mr. Stuart* renewed his request, saying, he had nothing to do with consequences. The Court repeated its determination not to take a contradictory verdict, to which Mr. Stuart rejoined, " I presume your Honours will take the verdict " such as the Jury gave it, which is all I ask."

The *Chief Justice* recommended the Jury to retire, and reconsider their verdict; upon which *Mr. Lavallée* explained to the Court, that considering the Prisoner guilty of *assisting* MAINVILLE, who *committed the Murder*, the Jury found him GUILTY upon the *eight* count.—*Mr. Justice Bowen* strongly urged upon the Jury, that if they intended to find the Prisoner *guilty of having been present, aiding Mainville*, they must find him guilty upon the *fourth* count, as being that which *first* recounted the charge of MAINVILLE'S having killed OWEN KEVENY with a gun, the Prisoner, CHARLES DE REINHARD, being then and there present, aiding and assisting in the murder. He pointed out the

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* " *Suivant le témoignage qui a été rendu, nous le trouvons coupable d'avoir assisté dans le Meurtre selon le huitième chef.*"

only difference between the *two counts* to be, that by the *eighth*, the crime of some *other* persons accused was reduced, but not that of *the Prisoner*; and concluded by endeavouring forcibly to impress upon their minds the impossibility of saying, that the Prisoner was GUILTY upon the *fourth*, when as far as regarded DE REINHARD, (who alone was on trial,) both counts were precisely the same.—The *Chief Justice* briefly enforced *Mr. Justice Bowen's* view of the duty of the Jury, adding, with great earnestness: "It is, *therefore*, that we request you will reconsider your ver-" dict, because if you find the Prisoner GUILTY upon the *eighth* count, " and at the same time say that he is NOT GUILTY upon the *remaining* " counts, it is *a manifest contradiction*, for (as regards the Prisoner,) *the* " FOURTH *is precisely the same as the* EIGHTH."

[*Mr. Stuart* again urged the Court to receive as the verdict—" that " the Prisoner is *guilty* upon the *eighth* count, and *not guilty* on the " others;" and was answered, that it would be a *contradictory* verdict, and therefore the Court could not receive it. He then pointedly asked, " am I then to understand that the Court *refuse to receive* the verdict?" And the *Chief Justice* replied, " certainly, *Mr. Stuart*, we *do* refuse. " You ask us in the face of all the world, to let a Jury say, that *Main-*" *ville* DID with a gun kill *Owen Keveny*, *De Reinhard* being present " aiding, &c. and at the same time to let them also say, that he DID " NOT kill him, and that he WAS NOT SO PRESENT. The thing is ab-" surd."—*Mr. Vanfelson* commenced an address, but was stopped by the *Chief Justice*, who remarked, that " no assistance was wanted by the " Court in entering the verdict, nor should a particle of justice be with-" held from the Prisoner." *Mr. Stuart* observed, that all he asked was to have the verdict as given by the Jury taken, alleging that it was *their* province to give it, and the Prisoner's privilege to have it entered of record, be it what it may; adding, " what may be the consequence " hereafter, I have nothing to do with, I only want the verdict as they " gave it by their foreman." *The Court* stated, that the Jury had *not* given a verdict, as they were not agreed. To which *Mr. Stuart* rejoined, that they had better retire; but they had said to the officer of the Court, " that *they were agreed.*" The *Chief Justice* directed the fourth and eighth counts, *as far as related to the Prisoner*, to be read; which was done by *Mr. D'Estimauville.* (The *eighth* was read *throughout.*)]

Mr. Stuart.—I hope your Honours will lay down the law to the Jury, on the doctrine of *accessary before, and after, the fact*, as probably they have not clearly comprehended the application of *a point of law* to the evidence.

Chief Justice Sewell.—There is no such charge in the indictment as that of accessary before, or after, the fact, against *De Reinhard*, and

therefore there can be no necessity of explaining the law to the Jury on a point not involved in this case. The verdict against De Reinhard cannot be manslaughter, or any diminished homicide. The charge against him is murder, and murder only.

Mr. Stuart.—I know it; but the intention of the Jury in the verdict which they returned would, had it been entered, have appeared. It was *not* to find him *guilty of murder*, but of being an accessary.

Solicitor General.—They cannot find such a verdict, for as your Honours have remarked there is no charge against the Prisoner, but that of murder.

Chief Justice Sewell.—I will not certainly permit the Jury to say the Prisoner is guilty of *any other crime* than that of murder which is charged, but I will enter a verdict of *not guilty*, if returned by the Jury, with the greatest pleasure.

Mr. Stuart.—I humbly submit that there could be no impropriety in your Honours explaining to the Jury the application of the principle of an accessary before and after the fact, inasmuch as, from the verdict offered by the Jury, it is evident they were about finding him so, and what the *effect* of their so finding would be, I humbly contend, is not a question for our consideration at the present moment. *They* are to give a verdict, and as it is to be *their* verdict, I submit we are bound to receive it, without enquiring what *may, or may not, be* the *consequences* of that verdict.

Chief Justice Sewell.—The law upon the subject of accessary before or after the fact is so clear that there can be no misunderstanding upon the subject, and it is equally clear that, in no point of view, does it apply to this unfortunate man. An accessary antecedent to the commission of the offence, becomes so by aiding, proposing, counselling, encouraging, or by any acts which may have direct tendency to excite to the perpetration of crime. An accessary after the offence is committed, becomes so by receiving the felon, aiding his escape, or any other conduct the tendency of which is, to shield the perpetrator of the crime, or enable him to escape the course of justice. Those are principles of law. This indictment states to us a fact, namely, that De Reinhard, of malice aforethought, killed the deceased, or was present, aiding and assisting another in the act, and the law, in either of the cases, constitutes such a charge, a charge of murder, and of murder only.

Mr. Vanfelson rose, but was not permitted to address the Court.

[The *Chief Justice* recommending the Jury to retire, *Mr. Levallée* observed: "Mainville began to commit the murder, and *De Reinhard* "was present and assisting him. This is my verdict, and the verdict of

" my colleagues, according to the evidence we have heard, and we will " return no other."—The Chief Justice remarked, " that is to say, gen- " tlemen, that he is guilty upon the *fourth* AND *eighth* counts;"—to which *Mr. Levallée* replied, " it is the same thing."—The clerk of the Crown having, under the direction of the Court, entered a verdict of *guilty* upon the *two* counts, read it to the Jury; but upon asking their concurrence in the usual form, " and so you say *all*," one of them (*Mr. Trahan*,) said " *No*, not on the *two* counts." The Court observing, " Gentlemen, you must be *all* agreed; you had better retire," it was suggested that *Mr. Trahan* had not distinctly heard the *fourth* count; upon which, the part of it relating *De Reinhard* was read again by direction of the *Chief Justice*, who, after enquiring if the Juror had rightly heard it, and being answered " *yes*," begged him to attend to the *eighth*, and see if there was the least difference between the two. The eighth count having been read, *Mr. Stuart* wished to know if the *whole* of the fourth count was read, to which the *Chief Justice* observed, that *all relating to De Reinhard* had been, and that it was unnecessary to read what related to the *accessaries*, to enable the Jury to decide on the guilt or innocence of the *Prisoner*. This not being satisfactory to *Mr. Stuart*, it was remarked by *Mr. Justice Bowen*, that the accussed having chosen to have *separate* trials, the charges against them must be *severed* also—that the counts then in discussion, containing two distinct charges, and against different persons, it could be of no consequence to read to the Jury, on the trial of the *principal*, the accusation against the *accessaries*. *Mr. Stuart* again expressed his dissatisfaction, adding, (with some emphasis,) " I beg again to repeat, very respectfully, to the Court, that all " I ask is that, if the Jury are to find on a count, they may hear it read, " indeed *I know of no* RIGHT *that exists to keep any part from them.*"]

Chief Justice Sewell.—What is it, Mr. Stuart, that you propose to effect by having it read? What do you wish, or mean, to have read?

Mr. Stuart.—I mean, with great deference to the Court, to contend that the *whole* of the fourth count should be read, and that the officer of the Court had no right to keep back any part of it.

Solicitor-General.—Your Honours must perceive, that the object of all this is, merely to distract the attention of the Jury. My learned friend cannot propose to himself any other object by this course. What have the charges against *M'Lellan*, and others, to do with *De Reinhard*?

Mr. Stuart.—All I mean is, to ask that the *whole* count may be read. The Court will take such a course as they think proper. I feel it my duty to *ask* it.

Solicitor-General.—I contend, may it please the Court, there are no reasons whatever for granting the application; the present is not like a

formal reading of the indictment, such as at the *arraignment* of a Prisoner, it is merely for the information of the Jury. For the sake of regularity, not that we can have any objection, from any effect the reading might produce, but solely from a desire to proceed regularly, I trust that the Court will not consider it necessary to grant this application.

Mr. Justice Bowen.—If any important point, or material averment, was contained in the remainder of the count, which it was necessary for this Jury to understand, I should be clearly of opinion that it ought to be granted, but I really cannot see the necessity, or propriety, of such reading.

Chief Justice Sewell.—What *good* it is to produce I know not, but let it be read.

[The *Attorney-General* rose, to oppose the reading, but at the suggestion of the *Chief Justice*—to which *Mr. Justice Bowen* stated, that though he did not see that any *benefit* could arise from it, *he* had no objection to the reading—did not persist in the opposition. *Mr. Stuart* observed, his reason for urging its reading was, that if the Jury were *to find* on it, not *one word* ought to be omitted.—The *Court* remarking, that the *eighth* count had been entirely read without the omission of *even a name*; *Mr. Stuart* said, he only complained of the *fourth*. The *Chief Justice* observed, " then you want the *names of the accomplices* read, for " that in fact is all that remains to read;" to which *Mr. Stuart* rejoined, " I do not know *what* may remain; I want the *whole* read, be it what " it may."]

The fourth count was then read throughout by Mr. D'Estimauville.

[During the whole of the discussion, of which the foregoing is an *accurate compendium*, the Prisoner appeared to be agitated, and upon the reading of the count being ended, he exclaimed, with considerable emotion, (*in French,*) " *Mr. D'Estimauville*, have you finished with this *in-*" *stigation of the devil?*" (*To the Court.*) " Will you permit me to say " a few words?" The *Chief Justice* saying, " certainly, yes,"—he continued, " I am mortified to hear the indictment read so often, it would " seem to be the *beginning* of my trial, when I thought it would have " been *finished*. It is *long* enough as it *is—ten days;* and I am mortifi-" ed, much mortified that it should be made *longer* by reading the in-" dictment."—The Jury then consulted together in their box for a few minutes.]

Mr. Levallée, (addressing the Court.)—We find him *guilty* on the *eighth* indictment, that is, the eighth *count* of the *indictment*.

Chief Justice Sewell.—What do you say to the *fourth* then, which is the *first* in order, and precisely the same as the *eighth?*

Mr. Stuart and Mr. Vanfelson.—We hope the verdict will be taken as they give it.

Chief Justice Sewell.—Gentlemen, you *must* let us understand what they *do* intend to say, before we can record their verdict. I only want to know, what, in point of fact they do say, so that I may enter it, if it is a verdict according to law.

Mr. Levallée.—We find him guilty on the eighth count, of *assisting*.

Chief Justice Sewell.—We request you will retire. It is a *contradictory* verdict, and *we cannot receive it*.

A Juror.—It is useless for *me* to retire, it is my verdict, and I will give no other, were I to die of hunger.

Chief Justice Sewell.—If you will listen to me for a moment, I will explain to you. By *this* verdict, you say, upon your oaths, that he is *guilty* upon the *eighth count*, and you *also* say, upon your *same oaths*, that he is *not guilty* upon *all the others;* to say *so* is a contradiction, for the *fourth* and the *eighth* are *exactly alike*, *the same entirely*, *word for word*, *as to De Reinhard.*

The Jury then retired and shortly after returned into Court, and were called over.

Officer of the Court.—Gentlemen, are you agreed upon your verdict.

Jury.—Yes, Sir.

Officer.—Who shall speak for you?

Jury.—*Mr. Sasville.*

Officer.—Look at the Prisoner. How do you say? Is he guilty of the murder and felony, in the manner and form in which he stands charged in the indictment, or not guilty?

Mr. Sasville.—*He is guilty* upon the *fourth and eight counts of the indictment, and not guilty upon the others.*

Chief Justice Sewell.—Let it, *Mr. Waller*, be so entered of record.

Clerk of the Crown, (by the Interpreter.)—Gentlemen of the Jury, hearken to your verdict, as the Court have recorded it. You say that, "you find CHARLES DE REINHARD GUILTY of the FELONY and "MURDER, whereof he is accused, in *manner and form* as he stands "charged in the FOURTH and EIGHTH *counts of the indictment*, and that "he is NOT GUILTY of the rest of the indictment"—*and so say you all?*

Jury.—Yes, Sir.

Chief Justice Sewell.—Do you hear and understand it, gentlemen?

Mr. Sasville.—Yes, your Honours.

Chief Justice Sewell.—Gentlemen, before you retire, the Court have to present you with its thanks, and not only the thanks of the *Court* but those of the *district at large*, for your attention to this case.—

Gentlemen, the *Court for itself*, and *in the name of the district*, most *sincerely thank you*, not only for your *attention*, but for the *manner* in which you have performed your duty, during this *long* trial. Gentlemen, you are discharged.

[The *Attorney-General* immediately moved for *judgment* against the Prisoner, and the enquiry being made, "what he had to say, why the "Court should not proceed to *judgment and execution* against him?" *Mr. Vanfelson* stated, that he proposed, for divers reasons, to except to the judgment. After mentioning some of them, he added, that their objections would be more fully stated by his colleague; and as *Mr. Stuart* restated those of *Mr. Vanfelson*, it is only necessary to observe, that *one* was to a point of *law*, and others related to the conduct of the *Jury* and of the *officer*, who had them in charge.

Mr. Stuart intimating, that it was their intention to submit *two* motions to the Court; the one in arrest of judgment, and the other for a new trial; and that the first step would be founded on the question of jurisdiction,—The *Chief Justice* observed, that the question of *jurisdiction* was done with, as *the Court* had given *its* decision upon it, after a solemn argument, whilst *the Jury* had, by their *verdict* given *theirs*.—He then directed *Mr. Stuart* to state the solid *legal* gounds upon which he proposed to discuss the motions.]

Mr. Stuart.—I will state them explicitly to the Court. If the Court differ with me, my duty is of course to submit, but I will briefly state the course I propose to adopt, and it will include the grounds of objection submitted by my learned friend who is with me. My *first* objection goes to the question of *jurisdiction*, which, although considered by the Court to be a point upon which they have decided, I may perhaps be permitted to renew to a certain extent. I do not desire to go again into an extended argument on the subject, but I do hope that in an incidental manner I may be permitted, to renew the consideration of the jurisdiction, as connected with the question of *locality*. I proceed to say,

2ndly. That neither *this* Court, nor any *other* Court in *Canada*, has the right to try for *felonies* committed in the Indian territories. Power is only given them, I contend, for the trial of *misdemeanours*.

3dly. Waiving the last objection, I submit that, if power to try for felonies is given to *any*, still it is only to such as are the *usual Courts*, and not to a Court of Oyer and Terminer.

My *fourth* objection will be, that two separate returns of the Jury have not been allowed by the Court to be taken; although, as I contend, the Prisoner is entitled to have the verdict of the Jury recorded, without any consideration of what the consequence of that verdict may be.

Chief Justice Sewell.—We cannot allow you, *Mr. Stuart*, to argue the propriety of our refusing to receive and record an *illegal*, because a *contradictory*, verdict. All that we said to the Jury was this, if you find the Prisoner *guilty* of being present, aiding, and assisting *François Mainville*, to murder *Owen Keveny*, it must be, upon the *two* counts that charge that crime, or if guilty upon *one* count only, then you must find him so upon the *first* which charges the offence, which is the *fourth* count, but we cannot take, such a verdict upon the *eighth*, because it would amount to an absurdity, involving in it a direct contradiction, as the *fourth* is verbatim the same, as far as the crime of the Prisoner is set forth. We cannot, Mr. Stuart, permit you to argue upon our refusal to record what was an *illegal*, because a *contradictory*, verdict.

Mr. Stuart.—I merely state my objections, and must of course bow to the authority of your Honours. My next objection, waiving the former ones, is, that by the 43*d* of *the King*, *cap.* 138, it is only *subjects* of the King, committing "offences in the Indian Territories," over whom the jurisdiction of this province is extended, and that, in the present case, the Prisoner is not stated in the indictment nor have the Crown officers proved him, to be a *British subject*, and I might add that, in point of *law*, he is not so.

Solicitor-General.—I beg to remark that it was not necessary for *us* to prove that he *was* a British subject. By the act upon which he was indicted, if *he* had shewn that he was wrongfully or illegally indicted, he was entitled *forthwith* to his acquittal, but the *onus probandi* lies upon the Prisoner.

Mr. Stuart.—A further objection is *misconduct* on the part of the *Jury*, and of the *officer* who had charge of them, during the time they were absent from Court. I beg I may not be understood as intending any thing *personal* to the Jury, very far from it, but I am given to understand, that the Jury have been allowed *to converse* with persons on the subject of *this* trial, and that the officer who had them in charge has *himself* held conversations on the subject *with* them. In reference to the gentleman thus alluded to (*Mr. D'Estimauville,*) I beg to remark that, as of course it must be under *affidavit* that this allegation must be sustained, we shall give him every information in our power as early as possible, so as to enable him to meet, and if he can, rebut the charge.

Solicitor-General.—As it will, perhaps, to rebut the charge be necessary that we prepare *counter-affidavits*, I should wish some time to be appointed for *us* to receive those of the Prisoner, that a suitable arrangement may be made for the discussion of the motion of which my learned friends have given notice; at present, it is impossible to fix a

precise time, as we cannot foresee to what extent the opposite side may carry their support of this charge.

After some explanation between the Court and the counsel on both sides, the Court was ordered to be adjourned till twelve o'clock on Saturday, the 30th instant, and accordingly was so adjourned.

Saturday, 30th May, 1818.

PRESENT AS BEFORE.

[*Mr. Stuart* stated to the Court, that the Prisoner's counsel being called upon last night to state their grounds of opposition, they had from the circumstances which had been communicated to them, felt themselves bound to *include* the objection to the conduct of the *Jury*, and of the *officer* who had had them in charge, although they had not examined the evidence to sustain the validity of it, but that their enquiries *since* had satisfied them it was their duty to abandon the objection. He added, " we feel, however, that we should be wanting to the gentleman, " (*Mr. D'Estimauville,*) in whose care the Jury were placed, after hav- " ing, for a moment, questioned his conduct, if we did not thus publicly " declare that he most correctly fulfilled his duty as an officer of this " Court, and that we were misinformed. For the argument we are not " at present prepared, having been completely occupied in examining " into the evidence by which it was supposed that the allegation just " alluded to, could be sustained, we therefore hope for the indulgence " of the Court."]

After some conversation between the Court, the Crown officers, and the counsel for the Prisoner, the Court was adjourned till Wednesday, 3d of June, at ten o'clock, A. M.

Wednesday, 3d June, 1818.

PRESENT AS BEFORE.

THE *Chief Justice* enquiring if the gentlemen were ready to proceed with the argument, Mr. *Stuart* intimated that Mr. *Vanfelson* would open it, and *he* should follow him in support of the motions for *a new trial*, and in arrest of judgment. *Mr. Solicitor-General* questioned whether it was competent to the Court to *receive* a motion for a new trial in a case of *felony*, and, as the Crown officers were prepared with authorities to shew that it could *not*, he suggested that to enter upon a solemn argument till the question of competency was decided, might be a waste of time. *The Chief Justice* remarked that, upon the motion in *arrest of judgment*, their right to be fully heard could not be questioned. The better course, therefore, *he* considered would be, to hear the Prisoner's counsel in support of their motion till they were exceeding *legal* bounds, and then to stop them, and argue the objections. As any other than this apparently direct method, would, he feared, occupy more time, and present greater difficulties, he should direct *Mr. Vanfelson*, who was to open the argument to proceed.

Mr. Vanfelson.—May it please the Court,—We shall have the honour to submit *two* motions; the first for a new trial, and the second in arrest of judgment. To support the *first*, we shall urge three grounds, *first*, That the *confession* proved by Doctor Allan, and received by the Court as coming from the Prisoner, has not been *legally* proved, and ought to have been *rejected* by the Court.

Chief Justice Sewell.—If I understand you correctly, the ground you take is, that *in receiving the confession of the Prisoner, delivered to the Earl of Selkirk, in the presence of Doctor Allan, at common law, the Court proceeded irregularly.*

Mr. Vanfelson.—With great deference to the Court, that *is* one of the points which we submit. The *second* is, misdirection to the Jury by the Court, in as much as there was no proof that *Owen* Keveny was killed: I mean there was no proof of the *baptismal* name of *Keveny*, whether it was *Owen* or *Oliver*, or any other name, and the indictment

charges it to have been *Owen* Keveny. It was, therefore, incumbent on the Crown to have proved that it WAS *Owen Keveny*, who had been killed; neither was there any proof given of the *actual death* of *Keveny*.

Chief Justice Sewell.—I must stop you, *Mr. Vanfelson*. You must confine your arguments to *legal* objections, and, upon those, we shall be happy to hear you fully. Your objections to the not proving the baptismal name of the deceased, and the want of positive demonstration of the death, are points that have been settled, and, to revive them, would be to try the cause again.

Mr. Vanfelson.—We shall have the honour to submit to the Court in the first place, the motion for *a new trial*. We believe that it will not be wrong for us to support it by such arguments as may present themselves to our minds as calculated to evince that the grounds upon which it is made are *legal* being conformable to the criminal law of *England*. I submit, therefore, very respectfully to the Court, that in proposing this motion, and urging in its support the arguments I shall presently offer, I only fulfil my duty towards the Prisoner, but, I fear, I have not correctly explained myself, and, by that means, have been misapprehended by your Honours. I propose to submit to the Court that my learned brethren, the officers of the Crown, have not proved the necessary and essential facts, namely, that *Keveny* is *actually* killed, nor that it is *Owen* Keveny who is dead. I also take the liberty of representing that we consider the *confession* of *De Reinhard*, admitted by the Court, as evidence that was not admissible.

[Here *Mr. V.* was stopped, by the Court stating that those points being already decided, they could not hear an argument upon them. *Mr. V.* contended, that at the *present* stage of the proceedings he was entitled to argue them. The *Chief Justice* expressed the readiness of the Court to hear his counsel upon *every* point that could advantage the Prisoner, but the legality of receiving the confession *had* been argued, and solemnly decided, by the *Court*, whilst the point depending on the credibility of the witnesses had been decided by the *Jury*, and, it was, therefore, impossible for the Court to hear further discussion on those points. *Mr. V.* again urged his opinion, and begged the Court to consider him as arguing on *general* grounds, though he considered, at this stage of the proceedings, so far from being beyond his privilege in bringing before the Court the receipt of illegal evidence, or its own misdirection, that it was "no unusual occurrence, but the constant practice." *Mr. Justice Bowen* observed, that points of *law* decided in the *lower* Courts were often brought up to the *superiour*, and arguments took place upon the correctness of the decision; but, he believed, no case ever was heard of, wherein a Court was called upon to hear a solemn

argument the object of which must be to induce it *to reverse it own decision.*]

Chief Justice Sewell.—It is the wish of the Court, in refusing to hear an *argument* on what is in fact already decided, (and decided after hearing argument,) in the most solemn manner, that you should distinctly appreciate our motives for so doing. The indictment charges *Owen* Keveny to have been killed by *Mainville*, the *Prisoner* being present, aiding in the murder; and the Jury have, by their verdict, declared *Owen* Keveny *was* the person killed. As to the proof of the *actual* death, the verdict equally establishes *that* point. In the absence of *positive* evidence of the death, by the body having been *seen*, the Crown officers produced a chain of testimony, from which, as they contended, the death must be *inferred*, The Jury have, by their verdict, declared that they *did* so infer, and have decided alike, that the man *is* dead, and that the man who was murdered by *Mainville*, was actually, as is charged in the indictment, *Owen* Keveny. They have decided these matters, and we cannot meddle with their decision. Their verdict is upon record, they returned it according to the credit which they gave *to* the evidence, and not *against* manifest evidence, and we cannot on that ground disturb it. Had they *acquitted* even *against manifest evidence*, we could only, *before* recording the verdict, direct the jury to go out again, and reconsider the matter, but not *after* the verdict had been recorded, then, though it was a verdict against evidence, we could not set it aside, on a prosecution properly criminal; and, though a verdict which *convicts* may be set aside, under the humane provisions of our law, it is *only* for being given contrary to evidence, or the misdirections of the judge. These rules are found in *2nd Hawkins, cap. 47. sect. 11 and 12.*

Mr. Justice Bowen.—The point is so well established, that, *after* a conviction, a motion in arrest of judgment must be on clear matter of *law*, that I confess I am surprised it should be attempted to pursue a different course.—My *Lord Hale* expressly lays it down, after conviction a motion in arrest of judgment must be on a clear point of *law*, and not of *fact*, and that if a Jury had found even *contrary* to fact, still such finding could not stay judgment, though it furnished ground for a recommendation to mercy. But a verdict being *recorded*, unless on points of law, a Court can hear nothing, as if they did, they would be a *Jury*, deciding upon facts, instead of *Judges*, administering law.

Mr. Vanfelson.—May it please the Court, I have no desire in submitting these two motions, that points already decided should be re-argued, but I *do* submit on the part of the Prisoner, under a firm persuasion that it is my duty, and equally my right, to do so, two motions,

the one for a new trial, and the other in arrest of judgment. In support of these motions, I have the honour to submit that "*the confession of the Prisoner ought not to have been received;*" again, I submit, certainly, with great deference to the Court, that the directions given to the Jury by the President of this Court, upon the two points, namely, the *christian* name, and the *death*, of Keveny, were not conformable to law, and that, in following those directions, the Jury found the death of *Owen Keveny*, without any proof.

Chief Justice Sewell.—We cannot allow you to argue the points you mention. You are, by this course, asking us to take up the cause again, and go through it from beginning to end, point by point, and say whether or not the *Jury* have rightly decided on the matters of *fact*, and whether the *Court* have decided rightly on the question of *law*. We cannot do it; if you have a motion for a new trial, or in arrest of judgment, let them be supported by legal arguments, and we are ready to hear you at any length your inclination, guided by a sense of duty, may lead you to address us.

Solicitor-General.—I request permission again to remark, that it appears to me to be a question whether the Court have *power to grant* a new trial in a case of *felony*, and, if they have *not*, that it will be useless for my learned friends to occupy the time of the Court upon a subject which, perhaps, if *strictly* looked into, ought not to be *entertained at all*. I take it to be a settled point, that in no offence higher than a misdemeanor, can a new trial be granted, and, if that opinion is not erroneous, I should consider that my learned friends cannot be permitted to argue the former motion, but must confine themselves to that in arrest of judgment.

Mr. Stuart.—I by no means consider that it is a *settled* point that a new trial cannot be granted in a case of felony. The course, I believe, which is to be observed in *this* argument is, that we shall be first heard in support of the motions, and the learned Crown officers will reply to us. In so doing, they will oppose such authorities, as their judgments esteem to weigh against us, but I beg that *we* may be permitted to state the grounds upon which we rely, without interruption. My learned friend, *Mr. Vanfelson*, will open to the Court our reasons in support of the motions, and I shall have the honour to follow him. If we exceed the fair limits of discussion, or advance illegal positions, we shall be stopped by the Bench, and, as is our duty, bow to any correction which its wisdom may dictate.

Mr. Vanfelson.—The grounds then which I have the honour to submit, in support of the two motions which we propose to lay before the Court, namely, for a new trial, and in arrest of judgment, are nume-

rous. In the *first* place, I say that the Prisoner's confession before my *Lord Selkirk* ought not to have been *received*. *Secondly*, I submit, with the greatest deference, that the Court *misdirected* the Jury with respect to the *boundaries* of the province of *Upper Canada*; and *thirdly*, I maintain that the Jury have found that the Prisoner assisted *Mainville* to kill *Owen* Keveny, contrary *to*, or rather without *any* evidence, inasmuch as the officers of the Crown have not put in proof that *Keveny* is *actually* dead, nor that it was *Owen* Keveny, who was killed by *Mainville*.—These are the means by which I propose to support the motion for a new trial.

Mr. Justice Bowen.—And they are grounds upon which, I confess, I think we ought not to hear you. On the face of them is stated what certainly is not a fact, for the verdict of the Jury directly and flatly contradicts it. The verdict of the Jury, declaring the Prisoner to be "guilty of the felony whereof he was accused, in manner and form as "he stood charged in the indictment," explicitly says, that the man *is* dead, and equally declares that it *was* OWEN KEVENY whom the Prisoner was present aiding and abetting in the murder of. I confess that I cannot reconcile myself to hear you argue points already decided by the Jury, and without at this moment expressing an opinion upon *Mr. Solicitor's* suggestion as to the propriety of *at all* entertaining a motion for a new trial in a case of *felony*, I remark that, *if* permitted, it must be argued on *legal* grounds, and not upon matters of *fact*, for they were never within the sphere of *our dictum*; *they* belonged to the *Jury*, who have decided upon them according to their judgments and consciences; *we* have recorded *their* decision, and have no right to meddle with it. As to the *confession*, you have been heard upon it, and the *Court* solemnly pronounced as its decision that, *as evidence at common law, it was admissible, and could not be withheld from the Jury*, it, therefore, went to them, and, in the exercise of their discretion, *they have* (unfortunately for the prisoner) *believed it*. Under these circumstances, I think, it is going too far to endeavour to *support* a motion for a new trial, by calling upon *us* to say that in so deciding we acted contrary to law. As to *entertaining* a motion for a new trial, I repeat, *at present I give no opinion*.

Attorney-General.—I beg permission of the Court to contend, before my learned friend resumes his observations, (as it may save time) that in receiving a motion for a new trial in this case, we are acting in contradiction to first principles. This is a case of *felony*, and, I believe, that it is settled, beyond dispute, that no new trial can be granted in cases of felony. I find no authority, which goes the length of saying that a new trial can be granted, in a case of felony, under *any* circum-

stances. The attainment of substantial justice, your Honours know, is not a principle by which a Court can be *altogether* governed in granting or refusing a new trial *Law* and *usage* combine to limit this discretionary power, even in *ordinary* cases, where the *legality* of them is not disputed. In support of this doctrine, I refer to 6 *Term Reports, page* 628, the case of the *King* versus *Mawbey, Bart. and others.* In the argument upon *that* case, the principle I have just submitted is contended for on the part of the Crown, and although *Lord Kenyon* did not altogether recognize the general opinion, yet he said, " In one class of of-" fences, indeed *those greater than misdemeanors, no new trial can be granted at all.*"

The Attorney-General read at considerable length the argument on the part of the Crown, by Mess. (*now Baron*) GARROW *and* LAWES, *and continued;*

In delivering judgment upon the case, *Lord* KENYON says, *page* 638. " It has been contended that inasmuch as defendants, who have " been *acquitted* in criminal cases, cannot be *tried a second time*, the ne-" cessary consequence was, that in *this* case we could not grant *a new* " *trial*, even though we were clearly of opinion *that the other two defen-*" *dants had been improperly convicted.* But I think the rule was cor-' rectly stated by the counsel for the defendants, that in granting new " trials the Court knows no limitation, (except in some excepted cases) " but they will either grant or refuse a new trial, as it will tend to the " advancement of justice. In one class of offences indeed," his lordship adds, " *those greater than misdemeanors, no new trial can be granted at all.*" After citing such an authority as my *Lord Kenyon*, I consider it unnecessary to trouble your Honours further, as no argument of mine can, by possibility, add to the decision of so learned a judge. I proceed to remark upon another of my learned friend's proposed points, which I consider it would be equally inexpedient for the Court to entertain, viz. his objections to the want of *proof* of *the baptismal name* and of the *death* of *Keveny*. They are circumstances involving in them matters of *fact*, upon which the *Jury* have given us a decision, by which we are *bound to abide.* If their decision is *wrong*, there is another quarter in which a representation can be made, and if proper that it should be so, will no doubt be made with success. A word as to the *confession before Earl Selkirk*, which my learned friend states to have been *irregularly* received. It was not *put in* as " *a confession made before Earl Selkirk ;*" it was undoubtedly *offered* as such, but was refused admission, *except* as, a piece of evidence at common law. The Court decided, after hearing the learned gentlemen against it, that it *must be so received*, it is, therefore, useless

to argue upon that point, as I take it your Honours will not be disposed to listen to an argument against *your own* decision. As to the Jury convicting *against*, or *without*, evidence, it is equally unnecessary I should trouble the Court, as I consider the motion which that position was intended to support, viz. one for *a new trial*, must be refused to be heard. I beg to refer to another authority upon this point, 13, *East*, *page* 416, the *King* versus *the Inhabitants of Oxford*, in a note,(b) "In "capital cases at the *assizes*, if a conviction take place upon *insufficient* "evidence, the common course is to apply to the Crown for a pardon, "upon a full report of the evidence sent in by the learned judge to the "secretary of state for the home department, but I am not aware of *any* "*instance of a new trial being granted in a capital case*, and upon the de-"bate of *all the judges* in *Margaret Tinkler's* case, in 1781, it seemed to "be considered that *it could not be.*" Under these authorities, which, for the sake of preserving regularity, I have produced as conclusive against receiving a motion for a new trial, I presume the gentlemen will be compelled by the Court to restrain themselves to the motion in arrest of judgment.

Mr. Stuart.—With permission of the Court, I will state very summarily the ground proposed to be occupied by the Prisoner's counsel on these motions, for I beg to say, that I consider it by no means a settled point that a motion for a new trial cannot be entertained and granted in a criminal case, such as the present. It is true that, as the learned Attorney-General has shewn, there is *a dictum* upon the subject ——

Chief Justice Sewell.—Allow me to interrupt you, *Mr. Stuart*, to say that we will hear you fully on every point which consistently with our duty we can do. You know we should be glad to hear you on every point which your judgments consider it to be your duty to urge on behalf of this unfortunate Prisoner, but the solid, legal points in arrest of judgment, must not be confounded with reasons to suspend the execution of the judgment as they must be addressed to another quarter. It is not necessary to determine at the present moment how far a new trial can or cannot be granted in cases of felony. We will hear you fully on the grounds of your legal, indisputably legal, motion, that in arrest of judgment, and *incidentally* you may touch on other matters, but, if you exceed legal bounds, you must of course be stopped—I think this course will save much time and enable you, Gentlemen, who have to support the motion to attain fully the objects you have in view without trenching on what appears to have been fully considered, and in fact determined.

Mr. Vanfelson.—Then, may it please the Court, I submit on the motion in arrest of judgment two positions. That *this* Court has not jurisdiction or power, under the statute of the *43d of the King*, to take

cognizance of offences committed in the Indian territories; and, *secondly*, that if the Court can take cognizance of *some* offences, it has not the power to try any *felony*. By the *first* position, I say generally, that a Court of *Oyer and Terminer* does not originally possess any jurisdiction to take cognizance of offences committed in the Indian territories, and that the statute of the *43d of the King*, does not give it to *any* Court of the province of *Lower* Canada, but to the *Courts*, to the "*usual Courts*" that is, the ordinary Courts. It is well known the statute of the *34th of the King*, commonly called the "*Judicature act*," divides the province of *Lower Canada* into three districts, in each of which a Court was erected, and, I submit to your Honours, that it is in these district Courts—the district of *Quebec*, of *Montreal*, and of *Three Rivers*—we must recognize the "*usual Courts*" of this province.

Let us now look for a moment at the *act of* 1803, and we shall see that it contains two or three very remarkable things. Let us first read its *title* and *preamble*, and then compare them with the statute of the *34th of the King*, *cap.* 6.

Mr. Vanfelson having read the title and preamble continued;

Here we perceive the evil requiring a remedy. It was, that great crimes and offences had been committed in the Indian territories, and, for want of a competent jurisdiction to try them, the offenders had escaped with impunity. The remedy, which this act provides, is to give to the Courts of the Provinces of *Lower and Upper Canada*, authority to try crimes and offences so committed, "*in the same manner as if they* "*had been committed within* (one or other of) *those provinces*;" the act further declaring that they "*shall be, and be deemed to be, offences of* "*the same nature, and subject to the same punishment.*" Before we refer to the "*Judicature act*" let us examine the 3d section of this act for what is said concerning the *Courts* of the two provinces.

Mr. Vanfelson read it throughout, and continued;

I pray the attention of the Court to the words "may and shall be "prosecuted and tried in the *Courts* of the Province of *Lower* Canada," &c. whilst, in speaking of *Upper* Canada, this section says *the Court*. What *Courts*? assuredly the Courts of the three districts established by the act of the *34th of the King*, to which we shall presently refer. The reason this distinction was made between the two provinces is obvious—the province of *Upper* Canada has but *one* Court, whilst that of *Lower* Canada contains the Court of the district of *Quebec*, the Court of the district of *Montreal*, which, together with the Court of *King's Bench* for the district of *Three Rivers*, constitute the *usual Courts*. Let us

now advert to the 34th of the King, which is entitled " An act for the " division of the province of Lower Canada, for amending the Judicature " thereof, and for repealing certain laws therein named."

[*Mr. Vanfelson* read the *preamble* and *first* clause, which divides the province into *three* districts, and defines the *boundaries* of each—the *second* and *third* constituting in each of the districts of *Quebec* and *Montreal* a *Court of King's Bench*, and establishing terms for holding the *criminal* sessions thereof; and the *eleventh* section which enacts that, for the district of Three Rivers, a Court of King's Bench shall sit in two terms of every year at the town of Three Rivers, for criminal and civil causes—and then continued his argument.]

It is here, therefore, I submit, that we must seek for the *usual* criminal Courts of this province, and, in one of them the Prisoner would have been tried, had the offence been committed within the province.—I know very well that his Majesty has the prerogative of appointing Courts of " *Oyer and Terminer*," and that the *fourth* section of this act provides for its exercise in this province. We say nothing against this provision, we know that it is specially the prerogative of his Majesty, and of his representative, to originate commissions of *Oyer and Terminer*; but, I take the liberty of remarking, *generally*,—that such a Court is not co-equal, either in its formation or in its powers, with the Courts of *King's Bench*, and, in *particular*, I maintain that a Court of Oyer and Terminer and General Gaol Delivery, cannot be a Court designated by the act of 1803.

If we refer to the *third* section of that act, we shall perceive the impossibility of a Court of *Oyer and Terminer* possessing authority to try offences committed in the *Indian* territories, for it is given alone to " the *Courts* in which offences of the same nature committed within the " province are *usually* tried." It is only that in speaking of *Lower* Canada it is always said " *the Courts*" whereas the term made use of in relation to *Upper* Canada is " *the Court*" (although I consider that circumstance as strongly indicating the views of parliament) but, if we look further into this section, we shall find the intention of parliament so clearly expressed, that it is not possible to mistake what is meant by " *the Courts*" of *Lower* Canada. Having confined the jurisdiction, the act goes on to make full provision for the issuing of subpœnas and other processes to compel the attendance of witnesses. It appears to me that the moment we read the *terms* in which this power is conveyed, and the *persons* to whom it is delegated, it will be impossible longer to doubt that only to the Courts of the three districts created by the " *Judicature act*" was power given, or jurisdiction extended, by the 43d GEO. III. *cap.* 138.

