GOULD'S

STENOGRAPHIC REPORTER;

PUBLISHED MONTHLY,

IN THE

CITY OF WASHINGTON,

AND DEVOTED TO THE RECORDING OF

IMPORTANT TRIALS,

FOR TREASON, MURDER, HIGHWAY ROBBERY, MAIL ROBBERY, CONSPIRACY, RIOT, ARSON, BURGLARY, SEDUCTION, ETC.

ALSO

MISCELLANEOUS SPEECHES

OF AMERICAN STATESMEN, IN CONGRESS AND STATE LEGISLATURES; LAWYERS AND JUDGES IN THE SUPREME COURT OF THE UNITED STATES AND INDIVIDUAL STATES; POLITICAL ADDRESSES, ORATIONS, LECTURES UPON ARTS, SCIENCES, LITERATURE, AND MORALS.

VOL. II.

1841.

[13 *Sheets, Periodical.*]

This work is published and sent through the mail, in monthly numbers of 64 pages,—making two volumes a year, of 384 pages each, at $1 the volume, or $2 a year, PAYABLE IN ADVANCE.—All communications must be franked, or Postage Paid.

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STENOGRAPHIC REPORTER.

VOL. II.—1841. Nos., 1, 2, 3, 4, 5, 6.

PROSPECTUS,

TO THE FIRST VOLUME OF

GOULD'S STENOGRAPHIC REPORTER,

A MONTHLY PERIODICAL,

PUBLISHED IN WASHINGTON CITY, D. C.

The Subscriber, formerly well known to the American public by his numerous *Reports* of Convention debates, Legislative debates, Sermons, Trials, Orations, Addresses, Lectures, &c., in the principal cities of the United States—as the author of a work on stenography, and as editor and publisher of several successful periodical works in the city of Philadelphia—having resumed his Stenographic profession, respectfully announces his intention to publish a series of periodical numbers and volumes, to embrace important TRIALS for *Treason, Murder, Highway Robbery, Mail Robbery, Conspiracy, Riot, Arson, Burglary, Seduction, &c.* Also, miscellaneous *speeches* of *American Statesmen*, in Congress, and other Legislative bodies; *Lawyers* and *Judges in the Supreme Court of the United States, and individual States;* political addresses, orations, lectures upon arts, sciences, literature and morals.

Appropriate materials for such a publication have been accumulated, in short hand, during the last twenty years, from the lips of eminent American orators in fifteen different States of the Union. From these materials about 10,000 pages have been published in book and pamphlet form, at different times, and in various places; but, though liberally patronised, in particular States and districts, no attempt was made to give them a more general spread—they were isolated items, without connection, uniformity, or order, and are now generally out of print, and not easily obtained even for reference, however desirable.

At the earnest solicitation of numerous professional gentlemen, and many distinguished citizens of the United States, the subscriber has been induced to enter upon the plan above proposed; and, as he has hitherto enjoyed the confidence and received the countenance and favor, of Legislatures, Courts, and public speakers, it will be his aim to deserve their friendly support in future.

To select, revise, arrange, and publish, in a uniform series of numbers and volumes, the better portions of the matter alluded to, and to add from time to time new matter of a similar character, when recommended by its merits, and called for by the public, are prominent objects of this pub-

lication ; nor will matter of this character be rejected, though occasionally reported by others, or furnished by speakers themselves.

Another object is, to secure a more general diffusion, by a regular and cheap mode of distribution, through the *mail*, to subscribers at a distance from the place of publication, and from the cities, legislative bodies, courts, and other places, where such materials are chiefly furnished ; while those residing in or near the larger cities and towns, may be regularly supplied with sinlge numbers, or perfect volumes, through the hands of booksellers, agents, or carriers.

The work will be printed upon excellent paper and with new type. The monthly numbers will contain not less than 64 octavo pages each, with a handsome printed cover. Price, single, to non-subscribers, on delivery, twenty-five cents. Each volume will consist of at least 6 numbers, or 384 pages, with a title page and index ; price, to subscribers who have their numbers regularly sent through the mail, One Dollar a volume, or Two Dollars a year, payable in advance. If delivered in cities and towns, not in numbers, but at the close of each volume, One Dollar a volume on delivery.

When an important *trial*, or other *subject*, is exciting an intense interest, and is deemed of sufficient importance to authorize its *immediate publication*, *entire*, and in *connection*, it will be thus published and distributed at once, in a single pamphlet, though constituting an equivalent for several single numbers of the promised series—for example :

The late Trial of the Celebrated Mail Robber, Dr. John F. Braddee, in the United States Circuit Court at Pittsburg, for a succession of *daring* and *extensive depredations* upon the *United States Mails*, at Uniontown, Penn., having passed through a large pamphlet edition in the course of a few days, without supplying a tenth part of the probable demand throughout the Country, is thought deserving of a place at the commencement of this publication ; and will accordingly be revised and republished, *immediately*, in a style not derogatory to its importance, and the distinguished legal talents displayed on the occasion. It will make about 190 pages, or equal to 3 *regular numbers* of the periodical, and be ready for delivery on the 15th September instant, (1841) at Fifty cents—it may be considered as the *half part* of Volume 1—of which,

The second, it is expected, will embrace the entire *Trial* of ALEXANDER McLEOD—should it take place as now proposed ; and arrangements are already made for publishing it, *immediately* after the close of the Trial, so that it may be distributed through the mails, and otherwise, at once, to all who have subscribed. The character and importance of *this Trial*, and the interest which it has excited, are sufficiently known to all, nor is it probable that public anxiety will at all abate, till the subject is definitely disposed of by the legitimate authorities and ultimate tribunal.

In relation to the case of *Dr. Braddee*, a few words of explanation are necessary. The safety of the United States Mails is a matter of interest to every individual throughout the Country—it strikes at the root of all our varied interests, for the affairs of Government could scarcely be carried on a week without the mails.

The case of Braddee is without a parallel. He was enjoying a *Quack Medical Practice* worth from $5,000 to $15,000 a year. He was suspected, arrested, his premises searched, and no less than *fifteen mail bags* were found, cut open, rifled, and secreted under an out-building. Money

and other property were missing from the mails, about this time, to the amount of half a million of dollars, of which $10,500 were found in Braddee's hay-mow, and other items paid away by him, were recovered, though much is yet missing. He was held to bail in the sum of $120,000, and continued at large from January till May, 1841. When his trial came on, he chartered a steamboat, and brought to court, more than one hundred witnesses, a distance of seventy miles, triumphantly boasting on his way, that he had those who would *swear him out of hell*, if already there—he had also secured the services of no less than seven lawyers.

He was met, on the part of the prosecution, by about an equal number of witnesses, summoned by the United States from St. Louis, Louisville, Cincinnati, Wheeling, New York, Boston, Washington City, and other places; eighteen mutilated mail bags were exhibited upon the floor of the court-room, and thousands of dollars of his stolen treasure placed upon the table. The mail bags and portions of the money were identified, the stealing proven, guilt established, and sentence pronounced—notwithstanding, extensive subornation had been resorted to, and the most alarming perjury perpetrated in his behalf. The trial was conducted with great legal ability—the speeches of council and the charge of Judge Baldwin occupied *seventeen hours*, and the whole are published in the language of the speakers.

It is thought that *this Trial*, at least, should be in the hands of every lawyer, every mail-contractor, every stage-driver, and every post-master in the United States—as the report of *McLeod's case*, doubtless *will be*, in the hands of every *politician*.

All Post Masters are respectfully requested to act as agents for this publication—to obtain subscriptions, and make remittances for their respective neighborhoods.

Every sixth copy of the work will be allowed for obtaining subscribers and forwarding the money—that is, if *five* copies are taken and paid for, the *sixth* will be free; or a cash commission of 20 per cent. will be allowed on all sums transmitted by agents. MARCUS T. C. GOULD.

WASHINGTON CITY, D. C., SEPT. 1841.

N. B.—All communications, by mail, must be free from postage, and addressed GOULD'S REPORTER, Washington City, D. C.

ADVERTISEMENT.

Although it is well known that numerous *Reports* of the trial of ALEXANDER McLEOD have appeared, in the columns of the newspapers and in pamphlet form, it is not so well known that, owing to physical impossibilities, these reports were, in many respects, necessarily abridged, and less perfect than if produced under other circumstances.

In the first place the language of a public speaker, one hour, if recorded in short hand, and written out in long hand for the press, requires from four to five hours' labor, and makes about half a quire of newspaper manuscript; and as the court at Utica was in session from 10 to 12 hours each day, for 8 days, it was out of the power of any one man to prepare the matter of each day, for the first evening or morning mail, to New York. The speeches of one single day, 11 hours, furnished matter for more than 30 newspaper columns, to copy which was the labor of at least a week.

How, then, without much previous arrangement and concert of action, for the division of labor, could a full and perfect report be produced, as the trial proceeded? All was done, that could be done, and the result was placed before the public; but a work still remained, and that work is here presented.

To lessen the labor of writing out, personally, the whole of what was expected to pass during this important trial, an arrangement was made, by the subscriber, with two or three other reporters, to exchange an occasional speech reported by himself, for an equivalent, from their notes of testimony.

Though this arrangement was pursued to some small extent, yet the undersigned failed not to record the greater part of the testimony, and the whole of every speech and the charge of the court, with the exception of one hour out of seventeen; for the supplying of which, and other favors, he is indebted to the politeness of Messrs. Sutton, and Fowler, stenographers.

Portions of the testimony having been furnished as above intimated, will account for the occasional change from first to third person, and *vice versa*, as well as for the introduction of question and answer in some parts, while in other parts the questions are omitted. This applies chiefly to small portions of the testimony, and to some brief discussions between the counsel on opposite sides—and even these items have been generally revised, corrected, and amplified by the original stenographic notes of the subscriber—though their phraseology shows the work of different hands.

It is, notwithstanding, confidently believed, that nothing essential has been omitted which could give greater value to the publication, as a whole, or entitle it to fuller confidence, as to the accuracy of the *Report*, either in this country or in Europe: and as it is looked for with considerable interest, not only throughout the United States, but in Canada, in England, and other parts of the British Empire, it may not be improper to state at the close of this brief explanation, that Mr. Harvey Fowler, a well known stenographer and reporter in the Canadian Parliament, has been associated with the subscriber in preparing the Report which is here submitted.

To the court and its officers—to counsel on both sides—to jurors, witnesses and the public it is submitted, not only for their sanction and approval, but for their patronage and support.

MARCUS T. C. GOULD.

City of New York, Nov. 1, 1841.

CONTENTS.

TRIAL OF ALEXANDER McLEOD

FOR THE MURDER OF

AMOS DURFEE.

CIRCUIT COURT, 5TH JUDICIAL DISTRICT OF THE STATE OF NEW YORK, AT UTICA, ONEIDA COUNTY, OCT. 4, 1841.

Hon. PHILO GRIDLEY Presiding,
Sustained by JUDGES WHITE, KIMBALL and JONES, of the County Courts of Oneida, though having no voice on this occasion.

DAVID MOULTON, Esquire, Sheriff.
P. SHELDON ROOT, Esquire, Clerk.

SHERIFF'S OFFICERS.

Edward Eames, Under Sheriff.
Samuel Hall, Deputy Sheriff.

CONSTABLES IN ATTENDANCE.

Clark Potter,
George Hotchkiss,
Charles Benedict,
Samuel Hall,
Ephraim Wilcox,
Eli Bridges,
John Sutton,
Joseph Merrill.

COUNSEL FOR THE PEOPLE.

WILLIS HALL, Esquire, Attorney-General.
JONATHAN L. WOODS, Esquire, Dist. Att'y for Niagara county
TIMOTHY JENKINS, Esquire, Dist. Att'y for Oneida county.
SETH C. HAWLEY, Esquire, of Buffalo.

COUNSEL FOR PRISONER.

JOSHUA A. SPENCER, Esquire, United States District Attorney.
HIRAM GARDNER, Esquire, of Lockport.
ALVIN C. BRADLEY, Esquire, of Lockport.

COURT ROOM,

UTICA, MONDAY MORNING, OCTOBER 4, 1841.

In pursuance of arrangements previously made and published by the City Council, under the advice of the Court, to prevent confusion on the present occasion, the following order of admission to the court-room was observed, viz.

"1. The Members of the Court.
2. The Members of the Bar and Reporters.
3. The Prisoner, and Constables who attended him.
4. The Jury drawn to try him.
5. The Witnesses, who had a seat by themselves.
6. Citizens generally."

A large number of constables and special deputies were in attendance at the outer door and in the court-room, and other precautions taken to insure the most perfect order and decorum, not only while assembling, but throughout the sittings.

A few minutes past nine o'clock, Judge Gridley entered the Court, attended by the usual Common Pleas Judges of Oneida county (who, however, take no part in this trial,) and the counsel engaged in the case, followed by the bar generally. The jurors were next admitted; and when they were seated, the witnesses were accommodated with seats. The spectators next entered in a very orderly manner, which reflects credit on those who conceived and carried out the arrangements and regulations. There was no rushing for the seats, but every one entered as demurely as though the court were a parish church. No more were admitted than could be comfortably seated; and, indeed, no more appeared desirous to be present. Persons at a distance, who have been wrought up to a feverish excitement on this subject, will be astonished at the apparent apathy felt here.

At fifteen minutes to ten o'clock, the crier opened the court with the usual formality, and

Mr. Wood, district attorney for the county of Niagara, applied to the court for an attachment against Theodore Stone, of Lockport, sheriff of the county of Niagara, for disobedience to a subpœna served upon him on the 27th ult., to appear at this court as a witness for the prosecution.

The court made the order.

A few minutes before ten o'clock the prisoner was brought into court, walking deliberately to a seat within the bar, near his counsel. He was dressed neatly in a suit of black, and was wrapped, as he entered, in the ample folds of a blue cloak. His counsel shook him cordially by the hand, and he gracefully returned the salutations of others. He is a man of gentlemanly bearing and demeanor, and he appeared respectful but not embarrassed.

Judge Gridley.—Mr. Hall, are you ready in the case of the

PEOPLE OF THE STATE OF NEW YORK

VERSUS

ALEXANDER McLEOD?

Mr. Hall, Attorney-General—(with whom were associated, for the prosecution, Mr. Jenkins, District Attorney for Oneida county, Mr. Wood, District Attorney for the county of Niagara, and Mr. Seth C. Hawley, of Buffalo)—If the court please, I move on the cause.

Judge Gridley.—Are you ready, Mr. Spencer?

Mr. Spencer—(with whom were associated Mr. Bradley and Mr. Gardner)—We are ready.

Judge Gridley.—Then we will proceed with the case, and as the clerk calls the names of the jurors, they will advance to be sworn.

Mr. Root, the clerk of the court, called the prisoner, who rose and was informed by the clerk of his right to challenge.

Charles O. Curtis of Paris, was the first juror called.

Mr. Spencer to the Attorney-General.—Do you purpose to put any question generally to the jurors?

Mr. Hall.—Yes. (To the juror.) Mr. Curtis, have you formed or expressed any opinion as to the guilt or innocence of the prisoner?

Mr. Curtis.—I have not.

Mr. Hall.—Have you any conscientious scruples on the subject of giving a verdict involving life?

Mr. Curtis.—No, sir.

Judge Gridley.—Let him be sworn.

Mr. Hall.—I will ask, if the court please, one further question. (To the juror.) Do you entertain an opinion founded on motives of public policy, or otherwise, that the prisoner ought to be exonerated from punishment, whether he participated in the burning of the Caroline and the murder of Durfee or not?

Mr. Spencer.—That is a new question.

Mr. Curtis.—I feel desirous that justice should be done. I have formed no opinion.

Judge Gridley.—It strikes me, that where a juror is interrogated in this formal way, if he answers that he has formed no opinion, and that he has no conscientious scruples on the subject of giving a verdict which may involve the life and death of the prisoner, the whole ground is covered.

The juror was then sworn.

Edmund Allen, of Augusta, answered properly and was sworn.

John Mott, another juror, said he felt as if it was his duty to be governed by the evidence.

Joseph Cauldwell, of Whitesborough, had conscientious scruples on the subject of capital punishments.

Mr. Hall.—You may stand aside.

Judge Gridley.—What are those scruples?

Juror.—I never felt willing to bring a man in guilty where the law pronounces the punishment of death.

Judge Gridley.—I think it is better you should stand aside; but it is no portion of a juror's business to look to consequences.

Mr. Jenkins.—The statute makes it cause of challenge, if your Honor please.

The juror was told to stand aside.

Ashley Hills, farmer, of Kirkland, was next called.

Mr. Spencer.—Challenged.

The juror was put aside.

Elijah Brush, of Rome, was next called, and the usual questions were put on the subject of conscientious scruples.

Judge Gridley said the question was a proper one, when it was understood. It was not meant that a juror should be excused because he might feel pain on returning such a verdict, but that it was a matter of duty not to return a verdict involving life by the law of the land.

Mr. Hall.—How do you answer? Would you find a verdict according to the evidence on the guilt or innocence of the prisoner in a capital indictment?

Juror.—Certainly.

Mr. Hall.—Swear the juror.

Royal Robbins, of Marcy, said he had formed no opinion further than he hoped that justice would be done. He had not made up his mind as to what justice was.

Mr. Spencer.—He may stand aside.

Roswell T. Eastman, of Paris, was excused, being too unwell to set as a juror.

Ira Byington, of Camden, was sworn. Also Wm. Carpenter, of Kirkland.

John Swann, jun., of Weston, did not answer.

Edward Scoville—I wish to be excused on the ground that I have doubted the policy of inflicting capital punishment.

He was excused.

Luther Shepherd, of Verona, was challenged.

Josiah Thurber, of Utica, answered the questions satisfactorily that were put.

Mr. Hall desired that this juror might stand aside until the panel was exhausted. He believed it was a common law right, although they had no peremptory challenge.

Mr. Spencer—You have no such right.

Mr. Hall argued that he had the right to put a juror aside, until the whole panel was exhausted, and then, if it were necessary to call the same juror, he could only be put aside on cause shown.

Judge Gridley—It is a qualified peremptory challenge. Is there any objection?

Mr. Spencer—I never heard of such a right before. It is much more than a qualified challenge, and they may thus ask that thirty-six jurors may stand aside, while the prisoner has the right to challenge but twenty.

Mr. Hall said a decision had been made in a similar case in the United States Supreme Court, in the case of the United States v. Wilson and Porter, which was tried before Judge Baldwin, of Pennsylvania. Mr. Dallas, in that case, claimed the right, and it was contested, upon the ground that there was no peremptory challenge allowed by the laws of Pennsylvania.

The opinion of the Supreme Court, delivered in the above case, is as follows:—

The court observed that they had known no case where the right now claimed had been allowed to the prosecution. That they would not be the

first to do it in a capital case, unless it was clearly established; but that, on examining the opinion of the Supreme Court in the case of the United States v. Marchant and Colson, 12 Wheaton, 480, 484, 485, they did not feel themselves at liberty to refuse the qualified right of challenge now claimed by the United States. The law as laid down by that court is, that in England the crown had an acknowledged right of peremptory challenge before the statute of 33 Edward I., which took it away and narrowed the right down to that for cause shown; but that an uniform practice had prevailed ever since, down to the present time, to allow a conditional and qualified exercise of that right, if other sufficient jurors remained for the trial, by not compelling the crown to show cause at the time of the objection taken, but to put aside the juror until the whole panel is gone through, so that it appears there will not be a full jury without the person challenged.

That the right of peremptory challenge allowed the prisoner was not to select the jury who were to try him, but merely to reject such as he pleased, though he could assign no reason for so doing, and that the court would not inquire into what was the United States' prerogative, but simply what was the common law doctrine. The court considering the opinion of the Supreme Court as a recognition of the qualified right of the United States to challenge, directed the juror to be put aside till the panel was exhausted, declaring that if that should happen, and the juror be called again, the United States could not challenge him without showing cause. Baldwin's Rep. p. 82.

The authority referred to in the above opinion of the Supreme Court is as follows:—

Until the statute of 33 Edward I. the crown might challenge peremptorily any juror, without assigning any cause; but that statute took away that right, and narrowed the challenges of the crown to those for cause shown. But the practice since this statute has uniformly been, and it is clearly settled, not to compel the crown to show cause at the time of objection taken, but to put aside the juror until the whole panel is gone through. Hawkins on this point says (Pl. Cr. b. 2, ch. 43, §2, §3,) "if the king challenge a juror before the panel is perused, it is agreed that he need not show any cause of his challenge till the whole panel be gone through, and it appears that there will not be a full jury without the person so challenged. And if the defendant, in order to oblige the king to show cause, presently challenge 'touts par availe,' yet it hath been adjudged that the defendant shall be first put to show all his causes of challenge before the king need to show any." And the learned author is fully borne out by the authorities which he cites, and the same rule has been recognized down to the present times.

The Attorney-General also quoted the following from Chitty's Criminal Law, vol. 5, p. 533:—

The challenge to the array or the polls may be made either by the crown or the defendant.

On the part of the former it seems that at common law any number of jurors might have been peremptorily challenged, without alleging any other reason for the objection than "quod non boni sunt pro rege."

This power, however, being found very liable to abuse, was taken away by the 33 Edward I. stat. 4, commonly called ordinatio de inquisitionibus. which has been construed to extend to criminal as well as civil proceed-

ings, and the same provision is to be found in the 6 George IV. c. 50. But under a similar provision in a prior statute, it was agreed that the crown is not compelled to show any cause of challenge until the panel is gone through, so that it may appear that there will not be sufficient to try the prisoner if the peremptory objection is permitted to prevail. And it has been also holden, that if the defendant, in order to oblige the king to show cause, challenge the 'touts paravaile,' he must first show all his causes of objection, before the king can be called upon to show the grounds of his challenge. And it is quite clear that the prosecutor may challenge the array or the polls for cause shown, in the same way as the defendant.

Mr. Spencer, in reply, said this was the first time in the whole course of his practice that he had ever heard of such a proposition being made, and insisted on by the prosecution. It was, he said, in fact, a qualified peremptory challenge which belonged of right to the prisoner alone, and to support his objections he cited 2 R. S. p. 41, sec. 61, and 2 R. S. p. 615, sec. 9. "Every person arraigned and put on his trial for any offence punishable with death, or with imprisonment in a state prison for ten years or any longer time, shall be entitled peremptorily to challenge twenty of the persons drawn as jurors for such trial, and no more."

Judge Gridley, in deciding on the proposition, said,—In a case where the common law recognizes a right, although the fact be that no attempt has been hitherto made by a public prosecutor to avail himself of that right, it is not consequent that it should not be awarded to him, if he does avail himself of it. But it has not been shown that the statute recognizes this right. I see no reason why this common law right should have been preserved to the king, after the statute took it away from him. But it seems that it was so, and that it was part of the common law which came down to us at the time of the revolution. But so far as I can see, the provisions of our statutes have trenched on this common law right. The statute points out how juries should be empanelled in civil and criminal cases, and unless some of them are set aside for cause shown, or by peremptory challenge, the rule is distinctly prescribed, that the first twelve men called shall constitute the jury. I therefore decide the question, that the people have not the right to have jurors set aside until the panel is exhausted, and the juror must be sworn unless challenged or set aside for cause shown.

The juror was then sworn.

Henry Addington, of Paris, farmer, had religious scruples, and was put aside.

Peter Sleight, of Westmoreland, was sworn.

Henry Hayter, of Kirkland, was challenged.

David Tuttle, of Broomville, was challenged.

Asher Allen, of Augusta, was sworn.

Seymour Carrier, of Steuben, was sworn.

Amasa Barnes did not answer.

Thomas Noonan, of Amsville, was challenged.

Jonathan House did not answer.

Joseph Davis, of Remsen, was challenged.

Joseph Seymour, of Western, was challenged.

Henry D. Babcock, of Marcy, was challenged.

Eseck Allen, of Floyd, was sworn.

Stephen Northrup, of Marcy, was excused, being too unwell to encounter this trial.

Levy Gale, of Augusta, was challenged.

Volney Elliot, of Kirkland, was sworn.

The jury being now complete,

Judge Gridley directed the sheriff to provide lodgings, and places to take their meals, for the jury, as it would be necessary to keep them together during the whole of the trial, and to provide them with accommodations as near the court as possible.

The sheriff promised that it should be done.

The following is the jury complete, as sworn, viz.

1. Charles O. Curtis, farmer, Paris.
2. Edmund Allen, physician, Augusta.
3. John Mott, merchant, Sangerfield.
4. Elijah Brush, farmer, Rome.
5. Ira Byington, farmer, Camden.
6. William Carpenter, farmer, Kirkland.
7. Isaiah Thurber, merchant, Utica.
8. Peter Sleight, farmer, Westmoreland.
9. Asher Allen, farmer, Augusta.
10. Seymour Carrier, farmer, Steuben.
11. Eseck Allen, farmer, Floyd.
12. Volnev Elliot, farmer Kirkland.

INDICTMENT.

AT a Court of General Sessions of the Peace, holden at the Court House in the town of Lockport, in and for the county of Niagara, on the first day of February, in the year of our Lord one thousand eight hundred and forty-one, before Washington Hunt, Levi F. Bowen, Lathrop Cook, and Hiram McNeil, Esquires, Judges of the County Courts for the said county of Niagara, assigned to keep the peace in the said county of Niagara, and also to inquire, by the oath of good and lawful men of the said county, of all crimes and misdemeanors committed or triable in said county, and to hear and determine, and punish, according to law, all crimes and misdemeanors not punishable with death, or imprisonment for life in the State Prison, and to exercise such other powers and duties as may be conferred and imposed by the laws of this State, and duly authorized to hold the said Court:

NIAGARA COUNTY, ss.

The Jurors for the people of the State of New York, and for the body of the county of Niagara, to wit: Charles L. Safford, Joseph Cleveland, James Crownoon, George Curtis, James Field, Andrew Pease, Erastus Odell, Warner Green, James Tompkins, Hunt Farnsworth, John Jeffrey, Warren Carpenter, Truman Roberts, Jesse Huntley, Moses Beech, Alfred Pool, and Henry P. Trobridge, good and lawful men of the said county of Niagara, then and there being empannelled, sworn and charged to inquire for the people of the State of New York, and for the body of the county of Niagara, upon their oaths present—That *Alexander McLeod*, late of the province of Upper Canada, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the thirtieth day of December, in the year of our Lord one thousand eight hundred and thirty-seven, with force and arms at the town of Niagara, in the county of Niagara, aforesaid, on and upon one Amos Durfee, in the peace of God, and of the people of the State of New York, then and there being, feloniously, wilfully, and in his malice aforethought, and with a premeditated design to effect the death of the said Amos Durfee, did then and there make an assault upon the said Durfee, and that the said *Alexander McLeod*, with a certain *gun* of the value of five dollars, then and there loaded and charged with gunpowder and one leaden bullet, (which the said *Alexander McLeod*, in his right hand, then and there had and held,) to, against, and upon the said Amos Durfee, then and there feloniously, and wilfully, and of his malice aforethought, and with a premeditated design to effect the death of the said Amos Durfee, did shoot and discharge, and the said *Alexander McLeod*, with the leaden bullet aforesaid, out of the gun aforesaid, then and there by force of the gunpowder, and shot sent forth as aforesaid, the said Amos Durfee, in and upon the back part of the head of him the said Amos Durfee, a little above the neck of the said Durfee, then and there feloniously, wilfully, and of his malice aforethought, and with a premeditated design to effect the death of,

the said Amos Durfee, did strike, penetrate, and wound, giving to the said Amos Durfee, then and there with the leaden bullet aforesaid, so, as aforesaid, shot, discharged and sent forth, out of the gun aforesaid, by the said *Alexander McLeod*, in and upon the back part of the head of him, the said Amos Durfee, one mortal wound, the said Durfee, then and there on the said thirtieth day of December, in the year of our Lord one thousand eight hundred and thirty-seven, aforesaid, at the said town of Niagara, in the said county of Niagara, did languish, and languishing, did die, and so the Jurors aforesaid, upon their oaths aforesaid, do say that the said *Alexander McLeod*, the said Amos Durfee, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, then and there did kill and murder, against the peace of the people of the State of New York, and their laws and dignity.

2*d Count*—Presents that Alexander McLeod, killed Amos Durfee, at the time, place, and manner, as specified in the first count, with a *pistol.*

3*d Count*—Presents that *John Mosier* committed the crime of murder; and that Alexander McLeod was accessory before the fact; and that the deed was done with a *pistol.*

4*th Count*—Presents that the murder was committed by certain evil disposed persons to the Jurors unknown, and that Alexander McLeod was accessory before the fact; and that the deed was done with a *pistol.*

5*th Count*—Presents that *Thomas McCormick* committed the crime of murder, and that *Alexander McLeod* was accessory before the fact; and that the deed was done with a *gun.*

6*th Count*—Presents that the crime of murder was committed by certain evil-disposed persons, to the Jurors unknown; and that Alexander McLeod was accessory before the fact; and that the deed was done with a *gun.*

7*th Count*—Presents that *Rolland McDonald* committed the crime of murder; and that Alexander McLeod was present, aiding and abetting; and that the deed was done with a *pistol.*

8*th Count*—Presents that the crime of murder was committed by *John Mosier;* and that Alexander McLeod was present, aiding and abetting; and that the deed was done with a *gun.*

9*th Count*—Presents that the crime of murder was committed by certain evil-disposed persons, to the Jurors unknown, that Alexander McLeod was present, aiding and abetting; and that the deed was done with a *pistol.*

10*th Count*—Presents that the crime of murder was committed by certain evil-disposed persons, to the Jurors unknown; and that Alexander McLeod was present, aiding and abetting; and that the deed was done with a *gun.*

11*th Count*—Presents that the crime of murder was committed by certain evil-disposed persons, to the Jurors unknown, and that Alexander McLeod was present, aiding and abetting; and that the deed was done *with certain instruments and deadly weapons* to the Jurors unknown.

12*th Count*—Presents that Alexander McLeod and divers other evil-disposed persons, to the Jurors unknown, &c., wickedly devising and intending to oppress, injure, and prejudice one William Wells, and to injure, damage, and destroy his personal property, seized and destroyed his steamboat called the Caroline, in a manner dangerous to the lives of persons; and that the deed was done *with deadly weapons.*

13*th Count*—Presents that Alexander McLeod, and divers other persons,

to the Jurors unknown, &c., conspired together, &c., to destroy the steamer Caroline, the property of the said William Wells; and that the deed was done with a *gun*.

14*th Count*—Presents that Alexander McLeod, in destroying the steamer Caroline, the property of the said William Wells, caused the death of the said Amos Durfee; and that the deed was done with a *gun*.

15*th Count*—Presents that Alexander McLeod, in destroying the steamer Caroline, caused the death of the said Amos Durfee; and that the deed was done with a *pistol*.

16*th Count*—Presents that Alexander McLeod, with divers other evil-disposed persons, intending to deprive the said William Wells of his property, &c., committed the crime of murder, and that the deed was done with *divers instruments, tools, and deadly weapons*, unknown to the Jurors.

17*th and last Count*—Presents that Alexander McLeod, with divers other evil-disposed persons, to the Jurors unknown, conspiring to injure the said Wells, and to commit the crime of arson, did commit the crime of murder, by producing the death of the said Amos Durfee, with *divers instruments, tools, and deadly weapons*, to the Jurors unknown.

(Signed) J. L. WOODS, District Attorney.

[Indorsed.] Niagara General Sessions, February Term, 1841. The People *vs.* Alexander McLeod; Indictment, murder. J. L. Woods, District Attorney. A true bill—C. L. Safford, foreman; Filed July 6, 1841.

EXPLANATORY NOTE.

For the information of persons not familiar with the history of this case, the following is deemed appropriate in this place, viz:—On the evening of the 29th day of December, 1837, a steam vessel called the Caroline, belonging to one William Wells, a citizen of Buffalo, State of New York, was lying in the Niagara river, alongside of the wharf at Schlosser, in the county of Niagara, and had on board a number of our citizens. At that time a civil commotion prevailed in the Canadas, and, as it is alleged, the Caroline had been used to carry arms and munitions of war from the shores of the State of New York to an insurrectionary party on Navy Island, then in arms against the government of Upper Canada. While the Caroline thus lay within the jurisdiction of the State of New York, a party of her Britannic Majesty's subjects left the shores of the province of Upper Canada, and came within our lines, seized and destroyed her, and killed one Amos Durfee,—who was found dead upon the wharf,—and as it has been supposed, several others of the citizens who were on board of the vessel. The perpetrators of this act were deemed to have been guilty of the crime of murder, and to be amenable to our laws.

On the 12th day of November last, Alexander McLeod, the prisoner, a subject of the crown of Great Britain, and a resident of Upper Canada, came to Lewiston in the county of Niagara, and was there arrested on the charge of having been concerned in the destruction of the steamer Caroline, and in the murder of our citizens; and on examination was committed to the common jail of said county, to answer to such charge. On the 6th day of February last, at a Court of General Sessions of the Peace, a Grand Jury of said county found a true bill of indictment against him for the murder of Durfee. This indictment, which is now to be traversed, the prisoner, McLeod, removed from the Niagara Oyer and Terminer, to which it had been sent from the General Sessions, into the Supreme Court of Judicature of the people of the State, from which it was sent down to this Circuit to be traversed. It is tried as a civil suit, by the Circuit Judge; the county Judges, who are Judges of the Oyer and Terminer, having no voice on the trial. REPORTER.

THE PEOPLE OF THE STATE OF NEW YORK,
vs.
ALEXANDER MCLEOD.

For the murder of Amos Durfee.

OPENING SPEECH OF THE ATTORNEY-GENERAL.

GENTLEMEN OF THE JURY—

I stand before you in obedience to the law, and in the name of the people of the State of New York, to make out before you the charge of murder against Alexander McLeod, the prisoner at the bar. The grand Inquest, upon the solemnity of their oaths, have denounced against the prisoner at the bar, the blackest in the catalogue of crimes. And it now devolves upon me to place before you the evidence of his guilt. Gentlemen, it cannot be disguised that this trial has produced an extraordinary excitement in the public mind. We have witnessed it in the crowding masses of anxious citizens, who have collected here to witness the transactions of this day. We have witnessed it in these paroxysms of public agitation; and it is for that reason that I feel called upon to put you on your guard—to warn you of your danger—for these are stumbling-blocks in the way of your oaths, upon which hundreds have fallen. Whatever may have been the extraneous causes which have produced this exhibition of unusual popular excitement, it is one with which neither you nor I have properly any thing to do—unless to shut our eyes and our ears—to close up every avenue to our minds against them. If possible, we should forget that we are not here, alone, with the prisoner and his witnesses. We should forget that there is any ear to hear, or eye to see, save that alone of the all-seeing God of Justice. My duty, gentlemen of the jury, like yours, is as plain and as easy to be discerned, as it is difficult to be performed. To array and present to you—to examine and enforce, and urge upon you the testimony which bears against the life of a human being, is always a painful duty. But, gentlemen, it is a duty as peremptory and paramount as it is painful. Thank God, it is no part of my duty to attempt to blind, deceive, or mislead you. I am not required to insist upon any principle which I do not believe to be in accordance with law and evidence—which I do not believe to be true. The task to which my oath binds me, is nothing more nor less than with an unshrinking mind to elicit the truth and place it clearly before you. A task, in this case, embarrassed with all that we see around us—with prejudices in many quarters, with many unfounded and false rumors, with the interests and passions of men, which it has excited: a task which overwhelms me with the sense of the greatness of my responsibility, and drives me, with unfeigned humility, to throw myself upon your indulgence, and pray you not to let the cause of Justice suffer on account of any deficiency on the part of her humble advocate. If you shall see that through any bias, fear, or innate weakness, I do not press it as may be necessary

for the development of truth, I pray you to redouble your own vigilance, that the truth may not escape you, and that you may not be overwhelmed with error. If, on the other hand, you shall perceive an effort to sustain my cause against proof, or in consequence of the array of eloquence and talent enlisted for the prisoner, I should seem to be captious or over zealous, place it against me. But let it not turn your hearts against the truth of the case which I present to you. Gentlemen of the jury, the indictment found by the Grand Jury, and which is now presented for your consideration and investigation, charges the prisoner at the bar, Alexander McLeod, with having murdered, on the 29th day of December, 1837, Amos Durfee. This charge is presented in various forms or counts—they are seventeen in number. They are presented in these various forms, in order to meet the testimony as it shall be presented. The substance of the indictment is, that Durfee was killed and murdered by the hand of the prisoner at the bar, or by some other person with whom the prisoner was connected—aiding or assisting. To sustain this indictment, it will be proved before you, that upon or about the 29th day of December, 1837, a steamboat called the Caroline, a boat of some 30 or 40 tons burden, left the harbor of Buffalo for Schlosser, about eighteen miles below Buffalo and two miles above Niagara Falls. This boat was manned by citizens, enrolled at the Custom House in Buffalo, according to the laws of the United States. She had a license from the Collector of the Port of Buffalo to ply between Buffalo and Schlosser. At that time, gentlemen of the jury, a band of some two or three hundred Canadian insurgents had taken possession of Navy Island. They possessed it and claimed to hold it, under the name of the provisional government of Upper Canada. There had been in Canada great excitement, and this excitement extended all along our borders. Efforts were made by the Canadian insurgents to enlist our citizens in their cause. The fugitives from the terrible massacres of St. Charles and St. Eustache, whose houses were burned and property destroyed—and whose wives and children had been forced into the driving snows of a Canadian winter, found no difficulty, upon telling the tale of their dreadful sufferings, in eliciting the sympathies of our fellow citizens. And it was but an easy and natural step, from sympathizing with the sufferings of the refugees, to sympathize also in their cause. And, thus stimulated and excited, some of the more reckless young men joined the insurgents upon Navy Island. For this act Great Britain has bitterly complained; and in our own country many of our most judicious citizens have looked upon it as a grievous fault. Gentlemen, it is no part of my case, nor is it my design, to vindicate the conduct of the Patriots or insurgents; but it is not irrelevant to my case to state thus far; that those of our fellow citizens who, without forming any military enterprise, or organizing any body upon our own soil—single-handed and alone, left our territory and united themselves with a foreign power, have violated no law of our State, no law of the United States, no law of nations. They have done no more than has been done again and again by the people of every nation. Your own recollections of history will furnish your minds with hundreds of examples. The Swiss nation have for hundreds of years fed all the armies of Europe; and who ever thought of holding them responsible for it? They did no more than Admiral Lord Cochrane did in taking part with South America. They did no more than Lord Byron did, who gave his life to aid the Greeks in breaking the chains of Turkish bondage. They did no more than La

Fayette—the good, the glorious La Fayette—who in his love for human liberty crossed the Atlantic, and gave his life and princely fortune in the struggle of the Patriots in our own Revolution. Gentlemen, I am not deviating from the case further than is necessary to remove the just odium under which the case labors, by having heaped upon it that which has been unjustly thrown upon those who joined the insurgents. I wish to set before you distinctly, that in this case, it will appear in proof, that the Caroline was not connected with the insurgents on Navy Island, that she was not in their employment, or in any way connected with their operations. It will appear from the testimony, that the objects of the owners of the Caroline was of a totally different character. This collection upon Navy Island had excited great curiosity throughout the country. At this period of the year, the lakes and the canals were closed with ice. Those whose usual occupation was to navigate those waters, were relieved from their labor—and this was a season of leisure. Winter had set in—the farmer and his sons and laborers were relieved from the cultivation of the soil, and had leisure to enjoy the fruits of their labor. It was about the time of the Christmas holidays. Large numbers of people were assembling at Schlosser, the nearest landing place and port to Navy Island. Is it remarkable that one of our countrymen, especially one of our eastern brethren, should see an opportunity of gain under these circumstances? This was the fact, and Mr. Wells saw in the circumstance of the excitement and curiosity which were drawing thousands to Schlosser—of whom not one in a thousand went to the island—he saw an opportunity of making gains by his little boat, which was hardly larger than a ferry boat, and which was lying idle at Buffalo. With this, and no other motive than that of profit, he started from Buffalo, on the 28th of December, 1837, to Schlosser. He stopped at all the intermediate points, or landing places where boats had theretofore stopped. After reaching Schlosser, about 2 o'clock in the day, he went from there to Navy Island; he made two trips in the course of the afternoon, carrying passengers and such articles as were brought to him to be conveyed, and such as were conveyed by other ferry boats. Among these articles it will appear there was a cannon. Much stress has been laid upon this circumstance; and I therefore pause one moment to comment upon it, so far that you may perceive what force an act of this kind should have. It was one of those articles which, when nations are at war, neutrals are prohibited to convey, under pain of forfeiture if taken. If a neutral undertake to carry arms and munitions of war, the vessel and articles so conveyed are liable to forfeiture. But if a vessel carry such articles to the destined point and land them, she cannot afterwards be held liable. The moment the articles are landed she is no longer liable to be seized or molested. This law applies upon the high seas, the common high-way of all nations. In this portion of the territory it would apply only in cases of seizure within the waters of Great Britain, and it would not extend to them the right of coming within our own waters.

It will be observed that at the same time that this vessel was passing between Navy Island and the American shore, a ferry boat was passing from Black Rock to Waterloo, on the Canada shore daily and hourly, carrying to Canada arms and munitions of war, and the Canadian army were fed at the same time from the American shore. And I go further and say—but I do not in this case say it with pride—it will be found that American citizens were in the ranks of the army embodied upon the

Canadian side. But when it is brought up against these people as a charge that their interference was unjust and iniquitous, the charge seems to be unfounded in fact. It seems as a course consistent, when citizens of a neutral power enlist in the ranks of their enemies, that our citizens should be equally ready to enlist in their ranks. Our relations are such that we can interfere neither on one side nor the other. After having performed these trips, this steamboat was moored at Fort Schlosser. Be not deceived. There is no fort there. The old fort is covered with luxuriant cornfields. There is no building except a warehouse at the wharf, and a tavern about fifty rods from it, and scarcely a house except at the Falls, for a distance of two miles. At this tavern the hundreds who were flocking there, and were crowding and thronging this place in the evening could not obtain lodgings, and came to the boat. The captain gave them liberty to lodge upon the boat, so far as her accommodations extended. It will appear that some eighteen or twenty went to the boat and took up lodgings. It will also appear that this boat was unarmed, that she had no equipments of her own, nor had she on board any arms, nor were the men on board armed. Nor were those who came on board to lodge that night armed. At 10 o'clock, as will appear, the watch was set, and the inmates retired to their repose, unsuspicious of danger, as they were unconscious of wrong. But about 12 o'clock—the testimony may vary from half-past eleven until one o'clock—the Captain was aroused by the watch, who informed him that boats full of men were approaching, and that the men were coming on board. Presently the noise of tramping and shouting was heard, and the men aroused in this manner from their slumbers, hastily arose, and seizing whatever of their clothing was at hand, they rushed for the companion-way or gangways, to every avenue through which they might escape. Some were fortunate enough to escape with their lives, others were met by armed men, and thrust at with swords and pikes, and severely wounded; yet they were enabled to escape with their lives. It is but too probable that there were still others, who, alarmed at the sudden onset, by the cries and shouts, the clashing of arms and firing of pistols, and cries of no quarter; and apprehensive of being put to death, concealed themselves beneath and around the boiler and other places, and came forth after those ruffians had left the boat, only to meet the rushing flames, and to hear the roar of Niagara. But, gentlemen of the jury, those who had escaped from the boat, found that they had not thereby escaped from danger. Some who had escaped from the attack upon the deck of the vessel, were pursued into the warehouse. And the warehouse was searched with lights to ascertain—in the language of themselves—if some of the d——d Yankees were not concealed there. Amos Durfee, whose sad fate is the immediate cause of your being empannelled here, was found upon the wharf, some four rods distant from the boat, a ball having been shot through his head, entering the back part, and coming out in front. It had been so near that the cap upon his head was singed with fire from the gun. He had doubtless been shot upon the spot, and died instantly with the wound. It will appear also that the assailants who had committed this bloody deed were some of a band of armed men, between forty and sixty, who had come from the Canadian shore. It will appear before you that it was a secret and voluntary expedition, armed for the purpose of the destruction of the Caroline. At that time, gentlemen of the jury, there was on the Canada shore an

army of some twenty-five hundred men, who had been collected there on the occasion of the seizure of Navy Island by the insurgents. They were there avowedly for the purpose of repelling any attempt at invasion which might be made by the insurgents. From these circumstances, it has been alleged that the transaction was one more of a military character than civil; that it was a transaction of armed men, acting in an organized manner, and to be governed by laws and rules which do not prevail in courts of justice. Gentlemen, it is but right that your minds should be perfectly disembarrassed; I therefore present the case to you broadly, that when the testimony is brought before you, you may see its bearing and application. I will submit the decision of the Supreme Court, given upon the facts in evidence, after able and eloquent arguments on the part of the counsel for the prisoner—given after great deliberation—an opinion which is unanswered and unanswerable. In that opinion, all those questions which might embarrass you, under the ingenuity of counsel, have been entirely disposed of, and the real points which you are to pass upon are distinctly pointed out to you.

The learned gentleman here read the opinion of Judge Cowen, recently made on the case brought before the Supreme Court of the State by the prisoner some few months ago, which is as follows:—

OPINION OF JUDGE COWEN.

The prisoner's petition, on which I allowed this writ, contained an intimation that his commitment to the jail of the county of Niagara had not been regular; but that ground is now abandoned. The sheriff returns an indictment for murder, found by a grand jury of that county against the prisoner, on which he appears to have been arraigned at the Court of Oyer and Terminer holden in the same county. It further appears that he pleaded not guilty, and was duly committed for trial. The indictment charges, in the usual form, the murder of Amos Durfee by the prisoner, on a certain day, and at a certain town within the county.

These facts, although officially returned by the sheriff, were, by a provision in the habeas corpus act, 2 R. S. 471, 2d ed. §50, open to a denial by affidavit, or the allegation of any fact to show that the imprisonment or detention is unlawful. In such case the same section requires this court to proceed in a summary way, to hear allegations and proofs in support of the imprisonment or detention, and dispose of the party as the justice of the case may require. Under color of complying with this provision, which is of recent introduction, the prisoner, not denying the jurisdiction of the court over the crime, as charged in the indictment, or the regularity of the commitment, has interposed an affidavit, stating certain extrinsic facts. One is, that he was absent, and did not at all participate in the alleged offence; the other, that if present, and acting, it was in the necessary defence or protection of his country against a treasonable insurrection of which Durfee was acting in aid at the time.

Taking these facts to be mere matters of evidence upon the issue of not guilty, and of themselves, they are clearly nothing more, I am of opinion that they cannot be made available on habeas corpus, even as an argument for letting the prisoner to bail, much less for ordering his unqualified discharge. That this would be so on all the authorities previous to the Revised Statutes, his counsel do not deny. The rule of the case is thus laid down in the British books:—"A man charged with murder by a verdict of a coroner's inquest, may be admitted to bail; though not after the finding of an indictment by the grand jury." 1 Chit. Cr. L. 129, Am. ed. of 1836. Petersd. on Bail, 521, S. P. It has never, that we are aware, been departed from in practice under the British habeas corpus act. Lord Ch. Justice Raymond said, in Rex v. Dalton, 2 Str. 911, that he would bail though a coroner's inquest had found the crime to be murder; and the distinction was between the coroner's inquest, where the court can look into the depositions, and an indictment where the evidence is secret. Lord Mohun's case, 1 Salk. 104, S. P. This reason is adopted by Chitty, at the page of his Cr. Law before cited; and by Petersd. on Bail, London ed. of 1835, p. 521. It was also recognised by Suther-

land, J. of this court, in 1825. Taylor's case, 5 Cowen's Rep. 56. He says, "the indictment must be taken as conclusive upon the degree of the crime," id.

The depositions heretofore taken in the cause being thus cut off, there are no means of inquiry left to us on this motion, by which we can say whether a murder was in fact committed, or whether the charge would probably be mitigated on the trial to a very doubtful case of manslaughter, or to a homicide in defence, or whether all participation might be disproved by showing a clear alibi. Nothing is better settled, on English authority, than that on habeas corpus, the examination as to guilt or innocence cannot, under any circumstances, extend beyond the depositions or proofs upon which the prisoner was committed. This would be so, even on habeas corpus before an indictment found, however loosely the charge might be expressed in the warrant of commitment. Chitty, at the page before cited, says, "It is in fact to the depositions alone that the court will look for their direction: where a felony is positively charged, they will refuse to bail, though an alibi be supported by the strongest evidence." He cites Rex v. Greenwood, 2 Str. 1138, a case of robbery, and eight credible witnesses making affidavit that the prisoner was at another place at the time when the robbery was committed; yet, adds the report, the court refused to admit him to bail, but ordered him to remain till the assizes. Here the crime is clearly proved by the depositions which have been read on the side of the people, while, instead of eight witnesses to an alibi, we have the solitary affidavit of the prisoner. In Rex v. Acton, 2 Str. 851, the prisoner had been tried for the murder and acquitted: afterwards a single justice of the peace issued a warrant charging him with the same murder, upon which he was again committed. On an offer to show the former acquittal in the clearest manner, the court refused to hear the proof. On the authority of this case, Mr. Chitty, at the page just cited, lays down the rule that the court will not look into extrinsic evidence at all. He states a case wherein the same question came up in respect to an inferior crime—receiving stolen goods with a guilty knowledge. The prisoner's affidavit denied his knowledge; yet the court refused to bail, saying the fact of knowledge was triable by a jury only. They added, it would be of dangerous consequence to allow such proceedings, as it might induce prisoners generally to lay their case before the court. Page before cited, Petersd. on Bail, page before cited, refers to Chitty, who cites cases K. B. 96. This book, eo nomine, does not appear now to be extant; and 12 mod. the only reference I am aware of, which, among the English quotations, is synonymous with Chitty's, does not appear to contain the case stated by him. But it accords with many others in circumstance; and the reason given is almost too plain to demand any direct authority. To hear defensive matter through ex parte affidavits as a ground for bailing the prisoner, would be to trench on the office of the jury; for in the case of high crimes, bail would be equivalent to an acquittal. Accordingly, the rule as laid down in Horner's case, 1 Leach 270, 4th edition, London, 1815, is in effect the same with that stated by Chitty. The prisoner had been committed under a charge of defrauding and robbing a man of his money by false pretences. It was insisted that the facts stated in the depositions for the king made out a mere misdemeanor; and that the prisoner was therefore entitled to bail. But the transaction by which the money was obtained, admitted of one construction which might make it a felonious taking. The court said, "In cases of this kind the course has always been to leave it to the jury to determine *quo animo* the money was obtained. In such a case the court never form any judgment whether the facts amount to a felony or not; but merely whether enough is charged to justify the detainer of the prisoner, and put him upon his trial.

The cases I have noticed were, in several respects, stronger for the prisoners than the case before us. They were mostly founded on charges of a character much less serious than murder. They were all before indictment found: some of them presented a state of things on which it was plainly impossible to convict; and last, though not least, they were mere applications for bail; a thing which McLeod does not ask for. He demands an absolute discharge, on grounds upon which, according to the laws of England, he would not even be entitled to bail. The law of England formed in this respect the law of New York, until our new habeas corpus act took effect.

It becomes necessary next, to inquire whether the new statute has worked any enlargement of our powers beyond what we have seen they were up to the time when it passed. The 2 R. S. 469. 2d ed. §40, 41, requires us to examine the facts contained in the return, and into the cause of the confinement of the prisoner; and if no legal cause be shown for it, or for its continuation, we are to discharge him. That here is legal cause, viz. an indictment for murder, and an order of commitment, we have seen, is not denied. By the 45th section, p. 470, if it appear that the party has been legally committed for any criminal offence, we are required to let him to bail, if the case be baila-

ble. But so far we have no direction as to what case shall be considered bailable. We are left under the restraints which I have noticed as existing before the statute. Not one of them is removed by it.

Then comes section 50, p. 471, which is relied on by the prisoner's counsel. I briefly noticed this in proposing the question to be considered. But the prisoner is entitled to the benefit of it entire. The words are, that "the party brought before such court or officer, on the return of any writ of habeas corpus, may deny any of the material facts set forth in the return, or *allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge*, which allegations or denials shall be on oath; and thereupon such court or officer shall proceed in a summary way to hear such allegations and proofs as may be produced in support of such imprisonment or detention, or against the same, and to dispose of such party as the justice of the case may require." Under this statute, the prisoner's counsel claim the right of going behind the indictment, and proving that he is not guilty by affidavit, as he may by oral testimony before the jury. We have already shown the absurdity of such a proposition in practice, and its consequent repudiation by the English Criminal Courts. And we were not disposed to admit its adoption by our legislature, without clear words or necessary construction.

We think its object entirely plain without a resort to the rules of construction. Its words are satisfied by being limited to the lawfulness of the authority under which the prisoner is detained, without being extended to the force of the evidence upon which the authority was exerted, or which it may be in the prisoner's power to adduce at the trial. This, if necessary, is rendered still more plain by considering the evil which the statute was intended to remedy. At common law, it was doubtful whether the prisoner could question the truth of the return or overcome it by showing extrinsic matter, upon the point of the authority to imprison. The statute was passed to obviate the oppression which might sometimes arise from the necessity of holding a return to be final and conclusive, which is false in fact, or if true, depending for its validity on the act of a magistrate or court which can be shown by proofs aliunde to have been destitute of jurisdiction. Watson's case, 9 Adolph. and Ellis, 731, 3 R. S. 78. 5, 2d ed. App. note. An innocent man may be, and sometimes unfortunately is imprisoned. Yet his imprisonment is no less lawful than if he were guilty. He must await his trial before a jury. There are various cases in which the enactment, allowing proof extrinsic to the return, may have effect without supposing it applicable here. It must, I apprehend, for the most part apply to the cases where the original commitment was lawful; but in consequence of the happening of some subsequent event, the party has become entitled to his discharge, as if he be committed till he pay a fine, which he has paid accordingly, and the return states the commitment only; so after conviction he may allege a pardon, or that the judgment under which he was imprisoned has been reversed.—Nor is it necessary to inquire how far we might be entitled to go, were the prisoner in custody on the mere examination and warrant of a committing magistrate.

But it is said we have the power to direct the entry of a nolle prosequi, and it is our duty to look into the merits of the case, with a view to decide whether it be a proper one for the exercise of that power. This proposition is also put upon a new section of the Revised Statutes, which most clearly gives no color for the suggestion. At common law the Attorney-General alone possessed this power; and might, under such precautions as he felt it his duty to adopt, discontinue a criminal prosecution in that form at any time before verdict. The power and practice under it are laid down in 1 Chit. Cr. Law, 478, ed. before cited.—It probably exists unimpaired in the Attorney-General to this day; and it has been by several statutes delegated to District Attorneys, who now represent the Attorney-General in every thing pertaining to indictments and other criminal proceedings local to their respective counties. The Legislature finding the power in so many hands, and fearing its abuse, by the 2 R. S. 609, 2d ed. § 54, provided that it should not thereafter be lawful for any District Attorney to enter a nolle prosequi upon any indictment, or in any other way discontinue or abandon the same without leave of the court having jurisdiction to try the offence charged. This provision the prisoner's counsel contended, so enlarged our powers that we might arbitrarily interfere on the prisoner's affidavit and other proofs verifying his innocence, or even on grounds of national policy, as where the prosecution would be likely to affect our foreign relations unfavorably; and that too in despite of the Attorney-General and District Attorney. Conceded as it was, that before the Revised Statutes, we had no power to give such direction, the argument seeks to draw from the statute giving us a veto against the nolle prosequi a positive power to compel its entry. Even if we had such power, the argu-

ment would be quite extraordinary. It demands that we should finally dispose of an indictment for murder, on the sort of evidence by which we are guided upon a motion to set aside a default or change a venue. In any view, this question belongs primarily to the executive department of the government.

I shall have occasion to inquire hereafter whether these views should not be regarded as a final answer to this application. That will depend on the question whether facts stated on the part of the prisoner, supposing them to be admissible at all, are proper for the consideration of the jury only; or whether, as counsel have insisted with great zeal, they are such as to divest our criminal courts of all jurisdiction either over the subject matter or person of the prisoner. We should, as we thought at the close of the argument, have felt ourselves entirely satisfied to dispose of the case on the first question, without looking any further into the nature of the transaction out of which this indictment has arisen. But, as counsel made the question of jurisdiction their main topic, we preferred to reserve the case, and have looked into it as far as possible during a very short vacation, consistently with other pressing judicial avocations.

Want of jurisdiction has not been put on the ground that McLeod was a foreigner. An alien, in whatever manner he may have entered our territory, is, if he commit a crime while here, amenable to our criminal law. Lord Mansfield, in Campbell vs. Hall, Cowp. 208. Vattel, B. 2, ch. 8, § 101–2. Story's Confl. of L. 518, 2d ed. Nay, says Locke, though he were an East Indian, and never heard of our laws. On Civ. Gov. B. 2, ch. 2, § 9.

But it is said his case belongs exclusively to the forum of nations, by which counsel mean the diplomatic power of the United States and England; or in the event of their disagreement, the battle-field. I have already admitted that counsel may, under the 50th section of the habeas corpus act, allege and prove a want of jurisdiction. To show this the affidavit of McLeod is produced, from which the inference is sought to be raised that the Niagara frontier was in a state of war against the contiguous province of Upper Canada; that the homicide was committed by McLeod, if at all, as one of a military expedition, set on foot by the Canadian authorities to destroy the boat Caroline; that he was a British subject. That the expedition crossed our boundary, sought the Caroline at her moorings in Schlosser, and there set fire to and burned her, and killed Durfee, one of our citizens, as it was lawful to do in time of war.

We need not stay to examine the conclusion, viz, a want of jurisdiction, if the premises be untrue. To warrant the destruction of property, or the taking of life, on the ground of public war, it must be what is called lawful war, by the law of nations, a thing which can never exist without the actual concurrence of the war-making power. This, on the part of the United States, is Congress; on the part of England, the Queen. A state of peace and the continuance of treaties must be presumed by all courts of justice till the contrary be shown; and this is a *presumptio juris et de jure*, until the national power of the country in which such courts sit, officially declares the contrary. A learned English writer on the law of nations makes this remark. (1 Ward's Law of Nations, 294.) "Although I am aware that there is a great authority for the contrary opinion, yet it is upon the whole settled that no private hostilities, however general, or however just, will constitute what is called a legitimate and public state of war. So far indeed has my Lord Coke carried this point, that he holds, if all the subjects of a king of England were to make war on another country in league with it, but without the assent of the king, there would still be no breach of the league between the two countries." 1 Bl. Com. 267, S. P. Again, in Blackburne v. Thompson, 15 East, 81, 90, Lord Ellenborough, Ch. J., delivering the opinion of the Court of King's Bench, said, "I agree with the Master of the Rolls in the case of the Pelican, (1 Edw. Adm. Rep. Append. D.) that it belongs to the government of the country to determine in what relation of peace or war any other country stands towards it; and that it would be unsafe for courts of justice to take upon them, without that authority, to decide upon those relations. But when the crown has decided upon the relation of peace or war in which another country stands to this, there is an end of the question." 3 Campb. 66, 7, S. C. and S. P.

So far were the two governments of England and the United States from being in a state of war when the Caroline was destroyed, that both were struggling to avoid such a turn of the excitement then prevailing on the frontier, as might furnish the least occasion for war. Both had long maintained the relations of national amity; and have done so ever since under an actual treaty. So far from England fitting out a warlike expedition against the United States, or any public body, she utterly disavows any such object; while on our side we have inflicted legal punishment on the leaders of the expedition

of which Durfee made a part, on the ground that England was then at peace with us. Whatever hostile acts she did were aimed exclusively at private offenders; and if there was a war in any sense, the parties were England on one side, and her rebel subjects, aided by certain citizens of our own, acting in their private capacities and contrary to the wishes of this government, on the other.

In speaking of public war, I mean to include all national wars, whether general or partial, whether publicly declared or carried on by commissions, such as letters of marque, military orders, or any other authority emanating from the executive power of one country and directed against the power of another; whether the directions relate to reprisals, the seizure of towns, the capture or destruction of private or public ships, or the persons or property of private men belonging to the adverse nation. I mean to exclude all hostility of any kind not having for its avowed object the exercise of some influence or control over the adverse nation as such. I deny that public war in this sense can be made out by affidavit or by any other medium of proof than the denunciation of war by one or both of the two nations who are parties to it.

There are but three sorts of war—public, private, and mixed. Grot. B. 1, ch. 3, § 1. Private war is unknown in civil society, except where it is lawfully exerted by way of defence between private persons. To constitute a public war, at last two nations are essential parties, in their corporate capacities. Mixed war can be carried on only between a nation on one side, and private individuals on the other. There is no fourth kind. Grot. ut supra.

The right of one nation, or any of its citizens, to invade another, or enter it and do any harm to its property or citizens, does not arise till public war be lawfully denounced in some form. It does not arise where one nation has a quarrel with private persons being within the territory of another. Whether there be any exception to this rule, I shall hereafter inquire.

Much was said in argument on the assumption that the state of hostilities on the frontier amounted to unsolemn war. In supposing this to be so, counsel come back to the very error which they repudiated in more general terms. A war is none the less public or national because it is unsolemn. All national wars are of two kinds, and two only—war by public declaration, or war denounced without such declaration. The first is called solemn or perfect war, because it is general, extending to all the inhabitants of both nations. In its legal consequences it sanctions indiscriminate hostility on both sides, whether by way of invasion or defence. The second is called unsolemn or imperfect war, simply because it is not made upon general, but special declaration. The ordinary instance is a commission of reprisal, limiting the action of the nation plaintiff, to particular objects and purposes against the nation defendant. It supposes a partial grievance, which can be redressed by a corresponding remedy or action; and does not authorize hostility beyond the scope of the special authority conferred. Such are several of the instances I have just now mentioned. But they are no less instances of public war. The attack on Copenhagen was mentioned on the argument as an instance of unsolemn war. So indeed it was. The British admiral had a deputation from the war-making power of England to act against the war-making power of Denmark; to demand the surrender of the Danish fleet, and, on refusal, to destroy public or private property, or take life, not as a punishment of private offenders, but to coerce the nation. Why was the attack made?—Because Denmark would not surrender her navy voluntarily; and there was danger that France would take it either by force or under collusion on the side of Denmark. Those who were in arms on the side of Denmark, acted not in their own right, but as agents of the nations to which they were subject. Before the remotest analogy can be seen in this to the case at the bar, the United States must be brought in and made defendant in their corporate capacity. It will be seen, I trust, by this time, that the instance derogates not in the least from the distinction that runs through all the writers on the international law, viz, that whether to constitute solemn or unsolemn war, the authority to act must emanate from the war-making power on one side, and be intended to influence that power on the other. Action under such a power is necessarily a collision between two nations; and answers to Grotius' definition, viz: "That is a public war which is made on each side by the authority of the *civil power*." B. 1, ch. 3, § 1. At § 4 he divides this sort of war into solemn and unsolemn, of which latter he gives an instance in B. 3, ch. 2, § 2, N. 3, Vid. Also 2 Ruth. p. 507 & 548. The distinction has been followed to this day, though the legal character of unsolemn war has since been changed. "Both," says Rutherforth, "are now lawful. The only real effect of a declaration of war is, that it makes the war a general one; while the imperfect sorts of war, such as reprisals, or acts of hostility, are partial or are confined

to particular persons, or things, or places. In solemn wars all the members of one nation act against the other under a general commission; whereas in public wars which are not solemn, those members of one nation who act against the other, act under particular commissions." Ruth. B. 2, ch. 9, § 18. Vattel, B. 3, ch. 15.

Both sorts of war are lawful, because carried on under the authority of a power having, by the law of nations, a right to institute them. In any other war no belligerent rights can be acquired. All captures, all destruction of property must be illegal; and the taking of life a crime. Short of this, war cannot be carried into an enemy's country, for the simple reason that there is no war to carry there, and no enemy against whom it can be exerted. The nation denouncing war must be explicit. "This makes it," says Vattel, "formal, and so lawful. But nothing of this kind," says he, "is the case in an informal, illegitimate war, which is more properly called depredation. A nation attacked by enemies, without the sanction of a public war, is not under any obligation to observe towards them the rules of formal warfare. She may treat them as robbers." Vattel, B. 3, ch. 4, § 68. Such unauthorized volunteers in violence," says Blackstone, "are not ranked among open enemies; but are treated like pirates and robbers."

It was accordingly conceded, in argument, that the Canadian provincial authorities had no inherent power to institute a public war. Vide 2 Ruth. 496, 7, 8. We were, however, referred to Burlem, Pt. 4, ch. 3, § 18, 19, to show that those authorities might do so on the presumption that their sovereign would approve the step; and that such approbation would reflect back, and render the war lawful from the beginning. On the assumption that this indirect mode of instituting war had actually been resorted to, counsel again bring themselves back to the fundamental error which led to this application. No one would deny that if the affair in question can be tortured into war between this nation and England, the United States might take possession of McLeod as a prisoner of war. In such a case, there would have been no need of this motion. But admitting the rule of Burlemaqui, and that counsel might, by the aid of England, get up an *ex post facto* war, for the benefit of McLeod; this cannot be done by an *equivoque;* and especially not in contradiction to the language of England herself. Neither the provincial authorities nor the sovereign power of either country have, to this day, characterized the transaction as a public war, actual or constructive. They never thought of its being one or the other. Both have spoken of it as a transaction, public on one side, to be sure, but both claimed to hold fast the relations of peace. Counsel seem to have taken it for granted that a nation can do no public forcible wrong, without its being at war, even though it deny all action as a belligerent. At this rate every illegal order to search a ship, or to enter on a disputed territory, or for the recaption of national property even from an individual, if either be done *vi et armis*, and work wrong to another nation or any of its subjects, would be public war, necessarily so, though the actor should deny all purpose of war. Were such a rule once admitted, England and the United States can scarcely be said to have been at peace since the Revolution which made them two nations. My endeavor has been to show, that on the question of war or peace, there is a *quo animo* of nations, by which we are bound.

To prevent all misunderstanding in the progress of the argument, it is proper to observe farther, that an act of jurisdiction exerted by inferior magistrates, civil or military, for the arrest or punishment of individuals, is not public war of either kind. So long as the act is kept within legal compass, though its exertion be violent, where, for instance, the object is to suppress a riot, quell an insurrection, or repel the hostile incursions of individuals, it is, though sustained by a soldiery in arms, only one mode of enforcing the criminal law. It is like calling out the militia as a posse comitatus to aid a sheriff who is resisted in the execution of process. Force becomes lawful where the laws are set at defiance. We see this in the frequent resort to soldiers of the regular army by the English, in cases of dangerous riots.—Vid. Ruth. B. 2, ch. 9, § 9. Such a state of things, therefore, confers no right to act offensively against individuals who reside or sojourn in the neighboring territory. Should they be pursued and arrested, or killed, the act would be a naked usurpation of authority, like the sheriff of one county going into another to execute process. "If," says Rutherforth, B. 2, ch. 9, § 9, "the magistrate, in any instance, use even the force with which he is intrusted in any other manner, or for any other purpose than is warranted by his appointment, this, as it is his own act, and not the act of the public, cannot be called public war."

Sensible that all pretence of belligerent right was wanting, it is therefore, in the first view, a lawful act of magistracy that the case was sought to be put by Mr. Fox, both in his letter to Mr. Forsyth and Mr. Webster. I take the words of his last letter, writ-

ten after the question had been deliberately considered by his government: "The grounds upon which the British government make this demand," (the surrender of McLeod,) "are these: that the transaction on account of which Mr. McLeod has been arrested, and is to be put upon his trial, was a transaction of a public character, planned and executed by persons duly empowered by her majesty's colonial authority, to take any steps and do any acts which might be necessary for the defence of her majesty's territories, and for the protection of her majesty's subjects; and that consequently those subjects of her majesty who engaged in that transaction were performing an act of public duty, for which they cannot be made personally and individually answerable to the laws and tribunals of any foreign country." In the same letter he re-states the opinion of his government, that "it was a justifiable employment of force for the purpose of defending the British territory from the unprovoked attack of a band of British rebels and American pirates."

If this view of the transaction can be sustained, it was lawful *ab initio*. It required no royal recognition to render it national. It came within the power which the Canadian authorities held from England to act in her place and stead. So long as they confined themselves within the territorial line of Canada, they were doing no more than the nature of their connection with England required; sustaining that absolute and exclusive jurisdiction to which she is entitled with every other nation. Whether they had power, without pretence of being engaged in a war with the United States, or could derive power from England, to fit out an expedition, cross the line, and seize or destroy the property and persons of our citizens in this country, and whether any one acting under such an assumption of power can be protected, is quite a different question.

One decisive test would be furnished by admitting that Durfee had committed a crime against England, for which he was liable to arrest and trial in Canada. None would pretend that any warrant from the English nation could be used to protect one of her officers from an action of false imprisonment, if he had merely arrested the offender on this side the line. No one would pretend that a military order and the addition of the Queen's soldiers and sailors would, in such case, strengthen a plea of justification; nor would the subsequent approval of the nation. This would have no greater effect than the original authority, accordingly it was not pretended on the argument that England had any right whatever to send and arrest Durfee as a fugitive from justice. The pretence that she had any such right would have been too absurd to bear the name of argument. Nor is it pretended that her magistrates, civil or military, had any power within our territory to seize and bind him over to keep the peace on England or her subjects. "We cannot," says Vattel, B. 2, ch. 7, § 93, "enter the territory of a nation in pursuit of a criminal, and take him from thence. This is what is called a violation of territory; and there is nothing more generally acknowledged as an injury that ought to be repelled by every state that would not suffer itself to be oppressed." The rule is too familiar, even as between the states of this confederacy, to require that it should be insisted on at large.

But the civil war which England was prosecuting against various individuals, was insisted on as a ground of protection; but I am free to admit that the strongest possible color for the extraordinary right claimed, is to be derived from taking the United States to stand in the attitude of a neutral nation with respect to two parties engaged in actual war; England on one side, and Van Rensselaer, Durfee and their associated assailants on the other. This is what Grotius calls mixed war, being, as he says, "that which is made on one side by public authority, and on the other by mere private persons." B. 1, ch. 3, § 1. Rutherford retains the same distinction under the same name, in characterizing a contest between a nation as such and its external enemies coming in the form of pirates or robbers; associates, he says, who act together occasionally and are not united into civil society. Ruth. B. 2, ch. 9, § 9. The several invasions of England by Perkin, Warbeck, and Lord Herise, mentioned in 1 Hal. P. C. 164, the former of which is also noticed in Calvin's case, 7 Co. Rep. 11–12, are instances of such a war; the books saying that in England such offenders must be tried by martial law, for a reason which I shall hereafter consider. Let Durfee, then, be regarded as England's enemy, who has, with Wells, the boat owner, and his boat, taken shelter in the neutral territory of the United States. Had England any right to follow him there? None, say the books, not even in the heat of contest, had he been an enemy pursued and flying for shelter across the line. 1 Kent's Com. 119–20. Independently of fresh pursuit, no writer on the law of nations ever ventured the assertion that one of two belligerents can lawfully do any hostile act against another upon neutral ground. If it be not a plain deduction from common sense, yet, on principles in which publicists agree, all rightful power to harm

the person or property of any one dropped from the hands of McLeod and his associates the moment they entered a country with which their sovereign was at peace. No exception can be made consistently with national safety. Make it in favor of the subordinate civil authorities of a neighboring state, and your territory is open to its constables; in favor of their military, and you let in its soldiery; in favor of its sovereign, and you are a slave. Allow him to talk of the acts and machinations of our citizens, and send over his soldiers, on the principle of protection, to burn the property or take the lives of the supposed offenders, and you give up to the midnight assault of exasperated strangers the dwelling and life of every inhabitant on the frontier whom they may suspect of a disposition to aid their enemies. Never since the treaty of 1783, had England, in time of peace with us, any more right to attack an enemy at Schlosser, than would the French have at London in time of peace with England.

"The full domain," says Vattel, "is necessarily a peculiar and executive right. The general domain of a nation is full and absolute, since there exists no authority upon earth by which it can be limited; it therefore excludes all right on the part of foreigners."—B. 2, ch. 7, § 79. The same writer defines the jurisdiction of courts within that domain, "The sovereignty united to the domain establishes the jurisdiction of the nation in her territories. It is her province to exercise justice in all the places under her jurisdiction; to take cognizance of the crimes committed, and the differences that arise in the country." Id. § 84. "It is unlawful," says the same writer, "to attack an enemy in a neutral country, or to commit in it any other act of hostility." "A mere claim of territory," says Sir William Scott, a British judge of admiralty, "is undoubtedly very high; when the fact is established, it overrates every other consideration." In the Vrow, Anna Catharina, 5 Rob. Adm. Rep. 20-1. And he refused to recognize a right of capturing an enemy's ship within a marine league of our coast. The Anna Laporte, id. 332. "We only exercise the rights of war in our own territory," says Bynkershoek, "or in the enemy's, or in a territory which belongs to no one." Quest. Jur. Pub. B. 1, ch. 8. "There is no exception," says Chancellor Kent, "to the rule that every voluntary entrance into neutral territory with hostile purposes, is absolutely unlawful." 1 Kent's Com. 118, 4th ed. "The jurisdiction of courts," says Marshall, ch. J. "is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself: any restriction derived from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction." That these are not rules of yesterday, but have formed a part of the acknowledged law of nations for nearly two thousand years, may be seen in Grotius, B. 3, ch. 4. § 8, N. 2. He says we may not kill or hurt an enemy in a country at peace with us. "And this proceeds not from any privilege attached to their persons; but from the right of that prince in whose domains they are. For all civil societies may ordain that no violence be offered to any one in their territories but by a proceeding in a judicial way, as we have proved out of Euripides.

'If you can charge these guests with an offence, do it by law; forbear all violence.'

But in courts of justice the merit of the person is considered, and this promiscuous purpose of hurting each other ceases. Livy relates that seven Carthaginian gallies rode in a port belonging to Lyphax, who, at that time, was at peace both with the Carthaginians and Romans; and that Scipio came that way with two gallies. These might have been seized by the Carthaginians before they had entered the port, but being forced by a strong wind into the harbor, before the Carthaginians could weigh anchor, they durst not assault them in the king's haven." Several more modern instances of a like character are stated by Molloy de Jur. Mar. B. 1, ch. 1, § 16. It is said to be a rule of the common law of nations, that not only must the parties refrain from hostilities while in a neutral port, but should one sail, the other must not, till 24 hours after. Marteus' L. of Nations, B. 8, ch. 6, § 6, note. And a doctrine about as strong was laid down by Sir William Scott, in the case of the Twee Gebroeders, 3 Rob. Adm. Rep. 162.

To apply these authorities: the affidavit of McLeod suggests that Durfee had, on the day before he was killed, aided in transporting military stores to Navy Island, and surmises that he intended to continue the practice. I put it again, that the war, if any, was by England against him and his associates—not against the United States. But what right, I again ask, had she to pursue him into a territory at peace? That she had none I have shown from her own judge sitting in the forum of nations, from one of our judges sitting in the like forum, from authoritative publicists, and from all antiquity. I have shown that even punic faith felt itself bound to let an enemy go free whom it accident-

ally met on neutral ground. Within the territory of a nation at peace, all belligerent power, all belligerent right, is paralyzed. They have passed from the dominion of arms to that of law. "No violence can be offered," says Grotius; "but you must proceed in a judicial way." The only offence against our law which Durfee had committed, was in setting on foot a hostile expedition against England, with whom we were at peace. So far I admit he was guilty according to the suggestion in McLeod's affidavit. He had made himself a principal in the aggression of McKenzie and others; for there are no accessories in misdemeanor. The courts were open. Why did not England prefer her complaint? Was it competent for her to allege that our justice was too mild or too tardy, and therefore substitute the firebrand and musket? To admit such a right of interference on any ground or in any way, says Marshall, would be a proportional diminution of our own sovereignty, of which judicial power makes a part. "The law of nations," says Rutherforth, "is not the only measure of what is right or wrong in the intercourse of nations with each other. Every nation has a right to determine by positive law, upon what occasions, for what purposes, and in what numbers foreigners shall be allowed to come within its territories." Ruth. B. 2, ch. 9, sec. 6: Vattel, B. 2, ch. 7, § 94.

It follows from the authorities cited, that a right to carry on a mixed war never extends into the territory of a nation at peace. It can be exercised on the high seas only, or in a territory which is vacant and belonging to nobody. It is in modern law confined mainly to the case of pirates. But even these can not be arrested in the territory of a foreign nation at peace with the sovereign of the arresting ship. Molloy de Jur. Mar. B. 1, ch. 1, § 6.

Admitting, then, that England might protect a man against our jurisdiction by saying he did a public act under her authority, does it not behove her at least to show that she was acting within the limit of her own jurisdiction, especially where she has prescribed them to herself? Shall her declaration serve to deprive us of power where she is exceeding her own? And this brings one to inquire whether the transaction in question be such as any national right so far examined can sanction. She puts herself, as we have seen, on the law of defence and necessity; and nothing is better defined nor more familiar in any system of jurisprudence, than the juncture of circumstances which can alone tolerate the action of that law. A force which the defender has a right to resist must itself be within striking distance. It must be menacing, and apparently able to inflict physical injury, unless prevented by the resistance which he opposes. The rights of self-defence and the defence of others standing in certain relations to the defender, depend on the same ground—at least they are limited by the same principle. It will be sufficient, therefore, to inquire of the right so far as this is strictly personal. All writers concur in the language of Blackstone, [3 Com. 4,] that, to warrant its exertion at all, the defender must be forcibly assaulted. He may then repel force by force, because he cannot say to what length of rapine or cruelty the outrage may be carried, unless it were admissible to oppose one violence with another. "But," he adds, "care must be taken that the resistance does not exceed the bounds of mere defence and prevention; for then the defender would himself become the aggressor." The condition upon which the right is thus placed, and the limits to which its exercise is confined by this eminent writer, is enough of itself, when compared with McLeod's affidavit, to destroy all color for saying the case is within that condition. The Caroline was not in the act of making an assault on the Canada shore; she was not in a condition to make one; she had returned from her visit to Navy Island, and was moored in our own waters for the night. Instead of meeting her at the line and repelling force by force, the prisoner and his associates came out under orders to seek her wherever they could find her, and were in fact obliged to sail half the width of the Niagara river, after they had entered our territory, in order to reach the boat. They were the assailants; and their attack might have been legally repelled by Durfee even to the destruction of their lives. The case made by the affidavit is in principle this: a man believes that his neighbor is preparing to do him a personal injury. He goes half a mile to his house, breaks the door, and kills him in his bed at midnight. On being arraigned, he cites the law of nature, and tells us that he was attacked by his neighbor, and slew him on the principle of mere defence and prevention; or, in the language of the plea, for an assault *demesne*—"he made an assault upon me, and would then and there have beat me, had I not immediately defended myself against him; wherefore I did then and there defend myself as I lawfully might for the cause aforesaid; and in doing so, did necessarily and unavoidably beat him, doing him on such occasion no unnecessary damage. And if any damage happened, it was occasioned by his assault and my necessary defence."

"To excuse homicide in self-defence," says another English writer, "the act must not be premeditated. He must first retreat as far as he safely can, to avoid the violence threatened by the party whom he is obliged to kill. The retreat must be with an honest intention to escape; and he must flee as far as he conveniently can by reason of some impediment, or as far as the fierceness of his assault will permit him, and then, in his defence, he may kill his adversary." 1 Russ. on Cr. 544.

Such is the law of mixed war, on neutral ground. The books cited are treating of no narrow technical rule peculiar to the common law; but the law of nature and of nations, the same every where, of such paramount price as no municipal or international law could ever overcome; and intelligible to every living soul. It is easily applied both as between individuals in civil society and nations at peace. Passing the boundaries of strict, not fancied necessity, the remedy lies in suit by the State or citizen whose rights have been violated, or by demanding the person of the mischievous fugitive who has broken the criminal law of a foreign sovereign. Accordingly, Puffendorf, after considering the rights of private war in a state of nature, adds: "But we must by no means allow an equal liberty to the members of civil States. For here, if the adversary be a foreigner, we may resist and repel him any way at the instant when he comes violently upon us. But we cannot, without the sovereign's command, either assault him while his mischief is only in machination, or revenge ourselves upon him after he has performed the injury against us." Puf. B. 2, ch. 5, § 7. The sovereign's command must, as we have seen, in order to warrant such conduct in his subject, be a denunciation of war.

England, then, could legally impart no protection to her subjects concerned in the destruction of the Caroline, either as a party to any war, to any act of public jurisdiction exercised by way of defence, or sending her servants into a territory at peace. That her act was one of mere arbitrary usurpation was not denied on the argument, nor has this, that I am aware, been denied by any one except England herself. I should not, therefore, have examined the nature of the transaction to any considerable extent, had it not been necessary to see whether it was of a character belonging to the law of war or peace. I am entirely satisfied it belongs to the latter; that there is nothing in the case except a body of men, without color of authority, bearing muskets, and doing the deed of arson and death; that it is impossible even for diplomatic ingenuity to make it a case of legitimate war, or that it can plausibly claim to come within any law of war, public, private, or mixed. Even the British minister is too just to call it war; the British government do not pretend it was war.

The result is, that the fitting out of the expedition was an unwarrantable act of jurisdiction exercised by the provincial government of Canada over our citizens. The movements of the boat had been watched by the Canadian authorities from the opposite shore. She had been seen to visit Navy Island the day before. Those authorities, being convinced of her delinquency, sentenced her to be burned; an act which all concerned knew would seriously endanger the lives of our citizens. The sentence was, therefore, equivalent to a judgment of death; and a body of soldiers were sent to do the office of executioners.

Looking at the case, independently of British power, no one could hesitate in assigning the proper character to such a transaction. The parties concerned having acted entirely beyond their territorial or magisterial power, are treated by the law as individuals proceeding on their own responsibility. If they have burned, it is arson; if a man has been killed, it is murder.

This brings us to the great question in the cause. We have seen that a capital offence was committed within our territory in time of peace; and the remaining inquiry is, whether England has placed the offenders above the law and beyond our jurisdiction, by ratifying and approving such a crime. It is due to her, in the first place, to deny that it has been so ratified and approved. She has approved a public act of legitimate defence, only. She cannot change the nature of things. She cannot turn that into lawful war which was murder in time of peace. She may, in that way, justify the offender, as between man and his own government. She cannot bind foreign courts of justice by insisting that what, in the eye of the whole world was a deliberate and prepared attack, must be protected by the law of self-defence.

In the second place, I deny that she can, in time of peace, send her men into our territory, and render them impervious to our laws, by embodying them, and putting arms in their hands. She may declare war; if she claim the benefit of peace, as both nations have done in this instance, the moment any of her citizens enter our territory,

they are as completely obnoxious to punishment by our law, as if they had been born and always resided in this country.

I will not, therefore, dispute the construction which counsel put upon the language or the acts of England. To test the law of the transaction, I will concede that she had by act of parliament, conferred all the power which can be contended for in behalf of the Canadian authorities, as far as she could do so. That, reciting the danger from piratical steamboats, she had authorized any colonel of her army or militia, on suspecting that a boat lying in our waters intended illegally to assault the Canada shore, to send a file of soldiers in the day or night time, burn the boat, and destroy the lives of the crew. That such a statute should be executed; but that one of the soldiers failing to make his escape, should be arrested, and plead the act of parliament. Such an act would operate well, I admit, at Chippewa, and until the men had reached the thread of the Niagara river. It would be an impenetrable shield till they should cross the line of that country where parliament have jurisdiction. Beyond, I need not say it must be considered as waste paper. Even a subsequent statute, ratifying and approving the original authority, could add nothing to the protection proffered by the first. It would be but the junction of two nullities. So says Mr. Locke, (on Gov. B. 2, ch. 19, sect. 239,) of a king even in his own dominions: "In whatsoever he has no authority, there he is no king, and may be resisted; for wheresoever the authority ceases, the king ceases too, and becomes like other men who have no authority." I shall not cite books to show that the Queen of England has no authority in this state in a time of peace.

I will suppose a stronger case;—that England, being at war with France, should, by statute or by order of the Queen, authorize her soldiery to enter our territory and make war upon such French residents as might be plotting any mischief against her. Could one of her soldiers indicted for the murder of a French citizen plead such a statute or order in bar? If he could not as against a stranger and sojourner in our land, I need not inquire whether the same measure of protection be due to Durfee, our fellow-citizen.

"The laws of no nation," says Mr. Justice Story, "can justly extend beyond its own territories, except so far as it regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction. It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories for the purpose of seizing vessels which had offended against our laws." The Apollon, 9 Wheat. Rep. 362–371. He has examined the question at large in his book on the conflicts of laws, ch. 2, § 17 to 22, p. 19 of 2d ed. The result is, that no nation is bound to respect the laws or executive acts of any foreign government intended to control and protect its citizens while temporarily or permanently out of their own country, until it first declare war. Its citizens are then subject to the laws of war. Till that comes they are absolutely bound by the laws of peace. While this prevails, a foreign executive declaration saying, "My subject has offended against your criminal laws. I avow his act. Punish me; but impute nothing to him," is a nullity. As well might a nation send a company of soldiers to contract debts here, and forbid them to be sued, saying, "The debt was on my account, discharge my men, and charge it over against me!" Indeed it was urged on the argument that the letter of Mr. Fox had taken away the remedy of Wells, the boat owner, by an action of trespass againt McLeod for burning the boat. This action having, it seems, been settled, counsel resorted to it as an illustrative case. Another action brought against him for shooting a horse on the same occasion, it was said is also defeated by the same principle. Counsel spoke as if Schlosser had undergone a sack, and its booty had become matter of belligerent right in the soldiery. Surely the imaginations of counsel must have been heated. It seems necessary to remind them again and again, even in affirmance of their own admission, that we are sitting to administer the laws of a country which was at peace when she sent in her soldiery. If they mean that the approval and demand in Mr. Fox's letter should, under the law of peace, have the sweeping effect which is claimed for it, they are bound to show that the royal mandate improves by importation. The Queen has no power at home to take away or suspend, for a moment, the jurisdiction of her own courts. Nor would a command to discharge any man without trial who should be suspected of having murdered her meanest subject, be deemed a venial error. It is justly a source of the Briton's pride that the law by which his life and property are protected cannot be suspended even by his monarch; that the sword of Justice is holden by her own independent ministers, as a defence for those who do well; but constantly threatening, and ready to descend upon the violator of property or personal safety, as the instrument of a municipal law which knows not of any distinction between the throne and the cottage; a law constantly struggling, in theory at least, to attain a per-

fection that shall bring all on earth to do it reverence; the greatest at fearing its power, and the least as not unworthy of its care. That case is our own.

Much was said on the argument about the extreme hardship of treating soldiers as criminals, who, it was insisted, are obliged to obey their sovereign. The rule is the same in respect to the soldier as it is with regard to any other agent who is bound to obey the process or command of his superior. A sheriff is obliged to execute a man who is regularly sentenced to capital execution in this state. But should he execute a man in Canada under such sentence, he would be a murderer. A soldier, in time of war between us and England, might be compelled by an order from our Government, to enter Canada and fight against and kill her soldiers. But should Congress pass a statute compelling him to do so on any imaginable exigency, or under any penalty, in time of peace, if he should obey and kill a man, he would be guilty of murder. The mistake is in supposing that a sovereign can compel a man to go into a neighboring country, whether in peace or war, and do a deed of infamy. This is exemplified in the case of spies. A sovereign may solicit and bribe; but he cannot command. A thousand commands would not save the neck of a spy should he be caught in the camp of the enemy.—Vattel, B. 7, ch. 10, § 179. It is a mistake to suppose that a soldier is bound to do any act contrary to the laws of nature, at the bidding of his prince.—Vattel, B. 1, ch. 4, § 53—4, id. B. 3, ch. 2, § 15. Grot. B. 2, ch. 26, § 3, n. 2 and 3. Puf. B. 8, ch. 1. § 6, 7. But if he were, he must endure the evil of living under a sovereign who will issue such commands. It does not follow that neighboring countries must submit to be infested with incendiaries and assassins because men are obnoxious to punishment in their own country, for being desirous to go through life with bloodless hands and a quiet conscience. The Parisians thought themselves bound to obey Charles IX. when he ordered them to massacre the Huguenots. Suppose they had obeyed a similar order to massacre the Huguenots in England, would such an order have been deemed a valid plea on one of them being arraigned in the Queen's Bench? It might have been pleaded to an accusation of murder in France—it would have been good as between the criminal and his own sovereign; but hardly, I suspect, have been deemed so by Queen Elizabeth's Judges. The simple reason would have been that Charles IX. had no jurisdiction in England. He might have threatened the government and declared war, if such a meritorious servant, a defender of the church, should not be liberated by the Judges. But there is no legal principle on which the decrees of foreign courts or the legislator of foreign parliaments could have ousted the Judges of jurisdiction. Charles might have ordered his minister to call the massacre a public act, planned and executed by himself, he having authority to defend and protect his established church; and demanded a release of the man. All this would have added no force to the plea. Neither Elizabeth herself, nor any of the Tudors, arbitrary as the government of England was, would have had power directly to take away the jurisdiction of the Judges. Coke, with a law-book in his hand, could have baffled the sceptre within its own territorial jurisdiction. It should, in justice, be remarked, that one, the Governor of Bayonne, and many of his companions in arms, refused to co-operate in the massacre at home, and were never punished for disobedience. He replied to the king; that he had sounded his garrison, and found many brave soldiers among them, but not a single executioner. Suppose a prince should command a soldier to commit adultery, incest, or perjury; the prince goes beyond his constitutional power; and has no more right to expect obedience than a corporal who should summarily issue his warrant for the execution of a soldier. Vid. Burl. L. of Nature. Vol. 1, pt. 2, ch 11, § 8.

Every political and civil power, has its legal limits. The autocrat may indeed take the lives of his own subjects, for disobeying the most arbitrary commands; but even his behests cannot impart protection to the merest slave as against a foreign government. Public war itself has its jurisdictional limits. Even that, in its pursuit after a flying enemy, is, we have seen, arrested by the line of a country at peace. Besides the limit which territory thus imposes, there are also, even in general war, other jurisdictional restraints, as there are in courts of justice. An order emanating from one of the hostile sovereigns will not justify to the other, every kind of perfidy. The case of spies has been already mentioned. An emissary sent into a camp with orders to corrupt the adverse general, or bribe the soldiery, would stand justified to his immediate sovereign. Vattel, B. 3, ch. 10, § 180; though evenhe could not legally punish a refusal. In respect to the enemy, such orders would be an obvious excess of jurisdiction. The emissaries sent by Sir Henry Clinton in 1781, to seduce the soldiers of the Pennsylvania line, falling into the hands of the Americans, were condemned and immediately executed. 4 Marsh. Life of Wash. 366, 1st edit. Entering the adverse camp to receive

the treacherous proposition of the general is an offence much more venial. It is even called lawful in every sense as between the sovereign and employee. Vattel, B. 3, ch. 10, § 181. Yet in the case of Major Andre, an order to do so was, as between the hostile countries, held to be an excess of jurisdiction.

These cases are much stronger than any which can be supposed between nations at peace. In time of war such perfidy is expected. In time of peace, every citizen, while within his own territory, has a double right to suppose himself secure—the legal inviolability of that territory, and the solemn pledge of the foreign sovereignty.

The distinction that an act valid as to one may be void as to another, is entirely familiar. A man who orders another to commit a trespass, or approves of a trespass already committed for his benefit, may be bound to protect his servant, while it would take nothing from the liability of the servant to the party injured. As to him, it could merely have the effect of adding another defendant, who might be made jointly or severally liable with the actual wrong-doer. A case in point is mentioned by Vattel, B. 3, ch. 2, § 15. If one sovereign order his recruiting officer to make enlistments in the dominion of another in time of peace between them, the officer shall be hanged notwithstanding the order, and war may also be declared against the offending sovereign. Vid. a like instance, id B. 1, ch. 6, § 75.

What is the utmost legal effect of a foreign sovereign, approving of the crime his subject committed in a neighboring territory? The approval, as we have already in part seen, can take nothing from the criminality of the principal offender. Whatever obligation his nation may be under to save him harmless, this can be absolutely done only on the condition that he confine himself within her territory. Vattel, B. 2, ch. 6, § 74. Then, by refusing to make satisfaction, to furnish, or to deliver him up, on demand from the injured country, or by approving the offence, the nation, says Vattel, becomes an accomplice. Id. sec. 76.

Blackstone says, an accomplice or abettor—[4 Com. 68]—and Rutherforth, still more nearly to the language of the English law, an accessory after the fact—B. 2, ch. 2, § 12. No book supposes that such an act merges the original offence, or renders it imputable to the nation alone. The only exception lies in the case of crime committed by an ambassador—not because he is guiltless, but by reason of the necessity that he should be privileged, and the extra-territorial character which the law of nations has, therefore, attached to his person.

Hence, say the books, he can be proceeded against no otherwise than by a complaint to his own nation, which will make itself a party in his crime, if it refuses either to punish him by its authority or deliver him up to be punished by the offended nation. Ruth. B. 2, ch. 9, § 20. Independently of this exception, therefore, Rutherforth insists, with entire accuracy, that, "as far as we concur in what another man does, so far the act is our own; and the effects of it are chargeable upon us *as well as upon him*." Ruth. B. 1, ch. 17, § 6.

A nation is but moral entity; and in the nature of things can no more wipe out the offence of another by adopting it, than could a natural person. And the learned writer just cited, accordingly treats both cases as standing on the same principle. B. 2, ch. 9, § 12. "Nothing is more usual," says Puffendorf, "than that every particular *accomplice* in a crime be made to suffer all that the law inflicts." B. 3, ch. 1, § 5. Vattel says of such a case, B. 2, ch. 6, § 75—If the offended state have the offender in her power she may without scruple punish him.

Again, if he have escaped and returned to his own country, she may apply for justice to his sovereign, who ought, under some circumstances, to deliver him up—id. § 76. Again, he says, she may take satisfaction for the offence herself when she meets with the delinquent in her own territories. B. 4, ch. 4, § 52. I before cited two instances in which positive orders by his sovereign to commit a crime are distinctly held to render both nation and its subject obnoxious to punishment. Vattel, B. 3, ch. 2, § 15.—id. B. 1, ch. 6, § 75; vid. also 1 Burl. pt. 2, ch. 11, § 10.

Was it ever suggested by any one before the case of McLeod arose, that the approval by a monarch should oust civil jurisdiction, or even so much as mitigate the criminal offence? —nay, that the coalition of great power with great crime does not render it more dangerous, and therefore more worthy of punishment under every law by which the perpetrators can be reached?

Could approbation and avowal have saved the unhappy Mary Queen of Scots, where would have been the civil jurisdiction of Elizabeth's commissioneus? The very charge of an attempt by Mary to dethrone and assassinate the British Queen implied the approbation and active concurrence of one crowned head at least. Could the criminal have

been saved by any such considerations, the enterprize might truly have been avowed as one which had been planned by the leading government of Catholic Europe.

The Pope, then, having at least some pretensions to jurisdiction even in England, had openly approved it under his seal. The Spanish ambassador at Paris was a party relied upon to follow up the event with an invasion. Would James, the son of the accused, have hesitated to join in the avowal could he have thus been instrumental in saving the life of his mother? Yet the principle was not thought of in the whole course of that extraordinary affair.

Mary openly avowed her general treason as a measure of defence and protection to herself, though she denied all participation in the plot to assassinate Elizabeth. Yet the only ground taken was, the technical one (not the less valid because technical) that the accused was personally privileged as a monarch, and could not be tried under the English law, which required a jury composed of her peers. It was added that she came into the kingdom under the law of nations, and had enjoyed no protection from the English law, having been continually kept as a prisoner. Vid. the case stated and examined in the right of international law, 2 Ward's L. of Nations, 564.

No one pretended that her approbation, or that of a thousand monarchs, could have reflected any degree of exemption from judicial cognizance, upon the alien servants in her employment. Such a principle would have filled England with an army, in time of peace, disguised as Jesuits; for the bigotry of monarchs would, at that day, have led them to avow any system of pernicious espionage which could have served the purposes of the Pope by executing his Bull of excommunication against Elizabeth.

Canada again being disturbed, and our citizens aiding the revolt by boats, provisions, or money, the purposes of England would certainly require such conduct to be put down at all events. Adopt the principle that she may, by avowal, protect her soldiery who steal upon our citizens at midnight, from all punishment at the common law; and before you get even a remonstrance from Washington, your whole frontier might be made a *tabula raza*. No. Before England can lawfully send a single soldier for hostile purposes, she must assume the responsibility of public war.

Her own interests demanding the application of the rule, she perfectly understands its force. What regard have her courts ever paid to the voice of public authority on this side the line, when it sought to cover even territory to which the United States denies her title? The mere act of taking a census in the disputed territory under the authority of Maine, was severely punished by the English municipal magistrates. Had a posse of constables or a company of militia bearing muskets been sent to aid the censor, in what book, or in what usage could she have found that this would divest her courts of jurisdiction, and put the cabinet of St. James to a remedy by remonstrance or war? Had the posse been arrested by her sheriff, and in mere defence had killed him, and this nation had, after some two or three years, avowed the act, would she have thought of conceding that in the mean time, all power of her courts over the homicides had been suspended, or finally withdrawn?

But it is said of the case at the bar, here is more than a mere approval by the adverse government; that an explanation has been demanded by the Secretary of State, and the British Ambassador has insisted on McLeod's release, and counsel claim for the joint diplomacy of the United States and England some such effect upon the power of this court as a *certiorari* from us would have upon the county court of general sessions. It was spoken of as incompatible with a judicial proceeding against McLeod in this State; as a suit actually pending between the two nations, wherein the action of the general government comes in collision with and supersedes our own.

To such an objection the answer is quite obvious. Diplomacy is not a judicial, but executive function; and the objection would come with the same force whether it were urged against proceeding in a court of this State or the United States. Whether an actual exertion of the treaty-making power, by the President and Senate, or any power, delegated to Congress by the federal constitution, could work the consequence contended for, we are not called upon to inquire; whether the Executive of the nation—supposing the case to belong to the national court—or the Executive of this State, might not pardon the prisoner, or direct a nolle prosequi to be entered, are considerations with which we have nothing to do.

The Executive power is a constitutional department in this, as in every well-organized government, entirely distinct from the judicial. And that would be so, were the national government blotted out, and the State of New York left to take its place as an independent nation.

Not only are our constitutions entirely explicit in leaving the trial of crimes exclusively in the hands of the judiciary, but neither in the nature of things, nor in sound policy, can

it be confided to the executive power. That can never act upon the individual offender, but only by requisition on the foreign government; and in the instance before us, it has no power even to inquire whether it be true that McLeod has personally violated the criminal laws of this state. It has charge of the question in its national aspect only. It must rely on accidental information, and may place the whole question on diplomatic considerations. These may be entirely wide either of the fact or the law, as it stands between this state and the accused. The whole may turn on questions of national honor, national strength, the comparative value of national intercourse, or even a point of etiquette.

Upon the principle contended for, every accusation which has been drawn in question by the executive power of two nations, can be adjusted by negotiation or war only. The individual accused must go free, no matter to what extent his case may have been misapprehended by either power. No matter how criminal he may have been, if his country, though acting on false representations of the cause, may have been led to approve of the transaction and negotiate concerning it, the demands of criminal justice are at an end.

Under circumstances the executive power might, in the exercise of its discretion, be bound to disregard a venal offence as no breach of treaty which the judiciary would be obliged to punish as a breach of international law. Suppose some of our citizens to attack the British power in Canada, and the Queen's soldiers to follow the heat of repelling them by crossing the line and arresting the offenders, doing no damage to any one not actually engaged in the conflict. The line being absolutely impassable in law for hostile purposes, the arrest on this side would be a technical false imprisonment for which we should be bound to convict the soldiers, if arrested here; while the executive power might overlook the intrusion as an accidental and innocent violation of national territory. Vattel, B. 4, ch. 4, § 43.

I forbear now to notice particularly some of the legal passages and cases which were referred to by the prisoner's counsel in the course of his argument; not for the reason that I have omitted to examine them, but because I consider them inapplicable under the views I have felt it my duty to take of the prisoner's case. They were principally of three classes; first, passages from books on the law of nations as to what is public war, and the protection due to soldiers while engaged in the prosecution of such war by their sovereign against a public enemy; secondly, the general obligations of obedience as between him and his sovereign, whether in peace or war; thirdly, cases from our own books relative to the conflicting powers of the general and state governments. The case of Elphinstone v. Bedreechund, 1 Knapp's Rep. 317, related to the breach of an actual military capitulation, entered into during an acknowledged public war between England and one of the petty sovereignties of India.

In considering the question of jurisdiction, I have also forborne to notice that branch of the affidavits which sets up an alibi. McLeod's counsel very properly omitted to insist on it as at all strengthening the claim of privilege. Indeed, he said the clause was put in merely by way of potestando. If it was inserted with the intention of having it taken as true upon the motion, that alone would destroy all pretence for any objection to our jurisdiction. His surrender was demanded upon the hypothesis that he was acting under public authority. If in truth he was not, or was not acting at all, he enjoys, according to his own concession, no greater privilege than any other man. The essential circumstance relied on, as going to the question of jurisdiction, turns out to be fictitious; and the argument must be, that we have no power to try the question of alibi. On that, and every other lawful ground of defence, he will be heard by counsel on his trial.

It is proper to add, that if the matters urged in argument could have any legal effect in favor of the prisoner, I should feel entirely clear that they would be of a nature available before the jury only. And that according to the settled rules of proceeding on habeas corpus, we should have no power ever to consider them as a ground for discharging the prisoner. I took occasion to show in the outset that in no view can the evidence for the prosecution of the defence be here examined independently of the question of jurisdiction, and I entertain no doubt that whenever an indictment for a murder committed within our territory is found, and the accused is arrested, these circumstances give complete jurisdiction.

I know it is said by the English books, that even in a case of mixed war, viz. a hostile invasion of England by private persons, the common law courts have not jurisdiction. It was so held in Perkin Warbeck's case. He was punished with death by sentence of the constable and marshal, who, it is said in Calvin's case, 7 Co. Rep. 11–12, had exclusive jurisdiction. Dy. 145, S. P. 1 Curw. Hawk. ch. 2, § 1, p. 9. But that rests on a distribution of judicial power entirely unknown to this state or nation. The court of the constable and marshal seems to have had an ancient right not very well defined by

the common law, of trying all military offences, as appears by the Stat. R. 2, ch. 2, (vid. 2 Pick. St. at large, p. 310,) which was passed to settle conflicting claims of jurisdiction between that and the ordinary courts, vid. also 3 Inst. 48. The whole is obviously inapplicable to this country, and is pretty much obsolete in England. It never can have been held in England or any country, that where a common law court is proceeding on indictment for a common law offence against any one arrested and brought before it, a mere suggestion by affidavit, that the offence imputed pertains to deeds of arms, either in a public or mixed war, shall take away power to try, whether the prisoner be guilty or not of the charge contained in the indictment.

All homicide is presumed to be malicious, and, therefore, murder, until the contrary appear upon evidence. "The matter of fact," says Foster, "viz. whether the facts alleged, by way of justification, excuse, or alleviation, are true, is the proper and only province of the jury." Lawful defence by an individual (still recognized, it seems, by the law of nature under the name of private war, Grot. B. 1, ch. 3, sec. 2,) is one instance. Foster, 273. That he acted in right of a nation, or under public authority, is no more than matter of justification. It is like the case mentioned in Foster, 265, the public execution of malefactors; and the jury must judge whether the authority may not have been exceeded. But more, when either public or mixed war is alleged in mitigation, either allegation may be fictitious; and it shall be put to the jury, on the proper evidence, whether it existed or not. The reason is plain, says Lord Hale; for the war may be begun by the foreign prince only, where it is public; and he supposes it still plainer where the war is between the king and an invading alien, being the subject of a a nation with whom the king is at peace. 1 Hal. p. 6, 163. The same writer puts the case of plunder or robbery by an enemy, *tempus belli*, which would not in general be burglary. Yet he admits it might be otherwise if the act were not done in the regular prosecution of the war. Id. 565.

Suppose a prisoner of war to escape, and that on his way home, and before he crosses the line, he should set fire to a farm-house in the night and kill the inmates; is there a doubt that he might properly be convicted either of arson or murder? When a grand jury have charged that a man has committed murder in this state, I can imagine no case, whether the charge relate to the time of open public war or peace, in which he can claim exemption from trial. If he show that he was in truth acting as a soldier in time of public war, the jury will acquit him. The judge will direct them to obey the law of nations, which is undoubtedly a part of the common law. So, if the accused were acting in defence against an individual invader of his country. But above all things, it is important in the latter case for the jury to inquire whether his allegation of defence be not false or colorable.

They cannot allow as an act of defence the wilful pursuing even such an enemy, though dictated by sovereign authority, into a country at peace with the sovereign of the accused, seeking out that enemy and taking his life. Such a deed can be nothing but an act of vengeance. It can be nothing but a violation of territory, a violation of the municipal law, the faith of treaties, and the law of nations. The government of the accused may approve, diplomacy may gloze, but a jury can only inquire whether he was a party to the deed, or to any act of illegal violence which he knew would probably endanger human life. If satisfied that he was not, as I sincerely hope they may be, upon the evidence in the case before us, they will then have the pleasant duty to perform of pronouncing him not guilty. But whatever may be their conclusions, we feel the utmost confidence that the prisoner, though a foreigner, will have no just cause to complain that he has suffered wrong at the hands of an American jury.

At our hands the prisoner had a right to require an answer upon the facts presented by his papers, whether in law he can properly be holden to a trial. We have had no choice but to examine and pronounce upon the legal character of those facts in order to satisfy ourselves of the bearing they might have on the novel and important question submitted. That examination has led to the conclusion that we have no power to discharge the prisoner.

He must, therefore, be remanded, to take his trial in the ordinary forms of law.

Before the learned gentleman got through the whole—

Judge GRIDLEY reminded him that the hour of one o'clock had arrived, which time the Court had fixed to adjourn for dinner.

Officers were then sworn to attend the jurors, and other officers to take charge of the prisoner, and the Judge charged the jury (for whom accommodation was provided at the Temperance House) not to converse on the

subject of this trial, nor to allow other persons to approach and speak to them until they had rendered their verdict. He also charged them to abstain from spirituous liquors, except as a medicine, as they might thereby vitiate their verdict. In a civil suit, a case had occurred in which the verdict was set aside for that reason. He then directed that the printed arrangement for leaving the court should be reversed; and accordingly the jurors left first, in charge of officers; then the prisoner, accompanied by the sheriff, and Mr. Clark Robinson, the marshal of the district; next the bar and the reporters, followed by the court and the audience. The prisoner proceeded through the public street, with his attendants, to Bagg's hotel, where dinner was provided for him, without exciting any curiosity, except of some few small boys. There were very few strangers present, and the citizens of Utica apparently feel no interest in the case.

At two o'clock the court was again opened, and the same quiet and order prevailed, the court being but partially filled. The names of the jurors were called over, and

The Attorney-General resumed and concluded the reading of Judge Cowen's opinion and decision, as presented in the foregoing pages, and added as follows:

In the first place, the Supreme Court of the State of New York have decided, that this was not an act of war—that it was not to be governed by the laws of war, but of peace; not by the laws of Canada nor of the United States; but by our own municipal laws. There is, therefore, no consideration in the case, which would not be brought before you in any case, where an attack has been made and one of our citizens murdered. The law is precisely the same here as in our own municipal laws under which we all live and act and seek protection. There is no justification, or excuse, or palliation. Another point is, to excuse the act on account of its being done in a pressing and dangerous assault. I will add one suggestion; it is this, that the offence which has been committed, is an offence against our laws alone, and no other laws. Blood has been shed upon our soil, and we, the people of the State of NewYork, are held responsible, and no other people. If the prisoner is not punished here, he will be punished nowhere. Not in Canada. Not under the laws of the United States. He has violated no law of the United States. It is here and here alone that the avenger of blood calls upon you to answer as to the guilt or innocence of the prisoner. I will make another suggestion. Throughout, the court proceeded to take facts which he states to be true—they presume that Durfee was one of the insurgents in arms against Canada upon Navy Island. They have placed him in the same position as if he were one of the insurgents, or as they would have placed Van Rensselaer himself had he been killed instead of Durfee. This you will perceive is a fallacy. And that the unhappy man who met his death there was as innocent as you are. He was there on his lawful business as you might have been, and had any other citizen been killed in that situation, the facts would have been the same as in the case of the unfortunate Durfee. The only question which you have now to decide is the simple fact, "Is the prisoner one of those who assailed the Caroline, and killed Durfee?" To that single fact are you limited. The questions of law have been disposed of by the Supreme Court, by which decision you and this court and all are bound. You must bear constantly in mind that the testimony which bears to any other point except whether he

was there or not, is to be thrown from your mind, as calculated to perplex and embarrass. The question then is, was the prisoner in that expedition? Upon this point we shall examine numerous witnesses; some of them will show that upon various occasions and in presence of those who were in it, the prisoner declared that he was there. We shall show that previous to this expedition the prisoner was one of the most busy and active in getting up this expedition—that a few days previous he went to Buffalo for the purpose of seeing the boat, and of ascertaining if it were coming to Schlosser. He went round the Island in various ways, and appeared to take a deep and active interest in the affair, and we shall show you that he was engaged in enlisting persons for the expedition. It will also appear before you that on several occasions he exhibited a pistol and a sword with blood upon them, and repeatedly pointed to the blood, and said it was the blood of a d—d Yankee. Several witnesses will prove before you that they saw him enter the boat to go on that expedition—again, others saw him leave the boat on its return. Such, gentlemen, is the nature of the evidence which will be adduced on the part of the prosecution to show what part the prisoner had in this expedition—the destruction of the Caroline, in which Durfee met his death. Little now remains for me but to lay down some principles of law, that you may judge of the weight and application of evidence, which shall be given in before you. Having stript the case of all extraneous law and all foreign law, we are to try the case according to our law as it is administered in England, the government of which the prisoner was a subject. The first thing is, that every murder is presumed to be malicious. It is for the accused to show, that there was cause of excuse. When one man meets his death by the hand of another, it is presumed to be a murderous act, unless the other can show that it was done by authority of law, as in the case of a sheriff, or in necessary self-defence, as when assailed by a robber; or some excuse or justification of this kind, to excuse the person whose hands are marked with the blood of the person whom he has slain. The second proposition, that malice is necessary to constitute murder, is confined to an intention to take the life of an individual, the malice prepense essential to constitute murder, consists in a foul design under the dictates of a depraved, wicked, and malicious heart. Roscoe's Criminal Evidence, 651; 4 Blackstone, 199; 3 Revised Statutes, 546. It is not necessary for you to say, that the hands of the prisoner were the hands that slew Durfee. The third proposition is: If an action be unlawful, and its deliberate intention is mischief indiscriminately, and death ensues besides the original intent, it will be murder—no matter whether they intended to kill when they left Canada, if they were bent on an act of villany, they must take the consequences; 2 Revised Statutes, 546. The fourth proposition is, that, in order to convict the prisoner, it is not necessary to prove that the fatal wound was given by his own hand. Roscoe, 640; if he was present, aiding and abetting, he is a principal in the felony; B. C. C. 24. If several persons set out together, or in small parties, as several boats starting from Canada upon one common design, be it for the purpose of murder or for other felony—for the purpose of murdering Durfee or destroying the Caroline, or any other object, some being employed to watch, some to prevent the escape of those who are more immediately engaged—they are all, in the eye of the law, present at the act committed. Foster, 350; 1 Hall P. C. 466. These are the principles admitted; they are the known rules of law, and

it is only for you to apply to these principles the evidence which shall be adduced. And if the evidence brings the prisoner within the province of the law, there is no alternative but to pronounce the verdict which your oaths will require. Before you will be called upon to find a verdict of guilty, the following facts must be established. First, that Durfee was killed; secondly, that he was killed in the county of Niagara; thirdly, that he was killed by a pistol or musket shot, or a weapon of a similar character; fourthly, that he was killed by the prisoner; or fifthly, that he was killed by the prisoner or others connected with him, with whom he was acting, counselling, aiding and abetting. If this act was done by him or by the company, your verdict of guilty must follow.

Gentlemen, I have endeavored to place before you, in the most simple manner, the leading features of this case, so far as they may be useful to you, and no further, in understanding and applying the evidence as presented to you. The interests which are committed to you are of inexpressible importance to the prisoner, whose life is in your hands; to the people—for they have committed to you the vindication of the laws upon which all our lives depend. If the prisoner be proved guilty, and you find him innocent, you sap the foundations of government, by destroying the confidence of the people in the administration of justice. Why is it that our ears are so often shocked with accounts of deeds of villany and bloodshed? Why the assembling together of men without law or the form of a trial, assuming to themselves the right to take the lives of offenders? It is because courts and juries have failed to execute the laws. The people have lost confidence in the regular administration of justice. Gentlemen, this trial must necessarily be long, tedious, and painful. Let me urge upon you to arm yourselves with patience, as you would consult your own future peace. This trial will be an epoch in your lives. You will think of it at your firesides, upon your farms, by the way-side, in the long sleepless watches of the night, in the last dread hour of review, when your past lives rise up before you—as dark and forgotten things are suddenly illuminated by light from eternity, this will stand out as one of your most important acts and greatest responsibilities. But if through fear, favor, or partiality, or from any other weakness—if through an overlooking of the law and testimony, which you are bound to observe by your solemn oaths—if by any assumption of that power to decide upon the expediency of a trial and conviction, a power which belongs to the executive alone and not the judiciary—if through vain and presumptuous attempts to overlook the cause and weigh the consequences—if from any or all of these causes you fail to vindicate the confidence which the law has reposed in you, you will then, at the last hour, bitterly but vainly regret it. Gentlemen, I have but one word to say; it is, that throughout this trial, in every stage of it, you are to keep fixed before you, as if written in letters of fire—*Be just and fear not.*

EXAMINATION OF WITNESSES FOR THE PROSECUTION.

William Wells, the first witness called and sworn, was examined by Mr. Woods. He said: I reside in Buffalo. I was born there. I am now 35 years old. In December of 1837, I was owner of the steamboat Caroline. When I bought her, she lay in the slip or ship canal at Buffalo. I fitted her up immediately, and on the 29th of December I ran her down to Schlosser. I lay up that night at Schlosser about six o'clock, and made her fast by a chain cable. There is a frame dock there, made of timber. After supper I set a watch, and did what is usual on steamboats. I gave each man his duty and retired to rest. Sylvanus Stearing was on deck. About 12 o'clock I was awoke by the hands of the vessel, who complained that their berths were occupied. The hands had been to Niagara Falls, and when they returned, they wished to have their berths. I told the strangers who occupied them, that the condition on which they were permitted to occupy them, was, that they should be given up when the hands returned. Those persons were strangers to me, and had come on board for lodging for the night. Afterwards some one put his head into the cabin, and said a boat was coming, with men in it. I do not know who informed me, nor whether it was to inform me alone. Captain Appleby and myself directed him not to let any one come on board, but to see who they were. He stepped from the companion-way, and then said there were four or five boats full of armed men coming, and he called to me to come on deck. I got out of my berth and was dressing, and I heard a terrible uproar, and men on board; I heard the report of one or more pistols or guns, and the noise of feet on deck. There was much hallooing and noise: I stood by the side of my berth until I was dressed; I made up my mind that they wanted the boat, and that that was all the harm they would do; I knew they had possession of the deck, and I secured my papers and little effects in the berth, and started for the companion-way. Before I could get on deck I heard orders given to give no quarter, but to kill the damned Yankees, or words to that effect. I asked Captain Appleby what we should do? He said he did not know; we must do as well as we could. I did not get on deck. Capt. Appleby placed one foot upon deck, when some one on the cylinder took hold of his collar and shoved him back, saying they would kill him, which crowded me down stairs. I went back below, turned round to the right to pass forward of boiler, which was below deck, to make escape from forward hatch; while I stood looking, a man jumped down into fire-room; I was standing aside of and little back of front of boiler in the dark; he turned round, took poker, and commenced poking the fire, as I supposed, to get up steam to take off the boat; I stood till he was busily engaged, then went back to the cabin stairs; I went up, intending to run out; ascended on hands and feet; I put my head up to the cabin door, which was open, brushed against the calf of a man's leg standing on the stairs; was not yet at the top of the steps; thought he felt it, and sprang below; turned round and went forward again; run against some one, supposed to be one of the attacking party; he spoke; I knew his voice; did not name one of his men in the boat; passed each other—he to the cabin, and I to my first position

near the front of the boiler, looking for a chance to escape up the forward hatch; man raised up from furnace, stepped in front of me and seized a man by the collar who was concealed in the wing of the boat, and pulled him out to the light; asked who he was, and what doing; he said he belonged to the boat; it was Durfee; he knew him as he stepped aside, and learned his name to be Durfee next morning; he pulled him along to hatch-pump, telling him to follow on deck, or he would blow his brains out; felt in his belt, but saw him draw nothing; Durfee followed; held on to Durfee's collar: last step let go and Durfee sprang on deck; intended when he saw me to surrender, but when Durfee was on deck thought better not, from what he saw. Durfee trying to get on shore, turned eyes to starboard-river side of boat; saw small hole eight inches open, and thought he would get out overboard and swim; put head out, saw boat full of men under him. Went into after cabin, threw off overcoat to swim; retired to fire-room, put head out of hole, and saw boat with men armed in it; one standing in bow as if he had thrown painter of yawl on the steamboat near the bow, swinging round with the current, bows up stream, small boat on the river side. Steamboat registered 46 tons; low bows, yawl just under guards; could step from the boat to the steamboat; steamboat about 75 feet long. Could not escape; returned again to cabin; recollected one of the stern cabin windows had been out a few days previous, and thought could escape there; went aft, got in the locker, worked at the window; began to loosen, and saw two boats made fast to the steamboat, one to each quarter, swinging with the current, and guard in each; went into the centre of the cabin, to act according to circumstances; felt the boat move, ran up stairs to deck engine-room; felt her stick to wharf; door open; saw no one standing; wait for better opportunity; stepped back, heard noise at or near stern of the boat; whilst standing, heard man cast off; "God d——n, why don't you cast off from her;" where rockets; stepped out, saw no one, knew had to go ashore at the forward gangway; saw three men standing twelve or fourteen feet off across starboard gangway, and determined to surrender; went to first; had sword in hand; second one boarding pike; third leaning on his sword; stepped to surrender to first; looked at him; he looked away, supposing I was one of his party; passed the third towards bow; when opposite gangway, crossed deck to go off, placed hand on rail to step on dock and was seized by first of the men; drown these; who are gone; covering of deck broken up; turned round, told him I did not belong to boat; on shore; started toward me when pistol fired behind them; they looked round, I jumped off the dock and got behind wheelhouse; passed on to the railroad track; when I got to railroad saw a man lying on lower track, head towards water three or four feet from edge of wharf; looked at him; warehouse at upper end, gable end to river; boat close to warehouse, upper story projected to edge of wharf; could step from door of upper story to deck of boat; water under warehouse; bow projected above end of dock; railroad on dock below warehouse; three or four feet from warehouse; man lying on rail farthest from the house; head to river and about opposite aft gangway; passed on railroad track north of tavern; march from main-road till further than inner edge of wharf; saw two men eight or ten rods from river; tavern little east of north from warehouse, about sixty rods; kept by Field; looked a moment; supposed they were guard; looked round to him; party ran from

boat; cast off and towed into stream. Supposed men were after him; spoke to them; well boys, how does it go; recognized two of his own men; John H. Smith; asked where rest of hands; asked for King; did not know; saw King coming in the road; went to meet him; saw he was hurt. You are hurt? Yes, they have cut me almost to pieces. Assisted him to the house. Could see without recognizing a man four or five rods; partly starlight. Would have to be well acquainted with person and dress. Did not see Durfee again till next morning; he was then dead; lying on his back, between inside track and warehouse; arms crossed on breast; brains blown out and scattered on the ground; head shattered to pieces; ball entered at back of head, came out near middle of forehead; puddle of blood near him. Saw his cap at the house; was what is called a sealet cap; found a hole just above the band behind, and another above vizor, in front; cap looked as if singed behind; blood and brains covered a small space where his head lay before he was turned over on his back. Boat was boarded, he thinks, about 12 o'clock, but cannot say. Don't know how many assailants, but thinks forty or fifty; were five yawl boats; carry about eight or ten men comfortably; the men or watch on boat were not armed, nor were the men lodging on board armed. To his knowledge no arms belonging to boat. About 33 persons on boat. The men who came on board had been left by cars. Field's tavern was full, and could not get supper or lodging, and received permission to lodge on board. Durfee did not belong to boat; was one of the lodgers. Schlosser is in town and county of Niagara, two miles above the falls. Search was made next day for the men on board the boat, of whom seven were missing; two of them prisoners; the rest never heard of.

When King reached the house found a bad cut four inches on left shoulder, another on left arm below elbow, as if received in warding off blow of sword. Others wounded. John Leonard received a blow on forehead. Captain Harding received a blow cutting leather front of cap, and skin on forehead.

The object in running boat was to make money. Boat made three trips that day—started at Buffalo, landed at Black Rock Dam, Tonawanda, Navy Island, and Schlosser, and made two trips from Schlosser to Navy Island. Carried passengers both ways, to the Island and back, and what freight offered, to the Island. Brought none back. Captain G. Appleby acted as captain that day. Neither boat nor I had any connection with men on Navy Island. Thinks Durfee's not the same body saw previous evening. It was not King. Heard 40 or 50 shots fired and clashing of swords. Men on boat had no swords to my knowledge. One party boarded at forward and one at aft gangway. Were lights on board in lower cabin? There was light in companion-way, but don't know if lamp was there—thinks it would not have been lighted from any other place. Put out the lights after they were boarded, to prevent their coming in the cabin.

Cross-examined by Mr. Spencer—The light was immediately extinguished in companion-way. Boat was of peculiar construction, and a stranger could not well find his way down in the dark. Had but two hands on the boat, King and a black boy; found but one person killed. Cannot name any person missing; and do not know those inquired for on the boat. Did not see D. to know him till morning; saw no other blood. Durfee seemed to have fallen and died on the spot: is quite sure cap was scorched; *knew* whether cap

was scorched or not. Lake Erie usually closes 15th December. Boat had been seized for smuggling in summer. I bought her and furnished the money. Had been frozen in a week or so; was lying in ship canal—cut out on 25th to 28th December; no bond of indemnity given or written before starting, to his knowledge. It was talked of with me. Understood one was to be given; does not know for what object—supposed to indemnify owners in case of accident to boat. Understood it was done and signed by some—was to be signed by twenty—signed by five. Loaded at Buffalo. Don't know freight was put on board and put ashore by order of the Collector. Small stove and cask was put on board; don't know what was in the cask. About half a dozen persons, including hands, sailed from Buffalo; touched at Black Rock Dam; here got halliards for running up colors; don't know that I took in freight. Men came on board—say half a dozen; one man had a rifle. Were no *armed men* on board—if they had arms they did not have them in their hands. Land freight and passengers on scow at the Island. Was so occupied with looking at the working of the machinery, that I did not notice much what was going on. Was not engineer myself. Have not made application for payment of boat to government; been examined as to use of boat. Expect to be paid by government. Expected to run between Schlosser and Island as long as profitable—running up to the dam at night; this was the use to be made of the boat—supposed she would not be employed more than a week. Did not run up that night because one of the engineers told him a piece of the machinery was gone, and it would not be safe to run her. They were my friends, and looked at the machinery from curiosity. Took to the Island a six pounder cannon, first trip from Schlosser. A horse, lumber, boards, and straw. Don't know what intended for. Did not inquire. Some provision, don't remember what kind. Thought the boat would be employed a week, because, supposed the men would return to this side and disperse. Did not understand they would cross to Canada. Was on Navy Island two or three hours on the 26th December; crossed from Schlosser in sail-boat; saw about 250 men; 10 or 11 pieces cannon; saw none at Schlosser; some on the Island were pointed towards the Canada shore; don't know whether there had been firing either way. Understood Van Rensselaer was in command. Don't know who paid freight; don't mean to say he charged regular freight; received eight or ten dollars for freight and passengers. Don't remember any items charged or paid, either for freight or passage, except one dollar from a stranger. Taverns about Schlosser and the Falls were full—don't know I saw any arms on shore—don't remember any firing on Navy Island that morning. Understood, before he left Buffalo, there had been firing between Navy Island and Canada. Did intend to run boat to favor men on Navy Island. Saw on the Island, two or three days before took down the boat, Van Rensselaer, with whom conversed about coming down with boat. They requested it; no agreement. They said I could make money out of it. Was not referred to an Executive Committee at Buffalo; knew from hearsay there was such a committee to aid the Navy Islanders; committee of thirteen; don't know who they were. Understood Dr. Johnson was one. Conversed with Phelps about boat. Did not pay for boat being cut out; many persons helped; cut out 150 or 200 feet. Would not have cut out the boat but for this particular service, or other service as profitable as this. Boat about a fortnight undergoing repairs. Cost

$100. *Think* I furnished the money. Mr. Swanton says he thinks he paid it, and I am very certain I furnished it. Purchased 1st December, and commenced repairing immediately. Did not repair for this service; intended to run her to Cattaraugus Creek, to be above the ice when lake broke up in the spring. Boat cost $800—of John P. Murray, bill of sale in his name—made the bargain with P. H. Rankin. Meeting at Buffalo theatre—sympathizing with Canadians. McKenzie of Canada spoke. Don't know whether there was a procession or martial music. Understood the object of the islanders was to free Canada, that they intended to invade Canada.

Attorney General—Am not connected in any way, openly or secretly, with the islanders. Understood the running of the boat would accommodate the islanders and people in Buffalo, and denied having any thing to do with bond. Went in good faith and only for gain. Hole in back of cap, sound in front, triangular. Don't know of his own knowledge that the committee of thirteen existed. Don't know whether I invited the engineers to go, they always go on the lake by courtesy, and I asked no questions.

Spencer—Did not take cannon balls from W.'s furnace. Don't know they were taken. Cask was a quarter cask. Did not take boiler iron punchings. Collector told me I could carry any thing—arms and ammunition as freight if I would run the risk of being taken in the British waters, without violating a United States law. Don't recollect taking a cask of boiler punchings from Black Rock.

Adjourned to a quarter before 8 to-morrow morning.

Second Day of the Trial.

