

F

1032

S96

SUTHERLAND'S
LETTERS.

24B2

24B2

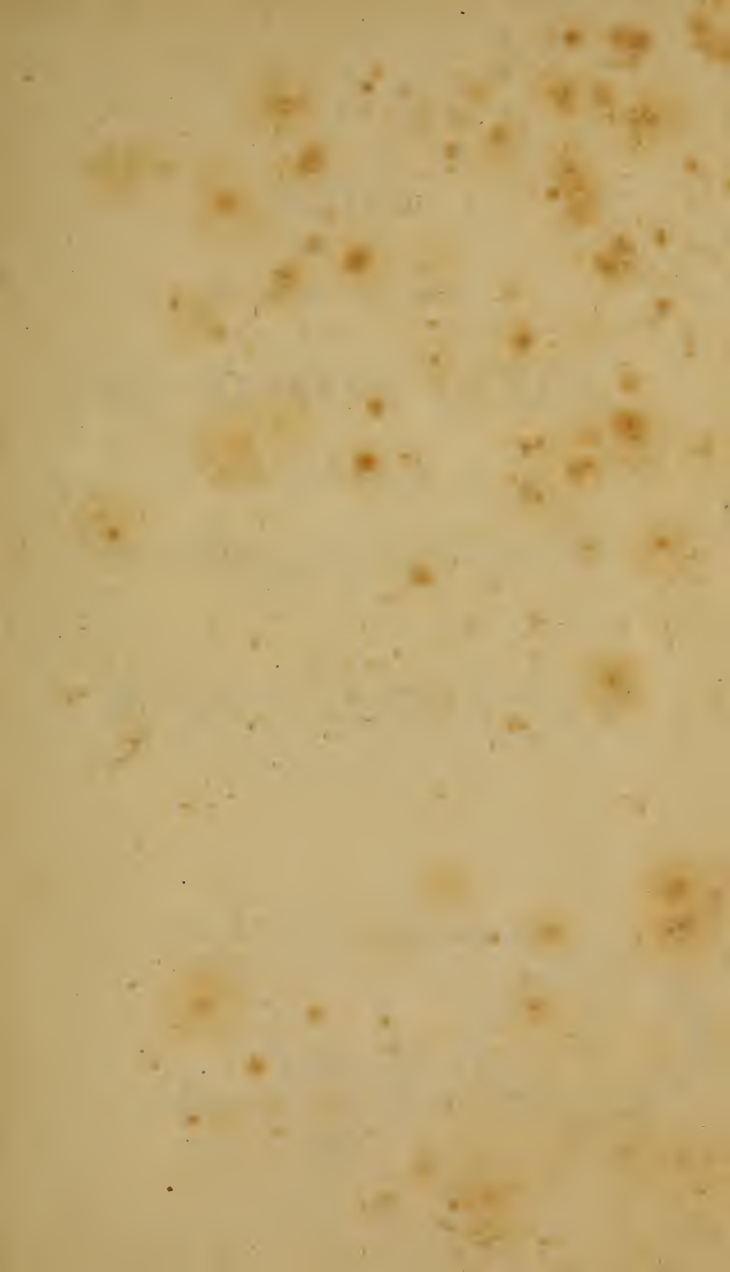
99

463

LIBRARY OF CONGRESS
class F1032
no. .596
UNITED STATES OF AMERICA.









A

LETTER

TO HER MAJESTY

THE BRITISH QUEEN,

WITH LETTERS TO

LORD DURHAM, LORD GLENELG AND SIR
GEORGE ARTHUR:

TO WHICH IS ADDED AN APPENDIX EMBRACING A
REPORT OF THE TESTIMONY TAKEN ON THE
TRIAL OF THE WRITER BY A COURT
MARTIAL, AT TORONTO IN
UPPER CANADA.

BY TH: JEFFERSON SUTHERLAND.

ALBANY: *W*

PRINTED BY C. VAN BENTHUYSEN.

.....
1841.
2



F1032
.S96

Entered according to act of Congress, in the year of our Lord
one thousand eight hundred and forty-one, by TH: JEFFERSON
SUTHERLAND, in the Clerk's Office of the District Court of the
Southern District of New-York.

10-21803

ADVERTISEMENT.

OF those who were implicated in the late revolutionary movements in the Canadas, the writer and publisher of this volume was the first put upon trial, with the intention on the part of the British government that he should have been the first to be executed. Why he escaped will be understood after a perusal of these pages.

There are now about 150 citizens of the United States, who were captured by the military forces of Great Britain in the Canadas during the late revolutionary movements, still held by that government as prisoners of state. They have been sent to Van Dieman's Land, one of the British penal colonies, where they have been reduced to the condition of common felons; and thrust into a convict station with thieves, robbers, burglars and others of the vilest of the overflowings of the prisons of the British empire—without sufficient food or necessary clothing they are being compelled to labor for unreasonable hours at the most servile employment; and made subject to the lash and other severities, unusual to be inflicted by civilized people. Those men, having been induced to believe that a hearty struggle was about to be made by the Canadians for liberty, with a generous motive, volunteered their services to aid them in their efforts; and so doing became prisoners. By the publication of this volume, it is hoped to bring the attention of our own government, as well as that of Great Britain, to the condition of those, our unfortunate fellow-citizens; and that the British government may then be induced to set them at liberty. Should it prove one of the means of bringing about the desired result, the sole object of the publication will have been attained.

Aside from the matters which bear upon the object expressed, this volume will be found to contain expositions of legal questions, which give it value, as a book of reference; particularly, on trials by Court Martial.

Faint, illegible text, possibly bleed-through from the reverse side of the page. The text is arranged in several paragraphs and is mostly obscured by the paper's texture and some minor stains.

DEDICATION.

*To the Attorneys and Counsellors at Law
Of the United States of America,
With the highest consideration,
This work is respectfully dedicated.*

GENTLEMEN—In assuming to dedicate this volume of LETTERS to so learned and patriotic a body as is constituted by the members of the profession of the law in the United States, I have simply to offer as an apology the motive with which the publication is made.

The letter to the BRITISH QUEEN has been written in behalf of the American citizens who are now detained as prisoners by the British government, charged with having participated in the late revolutionary movements in the Canadas. Some of these men, according to the most recent accounts, have been sent off in chains in a convict ship for Van Dieman's Land; others have been placed in the hulks in England—and a few have been disposed of in the penitentiary at Kingston in Upper Canada.

The other letters comprising this volume are copies of communications which were addressed by me, during my confinement in the citadel of Quebec, to the functionaries of Her Majesty's government. In them I have reviewed the circumstances of my own capture, trial and imprisonment; and I have endeavored to show that all the proceedings of the British government towards me were, in the extreme, illegal and unjust.

These papers, together, contain matters of justification for all the American citizens who have taken a part in the

late struggles by the Canadians for independence; and they are published with a view to furnish arguments in behalf of those Americans whose fortune it has been to become prisoners in the hands of the British government; and who, (perhaps, merely for the want of ability to represent their case,) have not yet, like myself, been able to obtain their liberation.

I am informed by a gentleman residing in London, who is highly esteemed as a man of honor and probity—and who possesses some political reputation in England, that if I should lay before the public these letters which have been the instruments of my own release, they would be made to have much influence with the British government to procure the release of the American citizens who are still detained in prison—as my case was a very near parallel to theirs; with the difference, that I was one of the principal and most active leaders—and subject to no other influence than my own principles; while they, who are now in prison, are young men, without influence—the sons of the farmers and mechanics of our frontier counties, who were persuaded by others to embark in the late military movements of the Canadian revolutionists.

In the early struggle of our forefathers, the lawyers of our country were found front and foremost in the cause of political freedom. The charter of American liberty, the Declaration of Independence, was the work of Thomas Jefferson, a lawyer; and while John Adams, a lawyer, proclaimed liberty at the north, in deep and hallowed tones—Patrick Henry, a lawyer, reëchoed the sacred principle at the south, with the cry of “Liberty or death!” Shall I not be safe, then, in supposing the lawyers, of the present day in our country, no less the advocates of political liberty—and as firm friends of the oppressed? and

having shown, (as I believe I have in this volume,) that the further detention of the American citizens now in the custody of the British government is no longer called for by a regard for the safety of that government, or the peace and quiet of the Canadas—and that the course being pursued by that government, towards those individuals, cannot be justified by the rules of civilization, or upon any other reasonable pretext—GENTLEMEN, I have ventured to hope that your actions will not be quieted, nor your voices stilled until our unfortunate countrymen shall be set at liberty and permitted again to return to their homes.

TH: J. SUTHERLAND.

New York, January 21, 1841.

TO HER BRITTANIC MAJESTY

VICTORIA I.

MADAM—By your Majesty, the reception of a communication from an humble citizen of a foreign republic, may be held an extraordinary matter; and perhaps, be regarded as strange in its course; but the position in which I have lately been placed, in relation to your Majesty's government, by a course of circumstances peculiar to themselves, fully justify, as I believe, the liberty I am about to take of addressing your Majesty, as the chief executive of the British nation.

Your Majesty will be informed that I am an ardent admirer of democratic institutions and an enthusiastic advocate of political freedom; and that believing as I did, that the people of the provinces of the Canadas were about to make a hearty struggle for LIBERTY; and entertaining the desire to obtain the small share of applause which might chance to accrue to one of the humble agents in the establishment of another independent republic on the continent of America, in the early part of the month of December, 1837, I joined myself, as a military officer, with the inhabitants forming a revolutionary party in the province of Upper Canada, who were then making an effort to subvert the authority of your Majesty's government in that province—to drive their masters, who were your Majesty's agents, from the soil—and to establish a republican form of government in the stead of the colonial system maintained therein by your Majesty. That after I had been for some short time engaged in the revolutionary movements of Upper Canada, I withdrew from the cause

of the revolutionists, having become satisfied that nothing, at the time, could be moved in behalf of their undertaking with a promise of success—and doubting that any thing could be effected, with such means as we possessed, in a manner, as I deemed, honorable or creditable to myself as a commander; and that after having so withdrawn from the cause of the Canadian revolutionists—and when I was in no manner connected with any of their movements, or affairs—and when I was peaceably pursuing my own private business, *within the United States*, at a distance of not less than seven miles within our lines, I was come upon and kidnapped by an armed party of your Majesty's officers and soldiers who had crossed our lines for the purpose of my capture; and by them carried off into the province of Upper Canada; and there, by an order of your Majesty's Lieutenant Governor, Sir F. B. Head, I was tried by a court martial, on a *charge* of having joined with and participated in the movements of the revolutionists of that province—was threatened with immediate execution, tortured with suspense for a long time; and then, had passed upon me a sentence “to be transported, as a felon, to one of your Majesty's islands for life”—when, by the laws of the British nation, upon the proceedings before the court martial, I was clearly entitled to an acquittal. That the members of the court martial, by whom I was tried, took their seats with predeterminations to find me guilty at all hazards; which they did—and in violation of every principle of justice and of law, as it will appear from an examination of a LETTER addressed by me, during my imprisonment in the Canadas, to LORD DURHAM, then your Majesty's High Commissioner, &c., a copy of which is hereunto annexed, marked A; and while I was debarred from all opportunity to comply with an

extremely unjust demand, as it will appear from the examination of a LETTER addressed by me to SIR GEORGE ARTHUR, your Majesty's Lieutenant Governor of Upper Canada, a copy of which is hereunto annexed, marked B—and that although it was plain to all those acquainted with British institutions, of the commonest understanding, that I was illegally detained, as it will appear from an examination of a letter addressed by me to LORD GLENELG, a copy of which is hereunto annexed, marked C, the officers of your Majesty's government still kept me, under the severest condition of imprisonment, for more than a year.

I do not, however, address your Majesty on this occasion, for the purpose of preferring any complaints for the treatment which I have, myself, received at the hands of your Majesty's government—and which I deem to have been unwarrantable. Such is not my purpose.

But, I would suggest to your Majesty, that during those political commotions in Upper Canada, in which I have already set forth, that I was myself engaged, many individuals, inhabitants of that province, (as also of the province of Lower Canada,) who had been variously honored with political preferments by the people of those provinces, came into the frontiers of the United States—and there publicly alleged various grievances against your Majesty's colonial government maintained in the provinces of the Canadas—and solicited aid and assistance from our people to enable them to redress their alleged grievances by the establishment of a government independent of your Majesty; and that at that time, the cause of the Canadian revolutionists was espoused by a vast majority of the people of our whole frontier—and public meetings in their behalf were held throughout the states which border upon

the Canadas—and were numerous attended. That at those meetings it was urged by the most honorable and most exalted people of our country, that to embark in those revolutionary movements—and to give personal aid to the people of the Canadas, who were then struggling to establish an independent republican form of government, was both commendable and praiseworthy; and a large number of American citizens, (as well as myself,) were soon found embarked in the revolutionary movements of the Canadas then being carried on—a portion of whom were persons without political influence, either in the United States or the Canadas—and were in no wise capacitated to hold in any military body of men any other rank or grade than that of common soldiers(1.)—yet many of this inferior class, (as well as some others,) who have been captured by your Majesty's military forces, are now still detained, by your Majesty's government, in the condition of imprisonment usually bestowed only upon the worst class of common felons. According to my information, there are now from sixty to an hundred American citizens, of the class I have mentioned, thus detained by your Majesty's government. They are principally from the sons of the farmers and mechanics of our frontier counties, who have been persuaded to embark in the affair by others. By individuals of our country to whom those men have been habituated to look up to for a declaration of what was just and proper in a public point of view, they were recommended and even urged, to join the standard of the Canadian revolutionists—and having done so, by the fortunes which have befallen them, they

(1.) All those American citizens who became prisoners to the British government of a higher grade, have been executed, or they have escaped through the irregularity of the proceedings against them, or from the loopholes of their prison

have become prisoners—and are now enduring the severities of a dungeon, while their more responsible as well as more fortunate fellow citizens, by whom they were induced to embark in the undertaking which has placed them in their present condition, are now enjoying their wonted freedom and comforts of life; and I would then submit to your Majesty, if the further detention of those American citizens who are now prisoners in the hands of your Majesty's government, charged with having been concerned in the late revolutionary movements of the Canadas, be not in violation of that liberal policy which is provided by the modern rules of civilization—and if the continuance of those persons in the condition of common felons, as they are now placed, is not calculated to bring us back to the usages of the savage people of a darker age, by the establishment of a spirit of retaliation—and thereby laying the foundations for wholesale murder and an exterminating warfare, to be acted upon at some future day?

Your Majesty will understand that neither myself, those who are now prisoners, nor any others of the inhabitants of the United States had any part in or connexion with the political matters and occurrences which preceded the revolutionary movements in the Canadas of 1837 and 1838—and that we did not interfere until we beheld a civil commotion began and in full operation in those provinces—and our interference and our services had been asked for by men on whom had been bestowed the highest honors at the disposition of the inhabitants of those provinces. Nor did we connect ourselves with the revolutionary movements in those provinces until we had seen that your Majesty's government had failed there to give security to life and property, (the only legitimate purposes

of government;) and that robbery, arson and murder were perpetrated with boldness and impunity in every section of the country; nor until we had seen thousands of the most worthy, honorable and respected inhabitants of those provinces, seized without proof of crime—and upon accusations, evidently false and only made by the most arrant vagabonds, thrust into prison—their homes robbed and their wives and children driven off from their possessions and thrown upon our borders, appealing to our sympathies for the bread of existence; nor until we had seen a large foreign army landed upon their shores and marshalled through their territories, not to defend them from the attacks of foreign enemies, but to subject the people to political slavery. Then, with this picture before our eyes, when we were appealed to for assistance, was it not to be expected that we should be moved by that appeal?

It is notorious that in our course we had the countenance of some of the best men in America—and that we were applauded by a large portion of our fellow citizens; and your Majesty may have known that there has been placed upon the banks of the Hudson, a monument to the memory of Thadeus Kosciusko—and that our citizens in 1824 raised the triumphal arch for Lafayette. Were not those things done as rewards for similar acts as these of mine; and of the other American citizens whom your Majesty's government now have incarcerated in its dungeons? That they were so there can be no doubt; and is that not in effect, as much as to say to the young and gallant of our country—"Go and do likewise and be alike honored?" So we received it—and if we have sinned, it is no more our fault than that of the whole American people.

We did no more than we had seen repeatedly performed by American citizens in aid of the revolutionists of

the provinces of other countries ; and we had seen British subjects giving the same aid to the revolutionists of the Spanish colonies of South America, which we proposed to give to the Canadians. We had seen British subjects doing more to aid a revolution in Greece than we had offered to do for the Canadians. We had seen British subjects effecting more in carrying out a revolution in Portugal than we had aimed to do for the Canadians ; and all these things were done while there were treaties of peace and amity existing between Great Britain and the governments of all those countries I have mentioned ; and the only interference by the British government with the proceedings of British subjects, in their attempts to give aid to revolutionary movements in other countries, I find recorded in the annals of that country, occurred in 1819. An individual bearing the name and title of Sir Gregor McGregor, who had received a commission as a general in the army of one of the revolted Spanish provinces of South America, purchased a number of ships in England for the South Americans—and engaged of British subjects, officers and soldiers, amounting to a considerable force ; and having embarked them on board his ships, with a quantity of arms, military stores and camp attirail and dropped down to the Downs, (so as to be entirely out of the reach of the government, as soon as it might be for his safety or interest,) a bill was introduced into the British parliament to prevent enlistments in England for foreign service. In the debate on this bill, Sir James McIntosh, a distinguished statesman and member of the commons of Great Britain, made a statement which is so full of historical information, that I deem it essential to my purpose to recite it for your Majesty's consideration. He said—

“The historical records of England affords innumerable instances of British troops serving under foreign belligerents, without subjecting themselves to any penalty in consequence. A Catholic regiment served in the Spanish service in Flanders under Lord Brudenel of Wardour, a nobleman distinguished among the first of his contemporaries; and a regiment of Scottish catholics, commanded by the Earl of Home, entered the service of the King of France. In neither instance, however, was any breach of neutrality supposed to have taken place. But perhaps it might be more agreeable to the taste of the right honorable gentleman opposite, if he cited Spanish examples to justify the proceedings against which the present bill was brought in. Not only was there the authority of facts and historical experience against the principle of the proposed measure, but there was that of the writers of the laws of nations, particularly one of the most intelligent of those writers, the celebrated Bynkershook, who was president of the Courts of Holland. On the question, whether it be a breach of neutrality to allow a friendly belligerent to levy troops in your territory? he answers in the negative. What would have been the cheers of the gentleman opposite had any member on his side of the house ventured upon asserting an opinion similar to that expressed by this grave authority? In the war of the Bishop of Munster against Holland, in 1666, the States General complained to the governor of the Spanish Netherlands, that he permitted troops for the service of the Bishop to be levied within his territories. What was the governor’s reply? That the Spanish territories were equally open to the States General as to the Bishop for the purpose in question; for although the latter was his friend, he would act with justice towards both. But this agreeably to the

modern interpretation of the law of nations, would be considered a breach of neutrality. It was clear, however, that the Spanish governor thought otherwise. A breach of law, forsooth! What would the scrupulous politicians of the present time say, when he mentioned the name of one of the greatest princes and most valiant leaders that Europe had ever beheld—a man whose sword had vindicated the cause of civil and religious liberty against the combined efforts of tyrannical power—what he asked, would they say, when he referred them to the instance of Gustavus Adolphus, who had in his pay, not a small portion of British troops, not a little smuggled army, headed by a few half pay officers, on board a transport or two in the Downs, but a band of six thousand men raised in Scotland—and by whose coöperation, with a handful of other troops, he was enabled to traverse a great part of Europe, to vanquish the hosts that opposed him—and to burst the galling fetters of Germany? and who was the chief by whom those six thousand British troops were led? Not an adventurer, not a Sir Gregor McGregor, of whom he knew little and for whom he certainly cared less—but the Marquis of Hamilton, a man of the first distinction and consequence in his own country, the personal friend of the king, from whom, however, he had no license. At that time the Spanish and imperial ambassadors were resident in London, but neither of them presumed to remonstrate or make a demand like that which had been made in the present day. It was expressly laid down by Vattel, that a nation did not commit a breach of neutrality by allowing its subjects to enter into the service of one belligerent and refusing the same permission with respect to another. There was one case more, which occurred in the reign of James the First, to which he could not help

adverting. At that period a great body of English troops, commanded by one of the most gallant captains of his day, Sir Horace Vere, who served his time against the Spaniards and received pay from a foreign power. Yet Gondomar, the Spanish ambassador, whom King James was endeavoring, by the most servile and abject submission to conciliate, who might almost be termed the viceroy of Spain in this country, who had sufficient influence to cause the murder of that most distinguished individual, the ornament of his native country and of Europe, who united in himself more kinds of glory than had perhaps ever been combined in an individual, that intrepid soldier, that skilful mariner, that historian, that poet, that philosopher, that statesman, Sir Walter Raleigh—Gondomar, whose power protected him from the punishment he deserved for such an act, dared not go so far as to require the boon which his Majesty's ministers now call on the house of commons of England to have the condescension to grant!"