Mr. Vanfelson read the third clause throughout calling upon the Court particularly to observe the expression " it shall be lawful for *the judges*," &c. *and continued;*

Proceeding to remark upon this part of the act of 1803, I submit with much confidence, that *this* Court of *Oyer and Terminer*, not having the *officers* of which the third section speaks, cannot be the Court intended by the expression, " *the Courts* of the province of Lower Cana- " da, in which crimes and offences of the like nature are *usually* tried"— because we perceive that the extended jurisdiction is given to the Courts in which *judges* preside. It is the *judges*, who by the act of 1803, are legally empowered to issue *subpœnas*, &c. Now, in the present Court, I say, (though with the utmost respect for your Honours,) that we have *no judges*. Your Honours sit at this moment as his Majesty's *Commissioners*, but not as *judges*. Considering this circumstance, it follows, that *this* Court cannot be the *usual* Court, because in a *usual* Court it is *judges* who preside; and in this province such a Court can only be found in the *Courts of King's Bench.*

[*The Chief Justice pleasantly remarked, that though he questioned their* power, *he hoped Mr. Vanfelson was not disposed to deny, that, in point of fact, they were* Judges, *and Mr. Vanfelson said* certainly not.]

We say again, that another difference between the Court of *King's Bench* and a Court of *Oyer and Terminer*, exists in the *nature* and *extent* of the *authority* of the one and of the other. It is necessary for this Court actually *to meet* before it can act. Before meeting it cannot even issue *a subpœna*—and why? because a Court of Oyer and Terminer has no *judges* belonging to it. The officers of such a Court, are the *King's Commissioners*, and their power is of short duration, and at the same time of a different nature from that of *judges*, from beginning to end. Were a subpœna to be issued before the Court met, there exists no power in the Commissioners to compel a witness to regard it, or to force an unwilling witness to attend. The situation of your Honours in *this* Court, as *King's Commissioners*, is altogether unlike that, you sustain as *judges* of the Court of *King's Bench*. *Your* authority as *Commissioners* of *this* Court, is like the Court itself, one of short duration, and as limited in power, whilst that of the *judges* of the Court of *King's Bench* is a permanent authority, and an authority as potent as it is permanent: for these reasons, because the power of a Court of *Oyer and Terminer* is not a perdurable one, nor sufficient even to enforce its own processes in the same way as the Court of *King's Bench*, and because the King's *Commissioners* are not *judges*, (or need not be, or though judges yet as

Commissioners they have not the power of *judges*,) we submit, that *this* Court has not power to take cognizance of offences committed in the Indian Territories, wanting, as it does, almost all the distinguishing characters of the *usual Courts*.

I would further remark, that in *making* provision for Courts of *Oyer and Terminer*, parliament has again distinctly marked the difference between the two Courts. That of the *King's Bench* of each district, is not only a permanent and powerful Court, but it is an *entire* and *complete* one in itself, having power *to execute its sentences*. A Court of *Oyer and Terminer* on the contrary, is obliged by the *fifth* section of the "*Judicature Act*," to *suspend*, in certain cases, "the execution of its "*sentences* or *judgments* until the *approbation* of the Governor, or person "administering the government of the province, shall be signified there-"on, by warrant under his hand and seal at arms." The *sixth* section also strongly manifests the difference, by directing the transmission of "the *proceedings* of Courts of *Oyer and Terminer*—the scope and sub-"stance of points ruled in evidence—their charge to the Jury—a copy "of the verdict, and of every material transaction in the cause—to the "Governor." The only *exceptions* to the *suspension* of its *sentences* and the *transmission* of its *proceedings*, are such cases as "shall not extend "to life, or limb, or transportation, nor to any greater fine, penalty or "forfeiture, than the sum of twenty-five pounds sterling."

Upon the *first* head of my argument in arrest of judgment—namely, "that *this* Court cannot take cognizance of this case,"—I have thus submitted generally that a Court of *Oyer and Terminer* does not possess an *original* jurisdiction over offences committed in the *Indian Territories*, and that the statute of the *43d of the King*, conferred this jurisdiction *solely* upon the *usual Courts* of *Lower* Canada—that these usual *Courts* must be sought in the Courts of the three districts of *Quebec*, *Montreal* and *Three Rivers*—that a *Court of Oyer and Terminer* does not accord, either in its *formation* or its *authority*, with the usual Courts, because it has no *judges*—and that *this* Court is neither perdurable, powerful, nor complete in itself, whilst the *usual Courts* of the province *are* permanent, powerful, and complete in *themselves*. I now propose to pay attention to the *second* branch of my argument; to wit, "that *if* "this Court has jurisdiction over *some* offences committed in the Indian "Territories, nevertheless it does not possess the power of trying any "*felonies*."

The act of 1803, in giving the power of trying offences committed in the Indian Territories, and parts of America therein described, to the Courts of the provinces of *Canada*, has not included FELONIES therein. It is this act alone which extends the jurisdiction of the Courts of *Cana-*

da, over offences committed in the Indian Territories; and looking to it for the extent of the authority given, we shall find it limited to the trial of "*crimes* and *offences*," to the exclusion of *felonies*. By the *preamble* we see, that what gave occasion for the act was, "crimes and "offences" having been committed in the Indian Territories. (*Preamble read.*) In the *third* section, the same description is given. (*Section read.*) After previously repeating this term several times, the conclusion of this clause in delegating the power of issuing subpœnas to the Courts, expressly gives it—in relation to the trial of any *crimes and offences* made *cognizable* by this act. In the *second* section (throughout,) it appears to me that the words are so strong, that there cannot be two opinions. [*Mr. Vanfelson read the section, remarking that the same words were uniformly made use of.*] All we have to ascertain is: what the LAW considers as "*crimes and offences?*" and certainly there is no difficulty in saying, that MISDEMEANORS *alone* are understood by the term. As from the beginning to the end of the statute of the 43*d* GEO. III. the words, "*crimes and offences*," are used. I contend, it is clear that no jurisdiction is given by it over *felonies* committed in the Indian Territories, but only over *misdemeanors*; because *felonies* are not in law considered as offences. In support of this opinion, I produce to your Honours a very recent decision of the twelve judges of *England*, in the case of a man named *Shaw*, who was proceeded against under the act of 42*d* GEO. III. cap. 85, and found *guilty* by the Jury. In arrest of judgment, the prisoner's counsel submitted that the Court could not, under the words, "*crimes and offences committed in America*," take cognizance of *felonies*. It was not denied *generally*, that the Courts of *England* had the power of trying capital felonies committed in *America*, under certain circumstances, but *this* indictment being founded upon an act which *only* gives power to try *crimes and offences* committed there, it was urged that the proceedings ought to be quashed. I think that the reason for this is plain, because crimes and offences are *misdemeanors*, and not *felonies*; and my *Lord Chief Justice Ellenborough*, in pronouncing judgment upon the motion, confirmed the position of *Mr. Selwyn*, (*counsel for the prisoner,*) that felonies were *not* included in the term crimes and offences, and therefore could not be tried under that act. Thus is seems that the Courts of *England*, and those Courts alone, are considered to have authority to try *felonies* committed in certain parts of *America*.—I have here the reports at length in the case of *Shaw*, at the service of the Court, and I believe that your Honours will find that my statement is correct.

Chief Justice Sewell.—I shall certainly be glad to see them, though I do not think my *Lord Ellenborough* could intend to go that length.

Mr. Vanfelson.—I think your Honour will find that I have stated the decision correctly; it certainly was that " the proceedings must be " *quashed*," my *Lord Ellenborough* holding, with the counsel for the prisoner, that, under the terms *crimes and offences*, which is made use of in the 43*d* GEO. III. *cap.* 85, *felonies* could not be included ——

Chief Justice Sewell.—Yes, but the decision was confined to that particular statute. I beg your pardon, if I have interrupted you, I thought you had concluded your observations.

Mr. Vanfelson.—I was merely going to have added, that the inference I would draw from the opinion of my *Lord Ellenborough*, in conjunction with the statute of 43*d* GEO. III. *cap.* 138, is, that the reason the power of trying for *felonies* was not extended to the Courts of the *provinces* by that act, was that the prerogative or authority of doing so was *intended to be exclusively* possessed by the Courts of the *parent* state, and their intention is clearly manifested, I think, by the term " *crimes* " *and offences*" being constantly used, which, according to this late decision, does *not* include felonies.

Chief Justice Sewell.—This decision upon *Shaw's* case, goes no farther than to the individual act then before the judges. It was upon that particular statute that judgment was given, and, perhaps, you have shewn enough to induce *us* to say, that, under that particular statute, crimes and offences, did *not* include felonies. We should certainly say, that the 42*d* GEO. III. *cap.* 85, could have no greater power than the trial of crimes that may be prosecuted by indictment *and* by information. It was in fact, an extension of an act passed in 11-12th WILLIAM III. to *other* cases. The question *Shaw's* case hinged upon was the point, whether, in an act *so* constituted, *felonies* were included in the term made use of, and it was said by the judges, *no;* for the plain reason, *felonies* cannot be prosecuted by *information.*

Mr. Vanfelson.—I shall now offer to the Court some reasons for suspending the judgment, if your Honours will not allow that I have sufficiently established the motion I have submitted. As they may not be strictly applicable to go in *arrest* of judgment, I propose, with the permission of the Court, to notice them *incidentally.* The first remark of that nature which I make is this :—That the confession of the Prisoner, proved by *Dr. Allan*, is not a confession according to law, and ought not to have been received. Let us look at this confession, and we shall see that it was made with all the formality of the statute of *Philip* and *Mary*, which says, that " in any felony whatever, the magistrate be-" fore whom any person may be taken for manslaughter or felony, be-" fore he shall commit the accused, shall cause him to be examined, and " shall take the examination of such prisoner, and the information of

" those who bring him before him, as to the fact and attending circum-
" stances, and the same or as much of them as shall be of importance in
" proof of the said felony, shall cause to be put in writing within two
" days after the said examination, and the said writing shall be certified
" in the same manner and form, and at such time, as the same would or
" ought to be done, if the prisoner were admitted to bail," &c. &c. This is the description of an examination under the act of the 2d and 3d of *Philip and Mary*, *cap.* 10. and this confession is invested with all the formalities prescribed by the statute. *All* the formalities, do I say? We find *more* than all. The anxiety to make this confession stronger was such that there were *witnesses* to it who have been produced on the part of the Crown; but I would submit to the Court that this circumstance ought rather wholly to destroy it, inasmuch as it was originally a confession according to the law of *Philip and Mary*, which direct that the confession, or examination, of any person accused of felony, shall be reduced to writing, and certified by the magistrate taking the examination; they do not direct that the *witnesses* shall certify it, but the *magistrate*. I say, therefore, that this confession was a *formal* confession, and ought to have been *proved* by the *magistrate* who had taken it, or that, otherwise, it ought not to have been *received* by the *Court*. But it will be said by the officers of the Crown, that the confession was only received by the Court as an *individual* confession, and not one under the statute.

Mr. Justice Bowen.—The Court received it—as a paper *proved* to be in the hand-writing of the Prisoner, and *by him* delivered to the *Earl of Selkirk*—at *common law*.

Mr. Vanfelson.—Yes, your honours, but the argument which I very respectfully submit is this, seeing that this confession was *in fact* a formal confession, it ought *not* to have been received at *common law*, and moreover that the rule of law which requires that the *best* evidence shall *always* be produced was *disregarded* when it was *so* received. Admit for a moment that the confession had been *offered* at common law, in *that* case *we* should have said, " no; this confession, this paper, or what-
" ever you please to call it, cannot be proved by *Dr. Allan*, for this
" plain reason, that *he* cannot be the *best* witness to the circumstance,
" and the *law* requires the *best* evidence." The confession was not made to *Dr. Allan*, the paper was not delivered to *Dr. Allan*; no; the confession was made, and the paper was delivered, to my *Lord Selkirk*, therefore it cannot be pretended that *Dr. Allan* is the best witness. It is most assuredly my *Lord Selkirk*, who (it is a matter of public notoriety) is within the jurisdiction of the Court, and ought to be produced by the Crown. As it has been remarked in the course of an argument

which took place during this trial, it does not become the officers of the Crown to tell *us* that *we* might have produced him. It was *their* duty to produce him to prove this confession, whether as a *magistrate*, or as the *best* evidence at *common law*. I beg your Honours' attention to this position, that if we look upon this paper as a *confession under the statute*, we say, that in that case, it ought to have been proved by *the magistrate;* and that if we look upon it as an *individual confession*, then, we say that it was the *duty* of the Crown officers to prove it by the evidence of my *Lord Selkirk*, because his lordship was the *best* witness; and, inasmuch as his lordship has *not* been produced, the Prisoner is taken by surprise. Incidentally, I submit that the *actual death* has not been proved, and also that, if a man named *Keveny* has been killed, it yet has not been proved that it was *Owen* Keveny. The witnesses have simply spoken of *Keveny*, but have no more said *Owen*, than *James*, or *John*, or *Peter*. The confession has it *O*. Keveny; not *Owen* any more than *Oliver*, I say, therefore, there is not a syllable of proof that *Owen* Keveny was the man that was killed. If we find ourselves compelled to admit, that there was one named *Keveny* killed, the only evidence on the subject of the *christian* name would induce us to believe that the gentleman in the service of the *Hudson's Bay* Company who was killed, bore the name of *Oliver* Keveny.

Solicitor-General.—I would submit that the testimony of *Mr. Miles Macdonell* so completely removes all difficulty as to the person killed being, as he is named in the indictment, and as the jury, by their verdict, have declared, *Owen* Keveny, that doubt could hardly be entertained upon the subject. Indeed, whatever might exist *before* the verdict, I should consider to be legally removed or set at rest after the recording a verdict finding the Prisoner guilty in manner and form as he was charged in the indictment.

Mr. Stuart.—I beg to remark, in reply to the *Solicitor-General*, that we are addressing ourselves to the Court upon *law*, and every thing connected with the *record* is a matter of law. To his observations relative to *Mr. Macdonell's* testimony, setting at rest *all* difficulty upon the identity of the person said to have been killed, and the person once in the service of the *Hudson's Bay* Company, I do not see that it can obviate even the *smallest*. The utmost length *Mr. Macdonell* went was, that a man named *Owen Keveny* was some time in the service of the *Hudson's Bay* Company, and that some two or three years before, he saw him, but had not since. How that is to remove or set aside all, or any, difficulty as to the man killed not being *proved* to be *Owen* Keveny, or how it has a tendency to *shew* that it *was Owen* Keveny, I confess I cannot comprehend.

Mr. Justice Bowen.—I confess I sit, and have for some time sat, very reluctantly, to hear an argument upon either point, as I consider them both to have been decided by the voice of the country, whose peculiar indeed *exclusive* right, it is to decide. The Jury, in their verdict, finding the Prisoner guilty in manner and form as he stood charged in the indictment, declared that *Keveny is dead*, and that it was *Owen* Keveny, whom the Prisoner aided *Mainville* to kill, because the indictment charged him with having helped, aided, and assisted, *Mainville*, to kill *Owen* Keveny, not *Oliver*, or any *other* Keveny, but *Owen* Keveny. On the point of *law* involved in this objection, relative to the proof or description of the deceased's name, it is hardly necessary that I should say any thing, thinking as I do, that we ought not to hear you on this part of the subject *at all*. If there is a material error, so as to render the indictment *insufficient*, the Court will feel itself bound to arrest the judgment. But supposing that the question had been raised at an *earlier* period, or, that the Jury had not, by their verdict, said *Owen* Keveny was killed, what would have been the effect? The object of description is *certainty*, and it might be a question whether the indictment is not sufficient for that purpose. It is not an uncertainty as to the *defendant* himself, and we know that it has been *adjudged* that an indictment for an assault, against JOHN, *parish priest of* D. in *the county of* C. is *good*, without even mentioning his surname; this is mentioned in *2nd Hawkins, cap.* 25, *sect.* 1 *and* 2, and he argues "if a *wrongful* surname of "the defendant *himself* will not vitiate an indictment as hath been more "fully shewn, *section* 69, surely *a fortiori* the *omission* of the surname "of any *other* person will not vitiate it, *especially* where such person is "otherwise described with such *certainty* that it is impossible to mistake "him for any other." I merely mention *this* for your consideration, but, returning to the question of how far we ought to hear you *at all*, I am clearly of opinion that our doing so must *imply* that we have legal doubts of the correctness of tha Jury's finding, that we consider it a verdict against evidence, or contrary to his Honour the Chief Justice's directions. Now, if doubt does *not* exist in our minds, we ought not to hear you argue what the Jury have solemnly decided, according to my opinion.

Mr. Vanfelson.—I submit to your Honours that I am not *beyond* the legal right of argument *upon* the point, and that it *is* a point, which, in strict legal construction, I am privileged *to* argue. Upon this ground, I urge again, that the finding of the Jury, with *no* evidence of the *actual death*, is contrary to the opinion of the greatest and soundest lawyers that ever practiced at the bar or ornamented the bench. *Lord Chief Justice Hale* is exceedingly pointed on this subject; he says, *vol.*

2d. *page* 290. " I would *never* convict any person of murder, or man-
" slaughter, unless the fact was *proved* to be done, or *at least the body*
" *found dead*, for the sake of two cases, one mentioned in my *Lord*
" *Coke*, *P. C. cap.* 104, *page* 232, a *Warwickshire* case, which is men-
" tioned in a note," and the other stated by the learned judge (*Hale*) himself.

Mr. Vanfelson read the cases at great length, and continued;

These two cases induced the great and very learned judge to declare, that in a case of murder or homicide, *he* would *never convict*, unless the *fact* was absolutely proved to have been committed, or that at least the *dead body* had been found.

Mr. Justice Bowen.—Well, now apply your law to the case before *us;* you remember also there are *his own* confessions.

Mr. Vanfelson.—Yes; but I say that his confession was not proved in conformity with the rules. *Hawkins* says, *book* 2*d. cap.* 46, *sect.* 44, " but if a confession be *not taken in writing*, parole testimony *may* be " given of it, and the prisoner thereon convicted, although it is totally " uncorroborated by any other evidence." *Here* the confession *was* written, and I submit that the *parole* evidence of *Dr. Allan* is against the rules; now, if we take away the confession of the Prisoner, there does not remain a tittle of evidence of *the death* of *Keveny*. What my *Lord Hale* considers it necessary should be proved is the *actual death*, either by the corpse having been found, or the murder having been seen to be committed; and the wisdom of this opinion is confirmed by a case in *Leach*, *vol.* 1, *case* 127. *the King* versus *Jane Warrickshall* (*in a note.*) " Three men were tried and convicted for the murder of Mr. *Harrison*, " of *Camden*, in *Gloucestershire*. *One* of them, under a promise of *par-*
" *don*, confessed himself *guilty* of the fact. The confession was not, " therefore, given in evidence against *him*, and a few years afterwards " it appeared that Mr. *Harrison* was *alive*." In this case, unfortunately, the man was *executed*, and afterwards we see *Harrison* was found to be *alive*. There is another case of the same nature which occurs to me at the moment, the case of a man who, in a scuffle with another, either fell, or was thrown, into a river, and who not making his appearance afterwards for some time, the other (being tried) was found guilty of his death. Some years afterwards the man, who was believed to have been drowned, was discovered to be alive. The *application* I am desirous of making is very plain. It is that in *this* case, the *dead* body has not been seen, no more than the *perpetration* of the offence, and that, with the exception of the *confession*, there is not a tittle of evidence of the *actual death*, and further, that *this confession* even is not evidence

of the death of *Owen* Keveny. I submit with confidence, considering I have with me the opinion of so learned a judge as my ***Lord Hale***, that, in a case of murder, the *only certainty* there can be of the *death* of the individual charged to have been *killed*, must arise from the murder having been *seen*, or *at least* from the body having been *found*. I say that it is absolutely necessary, before finding a prisoner guilty of murder, that the *actual death* be undeniably proved, and in *this* case I submit that it has *not* been proved up to the *present moment*. With these cases before our eyes we ought to be extremely cautious. It is upon these grounds that I have the honour to submit the motions; in the first place, for *a new trial* for the Prisoner; and, if the Court does not grant that, I offer the observations in arrest of judgment. My learned brother, *Mr. Stuart*, will follow me, and will more fully explain to the Court other reasons which we allege in support of the motions. *My* arguments upon the *two* positions go to this length; that the Court is not possessed of *any* authority to try offences committed in the *Indian territories*, or, if it has such a power for *smaller* offences, it does not extend to any *felony;* and further that the *confession* ought not to have been received, that the *actual* death of *Keveny* has not been proved, that there is not one word of evidence which goes to prove the murder of *Owen* Keveny, and that it is not at all certain that *Owen* Keveny is not at this moment still alive. I am bound to make my acknowledgments to the Court for the attention with which I have been heard, and I hope that the motions I have submitted will be of benefit to the Prisoner.

Chief Justice Sewell.—Before Mr. Stuart commences his arguments, I wish to remark that in all the cases you have alluded to relative to circumstantial evidence, the obvious question of the *actual death* must have been left to the Jury. In this case, the question of the actual death of the man, and who it was that was killed, (if any person was,) went to the Jury, surrounded with all the circumstances which, in your opinions, lessened or destroyed their weight and credibility. The evidence of the *death*, of *who* killed, of *who* was present, aiding, and *who* it was that *was killed*, have been credited by the Jury, who have found the Prisoner guilty, in manner and form as he stood charged in the indictment. It is *their* verdict, and on circumstances upon which *they were the sole judges.*

Mr. Justice Bowen.—In stating there was no evidence but the Prisoner's own confession, I think, you appear to have forgotten the evidence of the two voyageurs, Faille and La Pointe, as well as the circumstance of the clothes being in the canoe and the division of the *butin.*

Mr. Stuart.—The first question before the Court, appears to me to be, can a new trial be granted in a case of felony? or, to meet more di-

rectly Mr. Solicitor-General's objection, the enquiry is; ought the Court to grant a new trial in the case of Charles De Reinhard? Upon the former branch of the inquiry can a new trial be granted in a case of felony? I find a *dictum* of my *Lord Keynon*, that it could not, but I find also a later decision than that of my Lord Kenyon, in *East*, p. 416, in which it is said that the point is not settled in England, but that the impression seemed to be that there could not be a new trial in a case of felony. On the one hand we have then the *ditcum* of a learned judge, entitled, unquestionably, to respect, but still we cannot forget that it is *only* a *dictum* not a *judgment* rendered after hearing, in solemn argument, all that could be urged in support of a contrary opinion, but incidentally expressed in considering a case of a very different kind. On the other hand we have an undoubted authority, declaring that the point had not (at a period subsequent to the dictum of my Lord Kenyon,) been settled in England. I conceive the door is now open to argument in its broadest shape. I shall trespass shortly on the time of the Court, to make a few observations on the question raised, as to whether motions for a new trial in capital cases, can be entertained? To me it appears quite clear that they can, and why should they not? Motions are heard daily for new trials in civil cases, and daily are granted, and I humbly contend that, in accordance with, the mild and humane spirit of British law, they should be more fully entertained in criminal, than in civil, cases. For what is the distinguishing feature of our criminal jurisprudence?—a carefulness of life: but refuse to entertain a motion for a new trial, and our civil code is infinitely more careful in protecting our property, than our criminal law will be in preserving the lives of the accused. Another reason in support of my position, that a motion for a new trial ought to be even more fully entertained in criminal, than in civil cases, is this, that a Jury in a civil case are liable to a writ of attaint for corrupt conduct, whilst in criminal cases a writ of attaint will not lie against a Jury. If the motion for a new trial cannot be entertained, or granted, in criminal matters, there is no remedy, there is no legal remedy, to the prisoner, however wrongfully convicted. Suppose a capital conviction, with no evidence to justify it—if a new trial cannot be granted, than there is no remedy, because the insufficiency or total absence of evidence, can form no ground for a motion in arrest of judgment. I am aware it may be said, that in such a case the effect, with reference to a prisoner, would be the same; as, the Crown might, and would, pardon the prisoner. This may be so—but it is not the less true that the prisoner would be without remedy in the Court, wherein the verdict was rendered. Again, in trials, let them be conducted with whatever caution they may, superintended by whatever talent and in-

tegrity, error may creep in, misdirection may be given, or omissions may be made, by the best and most enlightened judges, whilst, by a peculiar anomaly, in criminal cases, no counsel is heard on behalf of a prisoner. All that the Jury hear, for the purpose of assisting their judgments, either on the law or the facts of the case, is the judge's exposition of the one and the other. And as the best and most enlightened may err, the door ought to be opened wider, rather than closed, to the introduction of the only remedy that can be applied to the consequences of such error, omission, or misdirection. I call upon the learned Crown officers, in opposing this doctrine, to shew me the principles upon which their opposition is founded. I call upon them, after I have shewn that the point is as yet unsettled in England, to substantiate by argument, in the absence of authority, the (to my mind,) strange proposition, that a remedy shall not be applied to an error affecting the life of a man, whilst they would extend it to every case of mere property. I call upon them to say, why the mouth that has been closed during a prisoner's trial for his life, (by, as I said before, a peculiar anomaly, which does not allow counsel to be heard on his behalf,) is to remain sealed after his conviction, whatever may have been the error, omission, or misdirection that occasioned it. I contend that the entertaining a motion for a new trial in all cases, criminal as well as civil, is in the discretion of the Court, who will grant or refuse it, as apears to them most consonant to the ends of justice, which I take to be the governing principle of all judicial proceedings.

Mr. Justice Bowen.—Admitting your principle for a moment to be correct, what would you gain? If prisoners are to be entitled to a new trial, must not the Crown be equally so, and where is the system of new trials to end?

Mr. Stuart.—I beg the Court's pardon, but it is agreed on all hands that a verdict of acquittal ends proceedings. I might refer to innumerable authorities, that a verdict of acquittal cannot be disturbed, upon the equitable and humane maxim, that "a man shall not be brought "into danger for one and the same offence more than once." The distinction is stated in *Viner*—word *Trial:* It is found in the second section, under the general head of, "*new trial granted, in what cases, in respect of the action being criminal.*" "A new trial will not be granted "where the defendant is acquitted in criminal and capital cases, but "otherwise it is, where he is convicted"—Liev. 9. *Mich.* 12 Car. II. B. R. Anon.—Indeed there is a case of a defendant's being discharged of a verdict, and receiving a new trial, as late as 26th Elizabeth.

Chief Justice Sewell.—In the case you refer to, in the time of Elizabeth, the new trial was granted before the recording of the verdict, in

such a case probably the same thing would be done again. Upon a disagreement of the Jury, the defendant was asked if he would be discharged of the Jury and their verdict, and he agreed to it; he was tried by another Jury upon the same indictment, was found guilty, and had judgment to be hanged. It is *Mansell's* case, I presume, that you referred to.

Mr. Stuart.—It was, Sir, ——

Chief Justice Sewell.—Then it is one of another kind, as a new trial was granted there, before the verdict was recorded. The verdict of the Jury has been recorded in this case, and the question is how can it be set aside?

Mr. Stuart.—There is another in *Hawkins*, where a new trial was granted after the verdict had been recorded. I cannot, at this moment, refer to the page of *Hawkins*, but I will send it to your Honours.

Chief Justice Sewell.—Do, if you please, for I do not recollect it.

Mr. Stuart.—I will. I speak with confidence on the subject, as I was looking at it this morning. And the reason of this distinction appears to be that the King, in whose name all criminal prosecutions are conducted, is not interested in the indictment farther than the maintenance of law and right concerns him, and that, if twelve of his subjects say, upon their oaths, that his peace, crown and dignity, have not been infringed, it is reasonable to suppose that he will be satisfied with such finding, and this principle has been recognized and acted upon when new trials have been moved for, in cases of acquittal in misdemeanors, *3d Salk.* 362. pl. 4. Having thus cleared away the difficulty raised by my learned friend, the *Solicitor-General*, upon the question of competency, we enter at once upon the motion to set aside the verdict of conviction, and grant a new trial in the case of *Charles De Reinhard*. It was necessary thus to clear the way to this motion, because it is only *before* a motion in arrest of judgment that it can be heard. The rule is "one shall not move for a "new trial *after* motion in arrest of judgment; but, after motion for a "*new trial*, he *may* move in arrest of judgment." In support of the motion which we thus submit, I have the honour to contend ——

Chief Justice Sewell.—Had you not better, *Mr. Stuart*, combine your objections, that is, state all you have to offer on any particular point, whether it may refer to the evidence or to the direction of the Court. It will have a tendency to abridge the argument, and save time, without excluding any thing you may be desirous of offering.

Mr. Stuart.—I will adopt that course.—On the motion to set aside the verdict, and for a new trial, I shall contend, that the paper purporting to be the confession of the Prisoner, received as evidence on his trial, was a confession taken, under the statute, before a magistrate as pre-

pears from the very face of it, and was irregularly received as a confession at common law. This confession, if not used as a confession under the statute, ought not to have been permitted to be used at all. If this were otherwise, the rule that proof of the examinations of prisoners must be made, either by the justice of the peace, or the clerk, would be nugatory. It might at all times, be evaded by producing the confession, as a confession at common law. Had the best evidence been produced, either regarding it as a confession at common law, or under the statute, still the effect would have been the same to the Prisoner, as the same individual would have been produced, the *Earl of Selkirk*. In truth the rule above adverted to is but a corollary of that general rule that the best evidence the nature of the case affords, is the only evidence that can be received. There can be no question that, had this paper been in the hand-writing of *Lord Selkirk*, or his clerk, it would not have been received, unless they were here to prove it, and the circumstance of its being in the Prisoner's writing, does not alter the argument at all; as no greater legal certainty is given to it. The acts of *Philip* and *Mary* do not require that the magistrate should take the examination in his own writing, but that the examination shall be put into writing, and signed by the magistrate, and, upon the trial, shall be proved by him, or his clerk. An additional reason might be urged from the general necessity of proving that at the time of making the confession the person was *free*, or if *not*, that the restraint imposed was a *legal* restraint, and that no improper inducements were held out to obtain the confession, and who is to prove this but the magistrate? If the confession is to be received at *common law*, still upon the principle of having the *best* evidence, the necessity presents itself again, who can best prove that no promise or menace was made use of to induce a confession? Certainly the answer is immediately, he to whom the confession was made, and applying this reasoning to the present case, either as a confession at common law, or one under the statute, it was necessary to have produced the *Earl of Selkirk*. But I go a step farther, and leaving the *general* rule, I say that, in the *present* case, it was specially requisite, from the very extraordinary nature of the circumstances which are connected with it, that *Lord Selkirk* should have been brought here by the Crown, if he did not come here himself as a magistrate with his returns, &c.—though it might have well been expected that his own anxiety, in a case where personally he was so much, and his own honour so deeply, concerned, would have outstripped the tardiness of a legal obligation to appear—for, at the time of making this confession, *De Reinhard* was under restraint, a restraint imposed by my *Lord Selkirk*, the which, if not imposed by magisterial authority, must necessarily have been an illegal duress, and

had been so from the 19*th* of *October*, a period of ten days, the confession being delivered to *Lord Selkirk* upon the 28th, and three or four days after he was set at liberty, a very strong circumstance certainly, and one upon which had my *Lord Selkirk* been here, as it was his duty to have been, and as his own feeling, I should have imagined, would have urged him to have been, and in that witnesses box, he might, (for he only could,) have given us some information. At present, it only can be mentioned as a circumstance peculiar to the case itself, and one which I greatly regret that, in deviating from the general, and as I have always thought the unalterable, legal rules that confessions taken before a magistrate must be proved by the magistrate, and that upon all matters, whether civil or criminal, at common law, the best evidence is required, we are left in the dark about, exposed to all the suspicions which will suggest themselves as to the circumstances, which first led to the imprisonment of this individual, and after he had confessed himself to be guilty of a murder, the circumstances which occasioned—what? his being confined more closely? guarded more carefully? No;—but what those circumstances were which, after this confession, occasioned his being set at liberty. All this information, so important, not only to the Prisoner, but to the cause of substantial, impartial justice, we are shut out from, by a course which, we contend, exposed the Jury to the influence of that which, although allowed to be given in evidence, was not legally so.—*Lord Selkirk* is within the jurisdiction of this Court, and could have given better evidence than *Doctor Allan*. This part of my argument I conclude by saying, that, in our judgments, the proof which the Court received of the paper-writing was not according to law, there is, however, one point more, connected with the confession, which I have omitted noticing, I beg, before proceeding to the next objection I have to submit to the Court, that I may be permitted to advert to it. It is that the Crown, having offered a paper-writing, and succeeded in getting it admitted as good evidence against the Prisoner, the *whole* ought to have been admitted, the entire paper should have been received, the entire paper should have been given to the Jury, we argue that it was not in the power of the Crown, after producing a paper, to sever it.—We contend, that all must go, or rather should have gone, to the Jury, or that none should have been handed over to them. We further submit, that it is no answer to say, that the confession was received at common law, and therefore the certificate of the magistrate was unnecessary for the Jury. We say, and feel ourselves warranted in so doing, that all that was on the paper was proper evidence to go to the Jury, if any part of it was entitled to find its way to them, and that it was not competent to the Court to enquire what the contents of any part of it might

be; if a discovery was made that a part was a magistrate's certificate, that it contained his examination of a person making a confession, or that it was the confession itself, still the certificate ought, as forming a part of the paper produced, to have gone to the Jury. I will put a case, suppose this certificate stated, that under his examination the prisoner had been contumacious, and had refused to answer certain questions, and thereupon had been stretched upon a rack, and told he should suffer its pains unless he answered the questions put to him, and being relieved, he then wrote his confession; on his trial it is made evidence at common law against him, being proved by some bye-stander, I should ask, ought not such a certificate to go to the Jury? Would it be any answer to say, the paper the prisoner wrote and delivered to the magistrate is received at common law, and therefore the magistrate's certificate is not required, it is not evidence? No, certainly not; nor, as we contend, is it in this case. It would have been proved and received as evidence, had the confession been made so under the statutes of *Philip* and *Mary*, and though received as a paper-writing at common law, ought not, according to our view of the subject, to have been kept from the Jury.

The second point which I shall have the honour to present is one that, of course, I offer with great diffidence. It is that this honourable Court, in its charge to the Jury, misdirected it upon two points; first, as to the limits of his Majesty's province of Upper Canada, and also to the interpretation of the western boundary, as settled by the act of 1774, in its explanation or construction of the term *northward*, which your Honour directed the Jury, must be considered to mean *due north*. In renewing, to a certain extent, that which your Honours might consider as already decided, I beg to mention that it is not my intention to touch upon the former part of the objection, because it was argued to its full extent, and your Honours have pronounced your decision upon it, but the latter objection was by some means omitted. It will be in the recollection of your Honours that, on that occasion, we contended that the province of *Upper Canada* exceeded in its limits the extent which bounded the antient province of *Quebec*. That point, may it please the Court, having been discussed, and determined, we do not propose to renew the argument. But that which it is my intention to address the Court upon, is the construction given to a part of the preamble to the act, usually called the *Quebec* act. I will read a part of these boundaries, so as to introduce the point I intend to argue fairly to the Court: after tracing the line to the northwest angle of the late province of *Pennsylvania* it goes on to describe its course thus, " and thence along the *western* boundary of " the said province until it strikes the river *Ohio*; and along the bank of " said river westward to the banks of the *Mississippi*, and *northward* to

" the *southern* boundary of the territory granted to the merchants adven-
" turers of *England* trading to *Hudson's Bay*, &c. &c." Upon this portion of the boundary it is that I propose to found my observations, and the objection which, with great deference certainly, I state to the opinion which your Honours hold is, that *northward*, means to continue along the banks of the *Mississippi*, according to the course of that river, which is in a *northward* direction, though not *due north*. A construction warranted by law and usage and more consistent with the intentions of the act as expressed therein.

Chief Justice Sewell.—That, *Mr. Stuart*, is the same point which we have already decided. We heard you and *Mr. Vallière*, in solemn argument upon all the points connected with the boundaries, both in relation to the *Upper* province and the *American* line, and gave you our solemn decision upon them. We have followed it up by taking the verdict of the Jury upon that solemn decision. That verdict declares that the offence was committed in " the Indian territories, or parts of *Ame-*
" *rica*, not within the limits of either of the provinces of *Upper* or
" *Lower* Canada, or of any civil government of the *United States* of *Ame-*
" *rica*," and the Jury have so found, after we had charged them on the law of the subject, and that such as we laid them down were to be considered by them the boundaries of his Majesty's provinces of *Upper* and *Lower Canada* in relation to each other, and to the *United States* of *America*. We cannot alter that; it must be to another quarter that you must make your appeal, to that quarter where this case must finally end; indeed, after having given our decision, you ought not to raise the question. The Jury, under our directions as to the *law*, have decided the *fact*, with which we did not meddle, having no authority to do so. They have decided that, according to our defining of the boundaries of Upper Canada, and the line of separation between his Majesty's possessions and the late provinces,—the *Dalles* are in the Indian territory, or parts of America, not within the province of *Upper or Lower Canada*, or of any civil government of the *United States* of *America*. If we have done wrong, you know how to remedy the error, and you may depend that every opportunity will be given to enable you to avail yourselves of the mercy of the Crown, but we cannot, without legal grounds are shewn to us, disturb their verdict. We cannot hear you upon the point of *jurisdiction* again, the question being, as far as lies in us, already settled.

Mr. Justice Bowen expressed his entire concurrence with the Chief Justice, and added, that he had a long time sat with sensations of regret to hear the discussion on the former point; that its admission was greatly at variance with his own sense of propriety although he had not interfered.

Mr. Stuart.—If that is the opinion of the Court, I shall not urge it farther, but proceed at once to the third point, which I propose to adduce in support of my motion for a new trial, viz:—that no legal evidence has been produced to the Jury of the *actual death* of *Owen Keveny*.

Chief Justice Sewell.—I cannot hear you, *Mr. Stuart*, upon that point either. You know that it has been equally solemnly decided, and by the same authority. It was a fact, and solely with the Jury, and they have decided that the death has actually occurred. Their verdict solemnly declares to the Court and to the world, that *Owen Keveny* was murdered, and we cannot allow you to say, that he was not, and hear you argue upon the assertion. You know we cannot—then why attempt it?