Daniel J. Stewart was the first witness called this morning He was examined by Mr. Hawley. I reside in Buffalo. I resided there in December 1837. I was on board the Caroline at Schlosser. I left Buffalo in her about 8 o'clock in the morning, touched at the Island, and then proceeded to Schlosser, where I arrived about two o'clock. We made two trips to the Island afterwards the same day. We tied up at the wharf about six o'clock. The boat lay with her bows up stream, moored to the wharf. I was called on watch at 12 o'clock. About half an hour after I and Capt. Kennedy came on watch, we discovered boats nearing us. My first impression was, they were Indians; the woods making a considerable of a shade on the water, it was hard to tell what they were filled with. I mean the wooden buildings. Some of those boats were opposite the bows, but off in the stream a little when I saw them; they were inside of the small island, which lies eight or ten rods from the dock. It may be more; I merely guess, perhaps it is twenty rods. I told Captain Kennedy he had better call them up from below—from the little cabin. The boats that I saw, I think were floating down stream; they did not use their oars I think. Capt. Kennedy called those in the cabin. There was a man who came on deck just before; his name was Nichols, and he hailed them. He asked, "who comes

there?" The answer was, "friends." They appeared to spring on their oars then, as if they found they were discovered. When Nichols hailed, the first boat was not more than three or four rods from the bow of the boat; one boat ran down towards the stern of the steamboat. I ran aft for the purpose of seeing who they were, and when I got there the officer of the first boat had got on deck. He got over the rail a little aft of the gangway. By the time I had got up to him he had got his sword drawn, and threw himself in an attitude as if he was going to strike me He then ordered his men on deck. I then discovered several armed men in the act of getting on board. I then went into the ladies' cabin, to give the alarm there. The officer stood near the ladies' cabin. I am not sailor enough to know whether I went starboard or larboard side. It was the river side of the boat. I found, in the cabin, they had been alarmed, and were getting up. I then came out of the cabin and went ashore. I was not armed. The cabin of which I have been speaking was on deck. I fired no arms that night. Neither Kennedy nor Nichols were armed, nor did they, to my knowledge, discharge any fire-arms. I did not see that any of the crew or passengers, who lodged there, had arms. I have no knowledge of any arms on board. I saw no resistance, nor preparations for resistance. When I was set to watch I did not expect an attack from any quarter. It is customary to set watch on steamboats. When I first saw these men I did not discover that they were armed. I only discovered it when I went aft. When I went aft none of them had boarded forward; they might have boarded both at the same time. There was considerable confusion. When I came out of the ladies' cabin I heard the discharge of fire-arms. The ladies' cabin was over the hull of the stern part, leaving a passage round it. I saw Durfee dead the next morning about 8 o'clock. I saw him the evening before. I discovered four or five boats approaching. I went up above the main railroad and saw the boat burn. I saw she was towed into the stream by row boats. After the boats got out of the sight of the steamer, which was on fire, I did not see which way they went. When I came out of the cabin and was going towards the shore, I heard the officer say, "Guard the gangways—show the damned rebels no quarter." I don't know that the officer was in uniform, but he had a sword and assumed the command. The companion way from the gentlemen's cabin came up partly through the engine room. It was a narrow, crooked way, and different from the companion way of boats generally. I believe there were only two discharges of fire-arms before I left the boat. I heard several after, and considerable clashing of swords. There was no firing from shore.

Cross-examined by Mr. SPENCER.—I saw Durfee in the course of the afternoon, when we were running from Navy Island to Schlosser. I don't know that he went down from Buffalo. I had never known him up to that time. He told me he was a stage driver in Buffalo. That was my first trip down. I considered if there was any thing to do on board I was to do it. I was not employed as a hand. It is customary for boatmen to ride on any boat for nothing, but if they are asked to do any thing, to do it. I had been a boatman for two

years. I went to see what was going on more than any thing else. I don't remember doing any thing on board. There were perhaps seven or eight on board from Buffalo. I don't know what was taken in at Buffalo, but some things were put on board there. There was a barrel or two I saw on board, but I can't say as to any thing else, and I did not see them taken on board. I saw nothing taken on board at any other place. I can't say how many barrels or packages I saw at Buffalo. At Black Rock Dam we took provisions on board, and two men, if no more, came on board; one of them had a gun, I think, but I saw no more on board, nor did I see any landed at Navy Island. We touched at Tonawanda, and perhaps at Grand Island, coming down from Buffalo, but I believe we took nothing on board at Tonawanda. I don't know for what purpose the boat was taken down to Schlosser. At Navy Island some few things were put ashore, but I don't know what they were; I did not handle them. Some men perhaps went ashore at Navy Island, but they returned again. I think none stayed ashore there. We then went to Schlosser, and there they took on some things for the Island. On one of the trips they took some straw, and one piece of cannon. There was a quarter of beef too, and some boards, I think. I saw no other provisions, or munitions of war. These are all I saw. A good many men passed over from Schlosser to Navy Island. I can't say how many, perhaps fifteen or twenty. I can't say as to their being armed. Some might have been so, but I don't recollect seeing any armed men land on the Island. I saw one or two muskets standing in a corner in the ladies' cabin, but I can't say if they were landed at Navy Island. I saw no armed men on the boat at all. I did not go ashore at the Island. I had never been at Schlosser before. There were a good many men there. They appeared to be going and coming the whole time, but I can't say as to their numbers.

I was not molested in getting ashore on the night of the attack from the boat. I saw two or three persons pass ashore ahead of me. Those are all I saw go ashore. I don't know the weight of the cannon we took over, but I heard it was a six-pounder. I only heard the boat was going down the evening before she went down. I reside now in Buffalo, and have resided there all the time since the occurrence.

Frederick Emmons Examined.—I reside at Buffalo; lived there in December, 1837. On the night the Caroline was destroyed, I was staying at the inn, at Schlosser. (A map was here handed to the witness.) I believe this map to be a correct map of the localities of Schlosser. The small island in front of Schlosser, is called Horner's Island, and is about 30 rods from the wharf. When the attack was made on the Caroline I was in bed at Field's house.

To a question by the COURT.—The length of the wharf up and down the river, is perhaps seventy-five feet; the warehouse occupied thirty or forty feet of the upper part of the dock, so that it left about thirty-five feet of docking below the warehouse; the dock extended into the river; the lower front of the warehouse was open to enable boats to load and unload; the upper part was closed; the floor of the docking constituted the floor of the warehouse; the railroad

track was below the warehouse; there were five or six feet between the railroad and the warehouse; the flooring of this docking had holes in it to the water; there is very little business there, and it is not kept in good repair.

By Mr. HAWLEY.—I was roused from bed by some one who said the boat was attacked. We sallied out, and I went partly down to the warehouse. I was not armed. I knew Amos Durfee; I had known him for a number of years. I went down to the warehouse after the boat was hauled off; I went down in ten or fifteen minutes after—the row boats were still in sight. I found Durfee on the railroad, twelve or fourteen feet from the river; he was on the dock, between the rails of the railroad; his head lay from the river; I turned him over and recognized him; there were two or three others with me, and we had a light; he seemed to be dead; I left immediately after, and went to Buffalo. On examining Durfee, I saw he was shot in the back part of his head. I think Capt. Appleby was with me, and Capt. Haggerty. I think Durfee's cap lay near him. I saw the body of Durfee afterwards, in Buffalo; he was laid out at Baldy's. Where Durfee lay I should think it would be sharp shooting to reach him with a shot from the tavern. I went on board the Caroline, after she was tied up that night, with Durfee. I did not see any arms on board the Caroline. Fields, who keeps the public house, is my brother-in-law, and I am much at home there. During the time the boat was attacked, we feared the house would be attacked also, and we looked for arms, but could only find one musket about the premises. When the row boats cast off from the Caroline, they went in the direction of "Horner's Island" and Chippewa. The planks of the floor of the warehouse lay loose. It was not used a great deal.

Cross-examined by Mr. SPENCER.—I resided at Buffalo at that time, I was then at Schlosser only for the night. I assisted my brother-in-law in the Inn. I was there frequently for two or three days at a time. I was not there when the party took possession of Navy Island, which was about the 17th or 18th of December. From that time to the 29th, I cannot say how many days I spent there. I was there three days at a time. There were arrivals from Buffalo, with what, I cannot say; they crossed over to the Island.

The ATTORNEY GENERAL thought the Counsel was traveling too far in his cross-examination, when he inquired what other boats carried.

Judge GRIDLEY said it was desirable to be as brief as possible, and to ask no more than was necessary to give the Jury a history of the the transaction.

Mr. SPENCER assented, and the examination was resumed.

Witness—I saw a piece of ordnance go over in a scow boat, and I saw armed men go over. I was on the island the day the Caroline was destroyed. The musket found at Field's tavern on that night, was discharged once by Captain Keeler. He ran out in the road and fired it off. I did not see which way the gun was pointed. After the Caroline was turned loose she grounded and remained so until she burned near the water's edge. The stream there is 5½ knots. The

current on the Canada side is 6, and on the American side about 5 knots.

By a JUROR.—I saw Durfee after the gun was fired from the house.

By Judge GRIDLEY.—The gun was fired while they were casting the Caroline loose.

By Mr. SPENCER.—I helped to get the Caroline out at Buffalo, from the ice; I do not recollect how many were engaged in cutting her out; I supposed she was to run between Buffalo and Schlosser with passengers; there was a good deal of excitement and passing there; I was going down to my brother's that evening or the next day, and that was the reason I assisted; I was not engaged by any one; I did not go by the boat, but by the railroad, which ran twice a day both ways; I have seen times when the railroad could not take all the passengers; the cars ran near Field's tavern; I supposed the boat was to carry passengers; I did not know that she was going to Navy Island nor that she was to promote the interests of the Navy Islanders.

By Mr. JENKINS.—The man who fired the gun was three or four rods below the main railroad track.

By Mr. HAWLEY.—The railroad employs horse-power. There have been two boats on, the last season, and there is one now; there was a horse express at the time from Schlosser to Buffalo; the people who went there went from curiosity; there were all sorts of people there; Mr. Field was out of health, and I stayed two or three days at a time to help him.

By Mr. SPENCER.—He had a great run of custom then. The express, I suppose, was for the press. An invasion of the Island was expected from Canada, and they wanted to get information. I did not understand that there was to be an invasion of Canada from the island. They were not strong enough. The express ran from the time the Navy Islanders took possession of the Island until the Caroline was destroyed, once a day I believe.

THE ATTORNEY GENERAL here addressed the Court, and said, that the Counsel for the prisoner was going into irrelevant inquiries, unless he intended to set it up as a matter of defence; and, in that case, it would be well for the Court at once to decide, that the circumstances now sought to be brought out in evidence could constitute no defence whatever.

Judge GRIDLEY said, that the particular inquiries which were now made by the prisoner's Counsel, had grown out of the direct examination. But the Court thought that the details of this part of the case should be given with as little delay as possible, as they could constitute no defence. They were but the historical parts of the case, and necessary only so far as to render the testimony intelligible to the jury. But, except for that purpose, they had no bearing on the case.

The ATTORNEY GENERAL again objected to this mode of cross-examination.

The Court intimated again that the examination should be brief, but as the subject alluded to was part of the examination in chief, and a part of the history of the drama, it was admissible.

Mr. SPENCER said he had finished, but nevertheless he should insist upon having out the whole truth of the matter.

James Field—Examined by Mr. HAWLEY—I live at Schlosser, and lived there in December, 1837. I kept the public house there. I recollect the night of the destruction of the Caroline. I got up; I saw Durfee about one o'clock that morning; he was lying on the wharf dead; he lay with his head from the water, partly on his face; I saw the wounds; he appeared to have a ball shot through his head; it appeared to have gone in at the back, and come out in front; the orifice was small behind, and bursted out in front; I should suppose he fell where he lay; he lay about four feet on the dock from the water; there was blood near where he lay; there was not a great deal of blood, but some might have run through the plank; I saw his cap; it lay partly right off from his ear, by his head. The perforations in *that* were the same as in his head—one behind, and the other before. I thought the cap was singed. I kept it a year. The singe was at the back, about the small hole. Finally, I gave the cap to a man who called himself his brother. I was not on board the Caroline that day or night. The people in my house that night were not armed. There was one gun in the house, and that was all. That gun was fired. The man who fired it stood about ten rods from the house; he fired south, or towards the river. He fired at the men who were taking the boat off; the boat was then in the stream, but she had not got to the foot of the Island by 30 rods; they were about 10 rods below the warehouse. A line from where the man stood to the men who were towing the boat, would go 20 rods below where Durfee was.

Question by the Court—How can that be if the boat was only ten or fifteen rods below the storehouse, and the gun was fired from a point between the public house and the river?

Answer.—Upon reflection, the line would pass five or six rods below where Durfee was lying; the gun was fired at the boat; I remonstrated against the gun being fired, telling the man it might aggravate them, and make them attack the house; don't know the appearance a shot wound would present.

By Mr. SPENCER.—I lived at Schlosser when Navy Island was invaded. It was a week or so before the boat was burned. The invaders, I understood, went from Grand Island. There was a good deal of passing and re-passing after the Island was invaded. The land where my house stands is about level. At that time they were carrying men and munitions of war to Navy Island daily. There was a great assemblage at Schlosser daily and nightly. Provisions were brought in on wagons and railroad cars. There were a good many pieces of artillery taken over. I cannot tell how many. I had as much business as I could attend to, and I saw only three. I saw a man go over occasionally, with a gun on his shoulder.

The ATTORNEY GENERAL again objected to the cross-examination.

The Court thought the nature of this expedition should be brought out.

The ATTORNEY GENERAL said he conceded that there was an expedition and great excitement, but it had nothing to do with the case

here. Before another forum Mr. Field's testimony might be necessary.

Mr. SPENCER.—If you concede that it is all we require.

The Court thought the nature of the proceedings should be made known.

Examination continued.—I saw beef and other provisions carried over for the Navy Islanders; the burn which I saw on the cap was round the hole where I supposed the ball had gone in. The hole was singed round, about as big as a quarter of a dollar. The cap was a snuff color knit or woollen cap; it was a kind of plush. The body was not moved until the next morning; it was turned over when I then saw it. I was about ten or twelve feet north, or back of the man when he fired; he fired rather at random.

By Mr. HAWLEY.—There were militia ordered out about my place; the militia were not ordered out until after the burning of the Caroline; there were marshals there to preserve neutrality. When I spoke of provisions and other things being carried over to Navy Island, I alluded to the time both before and after the burning of the Caroline.

By the COURT.—The beef, hogs, flour, and cannon that went over, were some before the burning and some after; one cannon and flour went over before; two cannon and other things after.

By Mr. SPENCER.—One cannon went over about a week before the burning; I was on the Island then.

The ATTORNEY GENERAL protested against the prosecution of this inquiry further. It was admitted on the part of the prosecution, and was not necessary to this cause.

Judge GRIDLEY said: I understand Mr. Spencer offers the testimony as part of the transaction, and insists upon his right to do so I do not think those parts of the transaction are material. They are merely material in order to show the jury what was the character of the transactions amongst which the Caroline was burned. It now appears that there was an armed force at Chippewa, that there was a hostile force on Navy Island, and that this force was recruited by men and furnished with arms and provisions from this side, and that the Caroline was employed in transmitting them. It seems to me, that the minute details of those circumstances cannot be very material. But if Mr. Spencer desires it, I will note that he offers to prove them.

Mr. SPECENR said that he intended, in a more formal way, to present the question to the Court; he intended to show the strength and force on Navy Island; he understood that there were twenty or thirty pieces of artillery on it, and he supposed that this witness knew something about it. It was a little remarkable that so many persons should get on and off it, without knowing any thing about it. The Attorney General took wide ground in his opening, and if he expected to confine the examination to the single fact that five boats came over, he was mistaken.

Judge GRIDLEY said if Mr. Spencer desired it, he would make a note, that minute evidence was offered on this point and overruled, so that advantage could be taken of it hereafter.

Mr. SPENCER said at a future period of the trial he intended to submit some questions to the Court respecting the strength of the force on Navy Island, the batteries there, &c.

The examination was then continued.—There was a military force on the Canada shore, and cannonading from there and the Island.

J. C. Haggerty—Examined by Mr. Hawley—I reside at Buffalo, and resided there in December, 1837; I was on board the Caroline when the attack was made upon her; I was in her when the watch called us; I am a sailor; I sailed a vessel as master that year; I was only a passenger on board the Caroline; I did not pay anything nor expect any pay; it is a custom among sailor folks not to pay on any boat on which they may travel; they are then called "dead heads," but they are required to assist on a pinch; William Kennedy was on watch, and he put his head in the ladies' cabin, on deck, and said a boat was coming; we did not believe him at first, and nobody got up; he went away for about a minute and then came back, kicked at the door, with an oath, and said we had better get up, or we should be burned up very soon; two men then got up with me; I went to the starboard stern gangway, next to the river, abaft the wheel house; I saw a boat full of men—ten or twelve I should think; they were armed; one boat had a man standing up in her; she stood with her head up stream, as the steamboat did; I and the two men stood at the rail next the river, and three pistols were fired at us; one of the men fell; I do not know who he was; Mr. Leonard, one of the two men, started and went into the cabin; I started to the gangway on the larboard side to go ashore, but I met men with swords and cutlasses, and could not get ashore; they were getting out of a boat under the guard of the steamboat; and some of them were on the wharf, and some of them were on the steamboat; I went back to the ladies' cabin to get off at the fore end of the boat; when I got to the starboard side, I saw a man lie there; the men were then in the act of getting on deck; I went forward, and when I got on the forecastle, I heard pistols fired and clashing of swords; I imagined the parties were fighting themselves, and I got a chance to go ashore through the main building of the warehouse; I saw Durfee three quarters of an hour after; he lay on his face when I first saw him; the boats then had gone; I had not been asleep when the attack was made; I had not been aboard more than half an hour; I had been to the Falls, and could get no lodgings; there were five others with me; we went on board the boat to sleep, and lay on mattresses; I had a pocket pistol which was not loaded; I saw no other arms; I heard no firearms discharged from on board, before I went to the gangway; I think there could not have been any pistols discharged without my hearing them; I don't know that I heard more than one man speak before I left the boat; as I passed the dead or fallen man, I heard one man say, "give it 'em, God d——n 'em." When I got ashore I heard them cursing among themselves.

Cross-examined by Mr. SPENCER—There was a light which hung in the gangway that led from the ladies' to the gentlemen's cabin. I broke the lamp with a bolt. Somebody cried "put out the lights." There was a light forward, and also in the cabin. That light was on

the for'castle, and I believe it was put out too. The ladies'cabin was on deck: the gentlemen's cabin was below. I got ashore as soon as I could. The boats had not got fast to the steamboat. I saw five of them. Durfee lay ten or twelve feet from the edge of the wharf; his head was farther off. I did not help to get the boat out at Buffalo. There was another boat came down after the *Caroline* was destroyed; she was called the *Barcelona*.

Henry Emmons—examined by Mr. JENKINS—I lived at Schlosser, when the Caroline was destroyed; I was awoke by a noise in the house, and an alarm that the boat was attacked. I got down into the road leading to the Falls. I heard a loud noise: there was hallooing, and guns were fired. I could not hear what was said so as to understand it. I remained there till the boat was got loose and set fire to; she was towed off fifteen or twenty rods from the wharf, and ten rods down the stream. They left her, gave three cheers, and rowed up towards the wharf. We thought they were coming to burn the warehouse, but they did not. When they had gone, we went down with a light, and found Durfee. He was eight or ten feet from the boat, in a direction from the gangway, on the railroad which runs to the edge of the wharf. I saw his cap; it is called a Canadian cap. It is of a dark color. There was not a great deal of blood there. There was one gun fired from the road. I was two or three rods from where the man stood who fired. He fired in the direction of the steamboat Caroline. The man was thirty or forty rods from the warehouse. The shot could not have gone within seven or eight rods of the warehouse. I saw no arms there more than his gun.

Cross-examined by Mr. SPENCER.—There was a Captain Lawton, who formerly run a steamboat, who had two pistols. I was looking at the Caroline; and the man who fired went two or three rods from me. The steamboat was then burning. I was looking at the man with the gun; there was a remark made, that if we had arms we could kill some of them without much danger. That attracted my attention to the man who fired.

John Hatter,—(examined by Mr. HAWLEY)—I live in Niagara County. I was at Mr. Field's, at Schlosser, on the night the Caroline was destroyed. The gun was loaded with powder merely, and was fired to alarm the company that boarded the Caroline. I did not fire it. I think there was no other gun fired from the house.

By the ATTORNEY GENERAL—I was on board the Caroline that night, and did not notice that she was armed. I was aboard about 11 o'clock at night.

Cross-examined by Mr. SPENCER.—I lived at that time at Lockport; I happened to be at Schlosser; out of curiosity mostly; were many there at that time; I had not been to bed; I had been to the Falls with some gentlemen who requested me to walk down with them; we returned about eleven o'clock; the distance from Field's is about three miles; I had no particular business there, and went to Field's to get lodging; there was no chance to get any there, and I went to the boat, but the berths were full, and I returned to Field's; the gun was loaded in the kitchen; a man brought it from another room, and Mrs. Field brought the powder; I stood about five feet from the man who

loaded it; I might have drank some that night; it is very natural for a man to drink a little, but I was sober; I think I stated the next day, that the gun was only loaded with powder; the man who fired the gun loaded it; but I cannot tell who he was; I stated it to several persons at the Falls, that the gun was only loaded with powder, and I stated it to-day to Mr. Emmons; I saw the gun fired; it was fired about four rods from Field's house towards the warehouse; I have stated all I know about it, and I cannot say whether it would not have answered the same purpose, if it had been fired at the house, if it were loaded only with powder.

By the COURT.— The steamboat, when the gun was fired, was cast off and going down stream; but I can't say which way the row boats were going. The Caroline was moving down the river. The object of firing was to prevent the party from coming to the house.

Cross-examined.—Mr. Emmons did not tell me to come forward and swear to the fact about the gun. I told it to him about two hours ago down by the canal.

Direct resumed.—I was subpœnaed as a witness, at my residence in Niagara County, a week ago last Tuesday. I was called on to tell what I knew, I suppose. I was subpœnaed by Allen Buck, sent down by the District Attorney.

I don't know that they told me or talked to me about what I could swear. Nothing was said to me about the loading of the gun, or about testifying as to that point.

Joshua A. Smith—examined by Mr. HAWLEY. I reside in Buffalo, and did in December, 1837; I follow steamboating and engineering; I was on board the Caroline at the commencement of the attack; I was in the ladies' cabin when the alarm was given; I had not been asleep; I had just laid down on a row of mattresses, and the alarm was, a boat or boats are coming; I thought it was a false alarm to get us out of our berths that others might get them; in about a minute after, they came again in a good deal of alarm, and said there were boats coming filled with armed men; we then got out; I went to the starboard gangway and looked over; there was considerable of a rumpus; I went aft and saw people getting on board from a small boat, on the river side there was a gun fired, and some one fell by my side, who apparently came from forward aft; I thought he fell from a shot; I was somewhat frightened at the time; I went across the boat and went aft not very slow; I was not armed, nor were any of the men to my knowledge; I think there were no fire-arms discharged until after the alarm, and then I think there was one; when I went aft I did not see one of the assailants' boats under the guard of the steamboat.

Cross-examined by Mr. SPENCER—I went on board the boat at Black Rock dam the morning before; I had not been down before, that winter, to my recollection; I do not know whether the person who fell was one of the assailants or of the persons on board; there was a good deal of clashing.

By Mr. HAWLEY—I was one of the "dead heads" on that occasion.

James H. King—examined by the Attorney General—In December, 1837, I resided in Buffalo; I was the mate of the Caroline steam-

boat; I was on board on the 29th December, 1837; I remember the attack made on her that nigh; I retired to the ladies' cabin about 8 o'clock, and was asleep when the alarm was given; I was awoke by the firing of guns and a noise on deck; I got up, put on my boots and hat, threw my overcoat on my arm and went out, but armed men shoved me back to the back part of the cabin, where they made me lie down on the mattresses, and they beat me and stamped upon me; they beat me with swords and cut and mangled me a good deal; they asked me where I came from, and a good deal; they cut my arm as I "fended" off the blow with it; there were five or six struck me; the place was not high enough for them to use their swords much, and my coat saved my arm some; there was noise and confusion and low talking; as I was lying on the mattresses, after I was wounded, one man came in and said, "Roll over, you damned yankee son of a bitch, and give me these mattresses;" I rolled over and he threw the mattresses through the window; they took a large corn basket, set the lamp in it, and put the cross bars from the window upon it, and set fire to them, which drove us out. As I lay there one said, "What shall we do with this man—kill him?" "No," said the other, "take him prisoner;" a man then came in who was an officer and said, "Oh, we want no prisoners; he's pretty nearly dead, let him go ashore"—I was then very weak; I made towards the sentry, but he would not let me pass; I spoke again to the officer, and told him the sentry would not let me pass, and he sent a man to pass me; I did not get a very good sight of that officer; I do not know that I could recognize him; I have not seen any man that I supposed might be that man since; I went ashore; I staggered along the railroad track and my friends met me—Mr. Wells, I believe, was one—and they took me into the house; I had a serious wound on the left arm and other very serious cuts; I was not aware of arms being on board that night, nor armed men.

Cross-examined by Mr. SPENCER.—I was in the ladies' cabin; there was a light burning in it all that time; all the others escaped when I was in the cabin, as I have mentioned; I do not know that the basket was the only fire made on board; all mattresses and the bedding were thrown out of the cabin window; I should think there were twenty of the attacking party in the ladies' cabin; I went on shore; the boat then had moved from her moorings; I did not see any one go ashore after me; there was a little boy in the cabin, and I have the impression he was there when I left; he was 12 or 14 years of age; I helped to get the boat out of Buffalo Creek.

By the ATTORNEY GENERAL—I was not acquainted with the prisoner at the bar previous to that time.

It was now 1 o'clock, and the Court took a recess for dinner; the jurors, the prisoner, the bar and the reporters, the Court and the audience, retired in the usual order, one class retaining their seats until the other had retired.

AFTERNOON SESSION.

At 2 o'clock, Judge GRIDLEY again took his seat on the bench, and the trial proceeded.

Gilman Appleby, examined by Mr. WOODS.—I reside in Buffalo,

and have lived there more than six years. I was on board of the Caroline when she was attacked. I took charge of her at the request of the owner, Mr. Wells. I went to bed on board of her that night; I was awoke about 15 or 20 minutes after 12; I was alarmed by one of the watch; he came to the companion way, and said there were armed boats approaching. I was in a berth in the lower or gentlemen's cabin. I got up as soon as I could; I got my boots on and my vest; I had my pantaloons on; I went to the companion way with my coat on my arm; the companion way is a very narrow passage; one side, next to the engine, was not sealed up; the stairs are winding and very narrow; I attempted to ascend the stairs; Captain Harding, was ahead of me, and perhaps some others; a scuffle took place between him and some one on deck, and the door was closed, perhaps by the scuffling, and shut me in; I remained on the stairs two or three minutes, and heard such expressions as "show the damned Yankees," or "the damned Yankee rebels no quarter." There was firing and scuffling; it was one general noise and confusion. I again got to the door and had got it open about a foot; a man sprang at it and said "down," and the door was shut in a twinkling; he struck at me with a sword which cut my vest; it went down to my pantaloons and struck a metallic button which turned the sword off. I sallied back and went below; there were a number behind me; I had the lights in the cabin blown out, for I expected they would come to search for us when they had done all they wanted to on deck. I recollected that I could get through the engine to the deck, and I crept through to the upper or promenade deck. There was no one on the upper deck, but there was considerable noise on the main deck. I got from the deck to the warehouse. I hung on to it some minutes. When there, I heard one say, "God damn them, what has become of the six-pounder that was there before night." In a very few minutes I heard some one say from near the warehouse door, "Bring a light, God damn them, we may find some of the damned Yankees here." There was no floor nor any thing but sleepers; as they searched there, I thought that I was discovered, and I jumped from where I stood into the water. I went down and was rather strangled; as I came up some one struck me on the back. I got under the pier, and afterwards crept out and made the best of my way to the tavern; I thought at the time that I was struck with an oar or a boarding pike; saw the man who gave me the blow with the sword; there was a globe lamp hung at the head of the companion way; it hung just so a man could clear it as he got up; I then supposed that man to be the prisoner, Alexander McLeod; I had had an introduction to him at the Eagle tavern in Buffalo a week or ten days before; I thought then I knew him; I was examined the day after this transaction at Schlosser before a magistrate; my attention was called to this subject the next day, and I told every one, I supposed it to be Mr. McLeod, but it was done very quick, and I might possibly have been mistaken about it; I went to Field's tavern; I afterwards saw Durfee lying on his face, dead; I saw where he was wounded; the ball passed through his head from behind, and came out in front; the brains were blown out; there were blood and brains

where he lay; I did not go down there again that night; I believe there were ten of the crew, and twenty-three others on board the Caroline that night; none of them were armed; I heard the report of a gun immediately after the alarm was given, and before I got out. Before I got out I heard the report of other guns; some five or six I should think, but there was a great noise. There was a boy on board called "Little Billy." He had been with me on the *Constitution* on the lake, as a kind of second porter; he was twelve or fourteen years of age, I have never seen or heard of him since.

Cross-examined by Mr. SPENCER.—We lay at Navy Island when I last saw the boy. There was another boy on board of the name of Luke Walker; he was on board when we lay up for the night. It was said he was taken to Canada. I have seen him since. Mr. Wells spoke to me about running the boat. I was to run from Buffalo to Schlosser. I volunteered to go until the next morning, if he could get nobody else, and I could return by railroad. I had had enough of it in the summer. We did not take much from Buffalo or Schlosser. When I went below there was a bull's eye lamp in front of the ladies' cabin, in the passage way, and one forward. The one in front of the ladies' cabin was a globe or signal lamp. It hangs overhead above the companion way to the gentlemen's cabin. I pushed the door open about a foot; outside the door there was not much light; I had not discovered anybody before I opened the door; it was jerked open quick, and at the same instant the sword was thrust at me. I shrunk back pretty quick, and got into the cabin as soon as I could. The transaction was done in a twinkling; I did not mark the features of the man at that time; it was only a supposition of mine. I do not now say it was McLeod.

Samuel Drown, examined by Mr. WOODS.—I reside at Canandaigua, Ontario county. I have resided in Canada. I resided at Chippewa in December, 1837. I recollect the time the Caroline was destroyed; I was attending bar for Mr. Philo S. Smith. I know Mr. McLeod; I knew him in December, 1837, and then had known him three years. I lived one year in St. Catherine's and two years in Chippewa. McLeod then lived at Niagara, distant about twelve miles. I saw him sometimes once a week—sometimes once a month. He was deputy sheriff of that district, and I have seen him attending courts. I saw him when I resided at Chippewa; I attended two or three courts, and I saw him at Queenston; I saw McLeod at Chippewa on the evening that the Caroline was destroyed; I saw him once—it was after the Caroline was burned—and where the rails were burning; they have a canal cut from the Niagara river to the Chippewa creek; it is called "the cut," and it is about forty rods long; the Niagara river empties into the cut; there were many rails burning there; I should think, judging from the fences afterwards, there were over a thousand rails burned there that night; I went there from curiosity; Platt Smith was with me; there were people there keeping up the fires; I saw two or three of the boats come into the cut from towards Schlosser; they went up Chippewa creek and I followed them; there is a tow path between the road and the canal; there is a highway there; from the centre of the road to the Chippewa creek

it may be two or three rods; there is a road running along the Niagara river, and when it gets to where the creek empties itself, it runs up to the village; it diverges from the cut; the boats landed just below the steam mill on the Chippewa creek; three boats landed there; when the men disembarked I was near to them; there were ten or twelve in a boat; I should say McLeod was one of them; I was eight or ten feet from the boat; I saw them all get out of the boat; Mr. Smith was with me when I came up the canal; I said I would go and see who was in those boats, and I ran to the spot; the men who came from the boats went to Mr. Davis's Tavern, which was distant ten or twelve rods; they were talking about the Caroline; there were other persons who came to the boats, but I asked no questions; when they got to Davis's Tavern, some said, "Let's go in and take something to drink;" there was light in the house and the door was opened two or three times; the man was there that I call McLeod, and I don't think I'm mistaken about it; I was within eight or ten feet of him when they made a halt at Davis's Tavern; he stood about ten feet from the stoop; persons talked with him; there was a good deal said, and many questions asked; I am as sure that it was McLeod as I am that he is now sitting before me; he then went into Davis's; some of them said "our bar-tender is here," (meaning me,) we will go over to Smith's;" five of them went with me; between daylight and sunrise the next morning, some one came in and said McLeod was standing on the steps at Davis's Tavern. The man that said McLeod was on the steps, said McLeod was wounded last night at the burning of the Caroline. I said he was mistaken, for I saw him last night and he was not wounded.

Question by the Court.—Who mentioned to you that McLeod was wounded?

Witness.—Peter Smith. I think it was Peter Smith that spoke to me about McLeod being wounded; it was spoken of by several. I went over to see if McLeod had his arm slung up, but did not see him. I asked Davis's bar-tender if McLeod was there, and he said he was somewhere about. When I looked out, McLeod stood on Davis's stoop, near the hall door; that might have been four or five rods from where I stood. McLeod had a belt round him, and a sword at his side, when he got from the boat.

Cross-examined by Mr. Spencer.—I am about 47 years of age. I went from Canandaigua to go to Canada. I left there the 1st September, eight years ago. I left to go there to make money. I did not run away. I did not go away for debt, or anything dishonest. I returned to Canandaigua in April, 1838; I am a farmer; I know Mr. David C. Bates and Mr. Phineas Bates; I went into the baking business at St. Catherine's: from there I went to Chippewa; I built me a house there, and some part of the time I was in the lumbering business, and some part of the time I was carrying passengers from the steamboats; I only stayed with Smith in the bar six weeks; I commenced there at the time they began on the Island; Platt Smith returned with me that night, and a couple of sailors that I did not know, and Captain Miller also, I believe; we started together from the front of Davis's; the sailors were of the party that came from

the boats ; I asked them their names, but they gave me no other answer than that Col. Clark would pay their board ; they boarded there two or three days before and one day after the affair of the Caroline : the sailors had belts and boarding pikes ; I saw them down at the boats ; I knew them : in front of Davis's they asked me if I was going home ; the first day they came there they gave me their pistols, cutlasses and blankets ; they were there two nights before the affair of the Caroline ; they wore their cutlasses in their belts ; they had their blankets rolled up ; they called for their cutlasses and pistols the evening they came, after supper ; they took them and walked out ; I saw them again the next morning. Mr. Platt Smith laid them away for them the next morning in the same place where I had put them the day before. They remained till evening again. The sailors then called for the arms, but not for the blankets. The sailors lay up stairs part of the day ; I saw them at their meals. The night the Caroline was burned they took their arms again, and said " we'll take something to drink, we shall never see you again." The fire where the rails were burned was a little above the head of the cut. I thought there were but two boats at first, for they went pretty quick, but when I came up, I saw there were three. It was as late as 3 o'clock when they landed. I was not absent above three-quarters of an hour from Smith's. I was absent to see the boat burn ; I was not in bed for six weeks. It was a busy time, and I slept on the counter. I went up to where the big light was to see the Caroline burn. I could see it from the house, but there was not so good a view there.—Some thought they saw men on the boat, but I did not ; I thought they were trees that intercepted our view : I only knew Mr. McLeod and the two sailors that landed from those boats ; it was a cloudy night ; I should think there was a moon, but I did not see it shine ; it was a dark night, but I think I should know a man ten feet off ; I did not speak to the sailors ; I did not think it was my business to meddle with other people's business ; they spoke to me first ; I don't recollect seeing any other light than that at Davis's tavern ; I went up within twelve or fifteen feet of the stoop ; McLeod stood on the stoop ; his side face was towards me ; folks were talking with him ; McLeod was asked the question, how many were on board the Caroline ; he said there were a good many ; he was asked if any of his own party were hurt, and he said there was only one armed man on the Caroline, and he stood sentry ; I don't know how many lights there were in the bar ; McLeod stood between me and the light ; I cannot tell whether there was a light outside Davis's bar or not ; there was a lamp hung out there sometimes on dark nights ; I knew McLeod by his voice and also by the light. The light by which I saw McLeod was inside the tavern. I cannot say whether it was a lamp, a candle, or a fire-light. I only saw a light shine through the window, and I stood ten or twelve feet from him. I cannot say how the prosecutor knew that I knew this. I was subpœnaed last winter to go to Lockport. I don't know but I told this story to Mr. David C. Bates. I don't know that I ever told it to Mr. Wheeler, postmaster of Canandaigua. Many people have asked me questions about it. When I

was lumbering, I was sometimes with Mr. Walker, and sometimes with Platt Smith. After I went home with the sailors that night, I laid up their arms. I saw the sailors again the next day. They told me they were going to board on a schooner. They called for their blankets, and said they were going on a schooner. I saw one after and asked him where he "put up," and he said "on the schooner." I never held any conversation with McLeod. I had seen him at the court room, and at Niagara, and St. Catherine's, and Chippewa; I have "passed the time of day" with him, but never held any conversation with him; I thought I knew McLeod's voice and his face also; I am satisfied that I know him. I knew an expedition was got up one night to go round the island. I was not accustomed to run about that time of night, but I then suspected they were going on the island; I knew nothing of the burning of the Caroline until I saw her on fire going down the river; I did not know that the expedition was for that purpose until they landed from the boat; I heard in the evening that there was an expedition on foot; the sailors asked me if they could get in in the night, if they came back. I told them they would find me up; I ran down to see who were in the boats, that I might see if the sailors were there, that I might go home and let them in. I saw the sailors there, but I did not speak to them. I did not know anybody there, until they got out of the boats. They stayed to pick up their implements at the boats about two minutes, and about three minutes at Davis's.

Isaac P. Corson, examined by Mr. WOODS.—I reside at Niagara Falls. I have been there about three years—since September, 1838; I am a builder; I lived in Chippewa from 1833 to 1837–8; I was a master builder there; I remember the time the Caroline was destroyed; I saw a light, but I am not certain that I saw her; my house was about a quarter of a mile from Chippewa; I was in the village that afternoon and evening; I know Alexander McLeod; I knew him in 1833, and from that time on; I saw him the day previous to the destruction of the Caroline at Mr. Macklem's store that afternoon about 3 or 4 o'clock; I also saw him at Davis's; he was in the back part of the store; Capt. Drew, Mozier and Usher, and others, were with him; I thought they were taking liquor; glasses were spread around; I remained but a minute or so; the man who kept the store wished me to retire—they had some private business; his name was Call, I think; I saw McLeod again about 9 o'clock in the evening at Davis's tavern; he came out at the bar-room door as I went in; I did not see that he was armed; a man went out behind him, but whether in company or not I cannot say; I saw him again the next morning, between daylight and sunrise, at the stoop of Davis's Steamboat Hotel; there was a crowd around him; he was telling some of his exploits on board the Caroline, and what the performance had been. He was saying he guessed they would not want to see him there again; he had killed one damned Yankee or two. There were many around, and I was listening to one or another bragging of what they had done in the expedition with him. None of them disputed McLeod or said he lied. I might have seen him that day

again ; I saw him a day or two after that, coming up from the north side of the Creek to Kirkpatrick's ; he had a spy glass ; he had been looking over at Schlosser ; there was a gathering there ; he talked of the gathering at Schlosser, and said the Yankees were a set of cheats, robbers, and thieves, and he should like to be on such another expedition as the Caroline, and cut out and burn Buffalo.

Cross-examined by Mr. SPENCER.—I saw McLeod when he was taken up at Niagara Falls ; it was last fall, but I cannot say what month ; I think it was December ; he was taken up for this murder ; I understood there was an examination, but I was not present ; I was there in the evening, at the Eagle Hotel, when he was there ; I was told Squire Bradner issued the process ; he was sent to Lockport then, as I was told ; I do not know whether he was discharged by Squire Bradner or committed, but I was told he was sent for to Lockport ; when I came up there I was told he was under a warrant, was to be examined the next morning ; I did not appear against him as a witness, nor did I tell anybody that night what I knew about this matter ; I appeared before the grand jury against him, at Lockport, after that, three or four months after ; I don't think he was discharged before Squire Bradner ; I heard that McLeod had a hearing on Habeas Corpus there, and was discharged and went home ; I appeared against him before the grand jury in February ; I was at the Falls when he was arrested at Lewiston ; he was there under arrest three or four, perhaps five days ; I did not go down ; I was not subpœnaed ; I did not tell anybody what I knew ; I did not want to have any trouble about it ; I did not tell anybody until I was taken to Court, no more than what I had told on the other side the river before I moved over ; I moved in September, 1838 ; I had told there, what he had said about the Caroline ; I recollect his being examined before Squire Bell ; it was the same fall that he was discharged under Habeas Corpus ; I heard of his examination before Judge Bowen ; I did not attend either examination ; I kept it to myself on this side ; the Captain Usher that I saw was the Captain Usher that was murdered at his own door ; I only knew Capt. Drew and Capt. Mozier by sight ; it was the 28th or 29th of December that I saw them ; I only knew it was that time from the almanacks ; I was doing a heavy business, and I kept my books, and put down the date usually at the foot of my bills ; I was engaged three or four weeks making out my bills, off and on ; I am well convinced it was the latter end of December that I saw them at Macklem's ; it was on the day previous to the destruction of the Caroline I saw the fire on the opposite shore ; I lived in the village of Chippewa ; I was in at Macklem's frequently ; I have seen McLeod at Davis's frequently ; I saw him there at 9 o'clock that night ; I had heard a whisper about 2 or 3 o'clock that day, that the troops or volunteers that they were getting up, were going round the Island or to cut out the Caroline that night ; I don't know that McLeod was one of the troops, but he was among them some times. I did not know one in a hundred that came out of Davis's that day, nor do I know in particular why I noticed McLeod then. I did not speak to him ; he went towards Macklem's store, and he went off towards the cut. It was as late as 9 o'clock. The next morning I was within four or five

feet of him. I did not speak with him. There were a great many flocking round him. The people that were round him were principally strangers. I think Mr. William Caswell was there, but I am not certain. Mr. Caswell is here as a witness. It first struck me this moment that Caswell was there. We have talked some little about it. Caswell told me he was subpœnaed as a witness; I think we have talked about seeing McLeod that morning.

By the COURT.—I cannot say which spoke of seeing McLeod that morning first; I think I did; I think he said he saw McLeod the next morning after the burning of the Caroline.

By Mr. SPENCER.—I think Caswell told me McLeod bragged about being on the boat. We did not fix what he said and the time together.

The ATTORNEY GENERAL objected to the witness being asked what another witness had said.

Judge GRIDLEY thought it was proper; the witness had said that it never occurred to him till this moment that Caswell was there, and he also said that Caswell and he had talked on the subject before, and that Caswell told him he was there. The examination was proper to ascertain whether the witness was mistaken or alluded to some other time.

By Mr. SPENCER.—Caswell resides in Buffalo.

By Mr. WOODS.—Chippewa was filled with troops and other people; there were 2,000 there; many were quartered at Davis's.

By the Attorney General.—Recently, after the affair, I told several at Chippewa what I had heard and seen.

By Mr. SPENCER.—I told Mr. Frederick Smith and John C. Davis, who keeps the hotel. Mr. Davis is here as a witness.

It being now 6 o'clock, the Court adjourned until 15 minutes to 8 o'clock to-morrow morning, and the Jurors and others retired with their usual order and regularity. The prisoner was re-conveyed to Bagg's hotel, where he was kept in the custody of the Sheriff. The prisoner sat throughout the day with his counsel, much at his ease, notwithstanding the strong testimony of some of the witnesses against him.

THE THIRD DAY.

Judge GRIDLEY took his seat this morning at 15 minutes to 8 o'clock, at which time there were but a few officers, lawyers and reporters, and not a single spectator present. The prisoner was brought in soon afterwards; the jury were a few minutes later, and then about a dozen witnesses and idlers took possession of the spectator's seat.

Charles Parke was the first witness called—Examined by Mr. WOODS.—I reside in the Niagara District in Canada; I am a native of Canada; I was raised on Chippewa Creek; I was there when the Caroline was destroyed; I was attending bar for Mr. Davis; I was there rising three months, commencing about the 10th or 15th of December, on the day on which they first discovered people on the Island; I have known Mr. McLeod the greatest portion of the time;

he has held the office of Deputy Sheriff of the Niagara District. I saw him at Chippewa in the afternoon of the day previous to the night on which the Caroline was destroyed; I saw him pretty much that day, and almost every day for that matter; I saw him that day; he went to bed at Mr. Davis's pretty early—before dark; I saw him again after dark; a gentleman came and asked for McLeod, and he was shown where he was; Mr. McLeod got up; it was between eight and ten o'clock; he came down into the bar-room, and I think he said to Mr. Davis, if his brother should come to say he had gone to Niagara; I saw him after he left the house that night, between Mr. Davis's and Chippewa Cut; it was perhaps three-quarters of an hour after; there were a good many people along the road; whether you could consider them in his company or not I cannot say; he went to some boats tied up at the side of the river; there were from 100 to 200 people there—100 at all events; he proceeded up the Niagara river with the boats; I think he got into one of them; he went, I should think, three-quarters of a mile up the river with the boats; they had got out of the boats again and towed the boats up the river to the point of embarkation, nearly opposite the lower end of Navy Island; the current is stiff, and they towed the boats to get them up earlier; they shoved off from shore, and steered across the river as far as I could see; I remained there an hour, and then returned to Mr. Davis's and went to bed; I left Mr. Johnson, the bar tender, with me, up; I have understood he is in Detroit; I have not seen him since the fall of '38; I saw McLeod again next morning, about sun-rise or a little after, or a little before; I saw him in the village of Chippewa, either in front of Mr. Davis's house, or in the square; there were a great many people stirring at that time; there were none very close to him; I do not recollect hearing him say anything; if I recollect right McLeod had a sword by his side; I believe I saw him again during that day; I think not a great while after, standing on Mr. Davis's platform or stoop; I don't recollect how often I saw him; I have seen him very often since that day; he was about Chippewa a good deal that winter; he was often in the officers' mess room; I think I have heard him say something about the destruction of the Caroline; it was two or three days after; I think it was in the mess room where the officers dined; Captain Stennot was one that was there, and Major Cockle of the dragoons; there were four or five of them; he said he had killed a Yankee, or something to that purport; they were conversing in reference to the Caroline; I speak with considerable certainty when I say that McLeod got into the boat opposite the lower part of Navy Island. I have no doubt of it.

Cross-examined by Mr. SPENCER. When I am at home I live now in the township of Mamfleet, seventeen or eighteen miles up the Chippewa Creek; I am farming and have a family; I cannot exactly say I own the farm; it would be a lengthy story to say how I hold it; I hold it with the other heirs of my father—my brothers and sisters; my age is twenty-nine. I attended bar for Mr. Davis something like three months and a half; it was a busy time there; there was a man named Johnson attended bar there; he was there before I came; Mr. Davis attended sometimes; the regular number that be-

longed to the officers' mess was six or eight; there was Capt. Wm. Stennot, Lieut. Caldwell, Captain Lackey, Mr. Cockle, who had some office in the Dragoons, whether Major or Captain I cannot say; I don't recollect the names of the others. There were other guests about the house. There was a great deal of business doing. I saw several persons in the square that I knew the next morning. The mess room was up stairs immediately over the bar-room; McLeod spoke boastfully there of the Caroline affair; there were several in the room; I had business there as bar tender; it was a day or two, or three, after the Caroline affair; they were all talking; I cannot say exactly what they said; they were speaking in praise of the deed, or something that purported to be that; they were all talking; I cannot tell what either one said; I was in the room five or ten minutes; I was called into the room; I never went in unless I had business, but I had business there sometimes when I was not called; I don't know whether I went there with beer or liquor, or what it was. I don't know the date on which the Caroline was burnt; the evening before I don't think I left the house; I was very seldom away unless it was to go to a store on business; I had business enough to confine me to the house; after the night on which the expedition took place it was some time before I left the house again; I think it was as much as a month; we were kept busy night and day; for aught I know the 29th Dec. was as busy a day as any other; there was no room that night; I think I left the house that night about 10 o'clock, perhaps it was later, probably 11 o'clock; I left the house that night on the invitation of a friend of mine, Peter B. Nellis, who then lived on the Grand River, who said there was to be an expedition to destroy the Caroline; I think he has removed to the Forty Mile Creek.

I saw something burning over at Schlosser; we were up the river side, I should think, a full hour; I came back alone; my friend did not wish to go back so soon, and as I had been up a good deal, and was fatigued, I went back and went to bed; perhaps it was 12 o'clock when I returned; it might be later; I saw the fire but a short time before I started to go home; I was not then where the boats started; I looked at the fire but a few minutes—perhaps three minutes—perhaps five; I got tired of being there before that; it was quite still then; there was no noise from any quarter. When I saw the fire, I only knew what it was from imagination, and from what Mr. Nellis said it was; he and I had come back together as far as the beacon light; there was another Nellis with us—Captain William Nellis; he is cousin to the other Nellis, and he now lives on the Forty Mile Creek. We three were in company; there were many others strolling along; Mr. Davis's house was perhaps 60 rods from the beacon light by the road; there were several sentinels that I had to pass on going up; I had to give them the countersign; I got it from Mr. Nellis, the man who invited me to walk up the river with him; it was "Place," if I recollect right; I think I was only hailed by the first sentinel as we went up and by none as we returned; the sentinel cried "who goes there," I said "friend;" he said "advance friend and give the countersign;" I advanced and said "Place" in a low tone; we each gave the countersign; the soldier was Robert

Miller, who had been a student under my brother at Dundas; he had studied physic or something of that sort; when I left the house that night there were very few people there; Mr. Nellis had been staying at our house two or three days at that time; there were a good many men got into the boats where they were first towed up at the mouth of the Chippewa. There were eight boats towed up the river; they were towed up by hand; there were no candles or lamps about the boats; I cannot say McLeod got into the boats at the mouth of the Chippewa. I saw three or four others that I knew of the party. I saw Captain Drew there, or a person I considered to be Captain Drew; I did not speak to any of the party; I knew a person of the name of McDonald; I believe he belonged to the Coburg Company; I was quite close to McLeod, sometimes three feet from him, sometimes our elbows might touch; I was very close to where they were getting out the boats; I did not speak to him; I think I heard him speak; it was something in reference to the men getting into the boats; I don't recollect what it was; I don't know how many got into the boats at the point of embarkation from which they left the Canada side; perhaps 60 or 70; I think there were some in the boats as they were towed up the river; I cannot tell how many composed the whole party; I was with the party, and among them as they were going up; sometimes I was a little ahead of them. There were a considerable many persons besides; I was close to them when they embarked finally; I was within four or five feet of them; I was with them and among them; I looked McLeod in the face as he went aboard; I am in the habit of looking men in the face, it is common; I had no more reason than I have ordinarily when I meet a man.

By the COURT.—The embarkation was not from one boat to another, but to each one.

By Mr. SPENCER.—The boats lay along shore; I do not recollect whether McLeod went aboard with Capt. Drew; he did not go on board with McDonald; the boats did not all leave the shore; seven only left; one remained, and I believe there was a man in it, who had it tied up; I think eight or nine went on board each boat; I think they were all about an equal number; I think Capt. Drew went on board one of the centre boats; I cannot say that I knew any one man in particular who went on board with Capt. Drew.

By the COURT.—I cannot recollect whether Capt. Drew and McLeod went on board together.

By Mr. SPENCER.—I knew what they were going for; Mr. Nellis told me; he is a militia officer; I don't know Col. McNab; he was generally understood to be commander-in-chief; he had his head quarters somewhere in the place; I had a man pointed out to me as McNab; I know Davis's tavern; that was possibly five rods distant from Smith's; I do not know that McNab had his quarters there. I have had some conversation with the counsel in this case, since I came here; it was with this gentleman (the Attorney General) and Mr. Wood.

ATTORNEY GENERAL.—I can tell the Counsel; I desired him to tell me all he knew.

Mr. SPENCER.—I don't desire the Counsel to tell me any thing.

Cross-examination continued.—I did not see any papers, but I have heard commissions were taken in Canada.

By Judge GRIDLEY.—The embarkation was much about the same time; they were two or three minutes getting ready.

By Mr. SPENCER.—I think McLeod went aboard a centre boat; I was acquainted with him; I had done business with him; I had two executions against a man, and I wished his goods to be levied on, and I called upon McLeod as Deputy Sheriff, on the subject; on another occasion I went with Mr. Ford to settle some Sheriff's fees; that was in the fall of 1836; I went to be a witness to the transaction; that was at Niagara; I lived on Grand River at that time; that is seventy miles from Niagara; I went from my mother's down to witness that transaction at that time, a distance of 28 or 30 miles; I don't recollect the sum; Ford is my brother-in-law; he was in the lumbering business; Ford paid my expenses; indeed I was in their employ at that time; he lived at Grand River too. I think Mr. McLeod carried arms at times; I have seen him wear arms in his official capacity; I saw him once at the Falls, wearing a sword; Sheriffs sometimes wear swords there; they wear them when going on some dangerous expedition.

By the COURT.—The High Sheriff wears a sword in Court sometimes.

By Mr. SPENCER.—The guard I spoke to was up the Chippewa Creek; after I had passed young Miller I think I saw other guards; they were militia; I don't recollect that I was challenged by any others; I do not know that there was a guard-house there, with colored guards; I saw McLeod the next morning about sunrise; I went to bed, leaving the boat burning, and did not get up till morning; I crossed a bridge near Davis's tavern as I went; Miller, the guard, stood there; I cannot tell when I first mentioned what I knew of this matter; I told many I was on business at Buffalo, and was there subpœnaed by a man of the name of Pierce, I think; it was last Monday week; I had been spoken to before about coming here.

The ATTORNEY GENERAL objected to this examination, and to the names of persons being mentioned who might be prejudiced in Canada, when the disclosure was not material to the case.

Judge GRIDLEY thought the means and agency by which he was brought here was admissible. By such examinations it sometimes turned out that witnesses had been bribed.

Examination continued—I was spoken to last winter; they wished me to go across the river that I might be caught or subpœnaed against McLeod; I think the persons were not engaged in the patriot matter; they are religiously bound against taking up arms; they are "Reformers;" one said, if he was in my place he would go over, and he asked me why I would not go over; I was spoken to a week before I went across, to know if I would not go to Buffalo; I told them that I would not. This conversation took place at the mouth of the Chippewa; I was then on my way to Buffalo; I had come from home; I was not spoken to some few days before I came; I was spoken to a month or two months before I came, by different

persons than those who spoke to me last winter; they asked me if I was going, and why I would not go; I told them I would have nothing to do with it. When I left home this time to go to Buffalo, I did not expect to come to this trial; I came to buy books for a library, a stove, a pump, and a plough; I did none of that business; I was taken early after sunrise; he knew I was there in this way; he said he was in Chippewa when I drove through, and he knew me; and I suppose it was known that I was going; we had held a committee about buying books two or three weeks before, and I told them I had business in Buffalo, and would do the business for them if no one else went first; a few days before I started I gave them notice, that they might have the money ready; Pierce crossed from Chippewa to the Falls; I charged him with having an emissary on the Canada side, for the purpose of giving him information; and he said his emissary was himself; my brother took my team home, I expect; I was hurried off to this place immediately after breakfast; I said I would rather pay the penalty mentioned in the subpœna ($50) than go; but I was told it must be left with Mr. Hawley; Mr. Hawley came and said I could prove some important facts, and if I would not go, he would detain me on that subpœna, and set himself to work to arrange means to force me to go; he had some name for it that I do not recollect; I was ignorant of the power he had; when I left home I understood the trial was to come on, but I thought a week before.

By the ATTORNEY GENERAL.—I came to Chippewa and returned home again; my reason was, that I was asked by a man whether I was going to Buffalo; he was a man who had asked me some time before to go; I returned home, and stayed a week from fear of being taken as a witness; when I had the interview with the counsel which has been alluded to, I had not any evidence read to me, nor was I prompted in any way; I was asked, on the night of the expedition, to join it, and enter the remaining boat which they had not men enough to man, but I declined.

By Mr. SPENCER—Who was the man that asked you to come to Buffalo?

The witness hesitated.

The ATTORNEY GENERAL objected to the question.

Judge GRIDLEY said if Counsel insisted upon it the Court had no discretion.

Mr. SPENCER waived the question.

The cross-examination continued—When I turned home, as I have mentioned, I did so because I was afraid of being taken; I understood they took witnesses under warrants sometimes; I am ignorant of the laws of this State.

Henry Meyers—Examined by the ATTORNEY GENERAL.—I reside about 4 miles this side Canandaigua; I work on a farm; I have a family; I am a blacksmith by trade; I have resided in Canada; I am a citizen of the United States born. I went to Canada 7 years ago, and left there 8 or 10 days after the Caroline was burned; I have seen McLeod twice before; I saw him once when I came from Canada to Geneva, to see my friends at St. David's; and I saw him

when I was moving out of Canada, at Niagara in Canada; it was about a year before I left Canada that I saw him at St. David's; when I saw him at Niagara I had stopped with my horses to "bait" them; it was cold, and I went into the bar to warm myself. There were 50 or 60 persons there, some of whom had weapons, and some had not; when I was in the tavern, there was a conversation as to who had shot Durfee; somebody spoke and said, "where is the man?" McLeod spoke and said, "here he is; by God I'm the one;' Then he pulled out a horseman's pistol, and said "that's the pistol that shot him;" he then put up his pistol, and pulled out his sword, and said, "there's the blood of a damned Yankee;" there was blood on the sword about five or six inches long; it was dried on; I then went out of doors to the shed to feed my horses with oats, and he and two or three others followed me out; they asked me where I was moving to; I said to Geneva; they asked me why, and I said my friends all lived there, and my wife was not satisfied with Canada. Some of the company said I was a damned rebel, and McLeod said I was a damned Yankee, and should go no further; they were under the shed some time talking, and at last McLeod said if I had a mind to treat the company I might go on; I did so. I said I had nothing against either party; we went into the bar and drank till it amounted to a dollar, which I paid, and was then allowed to go; I have not, neither before nor since, heard McLeod say any thing about it, nor do I know any thing about the Caroline.

Cross-examined by Mr. SPENCER.—I did live about 6 miles from Geneva; I now live 13 miles from Geneva. I left Canada on account of the troubles; my wife was not content there, and my friends kept writing to me to come back. I lived one year at Long Point, in the London District, in Canada. I then moved to Victoria and set up shop; that was four miles from the Furnace, where I lived a year; I then went to live at Round Plains, about six miles from Simcoe; I lived there two years and set up shop; and from thence I moved to this country; Round Plains is eighty or one hundred miles from Niagara; I first saw McLeod at St. David's, about a year before, at a place where I stayed all night. I believe he stayed there all night; he was there during the evening before I went to bed. I did not know him before; but I heard his name mentioned that night; I never saw him after until I saw him at Niagara; the conversation there about the man who shot Durfee took place in the bar-room; there were twenty or thirty in the bar-room at the time; I told of the circumstances and the conversation there, at Canandaigua; I cannot mention the names of the persons I told it to; it was talked of pretty much every day there; I was asked by Dr. Woodruff and others if I knew any thing about the Caroline; I don't remember whether I told him the story; I live now at the third place since I came from Canada; lived at Phelps; I talked of these things there; my neighbors asked me some questions about it, and I told the same story I have told here; I talked to—Sherman, and I believe he wrote to Lockport about it; I was subpœnaed last week to go to Lockport by Sherman; I don't know that he is one of the patriots there; I did not go to Lockport. I got a letter to say I need not go to Lockport.

I was subpœnaed to come here two weeks ago last Monday; I was paid nothing for coming, but I was told I should be paid, and that some means would be provided for me here; Niagara was not my nearest way to this State; I was told I should not be allowed to cross at Black Rock; I got a "pass" at Queenston; it was at Niagara Falls that I saw McLeod on the north side of the road; I saw several soldiers before I came to that house, at various places; I came in sight of the Niagara River two or three miles before I came to the Falls; I arrived at the Falls about 1 or 2 o'clock; I left Smithsville that morning a little before sunrise; I came from Smithsville to the Falls, because I was told there was better sleighing that way; I am 32 years of age; I heard McLeod called by name at Niagara, I do not know by whom; I knew him by sight, and was pretty sure he was the man I had seen at St. David's; I heard his name called under the shed; he was called "Alexander," and then somebody called him "Sandy McLeod;" the man who spoke to him and called him "Alexander," said, "Alexander McLeod, is it best to let him go or not?" McLeod said, "If he'll treat he may go." I said I had nothing to do with the party, but as to treating I would say nothing about it; then one of them said, "Sandy McLeod, let's go in and take something." I did not know what "Sandy" meant; I had never heard it before; some of them took rum, some whiskey, and some brandy; I took nothing; at St. David's I heard him called "McLeod;" there were several drinking there; my wife and one child were then with me; the pistol appeared to me to be a horseman's pistol; he had it under his coat in a belt; I believe the sword was not very wide; he wore it hanging to his side; there were other men there with swords, and I think one man had a pistol in a belt.

By the ATTORNEY GENERAL—I had never travelled from Smithville before; the country is not thickly settled as in this country, and I took directions from others; the person that I saw there was the prisoner; I have no doubt of it; I took particular notice of him, for, as he used me in that way, I thought if ever I caught him on this side, I would try and use him in the same way.

Calvin Wilson—Examined by the Attorney General.—I live in the town of Wilson, in the county of Niagara; I have seen the prisoner at the bar, and am somewhat acquainted with him; I was in Canada in 1838; I owned and kept the ferry from Youngstown to the town of Niagara—it is the lowest ferry on the Niagara river; I saw the prisoner somewhere between the 4th and 15th January, 1838, at the house of James Miller, a public house in the village of Niagara; there was quite a number of people with him; I knew a young man of the name of Raincock, who was with him; I saw Mr. Miller passing in and out; I think John Mozier was there; I suppose I saw a young man named Meredith that I wanted to see, and a man called Elmsley; they were in a sitting-room in the public house. Mr. Raincock brought up the subject of the destruction of the Caroline, and how many were killed, murdered, or burnt; this Mr. McLeod then replied, he did not think there were more than three or four; he did not know but there might be five. One thing, he said, he

did know, that one "damned Yankee" or "damned rebel," got shot on the wharf; Mozier did not say any thing, if it was Mozier; I don't recollect Elmsley saying anything; I believe I am sure the prisoner said very near the words I have given; I have no doubt the prisoner is the man.

Cross-examined by Mr. SPENCER—Raincock had formerly been a custom-house collector at the Canada side; I understood Mr. Meredith had assumed the station of Mr. Raincock, whom I had known a year and a half; the last time I saw him was a few days after that; I recollect the time, because, for above a week, we were prohibited from landing; the prohibition commenced on the 6th; I had never spoken to McLeod, but I had seen him frequently, and knew him very well; I am just as sure that I saw him there as I am that I saw Raincock; and as sure of Raincock as of McLeod; I am sure they were both there; I don't know that I said any thing except to ask if Mr. Meredith was to be the collector of the port; I inquired from Raincock; I had heard that Meredith was appointed, and Raincock told me he was; Raincock did not run away from Canada before Meredith was appointed; I don't think he ran away to Europe before the Caroline was burned; he was there that night; I have heard that he did run away; I think I saw him there after that time; I believe I cannot tell any other conversation which I heard there; there was a good deal of talking; I was subpœnaed to come to Utica; I don't know but I mentioned at the time that I had heard the conversation; I mentioned it to Christopher Herring; he lives at Niagara; I have not taken a great part in this "Patriot" matter.

The ATTORNEY GENERAL objected to questions that were not specific.

Mr. SPENCER.—To the witness.—Have you belonged to a patriot lodge? That's specific.

The ATTORNEY GENERAL objected to the question. It would be necessary to go into the rules and regulations of patriot lodges, and their objects, if such questions were to be put.

Mr. SPENCER said he wished to know whether this man had taken part against the authorities of Canada, that he might show the state of feeling which brings these witnesses here.

Judge GRIDLEY advised Counsel to change the form of the question. The object could be gained by other questions.

The examination was continued.—I have taken some interest in the movements against Canada; since the destruction of the Caroline, I have aided the Canadian refugees by giving them what little I had to spare; at a rough guess, I have given them two hundred dollars; I have entertained them at my house; some were my namesakes.

By Judge GRIDLEY—Since that time I have given means to aid in promoting an enterprise against Canada.

By Mr. SPENCER—Have you entered into a concert to join parties to get up an enterprise against Canada?

Judge GRIDLEY informed the witness that such an enterprise was an offence against the laws of this State, and if the witness thought his answer would tend to convict him, he might decline to answer.

WITNESS—I decline to answer, then.

Mr. SPENCER—Are you a member of any secret society, other than that of Freemasons?

Mr. HALL said that question was like the last.

Judge GRIDLEY said he might refuse to answer for the reasons given before.

WITNESS—I refuse, then.

The cross-examination was then continued—I don't think I have ever conversed with any body on the importance of getting McLeod convicted; I have never said that the conviction of McLeod would get the country into a war; I have never expressed to any one a desire to have McLeod convicted; I should be willing for him to have a fair trial.

By the ATTORNEY GENERAL—I think I have been desired not to talk with any one respecting my testimony on this trial.

Mr. SPENCER—Have you entertained Benjamin Lett?

The ATTORNEY GENERAL objected to the question.

Judge GRIDLEY—If he has entertained and protected him, it is an offence, punishable by indictment, and therefore he may refuse; otherwise it is evidence, as it shows strong feeling.

ATTORNEY GENERAL—If he answers the question, I may ask him questions respecting Lett's history, and the circumstances which operated on his sympathy.

WITNESS—I refuse to answer. He also declined answering whether he knew Lett.

Cross-examination continued—Mr. Buck subpœnaed me here; I am rather a poor man; when I contributed the $200 I had more than I have now; I have a family.

The Court now took a recess for dinner, it being one o'clock

The Court was again opened at two o'clock.

Elijah D. Effner examined by the ATTORNEY GENERAL—I live at Buffalo; I recollect the Caroline steamboat; I was on board the boat while she was at Schlosser; I went to endeavor to get accommodation for the night; this was in the afternoon about two or four o'clock; I said to the persons on board, how do you expect to defend this boat if she should be attacked? The reply was, they were a ferry boat, and were not allowed to carry arms; I saw persons go on board with arms, but I did not see that the boat was armed; I was a dept. marshal; I saw no arms in the possession of citizens; the persons who had arms told me they were from Canada; they were dressed as Canadians; they told me they were going a hunting; the United States Marshal had appointed a large number of marshals, and I suppose all those appointed were ready to go on any duty on which they might have been directed.

Cross-examined by Mr. SPENCER—I don't think Navy Island was good hunting ground then; the commander of Navy Island, General Van Renssellaer, was reputed to be an American; General Sutherland was there occasionally; I don't remember how many stand of arms were taken from Buffalo.

The ATTORNEY GENERAL objected to evidence being given on this point.

Mr. BRADLEY said the ATTORNEY GENERAL had endeavored to show

by this witness that marshals were appointed to preserve neutrality, and that they were efficient; and the prisoner's Counsel wished to show that 200 stand of arms were taken from Buffalo and conveyed to the Island.

Cross-examination resumed—Immediately after we heard of the movements of the patriots on our shore, and before the burning of the Caroline, the arms were stolen; I went with the Sheriff, and we found Sutherland and others with arms in their hands; the Sheriff took them and other arms which were found; they were half a car full; I have only hearsay knowledge that the arms were taken back to Buffalo, and were again stolen; those were the only arms and munitions of war that I was aware were taken from Buffalo; I know nothing but newspaper report about the Batavia arsenal.

Seth Hinman—examined by Mr. Woods—I reside at Youngstown, Niagara county; I was in Chippewa in December, 1837; I had worked there at the joiner business; I was there when the Caroline was destroyed; I knew Alexander McLeod; I had seen him repeatedly; I saw him the night that the Caroline was destroyed, at Mr. Davis's, between seven and nine o'clock; I saw him pass through the bar-room; there were a good many people there; he passed out; I could not say that he was armed; I saw him the next morning near Mr. Davis's, a little before sunrise. There was not a crowd of men around him when I saw him; he was in the street near Davis's, going towards Davis's; it was very early in the morning; four men came in to get something to drink where I attended bar, before light, and they told me of the destruction of the Caroline; I went down to hear the news, as Davis's was the place where they met.

Cross-examined by Mr. SPENCER—I live now at Youngstown, Niagara county; I attended bar for Patrick Cameron, eighty or a hundred rods from Davis's; I went to Davis's to hear the news; I saw a great many people there on the evening I have mentioned; there were a great many soldiers there; the reason for noticing McLeod was that I had seen him arrest people and the way in which he did it; and when I saw him I noticed him; I was sworn before Squire Bell; I did not then say any thing about seeing him that morning; I did not then recollect it; I believe I mentioned it to Mr. Corson; I don't know that there was counsel for the people before Squire Bell; I swore then it was between seven and eight o'clock that I saw McLeod that night; I never was able to give any thing to the patriots; I never aided in secreting Benjamin Lett, nor did I ever ferry him across a river; I decline answering whether I belong to a secret society.

The ATTORNEY GENERAL objected to the question, and insinuated that the counsel for the prisoner was endeavoring to elicit testimony on this trial for other purposes.

Mr. SPENCER said it was not the first time that the learned Counsel had insinuated that we were taking testimony for other purposes; and I rise now to say to him, in presence of the Court and this audience, that I am here defending Alexander McLeod, as his Counsel, on his trial for life. I purpose to put no enquiry, to elicit no fact, which has not a direct tendency upon this question. I am not here

for the United States Government, to ascertain facts for the use of the Government, which the Attorney General would imply. If I know any thing about the defence of a man on trial for his life, it depends essentially upon the very kind of testimony which we are seeking to elicit; and I would ask the Attorney General whether he supposes that an intelligent, law-observing people will as readily believe those who are contributing their means, their influence and their feelings, in behalf of those who would make war upon the frontier, by sacrificing the individual now on trial, as they would Mr. Effner, a reputable citizen from Buffalo? Does any man believe that Wilson and others will command belief like Effner? He is not as well acquainted with an Oneida jury as I am, who believes any such thing. Now, sir, I propose to ask this question of this witness and some others, to show that they are connected throughout with this movement; and I have some reason to believe that in this movement they are connected from the forty-fifth degree of north latitude to the entrance into Lake Huron; that the witness is one of those who have been engaged throughout in this movement, for the purpose of disturbing Canada, and dislodging it from the British Government. The objection is a novel one. Does the Attorney General suppose that Wilson, the keeper of the ferry, who would take Benjamin Lett back and forth as often as he pleased, without fee or reward, will command respect and confidence like Mr. Effner, and others of respectability? I propose to show by this witness that he is connected with this whole movement—that he has contributed, and been in concert with these persons, to furnish evidence to convict McLeod—and if need be, it could be proven by the Attorney General and District Attorney—because I am in possession of the facts, that they have been in correspondence with them—giving letters to both these officers, as to McLeod's crossing the river, or that he went into the boats. May we not, then, show that they are connected with this matter, and see if they will command belief? I will not shrink in bringing out proof in favor of a man whom I believe to be falsely accused; having no participation whatever in the affair. I do not believe one single word of his guilt, and I will convince the world that I have warrant for my belief and scepticism. It is, that these men, who have been acting in concert, have not been able to command respect upon me, or disbelief before this jury; and if they would tell the truth, they would say that it is their heart's desire to effect the conviction of McLeod, guilty or innocent—that their other desires may be gratified.

The ATTORNEY GENERAL thought the remarks of the learned gentleman somewhat extraordinary. The time will soon come, said he, when these remarks will be in place and proper; perhaps they are not so much so now. He would advert to the fact, which he had discovered, as had also the jury, that the learned Counsel had come here prepared to believe, that every witness on the part of the people, had come to perjure himself; and a system of cross-examination has been adopted, which, under any other circumstances, would not be permitted. He had not objected to this course as often as his duty required, though he had observed that whenever a witness took

the stand, there was a sneer. The learned gentleman believed in his heart, as he says, weeks and months ago—and I am of the same opinion, that we might bring the best man, and of the best reputation in the country, and his character would be as black as night the moment he takes the witness stand. The Attorney General would further remark, that he had been gratified to hear the learned Counsel disclaim that he had any ulterior object, either to procure testimony for the United States, or any other Government; and he hoped the learned gentleman would unite with him in endeavoring to keep the testimony within legitimate limits, with a view of testing the knowledge and the honesty of the witness. I should not respect him, if in defending the life of a citizen, he did not go to the extreme of duty required of him; but, beyond that, I hope he will not insist. I will further remark, that it seems to me premature to comment upon a witness for the purpose of prejudicing or impeaching him. If the witness is a perjured witness, it is most unaccountable to me that he did not tell the easiest lie he could tell to convict him. When we come to the summing up, all these matters can be brought before the jury.

The COURT remarked, that no testimony would be here admitted which was not in strict conformity to every day practice. To show that the feelings of a witness are enlisted is entirely proper—to show that he has been active, or that he indulges strong feelings, is so intimately connected, as to be admissable, under suitable restriction.

Examination resumed.—I am not a member of any association against the Canadas.

Judge GRIDLEY.—Have you been, since the movements against Canada?

The witness was silent.

Judge GRIDLEY.—You are not asked if you have been busy in getting up such an enterprise, but whether you were a member of such an association.

Mr. SPENCER.—Have you heard of Hunter's Lodges?

I have.

Did you attend them?

Yes.

How many times?

Twice or three times

Where?

At Niagara Falls, two or three years ago.

Did you hear anything said about procuring fire-arms?

I did not.

How did you pass the creek to Davis's that night—Did you give the countersign?

I did not.

By the ATTORNEY GENERAL.—Is this association organized for the purpose of getting up war against Canada?

I am not sufficiently acquainted with them to say.

Are those Lodges in existence now?

Not that I know of.

Examination continued.—I came back to this side to go to work,

for business was broken up by the troubles; I have no doubt about seeing the prisoner that morning; it was early in the morning.

Sarles Yates—examined by Mr. WOODS.—I reside in the west part of the town of Clarkson, Monroe County; I lived in Canada when the Caroline was destroyed, about 100 miles from Toronto, down the Lake; I don't know that ever I saw McLeod to know him but once before; that was in Niagara gaol, Lockport, Niagara County; I believe it was last April; I could not say that I had seen him before that; I have been to Queenston several times; I was there in the latter part of the winter of 1839, for the first time; I cannot say positively that I saw him; I was in the public house where there were persons taking something to drink; one said this is something like the night after the burning of the Caroline; another said, yes, damn them, we gave them "aleck," and I should like another job of the same kind; I was told McLeod was the person who made that observation.

Mr. SPENCER.—I hope the Jury will have sense enough to know that is not evidence.

Judge GRIDLEY said he had heard much that was not evidence, and he regretted to hear it. Counsel should avail themselves of the rules of evidence.

The witness was asked if he saw McLeod there, and he said he did not recollect; he did not appear to know him at all.

William W. Caswell—examined by Mr. WOODS.—I reside at Buffalo and have lived there nearly three years; I resided at Chippewa when the Caroline was destroyed; I know McLeod; I had known him some two years before the Navy Island affair; I saw him at Chippewa about 9 o'clock of the night on which the Caroline was destroyed; he was going from Davis's towards Macklem's; I did not see him again that night; I saw a number of men collected together, and a man with whom I was acquainted told me there was something going to take place; I thought they were going to attack Navy Island; I saw the Caroline on fire; I saw McLeod a few minutes before sunrise the next morning on Mr. Davis's stoop; there was quite a number there; he came from towards the barn when I first saw him; I heard him talking with some others about going to cut out the Caroline and the way it was done; they talked about it being done pretty cleverly; they talked that they had made the damned rebels run when they came; there appeared to be two or three of the company there; one said he saw a man lie dead on the dock; and he added "damn him, he'll never come back to annoy us;" I don't know whether that was McLeod or the man that was with him; he had a pistol in his hand; it is three miles across the river there to Schlosser; it may be a little shorter at the lower end of Navy Island, but it is usually called three.

Cross-examined by Mr. SPENCER—I know Mr. Corson; I saw him often in Canada. I left Canada in March, 1838, and went to Buffalo. I have had nothing to do with the Canada affairs; I follow the Lake; I have been mate of a steamboat this season; I talked with Mr. Corson on the subject; I asked him if those depositions taken in Canada would come up against positive witnesses; he said he did

not know; he then asked me if I saw McLeod and I said I did the next morning; he told me that he saw him that morning; I only saw McLeod once that night; as he went through the door I knew him; I should have known him ten feet from him; I had been told they were going to attack Navy Island that night, and I had some curiosity to know who was going; I went to Davis's to see what was going on; I went on the stoop as McLeod was going off. There are two windows in the bar room that come out on the stoop; the light of the door or windows shone so that I could see McLeod; he went off pretty much in front of the door; I started the next morning before it was cleverly light to hear what was going on; I went down every morning, almost, during the Navy Island affair; I saw Col. Clark and Col. McNab; Col. McNab's quarters were in Macklem's dwelling; I noticed McLeod because I knew he had been engaged in the concern; I saw him in company with others who were in it. Mr. Smith told me the night before that they were going to do something; I thought it was to attack Navy Island. I saw McLeod there—I did not see him with any arms; I saw the Captain of the Artillery the next morning or the morning following; I saw Captain John Mozier the morning after the Caroline was burned. I saw an Englishman they called Byron, who went over.

Anson D. Quinby—examined by Mr. HAWLEY.—I reside in the town of Columbus, Warren county, Pa. In December, 1837, I resided two miles from Chippewa village: I recollect the destruction of the Caroline; I then knew McLeod by sight; I was not intimately acquainted with him; I think I saw him on the night of the burning of the Caroline, at Mr. Davis's, in Chippewa, about 8 o'clock; he was coming out of the bar-room as I was going in; I saw him again the next morning, about sunrise, near Mr. Davis's house; it was not far from the end of the bridge that crosses Chippewa creek. I didn't know any body with him; there were some that they call the Coburg troops; I think he had a belt on, but I am not sure that he had any thing hung to it; some one came across the bridge, and asked how they made it go last night; he said they made it go very well; he said we killed two of the damned Yankees and destroyed the boat; he then remarked he had Yankee blood on his sleeve; I saw a light that night, but I was not near enough to know it was the light of the Caroline.

Cross-examined by Mr. SPENCER—I live at Columbus, and about three or four miles from Lottsville; I never lived in Lottsville, but I know many that live there; the patriot war was the principal cause of my leaving Canada; I did not take part in that matter, nor have I since; I came here as a witness at the solicitation of others; Mr. Love, at Buffalo, came; he was at my house a week ago last Friday; I had never known him before; I had a letter a week before brought to me; the Attorney General had written to Mr. Grosvenor, who lives near Lottsville; somebody had informed the Attorney General that I knew something about it; Mr. Grosvenor is under indictment; I went directly to Pennsylvania when I left Canada; I made an affidavit before Squire Woodin; I have no knowledge of ever having told this story to Grosvenor; I told it to others; Mr. Love paid my

expenses to Buffalo from Pennsylvania, and there I received $10 from Mr. Hawley; that did not quite pay my expenses, but I have had a promise of having my expenses paid and reasonable wages; I was in Chippewa the day the Caroline was destroyed, with some hay; I think the government had the hay; I don't recollect seeing McLeod until the evening; he was a man I was not in the habit of seeing, and that was one reason why I recollect seeing him, better than I should those I was in the habit of seeing, and the conversation the next morning brought him to my recollection; on the night on which I saw him he passed out from the bar; I was down the next morning, because I heard they were going to pay money, and I had a demand against the Commissary; I had staid that night at Mr. Pettits's, about a mile out of the village; he is a farmer; I did not expect to get money from the Commissary before sunrise; I did not know who came up and spoke to McLeod that morning; I was going to the Commissary's office, when I was crossing the bridge; it was about sunrise; I don't know that I expected to find the Commissary in at that hour of the morning.

By the COURT.—My intention was to be at the office, ready to do my business; I did not know but there might be some of the clerks there.

Justus F. P. Stevens—examined by the ATTORNEY GENERAL. I live in Orleans county, in the town of Gaines; I was in Chippewa the night the Caroline was destroyed; I know the prisoner; I saw him there that night; I have known the prisoner since the fall of '36; I have seen him six or eight times; I have never had any conversation with him since the first time I saw him; I saw him at Chippewa, not a great ways from ten to eleven o'clock, on the night the Caroline was destroyed. When I first saw him that night he was very near the Niagara river. There is a canal or race, and it was some fifteen rods from the head of that cut that I saw him. He was there with a number of others; they were about getting into some boats; they got into them and went off; I think I saw the prisoner get into a boat; I am positive of it. At one time I was within five or six feet of them; part of the men were armed; the prisoner was armed; they rather layed up the river, off from the shore; they went out of sight; they started off from the head of the cut to get into the river; I saw three boats; I saw the prisoner next, a little above where they started from, pretty near the shore; the boats were returning to the shore; there were some rails burning there; this, I think, was not far from three o'clock, and four or five hours after I saw them embark. McLeod came ashore there; three boats, the same number that went off, came ashore there; after they left the boat, they went to Davis' tavern; the point where McLeod disembarked was four or five rods above the head of the cut.

Mr. SPENCER declined cross-examining him.

Several other witnesses were called, but did not answer.

Judge GRIDLEY said it was very desirable that the witnesses should be found, as, if possible, this cause must be finished this week. It would be very unfortunate if the Jury should have to be kept together on Sunday.

Mr. HAWLEY was examined to show that due diligence had been made to procure persons whose names had been mentioned, as witnesses. This was offered that counsel in summing up might not make use of the non-production of those persons to prejudice the case.

The court here took a recess for tea.

The court re-assembled at seven o'clock to hold a night session, for the purpose of completing the case for the prosecution, if possible. It was, however, understood that certain witnesses had not yet arrived, for whom attachments had been issued, but JUDGE GRIDLEY said he would take their testimony when they did arrive. His desire was to complete the case that week, if it could possibly be accomplished.

Mr. WOODS stated to the court that sickness in his family, which was likely to terminate fatally, called him home. He made this statement that it might not be imagined he abandoned his duty without good and sufficient cause; but he was satisfied the public interests would not suffer so long as the case was in such hands as those of the counsel who were associated with him.

The ATTORNEY GENERAL regretted the necessity which called the District Attorney home, but he was satisfied the cause was sufficient, and that it was his duty to go. He should feel the loss of the District Attorney's valuable assistance in the progress of the case, and in the summing up; but perhaps the District Attorney for this county, Mr. Jenkins, would take his place.

Judge GRIDLEY said he had been advised of the state of Mr. Woods' family, and he deemed the cause sufficient to justify his absence.

Leonard Anson was called and examined by the ATTORNEY GENERAL—I am a carpenter, and live at Lockport; I was at Chippewa in Dec. 1837, and remember the expedition against the Caroline; in the night, the sentinel in front of the house called me up, and I saw the light of the Caroline burning; I was sleeping at Smith's house; early in the morning I went over to Davis's, and saw a number of persons in the bar room, and among the company was Mr. McLeod; I knew McLeod, and had seen him frequently; I had seen him through that summer, perhaps, once a week, or oftener; he was generally known; he was deputy sheriff; I have no doubt that he was there that morning; he was standing by the side of the bar; I believe the lights had been blown out; it was just at the break of day; the room was full all round; it was a large room; he had just been drinking, apparently; he had hold of a glass, and had his hand on the counter; they were all talking of the expedition they had been on that night, and which had done the greatest crime; the persons with him talked as if they had been on the expedition; he said, "I have killed one damned Yankee, and here's his blood," pulling out a pistol and exhibiting it. I don't recollect any thing else said by him; when he said he had killed a damned Yankee, those that were there did not contradict him, nor express surprise, as though that was the first time they had heard of his being there; when the sentinel called me, he said, "they have cut out the boat and set her

on fire," or words to that effect; I drove Mr. Smith's team at that time; when the outbreak took place, there was no work in my business; I am a native of the United States, and was born in Albany county; I now work at my business; I am employed by Judge Porter's son.

Cross-examined by Mr. SPENCER—I have no connection with the people on this side who are acting against Canada; I have feeling, but I suppose it is only such as any American citizen would feel; I was examined on this subject before Squire Bell; I removed from Albany county at six years of age to Tioga County, afterwards to Ohio when I was 19 years of age; I afterwards travelled West to Indiana and Michigan; I was there about three weeks; I went on to Detroit and crossed over into Canada; I came out at Lundy's Lane on the Niagara River, and from there I went to Chippewa, where I arrived in January, 1837; I boarded at Philo Smith's tavern, and worked at my trade till the outbreak, about the 1st of December; I was a journeyman and worked for Mr. Corson, who has been sworn here; I stayed in Canada till September of 1838; I went then to Ohio and remained there, in Lorraine County, about a year; I worked at my trade there; I then came back to Lockport, and remained there till last spring, when I went to Niagara Falls; the morning I first heard McLeod was taken I was at Lockport, and then for the first time I told what I knew about it; I went to Lewiston that same night; Lewiston is 21 or 22 miles from Lockport, the way I went; I arrived there about 10 o'clock; I went alone on horseback; it was about the 10th of November; the roads were pretty bad; I went as a witness at the request of Mr. Bell; I did not get a subpœna, but I got a line from Philo Smith desiring me to come down; I first told of this matter the morning before I went to Lewiston; I told it to Philo Smith just as I do now; he was then living at Lockport; he is the man who kept the tavern at Chippewa in 1837; Philo Smith testified in this matter; we had not talked it over at all; I went over to Davis's the morning I have mentioned, out of curiosity, the same as any body would have done; I believe I spoke to no one; they were talking about the expedition, but I cannot tell what was said more than I have mentioned; I saw the blood on the breech of the pistol.

By the ATTORNEY GENERAL—I went to Ohio in pursuit of employment.

ATTORNEY GENERAL—If the Court please, I rest here.

Mr. SPENCER—I wish the Attorney General to understand my views of this case, if he rests, he cannot call evidence, to the main charge afterwards, but only in reply.

The ATTORNEY GENERAL—I have endeavored to come up to the rule, and bring all my evidence up to it. I shall only call witnesses for the purpose of rebutting testimony, though other facts may come out.

Mr. SPENCER said it must be understood that no cumulative evidence could be afterwards adduced.

The JUDGE said it was very desirable that the cause should proceed as fast as possible. He called upon Mr. Spencer to proceed.

MR. SPENCER'S OPENING SPEECH.

GENTLEMEN OF THE JURY: I will endeavor to open this defence in the manner which has just been suggested by his honor the Circuit Judge, because it is precisely the way in which every defence should be opened, and from which the jury can best appreciate the evidence to be brought before them. I need scarcely say, that this is a case of no ordinary character and importance. It is the first of the kind you have ever tried, or in all probability will be again called on to investigate. A solemn duty has devolved upon you, and I have not the smallest doubt that it will be fully and faithfully discharged. The defence which we intend to make is two-fold, and I will place it before you in its double aspect, thus early, in order that the court may be prepared to direct our conduct of the case as it may think proper. In the first place, then, we will inquire whether any murder has been committed at all by anybody; and secondly, whether, if that question be answered in the affirmative, Alexander McLeod was one of the murderers. The first portion of our defence we shall conduct with all deference to the opinion of the Supreme Court, which the learned Attorney-General referred to so fully in his opening. We are no strangers to that opinion, nor to the questions presented in the argument which drew forth that opinion: and if the learned gentleman opposite really supposes, as he said, that the counsel of the prisoner sustained a rebuke when that opinion was delivered, I avail myself of this early opportunity to say, that the counsel have never felt the justice of that rebuke, and it yet remains to be shown that that opinion administered any just rebuke. There are some things in that opinion, which, when I first heard them within this very circle, fell upon my ear as a little strange; but there is also very much of that opinion to which I listened with great pleasure. That document is ably written: it contains the evidences of great research and profound legal learning, and it may present the sound law of the case. But whether it be the sound law of the case or not, and whether the learned Judge who now presides on this trial will so regard it, I know not, but I feel bound to conduct this case on the broad grounds of what I consider the true principles of the law as applicable to it. We shall then, in the first place, after a few more facts shall have been made to appear in evidence before you, insist that there can be no such offence as that of murder proved as growing out of the destruction of the steamboat Caroline. And here allow me to say, that in the whole course of my reading—limited, I admit, it has been—I never knew of a similar case. It is now for the first time that we see an individual acting under the authority and by the orders of the government whose subject he was, having been put on trial for obeying those orders. This is indeed a remarkable occurrence, almost at the end of the first half of the 19th century! As the counsel of Alexander McLeod then, I shall have occasion to contend that there can be no such thing as murder charged against any of the persons who formed the expedition sent to destroy the Caroline. And let me here add, that the question as to whether that act was a justifiable procedure or not on the part of the British Provincial Government cannot be entertained by you. The facts, gentlemen, to be adduced, will show that this party which made the attack upon the

Caroline consisted of the crews of seven boats, six of them containing eight persons and one containing nine, which were made up of British provincial soldiers then on duty at Chippewa, or British naval officers then on duty at Chippewa; that Colonel McNab ordered the expedition; that he acted under the authority of Sir Francis Bond Head, the provincial governor, who directed them to seek out and destroy the Caroline, which he then believed to be in the employment of the party on Navy Island, who had there raised the standard of revolt, fortified their camp, and opened their batteries on the Canadian shore. When this party was thus circumstanced, and at a season of the year when navigation by any other vessel was extremely perilous, that boat came down for the express purpose of being employed by the occupants of Navy Island, and in their service that boat was from day to day engaged. The boat was then as liable to destruction at Schlosser as if she had been moored at Navy Island, so far as respected individual responsibility. Indeed, it was now proved that Schlosser was the very rendezvous of the party of the invaders of the island, or of those who were continually carried over to the island. We shall contend, then, that the boat, while at Schlosser, was there for as hostile a purpose as if at Navy Island, and that the British authorities were therefore as much justified in destroying her there, as if she had been at the latter place; and I ask every American citizen if he would have regarded the destruction of the boat at Navy Island as an offence? Might not the island have been justifiably invaded, and the persons on it taken prisoners and slaughtered, without the persons so invading it being chargeable with the crime of murder, or any other offence against the laws whatever?—such proceeding being well known to and recognized by the laws of war. Whether the insurgents on the island were right or wrong, is wholly immaterial. Whether the British Government had been tyrannical, and had driven these people to desperation, is wholly immaterial. The Canadian subjects of Great Britain had seen fit to revolt, and, with the aid of American citizens, had made open war in Canada; and whether they were right or wrong, it was a war, and all the rights and immunities that belonged to those engaged in war, pertained to them. This is the broad ground on which we rest the case. We will show to you, gentlemen, that the federal government of the United States took this view of the case; that they took cognizance of this offence, and demanded reparation from the government of Great Britain, and that at a later day the British government acknowledged the responsibility of that act, and declared that it was done in obedience to the British provincial government, and justified it as a necessary act for the protection of the subjects of Great Britain, then living in Canada. The federal government, then, under the constitution, had taken full cognizance of the whole matter, embracing not only the invasion of our territory, but also the destruction of the steamboat the property of one of our citizens, and the taking away of the life of another. All, all those considerations were presented to the notice of Great Britain, and our government, mindful of the nation's rights and ready to vindicate them, had demanded full and entire satisfaction for the injury which our country has received. But the individual who formed part of that public force of Great Britain stands excused, as he always must, from all the consequences of his action under those orders. As an individual offender he is not answerable to any tribunal. Passing from this, I will now take up another branch of the case, in which I am well persuaded the intelligent Judge who presides here and

myself shall have no difference of opinion—whatever may be our respective views of the other feature of the case, and that is the point as to whether McLeod had any thing to do with this transaction or not. I am willing and I intend to call your attention more minutely to the evidence sustaining that ground of defence, than to that pertaining to the other position which we have assumed; because the evidence sustaining the latter is not in any degree susceptible of dispute. Every word of evidence given on the part of the prosecution has gone to establish our case, and what is yet to come will only confirm what has been shown already. But the point to which I call you now is, that Alexander McLeod had no more to do with the destruction of the Caroline or with the killing of Durfee than either of you, gentlemen of the jury—not any more. And I speak with knowledge of the facts, and will satisfy you that what I have now said is fully and literally true. I confess that I am somewhat surprised by the results of this trial which we have yet seen. I anticipated much greater strength on the part of the prosecution. I will say to the Attorney-General, if I am honored with his audience—I will say to his associate that I am astonished at the feebleness of their cause, conducted as it has been with such an array of talent. Without making any extravagant pretensions to that sort of skill in matters of this kind, yet I would venture fearlessly to enter on the argument on the evidence as it is now before you, without the slightest dread of a verdict against my client. But I am not at liberty to play at haphazard in such a case as this. I am here to defend a man whose life is dear to him as yours is to you, and to whom you are bound to give a fair trial, a patient hearing, and a faithful and impartial verdict, just as much as if he were an American citizen. I ask no favor at your hands because he is a foreigner. We expect nothing whatever from your hands on account of the difficulty in which your verdict may place the governments of the two countries. We ask only that you will listen to the evidence, cautiously weigh it, and then pronounce whether Alexander McLeod is a murderer or not. First, then, we will lay before you a mass of evidence taken by commissions, under the order of the Supreme Court, and which, singular as it is, have been attended to in the execution by gentlemen on both sides. And here let me remark that the opposite counsel have enjoyed all the advantages which a perfect knowledge of our whole case from beginning to end could afford, whilst we have been kept in most profound ignorance of theirs. Yes, had they enclosed their case in the hecatombs of Egypt, it could not have been more religiously concealed from our view. None of the new witnesses, who are relied on to sustain the prosecution, went before the grand jury. There may be a few exceptions, but I believe my assertion will be found to be correct. And permit me to add, that in my judgment, if this case were tried as often as the moon changes, new witnesses could be found to prove the case as strong as it has been now presented on this trial. But the commissions have been returned, and the evidence will be read before you. With a great deal of pains and perseverance, my respected colleague succeeded in finding some men, more or less, who were on board each of the boats which formed the expedition against the Caroline. Twelve or so of our witnesses are of this description. First, on the part of the defence, we have Colonel McNab, who proves the issuing of the orders to Captain Drew, the individual who had charge of the expedition. Colonel McNab states that the expedition, when planned, was a profound secret, unknown to any except himself and one

or two confidential officers. The party collected on the shore, and went on board the boats, and then the purpose of the expedition was declared, when the party was on its way to accomplish its object. When the expedition returned, Colonel McNab ordered a list of all the men engaged in the expedition to be made out, intending to bestow upon them some mark of approbation for their hardihood and successful conduct of the expedition. And here let me say, that however we may regard this transaction, the Provincial Government of Canada looked on that as a gallant achievement. But whether they rightfully or wrongfully appreciated the undertaking is perfectly indifferent to us. To return, however: in the lists thus made out, the name of McLeod, either Alexander or Angus, does not appear. They refused to give us that list, for very proper reasons, in order that no person should be exposed by its publication, except who were already well known, or who had voluntarily come forward and avowed themselves. Colonel McNab also says that he was on the shore when the expedition embarked, and that he did not see McLeod, whom he knew most intimately. Then every boat's crew were acquainted with each other, and they respectively testify that McLeod was not among them. And it was surely likely that the members of every little party knew each other. The boat which Drew was in had nine men in it, and he says that on the return of the boat to the Canada shore all the names of the men were taken down, and the name of McLeod is not amongst them. Captain Drew further says that he never heard that McLeod was in that expedition. He says that he knew every man in his boat, and that McLeod was not in it. Other persons who went in some of the others were also examined, and say that McLeod was not in them. And you and I know, gentlemen of the jury, that those who were going in small boats on an attacking party, to stand or fall together, or be perhaps cast into the current of the Niagara, would be likely to know each other. And when they say that Alexander McLeod was not one of the party, you will believe it. This is in substance the evidence which we have taken on commission, and that will be first laid before you in our defence. You will listen to that reading with attention, although it may not be so satisfactory as the evidence of witnesses who will be before you personally. We shall next have the satisfaction of producing living witnesses, and more than one who will speak of what they themselves knew and what came under their own observation. These witnesses speak of the matter, under circumstances which admitted of no mistake. And we will also show you how easily men can sometimes be mistaken. One of the witnesses (Wilson) will give you a conversation with Raincock about the time of the burning of the Caroline. Now we will show you that Raincock left that country in the early part of the year, between the 15th and 20th of June. A respectable man, named Hamilton, who was married in January, 1837, and left Canada for England, and was gone until the fall of 1837, then came back before the outbreak in Canada, and this man Raincock had been then gone so long, that Hamilton was asked had he not seen him while he was in England. With respect to Quinby, we will show you that a short time ago a letter was received by the postmaster here, from a gentleman of respectability in Warren county, Pa., who, hearing of Quinby's intention to come here as a witness, and knowing his character, wrote a warning as to his worthlessness; and acting on this information, I wrote to the worthy citizen there who has come here to speak of Quinby's character. This Quinby, you recollect,

is the fellow who sold his load of hay, and went to get payment before day-light of the commissary. We will then show you, gentlemen, that McLeod was at Chippewa, in Davis's tavern, on the day of the destruction of the Caroline; that he went to bed early, as he was fatigued, having been one of the party who rowed round Navy Island. He remained in bed till sun-down, when he rose. We will then show you that he went in company with Mr. William Press, then living at Niagara, and now keeping the Hamilton House, in Hamilton, Canada; and in his company McLeod left Davis's tavern, and rode to Stamford, about four miles distant, in a very bad state of the roads, where he got out of his wagon, concluding that he would tarry over night with Capt. John Morrison, a retired British officer in Canada. He left Chippewa in company with Mr. Press after dark on that day. Well, he got out, and went into Capt. Morrison's, and we will show by that gentleman's evidence that McLeod came to his house; that they sat and conversed till about midnight; that they then retired to bed; that he (Capt. Morrison) rose early in the morning, as was his custom; that Mrs. Morrison arose, and their son, a little boy of 15 years of age; that the lad went down to the gate in front of the house; that he saw there two gentlemen, who stopped as they passed, and asked the lad to call his father; that Capt. Morrison went down and there found some one whom I do not now remember, with a Colonel Cameron, who lives at Toronto, and is an elderly gentleman, and is not able to be here, but whom we have examined by commission; that these gentlemen asked Morrison if he had heard the news, and on receiving his reply in the negative, they told him of the burning of the Caroline, and gave him as a trophy a fragment of the boat which they had found in an eddy below the Falls. Captain Morrison returned to the house and found Mr. McLeod at his toilet, and to him he told the intelligence he had just received; and McLeod immediately called for his horse, in order to go away, but Mrs. Morrison requested him to wait for breakfast, which he did, and then mounted his horse and rode to Chippewa. Mrs. Morrison, who is an intelligent lady, will tell you, among other circumstances, that McLeod's boots were wet when he arrived there the evening before, and were set near the kitchen fire, and were still there and dry in the morning. The son will also tell you that he brought the horse out of the stable, and that McLeod went away on it.

There is also a step-daughter of Mrs. Morrison's, who did not see McLeod when he first came, but saw him soon after at supper, and also the next morning, and fixes the time beyond all controversy.

To recur to the evidence of Mr. Press. He said he was at Chippewa but once; that he lived at Niagara and kept a public-house, and that the day he went to Chippewa was on the 29th December, and that he knows it was that day because he took passengers with him, whose names are in his books, and also the amount, four or five dollars, which they paid him for taking them to Chippewa. He will also tell you that he heard of the destruction of the Caroline on the morning of the 29th of December, so that the time will be fixed beyond all dispute.

This evidence takes McLeod from Chippewa the evening of the night on which the Caroline was destroyed, and leaves him at Morrison's in the morning. When he left Morrison's he made towards the Falls. A little way from the Pavilion, he fell in company with a Mr. Gilkinson, who was in the army of the government. He and McLeod rode from the Pavilion to Chippewa, and the destruction of the Caroline was a subject of

conversation between them; for it had been agreed between them that if any thing was to be done in relation to her they would participate in it. And now it had been done, and they had nothing to do with it. They rode then up the Niagara river to where Captain Usher lived, and while they were going along the shore of the Niagara river, they were fired at repeatedly; ten or a dozen shots being fired at them, and one of them was picked up and given to McLeod when passing back. While going from the pavilion, they met another person, John McLean, now of New York. He was riding towards Niagara Falls and met McLeod, whom he knew well. Mr. McLean had not gone to rest when he heard the cry of fire, and looked out and saw the flames.

If this testimony is sufficient, we will be relieved from embarrassment as to the question, whether there was any murder committed at all. And you, as American citizens, will rejoice that you can acquit Alexander McLeod as an innocent man; and I know it will rejoice you, as honest men, to be able to say, Alexander McLeod is as innocent of that imputed murder as any man among you.

If this evidence is sufficient, what becomes of the evidence on which the prosecution rests. You must either say that those witnesses fabricated their stories, or their heated imaginations led them into error,—while on our side the witnesses saw McLeod, not at the break of day nor in the darkness of midnight, but were with him from the time he left Chippewa. With them it is either perjury or all truth, and if it is all truth you can have no difficulty in pronouncing that verdict due to the nation of which he is a subject, and due to the American people. And with that verdict, we will say, we are satisfied.

At the close of the learned gentleman's remarks, the court adjourned until Thursday morning at 15 minutes to 8 o'clock.

FOURTH DAY'S PROCEEDINGS.

Judge Gridley remarked, on the opening of the court, that as the very earnest desire expressed by him to terminate the cause this week, might possibly induce the counsel on each side to restrict themselves perhaps more closely than if he had not made such an intimation, he would remark, that however desirable it might be to conclude the cause this week, and however anxious he was to avoid keeping the jury in this case out over Sunday, he did not wish the counsel so to limit themselves as to be doing injustice to either side. He presumed, of course, they would make every reasonable effort to close the cause this week, but if that could not be effected without doing such injustice, the case would of necessity go over into the following week.

Mr. Hall said, that he had no doubt that the counsel on both sides were extremely anxious to bring the trial to a close this week. It was a trial of very great importance, and one which had excited such universal interest, that the counsel might feel bound to take greater latitude in the prosecution of it than under ordinary circumstances. It was expected of them, that all the circumstances connected with the transaction would be fully developed, and the people would be disappointed if they were not. For his own part he would endeavor to throw no obstacle in the way of bringing the cause to a close at the earliest possible hour, but it was more than doubtful, if the desire of all parties to close it this week could be attained.

The counsel for the defence than commenced the examination of witnesses on behalf of the accused, and called to the stand

Alexander C. Hamilton, Esq., who was examined by Mr. Spencer, to contradict one of the witnesses for the prosecution, who deposed to a conversation between him and Raincock and McLeod, after the affair of the Caroline.

I reside at Niagara, U. C., and have resided there since the summer of '35, excepting some partial absence. I knew William Raincock very well; he was deputy collector of the customs at Port Niagara; cannot say the exact period he left Canada, but he was not at Niagara in the month of November, 1837; I recollect the date from my own marriage, which took place about that time. I went to England in January '37, and when I returned in the beginning of November, or the last of October, he was not there. I took my wife with me to England; I had been very intimate with him; to my knowledge he has not been in Canada since, and could not have been there without my knowing it, I think; he went to England I understood when he left Canada; the outbreak occurred after I returned from England.

Cross-examined—He was deputy collector of customs at Niagara; the office is just opposite the ferry; the principal collector was Thomas McCormick—is so still; Raincock did not do buisness at the office of the principal collector; McCormick only sees that the accounts are correct; I had known Raincock since the summer of '35; he was a native of England; he was purser of the steamboat Cobourg, when I first knew him; I cannot say which party he belonged to, and I dont't know that he took part with the insurgents; to my knowledge he was not there; I can't swear he was not in Canada of course; there were, previous to my leaving, two parties—I

cannot call them however violent parties ; the violence was confined to the legislature. I know Mr. Papineau ; he was then in parliament ; there had been violence at an election in Montreal, and the military were called out, and fired on the people at that election. I know Mackenzie by reputation ; I know the historical parts of his career. There was in U. C. a high state of political feeling. I do not know Raincock's political views: do not know that some who were openly in favor of the government, were privately advising the reformers—at least to my knowledge—though I have reason to believe that such was frequently the case. I went to England in the packet ship Hibernia in February and remained till September 1837, and returned *via* Liverpool in the Rob Roy. I reached New York in October ; don't know that any steam packets ran then ; don't remember that the Great Western was running, and if she had been I should have taken a packet ; can't be exact as to the period of my return to Niagara. It was the last of October, or November early. I resided with Raincock at one time ; was intimate with him : did not reside with him at the immediate time I left Canada, but was in the habit of seeing him every day ; I crossed the ferry very frequently. Raincock might have come over to the United States without my knowledge, and might have been here then for what I know. I heard of him however in England. John McCormick is now at Niagara. I remember an affair taking place at St. Dennis, between the British and insurgents ; can't fix the date of that, however ; I think I was then in Upper Canada, but I might have heard of it in the United States : don't know if it took place before or after my return. I recollect the destruction of St. Eustache, but can't say what time that, was. The movement on Toronto took place in December. I cannot of my knowledge say when Raincock left Canada : it must have been between January and November, 1837. He had no family in Canada: he was not married. I have taken an active political part in Canada in favor of the government : I hold no office. I am a lawyer ; I was living at Niagara in a military capacity, when the affair took place at Chippewa : I was in Lower Canada on business, and to see the method of conducting a judicial investigation of this kind I varied my route and came by this way, and when here I was summoned as a witness ; I am not here at the request of the prisoner or his counsel ; was anxious to see the proceedings of the court, and had no other reasons for coming here.

Mr. Spencer. Did you ever hear that Raincock was in England ? Objected to by Mr. Hall as being too vague to be admitted as evidence contradictory of another witness.

The court said the witness could speak of what was notorious generally at the place, but individual statements would be improper.

Mr. Spencer. Well, what was the notorious report about him at Niagara ?

That he had absconded for debt.

The court. How notorious was this—was it limited to a few persons, or general in the community ?

It was general. What is the population of Niagara ? From 750 to 1000 inhabitants.

Mr. Hall. Is not imprisonment for debt in vogue both in Canada and in England ?

It is, sir, I believe.

Mr. Hall. How then could a man escape prosecution or imprisonment for debt by fleeing from Canada to England ?

I cannot say precisely. The expedient is often resorted to, perhaps because of the inconvenience rather than the impossibility of pursuit and prosecution.

I am acquainted with McLeod: I am not a relative of sheriff Hamilton.

Cross-examined—I do not know that McLeod has made any attempt to escape from arrest; on the contrary, I know that it was very important for him to have been in Niagara, where he was arrested. I know that persons go from Canada to England, and come from England to Canada, to escape arrest for debt.

Hewlett Lott—I am a farmer, reside at Lottsville, Warren Co., Penn. and am also a justice of the peace. Know Anson D. Quinby, and have known him since 1838. Know the reputation of Quinby for truth and veracity—it is bad, I would not believe him on his oath.

Cross-examined—Was not subpœnaed here. Came to attend as a witness at the request Mr. Spencer. He wrote to a Mr. Wetmore in Warren about me. Can't say how he came to write to Mr. Wetmore. Never wrote to Mr. Spencer on the subject, but have written to McLeod. Do not know him and never saw him before. Know Levi Boardman residing near Quinby's—his reputation is passably good. He is a man of truth and veracity. Quinby is a farmer, and sometimes makes shingles. Do not reside in the same town with him, but meet him very frequently. I know O. L. Monroe, he lives about 2 miles from Quinby. His reputation is good. I think neither he nor Boardman would swear falsely. I know David Wooding, he is a farmer and justice of the peace. He is a respectable man. If they were to swear that Quinby's character was good and that he was credible on oath, I should say they were very much mistaken. I am here because I thought justice required it. I was afraid there would be wrong evidence against McLeod. Know nothing whatever of the transaction except what I have seen in the papers. Recollect being a witness in the same cause with Quinby on one occasion in our county. The common pleas of our county was held in September at Warren—that was the last session. Was not an important witness in the cause. Was summoned on two or three cases in that court. When I wrote to McLeod, told him that I thought there would be no difficulty in impeaching Quinby's evidence. Was requested to take the deposition of Quinby, and the person who brought the letter asked me to state whether Quinby's character was good, and as I could not say it was, the deposition of Quinby was not taken before me; but when I heard it had been taken elsewhere, I then wrote to McLeod. Expect my expenses here will be paid by Mr. Spencer; he has assured me they should be. Have my expenses paid, and beyond that I am to receive nothing that I know of. There are, perhaps, 10 or 12 families in Lottsvile, and the greater part of them have told me the character of Quinby was not good for truth and veracity. How far does Quinby reside from you? About four miles. How many of the population of your village have you heard speak of Quinby's bad character? The greater share of them; Mr. Low speaks badly of him, also my brothers James and Daniel Lott. One man in our village differs from us. What! one entire man in your village? Yes, sir, one entire man. Do you and Quinby range on the same side in politics? No sir, we are politically opposed. Have never had any personal difficulty with Quinby. Knew nothing of him before the period I have mentioned, the summer of '38.

Lansing Wetmore—Reside in Warren, Pa., and know Quinby. Have known him about two years this fall. Have heard that his reputation for truth and veracity has been universally bad. Have heard quite a number speak of him; and from what I know of him, I would not believe a word he said, on oath or otherwise, unsupported by other testimony. He has been a pretty constant attendant at courts as a witness.

Cross-examined—Reside about 26 or 27 miles from Quinby. Am a lawyer and practice there. Attended the last term of the common pleas, and was engaged in the cause where Quinby was a witness. He testified on the other side. Quite a number of people from his vicinity were there at that time. His testimony was rather unimportant. No witnesses were called to impeach Mr. Quinby. Came here at the request of Mr. Spencer. When I heard that Quinby had been summoned as a witness, I wrote to the postmaster here requesting him to inform McLeod's counsel of Quinby's character, and soon after received a letter from Mr. Spencer, requesting me and Mr. Lott to come here and testify. I heard Quinby's brother speak very hard of him. [The witness here mentioned the names of many neighbors who had spoken of Mr. Quinby in derogatory terms—he underwent a long and rigid cross-examination as to the circumstances, connections, &c. of Quinby, which, however, had no other bearing on the case, than to show personal motives in attempting to impeach Quinby's testimony.] I am opposed in feeling to the transactions of the patriots, and I am opposed to the great length to which the affair of the Caroline was carried. It is possible I have expressed an opinion that McLeod ought not to be tried.

Re-examined—Have heard the very common remark among the lawyers where I live, that when they want a witness to swear up to the mark, they must get Quinby to come forward.

Samuel Brown, recalled by Mr. Spencer—Have conversed with David C. Bates, on the subject of this matter, and might have said in his presence I did not know much about the affair and could not do any good. I told my brother-in-law that if they could not find a bill without me, they could not convict him with me. Have never said I thought McLeod was not in the boats.

David C. Bates—I reside at Canandaigua; know Samuel Drown; heard him in February last, I think, speaking about the Caroline affair, and he said he was summoned to go to Lockport to testify in the McLeod case. I asked what he knew about it, and he said he didn't know that he knew any thing about it, or enough to do McLeod any good or harm.

Cross-examined by the Attorney-General:

I was well acquainted with his affairs at that time; it would have been inconvenient for him to leave home at that time; it has always been so on account of his poverty. He is a poor man; that may have induced him to keep silent upon the subject.

How long have you known Drown?

I have known him ever since he was a boy. I have never heard his character called in question in a court of justice.

From your knowledge of his character how does he stand for truth and veracity?

I have never heard him called in question for truth and veracity.

Mr. Spencer objected to this mode of interrogating the witness.

The court remarked that the rule laid down by Judge Oakley was to

inquire as to the character of the witness for truth and honesty. He says the inquiry as to truth and veracity is too limited, since which I have adopted the same rule, and I know of no decision of our Supreme Court against it.

The Attorney-General remarked that that decision had arisen from the circumstance that the witness produced, had proved himself to be a despicable character, living in illicit intercourse in the same neighborhood; it came out on his own cross-examination; then the question arose whether the party introducing him might not show that his character, though bad in some respects, was good so far as his truth and veracity were concerned. And the Circuit Court ruled that they might. It was also discussed before the Supreme Court and confirmed: BRONSON dissenting.

Mr. Spencer—This cross-examination I supposed admissible under the decision in 12 Wendell. I therefore allowed the inquiry to be put to Mr. Bates as to the general character of this man for truth and veracity. Yet I hold that I am allowed, on cross-examination, the same right which would be allowed when I call a witness as to the credit of another.

The court decided that the Attorney-General was within the rule; it was proper to sustain the witness by showing that he had a good character.

They had a right to inquire into such particulars as involve his character in its general principles, as had been decided by the Superior Court upon the reasons assigned by Judge Oakley in the first place; and secondly, that when a witness is sought to be impeached, it is not solely what his character is for truth and veracity, but you may go to the length of asking what his character is for truth and honesty,—not whether he is lascivious or intemperate, but as to his integrity, for that goes to his truth; for if a man is dishonest, he is not a man of truth. Judge Oakley gave the soundest reasons for his opinion; I have, therefore, adopted the rule, and I understand that others have.

Mr. Spencer—How is his reputation in your community for truth and *honesty?* For the last two or three years it has been good. Before that it was rather bad.

Mr. Hall—As to Mr. Drown's previous bad character, did it reach his truth and veracity? He was reputed dishonest, and a man not to be relied upon.

A Juror—How long had he lived there? Six or eight years. When he went to Canada his character had become good, and remained so after his return from there. I think he had redeemed his reputation two or three years before he went to Canada, and I have heard of no relapse.

James A. Sears, examined by Mr. Spencer—I reside at St. Catharine's, in the district of Niagara; I resided there on the 5th December, 1837, when the rebellion broke out; after that I entered the service as a captain in the incorporated militia, and was at Chippewa; I was in command of the in-line piquet guard, from outside the main guard, which terminated at a little bridge near Davis's tavern, to the point opposite the end of Navy Island. The bridge was about half way from Davis's tavern to the place of embarkation. After crossing the little bridge, outside the main guard, there was a sentinel stationed. The first sentinel on the piquet guard was nearly opposite the place of embarkation, and perhaps ten or twelve rods from the main guard. There is a road there, and the sentinel was in that road. The place of embarkation was very near

where the cut entered the Chippewa; there were a large number of trees there, quite close to the shore, and between the shore and the road; they form a very beautiful shade; the second sentinel was about six or eight rods above the cut; there was a guard-house built of boards; it was about a quarter of a mile below the lower point of Navy Island; there was a sentinel there on the bank of the river; there was another sentinel at the door of the guard-house; there was another sentinel about 20 rods further up on the bank of the river; all the sentinels were in the road; there was another sentinel 20 rods further up; they were placed along the road, 15 or 20 rods above each other; there were frequent challenges that night; I was up all night; I was there at the embarkation of the expedition; I do not know that Col. McNab was there; it was so very dark I could not distinguish any one, unless I was very particularly acquainted with him; there were seven boats in which the men were embarked; I was mixed up with the party; I then knew McLeod; I had known him very well since 1834; I was acquainted with him as with a man in a public office; I did not see him in that party; when they embarked they began to row; then some of the sailors landed and "tracked;" I received directions that when the sentinels saw boats approach, they were not to challenge, lest it should be heard on Navy Island; I instructed the guard to that effect, and to prevent mistake, an officer of Col. McNab's staff rode up the line of sentinels as the boats went up; the expedition was to be kept as secret as possible; I went with the expedition as far as I had charge; there was another officer who had charge of a guard above my guard that night; when the boats took their departure from the Canada shore, I did not see them; it was then about ten o'clock; I went back to the guard-house, and remained there until I saw a light at Schlosser, of the Caroline on fire; I then went immediately down to where the beacon light was just blazing up; I stopped there but a few moments; I went to the orderly house to some officers who were camping on the floor, to inform them of the circumstance; I then returned to the beacon light, and the fire of the boat enabled me to see it was the Caroline, as it got her steam up; the beacon light was to aid the expedition on its return; they returned between two and three o'clock; the general orders were, that no person should pass the sentinels without the countersign; when the expedition returned, I went among them; I had some friends and acquaintances in the party, and I wished to learn the result; I saw all the men as they disembarked respectively, and I learned these were the five boats which had reached the Caroline; I did not see McLeod among the number; I saw the other two boats come in; I think it was daylight; the beacon light was then nearly burned out; I understood they had separated from the rest of the party in the river; the other party had all gone to their quarters silently. I was frequently in Davis's tavern in the night, and also in the morning; I saw nothing of McLeod there; I saw him about noon of that day; I and another officer had gone up the river to near the residence of Capt. Usher, who was murdered; while standing there, looking across to Navy Island, to observe their movements, we saw them bring out a cannon from behind a pile of cord wood, and prepare to discharge it; we looked down the road, and the officer that was with me said, "here comes Col. McNab;" two men were coming on horseback! I said one of them is McLeod; they passed on; the Navy Islanders fired at the horsemen, and that fixes it on my recollection; there had been

cannon fired from Navy Island almost, I think quite, daily, and frequently in the night; they fired at the people on the Canada main, and people were killed.

The Attorney-General objected to this course of examination. He said they were not trying the Navy Island affair.

Mr. Spencer said he should show yet that two hundred stand of arms had been stolen from Buffalo. These circumstances, immediately in connection with the affair, were competent to be given in evidence. He was surprised that the learned Attorney-General should be so restive on this subject.

Mr. Jenkins argued that the evidence was inadmissible.

Judge Gridley said the opinion of the Supreme Court would be binding on him, and would govern him if the prisoner's counsel should offer testimony on the question raised last night, to which he supposed the counsel would except, that he might carry it up to another tribunal. The killing of persons on the Canada shore, therefore, was not admissible in proof on this trial.

Mr. Spencer—We propose to show that three persons were killed on the Canada shore.

Judge Gridley—I overrule it.

The examination resumed—The river there is not frozen over in winter, and persons accustomed to it may cross with perfect safety.

Mr. Spencer—Would not a steambeat, in the employment of the Navy Islanders, be of great use to them, and a great annoyance to the Canadians?

Mr. Jenkins—I object to that.

Judge Gridley—It is overruled.

By the Attorney-General—I am a native of Lower Canada, forty miles east of Montreal, Caldwell's Manor; I have resided a few years in Rochester, in the county of Munroe, in this State; I went there in 1824, and returned in 1828 or 1829; I came from the Gore District; I resided at Niagara Falls in 1818, and in the Gore District in 1820; in the close of the spring of 1815, after the close of the war, I came to the United States to see the different parts of the country; I was in the army during the latter part of the war; I was drafted into the incorporated militia in 1813; I went to Rochester for the purpose of publishing an elementary school book; in the Gore District I cultivated a farm of one hundred acres, and I followed the business of house joiner; at Niagara Falls I followed my trade.

Judge Gridley objected to the examination. He said if they were to have as many biographies as witnesses, they would not get through for a long time.

Examination resumed—I resided in St. Catharine's ten years; I was a political writer for a newspaper; I was a reformer, and was out in opposition to the government; but circumstances have changed; the militia with which I was connected was raised by enlistment, and they were stationed like a regular army; the persons I enlisted were colored men; I suppose they were natives of the United States; I had this company at Chippewa; the recruiting officers were not colored men; no colored men were allowed to be officers; I was commissioned by Sir F. B. Head in person; there were Indians in the service.

Judge Gridley thought this was not relevant. This cause should be

tried in a lawyer-like way, but much evidence had been given that had no sort of relevancy to the case. The time of the court was too valuable to be thus consumed.

Cross-examination resumed—I was at Chippewa on the night of the destruction of the Caroline, as I have stated, and these persons were the sentinels; when the beacon-light was burning, it was lighter out of the shade of the trees than before; it was an excessively dark night; the trees might not all have been willows; while I was present, no person was allowed to pass the sentinel without the countersign; I was always challenged myself, and that led me to suppose that they were attentive to their duty. I came down from the guard-room when the men were assembling to go on the expedition; I knew there was an expedition in preparation; I was told by a friend who was one of the expedition; when the expedition left the place of embarkation I saw five or six men remain at Chippewa creek; I did not see many persons; I did not see hundreds; I could not distinguish persons going on the expedition without a close examination; it was very dark; it was a secret expedition; I was invited to go; they only wanted volunteers and some sailors to man the boats; Col. McNab was the officer in command; I know him by sight; Captain Andrew Drew was pointed out to me some days previous; I knew John Elmsley in the same way; he was an officer in the navy; I was told, including sailors and volunteers, there were about sixty persons in the expedition; I know Rowland McDonald, George Chalmers, John B. Warren, Captain Mozier, and Richard Arnold; Arnold was wounded in that expedition; I cannot say that I saw Col. McNab there that evening; I heard captain Drew giving directions about the embarkation; I saw no person in uniform; I think there were five persons in that expedition that I knew.

The court now took a recess for dinner.

THURSDAY, 2 o'clock, P. M.

The proceedings were resumed by the Attorney-General, who continued the cross-examination of Sears.

How did the men go when they got out of the boats—in military order? No. How long were you there altogether? Can't exactly say. Did you wait for the other boat that lagged behind? Yes. The companies of these four boats went away together? I can't say. Did the fifth boat come up after the others left? Yes. Were people coming back and forward? I couldn't say that. Only a few were in the secret? Yes, very few knew of it. When did you get to Davis's? About two or three o'clock at night. Did you speak to any one of the party there? No. Did you find any in the orderly room? Yes—one person. Was that either of the persons that you saw when they landed? Yes. When after that did you see McLeod? I saw him between ten and twelve o'clock the next day. How do you recollect that? From the circumstance of their firing at him. How far off was he? A short distance. On foot or on horseback? On horseback. Did you speak to him? No. Did he not accost you? It strikes me he did on his return. When did he return? In the afternoon. At what hour? Can't say exactly. Had you dined? No. What hour did you dine? No particular hour. Have you been present during the trial? During part of it. When did you arrive? On Tuesday morning. Have you been present all the time since? No, one

day I was absent. Have you taken an active part as agent for the prisoner? No. Have you done any thing in that way? I have not. Are you acquainted in Niagara? A little. You know some of the inhabitants? Yes. Do you know Mr. Hamilton? Slightly. Did you know the Deputy Collector? Raincock? Yes—do you know him? No.

By Mr. Spencer—Did the fifth boat arrive before the others left? A considerable portion of the persons in the others had gone.

By a Juror—I think it was a mile from the place of embarkation to where the last sentinel was posted.

Mr. Spencer then proposed to bring forward the documentary evidence. He would first introduce the various official documents that had reference to the negotiations at present pending between the Government of the United States and Great Britain.

First—Communication to our Minister in England.

Second—A communication from the British Government to Mr. Fox.

Third—Instructions from Mr. Forsyth to Mr. Stevenson, given shortly after the affair of the Caroline.

Fourth—Letter of Mr. Stevenson to the British Government, demanding satisfaction in this matter.

Fifth—Answer of Lord Palmerston, who was Secretary of State for Foreign Affairs, to Mr. Stevenson.

Sixth—A letter of Mr. Forsyth to Mr. Fox.

Seventh—Letter from Mr. Fox to Mr. Forsyth, with accompanying documents.

Eighth—Letter from Mr. Fox, 12th March, to Mr. Webster, Secretary of State.

Ninth—Letter of Mr. Webster to Mr. Fox, dated April 24, 1841.

He (Mr. Spencer) did not know but these would be all that might be necessary. There were others which he desired to introduce. These had all now been published, and were public property, which was not the case when the argument was had before the Supreme Court.

The Attorney-General asked, with what intent?

Mr. Spencer thought the gentleman could scarcely misapprehend him if he recollected his (Mr. Spencer's) opening. It is with a view to present the question in such a state before this court upon the traverse of this issue, that having established the fact that this was the exercise of the public force of Great Britain, and being acknowledged as an act of the public force on the part of Great Britain, the individuals who acted in obedience to their orders, are not individually responsible. Substantially upon the principle contained in Mr. Fox's letter to Mr. Webster in March last, and the acknowledgment of Mr. Webster in the matter—both Governments insisting that there had already been an invasion of their respective territories.

Attorney-General—That is, a state of war?