Indeed! by an examination of the record of the times, your Majesty will find that whenever there has been exhibited a similar state of affairs to those which existed in the Canadas in 1837 and 1838, wherever it has been, there we have found the British people acting as volunteers with their swords. I bring these facts to the notice of your Majesty for the purpose of showing that the American citizens who embarked in the undertaking to sustain the late revolutionary movements in the Canadas, did no more than there had been examples set for them in almost every country on the face of the earth, by your Majesty's subjects; and that, therefore, although a severe and energetic self defence was expected to have been met from your Majesty's forces—we could not anticipate the treat-

ment which has been bestowed upon those of us who were engaged in those revolutionary movements and whose fortunes it has been to fall into the hands of your Majesty's government; and I would ask your Majesty, if from a government, supported by such people as your Majesty's subjects, we had not a right to expect to be met with more liberal measures; and to have received more generous treatment than such as has been meted out to us?

In a document, very recently published, your Majesty's governor general of the Canadas has declared "the rebellion at an end"—and he has proclaimed, "that he no longer entertains fears of those provinces being again disturbed by political commotion." I have, also, before me a document emanating from your Majesty's government, during the past year, wherein it is shown that your Majesty has a military force now organized in the Canadas, amounting to more than 50,000 men, including regulars and irregulars. While such a force is maintained in those provinces by your Majesty, the idea of any successful movement on the part of the revolutionists, without the assistance of some powerful nation, having at its command great resources and a large and well appointed army, is not now likely to be entertained.

For these reasons, in behalf of the American citizens who are now prisoners to your Majesty's government, I would respectfully solicit your Majesty to notice their condition; and so to consider their case as to allow them to be speedily released from their present confinement and permitted to return to their country and friends.

All of which is respectfully submitted,

For your Majesty's early consideration.

TH: J. SUTHERLAND.

New York, January 1, 1840.

(A.)

TO THE RIGHT HONORABLE JOHN GEORGE EARL OF DURHAM, VISCOUNT LAMBTON, &c. &c. &c. *Knight Grand Cross of the most Honorable Military Order of the Bath, one of Her Majesty's most Honorable Privy Council, and Governor General, Vice Admiral and Captain General of all Her Majesty's Provinces within and adjacent to the Continent of North America.*

MY LORD—The fact that I, (a citizen of the United States of America,) am now detained as a prisoner in this fortress, I must believe is well known to your Lordship; and therefore, I beg permission to call your Lordship's early attention to the causes and circumstances of my detention and imprisonment by Her Majesty's Government, to the end that your Lordship may order my immediate liberation.

Born and educated in a republic where no titles are conferred and no distinctions recognized, except those limited to place; and where the most exalted in power may be familiarly approached with the most homely language, I am, my Lord, consequently wholly uninstructed in the manner in which it is usual for persons of your Lordship's exalted rank and station, in this country, to be addressed; and at this moment I find myself not a little embarrassed in the choice of words to convey my ideas, for while I would approach your Lordship with all the deference and courtesy of language your Lordship is entitled to, and which it would be as creditable to myself as respectful to your Lordship for me to observe, I am in danger of being thought to make an unbecoming supplication. Therefore, I beg I may be allowed to address your Lordship in the manner common to my own country; and then, however

different may be the language of this, from the communications your Lordship has been in the habit of receiving, while it is recollected, *I am an American citizen*, I would have your Lordship regard no expression of mine as intentionally indecorous.

The Lieutenant Governor of the Province of Upper Canada, having caused information to be given me "that copies of all the papers and documents connected with my *capture* and *detention*, and *trial* before a Militia General Court Martial of that Province, (of which trial I am to presume your Lordship has been in some manner advised,) had been transmitted to the Home Government of Great Britain for Her Majesty's consideration," I had intended this communication for the Secretary of State for the Colonies; but having been, (unexpectedly to me,) removed into this Province, it has suggested itself to my mind that the determination of my case is now within the prerogative of your Lordship, and that it might be regarded as indecorous, on my part, to attempt to pass your Lordship with a communication to one of Her Majesty's Secretaries of State, at London. If I am in any way mistaken, I trust your Lordship will do me the kindness to cause this communication to go into the hands of those of Her Majesty's Government, who do hold the prerogatives, and whose duty it is to hear and determine this matter, in which my future liberty is concerned.

I would state for your Lordship's consideration, that at the time an attempt was made, during the past year, by a portion of the inhabitants of the Province of Upper Canada, to effect a political revolution in that Province and to establish a government therein, independent of Great Britain, numbers of the inhabitants of the Province fled to the borders of the United States, and there painted and described to the people of my country many grievances

to which they alleged the people of these Provinces were subjected by the system of Colonial Government maintained herein by the British nation; and that such description and statements of wrongs were generally believed by my countrymen: and your Lordship, no doubt, has been advised that a large majority of the citizens of the United States, bordering upon the Provinces of the Canadas, then took a deep interest in the political affairs of these Provinces, and warmly espoused the cause of the revolutionists. That such was the fact, and that among the number, I was one, I would have your Lordship to understand.

At that time, it was represented to me by recent inhabitants of the Canadas, (many of whom had held some of the highest political stations in the Provinces,) that the number of the people of the Province of Upper Canada who were disaffected towards the British Colonial Government, and who were then disposed and ready to try an appeal to arms, and make the effort, in connexion with the people of the Lower Province, to establish the political Independence of the Canadas, *amounted to more than three-fourths of the whole population of the Province*; and believing, as I certainly did, that the insurrection which was then begun would amount to a general rising of the inhabitants, I consented to be employed as one of the officers to conduct the military operations on the part of the Revolutionists: and on or about the 16th day of December last, I joined an armed body of men who had taken possession of, and who then occupied NAVY ISLAND in the Niagara River; and there, as second in command of the force, I used the utmost of my abilities and exertions to fortify the Island so as to resist any assault from Her Majesty's forces, and to reduce the officers and men composing the force congregated at that place to such a state of

discipline as would enable them to act in the field against Her Majesty's troops; and that I was thus employed on Navy Island until about the 28th day of December, when I left the Island and proceeded to the frontiers on the Detroit River, with instructions, from the persons under whose orders I acted, to take the command of a force of armed men which was being embodied in that vicinity to assist in sustaining the revolution; and on the 8th of January, (1838,) I arrived on the Detroit River, and there found a considerable force embodied, with which I remained until the 10th day of the same month. On the 9th, with a small detachment of the force placed under my command, I took possession of Bois Blanc, (an Island in the Detroit River, which is said to be within the Province of Upper Canada,) driving therefrom Her Majesty's forces, by which it had been occupied—and capturing, at the same time, a stand of Her Majesty's colors, with a large quantity of provisions and military stores belonging to the forces of Her Majesty which had fled upon our approach. My taking possession of Bois Blanc was an act preparatory to the making of an intended descent upon the Province for the purpose of co-operating with the force then on Navy Island. But through the disobedience of my orders by some of the individuals who were there acting as officers under my command, having lost a schooner we possessed, with a large quantity of arms, ammunition, military stores and camp equipage prepared for the expedition; and finding that the whole of the body of men I had to command were without the least practical knowledge of military tactics, or of the details of an army, and utterly ignorant of the first step of discipline, and without officers in any way competent to command them—on the 10th day of January I evacuated the post I had taken upon the Island of Bois Blanc, and relinquished my

command of the force ; and since said 10th day of January, I was not joined to, or connected with, any persons or armed body of men, within the limits of any of Her Majesty's Provinces, or with any such armed body of men collected elsewhere for the purpose of invading any of the Provinces of Her Majesty ; nor was I afterwards engaged in aiding any of Her Majesty's subjects who were traitorously in arms against Her Majesty.

After having been, the brief time I have mentioned, connected with those who were laboring to subvert the authority of Her Majesty the Queen of Great Britain, in the Province of Upper Canada, surrendering my command as I have stated, I proceeded to the city of Detroit in the State of Michigan, at which place and its vicinity I remained until the close of the month of January, when I became satisfied the insurrection in Upper Canada had entirely failed to present the character of a general rising of the people, as I had anticipated ; and then, although I had up to that time contemplated being again employed as a military commander in behalf of the Revolutionists of Upper Canada, I was convinced that no further operations in behalf of the revolution could, at that time, be carried on with any credit to the leaders, or with any chance of success ; and accordingly, early in the month of February, I tendered to the persons under whose orders I had acted, a resignation of the military command with which I had been invested, and caused the fact that I had done so, to be made known, by a notice, to that effect, published in a public newspaper of the city of Detroit, at which place I was at the time. But having learned that some of the Canadian Refugees remaining at Detroit had taken the publication of my resignation and retirement from the Patriots to be merely a *ruse*, and that they supposed I still intended further to act with them, that there might

tured by a party of armed men under the command of one *John Prince*, an officer of Her Majesty's Militia of the Province of Upper Canada.

At the moment of my being thus captured I protested to the persons by whom I was taken, *that I was at the time within the limits of the United States*; and gave them notice that *I was an American citizen, then peaceably pursuing my own private business*; and that *I was in no way connected with the Patriots, or with any movements of the Canadian Revolutionists*. I had thought that being within the limits of my own country would have proved a protection to my person—but, nevertheless, *Prince* and his party persisted in my capture, and took me a prisoner to Fort Malden in the Province of Upper Canada.

I was in no kind of military array when captured, nor had I any person in my company, except one individual, a youth who resided at the city of Albany in the State of New-York, and who was a native born citizen of the United States; and as for arms for offence, *we had none*, not even such as to defend ourselves with. We had neither pistols nor fire-arms of any description; though, it was true, we had in our possession two old, futile, inefficient and edgeless swords, which we had found at a public house on our way from Detroit, and which we had taken into possession solely from the circumstance of their being my private property—and not to be used as matter of offence or defence.

Shortly after my being taken a prisoner to Fort Malden, I was removed to the city of Toronto, where immediately upon my arrival, by an order of Sir F. B. Head, then

its of the United States, at a time when I was in no manner connected with the Revolutionists of the Province; and, therefore, that I ought to be set at liberty on the shores of my own country, without further detention. His reply was—"they had me—and my capture was justifiable even if I had been taken in the city of New-York."

Lieutenant Governor of that Province, I was tried by *what was called a Militia General Court Martial*, (which court consisted of but *eight members* exclusive of the President thereof,) under certain statutes, as I was informed, passed by the Provincial Parliament of the Province of Upper Canada, upon a *charge*, a copy of which was furnished me in the words and figures following, to wit:—

“*Charge*—That Thomas Jefferson Sutherland, being a citizen of the United States of America, (the said United States of America, being at peace with the United Kingdom of Great Britain and Ireland,) and having joined himself, on or about the 26th day of December last at Navy Island, in the District of Niagara, in the Province of Upper Canada to William Lyon Mackenzie, and others, unknown subjects of our Sovereign Lady the Queen, who were then and there traitorously in arms against Her Majesty after the 12th day of January last, within the limits of the Province aforesaid, was in arms against Her Majesty, against the form of the Statute in such case made and provided.” “A true copy.” (Signed,) “James Fitz Gibbon, Judge Advocate.”

I was also informed by the said Court Martial, that the *Charge* upon which I was tried, was framed under a statute of the Province, which was passed on the 12th day of January, A. D. 1838; a copy of which was also delivered me by the said Court Martial, bearing the title of “*An act to protect the inhabitants of this Province against lawless aggression from the subjects of foreign countries at peace with Her Majesty.*”

The first section of this act under which, as I was informed, I was put upon trial, was in these words and figures, to wit: “Whereas a number of persons lately inhabiting the State of New-York, or some one of the other United States of America, have, within the said State of New-York,

lately enlisted or engaged themselves to serve as soldiers, or have procured others to enlist or engage themselves to serve as soldiers, and have within the said state of New-York, collected artillery, arms and ammunition, and made other preparations for a hostile invasion of this Province under the pretext of assisting certain traitors who have fled from this Province to the said United States ; and whereas, the said persons without the authority of their Government, and in defiance of its express injunctions, have actually invaded this Province, contrary to the faith and obligation of the treaties subsisting between the United Kingdom of Great Britain and Ireland and the said United States, and during the continuance of the relations of amity and peace between the two countries: and whereas it is necessary for protecting the peace and security of this Province to provide for the prompt punishment of persons so offending: Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of, and under the authority of an act passed in the Parliament of Great Britain, entitled, "An act to repeal certain parts of an act passed in the fourteenth year of His Majesty's reign, entitled an act for making more effectual provisions for the Government of the Province of Quebec in North America, and to make further provisions for the Government of the said Province, and by the authority of the same," *That if any person being a citizen or subject of any foreign state or country at peace with the United Kingdom of Great Britain and Ireland, having joined himself before or after the passing of this act, to any subjects of our Sovereign Lady the Queen, Her Heirs or Successors, who are, or hereafter may be traitorously in arms against Her Majesty, Her Heirs or Successors, shall*

after the passing of this act be or continue in arms against Her Majesty, Her Heirs or Successors, within the Province, or commit any act of hostility therein, then it shall and may be lawful for the Governor of this Province to order the assembling of a Militia General Court Martial for the trial of such person, agreeable to the militia laws of this Province; and upon being found guilty by such Court Martial of offending against this act, such person shall be sentenced by the said Court to suffer death, or such other punishment as shall be awarded by the Court."

I was also furnished by the said Court Martial with a copy of another act of the Provincial Parliament of the Province of Upper Canada, bearing date the 6th day of March, A. D. 1838, (two days after my capture,) the same being a code of "Militia Laws of the Province," under one of the provisions of which act, I was informed by the said Court Martial, the same had been organized; and under the provisions of this law of the 6th of March, the oath administered to the President and members of the said Court Martial was framed, and couched in the words following, to wit: "You A. B. do swear that you will administer justice to the best of your understanding in the matter now before you, according to the evidence, and the Militia Laws now in force in this Province, without partiality, favor or affection," &c.

Now, if we should suppose that I could be properly tried by a Court Martial organized under a law passed after my capture; and that this law of the 12th of January, under the provisions of which the Charge upon which I was tried, was drawn up, had been constitutionally enacted, your Lordship will perceive that in order regularly to convict me of the Charge preferred against me, it was necessary to establish by proofs—

1st. That I was a citizen or subject of some foreign

state or country at peace with the United Kingdom of Great Britain and Ireland.

2d. *That I had joined myself, before or after the passing of the act, to some of the subjects of Her Majesty the Queen, who were then traitorously in arms against Her Majesty; and had continued so to be in arms after the passing of the act, (12th of Jan. 1838.)*

3d. *That after the passing of the act, (12th Jan.) I had been or continued in arms against Her Majesty within the Province of Upper Canada, or committed some act of hostility therein :*

And these were the special averments of the *Charge* upon which I was tried.

The only testimony adduced upon my trial before the Court Martial to sustain the *first* averment of the *Charge* preferred against me, and to prove the facts necessary so to be established on that point in order to bring me within the provisions of the act, under which it was professed I was tried, was the proof that I had, after my capture, admitted "*that I was a citizen of the United States of America,*" which testimony was, perhaps, so far as it went, sufficient in itself. But, then, there was no proof or evidence of any kind given or offered upon my trial to establish the fact that the United States of America, "*was a state or country at peace with the United Kingdom of Great Britain and Ireland.*"

Here I may remark to your Lordship, that it is a rule of law, as I believe, that every averment of a count in an indictment, (and consequently every averment of a *Charge* before a Court Martial,) must be proven.(2.)

(2.) It is an established rule of law that all those facts necessary to have existed in order to constitute an offence, must be set out in the indictment, (or charge,) and must be proven. In the 1st of Starkie, p. 444, it is said, "when there is a failure of evidence to establish any one essential averment, the court direct an acquittal in a criminal case. Same

To sustain the second averment of the *Charge* and to prove the facts necessary to be established on the part of the prosecution in order to bring me within the provisions of the act, one *Matthew Hayes* was called by the Judge Advocate, and sworn as a witness, who testified, substantially—"that on the 21st day of December last, (1837,) he went upon Navy Island, in the Province of Upper Canada—that after he arrived upon the Island he saw William Lyon Mackenzie, who asked him what brought him there—that he told Mackenzie he came to see the Island—that *Mackenzie told him he could not leave the Island*—that he saw me on the beach when he landed on the Island—that he saw me on Navy Island from the 21st to the 28th or 29th of December—could not be positive which—that I was in the capacity of second in command of the Patriot forces—that I was Brigadier General—that he saw me leave the Island—that I went towards the shores of New-York—that I addressed the men on the Island the day before I left it—and said '*they were embarked in a glorious cause*'—and '*implored the God of Battles to direct and prosper them*'—that while I was there I wore a cavalry sword slung in the usual form—that there were no people in uniform on the Island—that those on the Island were generally armed with guns swords, pistols and pikes—that some had charge of cannon—that he saw Mr. Gorham on the Island who acted as aid-de-camp to General Van Rensselaer, and who told him he, (Gorham,) came from New-Market in Upper Canada—that there were about forty persons on Navy Island whom he understood were British subjects—that many of them told him so—that they formed a part of the hostile force—but that all the knowledge he had that any

authority—p. 371, it is also declared, "that every material and essential allegation, and every circumstance descriptive of its identity, must be proven as averred."

person he saw on Navy Island at the time I was there were British subjects was that they told him so—that General Van Rensselaer was in command on Navy Island—but that he was sometimes absent—and then I commanded—that General Van Rensselaer was an American citizen as he understood—that William Lyon Mackenzie held no military command on the Island—that he, *Hayes*, did not go to Navy Island for the purpose of joining the Patriots—that when there I told him not to make himself uneasy—that he might stop in my quarters—that he was detained there against his will—that he considered himself while there a prisoner, not being allowed to go off—that *I appointed him to the office of Adjutant—which he accepted through fear*—and continued to do the duty until I had left the Island—and until he was displaced on account of not acting more efficiently—that *he left Navy Island on the 4th day of January—after Mackenzie had left it*, by leave of General Van Rensselaer—that he was not again on the Island—that he had never afterwards seen any of the persons whom he saw on Navy Island while I was there, in any part of Her Majesty's dominions, or elsewhere—and that he had not seen me since I had left Navy Island, (28th December,) until he saw me present in Court."

But, there was no evidence adduced upon my trial before said Court Martial to prove "*that William Lyon Mackenzie was a subject of Her Majesty;*" and other than the preceding statement of the testimony of *Hayes*, there was no proof given to establish the fact as alleged "*that any of the persons who were on Navy Island at the time I was there, were subjects of Her Majesty the Queen of Great Britain and Ireland.*" Nor was there any item of testimony or proof given on my trial before said Court Martial to show "*that William Lyon Mackenzie, or any other*

alleged subject of Her Majesty, with whom I was charged to have been joined in arms against Her Majesty, on Navy Island, were at the date of the passage of the act, (12th January,) or any time thereafter, traitorously in arms against Her Majesty, at Navy Island, or at any other place within the Province of Upper Canada," as averred in the *Charge*, and as it was necessary to have been established on the part of the prosecution against me in order to bring me properly within the the provisions of the act under which it was professed I was tried. Quite the contrary, however, was shown, as your Lordship will readily perceive by the testimony of *Hayes*; who swore that "*he left Navy Island on the 4th of January, (eight days before the passage of the act,) previous to which time Mackenzie had left the Island, and he, (Hayes,) had never after he left Navy Island, (4th of January,) seen Mackenzie or any other of the persons whom he had seen on the Island while I was there, in arms in any part of the Province of Upper Canada, and that he had no knowledge of any such persons, whatever, since he left Navy Island;*" and as the testimony of this *Hayes* might be supposed to apply to the 3d averment contained in the *Charge*, your Lordship will perceive he swears positively, "*that he had not seen me since he left Navy Island, (4th of January,) until he then saw me in Court, on my trial.*"

To sustain the 3d averment of the *Charge*, as well as to prove other facts necessary to be established to bring me within the provisions of the act, *John Prince*, the individual who commanded the party by whom I was captured, and *Prideaux Girty*, who was also of that party(3.)

(3.) In the first instance, Major Rudyard with Lieutenant James and Lieutenant Wright, were sent over from Malden to Toronto, to be used as witnesses against me on my trial, in order to establish the circumstances of my capture. But, Prince and Girty having arrived at Toronto before the court had commenced taking testimony, they were called

were called by the Judge Advocate, and sworn as witnesses on the part of the prosecution against me.

Prince testified, substantially—"that on the 4th day of March last, (1838,) he was on the shores of Lake Erie, at about *nine miles below Amherstburgh*, in the Western District of Upper Canada, when he saw *at a great distance*, two objects on the ice—that he was proceeding on towards Amherstburgh in company with *Girty*, and continued on his way about one mile, when he discovered the two objects were men—that then having procured fresh teams, he started off with others in pursuit—that he approached within one hundred yards of myself and another individual who was then in my company—when he and one *Haggerty*, a companion of his, (*Prince's*,) got out of their sleighs and following me with their guns, hailed me, and commanded me and my companion to halt. That we did so, and that I then asked '*what do you want?*'—and said '*we are American citizens going about our own business*'—that he then told me to consider myself his prisoner, and go with him—that I and my companion did so without any resistance—but, that *I charged him with having captured me within the limits of the United States*—that we had each of us a sword but no other kind of weapons—that *at the time of my capture I was walking towards the Canada shore*, of which he said, I was within a mile and a half—that the place at which I was captured, *was opposite the Canada shore, three miles below Bar Point*, commonly called *Hartly's Point*, and *opposite the shore of Michigan at or near Gibraltar*. That when captured, *I was one mile and a half from the Canada shore, and four and a half miles from the shore of Michigan*." *Prince*, also testified—"that at the moment I was captured by him,

first; and the Judge Advocate having ascertained that the first named officers would not corroborate the testimony given by *Prince* and *Girty*, rested the prosecution without calling them.