Mr. Stuart.—Then I shall procced immediately to the motion in arrest of judgment. I propose to argue, *first*, That this Court has no power to try any offence whatever committed in the Indian territories; and, *secondly*, that if it has a jurisdiction, it is a jurisdiction confined to the trial of misdemeanors, and is incapable of trying any *felony*. Before I enter upon the question itself, I must look at the act upon which this indictment is founded, and when I so look at it, I find it to be "an "act for extending the jurisdiction of the Courts of Justice in the pro- "vince of *Lower Canada* and *Upper Canada* to the trial and punishment "of persons guilty of crimes and offences within certain parts of *North* "*America* adjoining to the said provinces." My object in reading its title is to shew, from the very nature of the act, that its construction ought to be most rigorous and strict, seeing that it trenches upon one of the fundamental principles of the common law of *England*, viz. the association of locality with jurisdiction and trial. This statute, it will at once be remarked, gives jurisdiction to try crimes and offences committed *out* of *Lower Canada* to the Courts of this province, thus giving jurisdiction where there is no locality, and not only does this act of a British parliament assume the right of so doing as far as *England* herself may be interested therein, but also for the whole of Europe, as far as *British* subjects are concerned. Again look at the nature and state of the country; it is *Indian* territory, and it furnishes a strong additional reason for calling for the most strict and rigorous construction of such an act. Look at this country over which this act assumes power and jurisdiction, and we find it a country with no government at all, (that is, no civilized government) still in possession of the wild natives, the *aborigines* of the soil, who consider themselves the lords of it, and it may be questioned whether the power of legislation over it actually exists as a right. The right of legislation assumed by *England*, I say, may well

be doubted. How did she obtain it? There are only two ways, I contend, by which the right of legislation can be attained by any nation, viz. by occupancy, or by conquest; and by neither of these did England attain the right of legislation for the *Indian* territory. The fact of *non-occupancy* is matter of notoriety; I would ask then from whom did she conquer it? not from the *French*, for they never held an *adverse* possession of it, an adverse *possession* has never been held by *England*, for she never had *any* occupancy, no adverse possession was ever held by any *European* nation, no adverse occupancy has been maintained by *any* nation but the *United States*. *They* have been at war with some of the Indian nations, and they have held, and do still hold, an *adverse* possession of some of their lands, but they are the only nation who have acquired *Indian* lands by a course which the law of nations acknowledges as conferring the right of legislation. It might have been supposed that the *French* had a possession or occupancy, because some of their traders visited certain parts of this wild country; but their traders never dared to assume an adverse occupancy. They had their *trading* posts; how? by *sufferance*. They explored the wilderness; how? under the *protection* of its native lords, but they never dared to think of an *adverse possession*. It might, in the same way, be supposed that *England* had maintained a possession of this country, because she continued the trade which had been carried on by the *French*, and increased it, but she had not therefore any possession of the country, or any portion of it gained from the natives by conquest, and retained by actual occupancy. What occupancy has *England*, or what occupancy had *France* ever in this country? this country? none whatever. They visited it as traders, and were permitted to traffic, and erect trading-posts, but the *French* and the *British* have no more real occupancy or possession thereby, than they have of *Smyrna* or *Constantinople*, because they have established factories there. The ground I take, and the position I maintain, is this, that the British have only a precarious possession of any part of this immense and unexplored wilderness, a possession similar to that enjoyed by the *French* traders, by permission from the *aborigines*, not acquired by conquest, and therefore incapable of being transferred or ceded, nor indeed was it ever attempted to be ceded to the *British* government; for the possession of the *French* was, at its utmost extent, a permission to erect trading-posts.

Mr. Justice Bowen.—Do you intend to say, that it was *not* ceded to *England* at the treaty of *Paris* of 1763, or that the Court of *France* had no *right* to cede it? as according to your argument they could not legislate for it, having no occupancy in point of *fact*, and never having acquired the *right* of occupancy by conquest.

Mr. Stuart.—I do certainly; but I shall come to that point presently. I beg leave *now* to contend that this Court has *no* jurisdiction given to it by the statute of the 43*d* GEO. III. *cap.* 138. The title of the act I have just read, and its object is so well known that it is unnecessary to read the preamble and first enactment, wherein it is set forth at length. It recites that great crimes and offences, committed in the said Indian Territories, have gone, and may hereafter go, unpunished, and greatly increase, for the remedy whereof, this act declares that all offences committed in the said Indian country, not cognizable by any jurisdiction whatever, shall be, and be deemed to be, offences of the same nature, and shall be tried in the same manner, and subject to the same punishment, as if the same had been committed within the province of *Lower or Upper Canada;* the *second* clause of the act, authorises the Governor, Lieutenant Governor, or person administering the government for the time being, to empower persons to act as civil magistrates, and justices of the peace, in the Indian country, and makes it lawful for any body to apprehend, and take before any person commissioned as aforesaid, or to convey, or cause to be conveyed, any person guilty of a crime or offence, to the province of *Lower* Canada, and there to deliver him into safe custody, for the purpose of being dealt with according to law.—The third clause demands very particular attention, as it provides for the trial of the persons so brought down. The moment we have read this clause, it strikes me that it can no longer remain a question, that *this* Court does not possess any jurisdiction over the Indian Territory; the only act which extends the jurisdiction of the Courts here to take cognizance of offences committed there, is the one I hold in my hand, viz.—43*d* GEO. III. 138, and this act does not give any power to this Court. I will read its own declaration of the Courts to which it delegates these new and extensive powers, [*Mr. Stuart read section 3d. and continued:*] Here then we see, that the jurisdiction of this province was extended by this act, to the trial of persons committing offences in the Indian Territories " in the *Courts* where crimes and offences of the " like nature are *usually* tried, and where the same would have been " tried, if such crime or offence had been committed within the limits " of the province." The natural, the obvious, and, in fact, the only, enquiry, which this delegation of increased jurisdiction, taken in connection with this case, suggests, is, which are " the *Courts* in which of- " fences of the like nature are *usually* tried?" I answer, and contend that the answer is correct, they are the Courts of *King's Bench;* they are the Courts of King's Bench of the *three* districts, into which this province is divided, to wit, *Quebec*, *Montreal*, and *Three Rivers*, and that the increased jurisdiction is given *only* to them. I am perfectly aware

that it may be asked, may not, and do not, Courts of *Oyer and Terminer* take cognizance of crimes and offences? at once I answer, they *may* do it, and they *do* take cognizance of them, but I ask, is a Court of Oyer and Terminer the Court wherein crimes and offences of this nature are *usually* tried in this province? because it is only to the *Courts* where crimes and offences of the like nature, when committed therein, are *usually* tried, that by this act the jurisdiction to take cognizance of crimes and offences is extended. The answer, I think, must be, *no*, they are *not*. Again, I might be permitted to remark, that the words of the act are, the Courts where such offences *are* usually tried, and must therefore, *ex necesssitate rei*, mean Courts *already* established, not *to be* established, and where shall we look for Courts which, *at that time*, usually tried crimes and offences? We must look to the *Courts of King's Bench of the three districts*; for it cannot, I should think, be contended that a Court not in *existence*, not (if I might use the expression,) *born*, not yet *brought to life*, could be that *usual* Court, wherein offences of a like nature, committed within the province, would have been tried. The Courts of *King's Bench*, being the ordinary and established Courts of the province, must have been the Courts contemplated by the statute, and most correctly designated by the framers thereof, "the Courts where "offences are *usually* tried." A Court of *Oyer* and *Terminer* is a Court of *a day*, and cannot be the Court intended; the Courts of *King's Bench* are *perpetual*, and must therefore be the *usual* Courts. There is another reason which completely excludes the idea of a Court of Oyer and Terminer being intended, but the point has been argued with so much force by my learned friend, *Mr. Vanfelson*, that I shall barely mention it, as a concluding objection, which I offer to the act under consideration being construed as extending the jurisdiction of the *Lower* province to the trial of any crime or offence committed in the *Indian* Territory by a Court of *Oyer* and *Terminer*. The act in question, when speaking of *Lower* Canada invariably says, *the Courts;* the offenders are to be prosecuted and tried "in *the Courts* of *Lower Canada*, in which crimes or offences "of a like nature are usually tried, and where they would have been "tried, &c. &c."—what are these Courts? they must be, I again say, those of the *King's Bench*, for we know no other *Courts* wherein crimes and offences are *usually* tried. Again, "and it shall also be lawful for "the *judges, and other officers*, of the said *Courts*, to issue subpœnas, &c." what *Courts* but those of the King's Bench in this province, meet this description? What Courts have *judges*, and *other officers*, their sheriff, their prothonotaries, &c.? Not Courts of Oyer and Terminer assuredly, but the Courts of King's Bench, provided by the *the Judicature Act*, which not only *establishes* Courts, but to the several Courts *gives* what

is necessary to the permanent administration of justice, " JUDGES, and " *other officers.*"

As upon this part of the subject I may have to enter more fully, in examining, if it should be thought a Court of Oyer and Terminer has *any* jurisdiction over offences committed in the Indian territories, how *far* it extends, I leave it for the present, and, as I may not have succeeded in satisfying the Court that it has *no* jurisdiction over the Indian territory for the trial of any offences committed therein, I shall now submit some observations, in support of another branch of my argument, namely, that, if it should be found to possess jurisdiction at all, it is a *limited* one, viz. over *misdemeanors*, under the term " crimes and offences," and does not extend so as to enable it to take cognizance of any *felony*. I advert to the case of *Shaw*, produced at large by my learned friend who is with me, and with confidence submit it as conclusive on every point that bears upon this division of our argument. It first, I think, establishes that, although the term " crimes and offences" might in general be supposed to *include* felonies, yet that, under the circumstances of *extra-jurisdiction* conferred by this act, in opposition, or contrary, to the common law, a construction the most limited must be necessarily given to the terms, and under such a construction, the delegated power extends to no higher crime or offence than misdemeanor. The reason why this construction is given to statutes conferring an extra-jurisdiction is, that as no power to legislate over this territory or country exists in the colony or province to whose Courts authority to try crimes and offences is given, it is necessary that every thing affecting the *life* of an individual should be considered in the Courts at home, under the eye of the parent government, whither points, such as those arising in the present case, may be speedily referred, and a final decision given thereon, from an accurate knowledge of the whole circumstances having been obtained by the investigation having passed, as it were, immediately under the personal observation of those who have ultimately to decide. I contend that *Shaw's* case distinctly establishes that by the term " crimes and offences" it is only intended to give the power to try for misdemeanors, for it is proved, by the proceedings in that case being *quashed*, that an indictment, even in the Courts *at home*, for a *felony*, founded upon an act giving extra-jurisdiction over " crimes and offences" could not be supported, and, if it could not be *at home*, I suppose it will not be contended that it can be *here*. It is then, I consider, evident (however I might be disposed to admit that, under a general construction, the power of the Court might, under the term " crimes or offences," in its *own* district, take cognizance of felonies, though felonies do not, in law, come under the denomination of either

the one or the other,) that *felonies* cannot be considered, under this act of the 43d of the *King*, as comprehended under the description of "crimes or offences," because the extra-judicial authority conferred, demands imperatively that the strictest interpretation be given to it, and, in the strict legal construction of the words "crimes or offences," *felonies are not comprehended.* I contend thus, upon all the general principles of law, which are alike familiar to the Court, as they are well established; and I consider it needless to trouble the Court farther upon this head, after so late a decision on the point as the case of *Shaw*, upon which we rely. The Court will find that it goes all the extent for which we have contended, and particularly establishes the principle that the statutes of this description, (and the 42d GEO. III. *cap.* 85, on which *Shaw* was indicted, was one) where they make use of the terms "crimes or offences," do not therein embrace *felonies.*

I contend farther, that it was the duty of the King's law-officers to allege in the indictment, that *De Reinhard* was a King's subject. This also is a specialty arising from the *nature* of the jurisdiction, for I am free to admit that, in general cases, such as those which occur in *Quebec* in *Lower Canada*, or *London* in *England*, or any place known to be in the King's dominions, it is not necessary for the indictment to do more than allege that the offence was committed against the peace of our Lord the King, his crown and dignity, because every person found in his dominions owes him a temporary allegiance, and it matters not to the law what the individual is who commits an infraction upon it, whether he is a foreigner or a native subject, for, whilst receiving the protection of a government in its territory, he owes obedience to its laws. Widely different, as I conceive, is our case. We were not (admitting for a moment the entire representation of the Crown to be correct) receiving any *protection* from the British government, therefore could owe it no *allegiance;* in this wild country, destitute of the form of a civilized government, I would ask what *law*, even by possibility, we could have violated? How can it be said that we have violated the laws of our Sovereign Lord the King, when not the shadow of his law could be found there, and, *non constat*, that at the very time and place where this offence is alleged to have been committed, we were not in the acknowledged territory of some foreign power, of the *United States*, for instance. I contend that under this act, so various in its provisions, and as extraordinary as various, absolute certainty was indispensible, and that an essential featnre is wanting in the indictment, by the omission of the Crown to aver that the Prisoner was a *subject.* Admit, for the sake of argument, that the British legislature may pass a law to bind its *own* subjects in a foreign land, a point upon which, perhaps,

much might be said, but admit that every nation has the power at *all times* to legislate for its *own* subjects; will it be pretended that she has the right to legislate for those of *other* powers. It may be said the Prisoner was known some time ago to be in the British dominions, or that his occupation had made him owe allegiance. It did so, but it was a *temporary* allegiance only, which was paid and ended with quitting her service and territory. I contend this omission to charge the Prisoner with being a *subject*, and that the offence was committed within the King's dominions, is as fatal an omission as if the words, " against the " peace of our said Lord the King. his crown and dignity," had been left out. In supporting this position I submit to the Court that this offence, being charged as committed in the Indian territories, without alleging that it was in the King's dominions, *non constat*, but it was in that part of these Indian territories if committed wherein, the *act* itself acknowledges, as well as the indictment, that, unless a subject, he could not be tried.

The indictment sets forth that " *Charles De Reinhard*, late of a " certain place in the River *Winnipeg*, not known by any name, " and not comprised in any parish or county, but situated in the *In-* " *dian* territories, or parts of *America*, not within the limits of either " of the provinces of *Upper or Lower Canada*, or of any civil govern- " ment of the *United States of America*," &c, and the actdeclares, in extending the jurisdiction, that it is only to the prosecution and trial of persons committing offences in the *Indian* territories, or parts of *America*, not within these provinces, nor within the limits of any civil government of the *United States of America;* looking then at the indictment it appears to me as if it was drawn up expressly to shew that the offence *was* committed in a place where no jurisdiction could be exercised by the British government. The offence is not charged to have been committed in the *King's dominions*, nor is the Prisoner charged to be a *subject* of the King, two substantial averments to make in every indictment, but especially in a case founded upon a statute giving a jurisdiction at open war with the very first principle of our common law, that *locality* alone gives the right of *jurisdiction*. The general rule upon every indictment is, that it ought to be certain to every intent, without any intendment to the contrary, having the same certainty as a declaration, for all the rules that apply to civil pleadings are applicable to criminal accusations. Can it be said that *this* indictment is *certain?* must it *inevitably* follow that this " certain place without a " name, in the river *Winnipeg*, not comprised in any parish or county, " but situated in the Indian territory," is not within the limits of some *other* government, to whom the Prisoner must have owed a *temporary*

allegiance. The strictness with which indictments are construed, and the rigidity with which all their forms are insisted upon by judges, even in ordinary cases, where every thing being perfectly known to all the parties, it can be only for form's sake, are well known, and it is needless to advert to the circumstance, that the omission of a word, of a syllable, nay, almost of a letter, will quash an indictment; but here, in a case so completely *sui generis*, involved in doubt and uncertainty as to jurisdiction, in a case founded upon a statute which, I repeat, in giving jurisdiction to these provinces, trenches upon the very foundations and fundamental principles of the common law of England, namely, the association of locality and jurisdiction; the Crown officers, in their indictment, throw aside every rule which has heretofore guided our practice, or, when neglected, taught us, by the consequences, the necessity of being guided by them, and content themselves with simply averring that this *nameless* place is within the jurisdiction of this Court. In *Shaw's* case the *venue* is laid in a parish at *London* or *Middlesex*.

Mr. Justice Bowen.—Then you contend, I suppose, that the indictment should have stated that he the said *Charles De Reinhard*, being a *subject* of his Majesty, and late of a certain place in the River *Winnipic*, not known by any name, and not comprised in any parish or county, but situated in the *Indian* Territories, or parts of *America*, not within the limits of either of the provinces of *Upper* or *Lower Canada*, or of any civil government of the *United States of America*, but within his Majesty's dominions, and the jurisdiction this Court, *scilicet*, in the *parish* of Quebec, in the *county* of Quebec, in the *district* of Quebec, which being negatived, would have made the indictment void.

Mr. Stuart.—No, your Honour, I only contends, that it should have charged, in *addition* to the words contained in the indictment, that the place *was* in the King's dominions. It might have said *the Dalles*, or at *Red River*, or any *other* place.

Mr. Justice Bowen.—You argue that the omission of the *scilicet* is fatal, that it ought to have been laid as committed at a place which is extra-parochial, situated in the *Indian* Territories, but within his Majesty's dominions, as to wit, at *Red River*.

Mr. Stuart.—Yes, I do. The Crown officers have very wisely laid it as being *contra pacem domini regis* ——

Solicitor-General.—I beg to mention to the Court, that the omission of the *scilicet*, is not the result of any oversight on our part, but that, when preparing the indictment, it was considered by us to be mere *surplusage*, and therefore rejected as unnecessary. We charge the offence to be against the peace of our Lord the King, his crown and dignity, as sufficient.

Mr. Stuart.—That is the point upon which we are at issue, you say the offence was *contra pacem domini regis, coronam et dignitatem ejus*, and we say he had no *pax* at all to keep there, and this answer I make to shew that the averment, that it was in the *King's dominions*, was absolutely necessary. Had they done that, they would, the moment it was established, have shut out all argument on the question of his being a *subject*, because, if he was in the King's *dominions*, he owed the *King* a temporary allegiance, but, as we say he is *not* a subject, he owes no *natural* allegiance, and from *accidental* circumstances alone can it be required from him, and therefore the *obligation* should be *averred*, and should be *proved*. However much I might be disposed to doubt the *right* of *England*, (or any other nation,) to legislate for even her *own* subjects in foreign states, yet it can not, I imagine, be contended, if she does possess that right, in reference to those who owe her a *natural* allegiance, that she can *extend* it to all who, from circumstances, owe her a *temporary* allegiance only. That being the case, I say, upon the Crown's own shewing, it is not *evident* that temporary allegiance was *due* from the Prisoner, over whom the King possesses no natural authority, he being a *foreigner*, and on its own shewing, there is no proof that, instead of this offence having been committed *contra pacem domini regis*, it has not been committed *contra pacem United States*. The argument which I purpose to adduce to the Court, branches itself into two distinct propositions, upon each of which I shall briefly remark, and I hope, satisfy the Court that these omissions are fatal to the indictment. I contend, first then, may it please the Court, as a broad and marked position, that the British legislature possess *no* right to legislate for a country still in the *possession* of the Indians, and secondly, that, admitting even that they have the power of legislating for their *own* subjects *any where*, in a foreign country it is *only for them* that they can do so; upon both these points I argue that the indictment is radically defective.

Mr. Justice Bowen.—Have you considered what will be the effect of the fourth clause, which makes some provision upon that subject. It enacts, that if any "offence charged and prosecuted under this act shall "be proved to have been committed by any person or persons not being "subject or subjects," and so on. *When* must this be proved? necessarily it must be upon the *trial*, because, upon such proof being exhibited, the Court is directed forthwith to "acquit such person or persons not "being such subject or subjects as aforesaid, of such charge." *Who* then is to prove this? assuredly, the *Prisoner*, not only because he is the *most interested* in proving it, but because he is the *best able* to do so. The Crown have no means of knowing his birth, parentage, and education.

and ought not to be called upon to prove it. He himself knew his birth place, as well as all the circumstances necessary to secure his acquittal, if improperly indicted, and he should have proved them, so as to have entitled him to have his discharge. It was *his* duty, not that of the *Crown*.

Mr. Stuart.—Your Honour's observation completely confirms my argument, that the *omission* of the averment is fatal to the indictment. From the manner in which this indictment is drawn up, we should not have been allowed to *deny* our being a subject, and to go into evidence to *substantiate* such denial. It would not have been competent to us to do so, because it was not *in issue* between us and the Crown. This answer was not *put in* upon the trial, because we should not have been allowed to go into *evidence* upon it, inasmuch as the question under trial was, *guilty* or *not guilty*, not, *subject* or *no subject*. We could not, under the *general* plea of *not guilty*,—a plea which (from the manner that the indictment was drawn up in) constituted the only plea we could make—I say, we could not, under that plea, go into evidence of *De Reinhard* not being a subject, although the moment we established that *fact*, he would, under the act, have been entitled to his acquittal, *because* it was not averred upon the indictment that *he was so*, and consequently it formed no part of the issue in contest between the Crown and the Prisoner. The suggestion of *Mr. Justice Bowen*, abundantly strengthens the argument which I have had the honour to submit in support of the position that the indictment is defective, from its not *averring* that we were a subject, because, had it been done, we should have *negatived* the averment, and have been entitled to an *acquittal*——

Chief Justice Sewell.—Not exactly so, *Mr. Stuart*, according to *my* idea; there is another difficulty which you would have to surmount: when you had shewn incontrovertibly that *De Reinhard* was not a subject, that would only be half the point which it would be necessary for you to establish, so as to entitle the Prisoner to his acquittal, under the clause to which my brother *Bowen* has so correctly (and advantageously too,) drawn your attention. I will read you (for it is very short) the whole clause, so that you may clearly comprehend it, *verbatim et literatim*:—"4th. Provided always, and be it further enacted, that if any "crime or offence, charged and prosecuted this act, shall be proved to "have been committed by any person or persons *not being a subject or* "*subjects of his Majesty*, and *also within the limits of any colony, settle-* "*ment, or territory, belonging to any European states*, the Court before "which such prosecution shall be had, shall forthwith acquit such person "or persons, not being such subject or subjects as aforesaid, of such "charge." You will observe that this clause does not put it into the

power of the Court " to acquit him forthwith," even if it should be allowed that he *proved* himself to be a *foreigner*, he must, *beyond* making it appear that he is *not a subject*, go on, and also shew the offence to have been committed " within the limits of any colony, settlement, or " territory, belonging to any European states," before it is in the power of the Court before whom the trial was holding, to say that the Prisoner must be forthwith acquitted of such charge. The provision may have been dictated by some such suggestion as this; relative to being a natural-born subject, it can be known only to the *Prisoner* with certainty, the *Crown* has no opportunity of being acquainted therewith.—The Crown might say thus, *I* do not know, whether you are a natural born subject, or *where* the offence was committed; but *you*, the Prisoner, if you are not a natural-born subject (which *we* cannot know, or if *you* shew, we cannot rebut, as we cannot prove a negative,) must go *farther*, and, to be entitled to demand your acquittal, must prove that it was within the limits of any colony, settlement, or territory, belonging to any European states, as well as that you are not such subject as this act gives the power to try for any crime or offence committed any where in the Indian territories. I have stated that which appears a difficulty which you have not adverted to, that we may hear you upon it, as you may perhaps obviate what at present strikes the Court as a considerable obstacle to his acquittal, though it were established that he, in reality, was not a subject.

Mr. Stuart.—I am certainly indebted to your Honour for so doing, but I would remark that we are not asking for the *acquittal* of the Prisoner, or contending upon, or as to, what *would* have *entitled* him to it, but we are contending that, upon the *face* of this indictment, that which *ought* to have been *averred* is omitted, and that such *omission*, is a *fatal* omission, and ought *to arrest* the judgment of the Court. In thanking your Honour for your observations, I do it because they most forcibly manifest that the Prisoner *has been* deprived of the opportunity of shewing that which, when proved, must have secured his acquittal. The *indictment* does not aver that he *was* a subject, he could not, therefore, be permitted to prove the *contrary*, because this answer would immediately have been given by my learned friends, " *we do not aver him to be* " *a subject.*" I say that they ought to have so averred him, because, if he was not a subject, they had no right to try him. The moment that he was proved not a subject, the prosecution must stop, nor would the Court have a right, I take it, to try even a subject, if the offence was committed out of the King's dominions.

Mr. Justice Bowen.—Perhaps that is not quite so clear; and if you attentively read the 4th clause, I think you will find that his not being

a subject is not sufficient forthwith to stop a trial, but, as was pointed out by the Chief Justice, he must go farther. By the 5th clause you will find the direct reverse of your last position to be law. It is in these last words, " provided nevertheless, that it shall and may be lawful for " such Court to proceed in the trial of any person being *a subject or sub-* " *jects of his Majesty*, who shall be charged with the same or any other " offence, *notwithstanding* such offence shall appear to have been com- " mitted within the limits of *any colony, settlement, or territory, belong-* " *ing to any European state* as aforesaid." Here you see that provision is especially made for the trial of any *subject*, notwithstanding his offence shall appear to have been committed within the limits of any colony, settlement, or territory, belonging to *any European state.*

Mr. Stuart.—The principle I advert to as completely sustaining the argument I have submitted, is the great principle of public law, that no nation can legislate for the subjects of another, unless whilst they are receiving, in the territory of that nation, the protection of its laws; and that allegiance and protection are reciprocal obligations; thus I say that the British parliament could not, by this act of the 43d, legislate for a subject of the *United States*, in the *Indian* territory belonging to the *United States.* I do not know that it could even for its *own natural born subjects*, but that must be the utmost length to which it could carry the principle of perpetual allegiance, Then, I say, as the face of this indictment does not aver that the offence was committed in the King's dominions, that the Prisoner is not *bound* by this act if he is a foreigner, (as he is,) and owes no *natural* allegiance, because the obligation of *allegiance* is inseparable from the benefit of *protection.* Where the *latter* is not received, the *former* is not owed, and *ought not* to be demanded. This is a proposition that is true in the most unlimited sense. The *5th clause* of the act, I am aware, produces a limitation of this principle, but what I speak of is that it has *no* limitation by the acknowledged public principles of international law. It would be absurd to talk of the imperial parliament legislating for *China;* then what right has it to legislate for the territory of *any other* power? Now, if for an offence committed in *China*, the offender is ever tried in *London*, it can only be where that offender is a natural born subject of the British Crown, and therefore incapable of ever divesting himself of the obligation of allegiance. My argument embraces two or three points, and, 1st. *locality;* it is absolutely necessary that the indictment should not only aver that the offence was *not* committed within the limits of the *United States*, but also, that it *was* committed within the King's dominions. I then go one step farther, and urge that it is equally necessary that it should have averred that *De Reinhard* was a *subject* of the

King. I do not *admit* the right assumed by the legislature in this act of legislating for its *own* subjects in a foreign territory; I do not *admit*, nor do I *deny* the right. It is not necessary that I should do so, it is sufficient for me to shew that it was necessary that this averment should have been made, and, as from the Crown's own shewing upon its *indictment*, it does not necessarily follow but that this offence might have been committed *out* of the King's dominions, it should have been averred that it was committed by a *subject* of the King.

Respecting the *Indian territory*, in which it is charged the offence was committed, and which the Crown officers appear to consider a *sufficient* description, I observe, that I do not concur with them in opinion, for several and, to my mind, weighty, reasons, and I first submit to the consideration of the Court, that neither *France* nor *England* have, or *ever had*, any title, *adverse* to that of the *Savages*, to this territory; that they have not, nor had they ever, any possession *de jure*, or *de facto*, or any beyond the toleration given by the Indians, who are (as I shall presently have occasion more fully to shew,) completely an independent nation. I remark, that *one* of the persons included in this indictment is a Savage, and he stands indicted for an offence committed on his *own* soil, the *soil* of which he is one of the *lords*, as being one of the *aborigines*, in a Court of a country *foreign* to him, and to which he owes no *allegiance*, and of whose people he knows nothing, but that he permitted them to trade in his territory. I would ask of my learned friends, if *that* individual was tried, convicted, and executed, whether it would not, according to principles of national law, be a just case of war? I would ask, whether, upon all the acknowledged principles of national intercourse, which are usually known among civilized states, under the appellation of the law of nations, that would not be the case? and, in their absence, I would ask, whether *they*, knowing no civilized rule for their government, would not be entitled to blood for blood? Whether their language might not justifiably be, "You have taken the blood of *our* brother, and we will cause the blood of *your* brother to be shed to atone for it." That this territory is *theirs* is evident from the act itself which calls it *Indian* territory. It is not called *British* territory; in no part of the act is it denominated *British* territory, for the most obvious of all reasons, because it *never* was, in point of fact, in *our* possession, it never was conquered by *us*, and therefore could not be called other than *Indian* territory, because, neither by *conquest* nor *occupancy*, had it ever become *ours*. Relative to a consideration which very naturally arises out of this part of the argument, I am aware that it may be said that nations are satisfied with very slight proofs of occupancy. The erection, for instance, of a flag-post at the time a real, or imaginary

discovery (and perhaps more frequently the latter) of any place, appears to be made. As a part of the international law of the kingdoms of *Europe*, it may be good, and ought on them to be binding, because the obligations imposed by the law of nations bring with them benefits in which those civilized nations of the earth participate, but it is not necessary or imperative that the *Indian* tribes should agree to this convention, or that *they* should allow that the erection of a pole or staff should be a confiscation of their territory. No; *their* lands, like *ours*, are defended by *war*, and the only reason, perhaps, that we have not practically known this to be the case is, that we never attempted an *occupancy*.— We have wished to *trade* with them, and have been *permitted*. Hundreds of miles from each other, we have been permitted to build and establish trading-posts, but does that give us any right to assume a *lordship* over the *soil*, or make us the *owners* of the *territory*? No, certainly not, we have no title to it whatever; if we have, let the learned Crown officers produce it, that we may know upon what it is founded. I am not so visionary as to say to, or to expect, the Crown officers to produce *title deeds*, as if it was merely an estate, but I do expect them to shew me a government *de facto*, or, at least, a possession *de facto*, adverse to that of the *Indians*, but they cannot do that, for the *Indians* have always had the possession *de facto*, and have always had a government *de facto*. Again, I remark, that they manifest in their intercourse with other powers that they are an independent people of themselves, and have not forfeited, by the chance of war, or by voluntary cession, any of those privileges which belong to independent nations. In their treaties what nation ever interfered and asserted a claim to the territory, which they consider as belonging exclusively to themselves? Do they not make peace, and do they not go to war, like any other independent nation? If they are not an independent nation, why do we call them our allies? Why were they, during the late war with the *United States* of *America*, universally treated as such? But why should I detain the Court upon this point, when it is so clear that they possess all the attributes of an independent nation, and consider themselves to be an independent people, acknowledging no jurisdiction over them?— They are not in the situation which, in their own figurative and energetic language, was so feelingly and forcibly depicted when one of their sachems described their situation to be, "that the reeds which had been "blown across the Atlantic ocean had became great trees, which "scourged them." "They were reeds," said the aged chief, "when "they were blown across the great waters, they were received and "planted by us, we watered them, and they grew so that they became

" great trees in the forest, and we are scourged with the branches " thereof."

Chief Justice Sewell.—That would imply a very *strong*, though perhaps not an *equitable*, jurisdiction. Do you say that was the complaint of one of their chiefs?

Mr. Stuart.—It *was* the complaint of an Indian chief, but not of one belonging to *that* portion of the Indian Territory. It was a complaint made in *Quebec* by one of the chiefs, displaying in the most forcible simile, that those who, when weak, they had received and nourished, had, when strong, become their oppressors. *Above*, they have no occasion *yet* to make such a complaint, and I mentioned the circumstance to shew the different situation in which the Indian nations *above*, were to to those with whom *we* are more acquainted. How long it may be before *they* make the same lamentation, we cannot say. Whether those traders, who are now small as the reeds of which the sachem complained, who are *permitted* to erect posts for their convenience, but have *as yet* taken no actual possession of the soil, are to be nourished up into trees, and become the scourge of those who *now* protect them, remains in the bosom of time. But I conclude my argument by insisting that, as no *actual* possession has ever been held of this territory by the British nation, that as no *adverse* possession was even taken of it by *France*, from which nation it might be supposed that *England* derived an authority to legislate for this territory, the British legislature could not, for a moment, entertain any right to make laws to bind any, but her own subjects, in the Indian Territory; nor do I admit that they could even go that length, but, without admitting or denying their power over their *own* subjects, it could extend no farther. I therefore contend, that it was most essential to aver, that *Charles De Reinhard* was a *British* subject, and that the offence was committed, not only *contra pacem domini regis, coronam et dignitatem ejus*, but also, that it was committed *within his dominions*. That the *Indian* Territories are not part of those dominions, I consider to be satisfactorily established, not only by the Indians making peace and war as other independent nations do, but, I think, it will be evident that this independence has been, and is, recognized by *Great Britain* herself. If I only refer to the numerous treaties made *with* the Indians by the British nation, I completely establish my point. I need, indeed, only look to the very act upon which this indictment is founded, and I deduce the same favourable confirmation of my position. It is an act for the punishment of crimes and offences committed in the *Indian* territories. It is not even called *British* territories, and must be intended to bring to punishment persons owing allegiance to *Britain*, either from the offence being committed in the Bri-

tish dominions, or from the offender owing a natural allegiance to the British Crown, and neither of these all-important characteristics are avowed in the indictment. We contend, that *both* were necessary, and we consider that this circumstance, in conjunction with the other arguments we have had the honour to submit, furnish grounds which will induce the Court to accede to our motion in arrest of judgment.

Attorney-General.—In reply to my learned friends I beg to contend that the case cited from *East*, of the *King* against the *Inhabitants* of *Oxford* is conclusive against the argument to shew that a new trial can be granted.—The course to be pursued, if any of the evils which my learned friends have so feelingly described should occur, is there distinctly pointed out. "In capital cases if a *conviction* take place at the assizes upon in-" sufficient evidence, the common course is to apply to the Crown for a "pardon, upon a full report of the evidence sent in by the learned judge " to the secretary of state for the home department." I cannot but remark, that I consider my learned friend rather unfortunate in referring to this case, as it appears to tell completely *against*, instead, of supporting his argument. The reporter says, "I am not aware of any instance of a " new trial granted in a capital case." The reason he was not aware of it is, that there had not been any granted, and he adds, what must be considered as pretty strong evidence, that there had not, "that upon the " debate of all the judges in *Margaret Tinkler's* case in 1781, it seemed " to be considered that it could not be." If these are the sort of cases which my learned friends are reduced to the necessity of producing as authorities that a new trial may be granted in criminal cases of a capital nature, I apprehend your Honours will not be disposed to be the first judges to evince that it can, by granting one in this case, in opposition to the positive *dictum* of my *Lord Kenyon*, that they cannot be granted, when the utmost length to which the research of my learned friends enables them to adduce differing authorities is, that the point is not settled in *England*, but after a debate between the whole of the judges, it seemed to be considered that it *could not be*. A great deal has been said by my learned friends, particularly by my friend, *Mr. Stuart*, upon the *hardships* that would occur in this and other cases of a similar nature from the Court *not* being able to grant new trials, but the hardship is merely imaginary, and disappears the moment it is examined. Every thing my learned friend conceives he would gain by a new trial, or rather the making a motion for a new trial, under a similar rule to that upon which motions in arrest of judgment are now heard and decided, viz: heard upon an undoubted rule of law, and decided by the discretion of the Court to whom the motion is addressed, he can effect at present. Every thing that could be shewn upon a motion for a new trial addressed to

the Court, can now be shewn in an application to the protecting and sure remedy against improper conduct on the part of the Jury. Apply to the mercy of the Crown, but certainly not to the Court for a new trial, who, says the *dictum* of my *Lord Kenyon*, can not grant it. And if it could, what is the advantage? the *Crown* can at once remedy the evil, whereas a *Jury* cannot.

On the subject of the *confession* of the Prisoner, and of the *actual* death of *Owen Keveny*, my learned friends took nothing, nor could they, as they clearly were not topics that could be argued on a motion for a new trial, were your Honours even of opinion that you could entertain such a motion. I would, however, just remark, relative to the confession, that my learned friend's observations might have had some weight if the confession had not been in the Prisoner's *own hand-writing*, but the confession, being in his own hand-writing is a complete and satisfactory answer to every thing that has been said relative to it, as he there acknowledges the murder, and details the circumstances which unfortunately led to, and attended, its perpetration.

The next point urged by my learned friends was one of considerable delicacy, though unquestionably one of solid right, viz: the supposed misdirection of the Court relative to the boundaries, but as, in the former instance, they gained nothing by their objection, as they had, during the trial, urged it, and after all of us being heard at length upon the question, your Honours solemnly decided it, and the Jury, in appreciating the fact, adopting, as they were bound to do, your Honours judgment on the legal points submitted and disputed in the argument, have, by their verdict, set completely at rest the question of locality, (at least as far as we can possibly have to do with it,) that verdict declaring the Prisoner guilty in manner and form as he stood charged in the indictment. The questions of locality and jurisdiction were directly met by our charging the offence to have been committed at a certain place *without* the limits of the province, &c. but nevertheless, *within* the jurisdiction of this Court. Upon this statement the point of law contained in the indictment was raised by my learned friends, and discussed, both in relation to the *locus in quo*, and to the jurisdiction of the Court. The one was finally determined by the verdict of the country, and the other by the judgment of the Court. The Court decided the *southern* and *western boundaries* of his Majesty,s antient province of *Quebec* to constitute the *southern* and *western* limits of his new provinces of *Upper* and *Lower Canada*, and the Jury, assisted by that decision, by their verdict, say, " we have *proved* the death to have taken place *without* the limits of the " province," &c. Again the indictment, in the counts upon which *De Reinhard* has been convicted, charges that he was aiding, helping, abet-

ting, comforting, and maintaining, the said *François Mainville* to commit and perpetrate a felony and murder, (at this certain place so as aforesaid described,) by making " an assault upon one *Owen Keveny*, &c. &c. The counts conclude by saying—And so the jurors aforesaid, upon " their oath aforesaid, do say that the said *François Mainville*, *Charles* " *De Reinhard*, *Archibald M'Lellan*, *Cuthbert Grant*, *Joseph Cadotte*, " *and Jean Baptiste Desmarais*, him the said *Owen Keveny*, then and " there within the jurisdiction aforesaid, in manner and form last afore- " said, feloniously, wilfully and of their malice aforethought, did kill " and murder, against the peace of our said Lord the King, his crown " and dignity." If we had not proved the *death* of the man we should not have supported our indictment; the same observation will suffice as to identity, for it was *Owen Keveny*, we charged as having instantly died of the mortal wound which was given to him, and the verdict of the Jury says, that it was *Owen Keveny*, who was feloniously assaulted by " *Mainville*, and received from him " one mortal wound of the depth of " five inches, and of the breadth of one inch, of which last mentioned " mortal wound he the said *Owen Keveny*, then and there instantly *died*," and the Prisoner *Charles De Reinhard* is found guilty, " in man- " ner and form as charged, of having been present, aiding, &c." the said *François Mainville* to commit the said felony and murder. These points therefore were conclusively settled by those whose several functions gave them authority to settle them.