Mr. Spencer—Such a state of things that when they were there, the whole of the party were acting in obedience to the orders of the government, and are not individually responsible. Although the Supreme Court could not look into the whole case, yet here upon the traverse of the indictment, we are enabled to do so, and by means of this documentary evidence to show the extent and state of the war. We intend to enlarge very considerably, to show that a very considerable amount of arms and munitions of war were concentrated upon Navy Island; to show that the arsenals all along the frontier had been plundered, and the military stores

taken to Navy Island; that the very arms that were taken and returned in the car, were with the knowledge and consent of the Mayor of Buffalo, allowed to be taken out of the arsenal by the patriots, and taken to Navy Island. That, in short, if your honor please, there was such a state of things on the frontier, that the whole frontier was acting in subserviency to the attacking party on Navy Island. Not that there were not many honorable exceptions there, but the authorities of New York, as a sovereign state, were utterly paralyzed; and with respect to the authorities of the United States, they had no officers or troops; but there was a state of war. Now, I do not say a solemn war, but, as between the belligerents contending, there was a state of war emphatically—a war to all intents and purposes. It needed not the declaration of war by Great Britain; it was enough that the dependencies of Great Britain, charged with the duty of defence, had an assailant—that their territory had been invaded—that near them was an intrenched enemy, who professed to establish a provisional government, which would effect the dismemberment of the kingdom of Great Britain, and lead to the formation of an independent government in one of her provinces. To subvert the British Government was this armed force employed. We propose to go farther still, and to show that it was a necessary act of the provincial authorities in self-defence. We propose to show it by establishing the proposition, and in conformity to the well-settled rules of war, that this steamboat was in the hands of the assailants, or the attacking party—that it was an engine of destruction and annoyance more potent and effectual than any other thing in their employ. We are to look at the surrounding circumstances. What was Schlosser? Suppose the Niagara river were no wider than from Navy Island to the Canada shore, this whole army instead of being on the island would have been at Schlosser, and receiving arms and munitions of war from the whole surrounding country, and they were there accordingly, as at Navy Island, and opening a war upon the British dependencies, and threatening to invade the provinces, these provinces would have as much right to defend themselves by working the destruction of the assailing party as they would have had at Navy Island; and if so, this boat, passing back and forth, was subject to destruction, as a course of necessary self-defence. Now what are the rules of war in relation to this? That in any warlike movement, the party assailed is bound to wait till the attacking party have reached them and opened their batteries on them? Not at all. Whenever an army is approaching with a view to annoyance, the assailed party has just as much right to work the destruction of that army, as after they have reached and are ready to open their batteries. If the fact was known that she (the Caroline) was coming down the river—if the Canadians knew that she was coming down with munitions of war, to annoy them, they had just as good a right to work her destruction on the passage as at any time after arriving in the province of Canada. It is a great mistake to suppose that we are to apply the principles of an assault and battery in a war movement. It is a fundamental error to apply any such doctrine. You cannot apply the doctrine of retreating to the wall to get rid of an assailant—it being the fundamental doctrine that when open hostilities have commenced, they have a right, by stratagem or any other means, to get advantage, and make a destruction before they have an opportunity of doing an injury. The Canadian party were assailed, and had just as much right to defend themselves there as at Navy Island or the Canada shore. Does

it make any difference between Navy Island and Schlosser, or Navy Island and Chippewa? Suppose a lodgment had been made at Chippewa, and this steamboat had been running to Schlosser and that point, to give aid, and strength, and succour, I would ask whether, as between the American people and Great Britain, persons on the Canada shore would not have had a right to work the destruction of that boat wherever they could find her, whether in their own waters or ours? Would it not be a proper matter of self-defence? Where was this warlike movement? We are to look to the surrounding circumstances. They were divided by a rapid stream, and but little above the mighty cataract over which no human being ever went alive. It was therefore extremely perilous to navigate that stream with row-boats at any time, and particularly at that season of the year. They had no steamboats or armed vessels. A steamboat came down, say for hostile purposes. How was it to be guarded against? In the day time, when the steam was up, what would be the use for a few row-boats to make an attack? with her steam she could run away from them, or she could run down, and run over any boats which might be brought against her. They could not come out in the day time, when the boat was in active employment, with steam up, with any prospect of success. How were they then to come at her? I ask whether they were bound to let her be running continually to strengthen the post, so that they might make a descent upon Canada? Were they bound to lie by and do nothing to prevent supplies being sent to the Navy Islanders? I think your honor will sustain the doctrine, that they had a right, and that the Attorney-General will not contend that they had no right to attack those upon Navy Island, or to attack the boat at Navy Island. I think that he will not contend, that with this rapid stream running past, and the cataract below, and no means to get at the boat in the day time, that they were not justified in making the attack at night. What were they to do? Would you expect them to come from the Canada shore round Navy Island, with the whole island bristling with bayonets pointing in every direction? Would that be thought practicable? Would any person think that expedient? Surely not. When they came with their row-boats, would it not be the easiest thing imaginable for the steamer to escape to Schlosser, or up the river? Let them look at this subject as if they had some knowledge of military movements. Could this boat have been assailed with any hope of success in the day time, in the vicinity of Navy Island or Schlosser? I trust not. Where then is that boat to be destroyed, if at all? Here in Canada were the commanding officers—were they bound to lie by and be destroyed through the instrumentality of that boat—let her go on whilst they did nothing? Would they fold their arms and never fire a gun? Must they remain at home? Is it military, is it prudent? Then what are they to do? I repeat the question. They must do one of two things—they must destroy the boat, or allow her to remain unmolested for their own annoyance. Were they bound to submit to her annoyance? They had a right to work her destruction for their own security and self-defence, to prevent a descent, for they knew it was intended to work a revolt in Canada. They knew that they would have many of the discontents rallying to their standard. It was not whether 500 or even 2000 were upon the island. They had only to erect a standard upon the spot where they could rally. This was a gathering, a nucleus or rallying point from which a descent was to be made upon the province of Canada. They had

erected the standard to which the discontented were ready to fly ; a revolt had been already attempted at Toronto and put down by the militia. It was intended again to enter Canada. How was it to be done ? By collecting sufficient materials at Navy Island, and through the instrumentality of a steamboat, to make a descent upon the Canadian main. Now I would submit to your honor, whether they had not a right to put it out of the power of this party to annoy them, by destroying an instrument which was calculated to promote and further the views of the attacking party ? Let me illustrate this matter. Suppose the object of the invaders was to get across to the Canadian main—suppose they go across to Grand Island and cut down timber for the purpose of making a flotilla to carry the attacking party. Grand Island is within the territory of the United States. Will this court, will any court, will the law hold that the Canadians, knowing that this flotilla was constructing, would not have a right to go upon Grand Island and destroy the timber, and those engaged in making the flotilla, as well upon Grand Island as upon Navy Island ? Let us see how it is in our own country. How was it with respect to one of the Spanish islands in Florida, only a few years ago, perhaps 1818, when annoyance was expected to the United States from the occupants ? They had not opened their batteries upon the United States. Not at all. It was a province, belonging to Spain ; and what did our peace-loving president, Mr. Monroe, do ? He sent the public force of the country against them, for no other reason than that it was a medium of communication by which slaves were introduced into the United States. A force was sent with instructions to destroy the island. We have the documents to show, your honor, the grounds which he presented for doing as he did ; for no other reason under the sun was that public force put on foot and sent to the island—for the purpose of capturing those who were there, after having been requested to surrender, if they did not do it voluntarily—than that it would afford opportunities for the introduction of slaves, and interfere with our revenue ; the Spanish authorities were so feeble, as not to be able, or they did not exert their power, to dislodge those persons who had taken possession of the island. It was far from being a case like the one before us. There was not the slightest pretence of personal danger ; no other reasons were assigned than frauds upon the revenue and the introducing of slaves. Suppose the possessors of the island had not voluntarily surrendered, and our batteries had been opened, and they slaughtered—now let me ask if it would have been tolerated had they taken the commander, or a sailor who obeyed orders, and hung him ? I ask the Attorney-General to say—if he knows, from the authority of the Supreme Court, or any other authority, in which way they would be murderers ? This was a case in our own country, and the President put it upon the acknowledged law of nations. I allude to the occupation of Amelia Island. It was earlier than that of St. Marks. We have the orders here. It was not for the suppression of piracy, but to prevent the introduction of slaves, and frauds upon the commerce. Had the United States declared war against Spain, or Spain against the United States ? Was it the exertion of the force of the United States against Spain which constituted war, and which worked the individual irresponsibility ? Never was there a more heterodox doctrine put forth, than that there must be a declaration of war to work individual irresponsibility. When General Jackson had command, he had express orders not to enter any of the fortifications of Spain in Florida. The orders

were given expressly, but what did he do? He deemed that the United States required it, and that the Spanish authorities were too feeble to control the Indians. He marched into Florida, and took the forts of Florida. Was it ever dreamed of or thought of, that Gen. Jackson and his army were murderers? They killed men there—they took Ambrister and Arbuthnot, and tried them and executed them. It cannot be that an army acting by order of the government, whether right or wrong, are murderers. It is not so. It is revolting to every man. Compare this case with the one in question. It is evident that the United States and England are both desirous of maintaining peace. It was not intended to interrupt the friendly relations of the countries. It was intended for nothing more nor less than to work the destruction of an instrument of annoyance, which was threatening immediate destruction to themselves. Because they could not reach it in the day time, they must seek an opportunity when they could reach it, and at such point as they could find most practicable in such extremities, and with such means as they were able to employ; and in the employment of such means she was destroyed. I will go further and say, that it is not a question at all whether this power and authority were discreetly and properly exercised—that is not the question. The British Government may have been in the wrong throughout, and our Government may demand reparation or satisfaction, or find just cause of war on our part. It does not at all involve McLeod, nor any other one charged with being of that party. There is a wide distinction between a government being wrong and the soldier being wrong, and is it not intolerable and revolting, that individuals should be thus held responsible?

Let us change the tables, and see what would be thought by our government and country, if the Canadians had seized upon Grand Island, whilst we were at peace with Great Britain, and fortified it. Why, there is no war—Great Britain has not declared war—Canada has no authority to declare war. Would it not be justifiable for the American Government, if they had it in their power, to send an armed force to drive them away? I ask, if the Attorney-General would deny that authority? And could they not do it without waiting to have the British government declare war against the United States? Would not they have a perfect right to do so? I apprehend they would have. By that rule of reasoning, if a company, or regiment, were sent there to dislodge the invaders, should they be taken and treated as murderers? If our government had ordered a regiment of men to take possession without declaring war, and they had opened their batteries, they would have been held to be murderers, notwithstanding they acted under the authority of the government and in obedience to the commands of their officers. It is a strange doctrine that you have got to work up a war in all its forms before individual irresponsibility can be recognised. Thus far I have presented this case as one where the proceedings, so far as respects McLeod, would be entirely justifiable, because of the defence of the inhabitants. But I have yet another view to submit, it is that the public documents to which I allude, show that this matter is already taken possession of by the government of the United States as an entire transaction, that they have taken cognizance of it, and have a right to take cognizance, and having taken cognizance of the matter, it is within the jurisdiction of the United States; it is not in common with any inferior jurisdiction. The United States alone have the treaty-making power. The constitution takes it from the individual States

and places it with the United States. It is with the executive department of the government. No other party have to do with it, only in the ratification when approved by the executive. What is the duty of the executive when an outrage of this kind has been committed? It is to ascertain the facts, and when they are ascertained to decide upon the matter, and that decision is decisive and conclusive. That must be the law, or the government of the United States is a rope of sand. They have this subject at this moment in a state of treaty—in a state of negotiation between the two governments, and will it be denied that the United States have as much right to demand satisfaction for the killing of Durfee as for the destruction of the steamboat Caroline? Have they not a right to demand satisfaction for the invasion? Let us witness the case where the Leopard made an unjustifiable attack upon the Chesapeake. There was no declaration of war between Great Britain and the United States. They were making inroads and committing depredations. At that time the commander of the Leopard insisted on taking and carrying measures so far as to take hands from on board the Chesapeake, claiming them as British subjects. No war had been declared, but was the commander held as a murderer? So far from it, that you have only to look at the facts to see that the British government made provision for the support of the families of those individuals who had been destroyed. It is in conformity to the usage of nations. When such public force is exerted, it becomes a subject of public concern, and is a subject of treaty, and as such is within the jurisdiction of the executive department of the government. They had a right to take cognizance of it, and having so done, they have exclusive jurisdiction, and others cannot interfere. It is in this double respect that we offer this evidence—it will entitle the defendant to a verdict of not guilty, because we are now traversing the indictment; and if it cannot properly be taken cognizance of, then he will be acquitted for the reason, that he was acting under Canadian authority—that also entitles him to acquittal without any trouble at all as to the *alibi*. But in relation to this decision of the Supreme Court, I am free to confess that the doctrines are in no respect sound in this matter, when they go to refuse the Habeas Corpus in this case. The decision was neither more nor less than an *obiter dictum*, hastily pronounced. It is the fiat of a single Judge of the Supreme Court: and the only part of that decision, which may truly be denominated *obiter*, to which this court should attach any importance, is that part which declares that that court cannot look behind the indictment. And having decided the first question as they did decide it, suppose the Supreme Court had examined the matter and come to the opposite conclusion, that if facts appear upon the traverse of the indictment which fall within the law of nations, the individual cannot be held responsible. What would be the decision upon that issue? Would it be otherwise then it was? I say then that no part of the opinion, except that which says they cannot look behind the indictment, is in any respect binding on this court. It is entitled certainly to the respect which is due to the Judges upon the bench of the Supreme Court. It then is for your Honor to decide—in a court where the law of nations prevails as much as any other law in the country—whether these were warlike movements; and when they have received the sanction of the British government, whether it does not work an individual irresponsibility to all those who are of the attacking party.

The Attorney-General rose to reply, but,

Judge Gridley said: Mr. Attorney-General, I think I can relieve you. I have considered this question so far as I have any right to decide it. This indictment has been brought into the Supreme Court, and it has been sent down here to be tried by the Circuit judge, like any other issue; while pending there, a motion was made for the discharge of the prisoner; in the first place, on the ground that the court had powers to look behind the indictment. The court considered that question, and came to the conclusion that they had no such right on Habeas Corpus, and the motion was denied. But if they had the right, they decided that this was not such a case as would induce them to exercise it, and that the motion should be denied for want of right, on account of the absence of any thing like war, and for the reason that there was nothing in the pending negotiations between our government and Great Britain which took away the jurisdiction of New York for an offence against her laws.

This opinion has been arrived at by the Judges of the Supreme Court, on all these questions being deliberately argued before them, and which, although written mainly by one, was the united expression of the views of the whole court—after the most solemn and deliberate consideration. On such an opinion, I do not feel authorized to entertain, or express, if I entertained, a different opinion. Their opinion in this matter is law with me, and briefly stated, it is this: A band of men—Canadian refugees, and citizens volunteering with them—took possession of Navy Island; it was a hostile force for the invading of Canada. Navy Island was a portion of Canada, and I have no doubt that the Canadian authorities had a right to repel the invasion, suppress the insurrection, and use all means which nations may use for the suppression of that invasion and insurrection. But while that was true, our citizens had the right, so far as regards their obligations to their own government, to expatriate themselves, and join the insurgents, being subject to the same punishment; so too, any citizens of our government had a right to carry ammunitions and provisions to either of the two belligerent parties, and to Navy Island, subject, however, to the penalty of forfeiture in the event that they were captured. If this boat were a portion of the armament of Navy Island, at Navy Island, or on the high seas, it would be subject to capture on the part of Great Britain. But with regard to the United States, Great Britain was at peace, and Great Britain, or any subject of hers, had no right to molest it; and I can conceive no more right in the British government sending an armed band to make an attack on that boat and destroy it, for the fear that she might become a great nuisance to them, than that they have a right to send three men to Buffalo to destroy the arsenal that contained the munitions of war, and kill the mayor for fear he would send the arms there to be used against them.

These are the doctrines of the Supreme Court; not an opinion, but an authoritative decision which is binding on me; and I have no discretion to set it aside. I am administering law in the Circuit Court, subject to the decision of that very tribunal which has settled all these questions, and after a more full argument than we have had here. I therefore feel bound to reject the proposition to offer these matters in evidence, on the brief grounds I have stated.

The Attorney-General reminded the court of the decision of Chief Justice Spencer, in a case 18th Johnson, to show that this decision of the court would be found on examination not to be a novelty.

Mr. Bradley said there was one point in this case, which had not been presented to the Supreme Court. There was a class of cases in which even neutral territory may be entered for a hostile purpose—nominally neutral, not really so. That class of cases is referred to in the celebrated letter of Mr. Webster to Mr. Fox, in the last paragraph but one, which states what it will be necessary for the British government to show, in order to justify the attack on the Caroline. Now we suppose that if the defendant can comply, and show such facts as would exonerate his country from the act, that he would be discharged. It can be shown that it was a necessary act of war.

Judge Gridley.—Equivalent to lawful war?

Mr. Bradley.—Not equivalent to lawful war, but a case where even private individuals may undertake, and, as necessary to repel impending danger, may act, of their own mind and will; under the necessity of self-defence, instant and overwhelming, leaving no choice of means—then he would be exonerated. We offer to comply with this case. That point was not raised in the Supreme Court.

Judge Gridley did not think it appeared a case of that description. On an indictment for murder, who ever heard that it might be shown that, in self-defence, a man might cross the Niagara and destroy his adversary for fear he might destroy him. I think it would not approach a case of self-defence. That will not justify the murder of Durfee.

Mr. Bradley said the point which they proposed to establish was, that the Navy islanders were the striking party, and were within striking reach.

Judge Gridley.—Suppose the Navy Islanders, if they could get a forty-two pounder, could do immense injury to those on the opposite shore, and an individual has possession of it; and the Canadians, for fear that the Navy Islanders will obtain that forty-two pounder, go with a body of men and take that instrument and kill its owner; that would be justified by this doctrine. The illustration shows that the doctrine is unsound.

The defence is on the other ground.

Mr. Spencer.—And in an application to the court of last resort I hope no obstacle will be thrown in the way.

Judge Gridley.—You shall have every facility from me.

Mr. Spencer.—We now, as rapidly as may be, shall proceed to lay before the court the evidence taken under commission.

Mr. Hall said these depositions were taken under somewhat peculiar circumstances. It was under a law which was perhaps peculiar to our own State; there was no such power in England or in Canada, and he doubted whether there was such a law in any other of the United States—certainly there was not under the United States government—to take depositions in criminal cases in foreign countries to be used on the trial of a case in this country. They have been taken in great haste, and I have many objections to them, in various parts. I think the manner in which they have been executed is such as to show that we have not the fair responses of the witnesses. Under these circumstances I shall ask the indulgence of the court for making my objections to them, more full than under any other circumstances whatever. I will ask that the interrogatories be read previous to the answers in each case; and as they are so far from direct answers, I would suggest that the answers should be before your Honor, that they may be individually decided on.

Mr. Spencer again proposed to read the interrogatories and answers of Sir Allan McNab, taken in Canada under commission, and he suggested to the court that Mr. Bradley should read the interrogatories, and Mr. Gardner the answers.

The Attorney-General objected to these depositions. The first ground of objection was, that Col. McNab read his answers from a manuscript, which had been previously prepared.

Judge Gridley.—He had the interrogatories?

The Attorney-General.—Yes.

Mr. Spencer explained, that one commission had been issued, under which Sir Allan McNab's examination was taken; but afterwards it was found necessary to obtain some other answers—another commission was issued, and to save time, he may have been permitted to read the answers he had given under the previous commission, to such questions as were merely repeated in the second commission.

The Attorney-General said there were precedents for the rejection of testimony taken under such circumstances.

Judge Gridley thought the course should be to move the Supreme Court for the suppression of these depositions, if there were sufficient cause, as they were now the records of the Court.

The Attorney-General said they were in this position, that these depositions had been very recently brought into the court.

Mr. Spencer replied. If these depositions are set aside, does the learned Attorney-General think a new commission will not be issued? The examinations were taken in the presence of counsel for the people as well as for the prisoner, and it was a monstrous proposition to set them aside now, on a mere technicality.

The Attorney-General said it was his duty to try this cause according to law. This was an objection which went to the merits of the case.

Judge Gridley said he could conceive a case in which an illiterate man might have a set of answers imposed upon him, if this practice were to be allowed.

The Attorney-General said the test of accuracy would be the relation of the same story, without reference to any document to aid the memory. The poet makes Hamlet say, as the best test of the soundness of his intellect, "Bring me to the test, and I the matter will reword." It was an important point to aid them in determining whether these relations could be relied on.

The Attorney-General said there was another objection; the witness had refused to answer one of the interrogatories which was asked—who gave him the information that the Caroline was coming down? He said he received the information from gentlemen in Buffalo and Black Rock, whose names he declined furnishing.

Mr. Spencer said if this was a reason for excluding the depositions, he should be somewhat astonished.

Mr. Hall relied upon a decision of Chief Justice Nelson, who excluded depositions when a material question had not been answered; but he wished this to go rather to the credit of the witness than to the exclusion of the deposition. He also objected to great portions of these depositions, which related to the defence attempted to be set up, and which the Court had rejected.

The Court struck out several answers which related particularly to the

employment of the invading force by the colonial authorities, retaining under the rule laid down during the trial, such portions as give the jury the general history of the transaction. The court, however, would prefer the reading of the whole of the depositions as the better mode of saving time, and as no evil could arise out of it, the whole story having been had out from the witnesses in the course of the trial. He said he should take care to guard the jury on this subject in the summing up.

The following Commission and Interrogatories were then read:—

[L. s.] The people of the State of New York, by the grace of God free and independent—To Secker Brough, Esq., Adam Wilson, Esq., James E. Small, Esq., James Harvey Price, Esq., and Francis Hinks, Esq., all of Toronto, in the province of Canada. Greeting:

Whereas it appears to our Supreme Court of Judicature that certain witnesses, whose testimony is material on the trial of a certain cause now pending in our said court between us and Alexander McLeod, reside beyond the jurisdiction of our said court, and within Her Majesty's province of Canada, and whose personal attendance cannot be procured on the trial of the said cause:

We therefore, in confidence of your prudence and fidelity, have appointed you, and by these presents do appoint you commissioners to examine Sir Allan N. McNab of Hamilton, Barrister at law, Captain Andrew Drew, R. N., of Woodstock, John Gordon of Toronto, Edward Zealand of Hamilton, Richard Arnold of Wellington-square, John Elmsly of Toronto, Christopher Bier of Upper Canada, Neil McGregor of Chippewa, Thomas Hector of Toronto, Russel Inglis of Toronto, John Battersby of Upper Canada, Shepherd McCormick of the same place, and George Chalmers of Trafalgar, the witnesses aforesaid, together with such other witnesses as either party may produce before you, or either or any of you; and therefore we authorize and empower you, or any or either of you, at certain days and places to be by you or any or either of you for that purpose appointed, diligently to examine the said witnesses on the interrogatories hereunto annexed, on oath to be administered by either of you; and to cause such examination to be reduced to writing and signed by such witnesses, and him or those of yourselves by whom such examination be taken, and then to return the same, annexed thereto, unto Hiram Denio, Esq., clerk of the Supreme Court, Utica, New York, by mail, enclosed under the seal of him, or those of you by whom such examination shall be taken. Witness, Samuel Nelson, Esq., Chief Justice of our said Supreme Court of Judicature, at the academy in the city of Utica, on the sixth day of July in the year of our Lord one thousand eight hundred and forty-one—H. Denio Clerk, Gardner and Bradley Attorneys.

Let the within commission be returned by mail, directed to "Hiram Denio, Esq., Clerk of the Supreme Court, Utica, New York."

ELIAS RANSOM, Jr.
First Judge of Niagara County Court, and Counsellor of the Sup. Court.

The execution of the within commission will appear by the document hereunto annexed, dated this 21st day of September, in the year of our Lord one thousand eight hundred and forty-one—J. H. Price, commissioner.

The persons to whom such commission shall be directed, or any of them,

unless otherwise expressly directed therein, shall execute the same as follows:—

1. They or any one of them, shall publicly administer an oath to the witnesses named in the commission, that the answers given by such witnesses to the interrogatories proposed to them shall be the truth, the whole truth, and nothing but the truth;

2. They shall cause the examination of each witness to be reduced to writing, and to be subscribed by him, and certified by such of the commissioners as are present at the taking of the same;

3. If any exhibits are produced, and proved before them, they shall be annexed to the depositions to which they relate, and shall in like manner be subscribed by the witness proving the same, and shall be certified by the commissioners;

4. The commissioners shall subscribe their names to each sheet of the depositions taken by them; they shall annex all the depositions and exhibits to the commission, upon which their return shall be endorsed, and they shall close them up under their seals, and shall address the same when so closed to the clerk of the court from which the commission issued, or to the clerk of the county in which the venire shall be laid, as shall have been directed on the commission, at his place of residence.

5. If there is a direction on the commission to return the same by mail, they shall immediately deposit the packet so directed in the nearest post office.

6. If there be a direction on the commission to return the same by an agent of the party who sued out the same, the packet so directed shall be delivered to such agent.

A copy of this section shall be annexed to every commission authorized by this article."

Interrogatories to be administered to Andrew Drew, Edward Zealand, Richard Arnold, John Gordon, Shepherd McCormick, John Elmsly, Christopher Bier, John Battersby, Thomas Hector, George Chalmers, Russell Inglis, and such other witnesses as may be produced, sworn and examined on the part and behalf of Alexander McLeod, in a suit now depending in the Supreme Court of Judicature of the people of the State of New York, before the justices thereof, at the suit of the people, for murder, before Secker Brough, Esq., Adam Wilson, Esq., James E. Small, Esq., James Harvey Price, Esq., and Francis Hinks, Esq., all of Toronto, or before any one or more of them, under and by virtue of a commission issuing out of the said Supreme Court of Judicature, and under the seal thereof, pursuant to an order of the said court, entered on the 20th day of July, 1841.

First. Do you know, and if so, how long have you known Alexander McLeod, late deputy-sheriff of the district of Niagara in Canada? Down to the 29th day of December, 1837, what was the character of your acquaintance with him, as to the frequency of your meeting him, and the nature of your intercourse with him, whether professional, official, or otherwise? State particularly and fully. And of what nation is he a citizen or subject?

Second. Do you recollect the time of the destruction of the Caroline? Were you in Chippewa about that time? If so, how long, if any, before the destruction of that boat, had you been in Chippewa?

Third. From what particular place did those who went to destroy the Caroline embark? And about how long were they standing on the boat before they embarked? Where were you during all that time? And

what opportunities had you for seeing and noticing who went on that expedition? State fully and particularly.

Fourth. When those who went in the boats to destroy the Caroline embarked and put off from the shore, where was the said Alexander McLeod? If you do not know where he was, do you know any place where he was not? If yea, name that place.

Fifth. While those who went on that expedition to destroy the Caroline, were standing on the beach, and down to the time they embarked for that purpose, do you know where the said Alexander McLeod was? If nay, do you know any place where he was not? If yea, name that place.

Sixth. When the boats in which the men went, pushed off from the Canada shore on that expedition, where did you go to? By what conveyance did you go? Who, if any body, was in command of it?

Seventh. Did you see all the persons in the boat you went in from Canada to Schlosser? What can you say as to the presence or absence of the said McLeod, in or from that boat on its way to Schlosser? Where, if any where, did you see him on your way from the Canada shore to Schlosser?

Eight. Did you see the Caroline on the night of her destruction? If so, how near to her were you? If upon her, in what parts of her? Did you go on her before or after, or at the same time with the other assailants? With reference to the time that the other assailants left the Caroline, how soon did you leave her? What can you say with reference to the presence of the said Alexander McLeod among the assailants, from the first attack upon the Caroline to her final destruction.

Ninth. Do you know any thing, and if so what, concerning any person, who had been killed during the attack upon the Caroline, being conveyed upon the dock at Schlosser, and left remaining there? State fully and particularly all the circumstances attending the transaction.

Tenth. Did you see the men, who had been engaged in the destruction of the Caroline, when they landed on the Canada shore, on their return from Schlosser? If so, what can you say as to the said Alexander McLeod being among them? If you saw him at any time after the boats left the Canada shore for the purpose of destroying the Caroline, and before the men who did that act again landed on the Canada shore after its accomplishment, when was it that you so saw him?

Eleventh. How many boats started in search of the Caroline? How many reached her? How many returned in company?

Twelfth. Do you know Sir Allan N. McNab? Where was he at the time the expedition started, as you have above stated, in pursuit of the Caroline? By whose command was the expedition undertaken? What directions did you hear him give in reference to it? State fully.

Thirteenth. Who was in command of the expedition? By whose orders did he take such command?

Lastly. Do you know any other matter, or thing, or can you say any thing touching the matter in question in this cause that may tend to the benefit and advantage of the said Alexander McLeod, besides what you have been interrogated unto? Declare the same fully and at large, as if you had been particularly interrogated thereto.

The foregoing interrogatories settled and allowed this 11th day of September, 1841.

ELIAS RANSOM, Jr.
First Judge of Niagara County Court, and Counsellor of the Sup. Court.

Interrogatories to be administered to Sir Allan N. McNab—a witness to be produced, sworn, and examined on the part and behalf of Alexander McLeod in a suit now depending in the Supreme Court of Judicature of the people of the State of New York, before the justices thereof, at the suit of the people, for murder—before Secker Brough, Esq., Adam Wilson, Esq., James E. Small, Esq., James Harvey Price, Esq., and Francis Hinks, Esq., all of Toronto, or before any one or more of them, under and by virtue of a commission issuing out of the said Supreme Court of Judicature, and under the seal thereof, pursuant to an order of the said court, entered on the 20th day of July, 1841.

First. What is your profession? Where do you reside?

Second. Do you know whether a body of her Britannic Majesty's soldiers were assembled at Chippewa in the month of December in the year 1837, and January in the year 1838? If so, how many were there? What was the occasion on which they assembled? At whose call and for what purpose did they assemble? Who was in the actual command thereof? State fully and particularly.

Third. Who was lieutenant governor in fact of the said province of Upper Canada at the time mentioned in the preceding second interrogatory?

Fourth. Was the said Sir Francis Bond Head at Chippewa during the months mentioned in the last foregoing interrogatory? If so, what part did he bear in furthering or opposing the objects for which her Majesty's forces had assembled in that place? What knowledge had he that you were in command of the forces there assembled?

Fifth. At the time mentioned in the preceding interrogatories, was the Governor General of her Majesty's provinces of Upper and Lower Canada at Chippewa?

Sixth. Do you remember the last time when the steamboat Caroline came down from Buffalo previous to her destruction. What use was she to have been put to, according to the information you had and believed at the time she thus came down? What determination, if any, did this information and belief induce you, as the commander of her Majesty's forces stationed at Chippewa, to form in reference to the Caroline? By whom was the expedition for the destruction of the Caroline commanded to be undertaken? How many boats were engaged in it? How many men in each boat? Who had command of the expedition? Under whose authority did he take such command? What rank, if any, did he hold in her Majesty's naval or military service? State very fully and particularly.

Seventh. By whom was the purpose of this expedition first divulged? To whom? Where?

Eighth. What commands, if any, were given to Captain Drew as the commander of such expedition, as to its destination? By whom were such commands given? In what character or capacity were the commands given by the persons giving them? State fully and particularly.

Ninth. From what particular place did those who went on that expedition embark? Where were you when they embarked? Where were you when the boats shoved off from the shore? How long had you been there? While there, what portion of the men who went in the boats did you particularly notice? How near them were you? Among them or otherwise? What means had you of knowing who embarked? State particularly.

Tenth. Do you know Alexander McLeod, late deputy-sheriff of the

Niagara district, in the province of Upper Canada? How long have you known him? Before the evening of the destruction of the Caroline, what had been the character of your acquaintance with him, as to the frequency of your meeting him, the nature of your intercourse with him, whether professional, official, or otherwise? State fully and particularly.

Eleventh. While you were in command of her Majesty's forces at Chippewa, and before the evening of the destruction of the Caroline, had you seen said McLeod? If yea, state particularly. How often? Where? Whether at your quarters or elsewhere? And what was the character of your intercourse, whether official or otherwise? Whether business or otherwise? Had you seen him on the day before the destruction of the Caroline? Either at your quarters or elsewhere?

Twelfth. When those who went in the boats to destroy the Caroline embarked and the boats put off from the shore, where was said McLeod? If you do not know where he was, do you know any place where he was not? If so, name it.

Thirteenth. How long after the boats left the shore on the expedition to destroy the Caroline, was it before they returned to the Canada shore again? At what o'clock? In what direction, in reference to the Canada shore, did those boats proceed?

Fourteenth. When those boats returned, where were you? Where were you, when all the men in those boats got out of them and landed on the Canada shore? When they landed, how near to them were you? What portion of the men who disembarked did you observe the faces of? If you cannot tell where said Alexander McLeod was at that time, can you mention any place where you know he was not? If so, name it.

Fifteenth. Between the departure of the boats on this expedition from the Canada shore, and their return to it, what means had you of knowing what became of the Caroline? What appearances, if any, did you see, and what sounds, if any, did you hear in the direction of Schlosser?

Sixteenth. Did you ever furnish the Lieutenant Governor of Upper Canada with the names of the officers and men who destroyed the Caroline? If yea, was the name of the said Alexander McLeod among those names as furnished? If nay, why was it omitted?

Seventeenth. When did the forces under your command, or any part of them, take possession of Navy Island? Where is Captain Drew at this time?

Lastly. Do you know any other matter or thing, or can you say any thing touching the matters in question in this cause that may tend to the benefit and advantage of the said Alexander McLeod, besides what you have been interrogated unto? Declare the same fully and at large, as if you had been particularly interrogated thereto.

The foregoing interrogatories settled and allowed this 10th day of September, 1841.

ELIAS RANSOM, Jun.
First Judge of Niagara County Court and
Counsellor of the Supreme Court.

Interrogatories to be administered to Niel McGregor and such other witnesses as may be produced, sworn, and examined on the part and behalf of Alexander McLeod, in a suit now depending in the Supreme Court of judicature of the people of the state of New York, before the justices thereof, at the suit of the people, for murder, before Secker Brough, Esq.,

Adam Wilson, Esq., James E. Small, Esq., James Hervey Price, Esq., and Francis Hincks, Esq., all of Toronto, or before any one or more of them, under and by virtue of a commission issuing out of the said Supreme Court of judicature, and under the seal thereof, pursuant to an order of the said court, entered on the 20th day of July, 1841.

First. Where do you reside? Do you know any person of the name of McGregor, who is now or was in October, November, or December last, a clerk for a gentleman in Chippewa, whose name is Macklem? If so, give the christian name of the said McGregor and of the said Macklem, and how long the clerkship of the said McGregor has continued.

Second. During the last fall, was any person whose last name is McGregor, other than the individual of that name mentioned by you in your answers to the foregoing interrogatory, a clerk for any person whose name is Macklem, residing in Chippewa.

Third. What relation is this McGregor, named by you in your answer to the first foregoing interrogatory, to yourself.

Fourth. Do you know Alexander McLeod, late deputy-sheriff of Niagara district, in the late province of Upper Canada? If so, how long have you known him?

Fifth. Did you in January, 1838, or at any other time, in Chippewa or at any other place, have any conversation with said Alexander McLeod in regard to the destruction of the Caroline? If so, what did he say he had done during the attack on that boat? What, if any thing, did he say as to his being one of the company who destroyed the Caroline?

Sixth. How long before the burning of the Caroline had you known said McLeod? Before that event, have you seen him in Chippewa in the month of December, 1837? If so, how often? State particularly.

Seventh. In December, 1837, in whose employ were you, and in what capacity?

Eighth. On the 29th day of December, 1837, did you know of the selection of a body of men to go on some secret expedition? State particularly what you know about it.

Ninth. Did these men thus selected assemble in any one place in Chippewa? If so, state what took place at that assembly as to some of the men refusing to go, and the grounds of their refusal; and how long they were assembled together, and where you were at that time.

Tenth. How were the vacancies in the body made by these refusals supplied?

Eleventh. Was Alexander McLeod at that assembly, or his name among those who had been selected to go on that expedition?

Twelfth. Did those men, who were to go on that expedition, assemble again either at the same place or on the beach? If so, where did they assemble? Were you among them? What opportunities had you of distinguishing the individuals who were at this last meeting?

Thirteenth. What can you say as to the presence or absence of the said Alexander McLeod on that occasion?

Fourteenth. What was the expedition on which those men who had been thus selected, went? And where was the object of the expedition first communicated to them as a body? Who commanded the expedition? Answer particularly.

Fifteenth. Did you accompany it? Who commanded the boat in which you went? Who commanded each of the other boats? How many boats

started, and how many reached the Caroline? Was the said Alexander McLeod in the boat in which you went, or in any other of them?

Sixteenth. Were you on the Caroline that night? If yea, do you know where the said Alexander McLeod was then? Can you name any place where he was not? If so, name it.

Seventeenth. After your return, did you learn the names of all the persons who went to destroy the Caroline? What can you say as to said McLeod's name being among the number? State the circumstances fully.

Lastly. Do you know any other matters or things, or can you say any thing touching the matter in question in this cause that may tend to the benefit and advantage of the said Alexander McLeod, besides what you have been interrogated unto? Declare the same fully and at large, as if you had been particularly interrogated thereto.

The foregoing interrogatories settled and allowed this 11th day of September, 1841.

ELIAS RANSOM, Jr.
First Judge of Niagara County Court and
Counsellor of the Supreme Court.

Interrogatories to be administered by way of cross-examination to Sir Allan McNab, Neil McGregor, Andrew Drew, Edward Zealand, Richard Arnold, Shepherd McCormick, John Elmsley, Christopher Bier, John Battersby, Thomas Hector, George Chalmers, and Russell Inglis, and such other witnesses as may be produced, sworn, and examined on the part and behalf of Alexander McLeod, in a suit now depending in the Supreme Court of judicature of the people of the state of New York, before the justices thereof, at the suit of the said people, for murder, before Secker Brough, Esq., Adam Wilson, Esq., James E. Small, Esq., James Harvey Price, Esq., and Francis Hincks, Esq., or before any one or more of them, under and by virtue of a commission issuing out of the said Supreme Court of judicature, and under the seal thereof, pursuant to an order of the said court, entered on the twentieth day of July, in the year of our Lord one thonsand eight hundred and forty-one.

First cross-interrogatory. Where do you reside, and how long have you resided there? Are you a native of Canada? If not, of what country are you a native, and how long have you resided in Canada? What is your age and occupation?

Second. In what capacity or command were you at Chippewa, in December, in the year of our Lord one thousand eight hundred and thirty-seven? Were you in command of or attached to any vessel? If so, state what vessel, her size, and character, and in what capacity you were attached? If attached to the land forces, state in what capacity?

Third. Did you see Alexander McLeod the week preceding the burning of the Caroline? How often? Once, twice, thrice, or more? State particularly on what days and hours of the day. At what places?

Fourth. In any interview with McLeod, previous to the burning of the Caroline, did you converse with him, or hear him converse or speak on the subject of the Caroline?

Fifth. Did he tell you at any time that he had been at Buffalo and seen the Caroline? Did he tell you she was preparing to come to Navy Island? Did he describe to you her size and equipments and character, or tell you any thing about her? State fully what he told you, together with the time and place.

Sixth. Did you the night or morning before the burning of the Caroline, or at any other time and where, and at what hour in the day or night-time, go with McLeod in a small boat around Navy Island? If so, what was the object of this excursion?

Seventh. Did McLeod, as you know, or as you have understood from him, go around Navy Island the night or morning, or at some other and what other time before the Caroline was destroyed? And what was the object of his doing so, as you know or have understood from him? And who went with him? And how did he go? What occurred on his passage, and how long was he gone, and at what hour of the day did he return?

Eighth. Did McLeod at any time speak with you on the subject of cutting out or destroying the Caroline in case she should come down to Navy Island.

Ninth. When did the plan of destroying the Caroline first occur to you? Or when was it first communicated to you? And did you communicate it or any part of it to McLeod? Or was he present when it was communicated to you? Or did McLeod know of it?

Tenth. When did you first discover, or who first informed you, and where and when, that the Caroline was at Schlosser? Did McLeod at any time so inform you? And when did you commence your preparations for the attack upon her? Where did you go after the return of the expedition?

Eleventh. Were you at Davis' tavern at Chippewa the day after the night of the burning of the Caroline? Did you see McLeod there? If so, at about what hour of the day? Did you there converse with him about the burning? Did you on the Monday or any other day after the burning of the Caroline see McLeod at or near Davis' tavern, and converse with him about the burning?

Twelfth. Were you present at the burning of the steamboat Caroline at Schlosser on or about the 29th December, eighteen hundred and thirty-seven, or were you concerned in any, and what manner in the expedition for that purpose? Or were you present at the embarkation of the expedition at Chippewa, and did you see it embark? About how many were on the shore at and near the place where the boats started from, in your opinion?

Thirteenth. How many persons, as you know or according to your best judgment, embarked in the expedition? And did you know all the persons who entered the boats and went on this enterprise? Were you one of them? How many were in the boat you went in? Were you on the Caroline? What part did you take in her destruction? By acts or words?

Fourteenth. What kind of boats were used? How many were there in each boat? Were all the boats of nearly the same size and description? And how many boats were there?

Fifteenth. Did you know all who embarked in the expedition? Did you see the face of and recognize each one who went in the expedition? [Please name all whom you saw and recognised.]

Sixteenth. Did you know all who were in the same boat with you? And did you speak to or recognise each one of them? Please [name them and] state who commanded the expedition, and who commanded the boat you were in?

Seventeenth. Did you return in the same boat in which you embarked?

And did the same persons return with you in your boat that embarked with you?

Eighteenth. Did all the boats which embarked in the expedition reach the Caroline? How many failed? Who commanded them? What became of them? Did the boats which reached the Caroline arrive at or near the same time? Which arrived first?

Nineteenth. Was there any man in the expedition by the name of McLeod? If so, where at that time did he reside? What was his business or occupation? About how old was he, in your opinion? And what was his given name? And in what character or capacity did he belong to the expedition?

Twentieth. At which wharf or pier did the expedition embark?

Twenty-first. Did the boats in which the expedition embarked all lie at the same wharf or landing-place? If not, state at what wharfs or piers or landing-places, and how far they were apart. Did the boats all start at the same time?

Twenty-second. Did the boats all return at the same time? Did the whole expedition disembark at the same time? And at the same place? And did you see and recognise all the persons whom you saw embark?

Twenty-third. Did the persons composing the expedition belong to the regular army? or navy? or were they citizens and volunteers, or were they part citizens and part soldiers or sailors? How were the men procured? Were they drafted or levied by military orders, or did they come as volunteers? Did they go into the boats separately from time to time as they volunteered, or did they march up and enter the boats in a body?

Twenty-fourth. Was the force composing the expedition displayed in any military order, immediately previous to its embarkation? Was it so displayed or paraded in military form immediately on its disembarkation?

Twenty-fifth. Were the persons composing the expedition dressed as soldiers, or as sailors, or as citizens? Were they dressed in any uniform? Were they dressed as usual and customary for them and in their own clothing? Describe particularly what kind of hats or caps, and what kind of coats or over-coats were commonly worn?

Twenty-sixth. How was the party armed? and where and from whom were their weapons and dresses procured?

Twenty-seventh. After the expedition returned, did the force continue together, or did it disperse? If together, how long did it continue together?

Twenty-eighth. At what time of the night did the force disembark? was it moonlight? or cloudy? Describe particularly the character of the night. Where did the force go after its return? were they together that morning at sunrise? If so, where have you seen them together since? when and where? Have you since seen that force, or any part of it, armed and equipped as it was that night? If so, state particularly whom you have seen of the expedition so armed, and when?

Twenty-ninth. At about what hour in the night did the expedition embark?

Thirtieth. Were you, or was any one of the assailing party wounded in the attack upon the Caroline? Was any one killed? State who were killed [and who were wounded.]

Thirty-first. Was any resistance made by the crew, or by the persons

attached to the steamboat Caroline? Had they any weapons? Of what kind were they?

Thirty-second. Did they discharge any guns or pistols? or use any swords or pikes, or other military weapon? Was the boat armed in any manner? Were any cannon, or fire arms, or military stores, or ammunition, or provisions, or munitions of war of any kind or description found on board the Caroline? If so, state particularly what they were?

Thirty-third. Was any one of the persons found on board the Caroline killed or wounded? How many killed? How many wounded? Did you kill or wound any one? Did you see any one killed or wounded? Did you discharge a gun or pistol? Or strike any one with a sword or pike, or other weapon?

Thirty-fourth. How many persons, as you know, or have reason to believe, were in the Caroline when she was cut loose and sent over the falls?

Thirty-fifth. Did you, or any of the attacking party, go on shore at Schlosser? Did you, or any of the attacking party, go into the warehouse near the wharf?

Thirty-sixth. Did you, or any one of the attacking party, take and carry away from the Caroline any articles of her furniture, such as beds and bed furniture, lamps, candles, or other articles, or any articles of dress, as coats, hats, boots, &c., or any trunks, or other property found on board the boat? Or were any articles whatever taken from the Caroline and carried to Chippewa?

Thirty-seventh. When did you first hear that the steamboat Caroline was coming down from Buffalo, in the State of New York, to Schlosser, or Navy Island? Who informed you? Please name the persons? Did Alexander McLeod so inform you? If so, when, and where, and how many times?

Thirty-eighth. Do you know, or have you ever seen or heard of a person by the name of Sylvanus S. Rigby? If yea, when did you first know, or see, or hear of him? Was he in any way engaged in her Britannic majesty's service in the month of December, eighteen hundred and thirty-seven? If yea, when, and in what capacity?

Thirty-ninth—Did you know him or had you heard of or seen him before the Caroline was destroyed?

Fortieth—Did you ever receive any communication or information from him either directly or indirectly?

Forty-first—Was he on board the Caroline when she was attacked, as you know or have heard from him? If yea in what capacity?

Forty-second—Did he, in any way as you know, or have understood from him, give the party, or any one or more of them who attacked the Caroline, at, or before, or about the time she was attacked, to understand that she was unarmed? or that those on board of her, were also unarmed? Where is the said Rigby now?

Forty-third—How long before the attack of the Caroline did you see him? When was it? Where did he go to from there, as you understand or know?

Forty-fourth—Did Alexander McLeod go to Buffalo in the month of December, in the year of our Lord one thousand eight hundred and thirty-seven, as you know or have heard him say, to ascertain whether any steam-boat was to be taken down from there to Navy

Island or Schlosser, or near there, or for any other purpose? If yea at what time did he go? How long did he remain in Buffalo? What did he learn on the subject?

Forty-fifth—Did Alexander McLeod tell you or any person in your presence, the day or night before the Caroline was destroyed, or at any other time before, that she was coming down from Buffalo to Navy Island, or any other place in that vicinity? If yea at about what hour in the day or night time was it? When was it? and who was present? and what did he say on that subject in substance?

Forty-sixth—Did Alexander McLeod as you know or have heard him say remain at Chippewa the day before the Caroline was destroyed, and keep a look out to see when she came down to Navy Island or Schlosser? If yea how long did he keep a look out for her, and did he discover her at any time in the course of the day, and if so at about what hour? Where did he go and what did he do and say after he discovered her?

Forty-seventh—Did Alexander McLeod have any conversation, and if so what? Was it with you, or did you with him on the subject of the Caroline the day before she was destroyed, or did you with any other person in his presence, or did he with any other persons in your presence? If yea how many? at about what hour or hours in the day? Where was it? Who was present? and what was the substance of the conversation or conversations? State the whole fully and very particularly.

Forty-eighth—Did you hear Alexander McLeod say before the Caroline was destroyed that she ought, or could, or would, or might be cut out or destroyed, or any thing to that effect or import?

Forty-ninth—Did Alexander McLeod in any manner, either directly or indirectly, advise that the Caroline should be cut out or destroyed, or attacked as you know or have understood from him?

Fiftieth—Did you ever hear McLeod say he was at the burning of the Caroline or took any part in the expedition?

Fifty-first—How many boats were at first engaged for the expedition? Five or seven? How many started from Chippewa village? How many from near the mouth of the creek above Chippewa? How many got aground on Buckhorn Island?

Fifty-second—Was any person employed to pilot the boats? How many? In which boats were they? [What were their names?] Do you know or have you heard of one or more man by the name of Weiskuhu (pronounced Wiscoon,) who resided at Chippewa in 1837? *Were they or either of them, or any man of that name in the expedition?*

Fifty-third—If to the twelfth and thirteenth direct interrogatories you answer that the expedition was undertaken by command of Sir Allan N. McNab, state whether his order was public or private, in writing or verbal? If verbal, what was its language or the substance of it as near as you can recollect? Was it a permission or a command? To whom was it addressed? When and where was it given? On what day and at what hour of the day? In whose presence?

Fifty-fourth—Was there any armed force stationed on land, at or near the wharf where the Caroline was lying? Were you attacked

or fired upon from the shore, or the warehouse, or from any quarter? Was Lieutenant Elmsley or any other person sent on shore with sixteen, or any other number of men to protect the expedition while cutting loose the Caroline? If Lieutenant Elmsley or any other person went on shore, did he meet any opposition, or discover any armed men?

Lastly—Do you know of any other matter or thing, or have you heard or can you say any thing touching the matters in question in this cause that may tend to the benefit and advantage of the said people, besides what you have been interrogated unto? Declare the same fully and at large as if you had been particularly interrogated thereto.

The foregoing cross-interrogatories settled and allowed this eleventh day of September, 1841, except the part of fifteenth surrounded with black lines, and in the words following, ["please name all whom you saw and recognized,"] and the words in the sixteenth surrounded as aforesaid as follows, ["name them and"] and the words in the thirtieth surrounded as aforesaid as follows, ["and who were wounded,"] and the words in the fifty-second and surrounded as aforesaid as follows, ["what were their names?"] All those thus excepted are disallowed.

ELIAS RANSOM, JR.
First Judge of the Niagara County Courts and Counsellor of the Supreme Court.

Additional Interrogatories, to be administered by way of cross-examination, to Sir Allan N. McNab.

First cross-interrogatory:—If to the 8th direct interrogatory addressed to you, you reply, that you advised Captain Drew to destroy the Caroline, please state whether your order was written or verbal? whether at the time you knew the Caroline was lying within the territory of the United States? If the order was verbal, state the language of it? If you cannot recollect the words used, state the substance as near as you can recollect? On what day and hour was it given? At what place was it given? Did it direct him to invade the territory of the United States? Please state also, whether you had any order, instructions, or authority, to invade the territory of the United States? If so, were such instructions written or verbal? If verbal, state as near as you can recollect the language and purport thereof. State also from whom you received them, and where?

Second—Did the steamboat Caroline come down to Navy Island or Schlosser, more than once? Did you receive information of her intended coming before she arrived? From whom? Did you receive any such information from Alexander McLeod, when and where? Did you receive any information of her state and condition after she arrived at Schlosser? From whom? Was any information received from any person on the boat, or who had been on, or near the boat, after her arrival at Schlosser?

Third—If to the 16th direct interrogatory addressed to you, you answer, that you did furnish the Lieutenant Governor of Upper Canada with the names of the officers and men who were in the expedition to destroy the Caroline, state whether the names were

contained in a written list, or accompanied with any written communication referring to such list, and *explanatory* thereof—if yea annex such [*list and*] accompanying communication to your answer. And state from whom you received the names—how many names there were in the list, and answer whether from your own personal knowledge that list contained the true names of all the persons who embarked in the expedition to destroy the Caroline? Did Captain Usher's name appear in that list?

Fourth—How many boats did you see start on the expedition to destroy the Caroline? From what place or wharf did they start? And where did you stand at the time?

Fifth—Did McLeod at any time inform you that the Caroline was reported to have left Buffalo on her way to Navy Island? And did he solicit permission to prepare an expedition to destroy her? Or did he suggest that such an expedition should be fitted out? Or did you say anything to him, or he to you, on the subject of such an expedition, the night before the Caroline came down, or at any other time?

The foregoing additional interrogatories settled and allowed, except the part of the third surrounded with black lines and in the words [*list and*]. These words disallowed. September 11th, 1841.

ELIAS RANSOM, Jr.
First Judge of Niagara County Court, and Counsellor of the Supreme Court.

Additional Interrogatories, to be administered by way of Cross-examination to Niel McGregor.

First cross-interrogatory.—If you answer the 17th direct interrogatory addressed to you, that you did learn the names of all the persons engaged in the expedition, and that that of Alexander McLeod was not among the number, state how you learned the names. Was it by a list of their names in writing? If so, *attach that written list which you saw to your answer*, and state by whom that list was made.

Do you know of your own knowledge that that list is a true and faithful list of all the persons who embarked or were engaged in the expedition against the Caroline?

Second—If to the 9th direct interrogatory addressed to you, you answer that a certain number of men selected to go on the expedition to destroy the Caroline did meet together in Chippewa, state how these men were selected. What was their number, and occupation? At what house or place did they meet? At what hour of the day, and on what day?

Third—If to the 12th direct interrogatory addressed to you, you answer that the men you spoke of did assemble on the beach, state how many assembled there. And whether there were any others, and how many persons were there or near there? And at what hour they assembled there? And at what point or place on the beach they did assemble? And did they all embark together? How many boats did they occupy? And at what place did they embark?

Fourth—Did McLeod ever express to you an unwillingness to be known to be in the expedition? Or that if it were known, it would be

injurious to him? Or did you ever hear that the Sheriff threatened to remove him for being engaged in the destruction of the Caroline?

The foregoing additional interrogatories, settled and allowed this 11th day of September, 1841, except the word [names] surrounded by black lines; this is disallowed.

ELIAS RANSOM, JR.
First Judge of the Niagara County Court, and Counsellor of the Supreme Court.

DEPOSITION OF SIR ALLAN N. MCNAB.

Answers to interrogatories administered to Sir Allan N. McNab, a witness produced, sworn and examined before James E. Small, and James Harvey Price, Esquires, Commissioners on the part and behalf of Alexander McLeod, in a suit now depending in the Supreme Court of Judicature of the people of the State of New York, before the Justices thereof, at the suit of the said people for murder, under and by virtue of a Commission issuing out of the said Supreme Court and under the seal thereof pursuant to a rule of the said Court made on the twentieth day of July in the year of our Lord one thousand eight hundred and forty-one. Joseph Center, being present and *approving* for the People of the State of New York, and Hiram Gardner for said defendant, Alexander McLeod.

To the 1st interrogatory. I am a Barrister. I reside at Dundurn in the Gore District, in the province of Canada, about 45 miles from the town of Niagara.

To the 2d interrogatory. I know a body of militia was assembled at Chippewa in the month of December, 1837, and January, 1838, to the number of between two and three thousand to repel an expected invasion from rebels and American brigands assembled on Navy Island and on the American shore near Schlosser. (They were ordered out by the Lieutenant Governor of Upper Canada, Sir Francis Bond Head, for the purpose aforesaid. I was the officer in actual command of the force then and there assembled.)

To the 3d interrogatory. Sir Francis Bond Head was at that time Lieutenant Governor of Upper Canada.

To the 4th interrogatory. Sir Francis Bond Head was at Chippewa more than once during the months mentioned in the foregoing interrogatories. The force assembled there by his direction. I assumed the command of the forces there assembled by his order, directed to me as Colonel of the 3d Regiment of Gore Militia.

To the 5th interrogatory. The Governor General of Her Britannic Majesty's Provinces of Upper and Lower Canada, was not at Chippewa at the time mentioned in the foregoing interrogatory.

To the 6th interrogatory. I do remember the last time when the steamboat Caroline came down previous to her destruction. From the information I received, I had every reason to believe that she came down for the express purpose of assisting the rebels and brigands on Navy Island with arms, men, ammunition, provisions, stores, &c., to ascertain this fact I sent two officers with instructions to watch the movements of the boat, to note the same and *report to me.* These

gentlemen *reported* they saw her land a cannon, (a six or nine pounder) several men armed and equipped as soldiers, and that she had dropped her anchor under the east side of Navy Island—upon the information I had previously received from highly respectable persons in Buffalo, together with the report of those gentlemen, I determined to destroy her that night. I entrusted the command of the expedition for the purpose aforesaid to Captain A. Drew, Royal Navy. Seven boats were equipped and left the Canadian shore. I do not recollect the number of men in each boat. Captain Drew held the rank of Commander in her Majesty's Royal Navy.

To the 7th interrogatory. I ordered the expedition and first communicated it to Captain Andrew Drew on the beach where the men embarked, a short time previous to their embarkation.

To the 8th interrogatory. Captain Drew was ordered to take and destroy the Caroline wherever he could find her. I gave the order as officer in command of the force assembled, for the purpose before stated.

To the 9th interrogatory. They embarked at the mouth of the Chippewa river. I was there when they embarked, and when the boats shoved off. I had been there about one quarter of an hour. I noticed most of the persons going into the boats. I stood within ten or twelve feet of most of the boats as the men went on board, and while they were preparing I was walking about among them, which afforded me the means of knowing who embarked.

To the 10th interrogatory. I know Alexander McLeod, late Deputy Sheriff of the Niagara District in the late province of Upper Canada. I have known him for about five or six years. My acquaintance with him was of a professional nature. I did not meet him frequently, the nature of my intercourse with him was professional.

To the 11th interrogatory. I think I saw and spoke to Alexander McLeod, two or three times while I was in command of the forces at Chippewa. I do not recollect where it was I saw Alexander McLeod, or the nature of his business. I think I saw Alexander McLeod on the day previous to the destruction of the Caroline, and in what place and on what business I do not recollect.

To the 12th interrogatory. I did not see Alexander McLeod when the boats shoved off to destroy the Caroline, he was not in my presence that evening.

To the 13th interrogatory. I think the boats returned about two hours after they left the Canada shore. I do not recollect the hour, the boats seemed to go in the direction of Navy Island when they left.

To the 14th interrogatory. I was on the shore when the boats returned, and was near some of the boats when the men landed. I saw the faces of several of the men who landed, perhaps one half of the whole. I did not see Alexander McLeod, I do not know where he was, he was not in my presence.

To the 15th interrogatory. I saw the Caroline on fire going down the river after the boats had left the Canada shore. I heard two or three shots in the direction of Schlosser.

To the 16th interrogatory. *I think* I made a return to the Lieu-

tenant Governor of Upper Canada of the officers and men who destroyed the Caroline. I am sure the name of Alexander McLeod was not among them, because he was not one of the party, therefore his name could not have been in any return made by me.

To the 17th interrogatory. I was not in command when the force took possession of Navy Island. Captain Drew is now at Woodstock, in the Brock District of this province.

Lastly: I know of no other matter or thing, and can say nothing that can tend to the benefit or advantage of the said Alexander McLeod besides what I have been interrogated upon.

Signed, ALLAN N. MAC NAB.

Taken and sworn before us this thirteenth day of September, in the year of our Lord one thousand eight hundred and forty-one, at the town of Kingston, in Canada.

JAS. E. SMALL, } Commissioners.
J. H. PRICE, }

It being now 6 o'clock, the Court adjourned for one hour.

The Court reassembled at 7 o'clock, and the answers of Col. McNab to the cross interrogatories were proceeded with.

Answers to interrogatories administered by way of cross examination to Sir Allan McNab, a witness produced, sworn and examined on the part and behalf of Alexander McLeod, in a suit now depending in the Supreme Court of Judicature of the people of the state of New York, before the Justices thereof at the suit of the said people for murder, before James E. Small and James Harvey Price, Esquires, of Toronto, in the Province of Canada, under and by virtue of a commission issuing out of the said Supreme Court under the seal thereof, pursuant to a rule of the said Court made on the twentieth day of July, in the year of our Lord one thousand eight hundred and forty-one.

To the 1st cross interrogatory, he says: I reside at Dundurn, in the Gore District and Province of Canada. I have resided in that District for about sixteen years. I am a native of Canada, and have always resided there. I am forty-one years of age and am a Barrister at Law.

To the 2d cross-interrogatory, he says: I was commanding officer of the whole force at Chippewa, naval and military; was not attached to any vessel.

To the 3d cross-interrogatory, he says: I saw Alexander McLeod once during the week preceding the destruction of the Caroline. I do not recollect the particular day, the hour of the day, or the place at Chippewa, but I think it was the day before the destruction.

To the 4th cross-interrogatory, he says: I have no recollection of conversing with Alexander McLeod, of hearing him converse, or of speaking to him on the destruction of the Caroline.

To the 5th cross-interrogatory, he says: I do not recollect at any time McLeod informing me that he had been at Buffalo and seen the Caroline, that she was preparing to come to Navy Island, nor did he *describe* to me her size, her equipments or character, nor do I recol-

lect his telling me any thing about her, but I do recollect that the information which induced me to order the destruction of the Caroline was not received from Alexander McLeod.

To the 6th cross-interrogatory, he says: I did not at any time before or after the burning of the Caroline, during the day or night, go with McLeod in a *large boat* or a small boat round Navy Island.

To the 7th cross-interrogatory, he says: I have no knowledge or recollection respecting any of the matters contained in the 7th cross-interrogatory.

To the 8th cross-interrogatory, he says: I never did to my recollection.

To the 9th cross-interrogatory, he says: After I heard that she was coming down to assist the rebels, and after the officers appointed by me to watch her movements had reported to me, I made up my mind to have her destroyed; this was on the day of her destruction. I did not communicate my intention to Alexander McLeod, or in his presence, nor do I think that he could have known any thing about it.

To the 10th cross-interrogatory, he says: I did not see the boat at Schlosser, it may have been reported to me that she had returned to the American shore, but I have no recollection of the circumstance, McLeod did not so inform me. I commenced preparing for the attack immediately after the report was made to me of her having landed the men and cannon at Navy Island. This was on the day of her destruction. I was on the shore when the boats returned and went from thence to my own quarters.

To the 11th cross-interrogatory, he says: I do not recollect being at Davis's tavern on the day after the burning of the Caroline, nor did I see or have any communication with Alexander McLeod on that day, or any other day after the burning of the Caroline, on the subject of the destruction of that boat.

To the 12th cross-interrogatory, he says: I was not present at the burning of the steamboat Caroline at Schlosser. I ordered the expedition for that purpose. I was present at the embarkation of the expedition from Chippewa, and saw it embark; there were on the shore at or near the place where the embarkation took place about from sixty to one hundred men.

To the 13th cross-interrogatory, he says: I think there were about forty persons embarked in the expedition. I think I knew them all. I was not one of them. I have before stated that I ordered her destruction.

To the 14th cross-interrogatory, he says: The boats used are commonly named ship's cutters as I understand. I think there were seven or eight men in each boat.

The boats were nearly of the same size and description, they were seven in number, but as I had not the personal direction of the boats I cannot speak positively.

To the 15th cross-interrogatory he says: I think I know all who embarked on the expedition. I saw the faces of most of them, and recognized those whom I saw.

To the 16th cross-interrogatory he says: I was not in any boat,

as I have before stated. Captain Andrew Drew commanded the expedition, as I have before stated.

To the 17th cross-interrogatory he says: I was not in any boat.

To the 18th cross-interrogatory he says: I know nothing of the matters inquired after by this cross-interrogatory except from information from other persons.

To the 19th cross-interrogatory he says: I have no knowledge that there was any person of the name of McLeod in the expedition. If there had been a person of that name I think I should have known it.

To the 20th cross-interrogatory he says: There was no wharf or pier where the expedition embarked at the mouth of the Chippewa River.

To the 21st cross-interrogatory he says: The boats in which the expedition embarked all lay at the same landing place, near each other, and started about the same time.

To the 22d cross-interrogatory he says: The boats did not all return at the same time. Five arrived at about the same time, two at a different time, but I do not recollect whether they were before or after the others. They disembarked nearly at the same place as from where they started. I cannot say that I saw and recognized all the persons that embarked.

To the 23rd cross-interrogatory he says: I do not think that any of the persons composing the expedition belonged to the regular army. Some of them belonged to the Royal Navy. Others were militiamen. The force under my command volunteered their services on being called upon by the Lieut. Governor of the Province, from which force the expedition was composed of men selected by Captain Andrew Drew, under my orders. I think the men composing the expedition marched to the boats in a body, except such as took the boats down the river to the place of embarkation.

To the 24th cross-interrogatory he says: The force composing the expedition was under the immediate orders of Captain Drew who superintended the embarkation. I have already stated they came to that point in a body, and on their return they marched to their quarters in a body without any particular military display.

To the 25th cross-interrogatory he says: The persons composing the expedition were dressed in their usual clothing. The militia were not at that time provided with uniform. I can give no more definite answer to this cross-interrogatory.

To the 26th cross-interrogatory he says: The party were armed with pistols and cutlasses. The pistols belonged to some Provincial Dragoons then on service under my command. I think the cutlasses were procured from the Queen's stores.

To the 27th cross-interrogatory he says: After the expedition returned, the men composing it continued on duty until the force under my command was disbanded about the end of January or beginning of February to the best of my recollection.

To the 28th cross-interrogatory he says: It was about midnight when the force disembarked. It was not a moonlight night. I think it was cloudy. I do not recollect whether the moon was up or not. The force after their return went to their respective quarters. I do

not know whether they were together at sunrise or not. They were quartered in different houses in and about the village of Chippewa. I have seen the men engaged in this expedition since, on parade, some of them armed and equipped as militiamen. I cannot give their names or the period when I saw them. Some of them were subsequently ordered on board of schooners lying in the river. I cannot say that I have seen the same body of men together armed and equipped as they were when on that expedition.

To the 29th cross-interrogatory he says: The expedition embarked about ten o'clock, P. M.

To the 30th cross-interrogatory he says: There were some of the assailing party wounded in the attack, Lieutenant McCormack severely. There was no one killed as reported to me as commanding officer.

To the 31st cross-interrogatory he says: I was not there, therefore know nothing of the matters inquired after by this cross-interrogatory except from report.

To the 32nd cross-interrogatory he says: The same answer applies to this as to the foregoing.

To the 33d cross-interrogatory he says: The same answer to this as to the thirty-first.

To the 34th cross-interrogatory he says: I have reason to believe there was no one on board of the Caroline when she was cut loose and sent over the Falls.

To the 35th cross-interrogatory he says: I was not there.

To the 36th cross-interrogatory he says: I was not there, and I have no knowledge of any thing having been taken from the Caroline.

To the 37th cross-interrogatory he says: I heard that she was coming down a few days before her arrival. My information was derived from some gentleman in Buffalo or Black Rock. From the manner in which the information was given to me I do not feel at liberty to give their names. I did not obtain the information from Alexander McLeod.

To the 38th cross-interrogatory he says: I have seen a person of the name of Sylvanus S. Rigby. I first saw him at Chippewa. He was not engaged in her Britannic Majesty's service in December, 1837, to my knowledge. I cannot recollect the exact time when I saw him first. It was during the time I was in command there.

To the 39th cross-interrogatory he says: To the best of my recollection I neither saw nor knew him previously to the destruction of the Caroline.

To the 40th cross-interrogatory he says: Yes.

To the 41st cross-interrogatory he says: I have no knowledge of his being on board the Caroline when she was attacked, nor did he ever inform me that he was.

To the 42nd cross-interrogatory he says: Not to my knowledge, nor did he so inform me. I do not know where the said Rigby now is.

To the 43rd cross-interrogatory he says: I do not recollect seeing him before the attack on the Caroline, nor do I know where he went.

To the 44th cross-interrogatory he says: I do not know that Alexander McLeod went to Buffalo in the month of December, 1837, nor do I recollect hearing him say that he did so, to ascertain whether any steamboat was to be taken down from thence to Schlosser, Navy Island or near there or for any other purpose.

To the 45th cross-interrogatory he says: I have no recollection of Alexander McLeod telling me or any person in my presence the day or night before the Caroline was destroyed, or at any other time before, that she was coming down from Buffalo to Navy Island or any other place in that vicinity.

To the 46th cross-interrogatory he says: I have no knowledge of Alexander McLeod remaining at Chippewa the day before the Caroline was destroyed, to keep a look-out to see when she came down to Navy Island or Schlosser, nor do I recollect having heard him say that he did so.

To the 47th cross-interrogatory he says: I have no recollection or knowledge of the matters or any of them inquired after in this cross interrogatory.

To the 48th cross-interrogatory he says: No.

To the 49th cross-interrogatory he says: No.

To the 50th cross-interrogatory he says: No.

To the 51st cross-interrogatory he says: Seven boats were first engaged in the expedition. None started from the Chippewa village. All started from the Chippewa River. None got aground at Buckhorn Island to my knowledge.

To the 52nd cross-interrogatory he says: I am not aware that any person or persons was or were employed to pilot the boats. I have heard of a person living on the Niagara frontier of the name of Wiscoon, but I do not recollect of ever having seen him. I do not think there was any one of that name on the expedition.

To the 53rd cross-interrogatory he says: The 12th and 13th direct interrogatories to which cross interrogatory refers have not been put to me. I was the person who gave the orders to Captain Drew which were personal, verbal and private. My orders were to take and destroy the Caroline. They were given on the beach a few minutes previous to the expedition putting off from the shore.

To the 54th cross-interrogatory he says: I know nothing of my own knowledge of the matters inquired after in this cross-interrogatory.

To the last cross-interrogatory he says: I do not know any other matter or thing, nor have I heard, nor can I say anything touching the matters in question in this cause that may tend to the benefit or advantage of the said people, besides what I have been interrogated unto.

Signed ALLAN N. MACNAB.

Taken and sworn before us this thirtieth day of September, in the year of our Lord one thousand eight hundred and forty-one at the town of Kingston in Canada.

JAS. E. SMALL,
J. H. PRICE, } Commissioners.

To the 1st additional cross-interrogatory he says: My order to Captain Drew was verbal as I have before stated. The substance of which was to take and destroy the Caroline, as nearly as I can recollect. The order was given on the evening of the day on which she was destroyed, on the beach near to the place where the boats put off. I had no orders to invade the territory of the United States. In my orders to Captain Drew nothing was said about invading the territory of the United States, but such was their nature that Captain Drew might feel himself justified in destroying the boat where ever he might find her.

To the 2d additional cross-interrogatory he says: I do not recollect her coming down more than once. I did receive information of her intended coming before she arrived. The peculiar circumstances under which I received the information makes me feel that I cannot with any propriety disclose the names of those who communicated it to me.—The information, however, was not received from Alexander McLeod. I received no information of the state or condition of the Caroline after she arrived at Schlosser.

To the 3d additional cross-interrogatory he says: I am under the impression, although I will not be positive, that I did furnish the Lieutenant Governor of Upper Canada with the names of the officers and men who were in the expedition to destroy the Caroline. If I did so it must have been a written list. I do not recollect whether it was accompanied with a written communication or not. Captain Usher's name could not have been in the list, as he was not one of the party.

To the 4th additional cross-interrogatory he says: I have already answered the matters inquired after in this additional cross-interrogatory.

To the 5th additional cross-interrogatory he says: I do not recollect Alexander McLeod having informed me of the Caroline having left Buffalo on her way to Navy Island, nor did he solicit permission to prepare an expedition to destroy her, nor did he suggest that such an expedition should be fitted out, nor did I say any thing to him or he to me on the subject of such an expedition the night before the Caroline came down, or at any other time to the best of my recollection.

Signed ALLAN N. MACNAB.

Taken and sworn before us this 13th day of September, in the year of our Lord one thousand eight hundred and forty-one, at the town of Kingston, in Canada.

JAS. E. SMALL,
J. H. PRICE, } Commissioners.

John Harris of the town of London in the District of London in the Province of Canada, Esquire, aged sixty years, being produced sworn and examined in behalf of the defendant in the title of these depositions, doth depose as follows, viz:

To the 1st interrogatory he says: I have no personal acquaintance with Alexander McLeod, I am not certain that I ever spoke to

him in my life, I knew him by sight not for a longer period than a week; I do not know of what nation he was a subject.

To the 2d interrogatory he says: I do recollect the destruction of the Caroline. I was in Chippewa about that time. I was there about a week or ten days before she was destroyed.

To the 3d interrogatory he says: Those who went to destroy the Caroline embarked at the mouth of the Chippewa Creek, in the District of Niagara; the men were in the boats about half an hour before they started; they were ordered into the boats as they arrived. I was amongst them engaged under Captain Drew in manning the boats. I had every opportunity that an officer has of seeing and noticing those engaged in an expedition under his command.

To the 4th interrogatory he says: I do not know where he was, but one thing I do know, that he was not in any of the boats, nor was any one of that name.

To the 5th interrogatory he says; I had no knowledge of where he was, he was not in the boats.

To the 6th interrogatory he says: We pulled off from the Canada shore towards Fort Schlosser. I was in one of the boats. Captain Drew was in command of the boat.

To the 7th interrogatory he says: I did see all the persons in the boat I went in. Alexander McLeod was not in that boat. I did not see him anywhere on my way from the Canada shore to Schlosser.

To the 8th interrogatory he says: I did see the Caroline on the night of her destruction. I was one of the boarding party. I boarded her abaft the wheel-house. I went forward to the forecastle hatchway and I was afterwards in her cabin. I went on at the same time as the other assailants. I believe I was *the last person who left her.* With reference to Alexander McLeod, as I have already stated, he was not with the assailants and had nothing to do with the destruction of the vessel.

To the 9th interrogatory he says: I did not see that any person was killed nor did I see any person placed on the wharf. I saw one man severely wounded.

To the 10th interrogatory he says: I saw the men on their return to the Canada shore. Alexander McLeod was not among them. Their names were particularly taken down upon our return to Chippewa as they left the boats; *the name of McLeod was not on the list I saw the list then, and have seen it since.*

To the 11th interrogatory he says: Seven boats left Chippewa, five only reached the Caroline, five returned in company.

To the 12th interrogatory he says: I knew Sir Allan MacNab well —he was on the beach when we started. It was by his command that the expedition was undertaken as Commander of the Forces, on that frontier. *The directions I heard him give were to destroy her wherever we could find her.*

To the 13th interrogatory he says: Captain Andrew Drew was in command of the expedition, he undertook it by order of Colonel, now Sir Allan MacNab.

To the last interrogatory he says: I know nothing more than I have stated. All I can say is, I am positive Alexander McLeod was

not in the boats as I was actively employed as aide-de-camp to Captain Drew in superintending the manning of the boats.

(Signed) JOHN HARRIS.

Taken and sworn before me this thirteenth day of September, in the year of our Lord, one thousand eight hundred and forty-one at the town of Kingston, in Canada.

JAS. E. SMALL, } Commissioners.
J. H. PRICE, }

Answers to the interrogatories by way of cross-examination.

The said John Harris to the 1st cross-interrogatory says: I reside in the town of London, in the District of London in the Province of Canada. I have resided there since the year 1834. I am not a native of Canada but am a native of England. I have resided in Canada since 1813. I am sixty years of age, and am Treasurer of the London District.

To the 2d cross-interrogatory he says: I was attached to the Naval Brigade at Chippewa. I was acting as Aide-de-camp to Captain Drew. I was not in command of or attached to any vessel.

To the 3d cross-interrogatory he says: It is probable I did see him during the week previous to the burning of the Caroline, but when or where or how often, I cannot say.

To the 4th cross-interrogatory he says: I never spoke to him nor did I hear him converse on the subject of the Caroline.

To the 5th cross-interrogatory he says: I never spoke to him in my life, nor did he to me on any subject.

To the 6th cross-interrogatory he says: Alexander McLeod never was in a boat with me at any time whatever.

To the 7th cross-interrogatory he says: I do not know nor have I understood from him that he ever went round Navy Island at any time.

To the 8th cross-interrogatory he says: I have before stated hat I never had any conversation with Alexander McLeod whatever.

To the 9th cross-interrogatory he says: The plan for destroying the Caroline first occurred to me on the afternoon of the 29th of December, 1837, in consequence of having been directed either by Colonel MacNab or Captain Drew to observe her motions. I saw her go twice from Schlosser to Navy Island and land men at the latter place. She then returned to Schlosser and let off her steam. I reported this circumstance either to Colonel MacNab or Captain Drew or both and suggested the expediency of cutting her out. I did not communicate my views on the subject to Alexander McLeod or any other person than those above named, nor could McLeod have known of it to the best of my knowledge.

To the 10th cross-interrogatory he says: I observed the Caroline during the afternoon of the 29th December, 1837, coming down the river to Schlosser. McLeod did not communicate anything respecting her to me. We commenced our preparations toward dusk after she had let her steam off.

To the 11th cross-interrogatory he says: I have no recollection of being in Davis's or any other tavern at Chippewa the day after the

burning of the Caroline, or at any other time during my stay at Chippewa, nor did I see McLeod there to the best of my recollection on the Monday or any other day after the burning of the Caroline.

To the 12th cross-interrogatory he says: I was present at the burning of the Caroline, and I was actively employed in fitting out and arranging the expedition on the 29th December, 1837, and I embarked with it. I cannot say how many persons were on the shore, but there were a great many.

To the 13th cross-interrogatory he says: There were exactly forty-one, neither more nor less, in the five boats, that reached the Caroline—there may have been as many as twelve in the two boats that did not reach her. I knew a great many of those who embarked in the enterprise, others I knew by sight, and some I did not know. I have before stated I was one of them. There were nine in the boat I was in. I was on board the Caroline, and I took a very active part in setting fire to her, and was the last that left her.

To the 14th cross-interrogatory he says: They were five, six, and one from our boats. I cannot say exactly how many were in each boat; there were nine in the boat in which I was. I believe they were boats belonging to steamboats, such as are generally known as cutters. There were seven started, and five reached the Caroline.

To the fifteenth cross-interrogatory he says: I have already stated that many I knew well, some I knew by sight, and others I did not know. I saw the whole of them, but cannot say that I saw all their faces, or recognized the whole of them.

To the 16th cross-interrogatory he says: I knew every one that was in the same boat with me, particularly, I spoke to and recognized each one of them. Captain Andrew Drew commanded the expedition, and he also commanded the boat I was in.

To the 17th cross-interrogatory he says: I returned in the same boat as I embarked in, but all the nine persons did not return with me.

To the 18th cross-interrogatory he says: All the boats that embarked did not reach the Caroline. Five did, two failed, Captain Andrew Drew commanded one boat, Shepherd McCormack, Lieutenant in the Royal Navy, commanded another boat, Christopher Rice commanded another boat, Mr. Gordon commanded another, and the Honorable John Elmsley commanded the fifth. The two which did not reach the Caroline were commanded by Messrs. Hector and Battersby. The seven boats returned to Chippewa. There were not many seconds between each of the five boats reaching the Caroline. The boat in which I was, was the first boat that arrived.

To the 19th cross-interrogatory he says: There was no man of the name of McLeod in the expedition.

To the 20th cross-interrogatory he says: From the bank at the mouth of the Chippewa, there was no wharf or pier.

To the 21st cross-interrogatory he says: They did, and all started at the same time.

To the 22nd cross-interrogatory he says: They did not all return at the same time, nor did they all disembark at the same time, five only returned shortly after each other. I was in the last of the five boats.

The crews of the four other boats were on the beach when I landed, and the whole were immediately mustered, and the names taken down. I did not see and recognize all the persons who embarked. I did not stop to see the names taken down, but left a person in the act of doing it.

To the 23rd cross-interrogatory he says: There were none of the regular army, several of the navy, the remainder were of the militia under Col. McNab. They volunteered from the force under Col. McNab, upon being informed that their services were required for a secret expedition. They walked down together, but did not go in rank and file.

To the 24th cross-interrogatory he says: It was not, nor upon its disembarkation.

To the 25th cross-interrogatory he says: They were not dressed as soldiers or sailors, but in their ordinary clothing. Captain Drew, I think, was the only person in uniform.

To the 26th cross-interrogatory he says: With sabres, pikes, cutlasses, and some pistols, I cannot say where they were procured—their dresses were their own. The impression upon my mind is, that some of the arms were procured from the Provincial Dragoons.

To the 27th cross-interrogatory he says: They went to their respective quarters.

To the 28th cross-interrogatory he says: They disembarked about midnight. It was cloudy, but not a dark night. I cannot positively say whether the moon was up or had set. I have already stated that the force separated and went to their respective quarters. They were at Chippewa the next morning at sunrise, with the rest of the force, under Colonel McNab, but not embodied as a distinct corps. I have not since seen them together. I have not since seen them armed and equipped as they were that night.

To the 29th cross-interrogatory he says: I cannot say positively, but it must have been after nine o'clock, as we were absent two hours and some minutes. I do not recollect that I consulted my watch on the occasion.

To the 30th cross-interrogatory he says: I was not. Some of the party were. Mr. McCormack was severely wounded, and another slightly. I think that was all. There were none killed.

To the 31st cross-interrogatory he says: Yes. Resistance was made by the persons attached to the Caroline. Some of them had weapons. Whether they all had or not I cannot say. There were fire arms. I saw a pistol in the hands of one person, who snapped it at one of our men, but whether it went off or not I cannot say. Another had a gun or rifle and fired from the bow of the vessel at us. As we approached, the ball passed between Captain Drew and myself. The person who fired called out, "turn up boys, the enemy are coming. What boats are there? give the countersign," and then fired. I think I saw other weapons in the hands of the people on board the Caroline, but I cannot describe them.

To the 32nd cross-interrogatory he says: Besides what I have stated in the foregoing answer, fire-arms were discharged from the direction of a white house not far from the wharf, probably at the distance of sixty or seventy yards. I cannot say whether they used

any swords or pikes, or other military weapons. The steamboat had no cannon mounted. I saw no cannon, fire-arms, or munitions of war or military stores on board of the Caroline, as I did not search for any, further than those which I saw in the hands of the people, as above stated.

To the 33d cross-interrogatory he says: I am not aware that any one was killed on board. There were one or two wounded. One of them had a sabre cut, who I.believe, was put on the wharf, by some of our men. I did not kill or wound any one. I saw no one killed I saw no wound inflicted. I did not discharge a gun or pistol, having none with me. I struck no one with a sword or pike or other weapon.

To the 34th cross-interrogatory he says: No one. They were all driven ashore before she was cast loose, as Captain Drew's orders were to drive them on shore and hurt as few as possible, and to cast her off from the wharf previous to setting fire to her, so as to prevent the possibility of any injury to private property on shore.

To the 35th cross-interrogatory he says: I was not on shore, but I think Mr. Elmsley and some of the men were on the wharf. I did not go into the warehouse, nor do I know that any of the attacking party went in.

To the 36th cross-interrogatory he says: I did not take any of the articles mentioned in this cross interrogatory from the Caroline, nor do I know of any other person having done so, nor of any being brought to Chippewa.

To the 37th cross-interrogatory he says: I did not hear of her coming, to the best of my recollection. I think I heard a steamboat was to be down. I knew nothing of the Caroline till I saw her on the 29th December, coming down the river, near Buckhorn Island. I do not remember who informed me that a steamboat was coming, but I am certain it was not McLeod.

To the 38th cross-interrogatory he says: I never heard of the man before now that I know of.

To the 39th cross-interrogatory he says: No.

To the 40th cross-interrogatory he says: No.

To the 41st cross-interrogatory he says: He was not, that I know of.

To the 42d cross-interrogatory he says: He never did to me, nor to my knowledge to any one or more of the party who attacked the Caroline. I have no knowledge of his residence.

To the 43d cross-interrogatory he says: I never saw him.

To the 44th cross-interrogatory he says: I never heard or knew that he was there.

To the 45th cross-interrogatory he says: McLeod never spoke to me upon the subject, nor to any person in my presence or hearing.

To the 46th cross-interrogatory he says: I know nothing of the matters inquired of me in this cross-interrogatory.

To the 47th cross-interrogatory he says: I do not think that McLeod ever spoke to me in his life, nor I to him. I never heard any conversation between him and any other person or persons upon the subject of the Caroline.

To the 48th cross-interrogatory he says: I have before said I never heard McLeod speak to any person upon the subject of the Caroline.

To the 49th cross-interrogatory he says: I do not know, nor have I understood from him that he, directly or indirectly, advised the destruction of the Caroline, nor do I believe he ever did.

To the 50th cross-interrogatory he says: I never did.

To the 51st cross-interrogatory he says: Seven. And seven started from the mouth of the Chippewa creek. I am not aware that any of them got aground on Buckhorn island.

To the 52d cross-interrogatory he says: There was no pilot employed. I know a family living near Chippewa of the name of *Wiscoon*. There were none of them employed as pilots. There was no one of that name in the expedition.

To the 53d cross-interrogatory he says: His order was given to Captain Drew. It was verbal and private; it was not a permission, it was a command—it was given on the 29th December, 1837, at head quarters at Chippewa. The final command was given on the beach, just before starting, in my presence, but not in the hearing of any one else.

To the 54th cross-interrogatory he says: I do not know that there was an armed force stationed on the land at or near the wharf at which the Caroline was lying. I have before stated, that shots were fired from the front of the white house near the wharf.—I have before stated, that I believe that Lieut. Elmsley was on the wharf, but with how many men, or whether he was ordered there, I cannot say, nor do I know whether he met with any opposition, or discovered any armed men.

To the last cross-interrogatory he says: I do not.

Signed. JOHN HARRIS.

Taken and sworn before us, this 30th day of September, in the year of our Lord, one thousand eight hundred and forty-one, at the town of Kingston, in Canada.

JAS. E. SMALL,
J. H. PRICE, } Commissioners.

Filed, September 18th, 1841.

Note.—In the original, the signatures of the Commissioners appear at the foot of each page, but these are omitted in the copy.

(A copy) H. DANA, *Clerk.*

EDWARD ZEALAND, of the town of Hamilton, in the Gore District, and Province of Canada, mariner, aged forty-five years, being produced, sworn and examined on behalf of the defendant, in the title of these depositions named, doth depose as follows:

To the first interrogatory he says: I do know Alexander McLeod, and have known him since about January or February, 1838. I was not acquainted with him in December, 1837. I knew his person by sight in December, 1837, but did not know his name was McLeod until 1838. I think him a native of Scotland and a British subject.

To the second interrogatory, he says: I do recollect the destruc-

tion of the Caroline. I was in Chippewa at that time, and had been there from about the twenty-fifth day of December, 1837.

To the third interrogatory, he says: The expedition embarked from the Chippewa creek. I think those who embarked were engaged in preparation on the beach, for about an hour before starting. I was among the others assisting in the preparations during that time. I had no opportunity of noticing those who went, except the persons in the boat in which I went.

To the fourth interrogatory, he says: I do not know where Alexander McLeod was at the time mentioned in this interrogatory. I know he was not in the boat in which I was.

To the fifth interrogatory, he says: I do not know where the said Alexander McLeod was at the time mentioned in this interrogatory. I know he was not in my immediate neighborhood.

To the sixth interrogatory, he says: I went on the expedition in a boat commanded by Captain Drew.

To the seventh interrogatory, he says: I saw all the persons in the boat I went in from Canada to Schlosser. Alexander McLeod was not one of them, and I did not see him on my way from Canada to Schlosser.

To the eighth interrogatory, he says: I did see the Caroline the night of her destruction. I was on board of her, aft, in the cabin, and on the larboard side of the deck. I got on board of the Caroline about the same time with the other assailants. I left her nearly the last. I did not see Alexander McLeod among the assailants, and I do not believe he was one of them.

To the ninth interrogatory, he says: There was a dead man lying on the dock at Schlosser, but he was not conveyed there. The man referred to met his death during the attack upon the Caroline, but I do not know whether he received the shot on the Caroline, or on the dock. I think the shot which struck him proceeded from the direction of the tavern on shore. He could not have been carried or conveyed to the dock without my knowledge.

To the tenth interrogatory, he says: I did see the men who had been engaged in the destruction of the Caroline, when they landed on the Canada shore, upon their return from Schlosser. I did not see Alexander McLeod among them, and believe that he was not among them. I did not see him at any time after the boats left the Canada shore for the purpose of destroying the Caroline, and up to their return and landing on the Canada shore after her destruction.

To the eleventh interrogatory, he says: Seven boats started, five reached the Caroline, and five returned almost in company.

To the twelfth interrogatory, he says: I know Sir Allan N. McNab. I do not know where he was at the time the expedition started. I do not know by whose command the expedition was undertaken. I did not hear Sir Allan N. McNab give any directions. I have no doubt the expedition was undertaken by command of Sir Allan N. McNab. Knowing Captain Drew to have been in the Royal Navy, I think he would not have entered on the expedition without being properly authorized to do so; and on that account I joined the expedition, and served as in the regular service.

To the thirteenth interrogatory, he says: Captain Drew was in command of the expedition, but I do not know by whose order.

To the last interrogatory, he says: I know nothing further respecting the matters in question. EDWARD ZEALAND.

Sworn, taken and subscribed, at the town of Hamilton, Canada, this eighteenth day of September, 1841, before me,

SECKER BROUGH, Commissioner.

Answers to the interrogatories by way of cross-examination proposed to Edward Zealand.

To the first cross-interrogatory, he says: I reside at Hamilton, and have resided there about six years. I am a native of England, and have resided in Canada since the year eighteen hundred and thirteen. I am aged forty-five years, and am a mariner.

To the second cross-interrogatory, he says: I was in charge of the boats and seamen on shore at Chippewa at the time mentioned in this interrogatory. I was not attached to any vessel.

To the third cross-interrogatory, he says: I did only once. I saw him in a boat as one of a reconnoitering party. I think, but am not sure it was McLeod, as I did not know his name at the time. I think it was the person whom I afterwards understood to be McLeod. I think this was on the day before the day of the burning of the Caroline.

To the fourth cross-interrogatory, he says: I neither conversed with McLeod, nor heard him converse, nor speak on the subject of the Caroline.

To the fifth cross-interrogatory, he says: I never at any time heard McLeod speak on the subject of the Caroline.

To the sixth cross-interrogatory, he says: I went in a boat with Captain Graham round Navy Island, for the purpose of reconnoitering, on the day, I think, before the day of the burning of the Caroline, and a person was in the boat who, I think, was McLeod, but am not certain.

To the seventh cross-interrogatory, he says: I only know of McLeod's going round Navy Island according as I have stated in my answer to the last preceding interrogatory. I have never understood from him that he went round Navy Island at any time. On the occasion of going round Navy Island, as I have mentioned, I remember nothing particular occurring, but that the people on the Island fired constantly at us with grape, round shot, and musket shot.

To the eighth cross-interrogatory, he says: Never.

To the ninth cross-interrogatory, he says: It did not occur to me that an expedition was contemplated; it was communicated to me about two hours before it started, but I was not aware that the destruction of the Caroline was the object of the expedition, until the time of starting. I did not communicate the plan, nor any part of it to McLeod. He was not present, to my knowledge, when it was communicated to me.

To the tenth cross-interrogatory, he says: I did not discover she was at Schlosser until we failed in finding her at Navy Island. McLeod never informed me where she was. We commenced preparations some time near eight o'clock in the evening of the 29th of De-

cember, 1837. After the expedition, we went to our respective quarters.

To the eleventh cross-interrogatory, he says: I was at Davis's tavern at the time mentioned in this interrogatory. I did not see McLeod at or near Davis's tavern, or converse with him at any time during my stay at Chippewa.

To the twelfth cross-interrogatory, he says: I was at the burning of the Caroline. Was concerned in the expedition, and saw it embark in the Chippewa creek. I think there were within one hundred persons on the shore when the boats started, but I did not pay much attention to the numbers.

To the thirteenth cross-interrogatory, he says: I think about fifty or sixty persons embarked. I did not know them all. I was one of them. Eight persons went in the boat I went in. I went on board the Caroline and assisted in the destruction.

To the fourteenth cross-interrogatory, he says: The kind of boats used were such as are employed about steamers and schooners. The average number in each boat was about eight. The boats were of pretty much the same size and description, and were seven in number.

To the fifteenth cross-interrogatory, he says: I did not know or recognize all who were in the expedition.

To the sixteenth cross-interrogatory, he says: I was not previously personally acquainted with all, nor do I remember to have spoken to each individual; but I observed the face of each of them. Capt. Drew commanded the expedition, and the boat in which I was.

To the seventeenth cross-interrogatory, he says: I returned in the same boat in which I went, and all the persons, except Captain Drew, who embarked in the same boat with me, returned with me.

To the eighteenth cross-interrogatory, he says: Only five boats reached the Caroline—two of the seven failed. I do not know who commanded them. I believe they lost their way. The boats which reached the Caroline arrived nearly at the same time.

To the nineteenth cross-interrogatory, he says: I do not know whether any man of the name of McLeod was in the expedition.

To the twentieth cross-interrogatory, he says: The expedition did not embark from any wharf or pier.

To the twenty-first cross-interrogatory, he says: The boats all lay near each other along the beach, and started at the same time.

To the twenty-second cross-interrogatory, he says: The five boats which reached the Caroline, returned at pretty nearly the same time, and same place. I did not recognize at the disembarkation all who embarked.

To the twenty-fourth cross-interrogatory, he says: The force was not paraded or displayed in military order, either previous to its embarkation, or on its disembarkation.

To the twenty-fifth cross-interrogatory, he says: They were dressed in their usual and customary dress; not in clothes given out to them, but in their own clothes. Those who came from schooners, were dressed as sailors—civilians as civilians—there was no particular uniform.

To the 26th ross-interrogatory he says: They were armed with pistols, cutlasses and pikes. The arms were issued from the Ordinance Department.

To the 27th cross-interrogatory he says: After the expedition returned, the crews did not continue together but went to their respective quarters.

To the 28th cross-interrogatory he says: I think the force disembarked about two o'clock in the morning—it was not moonlight, or cloudy, but a little hazy, sufficiently light to distinguish each other as we sat in the boats. The forces on their return went to their respective quarters; they were not together at sunrise that morning as a body on duty, though some of them might have happened of their own accord to be together. I have not since seen them together as a body. I have since seen individuals of that force on duty in the different departments.

To the 29th cross-interrogatory he says: At about ten o'clock.

To the 30th cross-interrogatory he says: I was not wounded, Lieut. McCormick and Richard Arnold of the assailing party were wounded, but I am not aware that any one was killed.

To the 31st cross-interrogatory he says: I did not see any resistance made on board of the Caroline, with the exception of a shot which was fired from the after-part of the vessel at the time of boarding. I think that shot struck and wounded Lieut. McCormick. I saw no weapons.

To the 32d cross-interrogatory he says: One gun or pistol was discharged as stated in my answer to the last preceding interrogatory. I did not see them use any swords or other weapons. The boat was not armed in the after-part where alone I was. I did not see any arms or munitions of war of any description on board of the Caroline.

To the 33d cross-interrogatory he says: I did not see any one of the Caroline's crew killed, or receive a wound. I saw one man lying dead on the dock, who I suppose belonged to the Caroline but on what spot he received the shot I do not know—but I did not kill or wound any one. I did not discharge a gun or pistol, or strike any one with any weapon.

To the 34th cross-interrogatory he says: Not one!

To the 35th cross interrogatory he says: I went on shore at Schlosser for the purpose of cutting loose the stern-fast of the Caroline, to prevent the flames from her communicating with the storehouse on shore. I saw some two or three others of the assailing party on shore. I did not myself nor did I see any body else go into the warehouse.

To the 36th cross-interrogatory he says: Mr. Harris of London, having fallen overboard, while getting from the Caroline to his boat, and having pulled him out of the water, I returned from my boat on board the Caroline for the purpose of getting something to cover Mr. Harris, as it was a cold night, and took a piece of old carpet for the purpose. I saw also a mattress taken from on board the Caroline, and saw it thrown or fall into the water, and carried off by the water.

I believe a dog was also taken from the boat. I did not see nor am I aware that any other article was taken from the Caroline.

To the 37th cross-interrogatory he says: I never heard the Caroline was coming from Buffalo, but on the day she was destroyed; on the day before I heard she was plying between Navy Island and the American shore. I cannot remember who informed me, McLeod did not so inform me.

To the 38th cross-interrogatory he says: I never knew and do not remember ever to have seen or heard of Sylvanus S. Rigby before this, the time of my examination.

To the 39th cross-interrogatory he says: No! To the 40th cross-interrogatory he says: No! To the 41st cross interrogatory he says: I neither know, nor have I heard from him that he was on board of the Caroline when she was attacked.

To the 42d cross-interrogatory he says: No; and I know not where he is.

To the 43d cross-interrogatory he says: I know nothing about him.

To the 44th cross-interrogatory he says: I neither know, nor have I understood from McLeod anything of the matters inquired after by this interrogatory.

To the 45th cross-interrogatory he says: McLeod neither told me nor any person in my presence anything respecting the matters inquired after by this interrogatory.

To the 46th cross-interrogatory he says: I neither know, nor have heard McLeod say anything of the matters inquired after by this interrogatory.

To the 47th cross-interrogatory he says: I neither had nor have had any conversation with McLeod, nor with any person in his presence respecting any matters inquired after by this interrogatory.

To the 48th cross-interrogatory he says: No.

To the 49th cross-interrogatory he says: I neither knew nor have understood from McLeod, that he was in any manner advised, as mentioned in this interrogatory.

To the 50th cross-interrogatory he says: Never!

To the 51st cross-interrogatory he says: Seven boats were engaged in the expedition, and all started from inside the mouth of the Chippewa Creek, I do not know how many, or whether any grounded at Buckhorn Island.

To the 52d cross-interrogatory he says: I am not aware that any person was engaged to pilot the boats. I have an indistinct recollection of the person of the name mentioned in this interrogatory, residing, I think some years since, at or about Chippewa, but not in 1837, I believe he was a pilot, but no person of that name was to my knowledge engaged in the expedition.

To the 53d cross-interrogatory he says: I know nothing of the character of the order or command mentioned in this interrogatory. I was placed by Sir Allan N. McNab under the command of Captain Drew, and to him alone I looked for orders.

To the 54th cross-interrogatory he says: I did not see any armed force at, or upon the wharf, but several shots were fired towards us

from the direction of the tavern, near the wharf. I do not know whether Lieutenant Elmsley, or any other person was sent or went on shore for the purpose mentioned in this interrogatory or any other such purpose.

To the last cross-interrogatory he says: I know nothing further than what I have already stated in my answers to the foregoing interrogatories touching the matter in question.

EDWARD ZEALAND.

Sworn, taken and subscribed at Hamilton, Canada, this 18th day of September, 1841, before me, SECKER BROUGH, Commissioner.

DEPOSITION OF WILLIAM SMART LIGHT.

William Smart Light, of the township of North Oxford, in the District of Brock and Province of Canada, Esquire, aged twenty-two years and upwards, being produced, sworn and examined in behalf of the defendant in the title of these depositions named, doth depose as follows, viz.

To the 1st interrogatory, he says: I have no personal acquaintance with Alexander McLeod, he was once pointed out to me in the streets of Chippewa, but whether before or after the 29th December, 1837, I cannot say. I believe him to be a British subject.

To the 2d interrogatory, he says: I perfectly recollect the destruction of the Caroline. I was at Chippewa at the time, and had been there about four or five days previous.

To the 3d interrogatory, he says: The persons who went to destroy the Caroline, embarked at the mouth of the Chippewa Creek near some willow trees. I had been appointed to Mr. Elmsley's boat previous to my setting out, and entered her as soon as I arrived, and remained on board the boat until the expedition started. I cannot speak positively as to the persons who went on that expedition except such as went in the same boat with myself.

To the 4th interrogatory, he says: I do not know where the said Alexander McLeod was when the boats put off. I know he was not in my boat.

To the 5th interrogatory, he says: I do not know where the said Alexander McLeod was, he was not in my presence.

To the 6th interrogatory, he says: When the boats pushed off from the Canada shore on the expedition to destroy the Caroline, they pulled towards her. I was in one of the boats, which boat Mr. Elmsley commanded.

To the 7th interrogatory, he says: I saw all the persons in the boat in which I was on my way to Schlosser. Alexander McLeod was not one of them, neither did I *see* him on my way from the Canada shore to Schlosser.

To the 8th interrogatory, he says: I saw the Caroline on the night of her destruction. I boarded her on the starboard bow, and was the first on board from my boat. I left her immediately after the other assailants. The said Alexander McLeod was not among the assailants from the first attack upon her till her final destruction, to the best of my knowledge and belief.

To the 9th interrogatory, he says: I saw no one killed on board

the Caroline. I saw a man in the after cabin desperately wounded. I was ordered by Captain Drew to convey him on shore. I took him to the gangway, and believe he either walked or was carried on shore, but cannot say positively as I did not see him.

To the 10th interrogatory, he says: I did not see the whole of the men who had been engaged in the destruction of the Caroline, on my return from Schlosser to the Canada shore. I did not see Alexander McLeod among them.

To the 11th interrogatory, he says: I believe there were from seven to nine boats started. I saw but four at the Caroline. No boat returned in company with the boat I was in.

To the 12th interrogatory, he says: I know Sir Allan McNab, I did not see him when the expedition started in pursuit of the Caroline. I do not know by whose command the expedition was undertaken. I heard no directions given with reference to the expedition.

To the thirteenth interrogatory, he says: Captain Drew was in command of the expedition. I cannot say by whose orders he undertook the expedition.

To the last interrogatory, he says: I know nothing more in answer to this interrogatory than I have already stated in reply to the foregoing interrogatories.

W. S. LIGHT.

Taken and sworn before me, this seventeenth day of September, in the year of our Lord one thousand eight hundred and forty-one, at the town of Woodstock, in the district of Brock, in Canada.

J. H. PRICE, Commissioner.

ANSWERS TO THE INTERROGATORIES BY WAY OF CROSS-EXAMINATION.

The said *William Smart Light*, to the 1st cross-interrogatory, says: I reside in the township of Oxford, in the Northern Division. I have resided there nearly seven years. I am a native of England, and have resided in Canada for ten years. I am twenty-two years of age. I am a captain of the 2d Oxford regiment of militia, and superintend the management of my father's property.

To the 2d cross-interrogatory, he says: I was acting as Aide-de-Camp to Captain Drew in December, 1837. I was not in command of any vessel, nor was I attached to any vessel.

To the 3d cross-interrogatory, he says: I do not recollect having seen Alexander McLeod previously to the destruction of the Caroline.

To the 4th cross-interrogatory, he says: I never did converse with Alexander McLeod or heard him converse on the subject of the destruction of the Caroline, or any other subject.

To the 5th cross-interrogatory, he says: I know nothing of the matters inquired after in this cross-interrogatory.

To the 6th cross-interrogatory, he says: I never went with the said Alexander McLeod round Navy Island.

To the 7th cross-interrogatory, he says: I know nothing of the matters inquired after in this cross-interrogatory.

To the 8th cross-interrogatory, he says: Alexander McLeod never spoke to me on the subject of cutting out and destroying the Caroline.

To the 9th cross-interrogatory, he says: The plan for destroying the Caroline never occurred to me, it was first communicated to me after the boats had started. I did not communicate it to Alexander McLeod, he was not present when it was communicated to me, and to the best of my knowledge he knew nothing about it.

To the 10th cross-interrogatory, he says I had no knowledge of the Caroline being at Schlosser until the boat in which I was, was within a few yards of her. Alexander McLeod never informed me. I had nothing to do with any of the preparations for the attack. After the return of the expedition I went directly to my own quarters.

To the 11th cross-interrogatory he says: I was at Davis's tavern the day after the burning of the Caroline. I did not see Alexander McLeod there. I was there in the evening. I have no recollection of having seen Alexander McLeod at or near Davis's tavern on the Monday or any other day after the burning of the Caroline nor did I ever converse with him on the subject of burning that vessel.

To the 12th cross-interrogatory he says: I was present at the burning of the steamboat Caroline, at Schlosser on the 29th of December, 1837. I was present at the embarkation of the expedition at Chippewa, but cannot say how many persons were present at or near the place from whence the boats started.

To the 13th cross-interrogatory he says: I cannot say how many persons embarked in the enterprize. I did not know all the persons who entered the boats. I was one of them. There were eight persons in the same boat with myself. I was on board the Caroline, and assisted in destroying her.

To the 14th cross-interrogatory he says: The boats used were such as usually belong to schooners. I cannot say how many persons were in each boat. I think the boats were all nearly of the same size and description. There were seven or nine boats.

To the 15th cross-interrogatory, he says: I did not know all who embarked in the expedition. I did not see or recognize the face of each one of them.

To the 16th cross-interrogatory he says: I did know them all. I had raised the boat's crew for Mr. Elmsley. I spoke to each, but having no personal acquaintance with them, I cannot say that I recognized each one. Captain Drew commanded the expedition. Mr. Elmsley commanded the boat in which I was.

To the 17th cross-interrogatory he says: I did not return in the same boat in which I embarked, nor did the same persons return with me.

To the 18th cross-interrogatory he says: All the boats did not reach the Caroline. I cannot say how many failed. Captain Battersy commanded one, Mr. Hector commanded the other. I do not know what became of them. All the boats that reached the Caroline arrived about the same time. I think Captain Drew's was the first.

To the 19th cross-interrogatory he says: To my knowledge there was no man of the name of McLeod in the expedition.

To the 20th cross-interrogatory he says: The expedition embarked from the beach.

To the 21st cross-interrogatory he says: All the boats were near together and all started about the same time.

To the 22d cross-interrogatory he says: The boats did not all return at the same time, nor did they all disembark at the same time. The boat I was in disembarked at the place from whence we started. I did not see and recognize all the persons I saw embark. I returned in another boat.

To the 23rd cross-interrogatory he says: The force employed consisted of volunteers. There were some gentlemen who had previously been in the Royal Navy and Army. The men volunteered. The force marched up in a body, but the men composing it entered such boats as they chose.

To the 24th cross-interrogatory he says: Many of the parties composing the force were mustered at the quarters of the Naval Brigade and furnished with a pistol, cutlass and two cartridges. The force was not displayed or paraded in military form on its disembarkation.

To the 25th cross-interrogatory he says: The persons composing the expedition were dressed in their ordinary clothing. Those who could procure it had a red badge round their arm.

To the 26th cross-interrogatory he says: The party were armed with pistols, cutlasses and sabres, which were obtained from the quarters of the Naval Brigade and from the Provincial Cavalry.

To the 27th cross-interrogatory he says: I believe the force dispersed.

To the 28th cross-interrogatory he says: I should think between one and two o'clock in the morning. The night was clear, but I cannot say whether there was any moon. The force, I think, dispersed to their quarters. The whole party were not together that morning at sunrise. I have never seen that force together since. I have since seen some of the parties armed and equipped as they were that night on board of a gun boat, but who they were I cannot say.

To the 29th cross-interrogatory he says: I cannot now recollect at what hour the expedition embarked.

To the 30th cross-interrogatory he says: I was not wounded. Some of the assailing party were wounded in the attack upon the Caroline. No one was killed.

To the 31st cross-interrogatory he says: Resistance was made by the crew or by persons attached to the Caroline. They had weapons, pistols and swords. I saw also one gun fired by the sentry. The Caroline, I believe, was not armed. I cannot say that there were any military stores, amunition, provision or munitions of war of any kind or description found on board the Caroline.

To the 32d cross-interrogatory he says: They discharged both guns and pistols, and they had swords on board. There were no cannon, fire-arms, military stores, amunition, provision or munition of war of any kind or description found on board the Caroline with the exception of such as appeared to have been used in the conflict and which lay scattered about the deck.

To the 33d cross-interrogatory he says: I saw only one wounded as I have before stated. I saw no one killed. I wounded no one,

nor did I kill any one. I fired a pistol. I did not strike with sword, pike or other weapon.

To the 34th cross-interrogatory he says: I am perfectly confident that no person was on board the Caroline when she was cut loose and sent over the Falls, for when I left her I had to run from the after cabin to the bow with my head down to escape the smoke and flames which were bursting from below.

To the 35th cross-interrogatory he says: I went on shore at Schlosser. I did not go into the warehouse near the wharf nor did I see any of the party go into the warehouse.

To the 36th cross-interrogatory he says: I did take away a mattrass for the accommodation of Mr. McCormick, who was severely wounded, and I also took away a sword which was lying on the deck. I know of no other articles having been taken from her.

To the 37th cross-interrogatory he says: I never heard of the steamboat Caroline coming down from Buffalo to Schlosser from Alexander McLeod or any other person.

To the 38th cross-interrogatory he says: I never heard of such a person as Sylvanus S. Rigby.

To the 39th cross-interrogatory he says: No.

To the 40th cross-interrogatory he says: No.

To the 41st cross-interrogatory he says: I have no knowledge of his ever having been on board the Caroline.

To the 42d cross-interrogatory he says: I know nothing of the matters inquired after by this cross interrogatory.

To the 43d cross-interrogatory he says: I never saw him.

To the 44th cross-interrogatory he says: I know nothing of the matters inquired after by this cross interrogatory.

To the 45th cross-interrogatory he says: I never conversed with or heard Alexander McLeod converse on any subject.

To the 46th cross-interrogatory he says: I know nothing of the matters inquired after by this cross interrogatory.

To the 47th cross-interrogatory he says: I never had any conversation with Alexander McLeod on the subject of the destruction of the Caroline, nor had he with me the day before she was destroyed or on any other day, nor had I with any other person in his presence, nor had he with any other person in my presence on the subject aforesaid.

To the 48th cross-interrogatory he says: No, I did not.

To the 49th cross-interrogatory he says: Not to my knowledge.

To the 50th cross-interrogatory he says: I never did.

To the 51st cross-interrogatory he says: Seven or nine—I believe seven or nine—the same number. I cannot say how many grounded on Buckhorn Island.

To the 52d cross-interrogatory he says: I know nothing of the matters inquired after by this cross interrogatory.

To the 53d cross-interrogatory he says: Having answered the twelfth and thirteenth direct interrogatories in the negative, I can give no further answer to this cross interrogatory.

To the 54th cross-interrogatory he says: I am not aware that there was any armed force stationed on the wharf where the Caroline was

lying. I was fired upon from the shore while casting off the chain by which she was moored. I recollect nothing of the other matters inquired after by this cross interrogatory.

To the last cross-interrogatory he says: I know of no matter or thing, nor have I heard, nor can I say anything other than I have already stated touching the matters in question in this cause that may tend to the benefit and advantage of the said people.

W. S. LIGHT.

Taken and sworn before me this seventeenth day of September, in the year of our Lord one thousand eight hundred and forty-one, at the town of Woodstock, in the district of Brock, in Canada.

J. H. PRICE, Commissioner.

During the reading of the foregoing depositions the Attorney General objected to various portions, so as to bring the testimony within the rule laid down, and to make it applicable solely to the indictment for the murder of Durfee. The various points were warmly contested by counsel on both sides.

The testimony of John Harris was objected to by the Attorney General on the ground that he had not signed his testimony.

Mr. *Gardner* intimated that the testimony was not signed at the time because it was necessary to have it copied.

The testimony itself said "taken and sworn" before me, &c.

The ATTORNEY GENERAL withdrew the objection.

FIFTH DAY.

The Court sat last night until near ten o'clock, and Judge Gridley appeared to be as much disposed to continue sitting as he had been at any period of the trial; but the Jurors exhibited symptoms of drowsiness, and the appeal was irresistible. One juror had tied his handkerchief about his head, and appeared to be enjoying a sound sleep while the depositions were being read; others were resting their weary heads on the front of the jury box, and altogether they looked more like twelve convicts, broken down in mind and body, under the dreadful sentence which dooms to an ignominious death, than a jury sitting to decide on the fate of another. The Court accordingly was adjourned until a quarter to eight the next morning, at which time Judge GRIDLEY took his seat on the bench. He was, as usual, the first man in Court, and with all the freshness of joyous youth; he never fails, nor does he betray any fatigue under his arduous duties.

One objection made by the Attorney General to the admissibility of the depositions taken under commission, was made this morning to that of Mr. S. Light, on the ground that the counsel for the people was not present at the examination. It occurred thus:—commissions were issued and days were appointed for the examinations, and counsel for the people and the prisoner were in attendance at the places agreed upon, in Canada: but it was found necessary that the commissioners should separate for the examination of witnesses, and as there was but one counsel there for the people, he could, of course, only attend in one place at a time, and the depositions were taken by

the commissioners on the interrogatories previously framed by the counsel for the people and the prisoner.

Judge GRIDLEY said he saw no impropriety in the course taken. The commissioners were armed with full powers to take the examinations, and counsel had had the opportunity to frame the interrogations previously.

Some explanations were made between the Attorney General and Mr. Spencer, and the reading was resumed.

Previous to the reading of the following deposition of Mr. Armour, Mr. Hall objected to it—not desiring to set it aside altogether—that the name of this witness was not included in the list of witnesses to be examined by commission; consequently the prosecution had no opportunity of framing cross interrogatories, such as might be peculiarly adapted to the knowledge, circumstances or character of the witness.

Mr. *Spencer* explained—it was true this witness was not originally in the list mentioned; but he had been substituted at great trouble for another in the list, who *refused to be examined*, and whose knowledge was supposed to be similar to that of Mr. Armour.

Mr. *Hall* did not press any objection to the reading of the deposition, but wished the jury to understand the particular circumstance that attended it. The deposition was then read.

DEPOSITION OF ROBERT ARMOUR.

Robert Armour, of the town of Coburg, in the New Castle District, in the Province of Canada, Esquire, aged twenty-three years, maketh oath and, to the first interrogatory, he says: I have known Alexander McLeod from about the beginning of the month of December, 1837. I had seen Alexander McLeod once or twice before the 29th day of December, 1837. I only knew him by sight at that time. I had no acquaintance with him other than as I have just stated. I believe him to be a British subject.

To the 2nd interrogatory, he says: I do remember the time of the destruction of the Caroline. I was in Chippewa about that time. I had been there for about twelve days before the destruction of the Caroline.

To the 3d interrogatory, he says: All the boats were in Chippewa creek. Some of the party that were in the boats afterwards landed and tracked the boats along the shore a few hundred yards, until we came opposite to Schlosser. We may perhaps have stood upon the beach at the Chippewa creek about five minutes or so, before we embarked. I went into one of the boats that were lying in the Chippewa creek. I landed to help to track the boat that I was attached to, along the shore, as I have before stated. And when the boat had been tracked a sufficient distance, I got into it again. I was with the party that went upon the expedition, and was one of them.

To the 4th interrogatory, he says: I do not know where Alexander McLeod was, but I know he was not in the boat that I was in.

To the 5th interrogatory, he says: I do not know where Alexander McLeod was, and I do not think he was upon the beach at all

during the time of embarkation; at any rate he did not come under my view.

To the 6th interrogatory, he says: I went in Capt. Elmsley's boat, and he commanded it.

To the 7th interrogatory, he says: I saw all the persons that were in the boat I was in. Alexander McLeod was not in the boat with me. I did not see Alexander McLeod at all that night.

To the 8th interrogatory, he says: I saw the Caroline that night. I was on board of her, and over nearly all her deck. I boarded about the same time as the others. I was one of the last, or among the last that left her. I did not see Alexander McLeod at all that night, and do not think he was one of the assailants.

To the 9th interrogatory, he says: I know nothing of the matters contained in this interrogatory.

To the 10th interrogatory, he says: I saw the greater part of the men that had been engaged in the destruction of the Caroline after they landed. Alexander McLeod was not one, or among those that I saw, nor did I see him that night.

To the 11th interrogatory, he says: Seven started, five crossed the river, two of which remained in the stream, and the other three attacked her. They came back, I believe, one after another.

To the 12th interrogatory, he says: I do know Sir Allan N. McNab. I think he was on the bank opposite to Schlosser at the time the expedition started. I think the expedition was undertaken at the suggestion or command of Sir Allan N. McNab. I did not hear him give any directions.

To the 13th interrogatory, he says: Captain Drew was in command of the expedition. He commanded it, I believe, by the order or wish of Sir Allan N. McNab.

To the last interrogatory, he says: I know of nothing further that can tend to the benefit of the said Alexander McLeod, than what I have before stated to the foregoing interrogatories.

R. ARMOUR.

Sworn, taken and subscribed at the city of Toronto, in the Home District, in Canada, this ——— day of September, 1841, before us,

SECKER BROUGH, } Commissioners.
ADAM WILSON, }

Answers to the interrogatories by way of cross-examination proposed to Robert Armour:

To the 1st cross-interrogatory, he says: I reside in Cobourg. I have been there for about twelve months past. I am not a native of Canada. I am a native of Scotland. I have resided in Canada between twenty-one and twenty-two years. I am twenty-three years of age past, and my profession is that of an attorney at law.

To the 2nd cross-interrogatory, he says: I was a private. I was attached to a vessel during part of the time. I was in Chippewa. "The Queen" was the name of her. She was a large schooner, and was armed. I was attached to her as a private. I was also attached to the land force a part of the time. I was in Chippewa aforesaid, and served as a private.

To the 3d cross-interrogatory, he says: I did not see Alexander McLeod the week preceding the burning of the Caroline, to my recollection.

To the 4th cross-interrogatory, he says: I did not.

To the 5th cross-interrogatory, he says: I did not.

To the 6th cross-interrogatory, he says: I did not.

To the 7th cross-interrogatory, he says: I know nothing of the matters contained in this interrogatory.

To the 8th cross-interrogatory, he says: He did not.

To the 9th cross-interrogatory, he says: I knew nothing of the intended destruction of the Caroline until it was communicated to me about two hours before we started for that purpose. I did not communicate it to McLeod, and he was not present when it was communicated to me, and I do not know whether McLeod knew of it or not.

To the 10th cross-interrogatory, he says: I did see the Caroline plying between Schlosser and Navy Island, a day or two before she was burned. McLeod did not inform me of it. We commenced our preparations for an attack upon her about an hour before we started. After the return of the expedition, I returned to my quarters in Chippewa.

To the 11th cross-interrogatory, he says: I do not remember whether I was in Davis's Inn at Chippewa on the day after the burning of the Caroline or not; at any rate I did not see McLeod there, and consequently did not converse with him. Nor did I see McLeod on the Monday, or on any other day after the burning of the Caroline, at or near Davis's tavern.

To the 12th cross-interrogatory, he says: I was present at the burning of the Caroline at the time mentioned in this interrogatory, and was concerned in it as one of the attacking party. There were then from one to two hundred persons standing on the shore when the boats started.

To the 13th cross-interrogatory, he says: There were about sixty persons that embarked in the expedition—I knew about half the number of these persons. I was one of the party. Nine altogether were in the boat that I was in. I was on the Caroline, and did all in my power to aid in her destruction.

To the 14th cross-interrogatory, he says: Row boats, such as schooners use for jolly boats: there were nine persons in each boat. The boats were nearly all of the same size and description. There were seven boats.

To the 15th cross-interrogatory, he says: I did not know all the persons that went on the expedition, though I did know about one-half of them. I did see most of the faces of those that were on the expedition, and I recognised a great part of them.

To the 16th cross-interrogatory, he says: I knew all those that were in the same boat with me but two, and those two were entire strangers to me. I think I spoke to all those in the boat that I was acquainted with; and I think I observed the faces of all that were in the boat with me. Capt. Drew commanded the expedition, and Capt. Elmsley commanded the boat I was in.

To the 17th cross-interrogatory, he says: I did return in the same boat in which I embarked, and I think besides those that embarked with us, one other person returned with us from the expedition.

To the 18th cross-interrogatory, he says: Only three of the boats that set out for the Caroline reached her. I do not know who commanded the boats which did not reach her. Two of them lay out in the stream, and the other two lost their course altogether. The boats that reached the Caroline arrived at nearly the same time. I do not know which arrived first.

To the 19th cross-interrogatory, he says: There was no person in the expedition of the name of McLeod, to my knowledge.

To the 20th cross-interrogatory, he says: There was no wharf or pier where the boats were lying; they embarked from the Chippewa beach.

To the 21st cross-interrogatory, he says: The boats all lay at the same landing place. They started at nearly the same time.

To the 22d cross-interrogatory, he says: The boats did not all return at the same time, and the crews of the different boats disembarked as they arrived, and I believe about the same place where they embarked from. I did not see all those return that went on the expedition, but I saw and recognized several of them.

To the 23d cross-interrogatory, he says: The men that embarked on the expedition were militia volunteers. Some of them had been in the Royal Navy. Those that went volunteered to go, and came down to the boats in a body.

To the 24th cross-interrogatory, he says: It was not.

To the 25th cross-interrogatory, he says: They were all dressed in their common every-day clothes. I cannot describe particularly the different articles of their dress.

To the 26th cross-interrogatory, he says: The party was armed with sabres and boarding pikes, and some few had pistols. I cannot tell from whence the weapons were procured. They were served out to us in a house in Chippewa.

To the 27th cross-interrogatory, he says: It dispersed.

To the 28th cross-interrogatory, he says: The force disembarked about one of the clock in the morning. The night was dark and rather cloudy than otherwise. The force dispersed to their separate quarters after their return. They were not together at sunrise. I have not seen that force together as a body after that night, though I have seen several of the persons that composed it; but I cannot say whether or not they were armed as they were that night.

To the 29th cross-interrogatory, he says: I believe ten and eleven o'clock at night.

To the 30th cross-interrogatory, he says: I was not wounded, but some of the party were. No one was killed.

To the 31st cross-interrogatory, he says: There was some little resistance made by those attached to the Caroline, and I think they had pistols.

To the 32d cross-interrogatory, he says: I think the sentinel on board the Caroline fired a musket or rifle, and some of them on board, I think, fired pistols. I cannot say whether they made use of

any other weapons. I did not see, and do not know whether there were any cannon or munitions of war on board of the Caroline.

To the 33d cross-interrogatory, he says: I think there were one killed and two or three wounded. I did not kill or wound any one, nor did I see any one of them killed or wounded. I did not discharge a gun or pistol, or strike or wound any one.

To the 34th cross-interrogatory, he says: I do not believe there was one.

To the 35th cross-interrogatory, he says: I only know of one person that went on shore, and he went into the ware-house for the purpose of casting the cable off that fastened the Caroline.

To the 36th cross-interrogatory, he says: I did not, nor did any of the attacking party, to my personal knowledge, take or carry away any of the articles found on board, or belonging to the Caroline, though there were some mattrasses thrown into the boat in which I was, which I threw over board into the stream.

To the 37th cross-interrogatory, he says: I do not know who first mentioned it, but McLeod certainly did not.

To the 38th cross-interrogatory, he says: I do not know, and have never heard from him.

To the 39th cross-interrogatory, he says: I did not.

To the 40th cross-interrogatory, he says: I did not.

To the 41st cross-interrogatory, he says: He was not that I know of.

To the 42d cross-interrogatory, he says: I know nothing of the matters contained in this interrogatory.

To the 43d cross-interrogatory, he says: I never saw him, nor heard of him.

To the 44th cross-interrogatory, he says: I know nothing whatever of the matters contained in this interrogatory.

To the 45th cross-interrogatory, he says: He did not.

To the 46th cross-interrogatory, he says: Alexander McLeod never so informed me; nor did I ever hear him say so; nor do I know anything of the matters contained in this interrogatory.

To the 47th cross-interrogatory, he says: Alexander McLeod did not converse with me, nor did I with him, nor did he with any person in my presence, nor did I with any person in his presence, on the subject of the Caroline, at any time whatever.

To the 48th cross-interrogatory, he says: I did not.

To the 49th cross-interrogatory, he says: Not that I know of.

To the 50th cross-interrogatory, he says: I did not.

To the 51st cross-interrogatory, he says: Seven boats were first engaged in the expedition, and seven started from the mouth of the creek near to Chippewa village. I do not know whether any got aground on Buckhorn Island.

To the 52d cross-interrogatory, he says: I do not know whether any person or persons were employed to pilot the boats. I know, and have heard of no such person or persons as are named in this interrogatory.

To the 53d cross-interrogatory, he says: I do not know anything of the matters contained in this interrogatory.

To the 54th cross-interrogatory, he says: I do not think there was any armed force stationed on shore at or near where the Caroline was lying. I do not think we were attacked or fired upon from the shore or from the ware-house, and I was very busy during the whole time that I was engaged on board of the Caroline. I do not think Captain Elmsley went ashore at all, but one of our party went on shore to cast off the cable, but he met with no opposition, and discovered no armed men.

To the last cross-interrogatory, he says: I do not know of any other matter or thing that could tend to the benefit or advantage of the people of the State of New York.

R. ARMOUR.

Sworn, taken and subscribed, at the city of Toronto, in the Home District of Canada, this twenty-fifth day of September, 1841, before us,

SECKER BROUGH, ADAM WILSON, } Commissioners.

DEPOSITION OF JOHN GORDON.

John Gordon, of the town of Hamilton, in the Gore District, and Province of Canada, Esq., aged twenty-eight years and upwards, being produced, sworn and examined, in the behalf of the defendant, in the title of these depositions named, doth depose as follows, viz:

To the 1st interrogatory he says: I know Alexander McLeod, late Deputy Sheriff, of the District of Niagara, by sight, but have no personal acquaintance with him. I think the time that I saw him was, when he was a passenger on board of the steamboat I command. I cannot state positively that I saw him more than once. I believe him to be a subject of Great Britain, and a native of Scotland.

To the 2d interrogatory he says: I perfectly recollect the time of the destruction of the Caroline. I was in Chippewa about the time of her destruction. I had been there a few days before that time.

To the 3d interrogatory he says: The persons embarked near the mouth of the Chippewa river. I was there about half an hour before the embarkation. I do not know how long the others were there before I came. I remained on the beach during that time. I had no opportunity of knowing any of the persons, except those in the boat which I commanded.

To the 4th interrogatory he says, I do not know where the said Alexander McLeod was. He was not in my boat.

To the 5th interrogatory he says: I do not know where he was, he was not in my presence.

To the 6th interrogatory he says: I went in one of the boats to Schlosser, which boat I commanded.

To the 7th interrogatory he says: I saw all the persons in the boat I went in, from Canada to Schlosser. I am satisfied Alexander McLeod was not one of them. I did not see him on my way from Canada to Schlosser.

To the 8th interrogatory he says: I saw the Caroline on the night of her destruction. I was on board of her. I was not below; that is to say, not in the gentlemen's cabin, but with this exception, I think

I was in every part of her. I went on board at the same time as the other assailants, and went on board at the aft part of her, after the whole of the assailants had left her. I returned for the purpose of securing her colours; was on board for I should think nearly five minutes. I did not see Alexander McLeod on board of the Caroline. To the best of my knowledge he was not there.

To the 9th interrogatory he says: I did not see, nor do I know any thing of any person having been killed during the attack on the Caroline, or conveyed on the dock at Schlosser, and left remaining there.

To the 10th interrogatory he says: I do not think I saw any of the men, with the exception of my own boat's crew, at the time mentioned in this interrogatory. I did not see Alexander McLeod that night or since.

To the 11th interrogatory he says: I cannot say how many boats started; five reached the Caroline. I do no know how many returned in company.

To the 12th interrogatory he says: I know Sir Allan McNab. He was on the beach when the boats started. It was by his command, to the best of my knowledge, that the expedition was undertaken. I did not hear him give any directions.

To the 13th interrogatory he says: Captain Drew commanded the expedition. Does not know under whose orders Captain Drew acted.

To the last interrogatory he says: I have stated all I know in my answers to the foregoing interrogatories.

JOHN GORDON.

Sworn, taken, and subscribed before me, this 16th day of September, one thousand eight hundred and forty-one, at the town of Hamilton, in Canada.

SECKER BROUGH, Commissioner.

Answers to the interrogatories by way of cross examination.

The said *John Gordon* being duly sworn, to the 1st cross-interrogatory says: I command the steamboat "Britannia." I am twenty-nine years of age, and when on shore usually reside at Hamilton. I have been seven years in Canada—am a native of Scotland.

To the 2d cross interrogatory he says: I commanded the third division of the Naval Brigade at Chippewa, in the month of December, 1837; that is to say, I did so after the destruction of the Caroline. I was not attached to any vessel. I commanded a division of boats previous to the destruction of the Caroline. I was a captain in a regiment of "Gore Militia."

To the 3d cross interrogatory he says: I did not to my knowledge see Alexander McLeod at the time mentioned in this cross interrogatory.

To the 4th cross-interrogatory he says: I never had any conversation or interview with Alexander McLeod respecting the Caroline, nor did I ever hear him converse on that subject.

To the 5th cross-interrogatory he says: I have already answered

that I never spoke to Alexander McLeod respecting the Caroline. I have not spoken to him since the year 1836.

To the 6th cross-interrogatory he says: I did not at any time go with McLeod round Navy Island.

To the 7th cross-interrogatory he says: I know nothing of the matters inquired after in this cross-interrogatory.

To the 8th cross-interrogatory he says: He never did.

To the 9th cross-interrogatory he says: The plan for the destruction of the Caroline was communicated to me about two hours before the starting of the expedition. I did not communicate the plan, or any part of it, to Alexander McLeod, nor was he present when it was communicated to me. I am not aware that he knew of the same.

To the 10th cross-interrogatory he says: I was not aware that the Caroline was at Schlosser. I was under the impression that she was at Navy Island, until after I had passed Navy Island on my way to destroy her with the other boats. Alexander McLeod did not inform me that she was at Schlosser. I made every preparation a short time before the expedition started. After the return of the expedition, I went to Davis's tavern at Chippewa.

To the 11th cross interrogatory he says: I do not recollect whether I was or not at Davis's tavern. I did not see Alexander McLeod there. I did not on any day after the destruction of the Caroline see McLeod, or converse with him on any subject.

To the 12th cross-interrogatory he says: I was present at the burning of the steamboat Caroline. I commanded one of the boats. I was at the embarkation of the expedition and saw it embark. I cannot say how many persons were present, at or near the place, when the boats started. I should think at least two hundred or three hundred.

To the 13th cross-interrogatory he says: I should think between forty and fifty persons embarked on the expedition. I did not know them all. I was one of them. I think there were seven including myself in the boat I commanded. I was on board of the Caroline. I assisted in casting her off, and in towing her into the stream, as I think.

To the 14th cross interrogatory he says: Cutters and Jolly boats; I should think the number in each averaged from seven to nine. There were five boats at the destruction of the Caroline; they were nearly of the same size. I cannot say how many boats started on the expedition.

To the 15th cross interrogatory he says: I did not.

To the 16th cross interrogatory he says: I did not know all who were in the same boat with me; I did not recognize each one of them, nor did I speak to each individually; Captain Drew commanded the expedition; I commanded the boat I was in.

To the 17th cross interrogatory he says: I returned in the same boat in which I embarked, and believe that all those who went with me returned with me, but cannot say positively.