I informed him I had been robbed of my baggage at Monroe, and that I was on my way to Lower Sandusky, for the purpose of intercepting some persons who had been concerned in the robbery ;” and further, “ that at the time of my capture, I was travelling in a south-easterly direction—(the direct course, from whence I had started, to Sandusky—and a very different one from the Canada shore—which lay due north from the place where I was captured,) that at the time of my capture, I was within half a mile of a certain schooner which was then frozen in the ice at the head of Lake Erie, and eight or nine miles from the Island of Bois Blanc—[This schooner it is well known, lay at the time, several miles within the lines of the United States.]—that I had stated on an examination at Amherstburgh, before himself, (Prince,) Girty and one Lachlan, all justices of the peace of the Western District of Upper Canada, on the day next after my capture—(substantially)—‘ that I had been on Navy Island with Van Rensselaer and Mackenzie—that I had served there as second in command—that I had left Navy Island on or about the 26th of December—that I had then come to the Western Frontiers where I took command of an expedition which had been there fitted out—and that with a detachment of the expedition I had on the 9th of January last, taken possession of Bois Blanc Island, and had again abandoned it on the 10th—that I had then given up my command and gone to the city of Detroit.’ ”

Prince, also produced a paper on which, as he testified, he had written the substance of what, he said, were my admissions ; which paper I had not signed, nor been asked to sign, as *Prince* testified ; and he also produced a newspaper called the “ *Detroit Morning Post* ”—which had been published in the city of Detroit in the United States ; and in the copy of the newspaper he produced, there were

printed certain *Despatches* and *Proclamations* over my name, which he testified I had admitted of having published; and the papers were all received and admitted as testimony by said Court Martial, notwithstanding I objected to their being received, on the ground that they were irrelevant and improper as proof.

The testimony of *Girty*, failed to corroborate that deposed by *Prince* in many important respects; though he, like *Prince*, testified, "that they had captured me within one and a half miles of the Canada shore;" (the distance I am to suppose, *they had agreed upon, to call it,*) though neither pretended to have measured the distance—nor of having obtained any certain knowledge of the location and bearings of the place. *Girty* testified, "that I was walking, at the time of being captured, *from the Canada shore, down the lake,*" while *Prince* swore—"that I was going *towards the Canada shore.*" *Girty* testified, "that the nearest place on the Canada shore to the spot where I was captured *was Hartly's Point,*" while *Prince* swore—"that it was *three miles below Hartly's Point.*" *Girty* testified, "that the nearest point on the shore of Michigan to the place of my capture was *Point Mouillee,*" while *Prince* swore—"that it was *at or near Gibraltar,*" several miles above the place designated by *Girty*. *Girty* testified, "that I was captured *two miles from the schooner frozen in the ice at the time,*" while *Prince* swore—"that I was captured *within half a mile of it.*" *Girty* testified, "that I was captured *within four and a half miles of Bois Blanc Island,*" while *Prince* swore—"that I was captured *eight or nine miles below the same island.*" There were also many other discrepancies in the testimony deposed by *Prince* and *Girty*, which exhibited it to be altogether a matter of uncertainty—most extravagantly related.

During the proceedings of my trial, *James Macavley*, Esquire, Surveyor General of the Province of Upper Canada, was called by the Judge Advocate, and sworn as a witness ; and he produced then, a roll of drawings, or parts of charts, one sheet of which, he testified—“ *was said to be* a chart of part of the head of Lake Erie ;” that, on which it was alleged, I had been captured. On the chart there was a line marked to represent the dividing line between Canada and the United States ; which line, however, was admitted by the Surveyor General, *to be erroneous* ; and another line was marked upon the chart with a pencil, which he testified—“ he understood to be the true line—and that the sheets of drawings, (or charts,) produced, were found by him among the records of his office ;” and this was all he testified to in the premises ; and upon this showing, the cause was rested on the part of the prosecution.

There was no proof given on my trial which went to show how far the dividing line between the two countries, in the neighborhood of the place of my capture, was established from the Canada shore ; or that I was in any manner connected, at the time of my capture, with any of Her Majesty’s subjects, who were or had been, traitorously in arms against Her Majesty, within the said Province of Upper Canada ; nor was there any pretence of proof set up by the prosecution on my trial, to show that I had been in arms against Her Majesty, within any of Her Majesty’s Provinces, since the 12th day of January last, (date of passage of the act,) or that I had ever been within the Province ; (except the fact of my having been on the ice at the head of Lake Erie, at the time I was captured,) or that I had committed any act of hostility therein.

On my part, I neither called witnesses in my behalf, nor

produced any kind of testimony; relying for my defence upon the evident failure of the testimony, adduced on the part of the prosecution, to sustain the *Charge* preferred against me; with the several objections taken by me, during the trial, to the proceedings of the Court Martial, which were briefly as follows:

1st. *That one half of the members composing the Court had not before sat on a Court Martial.*

2d. *That the President of the Court had not before sat on a Court Martial.*

These objections were grounded upon information I had received, that the President of the Court Martial, and a majority of the members, were persons who had been recently appointed to office in the Militia of the Province of Upper Canada—that they had been but a few days in military employment—and that they had never before sat on a Court Martial. Although these facts were not disputed nor controverted by the Court, the members objected to were all permitted to keep their seats as members of the board. The objections were started in accordance with the practice usual in the organization of Courts Martial in the British Empire. On these points, however, it is true, the Militia laws of the Province are silent; but in the absence of any statutory provisions on the subject, the usual course, which is in support of the objections made, in my opinion, ought to have been regarded. The *Practice of Courts Martial*, the *Articles of War* of the nation, and the *Mutiny Act*, are and ought to be, as I think, the guide, in the absence of any particular statutory enactments.

3d. *That one of the members of the Court, a Major Dewson, was at that time, an officer in the regular army of Her Majesty, under full pay, and therefore ineligible to sit on a Militia General Court Martial.*

This objection was made in accordance with a provision of the statute of the Province, and grounded upon information I had received that Major Dewson, was at the time a *Lieutenant and Quarter Master of Her Majesty's 15th Regt. of foot*; (his name appearing on the army list as such;) and that he was, as such Quarter Master, receiving full pay. But, notwithstanding the fact upon which this objection was based was not denied by Major Dewson, nor contradicted by the Court, he was allowed to retain his place on the Court Martial, as a member thereof.(4.)

By the only Provincial law which was in force at the time of my capture, applicable to my case, (48 Geo. 3d, Chap. 1, Sec. 23,) it is provided, "that no officer serving in any of Her Majesty's other forces, shall sit on any Militia Court Martial," &c. (5.)

4th. That the act of the Provincial Parliament of Upper Canada of the 12th of January, under the provisions of which I was tried, was unconstitutional, and unauthorized by, and unfounded upon any delegated authority from the Government of Great Britain to constitute it a law.

The ground I assume, my Lord, is, that a law affecting the rights of foreigners can only emanate from the parent

(4.) By the common law of England, though jurors may be challenged, the judges, or justices cannot; but in the courts where the proceedings are carried on, according to the civil and common laws, the judges, who like the members of Courts Martial, are also judges of facts, may be challenged, and they commonly, of their own accord, decline sitting as judges in a cause where they may be supposed to be under the least bias or partiality to one side or the other.—*I. Coke's Inst. p. 294-677.*

(5.) *An extract from the Militia Laws of the Province of Upper Canada, passed March 16, 1808—and in force until the sixth day of March, 1838.*
 "Provided always, that the judgment of every such Court Martial shall pass with the concurrence of two-thirds of the members, and shall not be put in execution, until the Governor, Lieutenant Governor, or person administering the Government, has approved thereof: Provided always, that no officer serving in any of His Majesty's other forces, shall sit on any Court Martial upon the trial of any officer or private man serving in the Militia."

state, (if even from such sovereign state it may,) and that a case like mine, with all the facts of the *Charge*, as alleged, and intended to have been alleged, fully and sufficiently set out, and substantially proved, (which, however, in my case I contend have in no manner been done,) is only for negotiation between Great Britain and the United States, of which latter country I am recognized to be a citizen.

If the Province of Upper Canada has a right to enact or create such a law as this act of the 12th of January, then must any and all of Her Majesty's *forty Colonies* have equal privileges. The exercise of such privileges, however, it is self-evident, would involve the parent state in inexplicable difficulties, clashing with its treaties with foreign states, and in a variety of other ways interfering with that power and sovereignty, which it can alone possess. Upon examination, it appears to me that the constitutional act of this Colony, (31st Geo. 3d,) has clearly defined the powers given to the Provincial Legislature; and limited its control to certain matters of self government; such laws not being in contravention to the provisions of that act, and not repugnant to the laws of the empire state. Its treatise are parts and portions of such laws, and can only be made by the superior power. See *Vattel*, p. 192.

By the treaty now existing between the United Kingdom of Great Britain and Ireland and the United States of America, ratified 24th of June 1795, commonly called *Jay's Treaty*, it is provided, (3d article,) "that it shall at all times be free to His Majesty's subjects, and to the citizens of the United States, dwelling on either side of the boundary line, freely to pass or repass, by land, or inland navigation, into the respective territories and countries of the two parties on the Continent of America, and to navigate all the lakes, rivers, and waters thereof," &c.

Then, certainly, as I trust your Lordship will allow, a right derived from such a source, cannot be abrogated, however expedient it might be, by a less authority than the one which had created it. The Queen, as supreme head of the empire, has the prerogative of making war and peace, treaties, leagues and alliances with foreign states; and the Colonists are as fully bound by, and subject to, the consequences thereof as the inhabitants within the realm. See *B. Edward's*, Vol. 2, p. 353, cited in *Clark's Colonial Laws*, p. 47.

It is a restriction imposed by the commission and instructions of the Governor of the Province, "*that the laws made in the Colony shall not be repugnant to the laws of England.*" This restriction is enforced by statute 3d and 4th Will. 4th, Chap. 59, Sec. 56—and has regard to the laws of all the Colonies of Great Britain, whatever. The only exception to this rule, at the time, was in the case of the Province of Lower Canada, established by 1st Will. 4th, Chap. 20, cited in *Clark's Colonial Laws*, p. 27; and upon referring to the 46th Sec. of the 31st Geo. 3d, it will be made evident to your Lordship, that no such powers as have been assumed by the Legislature of the Province of Upper Canada in passing the act under consideration, could have been *intended* to be delegated by the mother country.

It seems to have been contemplated that the Provincial Legislature might be disposed to pass laws affecting the empire at large in its *commerce*. Therefore, that power was withheld by the above section; from which it may be inferred, fairly and clearly, that for the general benefit of the empire, the power of regulating its *commerce* should continue to be exercised by Her Majesty and the Parliament of Great Britain, *that the solemn obligation of*

treaties should not be touched or interfered with, by so subordinate a power as the Legislature of a Colony.

5th. That the Charge preferred against me, was not sufficiently specific, as required by the act under which it was framed.

By reference to the act of the 12th of January, and the Charge upon which I was tried, it will be perceived the Charge is defective, inasmuch as it is not alleged therein "that on, or after, the 12th day of January, 1838, (the date of the passage of the act,) I was in arms with any of the subjects of Her Majesty within the Province," or "that I had so committed any act of hostility therein," as required by the provisions of the the act under which the Charge was professed to have been drawn up.

It is a rule of law, "that all penal statutes must be strictly construed. See Sec. 14, *Geo. 2d, Chap. 6, cited in Blackstone's Commentaries, Vol 1, p. 88*, in confirmation of this rule. To subject me to the penalties of this highly penal statute, it should have been alleged in the Charge, *as well as proven on the trial*, "that after the 12th day of January last, I was in arms with such traitorous subjects," &c. which was not done. *Time and place* were also omitted, which were material defects in the Charge. See *Tytler on Martial Law, p. 214—215*.

6th. That the act of the 12th of January, not "affecting all Her Majesty's subjects," but "particular individuals," and those individuals foreigners, was "a private act," and therefore ought to have been duly proven on the trial; but which was not done.

A public statute requires no proof. See *Stark. Evid. Vol. 1, p. 163*. It is defined to be one "which affects all the King's subjects." I am a foreigner, recognized as such in the proceedings against me; and as this act of the 12th of January has been made to affect me, and not

Her Majesty's subjects, can it be otherwise than "*a private act?*" which is defined to be such as operates upon "*particular persons,*" and is therefore required to be proven. It has not even been declared a public act, if such a declaration could make it one. To have commenced legally with the proofs on the part of the prosecution, the act should have been proven, as the first step, which was not, however, done; and no evidence was given to the Court, (or exhibited to me, a foreigner,) to show that any such law had been enacted by the Legislative authority of the Province, and then in force. See *3d Campbell*, p. 166, *Cowp.* p. 174, *2d East*, p. 221, and *3d East*, p. 381.

In law, there are many presumptions, some obviously very violent. Among others, the presumption that every one, being a citizen or subject, knows the law, however ignorant, or however remote his residence from the law making place. Notwithstanding, the individual, (being a citizen or subject of the country,) never gave a vote for a representative who may have assisted in making the law, or indeed from his poverty, or some other reason, had no vote to give; yet, it is *presumed* he knows the law; it is *presumed* that either directly or indirectly he gave his sanction to its foundation. He belongs to the country, and must be governed by its laws. But, can this presumption be extended to a *citizen of a foreign country?* Does *he* aid, directly or indirectly, or can it be *presumed*, that he who has never resided in the country, nor received protection from its laws, and who owes no allegiance to the government, aided in the formation of its laws? The answer is clear, that he cannot. Therefore, this act which affects foreigners, who could not even be *presumed* to have had any part in framing it, must be considered a "*private act,*" which required proof.

7th. That the Militia laws of the Province of Upper Canada, passed on the 6th of March last by the Provincial Parliament of that Province, under the provisions of which, the Court Martial by which I was tried was organized, had an EX POST FACTO operation, as it regarded me, and therefore was not properly applicable.

The Court Martial by which I was tried, as I have before stated, was organized under the act of the 6th of March, and consisted of a *President and eight other members*, only. Whereas, the Militia laws of the Province in existence and in force at the time of my capture, as well as at the time of the passage of the act of the 12th of January, (which, by the terms of that act, became an essential part thereof, required that all Militia General Courts Martial convened in the Province, should consist of “*a President, who should be of the rank of a field officer, and not less than twelve other commissioned officers.*”

Upon the further examination of British authorities, I find it is enacted by 33d, Geo. 3d, Chap. 13, “that the Clerk of Parliament shall endorse on every act the time it receives the royal assent, which endorsement shall be taken to be a part of that act, and to be the date of its commencement, where no other is provided.” See 6th Bac. 371; and it is in general true, that no statute is to have a retrospect beyond the time of its commencement; for the rule and law of Parliament is, “that a law ought to place its mandate, (ought to be in force,) for the future, to meet future contingencies or events, not those that are past.” See 2d Mod. R. p. 310—*Gillmore vs. the Executors of Shorter*. This case arose upon a promise made before the 24th of June 1677. An action was brought against his executors, and the question was whether the promise, it not being in writing, was within the 29th C. 2d, Chap. 3d, whereby it is enacted, “that from and

after the 24th of June, 1677, no action shall be brought, &c. [in certain cases therein mentioned,] unless in writing signed." The court said "it cannot be presumed that the statute was to have *a retrospect* so as to take away a right of action, which the plaintiff was entitled to, before the time of its commencement." See *Bac. Vol. 6, p. 370.*

So in my case, on the 4th of March I was captured, and on the 13th of the same month, put upon trial on a *Charge* framed under the act of the 12th of January preceding; and I was on the 4th of March, unquestionably entitled to a Court consisting of *a President and twelve other members*, corresponding to the twelve Jurors of the civil law, instead of the Court by which I was tried, and which consisted of but *nine members, including the President*, organized under a law not in existence when the offence was alleged to have been committed, but passed subsequent thereto, to wit, on the 6th of March, *two days after my capture*. To my understanding, this was giving the law a retrospective effect, which is directly contrary to the legal rules of the country.

The oath administered to the members of the Court Martial by which I was tried, as I have before stated, was framed according to the provisions of this act of the 6th of March, by which the members were sworn to adjudge me "*according to the Militia laws then in force in the Province;*" when the fact was, I was neither tried by, nor amenable to any such Militia laws. Therefore, the oath administered to the members of the Court was a mere nullity.

8th. *That the maps produced to the Court by the Surveyor General of Upper Canada, were not made legal evidence of the dividing line between the two countries.*

There was no proof adduced on my trial before said Court Martial, which went to show that the plans or

charts produced by the Surveyor General of the Province, purporting to exhibit the line of demarcation between the United States and Upper Canada, *were the original plans*, settled and confirmed by the commissioners under the treaty of Ghent; or even copies of such plans, duly authenticated; therefore, they were no evidence, and ought not to have been received as such.

9th. *That I was prevented by the Court Martial from having the benefit of a cross examination of the Surveyor General, to which I was entitled.*

10th. *That the paper purporting to contain the substance of an examination, or admissions made by me, and the newspaper containing the Despatches and Proclamations, ought not to have been admitted as evidence.* It having been proven to the court, that I had neither signed the paper, said to contain a statement of my examination, or admissions, nor been requested to sign it, and had refused; and, (as I contend,) the matters contained in the newspaper produced by *Prince* were altogether irrelevant, and in no manner connected with the *Charge*.

Upon such proceedings, and unsupported by any other testimony than that which I have here detailed, and after I had filed a written defence, the said Court Martial *adjudged me guilty of the CHARGE*—and sentenced me “*to be transported as a felon, to one of Her Majesty’s Islands during my natural life.*” Which judgment and sentence, I protest to your Lordship to be contrary to the statutes and laws of the British Empire, unsupported by the testimony, against the usages of civilized nations, and to me most cruel and unjust. (6.)

(6.) After I had been arraigned before the Court Martial, one of the members called upon me and said—“He conceived it his duty to inform me that it was the intention of the Government to treat me in a similar manner to that in which Gen. Jackson had treated Arbuthnot and Ambrister”—which every body knows would be, *to try me one day and hang me the next.*

If my reading be correct, my Lord, the laws of the British Empire, both military and criminal codes, are intended to have a general, and not a special application ; and so long as such a character shall be maintained for them, and they are allowed to have their full force, however severe may be any of their provisions or penalties, *the laws will give no sanction to injustice or oppression.* It is to be supposed the laws are made, not to have regard to the individual, but to the offence. In this is the security of the person from the effects of prejudice, of falsehood, and the machinations of the wicked. But, whenever the recipient of power, or public functionary, shall, instead of dealing with the offence, thrust aside the provisions of the laws, in order to adjudge the individual, there is then an end to liberty and public safety. Can it be supposed, my Lord, that when the laws of a country cease to have that respect given them, which places their unimpaired operation paramount to every other object, and they fail to have force to protect even the guilty, from irregular condemnation, they will be found sufficient to preserve the innocent ?

Your Lordship will perceive that the deficiency of the testimony adduced upon my trial to sustain the *Charge* preferred against me, is as apparent as the irregularity of the proceedings ; no one part of the *Charge* being fully sustained, but the fact that I am a citizen of the United States, "*to which I have been at all times ready to plead guilty.*"

The fact that previous to my capture I had withdrawn

The manner I was treated upon my trial, by the individuals who composed the court, was outrageously savage and brutal. A description of their infamous proceedings, it is my intention, hereafter to lay before the public in another work. As a tribunal, the court by which I was tried had neither analogy nor parallel in the historical records of any nation or country—except the account we have of the court instituted by Pizarro for the trial of the unfortunate Inca of Peru, may afford one.

myself from the cause of the Canadian Revolutionists, and that I was, when captured, in no manner connected with any person engaged in any movements, or intended movements, of an insurrectionary or belligerent nature in Upper Canada, was notorious at the time of my trial, both in Upper Canada and on the borders of the United States, and might have been established on my trial by an abundance of proof had the proceedings against me made such proof necessary: and to establish the contrary, there was no proof.

The averment that I was captured within the lines of the Province of Upper Canada is in no manner sufficiently made to appear. Suppose the statement of *Prince*, "that I was taken within a mile and a half of the Canada shore," be admitted to be true, then there was no proof adduced to the Court on my trial which established the fact, that if I had been even at that distance from the Canada shore, it would have placed me within its bounds, which is defined but by an imaginary line running through those waters. This point in dispute, however, is of no moment to my defence. By the existing treaties between Great Britain and the United States, I had a right, as a citizen of the United States, to pass unmolested, not only over the waters of Lake Erie, but through any part of the British Provinces in America.

The act of the 12th of January provides only for the trial of such foreigners, &c. as were in arms against Her Majesty, in said Province on or after the 12th of January, (the date of the act,) or who should commit hostilities therein. Now, when captured, according to the testimony, I was peaceably pursuing my course on the ice, at the head of Lake Erie, in a south-easterly direction, (the direct route from Gibraltar to Sandusky in Ohio,) unaccompanied by any person but a single individual

whom I have before mentined ; (a citizen of the United States, like myself, and whom the Lieutenant Governor of the Province of Upper Canada has long since set at liberty and permitted to return to his home ;) and there was no proof given, that I had been at any other time, after the passage of the act, within Her Majesty's dominions.