There remains nothing then to consider but the question of jurisdiction, in relation to its *extent*, as conferred by the act. One objection of my learned friends, and particularly insisted on by my friend *Mr. Stuart*, was, that the rigorous construction which he contended the act conferring jurisdiction independent of locality, (thereby trenching, as he said, upon the fundamental principle of the common law, that locality alone gave power,) precluded *felonies* from being taken notice of under the " general term crimes and offences." It appears not to be seriously questioned, (though doubts were said to exist on the subject,) that in a case of felony committed in the *district*, or in the *province*, the Courts of the several districts of the province might, under the general description of " crimes or offences," take cognizance, but my friend *Mr. Stuart*, says, as the murder was committed in the *Indian territory*, it must go *home* for trial, because the right of trying for *felonies* committed in places over which an extra-judicial authority has been given, belongs alone to the parent state. It was also urged by my learned friend who addressed you first, that the constitution of *this* Court was such as to prohibit cognizance being taken by it of felonies committed in the Indian territories, for, said the learned gentleman, " your Honours are not *judges*, but *com-*

missioners," and the act of 1803, requires that *judges* shall belong to the Court taking cognizance of crimes and offences committed in the Indian territory, because, said my learned friends, "it is to *judges* that the power of issuing subpœnas is granted or given by the act." Another objection of my learned friends, which may be associated with this part of their argument, is the difference in the words *Court* and *Courts*, as applied to the two provinces. It is, say the learned gentlemen, the *Courts* of the Lower province, whose power or jurisdiction is extended, and this is but a *Court*, and, as presidents or commissioners of this *Court*, your Honours are not the *judges* of the *Courts* spoken of in the act, and they consider this as additionally supporting their position that a Court of *Oyer and Terminer* is not included in the act of 1803. It is constantly, they urge, the plural number in which the statute speaks of "*the Courts*" of the *Lower* province, and in the singular "*the Court*" of the *Upper* province. There is one other point of objection made by my learned friends, closely connected with this part of the question, which I will mention, because, I believe, I shall then have enumerated all that were advanced relative to the constitution of the Court, and the necessarily limited powers which such formation enabled it to exercise, and I propose to advert to the whole of them at once. The objection was, that the Court over which your Honours are presiding, was not *then* established, and therefore could not be meant.

On these objections, I say, *first*, that, in reference to the act meaning the Courts *then* established, there is nothing in the act itself which indicates that its operation was to be confined to the Courts *then* established, or to restrict its extension to any Court that might hereafter be established, provided it should be a Court in which a crime or offence of a similar nature to any sent from the Indian territory could be tried, if committed within the province. A Court of *Oyer and Terminer* and general gaol delivery was well known to the provinces of *Canada*, before the passing of this act by the imperial parliament, and *murder* was a crime *usually* tried in them, if, when they were held, there were persons accused of that crime of whom the gaol required to be delivered. I should think the more rational construction of this clause of the act would be to consider it as meaning the various descriptions of Courts, in which offences of all the different degrees of enormity are severally tried, if committed within either of the provinces, and, admitting that interpretation, we all know a Court of Oyer and Terminer and general gaol delivery, is a Court wherein felonies and murders are tried. All I contend, meant by the act was this, that an offence committed in the Indian territories should be prosecuted and tried in precisely the same way as if it had been committed within the body of one of our own districts. A

Court of *Oyer and Terminer*, being a competent Court to try a murder alleged to have been committed in the district of *Quebec;* a Court of Oyer and Terminer is, and must be, a competent Court to try the Prisoner, for a murder perpetrated in the *Indian territories*, under this act, which directs that the offence, whether the crime be a felony or a misdemeanour, " shall be, and be deemed to be, an offence of the same na- " ture, and shall be prosecuted and tried in the same manner, as if the " same had been committed within the limits of the province where the " same shall be tried under this act." In fine my learned friends contend, that no Court that was not actually *in esse* at the time of passing the act of 1803, is competent to try under it, whilst *my* position is, that these terms in the act, " *usually* tried, and where the same *would have* " *been* tried," &c. have reference to the time at which the offence requires to be *tried*, and, under this construction, any person now in the gaol of this district, upon a charge of murder will receive his trial before your Honours at this Court of Oyer and Terminer and general gaol delivery. I farther contend, that a Court of Oyer and Terminer, being known to the constitution of both provinces of *Canada*, *before* the passing of the act of 1803, was sufficiently *in esse* to be admitted, (even under my learned friend's interpretation as to the necessity of its so being,) to a participation in the intended jurisdiction conferred by that statute.

Having established that the objection against this very Court not being *in esse* in 1803, must fail, as well as shewn its power to try for felonies committed in the district of *Quebec*, it is necessary to follow up the enquiry, and prove that there is nothing that disqualifies it from exercising a similar jurisdiction over offences committed in the *Indian Territories*, to that with which the *other* Courts of the province are invested.— My learned friend's objection is twofold, your Honours are not *judges*, but commissioners, and it is the *Courts* of *Lower Canada* to whom power is given to try, &c. As to the distinction arising from the *plural* number being made use of by the act relative to *Lower*, and the *singular*, when it speaks of *Upper Canada*, I imagine a word will suffice. In the Upper province there is *but* one Court usually trying criminal matters, whilst in *Lower Canada* there are more. The objection as to your Honours is equally unavailing. Your Honours are, for all the substantial purposes of the administration of criminal justice, at this moment judges, fully as if sitting in bench or at bar, having power to compel the attendance of witnesses, and to fulfil all the duties attached to the office, from the trial of a larceny, to the passing against a prisoner the judgment of death. On another point suggested by my learned friends, in

connection with the offence charged, I think their observations very peculiar. If, (says my learned friend,) it shall be found that a Court of Oyer and Terminer *can* take cognizance of offences committed in the Indian territory, still its power is, by the act of 1803, extended only to the trial of *misdemeanors*. This is not an objection to this particular Court, or to Courts of Oyer and Terminer generally, on the ground of inferiority of jurisdiction, but is an objection founded upon the wording of the act which gives jurisdiction to the Courts of justice of the province of *Upper* and *Lower Canada*, for the trial and punishment of persons guilty " of crimes and offences" within certain parts of *North America*. The words, " crimes and offences," only give the power of trying for misdemeanors, and consequently, according to my learned friend's explication, no Court in *Canada* can try, under this act, for a felony, because, as he argued with some degree of ingenuity, *felony is no crime*. This is a conclusion which, I confess, I cannot see how my learned friend arrives at, and one certainly very dissimilar to those which *Mr. Justice Blackstone*, in his *Commentaries*, so clearly lays down, and so incontrovertibly establishes. I beg to refer the Court to *Blackstone, 4th volume, cap. 1, pages 1 to 5*, for an accurate definition of the nature of crimes. " A crime, or misdemesnor, is an act committed or " omitted, in violation of a public law, either forbidding or command- " ing it. This general definition comprehends both crimes and misde- " mesnors, which, properly speaking, are mere synonymons terms, " though, in common usage, the word *crimes* is made to denote such of- " fences as are of a deeper and more atrocious dye, while smaller faults, " and omissions of less consequence, are comprised under the gentler " names of *misdemesnors* only." Here, I think, we have authority which would justify us in opposing a contrary opinion to our learned friends, and in saying a murder, being an offence of a deeper and more atrocious dye, is a crime; but we have no occasion to advance our own apprehension upon the subject, for *Sir William Blackstone* expressly tells us, in the same page, when enlarging upon this general distinction; " treason, " murder and robbery, are properly ranked among crimes," and he gives, in very few words, the reason, " since, besides the injury done " to individuals, they strike at the very being of society, which cannot " possibly subsist where actions of this sort are suffered to escape with " impunity." Having premised in the following paragraph, that " in " all cases the crime includes an injury," that " every public offence " is also a private wrong, and somewhat more; it affects the individual, " and it likewise affects the community;" he says, in applying this principle to the crime of murder, " murder is an injury to the life of an " individual, but the law of society considers principally the loss which

" the state sustains by being deprived of a member, and the pernicious " example thereby set for others to do the like."

In relation to the act of the 42d, and the case of SHAW produced upon it by my learned friends, and so confidently relied on by them, I remark that, if that act is examined, it will be found to have been made for a very different purpose. It will be evident in a moment that the object of that act was to prevent, or punish, the commission of frauds, but very different are the objects of the 43d. Its preamble explicitly sets out by a declaration that, " whereas *great* crimes and offences have " been committed in the Indian territories and other parts of America," &c. " and that *great* crimes and offences have gone, and may hereafter " go, unpunished, and greatly increase," to prevent which they pray his Majesty that it may be enacted, and by the statute it is enacted, that all offences committed in the Indian territory shall be deemed to be of the same nature, shall be tried in the same manner in the Courts of the provinces, and subject to the same punishment, as if they had been committed within the province where the trial is held. In Lower Canada, *felony* is a *crime;* crime *includes* murder; *murder* is tried in a Court of *Oyer* and *Terminer*, which has power to award the punishment, which is death. It appears to me, therefore, that, in every respect, the offence of the prisoner is included in the act, and may be tried by this Court as far as depends on its constitution and the right of jurisdiction. It remains only to consider the objections to the *manner* in which the indictment accuses the Prisoner, and my learned friend says it is defective, because we have not averred him to be a *British Subject.* There is one remark that, I omitted, which I will submit before I enter upon the question of the indictment. The act of the 42d, as I have shewn, was for a very different purpose to that of the 43d, but I would ask of my learned friends, whether, or by what rule, it must necessarily follow, that, because, by one act, power is given to try for misdemeanors, it may not, by another, be extended to felonies? I would ask by what authority it is that the wisdom of the British legislature, is to be restricted to the mere power of conferring jurisdiction over misdemeanors to the Courts of the colonies.

I now proceed to consider the objection raised to the indictment, and in reply to it, I contend, first, That it was *unnecessary*, secondly, That it would have been *improper*, to have averred that *De Reinhard* was a subject, or that the offence was committed in the King's dominions. That it was not *necessary* to aver that he was a subject, I refer to the indictments under the acts of the 35th *Henry* VIII, to be found in *Chitty*, as precedents. These were indictments upon the statute which gives power to try *foreign* treasons in the King's Bench, or by a

Court of Oyer and Terminer, in *any* county appointed by the commission. *Hawkins*, in setting forth this act, declares it to be for a *remedy* and *declaration* to clear up the doubts which before existed upon the questions, as to in what manner, and at what place, high treason done out of the realm was to be tried, and by the act of the 35th *Henry* VIII, *cap.* 2, treasons, &c. done out of the realm of England, "shall be from "thenceforth enquired of, heard, and determined, before the King's jus- "tices of his bench for pleas to be holden before himself, by good and "lawful men of the same shire, where the said bench shall sit and be "kept, or else before such commissioners, and in such shire of the realm, "as shall be assigned by the King's Majesty's commission, and be law- "ful men of the same shire, in like manner and form, to all intents and "purposes, as if such treasons, misprisions of treasons, or concealments "of treasons, had been done, perpetrated, and committed, within the "shire where they shall be so enquired of, heard, and determined, as "aforesaid." Here then is a statute providing for the trial of an offence, (whose very essence is that the individual guilty of it was a subject, and owed allegiance,) committed out of the realm, directing that it "shall be tried by lawful men, in like manner and form, to all intents "and purposes, as if it had been done, perpetrated, and committed, with- "in the same shire where it shall be so enquired of." Nothing can, I think, be more direct in point than this, but upon reference to indictments upon this statute, for an offence committed out of the realm, and the guilt of which consisted entirely in the being a subject, we find it was not thought necessary to charge the accused with being a subject. I consider this as so conclusive, that I abstain from troubling the Court further on this objection to the indictment. In continuation, I submit, that the British government has a right to legislate for its own subjects any where; that, as they can not forego their allegiance, they are amenable to the laws of the country out of the realm, as much as if within it. It will not be necessary to trespass on the time of your honours farther on this point, as this offence was actually committed in British territory, because we do not grant my learned friends, in the face of positive acts of parliament, of treaties, of boundary-lines run, and of every other act that can positively demonstrate that this was considered by the British government as territory belonging to the Crown of Great-Britain, I say we can not grant that this was an erroneous consideration.

With respect to not proving the Prisoner to be a subject, it is true that the *fourth* clause of the act requires proof that a person is not a British subject, and that the offence was committed within the limits of a colony, settlement, or territory, belonging to an European State, be-

fore a Prisoner, indicted on this statute, shall be forthwith acquitted; but *of whom* is it required? Not of the *Crown*, certainly. If my learned friends enquire how so? why not? the answer is apparent. It is not required of the Crown, because it is a circumstance that can be *better* proved by the Prisoner. It is a circumstance completely within his knowledge, and therefore must be proved by him. It is in the nature of an *alibi*, the Crown indicts a prisoner for an offence, and, as well as the evidence in our hands will allow, we bring home to a prisoner the charge laid against him, he asserts that he was not at the *place* at the *time;* upon his defence *he* must prove *this* to entitle him to his acquittal, and in proving that he *was not* where the indictment charges him to have been, he must shew where he *was*. So in this case, we charge the Prisoner, with being accessary to the murder of Owen Keveny; the Crown was not called upon to destroy its own case by averring that he was a British subject, because if it had averred it, the *onus probandi* would lie upon the Crown; it would have been bound to have proved that which it is at all times difficult to substantiate satisfactorily, viz: the birth-place of the accused. If the Prisoner had made it a part of his defence that he was not a British subject, he had at once the evidence in his own hands, he would have been put to no inconvenience on the subject of substantiating that which he alleged, but my learned friends appeared, till your Honours reminded them of it, to have forgotten that it was necessary that a prisoner should go a step beyond the shewing that he was not a subject, before he would, under the statute, be entitled to his acquittal. By the *fifth* clause, the intention of the legislature is so clearly exhibited, that my learned friend's argument, though certainly very ingenious, must totally fail, for it is not left in any degree of uncertainty whether a British subject can be tried for crimes and offences committed in the territory of another state, for it expressly declares he may. So far from it being any way dubious whether a British subject can be tried for offences committed in a foreign state, the act expressly provides that a subject of his Majesty shall have his trial proceeded in, "nothwithstanding such offence shall appear "to have been committed within the limits of any colony, settlement, or "territory, belonging to any European state." All my learned friend's argument relative to the defect in omitting to charge the offence to have been committed in the King's dominions, vanishes in an instant because the act expressly authorizes the trial of any of his Majesty's subjects for offences committed out of the King's dominions, so as it is not within the limits of any civil government of the United States of America. To be entitled to his acquittal, it was not sufficient merely to prove *one* of the two points. His proving that he was not a subject

would not be sufficient; his proving that the offence was not committed within the King's dominions would not be sufficient; but to come up to the statute, it must, before the Court can acquit any person charged and prosecuted under this act, be proved that the offence was committed, not only not within the King's dominions, but also within the limits of some colony, settlement, or territory, belonging to any European state; and beyond that, that the person so charged and prosecuted is not a subject of his Majesty.

There was another observation of my learned friend, *Mr. Stuart's*, to which I can not but advert. He said the question between the Crown and the Prisoner was not, *subject* or *no* subject, but, *guilty* or *not* guilty. It is true *that* was the question, but it was open to the Prisoner to have proved, in any way that he could, that he was *not* guilty, and he would have done *that*, had he proved, what the act renders it necessary to prove, to entitle a Prisoner to his acquittal. So far from debarring the consideration of the question of subject or no subject, it forms a part of the question at issue, because he is charged with having committed this offence *within the jurisdiction of this Court.* To be within the jurisdiction he must be a subject of the King, or the offence must have been committed within the King's dominions. The points therefore of subject or no subject, and of King's dominions or not, were fairly *included* in this issue, and upon it the Prisoner might have said, I am not guilty in manner and form as I stand charged in the indictment, for I am not a subject of his Majesty, and the offence was committed within a colony, settlement, or territory, belonging to another European state. Having proved this, we know the consequence; the Court would have been bound forthwith to acquit him. Another ground of objection by my learned friend *Mr. Stuart*, and insisted upon by him at very considerable length was, that the British government had *no title* to this territory. My learned friend by saying that there was no title in possession of the government explained that he did not mean they required a title deed as an authority, but he said they had never acquired a right either by occupancy or conquest. My learned friend, with very great ingenuity, represented the Indians as having a government *de facto*, and a possession *de facto*, and would induce us to believe, that very great hardship and injustice would be done to this independent people, possessing, (to use my learned friend's own strong language,) "all the attributes of a "sovereign people," by its being determined that the Courts of the province of Canada, through an act of the imperial parliament, had had their jurisdiction extended to the cognizance of offences committed by its own subjects in the Indian territory, over and in which, as far as possession can demonstrate the right of governing, the British govern-

ment justify their legislating by actual occupancy. That the nature of the occupancy held of this territory by the British, has always been considered sufficient to form a title to a civilized power to dispose of the soil, or to make laws for the government, of any uncivilized territory that it may discover, is evident from numerous instances that might be referred to; I will mention but one, namely, the grant to the *Hudson's Bay* Company. The principles upon which this right is sanctioned throughout the world are not to be questioned or controverted by any reference to the abstract question of benefit or injustice to the Indians, whom my learned friend so feelingly compassionates. They rest, for their justification, upon the broad and universal assent of every nation, in every age, that to extend the march of civilization furnishes the greatest victory, and the highest title to government, that nations can boast. This is the right that Great Britain possesses over this immense territory. Its being called *Indian* territory in the act is mere designation. Wherever the Indians appear, whenever they appear, they are always treated as British subjects, as in fact they are, for to whom do they look for protection but to their Great Father. I therefore contend, in opposition to my learned friends, that the indictment is not defective, that the offence is properly laid, when it is charged as being against the peace of our Lord the King, that the place is correctly and fully described without the *scilicet*, that it was unnecessary to allege that it was in the King's dominions, and that it would have been improper for us to have averred that the Prisoner was a subject, seeing that, in default of proof, the Crown would be destroying its own indictment. For these reasons, amongst others, which no doubt will be adduced by my learned friend, the Solicitor General, I consider that the motion for a new trial can not be entertained by the Court, whilst that in arrest of judgement will not avail the Prisoner.

Solicitor-General.—The motions which my learned friends have, with so much ability, submitted to the Court, are two—the first, for a new trial, and the second, in arrest of judgment. At an earlier stage of the argument I took the liberty of stating to your honours my belief that the motion for a *new trial*, in a case of capital felony, could not be entertained by the Court. I still feel considerable confidence in the correctness of the opinion, but it is certainly with the greatest deference that, as the basis of my observations, I assume it to be law, that the motion for a new trial in this case can not be entertained. Whatever confidence I before felt upon the subject can not but be increased, when, at the present moment, I refer to the arguments of my learned friends, and find that all their ability and industry in research could not produce a single case to support the contrary opinion, for the utmost length

that they discovered any authority to go, was to say that it was believed the matter was not finally settled, but that the general opinion upon a debate of the whole of the judges, appeared to be that it could not be granted. Thus situated I feel persuaded your honours will not, in a case so completely novel, accede to the motion for a new trial. But we do not rely upon negative evidence in the opinion which we submit of the inadmissibility of our learned friend's proposition, because the case cited by the *Attorney-General*, from *Sixth Term Reports*, containing the *dictum* of my *Lord Kenyon*, "that in *one* class of offences, "those *greater than misdemeanors*, no new trial can be granted at all," puts all the arguments of the counsel on the other side upon this part of the subject completely *hors du combat*. This decision of the enlightened and venerable judge, I take it, will not be set aside by your honours in the absence of any conflicting authority, for I advert again to the circumstance of my learned friends on the other side, not producing a single case where a new trial had been granted, (nor has there been any, except that in *Lewis*, which has since been overruled,) and that all the length they went was to adduce an instance wherein it is said that the matter does not appear to be fully determined in England whether it may, or may not be granted. Under these circumstances, we can have no apprehension that there is any thing so peculiar in *this* case, as to induce your honours to sanction, with the weight of your decision, a contrary opinion to that of my *Lord Kenyon*.

The popular part of the argument, as to the hardship of refusing a new trial in criminal cases, has been supported by my learned friend, *Mr. Stuart*, on the ground that no other remedy exists, since a writ of *attaint* will not lie against the Jury for finding an improper verdict, and because this would be no reason for arresting the judgment; and 2dly, he has urged the peculiar anomaly that counsel are not heard on behalf of the prisoner in cases of felony, and that, as new trials are granted in *civil, a fortiori*, they ought to be granted in *criminal* cases. The plain answer is, that if they were granted to *prisoners*, they must also be allowed to the *Crown*, for it is just as possible that a Jury may *acquit* the prisoner against the weight of evidence, or upon improper testimony, as that they should *convict* him. Indeed it appears to me that if my learned friend's proposition were established as the ordinary practice of criminal Courts, the hardship would be greater to prisoners than at present, as the principles of humanity, which always influence the administration of our criminal law and the conduct of juries, inclines rather, I think, to the acquittal, than to the conviction of a prisoner, under the circumstances alluded to by my learned friend. The same answer may be given to the argument as to the prisoner not being allowed to ad-

dress the jury by counsel; for if the practice were otherwise, the crown officers must exercise their right to reply. Then as to no remedy existing, if a new trial can not be granted in a case of an improper verdict, inasmuch as it does not furnish a legal argument upon a motion in arrest of judgment, my learned friend, *the Attorney General*, has corrected that error by pointing to a sure remedy in the mercy of the Crown. Subject as every human institution is to error from the frailty of our natures, it would be presumption to imagine that improper verdicts may not sometimes be given, but it is the happiness of a defendant, who may be affected by such a verdict, that he has a sure protection against the consequences of such error in the mercy of the Crown, which never fails, upon a proper representation of the case, to extend its prerogative, and remedy the misconduct, or misapprehension, of a jury, by pardoning the prisoner. This is therefore the quarter to which my learned friends must direct their application, and if it is well founded, there can be no doubt of its success.

The observations which I have addressed to the Court on the principle of *competency* in *entertaining* the motion, I would also remark, may serve, in a great measure, as answers to the *expediency* of *granting* the motion. There is, according to our idea, no necessity for doing so, to enable the Prisoner to escape the effects of the verdict of the Jury, even if my learned friend's arguments, as to the propriety which dictated it, were admitted to be correct, and that, in justice and law, he ought to escape them, for he has a more sure remedy open to him in the Royal mercy, and the *power* of the Crown is equal to its mercy and its justice. Upon this part of my learned friends arguments, I therefore forbear troubling the Court farther. We consider first, with the greatest deference to your Honours, that the authority of my *Lord Kenyon* is decisive in support of our opinion upon the incompetency to entertain the motion for a new trial, and we see nothing in the case made out by my learned friends that would sustain such a motion, were it competent to the Court to receive it. Whatever may be your Honour's opinion on that point, I feel confident you will do me the honour to coincide with me, that the previous argument of my learned friends, even admitting every statement to be undeniably correct, cannot be made to bear on their motion in arrest of judgment. My confidence of being supported by the Court in this, that only for matters on the record, can judgment be arrested, arises from the numerous authorities on the point. The first to which I refer is the most elementary book, and indeed may be called the grammar of our law. I mean *Mr. Justice Blackstone*. In *vol. 4, page 375*, (*Christian's* edition) he describes, in considering of "judgment and its consequences," what may be offered in arrest or stay

of judgment by a defendant, upon a capital or inferior conviction.— "He may," says the learned judge, "at the period of being asked if "he has any thing to offer why judgment should not be awarded against "him, as well as at his arraignment, offer any exceptions to the indict- "ment, as, for want of sufficient certainty in setting forth either the "person, the time, the place, or the offence." In another place, speaking upon this subject, he observes that, "on no other ground than matter of law can it lie." In *Comyn's* Digest, *vol.* 5, title, *pleader*, letter S. 47, considering of the avoiding of a verdict by arrest of judgment, it is said, "after a verdict a man may allege any thing *in the record* in "arrest of judgment, which may be assigned for error after judgment," and. in the same Digest, title, *Indictment*, (N,) it is laid down from 1st *Siderfin*, 85, that a "prisoner shall not tender any matter for *stay of* "*judgment*,' but what arises *on the indictment*." Again, the same doctrine is expressly laid down, in the case of *Bell* and *Stewart*, M. 23. GEO. II. in *Wilson's Reports*, *vol.* 1, *page* 255. "After a verdict the "Court will suppose every thing to be right, unless the contrary ap- "pears on the *record*," and this very opinion was given upon a motion in arrest of judgment, wherein, its not appearing upon the declaration, that the cause of action arose within the jurisdiction of the Court, and the possibility that the debt might be such a one as that Court had no jurisdiction of, were made the principal grounds upon which the motion was urged, and, nevertheless, judgment was given for the plaintiff. In the case of *Sutton* versus *Bishop*, in 4th *Burrows*, *page* 2287, the same principle is laid down. In this case, which was one wherein a defendant had been improperly convicted, the Court held that, "he was entitled "to some relief, but in what mode he should receive it was not easy to "determine." The counsel for *Bishop* had contended that he ought, in some way, to have liberty to avail himself of the benefit of a particular provision of a statute, and, amongst others, suggested an arrest of judgment. Upon this the Court said, "there was no pretence to arrest the "judgment, because nothing appears *on the face of the record to justify* "*it, and the Court ought not to arrest judgments upon matters not ap-* "*pearing upon the face of the record, but are to judge upon the record* "*itself*, that their successors may know the grounds of their judgment." I have before noticed that the case in *Siderfin* goes so far as to say that the prisoner shall not tender any matter for stay of judgment, but what arises on the indictment. These authorities are, some of them civil, and some criminal, but they all arrive at the same conclusion, that no points can be moved in arrest of judgment but *solid matters of law, which appear upon the record.* The same opinions are set forth in various cases in which the conduct of the jury, &c. is considered as

affecting the judgment, in 2d *Hale*, 307. *Coke* upon *Littleton*, 227, B. 1st *Lord Raymond*, 232. *Salkeld*, *vol.* 1, p. 77, and 317 of same vol. and the conclusion which my friend, *Mr. Chitty*, makes upon the whole, is, I submit, perfectly correct in law. "The causes on which this mo- "tion may be grounded, although numerous, are confined to objections "which arise on the face of the *record itself*, and which make the pro- "ceedings apparently erroneous, and therefore, *no defect in evidence*, or "improper conduct *in the trial*, can be urged in *this* stage of the proceed- "ings." *Chitty*, 1st *vol.* p. 661. Upon this part of my learned friends argument, I shall close my observations by remarking that, whatever weight in *another* place the circumstances they adduce may have in obtaining mercy for the unfortunate Prisoner, they cannot *here* have the effect of obtaining a new trial, nor be of any consideration on a motion in arrest of judgment. The Court, having admitted my learned friends to make these remarks incidentally, I felt it my duty to submit some observation in reply to them; having done so, I proceed to consider their arguments relative to the jurisdiction of the Court, both as it was questioned, under their objections to *any* Court having the power to try for a felony committed in the *Indian* territory, and also to a *Court of Oyer and Terminer* being invested with that power.

The position of my learned friends I take to be, that no Court, and if any, that it is not a Court of Oyer and Terminer and general gaol delivery, that is invested with power, by the act of 1803, to try a felony committed in the Indian territories. My learned friends refer to the preamble of the act, and the words "crimes and offences" being used, and also *Courts* in the plural number. They insist that it is only *misdemeanors* which the term "crimes and offences," made use of in the act, give the power of trying, and also that that power, under the designation of *Courts*, is only given to the ordinary Courts of the several districts of the province, But, if my learned friends had gone on to the *fourth* clause, they would have found that clause conclusive against their construction' as to the word *Courts*, (the species of offences intended by the act will be considered presently,) for they would there have found that power is expressly given to the *Court* before whom such prosecution shall be had to acquit, under certain circumstances; the fourth clause is, "Provided always, and be it further enacted, that if any crime or "offence charged and prosecuted under this act shall be proved to have "been committed by any person or persons, not being a subject or "subjects of his Majesty, and also within the limits of any colony, set- "tlement, or territory, belonging to any European state, the Court "before which such prosecution shall be had, shall forthwith acquit "such person or persons, not being such subject or subjects as aforesaid,

" of such charge." Here then we see that power is not exclusively confined to the *Courts*, according to my learned friends construction of the term, but the power of acquittal is expressly given to the *Court* before whom such prosecution may be had, which clearly shews that a *Court*, *generally*, may try crimes and offences committed in the Indian territories. The reason of the word being used in the plural in relation to *Lower*, and in the singular number, in relation to *Upper*, Canada, was very suitably explained by the *Attorney-General* to arise from the difference in the judicial establishment in the two provinces. Then as to the term *usually*; " in which such crimes and offences are *usually* tried," I contend that, by this expression, all legal Courts must be meant, and, according to this construction, that we cannot measure the degree of use, or frequency of usage, of such Court, but that every Court legally having the power to try the particular crime or offence, if committed in either of the provinces, was meant by the legislature, as a Court where crimes and offences of the same nature are *usually* tried, and consequently had jurisdiction given to it to try offences committed in the Indian territory. A Court of Oyer and Terminer is such a Court in the province of *Lower* Canada, and therefore *this* is a Court where crimes and offences of the like nature as that of which the Prisoner has been convicted are *usually* tried, and therefore competent to try such a crime or offence, though committed in the *Indian* territory. In reference to my friend *Mr. Stuart's* observation that this act must be most strictly and rigorously construed; I beg to remark that I differ completely with him. On what it is that he founds his opinion, I do not know. He assigned as one reason, that it trenched upon what he termed a fundamental principle of the common law of England, which invariably associates locality and jurisdiction.

The enquiry which suggests itself to me, as proper to make, previously to deciding upon its construction, is this; is the statute of 43d Geo. III. a remedial or a penal statute? If it were a *penal* statute, I should agree with my learned friend that it ought to receive a most strict and rigorous construction, but it is a *remedial* act in its fullest extent, and, as such, I contend, in opposition to my learned friend, that it ought to receive the most extensive and liberal interpretation, because such acts are invariably construed in the most liberal manner, and such is the construction, that I think I feel warranted in believing this act will receive from your Honours, and, if it receive the extensive construction I contend for, it will include *all* Courts, and must take in a Court of *Oyer and Terminer*. Again, in deciding upon the construction which any act of parliament ought to receive, I should think it highly expedient to endeavour to ascertain what were the objects the

legislature had in view in passing it, and, in support of this opinion, I might refer to the authority of *Comyns*. What was the intention of the legislature in passing this act is manifest from its preamble, which states that, "whereas great crimes and offences have been committed in the "Indian territory, &c. which are not cognizable by any jurisdiction "whatever, and by reason thereof, great crimes and offences have gone, "and may hereafter go, unpunished, and greatly increase." This was the evil which this act was intended to remedy, and as great crimes and offences had gone unpunished, and apprehensions were entertained that they might still do so, and greatly increase, there was a necessity for speedy punishment of crime in the Indian territory, that retributive justice might overtake the daring offenders who had long fearlessly committed all manner of crimes and offences of the most atrocious nature. Your Honours know there are cases in which it is essential that retribution should almost instantly take plaae. I ought rather to say, in which the necessity of speedy justice is such, that, to delay it, would be almost to render it unavailing as an example. We know that cases of murder and treason require—not retribution—it was an improper term that escaped me, because it is not for vengeance that the law imposes punishment upon crimes, in different degrees, but for the public good, thus, making an example of one guilty fellow-creature, the means of deterring numbers from falling into a similar delusion, is really an act of mercy to the community at large. The situation of this unfortunate Indian country loudly demanded speedy justice, and the intention of the legislature was to bring to immediate punishment offenders, who, for want of any jurisdictson to take cognizance of their great crimes and offences, had gone hitherto, and, it was much feared, might hereafter go, unpunished. How could this salutary measure be best effected? In what way could this object of the parliament be best accomplished, but by giving power to all the Courts to take cognizance of offences committed in the Indian territory similar to those which are usually tried therein when committed within their respective provinces? This was done, and in extending the jurisdiction to the Courts where offences of a like nature would have been tried, if committed in the province, it included a Court of *Oyer* and *Terminer*. That it should have done otherwise, cannot for a moment be imagined, I think, if we look at the constitution of the other criminal Courts here.

The *Court* of *King's Bench* holds two short terms annually, or in case of the Chief Justice being sick, or, as was the case some time ago, absent from the province, or, if from any circumstance the Court be not full, or, as lately at Montreal, the Court be incomplete, or cannot sit, there could be no way of administering speedy justice to crime, or

to the individual accused, (perhaps wrongfully,) but by a Court of Oyer and Terminer. In such cases, do my learned friends contend they should not be tried at all? Supposing some of the individuals accussed arrived at *Montreal*, according to the course prescribed by the statute, immediately after the term had closed, are they to wait five months for their trial, without there being any possibility of having justice earlier rendered between the Crown and the prisoners? This surely could not be the intention of the legislature by the general expression that offences committed in the Indian territories are to be tried in the Courts where similar offences, if committed within the respective provinces, are usually, and would severally be tried. In *Lower* Canada as well as *Upper*, a Court of Oyer and Terminer *is* one of the *usual* Courts for the trial of murder and felonies generally, and is therefore a competent Court to try under this act the same offences, when sent down for trial to these provinces from the Indian territories. That this is a fair construction of the act in question, I feel satisfied, if not to the very letter, certainly according to the intent, which is the rule of law. There is another point which my learned friends have dwelt on considerably, and upon which they appear to me to place a reliance but little warranted by any argument which they adduce to support the correctness of their position. It is that *Courts* being used in the plural number, in relation to *Lower* Canada, it must have referred to the three Courts attached to the districts of the province. I contend, in opposition to that construction given to the expression " Courts where offences are usually tried," that it means, or has reference to, the different kinds of Courts or trials that may be had, as the Court of King's Bench, or a trial at bar, and a Court of Oyer and Terminer, and then the difference in phraseology as to the two provinces is accounted for, as in *Upper* Canada they do not hold trials at bar; their trials take place only in Courts of Oyer and Terminer.

Mr. Stuart.—I believe my learned friend, the *Solicitor-General*, is misinformed on that point. He would not, I am confident, state, that in *Upper Canada* trials at bar were not held, did he not believe it to be the case, but on farther investigation he will be satisfied that the fact is trials at bar *do* take place in the Upper province.

Solicitor-General.—I may, perhaps, have gone too far in saying they were not held in *Upper* Canada, they may be perhaps; but when they are, such Courts form an exception to the general rule, and such Court is not the *usual* Court, for the usual Court in the sister-province is by commission of Oyer and Terminer. In answer to what I consider as a minor objection of my learned friends, (though insisted upon at considerable length by both of them,) namely, that the jurisdiction of the Court

does not extend to *felonies*, though it might be admitted to try for misdemeanors committed in the Indian Territories, and the strange principle assumed and argued by my learned friend, *Mr. Stuart*, that felony is not a crime; I remark that my learned friend appears to consider *Mr. Justice Blackstone's* making use, in his elementary work, of the terms crimes and misdemeanors as synonymous terms, as settling, conclusively, that felony is not crime; but, if the learned gentleman had gone on a very little farther, in the 4th *vol.* of that able work, that valuable compendium of our law, he would find that his own authority is directly in opposition to the argument which he has submitted. "The general definition of crime," he says, "comprehends both crimes "and misdemeanors which, properly speaking, are mere *synonymous* "terms, though in common usage," (in what common usage? why, in common usage among lawyers, among that class of persons for whom his work was more particularly intended,) "the word *crimes* is made to "denote such offences as are of a deeper and more atrocious dye," and a little lower down, in the very same page, he settles the matter most conclusively as to what kind of *offences* ought to be rank among *crimes;* "but," he says, "treason, *murder* and robbery are properly ranked "among crimes." This is a part of *Mr. Justice Blackstone's* opinion which did not appear to attract my learned friend's attention; nor does the recent case of *Shaw*, produced by my learned friends, at all vary or oppose this doctrine. *Mr. Selwyn*, in opening the case on behalf of the Prisoner, abandons all idea of questioning the general power of the Court, under the term "crimes and offences," to try for felony, and the decision of my *Lord Ellenborough* was not at all influenced by a consideration of the right of trying felonies under that general definition, but in arriving at his own decision, the point upon which his judgment was formed was, that this particular statute, for the prevention of *frauds*, did not authorize it, and that, therefore, the proceedings must be quashed. In forming his judgment he adopted, and, as I humbly conceive, he sanctioned, the correctness of the position, which I have had the honour already to submit as a sacred legal rule, "that every "statute ought to be construed according to the intent of parliament," as well as another very similar, "that every statute ought to be ex-"pounded, not according to the letter, but according to the intent." Adopt this rule, and what was the intent of the act of 1803? not to prevent frauds, or to punish mere wrongs of property, not to bring to justice individuals who had been guilty of slight misdemeanors; no; the preamble of the act recites, in a manner too plain to be misunderstood, or to allow it for a moment to be supposed that it was made to repress and punish slight offences, "That, whereas great crimes and offences

" have been committed in the Indian territories, and by reason of their " not being cognizable by any jurisdiction whatever, these great crimes " and offences have gone, and may hereafter go, unpunished." To remedy this great evil, the act of the 43d GEO. III. was passed. What these great crimes and offences were, unfortunately, was matter of public notoriety, in the dreadful state of this devoted and unhappy country. It was not misdemeanors that constituted the great crimes and offences, but robberies, arsons, murders, and every other atrocious offence that adds to the dark catalogue of felonies. And to suppose that by this act the smaller offences were intended only to be prosecuted, tried and punished, would be to suppose that it was proposed to hold out encouragement to the perpetration of the larger ones. But it is contrary to common sense thus to interpret the act of the legislature. They gave the power to try for crimes and offences, for *great* cimes and offences, and the conclusion I arrive at on this part of subject is, simply, that *felonies are crimes.*

In adopting the rules that I have quoted from *Comyns'* Digest, *vol.* 5, word *Parliament*—Letter R. 10, one remark more occurs on the point of the proper mode of expounding statutes. *Comyns*, same word and number, says, " if the *enacting* words can take in the mischief, they " shall be extended for that purpose, though the *preamble* does not war- " rant it." *Bassett* versus *Bassett*, M. 1744, 3 *Atkins*, 203. Here the *preamble* does warrant it, for it recites that crimes and offences have been committed; the *title* warrants it, it is an act to extend the jurisdiction to the trial of crimes and offences; the *enacting sections* warrant it, the *second* speaks of crimes and offences, and of persons guilty of *any* crime or offence, the *third* speaks of every *such* offender, evidently refering to the former description of persons guilty of *any* crime or offence.—There can be no doubt that this act, being a highly remedial one, must be construed to include all crimes and offences. I say that, a necessity existing for the punishment of murder committed in the Indian territories, the parliament, by this act, gave under the term " crimes " and offences," power to the Courts of the two provinces, (and amongst them to this Court,) to prosecute, try, and subject to punishment, all persons accused and convicted of murder, or any other felony. With respect to the omission of proof as to the *baptismal* name of *Keveny*, of his *actual* death, and of the admission of the *confession* in a manner which my learned friends consider irregular, I consider that I should be most unwarrantably trifling with the time of the *Court* were I, after the solemn decision the whole of those points have received, to offer any thing in the shape of reply to my learned friends. The Court solemnly decided the admissibility of the confession, and as it would have been indecorous

in me, to have impugned your Honours' decision, had it been against the admission of it; so now it is completely unnecessary to say a word in support of it. As to the *death* and *baptismal* name of *Keveny*, I should be actually infringing upon the province of the *Jury*, were I to presume to stir their decision; each of these points have been decided by the Court, or by the Jury, according as they appertained to the one or the other. I decline, therefore, offering any argument upon either of the points, and shall proceed to a consideration of whether it was *necessary* to have stated on the indictment that the Prisoner was a British subject.