To the 18th cross interrogatory he says: I believe not; I have understood that two failed; I cannot say who commanded them,

or what became of them. The boats arrived as nearly together as possible; cannot say which arrived first.

To the 19th cross interrogatory he says: I am not certain there was any man by the name of McLeod in the expedition.

To the 20th cross interrogatory he says: The expedition embarked from no wharf or pier, but from the bank of the river.

To the 21st cross interrogatory he says: All the boats were together on the bank of the river; they started as nearly as possible at the same time.

To the 22nd cross interrogatory he says: I cannot say.

To the 23rd cross interrogatory he says: The force employed consisted entirely of volunteers; there were some half-pay officers of the Navy amongst them; the men came as volunteers, and entered the boats in the order in which they chose. The force was not drafted or levied; I am not aware that they marched up in a body; I understood there was a party at the Naval Officers' quarters who acted in a body, but cannot say whether they marched up together or not.

To the 24th cross interrogatory he says: I believe it was not before or after the embarking so displayed.

To the 25th cross interrogatory he says: They were in their own ordinary dress; they were not dressed in any uniform.

To the 26th cross interrogatory he says: I cannot exactly say how the men were armed; some probably had no arms, others had swords and pistols; I believe the arms were principally procured from the quarters of the Naval Officers.

To the 27th cross interrogatory he says: To the best of my knowledge the force dispersed to their different quarters; my party did so.

To the 28th cross interrogatory he says: I think the force disembarked about one in the morning; it was a star-light, not a moon-light night; it was neither a very clear nor a very dark night. To the best of my knowledge the force dispersed to their quarters; I am not aware that they were together the next morning; I have not seen them together since; I have not seen that force or any part of it armed and equipped as it was that night.

To the 29th cross interrogatory he says: The expedition embarked I think between 10 and 11 o'clock.

To the 30th cross interrogatory he says: I was not wounded; I believe Mr. McCormick was wounded, and two others; Richard Arnold and Major Warren were the two; no one was killed.

To the 31st interrogatory he says: We were fired upon before we boarded by the persons keeping sentry at the after gang-ways; I cannot say of what description the weapons were; I heard numerous shots fired, but cannot say whether on board the Caroline, or from the shore.

To the 32nd cross interrogatory he says: I answered the first part of this interrogatory in my answer to the preceding interrogatory. I am not aware whether they used any swords or pikes, or other military weapons, except as I have before stated. I do not know whether the boat was armed, or any of the men on board her,

or whether there were any munitions of war on board, except as I have before stated.

To the 33rd cross interrogatory he says: I am not aware whether any of the persons found on board the Caroline were killed or wounded; I did not kill or wound any one.

To the 34th cross interrogatory he says: No person was on board the Caroline that I am aware of when she was cut loose and sent over the Falls.

To the 35th cross interrogatory he says: I did not go on shore; I cannot say whether any of the others did; I believe some of the party did, but do not know that any of the party went into the store-house near the wharf.

To the 36th cross interrogatory he says: I did not take any thing from on board the Caroline; I believe some lamps were taken from on board, and one mattrass on which Lieutenant McCormack was laid when wounded; I believe also the boat's flag was taken from on board; I do not know of any other property being taken; I cannot state where the articles taken, if any were taken, were carried to.

To the 37th cross interrogatory he says: I cannot at all remember that I heard that the steam-boat was coming to Schlosser or Navy Island, before I saw her in the neighborhood of Navy Island.

To the 38th cross interrogatory he says: I am not aware of having seen or heard of the person enquired after by this cross interrogatory until this the time of my examination.

To the 39th cross interrogatory he says: I have answered this cross interrogatory in my answer to the preceding one.

To the 40th interrogatory he says: Never.

To the 41st interrogatory he says: I have answered this in my answer to former cross interrogatories, from number 38 to the 42nd cross interrogatories he says, I know nothing of the matter enquired after by this cross interrogatory.

To the 43d interrogatory he says: I have no other answer to give to this cross interrogatory than what I have answered to the enquiries respecting this individual.

To the 44th cross interrogatory he says: I never heard nor do I know that Alexander McLeod went to Buffalo for the purpose mentioned in this cross interrogatory, or for any other purpose in December one thousand eight hundred and thirty-seven, or at any other time.

To the 45th cross interrogatory he says: McLeod never spoke to me, or to any other person in my presence, on the subject.

To the 46th cross interrogatory he says: I know nothing of the matters enquired after by this cross interrogatory.

To the 47th cross interrogatory he says: McLeod never had any conversation with me, or with any person in my presence, on the subject of the Caroline, nor did I ever converse with any person in his presence on the subject of the Caroline.

To the 48th cross interrogatory he says: Never.

To the 49th cross interrogatory he says; Never to my knowledge, nor have I ever understood so from him.

To the 50th cross interrogatory he says: Never.

To the 51st cross interrogatory he says: To the best of my knowledge seven boats were at first engaged in the expedition, and all started a little above the mouth of Chippewa Creek; I do not know how many, or whether any boat got aground at Buckhorn Island.

To the 52nd cross interrogatory he says: I am not aware that any person was employed to pilot the boats; I know a person of the name of Weishuhu who resided at Chippewa in December 1837; he has I believe two or three sons; I believe none of them were engaged in the expedition against the Caroline; I boarded at Weishuhu's house at the period in question; I am not aware that any person of the name mentioned in this interrogatory was engaged in the expedition.

To the 53d cross interrogatory he says: I entered into the expedition at the personal request of Sir Allan McNab, and I have no further knowledge of any order or command, public or private, verbal or in writing, given by him. I cannot state whether Sir Allan McNab requested any other person to join the expedition; Sir Allan McNab's request to me as above mentioned, was made about two hours before the expedition started.

To the 54th cross interrogatory he says: I am not aware that any armed force was stationed on the land at or near the wharf where the Caroline was lying. I do not know whether the shots came from the store-house; I rather think they came from the neighborhood of a tavern, or from that direction; I understood at the time, but do not know, there was a guard placed on the wharf to protect the expedition while cutting loose the Caroline. I do not know whether Lieutenant Elmsley was there or was sent there, or what number of men the guard consisted of, or whether the guard met with any opposition or discovered any armed men.

To the last interrogatory he says: I do not know nor can I state any thing other than what I have stated, touching the matters enquired of by this interrogatory.

JOHN GORDON.

Sworn, taken and subscribed, at the town of Hamilton, Canada, this 16th day of September, 1841, before me,

SECKER BROUGH, Commissioner.

DEPOSITION OF CHRISTOPHER BIER.

Christopher Bier, of Chippewa, aged forty-nine, being produced, sworn and examined on behalf of the defendant in the title of these depositions named, doth depose as follows:

To the 1st interrogatory, he says: I have seen McLeod but have had no acquaintance with him. I have known him by sight since about the beginning of January, 1838, but not before the destruction of the Caroline.

To the 2d interrogatory, he says: I recollect the destruction of the Caroline, I was in Chippewa at that time. I had been in Chippewa since the 24th December, 1837.

To the 3d interrogatory, he says: They embarked from Chippewa Creek. I can only speak with certainty as to those who went in the boat with me, and they entered the boat immediately upon their coming

to the beach. I accompanied my crew. I had no opportunity of seeing and noticing persons who went on the expedition, excepting officers commanding boats, and my own boat's crew.

To the 4th interrogatory, he says: I do not know where Alexander McLeod was. I know he was not in the boat I commanded.

To the 5th interrogatory, he says: I do not know where Alexander McLeod was at the time mentioned in this interrogatory. I do not recollect to have seen him at all during that evening.

To the 6th interrogatory, he says: I went in a boat on the expedition, and I was in command of the boat in which I went.

To the 7th interrogatory, he says: I saw all the persons who went with me in my boat from Canada to Schlosser. I knew them personally. McLeod was not one of them. I did not see him at all that evening.

To the 8th interrogatory, he says: I saw the Caroline on the night of her destruction. I was on board of her, and in every part of her. I went on board of her as nearly as possible at the same time with the other assailants. We all left her about the same time. I did not see McLeod among the assailants.

To the 9th interrogatory, he says: I know nothing of the transaction enquired after by this interrogatory.

To the 10th interrogatory, he says: I saw a number of the men, but not all of them who had been engaged in the destruction of the Caroline, when they landed on the Canada shore on our return. I did not see McLeod either before or after my return from the Caroline that evening or night.

To the 11th interrogatory, he says: Seven started, five reached her, they returned straggling, but within ten minutes one after the other.

To the 12th interrogatory, he says: I know Sir Allan McNab. He was on the beach of Chippewa Creek when the expedition started. We received our orders from Captain Drew, who commanded the expedition. I cannot say by whose command the expedition was undertaken. Captain Drew's orders were, "the steamboat is our object, follow me."

To the 13th interrogatory, he says: Captain Drew. I do not know by whose orders he assumed such command.

To the last interrogatory, he says: I know nothing further than what I have already stated in my foregoing answers.

CHRISTOPHER BIER.

Sworn, taken and subscribed at the village of Chippewa, in the province of Canada, this twentieth day of September, in the year of our Lord one thousand eight hundred and forty-one, before us.

ADAM WILSON,
SECKER BROUGH, } Commissioners.

Answers to the interrogatories by way of cross-examination proposed to Christopher Bier.

To the 1st cross-interrogatory, he says: I reside on board of Her Majesty's Steamer "Minos," on lake Erie, resided there for twelve months. I am a native of England, and have resided in Canada about nine years. I am forty-nine years of age, and am a naval officer.

To the 51st cross interrogatory he says: To the best of my knowledge seven boats were at first engaged in the expedition, and all started a little above the mouth of Chippewa Creek; I do not know how many, or whether any boat got aground at Buckhorn Island.

To the 52nd cross interrogatory he says: I am not aware that any person was employed to pilot the boats; I know a person of the name of Weishuhu who resided at Chippewa in December 1837; he has I believe two or three sons; I believe none of them were engaged in the expedition against the Caroline; I boarded at Weishuhu's house at the period in question; I am not aware that any person of the name mentioned in this interrogatory was engaged in the expedition.

To the 53d cross interrogatory he says: I entered into the expedition at the personal request of Sir Allan McNab, and I have no further knowledge of any order or command, public or private, verbal or in writing, given by him. I cannot state whether Sir Allan McNab requested any other person to join the expedition; Sir Allan McNab's request to me as above mentioned, was made about two hours before the expedition started.

To the 54th cross interrogatory he says: I am not aware that any armed force was stationed on the land at or near the wharf where the Caroline was lying. I do not know whether the shots came from the store-house; I rather think they came from the neighborhood of a tavern, or from that direction; I understood at the time, but do not know, there was a guard placed on the wharf to protect the expedition while cutting loose the Caroline. I do not know whether Lieutenant Elmsley was there or was sent there, or what number of men the guard consisted of, or whether the guard met with any opposition or discovered any armed men.

To the last interrogatory he says: I do not know nor can I state any thing other than what I have stated, touching the matters enquired of by this interrogatory.

JOHN GORDON.

Sworn, taken and subscribed, at the town of Hamilton, Canada, this 16th day of September, 1841, before me,

SECKER BROUGH, Commissioner.

DEPOSITION OF CHRISTOPHER BIER.

Christopher Bier, of Chippewa, aged forty-nine, being produced, sworn and examined on behalf of the defendant in the title of these depositions named, doth depose as follows:

To the 1st interrogatory, he says: I have seen McLeod but have had no acquaintance with him. I have known him by sight since about the beginning of January, 1838, but not before the destruction of the Caroline.

To the 2d interrogatory, he says: I recollect the destruction of the Caroline, I was in Chippewa at that time. I had been in Chippewa since the 24th December, 1837.

To the 3d interrogatory, he says: They embarked from Chippewa Creek. I can only speak with certainty as to those who went in the boat with me, and they entered the boat immediately upon their coming

to the beach. I accompanied my crew. I had no opportunity of seeing and noticing persons who went on the expedition, excepting officers commanding boats, and my own boat's crew.

To the 4th interrogatory, he says: I do not know where Alexander McLeod was. I know he was not in the boat I commanded.

To the 5th interrogatory, he says: I do not know where Alexander McLeod was at the time mentioned in this interrogatory. I do not recollect to have seen him at all during that evening.

To the 6th interrogatory, he says: I went in a boat on the expedition, and I was in command of the boat in which I went.

To the 7th interrogatory, he says: I saw all the persons who went with me in my boat from Canada to Schlosser. I knew them personally. McLeod was not one of them. I did not see him at all that evening.

To the 8th interrogatory, he says: I saw the Caroline on the night of her destruction. I was on board of her, and in every part of her. I went on board of her as nearly as possible at the same time with the other assailants. We all left her about the same time. I did not see McLeod among the assailants.

To the 9th interrogatory, he says: I know nothing of the transaction enquired after by this interrogatory.

To the 10th interrogatory, he says: I saw a number of the men, but not all of them who had been engaged in the destruction of the Caroline, when they landed on the Canada shore on our return. I did not see McLeod either before or after my return from the Caroline that evening or night.

To the 11th interrogatory, he says: Seven started, five reached her, they returned straggling, but within ten minutes one after the other.

To the 12th interrogatory, he says: I know Sir Allan McNab. He was on the beach of Chippewa Creek when the expedition started. We received our orders from Captain Drew, who commanded the expedition. I cannot say by whose command the expedition was undertaken. Captain Drew's orders were, "the steamboat is our object, follow me."

To the 13th interrogatory, he says: Captain Drew. I do not know by whose orders he assumed such command.

To the last interrogatory, he says: I know nothing further than what I have already stated in my foregoing answers.

CHRISTOPHER BIER.

Sworn, taken and subscribed at the village of Chippewa, in the province of Canada, this twentieth day of September, in the year of our Lord one thousand eight hundred and forty-one, before us.

ADAM WILSON, } Commissioners.
SECKER BROUGH, }

Answers to the interrogatories by way of cross-examination proposed to Christopher Bier.

To the 1st cross-interrogatory, he says: I reside on board of Her Majesty's Steamer "Minos," on lake Erie, resided there for twelve months. I am a native of England, and have resided in Canada about nine years. I am forty-nine years of age, and am a naval officer.

To the 2d cross-interrogatory, he says: I was commanding a division of boats in December, 1837. I was not there in command or attached to any vessel. I was not attached to the land force, but received pay as a captain of militia. There was a force at that time called the Naval Brigade to which I was attached.

To the 3d cross-interrogatory, he says: I did see McLeod some two or three days previous to the burning of the Caroline. I do not know how often or what particular times. It was at Chippewa I saw him.

To the 4th cross-interrogatory, he says: I never heard him speak or converse on the subject of the Caroline.

To the 5th cross-interrogatory, he says: He never told me any thing about the Caroline.

To the 6th cross-interrogatory, he says: I did not at any time go in a boat with McLeod around Navy Island.

To the 7th cross-interrogatory, he says: I neither know nor have I ever understood any thing from McLeod respecting the matters enquired after by this interrogatory.

To the 8th cross-interrogatory, he says: He never did.

To the 9th cross-interrogatory, he says: It did not occur to me. I was first made aware that an expedition was intended, about 6 o'clock on the evening of the day on which the Caroline was destroyed, but did not know nor was informed the object of that expedition. About ten or eleven o'clock that evening I was informed that the steamboat was our object. I did not communicate the object or any part of it to McLeod. He was not present when it was communicated to me, nor do I know whether he was aware of it.

To the 10th cross-interrogatory, he says: No person informed me that the Caroline was at Schlosser. McLeod did not inform me. We commenced preparations for the expedition about 8 o'clock in the evening. After the return of the expedition we went to our quarters.

To the 11th cross-interrogatory, he says: Iwas not at Davis's tavern on the day after the night of the burning of the Caroline. I did not see or converse with McLeod at or near Davis's tavern on the Monday or any day after the burning of the Caroline.

To the 12th cross-interrogatory, he says: I was present at the burning of the Caroline. I was concerned in the expedition, and saw and was present at its embarkation. About some hundreds were present on the shore where the boats started from.

To the 13th cross-interrogatory, he says: Sixty-three started upon the expedition, there being seven boats and nine men in each boat. Five boats only reached the Caroline, containing forty-five men. The strict orders were, that each boat should contain only nine men, the officers in command included. I was one of the men engaged in the expedition, there was eight men in the boat with me. I was on board of the Caroline and assisted in every way in my power to destroy her.

To the 14th cross-interrogatory, he says: The kind of boats belonging to merchant vessels, they were nearly of the same size and description. The rest of this interrogatory I have already answered.

To the 15th cross-interrogatory, he says: I did not know all, or recognize the face of each who went on the expedition.

To the 16th cross-interrogatory, he says: I knew every one in the boat and spoke to and recognized each one in the boat I was in. Captain Drew commanded the expedition. I commanded the boat I was in.

To the 17th cross-interrogatory, he says: I returned in the same boat I embarked in, the same persons that went with me returned with me, eight others that belonged to other boats returned with me also.

To the 18th cross-interrogatory, he says: Five boats reached the Caroline, two failed, of which Captain J. P. Battersby commanded one, and I think J. P. Currant was the senior officer in the other, but I do not know from my own knowledge who commanded her.

To the 19th cross interrogatory, he says: No person to my knowledge of the name of McLeod was in the expedition.

To the 20th cross-interrogatory, he says: Not from any wharf or pier.

To the 21st cross interrogatory, he says: The boats all lay close together at the same landing place, and started at the same time.

To the 22d cross-interrogatory, he says: The boats returned at intervals, and the crews disembarked as they arrived, and at the same place whence they started. I did not see them all disembark.

To the 23d cross-interrogatory, he says: They were volunteers from the militia, some of them had formerly belonged to the army and navy, they were not drafted or levied, they came up as crews under the command of their different officers and so entered their respective boats.

To the 24th cross-interrogatory, he says: No.

To the 25th cross-interrogatory, he says: They were dressed in their usual, and in their own clothing and in no uniform.

To the 26th cross-interrogatory, he says: They were armed with cutlasses and pistols, the arms were served out from the Naval Brigade.

To the 27th cross-interrogatory, he says: The force dispersed to their respective quarters.

To the 28th cross-interrogatory, he says: The force disembarked about 1 or 2 o'clock, A. M. The night was not moon-light. I think it was cloudy, but cannot remember exactly. The force dispersed to its quarters. It was not together at sun-rise. I have never seen them together as a force since. I have seen individuals of them serve in their respective corps, some of whom were armed and equipped as they were that night, such being their usual equipment.

To the 29th cross-interrogatory, he says: About 1 or 2 o'clock in the morning we disembarked.

To the 30th cross-interrogatory, he says: I was not wounded. No one was killed. Three were wounded.

To the 31st cross-interrogatory, he says: Yes, there was resistance, they had a musket or rifle, for the sentry fired after challenging and demanding the countersign. I suppose they had other fire-

arms from the circumstance of hearing pistols on board, and from the fact of some of our party being wounded.

To the 32d cross-interrogatory, he says: A gun was fired, as I have stated in my snswer to the previous interrogatory. My impression is strong, that they were armed, because so few of our men were allowed to go forward. Captain Drew himself prevented them, and from the number of pistol shots fired there must have been more shots than those proceeding from our own party. Of the few who did advance towards the people on board three were wounded. I did not see any cannons or any munitions of war on board, no search was made for such. The boat was immediately cut loose, towed into the current, fired and set adrift.

To the 33d cross-interrogatory, he says: I saw two wounded and none killed on board of the Caroline, but saw one man lying dead on the dock. I did not to my knowledge kill or wound any one. I did not discharge a gun or pistol, nor did I strike any one with a sword or other weapon.

To the 34th cross-interrogatory, he says: None.

To 35th cross-interrogatory, he says: I did not, but saw some of the attacking party on the shore, who went ashore to cast the vessel loose, none of them went into the ware-house.

To the 36th cross-interrogatory, he says: I did not, nor was there any thing carried away in the boat I was in from on board the Caroline.

To the 37th cross-interrogatory, he says: I never heard of the Caroline coming down from Buffalo. McLeod did not so inform me, but I saw her plying between Navy Island and Schlosser with a great many people on board.

To the 38th cross-interrogatory, he says: I neither know nor have heard of, nor to my knowledge have ever seen Sylvanus Rigby.

To the 39th cross-interrogatory, he says: I did not.

To the 40th cross-interrogatory, he says: I did not.

To the 41st cross-interrogatory, he says: No.

To the 42d cross-interrogatory, he says: I know nothing, nor have I ever understood any thing from the said Rigby enquired of by this interrogatory.

To the 43d cross-interrogatory, he says: I am ignorant of the sub ject of this interrogatory.

To the 44th cross-interrogatory, he says: I know nothing of the matters inquired after in this interrogatory.

To the 45th cross-interrogatory, he says: McLeod never made any communication to me respecting the Caroline.

To the 46th cross-interrogatory, he says: No.

To the 47th cross-interrogatory, he says: I had no conversation with McLeod nor had he with me on the subject of the Caroline, nor had I with any other person in his presence, nor had he with any person in my presence any conversation relating to the Caroline.

To the 48th cross-interrogatory, he says: No.

To the 49th cross-interrogatory, he says: Not to my knowledge.

To the 50th cross-interrogatory, he says: No.

To the 51st cross-interrogatory, he says: Seven were engaged and

started, and all from the same place, from or near the mouth of Chippewa creek, there we put part of our crew on shore to track the boats up the Niagara river about a mile opposite the foot of Navy Island, when those of the crew who had been tracking up the boats re-embarked and thence we finally shoved off on the expedition. I do not know how many, or that any got aground on Buckhorn Island.

To the 52d cross-interrogatory, he says: No one was employed to pilot the boats. I know nothing of, nor have I ever heard of any person of the name mentioned in this interrogatory.

To the 53d cross-interrogatory, he says: Before answered in my answers to the 12th and 13th interrogatory in chief.

To the 54th cross-interrogatory, he says: I did not see any armed force stationed on shore, but heard the report of three rifles fired from the direction of the tavern towards us. I know nothing of the other matters enquired after by this interrogatory.

To the last cross-interrogatory, he says: I know nothing further of the matters in question.

CHRISTOPHER BEER.

Sworn, taken and subscribed at the village of Chippewa, in Canada, this twentieth day of September, in the year of our Lord one thousand eight hundred and forty-one, before us.

ADAM WILSON, } Commissioners.
SECKER BROUGH, }

DEPOSITION OF HAMILTON ROBERT O'REILLY.

Mr. SPENCER then introduced the deposition of Hamilton Robert O'Reilly, and was proceeding to read, when

Mr. HALL rose and said that he was informed, and believed that he should be able to prove at a proper time, that this deponent was allowed to read the depositions of other witnesses before he underwent examination himself.

Mr. SPENCER—Do you intend to set it aside for that reason, if you can?

Mr. HALL—No. I do not mention it with a view to prevent the reading of the deposition. The fact which I mention I believe I shall be able to prove, and I state it now, that the jury may judge from that fact, what degree of credibility the deponent is entitled to.

Mr. SPENCER then proceeded to read the deposition of O'Reilly, which was as follows:

Hamilton Robert O'Reilly of the town of Hamilton, in the Gore District, Canada, Esquire, aged thirty, being produced, sworn and examined on behalf of the defendant in the title of these depositions named, deposeth as follows:

To the first interrogatory deponent says: I have known him for about nine years or upwards. I have met him in his character of Deputy Sheriff and transacted business with him, and have casually met him while traveling, at inns, and at several sittings of the Assizes, and I have no doubt he is a native of Scotland and a British subject.

To the 2d interrogatory he says: I do. I was at Chippewa at that time. I reached Chippewa on the twenty-sixth day of December,

1837, and continued there until some time after the destruction of the boat.

To the 3d interrogatory he says: We embarked from near the mouth of the Chippewa creek. We were upon the beach about fifteen minutes before our embarkation. During that time I was in the boat with the exception of a short period while in search of oars. I had not a good opportuuity of knowing all persons engaged in the expedition, but speak positively with regard to those persons in the boat with me, as it was my duty to determine the number by counting them.

To the 4th interrogatory he says: I know not where Alexander McLeod was at the time of the expedition, but I know that he was not in the boat with me.

To the 5th interrogatory he says: I do not know where he was at the time mentioned in this interrogatory. He was not within my observation, and I think I should have seen him had he been on the expedition.

To the 6th interrogatory he says: I went on the expedition in a boat under the command of Captain Beer—I think Christopher Beer.

To the 7th interrogatory he says: I saw all the persons in the boat in which I went. I can say positively that McLeod was not in the boat in which I went on its way to Schlosser. I did not see him on my way from the Canada shore to Schlosser.

To the 8th interrogatory he says: I did. I was on board. I believe I was on every part of the deck—in the Captain's state room—and in the fire-house or room. I went on board at the same time with the other assailants. I first left the Caroline with the other assailants, afterwards returned on board with part of my own boat's crew to lift the Caroline's anchor. To the last part of this interrogatory I can only say I did not see the said Alexander McLeod among the assailants at any time during the attack on the Caroline.

To the 9th interrogatory he says: I have no personal knowledge of the circumstances attending the transaction inquired after by this interrogatory.

To the 10th interrogatory he says: I saw a majority of the persons engaged in the destruction of the Caroline upon their landing upon the Canada shore, or immediately afterwards. I did not see Alexander McLeod among them. I did not see the said Alexander McLeod among them at any time that night, and I have no recollection of seeing him any where that night.

To the 11th interrogatory he says: I believe seven boats started—five reached her. I think the five boats returned about one and the same time.

To the 12th interrogatory he says: I know Sir Allan N. McNab. I saw him standing on the shore of the Chippewa creek when the expedition started. I believe the expedition was undertaken by command of Sir Allan N. McNab who was in command of the British forces upon the frontier at that time. I heard him give no directions, but saw him in conversation with Captain Drew immedi-

ately before the departure of the expedition. I recognized Sir Allan N. McNab, then Colonel, as being in command.

To the 13th interrogatory he says: Captain Drew was in command of the expedition, and I am satisfied he assumed such command under the order of Sir Allan N. McNab.

To the last interrogatory he says: Nothing farther occurs to me touching the matters in question than what I have already stated in answer to other interrogatories.

H. R. O'REILLY.

Sworn, taken and subscribed this 17th day of September, in the year of our Lord one thousand eight hundred and forty-one, at the town of Hamilton, Canada, before me,

SECKER BROUGH, Commissioner.

Answers to Interrogatories by way of Cross Examination.

The said *Hamilton Robert O'Reilly* in answer to the first cross-interrogatory says: I reside in the town of Hamilton, Canada. I have resided there since June, 1829. I am a native of Canada. I am passed thirty years of age. I am a Barrister at Law.

To the 2d cross-interrogatory he says: I held in December, 1837, and January, 1838, the temporary rank of lieutenant at Chippewa in an independent volunteer company. I was for a few days at first, attached to the land forces and was afterwards removed to a schooner under the command of Lieutenant or Captain Graham of the Royal Navy. The schooner referred to was at that time called the "Rose." I still held the temporary rank above referred to.

To the third cross-interrogatory he says: I saw Alexander McLeod three or four times during the months of December and January. But whether before or after the destruction of the Caroline I cannot state. Nor can I state with certainty the days or particular places.

To the 4th cross-interrogatory he says: To the best of my recollection I never conversed with McLeod on the subject of the burning of the Caroline or heard him speak on the subject.

To the 5th cross-interrogatory he says: To my recollection he never told me he had been at Buffalo and seen the Caroline, nor did he ever say anything to me about the Caroline.

To the 6th cross-interrogatory he says: I never went in a boat with McLeod around Navy Island.

To the 7th cross-interrogatory he says: McLeod, I think, never told me he went around Navy Island, but I am under the impression that he did go round or partly around. I cannot say whether it was before or after the destruction of the Caroline, nor can I say how I derived the impression. I believe the object was to reconnoitre the Island. I do not know who went with him. If he went, as I am impressed he went, he went in a small boat. I cannot say what occurred on his passage, nor how long he was absent, nor when he returned.

To the 8th cross-interrogatory he says: he never did to the best of my recollection.

To the 9th cross interrogatory he says: I first knew that the destruction of the Caroline was contemplated when we set off from the shore, when Captain Drew stated in the boats that that was the object of the expedition; it did not occur to me at all; I never, that I can recollect, spoke to McLeod on the subject; I believe he was not present when it was communicated to me; my conviction is that he was not present; nor did McLeod know of it to my knowledge. I may be under a misapprehension as to Captain Drew stating the object of the expedition, it may have been Captain Beer; I am inclined to think it was Captain Drew.

To the 10th cross interrogatory he says: I first discovered she was at Schlosser when we reached within sight of her; when receiving our orders on our passage we were told by Captain Beer, that she would probably be on her passage from Schlosser to Navy Island; McLeod never so informed me. I commenced my preparations for the expedition about two hours before we embarked; not knowing at the time the object of the expedition; immediately after the return of the expedition I went to Davis's tavern, then to visit Lieutenant McCormick and then to my quarters.

To the 11th cross interrogatory he says: I have no distinct recollection, but think it probable that I was at Davis's tavern the day after the night of the burning of the Caroline; I do not recollect to have seen McLeod there; on the 1st of January I was at Queenston; I cannot recollect to have seen him at any particular day at Davis's tavern, nor at any time to have conversed with him about the burning of the Caroline.

To the 12th cross interrogatory he says: I was present at the burning of the Caroline at Schlosser at the time mentioned in this interrogatory. I was concerned in the expedition and embarked with it. A good many persons were present at the embarkation, but I cannot form any idea of the number.

To the 13th cross interrogatory he says: to the best of my judgment, there were seven boats with eight in each boat; I think I was personally acquainted with all or nearly all who went on the enterprise; I was one of them; I think nine started with the boat in which I went—one of whom was disabled before we left the shore of the river and remained on shore. We started at the mouth of the Chippewa Creek and tracked up the river some distance. I was on the Caroline and assisted to light the fire in the fire-room.

To the 14th cross interrogatory he says: I believe they were jolly boats or cutters and such as are usually attached to steamboats and schooners. I think they were nearly all of the same size and description. I think some of them were pulled with six oars and some with four. I believe seven boats started and five reached the Caroline.

To the 15th cross interrogatory he says: I was personally acquainted with all or nearly all. I cannot swear that I recognized the face of each one who went in the expedition.

To the 16th cross interrogatory he says: I knew all who were in the same boat with me; I recognized every one of them; cannot swear that I spoke to all of them individually. Captain Drew com-

manded the expedition and Captain or Lieutenant Beer commanded the boat in which I was.

To the 17th cross interrogatory he says: I returned in the same boat in which I embarked, with the same persons and I am inclined to think another person named Richard Arnold.

To the 18th cross interrogatory he says: Only five of the boats which started reached the Caroline, two failed, Lieutenant Battersby, commanded one of those which failed; I don't know who commanded the other; they returned to the Canada shore; I believe those which reached the Caroline arrived nearly at the same time—Captain Drew's boat reached first, a few moment's difference.

To the 19th cross interrogatory he says: I do not know that there was any one of that name engaged in the expedition.

To the 20th cross interrogatory he says: The expedition did not embark at any pier or wharf, but from the bank of the Chippewa Creek.

To the 21st cross interrogatory he says: The boats were near each other when they started, and started as nearly at the same time as they could, to enable them to track up the Niagara river—the place where the boats were lying cannot properly be called a landing place, but they lay near each other.

To the 22d cross interrogatory he says: I think the boats which reached the Caroline returned at the same time, nearly at the same time and place. I did not see or recognise all the persons *disembark*, whom I saw embark.

To the 23d cross interrogatory he says: I believe none of the persons composing the expedition belonged to the regular army, then upon full pay, and but three or four naval officers who were on half-pay, otherwise they were militia volunteers. They were not drafted or levied by military orders; they came as volunteers; I think they were collected in parties, and so went into their respective boats.

To the 24th cross interrogatory he says: It was not displayed in any military order except as mentioned in my answer to the last preceding interrogatory. I did not see it displayed or paraded in any military form after its disembarkation.

To the 25th cross interrogatory he says: They were dressed in usual and customary clothing, and in their own clothing, and not in any military or naval uniform; I am unable to give any particular description of their hats, caps, or coats.

To the 26th cross interrogatory he says: The party was generally armed with swords, sabres, cutlasses and pistols. I cannot state where the arms were generally procured, I got mine at the quarters of the Naval Brigade.

To the 27th cross interrogatory he says: After the expedition returned I think the force dispersed to their respective quarters. I did not see them assemble.

To the 28th cross interrogatory he says: I think the force disembarked between the hours of one and two o'clock in the morning. I think it was not moonlight, the night was neither very dark nor light. I think the force after its return dispersed to quarters, in and about the village of Chippewa; I am not aware whether they were together at sunrise or not; I was asleep at that hour. I do not recollect to

have seen them together since as a separate force, or any part of it. I think the arms were given up to the Naval Brigade.

To the 29th cross interrogatory he says: I think at between ten and eleven o'clock.

To the 30th cross interrogatory he says: I was not wounded nor was any one of the assailing party killed. But two of the assailing party to my knowledge were wounded, but have understood a third was wounded.

To the 31st cross interrogatory he says: When approaching the boat Caroline I heard the sentry on board at the after-gangway challenge twice or thrice and ask for the countersign. I heard him say give me the countersign or I will fire, and I think discharged a shot, I am not personally aware of any further resistance by persons belonging to the Caroline. I saw no weapons with any of the persons belonging to the Caroline except the sentry. I saw several persons leave the Caroline for the American shore, but I could not see whether they were armed or not.

To the 32d cross interrogatory he says: I cannot positively state that any more than one shot was fired from the boat Caroline, and cannot state positively whether that was a gun shot or a pistol. I saw no swords or pikes or other military weapons used by the persons belonging to the Caroline. I saw no arms of any kind except that had by the sentry, nor any military stores or munitions of war.

To the 33d cross interrogatory he says: I saw none of the people belonging to the Caroline killed or wounded. I neither killed nor wounded any one. I did not discharge a gun or pistol, nor did I strike any one with a sword or pike or any other weapon.

To the 34th cross interrogatory he says: I do not know, nor have I reason to believe that any body was on board of the Caroline when she was cut loose and sent over the Falls.

To the 35th cross interrogatory he says: I did not go ashore or into the warehouse at Schlosser, nor do I know that any of the attacking party did.

To the 36th cross interrogatory he says: I did not take or carry away any article whatever, as mentioned in this cross interrogatory. I believe there were one or two mattresses taken from the Caroline to Chippewa, but I have no personal knowledge that such were taken, or any other article whatsoever.

To the 37th cross interrogatory he says: I incline to think I first heard that the steamboat Caroline was coming down to, or had come down to Navy Island on the day she was destroyed. I have no distinct recollection who informed me, but I think it was either Mr. Harris of London or Mr. Cleverley of the same place, but to my recollection, Mr. McLeod did not so inform me.

To the 38th cross interrogatory he says: I neither know nor am I aware of having seen a person of the name of Sylvanus S. Rigby, but I have heard that a person by the name of Rigby was taken prisoner on board of the Caroline and brought to Chippewa. I first heard of him either on the night of the destruction of the Caroline or the next day. I am not aware that he was engaged in any way in her Brittannic Majesty's service, either at the time mentioned in this interrogatory or any other time.

To the 39th cross interrogatory he says: I never knew, saw, or heard of him to my knowledge before the destruction of the Caroline.

To the 40th cross interrogatory he says: I never did.

To the 41st cross interrogatory he says: I do not know, nor have I ever heard from him that he was on board of the Caroline.

To the 42d cross interrogatory he says: I know nothing of the matters inquired after by this interrogatory.

To the 43d cross interrogatory he says: I never saw him before the attack of the Caroline or ever.

To the 44th cross interrogatory he says: I know nothing of the matters inquired after by this interrogatory, either from my own knowledge, or from any information derived from the said Alexander McLeod.

To the 45th cross interrogatory he says: Alexander McLeod never told me nor any person in my presence at any time anything respecting the subject matter of this interrogatory.

To the 46th interrogatory he says: I do not know that he remained at Chippewa that day, nor have I heard him say he had done so, nor have I ever heard him say that he kept a look-out for the Caroline when she came down to Navy Island or Schlosser, nor have I heard him say, nor do I know that he discovered her; I do not know that he kept a look-out.

To the 47th cross interrogatory he says: I have no recollection of any conversation had, of the nature inquired after by this interrogatory.

To the 48th cross interrogatory he says: No.

To the 49th cross interrogatory he says: not to my knowledge, nor have I understood so from him.

To the 50th cross interrogatory he says: Never!

To the 51st cross interrogatory he says: I think seven boats were first engaged in the expedition. I think they all started from Chippewa Creek below the village, cannot say how many grounded on Buckhorn Island.

To the 52d cross interrogatory he says: There was no person to my knowledge engaged to pilot the boats. I am not aware that any person of the name mentioned in this cross interrogatory resided in Chippewa in 1837, nor am I aware that any one of that name was engaged in the expedition.

To the 53d cross interrogatory he says: I am not aware whether the order given by Sir Allan N. MacNab was in writing or verbal, I have reason to believe it was private, inasmuch as the officers under whom I volunteered assured me that they were not themselves aware of the object of the expedition, until pushing off from the shore of the Niagara River, some distance, probably two hundred yards, above the Chippewa Creek; I neither saw nor heard the order given by Sir Allan N. MacNab.

To the 54th cross interrogatory he says: There was one or more persons on shore near the wharf where the Caroline was lying. Several shots were fired from the shore upon us. Cannot state from what particular quarter the shots proceeded, but I think from the di-

rection of the tavern. I am not aware that Lieutenant Elmsley, or any other person was sent on shore to protect the expedition—nor am I aware that he or any other person went on shore.

To the last cross interrogatory he says: I do not know, nor can I say at this the time of my examination any thing further touching the matters in question, than I have already answered in previous interrogatories.

H. R. O'REILLY.

Sworn at the town of Hamilton in Canada, this 17th day of September, 1841, before me,

SECKER BROUGH, Commissioner.

DEPOSITION OF SHEPHERD MCCORMICK.

Shepherd McCormick, of the township of London, in the District of London, in the Province of Canada, Esq., aged forty-nine years and upwards, being produced, sworn and examined, on behalf of the defendant, in the title of these depositions named, doth depose as follows, viz:

To the 1st interrogatory he says: The first time I ever saw Alexander McLeod, was on the night of the 28th of December, 1837, when he was introduced to me by Captain Graham. I never saw him until the time I have before mentioned.

To the 2d interrogatory he says: I perfectly recollect the time of the destruction of the Caroline. I was in Chippewa at the time, and for some days prior to it.

To the 3d interrogatory he says: The persons who went to destroy the Caroline, embarked at the mouth of the Chippewa river. I think they were standing there about half an hour before they embarked. I was getting the boats ready. I took the list of the names and went round to get volunteers, by direction of Captain Drew, as I was second in command.

To the 4th interrogatory he says: When the boats went to destroy the Caroline, I do not know where the said McLeod was. He was not in my boat. *I did not take down his name*, and am positive he was not of the party.

To the 5th interrogatory he says: I did not see the said Alexander McLeod during the time the persons who went to destroy the Caroline were standing on the beach. He was not with the party I commanded.

To the 6th interrogatory he say : When the boats pushed off from the Canada shore to destroy the Caroline, I went in one of them, which boat I commanded.

To the 7th interrogatory he says: I did see all the persons in the boat I went in from the Canada shore to Schlosser. Alexander McLeod was not one of them. I did not see him at all that night.

To the 8th interrogatory he says: I was the second man on board the Caroline on the night of her destruction. I was in different parts of her. I was put into one of the boats after I was wounded, before the other assailants left the Caroline. I did not see the said Alexander McLeod among the assailants. I am positive he was not one of them.

To the 9th interrogatory he says: I know nothing of the matters inquired after in this interrogatory.

To the 10th interrogatory he says: I was so weak from the wounds I had received, that I cannot recollect who I saw on my return.

To the 11th interrogatory he says: Seven boats started in search of the Caroline—five reached her. I cannot say how many returned in company.

To the 12th interrogatory he says: I do know Sir Allan N. McNab. He was on the beach when the expedition started. The expedition was *undertaken by his command.* I did not hear him give any directions with reference to it.

To the 13th interrogatory he says: Captain Drew was in command of the expedition. He received his orders from Sir Allan N. McNab.

To the last interrogatory he says: Alexander McLeod called on me shortly after the destruction of the Caroline, and expressed his regret that he had not heard of the expedition, as he would have accompanied it. Further than this, I know of nothing more that may tend to the benefit and advantage of the said Alexander McLeod.

SHEPHERD McCORMICK.

Taken and sworn before me, this 20th day of September, in the year of our Lord, one thousand eight hundred and forty-one, at the town of London, in the District of London, and Province of Canada.

J. H. PRICE, Commissioner.

Answer to the interrogatories, by way of cross-examination.

The said *Shepherd McCormick* to the first interrogatory says: I reside in the township of London, District of London, and province of Canada, and have resided there three years. I am a native of Ireland, of the age of forty-nine years, and am a Lieutenant in the Royal Navy.

To the 2d cross-interrogatory he says: I was third in command of the Naval Brigade, at Chippewa, under Captain Drew, until Captain Graham left, when I was second in command. I neither commanded nor was attached to any vessel.

To the 3d cross-interrogatory he says: Alexander McLeod was first introduced to me on the night of the 28th of December, 1837, on which night he accompanied me in a boat round Navy Island. I did not again see him until after the destruction of the Caroline.

To the 4th cross-interrogatory he says: I never did converse with the said Alexander McLeod, nor did I ever hear him converse with any other person on the subject of the Caroline, previous to her destruction.

To the 5th cross-interrogatory he says: The said Alexander McLeod never told me any thing about the Caroline, previous to her destruction.

To the 6th cross-interrogatory he says: I did go round Navy

Island, very early in the morning of the 29th December, 1837, in company with Alexander McLeod, to reconnoitre.

To the 7th cross-interrogatory he says: Alexander McLeod did go round Navy Island early in the morning of the 29th December, 1837. The object way to reconnoitre. He went in a boat. I accompanied him. Thirty-six cannon shot were fired at us from Navy Island. We were absent about four hours.

To the 8th cross-interrogatory he says: Alexander McLeod never spoke to me on the subject of cutting out the Caroline, in case she should come down to Navy Island.

To the 9th cross-interrogatory he says: The plan for the destruction of the Caroline was first communicated to me by Captain Drew, on the evening of the 29th December, 1837. I did not communicate it, or any part of it, to Alexander McLeod. He was not present when it was communicated to me, nor did he to my knowledge know of it.

To the 10th cross-interrogatory he says: The first time I saw the Caroline was, during the day of the 29th of December, 1837, on her passage from Schlosser to Navy Island. Alexander McLeod never spoke to me on the subject. We commenced our preparations to attack her about nine o'clock of the night of her destruction. On my return, I was carried to the house of Mr. Kirkpatrick at Chippewa.

To the 11th cross-interrogatory he says: I was confined to my bed from the wounds I had received, and know nothing of the matters inquired after in this cross interrogatory.

To the 12th cross-interrogatory he says: I was present at the burning of the steamboat Caroline at Schlosser, on the night of the 29th December, 1837. I was present at the embarkation of the expedition at Chippewa, and saw it embark. I cannot possibly say how many persons were present on the shore, or near the place of embarkation.

To the 13th cross-interrogatory he says: About fifty persons embarked on the expedition. I was not personally acquainted with all the persons who entered the boats and went on the enterprize. I was one of them—there were eight in my boat including myself. I was on board of the Caroline. I was wounded immediately after getting on board, and consequently took no part in her destruction.

To the 14th cross-interrogatory he says: The boats used were row-boats. They were all nearly of the same size and description. There were about eight persons in each boat—there were seven boats.

To the fifteenth cross-interrogatory he says: I did not know all who embarked on the expedition, nor did I see and recognize the faces of each one.

To the 16th cross-interrogatory he says: I knew all who were in the same boat with me. I spoke to and reeognized each one of them. Captain Drew commanded the expedition. I commanded the boat that I was in.

To the 17th cross-interrogatory he says: From the weak state I was in, I do not recollect in what boat I returned.

To the 18th cross-interrogatory he says: All the boats that embarked in the expedition did not reach the Caroline—two failed. I

do not know what became of them. The boats that reached the Caroline arrived about the same time. Captain Drew's boat arrived first.

To the 19th cross-interrogatory he says: There was no man in the expedition of the name of McLeod, to my knowledge.

To the 20th cross-interrogatory: The expedition embarked at the mouth of the Chippewa river. There was no wharf or pier.

To the 21st cross-interrogatory he says: The boats were all lying on the beach together. They all started at the same time.

To the 22d cross-interrogatory he says: I know nothing of what took place at the disembarkation, nor did I recognize any one, owing to the exceeding weak state in which I was.

To the 23d cross-interrogatory he says: The persons composing the expedition were civilians, with the exception of a few naval officers. The men came as volunteers; they marched up and entered the boats in a body.

To the 24th cross-interrogatory he says: The force was not displayed in any military form previous to its embarkation; and as I have already stated, I cannot say what took place at its disembarkation.

To the 25th cross-interrogatory he says: The men composing the expedition were dressed in their ordinary clothing—they had no particular uniform.

To the 26th cross-interrogatory he says: The party were armed with swords and pistols, some of which belonged to the party themselves; the remainder were obtained from the Queen's stores.

To the 27th cross-interrogatory he says: As I have already stated, I know nothing of what took place after the expedition returned.

To the 28th cross-interrogatory he says: I don't recollect the hour at which the expedition disembarked. The night at the time we embarked was very dark. I was confined to my bed for three months, and therefore cannot say what became of the force after its disembarkation.

To the 29th cross-interrogatory he says: The expedition embarked about ten o'clock at night.

To the 30th cross-interrogatory he says: I was desperately wounded in the attack on the Caroline. I believe that no one was killed.

To the 31st cross-interrogatory he says: There was a strong resistance for a short period, made by the persons on board of the Caroline; they were armed with pistols and swords.

To the 32d cross-interrogatory he says: They did discharge guns and pistols and used swords, but not pikes. I am not aware that the boat was armed. I have no knowledge of any arms, military stores, or amunition, or provisions, or munitions of war of any kind or description being found on board the Caroline.

To the 33d cross-interrogatory he says: I believe one of the persons found on board the Caroline was killed. His death was caused by a blow from me immediately after he had wounded me. I fired neither gun nor pistol.

To the 34th cross-interrogatory he says: I do not think there was

a living creature on board the Caroline when she was cut loose and sent over the Falls.

To the 35th cross-interrogatory he says: I did not myself go on shore, nor am I aware that any others of the party did.

To the 36th cross-interrogatory he says: The only articles taken from the Caroline were two small mattresses on which I was laid, at least to the best of my knowledge.

To the 37th cross-interrogatory he says: I never heard of the steamboat Caroline coming down to Schlosser until I saw her, nor did Alexander McLeod ever speak to me on the subject.

To the 38th cross-interrogatory he says: I never heard of or saw such a person as Sylvanus S. Rigby.

To the 39th cross-interrogatory he says: I never saw or heard of him.

To the 40th cross-interrogatory he says: I never did.

To the 41st cross-interrogatory he says: I never heard or knew of such a person.

To the 42d cross-interrogatory he says: I know nothing of the matters inquired after in this cross interrogatory.

To the 43d cross-interrogatory he says: I neither knew him before or after the attack on the Caroline.

To the 44th cross-interrogatory he says: I know nothing, nor have ever heard Alexander McLeod speak on the subject inquired after in this cross-interrogatory.

To the 45th cross-interrogatory he says: Alexander McLeod never spoke to me, nor did I ever hear him speak on the subject of the Caroline previous to her destruction.

To the 46th cross-interrogatory he says: I know nothing of the matters inquired after in this cross-interrogatory.

To the 47th cross-interrogatory he says: Alexander McLeod never had any conversation with me on the subject of the Caroline, nor had I with any other person in his presence, nor had he with any other person in my presence previous to her destruction.

To the 48th cross-interrogatory he says: I never did.

To the 49th cross-interrogatory he says: I am not aware that he ever did.

To the 50th cross-interrogatory he says: I never did hear Alexander McLeod say that he was present at the burning of the Caroline, but as I have before stated, he, subsequently to her destruction, expressed his regret to me that he had not been informed of the intended attack upon her for he would have been one of the party.

To the 51st cross-interrogatory he says: Seven boats were first engaged for the expedition. None started from Chippewa village. Seven started from near the mouth of the Chippewa river. I do not know how many got aground on Buckhorn Island.

To the 52d cross-interrogatory he says: No person was employed to pilot the boats. I never heard of such persons as those mentioned in this cross-interrogatory.

To the 53d cross interrogatory he says: I heard no orders given by Sir Allan N. McNab, nor did I see any in writing given by him.

To the 54th cross-interrogatory he says: I was wounded so im-

mediately after boarding that I do not know what took place afterwards.

To the last cross-interrogatory he says: I do not.

SHEPHERD McCORMICK.

Taken and sworn before me, this twentieth day of September, in the year of our Lord one thousand eight hundred and forty-one, at the town of London, in the district of London, and Province of Canada.

J. H. PRICE, Commissioner.

DEPOSITION OF FREDERICK CLEVERLY.

Frederick Cleverly, of the town of London, in the district of London in the Province of Canada, Barrister at Law, aged twenty-six years and upwards, being produced, sworn, and examined on the behalf of the defendant in the title of these interrogatories named, doth depose as follows, viz:

To the 1st interrogatory he says: The first time I ever met Alexander McLeod was on the evening of the 28th of December, 1837, when he was preparing to accompany Captain Graham around Navy Island. He remained during the greater part of the night at our quarters. I was present when he embarked and when he returned, but have not seen him since.

To the 2d interrogatory he says: I perfectly recollect the time of the destruction of the Caroline. I was in Chippewa about that time and I had been there three days when it took place.

To the 3d interrogatory he says: The persons who went to destroy the Caroline embarked at the Chippewa river near its mouth. They were standing on the bank about half an hour before starting. I was there during the time and saw most of the men embark.

To the 4th interrogatory he says: When the persons who went to destroy the Caroline embarked I do not know where the said Alexander McLeod was. He was not in the boat with me.

To the 5th interrogatory he says: I have never seen the said Alexander McLeod since the morning of the 29th of December, 1837, when he returned from the expedition round Navy Island with Captain Graham.

To the 6th interrogatory he says: When the boats pushed off to destroy the Caroline I went in the boat commanded by Lieutenant Beer of the Royal Navy.

To the 7th interrogatory he says: I saw all the persons in the boat I went in from Canada to Schlosser. Alexander McLeod was not one of them. I did not see him on my way from the Canada shore to Schlosser.

To the 8th cross interrogatory he says: I was on board of the Caroline on the night of her destruction. I went into most parts of her. I boarded her at the same time as the other assailants, and left her about the same time that they did. I did not see Alexander McLeod among the assailants, nor do I believe he was one of them.

To the ninth interrogatory he says: I know nothing of any person having been killed during the attack upon the Caroline and having been conveyed upon the dock at Schlosser and left remaining there.

To the 10th interrogatory he says: I saw the men of the five boats engaged in the attack on the Caroline when they landed on the Canada shore on their return from Schlosser. I did not see Alexander McLeod among them, and *I believe he was not there.* I did not see him at all during the night, nor have I seen him since.

To the 11th interrogatory he says: Seven boats started in search of the Caroline—five reached her. Five reached the shore about the same time on their return.

To the 12th interrogatory he says: I know Sir Allan N. McNab. He was on the bank of the Chippewa river when the expedition started. It was undertaken by his command. I heard him give no directions with reference to it.

To the 13th interrogatory he says: Captain Drew was in command of the expedition. He received his orders from Sir Allan N. McNab.

To the last interrogatory he says: I saw all the men who composed the expedition. Alexander McLeod was not one of them.

FREDERICK CLEVERLY.

Taken and sworn before me, this twenty-first day of September in the year of our Lord one thousand eight hundred and forty-one, at the town of London, in the district of London, in Canada.

J. H. PRICE, Commissioner.

Answers to the Interrogatories by way of Cross Examination.

The said *Frederick Cleverly*, to the 1st cross-interrogatory says: I reside in the town of London, in the District of London, and Province of Canada. I have resided there between six and seven years. I am a native of England, and am a Barrister at Law.

To the 2d cross-interrogatory he says: I was acting as clerk to Captain Drew in December, 1837. I was neither in command of or attached to any vessel.

To the 3d cross-interrogatory he says: I saw Alexander McLeod on the evening of the the 29th of December, 1837. I never saw him before nor have I ever seen him since.

To the 4th cross-interrogatory he says: I never spoke to Alexander McLeod on the subject of the Caroline, nor did I ever hear him speak on the subject.

To the 5th cross-interrogatory he says: He never did.

To the 6th cross-interrogatory he says: I never did go round Navy Island in a small boat with Alexander McLeod.

To the 7th cross-interrogatory, he says; Alexander McLeod did go round Navy Island on the morning of the 29th of December, 1837, in company with Captain Graham and Lieutenant McLeod. Their object was to reconnoitre. They were absent about four hours.

To the 8th cross-interrogatory, he says: He never did.

To the 9th cross-interrogatory, he says: The plan for the destruction of the Caroline never occurred to me; it was first communicated to me on the evening of the 29th December, 1837. Alexander McLeod was not present, nor did I ever communicate it to him.

To the 10th cross-interrogatory, he says: I saw the Caroline cross once during the day of the 29th December, 1837, from Navy Island to the American shore. I did not see her at Schlosser until I went to attack her. Alexander McLeod never spoke to me of the Caroline. We commenced preparations for the attack, on the evening of the 29th December, 1837. After the expedition returned, I went to the quarters of Capt. Drew, for the purpose of procuring a surgeon for Lieutenant McCormick.

To the 11th cross-interrogatory, he says: I was not in any tavern in Chippewa after the burning of the Caroline, nor did I ever see Alexander McLeod after her destruction.

To the 12th cross-interrogatory, he says: I was at the burning of the steamboat Caroline at Schlosser, on the 29th December, 1837. I was at the embarkation of the expedition. There were a number of persons standing on the shore. I cannot possibly say how many.

To the 13th cross-interrogatory, he says: There were about forty persons in the five boats that reached the Caroline. I knew most of them. I was one of them. There were nine in the boat I went in. I was on the Caroline, and assisted in towing her into the stream.

To the 14th cross-interrogatory, he says: The boats used were ship's jolly-boats, there were about eight persons in each boat. The boats were all nearly of the same size and description. Seven boats started.

To the 15th cross-interrogatory, he says: I did not know all. I knew most of them. I saw all the men that embarked, but cannot say that I recognised the features of each one.

To the 16th cross-interrogatory, he says: I knew all in the boat with me. I spoke to, and recognised each one of them. Captain Drew commanded the expedition. Lieutenant Beer commanded the boat I was in.

To the 17th cross-interrogatory, he says: I returned in the same boat in which I embarked, and believe that all those who went with me returned with me.

To the 18th cross-interrogatory, he says: Five only of the seven that started reached the Caroline. I cannot say what became of those that failed. One of them was commanded by Lieutenant Battersby, of the Royal Navy. The other, either by Mr. Curran or by Mr. Hector. The boats that reached the Caroline arrived about the same time.

To the 19th cross-interrogatory, he says: I am not aware that there was any man of the name of McLeod in the expedition.

To the 20th cross-interrogatory, he says: The expedition embarked at the mouth of the Chippewa creek. There was no wharf or pier there.

To the 21st cross-interrogatory, he says: The boats were all lying together. They all started together.

To the 22d cross-interrogatory, he says: The five boats returned about the same time, and the men disembarked about the same time. I did not recognise them as they landed, as I was despatched immediately for a surgeon to attend Lieut. McCormick.

To the 23d cross-interrogatory, he says: Some of the persons composing the expedition belonged to the Royal Navy. Others were militia officers, and the rest were civilians. All the men volunteered. They went up to the boats in a body.

To the 24th cross-interrogatory, he says: The force was not displayed in any military order, either on its embarkation or disembarkation.

To the 25th cross-interrogatory, he says: The men were dressed in their usual clothing. They had no uniform.

To the 26th cross-interrogatory, he says: The party was armed with cutlasses and pistols. The arms were procured from the government stores; their dresses were their own.

To the 27th cross-interrogatory, he says: After the force returned, they went to their respective quarters.

To the 28th cross-interrogatory, he says: The force disembarked about two o'clock in the morning. It was a dark night. There was no moon. The force went to their respective quarters. I never saw all the men in a body together afterwards. I am not aware that they were together that morning at sunrise. I have since seen some of the persons composing that force, armed and equipped as they were on that night.

To the 29th cross-interrogatory, he says: The expedition embarked about ten o'clock.

To the 30th cross-interrogatory, he says: I was not wounded in the attack on the Caroline. Lieutenant McCormick was severely wounded. There were two others slightly wounded. I believe that no one was killed.

To the 31st cross-interrogatory, he says: Resistance was made by persons on board the Caroline. They had weapons, swords and pistols.

To the 32d cross-interrogatory, he says: There were guns or pistols discharged by persons attached to the Caroline. I did not see them use any swords or pikes. The boat was unarmed. I saw no cannon or munitions of war of any kind on board of her.

To the 33d cross-interrogatory, he says: I did not see any one on board the Caroline killed. I saw one wounded. I neither killed nor wounded any person. I neither discharged a gun or pistol, nor did I strike any person.

To the 34th cross-interrogatory, he says: There was no person on board the Caroline when she was cut loose and sent over the falls.

To the 35th cross-interrogatory, he says: I did not go on shore at Schlosser. Some of the attacking party were sent to cut loose the Caroline.

To the 36th cross-interrogatory, he says: I took a bed for the purpose of putting under Lieutenant McCormick after he was wounded. I am not aware that any thing else was taken except the colors of the boat.

To the 37th cross-interrogatory, he says: I never heard of the steamboat Caroline coming down from Buffalo at all until I saw her.

To the 38th cross-interrogatory, he says: I never heard of, or saw such a man.

To the 39th cross-interrogatory, he says: No.

To the 40th cross-interrogatory, he says: No.

To the 41st cross-interrogatory, he says: Not that I know of.

To the 42d cross-interrogatory, he says: I know nothing whatever respecting the said Sylvanus S. Rigby.

To the 43d cross-interrogatory, he says: I never saw him.

To the 44th cross-interrogatory, he says: I know nothing of the matters inquired after in this cross-interrogatory.

To the 45th cross-interrogatory, he says: Alexander McLeod never spoke of the Caroline in my presence.

To the 46th cross-interrogatory, he says: I know nothing of the matters inquired after in this cross-interrogatory.

To the 47th cross-interrogatory, he says: Alexander McLeod never spoke of the Caroline in my presence, nor did I to any other person in his presence.

To the 48th cross-interrogatory, he says: I never heard Alexander McLeod express an opinion on the subject.

To the 49th cross-interrogatory, he says: Not to my knowledge.

To the 50th cross-interrogatory, he says: I never did.

To the 51st cross-interrogatory, he says: Seven boats were at first engaged. None started from Chippewa village; the seven started from the mouth of the Chippewa river. I am not aware that any of the boats got aground at Buckhorn Island.

To the 52d cross-interrogatory, he says: I am not aware that any person was employed to pilot the boats. I do not know any persons of the name of Weisherlur, (pronounced Wiscoon.)

To the 53d cross-interrogatory, he says: The orders were given by Sir Allan N. McNab, and I do not know whether they were written or verbal.

To the 54th cross-interrogatory, he says: I saw no armed force on the shore at Schlosser. I believe there were some shots fired from a house in the neighborhood. Lieutenant Elmsley was sent on shore to cut loose the Caroline. I am not aware how many men he had with him. I do not know that he met with any opposition.

To the last cross-interrogatory, he says: I do not.

FREDERICK CLEVERLY.

Taken and sworn before me, this twenty-first day of September, in the year of our Lord one thousand eight hundred and forty-one, at the town of London, in the District of London, in Canada,

J. H. PRICE, Commissioner.

DEPOSITION OF THOMAS HECTOR.

Thomas Hector, of the city or Toronto, in the Home District and Province of Canada, Esquire, aged thirty-three years and upwards, being produced, sworn and examined on behalf of the Defendant, in the title of these depositions named, doth depose as follows:

To the 1st interrogatory he says: I know Alexander McLeod, late Deputy Sheriff of the District of Niagara, and have known him since sometime in the year 1836 down to the 29th day of December 1837. I have frequently seen him, but have had no personal intercourse with him. I am not aware of what nation he is a citizen or

subject, but believe him to be a British subject, and know that he was then a resident in the Niagara District in Canada.

To the 2nd interrogatory he says: I recollect the time of the destruction of the Caroline; it was on or about the 29th day of December, 1837. I was residing at Lundy's Lane and was in Chippewa daily for about a fortnight previous to the destruction of the Caroline.

To the 3d interrogatory he says: Those that went to destroy the Caroline embarked from the southern bank of the Chippewa River, in the Niagara District. They left the beach in about half an hour after I arrived there, but I cannot say how long they had been there before my arrival, it was about 10 o'clock in the evening when I arrived. I was on the bank among those who were going on the expedition, surrounded by a great concourse of people. I mixed with those going on the expedition, and recognized and spoke to several, but from the darkness did not recognize all; the night was clear but we were shaded by some willow trees. I could see all those within two or three yards; there was no moon.

To the fourth interrogatory he says: I cannot say where Alexander McLeod was. I did not see him that night.

To the 5th interrogatory he says: I do not know where he was while those going on the expedition were standing on the banks and down to the time when they embarked. I did not see him on the bank or in any boat.

To the 6th interrogatory he says: I embarked on board one of the boats and rowed to the mouth of the Chippewa River; we there landed and towed the boats up the Niagara River to a point opposite Navy Island, where I again embarked in one of the boats engaged in the expedition, and a second time returned to change the rowers, owing to their inability to stem the current of the river. I then finally embarked to join the other boats in taking the Caroline. I went to a part of the river within about two hundred yards of Fort Schlosser, when the Caroline burst suddenly into a blaze. We did not land, but approached sufficiently near to see persons on the wharf, and then returned to the Canada shore. I was in command of the boat.

To the 7th interrogatory he says: I did see all the persons in the boat I went in. Mr. McLeod was not in the boat; I did not see him at all that night.

To the 8th interrogatory he says: I saw the Caroline when on fire but did not go on board of her. I was not nearer to her than between one hundred and two hundred yards. I have before stated I did not see Alexander McLeod that night, and I have no knowledge of his being there.

To the 9th interrogatory he says: I know nothing as to the matters contained in this interrogatory.

To the 10th interrogatory he says: I can state positively Alexander McLeod was not among those whom I saw, who consisted of the greater number of those engaged in the expedition assembled at the tavern, where we were stationed immediately after our return, where we supped together. We conversed for the greater part of the

night respecting the parties engaged in the expedition. I heard the names of all that had been so engaged, but *the name of Alexander McLeod was not one of those mentioned, nor was it entered in any of the lists made out, of the names of those so engaged.* We were still in conversation when the lists were made out; this was between six and seven o'clock in the morning.

To the 11th interrogatory he says: Nine left the Chippewa River Seven only left the bank opposite Navy Island under orders. I cannot say how many reached her, and I only know of four having returned, who crossed about the same time in sight of the boat in which I was.

To the 12th interrogatory he says: I do know Sir Allan Napier McNab, he was on the bank of the Chippewa River when the boats started; the expedition was undertaken by *his orders*; it was commanded by Captain Drew; I *heard no directions* given by Sir Allan N. McNab.

To the 13th interrogatory he says: Captain Drew was in command of the expedition, and I believe under the orders of Sir Allan N. McNab.

To the last interrogatory he says: I know of nothing further relating to the matters in question.

ADAM WILSON,
J. H. PRICE,
JAMES E. SMALL,
} Commissioners.

Answers to the interrogations by way of cross examination.

The said Thomas Hector, in answer to the 1st cross interrogatory saith: I am at present residing in Kingston, have been here since the tenth day of June last. I am a native of England, and have resided in Canada since the year 1833. I am thirty-three years of age, and am a Clerk in the Surveyor General's Department.

To the 2d cross-interrogatory he says I was a volunteer under Captain Elmsley, and held no particular rank. I was not at that time attached to any vessel.

To the 3d cross interrogatory he says: I did not see him at all during the week preceding the burning of the Caroline.

To the 4th cross interrogatory he says: I did not at any time hear him speak, or speak to him on the subject of the Caroline.

To the 5th cross interrogatory he says: He did not.

To the 6th cross interrogatory he says: I never went with him.

To the 7th cross interrogatory he says: I know nothing of the matters contained in this interrogatory.

To the 8th cross-interrogatory, he says I did not.

To the 9th cross-interrogatory, he says: It did not occur to me. At 2 o'clock in the day I was told by Captain Drew to hold myself in readiness at 10 o'clock that night, but he did not inform me for what purpose. It was not aware until I went in the boat that the Caroline was to be destroyed. I did not communicate it to Alexander McLeod. He was not present when it was communicated to me. I do not know whether he knew of it or not.

To the 10th cross-interrogatory, he says: I think I saw her one or

two days before she was destroyed making trips from Schlosser to Navy Island. Alexander McLeod never informed me of her being at Schlosser. The preparations were made on the day on which she was destroyed. I went to Kirkpatrick's tavern, as stated in my answer to the 10th interrogatory in chief.

To the 11th cross-interrogatory, he says: I was not at Davis' tavern. I did not see McLeod at or near Davis' tavern at any time after the destruction of the Caroline.

To the 12th cross-interrogatory, he says: I cannot say how many persons were present when the expedition started *owing to the darkness of the night*, nor can I form an opinion on the subject. There was a large assemblage of people. I can state no more in answer to the other parts of this cross-interrogatory than I have before stated in my examination in chief.

To the 13th cross-interrogatory, he says: I cannot state positively how many persons were embarked, but I think between forty and fifty. I did not know the whole of them. I knew the greater part of them by sight. I was one of them. There were only four. I was not on board of the Caroline. I took no other part except endeavoring to reach her, but failed as I have before stated.

To the 14th cross-interrogatory, he says: They were all rowboats. I cannot say how many men in each boat. Some of the boats were eight oar boats, and some of them four oar boats. There were seven boats.

To the 15th cross-interrogatory, he says: I did not know all nor did I see the faces of all.

To the 16th cross-interrogatory, he says: I did. I did speak to and recognize each one of them. I have before stated that Captain Drew commanded the expedition, and I commanded the boat I was in.

To the 17th cross-interrogatory, he says: Yes.

To the 18th cross-interrogatory, he says: All did not reach the Caroline. I cannot say how many failed or who commanded them except the one I was in. I do not know what became of all those that failed, but believe they regained the Canada shore. I cannot say whether the boats that reached the Caroline arrived at the same time, or which arrived first.

To the 19th cross-interrogatory, he says: I cannot say whether there was a man in the expedition by the name of McLeod or not.

To the 20th cross-interrogatory, he says: I have before stated when the expedition embarked.

To the 21st cross-interrogatory, he says: The boats were all lying at the same place and started together.

To the 22d cross-interrogatory, he says: The boats did not all return at the same time, nor did the expedition disembark at the same time or place. I did not see and recognise all the persons I saw embark.

To the 23d cross-interrogatory he says: They were militia and volunteers who were ordered to hold themselves in readiness for some service which was not disclosed until the boats started, as I have before mentioned, and composed part of the force under the orders of Sir

Allan N. MacNab. I do not know how they entered the boats as five or six of them were manned when I arrived. They were lying on their oars in the Chippewa river.

To the 24th cross-interrogatory, he says: I cannot say whether the force was displayed in military form before embarkation, but I can state positively it was not at disembarkation.

To the 25th cross-interrogatory, he says: There was no particular uniform. Each man wore his own ordinary dress.

To the 26th cross-interrogatory, he says: With guns, pistols, pikes and cutlasses. I do not know when or from whom the weapons were procured, they were ready furnished when I arrived.

To the 27th cross-interrogatory, he says: The greater number reassembled as I before stated at Kirkpatrick's, and remained there as it was our appointed station, and we were inspected there the next morning by Captain Drew.

To the 28th cross-interrogatory, he says: The force disembarked at midnight. There was no moon. I cannot say whether it was cloudy or not. The night was fine and very warm for the season. I have already stated where the force went upon its return, and how they disposed of themselves afterwards. We remained together for several days until we were drafted into different schooners and corps. From the mixed nature of the corps, the arms used in the expedition against the Caroline were provided for the particular occasion. When the expedition was over the arms were again collected, and each person resumed those he had previously carried, consequently I never again saw the force armed and equipped as it was on that night.

To the 29th cross-interrogatory, he says: About 10 o'clock, as I have before stated.

To the 30th cross-interrogatory, he says: I was not wounded, nor do I know that any others were, but I saw four or five at least who had been engaged in the attack on the Caroline with wounds upon them, some of a dangerous character. No person was killed that I know of.

To the 31st cross-interrogatory, he says: I do not know.

To the 32d cross-interrogatory, he says: I heard fire-arms discharged and saw flashes on the wharf, but do not know by whom they were discharged. I know nothing of the matters contained in this interrogatory other than what I have already stated.

To the 33d cross-interrogatory, he says: I was not on board the Caroline. I did not discharge any fire-arms nor strike or wound any one, and have no knowledge of the other matters enquired of in this interrogatory.

To the 34th cross-interrogatory, he says: I have no knowledge that there were any, nor do I believe there were any on board the Crroline when she was burnt, although I think I was near enough to have observed had there been any person on deck.

To the 35th cross interrogatory, he says: I did not, nor did any of my boat's crew land. I cannot speak as to any of the others.

To the 36th cross-interrogatory he says: I did not, nor did any of those in my boat. I cannot speak in regard to what others may have

done. I saw one or two swords which I was informed had been taken from on board the Caroline.

To the 37th cross-interrogatory, he says: I know and heard nothing of the steamboat Caroline coming to Schlosser or Navy Island until I saw her. Mr. McLeod, as I have before stated, never spoke to me on the subject.

To the 38th cross-interrogatory he says: I never knew or heard of such a person.

To the 39th cross-interrogatory he says: No.

To the 40th cross-interrogatory he says: No.

To the 41st cross-interrogatory he says: I do not know.

To the 42d cross-interrogatory he says: I know nothing of the matters contained in this interrogatory.

To the 43d cross-interrogatory he says: I never saw him.

To the 44th cross-interrogatory he says: I know nothing of the matters contained in this interrogatory.

To the 45th cross-interrogatory he says: He never did.

To the 46th cross-interrogatory he says: I do not know and have had no conversation with him on this subject.

To the 47th cross-interrogatory he says: I never heard Alexander McLeod converse with any person nor did he converse with me, nor have I conversed with him or with any other person in his presence on the subject of the Caroline before she was destroyed.

To the 48th cross-interrogatory he says: I never did

To the 49th cross-interrogatory he says: He never did to my knowledge.

To the 50th cross-interrogatory he says: I never did.

To the 51st cross-interrogatory he says: Nine boats were first manned in the Chippewa River. Nine left the river, seven only arrived at the place of final embarkation. I cannot say whether any boats were grounded on Buckhorn Island.

To the 53d cross-interrogatory he says: No person was employed as pilot that I am aware of. Captain Drew led and we were ordered to follow. I never heard of such person or persons as are named in this interrogatory.

To the 53d cross-interrogatory, he says: I am not aware of the manner in which the orders *are* given, or whether they were given verbally or in writing, publicly or privately. I infer that Sir Allan Napier McNab gave the orders as he was present at the embarkation of the men and sanctioned the proceeding, he being at that time commanding on the frontier. This is all I know respecting the matters contained in this interrogatory.

To the 54th cross-interrogatory he says: I do not know whether there was any armed force stationed on land at or near the wharf where the Caroline was lying. I was not attacked or fired upon at all. I do not know whether any persons were sent on shore, or whether they met with opposition or not.

To the last cross-interrogatory, he says: I know of nothing further relating to any of the matters in question.

Signed THOS. HECTOR.

Taken and sworn before us this 11th day of September, in the

year of our Lord one thousand eight hundred and forty-one, at the town of Kingston, in Canada.

ADAM WILSON,
J. H. PRICE,
JAS. E. SMALL,
} Commissioners.

DEPOSITION OF NEIL MCGREGOR.

Neil McGregor, of Chippewa, aged twenty-four, being produced, sworn and examined on behalf of the defendant, in the title of these depositions named, doth depose as follows:

To the 1st interrogatory, he says: I reside in Chippewa. I do know a person of the name of McGregor, who was a clerk to a Mr. Macklem, of Chippewa, at the period mentioned in this interrogatory. I am the person I have just alluded to. Mr. Macklem's christian name is Oliver T. I was clerk with him at that time, and have continued constantly in his employ for nearly the last two years.

To the 2d interrogatory, he says: No other person of the name of McGregor than myself, was clerk for a Mr. Macklem residing in Chippewa during the last fall.

To the 3d interrogatory, he says: I am the person mentioned in my answer to the first interrogatory.

To the 4th interrogatory, he says: I am not acquainted personally with McLeod, but have known him by sight for the last five or six years.

To the 5th interrogatory, he says: I had no such conversation as is set forth, mentioned in the fifth interrogatory with McLeod.

To the 6th interrogatory, he says: I did not know McLeod only as before stated, and had so known him for about two years before the destruction of the Caroline. I do remember of having seen McLeod in Chippewa during the disturbance, in the winter of 1837 and 1838. I do not remember the month.

To the 7th interrogatory, he says: I was clerk to James Macklem.

To the 8th interrogotary, he says: Yes. I was one of the expedition. On the day in question I was one of a number of men assembled in a private house near the mouth of the Chippewa creek, for the purpose of some secret expedition. What the object of the expedition was, I did not then know. There was an officer in the room with us. I was in the room about two hours, when Colonel McNab came in with some others. I do not remember all he stated, but I do recollect his saying if you miss your aim, the Falls would make a very fine winding-sheet. Arms were then given to us, consisting of cutlasses, pistols, boarding pikes. We then proceeded over Chippewa bridge towards the Chippewa creek. I do not remember whether Colonel McNab accompanied us. We there found boats in readiness for us, and after remaining a short time, embarked and proceeded up the Niagara river about three quarters of a mile, quite close to the shore, to a point nearly opposite the foot of Navy Island. Some of the boats were tracked up the river. The boat I was in was not, it was rowed. We then drew up for a few minutes. The men of the crews who tracked up the boats then embarked, and we finally pushed off upon the expedition. The expedition was proposed to me privately. I do not know by whom.

To the 9th interrogatory, he says: Some of the men in the room refused to go. They declined because they were not informed where they were to go, and for what purpose. I have answered as to the other matters inquired after by this interrogatory, in my answer to the last preceding interrogatory.

To the 10th interrogatory, he says: By others, volunteers.

To the 11th interrogatory, he says: Not that I know of.

To the 12th interrogatory, he says: They assembled again on the beach as before stated. I was among them. I had no opportunity of distinguishing the individuals at the meeting on the beach, as the night was dark.

To the 13th interrogatory, he says: I cannot say whether he was there or not.

To the 14th interrogatory, he says: The cutting out of the Caroline. The object of the expedition was first communicated to us as a body opposite Navy Island. Captain Drew commanded the expedition.

To the 15th interrogatory, he says: I accompanied the expedition. J. P. Battersby commanded the boat I went in. I forget who commanded the other boats. I believe seven started and five reached the Caroline. I believe he was not in the boat I was in, or in any other. I did not see him.

To the 16th interrogatory, he says: I was not on the Caroline that night.

To the 17th interrogatory, he says: I did not learn their names at that time.

To the last interrogatory, he says: No.

NIEL McGREGOR.

By consent of the counsel for the respective parties to this case, the examination of the witness, Niel McGregor, on the cross interrogation, was waived.

Sworn, taken and subscribed, at the village of Chippewa, in Canada, this twentieth day of September, in the year of our Lord 1841, before us,

SECKER BROUGH, ADAM WILSON, } Commissioners.

DEPOSITION OF JOHN PALMER BATTERSBY.

John Palmer Battersly, of the village of Ancaster, in the Gore District Canada, Esquire, aged forty-four years, being produced, sworn, and examined on the behalf of the defendant in the title of these depositions named, doth depose as follows:

To the 1st interrogatory he says: I do not know him, and never met him to my knowledge.

To the 2d interrogatory he says: I do recollect the destruction of the Caroline. I was at Chippewa at that time. I think I was there four or five days before the destruction of the Caroline.

To the 3d interrogatory he says: From the bank of the Chippewa River, a little inside of the mouth. Some perhaps were on the beach about twenty minutes before they embarked, others immediately embarked upon their coming there. I was there twenty min-

utes or half an hour, and was employed in getting my boat ready. I had no opportunity of seeing or noticing those who went on the expedition except those who went in the boat with me.

To the 4th interrogatory he says: I do not know where Alexander McLeod was, but he was not in the boat with me.

To the 5th interrogatory he says: I do not know where he was at the period mentioned in this interrogatory, and cannot say where he was not.

To the 6th interrogatory he says: I went with the expedition in a boat. I commanded the boat in which I was.

To the 7th interrogatory he says: I did not go to Schlosser, but I saw all the persons in the boat I went in. Alexander McLeod was not on board of the boat with me. I did not see him at all. The boat I was in did not reach the Caroline, or go to Schlosser.

To the 8th interrogatory he says: I did not see the Caroline on the night of her destruction; I was not on board of her. The boat in which I was, did not reach the Caroline in consequence of my men being bad rowers, we lost sight of the other boats, and were then ignorant of the point of attack. I can say nothing as to the rest of the matters inquired after by this interrogatory.

To the 9th interrogatory he says: I know nothing of the transaction inquired after by this intrerogatory.

To the 10th interrogatory he says: I did not see any of them. I did not see Alexander McLeod at the time mentioned in this interrogatory to my knowledge.

To the 11th interrogatory he says: Seven boats started; I do not know how many reached her, nor how many returned in company.

To the 12th interrogatory he says: I know Sir Allan N. McNab; I do not know where he was at the time the expedition started. I do not know by whose command the expedition was undertaken. I never heard Sir Allan McNab give any directions in reference to it.

To the 13th interrogatory he says: Captain Drew was in command of the expedition. I do not know by whose orders he took the command.

To the last interrogatory he says: I know nothing further touching the matters in question.

J. P. BATTERSBY.

Sworn at the town of Hamilton, Canada, this 17th day of September, 1841, before me, SECKER BROUGH, Commissioner.

Answers to the interrogatories by way of cross-examination, proposed to John Palmer Battersby, a witness produced, sworn, and examined on the part and behalf of Alexander McLeod, in a suit now pending in the Supreme Court of Judicature of the people of the State of New York, before the Justices thereof, at the suit of the said people, upon an indictment for murder, before Secker Brough Esquire, a Commissioner, under and by virtue of a commission issued out of the said Supreme Court, and under the seal thereof, pursuant to an order of the said Court, entered on the 13th day of July, in the year of our Lord one thousand eight hundred and forty-one.

To the 1st cross-interrogatory he says: I reside at the village of

Ancaster in the Gore District and Province of Canada, and have resided there about four years. I am a native of Ireland. I have resided in Canada between four and five years. I am forty-four years of age, and am a farmer.

The the 2d cross-interrogatory he says: I was employed at Chippewa as a Lieutenant in the Navy, in December 1837. I was not attached to any vessel, but I had charge of a number of boats. I was not attached to the land forces.

To the 3d cross-interrogatory he says: I never saw Alexander McLeod to my knowledge..

To the 4th cross-interrogatory he says: I never had an interview with McLeod, or heard him converse or speak on any subect to my knowledge.

To the 5th cross-interrogatory he says: The answer to this interrogatory is contained in the answer to the last preceding interrogatory.

To the 6th cross-interrogatory he says: No.

To the 7th cross-interrogatory he says: I know nothing of the matter inquired after by this interrogatory, nor have I ever understood anything from him on this subject.

To the 8th cross-interrogatory he says: No.

To the 9th cross- interrogatory he says: It never occurred to me, and I was not aware at any time what vessel we were going to attack; but as we were about to push off from the shore Captain Drew called me out of the boat and told me we were going to attack a steamboat. I did not communicate with McLeod on the subject in any way. McLeod was not present to my knowledge when it was communicated to me. I do not know whether McLeod knew of it or not.

To the 10th cross-interrogatory he says: I first discovered that the Caroline was at Schlosser when I observed the fire, or at least that the vessel attacked was at Schlosser, for at that time I did not know the name. McLeod never at any time informed me where the Caroline was. I think I commenced preparations for an expedition about three hours before we started; though I was not aware what the particular object of the expedition was to be; went immediately upon my return to my quarters.

To the 11th cross-interrogatory he says: I do not recollect whether I was at Davis's tavern, the day after the night of the burning of the Caroline. I did not see McLeod there to my knowledge, nor did I ever converse with him about the burning of the Caroline, on the Monday or at any other time.

To the 12th cross-interrogatory he says: I was present at the burning of the Caroline in December, 1837. I was concerned in that expedition and did see the embarkation. I suppose about two hundred people were upon the shore at or near the place where the boat started.

To the 13th cross-interrogatory he says: I do not know, but to the best of my judgment, fifty or fifty-five persons embarked in the expedition. I did not know all the persons who went on the enterprize, I was one of the number. Seven persons were in the boat which I

went in, I was not on the Caroline, and took no part in her destruction.

To the 14th cross-interrogatory he says: Small boats of about four oars, cannot say how many were in each boat. I think the boats were all of the same size and description, except the one I went in. Seven boats started. The boat I went in, was a rough unpainted boat without a keel.

To the 15th cross-interrogatory he says: I did not know all who embarked in the expedition. I did not see the face of each one who went on the expedition.

To the 16th cross-interrogatory he says: I knew all in the boat with me. I recognised each of them, but cannot say that I spoke to each of them individually. Captain Drew commanded the expedition. I commanded the boat I was in.

To the 17th cross-interrogatory he says: I did return in the same boat in which I embarked, and the same persons returned with me.

To the 18th cross-interrogatory he says: They did not—two failed in reaching the Caroline; I commanded one of them and do not know who commanded the other. We rowed up to the Buckhorn Island—and on perceiving the fire from the vessel we returned to Chippewa. I have no knowledge of the other matters inquired after by this interrogatory.

To the 19th cross-interrogatory he says; I do not know of any man in the expedition of the name of McLeod.

To the 17th cross-interrogatory he says: The expedition did not embark from any wharf or pier, but in the first instance from the bank of the Chippewa, and having tracked up the Niagara river about a quarter of a mile, then finally pushed off.

To the 21st cross-interrogatory he says; The boats all lay at the brink of the river Chippewa, at a short distance from each other, the boats all started at the same time, with the exception of the second boat, which failed to reach the Caroline, which latter started a short time after the others.

To the 22d cross-interrogatory he says: The two boats which failed to reach the Caroline returned at the same time—I do not know when the others returned, or when or where they disembarked. I did not see or recognise any person engaged in the expedition, except those in my own boat.

To the 23d cross-interrogatory he says: With the exception of a few belonging to the Royal Navy, I believe all the persons comprising the expedition were militia volunteers. They were not levied or drafted but came as volunteers. They were not marched up to the boats. Each commander of the boat collected his own crew as I believe.

To the 24th cross-interrogatory he says: The force was not displayed in military order previous to its embarkation. I do not know whether it was so displayed upon its disembarkation.

To the 25th cross-interrogatory he says: They were dressed as usual and customary, and in their own clothing, and not in any uniform. I have no recollection of what particular kind was any part of their dress.

To the 26th cross-interrogatory he says: The party in general were armed with swords and pistols. I think the greater portion of the swords were usual cutlasses, and were procured through Capt. Drew.

To the 27th cross-interrogatory he says: I have no knowledge of the matter inquired of by this interrogatory.

To the 28th cross-interrogatory he says: I do not know at what time the force which reached the Caroline disembarked. I and those in the same boat with me, and the people in the other which failed to reach the Caroline disembarked about midnight. The night was not moonlight or cloudy, but rather dark. Those in my boat dispersed to their quarters in Chippewa. I know nothing of the movements of the others.

They were not together, to my knowledge, at sunrise. I have not seen that force or any part of it since together as a separate force, but have seen individuals of it in and about Chippewa serving in different corps.

To the 29th cross-interrogatory he says: I think about nine o'clock.

To the 30th cross-interrogatory he says: I know nothing of the matters inquired of by this interrogatory.

To the 31st cross-interrogatory he says: I answer to this the same as to the last preceding interrogatory.

To the 32d cross-interrogatory he says: My answer to this is the same as given to the preceding interrogatory.

To the 33d cross-interrogatory he says: I have no knowledge whether any one of the persons found on board of the Caroline was killed or wounded. I did not see any one killed or wounded. I did not discharge a gun or pistol, or strike any one with any weapons.

To the 34th cross-interrogatory, he says: I have no knowledge of, or reason to form a belief respecting the matter inquired of by this interrogatory, except the statements of individuals who have informed me, and I believe correctly, that no person was on board of the Caroline when she was cut loose and sent over the falls.

To the 35th cross-interrogatory, he says: I have never been on shore at Schlosser. I have no knowledge whether any of the attacking party went on shore there.

To the 36th cross-interrogatory, he says: I did not take or carry away anything whatever from the Caroline, and have no knowledge of the acts of any other individual in reference to the matters inquired after by this interrogatory.

To the 37th cross-interrogatory, he says: I believe I heard in the course of the day of the destruction of the Caroline, that a steamboat was plying between Schlosser and Navy Island. Do not recollect whether I heard she came or was coming from Buffalo, and do not recollect that the name of the steamboat was told to me before her destruction. I do not recollect who informed me—Alexander McLeod did not.

To the 38th cross-interrogatory, he says: I do not know, nor have I ever seen, to my knowledge, or even heard of a person named Sylvanus S. Rigby.

To the 39th cross-interrogatory, he says: My last answer is a reply to this interrogatory.

To the 40th cross-interrogatory, he says: I never did.

To the 41st cross-interrogatory, he says: I do not know whether he was on board the Caroline or not, and have never heard from him that he was.

To the 42d cross-interrogatory, he says: I have no knowledge of the matters inquired of by this interrogatory, and have received no information respecting them from the said Rigby. I have no knowledge where he now is.

To the 43d cross-interrogatory, he says: I never saw him to my knowledge.

To the 44th cross-interrogatory, he says: I neither know, nor have I heard McLeod say anything upon the subject of this interrogatory.

To the 45th cross-interrogatory, he says: Alexander McLeod never told me, nor any person in my hearing, anything relating to the Caroline.

To the 46th cross-interrogatory, he says: I neither know, nor have heard McLeod make any statement respecting any of the matters inquired after by this interrogatory.

To the 47th cross-interrogatory, he says: I never spoke to Mc Leod, and never heard him speak, to my knowledge, nor to my knowledge did I ever speak in his presence.

To the 48th cross-interrogatory, he says: I did not.

To the 49th cross-interrogatory, he says: He did not, as I know, or have understood from him.

To the 50th cross-interrogatory, he says: I did not.

To the 51st cross-interrogatory, he says: Seven were first engaged in the expedition, and all started from Chippewa creek. One boat grounded at Buckhorn Island: it was the boat I was in, and it was so grounded to rest the crew.

To the 52d cross-interrogatory, he says: No person was employed to pilot the boats, to my knowledge. I never heard the name mentioned in this interrogatory, mentioned before this, the time of my examination.

To the 53d cross-interrogatory, he says: In my answer to the 12th and 13th interrogatories, I stated that I did not know by whose command the expedition had been undertaken.

To the 54th cross-interrogatory, he says: I have no knowledge whatever of the matters inquired after by this interrogatory.

To the last cross-interrogatory, he says: I have no further knowledge touching the matters in question than what I have already stated in this my examination.

J. P. BATTERSBY.

Sworn at the town of Hamilton, Canada, this 17th day of September, 1841, before me,

SECKER BROUGH, Commissioner.

At the conclusion of the reading of this deposition, the court adjourned to 2 o'clock.

FRIDAY AFTERNOON.

On the resumption of the proceedings after the recess for dinner,

Mr. Spencer said that, as the remainder of the depositions contained merely collateral evidence, he proposed to introduce at present other oral testimony.

William Press was then called and examined by Mr. Spencer—I now reside at Hamilton, in Canada; I am a tavern keeper; I keep the Promenade House; I lived at the village of Niagara, from 1835 to the first of last July; I was a tavern keeper there; I knew McLeod well at that time; I made his acquaintance soon after I went to reside at Niagara; I lived about 300 or 400 yards from him; I recollect the troubles in Canada; I was at Chippewa only once during those troubles; I was there on the 29th of December; I returned to Niagara the same evening; I went on business; I took two passengers in a wagon from Niagara to Chippewa; I recollect the day from an entry in my cash book of the sum I received for their conveyance; I also recollect it by the burning of the Caroline, of which I heard the next day; the magistrates were sitting there; I left Chippewa the evening of the 29th, a little after dark; I put my horses in a place a little way from Davis's; Mr. O'Keith rode down with me, and Mr. McLeod rode with me to Stamford; I mean the prisoner at the bar; Stamford is about six miles from Chippewa; the roads were very bad from Chippewa to the Falls; they always are in wet weather; in the state in which the roads were then, it would take an hour and a half to ride down; McLeod left me at Mr. Morrison's gate; I knew Raincock, who has been spoken of, very well. He left Canada before the troubles; shortly after I received a letter from him from New York; I expect he has not been back since; I have heard of his being in England since, as a clerk on a railroad; I was told by a person who saw him.

Cross-examined by the Attorney-General—The wagon of which I speak was an open wagon; the distance from Niagara is about 18 miles; I travel about frequently with passengers; I always make an entry when I take passengers, because I was in partnership with another person; O'Keith was clerk of the steamboat Coburg; I always enter the date of the transaction; I cannot recollect what time I reached home, it must have been after ten o'clock; there was a guard at Niagara; the fire company was the principal guard; I was a member of that company; we relieved guard every hour; I was drawn on guard that night; it was an independent company, and we always drew; I was not on guard that night; I believe I spoke to some one respecting the time I might have been at home that night; I might have said I was there about nine o'clock; it was not before sundown that I left Chippewa; it was twilight; I arrived in Chippewa before dinner; I saw McLeod in Chippewa; he asked me when I was going back again, I told him; he asked me if I would take him down; I saw him some time before I started, for I know I waited for him and got very impatient; I believe he got into my wagon at Davis's; when the roads are bad it usually takes me about four hours to drive to Niagara; I had to walk my horses some times; from Chippewa to Stamford the roads were very bad, the other part was better; McLeod had not a horse there; I have no recollection that he had a

horse; my recollection is perfect that it was that day; I might have been at Chippewa six months before; I was not there before during the occupation of the island; I was not there again until the summer; the burning of the Caroline fixed the day on my recollection; I don't recollect the day on which the island was evacuated; I don't recollect that I ever told sheriff Stone, of Niagara, that I could not recollect that McLeod rode with me that night; I don't believe I ever did; I recollect hearing of McLeod's arrest; I was told he referred to me for proof of where he was, but he never sent for me; I was always convinced he was not present at the burning of the Caroline; I have never said I was doubtful about it; the two persons that I took up were Mr. O'Keith and Mr. Troop; O'Keith I took again with Mr. McLeod; I received $5 for the conveyance of Troop and O'Keith.

Did you carry them up and bring O'Keith back, for $5? It may have been so. Did you go on guard on your return? No. Did you make the entry then? It is like I did. Have you a recollection of the act? No. Might it not have been the next week? No, certainly not—the other entries follow on under the next day. Might you not have made it the next morning? I think not—that would have been quite unusual. You recollect they paid $5? Yes, because it is entered. Where did they pay it? I don't know. Who was Troop? I don't know—he was a stranger to me. Was the night dark? No. Was it moonlight? I am not sure, but it wasn't very dark. May it not be that, as you don't recollect receiving the $5, that it may have been received at some subsequent time? No.

When you left McLeod, did he intend going on to Niagara? No. You don't know any thing of him after he got out of your wagon? No. Did he ask you to stop with him? No. Did you ever say that your evidence wouldn't be of avail, as McLeod had time enough to go to Schlosser and back again? Yes.

The proceedings of the court were here interrupted by a terrific hail storm. The court room became almost dark as night, and the rattling of the hail against the windows, some of which were much broken, overpowered the voice of the witness. The rain fell in torrents, the lightning flashed, and the thunder rolled for some time after, and rain fell through the ceiling of the court room in copious showers. When the storm subsided, the examination was resumed.

I may have said that my evidence would not be of much importance to McLeod, as he might have got a horse and gone back twice from the time I left him to the time the act was done. The roads were soft and miry.

John W. Morrison, examined by Mr. Spencer—I live at Stamford, in Upper Canada; I have lived there six years; I removed from Toronto; I arrived in this country from Europe in June, 1835; I know Alexander McLeod, perfectly; I made his acquaintance in 1836; I had seen him occasionally from that time; I heard of the destruction of the Caroline on the morning of the 30th December, 1837, about eight o'clock; my boy told me that Col. Cameron, late of the regiment that I belonged to, wanted to see me at the gate; I went to the gate and saw him, and he asked me if I had heard the news; I asked him what it was; he told me a party had cut out the Caroline, and brought her, and sent her over the Falls; he said it was done the night before; I then said to him, your friend, McLeod, is in our house, won't you come up and see him? He

begged to be excused, as he was in a great hurry; he was travelling in a wagon; he gave me a piece of wood, which he said was part of the Caroline; I cut a piece from it, and returned the remainder to him; I understood it had been got under the Falls; I heard several people pass the gate during the day, and make remarks on the burning of the Caroline. Col. Cameron was an acquaintance of mine; we served together for fourteen years in France, Spain, and Portugal, under the great Duke of Wellington. McLeod was then in my cottage; he came there about half-past seven the night before, and slept in our parlor; he drank tea there that night; he took his breakfast in the same room that he slept in at my cottage; McLeod and myself retired to bed about half-past twelve o'clock; Mr. McLeod was an old acquaintance; he was not used as a stranger, and I left him in the evening with the family; about half-past nine, or from that to ten, we sat down and had a tumbler of toddy; he had not left his room that morning when I saw Col. Cameron; when I returned to the cottage from Col. Cameron, I said, "McLeod, what do you think has happened?" I then told him Col. Cameron had just told me, that a party had gone last night and cut out the Caroline, and sent her over the Falls; he said, "you don't say so;" I said I understood it was so; McLeod said, "I would to God I had been there—Captain, where is Archy? I wish you would tell him to get my horse ready." Archibald, my son, went off to get the horse from the stable; McLeod was pressed not to think of going without breakfast; he agreed to remain; he dressed before breakfast, and after breakfast he went down to the gate where his horse was; he rode up towards Chippewa; I did not see McLeod again, I think, until the afternoon of the 2d of January following.

Cross-examined by Mr. Hawley—My age is 58; I was born in Ayrshire, North Britain; I was in service under Sir John Moore, who was killed at Corunna, and afterwards under his Grace the Duke of Wellington.

Mr. Hawley—Were you drafted into the army?

Witness (with great astonishment)—Did you ever hear of an officer being drafted into his majesty's service? (Laughter.)

Mr. Hawley—How did you get in?

Witness—As other gentlemen do.

Mr. Hawley—Were you drafted from the militia?

Witness (with a Scotch accent)—I beg you will not talk to me about being drafted, for I cannot bear it, as a British officer!

Mr. Hawley—Well, I am a plain republican, I don't know much about these things. Will you tell me how you got into the service, and in what regiment and capacity.

Witness—I entered the British army in 1807 as ensign in the 79th regiment of Highlanders.

Mr. Hawley—Is that a commissioned office?

Witness (with apparent astonishment)—I should think so.

Mr. Hawley—How did you get it?

Witness—By my friends. My father was in the service under the Earl of Stair and George II., which is a pretty long story.

Mr. Hawley—Was your commission purchased for you?

Witness—I purchased it for myself in 1807.

Mr. Hawley—How long did you remain in the service in Europe?

Witness—I remained until 1821, upwards of 14 years.

Mr. Hawley—How high was your rank when you left?

Witness—I was a lieutenant.

Mr. Hawley—Are you a lieutenant now?

Witness—I retired on full pay as a lieutenant in his majesty's army.

Mr. Hawley—Are you on full pay now?

Witness—Yes.

Mr. Hawley—Which of the political parties do you favor?

Witness—Political parties! None whatever! I serve my country—I serve the government be it what it will, for the period. (A laugh.)

Mr. Hawley—When did you come to America?

Witness—I landed at New York, May 28, 1835.

Mr. Hawley—And became acquainted with McLeod in 1836?

Witness—Yes.

Mr. Hawley—And you remained on intimate terms with him?

Witness—Yes, and am so yet, but he has not been so often at my house as formerly.

Mr. Hawley—Did he often come to eat at your house?

Witness—Oh, yes.

Mr. Hawley—And to lodge?

Witness—No. I don't think he slept there above three or four times in his life.

Mr. Hawley—Were you in the house, and did he knock when he came in?

Witness—I think, to the best of my knowledge, I was in the house when he came; we do not expect gentlemen to come into our house without rapping; if they attempted it, they would not get in. I do not recollect who went to the door, it might have been myself; McLeod did not say much, but seemed to be *fagged* a little.

Mr. Hawley—How came McLeod to stay at your house?

Witness—Because we asked him; he said he was going to Niagara; and was intending to return in the morning; I told him it was a long way, and very muddy; and after a little persuasion, he got off his boots.

Mr. Hawley—What next?

Witness—I fancy they were carried away to the kitchen. At the tea table, myself, my wife, and sons, and daughters sat down together.

Mr. Hawley—How many sons have you, Mr. Morrison?

Witness—I had three at home, at the time, Archibald, George, and Charley.

Mr. Hawley—How old was Archibald at that time?

Witness—He was eleven at the time.

Mr. Hawley—How old was George?

Witness—He was two years old.

Mr. Hawley—How old was Charley then?

Witness—He must have been very young.

Mr. Hawley—How many daughters had you at home?

Witness—Let me think, I believe I had four, Ellen, Harriet, Emma, and Sophia.

Mr. Hawley—How old was Ellen then?

Witness—She was born in France on the 6th of June, 1817, and must now be 24. The next was two years younger, she was born in the island of Jersey.

Mr. Hawley—Was your lady at home?

Witness—My wife?

Mr. Hawley—Yes.

Witness—*Which wife? I had two wives.*

(Here the audience were convulsed with that which, but for the sternness of the court, and their rigid exaction of order, would have proved an open outbreak of laughter. The mind of the witness had doubtless been inadvertently thrown back upon by-gone days, rather than the cottage scene under consideration.)

Mr. Hawley—Had Mr. McLeod walked to your place?

Witness—I suppose he had rode, because he generally rode.

Mr. Hawley—Did you put his horse away?

Witness—No, Archibald had care of the horses; McLeod always had a spare horse in my stable, and a wagon; he had a great deal of business at that time.

Mr. Hawley—What made you think that McLeod was a little *fagged?*

Witness—Because he was all muddy, and cold, riding in a wagon, or any way, whatever, that he might come.

Mr. Hawley—Do you know what way he came there?

Witness—I tell you plainly, I do not know what way he came there; but I have reason to suppose that he rode.

Mr. Hawley—When a gentleman comes to your house, to stay over night, do you not, as a matter of course, ask if he has a horse, and see that it is put up?

Witness—McLeod knew the barn as well as I did, and could put his horse up as well as I could.

Mr. Hawley—But did not Archy see to such matters?

Witness—He did, when told to do so.

Mr. Hawley—Did you tell him to do so that night?

Witness—When I told him to supper the horses, I told him if he found McLeod's horse at the gate, to supper him also. McLeod had two horses with me, Bob and Charley, one had been at my place two months.

Mr. Hawley—What hour of the night was it, when you took your tea?

Witness—It might be about eight o'clock; the family retired, I think, about nine or ten o'clock.

Mr. Hawley—Do you generally have a bed in your parlor?

Witness—We do not; it was upon a stretcher.

Mr. Hawley—When was the toddy brought on?

Witness—It might have been pretty nearly ten o'clock.

Mr. Hawley—What was the subject of conversation, that occupied you till so late an hour as half past twelve?

Witness—Really, I do not recollect the subject of conversation.

Mr. Hawley—Did you ask him in relation to the movements at Navy Island?

Witness—I do not remember that I asked him about any particular movements—though it is probable I did ask him about Navy Island.

Mr. Hawley—Did he tell you the state of affairs at Chippewa?

Witness—Not particularly.

Mr. Hawley—Did he say any thing about the steamboat Caroline?

Witness—It strikes me there was very little known of the Caroline at that time. We had heard she was assisting the Navy Islanders, in carrying munitions of war, but I did not trouble myself with the like of that.

Mr. Hawley—But if that boat was actually assisting the rebels, would you not have thought ill of it?

Witness—I did think ill of it—it was natural.

Mr. Spencer thought that an unjustifiable latitude was taken by the counsel for the prosecution.

The witness, whose feeling had been evidently wrought up to a high pitch, could no longer refrain; but exclaimed—I will make the best answers I can according to my knowledge and belief, so help me God.

Here Mr. Hawley put a question to which the court peremptorily objected.

Mr. Hawley, addressing the court—"With all humility—"

Judge Gridley, not a word further about humility—Take your seat and examine the witness.

Mr. Hawley—Do you remember any other time, when he came to your house?

Witness—Yes, he came to my house in a wagon, with another gentleman, on the morning of the 30th of January. He introduced the gentleman to me, and I understood him to be a member of parliament from Sarnia in the western district. I have not seen that gentleman since, to my knowledge.

Mr. Hawley—We want you to state the words that were used between you and the Colonel.

Witness—"Good-morning, Mr. Morrison." "Good-morning, Colonel." "Have you heard the news?" "What is it, Colonel? "I am told they have cut out the Caroline last night, and sent her over the falls." I think I had heard of her before, as being connected with the affair at Navy Island.

Mr. Hawley—Did he state any particulars? He did not. Do you know where Mr. Cameron came from? I suppose he came from the Falls; he lived on Young street, Toronto.

As to the fragment of wood—describe it? It was about ten inches in length and four in width; I took off about three inches with a saw; he waited till I sawed it off and returned to him; I cannot say whether I mentioned the subject when I first went to the house; I think I did not show it to McLeod, but I might have done so; I showed it to him afterwards; it was about 8 o'clock in the morning, and the family were up. How long after this was it before McLeod left your house? I think it was pretty nearly ten o'clock when I went down to the gate with him.

Mr. Hawley—Have you not, Mr. Morrison, pretty strong feelings and attachments for McLeod?

Witness—It was once so; but not so much of late (recollect I am on my oath;) I am not related to him in any manner.

Can you state why once you took a greater interest in him than another man?

The court again interfered, and remarked that they could not see that the cause of justice was to be furthered by pursuing this subject with so much particularity. The witness, addressing himself to the court, said—"I claim your Lordship's protection." The court proceeded to state, that many questions had been put, which were well calculated to insult the witness, particularly in relation to his being drafted, &c. His views were now distinctly understood, that this was not the place where a witness was to be showed up and insulted by uncalled for interrogatories. All that is essential to elicit truth will be cheerfully submitted to, but further than this will not be allowed.

Mr. Hawley—May I be excused from going on with the examination?

The court—Why, sir?

Mr. Hawley—I cannot go on if I am not allowed to put such questions as I deem essential.

The court—Well, sir, then you must stop.

The Attorney-General remarked, that his colleague, Mr. Hawley, could not have intended any thing like disrespect to the court, or any thing not calculated to elicit truth—though counsel are often called on to put questions which are painful to all parties.

The court would not say that it was an intentional departure from the rules of propriety, but the effect was such. All the questions about his being drafted and his commission, had no more to do with the case than the history of the Egyptians.

The Attorney-General then proceeded with the cross-examination.

The Attorney-General—Have you ever said to any one that you could not fix the day McLeod was with you?

Witness—No, never.

Did you ever say any thing of this kind to Mr. Defield, of Kingston?

Witness—I would not be seen at all with him.

Judge Gridley, to the witness—You will restrain your feelings.

Attorney-General—Mr. Defield has been at your house?

Witness—He was once brought to my house, but never came by invitation.

Attorney-General—Was Mr. Defield at your house in January, 1838?

Witness—I do not recollect; he was at one time.

Attorney-General—Was he ever at your house more than once?

Witness—I think he was, but was never asked to my house; he has never been in my house more than twice to the best of my knowledge.

Attorney-General—Do you recollect at any time of saying, in the presence of Mr. Defield, that you hoped the United States would get hold of McLeod, that they might punish him for the affair of the Caroline?

Witness—Never, never.

Attorney-General—From what point did Colonel Cameron come that morning?

Witness—It appeared to me that Colonel Cameron had come from the Falls that morning; I did not learn from him how he had got the information at all; I do not recollect what piece of wood it was; I am not a judge of wood; it was a piece painted; I think there was green paint on it.

Attorney-General—Colonel Cameron told you it was a piece of the Caroline?

Witness—He did.

Attorney-General—But did not tell you how he had got it?

Witness—No, no.

Attorney-General—Do you say that you had heard of the Caroline before?

Witness—We had spoken of it.

Attorney-General—Who told you that the Caroline was carrying munitions of war, &c?

Witness—I think I was up there the day before, at Chippewa.

Attorney-General—You there learned that the Caroline was conducting in this manner?

Witness—Yes, from Col. Kenneth Cameron, not the one that I talked with, Col. Cameron, commandant under Sir Allan McNab, with the rank of

Colonel in Upper Canada; he and I were lieutenants together in the 79th regiment a few years.

Mr. Spencer—You had better answer in few words.

Judge Gridley—Just answer the precise questions put to you.

Witness—I generally learned how things were going on at his office in Chippewa; I usually called there and saw him; I had been at the office of Col. Cameron the day before; I there learned that a vessel was seen carrying munitions of war, &c., but did not make particular inquiry about it. There was not at this time any particular cause of dissatisfaction between myself and McLeod.

Attorney-General—Subsequently some domestic matter occurred, which gave you dissatisfaction?

Witness—Now I beg you that—I would be very happy not to answer further.

Attorney-General—Have you some objections to state more particularly what was the cause?

Mr. Spencer—I have, if the witness has not.

Attorney-General—When was the next time you saw McLeod?

Witness—I think the 2d of January; I think he staid all night then; I do not recollect what time he came to my house on that occasion; I think more than probable that he came from Chippewa.

Attorney-General—You think it was the 2d of January?

Witness—I do; my son was expected over from Toronto, with the family, on Christmas day; he did not come, but came on New Year's morning, and next day I saw McLeod; I think McLeod slept, on that night again, in the parlor; I cannot tell how long McLeod remained with me at that time; I have testified on a former occasion in this matter; that it was about the middle of November; you may rest assured it is as I have now stated; I cannot tell how Mr. McLeod came on the 2d of January; there was a spare horse at my stable three months for Mr. McLeod; he did not pay me for it; it was perfectly gratuitous; he breakfasted with me usually when he staid at my house all night; that was a matter of course; he staid with me on the night of the 25th of December; I don't recollect him staying any night after the 2d of January; my reasons you may know.

By Mr. Spencer—Angus McLeod also used the horses while they were kept at my stable; Angus is younger than Alexander McLeod.

Archibald Morrison, son of the last witness, and an intelligent looking lad, was then sworn, and examined by Mr. Spencer—I know Mr. McLeod; I have seen Col. Duncan Cameron several times; he lives in Toronto, I believe; I heard about the destruction of the steamboat Caroline from my father; I was down at the gate when Col. Camerom came; he told me to tell pa he wanted him; it was about 8 o'clock in the morning; there was another gentleman with Col. Cameron; they were travelling in a two horse wagon. My father went down and I went with him; I heard Col. Cameron say the Caroline had been burned and sent over the Falls; Mr. Alexander McLeod was then in the parlor of my father's house; he came there the night before, and I think it was before tea; he went away that morning; I think it was about 8 o'clock that he went away; he went after breakfeat, on horseback, towards the Falls.

Cross-examined by the Attorney-General—I recollect distinctly about McLeod's being at our house that morning; I shall be fifteen years of age this month; Mr. McLeod did not stay all night at our house very often;

he came that night I think between 7 and 8 o'clock; it might have been the 28th of December that he came; I think he came on horseback; I recollect putting his horse away; I used to do that when he came; I dont know Colonel Cameron to speak to; I have not seen him very recently; I don't recollect seeing him since that morning; I don't recollect when I saw him before; I dont't recollect any particular time when I saw him before that; I don't know who the person was that was with Colonel Cameron; I recollect Colonel Cameron coming that morning, because it was the morning we heard of the burning of the Caroline; I think I knew then who Colonel Cameron was; it was about three years ago; it was in 1837; I have heard it frequently said it was 1837; I think I unsaddled McLeod's horse, and I am certain about it being the night before the burning of the Caroline; I have been examined before about this; I signed my examination; I go to church when I am at home—it is the English church.

By Mr. Spencer—Colonel Cameron, gave my father that morning a piece of the Caroline; Mr. McLeod saw it that morning; I saw papa show it to him in the parlor; I saw McLeod the night before, but I am not sure that I saw him come in; I think he rode up on horseback; I had frequently before got out his horse, and afterwards also; I had heard before about the troubles on the frontier.

By the Attorney-General—I think Mr. McLeod was there again on New Year's day; I don't recollect whether he staid all night.

Margaret Morrison, examined by M. Spencer—I am the wife of Lieut. Morrison, who has just given his evidence; I have known McLeod six years; I heard of the destruction of the steamboat Caroline; I heard it in the morning; I heard the boat had been destroyed the night before; Col. Cameron, of Toronto, brought the intelligence; he brought part of the boat; I saw the small piece that Mr. Morrison cut off; Mr. McLeod was then in our parlor; he came there the night before about 7 o'clock I think; he took tea there that night; he remained all night; Mr. Morrison would not allow him to go away that night; Mr. Morrison and Mr. McLeod sat up until past 12 o'clock; I was in the room with them sometimes; they were taking a glass of toddy together; I was the last to go to bed; Mr. McLeod slept in the parlor on a "stretcher," that is, a bed that closes up and stretches out when required for use; Mr. McLeod's boots were taken from the parlor and put before the kitchen fire a good while before bed time; the next morning they were in the same place; at night they were wet, but the next morning they were dry; Mr. McLeod did not leave our house that night after he came in the evening; he could not have left without my knowledge; he could not have gone without coming for his boots, and he could not have got them without my knowledge; I slept in a little room just off the kitchen, and I was kept awake by a sick child; there was also a watch dog there.

By the Court.—I saw Mr. McLeod after Mr. Morrison went to bed. It was past 12 o'olock, or near one.

By Mr. Spencer.—I saw him again about eight o'clock the next morning; I had been up about an hour; he was in the parlor when Col. Cameron came along; Mr. Morrison came up and told Mr. McLeod what had taken place; I think Mr. McLeod wished he had been there; he went away immediately after breakfast; I cannot be mistaken about the night; I saw him again as he returned from Chippewa about three o'clock in the afternoon; he did not turn into our house; he went right on to Niagara;

he was on horseback and had a cannon ball in his hand; it was said it was fired at him from Navy Island.

Cross-examined by Mr. Jenkins—I don't know how Mr. McLeod came to our house on that night, whether it was on horseback or in some other way; I have been examined before on this subject before Judge Bowen; I had heard that he came on horseback, but I did not see him; I know that Archibald suppered McLeod's horse that night; I don't know that Archy put his horse up that night when he came; I only know from hearsay that Colonel Cameron came that morning; I never saw him in my life; I am Mr. Morrison's second wife; Mr. McLeod supped with us on Christmas night and stayed all night; I think Mr. McLeod stayed all night at the time of the races at the Falls; he very seldom stayed all night; he stayed there all night on the second day of January. I know that it was that day from the arrival of Mr. Morrison's second son, who came home on the first of January; his bed was on the stretcher, and on the second of January he was removed up stairs to allow Mr. McLeod to get a bed; the family and Mr. McLeod were on terms of intimacy; Mr. Morrison's second daughter, Ellen, lived with Mr. McLeod some time; I don't think they were married; I don't know how they lived; I know nothing about it; they never visited our house together; she returned to her father's house about a month ago; she lived with McLeod ever since she left her husband until he was arrested; the piece of the Caroline was burned by mistake; Mr. McLeod is not a married man that I know.

By the Court.—Mr. Morrison's daughter went to live with Mr. McLeod about two years ago.

By Mr. Jenkins.—I think Mr. McLeod left our house the morning after the Caroline was burned about half past nine o'clock; when he came the night before his boots were very dirty with mud.

By Mr. Spencer.—I have been married to Lieut. Morrison thirteen years.

By Mr. Hall.—I don't recollect McLeod staying any night after the second of January; I only recollect him being there on Christmas night, the night of the burning of the Caroline, the night of the second of January, and the night of the races; Mr. Morrison's son stayed at home from Toronto at that time, about three nights; I am not mistaken about the 29th of December.

By the Attorney-General.—I did not see Col. Cameron; Mr. Morrison told me it was him; whatever was the day of the month it was the morning that Col. Cameron came that I heard of these things.

By Mr. Spencer.—Those things became the subject of conversation at the breakfast table that morning; the intimacy of our family and Mr. McLeod was broken off by the connection of McLeod with Mr. Morrison's daughter; when she returned, a month ago, she came to see her father; she appeared to be well provided for with money.

By Mr. Jenkins.—The intimacy of the family with McLeod broke off two years ago last July.

Harriet Morrison examined by Mr. Spencer.

The Attorney-General hoped the learned counsel would allow the lady to tell her own story.

Mr. Spencer.—Examine her yourself, sir, according to your own notion of propriety.

The Attorney-General.—Proceed Mr. Spencer.

The examination was then proceeded with by Mr. Spencer.—I am daughter of Mr. Morrison; I was at home in the winter of 1837; I have known Mr. McLeod since about a year after we arrived in the country; I recollect hearing of the affair of the Caroline the morning after it had happened; I heard my father telling Mr. McLeod in the parlor: a friend of my father's had told him at the gate; it was Col. Cameron; I saw McLeod the night before; I drank tea with him about seven o'clock; I retired that night between nine and ten; he had not retired before I did; I spent my evening in the same room with him; the whole family was there; I saw him the next morning at breakfast; he left our house to go to Chippewa at nine or ten o'clock.

Cross-examined by Mr. Jenkins.—We usually go to bed about nine or ten o'clock, but we sat up that night on account of Mr. McLeod being there; I don't know what the conversation was; I suppose it might be about the state of the times; we were all in some excitement; I had heard of the Caroline going to the island with munitions of war; I heard it the day before; I think I heard she had been going for two or three days; we had breakfast that morning about eight o'clock; I saw McLeod as he returned in the afternoon; he had a cannon ball in his hand; he was going towards Niagara; my brother returned home on New Year's day.

By Mr. Spencer.—Mr. McLeod stayed at my father's house on Christmas night: I did not hear about his having been at Buffalo; before I heard of the destruction of the Caroline I heard she was employed to carry munitions to Navy Island; heard she carried powder and arms; I understood it was to aid the patriots; I cannot recollect the subject of conversation between Mr. McLeod and my father the night of the 29th December.

By the Attorney-General.—I have been previously examined on this subject.

Mr. Spencer then proposed to read the deposition of Colonel Duncan Cameron.

The Attorney-General.—I have one objection to the deposition, which I know will call on me the rebukes of my adversary. It is a case in which the whole testimony is thrown into the general interrogatory; in which, the whole testimony has no connection with the previous interrogatories. I am aware that the Supreme Court have decided that a general important matter may be answered by the interrogatory, if it come within the general purview of the previous interrogatories. The objection was taken, that you could under a sweeping interrogatory introduce any matter. The Supreme Court overruled it, and said it might be under the general interrogatory, if within the purview of previous interrogatories.

Mr. Spencer.—It is proper to say that Messrs. Gardner and Center were both present at the examination of Col. Cameron. Col. Cameron is an elderly gentleman; we had intended to have him come here; it so happened that when they got to Canada it was not convenient for him to come, and the counsel framed the interrogatory. There is nothing in the deposition, except the proof of his being at Chippewa, the night the Caroline was burnt. If the Attorney-General thinks the cause of truth will be promoted by excluding the testimony, I beg he will state the reasons. I do not intend to rebuke the Attorney-General, or to censure him, and yet I do intend, if occasion require, to state how much I am disappointed,

and I may as well state it now. I confess I did expect the prosecution of this case, of all others, would have been conducted in a high and lofty manner, despising technicalities, and aiming only at the truth. I did not expect to see that a man was to have his life jeopardied, and his country jeopardied, by little technical and unworthy objections, and I confess here, in the presence of this audience, that I am mortified at the mode and manner in which this has been conducted; I had not anticipated that the depositions would be objected to, but it has been one continued struggle, from the beginning to the end; and now there is one which I wish to read—that of Colonel Cameron, as to this single point, that there shall be no room for mistake—that McLeod was not at Chippewa when the Caroline was burned; I know it was contradicted by one man, and let him come forward if he pleases, and swear that the testimony of this Morrison family is untrue; I knew that a set of minions and strawheels were to contradict Mr. Morrison; and I have deemed it important that the testimony of this family should be fortified; hence Col. Cameron's deposition was taken, and hence Judge McLean's testimony will be introduced, and that of Mr. Gilkinson in corroboration of their testimony. And now we meet these objections. I had anticipated a trial that, according to my poor notions of law, should be worthy of the law-officer of the State of New York, and to which no objections would be taken in England; and that no objections would be taken that would, in any respect, tend to the exclusion of truth—that the doors would be thrown wide open, and every thing to show where the truth is, be brought forward. I have not met that mode of conducting the trial, and I am mortified and deeply disappointed in it.

The Attorney-General.—I have but a short answer to make. If the gentleman had supposed that I was capable from any ulterior considerations of overlooking truth, or winking at falsehood, of closing my eyes by any considerations external of justice, he mistakes me. That he would do so, I may think from the course he has pursued. I will not say I am surprised at it; but, as far as my own course is concerned, if he is surprised at my overshooting the mark, it is possible, it is because he felt that he himself was capable of doing so, had he been acting under similar circumstances. With reference to the objections, I wish to present this matter that it may be understood by the jury, that the deposition was taken without the least possible understanding in what manner the questions were to be asked, and so as to preclude cross-questions.

Judge *John McLean* sworn—Resides in New York city; is in the city of Washington during more than half the year; a few days previous to the burning of the Caroline, was at the American Hotel, in Buffalo—there saw McLeod in the bar-room; there were a number of persons present, and a conversation ensued in relation to the Canada troubles; McLeod became desirous of retreating from the room for safety; witness and another assisted him to do so; the night of the burning of the Caroline he spent in the quarters of Col. McNab, at Chippewa; got there about seven o'clock in the evening; did not see McLeod there; saw him next morning after leaving McNab's quarters; he left there about ten or eleven o'clock in company of Dr. Foote, in a wagon; and near the Pavilion Hotel McLeod passed witness on horseback, going toward the camp.

Cross-examined by the Attorney-General.—Is a citizen of the United States; went down there at the request of the Attorney of the northern district of New York; slept in the military quarters; had an interview

of upwards of an hour with Col. McNab; it was mostly a private interview; on his arrival went to a Hotel; got out and engaged a bed for driver and stabling for the horses; then inquired for McNab's quarters; went there immediately; he had been at the Canadian camp at Waterloo, where he was furnished with a conveyance; after the interview with Col. McNab had a glass of wine and went to the supper-room; had some refreshments there; continued there for about two hours; there were about half a dozen officers there; Col. McNab left soon after going into the supper-room, saying he had business that would keep him out all night; witness then went to his lodgings which were assigned him by the Colonel; heard of the destruction of the Caroline when she was in flames going over the Rapids; was awakened by a man rushing in and calling to a companion, saying, "Here's a splendid sight; the Caroline's in a flame!" Did not himself see the Caroline; knew it was an American vessel; Dr. Foote heard all this; witness wished Dr. Foote to get up; but they both resolved not to get up, as officers would be there who might make unpleasant remarks for them to hear; there was not much disturbance; saw McNab next day; witness rose at sunrise; went to McNab's quarters; wished to know the circumstances attending the burning of the Caroline; saw him; breakfasted about nine o'clock; then started for the Falls; it was then about ten o'clock; got there in about an hour; it was there witness saw McLeod; he was then near the Pavilion; would not swear to the particular house; thinks he would not be safe in saying it was before eleven o'clock; could not swear positively; did not accost McLeod; the prisoner was on horseback; witness recognised him; did not catch his eye, that he remembered; have taken no particular interest in McLeod; mentioned to Mr. Foote that he saw McLeod; he said, "there goes McLeod;" nothing more was said then of that subject; I sent the wagon back with the boy, Luke Walker.

Jasper T. Gilkinson was next sworn, and deposed that he has lived at Niagara since March, 1836; knew Raincock; he left before the troubles; he did not go in any notorious way; he went in September or October; witness was of the force at Chippewa; a volunteer; was in Chippewa on the 29th; lodged about half a mile below Stamford, at a tavern towards Niagara; returned to Chippewa the next morning about ten o'clock; saw McLeod; he overtook witness and a person who accompanied him; McLeod was on a bay horse; it was between Stamford and the Pavilion; when they got to Chippewa, rode along to near Capt. Usher's house; two guns were fired from Navy Island at the party; witness suggested the propriety of returning; in returning, the lower battery was discharged at us; one shot entered the bank of the river; a soldier of the 24th picked up the ball and gave it to McLeod; he took it home.

Cross-examined by Attorney-General.—Went up to the end of Navy Island; the upper end; it was about ten o'clock when he came up with McLeod; the roads were bad; they might have been absent from Chippewa three-quarters to one hour; it was an every day custom of his to go to Chippewa.

The Court then adjourned.

SIXTH DAY.

The Court re-assembled at the usual hour.

Mr. SPENCER informed the Court, that he had many witnesses in attendance that he intended to produce, to show more extensively the nature of the transaction out of which this trial had arisen. He now wished the Court to understand that the evidence was offered, though under the rule laid down, it was excluded.

Jared Stocking, brother of Mr. Samuel Stocking of Utica, was then called and examined: Resides at Niagara, was a Captain, and had command of a detachment of Dragoons, at Chippewa, during the outbreak. He was there in December, 1837, knows William Press well. Press resided nearly opposite to him at Niagara. He was not related to witness. Witness saw Press at Chippewa, on the 29th December, and spent most of the afternoon with him. He said it was his first appearance there, and desired witness to show him the batteries. Press dined with witness. Witness also knew Mr. Raincock well. He was a custom-house officer at Niagara. Witness thinks Raincock left the country in the summer, or in September. Witness was his creditor to a small amount, which Raincock could not pay when he went away.

Cross-examined by the ATTORNEY GENERAL.—Witness went to Niagara, immediately after the close of the late war with England, 1815, and has resided there ever since. He is a native of the United States—went to Chippewa a few days after the occupation of Navy Island: was in service about five months—at Chippewa two months, at the Falls or Drummondville, nearly three months. Supposes there were troops to the number of four or five thousand—the Assistant Commissary having informed him, that he dealt out about five thousand rations daily. They felt themselves very safe with so many troops. Witness did not think of being subpœnaed here; but was on his return from Montreal. Witness thinks it was three weeks after the destruction of the Caroline, when the evacuation of the island took place.

Witness believes that a military party were sent over to the island after the evacuation, but he did not understand it was to take possession of the island. A fatigue party went over, with a view of cutting down the timber, which had previously, in some measure, obstructed the sight of the fortifications, so that, if they should return to the island, their movements could be better seen. Insurgents evacuated the island about the middle of January. After the evacuation witness went to the island.

Witness was never examined or questioned on this subject before, or until since he came to Utica. What refreshed his memory was, that when it was learned McLeod was arrested, Press showed him the book in which he had made the entry. That was the first time it was ever mentioned, which was about three years afterwards. Recollects hearing Press say, when told that McLeod was arrested, 'Good God, it cannot be, for he came from Chippewa with me that night.' After Press came to witness' quarters at Chippewa, he wished him to walk up with him to see the batteries. Witness did so, and the Caroline was making her first trip to Navy Island.

Question by the ATTORNEY GENERAL.—Are you, or are you not aware, Mr. Stocking, that after the Caroline was destroyed, another boat came down? Witness: Yes, Sir, I think there was a boat there at the time of the evacuation of the island. It was sent down, I think, by order of General Scott.

The ATTORNEY GENERAL.—Do you know that it was the Caroline which you saw crossing to Navy Island?

Witness.—I knew, or I supposed I knew it to be the Caroline. I saw it go twice back and forth to the Island on the 29th, and that was the only boat that I saw. Mr. Press was with me at the time. Witness usually dined at about 2 o'clock. It was after dinner they walked up the river, and they may have been up there two or three hours. Witness was with Press both before dinner and after returning from the walk. The boat was easily perceived from where they were. Men were at work at the time, erecting the batteries with large timber which had been got out to ship to England. The Island was within rifle shot. The boat was a small one from appearance; it appeared to be one of the smallest class. The battery was eighteen or twenty feet in length. One battery was completed and a gun mounted. There were three batteries. One which was in progress of building was nearly opposite the head of Navy Island. There was one at the end of the island and one nearly at the centre. It was three or four days, and perhaps a week after the evacuation that witness went to the Island. Although he did not recollect the day of the evacuation, yet he recollected distinctly the day when Mr. Press dined with him.

Question by the ATTORNEY GENERAL.—How is it that you cannot recollect within a day, or week, or fortnight of the time of the evacuation, when you recollect so distinctly the day that Mr. Press dined with you?

Witness.—From the circumstance of Press dining with me, of our walking up the river together, and of seeing the Caroline crossing to and fro, and the burning of the boat on that night—all these things helped to confirm me as to the time.

Witness found on the Island nothing more than the appearance that there had been soldiers there. There was a log building standing which he was told had been their head-quarters.

Witness saw upon the island the remains of some buildings put up with rails or logs, and covered with brush. They were small, from ten to eighteen feet, and three in number. Besides these there was the old log building previously occupied for a dwelling. They found no person on the Island. Witness saw McLeod that day; thinks it was near Davis's tavern. Did not see him after that. He was not in the military business, and do not recollect seeing him again. Witness belonged to a troop of dragoons, and did his duty as a militia man. His quarters were down at the Chippewa creek. Had never interfered much with the politics of the country.

By Mr. JENKINS.—There was about two-thirds of the way up the Island the remains of a battery which appeared to be very well constructed. The engineer must have understood his business. There were batteries in the course of construction on the main shore when

witness went up with Mr. Press. Knows that the upper battery was there, for they could see people moving about it. They could be plainly seen at work. There were, witness thinks, but two batteries upon the Canada shore, neither of which was erected behind a house. The corps to which witness belonged had been organized about ten years.

By Mr. SPENCER.—Col. McNab's quarters were a short distance from Davis's tavern—eight or ten rods. I received a note about six or 7 o'clock on the evening of the 29th from Col. McNab, desiring me to give to an orderly that he sent as many arms as we could spare.