As to my having committed hostilities within the Province, subsequent to the passage of the act of the 12th of January, there was no proof offered, nor was I *charged* with any such offence.

It is true, my Lord, that at the time of my capture, myself and companion had with us two inefficient old swords ; but I submit to your Lordship if that circumstance alone can be so tortured and strained as to bring me within the *Charge* of being in arms against Her Majesty. It would, I conceive, be as rational to talk of an infant having been in array against its parent with a tea spoon. To have been in arms against Her Majesty, it was necessary I should, at the time, have been in some manner connected with a military force, sufficient to have resisted, in a measure at least, Her Majesty's authority. Had I been captured while on Navy Island, or at any other place in the Province, at the head of and directing, or in any manner aiding an armed force, with but a spy glass in my hand, I could not then deny I was in arms against Her Majesty, because, forsooth, I carried no offensive weapons about my person. Suppose, then, I had been taken, while quietly walking alone in the streets of Toronto, or in company with another individual, armed like a Turk, with pistols, dirk and sabre, but not connected with any body of men, by what rule of reasoning, or application of commonsense, could it be maintained under such circumstances, "that I was in arms against

Her Majesty," or that I had thereby offended within the intent and meaning of this act of the 12th of January. The offence with which I was *Charged*, is, in its sense, the act of levying war against Her Majesty, with her rebellious subjects—and nothing less. Any hostility, or aggression committed by one or two individuals would be an assault and battery, or an offence of some other description or denomination within the purview of the civil laws of the Province; the provisions of which, against such offenders, could readily be enforced by the aid of a special constable or two, and needed not the assistance of this most extraordinary penal act, and a Court Martial. It seems, however, that the application of this act of the 12th of January to me, taking any view of the proof, was altogether retrospective in its effect; and therefore, as an *ex post facto* law, comes under the objections I have raised to the application of the law of the 6th of March. The circumstances of my having been upon the ice at the head of Lake Erie at the time of my capture, even if I had been within the limits of Upper Canada, and but a mile and a half from its shores, constituted no offence of itself; and this is all I have been *charged* with having done since the 12th of January.

The attempt to prove that I was "on or about the 26th day of December last, [or at any time before or after] at Navy Island, in the District of Niagara, in the Province of Upper Canada, joined to William Lyon Mackenzie," or any others, subjects of her Majesty the Queen, was an equal failure, as I have before noted to your Lordship; as there was not even an offer of any proof whatever, to show that William Lyon Mackenzie, with whom it was alleged I had been joined, was a subject of Her Majesty; nor was there one jot or tittle of evidence given upon my trial to establish the fact alleged in the *Charge*, that

Mackenzie, or any other of Her Majesty's subjects, with whom it was alleged that I had been joined, "were traitorously in arms against Her Majesty, on or after the 12th of January last, within the limits of the Province of Upper Canada;" and without the establishment of such facts, by sufficient proof, the *Charge* remained unsupported.— Yet, in defiance of these palpable defects in the proof—and when it was evident I was justly entitled to an acquittal, the Court Martial adjudged me guilty of the *Charge*.

It will not be improper for me now, I trust, to exhibit to your Lordship wherein I think my case has been subjected to an undue influence. About the same time that my trial commenced, (which was not concluded for nearly forty days,) a British subject by the name of Edward A. Theller, who is now imprisoned in this fortress, was put upon trial upon an indictment for treason. He had been engaged in one of the revolutionary movements of Upper Canada, with which I was connected, and became a prisoner; whereupon, being a natural born subject of Her Majesty, an indictment for treason was preferred against him. Upon his trial, Theller alleged that he had been created a citizen of the United States; and set up the plea, that therefore, he could not be legally charged for treason, as a subject of Great Britain. The plea, however, availed him nothing on his trial, and he was condemned and sentenced to be executed; and when he again urged it to the Lieutenant Governor, as a ground for a respite until the opinion of Her Majesty's Government in England could be taken in the case, it still seemed to avail him nothing, until it was understood that the Government of Upper Canada had come to the conclusion to deal with its political offenders by classification; then, this man, together with his friends, (among whom he might num-

ber the most of the people of his particular country, in Toronto,) laid hold of me as an available sacrifice, to gain him a respite, which it was believed would be the means, at least, of saving his life. To this course, Theller the more readily resorted as he was aware that I held his conduct at the time of his capture, as any thing but creditable to himself. At this time, my case had been determined, and it was then urged upon the Lieutenant Governor, Sir George Arthur, that it would be very illy received by a portion of the inhabitants of the Province, (his particular countrymen,) if Theller should be executed, since I, one whom they alleged was a much greater offender, had not been subjected to capital punishment; and to give weight to their arguments, all my acts were greatly magnified, and both my character and conduct most grossly misrepresented; whereby I may well suppose the mind of Sir George Arthur, who knows nothing of me, but by the partial representation of Theller's friends, and others, who are far from being friends to me, has been much poisoned and embittered towards me; and it has been suggested to me, (with how much justice I cannot say,) that without this influence, I had long since, and while yet in Upper Canada, been released from imprisonment by the Lieutenant Governor of that Province, instead of being sent here, to be detained.

You may ask, my Lord, what proof have I that this course, of which I complain, has been pursued towards me? I answer, as one evidence, I have before me a printed document emanating from one of the Common Council Men of the city of Toronto, from which I transcribe the following paragraphs:

“On its being made public that the life of Sutherland, (who was tried by a Court Martial as an American citizen,) had been spared, it occurred to some of the

gentlemen, who afterwards waited upon his Excellency, that it might possibly produce an evil effect on the minds of the Irish inhabitants of the Province, were the commander-in-chief of the pirates to escape with secondary punishment *because he was an American citizen*, while his subordinate, was doomed to suffer the utmost penalty of the law, for the same crime, with the sole difference *that the latter convict was a natural born subject of Great Britain*, and by birth an Irishman.

“ We accordingly waited upon his Excellency to the number of *eight*, who were as follows: Aldermen—Dixon, Armstrong, Stotesbury and Taylor; Common Council Men—Craig, Trotter, Brown and Dr. King.

“ His Excellency received us with the greatest politeness, and condescended not only to listen to our arguments, but also to enter into conversation upon it with most of us at considerable length; and I am sure that those who were with me will agree that far from giving us any hope that the consideration we urged had prevailed, we were given to understand that it was not one upon which his Excellency could act.

“ Afterwards his Excellency did me the honor of send for me, and of informing me that the prisoner had been respited until Her Majesty’s decision could be had upon the case; and his Excellency further informed me that the question which was to be submitted to Her Majesty’s Government, was one of a legal character; and that he thought it necessary to state this to me, lest a false impression might be on my mind, or go abroad, that the prisoner was respited on any argument advanced by us.

(Signed,) “ JOHN KING.”

These paragraphs, afford most indubitable evidence that there was an attempt made to influence the Lieu-

ber the most of the people of his particular country, in Toronto,) laid hold of me as an available sacrifice, to gain him a respite, which it was believed would be the means, at least, of saving his life. To this course, Theller the more readily resorted as he was aware that I held his conduct at the time of his capture, as any thing but creditable to himself. At this time, my case had been determined, and it was then urged upon the Lieutenant Governor, Sir George Arthur, that it would be very illy received by a portion of the inhabitants of the Province, (his particular countrymen,) if Theller should be executed, since I, one whom they alleged was a much greater offender, had not been subjected to capital punishment; and to give weight to their arguments, all my acts were greatly magnified, and both my character and conduct most grossly misrepresented; whereby I may well suppose the mind of Sir George Arthur, who knows nothing of me, but by the partial representation of Theller's friends, and others, who are far from being friends to me, has been much poisoned and embittered towards me; and it has been suggested to me, (with how much justice I cannot say,) that without this influence, I had long since, and while yet in Upper Canada, been released from imprisonment by the Lieutenant Governor of that Province, instead of being sent here, to be detained.

You may ask, my Lord, what proof have I that this course, of which I complain, has been pursued towards me? I answer, as one evidence, I have before me a printed document emanating from one of the Common Council Men of the city of Toronto, from which I transcribe the following paragraphs:

“On its being made public that the life of Sutherland, (who was tried by a Court Martial as an American citizen,) had been spared, it occurred to some of the

gentlemen, who afterwards waited upon his Excellency, that it might possibly produce an evil effect on the minds of the Irish inhabitants of the Province, were the commander-in-chief of the pirates to escape with secondary punishment *because he was an American citizen*, while his subordinate, was doomed to suffer the utmost penalty of the law, for the same crime, with the sole difference *that the latter convict was a natural born subject of Great Britain*, and by birth an Irishman.

“ We accordingly waited upon his Excellency to the number of *eight*, who were as follows: Aldermen—Dixon, Armstrong, Stotesbury and Taylor; Common Council Men—Craig, Trotter, Brown and Dr. King.

“ His Excellency received us with the greatest politeness, and condescended not only to listen to our arguments, but also to enter into conversation upon it with most of us at considerable length; and I am sure that those who were with me will agree that far from giving us any hope that the consideration we urged had prevailed, we were given to understand that it was not one upon which his Excellency could act.

“ Afterwards his Excellency did me the honor of send for me, and of informing me that the prisoner had been respited until Her Majesty’s decision could be had upon the case; and his Excellency further informed me that the question which was to be submitted to Her Majesty’s Government, was one of a legal character; and that he thought it necessary to state this to me, lest a false impression might be on my mind, or go abroad, that the prisoner was respited on any argument advanced by us.

(Signed,) “ JOHN KING.”

These paragraphs, afford most indubitable evidence that there was an attempt made to influence the Lieu-

tenant Governor in behalf of this Theller, at my expense ; and that too, by individuals of no moderate standing and influence ; and although the statement of Dr. King, goes to deny the success of the attempt, as to Theller's benefit, it will be perceived he does not even profess to negative the presumption of its effect upon my case, to which the real ground assumed by the Lieutenant Governor in granting the respite is immaterial. It was natural that Sir George Arthur should have been predisposed to act against me ; and as, under such circumstances, men are often moved by influences of which they are themselves insensible, it will not, I hope, be regarded as disrespectful to Sir George Arthur to suggest, that although the arguments of Dr. King, and the other friends of Theller, had no weight to influence His Excellency in Theller's behalf, they may, nevertheless, *have had great weight to influence his determination in regard to me.* For, you will perceive, my Lord, they solicited no favor for Theller, on the ground of the merits of his case, but for the reason, as they assumed, that I was a worse enemy than he ; a ground as extraordinary to be taken, as the facts alleged were unreal, and their course of argument negative to the opinions of the whole civilized world.

That we were both chargeable with the same offence against Her Majesty's Government, " with the sole difference that Theller was a natural born subject of Great Britain," is most true. But national policy, as well as individual justice, makes that difference, as I humbly conceive, a very great and important one. To sustain the government from the aggressions of its enemies, Great Britain had no claims upon me. She could demand from me no more than that I should keep off my hands ; and in assaulting the Government, I made myself no more than an open and public enemy, to be disposed

of as I have before premised. Not so in his case. By birth he owed allegiance to the Government of Great Britain, which required him not only to stay his own hand, but to bear arms to sustain it from the ruthless attacks of others. In the dominions of Great Britain he had been educated, and from the government he had received emolument, (as I am informed,) which claims his gratitude; and for his offence, the laws to which he owed obedience prescribed the penalty; and if there may be any credit given to his own words, the only property he has any claim to on the face of this earth, is an interest, by his wife, in an estate in the District of Montreal, in this Province; and it was, as he has informed me, with a view to better his claim to that estate, that he took up arms to sustain the revolution. To me, the motive which affords the least apology, is that which has moved the British people, in more instances than one, to acts similar to mine, in other countries; and that which moves the officer of all civilized nations to enter foreign service. Then, again, I have this difference in my favour; I was captured on the waters of Lake Erie, within the jurisdiction of the United States, as I believe I can clearly establish, and not until after I had abandoned the cause of the revolutionists of my own accord; whereas Theller was captured decidedly within the Province of Upper Canada, and in the very act of his aggression.

As to the alleged fact that Theller had been made a citizen of the United States, in pursuance of the laws of the Republic for the naturalization of foreigners, I have no knowledge. I would beg to suggest, however, that if he had been made such citizen, when he took up arms violently to assault the Government of Great Britain, with which the United States were on terms of peace and amity, he lost the character of an American citizen, as

he thereby alienated himself from the Government of the United States; and it is not alone to be perceived by a lawyer, that the moment he stepped his foot within Her Majesty's dominions, in the attitude of hostility, he stood there in the naked character of a subject, and as fully amenable to all the laws of the realm, and the pains and penalties of treason, as if he had never been beyond its limits; and this, my Lord, is all the question of a legal character raised by Theller in his defence, and which Sir George Arthur had to submit to Her Majesty's Government for a decision.

In another view, the arguments adduced by Dr. King and his associates in behalf of Theller, to the detriment of my case, were extremely unjust in their premises. The case fairly stated is this: A portion of Her Majesty's subjects, lately inhabiting the Provinces of the Canadas, (of which this same man is one,) came to our country and complained to us of political grievances, and excited our sympathy by the relation of a multitude of wrongs, and asked our aid in their quarrel. As would an advocate listen to the oppressed, so did we hearken to their stories, (and true or false, it is immaterial to the case,) we believed them, and consented to espouse their cause—and with them were defeated; and so acting in behalf of those who had made us their agents, not with the offer of gain, but by appealing to our sympathies, according to the reasoning of those gentlemen, we are to be adjudged worse offenders than the principals in whose employ we were, and at whose instigation we had moved in the matter; and this was to be done, in my case, without even the application of the judicial rule of looking into the facts as they appeared upon legal investigation. What I am now stating, my Lord, is not merely argumentative, but facts—facts notorious and not subject to be controverted.

In the affairs of these Provinces I have had no direct personal interest, and only acted as a volunteer officer. Theller never professed to be a volunteer; he declared himself to be acting in his own behalf, and for his own country, and on his very trial at Toronto, wore the uniform and badges which were assumed to distinguish those who professed to belong to the Provinces, from the American volunteers.(7.)

(7.) To continue the absurdity, this man, Theller, after being taken out of the *casemates* of the Citadel of Quebec by his Canadian friends, petitioned the Congress of the United States for the enactment of a national law "to prohibit the British Government from trying any of its subjects for *treason*, who had emigrated to this country, and under our laws been naturalized, and who were then taken in arms against that government;" and his petition being put into the hands of Mr. Senator Clay, he to carry out the joke, presented it to the Senate. What would such a law avail, and who would be bound by it if enacted? Not Great Britain, certainly.

Let us suppose it should be settled and established by negotiation between the two governments, that the subjects of Great Britain emigrating to the United States, and becoming naturalized as citizens by our laws, should be regarded as citizens by the British Government; what would such a contract amount to in case of a war between the two countries, when all former contracts would be disregarded? and I trust that it would never be asked by the government of the United States, nor conceded by the British, that *adopted citizens*, who make war on their own account, while the governments are on terms of peace and amity, should have a protection that is not given to natural born citizens.

I propose to examine this question a little further for the satisfaction of some of our naturalized citizens. It is asked by them, that the Government of the United States should obtain from the Government of Great Britain, by negotiation, a stipulation on the part of that government to relinquish all claim for allegiance from such of their subjects as shall emigrate to this country and become citizens of the United States by our naturalization laws. If this measure should be proposed by our government and acceded to by that of the British, it could only be carried out by the enactments of the British legislature, declaring "that all British subjects who should absent themselves, (for a term of years to be agreed upon and specified,) from their dominions, should be deemed aliens, as well as the children born of their bodies in foreign countries;" and the British would be sure to require a corresponding enactment from our national legislature. By the existing laws of Great Britain, (and the same principle is embraced in our own laws,) any individual born in their dominions is a subject, and nothing that can be done, will deprive him of that character; and all children born of British subjects in foreign countries are regarded as subjects also. Hence, it will be perceived, that by the existing laws, a British subject may emigrate to this country, become naturalized as a citizen, and abide here for any length of time: and then, should it become his interest or his desire to return to the land of his birth, he may do so, and there possess all the privileges of a sub-

This, my Lord, is not the only evidence of my case having been subject to an irregular and improper influence. At the time my trial commenced at Toronto, the administration of the Government of the Province of Upper Canada was in the hands of Sir F. B. Head, and no trials for treason had then taken place. On the 23d of March, during the progress of my trial, Sir George Arthur arrived at Toronto and assumed the reins of the government. At the moment of his doing so, I learn from a despatch of His Excellency to Lord Glenelg, that he was informed by his Executive Council, it was almost universally expected "that the severest penalty of the law would be visited upon all the leaders, and most guilty traitors"—but he continues to say—"the members of the Council, themselves, saw the difficulty of proceeding to extremes, where so large a number of persons were concerned;" and that then "much consideration was given to forming some plan of classing the offenders." (I quote from the document which is now before me.) Before my trial had been concluded, a number of convictions for treason, (in addition to that of Theller's,) had taken place, among which were those of *Lount* and *Matthews*, who were sentenced to be executed on the 13th of April, then next following. In behalf of these men, (*Lount* and *Matthews*,) great exertions were made to save them from the utmost penalty of the law; and in three or four days, (says the despatch,) petitions signed by no less

ject, as if he had never been absent from his country; and the children of British subjects born in this country, have the privilege of choosing between the United States and the British dominions for a residence; and they may regard themselves as citizens or subjects, as it shall best suit their interest or wishes. To attain the stipulation proposed, all these immunities must necessarily be surrendered; and all British subjects who take up their residence abroad must as necessarily be made subject to the regulation. But it is not to be supposed that all of the British subjects who have taken up a residence in the United States, or even a majority of them, are wishing to become aliens to the land of their birth, while they would gain nothing by it,

than eight thousand persons had been presented in their favor ; which, however, availed them nothing. But, when it became known that the Lieutenant Governor would not interfere with the course of the law in the case of Lount and Matthews, it was at the same time understood by the public, that *while the Government had determined that some of those whom they considered the most guilty offenders should suffer death, it was their intention to reduce that number to a very few.* Then, as it was to be expected, commenced the struggle of the friends of each who was considered in danger, to make some others *appear those greater offenders*, who should be included in *the few* destined to suffer the most severe punishment. While this was going on, my case was brought to a determination by the Court Martial—and the Government—and the result made public. I was then, at once, seized up on by the friends of all those who were dangerously implicated, as the means to stop the avenues to the scaffold ; and although the true circumstances of my case were but very little known, and less understood, yet almost every one of the very persons at whose hands I thought I had a right to demand favor, took occasion to proclaim “ that *the Government could not consistently suffer any more executions, since I, whom they declared to have been one of the worst of criminals, had been suffered to go off with secondary punishment ;* and it is a known fact that there were no more executions for offences then committed. Thus it was, while one party, for the charitable purpose of serving their friends, took care so to represent me to the Lt. Governor, that I should appear the chiefest of offenders, and as deserving the worst of punishment, the ultra loyalists, (who seemed to have looked upon me, as does a child upon the fingers of a watch, who, when beholding them in their office of pointing the hours, never suspects that their

movements are not of themselves, but by the influence of a machinery, as the mechanic will tell, consisting of 992 individual parts,) did their best endeavors to have such punishment fixed upon me.

It needs no further explanation to show how seriously all these matters have, heretofore, and must still, affect my interest. The party whose cause I had once espoused, was then discomfitted and broken up; and the individuals who composed it, like the pieces of a shattered bark upon the waters, were made to strike and mar each other, as each struggled individually to save himself; and none thought it unjust to exhibit me as the instrument that had done the wrong, though they hid the hand that used it. While I have thus been borne down by a current of evil influences, I have seen others released and returned to the bosoms of their families and friends, whose influence with the Revolutionists of these Provinces, in comparison to mine, has been as a mill-stone to a feather; and whose conduct in the matter of the late insurrectionary movements would be as scarlet, while mine should be as wool.

If it be remembered, my Lord, that I come from a country where it is held a political text, "that to secure life, liberty and the pursuit of happiness, governments are instituted among men, deriving all their just powers from the consent of the governed; and that when any form of government becomes destructive of those ends, *it is the right of the people* to alter or abolish it, and to establish a new form of government, laying its foundations on such principles, and organizing its powers in such forms, as to them shall seem most likely to effect their safety and happiness"—that I am a citizen of a republic whose people begin their history as a nation with that of a fierce and bloody conflict with the people of Great Britain—of a country whose heroes "of story and of song" are only

those who have "measured steel," and "clashed their arms," with Britons, and against colonial rule—and in whose struggle for independence against the domination of the British Government, the aid of *foreign volunteers*, greatly, if not mainly, contributed to its success, when an insurrection was proclaimed in these Provinces, and numbers of the agents of the revolt had come among us and related their grievances, which were similar in nature and character, as we believed, to those which our forefathers had been subjected to by the British Government, while it had the power of coercion, and which had induced them, in 1775, to make *their appeal to arms*, your Lordship could hardly have been surprised to hear that I with my countrymen, had lent a willing ear to the detail of wrongs given to us by those agents; and that our minds should have then naturally reverted back to the lessons of our school books, in which, during our juvenile days, we had learned the stories of such volunteers in the early and hazardous cause of our own country, as Lafayette, Steuben, De Kalb, Kosciusko and Pulaski; and when the standard of revolt had been raised, and the banner of liberty once unfurled in these Provinces, your Lordship could not have been disappointed to find that I, as well as many others of my countrymen, were found as volunteers around it. For it had been made to appear to us, *that there was to be a struggle for liberty*, in which a large majority of the people of the Canadas were willing and ready to embark; and we felt that we were called upon to discharge ourselves from a debt of gratitude which we had been taught we owed. Such, with the desire to obtain the small share of applause which might chance to accrue to one of the humble agents in the establishment of another Independent Republic on the continent of America, were the moving inducements for my embarking, as I did,

in the undertaking, for which I am now being made to suffer.