This is clearly a question of *law*, and therefore as clearly a proper point to be insisted upon in arrest of judgement, but my learned friends appear to overlook that the *onus probandi*, by the fourth and fifth clauses of the act, is completely thrown upon the Prisoner. It is he who must prove that he is not a subject of his Majesty. After we have proved our allegation that the offence was committed in the Indian territory we have gone far enough, our case is proved, and it is the Prisoner who must produce negative testimony, or evidence that he was not a subject of his Majesty, and that the offence was committed within some European colony or settlement. All that was necessary in the indictment was to have averred that the offence was committed within the jurisdiction of this Court, in the Indian territory, but *ex majori cautelâ*, we have described it as being perpetrated at the said place in the River *Winnipic;* the Jury have said that the offence was perpetrated there, and it is not competent to the Prisoner, after his conviction, to turn round upon us and say, you have not averred that I am a British subject. Admitting what my learned friends advance to be the fact, viz: that *De Reinhard* is not a subject, still that alone would not entitle him to his acquittal. It is very true that the act does say to ensure to the Prisoner an acquittal forthwith, that it must be proved that he is not a subject of his Majesty, but it does not say that, if he stops at having proved that he is not one of his Majesty's subjects, he shall be forthwith acquitted, but that, if he is an alien, and the offence was committed within some European colony, or settlement, then the Court, before whom his trial is held, shall forthwith acquit him. But although necessary for *him* to prove himself an alien, and also that the offence was committed within an European settlement, before he could obtain an acquittal forthwith, yet had we averred him to be a subject, and failed in our proof, we should have destroyed our own charge, and though the offence might not have been committed within any European settlement, yet he must have been acquitted. Upon penal statutes, your Honours know, that it is not only unnecessary to aver that which may be negatived and therefore

destroy the charge, but that it is not necessary to state provisoes and exceptions. The utmost latitude my learned friends could take, as affording a chance of acquittal in this case, was that, provided *De Reinhard* was not a subject, and his offence was committed in an European settlement or colony, he must be acquitted. Matters of defence, it is well known, the prosecutor need not anticipate, these were purely matters of defence and as the effect of not proving an averment that the Prisoner was a subject, would have been to negative our charge, we did not make it. This doctrine is supported by a variety of authorities which are very summarily stated by my learned friend, Mr. *Chitty*, *vol.* 1st, *p.* 234, that the necessity for the proving the excuse lies upon the defendant, and the contrary need not be averred by the prosecutor. Our not stating the Prisoner to be a subject in no way deprived him of the opportunity of shewing tha the was an alien, because it, is one of the enacting clauses of the act which gives him the right of shewing all that is necessary for his acquittal. The same learned author says farther, in speaking upon this subject, " if the exceptions themselves are stated in the en- " acting clauses, it will be necessary to negative them, in order that " the description of the crime may in all respects correspond with the " statute." Then, if this is the case on penal, surely on remedial, statutes, which this is in the highest degree, it can not be necessary for us to aver that which might destroy our indictment. The provisions of the fourth and fifth clauses are purely matters of defence, and the statute opens the door for their admission, but at the same time it must be remembered that it is on the Prisoner that the weight of proof is placed. I must confess that I do not clearly understand my learned friend's argument relative to its being our duty to aver that the offence was committed in the King's dominions. Had the indictment stated that it was committed therein it would have been bad, for the statute expressly sets forth that this act is to give cognizance over offences committed in the Indian country, not within the limits of either of the provinces of Upper or Lower Canada, or within the limits of any civil government of the United States of America, and which were therefore not cognizable by any jurisdiction whatsoever. Had we, I therefore repeat, charged the offence as being committed in the King's dominions the indictment would have been bad.

Mr. Justice Bowen.—In this case of *Shaw's* I perceive the indictment charged the offence to have been committed in British North America, to wit, at the parish of *St. Mary la Bonne*, in the county of *Middlesex.*

Solicitor-General.—We are aware of the *scilicet.* It is a very old form to charge the offences committed abroad, as being at a certain

place, viz: at *Middlesex*. This, though not inserted, has not been overlooked, but we thought it unnecessary. We have charged the offence *contra pacem domini regis*, which we consider to be sufficient, as we are justified by precedents in indictments for offences committed at sea and in foreign parts, in which the offence is laid *contra pacem domini regis*, which have always been held as good indictments. I believe I have adverted to all my learned friend's arguments, and whilst I apologize for the length of time, which I fear I have so unwarrantably occupied, I beg leave to make my acknowledgments for the indulgent hearing the Court has favoured me with.

Mr. Stuart.—In reply to the arguments which my learned friends, the Attorney and Solicitor General, have presented to the Court in opposition to our motions for a new trial and in arrest of judgment, I shall trespass but very shortly upon the attention of your honours. To the observations which we have already had the honour of submitting as to the right possessed by the Court to grant a new trial, we have nothing to add, as we do not consider that our learned friends have at all met them by argument, though they have denied their correctness. The remarks as to the inconveniences which would result to the prisoners from the Crown moving for new trials, should they be granted to prisoners, and a variety of suggestions of a similar description, furnish, in our opinion, no answer to the authority which we produced and supported by analogy. The arguments which we adduced were broad and extensive, applicable to every case calling for the interposition of the power of the Court.—Our argument upon this part of the question was that the principles of criminal, were analogous to those of civil, law, and that, as a new trial can be granted in *civil*, so it *ought* and *might* in *criminal* cases. To these propositions my learned friends have given no answer, except producing a *dictum* of a learned judge, for whom I entertain as high a respect as any they possibly can do, saying that a motion for a new trial in criminal cases could not be granted, to which we have rejoined by exhibiting a later authority of a contrary description in which it is said that the question is not yet settled, besides the authority from *Viner* in which it is positively laid down that it may be, and an instance exhibited wherein it was granted. I quit, however, that part of the question, and on the other motion I agree with my learned friends, the Crown officers, that nothing certainly can be admitted on a motion in arrest of judgment, except matters which appear upon the record; but I would submit to the Court that this very circumstance of precluding any thing but absolute matters of law from being adduced, furnishes a strong argument in favour of the principle of granting a new trial, or of entertaining the motion for one in all criminal cases as fully as a motion in arrest of

judgment. I purpose to enter more minutely than I did before upon the branch of the question which is connected with a consideration of which were the *Courts* to whom this extended jurisdiction was given by the act of 43d GEO. III. And I set out by saying that I perfectly agree with my learned friend, *Mr. Vanfelson*, that it was given only to the *Courts* of the *three* districts of the province established by the *judicature act* and cannot extend to *this* Court.—My reasons for agreeing with him are numerous, and first, I submit that this power must of necessity be given to the Courts *then in existence*. That the act could not contemplate conferring jurisdiction on a Court not *in being*, I think a self-evident proposition. I ask then, (not to detain the Court by a protracted discussion upon this very manifest point,) was *this* Court in existence at the time, or is it to be said that the legislature looked forward in 1803, for ten, twelve, or fifteen, years, and seeing that a Court of *Oyer and Terminer* would be sitting, conferred upon it, *by anticipation*, jurisdiction over crimes and offences committed in the *Indian* territory. I take up the act of 1803, and I observe that it gives jurisdiction to the *Courts* of *Lower* Canada, and to the *Court* of *Upper* Canada, under special circumstances. To what *Courts*, I ask? It must certainly be to the Courts having power to try *then*, at the time the jurisdiction was conferred, to the Courts that were *in esse*, and not to Courts that were only *in posse*. In referring to the *preamble* I perceive one of the reasons for passing this act was that offences required to be punished, over which the established Courts of this province had no jurisdiction, and the statute proceeds immediately to confer authority to the *Courts* of this province for the prosecution and trial of offences committed in the *Indian* territory, and directs that they shall be prosecuted and tried in the same manner in which offences of the same nature are *usually* tried. I again remark that, from the *nature* of the jurisdiction to be exercised, the Court of *King's Bench* best comports with the *importance* of it, the Court of *King's Bench* is identical, and perpetual, whilst a Court of *Oyer* and *Terminer* is changeable and temporary. Whatever may be the variation of its officers, however death may remove those who occupy its bar, and dignify its bench, the Court of *King's Bench* remains the same. Its power is not arrested by the mutations of time, or the changes of of circumstances. Its processes are always in force. Its authority is always in exercise, whether it is term or vacation, still the identity and perpetuity of the Court is preserved. Its *judges* may be removed by casualties, or may vanish by death, but the *Court* is perpetual, it exists for ever. It participates in, or rather is, the seat of the monarch's power, and, like the King, it never dies. The Court that we have the honour to address in another room is a Court for ever. It has been, and

will continue so a thousand years hence; that Court will exist for ever, and although *different judges* preside over it, it will still be the *same Court*: the *Court of King's Bench*. It could not be meant Courts that *might be* erected, for where was the certainty they *would be* erected, and, *when* erected, *what* was the certainty of their *duration*. That forms a considerable objection in our minds to any but the Courts of the *three* districts, being considered the *usual* Courts of the province. However much we may respect this Court, we cannot but recollect that this Court is ephemeral, it was born a few days ago, and in few days hence it will die, and be no more heard of. Another material difference between the Courts is found in the mode of appointing those who are to hold the pleas. In the regular Courts they do not depend on the choice of any *Governor*, they are the *King's* judges, independent of every consideration, depending on no contingency, removed by no incident except death. Although your Honours are *judges* of the Court of *King's Bench*, yet it does not vary my argument at all; the appointment of Courts of *Oyer* and *Terminer* is a very high prerogative, a prerogative certainly, where the King, by his representative, names his own judges, for a special occasion. I do not, for a moment, insinuate that is not his prerogative, or that it is, or has been, improperly used, but I submit it is a very high prerogative of the Crown, and, with the page of history open to our view, we might be allowed to ask, might it not be made a powerful engine of oppression? Another difference that I notice is, that the judges are judges of the districts at large, and not confined to any particular one. For these reasons, we think, there is such a difference between the *judges* of the Court of *King's Bench*, and the *justices*, or *commissioners* of a Court of *Oyer* and *Terminer*, that we are induced to believe that the legislature did not intend, by the word *judges*, any other than the *regular* judges of the districts of the province. I come now, to the words, or part of the act, wherein the *Courts* of the province are specified, and contend that the difference is equally striking. My argument is that your Honours are sitting under a commission as justices of a *Court* of *Oyer* and *Terminer*, and that *this* cannot be the *Courts* of the province mentioned in the act as the Courts wherein offences of a like nature are *usually* tried. The *third* clause expressly provides that every offender may and shall be prosecuted and tried in the *Courts* of the province of Lower Canada, unless he shall, for certain reasons, be transmitted to Upper Canada for his trial. I allege that this *Court* cannot be the *Courts* designated in the clause of the act I have just referred to. If I look to its commission, I shall see it is a Court for the *district of Quebec*, not for the *three* several districts, and therefore cannot be the *Courts* of *Lower* Canada. When we have the Courts of *Montreal*, and *Three Ri-*

vers, and of *Quebec*, then we have the *Courts* of the province of *Lower Canada*, and it is the *Courts* in *Lower Canada* that are to try offences committed in the *Indian* territory. I take it that, unless we have these Courts, a prisoner has not all the benefit which the law intended him to have, because it might be probable that the legislature had conferred on one or upon some Courts, rights or privileges which it may not upon another ——

Mr. Justice Bowen.—Might not, according to your view, commissions issue under the act of 1793?

Mr. Stuart.—Undoubtedly, but our objection to it is, that would be a *Court*, and a Court of a *district*, when it is the *Courts* who are to try for offences committed in the *Indian* territories, and the *Courts*, not of a *district*, but of the *province*. Again, the *inferiority* of this Court must be apparent. The act, in making provision for the issuing subpœnas, declares they shall be issued by the *judges*; there are *no judges* under a special commission of *Oyer* and *Terminer*. We know of the twelve judges of *England*, and of the judges of the Court of *King's Bench*, but not of the judges of a Court of *Oyer* and *Terminer*. We hear of A. B. C. D. E. F. being tried before *justices of assize*, but we do not call them *judges*. It is only when speaking of *permanent* Courts, that we speak of *judges*, and we say that those who sit under a commission of *Oyer Terminer* are, neither technically, nor popularly, *judges*. They are called *justices* technically, and *commissioners* popularly, but no one thinks of calling them *judges*. My learned friends have contended that the indictment is sufficient in describing the offence to have been "committed *within* the *Indian* territories," but that such description did not prohibit more being added, and they, therefore, included "that it was *within* the *jurisdiction* of this Court." This description presents a mixed question of *law* and of *fact*. The judge directs the jury on the *law*, and the jury find the *fact* upon that direction; it is put upon record, and it is *then*, we are told, *too late* to plead that it was *not* in the King's dominions, or that we owed him no allegiance, as we were not one of his subjects. At present, *non constat*, on the Crown's *own* shewing, that this offence might not be commited within the territory of some *European* nation. I said before, and say still, my learned friends were bound, in their indictment, to give due *certainty*, and, I allege, that they did not, I was misunderstood by my learned friends before, it was not my intention to insist upon *that* being introduced into the indictment which would make it completely *inoperative*, but I stated that, merely to charge the offence as *contra pacem domini regis* was not sufficient, because the offence, though committed, might not have been committed against *his* peace, because he might not have any peace to

break, and that it was incumbent upon the Crown, to prove that it *was* against *his* peace, before it could be entitled to ask the conviction of the Prisoner. As to the laws of *other* nations, I know nothing of them till they are brought into evidence, nor *any* that justify one nation legislating for another. My learned friend, the *Solicitor-General*, produced a most extraordinary reason for extending the power of trying offences committed in the Indian territory to Courts of *Oyer* and *Terminer*; he spoke of the inconvenience that might arise from the incompetency of the Court of *King's Bench* to sit, from its not being full. I would ask if it be possible that the learned Crown officer can, with complacency, contemplate the Court of *King's Bench* of *Lower Canada*, as not assembling from incompetency. Are the private or personal feelings of a judge, or two judges, to interfere with the jurisprudence of the country, and the regular and due administration of justice between man and man. Is the stream of law and justice to be stopped through the disinclination of any individual whatever, no matter from what motive, to perform his duty? I should hope not. I shall now advert very briefly to the distinction which *we* draw between *crimes* and *felonies*. I take it to be a fact that will not be denied, or I will produce authorities upon the point, that persons may be tried in *England* under the statute of HENRY VIII. for *felony* committed abroad. That being admitted, I refer to the act of 1803, and find it is to give jurisdiction over crimes and offences, which are not "cognizable by *any* jurisdiction whatever." It might narrow my observations very much by stating that because *treason* and *murder* committed abroad, are cognizable by the statutes of HENRY VIII. they cannot be under *this* act; for this act *only* gives jurisdiction over "crimes and offences committed in the *Indian* territory, "which are not cognizable by *any other* jurisdiction." I will read the introduction of the preamble. "Whereas crimes and offences have been "committed in the *Indian* territories and other parts of *America* not "within the limits of the provinces of *Upper or Lower Canada*, or ei-"ther of them, or of the jurisdiction of any of the Courts established "in these provinces, or within the limits of any civil government of "the *United States* of *America*, and are *therefore not cognizable by any* "*jurisdiction whatever*, and, by reason thereof, great crimes and offences "have gone, and may hereafter go, unpunished, and greatly increase, "for remedy whereof," &c. &c. For remedy of *what?* why, evidently for the crimes and offences that were "not cognizable by *any jurisdiction whatever.*" If, then, I shew that the offence for which that man has been convicted *is cognizable* at the *King's* Courts at *Westminster*, I think I go a long way to shew that he has been *illegally* so, for that *this* is not the *crime*, or one of the crimes over which the legislature intended

to give the Courts of *Canada* jurisdiction, because it was *only* to the trial of offences *not cognizable by any jurisdiction*, that the 43d GEO. III. made provision. I would ask if it is not evident that there are *two* offences, viz. treason and murder, which cannot be tried under this act, because they can be tried in *England;* the case of *Shaw* completely embraces this principle. The statute must be *strictly* construed, notwithstanding the observations of *Mr. Solicitor-General*, that, as a *remedial* statute, it ought to receive a most *liberal* interpretation. I contend that its construction ought to be most rigorous, for the reason I assigned in the early part of this discussion, viz. that where jurisdiction is conferred independent of locality, there the greatest strictness ought to mark the construction of acts of parliament. Various other reasons might be assigned, but I will not detain the Court by reference to them, as we think, in that case, your Honours will find the doctrine completely recognized; but here the case is much stronger, a Court *does* exist where cognizance can be taken of this offence; the *King's* Court at *Westminster*. I shall refrain from troubling the Court further, conceiving I have offered sufficient in support of our propositions, the one for a new trial, and the other in arrest of judgment. *A new trial* we consider ourselves entitled to, upon the ground of the irregular receipt of the confession, and the misdirection of your Honours as to the boundary line, inasmuch as you laid down *northward* to mean *due north*. In *arrest of judgment*, I conceive the indictment to be defective, and that this Court has no jurisdiction.

The argument being closed, the Court was adjourned till Friday morning, the 5th instant, at 10 o'clock, A. M.

Friday, 5th June, 1818.

PRESENT AS BEFORE.

Chief Justice Sewell.—The Court is now called upon to deliver their judgment on the arguments urged by the gentlemen who are counsel for the Prisoner, on the motion in *arrest of judgment*, and for *a new trial*. In support of the motion in arrest of judgment, the jurisdiction

assumed by this Court has been objected to, on a variety of grounds, and very strictly examined, and in so doing, it has been held by the Prisoner's counsel, 1st, that the statute of the 43d of the King, does not give to *any* Court the power which we assumed in trying the Prisoner for *a felony*, and 2dly, that, on the *Quebec act*, in conjunction with the 31*st Geo.* III. we have put a misconstruction, and have misdirected the jury, who have consequently delivered an erroneous verdict. The gentlemen argued first that, under this act, 43d *Geo.* III. *no Court* has jurisdiction over felonies committed in the Indian territory, and they further urged that, if that power is given to *any*, it is by pre-eminence to those Courts which were *then existing*, and which had been previously known as the established Courts of the province, and *this*, being an *extraordinary*, or *special Court*, its power is denied. They have further avowed that, were it admitted that cognizance could, under this act, be taken of *felonies*, and by *this* Court, still the judgment ought to be arrested, because it was necessary that it should have appeared upon the indictment that *the Prisoner was a subject of his Majesty*, and that *the offence was committed within his Majesty's dominions*, neither of which averments are made, and it is contended that for these omissions, judgment ought to be arrested. In exhibiting the reasons upon which the Court founds its judgment, there are three points arising out of the statute of 43*d Geo.* III. *Cap.* 138, connected with the question of *jurisdiction*, which will demand our serious consideration. I notice, before stating them, that on the 14*th of the King* it is alleged that we have put a construction as to the boundaries of his Majesty's ancient province of *Quebec*, which is erroneous, and that we have followed up that misconstruction, by misdirecting the jury as to the limits of the province of *Upper Canada*. The argument of the learned gentlemen then states, that, by this misdirection and misconstruction, we have assumed a jurisdiction which is not warranted. There were two minor points stated, but these if indeed we may now notice them at all, having been before decided by the Court and by the jury, need only be mentioned: the first was as to any proof of the *actual death of Keveny*, and the second, that the *confession* said to have been made before the *Earl of Selkirk*, was improperly received as evidence. These are the whole of the points which have been suggested, and the Court will consider them in the order they have been now recapitulated. Upon the question of jurisdiction, there are three points arising immediately out of the act of the 43*d Geo.* III. *cap.* 138, as stated by the counsel. 1st, That by this statute no jurisdiction is given to *any* of the Courts of the province, to try for any *felony* committed in the Indian territory; 2dly, that it has not given jurisdiction to *this* Court to try for *any offence* committed in the *Indian* territory;

and, 3dly, that it was necessary to aver in the indictment that "the "offence was committed in the King's dominions," and that "the "Prisoner was a subject of his Majesty." These points demand, and have received, the most deliberate attention from the Court, and the result of our consideration, as well as the reasons which have induced it, I shall state in delivering our judgment. The object of the act of the 43d of the King, as we gather from its entire context, taking the act as a whole, appears to have been this; to give jurisdiction to the government of Lower Canada, for the punishment of offences committed, not solely in the *Indian territories* which were considered as belonging to the *British* dominions, but in *other parts of America*, viz. in European settlements, if committed by *British subjects*; for this purpose in the enacting clause, after having recited in the preamble the necessity requiring the act, it declares that "from and after "the passing of this act all offences, committed within any of the In- "dian territories, or parts of America, not within the limits of either "of the provinces of Upper and Lower Canada, or of any civil govern- "ment of the United States of America, shall be, and be deemed to be, "offences of the same nature, and shall be tried in the same manner, "and subject to the same punishment, as if the same had been commit- "ted within the province of Lower or Upper Canada." In the *second* clause it gives to the Magistrates whom it authorises and empowers the Governor, Lieutenant Governor, &c. to appoint, power, through the *Indian Territory*, and in *both Canadas*, to commit any person guilty of any crime or offence; and makes it lawful for *any* person to apprehend and detain for the purpose of their being conveyed to *Lower Canada* (to be dealt with according to law) any person so guilty.

[*The Chief Justice read the second clause throughout.*]

The *third* clause provides in certain cases for the transmission of the crime or offence for trial to the province of *Upper Canada*.—[*The Chief Justice read the third clause throughout, remarking that*—"by its provi- "sions the Court, in either province, trying such offence, were to pro- "ceed upon it in *every respect* as if it had been *really committed in the* "*Province* or within the *immediate* jurisdiction of such Court."]

Having thus declared the *mode of trial*, and given the power of *awarding punishment*, the clause proceeds to give power to take the necessary steps to secure and enforce the *attendance of witnesses*. Authority is therefore given, to the Judges and other officers of the Court, to issue subpœnas and other processes, and such subpœnas and other processes are made as valid and effectual, and are to be in full force, and to be put in execution, in any parts of the *Indian Territories*, &c. as fully

and amply as any such subpœnas, or processes are within the limits of the jurisdiction of the Court from which such subpœnas may have issued. By the next clause, (*the fourth*,) it provides and enacts "That if any "crime or offence, charged and prosecuted, under this act, shall be "proved to have been committed by any person or persons, not being "a subject or subjects of his Majesty, and also within the limits of any "colony, settlement, or territory, belonging to any European states, "the Court before which, such prosecution shall be had, shall forthwith "acquit such person or persons, not being such subject or subjects, as "aforesaid, of such charge." But the final clause provides that, if any person be charged with an offence committed in the *Indian Territory*, or with any other offence committed *elsewhere* within the jurisdiction of the Court, the Court shall proceed with the trial, if the offender be *a subject*, "notwithstanding such offence shall appear to have been com-"mitted within the limits of any colony, settlement, or territory, be-"longing to any European state."

From this outline of the statute itself, it is manifest that the intention of the legislature was; first, to punish the perpetrators of offences committed in the Indian Territory, *whether they be, or be not subjects*; and 2dly, to punish the perpetrators of offences committed in any *European* colony, or settlement, in *America*, *being subjects*. It is equally manifest, that there was *not* given by this act, any increased jurisdiction over any offences committed in the provinces of *Lower or Upper Canada*, nor *any* jurisdiction over offences committed within the limits of any civil government of the *United States of America*; and that it did not intend, to give *any* jurisdiction over offences committed in *European* colonies, if perpetrated by *aliens*. Having thus considered the statute generally, and the intention of the legislature in passing it, I shall proceed to apply itto the case of the Prisoner in reference, 1st. to the jurisdiction of this Court over the *person* of the Prisoner, and 2dly. to the jurisdiction of this Court, over the *crime* charged against him.

From the preliminary observations which I have made, as well as from a perusal of the act itself, it is evident that this statute claims, or assumes, all parts of America, not being within either of the provinces of Upper or Lower Canada, nor within the limits of any civil government of the United States of America, nor in the actual occupancy of any European state to be *Indian territory*, *within British jurisdiction*, and subject to *British legislation*, and holds all persons there being, to be bound to that power, whether *aliens or subjects*. It has been argued at the bar, that the right of British legislation, did not extend so far, and reference was had to the American rebellion to shew that although formerly the whole of North America might be considered as subject to

the British government, yet that by the event of that rebellion a part of it was severed, and that, although when no other civilized nation had possessions on this continent, it might make no difference whether the limits of any particular territory were or were not correctly ascertained, as her jurisdiction over the *whole* could not be disputed, yet that now it is indispensable that they should be so ascertained, and that it should be proved on what authority the right is assumed of legislating over the *Indian territories*. You will not of course expect me to refer to history upon this subject; it will be a sufficient answer that this claim has been set up from almost time immemorial, and confirmed, in almost innumerable instances, by the solemn acts of the King and Parliament. Then how stands the case at present before us? By the indictment and the verdict, it is said, the murder was committed in the Indian territories, or parts of America, not within the limits of Upper Canada, nor of Lower Canada, nor of any civil government of the United States of America. Upon what part of the evidence the Jury have made up their verdict, it is not for us to say, but it is immaterial, upon this finding, whether he was a subject or not, because, being in the Indian territories, as described, he owed a temporary allegiance, and was clearly within the jurisdiction of this Court, which is what the Crown alleges. If, instead of this, the offence had been committed in some colony or settlement belonging to some European state, then the Prisoner should have shewn it, as also that he was an alien. To enable him to do this, it was not necessary that the Crown should have alleged him to be a subject, nor that the offence was committed in the King's dominions. In the general course or practice it might be necessary for this plea to be made in abatement, or in accordance with general principles to plead it in Bar, but under the present statute, it evidently is not so, for upon the general plea of not guilty, it is competent to him to prove that he is an alien, and that the offence was committed in a colony belonging to some European state. It is the statute therefore which provides that pleadings in bar, or abatement, are *unnecessary*, because by the fourth and fifth clauses, it admits them to be proved upon the *general issue*.

The Chief Justice read the 4th and 5th clauses at length.

The consequence of these clauses is, that the door, by this statute, is opened to the prisoner to prove two facts, upon the trial on pleading the general issue alone, which will immediately enable him to *demand his acquittal*, but, as was observed by his Majesty's Crown officers, the *onus probandi* upon this issue, is manifestly thrown upon the *Prisoner*, and for a reason sufficiently obvious. He could *best* prove them, and had *most*

interest in doing so; but, having neglected to do it, he cannot *now* assert that he is *not* a subject. The finding of the Jury is, " *in manner* " *and form as he stands charged in the indictment,*" which charges the murder to have been committed in the Indian territory, and the finding is in the Indian territory, and he cannot now contradict it. It is impossible that he can stand here, at this moment, in a better situation than he did upon his trial. He must *there* have proved, not only that he was *an alien*, but also that his offence was committed within some *European settlement.* Had he proved that he was an alien, he must, in addition, have shewn that the offence was perpetrated within an European colony; and why should he stand *now* in more favourable circumstances than *before* conviction, where half of what must have constituted his defence is cut away by the finding of the Jury, which declares that the offence *was* committed in the *Indian territory*, and not in any European colony? This being the state of the case, there is a defect which is unanswerable; he should have proved that he was an alien upon the *general issue which he pleaded,* for it is most singular that he should now call upon the Court to hold him to be *an alien*, and entitled to an arrest of judgment *without an iota of proof, not so much even as an affidavit, that he is so*, whilst, on the other hand, the positive finding of the Jury renders it an irrelevant fact, by finding that the offence was committed in the Indian territory. It is manifest, if, before the finding of the Jury, we could not extend to him the right of acquittal, or relieve him from the authority of the statute, that we cannot now that the verdict of the Jury has actually disproved half of that which it was necessary for him to prove, to justify the Court in acquitting him. Thus much is relative to the *person* of the Prisoner before us.

I now shall consider the *crime* wherewith he is charged. It is felony and murder, and it has been argued, and very ably argued too, by the gentlemen engaged on the defence, that *we*, that is the *Courts generally*, have no jurisdiction over *felonies* committed in the Indian territories, and especially, it has been urged, that a Court of *Oyer and Terminer* has not. We will enquire first, whether to *any* of the Courts of this province jurisdiction is given over felonies committed in the Indian territory, and, if we find that there is, we will prosecute the enquiry, so as to ascertain whether *this* Court ought to be considered as one of them. In reference to the first question, the gentlemen engaged on the defence, in support of their position, have produced the case of *Shaw* at large, and contend that it satisfactorily proves that, under the term " crimes and offences," power is not given to try for a *felony.* Any decision of my Lord *Ellenborough* is unquestionably entitled to the utmost respect, and so is this, and it will re-

ceive it from this Court; but it is evident, upon looking at *Shaw's* case, that it is nothing more than a trial founded on a *particular statute*, and is therefore merely an exposition of *that* statute. The statute of 42*d Geo.* III. *cap.* 35, on which *Shaw's* case arises, is an extension to other cases of a previous statute, a statute of *William and Mary*, which made provision for the trial of offences which might by prosecuted by indictment and information, and the case is nothing but an exposition of that particular statute. Offences prosecuted, or that can be prosecuted, by indictment *and* information, must necessarily imply misdemeanors, and misdemeanors only. As it is an undoubted principle of law that felony can not be prosecuted by information, it is manifest no Court could assume the power of awarding punishment upon a conviction on a statute for a crime comprehended within a class of offences which was not included in the statute upon which the conviction was obtained. It was not doubted that the word *crimes* included *felonies*, indeed the counsel for *Shaw*, Mr. *Selwyn*, said himself, upon the application of the words, crimes and offences, to felonies generally, that there was no difficulty, the task was to determine whether, in the particular instance then before the Court, it could be extended to them. There is a manifest difference between a *general* application of a principle, and the *special* application of it to a *particular case*. My Lord *Ellenborough*, in pronouncing judgement in this case of *Shaw*, says, (referring at the same moment to the 42*d Geo.* III. *cap.* 35,) " the words *crimes* then, *for the reasons stated*, does include capital felonies" so that upon the whole of this case of *Shaw* being examined, we perceive that the decision is upon a particular statute, and is of course limited to those which are *sui generis*. From 4th *Blackstone*, *page* 5th, was shewn very properly that " crime" includes the offences of " murder, treason and robbery," which are felonies. In the last edition of that work, with *Mr. Christian's* notes, there is, at this place, some notes relative to the distinction between crimes and misdemeanors, in which language can not be clearer or stronger, and they come from a man certainly entitled to our highest respect. He says, " In the English law, *misdemea-*
" *nor* is generally used in contra-distinction to *felony*, and misdemeanors
" comprehend all indictable offences, which do not amount to felony;
" as perjury, battery, libels, conspiracies, attempts and solicitations to
" commit felonies, &c." In the following page, in considering the distinction between *public* crimes, and *private* injuries, he adds, " The dis-
" tinction between public crimes and private injuries seems entirely to
" be created by positive laws, and it is referable only to civil institu-
" tions. Every violation of a moral law, or natural obligation, is an
" injury, for which the offender ought to make retribution to the indi-

" viduals who immediately suffer from it, and is also a crime, for which " he ought to be punished to that extent, which would deter both him " and others from a repetition of the offence. In positive laws those " acts are denominated injuries, for which the legislature has provided " only retribution, or a compensation in damages; but when from ex- " perience it is discovered that this is not sufficient to restrain within " moderate bounds certain classes of injuries, it then becomes necessary " for the legislative power to raise them into crimes, and to endeavour " to repress them by the terror of punishment, or the sword of the pub- " lic magistrate.

One of the objects then of legislative interference is, by the terror of the punishment upon the offender, and the sword of the civil magistrate, to repress crimes. " The word *crime*" (*says the same author*) has no " *technical* meaning in the law of England. But it seems, when it has a " reference to *positive* law, to comprehend those Acts which subject the " offender to punishment." From *Mr. Justice Blackstone's* definition, and *Mr. Christian's* notes, there can be no doubt then entertained, but that the words " crimes and offences" may, and *do*, in ordinary acceptation, include *felonies;* it remains to enquire, does the term " crimes and offen- " ces," under the *present statute*, include, and give jurisdiction over them? The true question is this, whether, looking at the statute upon which the Prisoner is charged, in connection with its context, it appears to have been the intention of the legislature to give jurisdiction in cases of felony, by the use of the words " crimes and offences," which so frequently appear in the preamble and enacting clauses of this statute. The first clause is certainly most comprehensive; it is in general words, and amply sufficient to include felonies. The words made use of are, " *all* offences," and " *any* of the *Indian territories*," but, notwithstanding this general description as to crime and locality, it has been urged at the bar, and plausibly urged too, that the preamble of this statute is different, it will be necessary therefore, to have recourse to the preamble, to ascertain whether it really is in opposition to these words—it is as follows: " Whereas," &c.—[*Preamble read, page* 279.]—Now it is said, in reference to this, (and said truly,) that for murder committed by a subject in a foreign territory, there was a jurisdiction already established by the act of *33d* HENRY VIII. *cap.* 23, and a method provided, in which that jurisdiction shall be carried into effect, viz: " that mur- " der confessed by a person, who has been examined by three of the " council, or who is vehemently suspected to be guilty, may be heard " and determined before commissioners of *Oyer* and *Terminer*, in *any* " county of England to be named by the King." Originally this act extended to treason, and misprision of treason, but has been repealed in

relation to those crimes, but not in relation to murder. *Here* then, it has been argued, is the Court where the offence of murder, if committed in foreign parts, should be tried. The question is, is this the true import of the preamble of the act of the 43*d* GEO. III. *cap.* 138? Does the context agree with the text? The *preamble* cannot be understood but with reference to the states of *America*. The object of the whole statute, is to provide a local jurisdiction *in America*, for the trial of crimes committed in the Indian territories, and *why?* The preamble of the act tells us. It tells us that great crimes and offences are committed; *where* does it say they are committed? Not in *Lower Canada*, where they might be tried; not in *Upper Canada*, where they might be tried; not within the limits of any civil government of the *United States of America*, where they might be tried; but this mention of the provinces of Canada, and of the United States of America, implies that these words must be understood in reference to a jurisdiction strictly local. The preamble recites that crimes are committed in the Indian territory, and are not cognizable, by any jurisdiction whatsoever, (that is, in America,) not cognizable by any jurisdiction adapted to the necessity of the case; and by this act the legislature say, we will, for the remedy of this evil, erect a competent jurisdiction in *America*. Should this appear a fair and obvious exposition of the preamble, yet it may still be said that preambles are not always a guide to expound statutes; case of *Barker* versus *Reading*, *Jo.* 164, *M.* 3. *Car. II.* They are not always most certainly, but, again, on the other hand, it has been settled that though "the preamble may explain, it cannot restrain, the words "of enacting clauses," and in this, and in all cases, where it is possible the preamble and enacting clauses, are to be construed together, as the context of the statute.

To shew that these observations on the effect of preambles, and their operation upon the enacting clauses of an act, are correct, numerous authorities might be produced. I shall, however, only refer to one or two, as establishing the principle I have laid down, that the preamble and the enacting clauses must be construed, jointly if possible, in order to obtain the true intent of the framers of a statute, which upon all occasions must be the guide in determining the interpretation or exposition which it ought to receive. In *Viner's* abridgement, 19 *vol.* p. 521, *sec.* 100, it is said, "the *preamble* is a key to open the minds of the makers, "and the mischiefs they intend to remedy;" this was said by *Dyer*, ch. J. Pl. 369, in case of *Stowel*, versus *Zouch;* I refer also to *Coke* upon *Littleton*, 79 *a*, for the same doctrine. At the same place in this volume of *Viner*, is the declaration of three justices, in the case of *Barker* versus *Reading* before mentioned, relative to preambles, in these words: "the

" preamble is not a guide to expound statutes always;"—and this is immediately followed by an extract from 8th *Mod.* 144, in the case of the *King* versus *Althoes*, which elucidates and enforces the position relative to the joint exposition of the clauses and preamble. " *Per. Cur.* It is " no rule, in the exposition of statutes, to confine the general words of " the enacting clauses to any particular words, either introducing it, or " to any such words even in the preamble itself; it is true, my *Lord* " *Coke* commends a construction which agrees with the preamble, but " not such as may confine the enacting part to it." My *Lord Chancellor Cowper*, a man most certainly entitled to our respect, confirms this opinion in *Copeman* versus *Gallant*, where he said, " that he could by " no means, allow the notion that the preamble shall restrain the ope- " ration of the enacting clauses, and that, because the preamble is too " narrow or defective, therefore the enacting clause, which has general " words, shall be restrained from its full latitude, and from doing that " good which the words would otherwise, and of themselves, import, " which (with some heat,) he said, was a ridiculous notion, and instanc- " ed in the *Coventry* Act, which if it had recited the barbarity of cut- " ting *Coventry's* nose, and the enacting clause had been general, viz: " against the cutting of any member, where the man is disfigured or de- " faced, it might, with equal reason, be objected that the cutting of the " lips, or putting out the eye, would not have been within the act, be- " cause not within the preamble." *Wms. rep.* 320, *trin.* 1716.—This opinion on the *Coventry* act seems expressly adapted to this case, and is conclusive as to the mode in which law, as well as common sense, requires that preambles and enacting clauses, should be construed in relation to each other. The principle has indeed been carried much farther, it has been held that, " all things which may be taken to be within the " mischief of the statute, shall be taken to be within the equity of it," and, under this interpretation, it is said, " that consideration being giv- " en to the true reason of the remedy, then the office of the judge is al- " ways to make such construction, as redresses the mischiefs, and ad- " vances the remedy, and to suppress subtle inventions and evasions for " continuance of the mischief, and *pro privato commodo*, and to add " force and life to the remedy, according to the true intent of the ma- " kers of the act, *pro bono publico*." But without saying that it is the province of the judge to go that length, I shall apply the general rules to this case.