Mr. SPENCER then rose and said, this Court having felt it its duty to exclude the evidence which we proposed offering at the commencement of the trial, founded on national law, it, of course, leaves but a single question of fact to be investigated in this trial; and that is, whether in truth McLeod was one of the party who attacked and destroyed the Caroline. To this point, therefore, we have directed our attention, and produced all the evidence in our power to bear on it; and therefore close the defence on which we shall rely for the acquittal of McLeod.

REPLY TO THE DEFENCE.

The ATTORNEY GENERAL said, before we call witnesses I will offer some documentary evidence. I offer first the enrollment and then the license of the boat in Buffalo.

Mr. SPENCER.—Let it be read, sir.

The ATTORNEY GENERAL.—It is not necessary, unless you dispute it. The enrolment is dated the 1st of December, 1837. The license bears the same date.

I will now, also, if the Court please, read the statement of the prisoner.

Mr. SPENCER.—At what time and place made?

The ATTORNEY GENERAL.—Before Justice Bell.

Judge GRIDLEY.—I think evidence cumulative is not strictly admissible.

ATTORNEY GENERAL.—It is the statement of the prisoner, made before Mr. Justice Bell, when he was informed of his rights.

Judge GRIDLEY.—Is it properly authenticated?

ATTORNEY GENERAL.—Yes, sir.

Mr. JENKINS.—And it conflicts with the statement of some of the prisoner's witnesses.

The ATTORNEY GENERAK here proceeded to read the statement of Alexander McLeod, taken before Justice Bell, which is as follows:

Alexander McLeod states that the evening of the night previous to the attack of the Caroline he was informed she had left Buffalo for the service of the Navy Island people. Was one of ten persons who went in a boat with Captain Graham on the morning of the 28th December. Went round Navy Island to look out for the Caroline. Did not see her and returned about 8 o'clock to Chippewa. About 3 o'clock that afternoon went to bed at Mr. Davis's. Got up about 7 o'clock or half-past. Came to Mr. Davis and told him to tell the hostler to get his horse. The stable keeper brought

the horse to the door. I mounted him and went to Stanford, five or six miles from Chippewa, in company with Mr. Press, a tavern keeper of Niagara. Went to Captain Morrison's. Gave the horse to his son, eat supper and went to bed about 11 o'clock. Next morning was dressing, when Capt. Morrison came in and told me that Col. Cameron had just come from Chippewa and told him that they had burned a steamboat that morning or the evening before. Remarked to Capt. Morrison that it must be the Caroline, as the was expected down. Eat breakfast between eight and nine o'clock, and immediately after got upon horseback and went to Chippewa. I met with James M. Dyke between Stamford and the falls, who informed me of the particulars. Was in the Pavilion a few minutes, and, arrived at Chippewa between nine and 10 o'clock, A. M.

ALEXANDER McLEOD.

Taken the day and year last above written, before me,

JONATHAN BELL, Justice of the Peace.

The ATTORNEY GENERAL then read the following:

John Whitford Morrison, a witness on the part of the said Alexander McLeod, on his oath before me, the said Justice, in the presence and hearing of the said Alexander McLeod, saith:—that he resides at Stamford, Niagara District; resided there since 1836—Col. Cameron first informed witness of the burning of the Caroline, at witness's gate, from 8 to 10 o'clock, he thinks, it was before 11 o'clock. The front gate of witness is on the road leading from Stamford to the Falls of Niagara. Remembers that between 7 and 9 o'clock on the evening previous to the burning of the Caroline, McLeod, the prisoner, came to witness's house; next morning about 7 o'clock he saw Mr. McLeod lying upon the stretcher. Went to the gate and saw Col. Cameron, who informed witness of the destruction of the Caroline. Thinks it was near 10 o'clock when he informed prisoner of the destruction of the Caroline. Prisoner went to Chippewa, as witness believes. Witness is a retired officer of the British army on full pay. Witness knows prisoner was at his house at the usual time of going to bed, say from 10 to 12 o'clock, but witness does not recollect the exact hour that prisoner went to bed.

Cross-examined.—Went to Chippewa next morning, thinks it was about 11 o'clock when witness started. Prisoner went first. Thinks it was about 8 o'clock when defendant eat breakfast. Witness saw Mr. McLeod's horse in the stable about 9 o'clock in the evening. Saw the horse again in the morning somewhere from 8 to 10 o'clock in the morning. Thinks Mr. McLeod was walking in front of the house when witness informed him of the destruction of the Caroline. Witness knew of his going to bed. Defendant might have got up and gone out of the house without witness's knowledge. Witness has never stated to any person that Mr. McLeod was not at his house on the evening in question, or that he did not know whether he was there or not. Has not told any person witness did not know whether Mr. McLeod was there or not. Thinks he has had no conversation with McLeod on this fact or subject. Has told Mr. McLeod of his being charged with being there, and laughed about it

Witness had not heard previously that there was a steamboat coming down. Thinks it was dark when McLeod came to his house. Did not see the horse when he came, but saw him afterwards. Defendant generally kept his horses in witness's stable. Thinks the horse was a large bay horse : thinks he had a spot in the forehead. Thinks his son is about 14 years old. Has seen Wm. Defield and does not recollect having said any thing on the subject.

Was examined by defendant. Witness has a family of 8 or 10 persons, who also saw defendant on the same night as before stated by witness.

J. W. MORRISON, Lt. late 9th Regiment.

Archibald Morrison, a witness on the part of said Alexander McLeod, on his oath, before me, the said Justice, in the presence and hearing of the said Alexander McLeod, saith that he lives in Stanford with his father. Recollects hearing of the burning of the Caroline next day. Defendant came to the house after dark, does not know the hour. Witness took defendant's horse and put him in the stable and fed him. Saw prisoner at supper that night. Saw defendant at the house the next morning. That morning two gentlemen called at the gate, one of whom was Col. Cameron, witness informed his father who went to the gate; witness went with his father to the gate. Does not recollect where defendant was then. Thinks it was 10 or 11 o'clock when witness brought the horse for defendant. Witness recollects that defendant breakfasted there that morning. Witness's mother and sisters were present at breakfast that morning.

Cross-examined.—Witness is about 14 years old. Thinks the circumstances now related occured last summer. Mr. McLeod was frequently at the house to spend the night. Recollects this particular time in consequence of the burning of the Caroline. Witness saw defendant about 8 o'clock in the room. Thinks he was there about a week before, does not recollect the precise hour, thinks he did not take supper or stay all night. Was there again the same day, but did not stay all night. Was there two or three days after. Defendant occasionally when he came late at night would stay all night, frequently took supper. Witness thinks he was then about 13 years of age. Is not certain that this was last year. Does not recollect whether his father went to Chippewa that morning or not.

Examined by defendant.—Defendant has not been in the habit of going to his father's house since last winter.

In chief.—Witness knew Col. Cameron when he saw him.

ARCHIBALD MORRISON.

Taken and acknowledged before me the day and year last above written. JONATHAN BELL, Justice of the Peace.

William Defield, a witness on the part of the prosecution on his oath before me, the said justice, in the presence and hearing of the said Alexander McLeod, saith he knows Captain Morrison. Never conversed with Captain Morrison on the subject of the burning of the steamboat Caroline until last evening. Captain Morrison informed witness then, that he could not testify positively as to Mr. Mc-

Leod being at his house the night the Caroline was burned, but he was there frequently. This was stated in the presence of a third person whom witness thinks was Mr. Handy.

Cross-examined.—Does not know where Mr. Handy is. Witness resides in Queenston. Is an intimate acquaintance of Captain Morrison. Was at Queenston at the time the Caroline was burned. Defendant inquired where Mr. Defield resided during the winter after the burning of the Caroline, which question he declined answering.

WM. W. DEFIELD.

Taken and acknowledged before me the day and year last above written.

JONATHAN BELL, Justice of the Peace.

Frederic Tench, a witness on the part of the said Alexander McLeod, on his oath before me, the said Justice, in the presence and hearing of the said Alexander McLeod, saith that he resides in the vicinity of Queenston. Has known Captain Morrison several years. His reputation is that of a very honorable man. Witness having previously sent a letter to Captain Morrison requesting his presence at this examination. Yesterday afternoon went to Captain Morrison's house. Captain Morrison came over with witness after his arrival at this house. Captain Morrison appeared to be excited considerably from drinking. Saw him and Mr. Defield together. Took Captain Morrison away into the other room.

Cross-examined.—Did not hear Mr. Defield say any thing to Captain Morrison. Saw them going to the window, Mr. Defield in the advance.

FREDERIC TENCH.

Taken and acknowledged before me the day and year last above written.

JONATHAN BELL, Justice of the Peace.

Henry Phelps, a witness on the part of the prosecution on his oath before me, the said Justice, in the presence and hearing of the said Alexander McLeod, saith that he lives at the Center House in this village. Lived at Chippewa in the fall and winter of 1837. Lived there at the time of the burning of the Caroline. Saw the boat burning. Knows the defendant and has known him 3 or 4 years. Saw him the evening of the burning between 6 and 8 o'clock in the evening, saw him again just before daylight or betwixt daylight and sunrise. Thinks he could not have been mistaken in the man as he knows him well.

Cross-examined.—Saw the defendant first coming across the bridge on horse back. Witness was 30 or 40 rods off. There were a number of persons coming along across the bridge. Witness boarded at Mr. Smith's. The bridge is over a small creek. Witness lifted up the window at Smith's. Had been playing cards with Anson. Saw from Smith's window the defendant and other people crossing the bridge. Was up all night. Had been drinking, but could see well. Anson was teaming for Mr. Smith. Witness saw defendant at Mr. Davis's stable in the evening between 6 and 9 o'clock in the evening.

Defendant came about dusk with his horse, had him put up and fed, and between 6 and 9 o'clock he went away on horse back again. Did not see the boats return from the burning of the Caroline, but heard the people going up stairs at Davis's. Thinks defendant is not much altered. Thinks his whiskers were then shaved off, thinks he was lighter then than now, has never told this story before. Witness told Mr. Robinson that he knew Mr. McLeod, and told him if witness was wanted as a witness he would come. Has never heard defendant say that he was at the burning of the Caroline, but has heard other persons at Chippewa say so.

HENRY PHELPS.

Taken and acknowledged before me the day and year last above written.

JONATHAN BELL, Justice of the Peace.

ATTORNEY GENERAL.—These examinations were had on the 14th of November, 1840, before Jonathan Bell, at Lewiston, State of New York. I will now read the examination before M. T. Bowen upon the *habeas corpus*. The date of the writ, 19th of November, the examination, December 12, 1840.

Alexander McLeod on being examined by the District Attorney, not on oath, says that on the Christmas-eve before the Caroline was burned he was at Buffalo, and there learned that the steamboat Caroline was then preparing to enter into the Navy Island service, and that she was then lying at or near the mouth of Buffalo creek; that he (defendant) the next day went from Buffalo to Chippewa, Upper Canada, and there gave information that the Caroline was fitting out for the Navy Island service, and on the next day, which was Tuesday, made affidavit to it; and on the night previous to the burning of the Caroline, defendant, on his way to Niagara, stopped at the Pavilion, Niagara Falls, and there learned that the Caroline either had left, or was about to leave Buffalo, to come down to Navy Island; and then defendant returned to Chippewa and called on Col. McNab and informed him of the fact, and McNab said he could not act upon the fact that the Caroline had merely come down, and could do nothing. Defendant and Captain Philip Graham then got a boat between five and six o'clock, either on Thursday or Friday morning, and got eight sailors and went round the Island. They passed between Grand and Navy Islands about daylight, when they commenced firing upon them from Navy Island, and two musket shots were fired upon them from Grand Island. They got back to Chippewa about eight o'clock, and defendant remained at Chippewa all that day. Defendant went round the island to see if the Caroline had come down, but did not discover her; but about two o'clock in the afternoon defendant saw her passing from Schlosser to the Island. Defendant then returned to John C. Davis's tavern, at Chippewa, and being rather unwell, went to bed about three o'clock in the afternoon, and got up again about seven o'clock, or a little before, intending to go to Niagara, and directed Davis to get his (defendant's) horse. Defendant got his horse and started away with a Mr. Press, in his (Press's)

wagon, defendant leading his horse ; and when they arrived at Stan ford, about five miles from Chippewa, defendant called in at Captain Morrison's, an acquaintance of defendant, and Morrison asked him (defendant) to have his horse put up and stay all night, and he accordingly did so. He arrived at Captain Morrison's house about eight o'clock, P. M., or a little after. Defendant went to bed about eleven o'clock and arose about half past seven o'clock next morning ; and at between eight and nine Captain Morrison came to defendant in the parlor where he (defendant) had slept. Defendant then standing in the door of the room, and Morrison said : "They have burned an American steamboat last night." That defendant said: "It must be the Caroline ;" and Morrison said, "Here is a piece of her that went over the Falls." After that, defendant got his breakfast, then got his horse and went down to Chippewa, and got to Chippewa a little after ten o'clock in the morning ; that he did not go into Davis's tavern at all that day ; that he went into Chippewa with Jasper Gilkinson and Captain Sparke ; that about eleven o'clock he went to McNab's quarters, and found the officers at lunch, and there saw the boy, Luke Walker, who has been examined ; that on the Monday after the burning of the Caroline he went to Toronto, and on the next day he (defendant) went to Thorn Hill, about fourteen miles from Toronto, and returned to Toronto between four and five o'clock that evening. The morning after the burning of the Caroline he was not at Chippewa before some time after ten o'clock in the morning. No person slept in the room with him at Morrison's on the night that the Caroline was burned. There are eight or nine, and probably more individuals in Morrison's family. He does not know who were engaged in the burning of the Caroline, except by report. Knows James McLem, a merchant at Chippewa, and Oliver McLem, also a merchant. Has been in James McLem's store frequently, but can't say whether he was there the day before the Caroline was burned, but thinks not. He never was in Oliver McLem's store. Was not in McLem's store the day before the Caroline was burned, when some one was ordered out of the store, and the doors were locked. If he was there that day, the doors were not locked—if they had been locked, he should have remembered it. He don't think that any of the persons who were actually engaged in the burning of the Caroline now reside in Chippewa. Captain Drew now resides in England. He believes that a number of the men who started in boats to go and burn the Caroline reside within forty miles of Lockport, but he has no knowledge of the fact except from information.

That he never told any person that he was engaged in the burning of the Caroline, nor did he ever present a pistol to any one with blood on it, saying that the blood was that of a Yankee, or anything to that effect. Shortly after the burning of the Caroline there was an article published in a newspaper, stating that the defendant was engaged in the transaction, and defendant at once denied it orally, and published an article in a public paper, in which he specifically denied it. Before defendant went to Buffalo at the time above spoken of, the Governor of Upper Canada expressed a wish that

some one should go to Buffalo, and defendant, in compliance with the wish and request of the Governor, went. He has never, at any time, stated that he was at Niagara the night the Caroline was burned. That he (defendant) was in Buffalo about the 12th of December, 1837; that since the burning of the Caroline he has had his thigh broken. This happened the 22d of April, 1838, and he has hardly been well since. He has had the ague, and recovered from that only a few months since.

ALEXANDER McLEOD.

Subscribed by said defendant, Alexander McLeod, in my presence, this 17th of December, 1840.

L. F. BOWEN, Judge, Counsellor, &c.

The ATTORNEY GENERAL next read the depositions of Margaret Morrison, and Harriet Morrison, taken before Judge Bowen, viz:

DEPOSITON OF MARGARET MORRISON.

Margaret Morrison, a witness called on the part of the defendant, being by me duly sworn, deposes and says, that she resides at Bellevue cottage, near Stanford, Upper Canada. She is the wife of Captain Morrison. In the latter part of 1837, she resided in the same place, which is about five miles from Chippewa. Remembers hearing of the burning of the Caroline. The first she heard of it, she heard her husband tell defendant of it in his, defendant's, bed-room, a small parlor in witness's house. This was the morning after the Caroline was burned. Thinks McLeod came to witness's house between seven and eight o'clock the evening before. He took tea, and she thinks supper, at witnesses house. Thinks that it was between eight and nine that he took tea or supper. It was some time after he came there. Thinks McLeod set up with witness's husband that night, until about twelve o'clock. That evening, McLeod's boots were put at the fire to dry, and witness slept within four or five feet of where the boots were. There was a little space between the kitchen fire and witness's bed-room—that she always sleeps with the kitchen door open; thinks she, the witness, put the boots there, but cannot recollect. McLeod was not in the kitchen that evening. There was a thin partition between witness's bed-room and the room where McLeod slept, and the same partition between the parlor and the kitchen; and there was a door which opened out of the parlor into the kitchen. She saw those boots by the kitchen fire in the morning in the same place where they were put the night before, and they were in the morning entirely dry. The key to the stable was kept close to witness's bed-room door; was hung up a little over the bed-room door in the kitchen. McLeod did not know where the key was kept, to witness's knowledge. McLeod came there with his horse that evening. Col. Cameron, from Toronto, brought the intelligence to witness's house, that the Caroline was burned, and a Mr. Cameron, a Member of Parliament was with Col. Cameron at the time. McLeod remained at witness's house after he was informed that the Caroline was burned, until after breakfast; she, witness, was getting break

fast at the time, and she then hurried it as fast as possible. McLeod left witness's house between nine and ten o'clock that morning, and went towards Chippewa. No one went with him from witness's house. McLeod was not away from witness's house, from the time he came there that evening, until he went away the next morning, to witness's knowledge.

M. MORRISON.

Subscribed and sworn to, this 17th day of December, 1840, before me,

L. F. BOWEN, Judge, Counsellor, &c.

The said witness, *Margaret Morrison*, on being cross-examined, deposes and says, that she has lived at Stanford five years, and has known McLeod about the same time. McLeod lives about ten or eleven miles from witness's house. McLeod came to witness's house that night on horseback. Cannot say whether he came there in a waggon and lead his horse. McLeod had been at witness's house before, but not frequently—thinks he had stayed there one night before, which was Christmas evening. He stayed all night at that time, and left there the morning after breakfast, which was the day after Christmas. He spent Christmas-day at witness's house. He came to witness's house in the evening of Christmas-day, and the next morning she understood from him that he was going home. He never had stayed at witness's house over night at any other time, nor has he stayed at witness's house since that time, but has been at witness's house since. She can't answer whether her daughter is the wife of McLeod. She cannot answer that her daughter is married to McLeod, for she has never heard anything of the kind. Witness's daughter lives with McLeod. Cannot answer whether they live together as man and wife. Her name is Ellen Norman Morrison. She was married to a man by the name of Taylor, in Buffalo, and left him. When witness's husband informed McLeod of the burning of the Caroline, McLeod was dressing himself in the parlor—this was before breakfast. She is sure this was the morning after the Caroline was burned. Witness's husband is now at home, or she left him at home. She thinks that Mr. Morrison's second son, Archibald, put out defendant's horse that night. He is about fourteen years old, and is at home. Mr. Morrison wished McLeod to stay at their house that night. He came there between seven and eight, as she thinks, in the evening. Thinks her daughter was married to Mr. Taylor, in July, 1839.

M. MORRISON.

Subscribed and sworn to, before me, this 19th day of December, 1840.

L. F. BOWEN, Judge, Counsellor, &c

DEPOSITION OF HARRIET MORRISON.

Harriet Morrison, a witness called, on the part of the defendant, being duly sworn, deposes and says, that she is the daughter of Captain Morrison. She remembers the time when the Caroline was

burned. The first she heard of it, she heard her father tell McLeod of it. This was the same morning after it was burned. McLeod was then in the parlor at her father's house. McLeod came to her father's house sometime during the previous evening. McLeod that night slept in the parlor. McLeod went away between nine and ten o'clock in the morning. Thinks he came there about seven or eight o'clock in the evening, and took tea there, but cannot say whether he took supper there. He went away after breakfast in the morning. She heard her mother remark the next moning, that McLeod and her father had set up the night before till about twelve o'clock. Witness left the room, and went to bed between nine and ten o'clock that evening. She saw the persons who brought the news of the burning of the Caroline, through the window, down by the gate. She had never seen them before. When witness's father told McLeod of the burning of the Caroline, witness was in the kitchen. A person cannot look out from the kitchen to the street, but can from witness's mother's bed-room; and it was through that window that she saw the men who brought the intelligence.

HARRIET MORRISON.

Subscribed and sworn to, before me, this 17th day of December, 1840.

L. F. BOWEN, Judge, Counsellor, &c.

The said witness, *Harriet Morrison*, on being cross-examined, deposes and says, that she has known McLeod about five years; that she cannot say how many times he, McLeod, had slept at her father's house before the burning of the Caroline. He has slept there two or three times in all. She cannot tell when the first time was that he slept there. She recollects that he slept there on Christmas-night, and the night the Caroline was burnt, but she cannot specify any other night; and if he ever slept there at any other time, she cannot recollect whether it was before or after the Caroline was burned. She don't recollect what time he came to her father's house on Christmas-day; but recollects that he supped there. She does not recollect what time they had supper, the night the Caroline was burned. Thinks they had tea between eight and nine o'clock. McLeod came there on horseback. Witness's brother, Archibald, took care of his horse. McLeod was not walking in the road when he was informed of the burning of the Caroline. He was in the parlor, and was not fully dressed at the time. She cannot recollect precisely what time in the morning this was; but McLeod breakfasted immediately after, and left witness's father's house about ten o'clock.

HARRIET MORRISON.

Subscribed and sworn, before me, this 17th day of December, 1840.

L. F. BOWEN, Judge, Counsellor, &c.

Here the Attorney General read, on the part of the prosecution,

although taken on behalf of the prisoner, but omitted to be read by his Counsel—the deposition of Duncan Cameron, as follows:

Duncan Cameron, of the township of York, in the Home District, in the Province of Canada, Esquire, aged sixty years and upwards, being produced sworn and examined on behalf of the Defendant in the title of these depositions named, doth depose as follows:

To the 1st interrogatory he says: I first became acquainted with Alexander McLeod at Toronto, in the Home District, aforesaid, in the year 1835, at which time I had a few words conversation with him, and since then, though I have seen him upon one or two occasions, I have never had any further conversation or communication with him. I do not know of what nation Alexander McLeod is a citizen or subject, but I believe him to be a Scotchman.

To the 2d interrogatory he says: I do recollect of the destruction of the Caroline. The time was about the end of the month of December in the year 1837, so far as I recollect. I was in Chippewa upon the night the Caroline was destroyed—and I arrived at Chippewa as well as I can remember upon the morning of the day upon which the Caroline was destroyed.

The 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, and 13th interrogatories were waived by consent of the said Joseph Center and Hiram Gardner, and were not thereupon proposed to the witness.

To the last interrogatory he says: Upon the morning of the destruction of the Caroline, he thinks about 9 o'clock A. M., in company with Mr. M. C. Migan, the Presbyterian minister of St. Thomas, I stopped at Lieutenant John Morrison's gate, in front of his house near Stamford, about three or four miles from Chippewa—and Mr. Morrison came down to his gate. I then and there had a conversation with him for about five minutes. I do not remember any particular subject of conversation, though I may have mentioned to him the destruction of the Caroline, but I could not swear that I did so. I only now remember the fact of having held a conversation with Mr. Morrison at that time.

D. CAMERON.

Sworn at the city of Toronto, in the Home District, this 16th day of September, 1841, before me,

ADAM WILSON, Commissioner.

The ATTORNEY GENERAL—I will also, if the Court please, read the indictment which is now pending in the county of Niagara, against several persons for the same offence as that with which the prisoner is charged. This is matter which does not go to the exclusion of their testimony, but I wish it to go to the Jury to affect their credit.

Mr. BRADLEY—If the Court please, the indictment is an *ex parte* proceeding.

JUDGE GRIDLEY—My impression is that there is an express decision against its admissibility.

ATTORNEY GENERAL—I wish to show if your honor please, that they stood in the light of accomplices.

Mr. SPENCER—They prove that themselves.

ATTORNEY GENERAL—Well then there can be no objection to my giving the best proof I can of it.

Mr. SPENCER—Col. McNab was indicted too; was he not?

JUDGE GRIDLEY—I think there is an express decision against it, addressing himself to Mr. Jenkins, do you recollect it?

Mr. JENKINS responded, I must admit there is, but there is a contrary English decision.

JUDGE GRIDLEY—If there is an indictment, it is found on *ex parte* testimony, when the parties had no opportunity to cross-examine and confront the witnesses.

Mr. JENKINS—That principle has been acted upon nor do I think it material in the present instance.

The ATTORNEY GENERAL—Well, then, I now propose to offer one of the depositions which the defendant has taken and returned here, but which he does not think it important for him to read. I will now read it.

Mr. SPENCER—For what purpose?

The ATTORNEY GENERAL—It is the deposition of Russel Inglis; and I read it to rebut the testimony which you have offered.

Mr. SPENCER—Perhaps you had better be a little more particular, Mr. Attorney General.

ATTORNEY GENERAL—This testimony conflicts with the testimony given on the part of the prisoner. I suppose no better reason can be given for its introduction.

JUDGE GRIDLEY—If it conflicts I do not see why it is not evidence.

Mr. SPENCER—If it is to impeach any of our witnesses it is.

The ATTORNEY GENERAL then read the deposition of Russell Inglis, bar-keeper at the North American Hotel, Toronto, Upper Canada, as follows:

Russel Inglis, of the city of Toronto, in the Home District and Province of Canada, aged thirty-two years and upwards, being produced, sworn and examined on behalf of the defendant, in the title of these depositions named, doth depose as follows, viz:

To the first interrogatory, he says: I have known Alexander McLeod from about the beginning of February, 1836. I am bar-keeper of the North American Hotel, and the reason of my being acquainted with him is, that he was in the habit of residing at the hotel when in Toronto. His visits were very frequent. I believe that he is a Scotchman.

To the 2d interrogatory, he says: I believe that it was on or about the 29th day of December, 1837. I never was at Chippewa. I was at Toronto at that time.

The 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th and 13th direct interrogatories were waived by consent of the said Joseph Center and Hiram Gardner, and were not, therefore, proposed to the witness.

To the last interrogatory, he says: I know that Alexander McLeod arrived at the North American Hotel aforesaid, in the city of Toronto, on the evening of the 31st December, 1837, and put up there in company with Major Kingsmill, Robert Throop, Mr. Boswell, and a Mr. Gordon, and several others. He remained at the said hotel until Wednesday the 3d of January, 1838.

The cross-interrogatories were waived by consent of the respective counsel, with the exception of the eleventh, which was put at the request of the defendant's counsel—the counsel for the people objecting; to which witness says:

I was not at Davis's tavern at Chippewa at the time mentioned in this cross-interrogatory, nor have I ever been at Chippewa. I did not see him at or near Davis's tavern at that time, or at any other time. I was in Toronto during the whole time included in this cross-interrogatory, and Alexander McLeod was residing at the said North American Hotel on the Monday mentioned therein.

The counsel for the people of the State of New York objected to this portion of the evidence as irresponsive.

RUSSEL INGLIS.

Sworn at the city of Toronto, in the Home District, this 16th day of September, 1841, before us. The said witness having been first sworn that the answers given by him to the interrogatories proposed to him, should be the truth, the whole truth, and nothing but the truth; and he having subscribed the same in our presence.

ADAM WILSON, SECKER BROUGH, } Commissioners.

Rev. *John Marsh* was then called and examined by the ATTORNEY GENERAL—I am acquainted with Samuel Drown; I have been acquainted with him in Canada about four years; since that we have lived at a distance apart; I am a minister of the gospel; of the Methodist Episcopal denomination; I was intimately acquainted with Drown, during the time he resided in Canada; I have never heard any thing against him; I have no reason to believe that he is not worthy of credit under oath; I lived at Chippewa during the whole time he did.

Cross-examined by Mr. SPENCER—I am intimately acquainted with Drown: I was not in habits of daily intercourse with him during the first year at St. Catherine's; I was a local preacher at Chippewa during the four years; Drown was in the employ of my brother Charles Marsh and myself, as baker, the greater part of the time; the first year he was at St. Catherine's, driving team and doing such work as was necessary at a baking establishment; my brother kept a temperance house one year, and had a livery stable; Drown drove team part of the year; falls and winters he was in our employ, and when we did not employ him, he attended to the lumbering business, taking care of saw logs for other people; part of the time he worked for himself, getting out some barrel staves; one summer he was in our employ; he had the team and drove with passengers, and had a share in the profits; I never heard any thing said one way or the other respecting his character for truth; I never heard it questioned.

Platt Smith examined by Mr. HAWLEY—I reside in Lockport; I never lost my residence there; in December, 1837, I resided in Canada; I was in Canada then, at the mouth of the Chippewa creek, at Chippewa.

Mr. SPENCER—What do you propose to prove by this witness? I object to cumulative testimony.

Mr. HAWLEY said he intended to prove the same facts which had been proved by Drown, to show that the evidence of McLeod having been at Morrison's was false. We bring this witness to show that McLeod was at Chippewa. If, in sustaining a witness, who has been attacked, it should incidentally happen to be cumulative evidence, it should not on that account be excluded.

Judge GRIDLEY—You are entitled to replicatory testimony; if a witness is attacked, to sustain him. But the question is, whether you are entitled to sustain any witness by cumulative evidence.

Mr. BRADLEY—I have, in evidence, a case in 5th Carrington and Payne, 299, 24th vol. com. law reports, page 330; it was an indictment for robbery, the case for the prosecution had been closed, and the defence was an *alibi*. W. J. Alexander for the prosecution, wished to call a witness in reply, to prove that he saw the prisoner near the spot where the robbery was committed. The justice decided that whatever is a confirmation of the original case, cannot be given as evidence in reply; and the only evidence that can be received, is that which goes to cut down the evidence on the part of the defence. The learned counsel referred to 22 Wendell, 225. The authority of the case, as relating to criminal cases, was referred to by Mr. Justice Cowen in that case. There is another case—1st Carrington and Payne, 118; and also 2d Carrington and Payne, 415.

The ATTORNEY GENERAL—Your Honor will recollect that the charge in this case is that the prisoner killed Amos Durfee, in the county of Niagara and the State of New York. We have produced various witnesses to sustain that charge; among others, one who swears that he heard him declare, in so many words, that he was the man who killed Amos Durfee. If, after having produced that witness, we had rested there, and the prisoner had gone on to make out the case he has, by attempting to show that at that very time he was at Morrison's, in Canada, I would submit to the Court, if there is any part of the testimony we have given in chief, out of our liberality, which would not have been within the rule of rebutting evidence against his *alibi*. We have given very much testimony in the opening of the case, which was strictly rebutting testimony—for instance, two or three witnesses state they saw McLeod at Chippewa at that time. The whole point of this is derived from the testimony afterwards given. What is all this testimony given on the part of the State, but rebutting testimony? Now, because out of liberality we have gone so far, will the counsel for the prisoner insist that our liberality shall be turned against us? Above all things, in a case of this kind, when the great object in view is justice, and the public interest requires that nothing that is pertinent and proper to the case shall be excluded, material evidence of this kind should not be thrown out through mere technical forms. The witness now on the stand will testify to the character of Drown; and his oath will directly and positively sustain Drown. This is a case which, it seems, the learned counsel for the defendant have deliberately prepared for, as to their authorities; I had not the least idea of it, and am not pre-

pared to look to authority on this point. We contend that the testimony we propose to offer, will come fully and fairly within the definition of rebutting testimony. What is the case referred to here? It bears no analogy to this; it would, if we should go on and prove that McLeod was on the wharf at Schlosser—that would be testimony in chief; but the fact that he was at Davis's tavern—what connection would it have with the case, until the testimony of the defendant was first in? When they go to establish the fact that he was at Morrison's, we may bring witnesses to show that he was not there; and for this cause, if no other, that the witnesses who said that he was, are not to be believed; it will then go to show a fact that is utterly irreconcileable with the truth of the testimony, they have brought here. Is there any evidence that can be produced that comes more strictly within the rule of rebutting testimony? They prove a collateral fact, which is inconsistent with the charge of the indictment, viz: they prove a second collateral fact, which is inconsistent with the collateral fact they first set up; that is the whole force of it. By this witness we propose to show directly his knowledge of the witness on the part of the prisoner, and of the character of this witness. The question is made, to what extent we have a right to go? I think, if your Honor please, that in any view of the case, the case cited here does not bear at all—there the prosecutor attempted to show the party present at the robbery; that is a leading affirmative fact, but this which we attempt to prove was not essential to our original case at all.

Mr. JENKINS.—There are certain rules laid down, which, as taken up, from some authorities guide us one way; and from other authorities, guide us the other way, but the principal rule is the rule of good sense. Thus, it is laid down in the note, that where a party calls on a witness, and proves a certain fact, necessary to his cause, and gives over the witness for cross-examination, if the party introducing the witness desires then to proceed further to prove material facts, he has not the right, because he did not open that subject, at his first examination; and yet, in the trial in this case, how often it has happened on the re-examination of a witness, that he has been permitted, without objection, to give further testimony; and it is so, by the universal practice in this State, not to require parties to adhere strictly to the rules laid down in the books.

But to this case; first we prove the fact, that there has been a murder committed—or we assume it for the purpose of this argument—we prove that the defendant was engaged in this murder, and embarked in the boat; now, how do we know what defence the defendant is going to set up? If we were bound by this rule in this case, we should have to be able to foresee the amount and strength of evidence he might produce, before we could rest our cause; now is this to be required of any living man? All the prosecution is bound to make out is, a case charging on the defendant the crime which has been committed, and then we have a right to rest our cause, and if they introduce proof of the fact that he was in another place, manifestly we have the right to do it away by such evidence, that shows he was not at Morrison's at that time. We

propose to show the fact that he was in another place; are we bound to cumulate evidence to show the fact that he was not there, when *non constat* it may be denied that he was not there at all? Surely this is not consistent with any ground of reasoning or good sense.

Judge GRIDLEY.—It would be satisfactory to me, to hear the note read.

Mr. HAWLEY then read at some length from Cowan's and Hill's notes, citing various cases: a strict uniformity at all times is not to be expected, and indeed in some instances will prove injurious to justice; much therefore is to be left to the sound judgment and prudence of the Judge. All testimony in chief or special, that which goes to affirmative matter should be produced as far as possible in opening the cause. In conducting the examination of a single witness, we have a miniature course of the examination of a cause. The witness is first examined by the party producing him; after which the party opposite can examine; and then the other party re-examine. On the primary examination of a witness you are bound on your peril to ask all material questions, and if you omit them, it cannot be done in reply. If a question has been omitted in chief examination, the usual course is to ask the question to the Court. "It is discretionary with the Court, after charging a jury, on a witness's testimony, which is vague and indefinite, whether they will allow him to be called back." 4th Wendell, 249, Law vs. Merrill, 268. "Evidence should not be given by piece-meal generally, but sometimes be left to the judgment and sound prudence of the Court, and a Court of Errors ought never to interfere except when injustice has been done by it." 1st Monroe, 117, 118. "The general rule is ad hered to with the greatest strictness in criminal cases." "Your evidence in reply must in direct and express terms, negative the prisoner's proof." Various other cases were cited in the note, which then continued—"all this shows that the Court must have a discretion; the English Courts have allowed exceptions to the rule, though with formality and caution." "In the Courts of Pennsylvania the counsel is allowed to ask any question, on any matter, in reply." "The omission or rejection of a witness after a case is closed, is a mere matter of discretion."

Mr. JENKINS.—I feel that it is pretty well established in this Court, that it is a matter in the discretion of the Court, whether the testimony shall be introduced or not. The reason of this deviation from the strict rules as authorized in the note just read, I return to, and I repeat, how shall we know the nature of the evidence to be brought forward, or any thing pertaining to it? Is it possible that after we have examined a great number of witnesses to show that he was there, and left our cause without any sort of defect whatever, that we must go forward and anticipate not only the defence to be set up, but the strength of it? It is utterly impossible.

Mr. SPENCER said in sustaining this objection we may properly advert to the proceedings in this cause. We apprised the party of our objection before the people rested. If—

Judge GRIDLEY said, I will relieve you. In looking at this I am satisfied, I have no doubt; but ordinarily there is discretion left to

the Court; in this note of Cowan's and Hill's, probably about all the cases on this subject have been cited—the cases in England, in several of the States, and among others, in Pennsylvania. In Pennsylvania the rule has been laid down in the utmost extent of liberality and indulgence, and it is a decision from the courts of that State that testimony which is replicatory is admissible, although it be direct evidence to establish the original proposition. The decisions in that State are more indulgent than those which are found to have taken place in England, or in the United States courts, or in the courts of the other States. So far as I can see from the reading of this note, I have not a doubt but to a certain extent, in civil cases, it is a rule of discretion, as in cases of accident, the sudden illness of the witness, &c., that such cases do afford good reasons for an exception to the general rule; the ground is this, that the general rule is adhered to with the greatest strictness in criminal cases—that the proof which is to be admitted in reply, is to be strictly in reply, in opposition to being cumulative. After having considered this rule as applicable to civil cases, the following remarks are made; the general rule is adhered to with the greatest strictness in criminal cases. [Judge Gridley then referred to one of the cases just read; he then continued].

Now in this case, the Court refused to admit the evidence, saying that it was such as would be proper to have originally been given; therefore the case is an admission in favor of the rule, in this sense, that although the evidence offered in reply is in truth contradictory to that of the defendant, yet if the evidence is proper to establish the main proposition originally to be established by the people—or the king in England—then it is inadmissible. The following civil case presents the same adherence to the rule:

"Whatever is confirmation of the original case, cannot be given as evidence in reply; and that which can be, is that which is reply, without being in confirmation of the original case." This accords with the other cases. Now to apply this case—it is said that the evidence given by the witness sought to be sustained was not in confirmation of the original case, but strictly in reply. If we look to the circumstances of this case, I think we shall see with entire clearness, that it is a portion of the evidence, necessary to establish the original case. The charge is the murder of Amos Durfee.

In order to make out McLeod's connection with this transaction, no one swears that they saw him there. Appleby thought he saw him—but it was shown that the murder was committed by the crews of five boats, which made an attack on the Caroline; and in the course of that attack, some person of the crews performed that deed.

In order to show that McLeod was one of the party, evidence was given to show that the party embarked near the cut leading into Chippewa Creek. This witness Drown is called to prove that he saw McLeod disembark, and saw him at a tavern the next morning. Now then, this is material evidence, directly necessary to connect the prisoner with the transaction which originated the murder. It is, therefore, not only pertinent, but very material evidence, to show that McLeod was connected with the crime of murder. Now, in

order to show that he is guiltless of the crime of murder, he introduces an a ibi. The prosecution brought forward the testimony of Drown contradicting this, and now propose to rebut that evidence by the additional evidence of Smith. Now, it seems to me that if the evidence is in confirmation of the original case, although it would go to contradict the witnesses who have testified that McLeod was at Chippewa at the time, yet it will be direct evidence: and if evidence were produced to show that McLeod fired the fatal gun, it would be equally evidence that McLeod was there; it would be express, positive evidence of the guilt of McLeod, and as such, would be inadmissible. With respect to the discretion—

Mr. JENKINS—Allow me to cite the authority of the case of the People *vs.* Mather. That was a criminal case, and the court allowed a witness to be re-called and re-examined by the same party on matters on which he had been before examined; and the Supreme Court held that it was discretionary. This shows that the discretionary power is applicable to criminal cases, because this was an indictment against Mather for murder.

Judge GRIDLEY—In that case the witness was the same person who had been introduced before; the opposite party might have had an opportunity to introduce witnesses to show that he was a man unworthy of credit. In this case, I remark, there are none of the circumstances to justify it, if it were true that there existed a discretion, in criminal and capital cases, in relation to opening branches of the defence not before opened. It seems to me, therefore, that if I ascertain what the rule is, which Cowan declares is adhered to with the greatest strictness in criminal cases, and which is proved to be the rule in adjudged cases, that I am bound to regard it; if it is to be regarded at any time, it should be in criminal cases. This is my opinion, and I so adjudge.

The ATTORNEY GENERAL—The rule, as laid down by the court does not apply to the evidence we propose to offer. I have this to remark, that the discretion vested in the court is properly to avoid anything like unfairness or surprise; but in a case where the court is satisfied that there has been no disposition to entrap the party, it would seem to me that the discretion of the court to exclude from the jury the light of important testimony, is settled in a case *ex rigore*. We are by this rule, taken entirely by surprise, in testimony which is material; as bearing on the case attempted to be set up by the defendant—not only material, but vital. On that point, whatever may be the case in court, it will not be satisfactory as to the innocence of the prisoner, unless this testimony is allowed. Smith was an employer of Drown, who knows his character and can testify of it. That is of all men in the world, the proper man, to call, to strengthen and corroborate the witness, who is a vital witness. If ever, therefore, there was a witness who was a rebutting witness, or one who could sustain an impeached witness, it is Smith, who will sustain the testimony of Drown. It is not cumulative evidence; all we ask is, that we may be allowed to show that the testimony of Drown is true; it is not to go over the same story, by any means, but to sustain the evidence of Drown. We also propose to show,

by those who employed him, the reputation and the character of the witness. In any point of view, I cannot conceive that this witness is not most strictly within the rules of evidence, if, in this vital case, they are to be strictly applied; most assuredly, had I not supposed that this would have been within the rule, I should have brought it forward previously; I would ask of the court to exercise the discretion in this case, cautiously, and with reference to this witness, I ask the court to allow me to examine him, as a witness to sustain Drown.

Mr. JENKINS.—We offer to show that the prisoner was not at Mr. Morrison's, by showing that he was at Chippewa the 29th of December, at night, and was there the next morning, and also the identical time when the Caroline was burned, that is when they were embarking and debarking; and that he was at Chippewa on the morning afterwards, before sunrise, and from that time to 10 o'clock. I wish to put that as a distinct offer, and I apprehend it does not come within the rule, so as to be excluded.

Judge GRIDLEY.—I have a single remark to make, not assigning any further reason for the decision made; but in relation to the judgment made, I am sorry to hear an argument suggested, on the part of the Attorney General, that the decision will not be satisfactory to the public.

The ATTORNEY GENERAL.—If the court refers to my remarks, I beg to say I did not intend anything of that kind.

Judge GRIDLEY.—Sitting here, as I do, independent of all public opinion, on a question of law, as I regard it conscientiously, I can entertain no anxiety whatever as to whether the decision will address itself to the feelings, good or ill, of others. I have in this very cause excluded from those depositions every portion which was not responsive. Because I felt myself rigidly bound to decide according to my own notion of law. I felt that I had no right in a capital case to enlarge the rules of evidence, but was bound to follow them, as they existed. I mean this decision to stand, to exclude the evidence offered, but not in any way to exclude testimony which may be adduced in support of Drown, who may have been impeached.

The ATTORNEY GENERAL then proceeded to examine the witness.

Platt Smith, examined by the ATTORNEY GENERAL.—I am acquainted with Samuel Drown; I have known him about a year; he was employed by my brother, who kept a tavern; I boarded there; I was woke up on the night the Caroline was destroyed.

Mr. SPENCER.—What do you propose to prove?

ATTORNEY GENERAL.—The character of Drown, and also to sustain his testimony.

Judge GRIDLEY.—How?

ATTORNEY GENERAL.—Mr. Drown has here made a statement, and I wish to show that he had before made the same statement to the witness.

Mr. SPENCER.—That has been overruled. The learned gentleman cited 23 Wendell, p. 50, to show that evidence to corroborate the testimony of a former witness in this way was inadmissible. There were, however, special circumstances under which it might be done,

as where the charge was made that the statement of the witness was colored, and that motive existed for coloring the testimony. Evidence might be given to show this if charged that his evidence was a fabrication of a late date, that he had told a similar story when the motive to distort his evidence did not exist.

The ATTORNEY GENERAL replied.—He wished to prove by this witness, that certain things stated in court by Drown were true. Drown had stated that this witness was with him at certain periods and places, and the Attorney General wished to prove that those circumstances were true by other testimony, Drown having been in some respects impeached. This testimony was offered to give support and credence to Drown's entire statement, by showing that a portion of what he had said was true. He said he should afterwards offer to prove Drown's declarations.

Judge GRIDLEY asked the opinion of Judge Denio, who happened to be in court as a spectator, on this point.

Judge *Denio* said that he had his attention called to this question on a former occasion, when he was the referee whose judgement the Supreme Court had set aside. The facts in that case were those of an accomplice called on the part of the prosecution ; and yet the law, as laid down by the Chief Justice, was exceedingly broad, and would admit the testimony now offered ; it seemed to cover all cases. But under the present circumstances he thought the evidence now offered was inadmissable.

The ATTORNEY GENERAL said that testimony having been offered to show that Drown was unworthy of belief, his whole evidence was attacked. He now proposed to prove by the witness called, that he (the witness) was awakened by Drown, who told him that the Caroline was on fire—that Drown proposed to go up to the beacon light ; that witness got up and went with Drown ; that they went down into the road together ; that they saw boats coming in ; that Drown ran forward of him to see who were in the boats ; that Drown ran on and fell in with the party ; that Smith continued on his course until their paths again came together ; they then walked together with the party, which evidence most materially strengthens and corroborates the testimony of Drown.

Judge *Denio*.—If this testimony would have been immaterial in the case, except as connected with what was material, it does not strike me how it is now admissible.

The ATTORNEY GENERAL—If we can produce a witness who will here show the correctness of all which has been stated by Drown, except what was seen by the eyes of that witness alone—that they went down together—that they came up together—that they were there together—

JUDGE GRIDLEY interrupted the Attorney General by remarking that this evidence, if admitted, would also go to strengthen the other portions of the former witness's testimony in which he declared that he knew nothing which would materially affect the case.

His (Judge Gridley's) opinion was, that this case should be governed by the rules laid down in the 12th Wendell.

Mr. BRADLEY said, Mr. Bates, the witness, was not called to prove

that Drown was unworthy of belief, but simply as to declarations which he had made on another occasion, to show that they differed.

Judge GRIDLEY thought proof could not be given to show that a witness had told the same story elsewhere. It must be taken on the solemnity of his own oath.

The ATTORNEY GENERAL said he was unable to perceive why this case did not come within the exception in 23d Wendell, since it has been insinuated, by the Counsel for the prisoner, that the witness, Drown, was impelled by a strong desire to convict the prisoner, and now it is offered to show the declarations of the witness, Drown, before such a state of things could have existed. He did think that he had a right to do so, and that it would throw light upon the case.

At the suggestion of the Court the decision in 23d Wendell, p. 50, was then read and commented upon by the Court.

"Proof of declarations made by witnesses out of Court, in corroboration of testimony given by him on the trial of a cause, is as a general, and almost universal rule, *inadmissible.*

It seems however that to this rule there are exceptions, and that under special circumstances such proof will be received: as where the witness is charged with giving his testimony under the influence of some motive prompting him to make a false or colored statement, it may be shown that he made similar declarations at a time when the imputed motive did not exist. So in contradiction of evidence tending to show that the account of the transaction given by the witness, is a fabrication of *late date*, it may be shown that the same account was given by him before its ultimate effect and operation arising from a change of circumstances could have been foreseen."

"When a witness is contradicted his testimony may, of course, be fortified by proving the same facts by others. If his character for truth is attacked, it may be supported by proving it good; and if evidence is given that the witness has made declarations out of Court inconsistant with his testimony, it may be shown that those declarations were made under such circumstances as not to detract from his credibility. If an attempt is made to discredit the witness on the ground that his testimony is given under the influence of some motive prompting him to make a false and colored statement, the party calling him has been allowed to show, in reply, that the witness made similar declarations at a time when the imputed motive did not exist.

But as a general, and almost universal rule, evidence of what the witness has said out of Court, cannot be received to fortify his testimony. It violates a first principle in the law of evidence, to allow a party to be affected, either in his person or his property, by the declarations of a witness made without oath. And besides, it can be no confirmation of what the witness has said on oath, to show that he has made similar declarations when under no such solemn obligation to speak the truth. It is no answer to say that such evidence will not be likely to gain credit, and consequently will do no harm. Evidence should never be given to a jury which they are not at liberty to believe.

It is also agreed by Mr. Starkie that such evidence may, *under special circumstances* be admitted; as for instance, in contradiction of evidence tending to show that the account was a fabrication of *late date*, and where consequently it becomes material to show that the same account has been given, *before its ultimate effect and operation arising from a change of circumstances could have been foreseen.*

The ATTORNEY GENERAL said that he offered to show that before the prosecution of the prisoner and immediately after the transaction itself, the witness, Drown, had made statements similar to those which he had now made before this jury, and asked the Court if he might not be permitted to introduce such evidence. Are we seeking to commit a felony that we are thus headed and pursued? I ask the Court to protect me.

Judge GRIDLEY.—The Court will protect you. If I am right in saying when you have given affirmative evidence against McLeod, that he was seen lounging about, and exhibiting his pistol at Chippewa, and if I am now right in excluding further evidence, showing that he was there, and you merely seek to get in testimony which would sustain Drown; in such case, I consider it would be admissible.

Platt Smith's examination continued by the ATTORNEY GENERAL.—I never heard Drown's truth and veracity questioned. I saw the boats as they returned. I was at the beacon fire spoken of. I only saw three boats come to the cut—there might have been four; one fell short of the cut, and came into the creek below. I did not see five. Persons were continually passing and repassing the sentinels on the bank of the river. Some were coming from the village to the beacon light, and some were returning to the village. Some gave the countersign, and some did not. Citizens were allowed to pass by the guard. They were hailed, and if they said they were residents of the place they were allowed to pass. I believe I heard the countersign, but I think I had forgotten it before I got there. I don't know how I passed.

Judge GRIDLEY said Mr. Sears only stated that it was the general rule to demand the countersign.

Examination continued.—This occurred about one o'clock.

ATTORNEY GENERAL.---Can you say whether, from any thing you knew, Alexander McLeod could not have been at Mr. Morrison's, at Stanford, between 1 and 2 o'clock that morning?

Mr. SPENCER objected.

The ATTORNEY GENERAL was astonished that at that stage of the trial a rigorous rule was insisted on after such a liberality had been manifested all along in favor of the prisoner. He trusted the Court would at once decide that the question was proper.

The COURT had already excluded on sufficient grounds, questions going to elicit the answer now sought; this evidence was in chief and not in reply, and of course inadmissible. The Court then put the question thus—If you can state that McLeod was not there from any other reason than that he was at Chippewa, you may answer—if not you cannot answer. The Court then adjourned for dinner.

TRIAL RESUMED.

SATURDAY, 2 o'clock, P. M.

The examination of Platt Smith was continued by the Attoney General who asked the witness if any delay had occurred at the disembarkation?

Mr. SPENCER objected.

The ATTORNEY GENERAL.—I only intended impeaching the evidence of Sears.

Mr. SPENCER.—Go on then.

Witness.—There was a delay only of a very few minutes—I afterwards fell in with this party; they stopped at Davis's house, and some one asked if they should wait for the others; they did not wait; whilst witness was there the party from the other boats did not come up.

The ATTORNEY GENERAL then desired to ascertain from the witness where the prisoner was in the evening.

Mr. SPENCER.—Where do you propose to show he was?

ATTORNEY GENERAL.—At Chippewa.

The Court.—When?

ATTORNEY GENERAL.—At sunset; it is not at all cumulative evidence.

The Court.—It is still evidence of the same description, connecting the prisoner with the transaction.

The ATTORNEY GENERAL.—Not independently of the other evidence.

The Court decided the evidence was inadmissible. The rule was laid down in a late case at *Nisi Prius*, Littledale Judge, the decision in which case the court then read.

The ATTORNEY GENERAL then proposed to ask the witness:

Do you know any place where McLeod was not between 1 and 8 o'clock on the morning of the 30th Dec. 1837?

The Court remarked that that was substantially the same question as before, and therefore inadmissible.

The ATTORNEY GENERAL then proposed to ask:

Do you know that McLeod was not at Morrison's at 8 o'clock on the morning after the destruction of the Caroline?

The Court observed that as the fact intended to be elicited came within the rule, it was not to be got at, in any such ingenious way as that.

The ATTORNEY GENERAL would then ask:

Did you see the prisoner as late as 10 o'clock at Chippewa or any other place?

The Court decided that this question might be put, as none of the evidence fixed the time of McLeod's arrival at Chippewa, nor where he was at 10 o'clock.

The witness then replied that he did, about 10 o'clock, see McLeod go frem Davis's across the bridge down the Chippewa; there might have been one person with McLeod; he was going from the quarters of Col. McNab; saw him on the Sunday following; then saw him very near the guard-house, three-quarters of a mile above; it was about 11 o'clock—did not know who they were with McLeod;

cannot say whether it was Gilkinson; did not recollect seeing McLeod after that; one of the persons was spoken of as being McNab; it was not him; it was a stranger to witness; he rode upon a white horse.

Cross-examined by Mr. SPENCER.—I now live at Lockport; I never lost my residence there, though I was in business in Canada in 1836-7; during those years I often saw McLeod; while I was in Canada I sold a draft for $500 to a man in Albany; it was protested and came back; I was arrested and imprisoned, but it was paid in two weeks after, and I was released; I was taken for that to Niagara, and was put into jail, but not by McLeod, it might have been one of his deputies; that deputy might have been his brother; I don't think it was the prisoner; when I saw McLeod on the day I have mentioned, I fix the time as after breakfast; I had taken no part in the Patriot business, nor in any secret society; was in my brother's store when I saw McLeod at the bridge; it was on the morning of the 30th Dec. 1837; it was on Saturday; know it was on Saturday, because the boat was burnt on Friday, and this was the day after; it was nothing uncommon for me to meet McLeod.

John C. Davis was then sworn, and deposed that he resides at Chippewa; is the proprietor of "Davis's Tavern" house; was there when the Caroline was burnt; recollects that time; was then at home; recollects distinctly the transaction; knows the prisoner at the bar; he usually stopped at witness's house when in Chippewa.

Examined by the ATTORNEY GENERAL.—I reside at Chippewa, and am the bar keeper of Davis's tavern; I was there when the Caroline was burned; I know the prisoner; he usually stopped at my tavern.

The ATTORNEY GENERAL repeated the questions before overruled, for the purpose of having a note taken of them.

The examination was then resumed. I retired to bed that night about 12 or 1 o'clock; I was at the mouth of the creek when the boats approached the shore; the men commenced hurraing and I returned home before they had all landed; I cannot say I had retired before the party came to my house; I did not go into the bar room at all that night after the expedition; quite a number of the officers messed at my house; my bed room is separated from their mess room only by a thin partition of lath and plaster; I can hear persons speaking from one room into the other on particular occasions; I have heard it repeatedly; I imagine I might have heard voices in that room that night; I had an idea I knew the voices of several; there was a good deal of loud talking that night; I could not say, from the language I heard there that night, that the persons talking there had been of the party.

The ATTORNEY GENERAL then asked the witness if he did not hear the voice of McLeod in that mess room, and afterwards, whether he did not see McLeod the next morning. These questions, like the others, were put to save the right of parties, and to have a note taken that they had been offered.

Did not see any of the party that night drinking except one. There was a bed took out of his house that night, and there was some

talk about that. Waked about sunrise. Before he got out of bed saw some person.

The ATTORNEY GENERAL. Who?

Mr. SPENCER objected.

The COURT overruled the question upon the reasons already stated.

ATTORNEY GENERAL—Do you know Mr. Park?

Mr. SPENCER objected to the question.

ATTRONEY GENERAL—Did you see McLeod the day before the destruction of the Caroline?

Mr. SPENCER objected.

The COURT admitted the question.

Witness—The prisoner went to bed in my house that afternoon; he got up in the evening; saw him about eight or nine o'clock; he ordered his horse then, and said he was going to Niagara. A gentleman came in and asked for him afterwards; it was not Mr. Press.

Philo Smith was then called and sworn.—He deposed that he resided at Chippewa when the Caroline was burnt; recollects the occurrence. Was there part of the next day. Was there about eight o'clock next day. Knew McLeod well.

Mr. SPENCER—What do you propose to do?

Mr. JENKINS. Does that come within the rule?

The COURT. Yes.

Mr. JENKINS continued. Are you acquainted with Samuel Drown? Yes. What's his character for veracity? Never have heard it questioned.

Mr. SPENCER. Did Drown run away? Well—no I believe not. How did he get away? Oh, on account of some mob or other. Do you belong to a secret lodge? or ever did? Well, I once attended one, two years ago. Mr. SPENCER. That's all, sir.

By the ATTORNEY GENERAL. Drown was bar-keeper for me. There was some censure thrown upon him for striking some one. The soldiers came upon him, and he had to escape for his safety.

James M. Dyke, examined by the ATTORNEY GENERAL. Reside at Niagara Falls, on the American side. I am acquainted with the prisoner. I saw him on the morning after the patriots left the Island at Stanford.

The COURT did not see how the Attorney General could go on to contradict the statements of the witness, which he (the Attorney General) had himself introduced.

Cross-examined by Mr. SPENCER. Went to the Falls of Niagara the morning after the destruction of the Caroline. Went to the Falls the day before, and was there the night the boat was burnt. Had once said he met McLeod going to the Falls. Was mistaken in that, but would have sworn to it then. Would not swear to it now, the circumstance of recollecting his having seen a flag raised on Navy Island enabled him to correct his mistake.

Timothy Wheaton sworn. Examined by MR. HAWLEY. The counsel for the prisoner stated his objection to this evidence, inasmuch as he was one of the witnesses called before the prosecution rested

and did not appear, and there was no provision that his testimony should be admitted at any subsequent period of the trial.

The witness deposed that he resided in Canada in 1838. Lives now in Chemung county. Left Canada in the fall of 1838. Recollects being then in the town of Niagara. Was in Niagara the last of October, or the first of November, 1838. Saw the prisoner there. Conversed with him. Was standing near the ferry. Passed the time of day with McLeod, and said that "the poor fellows, (meaning the sentinels) had a hard time of it." Conversed about the difficulties in Canada before that, and then asked him how many had been killed on the Canada shore, by the Navy Islanders? He replied two, if witness rightly remembered. He said they never would have the Caroline to assist them again, if they got on to the Island. Witness then said he understood she had been destroyed, and the prisoner said she had. He, the prisoner, said he was the second or third man that boarded her. He was going on to say, that he came near being killed. Then some one came up, and said, "McLeod, come here for a moment." And McLeod, witness thinks, said, "Hold on a moment, Herron!" That's all the conversation witness had with McLeod, for he started off then. Witness had never seen McLeod before. Lived then at Whitby, about, sixty-five miles from Niagara.

Cross-examined by Mr. SPENCER. Knew it was McLeod, because the other man called him McLeod. He said, "come here a minute, I want to speak to you." Didn't hear any thing more said. Didn't see McLeod after that till he saw him here on trial. Recognizes McLeod now. He looks some paler than he did. Witness came here because he was subpœnaed about the 22d of last month. Did not know who subpœnaed him. Understood the man was from Elmira. Don't know how he learned that witness knew any thing about it. Wrote a letter, either to William Lyon Mackenzie, or John Montgomery, about what he knew. Montgomery lives at Rochester. This was about a year ago. Witness then lived in Chemung county. Don't recollect, particularly, what he wrote. Has forgotten it. Witness read in the papers, that such a man was taken. Wrote to Mackenzie because he had acquaintance with him. First saw him in Toronto.

Witness belongs to one of the patriot lodges. Joined in the fall of '38. Couldn't tell the time precisely. It was in Canada. Before he had the interview with McLeod, some of the witness's acquaintance had been taken up for stealing harness. Has had some intercourse with members of patriot lodges. Couldn't describe the ferry. No one was present at the conversation witness had with McLeod. Herron was a pretty good sized man. Is not sure he could recognize him. It was about twenty rods from the ferry to Niagara.

Mr. SPENCER. I believe it is nearly a mile. You may go, sir.

Wm. Defield, examined by the ATTORNEY GENERAL—I reside at Queenston, District of Niagara, Upper Canada. I know Mr. and Mrs. Morrison. I have not been at their house more than three times. I saw Mr. Morrison on this side, at Lewiston, in November, 1840. I

I had then some conversation with him, he said to me in conversation at his own house that he hoped the American authorities would get hold of Mr. McLeod, and punish him for his participation in the burning of the Caroline, that was in September, 1839; about that time they were relating to me that McLeod had seduced a daughter of Mr. Morrison's from her husband, and that Mr. Taylor, the husband, who was a wealthy merchant from the Southern States, was gone in pursuit of them to Torronto. I asked him, when I saw him in 1840, how he could prove an alibi? And he said that he thought that Mr. McLeod stopped at his place that night; I asked him if he was sure of that? He said he was not; but McLeod was one of Her Majesty's subjects, and must be protected at any risk.

Cross-examined by Mr. SPENCER—I never aided the Patriots directly. I was at Detroit when they crossed to Windsor. I was on Navy Island when the Patriots were there. I was there eight days. McKenzie took me as a prisoner, and kept me till the evacuation. He kept me at their head quarters. General Van Rensselaer was quartered there. I was permitted to go out sometimes by the permission of the officers. I saw the men on parade, and counted 344 rank and file on the Island besides the guards and officers. I am a school teacher. Taught school near Rochester last winter and spring. I did not teach school on Navy Island. They knew rather more than I did.

By the ATTORNEY GENERAL—I am a native of Canada.

Mr. SPENCER—And no great friend to it, are you?

Witness—Not particularly.

John B. Chubbuck, was then called for the purpose of proving that there were no fire-arms on board of the Caroline, and to impeach the evidence of the prisoner's witnesses, who swore to the contrary.

COURT—It is already proved that they were unarmed. Is it part of your case, Mr. SPENCER, that the attacking party was fired on?

Mr. SPENCER—No, your honor; I object, however, in addition, that this is cumulative evidence. They attempt now, to produce new evidence. The learned gentlemen contended that the case for the prosecution had been shrouded in gloom contrary to all precedent.

Mr. JENKINS—Did the learned gentleman not give the editor of the Observer a list of the witnesses for the prosecution?

Mr. SPENCER—I took the names in pencel as they were called by the clerk on the first day.

The ATTORNEY GENERAL contended that it would not have been prudent at one time to disclose the witnesses. But subsequently, in the spirit of liberality, the names were given in exchange for those of the prisoner's witnesses. And it was extraordinary that counsel, after entrapping him (the Attorney General) should discover so little of generosity and magnanimity.

Mr. SPENCER said that Mr. Wood gave merely the names, without residences, or the subjects of their testimony, and very few of them had been produced on the trial.

The COURT hoped the acerbities exhibited by gentlemen would all be smoothed down before another week, and wished to know the Attorney General's object in producing this witness.

The ATTORNEY GENERAL—To prove the fact of their being unarmed on the Caroline.

The COURT excluded the evidence as cumulative.

Mr. SPENCER then read the testimony of Defield before the Justice in 1840, in which he said he never conversed with Mr. Morrison on the burning of the Caroline, until the night before the examination. That is, the examination before said Justice, in 1840.

Dr. Joseph Hamilton was next called to prove that Defield was not worthy of belief, and that Captain Morrison was.

Witness—I have known Defield since he was a boy. He had the reputation of being a quick, smart boy, but his reputation for truth and veracity is not good. I have known Lieutenant Morrison for several years—his character for truth and honesty is good.

Cross-examined by the ATTORNEY GENERAL—I live in Queenston. I am a native of Canada. I am not an associate of Mr. Morrison's, but I have been in the habit of doing business with him. He resides on his income. The business we do together is the sale to me of bills of exchange for his pay. Witness resides about four miles from Morrison's house. Had never heard Captain Morrison's character called in question for integrity; had for sobriety; never heard any thing else to his disadvantage. Defield has always lived in witness's vicinity. Can recollect a public instance in which his veracity was questioned. That was about his affidavit at Lewiston. That was not the first instance but it gave rise to a conversation about his character for truth.

By the COURT—Witness is sufficiently acquainted with the persons associated with Captain Morrison to know his reputation and standing.

Defield was a sergeant in the militia; he was not appointed as a lieutenant; saw him on duty as a sergeant before he deserted to Navy Island; knows that from affidavits, not from personal knowledge, of course, as he did not follow him; witness is a brother of the late Sheriff Hamilton; prisoner was his deputy; does not know that prisoner is liable to civil or criminal suits growing out of the connection; knows nothing of prisoner being called on by Sheriff Hamilton to disavow connection with the disaffected party in Canada.

By MR. SPENCER.—I am President of a Bank, and in that way negociate bills for Capt. Morrison. Capt. Morrison has been perfectly sober since he was at Lewiston as a witness—he was intoxicated then—has not been so since, to witness's knowledge.

John Macomber examined by the ATTORNEY GENERAL—I reside in Farmington; I am acquainted with Mr. Drown; I know nothing against his character for truth and veracity; I live about five miles from Mr. Drown; I know nothing as to the estimate of his character in the neighborhood where he lives.

Cross-examined by MR. SPENCER.—Witness is twenty-one years old, was not subpœnaed here, came on a visit to his brother; has seen Drown often, never heard his character for truth and veracity questioned.

Joseph Center was then recalled, and deposed that he was the agent who attended the execution of the Canadian Commissions; was present at the taking of Harris' evidence; he was prompted by the Commissioners; don't recollect more than one instance—that was in reference to the number of persons on the bank—and one of the Commissioners stated on that point what has been stated by a former witness—no direct reference was made—however—the Commissioner refused to take down the witness's answers to the thirteenth interrogatory—as to what part he had taken in the destruction of the Caroline—he said that he was the last man that left her—that he set her on fire—throwing two carcases into her; and the Commissioners refused to put his first answer in their minutes.

The ATTORNEY GENERAL proposed to show by this witness that the conduct of the Commissioners had been irregular in some points.

The COURT said if so, the Attorney General could take the matter before the Supreme Court, by motion to set aside the depositions.

Andrew Robinson was then called by the ATTORNEY GENERAL for the purpose of testifying as to the character of Defield—knew him for a number of years—never knew anything against his truth and veracity.

Cross-examined by MR. SPENCER.—Witness is the person who preferred the complaint against McLeod—had Defield summoned to testify against Morrison—might have told some one to go and talk to Morrison—don't recollect.

James M. Dyke, recalled—never heard Defield's character for veracity questioned.

Cross-examined.—Is a frontier man—has lived all along the frontier, at Niagara, at Queenston—and at the Falls—was a stage-agent—not exactly "a runner"—had charge of the line—was arrested by Mr. McLeod in Canada and allowed to go without bail.

The COURT.—Mr. Spencer, have you any other evidence?

MR. SPENCER.—No, your Honor.

The COURT then admonished the Jury of their duty during the Sabbath, when, unpleasant as it would be, they must remain together.

Mr. Mott one of the Jurors was allowed by consent of counsel to visit, under charge of a constable, a brother lying at the point of death.

Another Juror asked the privilege of absence in the same way; which was denied, as no such cause for his separation existed as in the other case.

Another Juror asked if the Jurors could go to meeting.

COURT.—Yes—certainly, go in a body, sit together and be attended by a constable

A constable was then sworn to attend Mr. Mott during his temporary separation from his fellow Jurors. The other members of the Jury were then given in charge of two constables and retired; and the Court adjourned till Monday morning.

MR. BRADLEY'S ADDRESS TO THE JURY.

May it please the Court:

GENTLEMEN OF THE JURY: This cause, which, more than any other ever brought before a jury, has involved interests higher than those of individuals—disturbed the tranquillity of the country and endangered the peace of nations, now approaches its close. After a year of intense excitement, breaking out in popular tumult, giving origin to high legislative debate, and angry discussion between governments, the trial has come, and the testimony is ended. To the prisoner, whose life and death have been in the issue, it is closed. To this country, too, whose repose this cause has shaken, whose honor it has involved, and whose armies and navies it has threatened to call forth to glory or disgrace, it has likewise closed. To another nation, also, it has closed, whose subject the prisoner is; whose office, his imputed offence is to have obeyed; a nation which avows the act charged upon him as a crime to have been a duty, and stands ready to vindicate the faith plighted by all governments, of protection to be given for obedience rendered, by the resources of an empire on whose dominions the sun never sets.

Knowing the immense interests at stake, interests not local or partial, but national; knowing the mighty preparations made to ensure a successful prosecution, and hearing the anticipated triumph which has been pealed through the land by those in feeling and motive arrayed against us, I now confess to you, that, a week ago, I sat down to the trial with a sinking heart, lest there might come an adverse verdict. But that hour has long since passed, those feelings long since subsided. Notwithstanding the great array of witnesses, notwithstanding the zeal and energy which have marked the case for the people from its commencement to the end, a zeal which nothing has yet occurred to cool, an energy which hardly law itself was of force to baffle, I say to you again, that I feel neither a sinking heart nor the slightest anxiety as to the result. With the signal failure of the prosecution to establish a case of guilt, all fear, all solicitude has disappeared. The defence still rests on a foundation which no skill can strengthen, no want of it impair—the foundation of unquestionable innocence.

It has been often said in your presence, said by the counsel for the people, said by the court, and we now say that the simple question for you to try is the fact of the prisoner's presence at Schlosser when the Caroline was burnt, aiding and abetting that enterprise. This is the sole inquiry; this the only issue. All evidence bearing upon this you will regard; all not bearing upon it, or throwing light upon the character, motives, and ability of the witnesses, you will, of course, leave out of view.

Now, it is a principle of law, with which you are doubtless all familiar, that in criminal cases, even the slightest and most unimportant, every doubt goes to the benefit of the accused. Preponderance against him is not enough to convict; proof must be full; it must be conclusive; it must exclude all reasonable question, annihilate all reasonable doubt. On proof short of this, the only verdict must be, not guilty.

Let us look now at the circumstances of the case; let us see how near the prosecution has approached to this clearness, this conclusiveness of

guilt. First comes the legal presumption of innocence, excluding all other presumptions, yielding to nothing but proof; nor even to *that*, unless it be of strength to render mistake absurd and want of guilt incredible. In the next place we have the testimony of those who avowedly were in the expedition, obtained in the only way in which evidence in a foreign country can be taken, by commission. Gentlemen, what stronger, what higher proof need we, can we have? In whichsoever boat he went, he was, if he went at all, one of nine men, crowded into a narrow compass, men who were hours together, who sat at each other's side, saw each other's faces, heard each other's voices, touched each other's hands and feet. Why is it that he was not seen, recognized, remembered? Yet you have the clear, direct oath made by a portion of every crew that he was not in their midst. Bear in mind, gentlemen, the story of the prosecution; for I now hold the Attorney-General to his own character of the prisoner. He tells you that the prisoner, beyond a general feeling to repel the invasion, took a deep, a special interest in the Caroline; went to Buffalo to watch her movements, ascertained her designs, returned to Chippewa and made report, circumnavigated the island to detect her arrival, and set on foot the expedition which ended in her destruction. If this be so, if his agency have been so active, his vigilance so sleepless, his influence in bringing about her doom so great, how is it that, known as he must have been to all, none were aware of his presence? He was the life and soul of the enterprise. By what miracle is it, then, that his companions deny his agency, disclaim his fellowship? Has not the prisoner some shield other than the legal presumption of innocence?

Undoubtedly, gentlemen, testimony taken by commission is inferior to oral. You see not the witnesses, hear them not; but is their evidence, therefore, of no weight? By depositions in writing alone, all the immense litigations in chancery are determined; and though such proof be sufficient to enable a defendant to guard his property, shall it be of no avail in protection of his life?

Throughout the trial, the learned Attorney-General has employed himself, perhaps subserved the necessities of his cause, with bitter invective against the commissioners; all have seen with how little truth or justice. The strength of virtue is learned by its trial; the commissions were nearly a fortnight in execution; vigilant counsel in behalf of the people was present; counsel not indifferent to the result of this trial; counsel watchful for misconduct, jealous of partiality, and not unlikely to be even restive under equal justice. Now, what misconduct has been detected? what partiality? what abuse? Simply that, whereas Harris stated he had cast into the vessel two ignited carcasses,* the commissioners returned that he "took a very active part in her destruction!" This variation, having not the weight of a feather in the cause, aiding nobody, harming nobody, is all, absolutely all that the scrutiny of this most suspicious of agents could detect in the answers to some thousand inquiries fit to be talked about, told of, or wondered at! Gentlemen, what higher proof of good conduct in the commissioners, proof that silences question, destroys the possibility of cavil, could be furnished? An eagerness to detect faults so signally baffled by their being none to detect, proves the depositions not only to have been well taken, but taken in a manner above reproach and beyond exception.

* An instrument of combustion used in war—a species of rocket.

One thing, gentlemen, please to bear in mind. The case against the prisoner is based upon confessions. The Attorney-General has said that he has openly proclaimed his participation in the offence, from the time it was committed up to the following autumn—a period of ten or eleven months. It was by order of Col. McNab, that the expedition was undertaken; and yet, to him, McLeod never admitted any agency in the transaction. Now, gentlemen, how did it, how could it occur that he was there engaged? For do not forget that, fresh from the enterprize, a list was made of all who had shared its dangers and transmitted to the Governor, but the prisoner's name was not returned. If the prisoner has proclaimed it on all occasions—at Chippewa, at the Falls, at Niagara—how is it that he has made no admission to his acquaintance? If to Quinby, Myers, and Wheaton, why not to McNab—to him who, of all others, could have given him effectual credit, transmitted his name to the Governor, and procured for him the reward of an enterprize which, the Attorney-General says, he was the earliest to plan, and the most efficient to execute.

But it has been said, and doubtless will be again, that the witnesses whose depositions have been read are accomplices, and therefore of impeached credit. Whether the fact of having been an accomplice be always an impeachment or not, I submit, depends very much on the circumstances in which he swears. If he come upon the stand and depose *against* his companions, there is an implied promise of pardon. That is the motive which goes in impeachment of his credit. If he convict his associate, he is himself placed beyond punishment. If it be in a capital case, then he is bribed to perjury by the love of life; and, therefore, he is interested; he is under an impulse more resistless than any, than all pecuniary considerations, can give. But see whether this motive exist here. The men who have thus deposed were not known to have been engaged in the enterprize. Had accident, or any other cause, cast them among us, their agency might have remained undiscovered, and themselves been free from danger, by being safe from detection. Now, however, they are just to the prisoner at the expense of safety. They swear to their own hurt. Their testimony may not only lead to their own detection, but be conclusive evidence of guilt on their trial—making conviction sure and acquittal impossible. Every motive would induce them to silence. They swear *against* their interest, and, on every principle of law, are entitled to full faith and credit.

But, gentlemen, allow me to look over the history of this case, and see whether the motives which led these men to Schlosser be such as to deprive them of all credit—of all belief with an American jury. It is well known to you—indeed it has been stated in almost every sentence of testimony given in the cause—that it had its origin in high national questions. Throughout both the Canadas discontent, deep-seated, had prevailed: whether the cause was right or wrong, is not for us to determine. With that, on this occasion, we have nothing to do. Resort was had to arms, but with no success to the insurgents. After the failure of the movement on Toronto, peace was restored. Of the insurgents, a few fled to the United States, and, after a fortnight, returned with such recruits as could be obtained, to Navy Island. Their object was war; and upon the character of this state of society, some little light is thrown by the testimony already in the cause. How furious and bloody it must ever be, you can imagine from the transactions at Schlosser, and but faintly imagine; for,

of the accumulated atrocities of a whole campaign, to what part would this little affair, horrid as it seems in the detail, be equal?

Over all the province uncertainty and alarm, the most poignant and intense, were felt. Had its yeomanry been as rife for revolt as this movement assumed, had they been ready to seize the musket and brand, no tongue can paint the horrors. A civil war, of all the most sanguinary, amid the snows and frosts of a Canadian winter, a brutal soldiery, and a peasantry soon to become more brutal still—barbarized by violence! Horrors, too, all in vain! For, of what avail? Two hundred and fifty thousand souls—giving the insurgents one half the population—what could they do against the other half, and all Britain beside! At the first relentings of spring—if they could have held out so long—the whole had vanished, as the tempest vanishes, leaving the sky clear, but desolation all around.

Avowedly to kindle such a war, so mad in its origin, so hopeless in its results, Navy Island was seized from the American shore, in part at least by American citizens, organized on American soil, and headed by an American leader. A strange spectacle this for a land of law, bound by treaties which itself had made! Why this interference with another state? Why these efforts to break a peace which it was the interest of all to keep, and to bring on a war which all had a like interest to shun? The answer, while it will disclose the interests which have fermented through the case against the prisoner, will carry us another step in its progress.

When the movement on Toronto, by the weakness of the insurgents, or the incapacity of their leaders, or by utter destitution of all just cause, had failed, then followed a general rush to our shores. Had they come as Emmet and Samson, or as their own Bidwell came, to find a home, to mingle with us and become of us, to embark in our vessel and share her destiny, they had been welcome. For such, our ports are wide, our arms open. Let them come, share our institutions, taste with us the enjoyments and endure with us the trials of our course. For such objects many *did* come, have sought a home and found it in a land of warm friendships and generous sympathies. Others, too, came, but with no such aims; they came not to reside, but to visit; not to share our fortunes, but to implicate us in theirs; not to enjoy our peace, but to persuade us to wage their war—such war as I have described! They spoke as in unmerited distress, and were heard with sympathy; they talked of freedom, a dear word to Americans; and this, generous hearts, unregulated by sound heads, thought they had the power to achieve, the courage to fight for, and the wisdom to preserve. With Great Britain we are at peace; hither they came for recruits, thus disregarding the law of nations. The enlistment of soldiers *here* for war abroad, was by statute a high misdemeanor. This, they caused our citizens to disregard—thus to the meanness of broken faith, adding the guilt of violated law. From the consequences of crime at home, we gave them a shelter; they repaid us by deluding our people and trampling our statutes. How this mixture of enthusiasm and crime resulted, we know. In vain the National Executive issued his proclamation, enforcing order and commanding peace. Along all the border the same high passions had risen. Public meetings were held, arms contributed, volunteers enlisted, cannon stolen, the arsenal at Batavia plundered; and law had no voice to rebuke, and no power to arrest the wild outbreak.

Through Schlosser the influence of all this was to be carried into Canada. Navy Island once occupied, the next step was to form a provisional government, the object being not an immediate descent, but to organize, to fortify the post, establish head-quarters, to give the revolutionary banner a chance at the sun, and then to await the expected uprising which it was the sole purpose of the movement to create and sustain. Gentlemen, I warn you against the error to which all men in contemplating past events are exposed. Time, it is true, has cleared the atmosphere; things have since taken their proper size and color. In the distinguished head of this frail sister of nations, we now behold only a pardoned convict; and in his military chief—a convict also, pardoned or otherwise—nothing else but a name, another has made illustrious by a gallant adventure on Canadian soil; and, with some few exceptions, in the men who swelled their ranks, nothing but the collected idleness, vice, and profligacy of the border—kindly named by the Attorney-General "the more reckless of our young men"—men whom nothing good could rally, nothing bad disperse. Such, after four years of sunlight on their character, we behold them now: not such were they then beheld. Bad, indeed, they were known to be; but this knowledge only deepened the terror their projects had created. If, even when guided by the wisdom and purified by the virtues of Washington, aided by the self-restraint of a whole land, our revolution was traced in blood and ruin, what must have been a war in Canada, conducted by such leaders, backed by such a soldiery?

Gentlemen, standing here on this solemn occasion, speaking to interests which touch this country, not only, but reach beyond the Atlantic, and accountable for what I utter, not to man, but to Him alone whose justice we are attempting to administer, I am not at liberty to employ other than the language of truth. I say, then, that in a country which has Plattsburgh and New Orleans on its map, none can say, none shall dare say, that resistance to invasion, of whatever kind, incited by whatever motive, is aught but the highest virtue. To come to the rescue, to meet the foe on the beach, and to keep the soil stainless of hostile tread, is a holy call uttered in all lands and pealing to all hearts, and loudest to the noblest. At this call came forth those assembled at Chippewa; and such as in like circumstances we should have gone—such they came. Not the squadron, well-equipped and trained to the field; not the close column, stout as rock to the assault, and though liable to fall, yet falling where they met the foe, sure to remain a rampart still. Such were not at hand; but men, stepping out of the common walks of life, on business which, as the evidence has so often told you, brought all other business to a pause. The artisan from the shop, the merchant from the store, the sheriff quitting his writs, and the legislator the council-chamber, all undisciplined, but all true, each, like Young Gilkinson, seeking some, but as yet unknowing what, way to make his right arm felt in the general cause. Thousands of such, twenty-seven years ago, were seen rushing along the Green Hills of Vermont, soon to return chagrined and mortified that the foe was already routed, they having no chance in the fight, no share in the glory.

But mark the contrast! those boys of the mountain, in their march to the field, left behind a people of steadfast faith: no danger that the foe in front would be aided by a deadlier foe in the rear. In that direction all was

safe. Not so in Canada. It is the curse of civil strife, that none know in whom to confide. All hearts become haunts of suspicion and dread. He who smiles with you now, may, an hour hence, be your assassin. He who yesterday partook of the hospitality of your board, may, to-night, riot in the destruction of your dwelling. Such was the state of society these men left behind. From Navy Island had gone forth a proclamation, invoking revolt, offering a reward for the governor's head, and promising, as a stimulus to treason, a distribution of the public domain. Such were the incitements to revolt; and it might come, come any moment, but come only to be marked by desolation and crushed in blood.

The island, though far from impregnable, was yet difficult to assail, standing in a current of six miles an hour, guarded by twelve cannon, occupied by a force of hundreds and supported from the United States in the rear, with all that private contribution and plunder from the public could furnish. A regular siege was therefore begun, and pressed with such energy and skill as were at command. Cut off from the Canadian main, the whole strength of the post lay in the passage to the American shore. While that was open, the island was invincible by its undisciplined enemy; the moment it was closed, dispersion or starvation became inevitable. Hither, then, all attention was directed; and the Caroline appeared, not on a transient call, but for permanent employment, after negotiation and with a definite object. I know that Wells has sought to give this adventure the character of a private enterprise, undertaken for mere gain. Be it so. The danger arising from it to the Canadians was the same as if the vessel had been owned by the islanders. All *they* could have used her for had been to convey to them arms, and provisions, and munitions of war, and fresh accessions of strength. And all this she performed. Whether owned by Wells or Van Rensselaer, was all the same. She took the character of the enterprise she aided. For, "if I lay siege to a place," says Vattel, 339, "I have a right to TREAT AS ENEMIES all who attempt to enter it, or carry any thing to the besieged without my leave." Wells, then, and his vessel and her crew, were to be treated as enemies, embarked in one and the same cause with Van Rensselaer, taking the same risks, assuming the same responsibilities, and exposed to the same retributions.

A private enterprise! What but such was that of any man on the island? By what *public* authority were *they* acting? Under that of the United States?—that gathering was hostile; we at peace. Under that of Canada?—but she was resisting them as bandits, rebels, pirates. What was Van Rensselaer's but a private enterprise? what George Howel's? what Sutherland's? what any man's? What was the whole undertaking but a combination of private enterprises, acknowledged by no government, sanctioned by no law? A partnership of individuals, each contributing something to the capital stock, to be recompensed by an equivalent in the dividends. Howel giving his militia colonel's commission for a regiment; Sutherland his lawyer's profession, such as it was, for a brigade; Van Rensselaer, his uncle's name for the chief command; and Wells, his steamboat for passengers' fare!—each promoting the common object for private ends, some seeking profit, some honor, but all impatient for the dawn of that auspicious morn when they should no longer be pensioners on the bounty of the American border, but be transferred to the Canadian main, there to subsist on—what? Without property, without supplies,

having no treasury, no credit, no clothing for a winter campaign, on what *could* they subsist? how be fed, how clad, how paid, but by plunder and rapine? How be sheltered, but by ejecting from their dwellings the inhabitants in mid-winter? Besides these, they had, could have, no hope; without these, instant death, not by the people invaded, but death by cold, death by hunger, awaited them.

Such is the cause which the Attorney-General has sought to dignify by allusion to the great and good of a day that is past! So the time has come, has it, gentlemen, when the raked-up ruffianage of two frontiers, banded for robbery, receivers of stolen arms, dealing out murder with weapons taken from an arsenal which a burglary had opened, can suggest to our HIGHEST VINDICATOR OF BROKEN LAW nothing more appropriate than the Greek and American revolutions—the one ennobled by the genius of Byron, the other by the self-devotion of La Fayette? Gentlemen, it is forgetting what human nature is—what the love of kindred and home is—what the love of country is, to suppose the Canadians to look calmly on and behold all these horrors in deliberate and systematic preparation, and yet feel no desire to arrest their progress. Over all the broad surface of the globe, not one spot is to be found where man is so degenerate as not to stand fast at the call of such a duty. What other lesson is taught in our own forests, west or south, by the whoop from the thicket or everglade? Touch with hostile foot one worthless sand of Arabia, and the careering steeds and flashing cimeters which gird the land round, will tell that those deserts have homes, and that the rude dwellers there are men. The earth over, in civilized life or rude, wherever man breathes and a foe dare approach, nature has but one impulse, man one voice: "From HIM who spread out that broad arch above and this wide surface beneath came this scant substance, this home, and these little ones—all I have, and all I hope, and by that high title I will defend them." And Him I pray that, whatever else may befall, whatever other calamity be in store, to this high emotion the first rebuke be never administered by an American jury, holding that those who came forth for their country at such a time and against such a foe, are for *that*, and for no other cause, unworthy of belief under oath.

I do not apologize for their entrance of our territory—no need to do so; but I do say their end was good, their motive holy. The enemy they sought they had a right to strike. The error was in crossing a line no eye ever saw, no compass ever ran. They may have erred and mistook the law, as the President and his cabinet have, it seems, mistaken it—as our wisest jurists, as Great Britain herself, as the enlightened public opinion of all Europe mistakes it still. No time to consult Grotius had those men. They were to *act*, act on the instant. For, keep in view all the while that these operations, not only on the island, but on our whole frontier, had as their basis that the materials for a wide-spread insurrection existed in the province. It was this that the whole excitement rested upon. That such materials existed, there was evidence. If this evidence were true, and no human being at the time detected its falsity, every hour of delay at Chippewa was an hour of aggravated danger. If it were true, every trip made by the Caroline across those waters hastened the catastrophe. Something, therefore, needed to be done; something without delay; something to close that passage; something to dash the rising revolt, if revolt had begun to rise. Such was the need, such the motives to the attack at Schlosser.

Impeached, then, are these men? Their credit, is it impaired? All I ask is, that their testimony may be received by you and credited as the depositions of other men would be received and credited. If you accord to them this degree of trust, how is the presence of the prisoner at Schlosser to be made out? What stronger proof of innocence than this could be hoped? Yet it is the least of our case. Still little as it is, it wholly repels the possibility of guilt.

But the prosecutors themselves have thrown their own case into doubt. Why did the prisoner, on quitting Davis's, leave word for his brother that he had gone to Niagara? What could have been the motive? Unquestionably, not concealment; for if there be no mistake, no falsehood, in the proof against him, he went openly with the crowd which assembled to see the expedition embark; nay, himself embarked in the very presence of the man with whom he had left the message. Why, too, did he order his horse? Surely this is not the usual way of passage from Chippewa to Schlosser. Surely there is no proof that the Caroline was attacked by any on horseback. Whither was the horse led? Where left? Certainly these are not badges of guilt, unless it be shown that they were used for deception. But this is *not* shown. Unexplained, they are proofs of innocence: yet unexplained they are. Is this nothing?

But we have still other helps from the people's case. To prove the object of the prisoner's visit to Buffalo, and for what end he went round the island, his own declarations have been offered. Undoubtedly they are evidence, but they must all be taken together. Made at the same time, they are all evidence, or none. What in them works for him is to be credited, as well as what against him. These declarations, then, show why his horse was called for, where he went, with whom he went, how long he staid, and when he returned. Is this nothing? Creates it no doubt? None? So much for the evidence of innocence given by the prosecution. Now for our own.

That winter Mr. Press was at Chippewa but once. The same evening he returned to his home in Niagara, eighteen miles distant, and the next morning heard for the first time that the Caroline was destroyed. Does not that fix the day? But he had been to Chippewa on business, received money, charged it to himself on his partnership books: there stands the charge now, entered the day the service was rendered, the 29th December; preceded by charges of the previous, followed by those of the subsequent day, all in the usual course of entry. Does not that fix the day? When at Chippewa, Mr. Press dined with Captain Stocking, visited with him the fortifications, and together saw the Caroline plying between the island and Schlosser, the first, last, and only time they ever beheld her. That night she took her blazing course down the rapids and over the cataract. Does not this fix the day? On that evening the prisoner accompanied Mr. Press to Stamford, six miles. This shows where he went, does it not? The night the Caroline was destroyed Colonel Cameron slept in Chippewa, and at nine in the morning carried to Stamford the intelligence of her destruction. From him Captain Morrison received the news, and communicated it to the prisoner in the presence of the whole family. This family, four in number, all testify that the prisoner took tea with them the evening before, remained up till past twelve o'clock, tarried all night, breakfasted with them in the morning, and left for Chippewa about ten. Need I allude to

Judge McLean, who met him returning? to young Gilkinson, who rode with him through Chippewa up to the head of Navy Island?

Gentlemen, can there be a possibility that the prisoner was at Schlosser? can the presence of a man at any place be more conclusively proved than McLeod's at Stamford? The whole ground is covered. Can any man, you, or you, prove where you were ten days ago by stronger evidence than this?

It has already been intimated, and will be openly said by the Attorney-General, that the defence of an *alibi* is suspicious, the resort of rogues, and should be regarded by a jury with great jealousy. Be as jealous as you please, gentlemen. Were you indicted for the same offence, what could your defence be, but an *alibi?* Bear in mind, that presence at Schlosser was crime; and being away, the only innocence. Now what defence could every innocent man on earth interpose save only that he was not present? And what is that but an *alibi?*

Thus we see the situation in which the prisoner stands; how he is fortified, first, by the presumption of innocence, and then by the testimony of those by whom the crime, as it is called, was committed; next by the witnesses for the people, showing that he called for his horse and left; and lastly, by his own, proving where he went, how long he tarried, and when he returned. Such, gentlemen, is the prisoner's defence, such the proof by which it is sustained.

Now, let us look at the prosecution, and see whether there be a reasonable doubt, not of guilt, for that is out of the question, but of innocence.

It was said by the Court before you were empannelled, that you have nothing to do with consequences. In one point of view this is true, in another, erroneous. If the prisoner be proved guilty, by testimony which excludes doubt, leaving no chance of innocence, coming from witnesses who have had fair opportunity to see and clear memories to retain the facts to which they depose, and of unimpeached veracity—if his guilt be established by such testimony, then it is true you have nothing to do with the consequences of conviction. It is your duty to give a verdict of guilty. Though from it war should come, though our commerce should be swept from the ocean, our frontiers be desolated, and the flames of war blaze up over all our land, your duty is a plain one. Should you falter, suffer yourselves to be brought off from duty even by your love of country, though all the nation might rise up and call you blessed, still you would commit a crime for which He whose justice you are administering, would at a future day call you to a terrible account.

But, though you may not swerve from duty by fear of consequences, you must weigh the credibility of witnesses. It is a humiliating truth, but still a truth, that human testimony is swayed by human desires. If war is to come from your verdict, then it is your duty to look whether the witnesses who have appeared one after another on the stand, did not come moved by the desire to produce this consequence. These same men, by whom Navy Island was seized, are still in our midst; nay, before us now, watching with deepest interest the progress of this cause. If three years ago war was an object, is it not so now? If Van Rensselaer were then a valuable acquisition, would not the commander-in-chief of our national army be one more valuable still? The motive exists yet stronger now than then. It is now almost a certainty that the conviction and execution of the prisoner would lead to hostility. Now is the last op-

portunity of those who have so long infested our border. Failing now, the chances are, that they fail forever. Perhaps those who have heretofore been deterred from their purposes by no fear of crime, may now falter at a quiet, unobtrusive perjury, easy to commit, impossible to punish, the rewards of which would be the gratification of hopes so long cherished, so often deferred. Whether they have thus faltered, is a question for you, and you alone, to determine.

Now, gentlemen, allow me to review hastily the testimony against the prisoner. The first witness is Drown; his evidence is important, *if true*. On that fatal night, when the destroyers of the Caroline were disembarking, the sky covered with clouds, no moon, no snow, no light of any description, this witness saw the prisoner at the distance of ten feet, no nearer, and recognized him. "Are you SURE it was McLeod?" said the Attorney-General. "As sure as that he sits *there!*" That statement shows what credit the witness deserves. At the distance of ten feet, and in such a night, could he have been as certain that the man he saw, if he saw any, was the prisoner, as he was, on the stand, at a shorter distance, by daylight, and with a full opportunity to distinguish every lineament of his countenance? On all these questions of identity, the severest scrutiny must be employed. How infinite the diversities of the human countenance! And yet how difficult it is to distinguish, at a short distance, the individual, unless the light be clear and the acquaintance intimate! The degree of light, we know; but what was the intimacy? Of the one, the residence was at Niagara; of the other, at Chippewa, eighteen miles asunder. Their occupations as unlike as their residence: the witness a teamster, the prisoner a deputy-sheriff; and they had never spoken together. And yet he dare swear that the man he saw in that darkness was as surely McLeod as the one he looked down upon from the stand! The last three nights of this trial have been, in darkness, in the lowering state of the atmosphere, the want of snow and moon, and in an occasional star beaming through some fissure in the clouds, like the one to which all this testimony relates. And did not the thought occur to every one of you—I know it did, as you left court at the late hours of adjournment—how utterly uncertain, how worse than uncertain, was all the testimony tending to show the prisoner at Chippewa and not at Stamford? This witness further deposed that on the ensuing morning, between daylight and sunrise, he saw on the stoop of Davis's tavern a man who, he was equally sure, was McLeod, five or six rods off; and on hearing that he had been wounded, went there to learn the extent; but the prisoner had vanished and could nowhere be found! Such evidence needed not the impeachment it has received from the evidence of Mr. Bates, that this witness had denied all knowledge implicating the prisoner with the transaction.

The next is the witness Parke. At the same hour of midnight darkness, and with no better opportunities of correct vision, he *saw* McLeod embark for Schlosser. Like Drown, too, he saw somebody at the same emphatic period between daylight and sunrise, at the same distance of five or six rods—not however on the tavern steps, but on the Public Square; and this somebody he of course took to be McLeod.

Gentlemen, than these recollections of time, long past, nothing can be more unsatisfactory, nothing more suspicious. All hours, all days, all years are respectively alike, and can be distinguished from each other only by events connected with them. By what magic is it, then, that the wit-

nesses are enabled to remember the precise hour of the exact day when they may have looked upon the prisoner? How has it happened that his bare presence has formed an era in so many lives? For any reason they have assigned, it might have been as well a month earlier or later, as at the exact minute assigned. Parke gives none; Hinman, none; Corson, none; nor Caswell; they are very accurate in seeing him in the evening, a little later than our proof of his departure, and a little earlier in the morning than our proof of his return. All right and proper, certainly, if it be true; but they assign no reason for us to believe it true—no cause for remembrance—none for the discrimination. They give us no assurance against mistake, unless the absence of every thing likely to fix recollection connected with the unwavering positiveness with which they swear to time, may justly assure us that though mistake be absent, yet perjury is present doing its office.

Now, allow me to examine Corson's testimony. Of him there can be but one opinion. He is detected in what he must have known to be a wilful and deliberate perjury. Of this there can be no question or mistake. He was called, you remember, to depose to that stereotyped confession repeated by every witness without the slightest variation. The time, between daylight and sunrise; the place, Davis's stoop; the language, "I have killed one d—d Yankee." On cross-examination, the usual test of safe recollection was applied: "Who were present?" He could recollect none at first, but on being pressed, he replied, "It strikes me Mr. Caswell was." My associate suspected Caswell to be a witness, and to that inquiry, Corson answered in the affirmative. "Have you conversed with him about this suit?" "No." You remember how it came out that on that very morning, before being sworn, he and Caswell had talked over together what their respective evidence was to be; both were to swear they saw the prisoner come from the bar-room at nine in the evening; both to his being on the stoop in the morning; both to that same murderous confession: "Now, sir, when did it first occur to you that Caswell was present?" "THIS MOMENT!" How is it, gentlemen, that when Caswell said that he was to swear to the same confession, uttered at the same time and in the same place, this witness never suspected him to have been present? If their tale be all concerted and all false, the absence of such a suspicion is easily understood. But then there would be perjury in swearing to Caswell's presence, and perjury, at all events, in denying all conversation with him; unless, indeed, there be charity enough to suppose that, although he may forget what passes in the morning, he can nevertheless remember with infallible accuracy conversations held four years ago, the 30th day of of next December, *between daylight and sunrise.*

This witness also disposes of Caswell; for, though *he* denies all communication with Corson, yet he swears to the same facts that Corson had stated he would, thus convicting himself and unfolding the turpitude of both. These two witnesses, therefore, annihilate each other by entangling themselves in the same net of falsehood they had spread for the prisoner.

A remarkable place in your attention is deserved by the witness Meyers. Other confessions may have been dropped unawares, at least without due consideration of their importance; but *this* has a pageantry smacking of the sublime. It was at the Falls, ten days after the destruction of the Caroline—sixty persons in the room, mostly soldiers. All is deep silence. Suddenly, some one makes proclamation, "Where is the man that shot Amos Durfee?"

Forth steps the prisoner, draws a horseman's pistol from within the breast of his coat, and responds: "I'm the man, and this the pistol that did it!" —then puts back that murderous engine, and pulls out a sword with six inches of blood on the point, and continues, "That is Yankee blood!"— prefixing to the "Yankee," with due loyalty, the epithet *damned*, and then puts back his sword. Here the pageant ends; but not the testimony of this witness. How he discovered the prisoner's name should not be forgotten. The witness, you will remember, got into some difficulty at the stable, and had well nigh been arrested. After a parley, one of the soldiers said to the prisoner, "Alexander McLeod, is it best to let him go?" But he had before stated that McLeod was called Sandy as well as Alexander. His honor took up the question, and desired the form of expression in which that name also occurred. It was thus: "Sandy McLeod, let us go in and take something!" Such is the marvellous testimony of this witness—stupid in mind, stupid in feature, more stupid yet in his ridiculous falsehoods. Is the story thus told entitled to any thing but contempt? Is it not trifling with the solemnity of the court, with human life, to introduce evidence so utterly without pretence of truth? A horseman's pistol carried in this way! Human blood so carefully hoarded! The whole name thus unaccountably used in familiar conversation! All this, too, told by a wretch too besotted to have been able to repeat the story had it actually occurred.

These are circumstances, gentlemen, by which perjury may always be detected. This offence is nothing new on the earth: it is easily committed, always hard to discover. It has, therefore, long received the attention of courts of justice and sages of the law; and from their examination certain rules, certain texts have been framed. One of almost invariable certainty is, that the witness who deposes to a transaction falsely, never places at the time or place men by whom he can be contradicted. The conversation will be described as either alone or in the presence of persons unknown, unless the witness, like Corson, place there some one equally false, by whom he expects to be backed. But there will be no other there to throw light on the transaction, to correct any mistake, or to repel the falsehood. This is the evidence, the uniform evidence, of perjury. Now, take this rule and apply it to every witness. In the morning after the destruction, the prisoner confesses to a room-full—nobody to be named but Anson, who proves it!—afterwards again, on the stoop, to a crowd; no names disclosed but those of Corson and Caswell!—again on the Chippewa Bridge, to a company of soldiers. Quinby knew the prisoner, and knew nobody else! In every instance there was no man by whom the falsehood could be detected!—never before so complete a demonstration of the force of that rule as this case furnishes. At the Falls, Meyers can recollect no one from the whole sixty; and at Niagara, the confession was too precious to be enjoyed by any one known or unknown except Wheaton. Throughout, whenever a confession has been proved, no man has been located near, of whom we could inquire, to detect the falsehood, or to punish the perjurer. The face of the prisoner can be remembered, but no other face!—his words, but the words of no other! Wilson is another illustration: nobody vouched but Raincock. Yet Raincock just as certainly heard that confession as the prisoner made it! The witness had the same recollection of the one as of the other. Why should he not? The admission made by the latter was

given in answer to an inquiry put by the former. And surely it was very right in the witness to remember both with equal certainty. The idea was one and indivisible. So far, this was an apparent exception; only apparent, for the witness was constrained to admit that Raincock had absconded! And when it came out afterwards that he had absconded to Europe months before the destruction of the Caroline, the idea, so entirely one and indivisible, certainly became divided. This witness has other vouchers of integrity as well as disinterestedness. He refused to answer whether he had harbored the infamous Lett; whether he had set on foot a military expedition against Canada, and whether he belonged to any secret society aiming to produce a rupture between this country and Great Britain. But he did admit that he had given two hundred dollars to aid the "patriot" cause.

Here is another witness whose story is to be assumed as false—false at the beginning, false at the conclusion, and false in all its details. I refer to Stevens. On the night of the destruction, he says he saw the prisoner embark, and the expedition start; not from the canal, but the beacon; not seven, but three boats, and no more; and not ascend the river a mile, but put right out of sight towards Schlosser. This testimony is valuable for no other purpose than to show that perjury is rife in the cause; but this is the boldest of all, for, in every respect, it contradicts the proof—the whole of it—given on both sides.

Next comes the distinguished Quinby. He has acquired reputation elsewhere as well as here. At the county-seat in Warren, twenty-six miles from his home, and after a residence of only three years, the vigor of his oath has gained for him a fame amounting to a proverb—"If a witness is wanted to swear RIGHT THROUGH, call Quinby," is the tribute there accorded by common consent to his virtues. But though his neighbors had not brought us the proverb, his conduct here, I submit, would have enabled us to have formed one of the same kind for ourselves. High as is the fame of his veracity, his intelligence seems to be much on a level with that of Meyers. The day before the expedition, he came to Chippewa with hay; could not tell to whom he sold it, nor how much, where weighed, or where delivered. Entered Davis's bar-room *at nine*, saw the prisoner come out—had seen him often before—could not tell where—nor why he remembered it now. Walked HOME two miles before ten, was back in the morning, "between daylight and sunrise," to get his pay, and heard the prisoner confess on Chippewa bridge, to a troop of Coburg soldiers. My associate asked; "Why did you leave home so early in the morning?" The miserable idiot thought he had taken wrong lodgings, and that to be back to Chippewa at the indispensable hour between daylight and sunrise, would be too quick an operation. He faltered. At length: "I DID NOT GO HOME!" "Not home! Where then?" "To Mr. Pettis'." Where's that?" "In Sodom"—about halfway home, where he had never stayed before or since. Then came the wretched story of going to the commissary's for his pay before sunrise, though he did not expect to find him in his office; and of his wanderings about, unpaid and unfed, unable to name one man he saw, or one word he heard, until he safely deposited himself at home about noon—every thing forgotten, save that one ineffaceable confession deeply graven in his memory, that the prisoner had slain a Yankee! The exigencies of the prosecution needed such a witness.

Quinby came, swore *right through*, and not only sustained his previous reputation, but won a fresh laurel to his brow.

Why need I allude to Wheaton? He too heard a confession. He had left his residence, thirty-five miles from Toronto, on business at Lockport; arrived in Niagara; went to the dock; heard the prisoner, whom he had never before seen, nor since, make a confession; used no effort to cross the river; changed his mind; went right back home again, able to give no just reason for the change; no account of the business he so unaccountably left untouched, making a journey to and fro of one hundred and forty miles for nothing. Why speak of Anson, the wandering journeyman? He too, just at break of day, in a room were no lights were burning, before an unknown audience, heard an unusual controversy, "which had done the greatest crime;" and heard too then and there the prisoner confess, brandishing a bloody pistol;—a piece of information which slumbered in his mind three years for lack of "a convenient opportunity to tell of it;" and was first communicated to the world on the day the witness rode eighteen miles express to make the prisoner's commitment by the examining magistrate sure.

Such, gentlemen, is the evidence on which you are called to find a verdict of guilty. Much of it consists in declarations. If the prisoner be as communicative as he is represented to be—if he be as anxious to have the world know his participation in the affair of the Caroline, as the Attorney-General would have us suppose, and as we have a right to believe, if the evidence be true, it is a little remarkable that a more full and detailed account of the transaction cannot be procured. These alleged confessions run through a period of eleven months. His agency, you have been told, was prominent, and certainly there can be no complaint of want of frankness in his communications. Men of this kind have acquaintances, and are apt to narrate the transactions in which they have engaged, commencing at the beginning and going along step by step. Who ever heard of a man engaged in an event of great interest, producing high and deep excitement on both sides of the frontier, repeating one single sentence at all times and places, and never entering more fully into the history? It is incredible; it never did, it never can happen; it violates every law of human nature, every impulse of human vanity. Especially so, in a transaction like this. It was a deed calculated to strike—it was done amid danger—the passage was in a swift current, almost on the slide of the rapids. Navy Island behind, the cataract below; one rod of sweep too much, to avoid the cannon of the former, had plunged the adventurers into the abyss of the latter. Rely upon it, if the prisoner be thus frank, and were engaged in the enterprise, there are men on both sides of the frontier to whom he has spoken; told the whole story, how he got up the expedition, in which boat, and with whom he went and returned. How happens it there is none of these details? And yet, who does not see, who not feel, how infinitely stronger one such full relation would be than all the loose and casual repetitions of one single sentence, chance-dropped, nobody knows where, nobody can tell why? "Of all kinds of evidence," says Starkie, "that of extrajudicial and casual observations, is the weakest and most unsatisfactory. The necessity for caution cannot be too strongly and emphatically impressed, when particular expressions are detailed in evidence, which were uttered at a remote distance of time. Such evidence is fabricated easily, contradicted with difficulty." Such is the lan-

guage of the law on the subject of these declarations. And this is the case, if ever one arose, where these solemn cautions should be regarded.

I have now gone over the case. By way of recapitulation, allow me to reverse the transaction—to place the murder in the parlor at Stamford, and the *alibi* on the Caroline at Schlosser. For in one or the other of these places the prisoner unquestionably was. Give the Attorney-General the proof, showing him at the former, the Morrisons conversing, supping, breakfasting with him; the *time* determined beyond question or cavil by their recollections not only, but by Press and his account book, by Stocking, McLean, Gilkinson, and Colonel Cameron. Add to this the depositions of the destroyers of the Caroline, denying that the prisoner was among them—witnesses all of clear intelligence and unsuspected integrity. Against proof so full, conclusive, overwhelming, what could avail the midnight visions and twilight fancies, and worse than questionable veracity of men like Drown, Corson, Caswell, Anson, Quinby, and Stevens? Could there be a doubt of guilt? If not, can there be a doubt of innocence now?

I leave the cause. Deep anxiety and alarm for the result of this trial have been felt, but are felt no longer. There is now no danger of war, none even of disturbed foreign relations. Your duty is as delightful as it is easy; in giving liberty to an innocent man, you give repose to your country. I anticipate a resolute acquittal, which shall satisfy not only the crowds assembled around—not only public justice, but your own consciences now and through life, and bear the scrutiny of the dread hour of final account.

MR. SPENCER'S ADDRESS TO THE JURY.

May it please the Court—

GENTLEMEN OF THE JURY: It is the first time in my life that I have ever risen, having in my charge an important trial or defence, when I felt that the remaining duty of counsel, after the evidence was disclosed, was entirely a work of supererogation; and the consciousness that it is so really oppresses me. It seems to enervate the whole system, that circumstances like these should thus attend me, and that I should be obliged to detain a jury whose patience has been largely drawn upon, by commenting on evidence, when, in my deliberate judgment, the evidence has already convinced the understanding of the jury; and their judgment is ripe to be pronounced. But in all this I may be mistaken. It is very possible that my convictions of the evidence of McLeod's innocence are stronger than are yours, or those of any other person who has not been so intimately acquainted with the whole history of this case as I have been. It is because I have no right to remit any exertions which shall lead to the development of truth, and establish the innocence of McLeod, and the securing of your verdict of acquittal, that I will even now attempt to draw further on your patience, and submit such considerations as deserve to be reflected on by you; such as the case calls for, such as the prisoner has a right to demand, and such as our state and our common country may reasonably expect of me. As I took occasion, gentlemen, to remark, in the opening of the defence, this case is one, as the evidence has now disclosed it to be, of greater importance than almost any other ever brought before an American bar for trial. Cases involving the lives of individuals have at all times sufficient interest to awaken the deepest emotions of the human heart; but when we consider that this is a case involving other interests far beyond the life and death of McLeod, no man having an American heart, beating in an American bosom, can fail to be alive to every consideration that shall lead him to a right conclusion; and equally as jurors and as American citizens, I invoke your attention while I proceed to submit such considerations as I shall address to you.

You, gentlemen, after all which shall be said to you on each side of this case, and after what his Honor the Judge shall feel it to be his duty to say to you in giving to you this case, will have charge of a great and responsible duty; on you the whole question finally devolves, and to you will the country look for a proper verdict; and to yourselves, to your own consciences, to our common country, and to our God, are you responsible for the verdict which you may give.

Your duty, until you come to your final deliberation, is that of a patient, attentive hearing, that you may rightly understand all that shall be said, and that you may properly appreciate all that shall be proved. Patience and attention are the first duties which you owe; and, afterward, a careful, deliberate, anxious, conscientious consid-

eration of what has been submitted to your hearing; and when you retire to the jury-room for deliberation, then will come the time when a responsibility, the first in importance, will devolve upon you; and it may probably be the last in the long life which you may live. Our duty, gentlemen, as counsel, is altogether of a different character; more perplexing, more exciting, more vexatious, more trying than yours, save perhaps the final responsibility to which a jury may be called, in returning a verdict in a case like this. I allude to this, gentlemen, only because some things have occurred in the progress of this trial which I should have been exceedingly gratified to have avoided. It is very natural — it is very proper — that counsel on either side should feel, in respect to the case committed to their charge. It is fit and proper that the learned counsel who conduct the prosecution for the government, should feel for the advancement of justice. It is natural that they should feel and believe the truth of the case which they spread before a jury; and, so believing, it is natural that they should disbelieve that set up for the prisoner. On the other hand, you will agree that it is equally natural and proper that the counsel for the accused, having bestowed that attention which their duty requires in the case, should have formed some opinion, or received some certain and firm conviction, upon which they believe they can rely in the question involved. That they should feel thus is proper; believing their own case to be the truth. This case, above all others, presents the alternative that they must believe everything on the other side to be utterly untrue and unfounded. Hence it will have been observed, in the progress of this trial, that there has been some little excitement of feeling; perhaps more than was necessary.

Gentlemen of the jury, I hope you will be spared all your lives from any such excited feelings as have existed on this trial. You may well desire to be strangers to the anxiety which counsel must feel in the preparation of such a case as this. You may not be acquainted with the sleepless nights, and the anxious days, which attend the preparation of a case like this; and I assure you, gentlemen, it would afford you anything but pleasure, unless it be the pleasure which all must feel in the advancement of justice, and in the protection of innocence. You may have observed, in the progress of this trial, in the examination of witnesses, that there seemed to be a want of kindness and charity toward those who have been called to sustain this prosecution; there may have been a rigor and a rigidity of examination to which, perhaps, witnesses should not be subjected who appear here in obedience to the mandate of the law. These are sentiments which will naturally arise in the minds of a jury; and under such circumstances, witnesses always have the sympathy of a jury. It is right and proper that it should be so; to that we do not object. When they seem to be treated with unkindness, with asperity, with rudeness, it is natural that the sympathy of the jury should be excited in behalf of the witnesses, and that prejudice should be excited against the counsel who resort to such a line of duty. But if any such sentiments as these have arisen in your minds, I ask you to find an apol-

ogy for counsel in the extraordinary case which has been presented for your consideration, and you will have less of sympathy for witnesses who have come to swear against the prisoner and to take away his life, than you would in other circumstances and on other occasions.

It is natural, gentlemen, too, that counsel for the prosecution should indulge in a firm belief, on the one hand, of the truth of a case the very opposite of ours, and that they should believe the evidence which they were to adduce to support and sustain the prosecution. They certainly did believe it, or they would not have been capable of introducing one single word of that evidence; and believing that, as they do, it is reasonable that they should manifest some degree of solicitude that it should stand forth unimpeached and uncontradicted, unless truth required it to be contradicted, and it was unworthy of belief by the jury who have finally to pass upon it. On the other hand, before I opened the defence in this case, I was not an entire stranger to its strength and merits; and it had not failed to work strongly on my mind a degree of conviction as to its truth, as strong as that entertained by the counsel for the prosecution. And feeling, as I did, that our cause was the cause of truth, what followed? Why, necessarily, that the case for the prosecution was the case of falsehood. Both cannot stand; and, in grappling for the mastery, one or the other must be overthrown; and your verdict must decide who, in this struggle, shall be overthrown, and who shall stand firm as the rock of ages—firm as truth itself—stand forth to the world sustained by the evidence upon which your verdict shall be founded. And believing, as I do, that ours is the cause of truth, I firmly believe that the cause of the prosecution is untrue; and I am sorry to say, that I firmly believe a large portion of it is not only untrue, which implies mistake and misapprehension, but I hope I shall not be suspected of a want of charity, when I say that I believe a large portion of the case is utterly false; and I desire the word to be understood in its legitimate and strongest sense. I believe it is sought to be upheld by a combination of the rankest perjury that was ever brought into a court of justice since the sun shone on Christendom.

This case, gentlemen, involves not only the life of a fellow-being, but the highest interests of two great nations, in the two hemispheres, which hold the first rank in all Christendom—one common people, speaking one common language; and the object of this prosecution is, to involve these two nations in a bloody war. Believing this—and I doubt the power of my learned adversaries, able as they are, to convince me that such is not the character of the prosecution, and that such are not the reasons and the motives for its being brought—I confess frankly, I felt little charity for those who sought to take the life of McLeod. Such must be my apology for any feeling which may have been exhibited in conducting this defence.

I took occasion, gentlemen of the jury, in opening this defence, to state to you that it would be twofold—the one founded entirely on the broad ground that the killing of Durfee was not murder in

any one—that, by the law of nations, in the exertion of the public force of a country, those acting in obedience to the command of their superiors, in the discharge of a duty which, from the circumstances of the case, seems to devolve upon them, are not subject to arraignment and trial as murderers, though the discharge of that duty be hostile in its nature, and calculated to destroy the life of a fellow-being. That defence, gentlemen of the jury, whether right or wrong—whether it would or would not have been entirely conclusive, if admitted—has, by the direction of the learned judge who presides over our deliberations, been excluded from our view. Of that judgment it becomes not me to complain; I feel no desire to complain in the progress of this trial.

If the learned judge has been mistaken in the decision which he has pronounced, in excluding testimony which we in this argument cannot introduce, he cannot be said to have been mistaken without having some authority in his favor; it cannot be said it is other than an error which has arisen out of the opinions of those whose opinions of the law is binding and obligatory upon the judge who presides over us. I take occasion to allude to this point merely to say, that with that decision of the learned judge here, I am not disappointed. I had known him before—I had been in his court before—I had known the habitual respect which he pays to the decisions of the Supreme Court of this State, and properly so. I have not, therefore, been disappointed, that his ruling has excluded this defence from your consideration. What then, gentlemen of the jury, remains? Are we without defence? As far as our Supreme Court have decided, though the Canadian territory had been invaded by a hostile army, which had established a provisional government, and issued a proclamation inviting our subjects and citizens to come to their standard; and although a large band of American citizens had rallied to this standard; though our arsenals had been rifled of their contents; and though the arms of our country had been gathered and collected—batteries erected and opened upon the Canadian main; yet, if the subjects of Canada thought fit to exert their power to overthrow this enemy, and in the exertion of that power dared to put their feet on our soil, they were trespassers; and if they dared to take the life of an American citizen, they were murderers. Although, I say, the Supreme Court of the State of New York have thus decided, have they swept from our possession every defence which can be relied upon for the safe deliverance of McLeod from the bonds which he now endures? No, gentlemen, there is yet another remaining; and it only remains for me to say on this branch of the subject—and I desire it to be understood as well here as everywhere else—that I have no belief, no confidence, in the doctrine of the Supreme Court which have been promulgated in this case. I shall respect it—I shall abide by it—and I shall abide the decision of his honor here; but, if needs be, I have taken the precaution to be able to review the decision of his honor here, and to secure the right which will enable me to review the decision of the Supreme Court elsewhere, so that, in the event of McLeod's conviction, if the Supreme Court have been

mistaken—if that decision should not be in accordance with the law of the land, it may be reversed, and that established which I believe to be the law of the land—namely, that where there was such a war being carried on, between the British Government and those who waged it on our side of the waters, the British Government might properly exert its power to put down that war, and that those who acted in obedience to the orders of that government, discharged their duty as faithful subjects and citizens, and are not murderers.

I desire it to be understood here, in this court-house, and by this audience, as well as in this nation, and throughout Christendom—for our doings interest all Christendom—that I do, with all due respect to the Supreme Court of the State of New York, as a member of the bar of the State of New York, protest against the doctrine which has been promulgated as the law of the land. It is not the law of nations—it is not the law of reason—and I, for one, never will submit to it so long as it may be necessary to contend against it for the safety of McLeod. On this trial I submit to it—I will abide by it;—I will submit, so far as this trial is concerned, without complaint and without murmur; and I only now refer to that doctrine of the Supreme Court of the State, to express my regret that it should be sent forth as a doctrine springing out of the law of nations, as belligerents in the affairs of war. The remaining ground of defence is that to which I secondly alluded on opening our defence to you. It is one of common occurrence, and may as naturally arise in a case of murder as in any other. Sometimes the books say it is a defence of some suspicion. And we will see what suspicions rest upon this part of the case, before we close the remarks which we have proposed to submit to your consideration. And the books also say, when it is established, it is perfectly conclusive.

His honor has listened, I doubt not, to this portion of the evidence with all the attention and solicitude which his duty calls upon him to bestow; and this portion of the defence his honor will tell you you must alone regard, and he will take pains to exclude from your minds any consideration which can influence your verdict, growing out of the law of nations. Of that I shall make no complaint. When you advance to the question as to the truth of the alibi, for, as the opinion of the Supreme Court is understood by his honor, it becomes his duty to charge you not to look at the law of nations at all,—you will look beyond that, and inquire carefully and seek diligently for the truth as it shall exist in other portions of the defence; and when you have found it, you, gentlemen, will embrace it—yes, gentlemen, you will embrace the truth in this case as a treasure, and regard it as apples of gold in pictures of silver; for, if ever it were desirable that truth should be found, it is now,—that you may know where your duty lies.

The true question for your determination is, where was the prisoner at the bar on the night of the 29th of December, 1837? If, as it has been proved on the part of the prosecution, he was at Chippewa, after we took him from there—if he made a portion of the

attacking party—if he was one who boarded the Caroline at the dead hour of midnight—though his hand dealt not the death-blow, or the pistol which he held sent not forth the deadly bullet—yet, if Durfee received his death, it is murder, and all those who were engaged in the enterprise are implicated. You are to inquire where, in reality, was McLeod at that time? Had he the honor or the disgrace to be engaged in that expedition? If he had, then, under the law, as applied to this case, I confess it will be your duty to find a verdict of guilty. When I make this confession, I must be understood as referring to the law as it has been laid down and established by one of the higher tribunals of the State with reference to this case, but not as I believe it exists in the firm and unshaken principles of the law of nations. This case, gentlemen, presents some features of great peculiarity, to which allusion should be made, and which you should fully understand and properly appreciate.

It is, that, from the beginning, as I have before had occasion to mention, long before the trial commenced, nay, nearly a year ago the main features of our defence, with nearly every attending circumstance were fully and perfectly known to the counsel for the prosecution; not indeed to the learned gentleman who now has it in charge, but to the Counsel for the people.

And further, gentlemen, long since—a month ago, or nearly a month ago—our defence as far as respects the evidence which we have produced from witnesses in Canada—so far as respects our evidence taken by commission, was fully and perfectly known—although generally speaking such evidence should be known to ourselves only; in cases of a high criminal nature especially. Yet have we been driven to exhibit to the world as well as to the counsel for the prosecution, long ago, almost every word of that evidence—almost every word of our defence disclosing every minute lineament of our defence as it has been spread out before you. These depositions were in the hands of our learned adversaries days and days before their witnesses were produced upon the stand here to be sworn; and every word of those depositions had been read, (or else our learned adversaries have failed to do their duty, which we do not charge upon them in this instance,) and what has been the result?

Every one of those witnesses produced on the part of the government has had conferences with the learned counsel day after day, and night after night; and they have had these conferences with others also; with the counsel it was no more than was fit and proper, to be sure it was the business of counsel to have a previous examination of witnesses: and if they had brought them forward without first ascertaining what their witnesses would prove, I should have no hesitation in saying that they were guilty of a dereliction of duty, but I have no such belief.—If I had brought forward witnesses without knowing what they would testify, I would blush at the omission of an important duty. Neither of us I trust have omitted that portion of our duty. This becomes a high responsibility of counsel in trials of this character and importance; but I

allude, gentlemen of the jury, to the fact that the witnesses for the prosecution have been conversed with by other persons than their counsel; I am well convinced of this fact.

This trial has not gone forward without having eyes open to see abroad, without having ears open to hear; and I have reason to believe that there have been what may be called committee-rooms in this city, where those witnesses have congregated, and where they have had read to them, if unable to read themselves, from time to time, a report of the evidence which had been given in the case, and where they have had their minds prepared for the part which they themselves were about to take in the case. And you may be assured there was not one of those witnesses who had not a full knowledge of everything material in the depositions from Canada. I do not believe that the Attorney General or any one in this city has done it, but do you suppose that the learned Attorney General for the State of New York, that the District Attorney for the county of Niagara; that the District Attorney for the county of Oneida, and the learned counsel from Buffalo, who was himself one of the committee of vigilance—do you suppose that these are the only persons engaged as counsel to uphold this prosecution—do you suppose that they are the only four engaged in upholding this prosecution? If you do I desire that such a misconception should be removed from your minds. These four gentlemen, learned, able, and eloquent as they are, are but the corporal's guard of the army of conductors of the prosecution, which spreads itself from one of the frontier to the other.

Generals, colonels, captains, soldiers, all have lent their aid here and their missives have been sent forth in all directions.—The post-office department has been made subservient to their purposes; secret communications have been successfully kept up, and no effort has been left unexerted which was calculated to secure the conviction of McLeod—and for what? Not, certainly, that they desire the blood of an innocent man should be shed on the scaffold, but that the two countries should be involved in war, and that these persons who cannot on account of their offences return to their own country, may by that means be enabled again to enter Canada, though not as the vanguard, yet as the rearguard of an American army, for the purpose of wresting it from British dominion.

How does it happen, if this be not true, that fresh witnesses spring up on all sides like hydras, gathering fresh strength as the cause proceeds? I do not speak without authority; for after the evidence was closed, and the learned Attorney for the District of Niagara was about to leave, I desired him, in all frankness, to declare what witnesses, who appeared on this trial, ever appeared on any former occasion, when the case was under examination. And he was compelled to acknowledge that they were exceedingly few compared with the whole number. How then, gentlemen, does it happen that in every successive movement of this trial, new witnesses spring up? if it be not that an army such as I have mentioned are at work—not for the purpose of eliciting truth, but of aggregating falsehood, till they add so much weight to falsehood itself as to

give it an overwhelming power to crush the truth in its onward progress.

Why, gentlemen, we have not been unmindful of who has been sworn on former occasions; there was in the first instance an examination before Squire Bell,—nay, I will go farther back, to the time when witnesses appeared before the grand jury of the county of Niagara, in 1838, shortly after the burning of the Caroline, to charge certain persons, residents of Canada, with the offence. We have been furnished with a copy of the testimony on that occasion. There was also an examination before Judge Bowen of the county of Niagara. You have heard, I dare say, gentlemen, of these examinations, and of the names of the five witnesses who gave testimony on those occasions. But here, gentlemen, we have had a cloud of witnesses—thirty-three have been examined on this trial—and in the nature of their testimony there has been a great and radical change. And think you that these thirty-three who have been examined on the part of the government compose the whole army? Why, gentlemen, there is a *corps de reserve*, which far outnumbers all who have been brought forward into immediate action in the fighting of this battle. This intelligence came to our knowledge long ago, it was legitimately within our possession, and we have come up to it in our preparation, although our learned adversaries never condescended to declare to us who their witnesses were.

The learned counsel for the prosecution have withheld all knowledge of what witnesses were before the grand jury at Niagara.

The ATTORNEY GENERAL—I am sure the learned counsel does not mean to represent that the names of our witnesses were withheld from him. The names of those who were sworn before the grand jury were communicated to Mr. Bradley.

Mr. SPENCER—Yes, they were communicated at a very late day to Mr. Bradley. The complaint is, that few of the witnesses produced here are those of whom we have any knowledge.

Upon those examinations before Squire Bell and Judge Bowen, were the principal witnesses to prove the alibi. They were examined and though not so fully nor so carefully, as in a court of justice, still, they gave the leading features of the case as it exists on our side, and so strong was the evidence before Judge Bowen, showing that McLeod had no participation in the affair, that he determined to release him on his recognizance for his appearance. But as it happens in that district of the country, an appeal lies from a judicial officer to a popular assembly. Thank heaven, we have no evidence that such an appeal will be brought here, or if brought, that it will be entertained. No artillery or martial music, will be brought here—no artillery, will be planted in front of the prison-door to coerce us in our decision—no midnight mob assembled to the notes of martial music, has the power to exert an influence over our deliberations!

You have an easier duty to perform than had Judge Bowen on that occasion. You will have it in your power to open the prison-doors, and set the captive free; if in your deliberate judgments, you determine that justice requires that you should do so, without fear

of popular tumult: and it is your duty—justice requires it, without the fear of outrage from the populace assembled for the purpose of murder and rapine. You will be able to render your verdict as the result of your deliberate considerations—you will not feel yourselves called upon as did that high functionary, to apologise for the deliberate judgment which you have formed. No, gentlemen, Utica, Oneida, New York, America, itself, I hope, will be saved from another exhibition so disgraceful to our country and our laws.

Thus, gentlemen, you perceive that, from the beginning, the opposite counsel have been possessed of our whole case, and every witness has been well informed of it, and I challenge any man of ordinary capacity, to wink so hard as not to see that these witnesses have shaped and framed their testimony in conformity to the case.

They knew the exact time when our testimony takes McLeod from Chippewa, and returns him there; they knew full well the testimony which fills up the intermediate space from the moment when he left Chippewa, until he returned there again. And hence the whole strength of the prosecution has been brought to show that our testimony is false, and conjured up for the sake of saving the life of an individual; while on the other hand, the evidence on the part of the prosecution is true as holy writ. These witnesses from the ends of the earth, come like angels of heaven to speak the truth, as if the light of heaven was, by their voices, to be reflected upon the case before you, and you are not to doubt that it is all true. If so, take it, and give your verdict, and answer to your country for the consequences.