It has never been denied by me, that I was for some time in the months of December and January last connected, as a military officer, in the manner I have before stated, with forces which have been in arms in Upper Canada, for the purpose of subverting Her Majesty's authority in that Province, and to establish in its stead an Independent Republican form of government. Neither will I now pretend that I was at all ignorant of the danger in which I was placed by connecting myself with so hazardous, and as to its result, doubtful undertaking. I was at the time, my Lord, fully aware that while on the one hand, success would add to my name a "title of glory," and accord me such praise as "wits could imagine and poets sing," on the other hand, aside from the common dangers of the field, a defeat or failure might leave me but *the tenant of a dungeon—with a pallet of straw.*

In my conduct, I have been charged with having acted "*contrary to the express injunctions of the government of my own country,*" and of having contravened its laws. Yet, it is, nevertheless, notorious that I did not act against the will of the people. Until several insurrectionary movements had taken place in these Provinces, and until I had been present at respectable and numerous attended public meetings in my own country, at which the political condition of the Canadas was under consideration, and I had heard the cause of the Revolutionists of these Provinces advocated by men the most talented and esteemed of my country, I had no connection with any of the people of the Canadas; and until then, I had in no manner interfered with the political affairs of the Provinces: and when, at a public meeting held in the city

where I resided, (at which meeting it was estimated by the public prints, "that about every voter was present" of a population of 20,000,) I mentioned my willingness to be employed as a military officer in the attempt that was then being made to establish an Independent Republican form of Government in Upper Canada; the announcement was received with cheers! and when, (after I had left Navy Island,) I was passing from one extreme to the other of the American frontiers for the accomplishment of the objects of the revolutionary movements in which I had embarked, at every stopping place on my route, there was given me the most flattering reception. Indeed, until I withdrew myself from further acting with the Patriots, or Revolutionists of Upper Canada, (which was on or about the 5th of February, 1838,) wherever I appeared I was met with applause and demonstrations of approval.

Had I not then, my Lord, every reason to believe I was pursuing the wishes of my countrymen? and your Lordship could not expect it to be otherwise than that the people of the United States should be disposed to aid any attempt, which seemed to promise success, made to establish similar institutions to their own in these Provinces, although the Government, technically considered, might be opposed. Their every day intercourse with the people of the Canadas, and the very fact of their being satisfied with their own form of government would lead them to the act.

I would suggest to your Lordship that I find in the historical records of Great Britain, innumerable instances in the conduct of the subjects of that country which go far to excuse, if not to justify my own.

If I have read correctly, a large body of British troops, raised in Scotland, with Gustavus Adolphus, traversed a

great part of Europe, and mainly assisted in bursting the galling bands of Germany; and those troops were led by the Marquis of Hamilton, a man of the first distinction and consequence in his country, the personal friend of the king, from whom, however, he had no license.

It is also notorious, and a well authenticated matter of historical record, that during the conflict of arms which took place at the several revolts of the late Spanish Provinces in America, many British gentlemen of known honor and probity of character, entered the contest in behalf of the Revolutionists of those Provinces and served against Spain, while the government of that country was on terms of peace and amity with Great Britain; and largely contributed in achieving the independence of those countries. Among the names of the most prominent of such British volunteers stand those of Lord Cochran and Sir Gregor McGregor; and if my information be correct, this same Lord Cochran, at the time he was carrying his arms against the Spanish Government under the flag of its rebellious subjects, was a Peer of the realm, and held a seat in the highest legislative body of the British Empire.

Also, in 1825, (if I am correct in the date,) another Peer of Great Britain, Lord Byron, joined himself with the people who were then in a state of revolt in one of the Provinces of the Turkish Empire, while the Porte was on terms of peace and amity with the Government of Great Britain; and during his career in the Morea, which was brought to a close in a few short months by his Lordship's decease, he largely contributed to sustain the insurgents: and, also, at or about the same time Lord Byron entered Greece, another gentleman from England, with two hundred British officers, entered that country and espoused the cause of the insurgents of the

Morea, without any permission, as it is known, from the Monarch of their country, and while there was yet no rupture between their's and the government of the Sultan: Although a subsequent act of the British Government would seem a tacit adoption of those proceedings of British subjects; as shortly after the occurrence of the transactions I have mentioned, Sir Edward Codrington, in command of a British naval force, assisted by a French, and a Russian squadron, without a declaration of war, and without any apparent justification, (except as a matter of assistance to the Greek Revolutionists,) attacked the Turkish squadron in the Bay of Navarino, and totally destroyed it; and this act was decidedly approved of by the British Government, and as a mark of honorable distinction for his conduct on that occasion, the admiral had conferred on him the order of knighthood by his sovereign.

Then, by noticing the occurrences of a more recent date, it will be found that but a few years since, an ex-Emperor of Brazil, Don Pedro, engaged in England a number of British officers and soldiers, with whom he sailed from London for Portugal, where by their assistance, he was enabled to effect a political revolution in that Kingdom.

It may be further observed, that at this very time, a body of British officers and soldiers, assuming to be known as a British Legion, is engaged in Spain, in conjunction with a native party, in maintaining a civil war within that country; and this body of British subjects, as it must be well known to your Lordship, was lately commanded and led by a very popular member of the British House of Commons, (8.) who for his gallantry at the

(8.) General Sir William Evans.

head of the Legion, has recently been honored with the order of Knighthood by the sovereign of Great Britain.

It is also true, if public report be not grossly in error, that there are, at this very moment, a number of British subjects engaged in arming and sustaining the people of Circassia, one of the Provinces of Russia, against the Government of that Empire, and as it is said, if not by the expressed consent, without any objection or hindrance on the part of the British Government.

Then, my Lord, if such instances of foreign interference be just, and the British subjects I have mentioned were right in their acts, I am at a loss to discover by what rule I am adjudged a criminal and condemned as a felon.

I allow this principle, my Lord, that if the forces to which I was joined on Navy Island, or at any other place in the Province of Upper Canada, had been attacked by Her Majesty's troops, while I was with those forces, and overcome, it was for the conquerers to give me quarter or not, as they saw fit; and if so made a prisoner, the right to have detained me, without trial, so long as it might please Her Majesty, as a prisoner of war, is not to be questioned. But, I know not where, in the annals of civilized nations, a precedent may be found for the trial of a foreigner, by any court, taken under the circumstances attending my capture. It is true, however, that during a late revolution in Portugal, Don Miguel, a modern Caligula, whose whole history is but the detail of atrocities, upon taking as prisoners some of the British employed against him, caused them to be shot; and that the Spanish Pretender, Don Carlos, has also caused some of the British legion, who had fallen into his hands as prisoners, also to be executed. But, in neither case do we hear of any trials. They were mere acts of expe-

diency, adopted by weak and trembling powers, at the caprice of the moment; and which have been pronounced *murder* by all of the enlightened and civilized of mankind—who would now rejoice as much in the destruction of Don Carlos, as they have done at the overthrow of Don Miguel.

Well seated power and conscious strength is always forbearing and merciful. Injustice and cruelty are ever with the reverse. Bonaparte, standing upon his last foothold in Egypt, and beholding it fast crumbling beneath him, upon the pretext of expediency put to the sword four thousand Turks whom he had captured at Jaffa and El Arish; and a Mexican leader, Santa Anna, lately caused to be massacred some hundreds of unarmed Americans, who had surrendered to him, on the promise of quarter, in an engagement near Goliad in Texas. But, notwithstanding the wholesale murder on the part of Bonaparte, he was compelled to fly from Egypt, and Santa Anna, within the short space of a few days after the perpetration of the horrifying act on his part, was a prisoner in the hands of the compatriots of those whom he had murdered, suing for his own life; and Mexican rule was at an end in Texas.

I am, my Lord, constrained to admit, however, that upon searching the historical records of my own country, I find a very near parallel to this course of conduct pursued towards me by Her Majesty's Government in these Provinces, with this difference, that the material averments contained in the *Charge* preferred against me, did not exist, and have in no manner been proven or substantiated. About twenty years ago, a number of the Indian tribes on the south-western borders of the United States, having made inroads into the country, marauded and pillaged the white settlements, and commenced a

warfare with our people, when the Government of the United States employed General Jackson, with a small military force, to subdue the turbulent Indians. He entered the disturbed district, and there laid his hands on two British subjects, *Arbuthnot* and *Ambrister*, whom he found with the Indians, and who were *charged* with having instigated the indians to commit hostilities against the people of the United States. These men, by an order of General Jackson, were tried by a Court Martial, and executed in pursuance of a sentence of that court. This act of General Jackson, was, however, in no manner approved of by either the people or Government of the United States. It was termed a "cold-blooded murder," and excited the highest indignation on the part of the people; and upon the matter being brought before the Senate of the United States, a committee of that body, to whom the matter was referred, brought in a report on the 24th of January, 1819, reprobating the conduct of General Jackson, in that respect, in the strongest terms. In that report it was said—"In reviewing the execution of Arbuthnot and Ambrister, your committee cannot but consider it as an unnecessary act of severity on the part of the commanding general, (Jackson,) and as a departure from that mild and humane system towards prisoners, which in all conflicts with savage or civilized nations has heretofore been considered not only honorable to the national character, but conformable to the dictates of sound policy. The prisoners were subjects of Great Britain with whom the United States are at peace. Having left their country and united their fates with the savages, with whom the United States are at war, they forfeited their claim to the protection of their own government, and subjected themselves to the same treatment which might, according to the practice and principles of the American

Government, be extended towards those with whom they were associated. No process of reasoning can degrade them below the savages with whom they were connected. As prisoners of war, they were entitled to claim from the American Government that protection which the most savage of our foes have uniformly experienced when disarmed and in our power. Humanity shudders at the idea of a cold-blooded execution of prisoners, disarmed and in the power of the conquerer!" In another portion of that report the committee say—"The principal assumed by the commanding general, (Jackson,) 'that Arbuthnot and Ambrister, by uniting in war against the United States, while we were at peace with Great Britain, became outlaws and pirates, and liable to suffer death,' is not recognized in any code of national law. Nothing can be found in the history of civilized nations which recognizes such a principle except a decree of the Executive Directory of France during their short career of madness and folly, which declares 'that neutrals found on board enemies ships, should be considered as pirates.'"

I have contended, my Lord, as it will be perceived, that I have been tried by the provisions of a law enacted by the Provincial Parliament of Upper Canada, aside from any delegated authority from the mother country, and that the law was therefore void in all its bearings; and I have further contended that if I were guilty of all with which I have been *charged*, there was no usage recognized by the civilized nations of the earth, which would justify a trial on any ground. Nevertheless, I cannot but believe your Lordship will readily conceive that when once put upon trial, though a foreigner, I had a right to all the privileges of a subject, and was entitled to have my case adjudged by the established legal forms of the country, and according to the intent and meaning of the laws by which I

was tried, as expressed in the letter thereof, as much so as if the law had been constitutionally enacted, and I amenable to its provisions. Yet such has not been meted to me!

Every code of laws, civil or martial, provides certain *forms* for the distribution of justice, and every deviation or departure, on the part of judges, from those rules, is no less a violation of the *honor* and *dignity* which belong to the tribunals of the nation, than a wrong to the individual affected by it; and whenever judges step aside from these forms of the law, to bring even the guilty within the pale of their tribunals and judgment, they become themselves transgressors of the law, and are the greater offenders. It was by such conduct alone that the names of a Tresillian and a Jefferies have been immortalized with the most unenviable reputations; and in turning over the many volumes of reported decisions made by British judges in British courts, since the granting of the Magna Charta by King John, to the present day, it will be found that jurist after jurist have declared that in a country of laws, it is not alone sufficient that the offender be adjudged guilty—but *guilty according to the law and the evidence*; and that on trials involving the life or liberty of an individual, a strict adherence to form is in all cases, considered the best security against oppression and injustice.

By the sentence which has been passed upon me, my Lord, and of which I complain, *I stand condemned to transportation, as a felon, for life*; which is no mitigated punishment, but *a sentence worse than death*! According to the terms of the sentence, I am to be loaded with irons, and perhaps chained to some human being most loathsome in person and debased and degraded in mind, and thus dragged from one extremity of the globe to the oth-

er, and there consigned to perpetual slavery, subject to the contumely and lash of some brutal master, or petty official tyrant, with no friends to administer to my distress or soothe my woes, and no companions but the thief, the house-breaker, and the foot-pad. In such a circumstanced existence, death in any shape would be a boon! as from education and natural disposition I am likely to be made to suffer most from such a condition of life. The sentence appears to me, (if intended to be carried into effect,) to be a refinement upon cruelty, which no act that I have been *charged* with could justify; and I appeal to your Lordship to decide, if aught has been *proven* against me which could justify reducing me to the condition of a felon and a slave.

With the hope that your Lordship will find an early and convenient day to look into my case, and that your Lordship will make such a determination thereof as shall be dictated by justice and the laws of the British Empire—this communication,

Is respectfully submitted to your Lordship,
For your Lordship's consideration.

TH: J. SUTHERLAND.

CITADEL OF QUEBEC, }
July 4, 1838. }

NOTE. The preceding communication was conveyed to the Castle of St. Lewis, then occupied by Lord Durham as a Government House, by D. M. Chisholm, Esquire, a captain of the Coldstream Guards, who had been appointed to have the immediate custody of my person; but Lord Durham happening to be absent from Quebec at the time, I was given no reply until the 6th of August, when I received the following note from one of his Lordship's Secretaries:

CASTLE OF ST. LEWIS, }
Quebec, 6th August, 1838. }

SIR—I am commanded by his Excellency the Governor General to acknowledge the receipt of your letter and statement addressed to

him on the 4th of July last, and to inform you in reply that your case has been referred to Her Majesty's Government in England, with whom alone is vested the power of confirming or altering the sentence which has been passed upon you ; and that their decision will be communicated to the Lieutenant Governor of Upper Canada.

I have the honor to be, Sir,

Your very obedient servant.

THOMAS E. M. TURTON,

Secretary to Government.

TH: J. SUTHERLAND, Esquire,

State Prisoner, Citadel.

(B.)

TO HIS EXCELLENCY SIR GEORGE ARTHUR, *Lieutenant Governor of the Province of Upper Canada, Major General, &c. now at Quebec.*

SIR—Since I have been detained a prisoner in this fortress, and now near two months past, the Honorable Charles Buller, Chief Secretary of the Administration of Lord Durham, informed me that a despatch had been received at the office of his Government, notifying “that Her Majesty’s Government in England had directed that I should be set at liberty, and permitted to return to my own country, *on account of the irregularity of the proceedings on my trial.* But, that I should be required to give security not again to enter Her Majesty’s dominions;” and some few weeks since I was further notified by the same honorable gentleman, “that a *pardon* for me had been transmitted by your Excellency to the office of the Government here, but that on the ground of some informality it contained, it was found necessary to return it to your Excellency for correction.”

I have also been informed that my case has been referred to your Excellency, for a final disposition, by Her Majesty’s Government, and that my present condition is entirely under your Excellency’s direction and control; and, learning that your Excellency had arrived at Quebec, I have thought that my situation would be a sufficient apology for troubling your Excellency with this communication.

I beg to inform your Excellency that in regard to the bail which it has been said would be required from me, I have received no notice, as yet, of the form, nor specifically as to the condition; but whatever might have been

the exactions in either respect, I think I should have been able readily to have complied with them, if the proposition to receive the bail had been made any time within five or six weeks after notice was given me that my release had been ordered. The prolonging of my imprisonment, however, to this late day in the season, when there are few persons here from the upper country, will, I fear, render it quite difficult for me to procure bail at this place, should my release be now offered upon such conditions. But, would your Excellency be pleased to order my removal from this place back to Toronto, there, I think, I should find no difficulty in procuring sureties for any required amount. If sent to Kingston, I have reason to believe I could effect as much at that place.

The apparent difficulty which surrounds any attempt of mine to find sureties in any of Her Majesty's Provinces, and more particularly at this place, has induced me to examine the principles of the exaction of bail, and upon such examination, with the knowledge of British institutions I possess, I am unable to discover in what manner security could be taken from me, either to exclude me from Her Majesty's dominions, or to bind me to keep the peace within them, that would be just and binding in law; and on this subject I addressed a paper to the Honorable Charles Buller, (which I have been informed by him was enclosed to your Excellency,) in which I have contended *that there is no statute or law which would legalize the exaction of such bail or security from me*; and I cannot but think that your Excellency will come to the same conclusion, upon examining the paper transmitted to your Excellency, by me, through the Honorable Charles Buller, though all my reasons may not appear cogent, and some of my objections may seem far fetched. Yet, if your Excellency comes to the conclusion that there

is no statute or law in existence, under the express provisions of which I may be required to give security as has been exacted, I trust your Excellency will cause me to be set at liberty in my own country without further delay.

Any undertaking on my own part, which might exclude me from Her Majesty's dominions, would be readily entered into and strictly regarded by me for the sake of my liberty; and if on an examination of the whole matter, your Excellency determines to exact security, the moment I am advised your Excellency is ready to receive it, and I am made acquainted with the form and amount of the security, *I will endeavor to procure it*; and I beg your Excellency will then put me in a condition that shall further the attainment of such security.

I am aware that unfortunately for me, since my capture, and while I have remained imprisoned in these Provinces, I have been made not only the subject of abuse for the newspaper press, but the theme of the resolves of public meetings, which must also be known to your Excellency. But, believing, as I do, that your Excellency will allow neither the pasquinades of the one, nor the reckless advice of the other, to have an influence to prevent my obtaining that speedy relief which is allowed me by the established usages of the country, I feel satisfied that your Excellency will place my release upon the condition of a compliance with no exaction which is not compatible with a liberal application of the laws of the British Empire.

Should any expression contained in this communication, or in the paper from me, put into your hands by the Honorable Charles Buller, appear to have been couched in terms of too much assurance, I beg your Excellency will regard the fault as resulting from the effects of my present unfortunate condition, and acquit me of any intention to appear indecorous. I do not wish, either, to be

importunate, although I cannot but express my desire of a determination of my case. The misfortunes of my life have taught me patience in adversity. Yet, it is natural; and I hope it will not seem unreasonable, that I should greatly desire to be relieved from the tortures of suspense, and a gloomy imprisonment.

Very respectfully,

TH: J. SUTHERLAND.

CITADEL OF QUEBEC, }
October 8, 1838. }

NOTE. To the preceding communication I received no reply from Sir George Arthur, although it was put into his hands while he was in Quebec; and the only answer I received to it from any one was the following note from one of the attachés of Lord Durham:

CASTLE OF ST. LEWIS, }
Quebec, October 9th, 1838. }

SIR—I am directed by the Chief Secretary to inform you that your own bail will be taken here in Quebec. That in addition to your personal security, you will be required to get two securities in the sum of \$2000 each; and that the condition of the security will be, "that in ——— days after your release from Quebec, you shall not be in any part of Her Majesty's dominions."

I am, Sir,

Your Obedient Servant.

EDWARD PLAYDELL BOUVERIE.

TH: J. SUTHERLAND, Esquire,

State Prisoner, Citadel.

(C.)

TO THE RIGHT HONORABLE LORD GLENELG, *Her Majesty's Secretary of State for the Colonies, &c. &c. &c.*

MY LORD—Thomas Jefferson Sutherland, a citizen of the United States of America, now detained a prisoner in the Citádel of Quebec, in the Province of Lower Canada, by Her Majesty's Government, begs leave, again, respectfully to call the attention of your Lordship to the circumstances of his detention and imprisonment.

Could I believe, my Lord, as it was reported to have been said, in effect, a few months since, by an Honorable Member of the British House of Commons, (1.) in his place, "*that Petitions and Memorials for relief seldom arrive at the departments of Her Majesty's Government for which they are intended,*" or, could I believe that when this comes to your hand, your Lordship would not condescend to bestow a few moment's consideration upon the condition of a stranger you now have as a prisoner, I should withhold my pen from these sheets, and resign myself to live out the remainder of my days as the tenant of a dungeon.

But, my Lord, believing it is otherwise, by your Lordship's permission, I would suggest, that having been informed by His Excellency Lord Durham, "*that my case had been referred to Her Majesty's Government in England, with whom alone was vested the power of confirming or altering the sentence which had been passed upon me,*" some time in the month of July last, I drew up a statement of the circumstances of my capture, trial, sentence and other matters connected therewith, alleging error in the proceedings taken against me, from which I desired relief, and directing the same to your Lordship, procured

(1.) Admiral Sir Edward Codrington.

it to be put into the hands of His Excellency Lord Durham, with a note requesting it might be transmitted by him to your Lordship: and having also been advised that a copy of the proceedings of my trial, with my defence, and all the papers and documents connected therewith, had been previously transmitted to your Lordship, I am to suppose, thereby, your Lordship is fully advised of all the original circumstances of my case.