In the first instance, the words that give the jurisdiction are, " *all* " offences committed within any of the Indian territories shall be, and be deemed to be, offences of the same nature," &c. How can words be stronger or more general? If we go a little farther to the *third* clause,

we shall find it enacts, " that the Court may and shall proceed therein," (that is in each case of crime or offence committed in the Indian territory,) " to trial, *judgment, and execution, or other punishment*, for such " crime or offence in the same manner, as if such crime or offence had " been really committed within the jurisdiction of such Court." These words are certainly as general, and as strong, as those of the former clause, which gives the jurisdiction. It is impossible to make them stronger, or more general, and it is equally impossible to take for them an interpretation more limited than the words import, in their ordinary acceptation. But there is a part of these words which requires and deserves a more particular consideration. What are we to understand by the words " *judgment and execution*," in connection, as they are, with the words, " or other punishment?" By the two expressions, the act must surely refer to different kinds of punishment, and to all such as are usually awarded in similar case in the province, where the same may be tried. Let us, however, refer to the case of *Shaw*, which is a clergyable offence, and see how the record would be made up? or rather, let us take a case nearer to that of the Prisoner, a case of felony and manslaughter, of which the form of the record may be found in *Blackstone's* appendix, (in *Hunt's* case :) It concludes in these words, " who " upon their oath say" (that is the jury) " that the said *Peter Hunt* is " not guilty of the murder as aforesaid above charged upon him, but that " the said *Peter Hunt* is guilty of the felonious slaying of the aforesaid " Samuel Collins, &c. And immediately it is demanded of the said " *Peter Hunt*, if he hath, or knoweth, any thing to say, wherefore the " said justices here ought not, upon the premises and verdict aforesaid, " to proceed *to judgment and execution* against him, who sayeth, that " he is a clerk, and prayeth the benefit of clergy to be allowed him in " this behalf," &c. What then do these words " *judgment and execution*" imply? why, they imply that punishment which is usually awarded in cases of felony, pre-eminently the punishment of death; and, if the words " judgment and execution" do imply, in the language of the law, the *ultimum supplicium*, the judgment of death, and its execution, then it is the punishment of death which, by these words, is designated in the statute, as is manifest from what immediately follows, viz, " or other " punishment. For the words are, " the Court may and shall proceed " to trial, judgment, and execution, or *other* punishment, for such crime " or offence, in the same manner in every respect, as if such crime had " been committed within the jurisdiction of such Courts." To what end is it, if *only* some other punishment than that of *death* can be awarded under this act, to what end, I ask, is it that the words " judgment " and execution" are made use of, in contradistinction to " other pun-

ishment?" We are of opinion, upon the whole, that the legislature, in this act, intended to give the power of proceeding to "judgment and execution," that is, to award the punishment of death; and, if so, if power is given to accord the punishment of *death*, it must necessarily follow that it was the intention of the legislature, by the previous enacting clauses, to give the power of trying for *felonies*, because the punishment of death can *only* be inflicted upon convictions for felonies, and then the implications, which were drawn from the preamble by the gentlemen engaged in the defence, are necessarily done away. But, notwithstanding these words, "judgment and execution," by legal and technical construction do mean the *ultimum supplicium*, and that the ordinary Courts of Lower Canada, have the power of trying for felonies committed in the Indian territories, Is the same power vested in this Court of *Oyer* and *Terminer?* It is not necessary to enter at length upon clauses from which it follows that we have this power.

By the first clause in the act, it is declared, that the offence "shall be "tried in the same manner as if the same had been committed in Lower "Canada." Now, we try by various Courts, in criminal proceedings, though always by a jury, sometimes by the Court of *King's Bench*, and sometimes by a Court of *Oyer* and *Terminer* and Gaol Delivery; and by the 3d clause it is expressly provided, that "the offender may and shall be "prosecuted and tried in the *Courts* of the province of *Lower Canada*." Now, as this clause does not mention any particular Court, it is as if it said, in *any* Court, only let the offence be tried at the customary tribunal; but, proceeding a little farther in this clause, it designates, to a certain extent, *what* Court; "the Court in which crimes and offences "of a like nature are usually tried," that is to say, in any Court, not a civil, but a criminal, Court; and, it goes on to say, as a further designation, and certainly it is a most decisive one, "and where the same "would have been tried if such crime or offence had been committed "within the limits of the province." What can be plainer; let me ask? where, if this offence had been committed within this district, would it have been tried, but in this Court? The Crown has the right of choosing its own Court; would it not have been in this Court, then, that the Prisoner would have been tried, if the Crown had elected this Court for that purpose? These clauses are so forcible, and carry their own strength so completely with them, that it is really unnecessary to expatiate upon them. I shall now touch briefly upon the other points. What I have hitherto said, has been upon the 43d of the King, what I have now to remark upon, is that which is connected with the 14th of the King. The points connected with this act have been already decided during the trial, yet, if there had been any thing since advanced to induce the

Court to change its opinion, you should assuredly have had the advantage of it, but there is nothing. The act of the 14th of the King, is commonly called the *Quebec* Act. In the first clause of this act, the boundaries of His Majesty's ancient province of *Quebec* are described. It is unnecessary to read the whole, but the line reaches the river "com-" monly called *Niagara*, and then along by the *eastern* and *southeastern* " bank of Lake *Erie*, following the said bank, until the same shall be " intersected by the *northern* boundary granted by the charter of the " province of *Pennsylvania*, in case the same shall be so intersected, and " from thence along the said northern and western boundaries of the " said province, until the said boundary strike the *Ohio*. But in case " the said bank of the said lake shall not be found to be so intersected, " then following the said bank until it shall arrive at that point of the " said bank which shall be nearest to the *north western* angle of the said " province of *Pennsylvania*, and thence by a right line to the *north wes-* " *tern* angle of the said province; and thence along the *western* bounda- " ry of the said province; until it strike the river *Ohio*, and along the " bank of the said river, *westward*, to the banks of the *Mississippi*, and " *northward* to the *southern* boundary of the territory granted to the " merchants adventurers of *England*, trading to *Hudson's Bay*."

The statute describes the entire line of circumscription of the province which it erects, under the name of the province of *Quebec*, and describes it very exactly. The part I have been so particular in reading is the part upon which it is considered that a misdirection has been given by the Court to the Jury. It is necessary to observe, relative to this line, that it is a *curved* line in some parts, and a *straight* line in others. Thus, whilst going along the banks of the *Ohio*, it is *curved*, but as soon as it reaches the banks of the *Mississippi*, it becomes a *straight* line. It follows the banks of the Ohio in a curve, but the words of the statute are imperative, when it reaches the mouth of the Mississippi. It is to proceed "*northward*," in a *straight* line. If it had been intended that it should continue on, along the *banks* of the *Mississippi*, it would have said so. It carries the line *to* the bank of the *Mississippi*, and what right have we to say, that it should run along, or *within*, the banks where they who framed the act, omit it. They say, *thence* it is to run *northward*. *You* have contended that this means to *incline* north, according to the *course* of the river; it is impossible for *us* to say so, we are bound to take the statute in its *words*. It is impossible for us to do otherwise, it is a fixed and certain boundary, and, according to the statute, we have, to the best of our knowledge, decided it. In the decision we have made, we are supported by the authority of my *Lord Hardwicke*, in the case of *Penn* and *Baltimore*. In the disputes between *Penn*, the

proprietor of *Pennsylvania*, and my *Lord Baltimore*, on the question relative to the limits of *Maryland*, a similar difficulty arose, and the case is to be found at length, in 1 *Vesey, Senr.* 444. I mention this case, because the Court have taken upon themselves to decide the limits of Canada. Original jurisdiction relative to the colonial territories of the King, is in the King and his council. In this dependent province nevertheless, we have been compelled to give a decision upon the question, not from any wish on our part, but because it was brought before us incidentally, and there was no avoiding it. The power of deciding finally is, however, at home; the question will be taken before the King and his council, and in deciding the limits of *Upper Canada*, they will either confirm or reverse our decision, according as we have done right or wrong; so that as to any consequences that may result from our error, if error we have committed, they will be obviated by the superior authority to whom the question is to be referred.

It has been urged to us that no proof of the *death* of *Keveny* was shewn. It has been settled, the jury have settled it, but I wish there could be a *doubt* entertained about it, I wish it were *possible*, but I fear it is not. It has been urged that we admitted as evidence a confession of the Prisoner before the *Earl of Selkirk*. It no doubt was intended to be stated accurately, but it was not so in fact. The written paper in his own hand-writing we did receive, the certificate at the bottom by *Lord Selkirk*, we did not, because there was no proof of it by *Lord Selkirk*, or his clerk; we therefore rejected it, specially on the ground of there being no proof; though it went only to this, that previous to the examination and its being signed, he declared the contents of the paper was true, in presence of *Dr. Allan* and a *Mr. Dease*, who were called on to witness it. This confession was not an unsupported document: we had the same thing over again through *Vitchie*, and *Captain O'Orsonnens*, and as a paper in his hand-writing it was received as the others at common law, although the certificate of *Lord Selkirk* endorsed upon it was rejected. I shall not touch upon the motion for a new trial; the authorities against it are too strong, indeed they are conclusive. On the whole, the order of the Court is, that the Prisoner do take nothing by his motion.

Mr. Justice Bowen merely expressed his concurrence in the luminous view of the questions, taken by his honour the Chief Justice, in the judgment which he had delivered, and observed that if the construction of the Prisoner's counsel of the act of 1808 *was correct, then their practice for twenty five years, namely, from* 1793, *had been erroneous as it was pretty notorious that the Court had sat to try felonies of all kinds.*

Proclamation being made for silence, the sentence of DEATH *was pronounced by the Chief Justice, against the Prisoner in the usual manner, he being ordered for execution on Monday the 8th inst.*

END OF THE TRIAL OF CHARLES DE REINHARD.

SUMMARY

OF

THE TRIAL

OF

ARCHIBALD M'LELLAN, Esquire.

UPON *Tuesday* the 9*th June*, *Mr. Attorney-General* moving that "ARCHIBALD M'LELLAN" (who had at the close of the *March* term been liberated from confinement upon giving bail,) "be put to the bar "for the purpose of ARRAIGNMENT as an *accessary* to the Murder of "*Owen Keveny*."—*Mr. Stuart* observed, that after what had passed he should not have supposed that the Crown officers would have proceeded with any more trials on this indictment *at present*, and was proceeding to oppose the motion, when the *Court* stated, that till he was formally accused by the indictment being read to him, the *defendant*, not being before the Court, could not be heard by it. *Mr. Stuart* stated, that his objection was, "that the Court could not proceed to decide the limits "of *Upper* Canada, and that it was useless to expose the accused to "the hazard of a long imprisonment, whilst the necessary representa- "tions were made to the government at home," and suggested that perhaps he might be permitted to move the Court "that further pro- "ceedings upon this indictment be staid till the decision was obtained." *The Court* answered, "You must plead something, and then we will "hear you in any way your judgment may point out as most suitable."

ARCHIBALD M'LELLAN was then arraigned in the usual form, and pleaded NOT GUILTY. (*Mr. Stuart* being promised by the Court that time should be given to prepare a *special plea*.) In answer to the usual enquiry of when the Prisoner would be ready for trial, Mr. Stuart stated

that to prepare the *special plea*, would take some time, as his counsel must consult together, but he thought by *Thursday* they would be ready. *The Crown officers* disclaimed any wish to unreasonably press upon the Prisoner, and trusting that his counsel would then be ready, moved his commitment. *Mr. Stuart* submitted that MR. M'LELLAN was under bail to a large amount; but the Court said, "*After* his arraignment he "cannot be permitted to be at large."—*Let the Court be adjourned till* THURSDAY *morning at Eight o'clock, A. M.*

On *Thursday*, the 11th inst. *Mr. Attorney-General* again moved that *Archibald M'Lellan* be put to the bar. *Mr. Stuart* addressed the Court stating, that after great *legal* doubts as to the propriety of so doing, the counsel for *Mr. M'Lellan* had acceded to his urgent solicitations to allow the plea of the general issue *to stand*. "Our *own* opinions (*said Mr.* "*Stuart*) are not at all changed, for we are rather surrendering our "judgments to the anxiety of the *Defendant*, who, conscious of his in-"nocence, prefers an immediate trial, under some disadvantages, to "protracting the process, by availing himself of any privilege which "the law might give him, and he will be ready for his *trial* to-morrow." *The Court was then adjourned till To-morrow, at Eight o'clock, A. M.*

On *Friday*, 12th June, the trial commenced before His Honour CHIEF JUSTICE SEWELL, and ALEXIS CARON, Esq. *King's counsel*, the same professional Gentlemen conducting the prosecution and defence as in the case of *De Reinhard*, and the Jury sworn consisting of the following gentlemen:—

William Measam,	*John Glatterer,*
John Orchard,	*Jacques Tranquil,*
Jacques La Fleur,	*Joseph Chamberland,*
George Potts,	*Daniel Golstrom,*
David Golstrom,	*John Hersey,*
Jacques Boilieu,	*Joseph Defoi.*

The Prisoner's counsel assenting to a suggestion of the Court, that as the *eighth* count contained all the allegations against the Prisoner, it would be unnecessary to trouble the Jury with the *whole* of the long indictment, he was given in charge to them upon that Count alone.

Mr. Attorney-General opened the case by observing, that although accused of the crime of murder, the Prisoner was charged only as an *accessary* both *before* and *after* the commission of the offence, and adverting to the conviction of the *Principal*, stated, that the record thereof would be made evidence against the defendant, as establishing the actual commission of the murder. Having very briefly explained the *le-*

gal import of the charge, he expressed his expectation that the separate allegations would be so fully sustained, that the Jury would be compelled, in the discharge of their duty, to find the Prisouer guilty of the crime. He cautioned them against any prepossession which the notoriety of the disputes between the *Hudson's Bay* and *North West* Companies might expose them to, and disclaimed on the part of the Crown any wish relative to this trial, than that a *true* verdict might be given according to the evidence alone: but, in the absence of *positive* proof, (which cases of *murder* seldom admitted,) he should by a variety of strong circumstances, (*he feared,*) satisfy the Jury that such a verdict must be GUILTY.

The *Attorney-General* noticed the means by which *Mr. Keveny* was brought to *Bas de la Rivière*—his being sent away by the Prisoner in charge of *Bois-brûlés*—his subsequent transfer to *Faille*, *La Pointe*, and the Indian *José*, together with their quarrel and separation, observing, that it would be very material to recollect *M'Lellan's* conduct in a variety of situations, as from the *coincidence* of circumstances his guilt would become apparent. The opposition by the deceased to the warrant executed by *De Reinhard* was then adverted to, as well as the Prisoner's leaving *Keveny* the very last time he was seen, in the custody of *Mainville* and *De Reinhard*, (who might be supposed to be his enemies) and leaving him, after they had in *M'Lellan's* hearing freely spoken of killing him. The conduct of the Prisoner upon meeting *Faille* and *La Pointe*, after their separation from *José*, in beating them, and his observation that the Indian wanting to kill *Keveny* " was none " of their business" were alluded to, as well as the conversation between the people of his own canoe, relative to killing him, and dividing his *butin*. The conversation with the people of the *Swan River* brigade was instanced, and *M'Lellan's* remark to them, " 'Tis well, he will " not steal any more, to-morrow, at this hour, his business is done," described as peculiarly significant. The charge of harbouring the murderers with a guilty knowledge of their crime, the *Attorney-General* considered to be sustained by the following circumstances—their bringing to *M'Lellan's* encampment the bloody clothes of the deceased—the small canoe, in which he might have been expected to arrive, being in a similar situation, and the subsequent orders of the Prisoner to burn the canoe. His anxiety to retake *Keveny*—his anger at not finding him where he expected to do so, and then leaving him *to follow*, instead of himself handing him over to the laws of the country were noticed as singular, whilst the absence of surprise upon *De Reinhard's* communicating the catastrophe in these words, " *His business is done, he is well* " *hidden—he will not come back again,*" in connection with his continu-

ing to live, eat, drink, and sleep with the murderer, not only in the canoe, but also when encamped, were produced as strong additional evidences of guilt. His receipt of part of the *butin* of *Keveny*, and his forbidding the people to speak of his death, telling them the probability was if spoken of *they* would suffer, were adduced, and, in connection with the circumstance that he was a partner, and therefore had controul of the North-West servants, uged to the same point. In addition to these facts, it would be proved by a *Mr. Heurter*, that the Prisoner, in a letter addressed to a *Mr. M'Donell*, wrote these words, "*Keveny has* "*disappeared, don't be anxious about him*," which, the *Attorney-General* thought, must be applicable to his destruction, the incitement to which horrid step might (he suggested) perhaps be found in the circumstance of the valuable information *Keveny* could furnish to *Lord Selkirk*, if he reached *Fort William*, added to his natural intrepidity and capacity to be serviceable, if any contest took place between the companies. All these *Mr. Attorney-General* represented as strong indications of guilt, but, proceeding to lay before the Jury the evidence, he should rely with confidence that their verdict would be one strictly consonant to the oath they had taken, of making a *true* deliverance between our Sovereign Lord the King, and the Prisoner at the bar.

WILLIAM BACHELOR COLTMAN, *Esquire*,* and Mr. JOSEPH BOUCHETTE, *Junior*, being sworn, proved that *the Dalles* were to the *north* of a line drawn due *west* from *Portage des Rats*, and to the *west* of a line drawn *due north* from the junction of the *Ohio* and *Mississippi* rivers—thus establishing, in accordance with the decision in *De Reinhard's* case, that the place where the offence was alleged to have been committed was *within* the jurisdiction of this Court.

HUBERT FAILLE'S examination commenced by a relation of the circumstances narrated in his evidence (*page* 13) on the former trial, to the words "*remained on shore*," with the addition that "he had asked for a gun, but was refused by *Mr. M'Donell*."—[*Mr. Solicitor General* stated that his next question had for its object to prove, that at *this* time the intention of killing the unfortunate *Mr. Keveny* existed—the *Chief Justice* asked, "What has this to do with the Prisoner at the bar,

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* It may be proper here to correct an error which has passed unobserved in *Mr. Coltman's* evidence on the trial of *De Reinhard* (*page* 12.) Instead of saying, as is there represented, that "it is a matter of public "notoriety that writs issued by the magistrates of the Western district "of Upper Canada, *are* executed at *Fort William*," it ought to read, "It is a matter of notoriety that writs are issued by the magistrates, "&c. *to be* executed at *Fort William*." W. S.

" whose *name* even is not yet mentioned?" *Mr. Solicitor General* replied, that although *Mr. M'Donell* might *now* appear *hors du combat*, yet the Crown would incontestibly connect the whole of the circumstances, and the Prisoner with them.—" At this moment (*said Mr. Solicitor*,) " *Keveny* is delivered up to this party, who take him in charge; and we " shall shew, that they afterwards met the Prisoner at the bar, by whom " *Keveny* was taken out of the custody of these persons, and handed o- " ver to his murderers. Eventually, we shall unite these *two* branches " of evidence, and distinctly connect the Prisoner with *both*;"—and unless permitted to lay events before the Jury, in the order of time in which they occurred, the evidence would appear confused. The *Court* remarking, that this was reviving the course which on the late trial had been declared inadmissible, directed the Solicitor-General " to first con- " nect the Prisoner with the transactions he proposed to make evidence " against him."] *Witness* cursorily detailed the intervening occurrences, till the arrival of *M'Lellan's* canoe, including, among the transactions on shore, the beating he received, saying twice that " he did not " know *why* he was beat," but omitting the expression, " *that it was* " *not our business*," attributed to *M'Lellan*, (*page* 16, of the former trial,)—and its subsequent departure with himself and *La Pointe*, (*page* 17,) and continued his evidence up to the period of meeting the *Swan* River brigade, (*page* 18,) declaring, repeatedly, that he related on shore, and in the canoe, in the presence of *Mr. Archy*,* all that happened between the Indian and them, and that the Indian had wanted to kill *Keveny*, but that he could not say, *whether the Prisoner heard him or not*,† nor could he tell *what* M'Lellan said, though he stated that he spoke to *him*. As his account of what occurred at that meeting, differs from his former testimony, (*page* 18,) it is judged proper to give his exact words, accompanied by an abstract of observations by the *Court* and the *Advocates*:—" The next day (*after embarking*,) we met five or six canoes, " by which we learnt that *Mr. Keveny* was farther on, above the *Dalles* " in the River *Winnipic*, and afterwards we found *Keveny* at the place. " I do not know whether it was of *Mr. Ducharme*, but *somebody* asked " the people of the canoes, how *Keveny* managed for his living, *but I do* " *not know whether Mr. Archy heard it.* We were all talking together, " and *somebody* asked, " how does he manage for his living?" and some

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* The Prisoner is known to the *Voyageurs* by this appellation.

† It may be proper here to notice, that in *March*, he was particularly examined to this point, and gave similar evidence as to *M'Lellan's* hearing, but he *then* stated, that at this time *Mr. Archy* scolded him and tauntingly asked who directed *him* to beat the Savage? W. S.

" one answered, sometimes he stole from the Indians, and sometimes he " bought. *I do not know in what part of the canoe M'Lellan was at that* " *time. I do not know that M'Lellan heard this conversation. I cannot* " *say. M'Lellan was nearer than I was, and I heard it very well. I* " *was a little farther off than Mr. Archy.* I was not then speaking, and " at that time I heard no reply given to this answer. *I heard it very* " *well*, but *I do not know whether M'Lellan heard it or not, but certainly* " *he was nearer than I was.*"

[*Mr. Stuart* suggesting, that till it was shewn that *Mr. M'Lellan* took part in this conversation, the Court would not insert it on their notes, The *Solicitor-General* contended, that the witness having proved the Prisoner to have been in a situation, where it was almost *impossible* but he *must* have heard, his evidence ought to be taken down. The *Chief Justice* said, that was not so clear, as the witness did not know in what *part* of the canoe *M'Lellan* was sitting. To which the *Solicitor-General* remarking, that being *in* the canoe, it was reasonable to infer that he *must* have heard. *Mr. Stuart* rejoined, that if even he *did* hear it was not to convict him of being an accessary to the crime of murder, but that it did not unquestionably follow, that because a person was near enough *to* attend to a conversation, that he actually *must* so attend.]

Faille.—" At *that* time I did not hear any answer, but *afterwards*, " and whilst we were in the canoe, I heard some person say, " he will " not eat long." I do not know in what *part* of the canoe the person " was who said so, nor whether *M'Lellan* heard it."

[The *Chief Justice* remarked, that he could not see how this evidence could bear against the Prisoner. *Mr. Stuart* urged, that not only the presence of *Mr. M'Lellan*, but a *participation* in, and *approval* of, what was going on, must be proved as a *substratum*. The *Chief Justice* referred to the decision on the *former* trials, that evidence could not be accepted of conversations, which it was not proved the Prisoner *participated* in, or *approved; (pages* 16 *and* 17,) and then adverting to the *present* case, he added, " We do not see how *this* is to be brought home " to *M'Lellan*—the witnesses narrative is so imperfect, I really do not " see what is to be made of it. He does not know *where* the persons " were who held the conversation, whether behind or before him; he " does not know *who* they were, in fact, he appears to know nothing " but that they were all in a canoe, and that *he* heard what passed. It " would be highly dangerous to admit as evidence that which is not " *clearly brought home* to the Prisoner, and this conversation was cer- " tainly not brought home so as to make it evidence against *M'Lel-* " *lan.* If you can shew that he *was* in a situation near enough to have

" heard, in the common course of things, it is *a fact* you *may* prove, but " even then I do not think much could proceed from it, for though *thus* " situated he might *not* hear." These observations *Mr. Solicitor General* considered as going the length of saying, that a witness must swear that a man positively heard a thing which he held to be impracticable. *The examination was then continued, the witness answering to different interrogatories,* " that he did not know whether *M'Lellan* was *before* or *be-* " *hind* him, nor whether the man spoke *loud*, or as he was *then* speaking." The *Chief Justice* said, " It comes exactly to what he has said twice " before. You perceive he will not fix the *place* of the Prisoner, or " whether the person spoke *loud* or not. Can *such* evidence bear against " a prisoner" ?]

Examination continued.

Faille.—I heard some one say, but I do not know *who* it was, " that " he would not eat a long while." He said that the *Prisoner* would not eat a long while. I believe he spoke of *Keveny*. The person that said so was *before* me in the canoe.

Chief Justice Sewell.—Where ? in what part ?

Faille.—I do not know. *Mr. M'Lellan* was in the canoe at the same time, but I do not know whether or not he was *nearer* to that person than I was. The partners and clerks are generally in the *middle* of the canoe. *Mr. M'Lellan* was in the *middle*, a little towards the *fore-part*.

Chief Justice Sewell.—How did he speak ? Did he speak *loud* ?

Faille.—He spoke loud enough for me to hear him. He spoke as I do at present. The person that spoke was *before* me. The partners and clerks were in the *middle*. I was behind them.

Solicitor-General.—The one that spoke was consequently *between* you and the gentlemen (*bourgeois*) ?

Faille.—I do not know.

[The *Court* again asked what this *could* tend to, and *Mr. Solicitor-General* proceeded to examine *Faille* as to *finding Keveny*, but the *Chief Justice* wishing most *clearly* to understand, whether upon the expression, " *he will not eat a long time,*"* the Prisoner said *any thing;* the witness replied, to a question founded on the suggestion, " I do not " know. I do not know whether *M'Lellan* spoke then."]

Mr. Solicitor-General then examined the witness upon the expression

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* In *March*, he repeatedly swore that this very expression was used by *Mr. Archy*. W. S.

of *De Reinhard*, (*pages* 18, 19,) and to *M'Lellan's* situation in the canoe, at the time of the conversation of the *Métifs*. (*page* 21.) He described that *Mr. M'Lellan* was nearer to *De Reinhard* than *he* was, and that the people spoke as *he* was *then* doing, (*in an ordinary tone*;) and in answer to a solemn interrogatory from the *Court*, he said, "I do not "know whether MR. ARCHY *heard* it or not"—and to a *second*, "I "did not hear him *speak*." Upon which *Mr. Stuart* objected to the whole of this evidence. The *Chief Justice* replied, "it rests with the "*Jury* to give what credit to it they think proper, and also to say, "whether the Prisoner *did* or did *not* hear. The Crown has merely "proved that he was *in* the canoe."

The Court was then adjourned for half an hour.

The witness continued his evidence. by relating their departure in *M'Lellan's* canoe—their encamping for the night, and hearing the report of a gun, (*page* 22,) adding, (as he did in *March*,) that *Desmarais* said, "*Oh, the dogs! they have killed him*"—the arrival of the small canoe—*Mr. Archy*, and others, going to the water side—the conversation that passed—and the relation, (*to the engagés*,) by *Mainville*, of the circumstances attending the death, (but as the gentlemen (*bourgeois*,) were not present, evidence was not allowed of what they were.) The evidence here, referring particularly to the *Prisoner*, is given at length.

Faille.—I saw *Keveny's* things landed, but I do not know that *M'Lellan* saw them; but he was near enough to have seen them, if he had *looked*. There was a trunk with *papers* which *De Reinhard* opened, and, *examining the papers, threw them into the tent of the bourgeois*, where *M'Lellan* stayed. *Mr. M'Lellan* read them, and tore and burnt them. I am *certain* that they were the papers out of *Keveny's* trunk, which *Mr. M'Lellan read, tore, and burnt*. *De Reinhard* kept *Keveny's* boots, and a loaf of *white* sugar that belonged to him, *De Reinhard* put, and I saw it, into *Mr. Archy's* basket. Before that, he wanted to put some *tea* in, which belonged to *Keveny*, but *M'Lellan* prevented him, saying he had no occasion for *that*. I do not know whether *M'Lellan* perceived it, when he put the sugar in. We re-embarked the next day, and *Mr. M'Lellan* read more papers and tore them; but I cannot say whether *they* were *Keveny's*. Before we went, I heard *Mr. Archy* tell, to burn the small canoe, but I do not know for what. There was a great deal of blood in it, but I do not know, *and he did not say*, why it was to be burnt. Before embarking, at the waterside, I received orders from *De Reinhard* not to speak of the death of *Keveny*, and I promised him that I would say nothing about it; but I do not know that *M'Lellan* was there at that moment. I do not know whether *M'Lellan* and *De*

Reinhard met as if they were *friends*, but they ate together, and voyaged together, and did not quarrel, and they remained together in the canoe, as usual, in the *bar of the bourgeois*. That evening I went to bed before the others, and I do not know whether they slept together.

Upon his cross-examination by *Mr. Stuart*, no new fact was extracted, except he was taken into custody by *Captain D'Orsonnens*, but at the time did not know *why*, and that subsequently he was examined by *Captain Mathey*, and made an affidavit before *Lord Selkirk*. The following, it is believed, comprises the admissions in favour of the Prisoner:—

That *Mr. M'Donell* treated *Keveny* kindly, (*page* 29,)—that it is *customary* in that country for the *Indians* to have arms—that Mr. M'Lellan's was a *light* canoe, (*allège*,) and that in such canoes it is not usual for the *bourgeois* and *engagés* to converse together—that it was requisite for *De Reinhard* to remain with the *bourgeois*, as he could not *paddle*, and there was no room among the *voyageurs*—that though *De Reinhard* took his meals at the *same time* as *M'Lellan*, there was no table, but clerks and partners sat in a circle—that *M'Lellan* could not leave *De Reinhard* in that place, as he must have been starved to death —that eight *engagés* and two *bourgeois* generally went in a light canoe, but that they were fifteen—that he heard *M'Lellan* say, he could not take *Keveny*, because his canoe was too much loaded—and that, as he could neither write nor read, he could not distinguish *Mr. Keveny's* papers from *M'Lellan's*, nor from those then in his sight.

Jean Baptiste La Pointe, being sworn, related briefly the circumstances detailed in *pages* 13 and 14; when *Mr. Attorney-General* asking if *Joseph* shewed any intention of killing *Keveny*. The *Chief Justice* (upon *Mr. Stuart* objecting,) said, "first prove a connection to "exist between the *Prisoner* and this *Indian*, before you examine what "he did." The witness continued the narrative to the arrival of *M'Lellan's* canoe, which he described as on the *fourth* day, (instead of the *fifth* as at the last trial,) and continued as follows:—

La Pointe.—*Cadotte*, who was in the canoe, where *M'Lellan* was, enquired of us what we had done with *José* and with *Keveny*. *Faille* replied that *José* wanted to kill *Keveny*, but he had been prevented—upon which *Cadotte* said, "you blasted blackguards, it is false," also, "that was not our business," and that, "we deserved a threshing."—Upon this *Mr. M'Lellan* landed, and beat us with a canoe pole. Afterwards we embarked in *Mr. M'Lellan's* canoe, and he then told us that he had beat us because I had beat the *Indian*. The *Prisoner* and *Cadotte* were in the canoe, and three times nearer to *each other* than to *me*, when *Cadotte* said, "it is false;" and then *Mr. Archy* landed and

beat us. I should think that *Mr. Archy* heard the conversation between me and *Cadotte;* he was near enough to have heard it. The same day I heard *Mainville*, *Vasseur*, and the *Bois-brûlés* speaking about killing *Keveny*, and dividing his things amongst themselves. One said that he would have his hat, and another said, he would have his boots. *M'Lellan* was present and might have heard as I did. The *gentlemen* in the canoe *laughed* at it.

Chief Justice Sewell.—Did the *Prisoner* laugh?

La Pointe.—Yes, for certain, when *Mainville* said, that he would have his hat, he laughed as the others did. They assuredly spoke *several* times of the intention of killing *Keveny;* it was *almost the only subject* of their conversation.

Chief Justice Sewell.—Did the Prisoner say any thing at that time?

La Pointe.—Not to my knowledge, but he laughed at it. After we had met with the people of *Swan* River, I heard a Half-breed enquire, "where was *Keveny*," and they said, "he is above the *Dalles*." A Half-breed then asked, "how does he get his living," and after the answer was given that, "sometimes he stole, and sometimes he bought," the *Half-breeds* uttered a *cry of joy*, exclaiming, "he shall not steal much "longer." *Mr. Archy* was there, but I do not know whether he was near enough to hear this conversation, nor whether he was in the canoe at that instant, but, if he was not in it, he was not far off, for we *immediately* left the shore, and he was *in* the canoe when we pushed off. Before we met the people of *Swan* River, *De Reinhard* said, "I will take "good care of him," (*Keveny;*) "it is I who will kill him." *Keveny* was not on the island where we left him. After having landed there, we re-embarked, and *De Reinhard* not being yet on board, one of the Half-breeds, said to *M'Lellan*, that it would be *De Reinhard* who would kill *Keveny*, and *M'Lellan* answered, "*De Reinhard is too much of a* "*milksop, he is not alert enough to kill him.*"* Thence we returned to the *Dalles*, and from the time we met the people of *Swan* River, down to the time we got there, the people were dull, and I heard no conversation amongst them.

The witness then narrated the finding *Keveny*, and their subsequent departure, leaving him to be conveyed by *De Reinhard*, *Mainville*, and the *Indian*, but said that he knew no reason why *these* men were left, but he heard *M'Lellan* say they were to bring on *Keveny*. He considered that *Mr. Keveny* and his baggage might have been taken in *M'Lellan's* canoe, which he described to have been lightened by unloading a

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* "*De Reinhard est trop palôt, il n'est pas assez alerte pour le tuer.*"

quantity of wild rice. The exclamation in the canoe on hearing the report of the gun, (*page* 34.) he attributed to *Desmarais*, and that *M'Lellan* sat *between* him and *Desmarais*, but he could not say whether he heard it or not. He (the witness) did not hear any thing said, either by the Prisoner, or any other *bourgeois*, but that at that moment, they appeared to him to be more serious than usual. He continued his narrative to the arrival of the small canoe, (*page* 34.) but as he could not say whether *Mr. M'Lellan* went to the water side, the conversation was not gone into; he, however, said that when he *did* discover that *Keveny* was not with them, he did not hear the Prisoner express any *surprise*, nor did he put himself into a *passion*, though "when he thought *Keveny* "had escaped from the North-West people, at the time he was left on "the small island, (*pages* 32 and 33.) he appeared to him to be in a "passion"' nor "he never heard any reproaches or expressions of anger "against either *De Reinhard*, *Mainville*, or *José*." His examination proceeded as in the middle of *page* 35, with the addition that "the "clothes were washed before *M'Lellan's* tent, but he said nothing a-"bout it, neither good nor bad." In addition to the *sugar*, he saw *Keveny's* boots in the Prisoner's tent, and he also heard the Prisoner give directions to *burn* the canoe, (*page* 302.) "He said in *my* pre-"sence, and that of others, and *Faille* was as near as I was to the Pris-"oner, who spoke as loud as I speak, "Burn the canoe, because it "might give some knowledge to the *Indians*, or to some *Canadian*, "who might be passing by, of the murder." * His account of the destruction of the papers, though very positive, differing materially from Faille's (*page* 302.) it is given, together with his testimony that he received orders from the Prisoner to conceal the murder.

La Pointe.—I saw *De Reinhard* open *Keveny's* chest, but I do not know whether he opened it with the *key* or not. I can say upon my *oath*, that the papers were *Keveny's* papers, because I saw them. They were taken in the box by the Prisoner, which he carried *himself* to the *fire*. *De Reinhard* did not take the papers *out of the box*, and *M'Lellan* carried it himself, and after part of the people were gone to bed, he examined the papers, and threw them into the fire in succession as he examined them. He was not in his *tent*, but at the *fire*, and *De Reinhard* was not there then. I can say upon my *oath* it was *Keveny's* box. *M'Lellan* had not burnt all the papers, but on the following day he was still reading some of them in the canoe. He read one, and said to

* In *March*, he testified that at the time *M'Lellan* ordered the canoe to be burnt, he said something else, but *he* (*witness*) did not hear what it was. W. S.

the Half-breeds, " it is very well that *Keveny* is dead, because (shewing the paper) he had the power of getting *King's troops* to go and take your lands at *Red River*." One of the Half-breeds said, " that is one of his papers then?" and he answered, " *yes*." I saw *Mr. Archy* destroy the papers when he was in the canoe, he threw them into the river with stones to make them sink. Before starting in the morning, *M'Lellan* told me not to speak of this murder, saying, " take care not to speak of the murder of *Keveny*, for you and the rest of you would be punished by us." He said also that the crime was equally attibutable to *us*, and that *we* should be punished, and *Cadotte* told us that we should be *hung*. Several times afterwards on the way, he forbade us to mention the murder of *Keveny*, and again when we were come to Lake *La Pluie*. It was *M'Lellan* who was master in the canoe, and *De Reinhard* retained his arms in the canoe.

The Court adjourned till To-morrow, at Eight o'clock, A. M. LA POINTE *being committed to the care of a constable.*

Saturday, 13th June, 1818.

UPON his cross-examination by *Mr. Vanfelson*, he deposed, up to the time of his discovery by *Mr. M'Lellan*, nearly as on the former trial; (*page* 87,) stating, in addition, that upon their return after first leaving *Keveny*, seeing a *flag* upon the island, *they* (*Faille and himself*) wanted *José* to put to shore and take him on board again, but he said the canoe was too small,* saying, † *paddle, paddle*, (which was the only *French* he spoke) and they doing so, *he* steered the canoe from the island where *Keveny* was. He said, that " *Mr. Archy* landed the first, and it " was certainly *before* he landed that the conversation between *Mr.* " *Cadotte* and the witness took place;" (*page* 303,) and also that at the time *Cadotte* pointed out the Indian, and said it was *us* who had beat *José*. In answer to a solemn enquiry upon his oath, whether on seeing the Indian, he did not say, it was *Faille* who had beat him, and whether *Faille* did not say, it was him? He said, that *he* did not, nor

* The witness explained, that the canoe in which they first received *Keveny* having been broken, *José* had traded for this, which was a *smaller* one.

† *Nage, nage.*

did he hear *Faille* say that it was *him*, but that he *then* said, " It was I " who beat him, because he fired at me." He was reminded of his oath, and the question put again, but he gave a similar reply. In answer to a question from the *Chief Justice*, he said, that in the canoes the *bourgeois* conversed among themselves, and the *engagés* the same. That except on business, the *bourgeois* did not speak to the *engagés*, and that it was the *guide* they addressed when they had occasion to give orders. He admitted that it was not easy to *paddle* and *talk* at the same time, but still maintained that in the canoe they did frequently talk of killing *Keveny*, and dividing his things. Being questioned very particularly as to his own situation in the canoe at this time, and who was in the same bar with him, he said, " he did not know where *he* " was, nor could he recollect *who* was in the same bar." He then described the arrangement of a canoe, and what would have been his situation in relation to the middle (*or bourgeois*) bar—had he been paddling near the steersman, or near the foreman or guide, but although examined by the Court and various counsel, he did not appear to render his position at any time intelligible. He said, that he had almost always *M'Lellan* in front of him, sometimes facing him fully, and sometimes sideways—that the people very often changed places in paddling, and that he changed *his*, as also did *Mr. Archy*, but he could not say whether as frequently as *he* did.

In answer to a question from the Chief Justice, he said, that when *Mainville* said he would have Keveny's hat he was in the rank immediately before the witness, and *Vasseur*, at the time he claimed the boots, was in the *bourgeois'* bar. Being examined by *Mr. Vanfelson* on this point, he said, that when a canoe was overloaded the voyageurs paddled in the *bourgeois'* bar, and he was certain at that time *Vasseur* was there. That in canoes, such as the Prisoner's, the usual complement was eight paddlers and two or three *bourgeois*, but they were fifteen. He also declared, that the time of finding *Keveny* he did not hear *De Reinhard* say, that as *Mr. M'Lellan's* canoe was too much loaded he would remain with *Keveny*, nor did he hear *M'Lellan* say to *De Reinhard* that as he had taken him prisoner he had better stop and come on with him in the small canoe.

Mr. Vanfelson.—In what part of the canoe could you have put *Keveny* and *three others*, whilst *Vasseur* was in the same bar with the *bourgeois ?*

La Pointe.—*Keveny* might have been put between the two ranks of paddlers, but it is not usual to put any body between the paddlers, or else in the bottom of the canoe. He would certainly not have been at his ease, but he might have been put there.

Mr. Vanfelson.—Then, you mean to say, upon your *oath*, that in a canoe like the one in question, which had already *fifteen* men and their *baggage* on board, you could, without danger, take in addition, *De Reinhard*, and *three others*, with *their* baggage, and make a traverse. Upon your oath, is that true?

La Pointe.—I did not mean to say that the *four* could have gone. If we had taken *Keveny* and his things, it would certainly have been dangerous to have made the *great* traverse, if the wind blew, with the canoe so much loaded, but till then it might have done. It is dangerous to traverse the lake at all when it blows.