But if I do not mistake the evidence, and my own feeble powers in unravelling evidence, I shall be able to show you that it has been made up of the blackest perjury that was ever brought to bear upon a trial. Indulge me, gentlemen, in another channel of remark, before I come to the unpleasant duty of examining these witnesses one by one. It is, gentlemen—and it is not the first time that I have said it—that there can be no truth whatever in the one side or the other of this case. It presents a singular instance that it is impossible for human ingenuity to reconcile that both are true, or both may be believed to be true, so as to furnish an apology for witnesses who have been brought to sustain one side or the other—it is impossible.

To Him alone who gave us our existence, can be ascribed the attribute of ubiquity. While tabernacled in clay, we are limited to a single spot at the same instant of time. No man is able, while thus living, to be at Chippewa and at Stamford at the same moment. McLeod was not at Stamford at all, if he had the slightest participation in the destruction of the Caroline, or in taking the life of Durfee. He was not at Chippewa on the night of the 29th of December, 1837, if he were at Stamford, as we maintain he was. It follows, therefore, gentlemen of the jury, that, painful as must be the duty, you cannot escape its discharge; you must find that either the one side or the other of the evidence which has been adduced before you is utterly false—a sheer fabrication, got up to answer the purposes of the present trial. Now, gentlemen, allow

me to ask what motive could there be, for the witnesses on the part of the defence, to come forward and fabricate falsehoods, while, on the other hand, you have seen exhibited in those witnesses, again and again, motives strong in death, to give success to this prosecution, that their own darling object of involving our country in a war with Great Britain may be accomplished. I charge it upon them unhesitatingly. With few exceptions, if any, I believe, most solemnly, that they are every one of them engaged in the enterprise which by many has been called the patriot enterprise, which has been undertaken to get up a war and carry it into Canada. All their witnesses are of this character and description; if there are any exceptions they do not occur to me at this moment. Many of them are members of those secret lodges, of whose objects and purposes we are ignorant. And I am not addressing men who can inform me of their objects. They themselves know, and they keep the secrets, except so far as their public exhibitions disclose them. Bound by frightful oaths to act in concert for the accomplishment of that which they dare not disclose, for fear of being subjected to punishment by the laws, they certainly cannot complain of us if we judge of them by their fruits. And what are those fruits? In the first place, the contribution of money, which is the sinew of war, to carry on their unholy purposes; next, the contribution of personal services, encountering danger, and cold, and hunger; also the contribution of food and raiment, munitions of war—every species of material necessary to carry on war against our neighbors.

All this has been done by these men who compose these secret societies. Can you desire to have stronger evidence than the very secrecy of their proceedings. These men dare not give publicity to their doings; but they are kept a profound secret, under the sanction of an unholy oath. Does virtue, truth, and true honesty and patriotism, require this: that a man's motives should be buried in the dark, or locked up in impenetrable obscurity? No, gentlemen; virtue and honesty need no concealment. A virtuous action may be performed, without putting him who performed it to the blush—without exciting one uneasy moment. But these men take the witness-stand, and on their oaths declare that they dare not confess the nature of their society's oaths, for fear it should expose them to a criminal prosecution; and yet they expect to obtain credence from an intelligent jury! Tell it not in Gath; publish it not in the streets of Askelon!

No such thing will ever find belief in the honest heart of an intelligent man. These men, gentlemen, who have, by their oaths and associations, given protection and security to a notorious felon who, after conviction, had escaped from punishment before he reached the state-prison, take the stand and declare that they dare not confess it, and yet come into a court of justice, and ask you to believe their story. Yes, the witness Wilson, who kept the ferry, not across the river Styx, but across the Niagara, and who managed, not Charon's boats, but his own, could give free passage to the felon Lett, that he might burn and destroy the property of the peaceable inhabitants; that he might murder the lamented Usher;

that he might destroy the monument of Sir Isaac Brock; that he might set fire to steamboats, and destroy the lives of innocent persons. But alas! that celebrated captain-general in the army of the prosecution has been lost to them, and they have bitterly felt the sting of their mortification. These are the witnesses; these are the constituent parts of that gallant and virtuous combination of heroes, who come forward to take away the life of an innocent man, thinking to claim belief from an intelligent jury. I am, gentlemen of the jury, really at a loss to determine what I ought to do with respect to the duty which I owe to this cause and to you. Ordinarily, I should feel called upon to enter minutely into the evidence which has been given to uphold the prosecution. But so much time has been consumed—so many draughts have been made upon your patience, that I hardly dare enter into the thankless office of commenting on the evidence of the witnesses seriatim. But not being able, gentlemen, to discover, among you twelve, though some of you are well known to me, any window which opens a view to your hearts, and as long as there is a shadow of a possibility that you are not fully satisfied, I shall feel compelled to proceed, that no shadow of doubt may remain.

I will promise you as much brevity as I am able, in examining a few witnesses, until I come to those who connect McLeod with the transaction. I shall dispose of the whole at a glance, who were connected with the steamboat at the time of its destruction. It is enough, in thus glancing, to say that they came here with no intention to disclose fully and fairly the whole truth.

Take the first witness, Wells: Did he come here with an honest intention, and freely and frankly give you the honest truth, the whole truth, and nothing but the truth? Upon his direct examination, it appeared that his only purpose, in fitting out his boat, was for the sake of private gain, giving a little scope to the enterprise which naturally distinguishes an eastern man—an enterprise undertaken for his own individual emolument.

Such, gentlemen, was the plausible appearance of this witness's testimony on his direct examination. Was this true, or was it false? You saw with what reluctance he admitted one fact after another in his cross-examination. He started from Buffalo with this steamer, of which he was the owner, his crew consisting of a negro and a boy, and so exceedingly enamored was he of the movement of the machinery, that he stood gazing in silence; and it is surprising that he had not, while beholding with such intense interest the wonderful operations of the engine, been converted into a statue, or like Lot's wife, into a pillar of salt. Before he left the stand, a few facts leaked out, like rain-drops after a long drought, and those facts were quite sufficient to overthrow the whole of his direct testimony. He stands utterly impeached and convicted of direct perjury.

When a man takes an oath, he swears that he will tell the whole truth; and when his direct examination closed, he had not told the hundredth part of the material truth. Because, first when he stated that his resolution was to carry passengers and freight, he intended

to communicate the idea to the jury that ordinary freight and passengers were meant. But did he mean that? if he did, then the whole of his testimony is as false as the Koran; if he did not mean that, he was guilty of a prevarication which should discredit his whole testimony. Either way he is upon the horns of a dilemma. But it came out that he had carried upward of one hundred armed men—[where was the evidence of that? said the Attorney-General]—and it turns out, also, that before he brought his steamboat into the employment at all, he went to the Island, saw General Van Rensselaer, Colonel McKenzie, &c., and the result was, the fitting out the boat for the service of the Navy Islanders; and he was, besides, referred to the executive committee, composed of thirteen, which is spoken of as having a commissary, secretary, and chairman, in Buffalo; to these he was referred to conclude the details of the arrangements. In the early part of the examination he knew nothing of a bond of indemnity; but it ultimately turned out that there was to be a bond signed by twenty of the executive committee, and it was at last actually signed by five of them. What was the intention of this bond? To indemnify Mr. Wells for the expense of cutting out and repairing his boat, and against all risks to which his employment in the service of the brigands would expose him. This was the bond which should have been furnished by this committee of safety, who had the honor of being commissioners between the Islanders and this contracting party. This is their first witness. Let him be taken as a specimen of the whole; and see if you cannot discover reasons and motives enough, on the part of those on board the boat, for describing their dangers and perils with a little more coloring than the truth would warrant.

I will pass over a few of the succeeding witnesses, and will examine with a little minuteness, though it has already been done with much ability by my learned associate, the evidence of those witnesses who connect this affair with the killing of Durfee. And that there may be no confusion in the matter, we will take them up as they were called; and while considering this, we will show that every one of these witnesses knew perfectly well all the purposes of the enterprise. Let us examine and see how their testimony reads. Mr. Spencer here recapitulated the evidence of Philo Smith, of Caswell, and of Corson, and added, all these witnesses have been acting in concert. One of these was the witness who put the anxious question to the other, "Will the evidence taken by commission overthrow that taken upon the stand?" The bar-tender of Smith says, he "saw McLeod only once that evening, and that was at the place where the rails were burning. After the Caroline was on fire he saw two or three boats come into the cut, and having some friends in the boats, he ran down to the mill where the three boats landed."

Now mark, gentlemen, three boats came in—three landed; he had some acquaintances on board, you recollect, and he came within eight or ten feet, where he saw that McLeod was one of them. From there he went to Davis's tavern with the party, and the witness then says, they were debating in front of the tavern whether

they would go in and take something to drink. But all this time he had not broken silence; and then we have the singular fact of the soldiers' saying, "No, we'll not go in here, we have our bartender with us; we will go back and have something at Philo Smith's."

These three or four or five soldiers then separated from their party, and went home with the witness to take something to drink. But the witness does not stop here. Why not? I will give you the reason—first, because the darkness of the night would greatly weaken his statement, as there might have been a little doubt about identifying the prisoner. He goes on to say, that he saw McLeod the next morning about daylight, and speaks of his being wounded. Smith's tavern, he says, is on one side of the public square, and Davis' on the other, at six or eight rods distance. Witness looked out, he says, and saw McLeod across the square, and recognized him. But when he went over to speak to him he was gone, and could nowhere be found, although the witness sought him carefully (perhaps not with tears);—he did not afterward find him, or see him at all that morning. This Samuel Drown is the same man who, when he was summoned last winter to go to Lockport to give evidence, said he knew nothing which could beneficially affect either McLeod or the people, and for that reason refused to go. And now what is his evidence produced for,—to satisfy your minds that McLeod was at Chippewa—that he was in the boats which formed the expedition.

This is the same Drown who now tells you that he saw McLeod first by the light of the beacon; that he came within eight or ten feet of him at the boat; and in the darkness of midnight, and in the shade of those willow trees, his vision was such, that he asks you now to say upon oath that McLeod was the man he saw there, and that therefore you should hang him. He asks you to believe that he looked out in the gray of the morning and saw McLeod; and he wants you to believe, also, that he was not at Stamford, and not being there, that you should hang him, on the oath of this same Samuel Drown. Is this the testimony upon which to find a man guilty of a capital offence?

It is enough, if true, I will admit, and the Attorney General might have abandoned all other proof. But, gentlemen, we maintain that this Samuel Drown cannot command your belief. It is a singular fact, but so, by the eternal laws of our creation, will the fact always remain, that when a witness comes forward and commits a wilful perjury, he never covers the whole ground—never. He will always have some awkward feature in it, which might, by perjury, as well be supplied as not. A man committing perjury has unlimited means at his command—he will avail himself of some known and admitted circumstance which he can speak of and which will prove to be true, and with this he will connect the falsehood. Now what is the reason of this? I will furnish you with the best reason I am able, after several years' experience in the trial of causes. I say it with humiliation, but we never witness the

sitting of a court for the trial of causes, where we do not witness deliberate perjury. You need not be surprised then, gentlemen, that there should be perjury upon this trial. The reason is this: as to the omission to fill up the given niche, it affords an opportunity to the learned counsel to say, why, would it not have been just as easy to fill up that niche? He has therefore furnished you an argument that he has not been guilty of perjury. This, gentlemen, is one of the subterfuges to which felons resort, in order to lay hold on public confidence and command belief. If he speak as to one important fact which is corroborated by others, so much of his story is true, and having told the truth with regard to one circumstance, he argues that it is reasonable to presume that the rest of the story is true also. These are the ordinary supports which a perjured witness will always call to his aid, in order to command belief. How is it with regard to the testimony of Samuel Drown? It is perfectly true there were boats which passed through the cut and went up the Niagara River, and it is also true that a part of the expedition came up to Davis' tavern afterward. Though there is a discrepancy as to the number of boats, and it would also have been as easy for him to state that he saw McLeod at Davis' the next morning, as to say that he saw him across the public square, leaving something to be supplied by other witnesses. I pronounce the whole of this testimony to be, in my deliberate judgment, a sheer fabrication.

Now with respect to Corson. He begins by saying that he saw McLeod at Macklem's at four o'clock in the afternoon. Well, we have no evidence to show that this may not be true, but see how he alludes to this circumstance to give plausibility to his story, and obtain for it credence. He has failed to mention a single human being who was with him at Macklem's store to witness the interview of which he speaks. Why does he bring in the names of Drew, Mosier, and Usher? He speaks of the unfortunate Usher who, a year afterward was murdered at midnight, at his own door, as you have all heard—a man who was understood to be one of the party engaged in taking the Caroline, and who, for that reason, paid the forfeit of his life to the midnight assassin, when he rose from his bed to answer the call of a voice which he knew to be that of his neighbor. This Usher was vouched as one who was present upon the expedition. Mosier was vouched as another, and Drew as another, in this man's testimony; and why? because he saw these persons in Macklem's store in conversation with McLeod. Now what would he have you believe from this unsupported testimony? Why, he would wish to fasten upon your hearts and understandings the conviction that McLeod was a partaker in that enterprise, because he swears that he saw him engaged in confidential conversation with those men, who confessedly formed a part in it. Is not this his expectation? Surely it is. And yet you will have to form this conclusion against the united testimony of McNab, who commanded the performance of the act; of Drew, who executed it, in obedience to that command; and of Harris, who acted under the

directions of captain Drew. And you must recollect the parties were in a public store contemplating a project which required secrecy to insure its success. And you are called on to believe that men so engaged would publish on the house-tops the subject of their consultation. Gentlemen, I give you my full assent to believe, if you are able, the statements of Isaac P. Corson. Then he says, he saw McLeod again on the 29th of December, in the evening. Well, I inquired what pretence he had to know. He said he met him at the door. The man he met coming from the light, he going toward it. Well, it would have been easy to say that he went over to Davis' and saw him there, and spoke to him; this would have been just as easy, but it would have been more suspicious. To say he met him at the door, seems exceedingly honest, it is this plan which every man guilty of perjury would adopt to give credibility to his story. He stated also, that he saw him again the next morning, amid a crowd of persons, and heard him say he had killed one or two damned Yankees. He could see at this time only McLeod, although there were a number of persons present, and he could hear only what was said by McLeod, and no one else. Now, this looks very like fitting the evidence to the case. It was important to find a witness who would swear to a good deal of materiality. Unfortunately he cannot, speak as to what any one said but McLeod, of whom, he could see only the head and shoulders projecting above the crowd.

Now gentlemen there is another matter which is worthy of some note, this same Isaac P. Corson testified at a later period of his cross examination that he had heard of the arrest of McLeod, and of his examination before Squire Bell, in October or December, 1840, and it so happened that it was November; and he knew also that McLeod was brought before Judge Bowen by habeas corpus for examination, with a view to his release, and during all this time this witness never opened his lips with respect to what he knew. The examination lasted several days in succession; it was during that examination that Defield, made his attempt to impeach the testimony of the Morrisons. "I knew the whole transaction, but I kept it to myself," says the witness. And why? "Oh! because I am not in the habit of speaking of such things," such is the testimony of this infamous ——— I beg pardon gentlemen, I will not allow myself to make use of that expression, however, just and applicable it may be; it escaped me unguardedly. He says that McLeod had confessed that he was one of those who had set on foot and assisted in the enterprise.

I ask you gentlemen, if you can give any credence to Corson, who can give such a relation as this? This shows the importance of cross examination, though it may seem to be rigid and unkind, it shows that these are witnesses who call for no very great exercise of charity or kindness towards them. These overwhelmning and contradictory facts were drawn out on the cross examination.

But this is not all, there is another circumstance of impeachment of the witness, wherein he stands impeached, in the very witness's stand in our presence. I was desirous of knowing whether he

would venture to name any other person who was present, and who saw what he saw; and after a good deal of scrutiny—a good deal of pressing (for he had to be brought to the scratch several times, he was so skilful in dodging, like the race horse hard to be brought to the starting post, but when once engaged in the race pursuing it with pleasure), upon being at last brought to the mark. He says, "It occurs to me at this moment, for the first time, that Mr. Caswell was there."

I do not know whether any of you regarded this witness as I did, and if you did not it was no dereliction of duty, though I hope some of you did notice it, but my own conviction was that every word he uttered was rank perjury. You will have noticed how suddenly it flashed across his mind for the first time that *Caswell* was there, while it appears from his subsequent acknowledgment that he has since conversed with Caswell as to the particular day when these occurences took place and yet he told you on that stand, that then for *the first time* it occurred to him that Caswell was there.

Gentlemen I will apply to this witness, the old adage *Falsus in uno falsus in omnibus*, which means, that falsehood in one particular throws discredit upon the whole. If he is unworthy of confidence in one particular he is in all—a liar is not to be believed even when he speaks the truth. This witness—and the remark applies to many—was at a loss to tell how the people found out that he knew any thing about the case, but this is a point of no great consequence. I will now dismiss this same Isaac P. Corson as one of the colleagues of Caswell and the two Smiths, who could not do better than adopt for their motto "united we stand, divided we fall," but whether we consider their testimony together or separately, I believe it will not be considered worthy of belief.

Let us next come to Charles Parke, he was bar tender for Davis, and consequently had good opportunities of knowing whether Mc Leod was there; and yet he was exceedingly cautious. He saw McLeod in the afternoon, cannot tell the hour, and saw him again in the evening. You have the statement of McLeod himself that he went to bed at about three o'clock, and Davis also states that he went to bed about three o'clock. But this witness makes the time of his getting up a little later than the others do, so as to make it difficult for him to get to Stamford. At this point Mr. Press takes him to Stamford. Three quarters of an hour afterwards this man saw him at the cut at Chippewa. Now either Press has uttered a deliberate falsehood, or this same Charles Parke is perjured; about this there is no mistake.

He says he thinks McLeod got into one of the boats and proceeded up the river three quarters of a mile; nearly opposite Navy Island—witness remained there an hour or two upon the bank of the river and then returned and went to bed. Well, do you suppose, whether he was there or not, that he was ignorant of what was done—of the fact that the boats after they left the Chippewa were towed up the river? He knew precisely what the testimony of fourteen or fifteen other witnesses was, upon this point, and he made his testimony to square with theirs. Now, the next morning he saw

McLeod and saw him also through every part of the day. Well, this was not necessary, because our own witness brought him back the next day. His next statement is that at sunrise or a little later he again saw McLeod in the public square at Chippewa with a sword by his side, he could not say that any one was with him, nor did he hear him say anything. Now is it very likely that he should have seen McLeod alone with a sword by his side at that early hour in the morning? If you believe this story you will have to disbelieve our whole case; if you doubt it a little the witness cannot complain, after you have heard a little more which will appear in the sequel.

He says he afterwards heard McLeod boast of having taken part in the expedition. I, gentlemen of the jury, standing in my place as counsel for McLeod, authorized by him, take upon myself to say that he never made any such boast. When these statements have appeared from time to time in the public prints, McLeod has said "Can it be possible that they should suppose I am so very a fool as to boast of having had a part in this matter, when every person living along the frontier knows I had nothing to do with it!" If he had boasted of it on this side of the line would the evidence not have been brought forward here on the part of the prosecution? But if he boasted of it on the Canada side of the Niagara river he would have been guilty of the most arrant folly! I have had to interpose my authority to prevent McLeod from contradicting through the public prints, these absurd statements. I represented to him that it would be much better to allow the trial to exculpate him from the folly which had been imputed to him of boasting of an achievement in which he had no share, and at a place too where it was perfectly well known that he had nothing to do with it.

There is another circumstance regarding this witness, Charles Parke, to which I would desire to direct your attention. You will recollect that he lives seventeen miles up the Chippewa, and he wished to give you to understand that he came here reluctantly; that emissaries were stationed to watch his entrance within the limits and jurisdiction of the State of New York; and when, at last, he was surprised and caught at Buffalo, and subpœnaed to come here, he went to Mr. Hawley to ascertain whether he would be compelled to go, and was told, that unless he consented to go, measures would be taken to compel him.

Now it strikes me, gentlemen, that there was no want of understanding on the part of this witness. He knew perfectly well, that however potent the arm of the law is within the jurisdiction of our courts, that it could not have reached him, if he had gone home. I do not believe a word that Parke has said. He was a bar-tender; and he represents himself as being so busy that he did not even know where McNab's quarters were: and it is a little singular that he got away up the Niagara river three quarters of a mile, to see the expedition embark! Then, with respect to his unwillingness to come here, he says he was on his way to Buffalo, and a person asked him if he was going to Buffalo; he replied that he was, and then, like a scape-goat, got into his wagon and drove home; and

for no reason but because a man asked him if he was going to Buffalo.

Now if he was really going to Buffalo on business, and believed that this man was a spy, who would give intelligence to somebody that he was going there, would it not have been easy for him to put the man off his guard by what Mrs. Opie would have called a white lie? But he was so very scrupulous in truth-telling, that he said he was going, and then fled away! I will give you my interpretation of his conduct. He started to go to Buffalo, to be subpœnaed to attend this trial; and when he got to Chippewa, he ascertained that he was one week too soon. He went home and waited a week, and then what happened? We find him next coming, with a two-horse wagon, into Chippewa; and, as he says, he was inquired of again if he was going to Buffalo, and there was a man standing by who turned away his face as though he did not notice him; and this man crossed below the falls, and got to Buffalo before him, and was ready with a subpœna for him when he arrived. He had his team there, and what did he do? Did he buy his plough, and pump, and stove? No such thing; but sent his team home without them. Now, gentlemen, if this be a story which commands your belief, I confess I am greatly mistaken. In my opinion, the whole of this statement is set up to give force and consequence to his evidence; to give you an idea that he came here by constraint of the law, that this circumstance might furnish to you evidence that he had no motive in falsifying the truth. If it be not so, then I confess I have been wholly unable to see its purpose. He knew full well that he would have plenty of time to come here before his evidence would be required; and I submit to you, whether, if his statement be true that he came reluctantly, he would not have purchased his plough and the other articles which he professed to have gone to Buffalo to buy, and sent them back with his teamster? But if I know anything about it, he brought a person with him expressly for the purpose of taking the team back, knowing that he would be subpœnaed.

This man also endeavors to fortify his statements with other circumstances. He says he was invited to leave the tavern and go up the river with Captain Nellis. This same Captain Nellis was a stranger in Chippewa; but he had procured the countersign, which was the word "Place," and gave it to the first sentinel; and thus they could wander about, never having the countersign demanded after the first time. This part of his story may be true; but as I do not believe any part of it, you will pardon my skepticism in doubting this also. He says he went up merely from motives of curiosity, as the house was more empty then than common. He says he looked McLeod in the face, but did not speak to him. It became important that this same Charles Parke should testify that he saw him at a distance of eight or ten feet in midnight darkness, and that he looked him in the face. This is the same man who, several years ago, went with his brother-in-law, some twenty-eight or thirty miles, to settle sheriff's fees; and this is his apology for knowing McLeod! This ends the patchwork. He was afraid of

going to be a witness, and would flee from any one who was likely to subpœna him, as from the "wrath to come."

Meyers lived in Canada, and says that eight or ten days after the burning of the Caroline he saw McLeod. This is the man who wandered about the country from the round plains near Lake Simcoe; and the forty years' wandering of the children of Israel in the wilderness was never drawn upon a map more devious and crooked than was the route which he pursued; and it is a wonder that he was not as long in getting to the land of promise, as were Moses and his followers. I wish you could look upon a map: to pass by Smithville from the round plains, he must have gone forty or fifty miles out of his way. Did he go through St. David's? No; he went west of St. David's. Did he go to Chippewa? No; for he saw no soldiers. Where did you strike the Niagara river? I do n't know; it was two or three miles from the falls. The sequel shows that he was brought through this devious way to have an interview with Alexander McLeod. Now let us have it. [Mr. Spencer here turned to his notes of the testimony, and read: "Somebody said, Where is the man that shot Durfee. McLeod cried out, 'Here he is; I am the man,'—and drew out a pistol and said, 'that is the pistol that shot him.' He then drew his sword, and said, 'there is the blood of a d——d Yankee.' There was blood dried upon the sword, for five or six inches from the point."] Now if this is a story which you are ready to credit, that, eight or ten days after the burning of the Caroline, McLeod was at the Pavilion, or any other tavern near the Falls—if you believe that McLeod was there, with a pistol in his pocket, and a sword by his side with six inches of blood upon it,—then you will be able to believe the story of Meyers, who wandered forty years before he found Alexander McLeod. But I think, before you give credence to the story of the wandering Meyers, you will set him down with those who have preceded him, and who have fabricated their stories from beginning to end, and told the most foolish lies to get into the presence of McLeod.

Calvin Wilson is the man who kept the ferry at Niagara. He would not acknowledge that he harbored Benjamin Lett; but he is the same man who gave $200 to promote the patriot cause, and the man who belongs to a secret society, and who was afraid of a criminal prosecution, if he swore to the truth—the same man who swears to the confession of McLeod. Now look, and see if his confession does not follow up in the chain with those who testified before. When some one inquired how many were killed at Schlosser: "He did not know; but one thing he did know, that one d——d Yankee, or rebel, had got shot upon the wharf." Well, gentlemen, our commissions prove that there was, in point of fact, a man shot upon the dock, and that he fell dead; and it is well known that Durfee was found thus shot: and this confession, which was put by this witness into the mouth of McLeod, was framed just to suit the case.

I intended to treat this Wilson fairly. I asked him how the conversation was introduced. He says he went over the river to see Mr. Meredith, the successor of Mr. Raincock, and that he saw Rain-

cock in the bar-room; that Raincock made the inquiry, and McLeod answered him. I put the question to him—"Are you not mistaken about its being Mr. Raincock? His reply was, that he *was sure.* I did not stop here, but put the question whether Raincock did not leave before that. He answered, "I know he was there." Now it is possible that he is mistaken as to the man who held the conversation; but it so happens that a stranger to him and myself told me that he left before. We have called Mr. Hamilton, and four or five other witnesses, who testify that he had left before that time. It proves this: that he is mistaken, or that he is guilty of falsehood. Why did he vouch any person? It was to add strength to his testimony. Why did he name Raincock? I will answer that also. He named him because he thought that would add strength; he named him because he was out of the country, and could not be brought to confront him. These are two cases where the witness has involved himself in difficulty, as other liars always do. He named a man who had actually been there, but now could not be brought forward. Therefore it was that he vouched him, and no one else; and, through a failure of memory to sustain him, he has involved himself in a contradiction which renders his story utterly impossible.

Here allow me to remark again, in general, that it is one of the beautiful laws of Him who created the moral as well as the natural world, that truth will always be consistent with itself. It needs not the exertion of great memory or genius to be able to get along anywhere, whether the period be distant or otherwise, while truth is on your side. Whenever you undertake to bring falsehood to serve as the substitute of truth, the same law always involves the liar in difficulty. It is the contrivance of villainy which leads to the detection of villainy. A villain never breaks your dwelling, or robs you of your treasure, but he is driven to resort to those means of concealment which, sooner or later, lead to his discovery. So the means which this witness has used, has given to us the power to overthrow his testimony, unless the Attorney General would have you still believe him, and hang McLeod upon his oath, though every word he has said is false.

Will the Attorney General press the prosecution thus far? I trust not: I will wait and see, before I judge him thus harshly.

This disposes of Calvin Wilson. Now a single word as to *Seth Hinman.* He says he saw McLeod the next morning after the destruction of the Caroline. Now, gentlemen, you will find this story in exact conformity to our statement of the case. We say he was at Davis' after dark, and left there soon after; this witness must tell you that he was a bar-tender for Patrick Cavanagh, one hundred rods off from Davis'. While the village was filled with troops: —for there were 2,500 men at Chippewa—this man could get up between daylight and sunrise and see McLeod; and swear that he was there in the morning. This man swears that he had been examined before Esquire Bell at the examination of McLeod, and that he did not say anything about seeing him in the morning; he did not think of it then. He first mentioned it last spring. Now,

gentlemen, this man—this Seth Hinman—is a brother-in-law of Corson, and a colleague of the Smiths. This is the man who had been called, one year ago, and then only testified to the interview in the evening; but now, having heard our depositions, and knowing our whole case, and finding this an important point, he conjures up this story, that he came down in pursuit of news at daylight, and that he then saw McLeod. Oh! the depth of the wickedness of man! to fabricate a story to swear a human being to the gallows. May God grant him deliverance, for no other power is equal to it.

Here the Court took a recess for dinner.

AFTERNOON SESSION.

The court-room this afternoon was more densely crowded than in the morning, and the number of ladies was greatly increased—among whom were to be seen the ladies and daughters of the first citizens of Utica, attracted, doubtless, by the fame of the gentlemen who were to address the jury; and well indeed were they repaid for the eager attention with which the arguments of the eloquent counsel were received—for perhaps on no previous occasion, in this section of the country, have been heard more splendid displays of forensic eloquence and elaborate argument.

Mr. Spencer proceeded as follows:—

At the time the Court took a recess, I had partly finished what I conceived to be my duty to the prisoner, in pursuing the examination of witnesses for the prosecution, upon whom their case rests—though when I take a view of it, it appears to me to have no resting-place under the canopy of heaven. I have yet to examine the testimony of several other witnesses, because there are emphatically a great cloud of witnesses; and if in this case, as in others it is said, by the mouth of two or three witnesses shall all things be established, how much greater is the danger of my client, when such a host of witnesses are marshalled against him? Before proceeding further in this examination, which I admonished you would not be interesting, but dry and desultory, I will add, that, though I may seem harsh and severe in my strictures upon this evidence, I will "nothing extenuate, nor set down aught in malice," but truthfully, faithfully—and I hope fearlessly, present my views of the evidence connecting McLeod with the destruction of the Caroline, so that it will appear, as by the light of the brightness of the sun's rays, in its true character—the whole of it, as I verily believe it is from beginning to end, an unholy and wicked combination of wicked men, to promote the most base and wicked purposes.

Sarles Yates will not, need not, receive much attention at my hand. I notice him simply to remark, that the least trifle on earth has been hunted up with the hope of making it available in this case. The whole of his evidence amounts to nothing at all. He says, that somebody said, "This is something like the night of the burning of the Caroline." Another answered, "Yes—we gave them '*Aleck*'—I should like another job like that." His evidence, it was hoped, would connect McLeod with the affair, but that failed; and when he had got through, I was about to call upon him, when the Court interposed, and almost censured me for not objecting to

it at the time. I have no doubt the prosecution hoped, by means of his evidence, to connect McLeod with this affair, and I have only to call your attention, and say how signally it has failed. This witness shrunk from the service which he had pledged himself to perform.

The next is *William Caswell;* and here, you will bear in mind, I bring in one of the group, in respect to whom I have commented already. He is one and indivisible with Corson, the two Smiths, and Hinman. They all stand in the same category, or little knot, with combined hands; they have looked into the depositions, and have calculated to command belief from the greatness of their numbers. It needs no greater strength of ingenuity or depravity—the wickedness is the same—the depravity of which it furnishes the evidence is the same;—and this is a matter which involves interests sufficiently diversified to find more than one, or five, or twenty-five, or five hundred, as depraved as Caswell and the Smiths. It is my solemn conviction, that this most dangerous combination along the frontiers of our country can furnish any number of men for any purpose, whether to hang McLeod, or to involve the country in war. I have no confidence in them—I repeat it, I have no confidence in one single soul of them. I believe they are all steeped in desperation. My acquaintance along the frontier counties has satisfied me that they are a body of men, who, if consequence enough can be attached to them, will involve our country in a war; but if Great Britain and the United States will view this subject in its true light, they will find no cause for war, merely because such schemers shall undertake the work of pressing them into conflict. There are some within my hearing—within my look too—and I say to them, as I say to every other one along the frontier, that this effort to get up a war shall never meet with success, if their character and motives can be well appreciated by the community, to whom they owe a solemn duty, but disregard it.

This Caswell says, that he saw McLeod at 9 or 10 o'clock, more or less—he concluded that he was talking to a scrivener, who was making out a deed, and who says, seventy-five acres, more or less—going from Davis' to Mecklem's. He began, as did Corson, and as did the other two witnesses, and Parke, with taking latitude enough to meet any and every emergency. He says he saw him again the next morning on Davis' steps. If McLeod was there at 9 o'clock, and remained till ten, it would not be very strange if he were one of the party who entered a boat at that hour, and put off for the American shore; and if he were there at 7 on the next morning, never having been away through the night, it would not be strange that he should have been one of the party. Caswell swears to this with great positiveness: it is true or false, and he knows which, just as well as any human being can: and it becomes the duty of you and me, to put what construction we consider right, as to whether it be true or false.

He says there was quite a number of persons about there at the time when he came into the bar room, and heard McLeod talking and heard him say that they made the d—d rebels run when they

came there; that he had seen one dead on the dock, and adds I think he had a large pistol in his hand by the muzzle. This witness spoke with Corson and asked if the depositions would come up against the witnesses on the stand; two or three of the party, who had been over, were talking together; one had seen a man dead on the dock; and, if Corson was not mistaken, McLeod held a pistol in his hand.

I submit to you, gentlemen, whether you are not satisfied that this man who says he went on to the steps just as McLeod went off, that he came half a mile before daylight, that he did not speak to McLeod, that he had no arms, but "knew he was engaged in the Caroline affair," may not very well be set down with the rest. What do you think of this expression:—"If I am not mistaken, I think he had a large pistol in his hand by the muzzle"?

If the fact took place and he saw it upon the morning of the 30th December, there was no need of his expressing doubt as to being mistaken; if he saw him handle the pistol by the muzzle there was no need of thinking or doubting; but even here, this man is not the first instance where men have failed in having courage,—I will not say moral courage, he failed in nerve—and dare not come up to the labor of positively asserting that this man then held a pistol by the muzzle, and that it was the instrument of death which was used against Durfee; why not? Because he is like every other coward and knave, and villain, that stalks abroad in our land; when did you ever know a man of nerve who was steeped in iniquity? It is honesty, generosity, nobleness of soul, which enable a man to declare boldly and fearlessly what he knows. But no such thing ever pervaded the bosom of this Caswell; if so, it has been long since extinct, and if not, he only needed to be swayed by those who appeared before him to extinguish every particle which ever mingled in his composition.

Thus much for this man; which brings me to the evidence of Anson D. Quinby. The testimony of this man has been thoroughly examined by my associate, I shall not have occasion to say much respecting it; but I owe it to the Attorney General to say that he is not responsible for the character of this witness. I presume he has received many letters from persons with whom he would not be the first to open a correspondence. The man Grosvenor, who first wrote to the counsel for the prosecution on the subject of Quinby's testimony, is a fit associate of Quinby, as I verily believe, for he stands under an indictment in Pennsylvania on a criminal charge: He was a fit tool to inform the Attorney General that Quinby would be an important witness, but did he take the precaution not to be himself deceived? I believe he has been again and again deceived. It would seem so from the account which Quinby gives, and Mr. Lott, the magistrate, who would not put the statement in the form of a deposition, which was required; but the magistrate, Grosvenor, took the deposition and certified to his character and found out inducement sufficiently strong to bring this Quinby here to depose. He did come; we have seen him—we have heard him—and we have

heard his character from his neighbors, and it is now submitted whether he is deserving of your confidence.

The witness says, I saw McLeod again at sunrise, not far from the end of the bridge. This is an entirely new location; he was not a very apt scholar, or he has not observed his teaching with the same attention or fidelity as some others. He says there was no one with him, and he is not sure that McLeod had a belt around him or anything hanging at his side. He says that some one came across the bridge and asked him how they made it go. He said, "I or we, killed two d——d Yankees." He held up a sword and said, there was Yankee blood upon it. If he had seen it and knew it to be *Yankee* blood, it would have been almost proof conclusive that it was the blood of Durfee; as he was the only Yankee slain on the occasion. He says he saw McLeod at Davis'. But you cannot find a man to agree with him in this statement, because he says it was at eight o'clock, and it is stated by others to have been at seven; but as to the time, it is quite immaterial.

It became necessary that this Quinby should come all the way from Pennsylvania, and have his expenses paid from where he lives to Buffalo, then have $10 given him to get to Utica, and a promise of pay for his return, and for his time also. This, gentlemen, is the man we find, where the point pressed the hardest, ready to supply all deficiencies. He probably was at Chippewa on the night of the 29th. And if he was there on the 29th, with a load of hay, he might have seen McLeod, and it would not have weakened the force and strength of our defence, in the smallest degree; but since he came here, he has found, that it was much more important to have seen him in the morning. Think you that he had not learned that those witnesses, upon whom I have commented before, were ready to swear that they saw him in the morning, and that he himself has not taken courage to swear that *he* also saw him in the morning.

We will now see what reasons he assigns. He says he saw McLeod in the morning at a very early hour, between daylight and sunrise, not far from the end of the bridge. He says that he came in with a load of hay in the afternoon, with a team which was owned by his neighbor, for it seems he was not himself the owner of a farm, or a team. He did not know where the hay was weighed; he did not get pay for his hay. The man who brought it went home, to *Sodom*, a distance of about five miles; a fitter place for this man could hardly be selected on the face of the earth. The man went away and left him, and he saw McLeod there about nine o'clock in the evening. According to his story, he undertook to walk home about two miles, which he could do in thirty minutes. Well, he started; but, did he get home? No, he stopped at Mr. *Pettis'*, about half way to *Sodom*. He never had staid at the house of Mr. Pettis before. Was he invited to stay that night? Not at all; why did he stop there, and stay instead of going home to his family? Why, it occurred to him that he had a settlement to make with the commissary, and he wished to return early in the morning, and thought he would stay at Mr. Pettis' over night, as he would be just so far on his way next day. That is the reason. He therefore

left Pettis', and having only fifteen minutes' walk instead of thirty, he got to Chippewa about sunrise. Well, did he do any business at the office of the commissary? He did not; but he passed by Davis', and there he chanced to see McLeod at the end of the bridge. He went on to the office, thinking that he might find the clerk in. He staid there without his breakfast, and finally got home about noon, without seeing the commissary general or his clerk; without his money, and without his breakfast. He could not but have known that these offices are not open until nine o'clock, but he found it necessary to furnish some excuse for being back at Chippewa in the morning.

If you can believe this long story of Quinby's—if it does not carry its utter overthrow upon the very face of it—we may be obliged to show you something of his character. Lott and Wetmore, both of Pennsylvania, say they would not believe him on oath. That is his reputation where he is best known. It is a remark of the neighborhood—"If you want a man to swear up to the mark, call on Quinby." He came here and has sworn up to the mark, as perfectly as in Warren county, Pennsylvania.

If you are satisfied, and can put reliance in him, as he has come so fully up to the mark, you will give to his testimony all the consideration it deserves.

We will now pass to *Justus F. T. Stevens*. I did not ask this witness a word, for I saw the pain and distress that my adversaries endured while he was upon the stand. He had not got his lesson. He is contradicted by every other witness whom they have brought before you. After he had told his story, he was permitted to retire. I do not recollect whether it was after you had retired, but I saw the same Justus F. T. Stevens coming forward to the stand, where he received a certificate of attendance here, to entitle him to a reward for his services—the stipulated price to be paid for perjury. This is the man who spoke of seeing three boats put off directly from the cut across the river, and come back to the same place.

This brings me to another, who was considered by the prosecution an important witness. *I* thought he was entitled to be placed alongside of Parke. It was fun-and-frolic Leonard Anson. He was among the latest witnesses. I have no doubt the Attorney General had been deceived. When they made their former statements, they perhaps were not cross-examined. I will not believe that those who had the management of this prosecution ever had any just conception of the character of their testimony. One thing I have regretted; that among the number of the prosecuting counsel—composed of gentlemen whose reputation stands high for professional ability—gentlemen holding high and responsible judicial offices under the government—that not one among them, when this testimony was concluded, had risen and said: This testimony will not justify a conviction. There is so much doubt thrown over this case that we cannot ask a verdict of guilty.

If this had been done, it would have been an antidote for many evidences of asperity. For the evidence which has been given has not been confined under a bushel; it has been given in open day:

it has already gone forth to the world; it will be read by our reading community—by the European reading community; and throughout Christendom. The public will read and will judge it; and it may safely be said, they would justify the prosecuting counsel in rising in their places and disclaiming a verdict of guilty.

I spoke of this Leonard Anson. I am willing to leave to the learned gentlemen the conduct of their case; but, at the same time, I claim the right to judge of the manner in which it is conducted; and having formed a deliberate judgment, I claim the right to express it; and I have thus frankly expressed it before you.

This Leonard Anson was in bed at Philo Smith's. There was a sentinel at the door; he got up and looked out, and saw the Caroline burning. He went to Davis' tavern; where he heard McLeod say that he had killed one d——d Yankee, holding out a pistol which had blood upon it. He afterwards heard of McLeod's arrest before Squire Bell, and he went forward as a witness on that occasion. I have taken the pith and marrow of this testimony, and you will judge whether there is any fun in it at all. In the first place, he stated that it was just at the dawn of day—when light scarcely was streaming from the horizon—it was not sunrise—it was not broad daylight, when he went from Smith's over to Davis'. Again, he states that the lights were all blown out. Do not forget that, for he says so. We bring him to Davis' tavern, then, just as the day peeped; here is a room full of men discussing the question as to who had committed the greatest crime—McLeod declared that he had killed one d——d Yankee. Witness saw the pistol, six inches besmeared with blood. He resided at Niagara Falls.

Mr. Spencer here recapitulated the whole of the testimony of this witness, and proceeded to remark:—

Here you have the story of this itinerant witness. I have read his testimony pretty fully; and now I want you to bear in mind, that he went over just at the break of day; that he saw the bloody pistol in the darkness of the room, when every body knows that these horseman's pistols are very nearly the color of blood. Another singular circumstance is, that this man should have lived at Smith's, bedded and boarded with him, come to Lockport with him, and been constantly with him, and never mentioned, until after McLeod was arrested, what he knew; but when Smith went to testify, and having been unable to make himself believed, sent off twenty-one or two miles, in the night-time, for this witness—he was then ready to swear to this story, which it had never been convenient for him to tell before that day. If you are inclined to believe him, I have nothing to say.

John C. Davis, I will have occasion to allude to again, when I come to our part of the case.

Philo Smith supported Drown; now, Drown will support Smith; and Corson will support Caswell, and Caswell the Smiths; you may thus go round the whole circle; and I wonder that had not been resorted to, for they are ready to swear for one another.

I will now comment for a single moment upon the evidence of James M. Dyke. He would not own that he was a stage-driver,

but he had been entrusted to receive the pay. I wonder whether he has not been employed to lie too. He was called to disparage the examination of McLeod before Judge Bowen or Bell. McLeod had stated before Bell or Bowen, that on his return from Stamford, he met one James M. Dyke. McLeod vouched him, to prove that he was not at Chippewa. They then called James M. Dyke to swear he did not see McLeod at that time, and he did swear so, most stoutly; he must have a pretence for his inconsistency, and he says McLeod was mistaken altogether; that he met him at Stamford on the morning that the patriots deserted the Island; and that a boat was sent from the Canada shore to take off a single individual; he says that was the morning that he met McLeod. Well, how did he see him? McLeod had stated that he met Dyke a little way from the Pavilion. On the morning of the 30th December, Dyke swore that he saw McLeod hitching a horse; but he intended it as a contradiction. I have no doubt the circumstance he mentioned was false; it was one of those wicked devices which have been practised to get up a pretence to sustain them in iniquity. What further did he swear to when he came into our hands? He would swear that he did not see McLeod, but did leave the Pavilion to go to Niagara on the 30th December. If Dyke did go from the Pavilion to Niagara on the hour mentioned, McLeod may have seen him and Dyke not have seen or noticed McLeod. But he had told that he did meet McLeod, and never discovered his error until quite recently. It came as suddenly as it did across the mind of another witness that Caswell was present—as suddenly as electricity itself. He had declared that he met McLeod on the way; and this James M. Dyke was called to overthrow the deliberate declaration of McLeod when he was examined before the magistrate; for there they could summon James M. Dyke, Mr. Morrison, and his whole family, Press, and a cloud of witnesses to give the lie direct before Judge Bell. And so before Judge Bowen on the habeas corpus. I have done with Dyke, and it brings me almost through this painful business.

We come now to the testimony of *Timothy Wheaton*. When the prosecution rested, I advertised the Attorney General that we should insist upon the rule of law, that no further confirmatory evidence would be admitted. I did not then disclose the reason; but I now do, thus disclose it: I knew there were hordes of witnesses here who would, if it became necessary, come forward; that it would be in his power to add any number of witnesses to those already called. I intended, therefore, that he should exhaust his privilege, and no further door should be thrown open into which the step of perjury could enter.

But the Attorney General seemed to differ from us, he declared afterwards in the presence of the court, and I have no doubt he did it sincerely, that he embraced also the absent witnesses whom he had left, and upon his word as a gentleman the court allowed him to come in and examine those witnesses. I at the time made no complaint against it, and I make none now, I make him welcome to every pound, ounce, scruple, and grain of evidence which he derived from those witnesses; he needs it all, I would not detract one par-

ticle. With every support which can be gathered on all sides his case can hardly stand alone, and I will not therefore desire to take any thing from him.

Now this same Timothy Wheaton was not at Chippewa, he lived at Whitby some thirty-five miles from Toronto. He says in October, one year after the affair, that he was at Niagara ferry; that he then lived at Whitby, and was never at Niagara before; that he had started to go to Lockport; and when asked why he did not go, he said because he would have to get a pass, so he turned about and went back to Whitby again. You see again, how foolish a man can be as well as how wicked. Did you ever hear a more foolish thing than the story related by this same witness; first that he should have left Whitby and travelled to Niagara, with a view of going to Lockport, and not cross the river because he would have to get a pass; but turned back and went to Whitby again. No cause for his coming, no cause for his returning, except that he had heard a conversation from McLeod, so that he could come into court and swear.

Again, I submit to you, gentlemen of the jury, whether you will believe, if McLeod has one drop of European blood coursing in his veins, he would have opened a conversation of this kind with this witness. It outstrips the veriest Yankee. I never knew a man from the utmost confines of Rhode Island or Connecticut, with all his eagerness in boasting of the excellencies of his wife, and the success which had attended his peddling enterprises, who suffered himself to be guilty of so very foolish a volunteer statement, never; and do you believe all this? that a man like McLeod, coming from a land where they are famed for their silence, would have been guilty of such an indiscretion? Though last this witness may be regarded as not least in the stock of evidence. Welcome; I bid the prosecution thrice welcome; and this brings me towards a close—it only remains for me to allude to the evidence of *William Defield*:

What was he called for? To impeach the veracity of Captain Morrison, and for no other purpose. Who is this man? It is enough to know that he was a British soldier in Canada, while the patriots were on Navy Island, and that from the service of his country, where he had taken the oath of allegiance, he deserted in the night time, and came to Navy Island; who did he find there? William Lyon McKenzie; who would not trust him at all, but put him in gaol and kept him until the Island was evacuated; for fear he would spy out "the nakedness of the land," and return. William Lyon McKenzie never did a wiser act—I have no cause to complain of his conduct; if he had kept him there to the present hour, he would have been just as useful on this trial as he has been.

This same William Defield said that the only conversation he had with Morrison was when Morrison gave his evidence at Niagara in which Morrison said he could not swear positively that McLeod was at his house on the night of the 29th December, that he had been there a great many times; he says that was the only conversation he ever had on the affair, and now when he swore here, he stated that he had heard Morrison at his own house, with his own family, ex-

press a strong desire that the American government would get hold of McLeod and punish him for the part he had taken in the destruction of the Caroline.

This is the evidence of the redoubtable Defield—this deserter—this prisoner upon Navy Island;—I think I may now say this liar, prowling about; he was here to-day, and there to-morrow. I can scarcely speak with composure of these miscreants, when brought up to swear in contradiction to that which has been testified by persons of respectability, and with a view to consign to the gallows an innocent man; I have much difficulty in preserving my composure. What think you of a prosecution for murder which must be sustained upon such evidence? I have now gone through with this branch of my duty, I shall not name another witness individually, who has been called, but speak of them in general. From Samuel Drown down to Defield—take them all; put them together; melt them down in a crucible, and see how much virtue, dignity, and honesty of mind, can be found in the entire mass.

I am aware I have dealt somewhat plainly with this body of men, and the treatment which they have received at my hands, as examining counsel, may savor of harshness and unkindness. They are to me strangers; I judge of them by their conduct and story; and believing, as I do, that every material word is a fabrication, you will pardon me when I say, that I have no sort of respect for them whatever; and but little for the prosecution. But the law officers of Government are not answerable for this; they were only called on to sustain the indictment as they found it. They, however, in my judgment, have failed to do their duty fully, and faithfully; they were influenced, overwhelmed by the excited state of feeling along the frontier;—any man could be readily indicted there; any county which would give rise to a mob, and set at defiance the ministers of justice, is capable of finding an indictment, and conviction upon any and every character brought before them. The evidence of an unhealthy and unsound state of morals there, induced the removal of this trial elsewhere, and to bring it to the central part of the State; and old Oneida was selected as the fit portion in the State, where this trial should be had. And if we needed any evidence of the propriety of the selection, we have it in the order and absence of excitement among our citizens—in the perfect observance of the laws of decency and propriety which has been manifested here upon this trial. I rejoice at it. I am willing, living in the centre of the great State of New York, that an Oneida jury shall give a safe deliverance to an innocent man, and take him from the fangs of a combination as wicked as it is dangerous.

I have now gone through with the evidence on the part of the prosecution, and I ask if I was not warranted in saying, in my opening address, that I had no fear of leaving the case with you where the prosecution had left it? I ask you, if you would feel justified in convicting even upon the prosecution alone—notwithstanding these midnight witnesses have sworn that he was the man who perpetrated the offence? I know you would not convict; it is impossible that you could give credence enough to this entire case, without

one word of defence. Would you, upon such testimony, consign a fellow-being to the gallows? No! no such degradation would be cast upon the tribunals of justice.

But we are not at liberty to sport with the life of a fellow-being; we have endeavored faithfully, to prepare this defence, and I make my acknowledgements to my colleagues for thus preparing it; it evinces a greater diligence and faithfulness, on the part of those young gentlemen, than I have for myself any claim to the discharge of. But I came into the defence of McLeod at a later day than either of them. They dared to stand forth in the midst of a Lockport mob, which, aided and fortified as it was, made the magistrate quail, and called him out to apologise, for having dared to do his duty! My learned colleagues dared to stand up and send forth a manifesto to the world, that the conduct of the populace might be condemned by the world, and our country never again disgraced by such foul proceedings.

This brings me briefly to notice our case upon the defence of McLeod. It consists of two species of evidence which have been adduced before you. One by depositions, the other, evidence which was delivered orally, by witnesses on the stand. And I am persuaded, gentlemen, that you will vastly better appreciate the testimony of those who have stood before you, than of those who have sent it to you by writing.

But who loses by it? Is this the misfortune of the prosecution or of the prisoner? It is our misfortune. Those who live in Canada would not come here. They are not to throw themselves within the grasp of these men who live along the borders, and are ready to seize upon any one whose life they can put in jeopardy by charging him with murder. They did not see fit to throw themselves in the way of prosecution. They could not come. We sent, and brought the testimony which they have given, and we now submit to you whether it be for this reason less worthy of belief; but here again, we are in darkness; the opposite counsel have said nothing in their opening remarks or in the progress of the trial, as to the manner in which they intend to treat this part of our testimony. I have taxed myself to know what they will say to detract from it, and I can find no plausible argument.

We commence with the evidence of Sir Allan McNab. There is but one single point of inquiry; where was McLeod on the 29th December, 1837.

If a man cannot defend himself upon such evidence, where, oh where, I ask can he be safe if accused of murder! Where is the man in this audience—who is there that can look back, and say where he was on a particular night, and call to his aid witnesses, to show where he was? Is there not difficulty in this? Is it not hemmed in with difficulty? It seems to me to be extremely difficult; and I regard it an outpouring of Divine benevolence that has put it in the power of McLeod to show so satisfactorily where he was on that memorable night. I ask if we have not first shown where he was not, and secondly where he was? Will it be the argument of our learned adversaries that they were all implicated in a lie? I

consider that it depends upon the state of moral feeling which pervades the hearts and consciences of those men who speak, which determines the measure of credit which you will give to their story. If a man feels that he is a felon—if he is conscious of being degraded—that he has taken the life of a fellow-being, and has justly forfeited his life: if he has broken his neighbor's house, and stolen his money, or committed any other offence which exhibits a man as degraded and sunk to the level of the brutes; then, indeed, may you doubt the story which that man tells; but think you that McNab of the army, or Drew of the navy, or McCormack of the navy, feel degraded by the part which they took in the destruction of the Caroline? Do you believe the British Government looks upon them as degraded? Nor are they degraded in the eyes of the American people; look over this vast continent and inquire of every single human being; interrogate men of intelligence, patriotism, and of consideration, and if you receive the response that they are degraded, then I will be willing to give up the defence.

How stood these men? They say they acted in obedience to the orders of their Government: I will say they did; but it is said that these men are degraded! that they were volunteers in the perpetration of a crime! Volunteers! Yes, they were volunteers at their country's call; into that service every man to the number of 2,500 did come forth voluntarily, in defence of his country. These then, are the degraded individuals! subjects of Great Britain and her dependencies. I trust I have American feelings as well as other men around me, but I speak of Great Britain, and her Government, as they are; if there is a country under the light of Heaven, whose subjects have reason to feel a conscious pride that they belong to it, it is that country—it is Great Britain, our own dear mother. To that country and her laws which have given distinction to monarchs, statesmen, jurists, poets, artisans, all will unite in rendering her a just meed of veneration. No country can reflect more honor and glory upon her subjects—none deserves better the love and veneration, not only of her own subjects but of other nations; and I ask any American, who claims to be a full sharer in this vast amount of national honor, which may well be accorded—descendants of British parents, who now have an opportunity to speak the same language before an American tribunal; whether that is not the last country, where men holding commissions under its Government, and those under them, should feel degradation from obeying its orders.

It is said they were volunteers: I have heard of other volunteers before.

I will give you the memorable instance at Yorktown of the forlorn hope who led the attack upon the works and fortifications of Cornwallis. Who held and occupied the place of Captain Drew? That forlorn hope was headed by LAFAYETTE—the forlorn hope of the American army was headed by ALEXANDER HAMILTON. They engaged in that perilous enterprise; and because a little chosen band have ventured to volunteer in the Canadian cause, are they less entitled to the honors and immunities of war? Never—never!

Because Captain Drew at the suggestion of McNab undertook this enterprise—because McCormack, Elmsly and Mosier, undertook voluntarily this enterprise, are they in the estimation of the world murderers? Never—never; until you can degrade Hamilton and LaFayette to the level of murderers. Well did McNab declare to one or two of his friends, by whom the danger of the enterprise was fully understood, "If you miss your aim a glorious winding sheet awaits you below the cataract." Navy Island is scarcely a mile above the rapids which descend to the mighty cataract of Niagara. It is but about three fourths of a mile from Navy Island to that place from which no bark ever did or can return; the current passing at the rate of six miles an hour, ten minutes delay would have taken them where their fate would have been remediless! Shrouded in darkness they put forth, and think you, when they encountered the perils of the deep, and of the darkness, and of the cataract, that those gentlemen whose names have been mentioned regarded themselves as murderers? If so, detract from the credit of their testimony.

If when the tables are turned, and Americans destroy marauders, who dare to tread upon our soil, for the performance of those perilous enterprises you commend them, then you will commend these men.

McLeod stands charged with murder. I wonder what would have been said by this country and this government, if the Canadians had come forward and planted their standard upon Grand Island, in the Niagara River, and our militia would refuse to drive them off? What would be said to them if they had not hearts equal to the discharge of that duty? They would no longer deserve the protection of the government; but I will not dwell upon these circumstances. I know the reputation of these men is to be assailed, and I have only done it to show that so far from their being engaged in an enterprise calculated to militate against their honor, it should, on the other hand, elevate it; for almost universally where you find a brave man, you find a generous and a just man.

The question then is, was Alexander McLeod in that party? Who has the best opportunity to know? Is it those witnesses who come here on the part of the government, or the men who were engaged in the enterprise at the time? Col. McNab was a man who saw almost every man, and who actually knew a large portion of them. He knew McLeod well, and thinks he was not there; he returned a list to Governor Head, and McLeod's name was not among the number contained in that list.

Why was this list made out? I answer: it was because those who were engaged in the expedition had been engaged in a perilous enterprise. It had been successfully executed. They had returned, and having thus returned were entitled to the glory of the achievment; for it was thus esteemed by them. It is among the common occurrences that those who have distinguished themselves in battle, and encountered dangers, should have their names enrolled in the archives of the government. It was for that reason that a list was made out; and I ask you whether the evidence of Col. McNab alone

is not sufficient to overthrow the testimony of all those who have been brought forward, on the part of the prosecution. Next is Mr. Harris, Aid-de-Camp to Captain Drew, he says that he knew almost every man in the expedition, and helped to make it up. He says that a list of the names was taken down at the time of disembarking, and completed by another person who had it in charge, and furnished to Col. McNab, and upon that list the name of Alexander McLeod was not to be found.

Having disposed of these two points, I will dispatch another mass of evidence in very few words. It having been taken on commission, the questions must be general, and the answers are results; they never can contain details—but they present the great and leading facts contained in the case.

What is that evidence? It is that seven boats started on that expedition; that a certain number of men went on those boats, eight in each, except that of Drew, and that had nine. Five reached the Caroline, two lay in the stream for a short time, but ultimately boarded the Caroline. Two failed, and were obliged to return to the Canada shore. They landed on Buck-horn Island, for a time. The oarsmen were not good, and they fell back, but finally made their way, and landed on the Island to rest. They had to contend against the mighty current of Niagara, six miles to the hour, to keep from going over the falls.

I ask you whether the men who had a hand in making up this party, and who knew Alexander McLeod, can be mistaken? Are they mistaken? Can there be any doubt, when they say they know not where he was? But one thing they did know: "he was not on board the boat which I commanded; he was not in the boat in which I went; that I do know." And that thing is the very thing which you are desirous to know; and, knowing it settles and decides the fate of Alexander McLeod. It is the only thing to understand—the only thing about which you need to be informed.

Was he on any of those seven boats? If he was, then your duty is plain, though painful. If not, then equally plain, and vastly more pleasant.

You have heard the evidence; it has been read before you; it is the evidence of brave and honorable men, who have no cause to support other than that of truth. Believing them, then, there is no difficulty in finding that he was not on board the boats which left in pursuit of the Caroline. This one question, and this one only, remains to be considered. This is not material, except to show that he was not on the boats; as those officers who composed the party, and who have given evidence, have fully shown. I will glance at this evidence very hastily.

First, you will notice a little discrepancy in the evidence, as to the horse of McLeod. I presume that my learned friend will not forget about the horse, and he is welcome to all he can make of it. I regard it as wholly immaterial whether he had a horse with him or not, because we have strength of evidence enough, independent of it. It has been attempted to show that Press speaks of a different

time from that spoken of by other witnesses. In no other respect is it material whether he took a horse or not. It is enough that he went, whether with or without the horse; but it is due to the case to say that you have heard the confession of McLeod, and his honor will tell you that, so far as it makes for him, it will be received. You have a right to consider it; and having considered it, if compatible with circumstances, and not contradicted, you have a right to believe it. McLeod says that he left after dark, having called for his horse; he may have been mistaken, he had so often gone from Davis' to Stamford on horseback, as well as every other way. He had so frequently passed along there, he may well have confounded one time with the other. McLeod says he rode in the wagon with Press, to Stamford. That was his confession. He says his horse was hitched to the wagon. Mr. Press says that he got into his wagon, having spoken before to get in with him: whether at Davis', or at Stocking's quarters, he is unable to tell you; but this much he does say, that he has no recollection of McLeod's having a horse with him that night. That he rode in his wagon, he knows.

Archibald Morrison says that he first saw McLeod coming into his father's house that night, but whether he came on horseback, or otherwise, he does not know; but he put out his horse, and brought it up the next morning. But he had put out, and taken up the horses of McLeod so frequently, while they were kept at the stable of Mr. Morrison, that even he may be mistaken; because on that night, as well as on former occasions, he had put out the horse of McLeod.

Davis, the tavern-keeper, remembers well, that on the 29th December McLeod went to bed at his house, at about 3 o'clock; that he rose in the evening, called for his horse, and started; and that was the last he saw of him. It is due to Mr. Davis to say that McLeod had been there so often, and had his horse brought up for him, that he might be mistaken. Still this may be true, without in the slightest degree impeaching the veracity of Davis, of Morrison, or of McLeod. It would show that Press was wrong, when he says that there was no horse fastened to the wagon; that Archibald Morrison was right about putting the horse out; that McLeod is right, when he says he led the horse by the wagon, and that Press himself has now forgotten the circumstance that the horse was along. I make them welcome to either horn of the dilemma—either one, or both. They need it, and they are welcome to it; this is wholly immaterial.

I will show you the starting point. How does Mr. Press fortify himself? He tells you that he kept a public house at Niagara; that on the 29th of December he went to bear two passengers to Chippewa; that one returned with him; that he made an entry in his cash-book, because he has a partner. That entry shows that five dollars were paid as compensation for transporting those gentlemen to Chippewa. He cannot tell you, in the abstract, about making the entry, or about their paying the five dollars. One thing

he does remember, that he went to Stamford and Chippewa; and as to the time, the date fixes it. It is like the entry of a name upon the register at one of the hotels in this city. Suppose the clerk should be called on to prove when a man was there, do you suppose he could remember writing every name upon the register of persons who put up there in the course of six months? No; but he would tell you this: When a stranger arrives, if he does not write his own name, I write it for him; and I never make such entries unless they are compatible with truth. Further he cannot go.

What does Press say? He looks at his cash book and finds such an entry there, like those of a previous and subsequent date. Again he tells you that upon the following morning he heard of the destruction of the Caroline.

What further have we? We have a witness of whom I had no previous knowledge till he chanced to come from Montreal here; we detained him on subpœna; he proves that this William Press was a friend of his for whom he entertained a high respect; that while in command at Chippewa, Press visited there and dined with him. After dinner, to pay the respect due to Press, he walked up with him to the head of Navy Island. That while walking up or down they saw the Caroline passing to and from Navy Island.

The evidence is that she left Buffalo on the morning of the 29th. That she made two trips from Schlosser to the Island, and then made fast at about six o'clock in the evening, and that very night she met her fate, by going down in a blaze over the cataract of Niagara.

If Captain Stocking witnessed that boat, it could have been at no other time than the 29th; if in company with Press, it could only have been the 29th.

Now, I ask you, gentlemen of the jury, whether there can be any mistake as to the time when Mr. Press bore McLeod to Stamford? This is the starting point. Here we stand firm and unshaken. Here is the anchor of hope to which we will cling; and I challenge the learned counsel on the other side to make this matter swing from the firm bearing that we have thus established.

Press leaves McLeod at Stamford. Where do we find him then? At Mr. Morrison's. But the public papers have assailed the character of this family. I am happy to learn from Doctor Hamilton of Niagara, that there is not a family of higher respectability in the vicinity. It is a family which has not escaped affliction, and has felt deep grief; but I have yet to learn, that it has shaken confidence in that family, or furnished proper occasion for the learned Attorney General to tear open the wounds which are scarcely cicatrized, by an examination of any member of the family.

Now, does that family stand confirmed in any way further? We have brought the deposition of Col. Cameron, and when objected to by officers of the government who conduct this prosecution, it did excite my surprise. I will not, however, repeat the sentiment I entertained, nor give further vent to the feelings which I suffered. Truth, justice —neither of them required that that deposition should be excluded.

It was taken in presence of counsel on both sides. Col. Cameron is a gentleman of high respectability, living at Toronto. He says he was at Chippewa when the Caroline was destroyed; that he left in the morning; that on his way he called at Captain Morrison's gate, and held some conversation; he does not remember the substance of the conversation; but it proves another fact; that the news of the destruction of the Caroline must have been carried that morning and no other morning.

Was he mistaken when he tells you that it was on the morning after that memorable night? Was he mistaken when he tells you that on his way down the river he procured a trophy, and delivered a part of that trophy to Captain Morrison? Was that a matter of mistake? No, never. It is confirmation strong as holy writ. All point to the hour, and that hour alone which is material for the safety of McLeod.

But, gentlemen, this is not all. Miss Harriet Morrison, when asked, where next did you see McLeod? says, "I saw him in the afternoon of the same day, passing by. Making a pause in front of the house, he exhibited a cannon ball, which I understood to have been fired from the Island." Does she stand confirmed? Let us examine and see.

Young Gilkinson, an officer in the British service, says, that on the night of the 29th of December he slept at Stamford; that the next morning, on his way to Chippewa, he fell in company with McLeod. They were both on horseback; that, without dismounting at Chippewa, he and McLeod rode up the Niagara river; and the batteries on the Island were opened upon them. A cannon shot fell a little short of them, and one of the soldiers picked it up and handed it to McLeod, as a memorial of the movements upon the Canadian frontier. Does not that go to confirm what has been said by Captain Sears? He says that he saw him come there in company with another man, and that they were fired on either in their ascent or descent. This leads me next to consider the evidence of the family of Captain Morrison. McLeod took tea there, and spent the night there; remained there until morning and took breakfast there; so says Mrs. Morrison; so says Archibald Morrison; so says Harriet; so say all.

If, after all this, you can doubt where McLeod was not, and where he was; I ask where you find a foundation for that doubt? It is so strong and so overwhelming, that it sets argument at defiance; and the case will set argument at defiance to effect its overthrow—it is right; it is true; and no man can doubt it. But there is another point of no little moment, fixing the time, and proving that McLeod was not at Chippewa. I have already alluded to the testimony of Gilkinson. I say he was away, when they say he was there. Is it likely that McLeod would go to Stamford and return back at that hour in the morning? Gilkinson's testimony is important, as it proves the truth of what is testified by the Morrison family.

Here is a gentleman in our own State, Judge McLean, who slept at the quarters of Col. McNab, at Chippewa, on the night of the

29th December, and conversed with him in the evening, though we were not permitted to show what the subject of this conversation was; but this much we have a right to show that, during the evening and morning, Judge McLean did not see McLeod at Chippewa, although he had seen him at Buffalo, on the 24th December, and put forth his hand to shield him from the violence of a ruthless mob.

It was natural that he should have inquired for him. If he had been at Chippewa, would he not have inquired him out and seen him?

Judge McLean tells you that after breakfast, between nine and ten o'clock. he left Chippewa for Niagara Falls, and on his way, in company with Doctor Foote, he met McLeod, and knew him. If this be so, it is in conformity with the tale told by the family of Captain Morrison.

Would not Judge McLean be as likely to know as any of the witnesses that the government has brought here to uphold this prosecution? A man who knew him well, and not shrouded in darkness—would he not have seen him if he had been there at the dawn of day, or at sunrise—or later in the morning, before McLean left the village, as well as those witnesses, Smith, Corson, and others?

I think you believe with me, that he would have been far more likely to have seen him, having inquired for him, and being despatched there by the District Attorney of the United States, to consult with McNab. Would he not have been likely to find McLeod, if he had been there? Not having done so, proves that McLeod was not in Chippewa; and having met him at or near the Falls, riding toward Chippewa, puts it beyond all doubt.

If McLeod is unable to defend himself on alibi, I despair of defence. If necessary to prove him at Chippewa, as was urged by my eloquent young friend, instead of his being at Stamford, it would have crushed us to the earth. Had he been accused of a murder perpetrated at Stamford on that fatal night, it would have been impossible for us to prove an alibi with all this crowd of witnesses to swear, that at midnight they saw him at Chippewa—some of them within ten feet, others, at cock-crowing in the morning, saw him somewhere else; and when daylight had streaked in the east, he was in a different place.

Could they stand up against the overwhelming testimony of the Morrisons and those who corroborate their statements? The evidence showing where he slept, where he remained, and where he might have perpetrated the crime, if he had conceived it in his heart, cannot be destroyed by that which attempts to prove him at Chippewa; and I need not add one further consideration to what I have already stated, because the strength of our defence is so overwhelming that there is nothing of the prosecution left. It is enough; there is no cause of doubt. It is enough that the doubts and probabilities are on the other side. Juries are usually reminded, that where a doubt exists, the prisoner should have the advantage of that doubt; but I will make no such appeal to you, for the evidence shows that, so far from having participated in the destruction of the Caroline, he is as free from it as

you, or the learned counsel for the prosecution, or those who have conducted his defence.

Having taxed your patience beyond endurance, in discharge of the last duty which devolved upon me, I commit him to your charge; and if I have not deceived myself as to the duty which still remains for you, it will be as pleasant to you, as it will be propitious to our country.

MR. JENKINS' ADDRESS TO THE JURY.

May it please the Court,

GENTLEMEN OF THE JURY—Owing to the great variety of subjects which the learned counsel for the prisoner have seen proper to discourse upon, the remarks which I may make, may be regarded as scarcely an answer to them. I had supposed when we appear in courts of justice, it was to try causes upon the facts established, not upon extraneous circumstances which do not pertain to the case. It is utterly impossible that a court or jury shall understand the cause, and be able to decide it, unless they arrive at the facts through the medium of legal evidence. Much that has been said by the prisoner's counsel is addressed to men in England, not to Americans; to those who will not decide the issue in question; not to this Court and this jury. I concede that it is proper to look at the position of the two countries—to the position of Canada, and of the insurgents upon Navy Island, and in our own country, for the purpose of ascertaining the position of those concerned. But when we go beyond that, we have exceeded the bounds of our duty.

What, I would ask, was the situation of the two countries at that time? We all know that Canada had been afflicted with ruptures within its borders. We know that some of her inhabitants, considering themselves aggrieved, had been judged guilty of a violation of the law; and they had been punished with death. The state of New York, and others, deeply sympathised with those who had been arrested. Was it not to be expected that there should be people in Canada desirous and anxious to press forward and accomplish a revolution—that some individuals in the United States should sympathise and unite with them in accomplishing their design? Is it not matter of surprise that from a republic containing 17,000,000 of people, only some two or three hundred should have been found congregated at Navy Island? If there were no more, it is a cause of reproach to the British nation, that a handful of insurgents should agitate and alarm the whole empire.

The facts upon this trial show that this is a peace-loving community, having no disposition to disturb their neighbors. There are individuals here, as in other countries, who will sometimes unite with others in waging a fruitless war. When this nation was sympathising with the sufferers at the North, and those who had created the disturbances in Canada were desirous of establishing there, a government like our own, is it not surprising that, among this immense population, so few hundreds should be ready to join in the combat? Prior to the burning of the Caroline, and the commission of the murder in question, little excitement existed in the United States relative to the northern difficulties. It is true that a man by the name of Van Rensselaer was on the island, and had command of a few men whom he had gathered there. It is said they were there for the purpose of invading the Canadian mainland. What had they to expect when a large British army was assembled in their immediate neighborhood, and only some two or three hundred upon the island? They could not expect to

maintain their position for a moment. They could do but little mischief, and therefore no extraordinary measures on the part of Government were called for. In a single hour the English army could have made their way across the river, and captured every insurgent.

This is pressed into the subject, as though the Canadas were in danger of being revolutionized! To show that the Canadian authorities were authorized to make extra exertions to destroy this boat, then floating in American waters, the forces of the insurgents are magnified from a handful of men to an immense army, and this little ferry-boat has grown into a vast engine of war. The only purpose for which this subject is pressed into this trial is, to form some sort of apology thereby, for the destruction of that vessel. The Supreme Court have decided that, for any purpose of justification, the warlike movements on Navy Island are to be laid out of the case.

The vessel was seen at some two or three o'clock in the afternoon of the 29th December, '37, plying between Navy Island and Schlosser. Who saw her? Alexander McLeod. To determine whether the prisoner was there, it is proper for us to ascertain the bias which he had previously entertained on this subject. For if he were opposed in principle to the destruction of the boat, more proof would be required to establish the fact that he was in the expedition, than if he entertained the opposite opinion. Establish the bias, and the man is not far distant. I therefore ask your attention to the position of the prisoner at the time. He says in his confession that the Governor of Canada had requested him to go to Buffalo and ascertain whether she was to be sent down to Navy Island. The consummation of that mission, which took place on Christmas eve, 1837, in the city of Buffalo, it appears from Capt. Appleby's testimony, was effected under strange circumstances. Such was the tumult which he excited, that he required the aid of Appleby and McLean, to escape, and he fled from the house-top. How he got away, not being a witness, I am not at liberty to state. On the day following he returned to Chippewa, and gave intelligence of what he expected would occur, and made affidavits to the facts. What does he do next? He says in his confession, that on the evening of the 28th he was about to go to Niagara, the place of his residence, and had advanced as far as the falls of Niagara, and there received information that the Caroline had left, or was about to leave, for Navy Island. That he returned and informed McNab that she was about to come down. Did not that man feel some interest in the transaction? Was he not essentially in the employ of the Government? Surely he was a spy. And most admirably did he perform his duty. What next? On the morning of the 29th he, with some others, went into a boat and passed round Navy Island, for the purpose of reconnoitering. I would ask, had he not some motive in view? Surely it must be so. He felt extreme anxiety to know when she would arrive—and for what purpose? To destroy her the moment he could have an opportunity to do so. Why was the prisoner at the bar spending his time at Chippewa? For what purpose?—was this his residence? No, it was not for ordinary business that he remained there. Had he any such business that appears in evidence before us here? For what purpose, then, was he remaining at this place? It was for the purpose of carrying

the project of destruction into execution. Had she been found at Navy Island, it would have been a different question. He knew that she was plying between that island and Schlosser. He saw her cross to the island twice and back, and at night she let off steam and laid up by the American shore. Now, I ask you, where is McLeod when the boat is safely moored at Schlosser? He had been round the island in the morning, and a number of witnesses have spoken of the fact that the boat was there laid up at the dock. Now, would you not naturally expect when a man was so anxious as he was to accomplish the mischief—the man who had been a spy at Buffalo—who had made affidavit—who had returned from the Pavilion at the falls—who saw her passing back and forth, in full view—who was found in private consultation with the commanding officer of the expedition? See how faithfully the bent of his inclinations tallys with the fact!

Corson swears that on the afternoon of the 29th, he was in the store of Mecklin. That the prisoner *Capt. Drew* and others were there. They were not sitting in the business part of the store, but in the back part, surrounded with glasses, as if to take something to bring their spirits up to the nefarious deed. Not a word has been offered to show that he was not there in that consultation. When witness went into the store, though frequently there, and from a house trading much there, yet he was requested to go out of the store, by the clerk, who says they have some private business on hand. During these few fatal hours that the prisoner was there, the plan was ma tured to destroy the Caroline that night.

The keeper of the hotel, Mr. Davis, testifies that, in the afternoon, some two or three o'clock, the prisoner came to his house and desired to go to bed; that he did go to bed, and slept till between seven and nine o'clock. The prisoner in his own declaration or confession which we have heard, says that he thus went to bed and slept till about seven o'clock. Now, if he had been then concocting this plan, would he not desire to obtain some rest, and thus prepare himself for the conflict? Having regaled himself upon the wine, it was to be expected that he would take a bed, knowing that this would be a night expedition, in which there would not be much opportunity afforded to obtain rest. He did so, and there remained until his energies were recruited. Thus far we have not gone upon disputed ground. But we have shown what his feelings were—what his inclinations, and what the service in which he was engaged. Is it probable that he, knowing that the Caroline was there, and being thus anxious—is it probable that he would go to Niagara, when she was in reach, and her destruction was contrived, counselled and resolved upon? That is not to be supposed. Now, if he had been averse to any such movement or procedure, it would afford evidence in his favor. But even Morrison says that when he first heard of it, he exclaimed, "I wish to God I had been there." This goes to show that he was favorable to the transaction, and that he was the last man to have quitted the ground, after the arrival of the Caroline, until she was destroyed. I have thus established this one thing, that the inclination of the prisoner was to be engaged in that transaction, and by the sleep, which he had taken, that he was prepared for active employment in the affair.

Now, let us see what that affair was. I do assure you that the learned counsel, with their ingenuity, have not given to it its natural and due course. I am satisfied that you have felt it; that every man who has heard the counsel has felt it. What is the evidence? On the 29th December, the guard on board the steamboat Caroline, ascertained that boats were approaching. One of the guard went to the cabin and called to the Captain to inform him of the fact. The Captain did not suppose that there would be any difficulty, and the guard went again and gave the alarm, and the transaction occurred which has been minutely detailed to you by the witnesses. The persons on board were alarmed; they feared that their lives were to be taken, and perceiving how others were surrounded by the assailants, they used all the means in their power to make their escape, and did not observe with as much minuteness as they otherwise would have done.

I notice one single one of them: Captain Appleby had seen the prisoner but a few days before; that is, on the 24th, the prisoner being in difficulty at the time, and desirous of making his escape from Buffalo, fixes his attention upon him, so that he knew and recognized his countenance. He had been at the cabin door once, but turned back; but he again went to the door, and just as he opened it about a foot, a person from without wrenched it open and a sword was thrust at him, which cut off a button of his vest, and was warded off by a metallic button on his pantaloons. It was but an instantaneous sight or view that he had, but he thought then—and thought the next day—and thinks now, that the person who made the thrust at him, was Alexander McLeod, the prisoner at the bar. Upon the cross-examination he was asked "will you swear that it was Alexander McLeod"? All that he could say was to repeat what he had already said, that he then believed it—he believed it the next day, and still believes that it was the prisoner at the bar. Do you not suppose that when the light was shining full in his face, he would be likely to recollect his countenance? A countenance like that blazing in his face—it would implant an image never to be effaced from his memory. Such was the impression, and he will never forget it till the day of his death. Captain Appleby is careful in his manner of testifying, but his impression is that that was the man who made the thrust at him; that he was the man at the door of the cabin, when the Captain attempted to make his escape. The learned counsel for the prisoner says that all this evidence is made to suit the case. At one time he does not believe the witnesses, because their testimony is contradictory, and now he does not believe them because their testimony harmonizes. I agree with him that truth is consistent and reasonable. When a man does tell the truth, it is plain on its face that it is the truth. When a man prevaricates, and tells that which is not true, you see at once that it is stamped with falsity. You give it no credence, but say that it is false upon its face. The next person we call upon is Samuel Drown, and to what does he swear? The learned counsel here went on to read the testimony of Samuel Drown.

It is well to stop here and look at this case. What were the opportunities for this man to see the prisoner? He recollects distinctly, of seeing him disembark. He heard him converse, and saw him there the next morning. Though he did not stand so as to have the benefit

of the light directly, yet he could see the form of the face. They insist, on the part of the prisoner, that this man is impeached, for if they did not insist on that,—the proof of one, if believed, is as good as twenty. Now, I ask you, if a man who is a humble man—a plain farmer—appears upon the stand without disguise, and seems willing to tell his simple story, they call upon a witness to impeach him, and to whose testimony I shall ask your attention, they call upon a respectable man living in the vicinity, and what does he say? After they had taken him, he did say to his brother, if they could not get a bill against McLeod without his testimony, they could not convict him with it. This witness, Mr. Bates, says that Drown did say to him that he did not know enough to do McLeod any good or harm.

Whoever has been in the habit of attending Courts and consulting witnesses, is aware that they will often say "I know nothing of any consequence." It is a common remark with men of integrity who are willing to tell the truth. Why, the thing is not uncommon. There are men so ignorant as to suppose that you must prove not only that the prisoner was on the ground but that he was seen giving the mortal wound. This man, therefore, made use of the remark which he did, that he knew but little about it. Now, this is a mighty impeachment, for which a man has come all the way from Canandaigua to say—that Mr. Drown had informed him in this way as to his evidence. Now, I ask if this is the impeachment which the learned counsel has magnified into a mountain, and for which he says the witness has committed willful perjury.

Did his testimony not show as to the importance of it? He did not detail the facts. If he had stated things differently from what he has sworn to, then we might well say that he had sworn falsely, but when one witness comes in to contradict another, and does not contradict him, it shows that they have attempted to make an impeachment and have not succeeded. But what does Mr. Bates say? He says, expressly, that he has been acquainted with Drown for many years. That formerly he was a dissipated man, and a man of not very good character; yet before he went to Canada he had reformed and had never since returned to his evil practices. I ask, whether a man thus reformed, who conducts himself and pursues a wholesome course of life from year to year, and then comes into a Court of Justice—I ask whether the opposite party should travel back and say that seven or ten years ago that man was a drunkard? I say when Mr. Bates came forward and testified as he did, it added to the character of the witness instead of detracting from it. He, the witness, Drown, said he did not know much of the matter; he could not judge of its immense importance. It was a mere matter of opinion. If he had stated the facts and Mr. Bates had come forward and stated differently, it would have been an impeachment. This is all that I consider necessary to say of Drown, for the gentlemen have made use of many remarks respecting this witness which I deem unworthy of an answer. But thus far I did think worthy of being noticed. The counsel for the prisoner say that all are combined, and come here with a determination to sustain one another. Has not the learned gentleman drawn very largely upon his fancy to induce the jury to believe transactions which have never existed. It is true the argument was more like evidence than argument;

more than one half of it related to that which did not exist in the case. Strike out that which does not pertain to the case and weigh the remainder in the scales of intellect, and see if it is entitled to much consideration.

I might as well here remark that the four witnesses whom we first called to the stand pertaining to this subject I regard as the most important—as the all-important ones for upholding this prosecution. The next witness is Isaac P. Corson, I know you recollect him. He has been an inhabitant of Canada but is now an inhabitant of this state. He does not live far distant from the scene of this disgraceful affair; and if his character for truth was not good, remember, the vigilance of the counsel for the prisoner would have sought out those who would attempt to impeach his reputation. Not having done so I set it down that his character is good, that he is unimpeachable in the neighborhood where he lives, and that he is not liable to have odium cast upon him here. You are to judge from the facts which he testifies to, the appearance of the man, as I apprehend, would give confidence in his integrity, and yet the learned counsel,—and it was particularly manifest as to Mr. Corson,—found fault with his manner and tone of voice. And in every thing that pertained to his mode of cross examination seemed to say, "you have sworn to a lie, and I mean to have the facts out of you." The learned counsel has brow-beat the witnesses, and put their characters in as great hazard as were the lives of those who were in the Caroline. I suppose that in any counry, whether Niagara or any other, where counsel's put questions in the manner that they have done in this case, making insinuations, sneering continually during the examination, there is no witnesses who would not feel indignant. I do not cast reproach. I make these remarks to show the impropriety of going over the whole life of a witness, and asking questions which would put any man at a loss to answer. Well, what was the result of it? It was a short story which will carry belief with the proof as long as they shall recollect. The witness stated that he heard McLeod say, that he was there, and that "he would like just such another expedition, to go and cut out, and burn Buffalo."

On the 24th McLeod had been at Buffalo, he had noticed him to leave the city in a manner very disagreeable to his feelings, and no wonder that he should have feelings of indignation against that city. He said he would like to serve Buffalo as he had served the Caroline. He admitted that he had assisted in the destruction of that boat. It was only necessary to show that these sentiments were uttered over and over again, so that there could be no mistake. I do not wonder that this man has made these confessions. But you should consider where he was when he made them. It was to those who were engaged in this cause. It shows that he was proud of having done that which he may have thought his duty to his country: being at the head and almost the first upon the boat in performing that act of which the people of this country have a right to complain. I ask you then why not believe the testimony of this man in connection with that of a dozen others when these men come forward and swear to that which is corroborated by circumstances before and since? A jury would be extremely direlict from duty if they did not place reliance upon it.

Will a jury sit here and listen to all this about combinations? Shall counsel ask a jury to believe their own statements and call witnesses to impeach and set down other witnesses as not to be credited, as we have witnessed on this occasion? If that is to be the case, the sooner courts are done away with the better. Instead of being a trial upon the evidence it is the merest farce. You are to weigh the force of evidence. It is not only your right but it is your duty. But when you have weighed it you are not to consider the witness impeached, merely because counsel have said so. Suppose that witness had appeared in Court without any such strong remarks from the opposite counsel, would you hesitate to believe him? No, that never would be the case. Any man who has heard him and witnessed his intelligence as detailed here upon oath, in the presence of this Court and of his Maker, would place reliance upon the evidence of that man without stint or allowance.

The Court here adjourned for one hour.

Evening Session.

Mr. Jenkins resumed his Address.

At the time of the adjournment, gentlemen, I had proceeded in the course of my argument to show the force of the evidence of Appleby, of Drown, and of Corson, and to show that the prisoner was present upon the fatal night of the burning of the Caroline. I had named the name of Parke, but it may not be well to embarrass the mind with too much evidence at once. It may be proper at this time, having had a short adjournment, to consider the ground on which we are treading, and to reflect whether we have not a case here upon which a jury should consider. Was it ingenuous, when the people had called witnesses, for the counsel to intimate that the prosecution should discontinue the case on the ground that there was not sufficient evidence to convict the prisoner? Was it ingenuous? I do not claim that it was dishonest; but have not counsel been carried beyond their case by means of their anxiety to clear the prisoner? Is it not necessary and proper that we should pause and give that weight to the testimony to which it is entitled.

I feel that I am standing before a tribunal who are able and willing to examine this case upon the principles of law and justice. Although I admit I have been disappointed in some decisions which have been made, I do not doubt that they have been made honestly, though possibly made mistakenly. I am willing to rely upon the evidence before you, without regard to what may have been excluded. I am willing to place the case before you on that evidence, and have you pronounce guilty or not guilty.

When I heard it announced by the learned counsel in presence of this audience, and the Court, that they expected a jury to bring in a verdict without the least possible question, and that they only felt embarrassed because they had nothing to argue, because the case was so clear, that your verdict would put an end to the subject of war—when

I heard that subject drawn into this trial, I felt alarmed for our institutions.

Shall it be said that, when men stand up to argue upon the guilt or innocence of an individual, they should take into consideration whether it shall produce war or continue peace? I trust that no such sentiment has ever been before announced in this land. If advocating this case before a British court and a British jury during the period of 1837, then I might suppose that an appeal of this kind might have had some influence in inducing a jury to be led astray by their prejudices. But when addressing a jury in the county of Oneida, the place of my adoption—when addressing many of my personal acquaintance, I am satisfied there are no such prejudices to gratify,—that you are willing to pronounce upon the question, whether guilty or not guilty. I feel a confidence which inspires me with courage sufficient to produce conviction, and inspire a belief that you will give an honest decision fearless of all consequences.

If we are to consider whether it is to produce consequences beyond the immediate effect of your verdict, where are our courts and our institutions? It would seem as if the learned gentlemen had supposed themselves in another nation. I awoke almost as if from a reverie, in a country under Great Britain; not the island of England, because there is as much justice as any where. They would look with contempt upon any such insinuation being thrown out. Where such arguments are introduced into courts, and before a jury, shall they be listened to? Can we not, I ask, bring up feelings of justice more strong and powerful than any extraneous matter which pertains to policy or expediency? I am astonished that these allusions have been made and held out to you, that your verdict is to make war or peace, and therefore you must ease your consciences by coming forward and pronouncing a verdict without considering the evidence, and thus lean to the side of peace.

Gentlemen, this is not the way in which we are to view this question. If we look to the history of our country, I should regard it as the commencement of that system, which if persisted in, would allow the British Government to take away our soil or any thing else.

How was the right of search exercised previous to the last war with England? It began with the plausible pretext that they only searched to take such as belonged to the British nation—under that pretext how many have been taken from their families and homes, and never returned to their native land. Sworn away by false witnesses, and continued away till their deaths, and never permitted to return. If this is to operate with the jury, and our laws that are applicable to subjects of another nation, who commit depredations, how soon will the people upon our frontiers be snatched out of our hands, and lose their lives for any imaginary offence. I say therefore, in answer to this, that it is our duty—it is the duty of the Government of this State, to maintain the integrity of our dominion.

Let it be understood in every nation and kindred, that when men are within the territorial limits of New-York, they shall be protected and their lives preserved. They shall not be encroached upon by any nation whatever, though they can control one hundred and sixty millions of people, while we have but fifteen millions. I rose with

the principle in my mind, which has ever been inculcated, that this question was to be decided according to its intrinsic merits, as developed by the evidence.

It is conceded, that if Alexander McLeod was on board those boats, and engaged in that transaction, he is guilty of the crime with which he stands charged; even if there were no other evidence than that of the three to whom I have already alluded, together with the fact of the death of the deceased, Durfee. Would any jury in this country, or any other country, hesitate to pronounce that man guilty? I would be astonished if they would do so. I do believe that any jury or court would yield their sanction, and their credit, and their faith, and pronounce the prisoner guilty, without the least delay. But we do not stop here: we go further, and introduce witnesses in corroboration of these facts; and the only attack which can be made upon them is, that they so completely correspond in their testimony, with the facts charged, that it must be false or fabricated. A doctrine as strange as it is new, in any court of justice.

Charles Parke is a native of Canada, and never belonged out of the Province, as is the case with several of our witnesses. He never belonged to any of the societies which have been mentioned. Is it possible that a society so saps the morals of men as to render them entirely unworthy of belief? If that be so, we have got into a new sphere of action in relation to the administration of the laws of the land.

The witness yet resides in Canada, he is a farmer—a man well known there. He set out for the purpose of coming to Buffalo, about the time of the commencement of this court, and ascertaining that the trial was about to come on, though he had business in Buffalo, he concluded to return home, and wait till the trial was over. He is not one of those who might be liable to the charge of want of integrity. He resided in the very village and house where Davis did.

The vigilance of the learned counsel, through the particular friends of the prisoner himself, and the whole British Government, would surely have been able to produce those men, or to have taken their testimony on commission, who could impeach this witness, if he was in truth liable to impeachment. He came to Chippewa, and there ascertaining the fact, of the trial being about to take place, and being unwilling to come, returned to his home. The first week of the court having passed over, he again went to Buffalo, to attend to his business. He was discovered in Chippewa by a person who crossed the Niagara, and who, taking a different route, was ready as soon as the witness rose from his bed the next morning to subpœna him to appear in this case.

Now, the learned counsel says this was all a trick on his part. I ask where is the evidence of it? Is there the least evidenee of the fact? If so, I have failed to hear it. He did not know the effect of a subpœna, other than it laid him under a penalty of fifty dollars, and he concluded to send his horses back by his brother-in-law, and come to court. And this is made a subject of impeachment, as though what he has said under the sanction of an oath is nothing worth. I never have seen counsel driven to such extremities. His whole story is, from the beginning to the end of it, a continued chain of transactions bearing the impress of consistency.

Let the gentleman's argument be published, as it will be published, and I am glad that an argument of that description is to be published; so that if a jury brings in a verdict in conformity with it, that this enlightened community may see and know how it has been accomplished. But if the solemnity and sanction of an oath—if duty to his country, to himself, and to his Maker—if the ordinary laws of our country are to have their wonted course, I shall be proud of submitting the question to you, whether Parke is to be believed or not. What does he testify? I shall only give an extract: He says that he was Davis' bar-keeper, that McLeod directed him to tell his brother that he was gone to Niagara. Now, what was that done for? Was it not known to him that Corson and others had seen him in conversation with Drew? That it was whispered in the public mind that the Caroline—the thing which had occupied so much of his attention, and which had caused him to go to Buffalo—to go round Navy Island —to return from the falls the night previous,—that something was to be accomplished? For the purpose of not allowing them to know of his actions, he designed to put them off their guard, by saying, bring up my horse, I am going to Niagara. Who brought up his horse? He did not bring him up himself. Now, if there was a man who brought out his horse, do you not suppose his testimony would be brought to bear upon this trial, personally or by deposition? Yes, he would have been the first man.

Here Mr. Jenkins recapitulated the substance of Parke's testimony, bearing upon this point, and then proceeded as follows:

Whenever you find two witnesses essentially corroborating each other's testimony, and establishing the same fact, and there is no inherent evidence of its untruth, it gives to it a force in arithmetical progression; if you add a third it is stronger, if a fourth, it continues to increase in strength.

Now, the force of this testimony, all tending to one point, is stronger and of higher verity than if sworn to by one only.

Henry Meyers, of Canandaigua, swears that he saw McLeod at the falls of Niagara, where he stopped at a house on the north side of the road. He had previously seen him at St. Davids; some one asked him who shot Durfee? McLeod said, "By God, I am the man." He then said, "That is the pistol that shot him," Now, how do they seek to impeach this witness? He is made to go the grand round, to show where he was born, and where he has lived. I would not have said a word, if the learned counsel had not recommended you to look and see whether the witness had pursued the most direct route to get to the several places named. I have no objections to your looking at the map, but those who are better acquainted than my learned friend or myself with the points at which he arrived, say that the route was the most direct that he could have pursued, except where he varied it in order to get better sleighing. And think you,—when that learned gentlemen is surrounded by many high in station from Canada,—think you they would not be called on to testify and show the falsity of this evidence in that respect?

Gentlemen, I am astonished that my learned friend should have gone so far beyond his ordinary prudence—but he cannot blind men, with things so feeble and futile, upon their face.

I do not contend that this man has as much weight of character as more substantial men, who live in one place and are not moving about, yet he is not unworthy of credit, they have not impeached him at all; nor is his story improbable. For the whole course of proceedings, from first to last, show that McLeod had been willing to boast, that his queen, and England might know that he had been a dutiful subject. It has been said that the declarations of men are not the best evidence. It is not like that of a man who sees with unerring certainty; but still it is evidence and you are bound to allow it some weight. But I do object against going out of the record to impeach this man, for I verily believe he has told the truth, as nearly as he was able to set it forth.

The witness says, that McLeod had a sword and a pistol. The stock of the pistol was painted red. I care not whether it was or not. He saw it and it was stained, no doubt, whether with the blood of Durfee, or of any body else, or not blood at all, it is evident that the prisoner wished to hold out the idea that he was the man who had committed the deed. We introduce this man, for the purpose of showing that McLeod confessed himself to be on this excursion. When we have taken the testimony to that extent it has performed its office.

Gentlemen, add that to the foundation work, which has been erected in this case, and let the learned gentleman produce all the force he can against it, and we will see whether he has been able to raze its foundation. Calvin Willson was acquainted with the prisoner, who in reply to a question from Raincock said there was one thing which he did know, and that was, that one damned Yankee got shot on the wharf. Now, they have undertaken an impeachment of him also; and they have shown by Alexander C. Hamilton, a lawyer of undoubted respectability, that Raincock had left the place before the time alluded to. But is it not possible that he had gone to the American side and was back there on that occasion? Hamilton swears that he ran away for debt, and others say that he did not run away for debt. Now who knows but he resided near by there? It is a fact which I am ready to concede, that it has shaken his testimony and it belongs to you to say, how much credit it is entitled to. If you throw it altogether away there is enough left.

Seth Hinman lives in Youngstown, he saw McLeod on the evening of the twenty-ninth, and at seven o'clock the next morning; he was once in a Hunter's Lodge. He has no doubt that he saw him about sunrise. This does not prove that he was on board the boats, but it goes to prove that what they set up, in defence, is groundless. And I shall have occasion to advert to the circumstance for that purpose—to show that he was there about sunrise, and therefore probably one of the party. I ask why was he up there thus early in the morning? Is it improbable that he should be up thus early in the morning. He had taken a sound nap after his wine-drinking, and had risen in the morning. There is no proof that he was there positively. The officers there were up at an unusual hour in the morning, which shows to my mind that he was there drinking over the fatal deed which he had accomplished.

William W. Caswell saw him come out from Davis's about nine o'clock in the evening, and go towards Mecklem's store, where the

consultation had been held, and in the direction of the embarkation. He undoubtedly went there for the purpose of embarking. Witness saw him about sun-rise the following morning on Davis's steps. Prisoner said "We made the damned Yankees run." Now, do you not believe he said that? Do you not suppose, if you had been in Canada, a citizen of the United States and looking on that transaction, he being a deputy sheriff, and being in that transaction and confessing that he did a certain act, do you not believe you would remember the substance of it as long as you live? It was not like the every day occurrences that take place in a neighborhood; here was an important fact divulged.

When a man comes forward, in open day-light, and makes such statements; how could an American drive them from his thoughts? They will be with him to the latest day of his existence. McLeod also said that he saw one man dead on the dock; he had a pistol in his hand; now I ask whether this will not convince the mind of any reasonable man that McLeod was a participator in that affair.

Anson D. Quinby saw the prisoner come out of Davis's, about nine o'clock. The next morning he saw him not far from the bridge, and some of the colored troops about him. Some one asked how they made it go last night. The answer was, "we," or "I killed one or two damned Yankees." Do you suppose that he had forgotten? I apprehend the jury will wait long before they forget the circumstance.

Justus F. T. Stevens says he saw the boats depart and return, but upon the testimony of this witness very little reliance was placed.

Timothy Wheaton is less explicit than the others.

We have called no less than twelve witnesses, all showing that McLeod was there, and yet the learned counsel has stood up here and proclaimed to this Court, and audience, that it was the duty of the Attorney General to abandon the cause! But for my personal acquaintance with the learned counsel I would set him down as a maniac. I do not say that he intended to misrepresent.

Now let us go through with the evidence on the part of the prisoner, and see how far that changes the force of the evidence which I have recapitulated. Perhaps I ought to remark, before proceeding that it has been said by the distinguished counsel that he has impeached the testimony of Anson D. Quinby.

Well, let us see whether he has. Did you ever know a man impeached by introducing a single witness against him? If you were going to impeach a man, would you go twenty-six miles from the residence of the individual to get a lawyer who had been employed for the express purpose of impeaching him, and who when he came upon the stand did not impeach him at all, nor attempt it? Would you subpœna that man and rest your impeachment upon his testimony or even upon that of a Justice of the Peace? When it appears that no longer ago than a few weeks, he was called upon the stand and an effort was made to impeach him but abandoned.

The learned counsel has said that the Post Office has been made use of improperly. How did Mr. Lott of Pennsylvania—this Justice of the Peace, of no politics, do? Did he not communicate through the Post Office, and was not intelligence sent to the counsel, and Mr. Lott invited here through that channel? And that is the man who

comes here out of the pure love of justice, all the way from Pennsylvania! I suspected there was a moving cause, planted deeper than we can see. This is the man who is willing, voluntarily, to communicate intelligence, through the mail, for the purpose of getting a chance to come and swear on this trial. Why, gentlemen, this is a novel mode of impeachment; it is not much stronger than the learned gentleman's argument without any proof, and not half so amusing.

Here we happen to come upon a principle of law—if a man goes into a neighborhood for the purpose of inquiring whether the character of an individual is good or bad, and inquires of A. B. C. and D. and they all say bad, and so on through the town, and this man comes forward to testify, the Court will say "you are not a competent witness." It must be a person living on the ground. The Court are familiar with the doctrine.

Therefore the intelligence which this lawyer obtained is wholly useless.

It was not to be expected that when we had to draw intelligence from the other side of the fatal Canadian line, that the principal men would come. It would be useless to go there to take depositions. You might be sent back perhaps with a bullet in your head. We can not expect that men of wealth and high standing, of rank and dignity, can be brought here as witnesses; but it is men from the anvil and the plough, only, that we are able to procure. Shall a man's integrity be weighed by the weight of his purse? Is it not believed that the laboring classes of the community are the honest ones, rather than those who are engaged in speculations, to which the laboring classes have not access. Persons who labor for their living have but their character to bear them through life creditably. These men, when unimpeached, are the men to be believed; when you undertake to impeach a man whose character is not good, how much easier is it to take a poor man than a rich one. Take a rich man, and the first thing is, I know that man can injure me, possessing as he does, property and power. But take a man who is penniless, having nothing but the hands with which he gets a living, and how easy it is for wealth and affluence and power, backed up, as on the present occasion, by the British Government, by able counsel, to crush the poor man! I ask you not to shut your minds against the poor man. I apprehend that when they come to get through with it, the gentleman's charges against the Attorney General will show to this country, to England, and to the world, that this prosecution is brought in good faith, and carried through in good faith.

We now come to the prisoner's defence; and there is one circumstance which the jurors should have in their minds, as much as the carpenter his square and compass. It is that when a person testifies to an affirmative fact, his testimony is stronger than that of the witness who testifies against him. If I should see a person in this audience, and it should become important, next year, or the year after, or five years hence, to prove that man was here, and I should be called to prove it, and swear that I saw him here, that I recollect the fact; suppose, then, that forty others should be called on to say whether they saw him, and they should say that they saw almost every other one, but did not see him, would you be at liberty then to say that my

testimony was impeached, although they could say that they knew a great many, and that he was not one of them? Now, I want to know if that contradicts the most feeble evidence? Here, then, is the long and short of the argument; and of this character is the testimony of Capt. Sears. This man, who was in the confidence of the British Government, a sort of link between the black and the white races, standing where the complexions meet both ways. He is a man who appears pretty well, and has a reasonable amount of intelligence. The Attorney General, did examine him more severely than any other, and his answers did appear pretty frank, and quite intelligent; but if they had been strictly true, they would have had more weight. He goes too far, and swears that they were all in darkness, so that no one could see; he says it was very dark. He was asked whether he could see his friends. He answers yes, and there were five of these men engaged in this glorious deed, which has been compared to the seizure of Yorktown. But he cannot name the persons who were engaged in this black deed of butchery, and he had reason, I suspect, for not doing it. He says that he was in Davis's tavern several times in the course of the night; and that he saw Davis, and conversed with him. Davis swears that in the course of the night he did not see him at all, but that he was in bed. Now, what shall we say to the testimony of Capt. Sears? I should call this at least a contradiction, which detracts from the force and power of his evidence. It was so dark that he did not see Sir Allan McNab; No wonder, then, that he did not see the prisoner. There seemed to be a mysterious power in that man; the moment he turned his eye toward a friend, he could see him. I do not know how it is in Canada, but in this country, I should doubt very much if this peculiarity exists. He was about the beacon-light, but did not see McLeod, although it is possible that McLeod was there. He was asked, did you see Drew, the man who commanded? He says, yes, I saw him. Was there any man in uniform? No, is the answer. He saw Drew, and could swear that the prisoner was not there. Another witness swears that Drew was the only man in uniform, on that occasion. How could he identify his friends, and still not be able to tell whether the commander was in uniform? Harris swears expressly that he was thus dressed, and that he was the only one. But this distinguished Captain, when brought here, says that when the boats were passing up and down, no one was permitted to pass unless they gave the usual signal or countersign.

Platt Smith says it was usual to pass without any such ceremony. When that witness was called, he said he passed all except one. When they saw that they were people who lived in the neighborhood, they did not challenge him.

If there had been a large army on the island, it might have been different. But here was an army of two or three thousand men, and only two or three hundred upon the island, whom the Canadians feared no more than they would so many persons without arms at all.

But we have direct evidence that the sentinels were in the habit of challenging persons who passed. They were set there to do this duty. And unless this man has an all-seeing eye, to look any where, and every where, his testimony amounts to little or nothing.

We now approach a more important part of the prisoner's defence —the depositions. A commission is made up here at home, by the respectable counsel, to examine witnesses in behalf of the prisoner. In making up these questions, the counsel on the part of the prisoner makes out the ordinary questions, called interrogatories; and the counsel on the other side make out the proper cross-interrogatories; and they are sent to Canada, or wherever the witness resides, and these interrogatories are read over, and the answers of the witness taken down. Now, you perceive, you cannot change your cross-questions to meet any other thing which the witness holds out, but have to examine him on the old questions. Of course therefore the witnesses can screen themselves from saying many things, that the counsel would think proper to inquire about, were the witness on the stand. Why, suppose that the learned counsel had been required, in any manner, to draw up written interrogatories for the witnesses, he has examined—how much would he have found out? Very little. You cannot go into a cross-examination, where depositions are taken, that shall elicit important facts, many of which would otherwise be brought to light. I grant that the testimony, on the part of the party issuing the commissions, may not be as forcible, yet the cross-questioning of the testimony amounts to little or nothing. In these commissions, do you find the question put, who were on board these boats? You do not. If the witnesses were on the stand, they would have to answer, who were there; this matter was of the utmost importance. Suppose you should come forward in a court of justice, and swear that you did not see the Attorney General on board such a boat, that night; on the cross-examination, you would be asked, how many were there—who were there. If the witness could give in the names of all on board and say that he knew them, and give their number, and all these marks which make the truth, what would be the effect? To carry strength, and force, with such answers. Now what is done, in this manner of testimony? You find witness after witness, swearing not only strongly, but positively, that the prisoner was not on board the boats, at all, when it is utterly impossible, positively to know whether McLeod was on board or not—utterly impossible: it is true, they might know he was not on board the boat where they were; but, to know that he was not on any of them, is utterly impossible.

MR. SPENCER here interrupted. They have not said that; but the witnesses on board each boat—have declared that he was not on board the boat which they were in.

MR. JENKINS. That is not very important; if they desired to show with certainty that the prisoner was not on board the boat, they should have asked the question, themselves; it would brace up the residue of the testimony beyond all description: every man would see if they knew those on board and could describe them, that McLeod was not among them; and their testimony could be relied on; but let them put the naked question only, and it shows that these persons could not be satisfied with a degree of certainty.

MR. SPENCER. The question is put and answered, whether they knew every man on board the boat.

MR. JENKINS. But if the answer was made that they knew the

names of all on board, would it not add to the testimony? If they could say, "I knew all on board, and McLeod was not there,"—does it not amount to nothing at last? And, I will show you that these remarks are strictly applicable to the position I am about to take. The learned counsel did anticipate me—in saying that it would be urged by the counsel on the part of the people, that the parties to a crime, are not such as can be relied on in a court of justice, and I do admit, I was pained with the praise, which the distinguished counsel thought proper to attach to the transaction of these persons in this dark tragedy. Will the persons who are engaged in this business, be left to the tender mercies of those who, in the night time, invade our borders and attack in this manner our boats? when they know not who are on board—how many private citizens—who go and raise a gang of men, putting into their hands the most dangerous weapons, who cry out that they will "give no quarters," who shot one man on the spot, and how many others they killed, no man can tell; and after they had done all that, the learned counsel compares them with the heroes of the American Revolution. This is elevating them to a position to which the human mind can never give its assent! Shall those who commit an act of which they are ashamed, be thus praised, and in an American Court? It is to me, absolutely and exceedingly unpleasant. Did they not know they were crossing the important line that divides two nations jealous of each other? Did they know when they were about to commit this murder, how many fathers they would renner childless, and how many wives widows? Not, at all: and yet they were willing to go and fire indiscriminately on that boat. Now, I say, a man who will do this, is as hardened a villain, as ever swung on the gallows; they went and raised the murderous knife in the nighttime, with a view of slaughtering those people indiscriminately, and without any cause whatever; and yet, it is claimed, although they possessed feelings thus hardened—it is said by the learned counsel opposite me, that you are to believe them, as much as though they had not been parties to the crime: it is hard work, and never, in this country or in England where common sense prevails, can it be assented to. Depend on it, the man who has participated in such a transaction, has lost his moral sense, and will be more easily swerved from the truth, than the man who is not thus stained with the commission of an evil deed: and, gentlemen, I would prove this, in the very witnesses themselves. The law on this subject is this—that a party to a crime, although he turn states-evidence, cannot alone support the prosecution for a criminal offence, without strong corroborative circumstances, for the purpose of enabling a court, to authorize a jury to bring in a verdict of "guilty" against the prisoner. But if this testimony is of itself entitled to but loose credence, witnesses have been called against them; and I therefore insist that the testimony of these men should be looked into with great care, whatever it might amount to, were it not thus circumstanced, by the fact of their connection in the guilt of the prisoner. I will take one example—and that is the boat in which the commandant, Drew was himself; and the first question is this—it appears from the evidence of other witnesses, that Drew is in Canada; why is he not produced here? The man who must have known McLeod better than any other person—why is not the commandant

of the boats—the man too, who was in company with the prisoner that very afternoon, and in whose boat the prisoner would be likely to enter—why is he not on the stand, and required to testify? In this country every thing was at the command of the prisoner, and persons from his own country came here to watch the trial; why was not Drew authorized in that way, and requested to give evidence, as to whether he saw the prisoner at all or not? Remember that the prisoner, under the advice of his able counsel here, and perhaps equally able counsel in the Provinces, would not have called on men who were able to swear against him. Gentlemen, depend on it there is acute management in this case; that they have not called on him, to testify; if he could have sworn that the prisoner was not there, he would have been the first man pitched upon, and would have been called as a witness; but he was not. The second in command, Harris—

MR. SPENCER.—There was one other of the officers of the navy, who was in the boat together with Drew, who declined to testify, for the reason that he would not give any countenance, by giving testimony, to the right of trial before the courts of the States.

MR. JENKINS.—I presume the counsel has been so informed, and that is about as true as that the prisoner was not in the expedition, because he was at Morrison's; but I hope the learned counsel will not always be deceived with pretences so slight and flimsy; to save a man's life, it is true, he would not be sworn—he would not commit perjury, and therefore was not sworn. Who have they sworn out of that boat? The first was Harris, who was second in command; he says there were nine in the boat he went in. Edward Zealand, who was in the same boat, says there were eight in it; now, where is the odd man? I suspect it was McLeod; there is a difference of one between them; and how will they reconcile it? At any rate, there is a contradiction; and where is the odd man? If they can swear with such certainty—one swearing that there were nine, and another that there were eight, in the boat, it seems to me that it goes somewhat to invalidate the force of their evidence. Put that in connection with the fact that Drew himself would not swear, and let us see whether, as an American jury, who are not placed below mankind in general, for knowledge and good sense, cannot see that there existed a consciousness that McLeod was a sharer in this deed of violence, Now, Harris says there was no man of the name of McLeod in the expedition—he knew every person—"I did not see every person who embarked." "On their return home they went to their respective quarters; I had no acquaintance with McLeod; "I believe I was the last person who left her." Zealand says, when they came to get out, he jumped into the river; I do not know but it may be that he, and the prisoner, had drank deeper than they should have done, and therefore were unable to perform their fiendish duty.

Now, we come to the point raised by the testimony of Center. He swears that he threw a couple of carcasses, one into the fore, and one into the after cabin, and then came away. I should like to know how they burned, after the boat and he himself were wet. No man pretends that this Harris ever put any such article into this boat, for the purpose of firing her; it is contradicted by the other facts sworn to. What is there further on this branch of the case? It is

perfectly obvious, that when you look through the evidence, and examine it, with respect to these commissions, it amounts at best to very little. It would not be expected that they would be careful to notice who were there; giddy and excited as they were. If a list had been made of those who were there, and McLeod's name had been on it, they would have been the last to produce it, in a case of life and death. No such list was made. The people, when the temper of the times has cooled down, will hold up the perpetrators of this deed to the indignation of both nations. You perceive then, that the evidence from the commission, and that of Sears, does not amount to much.

Now, how do they establish their alibi? On this point of the case, I shall not detain you long; I do not deem it necessary. I shall leave much pertaining to this case to your own recollection, and to the remarks of the Attorney General. What is an alibi? It is to prove a man to be in another place, at the time charged. Have you not heard the learned counsel say that the question of time was the most difficult of all things to be remembered? So it is; and therefore the defence of alibi set up in criminal prosecutions, is such as almost always is looked upon with suspicion. Why? Because the question of time, about which people must remember, is an important one. Now, for the purpose of showing that we cannot rely on Morrison's evidence, we have introduced the confession of McLeod, to ascertain a fact entirely inconsistent with the statement of the Morrisons, in which McLeod says that on Christmas eve, the 24th of December, he was in Buffalo, and the following day he returned to Chippewa, and there gave the intelligence with respect to the Caroline. Now, Morrison swore with equal certainty that on that very evening, this same McLeod was at his house, and staid all night.

Mr. SPENCER. No—but on Christmas *evening*.

The ATTORNEY GENERAL. No, Morrison himself corrected the statement, and said it was on Christmas *eve;* the Judge will find it so, by reference to his minutes.

Mr. JENKINS. I understand it so; when the question was asked what time he was there, he said Christmas eve; that is what I understood him to say; if it is wrong, you will correct it. If so, then, of course, the witnesses stand contradicted in one point, for the reason that they swore that they remembered as distinctly that the prisoner was there on the 24th of December, as on the 29th: what is their recollection then good for? It is good for nothing. Inglis in his deposition, states that he was a bar-keeper in Toronto—that McLeod came there the 31st of Dec. 1837, and staid there three days; McLeod says that he did go to Toronto on the 1st January, 1838, and the next day was there; although they had been at the expense of examining Inglis, his testimony was not read at all, and it contradicted that of the whole Morrison family, with respect to his being there, the 1st and 2d January, 1838. The depositions of these Morrisons, taken on another occasion, have been read to you; what do they say? That McLeod came there with his horse, and that Morrison directed his son to put up the horse and supper it. The old man swears he knew nothing about the horse; his wife and daughter swear that they knew nothing at all about the horse, except from the boy; what has produced this change? They would rather have it suspected that Morrison's

family did not tell the truth, than that McLeod went there on horseback. In his deposition he says that he went on horseback himself; he says, "I got up about half past seven or eight o'clock, got my horse, mounted him, and went to Stanford in company with Press." In the examination before the judge, he says he led the horse and rode in the wagon with Press: Press says he has no recollection about the horse. The gentleman says he reconciles it in this way—that McLeod hitched his horse behind the wagon, and Press never found it out at all; is that possible? Not at all; if they were bothered by leading the horse, remember that the feeble recollection of Press, who is brought here to *press* every thing into service, would have remembered it as long as the fact of McLeod's being with him; it is not to be forgotten; but, there is something more improbable than that with respect to this. Press is brought to fortify Morrison; and when you come to ascertain the fact, Press's and Caswell's testimony goes for less than nothing, in support of the testimony of this family. That it is not true in fact, is manifest. Press believes he went down to Chippewa, and at the door of Davis's tavern saw the prisoner; thinks he mentioned to the prisoner that he was in a hurry. McLeod had a horse at Davis's, and still, in a muddy state of the roads and darkness of night, he detains Press from home, and takes a nap, while Press is waiting for him; it will do to tell this to new recruits, but not to us old soldiers. Do you suppose he got Press to wait for him to take a nap, and when he got to Morrison's, he was so sleepy as to take another? It is preposterous; men of sense see through the flimsy manoeuvering of which this is composed. The Morrisons say they usually go to bed at eight or nine o'clock: that night they were up till twelve o'clock; the old man remembers one thing—that McLeod took a glass of sling at ten o'clock, but what they talked about, no man can tell! Why, gentlemen, it will not do to prove an alibi by such evidence as that. They had heard that the Caroline was there, they say, before that time—

Mr. SPENCER interrupted. None but the young lady entertained any thought of the Caroline's coming down, before.

Mr. JENKINS. My recollection is as I have stated it; you will remember whether it is true or not: the young lady says that in the afternoon of the 30th, McLeod returned to Chippewa, bringing a ball that had been fired at him from Navy Island; is it to be credited that any man would carry a cannon ball in his hands, for the purpose of showing it to the young ladies! Gentlemen, it is not so. A little farther back, and let us see how this alibi is introduced. The Caroline was burned on the 29th of December; Cameron is shown to have been along there early in the morning; and that he brought along a piece of this ill-fated vessel—so anxious was Cameron to keep a piece of a vessel that had gone over the falls: that might all have been; yet it was quite early in the morning that Cameron should get hold of it; it is not very probable that he would have got hold of it, and taken it down to Morrison so early in the morning. If Morrison had sawed off a piece, Cameron would have remembered the special anxiety of a man to obtain a little piece of wood; and he would have been the last one of whom they would have forgotten to ask this question—what does he say? That on the morn-

ing after the burning of the Caroline, about nine o'clock, he stopped at John Morrison's gate, in front of the house near Stanford, and that Morrison came to the gate; "I there had a conversation with him of about five minutes; I may have mentioned the destruction of the Caroline to him; I now remember the fact of having held a conversation with Morrison at that time." Now, if that man had taken the pains to secure such an article as this, and the old soldier, Morrison, pleased with it, had thought proper to saw it off, Cameron could have remembered it. I ask if it does not look as if this alibi was manufactured? I regard this defence as made up for the occasion. It is possible, and barely possible, that it is true; but I regard it as made up for the occasion; and all the circumstances, to which I have alluded, show distinctly and positively that it is false; but when you place to it, the opposite testimony, it solves all these difficulties. What man can say that the force of the testimony of the four Morrisons, and the other testimony to sustain them, can ever weigh at all, against any witness positively showing that on this occasion, the prisoner was on the ground?

I do not feel very much enlisted in this cause; I believe the prisoner is guilty; if he be, and it clearly appears so, remember not only this country, but England herself, holds you responsible, under the exaction of a juror's oath, in the presence of God, and the face of man, to pronounce him guilty. Should motives of policy be brought into the jury-box? No; look through the case, examine it faithfully, and if you are not convinced that the prisoner was one of those persons on the expedition, I feel confidant that you will acquit him. "I feel no apprehensions of his conviction," says the learned gentleman for the prisoner, and yet adds, if there be a doubt in your minds, acquit him: so say I. But the door of doubt should be shut up till every effort is made for the purpose of direct conclusion; it is only in cases where the mind cannot come to a conclusion, that there is room for doubt: but begin with doubt, and so treacherous is the mind, that it will continue to doubt—doubt—doubt, and never come to a conclusion. I ask you to take up this testimony, and view it with all the powers of mind you have; the people will see this testimony, and when the verdict is pronounced, it will be such as we can look into: then we can say whether it has been decided according to justice, though perhaps it might have been more politic, to have decided it against the force of evidence.

THE ATTORNEY GENERAL'S CLOSING ADDRESS.

MAY IT PLEASE THE COURT AND GENTLEMEN OF THE JURY: Worn down with the labors of this case, I am called upon at this late hour to bear up, not against the intrinsic merits of the case, but against the powerful eloquence and the great personal influence of the counsel for the prisoner—to bear up this case under my own fatigue, and exhausted as you are by this trial, which has been of so great extent, against false issues, which the ingenuity of counsel has been too successful in placing before you. During the progress of this case, and the summing up, counsel for the prisoner have complained loudly of the manner in which the prosecution has been conducted, as if there had been something harsh and improper on the part of those whose duty it was to conduct it before you. We have been accused of concealing from him the names of the witnesses. Gentlemen, I do not feel that that charge is properly brought against us. For one, I can say it is not properly brought against me. As to harshness in the case, I owe it to the position which I hold to say, from the outset—from the first moment that the prisoner at the bar was arrested at Lewiston, to the present moment in which I am addressing you, by the direction of the Executive of your State, as well as of those in whose more immediate hands the prosecution was, every attention has been given to the prisoner, and there has not been left the shadow of a shade of ground for the enemies of our State, here or elsewhere, to charge us with having tarnished the name of the State of New York, in the administration of justice to the prisoner at the bar. Our indulgence has been unprecedented to the prisoner, lest perchance an opportunity should be afforded to the ill-disposed to say that the State of New York has been pursuing the prisoner in a spirit of malignity. It was above all things resolved, that in the administration of your laws, "All things should be done in honor; naught in malice." It has also been said there has been a committee room, in which these depositions on the part of the prisoner have been read to the witnesses who were to come here to refute them. Gentlemen of the Jury, believe it not. It is utterly untrue. There has been no such committee or committee-room. All the material witnesses for the prosecution have long since, on previous examinations, before the depositions were returned from Canada, or the commissions issued, stated the same facts, substantially, as they have stated them here. On what ground are you to be induced to believe that all this array of witnesses has been tampered with, or that there is some mysterious power extending behind the Court, driving forward this prosecution—and for what? No adequate motive has been presented here. Gentlemen, believe me, it is not so. The same heated imagination which conjured up conspiracies to murder McLeod in jail, and next to blow up your Court House, and other monstrous fancies—the same heated imagination has conjured this up also. I mean not to censure the counsel who have conducted the defence of the prisoner. Far be it from me to do so; they stand in a situation of great responsibility, and they have done their utmost. Gentlemen, if they had done less, I should have despised them for being recreant to their

duty. I pardon faults which arise in the excess of zeal; and if you have discovered in me any pushing of a point beyond what is right and proper, attribute it to my zeal; for I have thought I have been doing my duty, and nothing more. Gentlemen—one word more before we pass to the merits of this case. Something has been said here, of the mob at Lockport. I would not have mentioned this, but that it has been trumpeted forth that in this state we are so wild and regardless of law that we are ready to assassinate a judge on the bench. I stand not here to apologize for any appearance of violence at Lockport, but the circumstances were not as they have been exaggerated here this day, and as they have been represented in the public prints both here and in Europe. Gentlemen—the prisoner was, by a judge, let to bail without a precedent; and the people, who were somewhat indignant at the outrage which had been committed at their very thresholds, were excited. They did not do violence to any one; they insisted that those who had become bound should cancel their bond, and that was the whole. The judge cancelled no decision made; the individuals bound cancelled their bond, and the mob, as it has been called, retired. And why this? It was because they relied on you. It was not that they wanted to destroy the prisoner, but they wished the prisoner to have a trial by jury. It was the confidence which they had in a trial by jury, and I pray God they may always have it. It was their confidence in the trial by jury that induced them to retire like good citizens, and allow the simple course of justice to be pursued. Now, gentlemen, what progress have we made in this case? May I say that we have proved that the Caroline was destroyed, and that Durfee was murdered? I confess, when the counsel for the prisoner attacked so violently the testimony of Mr. Wells—the honest Mr. Wells, the first witness who was called to prove the destruction of the Caroline—I began to be alarmed lest we had not proved that the Caroline was destroyed, and that Durfee was murdered. I was astonished at the unprovoked assault—the savage assault made on the witness, who, I doubt not, you are all satisfied is an honest man. He is, gentlemen, as honest a man as any in the State of New York. His testimony, as far as material to the case, went only to prove facts notoriously true; facts admitted to be true by the defence. The charge of perjury made against him must be considered a gratuitous if not a malignant libel, for which no pretext can be found in the character or testimony of the witness. Gentlemen, I do not think perjury is quite so common as the counsel seem to suppose; but, gentlemen, it is a common thing to swear a little more than the witnesses know; a McNab, for example, in his testimony, as we will show hereafter, did not intend probably to swear to what he knew to be false, but only swore boldly and broadly to what it was impossible he could know to be true. When a witness is brought to swear in a favorite case which is near his heart, he does not always put in the words which qualify his testimony. But as to this open, deliberate perjury, in a case of life and death—it is monstrous and impossible! What man can stand here, and swear away the life of a human being, and his cheek not blanch? It is incredible in itself. I shall not pause to demonstrate

to you that the unfortunate Durfee is no more. You have his mangled body in your mind's eye, and you have seen the blood as it was described to you by the witnessess; you have seen that unfortunate, that inoffensive man, unconnected with any cause of offence against the Canadas, or any power whatever—his life taken in the darkness of the night, and his corpse thrown with indignity upon the wharf—our fellow-citizen, remember—one of those who are all bound together and to each other, to protect each and all, by laws which we have adopted for our government and guidance. We are bound to protect the life of every, the humblest citizen, as far as we have the power, and to revenge it when it is gone. The life of a man may be taken in lawful self-defence, or in the necessary defence of one's country. Yes, gentlemen, it might be taken by one in the patriotic defence of his country. On that point I will go as far as the counsel for the prisoner. But does the testimony here make out a lawful taking away of life in necessary defence? Gentlemen, it does not approach it. This point has been clearly discussed by the government at Washington, and I suppose the counsel for the prisoner will not dispute its authority. The learned gentleman here read an extract from the diplomatic correspondence which has taken place between the British Minister and our Secretary of State, in which our Secretary lays down the position that the affair of the Caroline was unjustifiable even in a national point of view, unless there was a strong necessity for instant self-defence, leaving no choice of means nor moment for deliberation, a necessity which the government of the United States could not believe to have existed. The learned gentleman resumed—Gentlemen, this has been extolled as an act entitled to be ranked among the glorious achievements of men. You well recollect the description of this boat; it was a ferry-boat—it was so small that a person could step out of a row boat on to her deck. Was it then so terrible an engine as would warrant such an extraordinary midnight expedition, violating the peaceful soil of a friendly nation and murdering its sleeping inhabitants? You will recollect that it came out from one witness that there were two steamboats lying at Chippewa, either of which might have met and destroyed her. Gentlemen, whatever other defence may be offered, this act cannot be justified as an act of self-defence. It was suggested by the prisoner's council that the persons on Navy Island might have been starved out by this act; but this plan, though it may have been a sagacious one, was one of barbarian cruelty—it was one which nothing but the rigor of war would justify—one which under no circumstances could we be expected to favor or abet. If our citizens were there, on Navy Island, they were no longer our citizens, and if they had been butchered or hung, there could be no appeal to our laws; but when they remain within our own lines, God grant that we may always be able and willing to protect them. We are appealed to on behalf of this act in a manner which may affect some minds. It is that their country was invaded; and you are called upon and required to say, whether we should not have done the same, if lawless insurgents were operating against us in the same manner. At least, gentlemen of the jury, I should blush if any of my

own countrymen would have done such an act in the night. If it should be necessary to destroy a little ferry-boat, I trust there will be men to be found in the light of the sun to do the gallant deed, if it were such. It was done, too, gentlemen, as I stated in my opening, would probably appear, by an armed band of men from Chippewa. But it was not such an act of public force as would justify an individual engaged in it. I can add nothing to the able opinion of our Supreme Court, which I read to you in my opening. I can only say, that Great Britain herself has decided that question, as far as the effect of an order of her government is concerned, when she refused to deliver up Greeley, when he was arrested at Madawaska, for taking the census under the order of the United States. When he was arrested for that act, and thrown into prison, and our government complained of the proceeding, what was the reply of the British government?—"We cannot interfere—our laws must be respected." That answer, as far as the law went, was conclusive and our government acquiesced. The same answer is equally applicable and equally conclusive now, and the principle on which we acquiesced then, compels us to insist now. But so far as this was an act of war, that question has also been disposed of by Great Britain. When she seized our citizens taken on her shores, she tried them in her civil courts, and she condemned some to be executed and some to be banished. Yes, gentlemen, our citizens have been thus treated, and the wives and children and brothers of those men have kneeled to the government at Washington, again and again, imploring that something may be done to procure their release from foreign bondage; but they have been told that we could not interfere. Shall not, then, the same laws which bind us from interfering with those who trespass on their soil, be equally imperative and binding when the sides are turned, and their citizens trespass on our soil? During this discussion, gentlemen, your attention has been directed to some few instances, supposed to be analogous to this case. I will not detain you at this late hour, but I cannot allow an occasion of so much interest here and elsewhere, to pass without one word with reference to these instances, which are cited. We are reminded of the case of Florida; a protracted system of aggression and annoyance continued there for more than three years. At last General Jackson, compelled by the very extremity of necessity in the defence of our frontier, pursued the fugitive Indians beyond our boundary into the territory of a nation at peace with us. What was the result? Why as you all remember, gentlemen, the subject was brought before Congress and referred to committees of the Senate and of the House of Representatives. These committees, a majority of which were the personal and political friends of General Jackson, then covered with fresh laurels, the darling of the nation, were compelled in spite of their personal admiration of the man, to declare that the act was an unlawful aggression upon a friendly nation. Why then is the case so totally dissimilar in every particular, brought up as a precedent on this occasion?