I would further suggest for your Lordship's consideration, that about the 20th day of August last, the Honorable Charles Buller, Chief Secretary to the Administration of Lord Durham, gave me notice "*that a Despatch had been received at his office, [or that a despatch had passed through his office,] for the Lieutenant Governor of Upper Canada, from Her Majesty's Government in England, ordering my release on the ground of the irregularity of the proceedings on my trial.*" But, at the same time he told me "*that I would be required to give security not again to enter Her Majesty's dominions.*" I was not, however, notified of the form of the security that would be required from me until the 8th day of October following, when being informed by one of the captains of the Guards that the Lieutenant Governor of Upper Canada was in Quebec, I addressed him a letter, of which the annexed, marked B, is a copy, (2.) to which I received in answer, a note from the Honorable Edward Playdell Bouverie, one of the attachés of His Excellency Lord Durham, simply informing me "*that in addition to my own recognizance, which would be taken at Quebec, I would be required to give two sureties in the sum of £500 each, conditioned that in—days after I should be set at liberty in Quebec, I should not again be found in any of Her Majesty's dominions; and that such security could alone be taken by the Attorney General of Upper Canada, at Toron*

(2.) The same which precedes this.

to; and that so soon as the Attorney General of that Province should communicate to the Government here, that such security had been filed, I would be set at liberty."

About the first of October last, I addressed a paper to the Honorable Charles Buller, the substance of which is embodied in this communication, objecting to the justice and legality of the exaction of security from me under the circumstances of my case; which paper, I was informed by that Honorable Gentleman, had been transmitted to the Lieutenant Governor of Upper Canada; as with him the disposition of my case was left entirely: and, now, my Lord, having done all within my power to effect, (as I am circumstanced,) for the procurement of the sureties required from me, I have not succeeded in obtaining them, and am still detained under the severest condition of imprisonment, from which I have no good reason to expect release, but from the order of Her Majesty's Government in England, through your Lordship.

I have objected, as your Lordship will recollect, that the proceedings taken against me before a Militia General Court Martial of the Province of Upper Canada, by which I was tried at Toronto in March and April last, were irregular; and those objections of mine it has been conceded, as I am informed, by Her Majesty's Government in England, were well taken; and I have also contended, my Lord, that it is properly supposed a general principle, that the laws of every nation are provided for its own citizens or subjects who receive protection from them, and not for the citizens or subjects of another. That they have reference solely to the inhabitants of the country where the laws are enacted, and have force no further than the territories of the government which makes the laws, extend; and that all who are tried by the laws must be regarded, so far as the matters of the trial are

concerned, as citizens or subjects. Then, if I have been correct in my position, I once having been put upon trial before a court of one of Her Majesty's Provinces, to be judged by Her Majesty's laws for that Province, (as it was alleged,) although a citizen of the United States of America, and not a subject of Her Majesty, and tried as a citizen of the United States, (which I conceive to be an anomaly in criminal proceedings;) by being put upon such trial, I was thereby vested with all the privileges and rights of a subject, in the fullest extent, so far as the trial and the matters connected therewith were concerned: and I will not believe you will tell me, my Lord, that Her Majesty has one rule of law for her own subjects, and another for the citizens of other countries; and as Her Majesty's Government have conceded the irregularity of the proceedings on my trial, and on that ground have ordered my release, and if I understand correctly, not at all with regard to myself, but as a matter of public justice, and respect for the laws of the British nation, which Her Majesty's Ministers deem to have been violated. Then, it follows, if I have been illegally condemned, as has been urged and admitted, the natural as well as legal presumption, (without reference to what appeared on the trial,) is that I should have been acquitted had the proceedings been regular; and if acquitted, the right of a subject which had been conferred upon me, guaranteed a full and perfect discharge from every part of the accusation; and I do think, my Lord, that such a conclusion is by no means the result of a strained argument.

With the people of the most enlightened and polished nations, such acts as are deemed to be crimes or offences, are made conventional matters; constitutions of government and laws are formed for their adjustment, and nothing is left open to the caprice of the individual who may

chance to exercise an executive or judicial authority. The offence is clearly defined and the laws made specifically to provide the process for the application, as well as the penalty itself. So I have understood it to prevail with the people of the British Empire: yet, by Her Majesty's Government, in violation of this rule, as I believe, I find myself now detained a prisoner.

In reviewing the circumstances of my detention, I have looked in vain for a motive of national interest or expediency; and have alike failed to discover wherein a public benefit to the British people could possibly result from it; and in the absence of the appearance of any fact which could lead me to suppose that in my present imprisonment any such object is intended or sought, I can but regard my detention at this time as the result of personal animosity and prejudice; it appearing palpable to me that I am not now deprived of my liberty in accordance with any regular course of the laws and customs of the British Empire. I have been charged, it is true, with the commission of offences against Her Majesty's laws, in the Canadas, and by those laws I have been put upon trial. But, then, there has been an entire failure, regularly to fix upon me the penalty of those laws by which I have been tried; and when by their provisions I am unquestionably entitled to my discharge from further jeopardy or harm, I am still held, in violation of those laws, and subjected to a degrading imprisonment. I am not conscious that my conduct in any instance or respect, has been such that it should deny me the grace extended to others taken and charged under similar circumstances with myself, or which could be made to warrant, (even as a matter of expediency,) a violation, by the authorities of the government, of the established laws of the British Empire, for the mere purpose of bringing harm to my person.

As I have neither interest nor property within these Provinces, [never having resided for any time in any of Her Majesty's dominions as an inhabitant,] I have assured the Lieutenant Governor of the Province of Upper Canada, that I was prepared to pledge myself in any manner that might be prescribed not again to enter any of Her Majesty's dominions, without first having obtained the consent of the Government thereof, upon the condition of being set at liberty and permitted to return to my own country. But I have been told, however, that my word is valueless in this respect, and that I must give other security before I can be discharged. Under these circumstances, I desire to be allowed to inquire into the justice and propriety of such a demand, as I believe I shall be able to convince your Lordship, in this paper, that it cannot be sustained by the laws and usages of the British Empire.

If I am, my Lord, correctly instructed in the law, in order to collect the penalty of a bond or recognizance after the condition has been forfeited, recourse to a court of law would be necessary, and in such a court no collection of the penalty can be made unless the bond or recognizance shall appear to have been taken in pursuance of the provisions of some express statute or other established law of the Province or Empire; and upon some previous inquiry, I am led to believe, there is no statute, or law, in existence and in force, in any of Her Majesty's dominions, which would give validity to bail or security taken from me under the circumstances of my case. In the civil law, it is understood, obligations are created between man and man by consideration and agreement, and that the least restraint of a party at the time of the making of an obligation, invalidates the whole. Not so in the operation of the criminal law. There, every exaction is made while the party from whom it is taken is, or is

supposed to be, under restraint ; and therefore the law allows no exaction to be made except when authorized by the express provisions of some statute, or in the course and practice of the common law, which is equally expressed and defined.

It will be recollected I have neither been indicted, nor charged with offence in any manner, in any court, or before any officer known to the common law ; and only when such charges have been preferred on oath, and in some manner substantiated, could bail be required of me according to that law ; as also, it should be recollected that the only proceedings which have been taken against me, were before a Military tribunal which knows nothing of bail or sureties, and which has long since been dissolved, and ceased to exist ; and no court will be found, I apprehend, to recognize the right of executive power, by a mere *sic volo*, to give validity to bail taken aside from the established provisions of the law. But, should it be urged, that as I now stand convicted of a charge, and under sentence, therefore the government may make it a condition of my release, that I give such security : to this I reply, the conviction is admitted to have been illegal, and therefore carries nothing with it ; and had the conviction been regular, it would not be different, as it was a conviction by a Court Martial, which I understand the law and the practice to forbid, even Majesty itself, to change or alter ; (except as an act of mercy in answer to the prayer of the condemned ;) though it may be mitigated in its extent, or annulled for irregularity by the proper officer. Nevertheless, the sentence against me is already altered, as instead of being imprisoned in pursuance of the award of the Court Martial by which I was tried, I am now detained in default of sureties to abstain from that which it is *not unlawful* for me to do.

When we come to look for a statute under the provisions of which security might be required from me, "not again to be found within any of Her Majesty's dominions," we find; my Lord, that there is a treaty (3.) in full force and effect between the United States of America, of which Republic I am a free citizen, and the United Kingdom of Great Britain and Ireland, whereby the right is secured to me, as a citizen, freely and at all times, in a peaceable manner to enter and come into Her Majesty's Provinces in America, for the pursuit of commerce; and while that treaty remains in force between the two countries, no statute, or law, could exist in Her Majesty's dominions to exclude me from them, or to authorize the exaction of security from me to abstain from the exercise of the privilege granted by the treaty, in good faith with the government of my country, and without repugnance to that treaty, which is a part and parcel of the laws of the British Empire; and I believe we should find none; and without such a statute, the bail, if taken, would be altogether nugatory.

(3.) EXTRACT FROM JAY'S TREATY.—"It is agreed, that it shall, at all times, be free to his Majesty's subjects, and to the citizens of the United States, and also the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America, (the country within the limits of the Hudson's Bay company only excepted,) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other. But it is understood that this article does not extend to the admission of the vessels of the United States into the seaports, harbors, bays, or creeks of his Majesty's said territories; nor into such parts of the rivers in his Majesty's said territories as are between the mouth thereof, and the highest ports of entry from the sea, except in small vessels trading bona fide between Montreal and Quebec, under such regulations as shall be established to prevent the possibility of any frauds in this respect; nor to the admission of British vessels from the sea into the rivers of the United States, beyond the highest ports of entry for vessels from the sea. The river Mississippi shall, however, according to the Treaty of Peace, be entirely open to both parties; and it is further agreed, that all the ports and places on its eastern side to whichsoever of the parties belonging, may freely be resorted to, and used by both parties, in as ample a manner as any of the Atlantic ports or places of the United States, or any of the ports or places of his Majesty in Great Britain."

It cannot be denied, that if I had been *an inhabitant* of any of Her Majesty's dominions, and committed offences against her laws, I might have been tried by those laws, and if convicted, sentenced to banishment; and if regularly convicted, so as to give the government legal custody of my person, if I had been sentenced to other punishment of a severer nature, that sentence might have been changed or altered to banishment. But, I have *never been an inhabitant* of any of Her Majesty's dominions, nor had I passed a night under the protection of her flag, until I became a prisoner; and it would be necessary that I should first have come peaceably within Her Majesty's dominions, and been amenable to her laws, which I have not, before I could legally be banished from them. In all the proceedings which have been taken against me by Her Majesty's Government, I have been recognized as a citizen of the United States, to which country I belong, and here stand *legally convicted* of no offence.

Then, again; the bail required, presents a serious objection in its form and effect. According to the procedure of British Criminal Jurisprudence, (if I rightly understand it,) the sureties, whether they be taken for an appearance, for the peace, or for any other purpose, taken in pursuance of the provisions of a statute, or in the course and practice of the common law, receive the principal into their custody, and are supposed to retain him to answer the conditions of the bond or recognizance, and by the established laws of England and the every day practice of Courts of Criminal Jurisdiction, bail, or sureties, at any time they fear their bond or recognizance will be forfeited by the principal, or when for any reason they become dissatisfied with remaining longer as bail or sureties, by the aid of a bail piece, or certificate of recognizance, are allowed to lay their hands upon the principal and surrender him to the

Court or Judge having cognizance of the matter ; and on making such surrender, the bail or sureties are exonerated ; and the principal neglecting to give new bail may be committed. But, this privilege of sureties, which is founded in justice and equity, would be denied those required of me ; and the moment they signed, they would be perpetually and irrevocably bound, as I, instead of being placed in their custody, as in the usual manner of bailment, to answer the conditions of the recognizance, would by the very condition of the security required, be placed out of their control. It strikes me as reasonable, that bail taken in such a manner, so contrary to the spirit of British institutions, and as I believe, entirely without precedent, should the bond or recognizance which might be taken from me, be forfeited, the sureties, by the principles of justice and of law, would be entitled to relief.

In the proceedings of the criminal law, bail is only required, wher the party from whom the exaction is made, is under a degree, at least, of impeachment of character ; and in the letting to bail, regard is had, no less to what the bail may have power to effect and enforce, than to the probable good faith of the principal towards the sureties ; and the requirement of bail is always accompanied with the belief, that there will be a due compliance with its conditions ; and it is never taken with the view to the acquisition of the amount of the penalty. Therefore, it is never required for the performance of more than is practicable for sureties to ensure by reasonable exertions. Hence arises the practice in criminal courts to grant relief to sureties, wher recognizances are forfeited, whenever the bail come in, and establish to the satisfaction of the court that they have used due diligence to procure a performance of the conditions of the recognizance, and that the undertaking has been in good faith on their part.

Reasoning thus, if I were to be required to give security to remain in this or any of Her Majesty's Provinces, the undertaking on the part of sureties for that purpose, would be feasible enough. But who will suppose that the two sureties I am required to give, would be capable, with their own might, of keeping me out of Her Majesty's dominions, when I am required by the conditions of the security itself to go beyond their reach?

The effect of this requirement of bail from me is a sentence of banishment from Her Majesty's dominions; and it is common, and I believe reasonable, to suppose the government fully competent, without extrinsic aid, to enforce the sentence of its courts and the execution of its laws; and I do not understand, my Lord, that in case of the banishment of a subject by sentence, or by the commutation of another sentence, it has been usual in the practice of Her Majesty's Government, to require security against a return; although a subject might be supposed to be among, or in, the vicinity of his friends, and as having the ability of giving such security, if required; which supposition cannot be applied to me, a foreigner and a stranger in the land.

It has come to me by information I suppose to be authentic, that Her Majesty's Government in England have decided in the case of Thomas S. Brown, and others, "that no person can be legally banished from Her Majesty's dominions, *without trial*." Then, I may ask what is the difference in value between *an illegal trial*, and no trial at all? In my case, I was illegally tried, and on that ground Her Majesty's Government have ordered the sentence of the Court against me to be vacated, as a matter of respect for the laws of the nation; and as it has been declared that in my case there was a departure from the established forms of the law for the distribution of

justice, it is reasonable to believe it had been the intention of Her Majesty's Government that I should have been absolved from every effect of the sentence; as otherwise, there would be no propriety in meddling with it. That no one should be twice judged for the same offence, is a principle embraced, as I have read, within the British Constitution; yet, I am re-judged, by executive authority, on the grounds of the same *Charge* upon which I have been once adjudged by a Court Martial, and an exaction made as the condition of my release, which is in itself a sentence of banishment, as much so in its effect as the sentence passed upon Thomas S. Brown, which has been *annulled*, as not having been based upon proper legal proceedings. But this demand of me for security, in its present effect, operates upon me as a much severer sentence. If it was merely banishment in its ordinary course, I should have little reason to complain. As it is, however, in default of a compliance with the demand for security, which I have no power to give, I am consigned to the worst condition of imprisonment. Again, my Lord; Sir William Blackstone in the first volume of his Commentaries informs us "that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless *by the sentence of the law*;" and he further remarks "that there is no power in the country, except the authority of the Parliament, which can send any subject of England out of the land against his will—no, not even a criminal;" and will you, my Lord, treat a stranger with less regard to his rights than a subject, after having so far naturalized him, as to put him on trial by your laws?

If the object be to exclude me from Her Majesty's dominions, and I were able to give the security exacted, the

sureties must necessarily, (as required,) be subjects and inhabitants of these Provinces ; and then, the consequence of the security would be no more than the change of plighted faith from the Government to the two sureties ; as they could have no control over my person. Will it then be presumed that I should regard as less binding a promise made, on my own motion, to Her Majesty's Government, than I would one made to two private individuals of Her Majesty's subjects? Subjects, who may be to-day right loyal, though to-morrow they may change their opinions and join others in another attempt to subvert Her Majesty's Government in these Provinces ; and having staked their whole fortunes, as well as their lives, by their own acts, may then desire me to assist them in the accomplishment of ends, from which to restrain me, (as I am to suppose from the nature of the security required,) they had become my sureties ; and they would be able to approach me with the argument " that the government having regarded my word as nothing, I was bound to place no more value on it than Her Majesty's Government had accepted it for." As to my own recognizance, it would be as effective to exclude me from the country, taken without, as with, sureties.

If this required security can be legally exacted from me, there are greater hardships attending the demand, than might be apparent at first view. It is often thought, my Lord, by those fortunate people who have never been required to furnish a security in their lives, that a man possessing any character at all, could hardly be without some friends, ready to perform the kind office of sureties when desired. But, under the most ordinary circumstances, fortunate indeed must be the man, (however exalted his character, or however much the bright eye of friendship may have glistened around his path,) of whom

bail has been required by the hand of the law, and he has not become fully sensible of this general truth, sung by a once well known British bard :

“ Friendship, alas, is but a name,
A charm that lulls to sleep ;
A shade that follows wealth and fame,
And leaves the wretch to weep.”

Where, then, shall I expect to find sureties to sign for me under the unusual, and as I think, most extraordinary conditions required? If I have friends, they are citizens of a foreign country to this, residing at a great distance from these Provinces ; and should they offer themselves as sureties for me, they would not be received, as they have neither estates nor effects within Her Majesty's dominions.

In these Provinces I have no personal friends, nor even acquaintances ; and in my previous communication, I have stated to your Lordship the full extent, and all of the circumstances of my connexion with the political affairs of Upper Canada : to the people of which Province, I am now to look for bail. Had I, my Lord, been engaged in a successful operation, it can hardly be doubted but I would then have been able to behold friends around me. Now it is very different. If there were of the inhabitants of that Province, persons who might have been willing to make themselves responsible for my release, some of them are now in the same unfortunate condition with myself ; others have fled from the country, to avoid such imprisonment ; while some have been expatriated by the government, and others have expatriated themselves ; and, as of the persons who have been charged with political offences in that Province, there having been lately a great number discharged upon bail, it is reasonable for me to believe that many individuals who might have been disposed to sign as sureties in my behalf, have already en-

cumbered themselves to an extent in that way, which entirely forbids their now offering themselves for me. There are others whom I apprehend would consent to enter the required security for me could they do so without subjecting themselves to a charge, or suspicion, of disloyalty ; and, as they fear, even insult, for doing so. I am forced to this opinion, from a knowledge of an attempt made by private individuals, and as I believe, for private motives, to influence the Government unfavorably towards me ; and therefore, I may now expect those persons will procure every obstacle within their control, to be thrust in the way to the attainment of my liberty.

Again, my Lord ; instead of having been retained in the Province of Upper Canada, where I was charged and tried, and among the people from whom I am now required to procure two sureties, I have been removed into this Province, six or seven hundred miles distant, where I am a stranger, and where I had never before placed my foot upon the soil. Here I have remained confined in a dungeon, and not permitted to make acquaintance, hold intercourse, or even speak to any individuals, except the military gentlemen under whose charge I am. Thus, when I am asked for bail, the very means of procuring it, as it is plain, are withheld from me ! I can see no individuals to inspire them with confidence to become my sureties, nor to appeal to their sympathies in my behalf. I am not now, nor have I been allowed to address any person by letter, except it be an open communication ; and I have reason to believe there are persons in the Province of Upper Canada, who would cause the security required for my release to be filed for me, could I see them, or address them in such a manner as would be acceptable to them ; *but they will not receive a letter from me which has passed unsealed through the hands of third persons.*

Thus circumstanced, my Lord, while imprisoned in a foreign country, as much cut off from the world as if I were confined, can it be expected that I, without friends to act in my behalf, or even the privilege of confidential correspondence, should be able to procure bail in another foreign country, where I am also a stranger? I am also surrounded by additional difficulties. There are other individuals who have been concerned in the late attempt to effect a political revolution in the Province of Upper Canada, who by the assistance of their friends, with misrepresentation and falsehood, have labored to magnify my acts, and give them an importance they have never in fact possessed; and they have attributed to me conduct I had never conceived, and proceedings I had not participated in, with the intent to throw their own acts, or those of their friends, in the shade, and to divest them of their due importance, in order to screen themselves from threatened punishment.

Now, if I were put in a condition to bring my case before one of Her Majesty's superior courts of law, I should not fail, there to procure an order of prohibition against the sentence which has been passed upon me, when an unconditional release would follow; and I cannot refrain from the inquiry of your Lordship, if it be compatible with even handed justice, longer to detain me in default of the sureties required?

How other men may feel in like circumstances, my Lord, I know not; but as for myself, it required but a portion of that pride of spirit which is in accordance with my nature, to make me prefer death in any shape, to a life of prolonged misery and degradation. Hence it has been impossible that I should regard the sentence which has been passed upon me as one of any mitigated severity. If the act of Her Majesty's Govern-

ment in making void that sentence is only to vary my condition so as to consign me to the narrow precincts of a dungeon, where, shut out from the face of heaven, with my steps circumscribed to twice the length of my body—I am to breath over the same atmosphere day by day for an unlimited period, trusting to the mercy of my God to forgive my sins, I could no longer dread the approach of the moment that should release me from the accumulated miseries of my life.