The witness was then examined relative to where the *fire* was, and he deposed, that he did not see any before the *bourgeois'* tent, and had there been any, as usual, he must have seen it, and that the papers were read by the *engagés* fire. Also, that at the arrival of the small canoe, *Mr. M'Lellan* was about forty or fifty feet distant, but he could not say whether he was among those who came forward. He confirmed his testimony relative to the Prisoner and De Reinhard taking their meals together during the whole voyage.

Mr. Vanfelson.—Are the partners generally *pell mell* with the *voyageurs* and half-breeds, or in their *tent* with the clerks and interpreters.

La Pointe.—I can not say that the *bourgeois* and *engagés* are *usually* together. The partners, with the clerks and interpreters, take their meals together, and the *engagés* their's at *their* fire; but they come from one fire to the other, and joke with the *engagés*.

Mr. Vanfelson.—Could *Mr. M'Lellan* have taken *De Reinhard*, *Mainville*, and *José*, prisoners, against the will of the half-breeds and Indians?

La Pointe.—If the half-breeds and Indians had opposed it, he could not have taken them if he had wanted to do so.

Mr. Vanfelson.—Is not *Mainville* a *half-breed*, and *José* an *Indian*?

La Pointe.—Certainly, and the half-breeds and Indians are near relations.

Being examined as to the conduct of *Capt. D'Orsonnens*, he said, that after *De Reinhard* was taken by him he did not see *them* eat together, or often see them in the tent together, but they might have done so. A very particular investigation took place relative to the white sugar, of which he gave the following account.

La Pointe.—Before the time that they divided *Keveny's* things, *Mr. Archy* had nothing but Indian (*maple*) sugar. The loaf of *white* sugar I never saw *in* his tent, but I saw a half-breed put it into his basket near his tent. I do not know that the half-breed *spoke* to him at the time that he put the sugar in the basket. It was the *next* day, and not

the same evening, that I saw the gentlemen take tea with *white* sugar, which their servant put into it. It was *Rochon*, his servant, who told me that *M'Lellan* had not any *white* sugar, and I had seen none before. It was *Rochon* who broke the sugar.

The witness continued, that he did not *sleep* on the night the papers were destroyed, for being ordered not to speak of *Keveny's* death made him thoughtful, and he was afraid of the half-breeds, of *De Reinhard*, and of all. He did not know that *M'Lellan* took away *De Reinhard's* sword and gun at *Lac la Pluie*. He repeated the account given by *Faille*, of being sent by *Capt, D'Orsonnens* to *Fort William*, and of making a declaration upon oath before Lord *Selkirk*.

Mr. Vanfelson.—Since you made it, I ask you, upon your *oath*, whether *you* did not say or hear *Faille* say, that, when you saw the flag, of *Keveny* on the island, *José* wanted to go on shore to take *Keveny*, but that *you* and *Faille* would not let him?

La Pointe,—Neither one nor the other. *I never said so, nor did I ever here Faille say so.*

Mr. Vanfelson.—Nor *told* any one that *you* heard *Faille* say so?

La Pointe.—I *never* heard it, nor did I *ever* tell any person whatsoever that I *had* heard it.

Augustin Poirier *dit* De Lorge was next sworn, and as his evidence is flatly contradicted on the defence, it is wholly given.

Poirier dit *De Lorge.*—In 1816, I was in the Indian territory with *Colishe Ducharme* in a brigade, and I met the Prisoner at the bar, below the *Dalles*, in the River *Winnipic*. I heard *Mr. M'Lellan* ask *Ducharme*, whether, on our way, we had heard any thing of *Mr. Keveny*, and *Colishe* answered, " yes, that he had seen and spoke to him." The Prisoner then asked, " how does *Keveny* do to live?" *Colishe* answered, " sometimes he *purchases* victuals from the Indians, sometimes " they *give*, and sometimes he *steals* them." Upon which *M'Lellan* said, " very good, 'tis well, he will not steal a long while; to-morrow " by this time, his business will be done, perhaps he may never see the " sun set again."

The Court was then adjourned for half an hour.

Upon re-assembling, the Prisoner's counsel stating that they had no questions to put to *Poirier* dit *De Lorge.*

Frederick Damien Heurter was sworn, and deposed, that he was at *Bas de la Riviere* in 1816, and that he knew the Prisoner and Mr. *Alexander M'Donell*, whom he believed had gone away to the Rocky Mountains. He did not know whether those mountains were in the *United States* of *America*. Witness knew the hand-writing of the

Prisoner, and being questioned whether he ever saw in a letter any thing in the Prisoner's hand-writing, *Mr. Stuart* objected to the question as illegal. The *Attorney General* contended, that having proved *Mr. M'Donell*, to whom the letter was addressed, to be beyond the Rocky Mountains, he was entitled to put it, but the Court said 'till the Crown proved that he was beyond the jurisdiction of *this* Court *secondary* evidence could not be received. *Mr. Solicitor General* contended, from the peculiarity of this case, enough had been proved to constitute this *secondary* evidence the *best* which the nature of the case would admit. The *Chief Justice* said, " the answer is clear, if you only read " the statute upon which the indictment is founded," and then read the clause providing that offences " *shall be tried in the same manner*," &c.

Attorney General.—It is not proved by the witness, but that *Mr. M'Donell* is in the *United States*. But I should contend that, in proving he had gone into an *unexplored* country, we have proved sufficient to let in the evidence we present. We wish to prove by a person who *saw* the letter, what its *contents* are, and we offer this as the *best* evidence in the absence of the letter, and under the impossibility of producing *M'Donell*, to whom it was addressed.

Chief Justice Sewell.—The basis of your argument, *Mr. Attorney General*, I take to be this, that *Mr. M'Donell* is not able to be produced from peculiar circumstances. If I am in *error*, set me *right*. If that *is* your position, we reply, you have not *proved* that he is *out* of the jurisdiction of *this* Court, and till you do that, you know, equally as well as the Court, that you *can not* be permitted to introduce *secondary* testimony.

Attorney General.—The basis of the argument upon which I contend for the right of producing this evidence is, that the *best* evidence, namely, the letter itself, is lost. That being the case, I submit, in examining a person competent to speak of its contents, from having actually seen the letter, that I am offering evidence which ought to be admitted. However, I will proceed with the examination, and when I come to prove the contents of the letter, my learned friends can object.

The examination being continued, *Mr. Heurter* stated, that he saw a letter written in *September*, 1816, addressed to the partner in charge at *Bas de la Riviere* with the signature of DEASE, on the third page of which there was some writing of the Prisoner's in pencil. *Mr. Stuart* appealing to the Court, was answered, that all that had come out as yet was undoubted evidence, as the *contents* of the writing was not as yet attempted to be made evidence. The *Attorney General* observed, that he should first trace the letter to the hands of *Mr. M'Donell*, and then prove its contents. *Mr. Heurter* continued, that *José*, and a man named

Allemagne, brought the letter and gave it to *Mr. M'Donell*, and the next day he saw a letter open on Mr. M'Donell's table, which he read. The Court enquired how he knew *this* to be the letter brought by *José*, as it was not open or examined by the witness at the moment it was brought. *Mr. Heurter* replied, "I cannot wholly say that it was the "same letter, I am not *quite sure* that it was."

Chief Justice Sewell.—Very well, now remember, you are not to speak as to the *contents* of that part of any letter which was in the Prisoner's hand-writing, whether it may make *for*, or *against*, him. You saw *a* letter brought by *José*, and given by him and one named *Allemagne*, to *Mr. M'Donell*. On the next day, you saw *a* letter on the table of *Mr. M'Donell*, and in that letter was something in the hand-writing of the Prisoner at the bar; *what* that something was, (at present at least,) you must not tell us.

The examination proceeded by MR. HEURTER repeating that he saw *José* deliver the letter to *Mr. M'Donell*, who, according to report, was on the other side of the Rocky Mountains.

Attorney-General.—Next day you saw it on *Mr. M'Donell's* table?

Chief Justice Sewell.—Stop, *Mr. Attorney-General.* Do not talk of *the* letter upon *Mr. M'Donell's* table. I stopped the witness when you were questioning him upon this point before, and and he very properly said that he could not say that the letter, which he spoke of as having seen on *Mr. M'Donell's* table, was *the* letter which was the day before brought by the Indian. Ask him about *a* letter, or fifty, if you think it important, but not about *the* letter, as he has fairly, and honourably to himself, told us that he cannot say that it was the *same* letter.

Mr. Heurter repeated that on *Mr. M'Donell's* table he saw a letter from *Mr. Dease*, addressed to the partner in charge at *Bas de la Rivière*, but that he had not seen it since, nor did he know what had become of it. He added, that *Mr. M'Donell* was *then* the partner in charge, and that it was generally understood that he was *now* beyond the Rocky Mountains.

Attorney-General.—I submit that we have *now* shewn sufficient to entitle us to produce evidence of the *contents* of this letter. This witness saw a letter brought by *José*, one of the three persons in whose company *Keveny* was left, the last time he was seen, and that it was not only brought in the month in which *Keveny* was murdered, but *written* and *dated* in that month. We have shew that the day following *a* letter, (whether *the* letter, is, I think, a question for the *Jury*,) was seen by the witness on the table of *Mr. M'Donell*, addressed to the proprietor in charge of the post at *Bas de la Rivière*, and that *Mr. M'Donell* was that proprietor. We have shewn that in this letter, written by

Mr. Dease, there was a *postscript* in the hand-writing of the *Prisoner*, and we have finally shewn, that, according to general report, *Mr. M'Donell*, to whom, as proprietor in charge, the letter was *addressed*, and into whose *possession* it came, has disappeared, and is, according to general belief, where it is impossible to reach him, namely, in the wilderness beyond the Rocky Mountains. I therefore submit, that we are entitled to put to this witness the question, "*what* did you see, in the hand-"writing of the *Prisoner*, contained in a letter from *Mr. Dease*, dated "in *September*, 1816, and addressed to the proprietor in charge at *Bas* "*de la Rivière?*" and I also contend, that it is a question properly belonging to the *Jury* to determine, what influence a letter being brought the very day before by *José*, ought to have upon their minds, in deciding, whether *the* letter containing the hand-writing of the Prisoner, was not the *very letter* brought by the Indian, who was present at the time of the murder!

Chief Justice Sewell.—It is not necessary, *Mr. Stuart*, that you should trouble yourself. Let us look at the case as at this moment it presents itself to our view, and what does all that the Crown officers contend they have proved amount to? Why to *this*, and to nothing more. They have proved that *Mr. M'Donell* being at the post of *Bas de la Rivière*, a letter was brought addressed to the proprietor in charge, and that, on the following day, this witness saw, upon the table of *Mr. M'Donell*, a letter from a *Mr. Dease*, containing a paragraph in the hand-writing of the *Prisoner*. So much for the letter. With respect to *Mr. M'Donell*, the evidence goes this length, that, according to common report, or general belief, he is on the other side of the Rocky Mountains. Upon shewing this, you ask to prove, by this witness, the *contents* of a letter that was *once* in his possession. Why should you be allowed to do so? you say, "because we cannot produce any *better* evidence." But you cannot *substantiate* this assertion *legally*. *Prima facie*, better evidence *is* in your power. *Mr. M'Donell* is, upon your own shewing, *within* the jurisdiction of *this* Court.

Attorney General.—He is beyond the Rocky Mountains.

Chief Justice Sewell.—It is no matter *where* he is, if you do not shew that he is *beyond* the power of a process of *this* Court, under the act for extending *our jurisdiction* to the trial and punishment of offences, committed in the *Indian* territories, you are certainly not producing the *best* evidence in producing this witness. The act provides for the issuing of *subpœnas*, and the enforcing obedience to them, and also declares that all offences tried under, or by authority of, this act "shall be tried "*in the same manner*, as if the same had been committed *within the pro-*"*vince*." You would not, I am sure, ask such an an admission for a-

condary evidence on a trial for an offence committed in this *district*, and the act of 1803 being *positive*, we cannot allow it, on an investigation into one charged to have been committed in the *Indian* territory, because the one and the other are *equally* within our jurisdiction, or your indictment must fall.

Attorney-General.—It would be perfectly nugatory to issue a *subpœna* to be served beyond the Rocky Mountains. I imagine no person, excepting *Sir Alex. M'Kenzie*, would be found to undertake the journey.

Chief Justice Sewell.—I cannot help that. If the legislature has done *right*, or if it has done *wrong*, in passing this act, I am not to enquire. We sit here, not to *make* or *amend* laws, but to *administer* such as *are made*.

The witness continued that he saw *M'Lellan* at Red River, after he had heard of the death of *Keveny*, and was informed by him that he had left *De Reinhard* at Lake *La Pluie*, to send him word to Fort *Douglas* if Lord *Selkirk* advanced towards Lake *La Pluie*. Also, that he saw a trunk and portable writing-desk at Red River, belonging to *Keveny*, having brass-plates on them, marked with his name. The Prisoner also told witness, that *De Reinhard* had sent him an order to buy a horse for him, and that use could be made of the things which were in *Keveny's* trunk for that purpose, as *De Reinhard* had property enough belonging to him, without taking goods from the store on his account. *Mr. Heurter* also added, that wanting to take away *De Reinhard's* trunk to where he lived, the Prisoner told him he had better take *Keveny's* trunk and desk, for fear the English or Red River colony people might soon come to the fort and recognize them.

Upon his cross-examination by *Mr. Stuart*, the witness could not recollect whether any body was present at these conversations, but it might be the case. He admitted that whilst in the regiment *De Reinhard* was a friend of his. *Mr. Stuart* enquiring *where* it was he received *Keveny's* baggage, the *Chief Justice* suggested that he had not said he *received* it, but that he had *seen* a trunk and desk at Red River; the question being put again, *Mr. Heurter* answered "at *Bas de la Rivière*."

[*Mr. Stuart* assured the Court he would not put an irrelevant question, but the examination of this witness (to whom he had a series of questions to put) would prove to be very important to the Prisoner, and his counsel must be permitted to take their own course in conducting it. The *Chief Justice* remarked, that the Crown, the counsel for the Prisoner, and the Court, he trusted, were equally desirous of strict and impartial justice, but if a real or imaginary difficulty appeared, the Court who could have no object but to render justice to both parties, must understand so that it might not, by misconceiving, fall into an error.]

Mr. Heurter continued, that between the 15th and 17th September, 1816, he there received a trunk and a portable desk, with the name of *Keveny* on them, from *José*, who said that having met *De Reinhard*, he had desired him to deliver them to the witness, but that the *Prisoner* was not at *Bas de la Rivière* at the time. He further stated that the same evening he sent them into *Mr. M'Donell's* room, who refused to receive them, although told that *De Reinhard* had sent them, and the next morning when *Mr. Heurter* was out, they were sent back to *his* room, and enquiry being made *why* they were sent back, *Mr. M'Donell* told witness that a party would be going to Red River in a few days, and he might send them there, which eventually was done, the witness taking his departure for Red River in the same brigade. Witness remained at *Fort Douglas* about ten days, and the conversation with *M'Lellan* (*page* 313.) occurred two or three days after his arrival there, and that was five or six days after reaching there himself. *Mr. Heurter* stated that he did buy a horse for *De Reinhard*, whose wages enabled him to keep one in that country, paying for it, according to the custom of trade there, in goods. He also said that he never received an order from the Prisoner, for six yards of cloth.

JOCELYN WALLER, *Esquire*, (*Clerk of the Crown*) proved the RECORD of *De Reinhard's conviction* for the *murder* of OWEN KEVENY, which being read, closed the case on the part of the Crown.

DEFENCE.

NICHOLAS DUCHARME being sworn, deposed that in 1816, he was the guide of a *North-West* brigade, destined for *Swan River*, in which was a man named *Poirier* dit *De Lorge*, whom he had known for ten years; that whilst they were together they met the Prisoner with fourteen others below the *Dalles*, that on seeing them they put to shore, *Mr. Archy* said, "Good morning, *Ducharme*, how long is it since you "left the *Grand Portage?*" to which he answered, "it is not a little "time, as the winds were frequent and contrary." Some unimportant conversation being detailed, *Mr. Vanfelson* proceeded to question witness very pointedly, and his answers being in direct opposition to the evidence on the part of the Crown, both the interrogatories and replies are given at length.

Mr. Vanfelson.—During that time did *M'Lellan* say any thing about *Keveny?* and if he said the *least thing* about him, what was it?

Ducharme.—He did not say *one single word* to me about *Keveny*, nor to the people all the time I was there.

Mr. Vanfelson.—As you were the *guide*, if the Prisoner *had* said any thing about him, it would have been to you?

Ducharme.—Yes, certainly, but he did not say a single word about *Keveny*. While *M'Lellan* was taking what he wanted from my canoe, a *Half-breed* came and asked me "whether I had seen *Keveny*," and I told him that I had seen him above the *Dalles*." I have said that for *ten* years, but, I believe, it is *twelve* that I have known *De Lorge*. He always bore an indifferent character amongst us, a very bad character.

Mr. Vanfelson.—According to all that you have known, and have seen, of *De Lorge*, is he worthy of belief, or would *you* believe him upon his *oath?*

Ducharme.—No, I should not believe him upon his oath.

Mr. Vanfelson.—At the time that *your* brigade met *M'Lellan's* canoe, did he ask of *you*, "*Colishe*," whether you had learnt any thing on the way about *Keveny*; and, if *you* replied, what it was that you said?

Ducharme.—No, he asked me nothing, *Mr. Archy* did not speak to me about *Keveny*.

Mr. Vanfelson.—Did *Mr. Archy* ask you, "how *Keveny* managed for his living?" and did *you* answer that "sometimes he stole, and sometimes he bought victuals?"

Ducharme.—No, not at all; neither one nor the other.

Mr. Vanfelson.—Did you hear *M'Lellan* say "good, very well, he "will not steal a long while, to-morrow by this time his business will "be done," or any thing else about *Keveny*.

Ducharme.—No, not at all, *Mr. Archy* did not say a single word to me about *Keveny*. I am sure of it.

Mr. Vanfelson.—I should now wish *De Lorge* to be brought into Court, that the jury may be satisfied the witness on the part of the Crown, is the *same* that this man has reference to, when he says he is not worthy of belief on his oath.

Augustin Poirier dit De Lorge came into Court.

Mr. Vanfelson.—Is this *De Lorge*, of whom you spoke?

Ducharme.—Yes.

Mr. Vanfelson.—At the time the *half-breeds* enquired, "whether "you had seen *Keveny*," and that you answered, "yes, he is above the Dalles," did the half-breeds shout for joy, and did *they* say "that "he would not steal a long time?"

Ducharme.—No, certainly not. That was all that was said. There was no shout amongst *M'Lellan's* people, nor any *at all.* [*Mr. Vanfel-*

son begged the Court to notice that, as it referred to *La Pointe's* testimony (*page* 304.)]

Mr. Vanfelson.—By what name are you known generally in the Indian country.

Ducharme.—I am generally known in the *Indian* country by the name of *Colishe Ducharme.*

Upon his cross-examination he admitted—that he had been for twenty-six years in the service of the *North-West* Company, by whom he was well paid, and remained with them—confirmed his former testimony, that *M'Lellan* did not speak to *him*, or *any one* about *Keveny*—that though in going down he saw, as he supposed, the deceased's tent, he did not tell *Mr. Archy* he had seen it, nor say a word about *Keveny.* Being questioned as to *how* he knew *De Lorge* to be a *bad* character, he replied, he generally had that character, and he considered him to be so, as he had deserted from his canoe.—[The *Attorney-General* enquiring what he had *done* that was *bad?* The *Court* said, enquiry might be made *generally* as to his means of knowing his character, but not as to *particular* acts. *Mr. Stuart* disclaimed any wish to oppose the mode of examination, although illegal; adding, that after the broad manner in which *De Lorge* had been attacked, he could not complain of any question by which the Crown might endeavour to support its witness. The *Chief Justice* again laid down the rule of law upon the subject, explaining it by another relative to a *defendant's* character: " If a defendant enable " a prosecutor to examine evidence to character, by calling witnesses in " support of it, even then the prosecutor cannot examine into particu- " lar facts." The *Attorney-General* dissenting from this, being an *applicable* authority, some further conversation took place in the course of which *Mr. Stuart* complained of the *Attorney-General's* representing that it was *only* because he deserted, that *De Lorge* was considered a bad man—stating, that he had been proved to be unworthy of belief upon oath, by this witness, whose character would be supported by the most respectable testimony. The *Chief Justice* briefly went over the ground again, concluding: " If you have fifty witnesses, bring them af- " terwards, to attack those of the Crown, or to support your own if at- " tacked, which is an alteration from the practice heretofore, and I " think a very proper one."]

The cross-examination being continued, the witness stated that he saw the tent about *nine* in the morning, and met *M'Lellan* about *two* in the afternoon; that he was not surprised at seeing a *canvass* tent, as they are common among the *French*, though not among the *Indians;* that he did not see any other that trip, and he did not tell *M'Lellan* the circumstance.

[*Mr. Stuart* proposing to call *Colonel Fraser* to support *Ducharme's* character; *Mr. Solicitor-General* remarked that the course was *novel*, tho' perhaps in this case very necessary; his learned friend's witness appearing to be an exception to the general rule, which considers evidence and character to be good, till they are attacked; and being *so*, he supposed a *good* character was to be given, from a conviction that the contrary might be attempted to be established. *Mr. Vanfelson* adverted to *Ducharme* being a *stranger*, and contended for the right of shewing his character to the Jury, to which the *Court* assented, the *Solicitor-General* observing, that he dare say, it was very necessary.]

COLONEL ALEXANDER FRASER being sworn, stated, that he had known *Nicholas* (commonly called *Colishe*) *Ducharme* upwards of twenty years, and that his general character was most excellent.—Upon being cross-examined, he stated, that *he* had been for almost twenty years, but was not *now*, a partner in the *North-West* Company, and had been in the *Indian* territory more than twenty years.

FRANÇOIS TAUPIER was sworn, and deposed, to the general bad character of *De Lorge*, whom he had known for fifteen or sixteen years, stating, that *no one* had a good opinion of him, but he was generally looked upon as one in whom it was *impossible* to have confidence, or to believe even upon his *oath*. He described a light canoe, (*allège*,) to be about twenty-seven or eight feet in length along the bottom, and its usual burden to be eight *paddlers*, and two or three *bourgeois*, with their provision and baggage, and that it would be impossible to make progress with sixteen men with baggage and provisions—and that even to follow the windings of the shore would not be safe. The arrangement of a canoe he thus described:

F. Taupier.—In each canoe there is generally a guide who is *master* of the canoe, even when the *bourgeois* are on board. When there is no guide it is the front man (*devant*) who is master. If the *bourgeois* were inclined to load the canoe more than the guide thought right, he has power to prevent it. If the guide would not take a man on board, he can not go, for they know the route, and are *always* masters in the canoes. When the gentlemen have any orders to give, it is to the guide, or to the front man, (*devant.*) I never knew the *gentlemen* and the *men* to converse together on the way, unless from necessity, and it is not the custom for the *men* to chatter to *one another*, for by talking they are prevented from getting on. It is hard enough work to paddle, and whilst paddling, it would be necessary, to speak *very loud*, in order to understand one another. If there were *three* men upon a bar they could *not* paddle.

Chief Justice Sewell.—Of what size is a bar?

F. Taupier.—That of the *bourgeois*, is of the size of *four* feet. Those of the men are, *three* feet and a half, next to the bourgeois, and diminishing from one to the other. I am a canoe-maker.

Cross-examined, he stated: "*All* the servants of the *North-West* "Company were *good* characters, he knew only *De Lorge* who was "not;" that he was "six or seven years in the service of the *North-* "*West* Company, and then deserted;" and that "he was not *discharg-* "*ed* for *bad* conduct." Being asked what he understood by *desertion*, he replied, "it appears to me a man deserts, when two sleep together, "and in the morning one is found to be gone, and to have stolen the "hat of the other; I slept with *De Lorge*, and when I woke I found he "was gone off, and my hat with him."—He also stated, that he *never* saw more than eight men, and the *bourgeois*, in a canoe like *M'Lellan's*.

Mr. James C. M'Tavish was sworn, and deposed, that being formerly a clerk to the *North-West* Company, he knew *De Lorge*, and had from his situation, means to know his general character, which he described as being that of a very *disaffected* servant, and not trust-worthy; indeed so bad, that he (*Mr. M'Tavish,*) would not believe him upon his oath. Being called upon by the *Court* to explain what he meant by *disaffected*, *Mr. M'Tavish* said, "he had always found him a displeased "and discontented servant—dissatisfied with every thing that was done "and extremely disaffected to the interests of his employers."

Upon his cross-examination, he stated, that they always endeavoured to select the *best* men they could for employment, and that *De Lorge* having been some years in *their* service, deserted and entered that of the *Hudson's Bay* Company, or *Earl* Selkirk, before his engagement with the *North-West* had expired.—In answer to a suggestion that a person quitting the service of the *North-West* Company, and entering into that of the *Hudson's Bay* Company, or *Lord Selkirk*, would not stand high with the *former*—*Mr. M'Tavish* said, that he would if he had finished his engagement like an honest man, but not otherwise. He stated, that persons generally enter the *North-West* Company's service for a term of years, *before* they go up to the *Indian* territory.—Mr. *Attorney-General* intimating, that it was not unusual for dissatisfied or *disaffected* persons to quit the service previously to their indentures expiring, *Mr. M'Tavish* declared, that during eleven years that he was employed by them, he had known but few persons do so; and among those who did, but very few who were honest in other matters. Enquiry being made *how* a person dissatisfied with their service could be relieved from it, except by what *Mr. M'Tavish* called *desertion;* he replied, "very easily for "if persons go up to the *Indian* territory, and do not find it suit them,

" upon applying to the company, they are permitted to return as *pas-*
" *sengers* in the first canoes that are going to *Montreal.*"

The Court was then adjourned till eight o'clock Monday morning.

Monday, 15th June, 1818.

MR. JEAN CREBASSA being sworn, stated that he was, and had been, a clerk to the *North-West* Company for sixteen years. That in the summer and autumn of 1816, being stationed at *Bas de la Rivière Winnipic*, he had a knowledge that towards the latter end of *August Keveny* arrived there a prisoner, in custody of *Charles De Reinhard*, and some others, at about *two* in the afternoon, and departed the next morning for *Lac la Pluie*, whence he was to be sent on to *Montreal*, by the usual route of *Fort William*. The persons who went with him were named *Lacerte*, *La Plante*, *Michel Martin*, *Vassall*, and *Vaudrie*, neither *José*, *De Reinhard*, or *Mainville*, (who was at the fort when he went away) accompanied him, and, that when *Keveny* arrived, there were not, with the exception of two old Canadians, who worked at the farm and in the garden, any persons but *Bois-brûlés* at *Bas de la Rivière*, which was distant from *Lac la Pluie* about seven days march for a *light*, and ten for a *loaded* canoe. *Mr. Crebassa* continued, that four or five days after *Mr. Alexander M'Donell* arrived there, staid *one* day, and then proceeded to his usual post " *Red River*," the capture of *Fort William* by *Lord Selkirk* not being known till four or five days afterwards, when the news was brought by *Mr. Stuart*, who came purposely to communicate the information to *Bas de la Rivière*, and the other *North-West* posts; and the circumstances being communicated to *Mr. M'Donell* at *Red River*, he arrived at *Bas de la Rivière* six or seven days after the information had been forwarded to him.

Mr. Stuart.—Did the capture of *Fort William* occasion any extraordinary feeling at *Bas de la Rivière?*

Mr. Crebassa.—It occasioned great anxiety lest the ordinary supplies should not come, as *Fort William* is the usual channel through which supplies come to the interior, and very great injury was apprehended to the trade. Personal injuries were also anticipated to the partners, and others accustomed to trade with the *North-West* Company. We apprehended great danger from the want of *provisions*, as, if we did not re-

ceive our usual supplies from *Fort William*, having no merchandize, we could not barter with the *Indians;* and, if we had not wherewith to buy food from the *Indians*, we must certainly starve. We were also in want of nets for fishing, as we depend a good deal on that source for supplies in that country. It was in consequence determined to fit out a canoe, to go in the direction of *Fort William*, and see whether any canoes were coming into the interior. This canoe proceeded the day after *Mr. M'Donell's* arrival, and, as it was considered an object of sufficient importance that the principal partner at the station should go, *M'Lellan* went with it. There also went in the canoe, *Cuthbert Grant*, *Joseph Cadotte*, *Charles De Reinhard*, *M'Lellan's* body servant, *Rochon*, one *Lorrain*, *Michel Martin*, *Le Vasseur*, *La Plante*, *Vassalle*, *Vaudrie*, and some others, I believe.

[In answer to an observation from the *Chief Justice*, that he had said *Michel Martin* went with *Keveny*, the witness said, " He *did go* with *Ke-* " *veny*, but when *Mr. M'Donell* put *Keveny* in charge of *Faille* and " others, *Martin* returned to *Bas de la Rivière*, and now accompanied " *M'Lellan.*"]

Chief Justice Sewell.—Did *Mainville* go with them?

Mr. Crebassa.—Yes, he did.

Mr. Crebassa being questioned by *Mr. Stuart*, continued that a canoe can average forty-five miles per day—that *M'Lellan* returned to *Bas de la Rivière* (twelve or fifteen days after leaving it) without *De Reinhard*, and, on the next day but one after his arrival, he went to his station at the *Red River* forks. Witness knew *Heurter*, a clerk in the *North-West* Company's service, who had left *Bas de la Rivière* before *M'Lellan* had arrived there, in a brigade for *Red River*, where he was to winter, and the first time he saw him afterwards was at the *Forks* of Red River in the *March* following, and he was then in the service of the *North-West* Company. *Mr. Crebassa* stated that it was not usual to have *hand-cuffs* at the *North-West* posts, nor were there any at *Bas de la Rivière* when *Keveny* was there to his knowledge, and, as chief clerk, had there been any, he thought he must have known it. When *Keveny* first left *Bas de la Rivière* witness heard *M'Lellan* tell *Lacerte*, and the others, to take good care of him, and treat him kindly.

Upon cross-examination the witness stated that *Keveny* was apprehended by *De Reinhard* four or five leagues higher up than *Bas de la Rivière*. He repeated that there was no other object for sending the canoe, and admitted that each man had his gun, according to the custom of that country. *M'Lellan's* directions to be kind, &c. to *Keveny*, he said were given to the *Bois-brûles*, who are half Indians, of those he said *Lacerte* had been at *Montreal* before, but for the others he did not

know. The *Attorney-General* remarked, that his having been there could not have taught him much of the way, as he went when a *child*, to which *Mr. Crebassa* said, " He went down when a child, and returned " when a man."

Mr. James C. M'Tavish was again sworn, and having stated that *Fort William* was taken on the 13th of *August*, 1816, was desired by *Mr. Vanfelson* to relate *how* it was taken, the *Solicitor General* objected, saying, " What effect can the manner in which it might be taken have " upon a charge of accessary before or after a murder?" The *Chief Justice* considering the fact already obtained as sufficient, *Mr. Vanfelson* explained, that, in his humble opinion, it was of great importance to corroborate *Mr. Crebassa's* testimony, by proving the *manner* in which *Fort William* was captured, inasmuch as the sending off this canoe had been represented by the Crown officers, as the result of a conspiracy against the life of *Keveny*. The evidence in continuation was, that at the time of forcible possession being taken of the fort, the canoes with supplies were all ready to start, but were not permitted to do so by *Lord Selkirk*, and that their detention exposed the Clerks and servants of the *North West* Company, in the Indian country, to starvation.

Upon his cross-examination, *Mr. M'Tavish* stated, that *he* repeatedly applied personally to *Lord Selkirk*, and also by writing, for leave to send off the canoes, but he considered that " he could not permit them " to proceed." *Mr. M'Tavish* added, " I do not recollect that he gave " any reason," which gave rise to the following discussion.

Attorney-General.—Had you heard of the destruction of governor *Semple* and his people?

Chief Justice Sewell.—No, *Mr. Attorney-General*, do not attempt to put that question; it can have nothing to do with it.

Attorney-General.—I beg the Court's pardon; I want to refresh this man's memory; perhaps he may remember that the circumstance of the *destruction* of governor *Semple*, was assigned as the reason why the canoes were not permitted to proceed. The *stoppage* of the canoes is in evidence if *we* can prove that a *reason* for stopping them was given, have we not a right to place it before the Jury, so that they may judge whether it was not a *justification*.

Chief Justice Sewell.—We are not trying *Lord Selkirk*. The Prisoner shews the fact that the canoes *were* stopped, *why* they were stopped, can be of no consequence to this trial. It cannot alter the fact. The reason the Prisoner went off in the canoe has been stated to be that, *Fort William* being taken, they were apprehensive that their supplies *might be* stopped. They have now gone a step farther, and proved that the canoes *were* stopped, and that the supplies did *not* go up. This is

a fact, which can not be varied as to the Prisoner, by any reason being assigned for preventing them going up.

Attorney-General.—I beg leave to submit, that if it is necessary to the *defence* to prove that the canoes *were* stopped, it may perhaps be of equal importance to the *Crown* to shew that they were *properly* stopped.

Mr. Stuart.—I should like to know what difference it was to make to the Prisoner if he was to *starve*, whether it was because the canoes were *rightfully* or *wrongfully* stopped.

Attorney-General.—I have no desire to waste time in argument. I shall repeat the question, and the Court will dispose of it as they think proper.

Had you heard of the death of *governor Semple*, and the *destruction* of his people, and was not that assigned to you as a *reason* for not permitting the canoes to proceed?

Chief Justice Sewell.—I can not allow it, *Mr. Attorney General.* Were I to do so, the gentlemen on the other side would wish, and be entitled, to go into their history of this transaction, and where should we end? and besides all which, it has not the most remote bearing on the case.

MICHEL MARTIN (after being questioned as to his religious belief) was then sworn, and deposed that upon the invitation of *La Plante* to go higher up with him, and *De Reinhard* to take some one prisoner, he went and, having taken *Keveny*, they returned directly to *Bas de la Rivière*, where they slept. The next day the party set out with him for Lake *la Pluie*, in *two* small canoes (*there being no large one.*)

[His narrative of occurrences from this moment being directly opposed to the evidence on the part of the Crown, is given in his *own* words, only divested of frequent repetitions and unimportant digressions.]

Martin.—In the (*two small*) canoes there were *La Certe*, *La Plante*, *Vassall*, *Vaudrie*, and *I*, and *Lacerte* told us that *M'Lellan's* orders were to take great care of *Keveny*. When we left *Bas de la Rivière*, I did not see any *hand-cuffs* in the canoe, but we afterwards found some in *Keveny's* canoe, and at the distance of two or three leagues higher up these irons were put on him. We proceeded four or five days before we met *Mr. M'Donell*, and he gave *Keveny* in charge to *Faille*, *La Pointe*, and *José*, to be conducted to *Lake la Pluie*. *Mr. M'Donell* caused his irons to be taken off, and treated him in a friendly manner, and breakfasted with him, and gave him some white sugar, and two bottles of rum. *Mr. M'Donell* talked with *José* by an interpreter, in the *Saulteux* language, (which I speak,) and told him, "to take great care of the Prisoner, and

" take him to *Lake la Pluie* as speedily as possible." *Cadotte* was the interpreter, and I heard *Mr. M'Donell* give these orders. *M'Lellan* had not seen *M'Donell* before we left *Bas de la Rivière*. *José* had his gun as is customary and necessary in that country, in case provisions should fail. *Lacerte*, *La Plante*, *Vassall*, *Vaudrie*, and *I*, were *engagés*, and were ordered by *Mr. M'Donell* to return with him to *Bas de la Rivière*, and we did so. The *guide* conducts the march and regulates the times of departure and of embarkation, and *José* was the guide of that canoe. I went up with *Mr. M'Donell* to Red River. In consequence of hearing that *Fort William* was taken, we came down to *Bas de la Rivière*. Thence, as the canoes from *Fort William* had terribly failed, we departed with *Mr. M'Lellan* to go and meet the people, and to ascertain whether they were coming. *Desmarais* was the guide and *Mr. Archy* was the *bourgeois* (commander) of the canoe. We proceeded for *Lake la Pluie*, and on the way we found *José* on a point of the River *Winnipic*. He had nothing but a shirt to clothe him, and he had no blanket, not any. *Mr. M'Lellan* made him embark with us.

He was asked why he was in that situation, and he told us, but I did not hear his complaint against any one. *José* had his hand wounded, and a lump upon his head. After that, we found *Faille* and *La Pointe* upon an island, about half a league off. Our people enquired of them why they were there, and where *José* was; they replied that the Indian wanted to kill them, and that he had run away into the woods, but he said *they* had beat him, and that he *fled* into the woods. *Faille* said that it was not him but *La Pointe* who had beat him, and *La Pointe* said that it was *Faille* who had beat *José*. *Mr. M'Lellan* landed, and reproached them much for having beat the Indian, and wanting to kill him, and as *Faille* and *La Pointe* laughed at that, he gave *Faille* blows with a canoe-perch. We took *Faille* and *La Pointe* with us, and the same day, we met the people who were going to *Swan River*, and *Colishe Ducharme* was their guide. Before meeting these last, we had asked *Faille* and *La Pointe* where they had left *Keveny*, and they told us that they had left him upon an island. *Bonhomme Montour*, who is a half-breed, asked *Ducharme* whether he knew any thing of *Keveny*, and he answered that he had seen him that day above the *Dalles* with the Indians. I had heard nothing on the way, on the part of *M'Lellan* or of *any other* person in the canoe, relative to *Keveny*, which could indicate that *M'Lellan*, or *De Reinhard*, or *any other* in the canoe, had any design of killing *Keveny*, nor *any* words about him, until the time when we met the people of *Swan River*. I was on the first bar immediately behind the *bourgeois*, from the moment that we had met with *José*, until the meeting with the *Swan River* people, and afterwards I was all the

time before *Faille* and *La Pointe*, who were next the steersman. On parting from the brigade, we pursued our way towards the *Dalles*, and that is the usual route for going to *Lake la Pluie*.

A map of the country was here presented to the Jury.

We found *Keveny* above the *Dalles* with the Indians. During the whole of this time, after we had parted from the people of Swan River, I did not hear any one whomsoever speak in the canoe, of *killing Keveny*, nor of *Keveny* at all. I heard nothing said by *Vasseur*, nor by any one else, that he would have *Keveny's* boots, or his hat.

Mr. Stuart.—There is now only the intermediate time, namely while they were in company *with* the brigade, to cover. During the time that you were *with* the Swan River brigade, did you hear any word about killing *Keveny*?

Martin.—No, I did not. I did not hear any word of the kind.

Mr. Stuart.—If it had been said, would *you* have heard it? or any thing similar?

Martin.—If that or any thing similar had been said, I should certainly have heard it.

Being questioned as to *Vasseur's* station, the witness answered, that he paddled *before* the *bourgeois*, and not in the bar, nor did he *ever* see an *engagé* paddle in the bar of the *bourgeois*. In continuation he stated, that having fifteen in *Mr. M'Lellan's* canoe, it was impossible to embark *Keveny* and his baggage, and he was therefore left to follow in company with *De Reinhard* and *Mainville*, having *José* as a guide, who was the only person amongst them (excepting *Desmarais*, who acted in the same capacity to *M'Lellan's* canoe) that knew the route. Having related their encamping, he declared positively, that there was on that night a fire before the entrance of *M'Lellan's* tent. The occurrences upon, and subsequent to, the arrival of the small canoe, is thus narrated.