Again, we are referred to the case of the Leopard and the Chesapeake. It is the very case I would select to prove the correctness of the decision of our Supreme Court. The commander of the Leopard

made an unprovoked attack upon the Chesapeake in time of profound peace. Our government complained to Great Britain of the outrage, and demanded that the commander should be punished, and he was punished by being removed from his command. The learned counsel asks, with an air of triumph, "Could that man have been tried here?" Passed all question, had he been found here, he could and would have been tried and punished here—else the demand upon England for his punishment would have been an absurdity. Else an offender in such cases should flee, not to his own country, but to the offended nation, where alone he is protected from punishment. In that case the British Government disavowed the act, in this it has not. Can the views of the British Government alter the nature of the act, or effect the power and jurisdiction of our Courts? Our Government declares it to be, not an act of war, but an act of lawless violence in time of peace. The British Government agrees it was not an act of war, but insists that it was an act of justifiable defence. The question of the *lawfulness* of the act, which is the point of difference between the two Governments, is one which belongs peculiarly to the judiciary; and if the executive opinions of either Government are to influence us, shall we not be controlled by the views of the Executive of our own Government, rather than by the groundless assumptions of the Executive of Great Britain?

Mr. SPENCER—The British Government say that it was an exertion of force, defended by the circumstances, and declare that the orders given by the Provincial government, received their sanction.

ATTORNEY GENERAL—And when our Government admits the correctness of this assumption, it will be time enough for our Courts to take notice of it. The United States have jurisdiction of this matter as an Executive, not a Judicial power; the acts of the Executive are binding here; if to-morrow, at Washington, they make a treaty in which it is stipulated that the prisoner is to be delivered up, his chains fall from him. One word more; although I am conscious I am trespassing on your patience, permit me to say one word more before I leave this subject; for another opportunity may not occur to vindicate the course of our State. It is false that the authorities of New York have been delinquent in reference to these transactions; the authorities have done all they could. Governor Marcy issued his proclamation, he went personally, and it will be observed that the information of the acts of the insurgents arrived at Albany about the 16th of December, and there was but scarcely a week before this catastrophe occurred. I stand boldly here and say that New York has done her duty, and her whole duty in this case; her Sheriffs, her District Attorneys, and her officers have done their whole duty. At the very time the event took place the excitement was almost quieted, and but for this foul and fatal deed, all would have gone off peacefully. There is not the shadow of a cause of complaint against the State, that she has not caused her laws to be executed, or against the United States, that she has not been able and willing to fulfil, to the point of honor, all her obligations to her friend and ally.

Mr. SPENCER—I take occasion to say that neither Mr. Bradley nor myself have said one single word, arraigning the United States Gov

ernment or the Government of the State of New York, in this matter, for omission of duty, but have confied ourselves expressly to those participating in it.

Judge GRIDLEY here intimated that the Court would adjourn until to-morrow morning, and the learned counsel suspended the conclusion of his remarks.

EIGHTH DAY.

The COURT re-assembled this morning at a quarter to 8 o'clock, at which time many ladies were in attendance, and the court was completely filled in every part. As soon as the jury had been called and the court had been properly opened, the Attorney General resumed his address to the jury, in which he was interrupted last night. He spoke as follows:

GENTLEMEN OF THE JURY:

We have established that Amos Durfee was murdered; it now remains for us to show by whom this murder was committed, and whether by the prisoner who is charged with it. Let us first look into the circumstances which immediately preceded this transaction, and in this manner explain something of the position of the parties, and see if there arises a probability or improbability as to the prisoner's participation in that transaction. We have from him an account of himself the previous day; he tells us that the night before this he started from Chippewa to Niagara; he had proceeded as far as the Pavilion, when he was informed that the Caroline had come down, and although it was then night, he mounted his horse and went back to Chippewa with that important information; he goes to the head quarters of the commander-in-chief, Sir Allan McNab, and informed him that the Caroline had come down; the reply was that McNab could not act merely on her coming down. Act how? The subsequent catastrophe shows. He tells you that before daylight he furnishes a crew of eight persons, and they went round Navy Island, to investigate, in order to furnish materials on which Sir Allan McNab could act; that he did not find the Caroline till two o'clock, when he found her coming down, and passing from the Island to Schlosser, and from Schlosser to the Island. What does he next do? We next discover him at three o'clock, P. M.; we find him, with closed doors, in consultation with Captain Drew, McNab, and others. He had exposed his life to peril the night previous by shots from Navy Island; the great fact has now become developed, and the chiefs were assembled in counsel. You are told that this is very improbable, that they would be collected in a counting-room or a store, to consult about matters of this kind. Under other circumstances, it would have been improbable; if the plot was some open and gallant act, you would have found them at head quarters, in their places consulting on the measures to be pursued; but it was an act of another kind—a midnight incendiarism; and they had met thus; it would not do to be collected in any other manner. It is in perfect keeping, and throws light and confirmation on the case in all its features. They were met in consultation, there, at three o'clock; and

then and there was the design and the determination to destroy the Caroline, fixed upon. You find the prisoner then retiring from his council to his bed; was it all then so quiet and peaceful? Had the great object been achieved, that all his cares should be thrown aside, and he quietly retire to rest? No: that was but to refresh his nature for a night's expedition to destroy the Carolme; all this is in keeping. If any man on the border would have engaged in it, it was that man; you find him busied about and consulting immediately before it was carried into execution; you find him on the spot equally busy after the return of the expedition. If we should go no further, governed by the laws of motive which regulate the conduct of men, we could all say that the individual would probably be found in this expedition; these facts alone establish a sort of presumption of it.

We next produce a witness from on board the Caroline, who was there during this fatal and dastardly attack. We find one gentleman, who had seen him but a few days before, who knew his appearance as it then was—for men change in their appearance from year to year—and if you produce a witness who has seen an indidividual a year before, he may not be able to say it is the same man. We produce a witness who had seen him but a few days before; he says that when he opened the door of the companion way, to escape, he saw the prisoner, who made a thrust at him with a sword; it was but a moment, but he believed then, and had no doubt but it was the prisoner, so the next day, and the day after. This witness, you will recollect, was the captain of the boat—Captain Appleby; he was inquired of whether he would now swear that this was the individual; he says "no," four years had passed; the circumstances under which the prisoner had lived and acted, had changed, and in human probability, his appearance had changed. I might refer to the sickness and confinement of the prisoner having changed his appearance; but he swore at the time that he believed it was the prisoner. Up to this time, gentlemen, although the proof is such as would induce any of us to believe the prisoner was the man, unless it was shown to the contrary, yet it is not conclusive; the busy conspirator may have proved a coward at the pinch, and Captain Appleby may have been mistaken in his man.

I will now call your attention to the next class of evidence; the testimony of those witnesses who have heard the prisoner declare he was one of the marauders.

Eight witnesses have sworn before you, that they heard him declare at different times and places, that he was there and participated in the destruction of the Caroline. Can you disbelieve this testimony? It is impossible; the laws of your minds will not allow you to do it. The first witness is Corson, who on two different occasions—on the morning after, and two or three days after, when he was standing on the shore with his spy glass, heard him make the expression, which is testified to by this witness. I will dwell a moment on this matter; a most virulent attack has been made on Corson. This witness has been examined before us, and is well known to the counsel for the prisoner; it was known that he would be here; he was a neighbor of the counsel; will you tolerate that the counsel should come here,

and by their own word denounce a witness, instead of bringing witnesses to impeach him, when they knew he would be here. They could not impeach him; not a more respectable man lives in the country, and if his character could be touched by an impeachment, the witnessess would have been brought forward, if there were any on earth; the importance of his testimony we all know. What has been done? A single expression in his testimony has been caught at and urged upon you as improbable. He was asked who was present when he heard the prisoner declare, the morning after, what he had done on board the Caroline. He answered "It seems to me at this moment, that Caswell was there, but I am not positive." On being further questioned, he said that Caswell was present, and that they had conversed on the subject that morning, and naturally told each other what they had seen and heard on the morning after the destruction of the Caroline. Now the prisoner's counsel says it is improbable that it should have occurred to the witness then for the first time, that Caswell was there. It must have occurred to him in the morning when they were talking together. Well, what then? The witness used a common form of expression, which is not to be taken literally, and which did not necessarily imply that it had never occurred to him before. Now is there any thing in it, even if taken literally? Caswell did not tell witness that he saw him there, nor had any question arisen between them, whether they saw each other or were there at the same time. For the first time the question was put to the witness on the stand—"Who was there?" It is the first time his mind is turned to that point, and not improbable it did then first occur to him that Caswell was there. We are here surrounded by many people, some of whom you know. We go home, and the scene passes away, and none of you will task his mind to recollect who was here. Three years hence you are placed upon the witness's stand, and for the first time asked who was present here. You then go into your own mind; your imagination calls up the scene, and for a moment you seem to contemplate the picture again —and face after face again is seen, and among them there is some dim glimmering of a face that you know—it may be imagination and it may be fact. But then for the first time it occurs to you. Why? Because then for the first time the question is put to you. There is nothing remarkable or inconsistent with our experience in supposing that it should for the first time have occurred to the witness that he saw the face of his acquaintance, Caswell, when on the stand the question was for the first time put to him.

This is the only objection which the ingenious counsel has been able to discover in the testimony of Corson. And on such contemptibly frivolous matter has he ventured, in his desperate zeal, to charge a well-known and respectable citizen with wilful perjury.

But, gentlemen, if this unimpeached witness is to be believed, he establishes, not only that the prisoner on two occasions, in the presence of numerous persons, boasted that he was one of the destroyers of the Caroline, but also the all-important facts that the prisoner was not at Morrison's at sunrise the next morning, but at Davis's tavern in Chippewa.

The next witness, to whom I will call your attention, on this point of the declaration of the prisoner that he was there, is Park. He says a day or two after the destruction of the Caroline he heard the subject discussed in the officers' mess-room, and McLeod was there, and made the declaration that he participated in the destruction of that boat. I will not stop now to comment on his testimony, but defer it till I come to where it is more material. It appears from the testimony of Davis and Park that there were two barkeepers, Johnson and Park; it was a busy time then; twenty-five hundred soldiers were there. You can easily perceive how in these circumstances any of our country villages would be overrun by a body of twenty-five hundred men. This was the case at Chippewa; the taverns were full, everybody was put in requisition about them, and they were open night and day. Park says he retired to bed at 11 o'clock, and Johnson was up during the remainder of the night. I have shown to you that every effort has been made to procure the attendance of the barkeeper at this trial. He lives in another State, and I am not authorized to compel him to come, or pay him any further than his expenses. But it is not so with the prisoner; our law gives him the power to issue a commission and take testimony everywhere; it gives no such power to the prosecutor; I cannot do it; he can; where then is the testimony of this barkeeper? This is not a new thing; the counsel well knew the importance of the testimony of Johnson, if they wished to contradict the testimony of other witnesses. Why did they not get Johnson to show the transactions of that night at Davis's tavern? The next witness who testifies to the prisoner's declaration is Henry Myers; he was the one who in moving from Canada with his family had so much difficulty in finding his way across the river. He tells you that while at Niagara baiting his horse, there was a crowd of persons assembled together, some of them dressed in military habiliments, and were carousing in the tavern, and drinking there together; that McLeod was among them, and he testifies to some expressions there used by McLeod.

The learned counsel supposes, because the prisoner could not well have done all that he boasted of, while brandishing his pistol and his bloody sword, and attempting to astonish the Canadian militia in a bar-room, that therefore our witness is discredited. Not so. We do not pretend that all the prisoner has said is true; his statements here in evidence prove the contrary. His improbable boasts may discredit himself, but not the witness who heard him make them.

The counsel also urges you to disregard the testimony of this witness, because the expressions sworn to by him are unusual. If you knew the prisoner you might pretend to judge whether such expressions were usual with him, and might probably issue from his mouth; but without such knowledge you can only judge from the unimpeached testimony of the witness; you can see only by his eyes, and hear only by his ears.

You are told that this witness is stupid, that he has not sense enough to keep the highway. It may be so. But remember that the counsel also told you that all the witnesses for the prosecution

had combined and conspired together to invent a tale of falsehood in order to procure the conviction of the prisoner. Are stupid men selected to act a part in so intricate and complex a game, when a single mistake or inconsistency would baffle the design and expose the conspiracy? A stupid man may tell the truth as well as a wise man; but can he give to falsehood the circumstance and color of truth, and escape undetected from the searching cross-examination of the ingenious and powerful advocate? The very stupidity of this witness refutes the charge of conspiracy and perjury so unscrupulously made by the counsel for the prisoner. This witness has told you no invented tale. He has told you what he heard and saw.

The next witness is Calvin Wilson. He was ferry-keeper at Niagara; he tells you that he met McLeod with a group of persons; he thinks one of them was Raincock, that had been a deputy collector. You recollect what was said at that time; witnesses have been brought before you to show that Raincock had left the country at that time. This impeaches the witness. It is no part of my business to wish you to receive any testimony that is not beyond impeachment; the witness is so much impeached that I would not place any great reliance on what he says. The possibility is, that he was mistaken—that he did not see Raincock; and it is possible that the witnesses on the other side were mistaken. It is by no means established that this man, Raincock, was not there; but the evidence before you is such as to warrant you in doubting whether much reliance is to be placed on this witness, and I therefore lay him aside, and will not insist on his testimony. The next witness is William H. Caswell, who heard him make the same declaration, near Davis's tavern, at an early hour the next morning. You will call to your recollection the person—his manner and deportment were those of an intelligent man—there was no air of eagerness, no disposition to make out a strong case before the jury, and for that matter I appeal to you, if every witness brought before you has not shown rather a reluctance than an over zeal. Have they been hasty? Have they declared in sweeping language that they knew this and that? Have they not rather had the information drawn from them, fact by fact, and circumstance by circumstance? And I might turn and ask you, if it has not been manifest that the witnesses on the other side—not to speak of the depositions—have been interested? Have they not been zealous in the cause? Have you not noticed that the witnesses would go on and insist in telling more than they were asked, whether it was testimony or not? Again, in reference to this witness, Caswell, who stands before you perfectly unimpeached; he was a witness who testified originally at the arrest before Justice Bell, in the presence of the counsel for the prisoner. I am mistaken, I understand, in saying that the counsel was present; but the statement made out at the time, the counsel have long since had copies of; and the same story here on the stand, and which we are assured was made up in a committee room to refute the Canadian depositions, is a story told a year ago. It is nearer the truth to say that the Canadian depositions were made up to refute Caswell and others, who testified long ago before Bell and Bowen, and whose

depositions were made public. This man lives in the neighborhood of the counsel; his character is well known, and if liable to be impeached, the witnesses for this purpose would have been produced before you. You have seen the vigilance with which these witnesses have been sought; they have had time to send to Pennsylvania, to Ontario, for impeaching witnesses. There has been no want of information in the matter, and they have procured in every instance, when it was possible, the men to impeach the witnesses brought on the part of the people. One thing more, which occurs to me now; it was intimated here with reference to this Caswell, that having made his statement he came here and was compelled to go over the same thing again.

Gentlemen, I make a remark here, and wish you to remember it, when I come to the commissions. The witnesses produced on the part of the prisoner, in almost every instance, have made affidavits, which were published in Canada, when the Governor wished to make out as strong a case as he could; then these men came forward, and have been brought up again with their old affidavits before them, and compelled in this cause to follow out what they, under the heat of the moment and the orders of loyalty, were induced to say. The next witness is Anson D. Quinby, who heard him also, about sunrise the next morning near Davis's tavern, make similar declarations of his bloody deeds on board the Caroline. This witness has been attempted to be impeached in a formal and proper manner; but the attempt is an utter failure. One impeaching witness, Lott, whom none of us know any better than we do Quinby, tells you that he has come direct from the county court of the county in Pennsylvania where he and Quinby were witnesses on opposite sides and swore against each other. He comes here by another oath to support the first. He is not an impartial witness, to say nothing of his being an election officer and Quinby opposed to him in politics. Another witness was brought here to impeach Quinby, himself a lawyer, who was employed on the side against which Quinby swore; he too thought Quinby had sworn to what was not true; but the circumstances which, I think, will weigh with you against all this, is that, during the trial, they made inquiry to see if they could impeach him at home, where all the parties were known, and abandoned it, because they saw it was in vain.

Mr. SPENCER.—I am very sorry to interrupt the Attorney General; I think, however, he mistakes also the testimony of this man. I will here take occasion to state that no one but McNab had given his testimony previous to these commissions; these men did not make affidavits.

The ATTORNEY GENERAL.—Gentlemen, you have heard the testimony; I endeavor to state the testimony as I have heard it; and am unconscious of having deviated from the true testimony of these witnesses, Lott and Wetmore. Lott was a Justice, and sworn in that case on one side, and Quinby on the other. Wetmore said he was a lawyer; he made inquiry about impeaching him, but did not undertake to do so.

Judge GRIDLEY.—He states also the reasons—because his associate counsel believed it too unimportant to justify the attempt.

The ATTORNEY GENERAL.—You will recollect that this witness, Quinby, is far from home, and therefore it is an extraordinary case; if we had had time to procure sustaining witnesses, you might then draw some inference from our neglect; but the first which I heard of any attempt to impeach Quinby, was when the witnesses appeared here on the stand. I will refer to the next witness, Stevens;—he stated some facts, but was so evidently mistaken, whether intentionally or otherwise, that I look on his testimony as so little to be regarded, that I will exclude it from my remarks, and such you will do—exclude it from your consideration. He is undoubtedly mistaken; the facts he states are inconsistent with those stated by witnesses on both sides. The next is Timothy Wheaton, who was the last witness before you, on the part of the prosecution. In the fall of 1838, he saw the prisoner at the ferry; had a conversation with him; inquired of him about the Patriots; the prisoner goes on to tell him, among other things, that he was one who participated in the destruction of the Caroline. This witness is positive; it has not been attempted to impeach him, except by the gentleman's criticism on etiquette, who says that the witness testified that McLeod spoke to him, and none but a Yankee would address a person with whom he was unacquainted. This might be, if it were a fact; but he said that he spoke to McLeod first, and I believe that, according to the rules of etiquette, a gentleman, when spoken to civilly, will reply, and that was the case here; and perhaps Wheaton was a Yankee; I think he was—he was a stranger there, and very naturally introduced the subject by saying, "I pity those poor fellows!" He then goes on to inquire about other transactions, and the prisoner answers him on those points, and tells him what took place at Navy Island and at Schlosser. Is there any thing improbable in this? Not one word; it is in the highest degree consistent, reasonable, and probable. And here, gentlemen, let me make one remark, which may be of some assistance to you, and throw light on the whole argument of the learned counsel for the prisoner. He has told you, and truly; and it was not necessary for him to tell you; it was discoverable—that he commenced the cause with the determination that every witness on the part of the people was a perjured villain; and he cross-examined them on that assumption, and has the assurance to ask you to do the same. I will ask you to take the other side, and assume for a moment, that the prisoner was there, and then take the testimony, and see if from beginning to end, it is not probable. If you view it in one point of view, assuming that he was not there, then turn round, and take the other assumption; but when you go into the jury room to decide, you must not take one hypothesis or the other; you are to arrive at your conclusion from the testimony, not to take the conclusion, and from that consider the testimony. Another witness, Seth Hinman, saw the prisoner early next morning near Davis's Tavern in Chippewa—a fact which utterly overthrows the alibi attempted to be proved by the Morrisons. This witness seems to have troubled the learned counsel much; he can find nothing against him; he comes

to him, and raises his hands, and says, "Oh, the depths of iniquity!" It reminded me of an anecdote I have heard of Oliver Cromwell, who, when he wished to get rid of his Parliament, went to one man and another, and charged them with derelictions here and there, and made various accusations, until at last he came to Sir Harry Vane, who was an upright man, against whom he could bring no charge—he could only say, "Oh, Sir Harry Vane! Sir Harry Vane! the Lord deliver me from Sir Harry Vane!" (Faint laughter.)

Judge GRIDLEY. There is no reason whatever for any exhibition of this kind, nor will it be tolerated. There is nothing in the arguments of the counsel or proceedings that should create any disturbance of this character, and the scene is altogether unsuitable to a Court room.

The ATTORNEY GENERAL. I will now call your attention to the testimony of *Leonard Anson*. No more intelligent man has appeared before you, on either side, whose matter and manner of testifying should entitle him to your credit. He was employed at Chippewa at the time. He has not been attempted to be impeached. He was a witness before Bell, a year ago. All that he says was well known. He lives too in Lockport, a neighbor of the learned counsel himself. And if any thing could be said against him, you would have found them saying hat he was not worthy of credit. But his character defies impeachment. They cannot impeach it. He says he heard the declaration in the bar-room, in the company of a large number of those who were present at the destruction of the Caroline. And the only way they have attempted to impeach him was, by the argument of the counsel, who misstates his testimony, and says that he testified that he was awoke at the burning of the Caroline, and got up and went to Davis's at the time. That is not his testimony. He states that he was awoke at the time, but that he remained there, and did not go to Davis's till morning. In order to make out the impeachment he is obliged to misstate the testimony.

Mr. SPENCER. I think you are mistaken, if I have read my own minutes rightly, and they are true, I think there is no great misstatement of evidence.

Judge GRIDLEY. I think the counsel had better be allowed to proceed. If the counsel misstates the evidence the jury will correct it.

The ATTORNEY GENERAL. I hope, that your Honor also, will correct me if I do not truly state the evidence.

Judge GRIDLEY. I think your statement was correct.

The ATTORNEY GENERAL. Far be it from me to wish to convict any man with evidence that is untrue. I hope in truth that you can acquit the prisoner. All my duty is, to have the facts placed before you. Now I have commented on all the witnesses, and among them are some seven or eight, who stand unimpeached. And I ask you, as men, can you refuse to say that, whether the prisoner was or was not there, he has again and again declared, under various circumstances, that he was there? It is true that the declaration of the prisoner is not absolute evidence. The fact that he declares he has done so and so is not positive proof of it, and I do not thus bring

it before you; although it seems most extraordinary, that on so many occasions, he should have made this declaration, if it was not so. But on one or more occasions he made the declaration in presence of those who were there. Mark the testimony of Leonard Anson. He said that he declared it, surrounded by those who were warm from the conflict. That he declared—"I did so and so;" and none of them disputed it. I ask you when he made the declaration in the presence of those persons, and they did not deny it, if it did not make every one of them a witness before you? Is not every man of them a witness before you, on the stand, that he was there? If you believe the testimony of Anson and others, who said that he made the declaration surrounded by these people, you must believe that he was there. Braggadocios do not select such a place for their boast. When, with their hands red with blood, a man comes among them, and says I was there, and did this and that, it must be so, gentlemen.

I will now proceed to the testimony of the witnesses who saw the prisoner embark in the boats. The first witness is *Charles Parke.* This is a Canadian witness. The gentlemen have undertaken to say that this witness contrived to get here. This is not so. He would not have been here had he known of the trial. It is true that he came to Buffalo to purchase a library, for a library association—which very library he has purchased in this city—and was unexpectedly summoned as a witness, and supposed the subpœna a compulsory process, which he was bound to obey. Is there anything that should induce you to doubt his testimony? He knew McLeod. Was in the habit of seeing him almost every hour of the day. He was not like the witnesses on the part of the prisoner, who never saw him, or saw him but once. Here was a witness who was in the habit of seeing him morning, noon, and night, under all circumstances, and who had seen him but one hour before—who had, therefore, seen him in the same habiliments in which he was at the embarkation, and he would have been less likely to have mistaken him? He went to the place of embarkation, and saw them embark, and saw the prisoner there, and there saw him get into one of those boats. Now, gentlemen, here is a witness who, if the prisoner was not present to take a part in the destruction of the Caroline, is a perjured man. That man, if the prisoner was not there, has come forward, deliberately and unblenchingly before you, and attempted, by perjury, to swear away the life of a man. To my mind the simple fact is more incredible than any thing you are called on to believe in this cause. The counsel have urged on you, that this witness, Parke, is opposed to Press, and that he or Press is perjured. It is not so. Press's story is perfectly consistent with the fact that the prisoner was present. Mark that! Press states facts which may be all true; but he may be mistaken in time, which, the counsel tells you, is one of the things which are most easily mistaken. It may have been the day before or the day after. Not so with Park. If his story be not true, there is no corner where he can shrink from damning perjury.

Gentlemen, let me advert to a very small circumstance. The learned counsel complains of Parke, because he did not resort to what he calls "white lying,"—to some evasive reply, which he might have

done and got off; he says that he might have told a "white lie" and avoided testifying in this matter, by saying that he knew nothing material to the cause. Why will not the learned counsel allow the same privilege to our witness, Drown? When he comes to Drown, who, when his family were sick, and he could not attend, said he did not know any thing of consequence in the cause? When he comes to Down, the lie is black enough. I wish the gentleman to be consistent, and if "white lies" may be used in one case, why not in another? Another objection made to the testimony of this witness is, that he said he did not know to whom he had ever told the story. "Now, how improbable," say they, "that is!" "How came he here?" Why, believing that this was true, we inquired who saw it, if true? and we found that Davis, Park, and Johnson, were men, of all others, who must be brought before you, and without stopping to inquire what they would state, we proceeded to get them here; we knew that Parke was present in the bar room, and must have seen the prisoner there; there was no necessity for him to divulge what he would testify to. We did not think it necessary to drill our witnesses, but to send for those on the spot, who must have known of the transaction. Thus much for the testimony of a witness unimpeached, who says he saw these men get into the boats at the time of the embarkation. Now, let us proceed to a witness who saw them disembark; that is Samuel Drown. You have heard, gentlemen, an attempt made to impeach this witness; you have heard the testimony of Bates; and also of Rev. John Marsh, who says he knew him several years in Canada; I can throw no more light on the subject. I look on his character as perfectly sustained; and I look upon the witness on the stand and the manner in which he has withstood the fearful cross-examination, as presenting him in an attitude which demands your belief; he is not a learned man—not a man of wealth and standing; but he appears before you in the attitude and manner of an honest and intelligent man. If he stands impeached at all, it is by Bates, and this I deny; for he tells you, that for the last four years, his character has been unexceptionably. Rev. John Marsh says he has known and employed him for many years and never knew any thing against his character. He has been attempted to be impeached by the comments of the learned counsel, who has said that he went down to see a sailor and did not speak to him. He did not say this, but that he went down to the beacon light; that while he stood there, he remarked to his companion that he wished to know who those persons were; and that he would run down and see them. He went from the high road to the path which passes some little distance along the river; and Smith kept along the road; Drown went down to the boats and saw the men; he went for the purpose of seeing them; out of that Yankee curiosity to know who the men were; and he tells you that the prisoner at the bar was there; he saw him; he knew him; was familiar with his face; was in the habit of seeing him at the time; was not only satisfied that McLeod was there, in the darkness, but went with the troop in the road to Davis's tavern, where the lights were shining, and saw him there in the light. He, too, like Parke, unless the prisoner was in

that spot, is a perjured man; there is no escape from it; he is a black-hearted perjurer, unless the prisoner was there. He says he knows it was him–he is as sure of it as he is that he saw him sitting here. This, gentlemen, is the substance of the testimony on the part of the prosecution. The learned counsel for the defence asks, with an air of triumph, why were not more witnesses produced of those who were on board the boat? He tells you, besides, that there is a conspiracy to take away the life of the prisoner. If there be a conspiracy, would not the same thing have suggested itself to the conspirators? Could there not be found one reckless man among the conspirators to come forward and swear that he saw him in the boat? How comes it that such natural testimony had not suggested itself to these perjurers? It would have been perfectly easy for one of these conspiring perjurers to have declared himself on board the Caroline. No, gentlemen of the jury, the idea has its basis in the imagination of the learned counsel, only, that a number of men from different parts of the State, dragged to this stand by compulsion, to give evidence, should have previously concerted a plan to come here and swear away the life of an innocent man. It is a thing most improbable; you cannot believe it to be true. It is utterly inconsistent in itself, and altogether too improbable in its nature to obtain belief. A sweeping attack, gentlemen, has been made upon the witnesses on the part of the prosecution, that they were connected in some way, with the excitements which existed upon the frontier, and the contentions which were going on between the Canadian authorities and some of their citizens. It is true, some of them were involved in those difficulties. How far this is to go to affeect their credit in this case, depends upon you, gentlemen. If you think that because they were witnessing these transactions, and partaking of the excitement which it was natural for them to feel; that therefore they are incompetent witnesses, I would ask you, on the other hand, whether those who testified on the other side, and who were also there, are not equally to be discredited? I ask you whether the fact of their being participators in those excitements, is to weigh against their positive testimony? If that testimony were respecting a question of quantity, quality, or degree, I grant you it would be objectionable; but when the question is as to an absolute fact,wholly disconnected with themselves, excited feelings furnish no ground of objection; when the question is merely whether they saw such things or not, the circumstance of excited feelings has no influence whatever.

Gentlemen, before I proceed to examine the evidence on the part of the defence, I wish to make one remark. The case made out on the part of the prosecution is one which, in point of strength, I have rarely seen surpassed. It is a rare thing that so much direct and positive testimony should have accumulated against the prisoner. This is a fact to which your minds must assent; and unless something be presented in opposition to this array of testimony which is physically irreconcileable with it, your verdict must be against the prisoner. Now, what is the defence set up on the part of the prisoner? It is what is called in technical phraseology, an *alibi;* and its

character has been best described by a pun on the word, making it *a-lie-by*. You, gentlemen, are not sufficiently acquainted, perhaps, with the practice of law to know, but it is a well known circumstance in the profession, that the proving of an *alibi*, as a defence upon a criminal prosecution, is the common resort of all felons. It offers many advantages to the accused. He has first the power of selecting the place where he will locate himself; next he has the power of selecting his witnesses; he may make his accomplices his witnesses; and we are told by learned writers upon this subject, that often has it been known to be made the screen for successful villainy. He goes in reality to the place fixed upon; he has his witnesses present, and they come into Court and testify according to what happened, but they fix upon a different time from that in which it really took place, and assign the particular and precise period of the act complained of, as that of which they speak. It is a matter easy to be established, and exceedingly difficult to be controverted. For this reason, it is, gentlemen, that there is another rule which applies to questions of this kind. If it is a mere approximation to truth, a mere probability that he was at the place in question, it weighs not one particle against the positive testimony of unimpeached witnesses. This is the law as applied to an *alibi*. Now, gentlemen, let us look at the evidence which has been taken in support of the defence. But first allow me to remark, the jury cannot but perceive the disadvantage which the counsel for the prosecution labor under in establishing their case. Witnesses who live in Canada are not within our power. Those who were engaged in the expedition will not testify against the prisoner. The only witnesses, therefore, within our reach, are those who were on board the Caroline, together with some who saw the prisoner embark, and others who saw him return from the expedition. It did so happen that there were some young builders who came over and established themselves in business upon this side of the line, who were acquainted with the prisoner, and who knew of his participation in the expedition. And it is rather a matter of surprise that we have been able to produce so many witnesses. On the other hand, how is it with regard to the prisoner? All Canada are ready to come to the assistance of the prisoner: every man, woman and child of them. Such is the position in which we stand in making out our case. Such, gentlemen, is the character of the testimony which has been brought forward so vauntingly in these commissions. But you see not the men, you hear not their voices; you know not their manner; and the same reasons which have been urged on you, to discredit our witnesses, would apply with greater force with respect to these depositions. On paper, all men appear alike. You may take the most perjured villain, place him in the closet with his counsel, and his testimony, calmly and coolly prepared and written down, would appear as well as that of the most conscientious and upright man. There are other considerations, gentlemen, which I wish you to carry with you, when you consider this testimony. We have no opportunity for cross-examination. We cannot, of course, know what their answers will be to the interrogatories in chief, and the cross-

interrogatories are, therefore, the most futile means of eliciting the truth imaginable. The witnesses, on the contrary, having the opportunity of reading over the cross-interrogatories, as well as those in chief, are enabled to frame their answers in that artful manner, which will meet the whole case. Again, whilst we have laws which very justly punish with imprisonment, witnesses who are guilty of perjury, these laws do not extend to those who make depositions in this manner in a foreign country. They swear with perfect impunity. Swear as they may, they go unscathed. We have no power over them. The depositions, therefore, are not entitled to more credit than mere voluntary statements, not taken under oath. There is another circumstance connected with these commissions, which I wish you to consider. It has been before stated that there are many objections to these commissions, and among other things, that the names of new witnesses were inserted, from time to time, as they happened to be discovered; that in fact, it was essentially a roving commission, a scoop-net to draw up all that could be found in Canada, whether filth or not, and bring it into Court and empty it here before you. You may have observed, and perhaps with a feeling of censure towards myself, that I have objected to the manner in which their answers have been framed, and the commissions executed; but, gentlemen, it was the only way in which I could protect my case from these irregularities, by pointing them out to your notice. The names of some of the witnesses we never knew until we saw the commissions produced here.

Mr. SPENCER.—This cannot be so, Mr. Attorney General. All the names were inserted in the commissions, to which your colleague at all events was no stranger.

ATTORNEY GENERAL.—I only know that after the cross-interrogatories were framed, the names of numerous witnesses which I had not before seen were added, and of whom I have reason to believe that the District Attorney was also ignorant. At all events they were not persons for whom cross-interrogatories had been framed.

The JUDGE.—It is just to say, however, that the opposite counsel had entered into stipulations that this might be done.

ATTORNEY GENERAL—The Court perhaps misapprehends the tenor of my observations. I only make this remark to show that we have had no opportunity of knowing what their witnesses would prove. There is another circumstance, which I should not do justice to myself, if I did not lay before you. The same person who took down the testimony acted also as agent in collecting testimony. Now, gentlemen, suppose this testimony to have been taken by the learned counsel for the prisoner, or by myself, is it not reasonable to suppose that we should give a certain degree of coloring to it? The variation might be apparently slight, yet it might alter the whole sense and meaning of the sentence. And that such coloring would be given is only consistent with human nature. It is for this reason, that in a Court of Chancery, and in some other courts, depositions taken by the Clerk of either party would not be allowed to be read. Such is the disposition which every one feels to state the case in the strongest manner on his own side. And so does he feel a disposition

also when he takes down the testimony of another, to give it all the coloring possible. Now, the object of this testimony is to establish the fact that the prisoner was not in the expedition. Let us see, in the first place, what we have a right to call up on the prisoner to show. First, I take it, we have a right to ask that he should bring forward persons who are acquainted with him—his associates—who are in the habit of being with him. And we have also a right to insist on a number of witnesses somewhat proportioned to those who were present upon the occasion in question. We should also require, inasmuch as the embarkation took place at different places, that there should be persons presented to us here who were at both those points. If they fail to do this, I think we may say that they have not made out a *prima facie* defence. It amounts not even to probability. As to the first point—that we are entitled to expect those persons to be produced as witnesses who are well acquainted with the prisoner—suppose a stranger came into this Court; at a future day, you might swear the whole audience, and they would not say that they saw such a man, because they neither knew him nor recollected him. If, therefore, they have not produced persons who knew the prisoner well, and in numbers somewhat proportioned to the numbers present, they have not begun to make out a case—they have done nothing towards convincing your minds.

Now, let us see how the matter stands in this respect. They have produced the testimony of only two persons who were present at the embarkation, except those who went in the expedition, who testify to the absence of the prisoner; these are Captain Sears and Sir Allan MacNab. Let us examine their testimony. I do not believe, gentlemen, that Captain Sears perjured himself before you; I have not the least idea of the kind; but he did what others have done, and what biased witnesses almost always do, viz: swear positively to what they only supposed to be true without having the means of knowing to any degree of certainty. This is the temptation to which they are exposed: and into this snare has Captain Sears fallen. He says he saw Davis that night; but Davis swears that he was not seen by any one, for he was not in the bar-room, but in his own private room. I might point out various other discrepancies, but it is quite unnecessary, because I would in fact rather adduce the testimony of Captain Sears on behalf of the prosecution. Sears says he did not see Sir Allan MacNab; he did not see McDonald; out of five or six persons whom he said he knew, I named three or four, and to each one he answered "I did not see him." Is it then wonderful that he did not see McLeod? Does his testimony advance the defence one iota? Does it in the slightest degree strengthen your belief that the prisoner was not there because he did not see him? Why, he did not see McNab, the commander-in-chief, who stood there, the cynosure of all eyes, the very head and front of the whole affair. Well, then, is it wonderful that he should not have seen McLeod? The other witness is Sir Allan MacNab himself. He says that he was there, and he did not see McLeod. Well, gentlemen, it is not very wonderful that he did not. He says that he was at Chippewa River, at the place of embarkation, and it appears from

the whole scope of his testimony that he never did go up to the higher place of embarkation. What is his testimony worth then? Suppose there are three doors to this Court room, and Sir Allan McNab stands at one of them, and he swears that McLeod is not in the house, because he did not enter at the particular door where he stood.

But, gentlemen, although it may not be thought necessary to go further into the testimony of Sir Allan McNab, still let us examine it a little further, not for the purpose of weakening that testimony, but rather to give you an idea of the whole mass. Now, who is this McNab? Why, although he is of the peaceful profession of law, yet we find him in command of twenty-five hundred men, and what is a little remarkable, kept at bay by about two or three hundred. The only exploit of which we hear as having been achieved by the gallant knight and his gallant army, was the destruction of the steamboat Caroline. For this he received the honor of knighthood. Gentlemen, in ancient times, it was customary to reward the achievement of gallant deeds by conferring the honor of knighthood, together with a coat of arms, and a crest emblazoned, emblematic of the deed for which the mark of distinction was conferred. When McNab emblazons his crest, let him take no emblem of noble daring—no bloody hand—no shivered spear. No, the torch of the midnight incendiary would be the fittest emblem to commemorate the deed on which *his* glory rests. In the days of chivalry gallant knights often swore *by* their knighthood—in reading the testimony of McNab I confess I could not resist the impression that he was swearing *for* his knighthood. Gentlemen, Sir Allan McNab's statements, if examined, will be found to impeach themselves in various ways. In reply to the question, "how the men embarked, whether in military order or not, and whether they disembarked in the same order," he answers that the men came in a body, and went away in a body. Now, this testimony is in contradiction to that of many of their witnesses, who say that upon arriving at the place of embarkation they waited, some ten minutes, some fifteen, and some half an hour. So that if you take the testimony of the witnesses whom they themselves produce, the testimony of Sir Allan McNab is entirely destroyed. Some came there and went instantly into the boats—so that those standing about had no opportunity of knowing who were among them. McNab tells you he did not see McLeod, but McLeod, in his statement, says that he rode back to Chippewa, and went to McNab's quarters and told him the boat was coming down from Buffalo. The testimony of Sears, says that although he had four or five friends there, he recognized only one or two of them; though he knew them well, he did not recognize them; this is sufficient to satisfy you that in this declaration of McNab, he swears by virtue of his office; it is more like a command of what ought to be, than a statement of fact that is.

I will now call your attention to John Harris; he was the witness whom the commissioner had occasion to prompt a little; he told him what other witnesses had said. He, gentlemen, is the man whose testimony seems to indicate that he knew all about the affair—that he was first in it, and last out of it; he heard McNab give the orders, though McNab says they were given privately in the ear of

Drew on the beach, and yet Harris heard it; he says he was the last man on the boat, when others say that the foolish old man could not keep on the boat, but fell overboard, and they took him up, and wrapped him in a blanket. What does he know upon the subject in reference to the first great fact? He says he did not know McLeod—he had never spoken to him in his life—but for a day or two he had known him by sight. He had never seen him since. There is another thing which this witness states, and to which I beg to call your attention. John Harris says that a list of all the names was made out—that he saw it at the time, and has seen it since, that there is no mistake; that it presents the names of all the officers, and of every man on board. But where was it made out? At the place of debarkation, at midnight, without a light or a candle; such perfectly absurd falsehood would damn the reputation of any witness who would come before a jury and state it. You have listened to a statement respecting the disembarkation with the wounded man; and in the midst of that confusion some one could take out a scrivener's inkhorn, and make a list in midnight darkness. It is the maddest lie that ever was offered before a jury. And that is the kind of testimony they expect you to rely upon. It appears there are four lists: one is the list that McNab talks of; he thinks that a list was made out and returned. Another is spoken of by Hector, made out at Kirkpatrick's tavern, where they had been up carousing all night; and at six o'clock in the morning, they undertake to make out a list. Another is the list which McCormack had; he says he was the deputy who was engaged in going about to gather up volunteers, and he made a list. How perfectly impossible it must have been to have a perfect list at that time, while going about to pick up volunteers for it; it seems that they had not been previously embodied, but were picked up all along shore, till the moment of embarkation. How could they know who was upon one boat and who upon another? It was all confusion; no man knew, no man could know, who was in the expedition at that time. So much for these boasted lists which have been spoken of. And how much, gentlemen, they talk of these lists, as if they were official papers, regularly drawn up and signed. Can you bring yourselves to believe, for one moment, that if a list had ever been thus made out, it would not have been produced here? That the whole nation should be agitated, even to the throne, for the purpose of releasing a prisoner, and not bring forward that list? For if they had brought an official document, made out by McNab, sent to the Governor, and filed in the archives of the government, I would not press a conviction. I would look upon it as a strong evidence that he was not there. Before you can give the least credit to this statement, you must be informed where that list was made out, by whom, and how made out; whether it was the mere random guess of some one of those engaged in the expedition, who knew but little about it, or whether it was an authentic and official document. If such an one was made out, why is it not here? They say because they were not willing to expose the persons who were there; but I think this was an evasion. There may have been two or three or four or five engaged in that expedi-

tion who are not known; beyond that number they are known. It is not, then, for concealment that this list is kept back. Let me now state the result of a little looking into these commissions. One of the interrogations was framed to ascertain the number. Let us see if any too of them agree in the number of men engaged in the expedition. It would have been very difficult to make out a perfect list. Captain Beer says that sixty-five embarked; Light says sixty; McCormick says fifty; Cleverly says forty; Gordon says forty-five; O'Reilly says fifty; Hector says fifty-six; Zealand says from fifty to sixty; McNab says forty; Harris says fifty-three, of whom forty-one, neither more nor less, reached the Caroline. There are no two of these witnesses agreeing as to the number of men in the expedition. Now, gentlemen, we will take up the examination of those who went on the boats. They do not pretend to know any except those who went on their own boats, that is the boat upon which the witness went.

To the 15th cross-interrogatory, "Did you know all who embarked in the expedition? Did you see the face of and recognize each one who went in the expedition?"

Neil McGregor says: "I accompanied the expedition. J. P. Battersby commanded the boat I went in. I forget who commanded the other boats. I believe seven boats started, and five reached the Caroline. I believe he was not in the boat that I was in, or in any other. I did not see him.

Armour says: "I did not know all the persons that went on the expedition—though I did know about one half of them. I did see most of the faces of those that were on the expedition, and I recognized a greater part of them."

Light says—"I did not know all who embarked in the expedition—I did not see nor recognize the face of each one."

McCormick says—"I did not know all who embarked on the expedition, nor did I see and recognize the face of each one."

Cleverly says—"I did not know all, I knew most of them. I saw all the men that embarked, but I cannot say that I recognized the features of each one."

Gordon says—"I did not."

O'Reilly says—"I was personally acquainted with all of them, or nearly all—I cannot swear that I recognized the face of each one that went on the expedition."

Battersby says—"I did not know all who embarked in the expedition—I did not see the face of each one that went on the expedition."

Zealand says—I did not know or recognize all who were in the expedition."

Hector says—"I did not know all, nor did I see the faces of all."

McNab says—"I think I know all who embarked on the expedition. I saw the faces of most of them, and recognized those whom I saw."

Harris says—"I have already stated that many I knew well, some I knew by sight, and others I did not know. I saw the whole of them, but cannot say that I saw all their faces, or recognized the whole of them.'

Christopher Beer says—"I did not know all, or recognize the face of each one who went on the expedition."

Thus much, gentlemen, for the knowledge of those men at the

point of embarkation. They can say nothing about it to show, that fifty or a hundred McLeods might not have been there, and they not have seen or recognized them.

The point upon which most stress is laid by the counsel for the prisoner is, that there are witnesses from each one of these boats, and that they did not see him. If that be so, it will go a great way, if you believe there was no opportunity for any one to go without their seeing and knowing it. It will have great weight with you in relation to the question, whether he was there or not. In the first place, gentlemen, they do not pretend that they knew all. I refer you to the answers to the sixteenth interrogatory. To this Robert Armour says: "I knew all but two, and these two were strangers to me."

Light says that he did know all; that he had raised the boats' crews, but having no personal acquaintance with them, he cannot say that he recognized each one of those who were in his own boat.

Mr. SPENCER here asked if it was fair to state testimony in that manner?

The COURT said counsel had a right to state that which would make for his own case.

The ATTORNEY GENERAL continued. Zealand says he was not personally acquainted with all who went in the same boat with him. He did not recognize each one, or speak to each one of them. He testifies that he had been introduced to McLeod and knew him. In his answer, he says, "I have known McLeod. I was not acquainted with him in 1837. I knew his person by sight, but did not know his name until 1838." And in a subsequent answer, this same Zealand states that he and McLeod were out the night before upon a secret expedition. He speaks with great hesitation about McLeod's being in the boat with him on that occasion, and I show this by way of illustration, that you may see how uncertain is their testimony. He says "I went in a boat round Navy Island; a person was in that boat, who I think was McLeod, but I am not certain;" this does not come out on the direct question, but upon the cross interrogatories.

Here is one of these witnesses who says that he went round Navy Island the night before, in the same boat with McLeod, and McLeod says it was in the morning when they returned; and if the witness could not be certain in relation to this fact, how could he as to others?

There is another circumstance to show how little these statements are to be depended on. To the seventeenth interrogatory "Did the same persons return with you in your boat as embarked with you?" I have collated the answers, and find that five boats reached the Caroline. Captain Beer says that those who went in his boat came back in it. Others say that the same came back, with certain exception. From these statements, it would appear that four boats brought back the same number of persons that they carried out, and nine more. This leaves one boat unaccounted for. McCormick says that there were eight in his boat. Here we find that four boats brought back one man more than they all carried out, which shows that there can be no substantial reliance placed upon them, as to the facts. In this dark night, two of these witnesses, Light and Armour, who were in the same boat, give different statements. Light says that all who went out with him, returned with him; Armour swears that all who went

in their boat, returned in the same, and yet Light did not return in it. Again, Harris and Zealand embarked in the same boat, commanded by Drew, the leader of the expedition—and Harris said that all returned in the boat that went out in her. But Zealand says that Drew did not return in his own boat, but came back in another. Is there then any reliance to be placed upon their statements as to who were, and who were not in the boats, except in a very general sense? I might call your attention to the fact of their recognizing each other on the Caroline. The fact is, they met and fought each other—which is pretty conclusive proof that they did not recognize each other there. The learned gentleman examined with great minuteness the evidence of the persons engaged in the expedition. Gentlemen, I wish to call your attention to this matter, in another point of view. It seems that the number embarked, was about sixty, of whom twelve are called to give testimony before you; that is, one in five. In such an expedition, and on such a night, it would be more wonderful if you could not find twelve out of sixty, than it would to find twelve who could swear they did not see or recognize particular individuals. Let us see what they did know. Their answers to the first interrogatory gives the following result. Three out of the twelve say they did not know McLeod at all; six of them say they had no personal acquaintance with him, but had merely seen him. One says he had been introduced to him. Two only say that they had known him for some time. Only two out of the twelve knew him intimately!

Remember, they could have examined all Canada, if they chose. They had a commission with them which enabled them to examine any and every man; and you have a right to presume that, out of the whole sixty, but twelve could be found, who could swear that they did not see him. Three of these did not know him at all, and six knew him but slightly.

Well, gentlemen, there is one other consideration with reference to this subject, and we will then leave this branch of the testimony.

All these witnesses, I believe, without exception, have sworn that they were resisted on the boat: that they were fired at. I suppose I need not say one word upon this subject. I presume that you, and the Court, are perfectly satisfied that there was no resistance—that no gun was fired—that those who were upon the boat were unarmed and helpless, and fled for their lives; and yet almost every one of these witnesses has sworn that they were resisted by those on the boat. I was astonished when I read it; and the expression occurred to me which STERNE has put into the mouth of my uncle Toby—"Our army swore terribly in Flanders"—but they swore *worse* in Canada.

I do not believe that respectable men would come forward, and deliberately perjure themselves; but it is very certain that they swore broadly and carelessly upon the side on which their feelings were enlisted.

Now, gentlemen, if you will pardon me for being so tedious, in relation to this evidence, which was not given to you upon the stand, and which I have thought it necessary to sift a little, in summing it up before you—I will ask you next to go with me in one or two of these boats.

With reference to this subject, some of the witnesses say, that seven boats' crews embarked; that five reached the Caroline and participated in the conflict. *Armour* says that three, only, reached the Caroline. *Hector* says that nine boats left. *Light* says that seven or nine left the shore; which corroborates Drown: that is, their own witness corroborates our witness. *Light* also says that four of these boats reached the Caroline, and that no boat returned in company with the boat in which he was; but *Sears* says that five boats returned together. Battersby was in one of the boats that failed, and he says that his boat and one other that failed, returned about midnight. Others state that they came back at a little after daylight, notwithstanding that those who commanded them have sworn that both returned together about midnight. How can you reconcile all these conflicting statements? You cannot. You can only come to the conclusion that in such darkness and confusion, they are unable to state the facts with certainty.

Now, gentlemen, these seven boats were commanded as follows:

The first, by Capt. *Drew*, from which we have two witnesses, Zealand and Harris.

The second, by Capt. *Beer*, from which we have three witnesses, Beer, Cleverly, and O'Reilly.

The third by Capt. *Hector*, and he is the only witness from that boat.

The fourth, by Capt *Gordon*, who is the only witness from his boat.

The fifth, by Capt. *Battersby*, from which we have two witnesses, Battersby and McGregor.

The sixth, by Capt. *McCormick*, and he is the only witness.

The seventh, by Capt. *Elmsley*, from which boat we have Light and Armour.

Now, gentlemen, let us see if we can get a passage for McLeod on board of Capt. Elmsley's boat, without being discovered? In order to ascertain this matter, let us turn to the depositions of the witnesses who were on board of this boat. How much did Light and Armour know of McLeod? Armour says that he had met him only once or twice before the 29th December, and knew him only by sight. "I had no personal acquaintance with Alexander McLeod; he was pointed out to me in the streets of Chippewa." He is asked when he was pointed out, whether before or after, and he could not say; he believed him to be a British subject. Armour says, "I did not know all the persons who went on the expedition; I did not see all; but I think I saw half; I recognized a part of them." Light says, "I did not see or recognize the face of each one of them; I knew all in the boat with me *but two*, who were strangers to me." He does not speak with positiveness at all.

Now, may not McLeod have been one of those two?

Here JUDGE GRIDLEY referred the Attorney General to their answers to the fifty-sixth and fifty-seventh cross-interrogatories, where Light says, "I do not know where he was; he was not in my presence."

The ATTORNEY GENERAL.—*Armour* says he did not know McLeod by sight. Here we have sweeping declarations, from witnesses who acknowledge they did not know McLeod by sight. What effect

can such declarations have. *Armour's* answer to the same question as that put to Light is, that he did not think McLeod was on the beach; he did not come within his view. *Light* says that when they pushed off, they pulled two oars; that he was on the boat which Elmsley commanded; that he saw all the persons who were in that boat, but did not see Alexander McLeod that night. He saw all, but McLeod was not one of them. In the cross-interrogatories, I have questioned him as to his means of knowledge. He says he did not know McLeod by sight; he did not recognize and speak to all who were in his boat. When they are inquired of, and say they recognized all but two, how strong the suspicion that one of those two might have been the prisoner. When they have said that they did not recognize all, and did not know McLeod, I ask if there is not room enough left in Elmsley's boat for McLeod, without contradicting these witnesses? And again I ask, where is Elmsley? Why is he not here to testify?

We will now pass to Gordon's boat; and Gordon, you will recollect, is the only witness on board his own boat.

Gordon says, "I knew him, but had no personal acquaintance with him." "I think he was once a passenger on board a steamboat which I commanded. I cannot say positively, that I saw him more than once."

And yet gentlemen, this is the degree of knowledge possessed by that individual, by which to discover him in the black darkness of midnight. Now let us turn to see how many he knew on board that boat. Gordon says I did not know all in the same boat with me. I did not recognize each one, nor did I speak to each individual. This is the whole that you have, to exclude him from Gordon's boat. He did not see or recognize all that were on board his boat. Here is the testimony of a man who had seen him but once before, and who says he did not recognize all who were on board of his boat. But gentlemen, are you to throw twelve men into the position of black perjurers, on such a statement. If, then, gentlemen, there were room enough in Gordon's boat, it is enough, and the whole that follows is valueless. Now, if there is one boat in which the testimony is not such as to render it improbable that he was there, it is precisely the same as if all were left open. One is enough, for he could only have gone in one at a time. If there is room enough in Gordon's boat without contradicting Gordon, it is enough; and the whole mass of testimony as to the alibi falls to the ground, and is utterly valueless.

Gentlemen, I fear I have fatigued you too long with this part of the testimony, and I take my leave of it.

Here Mr. SPENCER interrupted the Attorney General, but the Court interposed and read from the testimony of John Gordon, as follows: "I know Alexander McLeod; I have no particular acquaintance with him; I think at the time I saw him, he was a passenger on board a steamboat which I commanded. I believe him to be a British subject. I recollect the time of the destruction of the Caroline; I was in Chippewa, and was on the beach half an hour before the departure of the boats. He was not in my boat, he was not in my presence. I saw all the persons in the boat I went in, and I am satisfied that McLeod was not one of them.

Now, gentlemen of the jury, let us look into the testimony of those witnesses who have been presented to you, and have testified for the purpose of satisfying you that the prisoner was at the house of Mr. Morrison at Stamford, five or six miles from Chippewa. I confess, gentlemen of the jury, to my mind a shade is cast over the testimony bearing on that point, by the considerations to which I have before referred when I called your attention to the remarks of a writer on the defence of alibi. When they decide on making this defence, they select the place where they will set up the *alibi*, and they have the whole world to select from; and you will observe where the prisoner makes that selection. If he declared at the time he was among his associates—if he placed himself in some position where it is manifest he has some control over those around him, it is a matter which a jury should carefully consider. The prisoner at the bar locates himself in a family over which the testimony shows he had obtained a too fatal influence—or over one at least of its members. Now if it appear that he had a control over that family and its movements, their testimony when brought here to save his life, must be cautiously received. If it appears, gentlemen of the jury, that he bears a relation, whether legitimate or illegitimate, to that family, and it is shown that she who lived with him as his wife, resides with that family as the daughter of Mr. Morrison, it is a circumstance to which you will not shut your eyes. There is another consideration which you will legitimately and properly take into your view. When the prisoner went to that house, the question will occur to you, what did he go there for? Men do not act without motive. And again review his course. He started on Thursday to go to Niagara on business; he got to Chippewa; he was there on the afternoon that the Caroline came down; he rested in the afternoon, and at night, a witness says, he started in the wagon with Press again from Chippewa. Press got home about nine or ten o'clock; but McLeod stopped at this house. Now, gentlemen, look if there is any motive for going to Morrison's house that night. There are two witnesses, gentlemen of the jury, who have sworn to you that the prisoner was at the house of Mr. Morrison during that night. Mr. and Mrs. Morrison both say they sat up until twelve o'clock with the prisoner, whose guilt is utterly inconsistent with the truth of that statement—and they are the only witnesses presented before you whose statement is inconsistent with the guilt of the prisoner. If he had been there at twelve o'clock that night, he could not have been present at the destruction of the Caroline. But what the rest say may be true, and yet he may have been present at the destruction of the boat. I do not say that if McLeod was not at that house at twelve o'clock, that the witnesses are perjured; far from it. I only say they have mistaken one night for another. They may have added some circumstances—I fear they have. The fact that he staid there and had done so repeatedly, they have disclosed; that he was there on that night, is what no human being can testify to, three or four years afterwards. Neither you nor I could testify whether a fact which took place in 1828, '29 or '30, happened on a particular day; we might say about what time, whether Sunday or the day after Sunday; but to swear to a particular day of the month, is what none can do after that lapse of time.

The testimony of Captain Morrison has been before taken, and to that I must now refer you.

He then stated some things which he does not now recollect; and he recollects now some things of which he had then no knowledge. The learned gentlemen here read the testimony of Mr. Morrison, which was taken before Squire Bell, in which he said he thought it was near eleven o'clock, when Colonel Cameron called at his gate; on his examination in court, he fixed the hour at eight.

He, Mr. Morrison, now recollects, that McLeod had two horses, for when this new testimony of Press came out, there was a difficulty. The testimony of Press went to show, that he had no horse with him. It then became necessary to vary this a little. I will not say it was by design. Then, he was represented as coming on horseback—that the witness saw the horse in the evening and in the morning. Now, he says that he had two horses there. One which he rode, and the other in the stable. And he has here said, that he saw his horse in the stable at night and the next morning—though he does not say that he had two horses, and the implication is, that he had only one; for you see, that the testimony would have no application if he had two horses. Mr. Morrison again says, that he saw McLeod in the morning, and that he was walking in front of the house, when he informed him of the destruction of the Caroline. Now, it seems that it was in the house. McLeod might have got up and gone out. He never stated that he was not out of the house. He thinks he had never told any one so, or had any conversation upon this subject. He also stated, that he had not heard previously that the steamboat Caroline was coming down. Now he says, he had previously heard it. I have a distinct recollection of putting the question, and of his answering. He first stated, that it was dark when McLeod came, and that he did not see his horse; but afterwards adds, that he, the defendant, generally kept a horse there. You perceive, therefore, Gentlemen of the Jury, that the statements now made, differ somewhat from the statements at first made. It will have its weight with you, as to the infirmity of this witness's recollection.

There is another circumstance which goes to impeach his testimony, with respect to McLeod's being there on Christmas *night*. You will correct me if I am wrong. If it was Christmas eve, McLeod contradicts him. But if he said Christmas night, then there is no contradiction.

There is another fact, which is sufficient to do away any great weight that the testimony would otherwise have. Each and all of them—Mr. Morrison, Mrs. Morrison, Miss Morrison, and Archy, state, that he staid at their house on the second day of January. They recollect it well, for a son of Mr. Morrison was at home, and they had to remove him out of the parlor to make room for Mr. McLeod. If there is a doubt, you are to take it in favor of the prisoner. There is no question about the room. But now, for the second of January. He and his wife, and his daughter and son, all say that they are clear and positive that he was there on the second

day of January. That the son was at home, and they cannot be mistaken.

Now the prisoner has taken the testimony of different individuals, and among others, one says, I know Alexander McLeod, and I know that he arrived at the North American hotel, in the city of Toronto, on the thirty-first of December, 1837, and several others; and that he remained at that hotel until Wednesday, the 3d of January, 1838.

Again, I say, I do not suppose that they are all perjured, though it makes nothing in favor of the prisoner. It is to show you that they are all mistaken in that fact, that I speak of it, and that they might as easily be mistaken in this. They have stated positively, that he staid there on the second of January, and were all mistaken about it. Why may they not then as easily be mistaken when they say that he staid there on the twenty-ninth of December? May it not well be that they have confounded the times? Does not this whole testimony show confusion and misrecollection, which go to destroy the whole weight of the testimony which they have brought?

We will pass to the testimony of *Mrs. Morrison*. Her statement is different from the others, though she relates the same circumstances and is equally positive as to his being there on the *second of January*, as on the twenty-ninth of December. And in that, we have already shown, that she was mistaken. She states that McLeod came there with a horse in the evening, and that Col. Cameron of Toronto brought the news of the destruction of the Caroline, in the morning, and it seems that McLeod remained until after breakfast, and went away between nine and ten o'clock. That she had known McLeod for five years. That he came and brought a horse. That McLeod had staid there one night before. Mrs. Morrison thought it was Christmas evening. That he had spent Christmas day at witness's house, and never had staid there at any other time before or since. Here, she swears positively that he had.

She cannot say whether McLeod was married to the daughter of Captain Morrison or not. She now recollects that he staid there on the second night of January; to this she swears positively, although the fact is impossible, and therefore it destroys her testimony.

Take these two then, and strike them out—the daughter says that she retired to bed at nine or ten o'clock in the evening. Now the expedition could not have left Chippewa until eleven o'clock that night, for it seemed it was after twelve when they reached the boat; for they had set their twelve o'clock watch, and they might have been occupied an hour in crossing the river. When they started it may have been eleven o'clock. He may therefore have left Morrison's after the daughter had retired; but if he was at Morrison's at twelve o'clock he certainly was not in the expedition; it is physically impossible. This is merely the testimony of Captain Morrison and his wife. Now, as to the testimony of the daughter, it is important in some measure, as regards the Caroline being engaged in the service of the Navy Islanders. She says she is quite positive that she heard of the Caroline being engaged in carrying arms and munitions of war; and she is sure that McLeod staid at her father's

house on the night of the second of January, which facts are inconsistent with each other. She could not have heard this except the intelligence had been brought by McLeod himself. She says she had heard it two or three days before; this leaves the question open to the implication which you cannot resist; that McLeod was there, but not on the twenty-ninth day of December, though perhaps he was there on the night of the thirtieth.

The testimony of Archibald is immaterial, except that he states that Col. Cameron stopped there at the same time, and that McLeod came on horse-back. First, he shows that Cameron came there; but he does not know whether it was before or after the destruction of the Caroline, and that McLeod came on horse-back, for he recollects taking the horse, and taking the saddle off and putting the horse away.

Now, gentlemen, to sustain and bolster up this testimony, several persons have been brought. Mr. Press tells you that he was at Chippewa the day before the burning; that he was in a waggon; that he went to carry up two passengers; that he was spoken to by McLeod to take him to Niagara, where McLeod resided. He made one or two attempts to start in the course of the afternoon, but was interrupted. Press says positively that this was the day before the burning of the Caroline, because he finds on his cash book, the entry of five dollars received for carrying these men. He says he has no recollection of making the entry; he went once to Chippewa, and but once, and he infers that it was the twenty-ninth. He was asked whether it was immediately after he returned that he made the entry, or whether it was on some subsequent day. As to this he had no recollection; you are to determine what weight to place upon it. The time that Press brought McLeod to Morrison's we say was not the time that the Morrisons speak of. He came twice, but when he came with Press was not the time that he staid all night, for they all testified that he then came with a horse, and Press says that he does not think he had a horse when he rode with him; if he had a horse Press must have known it. You must suppose then that there were two occasions. Once he came on horse-back when Archy took the horse and put him in the stable; and once he came in Press's waggon, leaving Chippewa at five or six o clock, and did not stay all night; and where he was, remains to be ascertained.

Press has said that there was time enough for him to have returned twice before the expedition started. The proof of Press and Morrison shows that it was not the time he staid all night, for at that time he came at such an hour, that Press could drive twelve miles after he left Morrison's. He left Chippewa so that he could go eighteen miles and reach home at ten o'clock at night. Now, how many miles will a horse make over very muddy roads with a waggon? My own experience has never carried me beyond what would have required six hours to go from Chippewa to Niagara. At what time, then, must he have started? He says it was after dark. Let us take it to be after dark, then—let them start at five o'clock, and take two hours to get to Stamford; he had a horse in the stable there, and what had he to do but to take his horse and ride back again? There

was an object on the part of McLeod not to be known in this transaction. What that object was, has not been fully disclosed. There appears to be this, that McLeod, on that night, chose not to be known. It was an experiment, a secret matter not openly countenanced. It was not known how the Government would consider it; it was of a rash character; and one engaged, like McLeod, in public business, might have been greatly injured in his affairs. There were, therefore, grave reasons why, in the first instance, he might not choose to be known in this transaction. We see that he was particularly cautious to say to Davis and Parke—"Order my horse, I shall have to go to Niagara." These same persons state, however, that after thus saying, in this public manner, that he was going to Niagara, they both saw him afterwards the same evening at Chippewa. This only shows that for some reason he had a motive for choosing to throw a disguise over this affair; and not to have his movements known. You see then why he might have rode with Press in his waggon, and have taken his horse and rode back again from Morrison's in time to engage in this expedition. I am not now stating that these are matters which did actually take place, but I am stating that they are matters which might have taken place, according to the testimony of their own witnesses, and must have taken place according to the testimony of twelve men under oath, produced by the prosecution. Yet you are called on to say that they are all perjured. But you never will do that, while you can find any other way for him to go down, for the purpose of disguising his movements, and having the means and time to come back again. Rather than to suppose that these men have all perjured themselves, you are to suppose any thing which is not physically impossible in itself. This supposition also disposes of the testimony of Mr. Stocking. Take the supposition that Mr. Press has stated every thing perfectly correct—for this is all that they both prove—that he started to go down at about five or six o'clock; he might have been back at eleven to engage in the enterprise, as our witnesses have said they saw him.

You have a painful and solemn duty to perform, and you will not blame me for placing all the facts before you, that now and hereafter there may be no relenting that you may have given a false verdict. You will, therefore, be patient with me, if I am longer than I otherwise should be.

As to the deposition of Colonel Cameron, we have had no opportunity of cross-examining him. I have no doubt he is a very worthy and good man, of about sixty years of age. I have no doubt he has stated what he believes to be correct, that, on the morning after the destruction of the Caroline, about nine o'clock, he stopped at Mr. Morrison's, and that Mr. Morrison came down to his gate, that he then and there held a conversation with him of about five minutes, in which he may have mentioned the destruction of the Caroline. Now let us see the statement of Morrison as to this man. He says Mr. Cameron sent for him to come down to the gate. He then told him that an American steamboat had been burnt. The old man was so much engaged in the matter that he had gone down from

the Falls to the eddies of the river, and picked up a fragment of the boat. He gives to Mr. Morrison a part of it. His whole heart is full of the subject. Alas! the old man has now forgotten that he even mentioned that subject. Not a word about the fragment. If I could have had an opportunity to examine this good old man, if I could have put a cross-interrogatory—do you believe, if the old gentleman had been asked, "Did you not bring a fragment of the Caroline"—he would have answered 'Yes?' We know the answer would have been 'No'—because it is not here; it is a most conclusive circumstance, that the prisoner's counsel did not put the question, or omitted to note his answer. Captain Morrison says it was about eight o'clock; he says that it was about nine o'clock; that he left Chippewa in the morning, and had travelled six miles over a very bad road, such that a horse had to walk; and if he was there at eight, he must have started at six. Then this old gentleman must go from the high road down to the brink of the river to pick up this fragment. It is very extraordinary that they did not question the old gentleman, to see how far he sustained this account. If both the isolated facts are true in themselves, it only wants some link to be forged to connect them together. It is a trifling difficulty to be detected, but when it is brought to bear against the oath of innocent men, unimpeached, it should have but very little weight.

I shall not detain you, to dwell upon the testimony of Gilkinson and Judge McLean. It is not for me to make out that McLeod was not there on the road at ten or eleven o'clock, because there was time enough for him to have travelled back and forward four or five times after the expedition—but that it was the day after the one that he speaks of; that it was on Sunday that he rode up the river. Smith said that he saw a group of two or three persons on Sunday, which is not inconsistent with the case made out by the prosecution. But if deemed essential, I would ask where is Mr. Foote, who has been subpœnaed by the prisoner and has been here present? Considering they had to combat the oaths of twelve men they had not such a mass of testimony as to render it a work of supererogation. Now I have said all that I propose to say in relation to those witnesses who are brought to confirm the testimony of the Morrisons. What they state may be true, and yet what the Morrisons state may be false. They state circumstances which are consistent with the Morrisons; but further than that, their testimony is rebutted by all those who say that they saw McLeod at Chippewa at ten o'clock, and between eight and nine the previous evening. They testify directly in opposition to the Morrison family, for they say that they saw McLeod there in Chippewa at sunrise or thereabouts, which is inconsistent with what has been testified by the Morrisons. In addition to this we have produced a witness here to impeach Morrison by his own declaration in other situations. It is Defield. They produced a witness to impeach Defield, and we another to sustain him. They produce a man who says his reputation for truth and veracity is not good, and he cites an instance where he heard several gentlemen commenting upon an oath of Defield, in which he stated that Morrison told him that he could not say whether it was that or

some other evening that McLeod stayed at his house, and therefore Defield must be a bad man. We have produced several who declare that they know him, and know nothing against his truth and veracity. He says Morrison told him, that he could not swear it was the twenty-ninth—it was some night near then, and he was in the habit of being there frequently. He swears that he heard Morrison, at his own house and in presence of his own wife, say, that he hoped the Americans would get possession of McLeod and punish him for the part he had taken in the Caroline affair. The declaration of Hamilton, I trust, does not impeach his general veracity, sustained as it is by Robinson, Dyke, and others.

Now, gentlemen of the Jury, I am approaching to a close. I have but little more to say to you. I have but one more branch of the subject to place before you. It is the statement of McLeod himself—the first statement which he made when called upon before Justice Bell. This is a statement which a man has a right to make, but is not compelled to make.

He says, "that on the Christmas eve before the Caroline was burnt he was at Buffalo, and there learned that the steamboat Caroline was then preparing to enter into the Navy Island service; that she was then lying at or near the mouth of Buffalo creek; that he (defendant) the next day went from Buffalo to Chippewa, Upper Canada, and there gave information that the Caroline was fitting out for the Navy Island service, and on the next day, which was Tuesday, he made affidavit to it. And on the night previous to the burning of the Caroline, defendant, on his way to Niagara, stopped at the Pavilion, Niagara Falls, and there learned that the Caroline either had left or was about to leave Buffalo, to come down to Navy Island; and then defendant returned to Chippewa, and called on Colonel McNab, and informed him of the fact; and McNab said he could not act on the fact that the Caroline had merely come down, and could do nothing; defendant and Captain Philip Graham then got a boat between five and six o'clock, either on Thursday or Friday morning, and got eight sailors, and went around the island. They passed between Grand and Navy Island about daylight, when they commenced firing upon them from Navy Island, and two musket shots were fired upon them from Grand Island. They got back to Chippewa about eight o'clock, and defendant remained at Chippewa all that day. Defendant went round the island to see if the Caroline had come down, but did not discover her; but about two o'clock in the afternoon defendant saw her passing from Schlosser to Navy Island

Defendant then returned to John C. Davis's tavern at Chippewa, and being rather unwell, went to bed about 3 o'clock in the afternoon and got up again about 7 o'clock or a little before, intending to go to Niagara, and directed Davis to get his, defendant's, horse. The defendant took his horse and started away with a Mr. Press, in his, Press's, waggon, defendant leading his horse; and when they arrived at Stamford, about five miles from Chippewa, defendant called in at Captain Morrison's, an acquaintance of defendant, and Morrison asked him, defendant, to have his horse put out and to stay all night, and he accordingly did so. He arrived at Captain Morrison's house

about 8 o'clock, P. M. or a little after. Defendant went to bed about 11 o'clock and arose about half past 7 o'clock next morning, and at between 8 and 9,Capt. Morrison came to defendant in the parlor where the defendant had slept, defendant then standing in the door of the room; and Morrison said, they have burned an American steamboat last night. The defendant, said it must be the Caroline, because she was expected down. He ate breakfast at 8 or 9 o'clock and then went to Chippewa. He met James M. Dyke, who informed him it was all true.

Now, gentlemen, we have produced Mr. Dyke before you, and what does he tell you? He says that he told McLeod of the evacuation of the Island, and he knows it was that morning, because of the white flag, which he knew was the signal of the evacuation. Upon the examination in chief and upon the cross-examination, Dyke insists that he did tell McLeod; that he spoke of the white flag upon the island, and not of the destruction of the boat. That it was not the destruction of the Caroline, but the evacuation of the island.

Here Mr. SPENCER interrupted the ATTORNEY GENERAL, and by permission read from the testimony of Dyke as follows: "I went to Niagara on the morning of the 30th December. I have said repeatedly that I met McLeod that morning. I heard him say that he had slept at Morrison's. I told him I saw him there, and spoke to him about the white flag, when I told him so. I think that was the time of the evacuation of the island, and not the time of the destruction of the Caroline."

Gentlemen of the Jury, I have one application to make of this fact. A man charged with an offence says I was not there, and offers a witness to prove that he was not there. He vouches a man,who he says told him all the circumstances at a particular place, when he knows full well that he did not do it. If there is any one circumstance which in Courts of Justice is more damnatory than another, it is to find among the vouchers a forged paper to make out a title. When a claim is set up to land and there is a little forgery discovered, it damns the best title.

It is that one circumstance that shows and betrays the falsity that spreads through the whole of the prisoner's case. He came before a Justice and endeavored to exculpate himself by a false witness. For whether Dyke knew or not, McLeod knew and must have known full well all the particulars. When therefore he fixes upon him, knowing him to be a false witness, it throws a deep and dark cloud over the whole.

Gentlemen, I have only to remark to you in very few words—you are called upon to say by your verdict, which is most credible, that twelve men should combine together to make out a story, or that Morrison and his wife should be mistaken as to the time. Not that these twelve men should perjure themselves singly and alone, but that they should combine together and dovetail their stories one into another, and that they should have appeared here, and concerted boldly to swear away the life of a man.

Do you believe that the like ever occurred in the history of man? They could not do it. They would be confounded in all their plans and schemes,—it is impossible!

Gentlemen of the Jury, there may be one or two considerations not directly connected with the testimony, which may not be improper for me to suggest. Consider whether this is a mere naked act of obedience to an order, which the prisoner considered binding. Think whether it is such a case as that—whether he has not—even supposing the order of McNab was a sufficient warrant to protect the prisoner—gone further than he was called on to go? Was there any necessity for this massacre with swords and pistols? Was there any necessity, after the occupants had left the boat, for pursuing them on the wharf and killing them there? If not, it is no matter how solemn and how binding that order, even if given by our own authority—if he went beyond the order, he showed that depraved and malicious spirit which our law says is the index of murder. He exceeded the necessary force for destroying the Caroline which was the subject of the order.

And, gentlemen, think not that there is palliation to be found in obeying the order of his government. It was a voluntary act; no man was compelled to go.

They were going about and getting volunteers, and even some who engaged to go, afterwards refused to go. You perceive by all the testimony that it was entirely a voluntary affair, whether they were engaged, or not. There is therefore no palliation from their being compelled; nor has there been any attempt to show that McLeod was not aware of the law, and that he supposed himself bound. Gentlemen, there is no exception to the rule that, ignorance of the law can never be pleaded. It pervades the whole system. If the wild Arab and brutal Hottentot should come upon our shore, the moment they arrive the law throws its protecting shield over them, and exacts their obedience in return.

No man is permitted to say he does not know the law. The law knows him, and receives him into its protection as an obedient son. The law, like the Deity whose voice it is, is everywhere present within the extent of its dominions—it sees all—hears all;—its sleepless eye watches over the husbandman in the field, the artisan in his shop, the infant in its cradle—is present to receive the last behest of the aged man as he closes his eyes in death;—it hears the stealthy hand of the robber in the Capital; and its eye glares upon the midnight murderer on the border. There is no instance where ignorance of the law can be made available to the criminal.

Gentlemen, my task is done. I have endeavored to perform my duty in this painful matter, and it now devolves upon you to discharge your duty,—and gentlemen, while I take my leave of you, I pray that God may enlighten your minds, and strengthen your hearts, to see the truth and follow it fearlessly.

Judge Gridley's Charge.

Gentlemen of the jury: I congratulate you on at length having arrived at the closing scene of this long protracted trial.

After six entire days have been consumed in listening to the evidence, and one day and a half in listening to the arguments of counsel, you have arrived at that period of your labors, when you are to enter upon the last solemn duty, which, in the allotment of Providence, you have to perform.

I congratulate you, also, upon the auspicious circumstances under which you approach the performance of this duty. It is true, as we are all aware, that a deep and pervading interest has been felt in the issue of this trial throughout this entire land: and we know that a portion of the press, from the earliest moment when the controversy commenced, till this hour, has teemed with inflammatory appeals.

We have heard of the prevalence of popular commotion in various parts of the country, and of one popular outbreak in the county where this indictment originated; setting public justice at defiance, and setting at defiance the ministers of public justice.

Though these disturbances may prevail elsewhere, so far as my knowledge extends, they have not entered this solemn temple of justice. If the waves of excited popular commotion, originating elsewhere, have swept over other quarters, they have been arrested before they reached the portals of this building, consecrated as it is to the faithful administration of the law, to which the prisoner and the people alike appeal.

We have beheld, as attentive auditors during the progress of this trial, loyal subjects of the British government who were in arms during the recent troubles for the protection of their soil; and on the other hand, we have had the presence of more than one of those distinguished organs and actors connected with the recent unsuccessful and abortive attempts at a revolution in the Canadian provinces. Yet, although these individuals, as well as others who have been present, must have been deeply interested auditors and spectators of what has occurred, not a single murmur has been heard—not a single ebullition of excited feeling has escaped.—All has been quietness and good order, and a signal proof has been given, that here is a spot where pure and impartial justice can be administered, and that here, if nowhere else, the law is allowed to be paramount and supreme, and all bow before its sovereign behests.

In approaching the great question upon which you are to pass, allow me to add one more prefatory remark. In order fairly to appreciate this question, it is necessary that you keep your minds free from the consideration of other questions which have nothing to do with this. The counsel who have addressed you on the one side and on the other, have presented such arguments and such topics as they deemed essential to further the interest of the parties which they represent.

But the tribunal which tries has also duties to perform, altogether different from those incumbent on the advocates intrusted with the interests of those who are placed at its bar.

When this case comes to be presented to you, stripped of all the adventitious circumstances by which it is surrounded, it will be no more than

an ordinary charge of murder; it is like any other question for the same offence—here, as elsewhere, where such indictments are tried.

The first question then, is, has any murder been committed?

Secondly, is the prisoner at the bar guilty of that murder?

Upon the first question the Supreme Court of this State has passed. Their decision is authoritative on you and on me.

We are sitting here to dispense justice in the Circuit Court. This issue, as well as others, has been brought from the Supreme Court to be tried here, and we are to be governed by the decision of that superior tribunal which has sent down this issue to be tried here.

It is no longer an open question; it is an adjudicated one, and with it you have no concern. The circumstances out of which the indictment originated are briefly these.

In December, 1837, a body of Canadian refugees and American citizens occupied Navy Island, fortified themselves there, and opened a cannonade upon the Canadian main, where some twenty-five hundred or three thousand men were assembled, to protect the territory upon which they stood.

It was alleged that the citizens of Buffalo had given some aid to the occupants of Navy Island. William Wells, the owner of the steamboat Caroline, for the purpose of promoting his own interests, as he swears before you, had the steamboat cut out from the ice where she lay, in Buffalo creek, and on the morning of the twenty-ninth of December that fatal boat made her first trip from Buffalo to Schlosser, touching at Black Rock and at Navy Island. After that she made two trips between Schlosser and Navy Island; and was instrumental in conveying armed men, as well as arms, provisions, and one piece of ordinance, to Navy Island.

Further than this, it does not appear that the Caroline was instrumental in promoting the interests of the occupants of Navy Island.

The Canadian authorities saw fit to regard this boat as a portion of the armament of the insurgents, and resolved to destroy her; and if, in order to effect this, it should become necessary to destroy life, to do that also; and hence, in furtherance of this design, Sir Allan McNab, the commander of the provincial forces at Chippewa, ordered volunteers to embark in boats. Seven boats started, two of which failed to arrive, but five did arrive, and from these five boats the Caroline was boarded while her peaceful occupants were asleep in their berths; and with swords, pistols, boarding pikes, and fire-arms, the attacking party chased the persons from on board, wounding some, and killing one; and whether others experienced a similar fate we know not; and having set fire to the boat, the attacking party sent her over the Falls.

This is a brief history of the transaction, so far as it is necessary for you to consider it, for the purpose of understanding, appreciating, and disposing of this question. The act which I have described, is held, by the prisoner's counsel, to be excusable in the individuals performing it, for these reasons:

First, that it was authorized by the government which they served, and by the officers to whom they owed obedience.

Secondly, because it was done in necessary self-defence.

Thirdly, because the act, though not formally authorized, was afterwards avowed by the government.

Fourthly, because the whole transaction has already become the sub-

ject of negotiation between the two governments, so as to deprive this court of jurisdiction to try the offence.

These arguments have been laid before, and acted upon by, the Supreme Court, and that court has, deliberately, and with great learning and uncommon research, examined them all, and pronounced that the killing of Durfee, although performed in the prosecution of an enterprize such as that which I have already described, was murder; and it follows that all who were engaged, aiding or abetting, are guilty of the same offence; and it is not necessary that the arm of McLeod should have struck the mortal blow, to render him guilty. It is enough, that he engaged with others in that enterprize, to authorize you to pronounce him guilty upon evidence which satisfies you of these facts.

This question, then, is to be excluded from your consideration, and I mention it only for the purpose of enabling you to understand how far this portion of the case has been disposed of by a higher tribunal. This question has been already adjudicated, and is at rest.

Then comes the important question upon which you are to pass, is Alexander McLeod guilty of that murder?

The counsel for the people have presented many witnesses before you, the tendency of whose testimony has been to show that the prisoner is guilty, and in order that you may understand and appreciate this testimony, I shall briefly pass it in review before you. I shall distinguish it into two classes: the first branch will consist of direct and circumstantial evidence, other than that arising from confessions connecting the prisoner with this charge; the second class of evidence will consist entirely of confessions.

The first witness, according to this classification, who has testified before you, is Gilman Appleby. He is the only witness who was on board of the boat at the time of the attack, who has sworn that McLeod was there. He was the captain of the boat; he slept in the gentlemen's cabin; he was awoke a little past twelve o'clock, as he thinks, by information that there were boats approaching; he arose and partially dressed, made his way up the companion-way till he found his farther progress arrested; he retreated, but again returned, and had opened the door about a foot, when it was violently thrust open by some one outside, who then made a plunge at him with a sword, which cut off two of his vest buttons, and struck against the metal button of his pantaloons. He was considerably excited, but in that momentary glance he saw the features of the man thus attacking him, and his impression then was, that the individual was Alexander McLeod; but with all commendable prudence and caution, for which I honor him, this witness says, that amid the agitation of that moment, and in that hasty glance, he cannot say that it was McLeod. He had once before seen the prisoner in Buffalo, and it struck him that the person who thrust at him was similar in appearance to Alexander McLeod; but it was only one hurried glance; and he immediately replied to the question of counsel when on the stand here, that he could not say that it was Alexander McLeod.

The next witness is Samuel Drown. He resided at Chippewa, and was engaged in tending bar for one Smith, who kept a tavern there; and he says that he went up on the evening of this transaction to what is called the "cut," and up the Niagara river where the embarkation took place; that he was at the entrance of this "cut;" that he was at the beacon-

light when they kindled their fire for the purpose of affording a beacon to guide the boats on their return.

On that occasion he saw the boats passing into the "cut." They came along up the "cut" to the place where they had first embarked, and there they disembarked. He stood near by; within a few feet; it was dark. When asked whether McLeod was among them, his answer is, "I should say he was." He says he went from there to Davis's tavern, where a portion of these persons came, and there, by a light which shown from within the bar-room, or by a light on the stoop, although he cannot remember any light hanging out there, he professes to have seen there, again, Alexander McLeod. He says that the next morning, between daylight and sunrise, he heard some of the men in the tavern talking of McLeod's being wounded, and saying he was over on the opposite stoop, some four or five or six rods distant; the witness looked across, he says, and then thought he again recognized McLeod. He says he went over to see whether McLeod was wounded; he saw no one apparently wounded, and did not see him. He was inquired of in relation to the degree of certainty with which he could say that the man whom he saw was McLeod, and he said in reply that "he saw a man whom he called McLeod." Another question was put to him, and he then said, "I mean that I am as sure that it was McLeod, as that he now sits before me." This is his testimony. He submitted to a long cross-examination; and how far it went to weaken your confidence in his statements, it is your province, gentlemen, to decide. There is, however, one consideration which I will submit to you. It is this: When you are to judge of the credibility of a witness, it is right and proper that you should observe his manner on the stand; the degree of intelligence which he exhibits; the amount of powers of observation and accuracy of recollection; and, having done so, you are to decide whether his answers satisfy you that he is honest; and on the whole, whether his statement is of such a character, when taken all in all, that you can rely upon it. If you cannot entirely rely upon it—if it admits of some doubt, you are to weigh it, and give it just so much credit and confidence as you think it merits, and no more. It is argued by the prisoner's counsel that the darkness which prevailed then, and is testified to, was such as made it exceedingly rash for this witness to pronounce so confidently, that he was able to recognize McLeod as well, and as clearly, and certainly, as now, by the light of day. It is also argued that he stands before you impeached as to his character for truth and veracity, upon this principle, that where a witness, out of court, has made a different statement from that made by him in court, it should weaken confidence in the statement which he makes under oath. Mr. Bates has been called, who testifies that he lives near the residence of this witness, and he says that he heard him speaking on this subject, I think, at some former period when subpœnaed, and among other things he said he knew nothing in reference to this matter that could do McLeod any harm or any good. The statement which he makes of what he said is somewhat qualified. It is remarked on the other hand that witnesses who are subpœnaed, frequently make careless observations, and that this person being a poor man, might wish to avoid attendance on this trial. This is very true, that persons often make careless remarks, and had Drown made such a statement in presence of any one who could have excused him from attending here, then the plea of counsel would have been entitled to greater regard from you.

If in truth the facts which he has here stated were remembered by him at that time—facts which were all material, when the life of the prisoner is at stake—he could not have said consistently with truth that he knew nothing of sufficient importance to harm or benefit the prisoner. This, gentlemen, is the extent of the impeachment of this individual's testimony. You are to take it into your consideration, and so far as it detracts from confidence, you are to exercise your judgment, in order to restore him from this impeachment. I may add, that in order to restore your confidence in Drown, Bates was questioned, and in reply stated that that individual's character for veracity had latterly improved. Mr. Bates went on to say that Drown had been an intemperate man, and these habits had an effect upon his character, and made him dishonest; but for several years before he went to Canada he had reformed, and since his return he had known of no relapse. So far as he knew, he was an inoffensive man; he was a man in an humble walk of life, and not very intelligent; a man who had not had many opportunities to exhibit what his character was as to withstanding temptation, if offered to him. You have his testimony in the extent in which it has been given; you have heard the reply of the witness called by the Attorney-General, and whether you believe him or not is for you to decide.

The next witness, gentlemen, is Isaac P. Corson. He is a native of this State, a carpenter by trade; he had been in Chippewa in prosecution of his business. He testifies that he was at Mecklem's store three or four times on the afternoon of the 29th December, 1837; that he there saw Mosier, Usher, and the prisoner, and at nine o'clock he saw the prisoner coming out of Davis's tavern; and that he also saw him next morning at sunrise, with others, on the "stoop;" that he was at some little distance; that he could see only his head and shoulders; that he was telling of his exploits, and saying that he had killed a d—d Yankee; that he saw him again two or three days afterwards; that he then said he would like to be on another such expedition, and cut out and burn Buffalo. This is an analysis of this witness's testimony which is spread over several pages of my minutes. You will recollect, gentlemen, this witness's cross-examination, and will judge how far that weakened the force of the statements made by him on his direct examination. There is, however, one point that demands your particular attention;—it is a point which you should take into consideration and pass upon. This witness was inquired of as to who else were present when he heard McLeod flourishing and boasting of having killed a Yankee. At first the witness could not recollect any one; at length he said he could name one Caswell. He was then asked whether he was present at this trial, and he said yes. He was then asked when it first occurred to him that he saw Caswell there that morning, and he confessed that it was that very moment. The cross-examination was protracted, and in the course of it, it came out that he had conversed with Caswell as late as the morning of the day on which he testified on the stand before you; that they talked of the affair of the Caroline, and that Caswell informed him that he was there that morning. It may be that that was all true, and that it really did not occur to him that Caswell was there, till the moment the question was put to him. But you are to judge of that.

The next witness is Charles Parke, bar-keeper at Davis's tavern—he testifies that the prisoner went to bed at Davis's tavern early in the day,

and got up between 8 and 9 o'clock in the evening; that a gentleman called for him and he went out; that half an hour or three-quarters of an hour afterwards he saw him between Davis's and the Chippewa creek; that a good many people were on the road; that McLeod went into one of the boats; that at about sunrise next morning he saw him at Davis's; that he again saw him a few days afterwards in the officers' mess-room, and there heard him say that he had killed a d—d Yankee, or something like that. At the close of his examination this witness was asked whether he could say with considerable certainty that he saw McLeod at the "cut," and he said he could; he was asked further, and said he had no doubt of it; he also states that it was pretty dark that night; and testifies also to other facts, on account of which the counsel for the prisoner contends you should take his testimony with considerable grains of allowance. He testifies as to his knowledge of McLeod, and among other things, says that he once went a distance of thirty miles with a brother-in-law, to witness the payment of a sum of money, for which he thinks a receipt was taken, although he cannot remember the amount. It was expected there might be difficulty in relation to it, and his brother-in-law wanted a witness present. It is also argued that this witness tells a very extraordinary story in relation to the manner in which he has been induced to appear here: that he started from home a week before the trial, and had actually got as far as Chippewa, on his way to Buffalo, where he intended to make certain purchases; that he suspected some one who accosted him on the way, of the design of arresting him, to insure his attendance as a witness on this trial; that he returned home—again set out with another man, to purchase in Buffalo some books for a library, a stove, a pump, and a plough; and that early on the morning after his arrival, he was subpœnaed by a man who had seen him pass through Chippewa, who had crossed the Niagara river, and had gone up to Buffalo for that purpose.

He says, too, that he was ignorant as to the law, and supposed it was a process upon which he could be compelled to attend. That he referred to Mr. Hawley, and Mr. Hawley told him that if he did not consent to attend he would put means in operation to compel him to do so. Well, this may, or may not, be true. It is not the fact, however, that he could have been *compelled*, however much he may have been urged. He might have made his purchases, and gone out of the country before an attachment could have arrested him. It was only after he had been called here and failed to appear, that an attachment could have been issued, upon which to arrest him, and which would have been powerless in Canada. As to Mr. Hawley having given him that information, we have no light, except what the witness has himself stated. I am not aware that upon a subpœna any witness can be arrested. It is urged that he appears like an intelligent man, and is presumed to know something of the law. It is further urged that this will be more apparent when you look at other facts; he was asked, whether he had seen any person, who solicited him to come, within a week of the time when he started; he says he had been thus solicited within a month; he was inquired of who the persons were that solicited him. He says, they were persons religiously opposed to bearing arms.

Now, I have no opinion to express upon these matters. They have been insisted on by the prisoner's counsel, and it is urged that they ought

to destroy the confidence which you would otherwise place in his statements. To you I leave it.

The next witness is Caswell. He says, that he saw the prisoner the evening before the burning of the Caroline, and the morning after, on the steps of Davis's tavern.

Then comes Anson D. Quinby. He is the witness from Pennsylvania; he testified that he resided some two or three miles from Chippewa; that, on the twenty-ninth of December, he went to Chippewa with a load of hay for sale; that the hay was sold to the government; that he did not get paid for it at the time of the sale; that he remained till evening, and in the course of the evening saw the prisoner pass out from Davis's tavern; that he remained there from nine till ten o'clock; that he then started for home, stopped at Pettis', about a mile off, all night; that he then turned back, and was again in Chippewa between daylight and sunrise; that he went back to get payment for his hay at the commissary's office; that he was going there when he saw McLeod; that he saw him on the "bridge," and that he there heard him boast of his exploits on the Caroline, and heard him declare that there was the blood of a Yankee on his sleeve. He is questioned then as to whether he expected to receive payment for his hay at that early hour, and whether there were any persons in the office, and he said there were not; that he wished to be there in good season, as he thought he might probably find the clerk, but did not after all get paid, and finally went home. He went through a long cross-examination, which you will call to your recollection.

But, gentlemen, it seems, according to the testimony of Mr. Lott, of Lottsville, Pennsylvania, that on one occasion this Quinby came with another person for the purpose of making an affidavit before Mr. Lott, who is a magistrate, and that that gentleman refused to take the affidavit, because Quinby was unworthy of credit; that he went to another magistrate, by whom the affidavit was taken and sent on. Lott says that he resides in Lottsville, three or four miles distant from Quinby, that the reputation of the witness, Quinby, while resident there for three or four years, was very bad; that he was not to be believed on oath; and that, in informing the prisoner's counsel of his character, he (Mr. Lott) had no private motives of malice or revenge to gratify. He was asked whether they were not politically opposed, and whether that circumstance had induced him to take part against him. He says not. He says he was once called to testify in a case in which Quinby was on the opposite side; that he had no private griefs to complain of, or grudge to gratify, in writing the letter which has been alluded to; he had been induced to do so, because he knew that Quinby was unworthy of credit.

Mr. Wetmore, who resides in Warren county, Pennsylvania, testifies that he has talked with persons, with a view of ascertaining whether the character of Quinby, for truth and veracity, could be impeached. The result of his inquiry was, that it could be; but that his testimony on the occasion was not considered of sufficient importance to render it necessary. Now it is said, and it is true, that ordinarily a witness, to invalidate the testimony of another, should be called from the neighborhood where he lives, and that information which is derived from going into a neighborhood and making inquiries, is not that upon which you can rely for impeachment. This is the law; but this testimony of the lawyer goes a little

further. It is possible that this man may have been so often a witness in this county as to have created a sort of court reputation, which would justify counsel in saying, if you want a man to swear up to the mark, call upon Anson D. Quinby. So far as he has any such reputation, after living three or four years in the county, it is some reason for concluding that he is not worthy of belief. But you are the arbiters of this question, and to you I leave it.

The evidence of Seth Hinman, for whatever it is worth, is also before you. When examined before, he said McLeod was not seen by him that morning; he now swears he was. You will give this the credit you deem it deserves. Justus F. T. Stevens is then called and sworn. He testifies that he was present on the night in question, and that he saw three boats go out and return; and he distinctly and positively swears that he saw McLeod disembark by the beacon light. That is a statement which is not corroborated by any other witness, and is, on the contrary, hostile to the statements of all the other witnesses on both sides. It cannot be true. He was dismissed from the stand without cross-examination. He has testified to what is a deliberate falsehood—a falsehood for which the palliating plea of the probability of mistake cannot be offered. Leonard Anson is the next witness. He swears that he was present the next morning after the burning of the Caroline, in Davis's bar-room; that McLeod stood with his arm on the bar; that he had been drinking; that there were others there who took part in the expedition against the Caroline, each boasting as to who had committed the greatest crime; that he saw McLeod draw out his pistol, and heard him declare that he had killed a d—d Yankee; and that he pointed out the blood on the stock of the pistol. This, it is contended on the part of the prisoner, is an improbable story; that he could not have seen the blood on the pistol; and other considerations have been submitted to you in relation to the testimony of this individual, which it is unnecessary for me to dwell upon now. You are the judges of their weight, and the attention which should be given them. These are, I believe, the only witnesses belonging to the first class of evidence. That is, these are the only witnesses who testify of their own knowledge—as to facts unallied with confessions which go to connect McLeod with this enterprise. And the prisoner's counsel contend that some of these witnesses have been impeached, and that others have appeared in very doubtful circumstances; that the darkness of the night was a good reason why no very great confidence should be placed in the statements of those testifying so positively that they recognised McLeod with such certainty. And that what they have thus proved is enough to throw some shade of suspicion on the whole. That is the view taken of it by the prisoner's counsel. Whilst, on the other hand, the counsel for the prosecution insist that it is a mass of testimony which you must believe, and believing which, you cannot doubt the fact of the prisoner's guilt. It is your province to criticise all this and pass upon it. The other branch of the evidence is that contained in the confessions of the prisoner—and there is a principle of law, applicable to that description of evidence, to which the counsel for the prisoner has directed your attention, and to which it is right that the court should call your attention, though the counsel has read it to you. It is this, that confessions are the most suspicious kind of evidence—easily fabricated, and difficult to be disproved; liable to be mistaken, liable to be partially heard, partially remembered;

liable to be misrepresented; and unless corroborated by other testimony, the rule adopted by the elementary writers, and sanctioned by the most distinguished jurists, is, that they are the most unsafe description of testimony upon which a jury can rely. Nevertheless, they are competent to be weighed, judged of, and passed upon like all the other evidence in the case. I therefore, gentlemen, call your attention to the evidence of Henry Meyers; and I would admonish you that one rule by which you are to test the declarations of witnesses is, that you are to see whether they are probable—such as men in similar circumstances would make; and, whether they call for the indulgence of credulity, you are to judge by these rules. He testifies that on one occasion, about a year anterior to the destruction of the Caroline, he had seen McLeod at a tavern, where he stayed overnight; that in passing Niagara Falls on his way, removing back to Geneva, he stopped at a tavern on the north side of the road, and there saw McLeod with a number of others, in a bar-room; they were discoursing, about the destruction of the Caroline; McLeod was accosted by name, by another of the party; and in answer to a question by some one of the party, "where is the man that killed Durfee?" McLeod exclaimed, "here he is, I am the man," and drew out a pistol and exhibited it; and then drew a sword and exhibited that; there was blood upon the sword five or six inches from the point; that he boasted he had killed one d—d Yankee, or rebel, and that he compelled the witness to "treat" the party. You will judge of the credibility of this witness's story. It has been urged upon you, that it is very improbable, even if the sword had been used on the Caroline, that blood would have remained upon it ten days afterwards; and that such a story should not gain your credence—but you are the judges of it. This witness goes further and says, that McLeod attacked him, calling him a d—d rebel, and asked him where he was moving. That he went out to the shed, and McLeod and others followed him out, where it was finally agreed, that if he would go in and treat the company to some refreshment they would let him go; that he did go in and treat to the amount of a dollar, and they then let him go. He says, he knew that it was McLeod, the same whom he had seen a year before. To show that it was *Alexander* McLeod, and no one else, the witness says, that he was called Alexander McLeod.

He was asked to state the forms of expression—which he did in your hearing—it was like this: "Alexander McLeod, had we better let this man go?"—"Sandy McLeod, shall we go in and take something to drink?"

It has been urged, that it is very improbable that men under such circumstances, would have been as familiar as he represents them to have been—that it is not natural or probable—and that the statement carries with it, its own refutation. Whether it does or not, you are to decide; but there is one circumstance to which no allusion has been made by counsel on either side. He says that having been thus abused by McLeod, he determined that if he ever caught him on this side—he would use McLeod as McLeod had used him. Whether this will give character to his evidence is for you to determine.

The next witness is Calvin Wilson. He was the keeper of a ferry at Youngstown. He says to you, that a few days after the destruction of the Caroline, between the fifth and the fifteenth of January, he went over into Canada, and went into a house where was the prisoner, and one Raincock,

with whom he was well acquainted, he having been a custom-house officer with whom the witness had done much business. There was also Mosier, Elmsley, and other distinguished actors in this scene. While there, the question came up in relation to the Caroline. McLeod declared that one d—d rebel, or Yankee, had got shot on the wharf.

He was cross-examined; and acknowledged that his feelings are enlisted in the Patriot cause; that, though a poor man with a family, he had contributed $200 for the promotion of that cause; when he was asked if he had not been personally engaged in some enterprize against a foreign government, he refused to answer, and when inquired of whether he had not harbored Lett, he declined answering the question. The counsel for the prisoner have argued, that you are to take this as an acknowledgment that he did engage in that enterprize with the Patriots.

You are not to take for granted that he was actually guilty of any criminal act, by reason of his refusing to answer the question; because he is fully authorized, by an established rule of law, to decline answering any question, which may, by possibility, implicate himself; because there may be circumstances connecting him with those transactions, sufficient to convict him though innocent. Therefore this broad rule which the law allows in relation to matters which may tend to convict him for any offence. It is not to be inferred that he was guilty of perjury, merely because he throws over himself the shield, which the law affords him, for his protection; or that he was guilty of harboring Lett, because he refused to answer the question. These are independent grounds.

But he makes Raincock one of the persons with whom he held conversation on the occasion alluded to; he makes him the person who opened the conversation; and says he was a person with whom he was well acquainted; he declares to you that he was not mistaken, but actually saw him there; though evidence has been submitted on the part of the prisoner, which goes very strongly to show that his statement is not true. Mr. Hamilton says that he and his lady had been, through the previous summer, in England; that before he left the province of Canada for England, he was well acquainted with Raincock; that he was a most intimate companion; so much so that Raincock persuaded the witness to leave his own lodgings, and come and board where Raincock did.

He left England, and returned to Canada in the last of October, or the first of November. He found, on his arrival, that Raincock had become embarrassed, and had left the country, before the troubles commenced. Their residence was a small village containing only about seven hundred and fifty inhabitants, and he knows that Raincock was not there.

Another witness, Mr. Stocking, who resides in the same village, says that Raincock left before the troubles commenced. Both these witnesses testify that he was not there, and could not have been there without their knowledge: and if you believe he was not there, it is a refutation of the statement of this witness, Wilson. But if they are mistaken, and he was there, his statement is not affected.

Sarles Yates, another witness, has testified nothing worth hearing.

The next witness is Timothy Wheaton. He was called by permission after the prosecution rested—the Attorney-General supposing that there had been a reservation in favor of this witness being admitted to testify. He deposes that about a year after the affair of the Caroline, he went from his residence at Whitby, near Toronto, to Niagara; that he was near the

ferry; that he saw McLeod coming up from the water-side, and the witness remarked to him that the sentinels had a hard time of it; that they then talked of the Navy Islanders, and about their number; that McLeod said they never would have the Caroline there again, and added that he was the second or third man who boarded her; that then some person, a stranger to witness, interrupted the conversation by taking McLeod off; that he (the witness) turned from the ferry, although he had set out to go to Lockport, yet recollecting he had not a pass, and being fearful that he would not be allowed to cross the river, he turned short about and went home. Gentlemen, you are carefully to examine this evidence, and decide according to your conscientious conviction of the truth, as it really is.

These are the facts as they have been given in evidence: you have that evidence before you, and you are to pass upon it. You are then to take the entire mass of this evidence, and decide upon the weight which is to be attached to it, fearless of consequences; and as you really believe the truth is. If you believe this evidence, notwithstanding some objections have been made to it, and some deductions are to be made on account of impeachments; if you believe after all that there is an amount of evidence, which requires you to call upon the prisoner to answer; you will then take up the defence which has been spread before you. It is undeniable that much of it is very questionable; still, after all, it is undeniable that it bears very hard upon the question of the prisoner's guilt.

You are now to look at the prisoner's side, because it is the right of every man put on trial to present his witnesses, have them examined, and if he succeed in establishing the defence, to have the full benefit of it accorded to him. That defence, gentlemen, is what is called an *alibi*. It is, in other words, that he had no part or lot—no sort of participation in this enterprise. And this, after the disposal of the first question already passed upon by the Supreme Court, is the only other ground of defence that exists. And in my judgment no degree of suspicion should attach to it as an original defence, because it is, as I have just said, the only defence that remains for the prisoner at the bar. If he were, in truth, upon the expedition, then is he guilty, and so you must pronounce him. But, gentlemen, if he was at that time five or six or seven miles distant—if he had no participation in that enterprise, then the same great principles of justice require that you should pronounce him innocent. The evidence sustaining this defence consists of the depositions of individuals avowedly participating in the expedition; and secondly, of the oral testimony of several individuals, showing, or tending to show, that McLeod was during the execution of this enterprise at a distant spot in another town. First, then, with regard to the evidence of the commissions. The prisoner's counsel is right in telling you that evidence taken in this way is, and should be, less satisfactory than that given personally before you. But so far as the depositions themselves go to describe the individuals testifying, you may derive some information respecting the standing and character of these individuals. Some of them are lawyers, some of them mariners, and some of them officers in her majesty's service; and, by their description, they should all be men of character and responsibility: whether they were or not we have no means of knowing.

It has been said that this commission was a "roving commission;" that witnesses were examined whose names had not been before furnished to the opposite counsel. The Attorney-General admitted that there was no

reproach to be attached to the learned counsel on the other side, for it was not known who could be found: that many names were given, and with a commendable liberality, leave was given to examine more witnesses than those named. It has been said also that the clerk of the commissioners was engaged in getting together the witnesses, and that some suspicion should attach to this evidence on that account. Under some circumstances the observation would be correct, and entitled to your consideration; but we have heard in what manner they were executed, and you will be able to determine whether this latter objection should carry any weight.

The interrogatories were read over to each witness, and as each answer was obtained, such answer was dictated by the commissioners and written down by the clerk as amanuensis: and this mode was pursued throughout. Whether this scribe was a proper person to be employed, whether his feelings were interested one way or the other, it could make very little difference with the testimony. It has been said, too, that on one occasion, when Mr. Harris was examined, the commissioners refused to take down his answer as he gave it. It related to the mode and manner in which he had acted, and the degree of activity which he had used. He stated that he ignited two "carcasses," or instruments of combustion, and threw one in one part and another in another part of the boat. The commissioners substituted the statement, that he was very active in the destruction of the boat. It is not perceivable how this could be considered very important, as it does not conflict with the statement of any other witness. Again, it has been stated that these depositions are not entitled to full credit, because the deponents avow themselves accomplices in the transaction. The law is, undoubtedly, that in ordinary cases in the trial of individuals for felony, the witnesses for the people are not entitled to so much credence where they confess themselves accomplices, as fair and disinterested witnesses would be, because the former testify under a powerful motive. When the people put a witness upon the stand to swear against an accomplice, it is supposed they will not hold such witness responsible for participation in the crime. If this were an ordinary indictment, for a murder of an ordinary description, then the mooted point would be this objection. But as regards these individuals, we have no doubt as to their participation in the offence: they were all guilty of the murder of that individual who lost his life on the occasion of the destruction of the Caroline. There are distinguished men in our country, however, who hold that those persons ought not to be held individually responsible if they regarded themselves as engaged in a public enterprize. It does not involve the moral guilt of an ordinary murder, if they regard it as a public achievement, a kind of war; and they claim the same amenity as would be accorded to those engaged in a common war. Then you will perceive that the same degree of deduction from their credence ought not to be made, as should be made in cases such as I have alluded to; nevertheless, it is a subject for your consideration. If you consider it should detract from the degree of confidence to be placed in them, so much deduction will you make.

The Attorney-General has criticised the testimony of these deponents with great minuteness, and equally great ability. He has pointed out where the witnesses have testified inconsistently with each other, and made a very ingenious argument to show that they testified untruly. They testify that there was resistance; that pistols were fired, and that some were

wounded—when, if we believe those on the boat, no resistance was made at all—that they were unarmed, and that they fled for their lives, and they were pursued with arms by those men. On the other side, one and all of them have sworn, that there was resistance. If they did this with a knowledge that they were testifying falsely, it does certainly detract largely from the confidence to be placed in their statements. But I think it was Wells himself who said, as the boarders approached the boat in the darkness of the night, and in the confusion of the melée, they all taking a part, had mistaken each other for the occupants of the boat, and that they fought together. If that were true, then it would follow that in testifying as to resistance encountered on board the boat, they were not false in the corrupt sense of the term. It has again been said by one, that there were so many, on this expedition, by others that there was some other number. Now, some may have stated the number that reached the boat; others, the whole number engaged in the expedition in the seven boats; and so far as they have stated positively, and these positive statements have turned out to be untrue, so much you will detract from the confidence which you would otherwise place in them.

Passing from this, gentlemen, there is this other consideration, which must strike you in the outset. If, when Alexander McLeod sued out this commission, and directed the commissioners to examine persons who had been in each of the boats, upon the question whether he was there or not, and if in truth he were there on this occasion, he must be a bold man indeed. Because he must either have supposed that the commissioners would take only those who could not have known whether he was there or not, or that these men would be so corrupt as to swear falsely, to extricate him from the punishment of his crime. But this is no further evidence than as it is a portion of the history of the transaction; and with these views you are to take up the testimony, and ascertain, after solemn inquiry, how much credit you should give these witnesses, and how far they are to be believed in their statements.

Now, gentlemen, one word to begin with. It is undoubtedly true, gentlemen, that Sears cannot say, with any degree of certainty, that McLeod was not on board the expedition. It is equally true, that McNab cannot say so, although he superintended the embarkation of the persons engaged in the enterprise, was on the beach, and communicated the last command in a whisper to Drew. None but the All-seeing eye could penetrate the darkness that shrouded those there associated. But there are some, one or more, of the inmates of each particular boat who were there engaged, and who have been examined on oath. Some of them knew McLeod well before that time; others became acquainted with him afterwards; some talked with and recognised all their associates, and they all testified that McLeod was not among them on that night, though, in the strict sense of the term, they did not recognise them, because to recognise is to remember the face of one whom you have seen before. In that sense, some of them certainly did answer that they saw them, though they did not recognise them. In listening to the reading of those interrogations I may have erred; but as I listened to them, it was my impression that the witnesses all stated, either that they knew McLeod was not there, or they could safely say that McLeod was not before them. I may have misunderstood, but from the answers given to all, I gathered this as the substance of those answers. It may well be, that you should give the preference to the po-

sitive testimony of a witness who was upon the spot at the time, because it is far more satisfactory than that of one who says, "I did not see him;" but the degree of strength should depend on the attending circumstances, and upon the opportunities which the party has to know the truth of what he avers. If one of your number should ride with me in a waggon from here to Whitesborough, you would swear positively that I was in the wagon; and if one of you should ride alone, you would swear unequivocally that I was not in the waggon; and the opportunity would be such that you could say with entire certainty that I was not there; in that case, and in all like cases, the confidence which ought to be attached to testimony, should vary in proportion to the opportunity to know.

Now those boats contained some eight or nine persons each, all of whom embarked and crossed the Niagara river, before they reached the fatal spot where this catastrophe took place. You will determine what confidence to place in their statements, when each one says that he knows McLeod was not in his boat, and so far as his own boat is concerned, he ventures to say with positiveness, that he was not there. You will consider the darkness of the night, the conversation which took place, and the opportunities which they had to know these facts; and then judge and state the result of that judgment under the solemnity of your oaths. I leave this portion of the evidence, with a single remaining statement. You are to examine the testimony and deduct what you think ought to be deducted.

It is the prisoner's right, standing upon trial for life or death, if there is testimony which goes to exclude him from a participation in that enterprise; it is the solemn duty of the jury to weigh it, and allow it to have its appropriate influence.

Passing from this, the prisoner gives other evidence, not to show that he was not in the expedition, but for the purpose of showing that he was in another place, and that he could not have been there unless the laws of physical nature can be changed, and a man become capable of ubiquity—of being in Stamford and at Schlosser at the same time. You will lend an attentive ear to this part of the testimony.

I first call your attention to the testimony of Mr. Press. He was an inn-keeper at Niagara, which was the place of residence of Alexander McLeod. Press testifies that on a particular occasion during the Canadian troubles, he went from Niagara to Chippewa in a waggon—that he carried up two passengers, whose names he has given you.

He arrived in Chippewa and remained there until towards night; that he saw the prisoner, McLeod there, who informed him, that he was desirous of going to Niagara with him. Some time in the afternoon, when he wanted to start, he could not find McLeod; he continued to wait, and finally did find him about dark, or a little after; he testifies that McLeod came out of Davis's. Witness had not his horses at Davis's, but in a yard opposite. Where McLeod got in, witness cannot precisely say; but that he did get into the waggon with him, and that he drove down the river, over a very bad road; for two miles and a half, he drove slowly by necessity; that the residue of the road was better, though not very good. He drove on as far as Stamford, opposite the gate of Captain Morrison, where McLeod got out and went towards the house, which is the last that witness saw of him. It is an important point for you to determine, whether this was the night of the twenty-ninth of December, or another night. If any other, it breaks the chain of evidence. In relation to its being that night

Press testifies, that he had a partner at the time; that he kept a cash-book; that his entries were made consecutively; that he finds an entry of the five dollars, received from the two persons for their passage to Chippewa, of that date. He was cross-examined with much ingenuity, and at great length, whether this entry might not, possibly, have been made afterwards. He says no, the entries are consecutive, and this entry is in its place upon that very day; independently of this, he says he has reason to know it was the same day before the night in which the Caroline was destroyed.

In relation to times and dates it is true, that the human mind is so constituted that it is most difficult to fix with certainty, at what period of time any given event transpired.

We must have reference to some epoch, or event, standing in bold relief, around which others are made to cluster. If any of you, gentlemen, had a house burned on a particular day, other events happening to occur the same morning or night, would live long in your memories; so too the destruction of the Caroline, from that time forward, will serve as an epoch, for all who felt an interest in the political agitation of the times, upon both sides, by which to bring to recollection minor circumstances and events. It is an epoch which will be remembered as having given rise to the present trial, and which has been the occasion of requiring your attendance and services, at the present trial. It is an event which will live in the memory of all who witnessed it, and who were made acquainted with the circumstances; and it is therefore submitted to you, whether Mr. Press is warranted in speaking with such certainty as to the particular day. He says, he knows, from other circumstances, independently of the fact that he had made a written memorandum, that he started from Chippewa on the evening of the twenty-ninth of December.

Captain Stocking, who was on service, having command of a troop of dragoons, whose residence is at Niagara, and who is a particular friend of Mr. Press, says that Mr. Press called at his quarters, in Chippewa, on the twenty-ninth of December, and dined with him; feeling bound to show the ordinary courtesies to his neighbor, who was a comparative stranger there, he took a walk with him, up the margin of the Niagara, and looking across the stream, they saw the steamboat Caroline making her first trip. He is entirely certain that this was the first, and only time, that he ever saw her crossing there. Indeed she never made trips there, but one day. She came down in the morning, and met her fate at night. If Captain Stocking is right, and Press is right, that the very day on which Press alleges himself to have been there, and the evening on which he took McLeod to Stamford, was the evening of the twenty-ninth of December, much doubt will be removed from your minds. But you now are met with a difficulty, and it is a difficulty which you must solve.

The proposition of the defence is this; that Press left McLeod at Morrison's; that McLeod staid all night there, and in the morning was informed of the destruction of the Caroline; that he mounted his horse and rode to Chippewa; while riding up the Niagara river, he fell in with Mr. Gilkinson; that they passed through Chippewa, and continued up the river; that a cannon ball discharged from Navy Island reached the shore; that a soldier picked it up and handed it to McLeod; that McLeod went back the same day and carried it along as a trophy.

Now for the difficulty: McLeod, before 'Squire Bell, says, that he

mounted his horse and rode him; and on a second examination, he says that he took his horse and led him.

The Morrison family, so far as they speak and know, testify to his having a horse. Archibald says that he put out the horse; whether any one saw that he rode there on horseback, does not appear.

Press did not testify that he had a horse. He was questioned by the Attorney-General, "Did McLeod have any thing along with him?" "If he had had a horse, would you not have observed it?" "Certainly I should." Such was the statement of this witness, from his belief and recollection—that there was no horse led. It would seem singular that a horse should be attached to the back part of his wagon and he not know it, though it would be possible; and whether the other evidence shows it probable, you are to determine—that being an incident, merely, and not a material part of the testimony.

That is the argument of the prisoner's counsel, and you are to judge of its strength and probability, and whether there is any other mode of explanation. It is before you; and I leave it for you to determine.

When we pass from this period of time, and get in front of Mr. Morrison's cottage, we find him walking up to the house and entering about eight o'clock in the evening. He went in there, for he was on familiar terms with the family. He had a great deal of business to do in the line of his official duty, and therefore kept a horse at Mr. Morrison's. It is stated that he went in and spoke to Archy to put out his horse. All the members of the family, four in number, swear that he came there that night—that he was there at tea. All except the young man swear that he was there, up to a period of time between nine and ten o'clock; about this the boy cannot say; but Mr. Morrison and his wife both say that he was there afterwards till twelve o'clock, and after that they all retired to bed. A cot-bed was made up in the parlor for McLeod. His boots, which were wet the evening previous and had been placed by the stove, or kitchen fire, were dry in the morning. He was seen getting up in the morning, and when but partially dressed.

Mr. Morrison was called to the gate by Col. Cameron, an intimate friend, with whom he had served in the peninsular war, in Europe, under the Duke of Wellington. Col. Cameron had come down from Chippewa with intelligence that the Caroline was destroyed;—he had obtained, and he there presented to Mr. Morrison, as a trophy, a small piece of painted wood, which had been part of the Caroline. He (Mr. Morrison) took it to the house, sawed off a piece, and carried back the remainder. He took this piece of wood and showed it to McLeod, saying, "what do you think has happened? The Caroline is destroyed." McLeod says, "is it possible!—Captain, where is Archy? Send for my horse; I will go up immediately." He however consented to wait for breakfast, and then started on his way.

Then comes the next witness—Mr. Gilkinson—a resident of Niagara, who knew McLeod well. He was a volunteer at Chippewa; but as they were very full at Chippewa, he went to sleep at Stamford, below Morrison's. He came along in the morning and overtook McLeod before he reached the Falls; they went along together up to Chippewa; and he says he can state with absolute certainty that this was the morning of the 30th of December; that he was thus on his way from Stamford, and that he thus overtook and rode with McLeod to Chippewa; that without dismounting they rode up the Niagara river, till they were opposite Navy Island; that the batteries on

the island were opened upon them; that a cannon ball lodged in the bank near them; that one of the soldiers ran there, seized it, and gave it to McLeod, and he has since seen it in his possession.

The witness Sears says that he also was up there about this hour; that he saw McLeod and another ride along, and witnessed the firing from the Island.

Now this is not the whole of the testimony upon the subject of his coming up on that occasion.

Judge McLean, whose testimony you will bear in mind, was engaged by the then acting District-Attorney of the northern district of the state of New York, to go to the Canada side on a confidential mission to Colonel McNab. He went to Chippewa, and called on Colonel McNab, who ushered him into his quarters, and then excused himself during the night. The witness says he heard before morning of the blazing Caroline passing over the rapids and over the cataract. He knew McLeod, having seen him but a few days previous at Buffalo, where McLeod had got into some difficulty; and the witness (McLean) had aided him in making his escape. The next morning he got up, and at some nine or ten o'clock started off down the river; and near the Pavilion he met McLeod on horseback riding towards Chippewa.

This is the aggregate of the evidence on this branch of the subject. The testimony of the Morrisons, and the declarations which McLeod made on examination, have been submitted to you, and criticised by the learned Attorney-General with great ability. If he has satisfied you that these Morrisons are mistaken as to the dates, and in relation to this great epoch, then the defence vanishes. But if it be true, that though they have been mistaken in relation to some things; that though the old gentleman had not heard that the Caroline was coming down to engage in carrying arms and munitions of war, and the young lady had heard it; though they might have confounded that which McLeod said at a subsequent time with what then took place; and still in relation to this great question be right—though wrong as to other matters—for instance, that instead of the second it was in fact on the fourth of January that McLeod was there the second time; if you believe that they were uncertain in their recollection as to this, and yet quite right upon the great question as to whether McLeod was at their house on the night when the Caroline was burnt;—if, upon that point you determine that they are right, then there is an end of this case.

But if you believe that their testimony has been so successfully attacked, that they have been shown to be guilty of wilful or intentional misrepresentation, so that you cannot believe them in relation to this great question—this great epoch, which stands out so prominently from other portions of time—if in that light they are not corroborated, or if it appear to you that this evidence is all founded in mistake; that some other portion of time has been confounded in the recollection of these witnesses with the period in question—I repeat, that you will in the one case set it aside altogether, as unsatisfactory and unworthy of belief, and in the other, you will detract from it so much as deserves to be detracted; and if the whole, you will set aside the whole.

It is true that Colonel Cameron corroborates the statement of the Morrison family. He came along and had an interview with his old friend whom he had known in other days. So far as that is corroboration, it is worthy of your attention. You are to consider this, and then say whether

all this has satisfied you—that the case made out on the part of the people is brought together and bound up in perjury, or consists in some great and unexplained mistake; in either case you will acquit him.

But this is not all; in the defence upon a criminal case, you are not required to be absolutely sure. It is enough if the prisoner has presented such a case, that as to his guilt or innocence there is a reasonable doubt; because the humane laws of this land take no man's life unless upon clear and satisfactory evidence. It is a portion of our law, and it is the glory of it, that while it demands obedience to the extent of death itself, it never proceeds to this last extreme; it never divides the living from the dead; it never consigns an individual to the tomb, unless there is irrefragable evidence to induce a jury to believe, not that there is a mere preponderance, but that it is so overwhelming as to bear down the defence, so that there is no reasonable doubt of the existence of the crime, and that it is an imperative duty of the jury to consign him to the grave.

You are bound to do this as well in the performance of that duty which you owe to your God, as of that which you owe to your country, to the prisoner, and yourselves; all have a right to demand it in passing upon this great issue; this feature of the law is the great shield, the great ægis which the law has thrown around and over the heads of those who are brought to the bar of justice for crime.

It is then with you. I have thus gone through the great mass of evidence in this case, much of it not in detail, as it would have occupied much time to do so; yet I have gone through the great leading features of the case; and have presented them to you, together with the principles by which you are to be governed, according to the best of my ability. Now my duty is performed; your duty—and it is the highest duty which you can ever be called to discharge—the most solemn duty which your country ever reposes in her citizens—your duty is about to commence. You are to take this subject into your deliberate consideration, weigh and decide upon every portion of it; call into exercise your best powers of judgment; free your minds from bias, if any exist: you are to approach the consideration of this question, looking at it through the testimony which you have heard upon the stand, and that alone; discarding all considerations which have been held out by counsel, all rumors which may have reached your ears; every thing but the *polar star* of *looking to the evidence* to ascertain what is the truth. When you come to your decision, and determine where the truth is, let it be with an independence that shall do honor to a jury—with that impartiality which your country expects at your hands. With a single eye to the demands of justice, pronounce your verdict: and when you have pronounced it in the best exercise of your judgment, and of this great duty which you have to perform, I trust that all those who have witnessed this trial, and the manner in which it has been conducted—all those who have heard the able arguments which have been submitted by counsel, and the patience with which you have heard and drunk in the evidence, as portion after portion of it has been unfolded before you—that all those who have seen your anxious endeavors to arrive at the truth, will be satisfied.

If you shall believe that this man is guilty of murder, then, fearless of consequences, whatever those consequences may be—though they shall wrap your country in a flame of war—whatever the result, look with

a single eye to truth, and a hand firm to duty; look to the God of Justice, and say whether the prisoner be guilty or not.

If he has successfully met this charge and defended himself against it, then there is another duty to perform, irrespective of any rumors or charges; irrespective of any considerations which may be held out to you, or which may have entered your minds or exercised an influence over you—with the same fearless intrepidity pronounce that he is not guilty.

Now, gentlemen, I commit to you this great case with its solemn duties, and the rights of your country; and may the God of all justice and truth preside over your deliberations, and may the verdict which you render be in accordance with the *foundations of his throne and his government.*

Judge GRIDLEY having concluded his charge, the Jury retired, and after an absence of about half an hour, returned into court and pronounced their verdict;—

NOT GUILTY.

PUBLIC DOCUMENTS.

FROM THE

DEPARTMENT OF STATE OF THE UNITED STATES.

No. 1.

MR. FOX TO MR. WEBSTER.

Washington, March 12, 1841.

The undersigned, Her Britannic Majesty's envoy extraordinary and minister plenipotentiary, is instructed by his Government to make the following official communication to the Government of the United States:

Her Majesty's Government have had under their consideration the correspondence which took place at Washington in December last, between the United States Secretary of State, Mr. Forsyth, and the undersigned, comprising two official letters from the undersigned to Mr. Forsyth, dated the 13th and 29th of December, and two official letters from Mr. Forsyth to the undersigned, dated the 26th and 30th of the same month, upon the subject of the arrest and imprisonment of Mr. Alexander McLeod, of Upper Canada, by the authorities of the State of New York, upon a pretended charge of arson and murder, as having been engaged in the capture and destruction of the steamboat Caroline, on the 29th of December, 1837.

The undersigned is directed, in the first place, to make known to the Government of the United States that her Majesty's Government entirely approve of the course pursued by the undersigned in that correspondence, and of the language adopted by him in the official letters above mentioned.

And the undersigned is now instructed again to demand from the Government of the United States, formally, in the name of the British Government, the immediate release of Mr. Alexander McLeod.

The grounds upon which the British Government make this demand upon the Government of the United States are these: that the transaction on account of which Mr. McLeod has been arrested, and is to be put upon his trial, was a transaction of a public character, planned and executed by persons duly empowered by her Majesty's colonial authorities to take any steps and to do any acts which might be necessary for the defence of her Majesty's territories and for the protection of her Majesty's subjects; and that consequently those subjects of her Majesty who engaged in that transaction were performing an act of public duty for which they cannot be made personally and individually answerable to the laws and tribunals of any foreign country.

The transaction in question may have been, as her Majesty's Government are of opinion that it was, a justifiable employment of force for the purpose of defending the British territory from the unprovoked attack of a band of British rebels and American pirates, who, having been permitted to arm and organize themselves within the territory of the United States, had actually invaded and occupied a portion of the territory of her Majesty; or it may have been, as alleged by Mr. Forsyth, in his note to the undersigned of the 26th of December, "a most unjustifiable invasion in time of peace of the territory of the United States." But this is a question especially of a political and international kind, which can be discussed and settled only between the two Governments, and which the courts of justice of the State of New York cannot by possibility have any means of judging or any right of deciding.

It would be contrary to the universal practice of civilized nations to fix individual responsibility upon persons who, with the sanction or by the orders of the constituted authorities of a State, engaged in military or naval enterprises in their country's cause; and it is obvious that the introduction of such a principle would aggravate beyond measure the miseries, and would frightfully increase the demoralizing effects of war, by mixing up with national exasperation the ferocity of personal passions, and the cruelty and bitterness of individual revenge.

Her Majesty's Government cannot believe that the Government of the United States can really intend to set an example so fraught with evil to the community of nations, and the direct tendency of which must be to bring back into the practice of modern war, atrocities which civilization and Christianity have long since banished.

Neither can her Majesty's Government admit for a moment the validity of the doctrine advanced by Mr. Forsyth, that the Federal Government of the United States has no power to interfere in the matter in question, and that the decision thereof must rest solely and entirely with the State of New York.

With the particulars of the internal compact which may exist between the several States that compose the Union, foreign Powers have nothing to do: the relations of foreign Powers are with the aggregate Union; that Union is to them represented by the Federal Government; and of that Union the Federal Government is to them the only organ. Therefore, when a foreign Power has redress to demand for a wrong done to it by any State of the Union, it is to the Federal Government, and not to the separate State, that such power must look for redress for that wrong. And such foreign Power cannot admit the plea that the separate State is an independent body over which the Federal Government has no control. It is obvious that such a doctrine, if admitted, would at once go to a dissolution of the Union as far as its relations with foreign Powers are concerned; and that foreign Powers in such case, instead of accrediting diplomatic agents to the Federal Government, would send such agents not to that Government, but to the Government of each separate State; and would make their relations of peace and war with each State depend upon the result of their separate intercourse

with such State, without reference to the relations they might have with the rest.

Her Majesty's Government apprehend that the above is not the conclusion at which the Government of the United States intend to arrive; yet such is the conclusion to which the arguments that have been advanced by Mr. Forsyth necessarily lead.

But, be that as it may, her Majesty's Government formally demand, upon the grounds already stated, the immediate release of Mr. McLeod; and her Majesty's Government entreat the President of the United States to take into his most deliberate consideration the serious nature of the consequences which must ensue from a rejection of this demand.