This paper, my Lord, I have drawn up in my cell, by the aid of a rush light, without reference to books and authorities, for I have none to refer to; and without consultation with friends, or advice of counsel, as I have neither here to confer with. The statement of my condition may, perhaps, seem a florid account, but I assure your Lordship, I have given it no shade of coloring not its own. The opinions I have advanced are the unaided result of the moment's reflection; and although I may have in some measures misapprehended the letter, or spirit of British institutions and laws; and though I may have advanced principles not sustained by the written authorities of the nation, or though I may have wandered from the path of strict reasoning, yet if I have been correct in any one point, I trust your Lordship will allow such argument to have its full force and effect, and that your Lordship will so consider my case, as to direct that I be immediately restored to my liberty, and permitted to return to my own country, without further detention.

While I have urged this, my appeal, in that serious and firm language which I deemed most compatible with a due regard to myself, I have endeavored to avoid any expression which might seem indecorous; and I assure you, my Lord, it has been my earnest desire, to approach your Lordship with this communication in the

manner and with that respect to which the exalted station and character of your Lordship is entitled: and with the hope that it will receive the early and favorable notice of your Lordship,

It is very respectfully submitted,

For your Lordship's consideration.

TH: J. SUTHERLAND.

CITADEL OF QUEBEC, }
Nov. 1st, 1838. }

NOTE. I arrived at Quebec on the 10th day of June, 1838, and was placed in confinement in one of the *casemates* of the Citadel, in company with Theller, Dodge and seven other Americans; where I remained until the 20th of August, when I was removed to a room in another part of the Citadel, which I occupied by myself. This was done by the officer of the Coldstream Guards, in whose immediate custody I was, on learning that an order had been sent out by Her Majesty's Government in England for my liberation, which he supposed would be immediately carried into effect; and as he informed me, "because he was apprehensive that I might, if I was allowed to remain with the others, enter into some plan for their escape, in which I could assist them after my own liberation."

Previous to my removal, a plan had been formed to effect an escape—but no steps had as yet been taken to carry it into operation. But, when the information was received by Theller that he was to be sent to England *to be transported*, he resolved, with the others, to make the attempt to get away. As I was expecting soon to obtain my liberation from the Government, I had no desire to attempt an escape then, (and I was more particularly debarred, having obtained a number of privileges, among which was that of being out during the day time accompanied by a sergeant, and to ramble through the works, by pledging myself to Sir James Macdonell not to engage in any such undertaking,) but was disposed to afford Theller and the others every facility to do so; and for this cause, when the escape was effected, I had taken from me all the privileges I had before enjoyed, and was thrust into the *black hole for five weeks*; and it was during my residence in the black hole that I penned the preceding letter. Some months after, I was sent into Upper Canada, and there unconditionally released.

APPENDIX.

MEMBERS OF THE COURT.

Names of the Officers who composed the Court Martial convened at Toronto on the 13th day of March, 1838, for the trial of General Sutherland, with their several additions.

COLONEL JARVIS, PRESIDENT,

Member of the Provincial Parliament of Upper Canada ; Justice of the Peace ; Commissioner of the Court of Requests ; Colonel in the Militia, &c. &c. &c.

COLONEL KINGSMILL, *

Half-pay Captain in the British army ; Collector of Customs at Port Hope in Upper Canada ; Justice of the Peace ; Commissioner of the Court of Requests ; Colonel in the Militia, &c. &c. &c.

LIEUTENANT COLONEL CARTHEW,

Half-pay Lieutenant in the British army ; Deputy Collector of Customs at Toronto in Upper Canada ; Justice of the Peace ; Lieutenant Colonel in the Militia, &c. &c. &c.

LIEUTENANT COLONEL BROWN,

Half-pay Lieutenant in the British army ; Collector of Customs at Coburg in Upper Canada , Justice of the Peace ; Major in the Queen's Rangers ; Lieutenant Colonel in the Militia, &c. &c. &c.

MAJOR GURNETT,

(A naturalized citizen of the United States,) Clerk of the Peace in the Home District of Upper Canada ; Justice of the Peace ; Commissioner of the Court of Requests ; Alderman of the City of Toronto ; Major of the Toronto City Guards, &c. &c. &c.

MAJOR DEWSON,

Quarter Master of the 15th Regt. of Foot in the British army ; Justice of the Peace ; Major in the Militia, &c. &c. &c.

CAPTAIN POWEL,

Barrister at Law ; Mayor of the City of Toronto in Upper Canada ; Justice of the Peace ; Captain in the Militia, &c. &c. &c.

CAPTAIN FRY.

COLONEL FITZ GIBBON, JUDGE ADVOCATE,

Half-pay Captain in the British army ; Clerk of the Provincial Parliament of Upper Canada ; Justice of the Peace ; Colonel in the Militia, &c. &c. &c.

FIRST DAY.

TUESDAY, MARCH 13, 1838.

PURSUANT to the orders of Sir F. B. Head, Lieutenant Governor of the Province of Upper Canada, a Court Martial was convened for the trial of THOMAS JEFFERSON SUTHERLAND, a citizen of the United States of America, (late Brigadier General in the Patriot army of Upper Canada,) at the Garrison, near Toronto, on the 13th day of March, A. D. 1838. At ten o'clock in the forenoon of that day, the Prisoner, General Sutherland, was brought before the Court, and the *Charge* upon which he was to be tried, with the several *orders* for the convening of the Court, were then read by the Judge Advocate. This being done, and the Judge Advocate having furnished the Prisoner with a copy of the *Charge*, and of the law under which it was drawn up, and with a copy of the Militia laws of the Province, by the provisions of which the Court Martial was said to have been organized, the President adjourned the Court till 10 o'clock A. M. of the next day.

[I arrived in Toronto about mid-day on the 12th of March, and having been selected by Sir F. B. Head and his Executive Council as the first to be made a sacrifice, it was at ten o'clock on the morning of the next day that I was arraigned before the Court Martial, to be prepared for the scaffold which was then yawning for its victim.]

SECOND DAY.

WEDNESDAY, MARCH 14, 1838.

The Court met pursuant to adjournment. Present the same members as before. After some proceedings which

were merely preliminary had been gone through with, the President adjourned the Court till 10 o'clock A. M. of the 16th day of the same month.

THIRD DAY.

FRIDAY, MARCH 16, 1838.

The Court met pursuant to adjournment. Present the same members as before. Without proceeding with the trial, the President adjourned the Court till 10 o'clock A. M. of the 19th day of the same month.

FOURTH DAY.

MONDAY, MARCH 19, 1838.

The Court met pursuant to adjournment. Present the same members as before. Upon the opening of the Court, the Prisoner, General Sutherland, was brought before it, and asked by the Judge Advocate, "if he had any objections to make to any of the members of the Court?"

The following objections were then delivered to the Court, in writing, by General Sutherland.

1st. I object that Major Dewson, who has taken his seat as a member of this court, is an officer, on full pay, in the regular forces of Her Majesty; and that he is, therefore, incompetent to sit on this Court Martial, which the laws require to be composed exclusively of Militia Officers.

2d. I object that the President of this Court has never before sat on a Court Martial.

3d. I object that one half of the members of this Court have not before sat on a Court Martial.

The Court was then cleared, and on its being again opened, and the prisoner brought in, he was informed by

the Judge Advocate that the Court had decided that his objections were not well taken.

The prisoner, General Sutherland, then delivered to the Court, in writing, several other objections to its constitution; which were alike ruled against by the Court; and it also refused to enter them on the minutes. The members who had first taken their seat were then all sworn.

[Notwithstanding a number of the officers composing the board had served in the British regular army, in the proceedings of this Court Martial, there was but a little observance of the established rules and practice of such tribunals. In taking their places, the President was seated at the head of the board, with the Judge Advocate immediately on his right, seated as one of the members of the board, and indeed acting as such. This should not have been. By the rules and practice of Courts Martial in the British army, in the formation of a board of Court Martial, the President is seated at the head of the table. Immediately on the right of the President is placed the member highest in rank. The next in rank on the left; and so on, right and left, alternately, according to rank, until they are all placed. The Judge Advocate has his seat at a separate table, on the *left* of the President; and the accused is similarly placed on the *right*. While imprisoned in the Citadel of Quebec, I was present at a number of Courts Martial, convened at that place of officers of the British regular army, and I observed that such was their order of arrangement. On my trial I was furnished a table and a seat on the *left* of the President of the Court. In taking a vote, the Court Martial by which I was tried proceeded without any order, commencing by taking the vote of one member at one time, and that of another, at another time. By the established practice of Courts Martial in the British army, the vote of the officer lowest in rank on the board is taken first; and then that of his next superior, and so on, up to the President, who is not required to give his vote, unless there be a tie of the members'. This practice has been founded upon the supposed influence that an old and experienced officer might have over a subordinate, who may be a youth of

inexperience ; and it is adhered to in order to prevent the vote of the one controlling the other. The principle upon which this practice is founded, is carried still further in the practice of Courts Martial in the French army.— There, a vote is taken by delivering a sheet of paper to the junior officer of the board, who writes on it his vote, and then folding over the paper so as to cover it from view, hands the sheet to the next superior in rank, who does the like, and hands it to his next superior ; and thus the paper is passed from member to member, until it arrives to the hand of the President, who unfolds it and declares the result. I was required on my trial, to reduce the questions I propounded on the cross-examination of witnesses, to writing, before they would be accepted and considered by the Court. This requirement was in accordance with the rules and practice of Courts Martial ; and may be regarded as proper in order to prevent confusion. On the trial of officers this rule is generally adhered to ; and when a common soldier is on trial, the Judge Advocate usually reduces his questions to writing for him. It is also the practice of Courts Martial to allow no individuals to be examined as witnesses who have been present during the examination of a previous witness on the same trial. To enable the Court to preserve this rule, and in order to put the accused in possession of a perfect knowledge of the character of the testimony which is to be adduced against him, it has been established as a rule, that the Judge Advocate shall, on delivering a copy of the charge to the accused, furnish him with the names of the persons whom he intends to adduce as witnesses ; and none but those whose names have been furnished to the accused will be allowed to be examined. The accused is also required, at the opening of the Court on the first day, to furnish to the President the names of his witnesses, that they may be excluded during the examination of other witnesses, or to take care himself that none of them are present ; for the Court will not permit him to call and examine any who have been present at the examination of others. So far as this rule became applicable on my trial, it was adhered to. For the trial of officers and soldiers of the military forces of any country, a Court Mar-

tial constituted of officers of the same forces, has stronger guards against oppression and unjust condemnation, than the tribunals of the civil law. A Court Martial is instituted, in every case, for an inquiry and adjudication of specific matters ; and when that is done, the tribunal is at an end. The officer who is a member of a Court Martial to-day, to-morrow may be arraigned himself before a similar Court, of which the officer on whose conduct he may have just passed, might be a member. For this reason it is not to be supposed that any officer would be likely to vote for the application of a principle, or rule of practice he would not be willing to have applied to himself. The common soldier, in a certain sense, is the tool with which the officer operates ; the stock on which he speculates for military fame and glory. Hence if the common soldier be put on trial, though he is not tried by his peers, the interest which every officer will feel in his preservation, must necessarily render him secure from oppression and wrong. But, when a Court Martial is resorted to for the trial of a stranger or foreigner, it is without these guards *to protect him* ; and he is left open to the greatest violence and wrong.]

The President then asked the prisoner, General Sutherland, whether he said *guilty or not guilty to the Charge?* and he answered, "NOT GUILTY."

REPORT OF THE TESTIMONY.

JOHN PRINCE, (1.) Lieutenant Colonel in the Militia of the Province of Upper Canada, being duly sworn on the holy Evangelists, states to the Court :

That on the *fourth day of March*, instant, he was re-

(1.) This John Prince, who has become of late somewhat notorious on this continent as the violator of the rules of civilization and the common rights of man, is said to be a native of England. He was born, some forty-five or fifty years since, at Quedgley Green, in the county of Gloucester. At an early age he was apprenticed to an Attorney, and upon being admitted to the bar, commenced practice as an Attorney at Cheltenham, with one Stafford as a partner. Subsequently, Prince procured himself to be appointed Clerk to the Commissioners of Roads. By means of this office, as it is said, he got into his possession two or three thousand pounds of the public funds, with which he decamped, and came to the United States. He first landed upon our shores at the city of New-York ; and from thence he pursued his way into the interior until he arrived at Detroit, in Michigan, where he put himself down, with a view of making that place his permanent residence, and embarked in the business of smuggling. But apprehending that he might be looked after by the Commissioners of Roads, whose coffers he had defrauded, and observing the ready intercourse and communication which existed between the city of New-York and Detroit, he deemed himself unsafe at the last mentioned place ; and left that, and crossed over to the Upper Canada shore, and stowed himself away on a piece of land in the wilderness of the Western District of that Province. There he remained safe and secure for a number of years, engaging himself principally in smuggling ; for which his natural disposition for duplicity and scheming peculiarly fitted him. Subsequently becoming acquainted with a *lady* residing in the part of the Province where he was located, who was in possession of a considerable amount of money and property, but no character, having lost her claim to the latter, by certain derelictions from the principles and rules of chastity ; to her he married, and by adding her effects to his plunder, he was enabled to go back to England and make a compromise with the defrauded Commissioners of Roads, and still hold the possession of a considerable amount of property. Upon his first arrival at Detroit, and during his early residence in Upper Canada, Prince professed himself a Democrat in principle ; and in Canada he adhered to the Radical Reform party. Soon after he had effected a compromise with the Commissioners of Roads in England, he put himself up as a candidate for a seat in the Provincial Parliament of Upper Canada, to represent a county of the Western District, and by the votes of the Radical Reformers obtained an elec-

turning from Gosfield, in the Western District—was travelling in a sleigh along the shores of Lake Erie on the Canada side, and at about half past four o'clock, P. M. *he saw at a great distance two objects on the ice*, which he thought were men—that he was in company with Captain Girty and Mr. Haggerty; and they had been with him on Pelé Island on the preceeding day, with the forces under the command of Colonel Maitland—that in about *twenty minutes* after he had seen the objects, he saw that they were men *coming from the Michigan shore towards the Canada shore*—that he conceived them to be spies, and determined to intercept them if possible—that having met some people who accommodated him and Mr. Haggerty with fresh horses and sleighs, (2.) Mr. Haggerty got into

tion. Immediately after taking his seat in the Provincial Parliament, however, he abandoned his reform principles, and joined the ultra loyal party who sustained the measures of Sir F. B. Head; and upon the first movements of the Revolution which took place in that Province, in 1837, he was found among the most active of the supporters of the British Colonial authorities. To enable him efficiently to act in such respect, Sir F. B. Head commissioned him as a Justice of the Peace, and as a Lieutenant Colonel in the Militia of the Province.

Upon the convocation of the Provincial Parliament of Upper Canada, in 1837, by Sir F. B. Head, Prince took his seat, and during that memorable session, procured a law to be passed, authorizing him to practice as an Attorney, Solicitor and Barrister, in the several courts of law and equity of the Province.

The residue of the history of this man is too well known to need recounting in this note.

(2.) On the morning of the 4th of March, 1838, I had proceeded from Detroit down to Gibraltar, a small village or landing place, situated at the head of Lake Erie, nearly opposite to Amherstburgh in Upper Canada, and at the distance of 18 or 20 miles from Detroit. My intention had been, on setting out from Detroit, to proceed to Sandusky in Ohio, by the way of Gibraltar, Monroe and Perrysburgh, in order to make an effort to recover property of which I had been robbed, and to meet those who had been guilty of the robbery, who I had been informed had gone to Sandusky by that route. But, at Gibraltar, I was advised not to go on by the way of Perrysburgh; and in accordance with the advice I had received, I changed my intention, and resolved to proceed across the ice, which then covered the waters at the head of Lake Erie, on a right line to Sandusky, whereby I could have gained Sandusky in travelling a distance of only about one-third of that by the way of Perrysburgh; and in advance of the persons of whom I was then in pursuit. The roads were most intolerably bad, and this was one of the facts which

one of the sleighs and witness into the other—that he had previously prevailed on Captain Girty, who was unwell

recommended to me the measure of crossing upon the ice, which I was at the time informed I could do only on foot, as the ice was known to have been broken and separated at the head of Lake Erie, on a line from Point Mouillee in Michigan to Hartly's Point in Upper Canada; and this would prevent the crossing of teams, as it was supposed, though it allowed travellers on foot to get over. At about 15 minutes before 12 M., I set out on foot from Gibraltar, accompanied only by a single individual, (a lad some sixteen or seventeen years of age,) and proceeded on the ice down along the shore of Michigan, until I arrived at the place where the ice had been broken and separated, (which was in the neighborhood of Point Mouillee,) but, there I found that an east wind had closed it again so as to render it not only convenient for persons on foot, but also for teams, to get over. From thence I travelled in a *south-easterly direction*, (that being the course for Sandusky,) and had gained the distance of four or five miles below the fracture in the ice, (which had brought me very near a schooner, that was there frozen in the ice, and in the neighborhood of the Island called the West Sister, which was then fairly within my view,) when on turning my eyes to the rear, I perceived two objects on the ice which I conceived to be individuals travelling on foot in the same direction I was then pursuing. After they had crossed the fracture in the ice, however, and had come on some distance towards me, I discovered that the objects I had before noticed, were not single individuals on foot, but two sleighs, and that they were followed by a third, close in the rear. But, as I had observed that they were pursuing the same route travelled by myself, I did not suspect that they intended harm to me, nor was I so advised until the two sleighs in advance had come up to within about fifty yards, and a number of men they contained, armed with muskets, swords and pistols, got out and commanded me to halt; and their leader, who was this John Prince, declared me to be a prisoner.

I had no means of conceiving, nor did I ascertain why I had been thus pursued and captured, until after my trial at Toronto. Subsequent to the trial, and while I was being conveyed as a prisoner from Toronto to Kingston on board a steamer, I became acquainted with a Lieutenant of Her Majesty's service, who informed me that he was on duty at Amherstburgh at the time of my capture; and he stated to me "that immediately after my setting out from Gibraltar, an individual who had acted as a spy for them, came over from Gibraltar to Malden, and made it known to Colonel Maitland, who commanded at that post, that I was travelling on the ice towards Sandusky in Ohio, and that being on foot I might be readily pursued and taken by a party in sleighs; that Colonel Maitland declined sending a party from Malden for the object suggested, but directed the individual making the communication, to proceed down along the Canada shore, where he would be likely to meet some of the parties coming up from Pelé Island, (where the British forces

and his horses tired, to remain where he was (3.)—that they drove on, witness first, Haggerty next—that when witness came within about a hundred yards of the prisoner, who had another person with him of the name of ———, he desired the man who drove him to stop and take charge of his, witness's pistols—that he left in the sleigh *a tomahawk* which he had, and advanced towards the prisoner, following them and having his gun—that he desired Mr. Haggerty to follow with his gun also—that he was about *fifty yards* ahead of Mr. Haggerty when he hailed the prisoner and his companion, and desired them to halt—that they did so, and the prisoner asked, "*what do you want?*" and said, "*we are American citizens going about our own business*"—that as witness advanced, he recognized the prisoner—that he then said *they were some of the people he had been looking for*, or words to that effect—that on their turning round he discovered that they had swords, and he advanced towards prisoner and took his sword from him—that witness then desired Mr. Haggerty to demand the sword of the prisoner's companion—that Mr. Haggerty did demand it, and it was given to him (4.)—that witness then demanded of

had been engaged with the Patriots the day before,) to whom he could make the facts he had communicated known, and that they might act upon them; that the individual did so, and fell in with Colonel Prince, who fitted out the expedition by which I was pursued and captured." The party by which I was taken and carried off to Canada consisted of Colonel Prince, Major Rudyard, Captain Girty, Lieutenant James, and Lieutenant Wright, together with some twelve or fifteen soldiers, constituting as many persons as could be crowded into three sleighs.

(3.) Girty did not remain very far behind in the pursuit, as it will be perceived by an examination of the report of his testimony, but proceeded on after me as fast as his horses could draw his sleigh, then loaded with armed persons, while Prince, with his *fresh teams*, had taken the lead. On leaving the Canada shore, as I was informed by Girty and some others of the party, they drove directly towards the shore of Michigan, with the hope of taking me before I could have got down to the fracture in the ice near Point Mouillee; but when they had arrived near the Michigan shore, they discovered that I had crossed the fracture in the ice, and gone off in a south-easterly direction, and they, accordingly changed their course to the same direction and pursued until they came up with me.

(4.) After resigning my command with the Canadian Patriots I

both if they had any fire-arms about them—that *they assured him that they had not, when witness said he would be satisfied with that assurance, and would not search them*—that he told them to consider themselves as his prisoners, and to march before him to the sleighs which were at some distance (5.)—that Mr. Sutherland then *charged the witness with having taken him within the American waters*—that witness told him to look at our shore, and at the American shore from whence he came, and he told him to bear in mind that they were about *a mile and a half from the Canada shore, while they were about five or six miles from the Michigan shore* (6.)—that the prisoner then

had packed up my arms and field equipage, and left them at Toledo in Ohio; and I had kept no kind of arms in my possession except a brace of pocket pistols which belonged to a friend who resided in Detroit. These I returned to the owner, while there, and left Detroit on the morning of the 4th of March, with no kind of weapons for offence or defence. At a public house near Gibraltar, I was shown a couple of swords which were my property, and which had been left there by me, at a time previous, on account of their futility as weapons for the field. But, as the swords were of use to ornament a militia officer, and might be sold for some amount of money, the lad whom I had in company proposed that we should take them along—to which I consented; and one of these swords, which I carried in my hand, was all the weapon I possessed when come upon by Prince and his party. The lad who accompanied me carried the other in his hand, which was taken from him in the manner as testified to by Prince, (by one of his party, whose name I presume was Haggerty,) but not until the third sleigh had come up, and we had gone back to the sleigh which stood in the center, into which we were ordered to place ourselves. After the sword had been taken away from my companion, I produced the one I carried from under my cloak, and asked the man "if he wished it?" He replied—"Yes," and I gave it to him. Prince, at the time, was at the advance sleigh, and did not know that I had a sword in my possession until I had given it to his man. *So, he did not take my sword from me.*

(5.) On coming up with myself and companion, Prince and his party readily perceived that we had no arms, other than such as might be worn by our sides or carried in our pockets. *They were armed with muskets.* Prince did not allow myself or companion to come nearer than forty or fifty yards of him, before the third sleigh with Girty, had come up; thus keeping himself safe from harm, by sword or pistol, until we were surrounded by a body of men armed with muskets. It was then, that it was proposed by some of Prince's party to search us, when Prince said, "that it was not necessary."