Martin.—I saw the small canoe arrive. I was then on the beach. *Mr. M'Lellan* was not there, but I do not know whether he was in his tent, nor where he was. We set off the next day for *Lake La Pluie*, and I always continued to paddle in the *same* place. I have no knowledge that *M'Lellan* shewed a paper to *De Reinhard*, and said to *him*, or to *the others*, that it was well that *Keveny* had been killed, because he had the power of getting *King's troops* to take away our lands from us at *Red River*. *M'Lellan*, wanted to go farther, to meet the people, but we would not; the season was too far advanced. We remained two days at *Lake La Pluie*, and *Mr. M'Lellan* then returned with the others to *Bas de la Rivière*, *De Reinhard*, *Faille* and *La Pointe* remained at *Lake la Pluie*. The arms belonging to De Reinhard, namely a

sword, and a carbine, were brought from *Lake la Pluie* in our canoe. I did not hear any cry of *joy* when we met the people of Swan River, and that they told us they had seen *Keveny*."

Upon his cross-examination, he admitted that there *was* talking in the canoe, and he could not say that he heard *all* that passed, but he repeated, that during the whole voyage he never heard *Keveny's* name mentioned. Adverting to the time when he was taken prisoner, he said *Keveny* was going to fire at *De Reinhard*, but that he (*the witness*) seized him and took his gun away, which he uncocked, and that there was a good deal of resistance at the time, but as they spoke *English* he did not understand it. He heard no orders given to burn the small canoe, nor did he know *why* it was burnt, though he admitted there was *blood* upon it Being questioned as to *why* a canoe should be *burnt*, he answered, that *Vasseur* said "*I must go and set fire to that canoe*," but it did not *burn*. He also said that *Mr. M'Lellan* appeared by his countenance to be much concerned, but he heard nothing said about *Keveny's* death, nevertheless *M'Lellan* did not converse with *De Reinhard;* and the witness "saw very well that he did not look upon him in "the same light as before." Witness asserted that he was not known in the Indian territory by any other name than that of *Michel Martin*.

The Hon. WILLIAM BACHELOR COLTMAN, *Sworn.*

The commencement of *Mr. Stuart's* examination referred to the appointment of the special commissioners for the Indian territory. *Mr. Coltman* noticed his appointment, and in reply to a question as to the extent of the authority possessed by himself and colleague, stated that some of the *Hudson's Bay* gentlemen thought themselves entitled to act as magistrates *generally* (though he believed they declined acting whilst *he* was in the Indian country but under a kind of protest) but that himself and *Mr. Fletcher* were the only magistracy appointed under the Statute of 43d GEO. III *Cap.* 138, and that there were only *special* constables, no Courts of justice, nor any gaols recognized by law. *Mr. Coltman* continued that the Prisoner was in confinement at *Fort Douglas*, at the period of his arrival in *July*, 1817, and "he thought it his duty "to see him in his confinement, to ascertain that he was not treated "with any unnecessary degree of harshness." He saw him the *second* day (as he believed) after his arrival, and again "on the following day for "the purpose of receiving a *declaration* which he had stated he wished "to make." In reply to an inquiry *for* the declaration, *Mr. Coltman* said, "it had been filed with other papers with the *Attorney-General*," also that it was "a *voluntary* declaration, on the part of *Mr. M'Lellan*."

[The *Chief Justice* asked the *Attorney General* if he had the declaration, who replied, that he *had*, but as " his *own* declaration could not " be evidence, there was no necessity to *produce* it" to which the *Chief Justice* observed, though *prima facie*, not evidence, yet " reading it " might save a great deal of time and trouble," adding, " but exercise your own pleasure." The *Crown Officers* still refusing it, *Mr. Stuart* said he should not press it if objected to, but he had thought it would be the *best* evidence that the Prisoner had demanded the fullest investigation of his conduct as well as of the information given by him and his wish that the persons capable of giving evidence should be secured. The *Attorney-General* observing, that it was *no* evidence at all, being merely the Prisoner's own declaration, which was never admitted to go to the Jury, the *Chief Justice* suggested that " *M'Lellan* might have taken " a copy and read it in his defence, and it would *then* have been before " the Jury." *Mr. Stuart* said the important fact, that as soon as *Mr. Coltman* arrived at Red River, he went to the Prisoner to receive a voluntary declaration on his part—was obtained, and, although well aware that there were *technical* objections against this paper being received in evidence, yet, as they were *merely* technical, he did not expect the Crown officers to object to their reading, when the substantial justice of the case would be promoted thereby. The *Court* suggested that having as a fact that *Mr. Coltman* received at a given day the Prisoner's declaration, perhaps it would not be objected that the part relative to securing persons who might be evidences should be read, but *Mr. Stuart* observing, that unless the *entire* paper were read, he would prefer that *none* should be, the *Attorney-General* said, " then we do not consent to " *any part* of it being read," and the examination was resumed.]

Mr. Coltman repeated, that " it was not an examination of *M'Lellan* " which he received (he having been examined before) but a declaration " which he stated he wished to make."

[*Mr. Stuart* asked if the Crown officers *still* refused to produce this declaration, remarking that its production would save considerable time, and the objection could only be *technical*." *Mr. Solicitor-General* observed, that the objection of the Crown officers was not a *technical*, but a *substantial*, objection, viz. " that the declaration is not, nor could it " *legally* be made evidence" but the Prisoner could make " a similar " statement in his defence, if he thought it advisable," to which the *Attorney-General* added, " that to allow it to be read, would be to dis- " close the King's evidence." *Mr. Stuart* urged that it would not be to disclose the King's evidence, but to shew the Prisoner's anxiety to give every information, and to have every person secured who was likely to give any information on the subject, but the declaration being

refused, he should proceed to shew these circumstances by the *Hon. Commissioner* who received it. *Mr. Stuart* then asking if *M'Lellan* gave the *names* of the persons who were with *him* at the time the murder was supposed to have been committed, the *Solicitor-General* disclaimed any wish to exclude *legal* testimony, but doubted whether that question could be put, to which the *Chief Justice* observed that it certainly might be obtained from *Mr. Coltman* as evidence that in *July*, 1817, an account *was* given to him by the Prisoner, and that it was accompanied by a wish that the necessary evidences for his trial might be secured, and it would remain to the Jury to give this evidence what weight they thought proper. The examination was then resumed.]

Mr. Coltman continued his evidence by stating the Prisoner did name the persons who were with him in his canoe at the time the murder of *Keveny* was supposed to have been committed, and that the last time he saw the deceased he was with several Indians, and in company of *Charles De Reinhard*, (who had before executed a warrant against him) one *Mainville*, a Half-breed, and a savage named *José, fils de la Perdrix Blanche*,—that " he requested that all these persons might be se- " cured and sent to *Montreal* to give evidence upon his trial," to which *Mr. Coltman* said *he* objected on account of the expense, to which the Prisoner rejoined that " in a case like this, expense ought not to be " minded." *Mr. Stuart* enquiring " whether any measures were taken " in consequence ?" *Mr. Coltman* said that he felt embarrassed, but after consideration he thought it would be right, to make known the Prisoner's wish to his friends, and he knew that some steps were taken by *them* in consequence—that it appeared to him that *he* had no *legal* authority to incur the heavy expense, nor had he authority to secure the attendance of these people at the trial, by taking them into custody, but that he did bring *José* to *Montreal*, at the expense of goverment, (conceiving there was no other way of procuring his attendance, he being at that time at large and at a distance,) thinking it material to have him as a testimony. " Measures *were* taken, *Mr. Coltman* stated, " (but not so early as he could have wished) to instruct *José's* mind as " to the nature of an oath, and it *was* understood (for a time at least) " that he was to be received as an evidence for the Crown." *Mr. Stuart* stating that his object was to shew that after *José* was received as a King's evidence, he was indicted, and continued, " I would ask *Mr. Coltman*, whether he was received as King's evidence by the King's *lawyers* as well as by the King's *commissioners* ?"

Mr. Coltman.—He came down undoubtedly at the expense of the government, under the impression that he was to be a *witness*, but he did not know for *whom*. My *own* opinion, that he ought to be a wit-

ness for the Crown, I communicated to the *Advocate General*, (now *Mr. Justice Pyke*,) and to the *Attorney-General*, and I had letters from them which certainly led me to consider that he *was* accepted as the *King's* evidence, and I accordingly communicated the circumstance to *M'Lellan's* friends.

Mr. Stuart.—I beg to enquire if the Crown officers will *now* admit the declaration of *M'Lellan* to be read to the Jury.

Attorney-General.—We do not see that it ought to be.

Mr. Stuart.—The situation of the Prisoner *was*, and still *continues* to be, a very peculiar one, and in addressing myself to the Court, I hope not to go beyond, but I shall strive to reach, the bounds of professional duty to their utmost extent. *Fort William* was taken possession of, and the partners of the *North West* Company taken prisoners, and held out, not only in this *Indian* country, but elsewhere, as rebels, and persons guilty of the highest crimes and misdemeanors. A system of proscription was adopted against all who differed with the stronger party. A system of intrigue, (which perhaps is still carried on,) that those who sit in the same room, eat at the same table, drink of the same cup, should be made the instruments of mutual suspicion and jealousy, and every man be apprehensive lest his fellow should become his accuser. Such a system as this was calculated to excite alarm *any where*, but much more in this remote country; destitute of all those safeguards, which the law and its correct administration affords to *us*. Well might this system of proscription excite alarm in a country where the *Earl of Selkirk* was the *only* magistrate. I am not beyond the facts, when I say, this only magistrate was the *great* and *only* accuser, and that his intention, and perhaps his *only* intention, was to destroy this commercial company, who were his great rivals. A *witness* falls into his hands, if he does not answer his purpose, he is changed from a witness to a *prisoner*, and indicted. Look on the other hand to *Faille*, *La Pointe*, and *Heurter*, where, *prima facie*, *more* culpability attaches, *they*, instead of being *indicted*, are made *witnesses*.

Mr. *Solicitor-General* objected, that these observations were a series of accusations not founded in fact, to which *Mr. Stuart* observed, that such round assertions were not decorous, nor usual, in our Courts, and the *Solicitor-General* rejoined, that *Mr. Stuart* was incorrect in throwing imputations on witnesses which were not justified by any thing in evidence. The *Chief Justice* intimated to the gentlemen, that the Court always heard them with pleasure, but it could not permit this sort of replication, for when the *coolness* of argument was forgotten, it was the duty of the Court to interfere, as well as when its *legal* limits were exceeded—then, addressing *Mr. Stuart*, he asked " how by possi-

" bility the course he had adopted could benefit his client," and added, " on the other hand, we must remark, that the more eligible mode of " arresting irregularity in argument is to apply to the Court." *Mr. Solicitor General* explained, that his intention was merely to say, that the statements of his learned friend were totally unsupported by evidence, and that, if investigated, he believed the reverse would be found to be the case. The argument was resumed.]

Mr. Stuart briefly recapitulated his former remarks, and continued as follows:—The differences between the companies, to which the noble *Earl* and the *Prisoner* severally belong, are well known, and, without enumerating the various acts of aggression which have marked the contest, it is sufficient to say, that it belonged, from the peculiar situation of affairs, to the *Earl of Selkirk*, the *private* prosecutor, to say whether an individual was to appear in Court as a *witness*, or as a *Prisoner*. Take the instance of the Indian *José*. After the faith of the *government* was plighted, that he was to be a witness on the part of the *Crown*, after the communication of this circumstance has been made to the *Prisoner* and his friends, from the most respectable source, who has testified to the fact, suddenly the *Savage* is to be *indicted*, and *we* are to be deprived of his testimony. I do not intend to get out of the abstract question, but let us now, for a moment, turn to the conduct of the *Prisoner*. He calls upon the *Hon. Commissioner* as soon as he arrives, and requests, (after giving him a full account of all he knows of the transaction,) that all the persons capable of being witnesses may be sent down. Under this request *three* persons were eventually sent down. The Prisoner, thus easy as to the result, expecting that these persons are to be witnesses for the *Crown*, waits patiently till they put him on his trial, when, suddenly, he finds himself deprived of their testimony, by their being indicted as *participators* in the *same* offence. I intend to go one step farther. *Perdrix Blanche* was actually *received* as an evidence for the Crown by its *officers*, and under their directions, received religious instructions, yet, when upon subsequent examination his evidence is not found to be of sufficient importance to render it worth while to retain him as a *witness*, then he is immediately to be *indicted*, and *we* are to be deprived of his testimony. *Desmarais* is just the same case. *He* is brought down as a *witness*, but before the *trial*, is included in the same indictment, but in a different degree. The hardship of the situation in which the defendant stands, consists in this, that, from the peculiar situation of the *private* prosecutor, whom he will he puts into the *indictment*, and brings into Court as a *prisoner*, and whom he will he puts into the *subpœna*, and brings him forward as a *witness*. Thus, having the strongest passions of the human mind, *hope* and *fear*, at his command, it is easy to

conceive what must be the effect of such an influence. Not to mention any *names*, but what, I would ask, distinguish the cases of *three* of the principal witnesses on the part of the Crown from *Grant* or *Cadotte*? *Three* are brought to the witness box to *testify*, whilst the *two* are to be *arraigned* and *tried* at the *bar*. I do not accuse the noble *Earl* of partiality, but perhaps it is not going too far to say, that, so situated, it would be scarcely possible for any man so entirely to divest himself of personal feeling, as not to be influenced in some degree, by it. Looking at the scenes that have been presented to our view, and presumption might lead us to imagine we discovered, in the events of the *Indian Territory*, the force of this principle. The vigilence of my learned friends could not extend to *Red River*, they must necessarily be dependent on the assistance and representations of the *magistracy*, and looking at *what*, or rather *who*, is that magistracy, contemplating the deep interest and heavy stake he has in the events that take place there, I say, though, no doubt the magistrate is innocent, yet the presumption will present itself that, surrounded as our natures are by frailty, and exposed as our judgments are to influences often so secret and subtle as almost to defy detection, *personal* feeling may have had *some* share in the course of procedure that has been adopted. In conclusion, I would remark, that I did think, having been deprived of all the witnesses on whom we had a right to calculate, the officers of the Crown would not have objected to the *declaration* of the defendant being read. *José*, on whom we confidently relied as a *witness* on the part of the *Crown*, is *indicted*; *Desmarais* is *indicted*; *Grant* and *Cadotte* are *indicted*; and thus, deprived of our *primary*, we are compelled to resort to *secondary*, testimony.

Chief Justice Sewell.—One point relative to *José* is established, namely, that he was sent to receive instruction as to the nature of an *oath*, and that, up to *that* time, he was intended to be used as a *witness*. You therefore only require to prove the *second*, namely that he was *indicted*.

Attorney General.—It is a little singular, I think, to attempt to prove by the commissioner what was done in his absence. As to this history of *culling* witnesses, I do not know to what my learned friend refers. He appears to speak as if witnesses had been *taken on*, and then *hunted off*; to *all* insinuations of *that kind* I am completely *indifferent*. The *commissioner* undoubtedly acted with great *caution*, but the Crown *never* pledged itself to make *José* a *witness*.

Chief Justice Sewell.—There was a little unnecessary heat on this occasion, which I was sorry to observe, because, I am happy to say, it is what we are strangers to. *Mr. Stuart's* position was this: the persons whom we intended, and whom we had reason to believe the *Crown* proposed to produce as *witnesses*, have been *indicted*, and we are thereby deprived of our *primary*, and therefore ought to be allowed to introduce

secondary, testimony. The Crown officers may be assured that I feel it my bounden duty, and it is my pleasure to protect them, whenever they are attacked; but the object of the *defence* was merely to shew *why* they could not produce, what is called, the *best* evidence. Here are *five* persons, say they, indicted for being present at the supposed murder. Perhaps I am not *right* in my conjecture, but the *jury might insist* upon their being *indicted*, a *thousand reasons* might be assigned without attaching *blame* to the Crown officers. The only *necessary* question is this; *was Perdrix Blanche indicted afterwards?*

Mr. Coltman stated, "*Perdrix Blanche*, was (as he believed) subsequently indicted"—that he saw *Desmarais* at *Lake la Pluie*, about the 24th *June*, and understood, when he first saw them, that he was guide to a canoe of goods belonging to *Lord Selkirk*—that as positively as he could remember, (speaking only from memory,) he was brought as a witness, by one *Michael M'Donell*, an agent to *Lord Selkirk;* and there was no doubt but *Desmarais*, had since been indicted for the same offence. *Mr. Coltman's* examination concluded, by his stating, that *he* took no step to bring *Rochon* down, and that he did not come down.

Being cross-examined, *Mr. Coltman* said, he had *heard* many reasons assigned why *Rochon* was not brought down; but he was not sufficiently acquainted with their truth, to assert they were correct—he believed, he was *now* in the *Indian* territory. Also, that when it was deemed expedient, to take *José* as a witness, for the *Crown*, what he could prove could not be known, as he was then unacquainted with the nature of an *oath;* but that *he* had not felt himself warranted, in promising him that he should be a witness, without the sanction of the Crown officers. That at a time when *José* was with the witnesses for the *defence*, in consequence of a letter from the *Attorney-General*, wishing to have him (*as Mr. Coltman supposed*) for a *King's* evidence, upon his application he was produced by the gentlemen of the *North West* Company; and it had been his own opinion, which had been intimated to the *Attorney-General*, that he ought to be returned to the gentlemen, from whom he had been received, under an idea that he was to be a witness. Finally, *Mr. Coltman* said, that afterwards *José* was indicted; but previously notice was given him, that he could not be received as a witness on the part of the *Crown*.

This evidence closed the defence.

Mr. Nolin and Miles Macdonell, *Esquire*, were examined by the *Attorney General*, in support of Des Loges' character; the *former* said, he had known him three years, but did not know *enough* of him to say, whether confidence could be placed in him, but *he* had never caught him in a lie. *Mr. Macdonell's* evidence amounted to this, that

he did not know enough of *Des Loges*, to speak to his *general* character, but he knew nothing *bad* of him—that he could not say he *ever* heard his character, from the *North West* Company, but he knew *no* reason for not believing him upon his oath.

The CHIEF JUSTICE then charged the JURY—he commenced by an assurance that in endeavouring to *eclaircise* such parts of the subject as appeared to require it, the *Court* had no intention to suggest any opinion on the *facts* of the case, but its sole object would be to place both with reference to the Crown and to the Prisoner, those particular points which militate against the one and the other before the Jury, and thus assist them to form, but not to *guide*, their judgment. He then explained, that as the *facts* were exclusively with the *Jury*, the *law* was equally so with the *Court*, adding, " and, gentlemen, it is this happy " union of the respective duties assigned to each, that renders the sys- " tem of jurisprudence, which we are this moment administering, the " first in the world." The precise charge against the Prisoner, as contained in the eighth count of the indictment, was then stated, the *Chief Justice* remarking: " It is of no consequence to enquire whether it was " by *Mainville's* hand, or not, that the man was killed, because the " record of (*De Reinhard's*) conviction has been produced, and made a " piece of evidence against *M'Lellan*." The principles upon which distinctions of degree in the same crime proceeded, were illustrated and applied to this case in the following manner:—" Having thus exhibited " the principle, for a moment apply it *hypothetically* to this case. *Main-* " *ville* actually killed the man, and *De Reinhard* was present at the " time. Previously, in company with *Mainville* and *De Reinhard*, the " Prisoner, *M'Lellan* had advised, commanded, or even consented to " the murder. The application is obvious, *Mainville* is the principal " in the *first* degree, *De Reinhard* in the *second*, and *M'Lellan* would " be the accessary *before* the fact;" and the Jury cautioned against mistaking that by this hypothetical elucidation, he intended in the slightest degree to involve the Prisoner in the justice of its application, its only object being to explain the principle, so that the law upon which the *Jury* were to apply to the case, might be satisfactorily comprehended. Proceeding to the consideration of what constituted an accessary *after* the fact, he declared: " It is not a mere omission to perform a duty, it is not " a negligence to give information to a magistrate, so that the hue and " cry can be raised after the murderer; for such conduct, though reprehen- " sible in the highest degree, amounts only to *misprision of felony*, an " offence most undoubtedly, but not the aggravated one charged in this " indictment. He who is guilty of merely *concealing* a felony, is guilty " of a *misdemeanor*, which is punishable by fine and imprisonment, but " if this is carried any farther than a culpable remissness of duty, then

" the offender becomes an accessary after the fact." The *Chief Justice* supported his definitions by referring to *Mr. Justice Forster*, *page* 125, and to *Dalton*, C. 161. S. 5. and read at considerable length from the former, and arriving at the conclusion, that " it is a principle in law " which can never be controverted, that he who procureth a felony to be " done, is a felon ;" and, to point out the difference between a principal and accessary, adding, " if present, (that is at the perpetration of the " offence) he is a principal, if absent, an accessary before the fact."

Having thus defined what constituted an accessary *before* the fact, his Honour proposed to examine, by reference to the testimony, how far the Prisoner was guilty or innocent; intimating that, if the evidence appeared to the Jury, in the same light it did to the Court, they would, perhaps, find *no* testimony, making him an accessary *after* the fact; for, should they believe in the existence of a *conspiracy* to take away the life of *Keveny*, but still apprehend that only a *tacit consent* on the part of the Prisoner, or a very culpable negligence in not preventing it taking place, then (said he) " it is my bounden duty to tell you, " that though such conduct amounts to an offence, and is punishable as " such, yet it does not make the Prisoner (in the eye of the law) an " *accessary before the fact.*" To constitute him that, he continued, " it " is necessary that it be proved that he not merely did not *prevent*, as " perhaps he might have done, (I am now speaking merely *hypotheti-* " *cally*,) the murder being committed, but that he actually consented " in his heart to its perpetration." The *Chief Justice* explained to the Jury, very forcibly that it was *their* duty to determine whether the evidence proved merely " a tacit acquiescence manifested by a culpable " negligence, without having excited, or given his hearts consent to " the murder, or whether the crime, instead of being a mere neglect to " do a duty, was proceeded in from a wish for his death," adding, if they adopted the opinion that *M'Lellan's* silence resulted from malice, and from a secret wish in his heart for the death of *Keveny*, that he had abstained from preventing the murder, " then, gentlemen, it is not " merely a *negligence* in not *preventing* the murder, but it is a criminal " abstaining, the result of malice aforethought, and the law, judging " of offences by the *quo animo* wherewith they are committed, declares " such a consenting to be an actual participation *in* the murder, and " that the offender is *as* guilty, (though absent at the commission of the " crime,) as the *felon* who actually takes the life. It amounts to that " crime which *Mr. Justice Forster*, in commenting on the case then be- " fore him, says, ' It would be a reproach to the justice of the kingdom " to suppose that he is not an accessary.' "

His Honour noticed that the same doctrine was maintained by *Lord Hale*, *page* 615 of his learned work, and although difficult for the Jury

to say, *when* they shall determine that malice *was* in the heart, yet that it must in *this* case be done, as " it is the *intent* of the mind which con- " stitutes the crime," and elucidated the position by again putting a case hypothetically. " If the conversation in the canoe (*page* 301, *et* " *seq.*) was heard by *M'Lellan*, and without malice, or ill intention " towards *Keveny*, he neglected to give information of the design, then " he would be guilty of *concealment*, but would not be an *accessary*, for " it is the wicked design, the ill intention, which constitutes the crime." It was then explained, that this was an offence (viz. *misprision of murder*) which the law punished, and sometimes severely too, and adverting again to this conversation: " But, gentlemen, (*said his Honour*) if on " the other hand, as commanding officer of this canoe, he not only " heard the conversation, but approving of it in his heart, he neglected, " from a malicious intention, to prevent the crime, then, gentlemen, " he is guilty of what he is accused in the indictment. He is an *acces-* " *sary* to the murder, and in law *equally* guilty, and liable to the *same* " punishment as the *principal*." The *Chief Justice* cautioned the Jury against imagining that *he* had any intention of supposing that this *was* the case of *M'Lellan*, observing, that in passing a verdict: " It is *you* " (*the Jury*) who are to say, and you *only*, whether it was an omission " to perform a duty, arising from no motive of malice or ill-will to the " deceased, or whether he consented in his heart from malicious mo- " tives." Adverting to the suggestion previously made by the Court, it was observed that, if the Jury took a similar view of the evidence, the charge of accessary *after* the fact would perhaps be laid aside *altogether*, but to decide that point, it would be necessary to ascertain correctly what *in law* constituted the offence. Referring to *Hawkins' Pleas of the Crown*, established that, " the rescue of a felon from arrest," and " the voluntary suffering him to escape," were that crime, and that some held " those in like manner guilty who opposed the apprehending " a felon;" and from the same authority it was shewn, that " suffering " a felon to escape without arresting him on the bare concealment of a " felony, do not make a man an accessary."

The *Chief Justice* then noticed the following " very peculiar circum- " stances in this case"—that there was no magistracy in the Indian territory; the great and (as he believed) only outlet from that territory was in possession of *Lord Selkirk*, namely, the forcible detention of *Fort William*, was considered hostile to the interests of the *North-West* Company; and remarked: " It seems, I think, that he had a know- " ledge of the felony having been committed, and he brought *De Rein-* " *hard* to *Lac la Pluie*, whether with an intention to bring him to *Fort* " *William*, and then to send him to *Montreal*, where he might have " been tried, will be for you to determine. It will be for you to con-

" sider, whether the situation of affairs at *Fort William* was such as to " frustrate such his intention. Upon the face of the testimony, the " Court does not see any thing that brings home the charge of accessary " *after* the fact, it is solely, in *our* judgment, applicable to the allega- " tion that he was an accessary *before* the fact, and to that part of the " charge the evidence is of very serious importance." Before dismissing this branch of the inquiry, reference was again made to that part of *Hawkins*, wherein he discusses " what kind of receipt of a felon will make " the receiver an accessary after the fact," to enable the Jury clearly to appreciate the distinction which the law makes between that crime and a *negligent concealment* of a felony, and *Sir Edward Coke's second* and *third* institutes were cited for the same purpose, and the consideration of " how far the Prisoner had been proved an accessary after the fact," was thus concluded :—" In the present case, perhaps, it cannot be dis- " puted that a *knowledge* of the felony has been brought home to the " Prisoner, but is it that knowledge which amounts to more than a " *concealment*. You probably will be of opinion with the Court, that " *nothing beyond that* has been proved. It may amount to a most *cul-* " *pable* negligence, but is not, according to our idea, that aiding to " escape which is necessary, according to the authorities which I have read " to you, to constitute an individual *an accessary after the fact.*" The Jury were again cautioned not to consider the Court as wishing to *direct* their opinions in the following terms: " But let me again remind you, that " it not what *we* say that is to regulate *your* opinion. Your verdict, " gentlemen, is to be most emphatically your *own*. You are that coun- " try upon which the Prisoner has put himself for his trial. It is *you* " who have sworn duly to try him, and make a just deliverance between " our Sovereign Lord the King and himself, and to do that you must " fully and impartially deliver your own opinion, unfettered and unin- " fluenced by the sentiments of any man."

The question of *jurisdiction* was then examined, and reference had to the various acts so frequently mentioned; the Court repeating as the unanimous opinion of the judges, that the boundaries of *Upper Canada* were such as were laid down in *De Reinhard's* case. The evidence of Messrs. *Coltman* and *Bouchette*, as to locality, was read and commented on, and taken in connection with the legal decision, it was manifest " that the spot '*en haut des Dalles*' was beyond the *American* line, and " without the boundaries of the province of *Upper Canada*." The more particular consideration of the *facts* of the case was thus introduced— " the *locality*, involving in it the question of *jurisdiction*, being disposed " of, we proceed to the consideration of the case itself; and the Court " requests your most particular attention to that part of it which relates " to the charge against the Prisoner, of being an accessary *before* the

" fact.—The course I propose to pursue is precisely that which was taken " in the last case. I shall first read the evidence without any comment " whatsoever, so that you may have, clearly and distinctly, the whole " of it before you, and after having so done, I shall endeavour to point " out certain parts which, in the judgment of the Court, make *against*, " and also certain parts which make *for*, the Prisoner, and then, with- " out further observation, shall leave the whole case to your ultimate " decision."

The evidence was read to that part of *Faille's* (*page* 299) which relates the conversation with the *Swan River* brigade, and its difference with the testimony given by *Des Loges* (*page* 309) was thus pointed out —" He (*Des Loges*) represents that it was the *Prisoner* who made the " enquiries, while *Faille* as fully establishes that it was some *other* per- " son, though he cannot say *who*, because he repeatedly says that *Mr.* " *Archy* was with them, but that he does not know whether he *heard* " what passed, which clearly manifests that (according to his statement) " it was not *M'Lellan* who put the questions." Having reminded the Jury that to decide between the credibility of opposing testimony rested with *them*, it being the duty of the Court merely to point out what suggested itself as important, the *Chief Justice* resumed the reading of the evidence. Upon the directions " to burn the canoe" (*page* 302) and whether any, and what reason was assigned for so doing, it was remarked that his statement differed materially from *La Pointe's*, although they agree that both were present, (*page* 305) whilst *Michel Martin's* account opposed theirs altogether. (*page* 325.) A similar contradiction relative to the papers and their destruction was noticed, the one swearing, (*page* 302) the papers were taken *out* of the box by *De Reinhard* who put them into the Prisoner's tent, another giving completely a different account, (*page* 305) whilst *Martin* asserts that there *was* a fire before the *bourgeois* tent that night. (*page* 324.) The reading the evidence was concluded with only a remark, that *Martin's* evidence in favor of the Prisoner, (*page* 324) was in strict accordance with one of the principal witnesses for the Crown, (*page* 303) that the canoe being too much loaded was assigned at the time as a reason for not taking *Keveny*.

The *Chief Justice* intimated that it was his duty to place before the Jury, the particular bearings which presented themselves to the Court, as calculated to assist them in forming a correct decision, but not with the most distant intention of dictating, as the verdict must be *their* free and unbiassed decision, and continued thus:—

The entire case, gentlemen, resolves itself into a question of *credibility*, and the guilt or innocence of the Prisoner depends, upon the degree of credit you attach to three witnesses, viz: *Faille*, *La Pointe* and

Des Loges. If you believe *them*, that belief must, indisputably, lead to the conviction of the Prisoner. The circumstances they swear to are, that the Prisoner had the entire command of the party, that he was a *partner* of the North-West Company, and the others being *clerks* and *servants* were consequently under his controul; and this is not contradicted by any evidence on the part of the Prisoner. The conversation in the canoe, is a circumstance sworn to by all; they agree in the main fact, that the conversation relative to killing *Keveny*, did take place in the hearing of the Prisoner, and also that he participated in it to a certain extent. The circumstance of his receiving the *sugar* and appropriating it to his own use; his receiving the *papers*, examining them, keeping such as he thought advisable, making away with the rest, the burning of the little canoe, by his own orders—and, as sworn to by one of the witnesses, (*page* 305,) for the avowed purpose of preventing it being seen "by the *Indians*, or *Canadians*, who might come that way," &c.—though *Faille* says, (*page* 302,) equally positively, that the Prisoner simply ordered it to be burned, but gave *no reason whatever* for so doing; and it should also be remembered, that *Faille* and *La Pointe* agree that they were both present at the time when the order was given. The injunctions of the Prisoner not to speak of the affair, is related by the witnesses with little variation, and, if credited, forms a strong circumstance against him. His expressions upon reading part of *Keneny's* papers in the canoe—his reception of *De Reinhard* when he came without *Keveny*—eating, sleeping, and journeying, with him, and manifesting, (according to *these* witnesses,) a general disposition to be friendly to him as before; all these, gentlemen, are strong circumstances against the Prisoner at the bar: so much so that, if you credit the witnesses, it is the duty of this Court, to say, that notwithstanding these differences upon particular facts, you will feel obliged to render a verdict of guilty. But, to do that, you must believe the witnesses on the part of the prosecution, and discredit those in favour of the Prisoner.—To their evidence it is now my duty to request an equal share of your attention, as it goes to contradict, in almost every particular, the evidence of the principal witnesses for the Crown. And first, relative to *Des Loges*, whose testimony is so strong against the Prisoner, he stated, if you recollect, gentlemen, that in 1816, he was in the Indian country, with one *Colishe Ducharme*, that they were in the same brigade, and that, going to *Swan River*, they met the Prisoner, and he then went on to relate a conversation which he swore took place between them. On the part of the Prisoner, this man *Ducharme*, is the first witness called, (*page* 314,) and he says positively, that no such conversation did take place. A number of questions were put to him, in which different parts

of the conversation related by *Des Loges*, were embraced, to which he most positively gave a denial, contradicting *in toto* the whole that *Poirier* dit *Des Loges* had sworn to, with the single exception of the fact, that they did meet the Prisoner in going to *Swan River*.

Between this contradictory testimony, it was (said his Honour,) for the Jury to decide, and the only assistance they could have in forming a just decision, was the *characters* of the persons who give evidence, and in the present instance, testimony to that was produced, giving *Ducharme* a most excellent character—and *Des Loges*, one of the most infamous description.—If *Ducharme* was believed, it was stated, that *Faille* and *La Pointe's* testimony, being contradicted by him in many particulars, would probably be done away with, but it would certainly be impossible to entertain *Des Loges'*.—Reference was made to some of the contradictions, and also to the identity of the witness *Des Loges*—and the *Chief Justice* continued—that by an examination of *Ducharme's* testimony throughout, it would be found to do away the greater part of *Faille* and *La Pointe's*, and the whole of the other man's.—Having gone over the questions, &c. (*page* 315,) to *Ducharme*, his Honour repeated that this must be the effect of believing him, and proceeded :—

But, gentlemen, all the Court wishes, and all it will do, is to point out the striking parts of the evidence to your notice, and then leave it to your decision. It is, however, impossible, if you believe *Ducharme*, that you can, for a moment, entertain *Des Loges'* testimony. Relative to the effect it will have upon the two *Canadians'* evidence, the Court cannot but remark, that they appeared to feel as if they yet recollected the *coups de baton*, by their referring to it so frequently, and it will be for you to say whether that circumstance may have had any, and what, influence upon their testimony, but their very frequent reference to the circumstance proves that it has made a very strong impression upon their minds. Another circumstance, which you cannot but have noticed, is that they never recollect the *person* who said this, that, or the other, nor the *place* where they were at the time they relate a transaction to have occurred, though they are so very minute in their narrative. But, whilst on parts of transactions which it would not be surprising if recollection failed them, they are exceedingly positive, of others which it would be more natural that they should remember, the particulars appear to have escaped their own memory, or they swear that they never occurred, in which they are contradicted by other evidence. There are also many parts of the story in which they do not agree with one another.

[The difference relative to the *sugar*, (*page* 302 *with* 303,) and the destruction of the papers, (*page* 302 *with* 305,) were strongly marked.]

These striking differences in their testimony, will be sufficient, per-

haps, to shake your confidence in either, if not, perhaps, to destroy their testimony altogether. The Court, however, gives no opinion upon credibility; it is your own unbiassed decision, which must relugate your verdict, but it is our duty to notice to you equally, the favourable and unfavourable parts of the testimony, and I must now observe, that the oath of *Michel Martin* goes to contradict them at almost every point.

[The evidence of *Martin* was then gone over, and the contradictions were pointed out.]

More contradictory evidence never came into a Court of justice, indeed there is not one fact of any importance in which the evidence on the two sides is not almost diametrically opposite, and between them you are to decide. There is another point which we feel bound to notice to you; the Prisoner has shewn that he could not, in that wild country, owing to its peculiar circumstances, bring that evidence of his innocence which he wished; he also proved that he placed some reliance upon persons who were brought down being produced as witnesses on the part of the Crown, but who were afterwards indicted or removed from him. It will be for you to say whether this evidence does not explain what before appeared to be dubious, and account, in a great degree, for his not producing before you more positive testimony as to his conduct. There is another circumstance which it is right I should advert to. The Crown officers, with very great propriety, shewed that *Mr. Keveny* was sent away from *Bas de la Rivière* in the custody of five *Bois-brûlés*, intending, as was evident from the tenor of their questions, that you should infer that *Keveny* was not treated with that kindness which it was endeavoured to establish on the defence. To rebut such an impression, *Mr. Crebassa* is asked, whether at that time there were any persons excepting *Bois-brûlés* at *Bas de la Rivière*, and he answers that, excepting two old Canadians accustomed to work about the garden, there were not. So far that is explained completely. They had no right to keep him at *Bas de la Rivière*, they were bound to send him to *Lower Canada*, and the circumstance of his being put in charge of *Bois-brûlés* was unavoidable. Relative to the Prisoner following *Keveny*, he says the reason was because he had heard of the capture of *Fort William*, which was not known at the time *Keveny* was sent away. When this information was received at *Bas de la Rivière*, I think he must have known of *Keveny* having been turned over to the two Canadian lads, and the Indian *José*, though it is not in evidence that he did, but the circumstance of his being detained, owing to the quarrel of these people, certainly could not have been in his own knowledge. The Prisoner's account of meeting him is, that he came upon him accidentally, and takes him up that he might be forwarded on to this province. The reason of his going in the little canoe, if you believe *Martin*, is because

it was impossible he could go in the large one, from its being already overloaded, indeed the evidence on the part of the Crown, though it goes the length of saying that he might have been taken in the canoe of the Prisoner, yet says, that he would not have found himself "*à son aise.*"

These circumstances seem to explain those which appear unfavourable to the Prisoner, down to the time of his parting with *Keveny* the last time that he was seen alive. It only remains to notice the evidence as to the conduct of the Prisoner *after* the time when, I think it cannot be doubted but, the fact of the murder was within his knowledge. *Faille* and *La Pointe* concur in representing that the Prisoner treated *De Reinhard* in every particular as before, that they eat, drank and slept together, as usual, and that they saw no difference. *Martin* says certainly they did eat and drink together, yet that he saw a difference in *Mr. M'Lellan*, and that he did not look upon him in the same light as he had formerly done. Some enquiry was also made as to the possibility of this sort of intercourse being avoided, which you will doubtless recollect, and give to it what weight you think proper. The Court, gentlemen, will make no conclusions as to these very contradictory and extraordinary statements. Our duty is merely to put them before you, and this we have done, on the one side and on the other, to the end that you may correctly apply each part of the evidence to the point of the case on which it bears, and when you have maturely and conscientiously considered it, in all its bearings, that you may satisfactorily and conscientiously say, whether *Archibald M'Lellan*, the Prisoner at the bar, is guilty or not guilty.

The Jury then retired, and in about ten minutes returned, and delivered, by Mr. MEASAM, *a verdict of* NOT GUILTY, *which was formally recorded. The Jury assented to the record, and the Chief Justice, having thanked them for their intention, they were discharged.*

The Attorney-General stated to the Court that he had other matters against Mr. M'Lellan, and Mr. M'Lellan giving satisfactory bail, to appear to answer to the charge, was then liberated.

FINIS.

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