The United States Government will perceive that, in demanding Mr. McLeod's release, her Majesty's Government argue upon the assumption that he was one of the persons engaged in the capture of the steamboat "Caroline;" but her Majesty's Government have the strongest reasons for being convinced that Mr. McLeod was not, in fact, engaged in that transaction; and the undersigned is hereupon instructed to say that, although the circumstance itself makes no difference in the political and international question at issue, and although her Majesty's Government do not demand Mr. McLeod's release upon the ground that he was not concerned in the capture of the "Caroline," but upon the ground that the capture of the "Caroline" was a transaction of a public character, for which the persons engaged in it cannot incur private and personal responsibility; yet the Government of the United States must not disguise from themselves that the fact that Mr. McLeod was not engaged in the transaction must necessarily tend greatly to inflame that national resentment which any harm that shall be suffered by Mr. McLeod at the hands of the authorities of the State of New York, will infallibly excite throughout the whole of the British empire.

The undersigned, in addressing the present official communication, by order of his Government, to Mr. Webster, Secretary of State of the United States, has the honor to offer to him the assurance of his distinguished consideration.

H. S. FOX.

The Hon. DANIEL WEBSTER,
Secretary of State.

No. 2.

MR. WEBSTER TO MR. FOX.

DEPARTMENT OF STATE,
Washington, April 24, 1841.

The undersigned, Secretary of State of the United States, has the honor to inform Mr. Fox, envoy extraordinary and minister plenipotentiary of her Britannic Majesty, that his note of the 12th of March was received and laid before the President.

Circumstances well known to Mr. Fox have necessarily delayed, for some days, the consideration of that note.

The undersigned has the honor now to say, that it has been fully considered, and that he has been directed by the President to address to Mr. Fox the following reply.

Mr. Fox informs the Government of the United States, that he is instructed to make known to it, that the Government of her Majesty entirely approve the course pursued by him, in his correspondence with Mr. Forsyth, in December last, and the language adopted by him on that occasion; and that that Government have instructed him "again to demand from the Government of the United States, formally, in the name of the British Government, the immediate release of Alexander McLeod;" that "the grounds upon which the British Government make this demand upon the Government of the United States, are these: that the transaction on account of which McLeod has been arrested and is to be put upon his trial, was a transaction of a public character, planned and executed by persons duly empowered by her Majesty's colonial authorities to take any steps and to do any acts which might be necessary for the defence of her Majesty's territories, and for the protection of her Majesty's subjects; and that consequently those subjects of her Majesty who engaged in that transaction, were performing an act of public duty for which they cannot be made personally and individually answerable to the laws and tribunals of any foreign country."

The President is not certain that he understands, precisely, the meaning intended by her Majesty's Government to be conveyed, by the foregoing instruction.

This doubt has occasioned, with the President, some hesitation; but he inclines to take it for granted that the main purpose of the instruction was, to cause it to be signified to the Government of the United States, that the attack on the steamboat "Caroline" was an act of public force, done by the British colonial authorities, and fully recognised by the Queen's Government at home; and that, consequently, no individual concerned in that transaction can, according to the just principle of the laws of nations, be held personally answerable in the ordinary courts of law, as for a private offence; and that upon this avowal of her Majesty's Government, Alexander McLeod, now imprisoned, on an indictment for murder, alleged to have been committed in that attack, ought to be released, by such proceedings as are usual and are suitable to the case.

The President adopts the conclusion, that nothing more than this could have been intended to be expressed, from the consideration, that her Majesty's Government must be fully aware, that in the United States, as in England, persons confined under judicial process can be released from that confinement only by judicial process. In neither country, as the undersigned supposes, can the arm of the Executive power interfere, directly or forcibly, to release or deliver the prisoner. His discharge must be sought in a manner conformable to the principles of law, and the proceedings of courts of judicature. If an indictment, like that which has been found against Alexander McLeod, and under circumstances like those which belong to his case, were

pending against an individual in one of the courts of England, there is no doubt that the law officer of the crown might enter a *nolle prosequi*, or that the prisoner might cause himself to be brought up on *habeas corpus*, and discharged, if his ground of discharge should be adjudged sufficient, or that he might prove the same facts and insist on the same defence or exemption on his trial.

All these are legal modes of proceeding, well known to the laws and practice of both countries. But the undersigned does not suppose, that if such a case were to arise in England, the power of the Executive Government could be exerted in any more direct manner. Even in the case of ambassadors, and other public ministers, whose right of exemption from arrest is personal, requiring no fact to be ascertained but the mere fact of diplomatic character, and to arrest whom is sometimes made a highly penal offence, if the arrest be actually made, it must be discharged by application to the courts of law.

It is understood that Alexander McLeod is holden as well on civil as on criminal process, for acts alleged to have been done by him, in the attack on the "Caroline;" and his defence, or ground of acquittal, must be the same in both cases. And this strongly illustrates, as the undersigned conceives, the propriety of the foregoing observations; since it is quite clear that the Executive Government cannot interfere to arrest a civil suit, between private parties, in any stage of its progress; but that such suit must go on to its regular judicial termination. If, therefore, any course, different from such as have been now mentioned, was in contemplation of her Majesty's Government, something would seem to have been expected, from the Government of the United States, as little conformable to the laws and usages of the English Government as to those of the United States, and to which this Government cannot accede.

The Government of the United States, therefore, acting upon the presumption, which it readily adopted, that nothing extraordinary or unusual was expected or requested of it, decided, on the reception of Mr. Fox's note, to take such measures as the occasion and its own duty appeared to require.

In his note to Mr. Fox, of the 26th of December last, Mr. Forsyth, the Secretary of State of the United States, observes, that "if the destruction of the 'Caroline' was a public act, of persons in her Majesty's service, obeying the order of their superior authorities, this fact has not been before communicated to the Government of the United States by a person authorized to make the admission; and it will be for the court which has taken cognizance of the offence with which Mr. McLeod is charged, to decide upon its validity when legally established before it." And adds, "the President deems this to be a proper occasion to remind the Government of her Britannic Majesty, that the case of the 'Caroline' has been long since brought to the attention of her Majesty's principal Secretary of State for Foreign Affairs; who, up to this day, has not communicated its decision thereupon. And it is hoped that the Government of her Majesty will perceive the importance of no longer leaving the Government of the United States uninformed of its views and intentions upon a

subject which has naturally produced much exasperation, and which has led to such grave consequences."

The communication of the fact, that the destruction of the "Caroline" was an act of public force, by the British authorities, being formally made to the Government of the United States, by Mr. Fox's note, the case assumes a decided aspect.

The Government of the United States entertains no doubt that, after this avowal of the transaction, as a public transaction, authorized and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law, and the general usage of civilized States, to be holden personally responsible in the ordinary tribunals of law, for their participation in it. And the President presumes that it can hardly be necessary to say that the American people, not distrustful of their ability to redress public wrongs, by public means, cannot desire the punishment of individuals, when the act complained of is declared to have been an act of the Government itself.

Soon after the date of Mr. Fox's note, an instruction was given to the Attorney General of the United States, from this Department, by direction of the President, which fully sets forth the opinions of this Government on the subject of McLeod's imprisonment, a copy of which instruction the undersigned has the honor herewith to enclose.

The indictment against McLeod is pending in a State court, but his rights, whatever they may be, are no less safe, it is to be presumed, than if he were holden to answer in one of the courts of this Government.

He demands immunity from personal responsibility by virtue of the law of nations, and that law in civilized States is to be respected in all courts. None is either so high or so low as to escape from its authority in cases to which its rules and principles apply.

This Department has been regularly informed by his Excellency the Governor of the State of New York, that the Chief Justice of that State was assigned to preside at the hearing and trial of McLeod's case, but that, owing to some error or mistake in the process of summoning the jury, the hearing was necessarily deferred. The President regrets this occurrence, as he has a desire for a speedy disposition of the subject. The council for McLeod have requested authentic evidence of the avowal by the British Government of the attack on and destruction of the "Caroline," as acts done under its authority, and such evidence will be furnished to them by this Department.

It is understood that the indictment has been removed into the Supreme Court of the State by the proper proceeding for that purpose, and that it is now competent for McLeod, by the ordinary process of *habeas corpus*, to bring his case for hearing before that tribunal.

The undersigned hardly needs to assure Mr. Fox, that a tribunal so eminently distinguished for ability and learning as the Supreme Court of the State of New-York, may be safely relied upon for the just and impartial administration of the law in this as well as in

other cases; and the undersigned repeats the expression of the desire of this Government that no delay may be suffered to take place in these proceedings which can be avoided. Of this desire, Mr. Fox will see evidence in the instructions above referred to.

The undersigned has now to signify to Mr. Fox that the Government of the United States has not changed the opinion which it has heretofore expressed to her Majesty's Government of the character of the act of destroying the "Caroline."

It does not think that that transaction can be justified by any reasonable application or construction of the right of self-defence under the laws of nations. It is admitted that a just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both. But the extent of this right is a question to be judged of by the circumstances of each particular case, and when its alleged exercise has led to the commission of hostile acts within the territory of a power at peace, nothing less than a clear and absolute necessity can afford ground of justification. Not having up to this time been made acquainted with the views and reasons at length, which have led her Majesty's Government to think the destruction of the "Caroline" justifiable as an act of self-defence, the undersigned, earnestly renewing the remonstrance of this Government against the transaction, abstains for the present from any extended discussion of the question. But it is deemed proper, nevertheless, not to omit to take some notice of the general grounds of justification stated by her Majesty's Government in their instructions to Mr. Fox.

Her Majesty's Government have instructed Mr. Fox to say, that they are of opinion that the transaction which terminated in the destruction of the "Caroline," was a justifiable employment of force, for the purpose of defending the British territory from the unprovoked attack of a band of British rebels and American pirates, who, having been "permitted" to arm and organize themselves within the territory of the United States, had actually invaded a portion of the territory of her Majesty.

The President cannot suppose that her Majesty's Government, by the use of these terms, meant to be understood as intimating that these acts, violating the laws of the United States and disturbing the peace of the British territories, were done under any degree of countenance from this Government, or were regarded by it with indifference; or, that under the circumstances of the case, they could have been prevented by the ordinary course of proceeding. Although he regrets that, by using the term "permitted," a possible inference of that kind might be raised, yet such an inference the President is willing to believe would be quite unjust to the intentions of the British Government.

That, on a line of frontier, such as separates the United States from her Britannic Majesty's North American Provinces, a line long enough to divide the whole of Europe into halves, irregularities, violences, and conflicts should sometimes occur, equally against the will of both Governments, is certainly easily to be supposed. This may be more possible, perhaps, in regard to the United States, with-

out any reproach to their Government, since their institutions entirely discourage the keeping up of large standing armies in time of peace, and their situation happily exempts them from the necessity of maintaining such expensive and dangerous establishments. All that can be expected from either Government, in these cases, is good faith, a sincere desire to preserve peace and do justice, the use of all proper means of prevention, and that if offences cannot, nevertheless, be always prevented, the offenders shall still be justly punished. In all these respects, this Government acknowledges no delinquency in the performance of its duties.

Her Majesty's Government are pleased, also, to speak of those American citizens, who took part with persons in Canada, engaged in an insurrection against the British Government, as "American pirates." The undersigned does not admit the propriety or justice of this designation. If citizens of the United States fitted out, or were engaged in fitting out, a military expedition from the United States, intended to act against the British Government in Canada, they were clearly violating the laws of their own country and exposing themselves to the just consequences, which might be inflicted on them, if taken within the British dominions. But notwithstanding this, they were certainly not pirates, nor does the undersigned think that it can advance the purpose of fair and friendly discussion, or hasten the accommodation of national difficulties, so to denominate them. Their offence, whatever it was, had no analogy to cases of piracy. Supposing all that is alleged against them to be true, they were taking a part in what they regarded as a civil war, and they were taking part on the side of the rebels. Surely England herself has not regarded persons thus engaged as deserving the appellation which her Majesty's Government bestows on these citizens of the United States.

It is quite notorious that, for the greater part of the last two centuries, subjects of the British Crown have been permitted to engage in foreign wars, both national and civil, and in the latter in every stage of their progress; and yet it has not been imagined that England has at any time allowed her subjects to turn pirates. Indeed in our own times, not only have individual subjects of that Crown gone abroad to engage in civil wars, but we have seen whole regiments openly recruited, embodied, armed, and disciplined in England, with the avowed purpose of aiding a rebellion against a nation with which England was at peace; although it is true that, subsequently, an act of Parliament was passed to prevent transactions so nearly approaching to public war, without license from the Crown.

It may be said that there is a difference between the case of a civil war arising from a disputed succession, or a protracted revolt of a colony against the mother country, and the case of the fresh outbreak, or commencement of a rebellion. The undersigned does not deny that such distinction may, for certain purposes, be deemed well founded. He admits that a Government called upon to consider its own rights, interests, and duties, when civil wars break out in other countries, may decide on all the circumstances of the particular case upon its own existing stipulations, on probable results, on what its own security requires, and on many other considerations. It may

be already bound to assist one party, or it may become bound, if it so chooses, to assist the other, and to meet the consequences of such assistance.

But whether the revolt be recent or long continued, they who join those concerned in it, whatever may be their offence against their own country, or however they may be treated, if taken with arms in their hands in the territory of the Government, against which the standard of revolt is raised, cannot be denominated pirates, without departing from all ordinary use of language in the definition of offences. A cause which has so foul an origin as piracy cannot, in its progress, or by its success, obtain a claim to any degree of respectability or tolerance among nations; and civil wars, therefore, are not understood to have such a commencement.

It is well known to Mr. Fox that authorities of the highest eminence in England, living and dead, have maintained that the general law of nations does not forbid the citizens or subjects of one Government from taking part in the civil commotions of another. There is some reason, indeed, to think that such may be the opinion of her Majesty's Government at the present moment.

The undersigned has made these remarks from the conviction that it is important to regard established distinctions, and to view the acts and offences of individuals in the exactly proper light. But it is not to be inferred that there is, on the part of this Government, any purpose of extenuating, in the slightest degree, the crimes of those persons, citizens of the United States, who have joined in military expeditions against the British Government in Canada. On the contrary, the President directs the undersigned to say that it is his fixed resolution that all such disturbers of the national peace and violators of the laws of their country, shall be brought to exemplary punishment. Nor will the fact that they are instigated and led on to these excesses by British subjects, refugees from the provinces, be deemed any excuse or palliation; although it is well worthy of being remembered that the prime movers of these disturbances on the borders are subjects of the Queen, who come within the territories of the United States, seeking to enlist the sympathies of their citizens, by all the motives which they are able to address to them on account of grievances, real or imaginary. There is no reason to believe that the design of any hostile movement from the United States against Canada has commenced with citizens of the United States. The true origin of such purposes and such enterprises is on the other side of the line. But the President's resolution to prevent these transgressions of the laws is not, on that account, the less strong. It is taken, not only in conformity to his duty under the provisions of existing laws, but in full consonance with the established principles and practice of this Government.

The Government of the United States has not, from the first, fallen into the doubts, elsewhere entertained, of the true extent of the duties of neutrality. It has held that, however it may have been in less enlightened ages, the just interpretation of the modern law of nations is, that neutral States are bound to be strictly neutral; and that it is a manifest and gross impropriety for individ-

uals to engage in the civil conflicts of other States, and thus to be at war while their Government is at peace. War and peace are high national relations, which can properly be established or changed only by nations themselves.

The United States have thought, also, that the salutary doctrine of non-intervention by one nation with the affairs of others is liable to be essentially impaired if, while Government refrains from interference, interference is still allowed to its subjects, individually or in masses. It may happen, indeed, that persons choose to leave their country, emigrate to other regions, and settle themselves on uncultivated lands, in territories belonging to other States. This cannot be prevented by Governments, which allow the emigration of their subjects and citizens; and such persons, having voluntarily abandoned their own country, have no longer claim to its protection, nor is it longer responsible for their acts. Such cases, therefore, if they occur, show no abandonment of the duty of neutrality.

The Government of the United States has not considered it as sufficient to confine the duties of neutrality and non-interference to the case of Governments whose territories lie adjacent to each other. The application of the principle may be more necessary in such cases, but the principle itself they regard as being the same, if those territories be divided by half the globe. The rule is founded in the impropriety and danger of allowing individuals to make war on their own authority, or, by mingling themselves in the belligerent operations of other nations, to run the hazard of counteracting the policy, or embroiling the relations of their own Government. And the United States have been the first among civilized nations to enforce the observance of this just rule of neutrality and peace, by special and adequate legal enactments. In the infancy of this Government, on the breaking out of the European wars, which had their origin in the French Revolution, Congress passed laws with severe penalties for preventing the citizens of the United States from taking part in those hostilities.

By these laws, it prescribed to the citizens of the United States what it understood to be their duty, as neutrals, by the law of nations, and the duty, also, which they owed to the interest and honor of their own country.

At a subsequent period, when the American colonies of an European Power took up arms against their sovereign, Congress, not diverted from the established system of the Government, by any temporary considerations, not swerved from its sense of justice, and of duty, by any sympathies which it might naturally feel for one of the parties, did not hesitate, also, to pass acts applicable to the case of colonial insurrection and civil war. And these provisions of law have been continued, revised, amended, and are in full force at the present moment. Nor have they been a dead letter, as it is well known that exemplary punishments have been inflicted on those who have transgressed them. It is known, indeed, that heavy penalties have fallen on individuals, citizens of the United States, engaged in this very disturbance in Canada, with which the destruction of the Caroline was connected. And it is in Mr. Fox's knowledge,

also, that the act of Congress of 10th March, 1838, was passed for the precise purpose of more effectually restraining military enterprises, from the United States into the British provinces, by authorizing the use of the most sure and decisive preventive means. The undersigned may add, that it stands on the admission of very high British authority, that during the recent Canadian troubles, although bodies of adventurers appeared on the border, making it necessary for the people of Canada to keep themselves in a state prepared for self-defence, yet that these adventurers were acting by no means in accordance with the feeling of the great mass of the American people, or of the Government of the United States.

This Government, therefore, not only holds itself above reproach in every thing respecting the preservation of neutrality, the observance of the principle of non-intervention, and the strictest conformity, in these respects, to the rules of international law, but it doubts not that the world will do it the justice to acknowledge, that it has set an example, not unfit to be followed by others, and that by its steady legislation, on this most important subject, it has done something to promote peace and good neighborhood among nations, and to advance the civilization of mankind.

The undersigned trusts, that when her Britannic Majesty's Government shall present the grounds, at length, on which they justify the local authorities of Canada, in attacking and destroying the "Caroline," they will consider that the laws of the United States are such as the undersigned has now represented them, and that the Government of the United States has always manifested a sincere disposition to see those laws effectually and impartially administered. If there have been cases in which individuals, justly obnoxious to punishment, have escaped, this is no more than happens in regard to other laws.

Under these circumstances, and under those immediately connected with the transaction itself, it will be for her Majesty's Government to show upon what state of facts, and what rules of national law, the destruction of the "Caroline" is to be defended. It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the "Caroline," was impracticable, or would have been unavailing; it must be shown that day-light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know

whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this, the Government of the United States cannot believe to have existed.

All will see that if such things be allowed to occur, they must lead to bloody and exasperated war. And when an individual comes into the United States from Canada, and to the very place on which this drama was performed, and there chooses to make public and vain-glorious boast of the part he acted in it, it is hardly wonderful that great excitement should be created, and some degree of commotion arise.

This republic does not wish to disturb the tranquillity of the world. Its object is peace, its policy peace. It seeks no aggrandizement by foreign conquest, because it knows that no foreign acquisitions could augment its power and importance so rapidly as they are already advancing by its own natural growth, under the propitious circumstances of its situation. But it cannot admit that its government has not both the will and the power to preserve its own neutrality, and to enforce the observance of its own laws upon its own citizens. It is jealous of its rights, and among others, and most especially, of the right of the absolute immunity of its territory against aggression from abroad; and these rights it is the duty and determination of this government fully, and at all times, to maintain, while it will at the same time as scrupulously refrain from infringing on the rights of others.

The President instructs the undersigned to say, in conclusion, that he confidently trusts that this, and all other questions of difference between the two governments, will be treated by both in the full exercise of such a spirit of candor, justice, and mutual respect, as shall give assurance of the long continuance of peace between the two countries.

The undersigned avails himself of this opportunity to assure Mr. Fox of his high consideration.

DANL. WEBSTER.

HENRY S. FOX, Esq.,
Envoy Extraordinary and Minister Plenipotentiary.

SUPREME COURT OF THE STATE OF NEW YORK.

No. 3.

ARGUMENT OF MR. BRADLEY.

Mr. Bradley addressed the Court as follows:

The interest created everywhere by this controversy is no greater than justly belongs to it. This prosecution is the first attempt ever made to hold a man responsible to the municipal tribunals of another country for the obedience which he has rendered to the authorities of his own. And all can see that if it be adopted here, and infused

into the code of nations, no sagacity can predict the extent of the revolution which must follow. A brief review of the evidence introduced for the defendant yesterday, and the prosecution to-day, while it unfolds the true origin of this question, will show its fearful importance.

Canada is a far distant extremity of a transatlantic monarchy, but having a local government with powers adequate to every exigency of her institution. Though lately the scene of a transient rebellion, she was now quiet and her people apparently contented. Along her southern border lay a country of different institutions, in spirit as in name, republican. Here public meetings were held—arms collected—military stores provided—volunteers enlisted to aid a projected invasion of the Upper Province. On this same soil, the United States and Great Britain being at peace, these forces were publicly organized, and an American citizen placed at the head as Commander-in-Chief. Navy Island was their first object, and this they seized. The motives of this invasion—what were they? To produce war—a civil war, and this too in winter, and to arouse a population of less than half a million to rebellion against a nation whose fortresses belt the globe. Behind them lay the United States, and Schlosser was made their point of communication. In that direction, they looked for recruits, for supplies, for encouragement and succor of every kind. Thither too, in case of disaster, they could retreat, and arm for fresh aggression. All this, and more, they had a right to expect; because for their support, the sheriff of Erie had been robbed of two hundred stand of arms—twelve pieces of ordnance stolen, and the Batavia arsenal plundered of its contents. And the same lawless spirit was raging along the whole frontier, from Buffalo to Vermont.

How was it in Canada the while? After the event it is easy to be wise,—not so before. She was invaded by a force, then said, and here proved to have been, a thousand strong—and with what motives we know. One rebellion had just been, and another might come. If it did, all Canadians saw that the journey before them lay through ruined business, desolated homes, and a bleeding land, to a new condition worse than the old; for what chains were ever made lighter by a fruitless effort to cast them off? Motives enough there were,—if love of country, then *that*,—if fear, *that*,—if pride, which scorned being driven, even to freedom, by a ruffian band of invaders, *that* impelled them—to what? Self-defence. For aught they knew or could then know, their entire safety depended upon closing that passage to Schlosser.

Just at this moment, the Caroline appears, moving on the waters of the Niagara; and no matter by whom owned or with what motives employed, the effect of her presence was to make closer that dangerous connection and more difficult to sever,—a result most to be dreaded by the Provincials, and most to be hoped by their invaders. Between the isle and the American mainland, runs an imaginary line—the boundary of the two nations. To this line, the cannon of the island would protect her, and beyond it she was in the waters of a nation with whom Great Britain was at peace. Thus our very neu-

trality was made an instrument of war, and the means of a then incalculable danger to the Province.

The steamer, having deposited on the island her freight from above, and transported thither a field-piece and other warlike instruments from Schlosser, was fastened at the latter place, which, for whatever purposes of the war it had been used, was deemed neutral enough for protection. But she had been watched, and was already doomed. An armed force, (whether of regulars or volunteers, is no matter, for in war all citizens are soldiers, and should be prompt at the earliest call,) organized and dispatched by command of the Provincial Authorities, appeared at midnight by her side, and at once discharging their fire-arms, and shouting to their utmost voice, leaped on board. Her inmates unarmed and unresisting—some fell,—some fled. On the dock, and dead, Durfee was found. The assailants having fired her, and cast off the fastening chains, towed her into the current; she drifted slowly down a space, lodged an instant,—was again put afloat. And as the flames, now raging over her burning decks, announced in Chippewa, the success of the expedition, beacon lights there shot up to guide the adventurers back, while the Caroline was left to take her own blazing way down the rapids and over the cataract, to be extinguished in the abyss below.

Here allow me to pause a moment to tell the counsel for the prosecution, that any eloquence they may have to spare on this transaction as an unauthorized invasion of our soil by a friendly Power,—an unjustifiable violation of neutral rights, and demanding immediate and exemplary redress,—will be bestowed in exceeding good place. Such was the view taken by the Federal Government—such, by Gov. Marcy—such, by the American Minister at St. James, whose spirited remonstrance would furnish them an excellent brief. And when in their reply to my poor remarks, they give vent to the orator's noble fervor of an hour, let them be animated by the consciousness that from within a marine league of the coast, to where the farthest axe has new-hacked the wilderness, few American tracts will be found to say to them, Nay. And I pray that for the occasion, they may be inspired with the power of "those ancients, who shook the Arsenal and fulmined over Greece," to do justice to the theme. And why? Because in making good that position, they establish ours. For, neutrality is a relation between nations only. They alone can keep,—they alone violate. Individuals, as such, can do neither; although, acting for their government and by its commands, they may do both. But then their country is responsible. And when the prosecutors shall have driven home this charge upon Great Britain, they will have brought the destroyers of the Caroline and of Durfee within the operation of a principle which can be no more rightfully denied, than can be the mysterious influence which binds the earth in its orbit,—the same principle by which this Court administers justice, and all are bound to reverence its decrees and *obey*. For allegiance to their own government and to that alone, is a duty which all men owe and all civilized nations recognize. When under duress of that allegiance, a person violates the rights of another nation, the crime attaches not to the individual, but to the state

whose helpless and involuntary instrument he is. Consequently, he who obeys his own government, can never be made personally or criminally responsible for that act by the municipal tribunals of any other.

The prisoner is indicted for murder as a principal in the first and second degrees, and as an accessary before the fact. But to them all, this remark is applicable. The conduct complained of, must have been voluntary. It is not enough that the will assented before and at the time; that assent must have been uncaused by any of those constraints, either physical, which allow the accused no power, or political, which allow him no right to resist. And bound by this last, is every man under orders from his superior, having, as between the citizen and sovereign, jurisdiction to give them.

This brings me to the question how far nations recognize, in the subjects of each other, the obligations of allegiance?—But before entering upon that, a moment spent upon a preliminary consideration or two, obvious enough indeed, but important to be glanced at, will, in the sequel, be found, I trust, not to have been thrown away.

Publicists all refer for the model of the rights, duties and obligations of nations, to a state of nature. In that state, all were equal,—all independent. Each having no inferior, gave no law, and having no superior, took none. In matters of right, he consulted his own conscience alone, of wisdom, his own understanding, of force, his own good right arm. His mind, his powers, his members were all his own; and as *he* commanded *they* obeyed. By one set of faculties, he could preserve peace within; and by another set, and totally different, he could secure it from without. Thus each man was a miniature nation.

But framed as human nature was, some men weak, some rapacious, unions became necessary, and they betook themselves to distinct clusters. And the several clusters stood apart from each other, as equal in rights, and independent in power, as the individuals of whom they were composed had been before. A method was devised to determine what was right, what expedient, and the means provided to effect both. Thus each nation came to have a conscience, an understanding, and a right arm. This is a sovereignty. Each individual agreed with all, that he would obey; and all agreed with each, that obeying, he should be protected. This duty of submission is allegiance. This protection the price paid for it. To ensure domestic justice and repose, municipal laws, and municipal courts, and ministerial officers and process were devised. The care of external justice and tranquillity was entrusted to armies and navies and foreign ministers. And both the departments met in the supreme Executive Head, which gave a unity and identity to the whole. Thus, in all important analogies, each nation is a moral person, and the several nations several persons. The state framed a code among themselves, by which, and by which alone, their rights were to be enforced—by which, and by which alone, their wrongs redressed—the great Public Code of the World.

But to return to the internal rights and obligations of the several states:—sovereignty, embracing the right to judge conclusively for

itself, what is to be done, and the power to use every necessary means to do it, every state has and must have. In what part of the body politic it may be placed, and through what forms to be exercised, are alike immaterial. From the People it originally came, and was by them placed either where they pleased, or where necessity compelled. No matter whether it be vested in one despotic will as in Russia, or in a Queen, Lords and Commons, as in Great Britain, or in the singularly combined and interwoven system enjoyed by us in the United States, there is yet in every state, a Supreme Power, to which all other powers in it must do obedience. Every nation governs conclusively and has a right to govern,—commands in the last resort, and has a right to command, her own subjects. Indeed, without this power and right, she would be no nation. Take them away, and her people are at once landed back in that state of nature whence they had emerged.

Co-relative to this right of sovereignty and co-extensive with it, is the duty of obedience. From its obligation none are exempt. To the government, by the very terms of the social compact, all have, as to public affairs, bowed their wills, surrendered their power, and ceded away their rights and obligations. No longer can they do *whatever* they please,—no longer obey *whatever* may be the dictates of their own judgment. There is now a power above them whose laws are Supreme—and these, they must not, cannot resist. If they deem the mandate unjust and unwise, they may, indeed, reason and expostulate, and procure a change if they can; or, they may arise, and overthrow the decree and government together; that while it remains a law, and they subjects, they must bide their time, and look for better auspices. Meanwhile, however, they have nothing to do but to submit.

So far, indeed, reaches this principle, and such is the gratitude of men for the benefits it has conferred, that the obligation to render it, has warmed into a sentiment, and kindled into a passion, and glows more or less in every—or nearly every human heart, and brightest in the purest. It waits not for the command, but anticipates it, and renders that from love, which the state would hardly venture to ask under the compact. In this form, it is called patriotism or love of country, and has given birth to many of the virtues which most ennoble man.

Since, then, this right to command, and this duty to obey, are of the very essence,—nay, the very idea of government—it follows, that, whenever one nation recognizes in another a national existence, she recognizes also, *ipso facto*, the right of that other to exercise this sovereignty, and the duty of the subjects to yield this obedience. For, without them, she would be no nation,—have no government, and could not, therefore, *be* recognized. The existence of both then, every state which treats her as an independent community, is solemnly *estopped*,—legally and politically estopped—estopped in every form, from denying. And any interference with the subjects as yet in peace, of another, is, *per se*, just cause of immediate war. And why? Not merely on the ground of self-defence, although it disturbs the repose, endangers the happiness and perils the existence of the

injured state: but, because, it is treachery, breach of faith,—denying in practice what is stipulated by treaty. Nay, it is worse, far worse, than treachery, because, by striking at that without which civil organization cannot exist, it is digging away the very foundation-stone of the social edifice. And if she will not desist, her just doom is recorded by the Publicists when they say she may be utterly exterminated. And why? Because nations, owing their own very existence to civil submission at home, must not either become themselves, or employ others, as the missionaries of disobedience abroad. And allow me to add, that by nothing is more strongly marked the progress of correct principles and sound morals among the nations, than by the Total Abstinence on this subject, now practised by the nations.

Since, then, all governments possess this right of sovereignty, and all citizens, while they remain such, owe an equally extensive duty of obedience; and since the obligation of this duty is unqualifiedly admitted by the recognition of other nations; it inevitably follows, that for whatever any subject or citizen may do, in obedience to his sovereign, and within the range and under the duress of his allegiance, he cannot be held personally or criminally responsible to the municipal tribunals of other nations. For, what greater outrage can human atrocity perpetrate, than while admitting an act to be duty, to punish the performance of it as a crime? No: to his own master stands or falls every citizen, and to his own master alone.

Be the act, then, war, or invasion,—general or local hostility,—on a scale broad or narrow—be it the destruction of the Combined Fleet of the North at Copenhagen, or of the Caroline at Schlosser, whenever the command to do it is given by authority having jurisdiction, it must be implicitly obeyed. The right of sovereignty demands it—the duty of allegiance requires it; and the recognition of both, by the injured State, pardons it. Between submission and rebellion, there is no middle ground. The citizen subject is helpless, involuntary, and, therefore, unaccountable. He is bound by ties which nothing but Revolution can sever; and revolution no other state, as such, has a right to give him a single motive of hope or of fear to attempt. Revolution, he may, indeed, try; but he tries it on his own sole responsibility and at his own proper peril. If the command be such as violates the social compact, it is his right; but like every other right that is his, he may forego, waive, abandon it, and keep right on in the even tenor of his allegiance. And for doing so, no other state has a word of blame and much less a stripe of punishment to bestow.

If the act be injurious to another state, that is not a matter he may look into to find security for disobedience—to his government he has ceded his control over foreign affairs—*she* is to judge whether the act be right or wrong; and as a justification for him, that judgment is always right. Not so, however, to the injured state—as to her it may be very wrong. What be wrong? That judgment, and that command given under it. Who then is culpable? They who formed the one and gave the others,—not he, the instrument, having no power to resist, and stipulated by international recognition to have none. He is bound by a political necessity growing out of al-

legiance, as stern as matter by the physical, springing from gravitation. Both, indeed, operate under the same Almighty sanction. For, He who has tied the material universe together by the one, has said to man by his Revelation, "Let every soul be subject to the higher powers, and they which resist, shall receive to themselves damnation." As well, then, hold the tumbling granite responsible for the devastations of the avalanche, as man personally or criminally for the ruin he spreads in obeying the lawful commands of his country.

The United States, then, and Great Britain, have they recognized in each other a national existence? By war, by peace, by the Declaration of Independence, by the treaty of 1783, by that of 1815, by the interchange of ministers,—by every recognition which nations can give or nations receive, they are mutually estopped from denying to each other the rights of sovereignty, and from disputing in the citizens of each other the duties of obedience. By these acts, done under the highest national solemnities, the United States are concluded—throughout all their borders—not the Union alone, but all its parts—New York and its Courts—this Court—and the one above it and all below it.

I know the sacred tocsin of State Rights—which, however, is of late losing its just reverence, by being rung at every bonfire,—has been pealed through the country. But what of it? Were New York struck off from the Union and formed into a separate Empire,—could *she* deny to Great Britain a national existence? By her Northern Boundary, by her name, by her Constitution which adopts the English Common Law,—by that very Common Law, thus adopted, on every bright page of which it is written that the country wherever it came has a Supreme Power which all the other powers must obey,—by these, one and all, she would be held to take notice that Great Britain was, like herself, an independent State giving commands and laws, and exacting obedience. *In* the Union then, or *out* of it, it is the same with New York. Her people are concluded, and all her servants, from the lowest to those who sit in high authority on the summit.

What then is the case? Is it denied that the affair at Schlosser was an armed invasion of our soil?—denied that the invaders were a part of the Canadian public force?—denied that they came by command of the Provincial Authorities?—denied that the power to give this command had been previously conferred, and the exercise of it subsequently ratified by Great Britain? None of these do, or will the prosecutors question. When the command came, then, were not those to whom it was addressed bound to obey? Did not that command as between themselves and their sovereign, put them on their allegiance? Volunteers or no volunteers, undoubtedly it did. Are they criminal then? Misapplied as it may have been, and often will be, the principle itself of submission to constituted authority, acting in self-defence, and repelling lawless invasion, is sacred—and never yet, even in its wildest errors, has been held a crime. No! wrong as may have been their fearful errand, the destroyers of the Caroline started on it, that gloomy night, led by no motive which

any municipal court can hold to be malice aforethought, or instigations from the source of All Evil, but by that highest constraint known to civilized man—the duress *per patriam*,—that compulsion by which nations stand,—to which they owe all that is valuable in public order,—all that is splendid in public glory, and without which they would crumble down and disband, and mankind be thrown again at large, accountable to no superior and restrained by no law.

The whole transaction,—what is it but a transgression by one independent nation upon another? By what code, then, is it to be tried? By that and that alone which defines the rights, and punishes the wrongs of the communities of the world.

But the sanctions of this code,—are they administered by the municipal courts of New York? No: These are a part of the machinery devised to ensure domestic, not international justice. They are framed to deal with citizens,—individual offenders who set up business for themselves and do crimes on their own account. Examining magistrates commit not for wrongs done by one independent community upon another. The juries by whom indictments are found, are the Grand Inquests, not of nations, but of their own particular County. No: The tribunals for the correction of international wrongs begin at a different place, proceed on different principles, are guided by different rules of practice, and in whatever else they may result never end by bringing the issue to trial before a jury who would be compelled by their allegiance to take side with the country on whose injuries they would be called to deliberate.

Even then, if New York were an independent nation, over this matter her tribunals would have no jurisdiction. But she is not. So far as Great Britain is concerned, she is but a fragmentary portion of a nation. She has no external relations, can make no treaties, send or receive no ambassadors; not even surrender to Canada a poor trembling fugitive from justice How then can her courts take cognizance of national wrongs?

But we are told an indictment has been found. But can an indictment confer jurisdiction? Consent cannot,—a plea of guilty would not,—a statute of New York, in a case like this, or of the United States, could not. How can an indictment then? What *is* an indictment? Simply the declaration in a criminal suit—and who ever heard that a defendant in a civil suit, arrested by process from a court having no jurisdiction, could not be discharged after declaration filed? True, the indictment has been found by a grand jury. But for whose benefit is that jury impanneled? Civil prosecutions may be commenced at the will of the plaintiff, but the criminal are more oppressive. The law, in mercy to the defendant, then, declares that no suit of that kind shall be prosecuted at the will of any one man, and that the accused shall not be put on trial till the jury has looked into the cause for it. If they find cause, then he is in the same situation as a defendant in the other class of cases, after declaration on file. Then, if the court had no jurisdiction before, how can a grand jury, a part of its own machinery, give one? It is the law and the crime which confer jurisdiction; and if New York has not the supervision of international transactions, how can an indictment

give it? What mighty magic has this document, that it is of force to hold the prisoner in confinement against law—against the Constitution, making the court powerless to discharge, though having no jurisdiction to try?

Another objection to a discharge is that Durfee was not killed on the boat, and that his death was not necessary to her capture, and therefore the killing of him exceeded their commands. Whether his death were necessary or not, is unknown. But what if it were? What was the nature of that invasion? The message of Governor Marcy tells—the remonstrance of Mr. Stevenson tells—the negotiations between the governments tell—it was a hostile invasion, an entry of our territory with an avowed public force, in defiance of our laws and under the authority of a foreign government. What is that but war? Temporary, indeed, but yet war, and while it lasted, just as much so as that of the revolution or the one which followed it. If the force be public (was this public?) and put in motion by national authority—(was this so moved?) and exert itself by armed aggression—(was this so exerted?) it is then war. Will they contend that it was peace? Not the amount or continuance of force, but the authority by which it is moved, gives it character. Our minister at St. James's calls it hostility, open hostility and undisguised—and when this is committed by an independent nation, who will say that it is peace? And if it be war, who ever before heard—who will ever again hear that excess of violence gives the municipal tribunals of the invaded nation, jurisdiction of the offence?

Invaders owe the municipal laws of the State they enter, no obedience, because they owe the State none—the flag they march under shows the country they serve. The law under which they come is found in that chapter of international law devoted to war; and under that or some other of the same code, must crimes be punished. Excessive violence? The very nature of war is outrage. Every evil passion common to man and the tiger is put forth. What, then, if Durfee were needlessly slain? The transaction still is national: and Great Britain must answer the consequences. Whether he fell a mile or a yard from the boat, or on it, is, then, quite immaterial.

The whole prosecution is founded on one fundamental error, that the subjects of one State acting within the territory of another, in obedience to their sovereign, and as part of his public force, are responsible to the municipal laws prevailing where the act is done. But what obedience owes the American Minister at St. James's, or the humblest servant in his household, to the laws of Great Britain? He is there on the business of his sovereign—he is bound by laws undoubtedly, but not of her majesty—she has none for him. So in all cases. Foreigners come for their country or for themselves. If the latter, the municipal laws reach them—if the former, otherwise. The affair is national, and to their nation belongs the liability.

Why, then, should not the prisoner be discharged? For what should he be put on trial? To find the facts showing want of jurisdiction? Here they are—undisputed, indisputable,—found already. But it has been said in those quarters whence, if not legal arguments, speeches for courts of justice are sometimes drawn, that his trial is

necessary for the dignity of the State. Dignity of the State! What dignity is there in injustice? What dignity can she derive from her Courts holding in durance a man over whose conduct they have no jurisdiction? What dignity can she hope from her tribunals usurping cognizance of the affairs of nations? Dignity! because his release has not been requested, but demanded? Boons are craved, favors asked, but rights demanded—and if the courts have no jurisdiction, I ask, if his release be not a right to be demanded?

It is now some twenty years since the occurrence of an event at the other extremity of the Union—whatever analogies it may have to the affair at Schlosser, this is not the place to urge them, or to repel. Florida was invaded: and I am willing to grant here, what I would not elsewhere—that the transaction was illegal, and that the chieftain by whose orders it was done, exceeded his authority, and that he merited all that was charged against him by the illustrious son of Kentucky, whose eloquence, like the sacred bolts of ancient Jove, sometimes hallows what it strikes. When that army was assembled, and their chief, with the laurels of New Orleans fresh on his brow, placed at its head, their country said to them:—for it is hardly a figure to give nations a tongue—they speak by their laws, by their constitutions, by their authorities, by the very situations in which they place their citizens and then leave them in silence—she said, "Him, *we* trust, and do *you* obey. He will show you the foe: when you find them,—this banner, while it is the covenant of our protection, let it be the incentive to your duty." The invasion is over, the army returns—one of the gallant men, a private, suppose, ventures to Spain, is arrested, and the municipal courts go about to try him for murder. Who says, who dares say, that his release would have been craved as a boon, or even asked as a favor? Would our Minister have gone crawling to the head of Foreign Affairs, crouching before any dignitary of that nation, trailing the stars and stripes in the dust behind, and most humbly implored his discharge? No: that soldier had performed his part of the compact. He had no longer a duty, but a right now. He had obeyed—the price was his due—that price, protection. His right was high and holy—it would have reached forth and laid hold on the national faith—the national honor, and clutched every sinew of the national power. Begged as a boon, would his release have been? No: demanded as a right. The same eloquence which had flashed around his Chief to destroy, would have beamed over that distant and lowly private to illumine. No gathering of navies—no mustering of armies would there have been! If the country had not torn open that man's dungeon, or planted her banner on his grave, she had deserved to be blotted from the race of nations. Dignity to try McLeod! Call it rather the sacrament of infamy—baptism into disgrace.

This I repeat is a national affair; the wrong was national; and such be the redress. To the authorities at Washington and St. James's it belongs. Let them settle it amicably if they can; if not, let them arbitrate. This failing, let them muster their armies, call home their navies, and go to trial at the Grand Assize of Nations and take the solemn adjudication of God as to the right. But never let a nation, calling herself

civilized, just, humane and Christian, wreak her vengeance for a national wrong on an unprotected and humble individual, guilty of no crime but obedience to his country.

The prosecution then has these results. It seeks to make the municipal courts of New York exercise jurisdiction of the rights of nations.

It deprives the national government of the power and control over foreign relations conferred on it by the constitution, and drags them down to adjudication by the municipal laws of the state.

It seeks to thrust the municipal Courts between the duty of subjects of foreign nations and their own government.

It violates the independence of nations; for what is that independence but the right to be governed by no law save that by which alone they are bound—the Great Common Law of the World?

All these great interests are violated by the principles on which this prosecution is rested. And to hold the prisoner guilty of murder or any crime, would, as I said at the outset, produce in international law, a revolution the extent of which no human sagacity could foresee. And this it is, which gives the present controversy a solemnity far higher than belongs to any considerations of mere war or peace. War, indeed, may come, foreign commerce be broken up, frontiers desolated, cities burned, and the land filled with mourning. But it cannot last; peace must return with its blessings. The mourners will find solace, if no where else, at least in the tomb; the desolate places will blossom again; from the ruins of cities will spring new mansions nobler than the old, and commerce take up her march on the deep. Not so, however, with the everlasting blight of an evil principle, sanctioned by the highest courts and infused into the code of nations. The doctrine that man may be made personally or criminally responsible to the municipal tribunals of another country, for the obedience he renders the authorities of his own, if fit to be established here, is worthy of adoption everywhere and of a continuance through all generations. If it be right for this country to enjoin upon the subjects of others, disobedience at the peril of life, it will be right likewise for those others to adopt the same rule towards this nation and among themselves. And let it once be so settled, and every soldier and sailor and citizen on earth, will, from that moment, find himself amid new liabilities and ensnared by new perils. If he disobeys his own government, he is furnished with stripes, with infamy, with death; but if he adhere to his allegiance, then, by another, with fines, the dungeon, or the gallows. Meanwhile, that other doctrine, unknown to barbarians, and first seen on earth only when civilization began to dawn, that national wrongs will take no atonement which is not national also, will have become greatly modified, if not altogether repealed. And then, how many of the ties which now bind all in harmonious subjection to lawfully constituted authority can only be fancied by remembering how the utter impossibility of serving several masters of conflicting interests, produces a general lawlessness, and ends in disobedience to them all! And what atrocities would not creep into the practice of nations can only be foreseen by reflecting how national vengeance wreaked on private

helplessness, stirs up mankind to revenge. And how much of social order would then remain unshaken, can be known only to that mind which could behold the combined operation of these fearful causes as they act and react in the ever quickening progress of international exasperation.

But no fear. It can never prevail. If adopted here, not surer is sun-light on the morrow, than that it will be resisted by a war—a war founded on good faith—that faith which is at the bottom of the social compact—the faith plighted by government to her citizens of protection to be given for obedience rendered—of every kind of faith the most sacred. And though all know who *they* are that are thrice armed, and all know too they are not those whose adversaries have their quarrel just, yet whatever may be the result of that strife, the first other attempt to enforce the same principle will be met by a like resistance. It can never be enforced,—never. All civilization will rise against it and it will be arrested by the armed might of the world.

No. 4.

ARGUMENT OF THE ATTORNEY GENERAL.

Mr. Hall, Attorney General, then addressed the Court on the part of the people.

The matter before the Court is strictly a matter of law; this Court is a Court of Law, and I shall argue it strictly as a question of law. The question before the Court is not, as proposed, on demurrer. The case now stands before the Court on allegations from both sides, and contradictory proofs. After the intimation which was given by the Court we considered the demurrer withdrawn, and put in proofs, so that nothing is to be considered as admitted.

The prisoner stands indicted for murder, on which indictment he was arraigned and pleaded not guilty. Notwithstanding this, a motion has been made, that without any trial of that issue, or without disposing of the indictment, the prisoner be discharged from custody. There is no pretence that he was informally or illegally charged in that indictment. No pretence that the return of the Sheriff shows he was illegally committed or illegally detained in custody.

By common law, as well as by statute law, both of England and this State, an indictment must be disposed of by a motion to quash for defects, plainly on the face, yet by a trial of the record, when the issues of law are presented to the Court, or by a verdict of the Jury, or by *nolle prosequi*.

I know of no other way an indictment can be disposed of; I have heard of no other way, and will ask my learned friend, when he is closing his argument, to point out to the Court, some precedent, in which an indictment having been found and the person having pleaded to it, it was afterwards disposed of, except by one of those modes which I have mentioned, and the present motion is not any one of them.

This was a motion, altogether without a precedent, a mere experiment on the Court, the first of the kind that was ever made, and I trust, that if the view I take of the law be the right one, the Court will pronounce on it in such a manner, that such an experiment will never be repeated.

By the laws of England a person indicted for murder would not be brought before the Court of King's Bench. Nor would a suit of *Habeas Corpus* be granted at all under such circumstances.

I refer the Court to the statute of Habeas Corpus, and particularly to the Act of 31 Charles II., chap. 2d, of which England so much boasts, and of which we boast also. In that section which makes it imperative on the Court to grant the Habeas Corpus, cases of this kind are expressly exempted.

In the more recent Act of George III., which extends the right, and makes it the duty of Judges to grant the writ, cases of a commercial character are excepted, and they have no right to grant it where the prisoner is charged with a criminal offence, and if the prisoner was to be tried in his own country, he would not be let to come before a court and be heard on a motion for his discharge.

When a return is made by the officer in England, the Court gathers the facts from that return, and by the facts in this return will the Court determine whether the prisoner is legally arrested. Nor will they allow any other facts to be presented to them besides that return.

I will now request the attention of the Court to one or two cases.

In the case of Swallow *vs.* The City of London, s. 1. d. 287. The plaintiff was committed for refusing to take the oath of Alderman. This was returned to the Habeas Corpus, and the plaintiff desired to have liberty to plead the return, conceding that he had no right to contradict the return; but that matter consistent with the return might be pleaded, and offered to plead that he was an officer of the King's Mint and privileged from all offices and taxes. But the Court remanded Swallow and refused bail, but directed that the privilege should be suggested in the Crown Office, whereupon the Attorney General prayed for a writ of privilege, &c., to which the city answered.

Gardiner's Case. Cro. El. 821.—Gardiner was committed on the statute giving penalty of £10, for carrying bond-guns, &c., contrary to statute. He was removed by Habeas Corpus to the King's Bench, and the return disclosed that he was a special bailiff, having a right in the execution of his office to carry such weapons—the prisoner was not discharged by order of the Court—but all the facts were by direction embodied in a plea of justification, which was confessed by the prosecuting officer, and the party discharged by judgment of the Court upon the record.

So also in the Act of George III. 56 ch. p. 100. This statute extends the old Habeas Corpus, and allows the party to go beyond the return, but excludes cases where the party is criminally charged.

Amongst other cases decided in England, is that of Leonard Watson. This was a case relative to some of the rebels in Canada. When they were at Liverpool a suit of Habeas Corpus was taken out,

and it appeared that the officer in whose custody they were, made a false return, and the question was how to get at it. The Chief Justice said, "how far the truth of this return may be canvassed, I do not say." And the Court thus evaded it, but an application was made to attack the party for making a false return. The Court knew that there was a wrong return, and yet they were not willing to allow the parties to show that the return was false.

In Bushell's case, Vaughan's Reps. 157:

1. The prisoner is to be discharged or remanded barely upon the return, and nothing else, whether in the K. B. or Common Pleas.

This was a case of jurors committed to pay a fine for verdict contrary to law and evidence, in the Sessions. Discharged on ground that the cause was not good.

(This is said in Bethell's case, 4 Salk, 348, to be the first case in which a prisoner committed by O. and T. was discharged without writ of error.)

I therefore say, that if the prisoner was now before the King's Bench, he would not be allowed to produce any testimony except what appears in the return of the Sheriff.

It is admitted that our statutes have gone somewhat further. By our revised statutes, the court is required to inquire into the returns, and if there is no legal cause shown for his detention, it shall discharge the prisoner; but if it appears that the prisoner is committed for a criminal offence, he shall not be discharged. See 48, p. 669. The prisoner may deny the facts stated in the return, and may allege facts to show that he is entitled to his discharge.

I contend that this provision does not apply to a prisoner after indictment. And one reason is, that the indictment of a grand jury is in the nature of a final judgment of a tribunal having exclusive jurisdiction of the subject matter. The indictment of a grand jury is not an interlocutory proceeding. It is a matter of which no court but the grand jury has jurisdiction. This Court has no control over the finding of a grand jury. And if this Court discharge the prisoner, by doing so, they try the indictment and assume a control over the indictment, which the law has never given any tribunal.

There is another reason why that section of that statute cannot apply to a prisoner after indictment.

The provision is that the prisoner can make allegations or proofs to show that he is entitled to his discharge, and it goes on to show if it is not a criminal matter, the plaintiff or the State can give counter proofs or allegations. But after a man is held by indictment, this Court cannot examine the evidence on which that indictment was found. That is a matter which the grand jury is bound to keep to themselves. How then can this Court decide on the correctness of the finding of the grand jury, when by law the testimony on which the finding was made is not before the Court or ever can be?

I will illustrate this by one or two cases:

In the case of Rex *vs.* Dalton, 2 Stra. 911, the defendant had the misfortune to kill his schoolfellow. Return to Habeas Corpus before the Chief Justice, that prisoner was committed by the Coroner for manslaughter, prayer for bail. Chief Justice.—The return of Coro-

ner is no reason, for if the depositions made it murder, he would not bail him; or contra, if they amounted only to manslaughter, he would bail though the Coroner's inquest found it murder. The distinction is between a Coroner's inquest when the Court can look into the depositions, and an indictment when the evidence is secret.

See also Lord Mohan's case, 1 Salk. 103. Bail may be allowed after a Coroner's inquest finding murder, but not after indictment; because the Coroner sometimes proceeds upon depositions taken in writing, which we may look into ; but if one be found guilty of murder by a grand jury, the Court cannot take notice of their evidence, which they by their oath are bound to conceal.

See also in Bethell's case:

Rex *vs.* Bethell, 1 Salk. 347. The Court refused to discharge on Habeas Corpus, although the commitment held naught, but left the prisoner to his writ of error. The defendant had been indicted.

If these points are correct,—if it is true that this Court cannot look behind the indictment, and see the evidence on which the grand jury found their verdict,—therefore, as a matter of course, the provisions of the statute could not be extended to a prisoner after indictment, and the argument would end there. The Sheriff shows a regular and legal return, and that ends the case in this Court.

I regret being compelled to go into any further argument on this point, but as the Court expected the case to be placed fully before them, and as the counsel on the other side went into general considerations, I will also proceed, and examine what are the facts and the scope of this case.

It is no more than this. There was a strong excitement existing along the borders, and men on both sides were arrayed against each other. A rebellion broke out in Canada, and some of the rebels who fought there fled here, and excited the sympathies of some of our citizens. They went back to Navy Island, which is beyond our jurisdiction, and some of our citizens followed them, and there were great apprehensions of violence, both in Canada and in our territories. And if the Court will look at the papers in this case, they show that our governments at Albany and Washington were doing every thing they could to prevent an infringement of our obligations with England. The District Attorney of the United States, and of this State, and all the officers of the government at Albany and Washington, evinced the greatest desire to prevent any collision between our citizens and the subjects of England. And the letter of Mr. Rogers of Buffalo, the District Attorney, distinctly said that the crisis was past, that our people were quiet, and that the patriots had left there, and then the danger was in a great measure overcome.

Under these circumstances this midnight murder in our territories was made, and Durfee, one of our citizens, was murdered on our own shores. And after this murder had remained for three years without any explanation or satisfaction from England, the hand that committed the deed, the man that said he killed Durfee, is found within our jurisdiction, brought before our magistrate, and proved on the strongest evidence rarely brought before a committing magistrate, guilty of murder, and the magistrate commits him. And I might say

more: that at that time every effort was made to have him discharged. He was urged to get his witnesses to prove an alibi, that the magistrates might let him go, but the prisoner failed to do it. There was no bitterness of feeling evinced towards him, no spirit of revenge or hatred manifested, nor any other disposition shown, but that the laws of this state should not be trampled on with impunity.

I apprehend this is all the case they have made out. The borders were inflamed, as they will probably be again and again, as long as Canada is under one sovereign and this state under different jurisdiction.

The next question is, if the court will go beyond the indictment, what facts will the Court consider. I contend that the Court cannot consider any facts *aliunde*, except what go to the illegality of the commitment or detention, not to the guilt or innocence of the party. The words in the statute, "entitled to his discharge," are not equivalent to the words not guilty. Sections 42 and 43 instruct the Court to inquire as to the legality of the commitment, but an inquiry as to the legality of his detention by no means involves an inquiry as to his guilt or innocence. The distinction is a broad one, and essential to be made; and if the Court does not make that distinction, where will it stop? How prevent the most daring murderer to be brought to the bar of this Court for trial without a jury? The words of the statute are broad; it says, "inquire of the party entitled to be discharged."

If the language of the statute means, is the party innocent, where is the Court to stop? In every case of murder the party can allege that he is an innocent man, and claim to be discharged without trial by jury. If the Court can examine into the innocence of any party, nothing can prevent them from examining into the most complicated case of guilt.

But the Court has no such power. To illustrate my argument I will suppose the case of an ambassador from a foreign power being arrested and committed, and that he appears before the Court on Habeas Corpus and says he is the ambassador of a foreign power, sent here by virtue of treaties. In such a case, the Court could consider the fact because it is a fact, which goes not to establish his guilt or innocence, but only his exemption from trial.

But suppose a man to kill another in self-defence and that he was indicted for murder, and came before a Court and offered to show that the homicide was in self-defence, could this Court listen to him? Supposing that he was a peace-officer and while making an arrest was necessarily obliged to take a man's life, could this Court in such a case listen to him? Clearly not. Suppose that a Sheriff executed the sentence of a Court; he might be guilty of murder by executing the criminal at a different place and manner from that stated in his warrant. Suppose he is indicted for it, and brings the record and says that it was in pursuance of the sentence of the Court he did it, could that Court listen to him. How could that Court in such a case enter into any inquiry as to whether the Sheriff had an excuse for acting as he did? That would be a question only for a jury. It is

therefore evident that no matter how plain the case is, this Court cannot listen to any matter of guilt or innocence.

If the governor of this state calls out the militia to execute the law, and one of them kills a citizen, it might or it might not be murder, according to the circumstances; but suppose he offered to present those circumstances to this Court, would the Court listen to him?

Suppose the governor sent a certificate that the soldier killed the man by his order, would such a document produce any sentiment but astonishment, and should we be called on to pay respect to such an excuse of authority on the part of a foreign government, which would not be tolerated if coming from the executive of our own government?

The return of the Sheriff shows the legality of the commitment and detention, and there is no fact to show the illegality of either.

After the party was arrested and indicted, and the witnesses examined, time was given to the prisoner from the twelfth to the eighteenth of the month to procure his witnesses, and every facility was extended to him for the purpose, and after calm consideration on the part of the magistrate, he felt bound by his oath to detain him. He remained in that situation until the facts were placed before the grand inquest. And I will here say that the grand jury which arraigned him, was not made up of "patriots or those sympathisers," but of some of the calmest and most unprejudiced men in the country, as cool and dispassionate as the grand inquest of any county in New York; though living in its borders, in Niagara county, they had no feeling to induce them to find a verdict against the prisoner, unless his guilt was fully borne out by the strongest facts. And the foreman of this grand jury was a member of the Society of Friends.

Counsel for the prisoner denied this.

The gentleman at the other side says I am not correct, that he was not the foreman. But he was at least one of that grand jury who found the bill of indictment. And this man who did so was one whose principles and nature made him abhor the shedding of human blood. But to his conscience the act had been so clearly proved and the evidence of it was so strong, that in regard to the oath which he had taken on the inquest he could not hesitate to say it was a true bill.

What weight then is to be attached to the fact that the transaction was avowed by the British government? Does that alter the state of things?

This order being avowed by the British minister, the effect of that order can operate but in one of two ways. First, as a justification of the prisoner to establish his innocence, or secondly, admitting that he is guilty as charged in the indictment, the order is then to act as a protection to exonerate him from the operation of our laws.

In the first point of view, as a justification of the prisoner, it is a fact exclusively for the consideration of the jury, and comes not in accordance of the indictment. It charges him with having maliciously killed the man, but the avowal of the British government says he did it in discharge of his duty. It is therefore a fair issue

for the jury. If he did it from duty and not from malice, I presume the jury will find him not guilty of murder.

I presume, if the order of the British Government is to have any effect, it must be in this way. I see no other way. I can see no reason why a foreign order can have an effect different from an order of our own government; and if such a fact could protect one of our soldiers, in order to do so, it must be placed before a Court and jury, and not before a Court to be tried as a mere abstract question of law. If it is to have any effect, it is a matter for the jury to consider, whether the prisoner out of his own malice killed Durfee, or whether the evidence in the case gives the murder such a color as it receives in the language of the avowal by the British Government.

The ground on which the British Government makes the demand, is that the transaction for which McLeod was arrested, "was of a public character, planned and executed by persons duly empowered by her Majesty's colonial authorities to take any steps, and to adopt any acts which might be necessary for the defence of her Majesty's Territories, and for the protection of her Majesty's subjects, and *consequently* they were doing their duty, &c."

If I understand the effect intended by this, it is to put the transaction on the ground that the prisoner was not guilty of any criminal act, but was performing an act of duty. And if it were his duty to kill Durfee, it was consequently not murder; and the jury will so find it. This alleged question of duty clearly involves a matter which must go before a jury, to try whether he was right or wrong, but cannot be a proper question for the decision of this court. And the question of law as to whether he was legally arrested and detained, has nothing whatever to do with the question of duty.

It seems to me that there are insuperable difficulties in the way of the Court taking a different view of the matter. The Court must say was this invasion right or wrong, which fact could not be presented now. There is also another question, which perhaps as a question of law, this Court could decide, which is, supposing that the party acted under illegal orders, whether those orders would be a protection for them.

Another question would be, was the party guilty of any *excess* in executing his orders? If he went beyond the order or aside the order, that would be a question for a jury, and I think that question alone would be fatal to this motion; for that is a question of which this Court cannot judge. Whether there was excess in this case, is a question which should go before the jury under the restrictions of the Court, to find a verdict in it when all the evidence was brought out.

Another suggestion arises, which is, that in considering the question in that way, the Court can give the same effect to the order which would be given to it by a court in England. They have made the case their own, and ought to be satisfied if the same laws which they boast of are here administered and in the same manner. If the Court ought to consider this order as a justification, it is of course a question for the jury, as that would be giving to the order of the

British Government, the same effect which would be given to it in a court of England.

In the case of Gardner, Kelyrig's Rep. p. 46, he and nineteen others were indicted for breaking open the house of Hutchinson in Cheapside, and the evidence was, that Darlington, the Secretary of State, by order of the King, made out an order to arrest certain men, and he heard they were then holding a meeting at Hutchinson's house. Some of the soldiers broke open the house and some of them took away articles from it.

Here was a case where soldiers acting under the order of their own government were indicted.

There was no objection interposed that they had acted under the orders of the Secretary of State. The Court did not in this case obey the mandate of the Executive, but opened the laws and laid down and carried out the laws. Here was a case in England, somewhat similar to the one that occurred here. There the party arrested men illegally, broke open doors, and stole away articles. This was not in pursuance of their orders, neither was the killing of Durfee in pursuance of the order to destroy the Caroline.

If then the motion now before the Court prevails, you will then be administering the law to the prisoner, not as it would be administered to him in England, or as you would administer it to our own citizens acting under the order of an executive officer in our own country. And I will ask the counsel when summing up, to show that the order of an executive should have more efficiency when executed by foreigners on our own territories, than it would have when executed by our own citizens on our own soil, or by the same foreigners on their own soil.

I will now ask this Court to consider this order in the only other point of view it can be considered, as a ground on which the Court can discharge the prisoner

Let us suppose him to be guilty, and that this order is to have the effect of protecting the party from the authority of the laws of this State. In that view it would be a pertinent question for discussion, on this motion, and in no other view of it.

Considering it in this way, there are three propositions which are to be considered before the prisoner can be discharged. The first is, was the order of the British Government sufficiently authenticated by the avowal of the British minister? It would be more satisfactory to have the order itself, but the authenticity of it is not contested. The second proposition is that the order is not set forth with sufficient particularity in the letter from Mr. Fox to Mr. Webster, to show that it covers the act for which the prisoner is indicted. The third is that the order from a foreign government can protect a murderer from trial in this State.

As to the second proposition, the order in the letter from Mr. Fox to Mr. Webster is not sufficiently definite for the Court to act upon it. That letter says that the transaction for which the prisoner has been arrested, was "planned by persons empowered by her Majesty's Government." Was the transaction which these persons planned, the murder of Durfee? Such a supposition is absurd. What it was

we are left to guess, and without looking to public rumors for information, this Court cannot know what that public transaction was. We know from public rumor that it was to destroy the Caroline, but we have not the authority of this letter for it. The Court must therefore see from this document it is not sufficiently definite to show that the transaction it speaks of is the occurrence for which the Grand Jury have found their indictment.

It also says that they were authorized to take any steps necessary for the defence of her Majesty's subjects. Can this Court decide that the murder of Durfee was necessary for the defence of her Majesty's subjects. Thus far the Court must go. The Court must say that the murder was necessary under the order for the protection of her Majesty's subjects.

The third proposition, which is the main point of the whole discussion, is that the order of a foreign government will protect its agents from trial, though guilty of murder. We assume that the charge is true. No matter what his guilt. We shall not inquire into it, and must assume that he is guilty. And we must then assume that the order of a foreign government can protect them from a trial in this State, although guilty of murder. The proposition relies on the order, not as a justification, but as a protection.

In connection with this proposition I will answer some of the other propositions of the gentleman who addressed the Court on the opening of this case.

Some of those propositions are false, and some of them are true, but have no application to this case. He laid down that whatever a man does by order of his sovereign, he cannot be held personally responsible for it. That, generally speaking, is a true proposition, but it is only true as regards his own sovereign, as concerned, and to far as the order is duly carried out and not deviated from. But it cannot be inquired into between him and his own sovereign if he went beyond the order. But between him and any other sovereign it has no application. The gentleman said that the person would be subject to punishment if he did not obey his sovereign, but that has no application here, as the prisoner was a volunteer and a citizen, and not acting under involuntary or compulsory orders of his sovereign.

Vattel says that those not belonging to the army are not recognized by the usages of war, and if the peasantry mix in war they are not entitled to the privileges of men, but are cut down wherever they are met.

The prisoner was a civilian and not an officer of the army or navy, but volunteered to follow Capt. Drew "to hell." If then he was a volunteer to do things in violation of the laws of God and man, I do not know any principle of national or municipal law which can cover his conduct.

In the times of the Roman republic, soldiers were sworn, and none others were entitled to the laws of war who were not so. And Vattel says that none but soldiers and sailors are entitled to the usages of war. And if civilians, (like the prisoner,) go and place their consciences in other men's hands, to do he knows not what, or

go he knows not where, he cannot be protected by such an order, for he makes the act his own.

The gentleman has stated other propositions, in which there is some truth: that the law of nations is part of the common law, and that every nation and every citizen of every nation is bound by the law of nations. And it is an essential principle that every one subject to the law must know that law, and cannot plead ignorance of it. Therefore, if the law of nations is the common law, and the prisoner is guilty of murder under that law, he cannot plead ignorance in his defence.

It is not true that a subject is bound to obey the orders of his sovereign, no matter how much his conduct will injure other nations or individuals. He is bound to act in conformity with the law of nature and of nations, and he is legally and morally responsible to do so.

It is said that the destruction of the Caroline was an occurrence of war, and that therefore the civil courts are ousted from taking cognizance of it.

In the case of Arbuthnot, those who opposed what was done by General Jackson, said that Arbuthnot should have been turned over to the civil courts, and it was not replied that such would not have been the right course, but that there were no civil courts there to try him. But it was conceded on all hands that he, General Jackson, might have given up those men to the civil courts had there been courts in Florida to take charge of them.

I will now proceed with the discussion of the great and main proposition: Is there any power in this Court to discharge the prisoner, without reference to his guilt or innocence, but merely that there is an order of the British Government to protect him from our laws?

This order must have a binding effect on this Court in one of two ways. It is either an act directory to the court emanating from a superior jurisdiction having power to issue it, or derives its efficacy from some general law, binding on this Court.

As to the first there is no pretence that an order from the English Government has power to bind this Court.

Secondly, I deny that there is any law, municipal or national, which gives efficacy to this order, so as to make it binding on this Court.

It is conceded that the law of nations is part of the common law, of which this Court has jurisdiction. Blackstone says that "in arbitrary States the law of nations, wherever it contradicts, or is not provided for by the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations, whenever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and is held to be a part of the law of the land." 4 Bl. 67. So that in England no royal power can ever alter or suspend the law; and no royal order can suspend it here. It is therefore a part of the common law over which that Court has jurisdiction.

I say that the whole expedition from beginning to end could be

brought here and passed on as part of the common law, the administration of which is committed to the charge of this Court.

I do not propose to go into the question of the jurisdiction of the United States courts and State courts. No doubt this would be a proper matter for United States legislation, or it would be a proper matter for the United States Court. Perhaps the Constitution is sufficiently broad to cover a case of this kind, and therefore any act might be passed to declare which Court, Circuit or District, should take jurisdiction of it. But no such act has been passed, and therefore no court of the United States has jurisdiction of the case. And if so, where is the murderer to be tried? Not in the State Court, because it is a question of international law. Not in the Court of the United States, because they have no jurisdiction of the offence. Not in Canada, because it is not within their jurisdiction, and the counsel would thus send him again abroad with his brother's blood upon his forehead, if the case is, as we assume it to be, one of rancorous malice.

I, however, do not mean to be understood as expressing an opinion of his guilt, except for the purpose of this argument.

The law of nations is made up of the national law, the customary law and treaties.—1st. Kent's Commentaries, p. 3.

In which branch of this law of nations can be found the principle contended for by the gentlemen of the other side?

There is nothing in the treaties between the United States and Great Britain that an order of the English Government should protect her subjects if they murder our citizens.

There is no such principle in the national or moral law. That law condemns the murderer in as strong terms as our municipal law, and even forbids the unnecessary shedding of blood in open war.

"It is an untrue position, when taken generally, that, by the law of nature or nations, a man may kill his enemy; he has only a right to kill him in particular cases—in cases of absolute necessity for self-defence."—1. Bl. Com. 411.

The principle is therefore to be found neither in treaty stipulations nor in the national or moral law.

Is it to be found in customary law? Has it ever been the practice, as collected from the history of nations, for one nation to send such orders to be executed on the territory of another? Has such an order ever been considered valid? If such a military order is valid why not a civil one, emanating from the same sovereign? And whether it is of a military or a civil character, what difference does it make in the offence? If the sovereign of England can make an order to send soldiers and burn Buffalo in time of peace, why can he not make an order for a sheriff of Canada to go to Rochester and arrest McKenzie? And if he kill him when making the arrest, why should not the order protect him from trial? Can the gentlemen point out to me any difference, or why a civil order should not be as efficacious as a military one?

I will now call the attention of the court to some authorities to show that invasions of this sort, by orders of a foreign government,

whether civil or military, are always held a violation of national law, and are left to be dealt with by the jurisdiction within which the crime is committed.

I refer you to Vattel, b. 11, chap. 7, sec. 93; who says that foreign nations "cannot, without an injury to a State, enter sword in hand into his territories, in pursuit of a criminal, and take him from thence."

Thus trampling on the rights of the State or territory which they invade. It is called a violation of the territory, and that nothing should be repulsed with more vigor.

The instructions given by President Monroe to the commissioners at Ghent, contain this declaration:

"Offenders, even conspirators, cannot be pursued by one power into the territory of another, nor are they delivered up by the latter, except in compliance with treaties, or by favor." See Monroe's Instructions to the Commissioners of Ghent.

Vattel, b. 3, ch. 2, sec. 15, p. 764, shows that the order from a foreign government will not protect a subject from execution. He speaks of foreign enlistment of soldiers within other territories, and says that foreign recruiters are hanged, and justly, as it is not presumed that their sovereign orders them to commit the crime; and if they did receive such an order, they ought not to obey it, the sovereign having no right to command what is contrary to the law of nations. Here is authority that a subject is not bound to obey the order of his sovereign involving the commission of crime.

I refer again to Vattel.

B. 3, chap. 6, sec. 68: "Nothing of all this takes place in a war void of form and unlawful, more properly called robbery, being undertaken without right, without so much as an apparent cause. It can be productive of no lawful effect, nor give any right to the author of it. A nation attacked by such sort of enemies is not under any obligation to observe towards them the rule of war in form. It may treat them as robbers. The city of Geneva, after defeating the attempt of the famous Escalade, hung up the Savoyards, whom they had made prisoners, as robbers who had attacked them without any cause or declaration of war. Nobody offered to censure this proceeding, which would have been detested in a formal war."

This would be the case in the present transaction, if, instead of McLeod coming here three years after the invasion, he was taken at the moment and hung up. Then it would have been exactly the same case as I have cited.

In the case of John Baker, a report of whose trial is to be found in the House documents, No. 90, 20th Congress, p. 308. In this case Baker was a citizen of the State of Maine; and on the 4th of July, 1829, he invited some neighbors to dine with him, and put up the flag of the United States and a liberty-pole. For so doing he was arrested by the authorities of New Brunswick, and was tried and sent to prison, and remained there some time, when he was enlarged. And all this time our government solicited his discharge. There was a question as to the jurisdiction of the place where Baker lived

when he put up the American flag. Both nations claimed it, and the question was pending as to whom the territory belonged. The British authorities, however, did not let the individual question be merged in the national question. They held him personally responsible, and tried and convicted him, although negotiations were then going on at Washington and London. In May, 1828, there was a letter from Mr. Lawrence to Lord Aberdeen; he holds the following language: "How far the United States may regard it as an aggravation of their original complaint, that the prosecution of New Brunswick was proceeded with during the pendency of a diplomatic discussion on the right to arrest Mr. Baker, and that he was brought to trial more than two months after a formal demand for his release had been made by an American government to the British minister residing at Washington, must rest with the President to decide."

This demand was made on the ground that the jurisdiction of the place belonged to us. But though it was a public affair, and then the subject of negotiation, the British government refused to release him.

Another case, that of Ebenezer Greely, which took place a year since.—See House doc. 1st, 1st Sen., 25th Congress.

See his letter to Governor Dunlap, 12th June, 1837. Also Stevenson to Palmerston, Sen. doc. 197, p. 7, 1841. Palmerston to Stevenson, H. doc. p. 9 and 10.

In this case Greely, an American citizen, was sent to Madawasca to take the census, and for so doing was sent to jail by the authorities of New Brunswick. A demand was made for his release; but it seems that the British authorities were not then so expeditious as they seem disposed that we should be now. For, after much discussion, the British government declined surrendering Greely, as they had formerly declined surrendering Baker. It is true, that in this case there was a question of jurisdiction, as to who were entitled to the soil, but that did not prevent them detaining the man. Apply this case to the question before us, and, according to the argument which has been used in this case, it was a national affair, and the private injury was swallowed up by the national one. And it should only have been necessary to show an English court that Mr. Webster and Mr. Fox had it under discussion, and the court would of course immediately take his chains off and set him free.

Was it so when the rights of our citizens were at issue? We asked for his release, because we owned the soil, or at least it was a disputed question, and neither party by mutual understanding was to exercise exclusive jurisdiction over it. But they said that this man, who raised the liberty pole, had committed a treasonable offence, which could not be passed over with safety. They did not make it a question between the two nations, but seized the man, and said that their laws required that he should be punished.

Does not this reasoning apply here? And shall we let our Canada neighbors come here and commit murder? And shall we tell these bandits, if you come on our shores and murder our citizens by order of your government, you only do your duty? And shall we thus let men escape punishment both here and in Canada on the equally

novel and absurd doctrine, that there is no jurisdiction to try them? A doctrine so monstrous that it could never be received by any Court, or can it be supposed that it was ever seriously urged before any Court?

I will take you a step further, and show, that by the law of nations these illegal orders are discredited even by the usages of war.

Vattel, book 3, chap. 8, sec. 154, speaking of whether an enemy may be assassinated, condemns it, and says that the assassins should be considered as murderers. He speaks of soldiers getting into the camp of an enemy and killing the general; and he said that even though lawful, the persons doing it, when afterwards taken, were always executed.

I will now refer to what is a matter of history. In our revolutionary war, when an attempt was made by Sir Henry Clinton to send men to corrupt the soldiers of the Pennsylvania lines, these men were taken, and General Washington ordered them to be immediately hung.—4. Marshall's Washington, 368.

Where then is it to be found in the practice of nations, that an individual is never held responsible for executing the orders of his sovereign? There is no such principle in war or peace. When the order was unlawful, it was never held as a protection for the men that execute it.

I was surprised to hear the gentleman say that it was dangerous to establish such a principle. And I said, that I thought it was more dangerous to establish the doctrine, that a sovereign can protect his own acts in a foreign territory. Once establish such a doctrine, and every petty expedition of marauders becomes a war, as the men who commit it cannot be held responsible, and there is no resource left but the sword. Such must be the consequence of establishing the doctrine that the individual is never to be held responsible, but in every case the nation.

There is another ground assumed here, that the offence of the individual is merged in the national offence. I cannot solve what is meant by such a proposition. Is murder an offence which can be transferred from one person to another? Can the malice of the murderer's heart be transferred or wiped out by imputing it as an offence to his nation? If he acts with the malice of a murderer, the crime is his own, fixed upon him for ever, and no subsequent order, except of you, can ever wash the stain of murder from his hands, or transfer the guilt from his heart. Such a doctrine is at once so absurd and abominable, that carelessness or ignorance can alone account for its ever having been asserted.

It may be said that a civil offence is sometimes merged in a criminal one. But not so with crimes. The guilt of theft is not merged in that of murder, though the punishment of it may be.

We can have no stronger illustration of it than what takes place between the master and his slave. Supposing that the latter commits an offence by the mandate of the master, who holds all but the life of the slave at his disposal. Was there ever such a doctrine held, as that the crime of the slave is merged by that of the master? Both are alike punished, and there would be no safety for society

were it otherwise, particularly if you could merge the crime of murder by one man in the criminality of another.

According to Vattel—B. 1, chap. 6, sec. 75—As to emissaries coming into a country to entice away the useful subjects of a sovereign, he has in such case a right to punish them severely. Here, according to Vattel, the punishment is cumulative, and the sovereign has a right to claim redress from the persons who employed them.

Vattel does not use the sentence in the disjunctive. He says that he may punish the subjects severely, and then call on the nation which sent them for redress.

Another passage in Vattel, book 2d, chap. 6, sec. 75, says:

"If the offended State (in case an individual of a foreign nation commits a crime against it) keeps the guilty in his power, he may without difficulty punish him, and oblige him to make satisfaction. If the guilty escape, and return to his own country, justice may be demanded from his sovereign."

There is one more view to be taken, before I leave this part of the subject. It has been attempted to place the case of the prisoner on the footing of an ambassador. There is, however, little or no analogy between this man, acting under the order of the English government and an ambassador from that nation. They stand on distinct grounds. At all times and amongst all nations, the character of an ambassador has been held inviolable, which arises from necessity and stipulation. As, but for the perfect protection thrown around ambassadors, there would be no end to national wars. Necessity requires that we receive an ambassador and consent to the condition that he shall personify the sovereignty of the nation he comes from, and that throws round him an inviolability which no other subject or citizen receives.

He therefore stands on different ground from an agent who comes to effect an order. The ambassador's privileges arise from the necessity of nations, and to avoid interminable war. But these reasons do not apply to the prisoner at all. They apply to none but an ambassador, and much less to one who is *hostis humani generis*, or in other words a murderer. I speak not of the prisoner but from the record, and on the supposition that it is true. But I do not mean to speak positively, or give an opinion of the fact that he is guilty of murder; that is a question for the jury, and I wish to leave it exclusively to its decision.

But even ambassadors, great as are their immunities, are by the common law of England held subject to be indicted for the crime of murder. How little ground is there then to claim an exemption for so subordinate an agent as the prisoner?

I will refer to authorities on the subject, which are adopted here as well as at Westminster. Coke's institute 163, speaking of Ambassadors, says, "but if a foreign ambassador commits a crime *contra jus gentium*, or a crime against the laws of nations, he loses the privileges of an ambassador, and may be punished here as any other alien, and not sent back to his sovereign, except through courtesy."

Next, 1st Hale's pleas of the Crown, page 99.

Foster's Crown law, page 188.

1st Blackstone's Commentaries, 245–6.

Vattel, B. 4, chap. 7, sec. 100.

Vattel says. Book 4. C. 6. Sec. 100.

"If an ambassador commits such atrocious crimes as affect the safety of mankind, if he undertakes to assassinate or poison the Prince who has received him at his Court, he doubtless deserves to be punished as a treacherous enemy, as a prisoner and as an assassin.

"His character, which he has so basely stained, cannot shelter him from punishment.

"Is the law of nations to protect a criminal when the safety of all Princes, and the welfare of mankind, call for his punishment?"

Not only an ambassador, but a Sovereign himself, by the laws of England, if he comes into that country and is guilty of murder, may be tried and executed. It was so held in the celebrated trial of Mary Queen of Scots, on a consultation of the most distinguished professors of the common and the civil law, that although a sovereign Queen, while in England, she was amenable to the laws of England; and she was tried and executed for an offence alleged to have been committed against those laws. 2 Ward's Law of Nations, p. 578.

These authorities and these precedents seem to me conclusive that by the common law of England and of this country, no immunity, however great, no station, however high, surrounds the party with an exemption from the liability to punishment for the crime of murder.

Before concluding this argument I would make some ggestions, on the propriety of discharging this prisoner by the law officers of the State or by the interposition of the Executive power.

The Executive can interfere in no way but through the pardoning power, and that is expressly restricted by our constitution to be exercised only after conviction. Article 2, sec. 5.

Nor is this restriction without reason. It has arisen from the experience of England and from the maxims of her statesmen. It was introduced effectually to cut off the executive from the power of stifling investigations and dispensing with laws. It was to remedy the mischief disclosed in the decision of the case of Sir Edward Hall, 11 Howard's State Trials, page 1165. And although in theory the power may exist in the prerogative of the crown of England to pardon a murderer before trial, it is a power which it is believed has never yet been exercised. 3 Institute 235, 236.

It has also been suggested that a *nolle prosequi* should in this case be entered by the prosecuting officer.

Many reasons dissuade him from such a course. The main transaction out of which this indictment grew was a gross violation of the laws of nations. It was an invasion and a violation of our territory. An offence which according, to Vattel, should be repelled with the utmost rigor, by a state which means to maintain its independent position amongst the families of nations:—Chancellor Kent declares that there is no exception to the rule, that a neutral territory cannot be lawfully invaded. Kent, p. 121.

If the Caroline had given just provocation, no time had been af-

forded or notice given to the authorities of New York to remove the offence.

Again: Supposing the order for the destruction of the Caroline to be a legal and valid order, there is evidence which goes to show that the act for which the prisoner was indicted was not required or even contemplated by the order, and consequently cannot be justified or protected by it.

After the assailants had got peaceable possession of the boat, they unnecessarily went on our shore and searched the adjacent warehouses to find more victims to satisfy their insatiable thirsting for blood.

There is also evidence which goes to show that the prisoner was the very man who pursued, and wantonly and inhumanly shot Durfee upon our territory, as he was flying unarmed from the boat. If these facts should be established on investigation, the British nation would be the first to repudiate the act, and to declare that it was not done by their authority.

Great Britain has taken the lead amongst modern nations, in establishing the doctrine, that she will not listen to a demand for redress for a subsequent injury while a previous one against herself remains unatoned for. Witness her transactions with Spain, in 1770, with reference to the dispossession of her subjects at Nootka Sound, by the Spaniards, and subsequently, in 1778, relative to a similar dispossession of her subjects at the Falkland Islands.

These are not referred to in the spirit of reproach, but in a spirit of respect and admiration. This principle is one of high-toned national self-respect, and has acquired for her a lofty and enviable position amongst the nations.

In my early days, in reading the records of Roman greatness, it was not her palaces, nor her temples, nor the extent of her dominions, nor the power of her armies, that thrilled me, but it was the magic power of the exclamation, even amongst the remote and barbarous nations, "I am a Roman citizen." And in modern times, the exclamation, I am an Englishman, has become almost an equal passport and protection throughout the world.

When will the time arrive when the exclamation, I am an American citizen, shall claim an equal respect? Never, until we learn with equal scrupulousness to protect the lives, liberties and property of the humblest citizen of our republic. Never, while we disarrange the decent folds of the drapery of our judiciary, with undignified haste, to obey the irregular and illegal demands of a foreign nation.

No. 5.

ARGUMENT OF MR. SPENCER.

Mr. Joshua Austin Spencer commenced his argument in reply, on behalf of the prisoner, by observing, that he deemed it not improper, in view of what had been said out of doors, with regard to this case,

and his appearance as counsel for the accused, to state the relation he bore to it, and the motion which had been brought before the Court.

It had been said that his appointment under the Federal Government should induce him to relinquish the defence of McLeod; but he would say to all such, that they little understood, either the duties of his office, the merits of the question involved in this defence, or his own views of responsibility, if they thought him capable of such conduct: for he had yet to learn that a counsellor of the State of New York was called upon to give up duties he owed to his client, because other duties, entirely compatible with the faithful discharge of his former ones, had devolved upon him. He should endeavor to discharge both duties according to the best of his ability. At an early stage of the proceeding, and before his appointment to office, he had been retained as counsel for McLeod; as such, and not as attorney for the United States, he now appeared before this Court, and he did not believe that the duties he owed to his client in the one case, would run counter to those he owed to his country in the other. All that had been done in this case by his eloquent young friend who opened this argument, and by his partner, moreover, had been done in conformity with his views, or under his advice; and if there was any odium or crime in what had been done, he was willing to bear his full share, and answer therefor before the tribunals of his country and in the face of the world.

The attempt to make political capital out of this question, which he said had been made by some of the partizan prints of both political parties, deserves the reprobation of every fair mind. Its tendency is to prevent an impartial trial, if a trial is to be had; to strengthen and deepen the prejudices which already unhappily exist on both sides of our borders; to embarrass the negotiations pending between our own and the British Governments, and to expose them to open rupture.

Without doubt, he said, this is a question as novel as it is important. The opposing counsel have argued, with much zeal, that this motion to discharge has no precedent; and he had been charged with temerity for presuming to come into Court, to perform what his duty in this motion required of him. Grant that the motion is without precedent, and the argument is briefly answered. No precedent can be found within the bounds of Christendom for the prosecution itself. No case can be found on the records of the courts of any civilized nation, in which an individual has been indicted, and sought to be capitally punished, for obeying his rightful sovereign. It is indeed a hard dilemma, to be subject to be executed as a traitor for disobedience, on the one side, and as a murderer for obedience on the other.

The whole argument on the other side was founded on a fundamental error, namely: they assumed as true, what we utterly deny, that McLeod is guilty of murder; and starting upon this assumption, they have made, it must be confessed, some little headway in proving that the Court cannot properly discharge him. But his guilt we deny; and we have come hither to ascertain the facts, and bring together all the attendant circumstances of the case; on which, as

now established, without dispute, the questions of law arise; first, what has the Court power to do? and secondly, how ought the Court to exercise that power?

Let it not be supposed that we have come here to concede the prisoner's guilt and yet to solicit his discharge. The motion is founded on the assumption that he is guiltless of crime, even if he were one of the expedition which violated our territory and destroyed the property of one, and the life of another of our citizens..

Nor is the objection to trial in a state court. He conceded that the Supreme Court of New York has as much authority to try offenders as any other Court, when the offence has been committed within its jurisdiction. It is not a question of conflict between the Courts of the state, and those of the United States; for he denied that any Court, under either Government, had a right to put McLeod on his trial; and he insisted that Congress had no power to confer the authority to try him on the Courts of the Union. And why? Simply because the constitution of the United States clothes the Executive and Legislative departments of the Government, with the exclusive jurisdiction and cognizance of the entire offence. The prosecution is without precedent, as it is without jurisdiction; and he trusted the Court would so regard it.

Our motion is that McLeod be discharged without a trial; in what way is indifferent to us. We care not whether by the entry of a *nolle prosequi*, or an order for his discharge absolutely; or that he be let to bail on his own recognizance, so that he be set free, and it be understood that no trial is ever to be had; and thus the country saved from the disgrace which must attach to it if the prosecution is pursued; for we feel quite as much interested in the honor of our country as in the safety of McLeod.

Before proceeding to speak farther on the main question presented by the case, the counsel said it would be proper to see what power the Court had over the subject. He insisted that the Supreme Court had jurisdiction to try the crime of murder at bar, when the record and the body of the prisoner, as in this case, are both brought into court. He cited 2 Rev. Stat. 2nd Ed. 330 §1, as follows: "All issues of fact which shall be joined in the Court of Chancery, or in any surrogate's court, and which shall be sent to the Supreme Court for trial; and all issues of fact joined in the Supreme Court, shall be tried at a circuit court or sittings of the Supreme Court, in the proper county, *unless the* SUPREME COURT shall, on the motion of either party, in cases of great difficulty, or which require great examination, order such trial to be had at the bar of said Court."

No one will deny that this is a case of such description. The Court may therefore grant the leave mentioned in § 54 of R. S. 609. "It shall not hereafter be lawful for any district attorney to enter a *nolle prosequi*, upon any indictment, or in any other way to discontinue or abandon the same, *without the leave of the Court* HAVING JURISDICTION TO TRY THE OFFENCE CHARGED, entered on its minutes." The right to enter such *nolle prosequi*, previous to the enactment of the R. Statutes, was vested in the District Attorney or Attorney General, as it is now in England, and in most of the States of the Union, and in the U. States.

It was then and is *now* the exercise of the Executive power of the Government, influenced by considerations of sound policy and wise expediency. The same reasons which would induce the law officers of the Government to interpose to prevent a trial, ought to, and will, induce this Court to advise, allow and order, the same thing to be done. This is emphatically a question of political expediency, in the highest and best sense of that much abused term. It is one involving the dearest and most cherished rights of the nation; and all the consequences which would naturally flow from its decision, may very properly be taken into the account.

The note of the revisers to this 54th section shows where the power was before its enactment, and that it might now be legally exercised. It is as follows, 3 Rev. Stat. 845—"It is conceived that after grand juries have found bills on their oaths, such a presumption of guilt arises, that the prosecution of the offence should not rest in the discretion of any officer without the sanction of the Court. It may be abused; and there can be no difficulty in obtaining the leave of the Court in cases where it should be granted.'

Under this branch of the law, then, this Court has the power and the right to do what in its discretion shall seem to be proper.

The counsel then proceeded to examine the power of the Court under the act in relation to writs of Habeas Corpus, when issued to inquire into the cause of detention, 2 R. S. 465. He insisted that the powers of the Court and the officers, charged with the duties of allowing this important writ, are by these enactments greatly extended beyond the former law of this state, or present law of England. They authorise the court to look beyond the indictment, into all the facts of the case, and to dispose of the party "as the justice of the case may require." Without examining minutely all the important provisions of this law, the 75th section of which abrogates all the provisions of the common law in regard to this writ, except so much and such parts thereof as may be necessary to carry into full effect the provisions therein contained, it will be sufficient for the present argument to quote the 40th, 41st, and 50th sections.

§ 40. "The Court or officer before whom the party shall be brought on such writ of Habeas Corpus, shall immediately after the return thereof proceed to examine into the facts contained in such return and into the cause of the confinement or restraint of such party, whether the same shall have been upon commitment for any criminal or supposed criminal matter, or not."

§ 41. "If no legal cause be shown for such imprisonment or restraint, or for the continuation thereof, such Court or officer shall discharge such party from custody or restraint under which he is held."

§ 50. "The party brought before any such court or officer on the return of any such writ of Habeas Corpus, may deny any of the material facts set forth in the return, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge; which allegation or denial shall be on oath, and thereupon such Court or officer shall proceed in a summary way, to hear such allegations and proofs as may be produced in support of

such imprisonment or detention, or against the same, and to dispose of such party as the justice of the case may require."

The counsel said that it seemed to him that language could not be employed to confer broader power, and more enlarged jurisdiction, than are here given to the Court. So solemn, and so much involving the whole merits of the cause, was this proceeding regarded by the Legislature, that by the 70th section of the same article, a writ of error is given to either party, to the Court for the Correction of Errors. And the Supreme Court of the United States, in the case of *Holmes v. Jennison*, 14 *Peters' Reports*, 540, decided that the proceeding on the writ of Habeas Corpus is a suit within the meaning of the 25th section of the judiciary act of Congress; so that in the specified cases, a writ of error will lie to that Court from the judgment of the highest Court of law of the state. The counsel appealed to the experience of their honors, to say whether it is true, as he asserted, that it was the constant practice of the Courts of General Sessions and Oyer and Terminer to exercise their discretion in proceeding to the trial of indictments. A party is indicted separately for several felonies, is tried and convicted on one, for which he may be sentenced to five years' imprisonment. He may be tried on each, and on conviction, sentenced to imprisonment for a term of years, to commence at the expiration of the former term. It is a well known fact, that it rarely happens that more than one trial is had.

One may be indicted and flee from justice, and after an absence for years return within the jurisdiction of the Court with a redeemed reputation, and with an innocent family. Is the law so inexorable, that our law officers or Courts cannot, without a violation of authority, omit to bring him to trial and punishment, and his family to wretchedness?

A prisoner in jail is sick and languishing, so that his longer confinement will endanger his life. Have our Courts so little discretion or humanity, that they cannot set him at liberty and not proceed to the trial?

A man is indicted and imprisoned for murder. Before the trial the person supposed to be murdered returns to his kindred or home. Will it be affirmed that in such case a Court or an officer cannot discharge the prisoner on Habeas Corpus? Must the law officer of the Government still go on with the solemn mockery of a trial by jury? Cannot the Court be informed and know; cannot the understanding and knowledge of the community pronounce the verdict without the form of a trial?

Suppose a person to be indicted for an offence made felony by statute, but before the trial the statute is repealed; and suppose farther that that repeal was done by a course of enactment which required careful legal examination and construction before the conclusion is arrived at. But the Court so determine; must it still put the accused on his trial? Who will say, in all these cases, that the Court has no discretion, but must try, for the sake of having an acquittal by a jury?

It seemed to the counsel, as he said, that the argument need not be farther pursued, to prove that this Court has power to dispose of

this indictment and of the prisoner as in its acknowledged wisdom and discretion shall seem proper.

Acting under this belief, and it is hoped with a proper appreciation of the duty which counsel always owe to their client, and often to their country, these writs of Certiorari and Habeas Corpus have been prayed for and issued, and the record and the prisoner brought into this Court, and its judgment upon the whole merits of the great and important questions involved, is now invoked; and when pronounced it is confidently believed it will not only open the prison doors and set the captive free, but will give an enlightened interpretation and application of the laws of nations, a comprehensive and statesman-like view of the jurisdiction of the national and state governments, and of their different departments, and will place our country high in the view of all nations.

The counsel said he had now arrived at altogether the most important and interesting question in the case—what under the exercise of its high powers this Court ought to do in this matter.

With a view to raise and present the most interesting question, the accused, the indicted Alexander McLeod, had on his oath set forth in order all the material facts in the case, and had fully fortified and confirmed them all, by authentic public documents, not one of which material facts had been disputed, much less disproved. They are all before the Court and the country, and need not here be repeated.

It is not contended that they show a state of war to exist between the United States and Great Britain, or the state of New York and the British colonial possessions on her borders. Happily for both nations and all parties, we have as yet escaped this fearful crisis; but who shall say how long we may, if the tribunals of justice in this state shall fail to respect the laws of nations, or to have a wise regard to the harmonious movements of our complex system of government?

But the prisoner's counsel do contend, that a state of open war did exist and was waged on the Niagara frontier in the midst of the peace of nations. A war too by American citizens, commanded by an American citizen, whose name and title were well calculated to inspire confidence in the American soldier, and to excite apprehension in every Canadian mind. True, in their combination and armament they had violated the laws of their own country, and acted in defiance of the known will of the authorities of the state of New York, and the United States Government. But these circumstances did not make them less the enemies of the Canadian Government, nor deprive those public functionaries, charged with the defence of the colonial possessions of Great Britain, of the right to plan and execute every expedition necessary for public security. Whether necessary or not they are the judges for the time being, subject only to the appeal of nations. It belongs not to an humble individual to question, defy, or disobey their mandate.

Nor is the question, whether the expedition against the steamboat Caroline, which resulted in the violation of our territory in time of peace with the Government, in the destruction of the boat, and in

the death of Amos Durfee, was or was not justifiable or excusable, involved in this motion.

As counsel for McLeod, we are not before the court to justify, extenuate, or even apologize, for this most extraordinary and rash proceeding of the provincial authorities; nor, on the other hand, do we feel called upon to approve of the conduct of our citizens in their lawless and hostile invasion of a British island, and opening a cannonade upon British subjects in time of peace.

These are questions to be agitated and settled before other tribunals, and in a far different way. Already has that tribunal taken cognizance, and now has constitutional jurisdiction of the whole entire matter, and to the determination of that high tribunal it is both discreet and lawful to leave the issue.

All we contend is, that such a state of things existed on the Canadian frontier, as made it lawful for the provincial authorities to defend themselves against their assailants and invaders; and for that purpose to command the obedience of every British subject in the province, or to accept the voluntary service of loyalty; the Government being alone responsible for whatever was done; and that every subject who entered the service, and acted under such authority, whether for a month or an hour, incurred no personal individual responsibility to any American government or laws whatever.

So beautifully and eloquently, and it may be said too, so satisfactorily, have the facts been presented to the court, and the relative duties and obligations of governors and governed been illustrated by the opening counsel, that there is but little left on this part of the case to be said or done, save to cite authorities to sustain the principles for which he so manfully contended.

First, then, as to the duty of *obedience*. Vattel, book 1. ch. 1, sec. 12, says, "From the very design that induces a number of men to form a society, which has its common interests and which is to act in concert, it is necessary that there should be established a public authority to order and direct what is to be done by each, in relation to the end of the association. This political authority is the sovereignty, and he or they who are invested with it, are the sovereign."

"It is evident that by the very act of the civil or political association each citizen subjects himself to the authority of the entire body, in every thing that relates to the common welfare. The authority of all over each member, therefore, essentially belongs to the body politic or state; but the exercise of that authority may be placed in different hands, according as the society may have ordained."

Again, the same writer says, book 1, ch. 4, section 26, "We have seen already that every political society must necessarily establish a public authority to regulate their common affairs, to prescribe to each individual the conduct he ought to observe, with a view to the public welfare, and to possess the means of procuring obedience. This authority essentially belongs to the body of the society, but it may be exercised in a variety of ways, and every society has a right to choose that mode which suits it best.

At book 1, ch. 4, sec. 38, this writer, speaking of the obligation and rights of a sovereign, lays down the same great principles.

The same writer at book 1, ch. 4, sec. 40, and 42, says, "When therefore the people confer the sovereignty on any one person, they invest him with their understanding and will, and make over to him their obligation and rights, so far as relates to the administration of the state, and to the exercise of public authority."

"All that has been said in chap. 2d, of the general duties of a nation toward itself, particularly regards the sovereign. He is the depository of the empire and of the power of commanding whatever conduces to the public welfare. He ought, therefore, as a tender and wise father and faithful administrator, to watch for the nation, and take care to preserve it and render it more perfect, to better its state, and secure it as far as possible against every thing that threatens its safety or its happiness."

One more citation from this author on the subject of obedience will suffice. In book 1, ch. 4, sec. 53, he says, "As soon as a nation has acknowledged a prince for its lawful sovereign, all the citizens owe him a full obedience. He can neither govern the state, nor perform what the nation expects of him, if he be not punctually obeyed. Subjects, then, have no right in doubtful cases, to examine the wisdom or justice of their sovereign's command. This examination belongs to the prince. His subjects ought to suppose that all his orders are just and salutary. He alone is accountable for the evil that results from them.

Second, as to the effect of a ratification by the sovereign powers the Attorney General inquires, Can it protect the prisoner? Does it show him innocent? We answer, the facts in the case show McLeod innocent not only of murder, but of any other crime or injury whatever. As to the question of protection, let the writers on the law of nations answer.

Vattel, book 2d, ch. 6, sec. 73 and 74, says, "As it is impossible for the best regulated state, or for the most absolute sovereign, to model at his pleasure all the actions of his subjects, and confine them on all occasions to the most exact obedience, it would be unjust to impute to the nation or sovereign, every fault committed by the citizens. We ought not then to say in general, that we have received an injury from a nation, because we have received it from one of its members. But if a nation, or its chief, approves or ratifies the act of the individual, it then becomes a public concern, and the injured party is to consider the nation as the real author of the injury, of which the citizen was only the instrument."

Burlamaqui, part 4, ch. 3, sec. 18 and 19, "A mere presumption of the will of the sovereign, would not be sufficient to excuse a governor, or any other officer, who should undertake a war, except in case of necessity, without either a general or particular order."

"Whatever part the sovereign would have thought proper to act if he had been consulted, and whatever success the war undertaken without his order may have had, it is left to the sovereign whether he will ratify or condemn the act of the minister. If he ratifies it, this approbation renders the war solemn, by reflecting back as it were an authority upon it, so that it obliges the whole commonwealth. But if the Sovereign condemn the act of the Governor, the

hostilities committed by him ought to pass for a sort of robbery, the fault of which by no means affects the state, provided the Governor" (not the private citizen who obeyed) "is delivered up or punished according to the laws of the country, and proper satisfaction be made for the damage sustained."

In this case not only is Governor Head's general conduct approved, but his original authority covers the whole transaction, and the mode of its execution is sanctioned by the British Government.

But the learned Attorney General says all these are questions of fact, to be passed upon by the jury. A new doctrine this, certainly, that we need a jury to ascertain whether the British Minister has spoken; and if so, whether he has told the truth; and whether the Court can properly take jurisdiction of the matter. The Attorney General farther insists that the Court cannot consider any facts *aliunde*, except what go to the illegality of the commitment, not to the guilt or innocence of the accused, and that an innocent man may be legally detained and kept for trial. We do not claim that the Court can inquire whether McLeod was one of the attacking party or not, or whether that party killed Durfee; but assuming these facts to be so, we say the Court can and ought to inquire whether any portion of the transaction is cognizable before the state tribunals. The Court will see that it has jurisdiction rightfully to try before it proceeds.

The case of the ambassador, put by the Attorney General, fully illustrates our position. He alleges that he is an ambassador, and therefore protected by the law of nations. We allege that McLeod was a soldier in the service of his country, and therefore protected by the same law. Each goes to the jurisdiction of the Court, and may therefore be inquired of here.

The supposed cases of killing in self-defence, in the execution of the law, in the service of process, in keeping the peace, or in carrying into execution the sentence of the law at a different time and place from that appointed, have no analogy. They are the ordinary cases arising under our laws in relation to our own citizens in time of peace, and have no relation to the rights of war, to the laws of nations, to the provisions of our constitution, or to the jurisdiction of our Courts rightfully to take cognizance of the questions thus arising. If possible, there is still less analogy between the evidence furnished by the certificate of a Governor, and by the diplomacy between two independent nations.

Again: it is said there was an excess of force used; that the order to take and destroy the steamboat did not warrant the killing of Durfee. Do the counsel mean to insist on applying the technical doctrine of the action of assault and battery to the movements of armies in time of war? That to a plea of *son assault demesne*, they may reply an excessive beating? The wonder is rather that but one life was lost in the midnight execution of a perilous expedition. It cannot be denied that the assailants had reason to expect resistance from a band of armed men on board the boat. It is reasonable to suppose that the discharge of fire-arms was expected and

intended both by those who ordered and those who obeyed, else why were they supplied?

The validity of an order given by a government cannot be questioned or subjected to a trial by jury. What the order was, is admitted; that it was obeyed is admitted; the cause of its issue, its nature and object, are admitted. That Durfee was killed in its execution is admitted; and that this is the only murder or killing set forth in the indictment is also admitted. There is not a single fact disputed, and not a material one that does not fully appear on this motion. Then why call for the intervention of a jury? It is the sole province of this Court to pronounce the law on facts admitted and known—and when this Court perceives that there was no felonious killing, but that the municipal authorities of the state cannot take lawful jurisdiction of any portion of the transaction, has it not power to stay proceedings and discharge the prisoner?

The Attorney General has reiterated the hateful word "murder" so often in his argument, that one is almost led to believe he expected by its utterance to stamp its nature upon this transaction. This Court will not be influenced by sounds, but by ideas and arguments alone.

It is insisted that, whether ordered or not, McLeod having been afterward found within our state jurisdiction, he is individually answerable. This, in the judgment of the prisoner's counsel, is a great and dangerous heresy.

But let us again recur to the authorities. Rutherford, book 2d, ch. 9, sec. 18, says, "In solemn war the individual members of a nation which has declared war, are not punishable by the adverse nation for what they do; because the guilt of their actions is chargeable to the nation which directs and authorizes the act. But even this effect may be produced without a declaration of war. For in the less solemn kinds of war, what the members do, who act under a particular direction and authority of the nation, is by the law of nations no personal crime. They cannot, therefore, be punished consistently with this law for any act in which it considered them only as the instruments, and the nation as the agent."

Vattel, book 3d, ch. 2d, sec. 6, says, "The sovereign is the real author of war, which is carried on in his name and by his order. The troops, officers and soldiers, and in general, all those by whose agency the sovereign makes war, are only instruments in his hands. They execute his will, and not their own."

Where then, is the *malice*, so essential to constitute murder? Where the wicked and felonious design, if he is not acting his own will, but that of another, which he has no right to question or resist?

Id.—§ 7. "As war cannot be carried on without soldiers, it is evident that whoever has the right of making war, must also naturally have that of raising troops."

It has been farther said, by the Attorney General, that McLeod is a civilian—a deputy sheriff—not a soldier, and is a volunteer, and therefore not exempt from personal liability.

Let us again have recourse to authority, whether there is any warrant for this doctrine.

Vattel, book 3d, chapter 2d, sections 8 and 9, says: "Every citizen is bound to serve and defend his state as far as he is capable. Society cannot otherwise be maintained, and this concurrence for the common defence is one of the principal objects of every political association. Every man capable of carrying arms should take them up at the first order of him who has the power of making war.

"Every citizen or subject is bound to serve the state. The sovereign has the right, in case of necessity, to enlist whom he pleases. And it is highly proper that he should, as far as possible, confine his choice to *volunteers*, who enlist without compulsion."

Who composed the army of the Revolution? Who the militia of that day? Who the minute-men? Were they not all volunteers, offering themselves a willing sacrifice on the altar of freedom? Our enemy indeed called them "rebels," but that did not make them so. The history of their "deeds of noble daring" is "written in letters of living light," and the judgment of Christendom upon their character has long since been recorded.

Far distant be the day when any other than "volunteers" shall serve in the armies and navies of this country, or when they shall be denied the rights and immunities of war—or when these shall by us be denied to others.

But again, it has been said by the Attorney General, that there was no war; that none was declared; that the party who came over and destroyed the Caroline were a pack of marauders and murderers. It is true that no war had been declared between the United States and Great Britain; but it is equally true that there had been a very significant declaration of war by those who took hostile possession of Navy Island, and cannonaded the Canadian main; and that the steamboat destroyed and the man killed, had been engaged in transporting "volunteers" and munitions of war to the island for the purpose of destroying the inhabitants of Canada, and subverting their government.

Vattel, book 3, chap. 4. sec. 67, says, "Legitimate and formal warfare must be carefully distinguished from those illegitimate and informal wars, or rather predatory expeditions, undertaken either without lawful authority, or without apparent cause, as likewise without the usual formalities, and solely with a view to plunder."

"Armies of banditti who range about for plunder, cruises of the buccaneer without commission in time of peace, and such in general are the depredations of pirates."

"These two species of war, I say, the lawful and illegitimate, are to be carefully distinguished, as the effects and the rights arising from each are very different."

It is not difficult to tell to which class of war the defence of Canada, against an open, hostile invasion, belonged. Nor can it be said with any show of truth, or candor, that there was no "apparent cause" for the destruction of the Caroline. That there was a sufficient one to justify the entry upon our territory, at the time and in the manner that it was done, will not be contended for or admitted.

It now seems to the counsel for the prisoner that it has been shown by acknowledged authority that the laws of war, and of na-

tions, must govern this case; and hence we say that no nation, or people, having a proper respect for its own honor and dignity, would ever put McLeod on his trial. Would the Courts on the frontier indict a whole army of invaders? Then let them find bills against Captain Drew and his entire party who made the attack. Nay, more, why not find bills against Col. McNab and Gov. Head? They must both be accessory before the fact; and then let the Governor make a requisition for their surrender, as well as for that of Mitchell. The attempt to bring these gentlemen to trial for this offence would savor more of justice and courage than does the prosecution of an obscure individual, who obeyed their order.

In truth, this whole proceeding is an absurdity; its equal cannot be found, and for the honor of our nation it is to be hoped it will remain for ever alone—a precedent without a follower.

It is the offspring of the excited state of feeling along the frontier, where are to be found refugees from Canada, and some of our own citizens of desperate fortunes, and not very sound principles, who are anxious that McLeod should be tried, convicted, and executed, that a war between the two governments may be hurried on in the expectation that they might share the plunder.

The Attorney General admits that there is excitement on the borders, and he informs us that there will be again, if this trial of McLeod is not allowed to proceed. Let it be so, if it must. But it will furnish no reason with this Court for turning aside the law, or disregarding the established usages of nations, whatever effect it has had in other places, or before other tribunals, or officers.

This Court does not know what appeared before the grand jury, nor whether they were 'patriots' or 'sympathisers' or 'calm, unprejudiced men;' nor is it necessary it should. It is enough to know what appears before the Court, and that it is now shown that there was no *individual* offence, no cause for the indictment, and none for its farther prosecution. This is not established alone by the late avowal of the British Government, but also by the indisputable allegations of the prisoner, and by all the public documents before the Court.

Allusion has been made to the conduct of General Jackson, in the trial and execution of Arbuthnot and Ambrister, taken in Florida. What has this to do with the case at bar? Where is the analogy? Moreover, that transaction has not yet become authoritative in the code of nations. The counsel for the people have said that the Canadian authorities tried and condemned our citizens who entered their territory, executing some and transporting many others; and that our Government had not complained. True; but are the cases parallel? These citizens acted by no lawful command, but in open violation of the laws of their own country and the country they invaded.

Allusion has been also made to the case of John Baker, who was tried in the courts of New Brunswick for raising the American standard in the Madawaska district on the 4th of July, and of Ebenezer S. Greeley, who was in like manner tried for taking a census of the inhabitants thereof, under the laws of the state of Maine, to show that the British Provincial Government try our citizens without scru-

ple, and punish without mercy; and that the Government at home gave these proceedings its sanction. No enlightened mind will say that these trials have done the provincial or British Government any honor. Before they will be acknowledged as authority, or as safe precedent, they must be shown to be right, and that the case at bar is like them. In truth there is no analogy. In these cases, Baker and Greeley, having American hearts and feelings, with a knowledge of the disputed territory and the conflict of the laws, voluntarily violated those of New Brunswick, passed to maintain her assumed jurisdiction, and intended to operate on just such cases.

It has been said also, that General Washington, in the time of the revolution, ordered the men, sent by Sir Henry Clinton to corrupt the soldiers of the Pennsylvania line, to be hung. So too, and for the same offence, was Major André ordered to be hung by the same illustrious general, in obedience to the same stern mandate of the same code, the law of war. No civil tribunal, however, ever attempted to take cognizance of these offences.

But we contend that those laws which relate to spies, to emissaries, to robbers, to bandits, to assassins, to murderers, have no application to this case of McLeod—who, when his country was invaded, stood forth in her defence, and obeyed her orders. He took the hazards of war and periled his life in the expedition, but for the rightfulness of the order his country alone is responsible.

The Attorney General, in his extensive research, cited the trial of the unfortunate Mary, Queen of Scots, the bloodiest act of treachery and tyranny and the foulest judicial murder ever recorded, to show that though a sovereign, she might be tried in England for an alleged offence against its laws. He too might have cited the trial of Charles I., as a precedent equally in point, for both objected to the right and jurisdiction of the respective high commissioners, to try them; and both received the same answer and the same predetermined destiny. The bloody records of the doings of the infamous Scroggs and Jeffreys would also furnish precedents to sanction any act of oppression, and would be entitled to as much respect as is the trial of the Scottish Queen. Why did he not cite another case, to be found in those bloody State Trials, where a nobleman was arrested in the morning on a charge of treason; was denied a postponement of the trial till the next day, to give him time to prepare for his defence; and when he asked indulgence till the afternoon, was told it could not be granted, "because in these cases a speedy trial is necessary to secure a conviction."

The Attorney General seems to suppose that we ask the exercise of the pardoning power. Not so, that pre-supposes guilt. We ask the prisoner's discharge because there is no guilt, no individual responsibility, and because the judicial tribunals have no jurisdiction of any part of the transaction. It is a national concern.

In 1 Knapp's Rep. 316, of cases on appeal to the King in council, of England, a case more in point will be found.

Elphinstone, one of the defendants, was a high commissioner, acting under the Gov. General of the East India possessions, and gave the order which Robertson, the other defendant, a British Colonel,

executed, to seize upon the treasures of Narroba Antia, a nobleman of high rank under the Mahratta Government. This was done on the 17th July, 1817. An action of trover was brought by the representatives of the nobleman in the Supreme Court of Bombay; and on the 6th of February, 1827, an award was recovered against these officers for 1,745,920 rupees damages, and 16,303 rupees costs.* From this award an appeal was brought to the King of England in council. The cause was argued at great length by Sugden, Solicitor General, and Wightman for the appellants, and Williams and Denman for the respondents. The whole cause turned on the question of fact, whether there was such a state of war or disturbance, as to make the seizure colorable for that reason.

Lord Tenterden delivered the opinion of the council as follows:

"We think the proper character of the transaction was that of hostile seizure, made if not *flagrante*, yet *nondum cessante bello:* regard being had both to the time, the place, and the person; and consequently that the municipal Court had no jurisdiction to adjudge upon the subject: but that if any thing was done amiss, recourse could only be had to the government for redress. We shall therefore recommend it to his Majesty to reverse the judgment."

Here, then, is a case where the officer who gave the command, and the soldier who obeyed, were prosecuted civilly, not criminally, for an act done in the nature of war, and the judgment of an enlightened tribunal of statesmen and jurists declares, "that the municipal courts had no jurisdiction to adjudge upon the matter," and that the Government alone was answerable for any thing that was done amiss. So we say in the case at the bar. Capt. Drew and his party who made the attack on the Caroline are not responsible; nor is Gov. Head, who gave orders to Col. McNab; nor is Col. McNab, who directed the expedition—but the British Government alone, from whom reparation has been demanded by the United States Government, the injured party. The case cited proves that the municipal courts of this state have no "jurisdiction to adjudge upon the matter"—that this whole proceeding is a usurpation of authority which belongs alone to the Federal Government, but not to its judicial tribunals. If the courts of this state have no authority or jurisdiction to indict and try McLeod, then clearly they have none to detain or imprison him. There is no fact to warrant the assertion of the Attorney General that McLeod pursued and wantonly and inhumanly shot Durfee, on our own territory, as he was flying from the boat. That he was some thirty or forty feet from the water's edge when he fell, does appear; but that a projectile from a gun fired from the small boats, or the deck of the steamboat, might have overtaken and killed him, without his being pursued or seen amid the surrounding darkness, every body knows. McLeod has on oath alleged the facts, which are fully confirmed by all the documents and now undisputed, and which can never be denied or disproved, that show his imprisonment or detention to be unlawful, and that he is entitled to his discharge. He therefore asks this Court to dispose of him "as the justice of the

* A rupee is equal to 49 and eight-tenths cents.

case requires," in pursuance of the full authority given to it by our statute.

The question now is, not whether McLeod has or has not committed a homicide, but is he in law a murderer? This question the code of nations must answer. This Court is now sitting in judgment between nations. They are indeed illustrious nations, but the forum is worthy of the cause and the parties—and in this august trial is presented the singular anomaly, that all parties are equally interested in the rendition of the same judgment. On it may be suspended the question of peace or war. The preservation of peace is alike dear to both nations, and both were struggling therefor when this deeply to be lamented interposition of the municipal authorities of the state occurred, which threatens open rupture. Is it reasonable to suppose that the British nation will continue its friendly negotiation, with a halter about the neck of one of its subjects for obeying its orders? or that after its public avowal by its minister, of the act complained of, and of its readiness to answer, it would submit to the indignity of having McLeod sent back for trial as a murderer? It seems to us not.

We are now prepared to enter upon the discussion of another important and interesting branch of the case; one which more immediately concerns the institutions of our own country, their appropriate spheres of action, and their harmonious movements. The United States Government is clothed with the exclusive power and duty of taking care of all our foreign relations. Our state government has in charge most of our internal and domestic affairs; each, keeping within its legitimate bounds, will avoid jars and collisions with the other. Under the constitutional exercise of the treaty-making power, redress for this public and hostile invasion of the territory of the United States, the destruction of the steamboat and the killing of our citizen, was at an early day demanded of the British Government, by the Government of the United States; and the whole matter is still in course of treaty between them, with a view to a full and just settlement. The state of New York, therefore, cannot discreetly or lawfully interpose its municipal jurisdiction, and take cognizance of any part of this public offence against the entire American nation. It is the exercise of an authority by the state, repugnant to the constitution and laws of the United States, and brings the jurisdictions in collision and conflict. Its tendency is to thwart the constitutional exercise of the treaty-making power of the Federal Government, and thus involve the two nations in war. This power is vested exclusively in the U. States; Constitution U. S. art. 2d, sec. 2d. "The President shall have power by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

Art. 1, sec. 10. "No state shall enter into any treaty, alliance or confederation, or grant letters of marque and reprisal."

The invasion of our territory, the destruction of the steamboat, and the killing of Durfee, were one entire transaction. The whole was one offence against the United States. No one will contend that the state of New York could demand reparation of the British

government for any portion of this injury; nor deny that the United States government may, and has properly made the demand of redress, not only for the violation of our territory, but for the destruction of property and life.

The Government, therefore, has taken jurisdiction of the entire matter, and that must be exclusive; for two separate independent jurisdictions cannot lawfully act at the same time upon the same subject.

In support of these principles the counsel cited and commented upon the following authorities: 9 Wheat. Rep. 1, Gibbons vs. Ogden; 2 Peter's Rep. 245: 8 Cranch, 109; 3 Dallas, 199; 1 Cranch, 103; 2 Dallas, 304; 4 id. 14; 4 Wheat. 122; 5 id. 1; 4 id. 209; 12 Wend. Rep. 311.

As the Government has the right to demand, so it has a right to accept redress, and then to acknowledge itself satisfied. Suppose it had already entered into a treaty with Great Britain, by which that Government had acknowledged its wrong in the whole affair, had stipulated to pay the value of the property destroyed, and to provide for the surviving family or relatives of Durfee, and our Government had acknowledged itself satisfied. Will any one contend that a civil suit could still be maintained by the owner of the boat against the attacking party? or that a criminal proceeding for murder could still be had against any of those engaged in the affair? Surely not. That which is equivalent to all these proceedings has already been instituted, and is now depending in the high court of nations.

The complaint is made—the summons has gone forth—the party has appeared and answered, and the trial is now going on; and no American should entertain a doubt that the issue will be just and honorable to all concerned. In a suit brought before your honors, in this highest court of original jurisdiction, it is enough to arrest all proceedings, to show that a suit for the same subject matter was before brought, and is still depending in the most petty tribunal in the state. Shall not the same rule obtain here? Can an *inferior* Court oust this of its jurisdiction; and shall the same power be denied to the high court of nations, by this tribunal now sitting in judgment upon the affairs of nations? This Court cannot fail to perceive, that the finding of this indictment, the arrest and imprisonment of McLeod, directly conflict with the exercise of this high power by the United States Government. Is it too much to say, that they have probably already arrested the negotiation—the peaceable mode of trial between nations, and that it cannot again be resumed until this difficulty is removed? That the denial of this motion, and the bringing McLeod to trial, will most certainly involve our country in war?

But it is said the laws of the state of New York have been violated, and that her honor and dignity must be vindicated. No other than the law of nations has been violated, and according to that code must satisfaction be sought and obtained. The honor and dignity of the state cannot be promoted by a disregard of those laws, or of her own duties toward the Federal Government. Of all the states in the Union, New York, because of her position, power and dignity, should

be the most careful not to trench upon the acknowledged jurisdiction of the General Government.

But let us examine this case in view of other powers of the General Government. If it fail to obtain satisfaction by treaty for this entire offence, what then is to be done? Can it refer the matter, or any portion of it, back to the state of New York, to be redressed in her tribunals? No, it has yet a strong arm to stretch forth, whose power has been felt, and will again be felt, when justice and national honor require it. Const. U. S. Art. 1, Sec. 8—"Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

"To raise and support armies." "To provide and maintain a navy."

In this Constitution is power enough, and this portion of it belongs exclusively to the Federal Government. The act in which McLeod is alleged to have participated, being the exercise of the public force of Great Britain, and of a hostile character, becomes the subject of reclamation, reprisal, and war, on the part of the Government of the United States, as it shall see fit, on a failure to obtain acknowledgment and indemnity for the offence and injury by negotiation. Any interference of the state authority is, and will be, incompatible with the exercise of this high power.

Suppose Congress should authorise reprisals to be made, and the property of British subjects should be taken until the government felt itself satisfied for the entire injury, made compensation to the owners of the property destroyed, and provided for the survivors or the friends of Durfee—would not this settle the whole matter? Could Wells still prosecute for his steamboat? or the state of New York try, convict and execute for the murder?

Suppose again that Congress should declare war for this offence, because satisfaction is denied; and after the waste of millions of treasure, and the loss of thousands of lives, peace should be concluded. Would it not cancel the offence, and every part of it? Surely the contrary will not be contended for; nor but that Congress may rightfully exercise all these powers, and bring about this result. It cannot be denied that the killing of Durfee is as much embraced within the scope of these powers, as any other portion of this offence. No one will deny the right of the provincial authorities to kill and capture the invaders of Navy Island, or those engaged in furnishing them munitions of war, while found within their jurisdiction. If the steamboat had been found at the island, instead of at Schlosser, and there destroyed, with all on board, it might have been barbarous, but would it have been cause of complaint or war? No man in his senses will pretend it.

Then wherein is the offence? Clearly in the hostile invasion of our territory. Against whom committed? Not the state of New York, but the United States. Their rights and their laws are alone violated, and they alone, through their government, can demand satisfaction. The destruction of the steamboat was the object to be accomplished by this violation; the killing of Durfee was a mere incident to this warlike measure. All form one entire national offence,

and call only for entire national redress. This redress can be sought only in the way known to the laws of nations. Had this violation of our territory been at a place within the exclusive jurisdiction of the United States, as a fort, an arsenal, the District of Columbia, or one of our territories, the trial of McLeod, after reparation had been demanded, would be wholly incompatible with the pending negotiations between the two governments, and alike unworthy of the honor and dignity of both. But as between the United States and all foreign nations, we are one territory, one people, having one interest, one voice, one duty, one responsibility. All, all are the United States. New York is not, Delaware is not, and therefore it is that the general government, and all its citizens, are alike responsible for the action of the Court of General Sessions of Niagara, where this indictment was found, and for the judgment of this Court on this vastly important question. Nations are alone known to each other, as friends, by their ambassadors; as enemies, by their armies. Of these New York has neither—they are forbidden her by the fundamental law of our government. As well as the state of New York might Schlosser raise her voice of complaint that her territory is violated, and her honor and dignity stained, and demand reparation therefor. No; it is the territory of the United States alone which has been violated, *her* citizen slain, the property of *her* citizen destroyed. No hostile foot can tread her soil that does not tread upon the whole nation.

But we deny the right to put the prisoner upon his trial, in any court, whether of the State or the nation. They are both destitute of jurisdiction. The Constitution of the United States clothes the General Government with exclusive jurisdiction of this offence, and gives it exclusively to the Executive and Legislative departments of that Government. The one has lawfully taken cognizance of it, and of every part of it; and may God in his mercy forbid the necessity of its transfer to the other.

The offence involves not individual guilt, neither does it call for individual expiation. If McLeod was one of Captain Drew's party, (which is admitted only for the purpose of this argument,) what then? He was a British subject, owing allegiance to his Government, bound to obey her orders. He kept his faith; he, with others, rallied to her standard when her territory was invaded by a band of armed men, amid the roar of cannon and the din of war—yes, open war, which threatened the subversion of her Government in her Canadian provinces. He obeyed her orders, and fulfilled his duty; and think your Honors that while he felt the duty of allegiance, Great Britain will fail to feel her reciprocal one, of protection? No, numerous and deeply interested as is the audience attending this argument, should the state of New York so far forget the duties and obligations imposed by the law of nations, and by the Constitution of the United States, as through this high tribunal to deny McLeod's discharge, and send him down to a Circuit for trial, there is too much reason to believe that we should be surrounded by a far more numerous and illustrious audience—none other than a British fleet on our coast, and a British army on our frontier, and instead of wit-

nessing the conviction and execution of one man, we should have to mourn the slaughter of thousands.

If war must come, let it come. As Americans we will meet it—but let us not forget that "he is doubly armed whose cause is just." Great Britain has avowed this open, flagrant violation of our territory, with all that was done. Let us take her at her word, and hold her to her responsibility.

When she has denied our right, and refused to make suitable and honorable reparation; when moderation and forbearance cease to be virtues, then will the President of the United States inform the council of the nation of the true state of the question of which we know so little, and then shall its collected wisdom choose its own time and mode of redress. The trial of McLeod savors of cowardice and revenge, and is unworthy of our country. But the trial of the British nation, we, as Americans, understand; and when necessary, as Americans, will attend. In that trial there will be no British party on this side the waters.

But let this most troublesome and embarrassing difficulty be removed, in the only way in which it can be done in law or honor, and leave the United States Government in the free exercise of its constitutional powers, and there is every reason to believe, that all the great questions which now agitate the two nations will be speedily, justly, and honorably settled; their peace be preserved, and the prosperity and happiness of our country be perpetuated to after generations. Let the national and state governments continue to move only in their own respective spheres, regarding alike the rights of each other and the law of nations—let them cherish their own honor and dignity, by regarding the honor and dignity of other nations—not only the Attorney General, but all of us, will be satisfied with the respect accorded to the exclamation, "I am an American citizen."

No. 6.

MESSAGE OF GOVERNOR SEWARD TO THE ASSEMBLY.

In compliance with a resolution of the honorable the Assembly, I communicate a copy of all the correspondence which has taken place between this department and the executive authorities of the United States concerning Alexander McLeod.

I have the honor also to inform the Assembly that no arrangement whatever, of any kind, or for any purpose, has been entered into by this department with the Executive of the United States concerning that individual.

The Assembly is further informed, that the prisoner is now before the Supreme Court of this State on a writ of Habeas Corpus, sued out, as is understood, by himself, with a view to his discharge from custody. This department has no knowledge or information concerning the application for said writ, the issuing of the same, or the action of the Court, except such as has been obtained from the public news-

papers, and is presumed to be in possession of the Assembly. The proceeding first became known to this department when the prisoner passed through this city on his way to the city of New York, in custody of the Sheriff, in obedience to the writ of Habeas Corpus.

The Attorney General of this State was thereupon immediately instructed to resist the motion for the discharge of the prisoner, and at the same time the President of the United States was respectfully informed that the appearance of the District Attorney of the United States as counsel for the prisoner, was deemed incongruous with his official duties and injurious to this State. The Attorney General is now engaged in the discharge of the duty assigned him.

An incidental correspondence, on the subject of the imprisonment of Alexander McLeod, having arisen between his Excellency the Governor of the Canadas and the Executive of this State, a copy of the same is also laid before the Assembly.

The Assembly is respectfully assured that under no circumstances will any arrangement or proceedings be entered into or permitted, with the consent of this department, the effect of which might be, to compromit, in the least degree, the rights, dignity, or honor of this State.

WILLIAM H. SEWARD.