(6.) See notes to the answers of Prince to the 18th, 19th and 23d

stated that he thought he had a right over any of the waters of Lake Erie, or words to that effect—that he then desired the witness to take him before his commanding officer, and he expressed a hope that he would not be ill used by them (7.)—that witness told him he should be taken before the commanding officer, and should not be ill treated—that witness wished the Court distinctly to understand that the place where he captured the Prisoner, was not above a mile and a half from the Canada shore, and it was on that part of Lake Erie which belongs to the British government—that he also wishes the Court distinctly to understand that it was at least five miles from the American shore—that witness also wishes the Court to understand that the swords were both very efficient swords, (8.) and they wore them as military men usually do—that witness had seen Mr. Sutherland at Detroit some time previous to that day, about six weeks previous, and a few days after the capture of the schooner Ann of Detroit—that he had then a sword by his side, which witness believes to be the same which he took from him (9.)—that he also wore a military dress with a tri-colored

questions upon his cross-examination, and 1st note to the answer of Girty to questions by the Court.

(7.) Having captured me, and taken me towards and within a mile of the Upper Canada shore, it was then proposed by some of the party that I should be executed there upon the ice, by being shot. Hearing this proposition, I remarked to the officers, "that I had supposed them to be civilized people"—and told Prince "that for his own credit and the reputation of the people of his country, I hoped he would not allow me to be murdered, and asked him to preserve me from harm until I should be taken before his commanding officer. Some conference was then had between Prince and his officers; after which he told me "that I should not be ill treated, and that he would take me immediately to his commanding officer at Fort Malden." I was since informed by an individual who was of Prince's party, "that two of the officers were for shooting me upon the ice, but that the three others were opposed to the measure and prevented it—and that Prince was not numbered with the three."

(8.) The swords were French rapiers; but were never worn by either myself or companion. I could not have worn the one I carried, if I had desired, for the reason that the belt attached to it was not sufficient to girt my waist.

(9.) The sword which I had in my possession at the time of my capture, was never worn by me in the city of Detroit. Neither

cockade on his hat—that after Mr. Sutherland became the witness's Prisoner, they proceeded *in sleighs* to Malden, where witness placed him in charge of the Honorable Colonel Maitland, then commanding there.

That on the following day, being Monday, and Col. Maitland having expressed his determination to send both the Prisoners down to Toronto; and Mr. Sutherland having the preceding day expressed a wish to make a communication to them; (10.) witness arranged with Colonel

Prince, nor any other person ever saw me at Detroit with a sword by my side. Though I did there wear a military undress and a tri-colored cockade. [I objected to Prince's testifying to any matters which had occurred within the United States—but my objections were overruled by the court.]

(10.) I never expressed to any one a wish to make a communication to Prince, Lachlan, Girty, or any other person. Immediately after my capture I was taken to Fort Malden and placed in the guard-room, where I remained a short time, and was then taken to the officers' guard-room, before Colonel Maitland, who was the military commandant of the post. A number of other officers were present, by two of whom my person was searched, and my money, as well as every thing of value found in my possession, was taken from me. Colonel Maitland treated me with a considerable degree of courtesy, and when I complained to him that I had been kidnapped and brought off from my own country, he stated to me "that he was but the military commandant of the post, and could not act at discretion, but as such military commandant, must send me immediately to Toronto, to the Lieutenant Governor." While in the officers' guard-room, some of the British officers present abused me with invidious observations in relation to the character of my country, which I was inclined to repel; but another of the officers present pulled me by the sleeve and suggested that I should not regard their observations—and I desisted to reply. After this, I was sent back to the guard-room, where, in the evening, I was called upon by a clergyman, resident at Amherstburgh, [it should be understood that *Malden* and *Amherstburgh*, as mentioned in these proceedings, are names of but one place—the fort and the township is called Malden, the village Amherstburgh,] to whom I stated that it was my desire to be detained at Amherstburgh a few days, so that I could make my case known to my friends in Michigan, as it might be important for me to do so in case I was to be put upon trial. He advised me to see Colonel Maitland, and make the request to him in person. In accordance with his advice, I procured one of the officers of the 32d Regiment to inform Colonel Maitland that I desired to see him at the guard-room where I was confined. Soon after this I was sent for, and taken again to the officers' guard-room, where I was met by an officer of the British army who said to me, "that Colonel Maitland was an invalid and

Maitland that the Prisoners should be brought before him, the witness, *Major Lachlan*, and *Captain Girty*, all of whom were magistrates in the Western District—that Mr. Sutherland was in consequence brought before them about mid-day, in a room in the garrison where any body who pleased was allowed to enter; and the room was filled with military men and civilians (11.)—that the Prisoner, Mr. Sutherland was brought in first, and alone, apart from his companion; witness then reminded him of his having expressed a wish to make a communication to them; witness stated that he and his brother magistrates were ready to receive any information he may choose to give, at the same time reminding him that he need not say any thing which would criminate himself (12.)—that he said he was aware of that, and that he would frankly tell us all he knew (13.)—that he then made a voluntary

unable to come up to the guard-room, and had sent him to receive any communication I might have to make." This officer was one of those who had abused me upon my being first brought to the officers' guard-room, and I could but conceive that a request through him would be of little avail, and so I replied, "that I had no communication to make," and he ordered me to be taken back again to the guard-room. Some time after, another gentleman, a field officer in the British army, came to me and said, "that he understood I had wished to make a communication;" and stated "that if I had any thing to communicate, I might make it to him, and that he could perhaps turn it to some advantage for me;" to him I also replied, "that I had no communication to make." Further than this, there was nothing said to me in relation to any communication either at Amherstburgh, or elsewhere.

(11.) The room in which the examination was had, was the officers' guard-room, which was not permitted to be entered but by officers; and there were no persons present at the examination, who were not of the military.

(12.) When taken before Prince, Lachlan and Girty, I was told by Prince, "that they were three justices of the peace of the Western District of Upper Canada, and that I was brought before them for examination." It is, also, true that Prince did remind me, when he commenced the examination, on that occasion, "that I need not say any thing that would criminate myself."

(13.) I had not desired an examination before Prince and his brother magistrates; nor had I done or said any thing to induce the measure; and when I was brought before them, I then thought, as I still think, that the examination was had solely with a view to elicit some acknowledgment or admission from me which might be used against me upon a trial which they supposed I was soon to

statement which witness heard throughout—after he, the Prisoner, had made this statement, witness reduced the substance of it to writing in his presence (14.)—(the witness also produced a newspaper, which newspaper he handed into the Court, it being the “Detroit Morning Post,” dated the 12th of January, 1838, the paper containing Mr. Sutherland’s despatches and proclamations) (15.)—that when witness had finished the statement above

be subjected to. Understanding the examination to be had for such purpose, I resolved to give them what they desired, to their own satisfaction—but in no way that should be of less service to myself than to them. So I told them “that I would frankly tell them all I knew in relation to those matters, in which I had been concerned ;” and in my answers to the questions put to me, I fully and freely stated the part I had had in the matters about which they inquired. But, whenever the question was such as to require an answer that might be made testimony against me, with my answer I took care to give a statement of such matters as would destroy any force the answer might have as testimony against me—or of some fact that should weigh equally in my favor. Thus, while I admitted my connection with the Canadian Patriots, and a participation in their movements, I stated matters which went to deny every fact on which a trial could be predicated, under the provisions of the law of the 12th of January, of the enactment of which I had been made acquainted ; and on the examination I mentioned the names of no persons except Van Rensselaer and Mackenzie.

(14.) During my examination, Prince drew up a paper which he called a record of the examination ; and after it had been concluded, he read it to me. It contained only a brief statement of a few of the matters I had related, and those only which might be used as testimony against me. After reading the same, Prince asked me “if it was correct?” I replied, “that I had stated the matters the paper contained, but with many others, which were omitted.” To which he replied, “that he was aware of the fact, but to write out all I had said would require too much paper and ink to be used at that time ;” and as he did not request me to sign the paper, I took no further exceptions to the imperfections it contained. I knew that the paper Prince had drawn up, without my signature, could not be read in any court claiming to act upon legal principles and rules, as evidence against me ; and I knew as well that if he or any other of the persons present at the examination, were examined as witnesses upon any trial on which I might be put, to prove my admissions, I could show by them that all the admissions I had made, (taken together,) went to exculpate, and not to criminate myself.

(15.) These were certain despatches to General R. Van Rensselaer, sent from Bois Blanc Island, with the proclamations issued by me at that place.

mentioned, which he now holds in his hand, he read it deliberately over to the Prisoner, and asked him if it was *substantially true*—he said it was.

Here the witness delivered the paper to the Judge Advocate, who read it, when it was referred to the Appendix. (16.)

(16.) I have made every exertion, possible for me, to procure a copy of this paper, but have failed; as will be shown by the following correspondence:

Copy of a letter to the Lieutenant Governor.

TO HIS EXCELLENCY SIR GEORGE ARTHUR, LIEUT. GOVERNOR, &c.

Thomas Jefferson Sutherland, a citizen of the United States of America, now detained a Prisoner by the Government of the Province of Upper Canada, would respectfully represent to your Excellency, that it is his intention to present the circumstances of his capture and detention to Her Majesty the Queen of Great Britain and Ireland, to the end of relief, and that he may be liberated from his present condition, and permitted to return to his country and friends. Wherefore, he solicits your Excellency to cause to be made and delivered to him a *certified copy* of all the proceedings taken against him by and before a Militia General Court Martial in this Province, with his defence made before said Court Martial; and copies of the Laws or Statutes under which such proceedings were had, that he may lay the same, with his representation, before Her Majesty by an early day.

Very respectfully submitted to your Excellency.

TH: J. SUTHERLAND.

HOME DISTRICT GAOL, }
23d April, 1838. }

Copy of letter from J. Joseph to Sheriff Jarvis.

GOVERNMENT HOUSE, }
26th April, 1838. }

SIR—I am commanded by His Excellency the Lieutenant Governor, to request you to be so obliging as to acquaint T. J. Sutherland, a convict in the gaol of this city, under sentence of transportation, that his Excellency has received his memorial, requesting to be furnished with a “certified copy of all the proceedings taken against him by, and before, a Militia General Court Martial in this Province, with his defence made before said Court Martial—and copies of the laws or statutes under which such proceedings were had—that he may lay the same, with this petition before Her Majesty, by an early day.” In reply to this request His Excellency begs you to inform the Prisoner, that a copy of the Trial, and the documents connected with it, has been transmitted by His Excellency, to the Secretary of State for the Colonies.

I have the honor to be sir,

Your obedient humble servant.

MR. SHERIFF JARVIS.

J. JOSEPH.

The above was put into my hands by Mr. Sheriff Jarvis.

Witness here, also, delivered to the Judge Advocate the newspaper above mentioned, who read the publications stated in the declaration of Mr. Sutherland, and referred it to the Appendix.

That witness also recollects a statement made by Mr. Sutherland when he was taken prisoner, which witness desires may now be taken down—that after Mr. Sutherland stated that “they were American citizens going

Subsequently, and while I was still a prisoner in the hands of the British Government, I addressed a letter to Colonel Fitz Gibbon, who was Judge Advocate of the Court Martial by which I was tried, requesting him to procure for me, “copies of the orders of Sir F. B. Head, then Lieutenant Governor, ordering the the Court by which I was tried, with copies of all the proceedings before said Court Martial on the 1st, 2d, and 3d days of its sittings, with a copy of a paper which was produced before the Court by Colonel Prince, purporting to be a record of an examination of myself before three justices of the peace at Amherstburgh in Upper Canada; together with copies of the proceedings of the said Court, subsequently to the closing of the testimony, excepting my defence.” In reply I received the following :

Copy of a letter from Colonel Fitz Gibbon.

TORONTO, 7th November, 1838.

SIR—On the 5th inst. I addressed a short letter to you acknowledging the receipt on that day, of your letter to me dated the 11th ultimo.

On the 6th I applied, through the civil Secretary of the Lieutenant Governor, for His Excellency’s leave to give you a copy of such parts of the proceedings of the Court Martial as you desired, and yesterday I received an answer from the Secretary of which the following is a copy :

I remain, Sir, your Obedient Servant.

JAMES FITZ GIBBON.

THOMAS JEFFERSON SUTHERLAND, Esquire,
State Prisoner, Quebec.

(COPY.)

GOVERNMENT HOUSE, }
6th Nov. 1838. }

SIR—Having laid before the Lieutenant Governor the letters of Thomas Jefferson Sutherland, which you handed me yesterday, I have received His Excellency’s commands to inform you, that the request of that person for a copy of the proceedings of the Court Martial held upon him at this city cannot be complied with, as it is unusual to grant copies of proceedings in such cases.

I return you the letter you gave me; and have the honor to be,
Sir, your most obedient humble servant.

(Signed,) JAMES MACAULEY.

JAMES FITZ GIBBON, Esquire.

about their business," witness remarked that Americans had no business there in these times, when Prisoner replied, that "he was going to Lower Sandusky to endeavor to intercept some persons who had stolen some money from him and his trunk and clothes, while he was in Monroe" (17.)—that witness then remarked that he was coming in a direct line from the American to the Canadian shore; and witness here adds, that he was then at least one mile at this side of the line leading to Sandusky, and his steps were directed towards the Canada shore (18.)—that witness adds, that a line from where the Prisoner was taken to Sandusky, would run in about a *south-westerly* course, as far as he can judge, and that they, the prisoners, were going in a course about *south-easterly* (19.) he thinks, and if they had pursued the course they had been travelling, they would have been on the Canada shore in about half an hour. Witness states positively that the Prisoner is the same person he saw at Detroit, and whom he took Prisoner on the ice.

CROSS-EXAMINATION of the witness *Prince*, by General Sutherland.

1st Question. Were you, at the time I was captured, in a certain degree of excitement?

Answer. I was excited in a little degree with pleasure at finding a man whom I had desired to meet. I was excited with pleasure, but nothing else.

[Prince never approached nearer to me, at the time of my capture, than the distance of fifteen or twenty paces. He appeared to be very much agitated; and when I walked towards his sleigh, he placed himself on the opposite

(17.) I made no such statement as this at the time of my capture. It was made at the examination on the day following.

(18.) If I had been travelling towards the Canada shore, why did they not wait till I had arrived there?

(19.) It is true that I was travelling in a south-easterly direction; and that direction was a right line from the place from whence I started to Sandusky, as any one may ascertain by an examination of a map of that part of the country. It will also be perceived by an examination of such map, that if an individual be placed upon the ice, (or on the water,) at any spot at the head of Lake Erie, such individual would never get into Canada by pursuing a south-easterly direction; the shore of Canada being to the north.

side to that which I approached, and kept himself so that his horses were between us; and remained so until I had gone to another sleigh, a few rods in the rear, into which I got, and was taken to Malden. There was no exhibition of pleasure marked in the countenance of Prince; and his agitation could not have been from fear—as the number of his party forbade that. But, from his subsequent conduct, I am led to suppose it resulted from his meditating my immediate assassination.]

2d Question. Might you not have mistaken what was said by ———, at the time of the capture, and after, for what had been said by me?

Answer. Certainly not. ——— said nothing that I heard except his asking me whether he was bound to deliver his sword to Haggerty, when he demanded it by my order; and I have no recollection of any thing else said by ——— on that occasion.

3d Question. Did ———, at the time of the capture, say that we were on American ground?

Answer. Not in my hearing. I never heard *him* say so.

4th Question. Was it not Sandusky instead of Lower Sandusky, that I named as the place that I was going to?

Answer. No. Lower Sandusky was the place named, I am certain.

[This question was not material. It was put merely to befog the witness, who had shown a determination to answer no question I should put to him with any regard to truth. At the time of my capture, I only knew of Sandusky. Of Lower Sandusky I had never heard, but am now informed that Portage was once called Lower Sandusky.]

5th Question. When captured, did I not tell you that we were going to a schooner, that was frozen in the ice near by, for the night?

Answer. He did not say so when captured; *but he said so in about twenty minutes after*; and I observed upon the improbability of the act, *because the schooner had been stranded in the ice all the winter, a long distance from the shore, and without any person, and without any fuel on board.*

6th Question. How did you know that there was neither persons, nor fuel on board?

Answer. I never stated that I did know that there was no persons or fuel on board the schooner ; but I had seen her in the same position, blocked up in the ice, about a month before, and I took it for granted that there were neither persons nor fuel on board of her ; and I believe there were not.

7th Question. Where did you first see the schooner in question ?

Answer. I first saw the schooner in the place where she was when I captured Mr. Sutherland ; and that place is within the Province of Upper Canada, and not within the waters of the United States.

[This schooner, spoken of by the witness Prince, lay frozen in the ice, at the time of my capture, at a distance of about *two miles and a half* above the West Sister, and within a distance of from *two to three miles*, north from the main shore of Michigan, and all of seven miles within the United States ; the boundary line, as it has been settled between the government of the United States and Great Britain, running between the Islands called the Middle Sister and the East Sister.]

8th Question. How far was I from the schooner at the time of my capture ?

Answer. *Within half a mile.*

9th Question. Did I not say to you at the time, that I supposed the schooner was within the lines of the United States ?

Answer. I do not recollect any thing of the kind being said. It certainly was not said to me.

10th Question. How near were you to the schooner the first time you saw her ?

Answer. I was on the main land, travelling on the Canada side.

[I was sent off for Toronto, the next day after my capture. From Malden, our route was down the shore of the lake for some fifteen or twenty miles. As we travelled on the edge of the ice, I took the occasion to look for this schooner, as we came near opposite the place of my capture, when I observed that the schooner was so far distant from the Canada shore, that from thence nothing could be

seen of her but a speck of the pointed masts ; and I called this fact to the attention of a number of the men belonging to the escort, who were of the party by which I had been captured ; and who then agreed with me, that I had been captured six or seven miles within the lines of the United States.]

11th Question. Was there more than one schooner frozen in the ice in the vicinity of my capture ?

Answer. *There was one about four miles below, close upon the Canada shore, in the township of Colchester, I believe ; and those were the only two I have seen frozen in the ice in that neighborhood.*

12th Question. Had there been any others, were you likely to have seen them ?

Answer. If there had been any others in that vicinity, within three or four miles of the schooners spoken of, I should have seen them.

13th Question. Had the ice been broken, and separated between the shores of the United States and Canada, above the schooner near which I was captured, a short time before ?

Answer. It is impossible for me to say whether it was or was not broken and separated, not having been in the neighborhood at the time mentioned. I have been at Sandwich where I reside, and which is twenty miles distant, or I have been at Toronto.

14th Question. How many miles below Amherstburgh were you when you first discovered me upon the ice ?

Answer. As far as I can judge from memory, *about nine miles.*

15th Question. How long a time, after first discovering me, was it before you pursued ?

Answer. *I think it was about twenty minutes.*

16th Question. Were you above or below me, (in reference to the current of the waters,) when you left the Canada shore, to pursue ?

Answer. *I was above.*

17th Question. Was I not within three miles of an island, lying in the vicinity of the schooner mentioned, at the time of my capture ?

Answer. Certainly not, as far as I know. The only

Island with which I am acquainted, is *Bois Blanc*, and that, I think, must be seven or eight miles, [the true distance was seventeen or eighteen,] from the schooner near which Mr. Sutherland was captured.

[*Bois Blanc*, (or White Wood Island,) is situated at the mouth of the Detroit river, directly opposite Fort Malden, and the village of Amherstburgh, at a distance of only about six hundred yards from the Canada shore; and cannot be seen from the place where I was captured.]

18th Question. To what point of land on the United States shore, was the place of my capture nearest?

Answer. I am not sufficiently acquainted with the shore on the United States side of the water; but I think the nearest point must have been at, or below, [or below, was added in the record, by the direction of Col. Kingsmill—it was not so stated by Prince,] Gibraltar in Michigan.

[Gibraltar, is directly opposite *Bois Blanc Island*; or very nearly so; and is situated at a distance of from ten to fifteen miles from Hartly's Point, opposite which place, Girty testified to be nearest the place of my capture. Prince put it "at two or three miles below."]

19th Question. To what point of land on the Canada shore, was the place of my capture nearest?

Answer. There is no particular name that I can give to the point of land nearest to the spot where I captured Mr. Sutherland; but I think it must have been about two or three miles below a place called Hartly's point.

[At Hartly's Point, the boundary line, as settled between the governments of the two countries, runs within a mile and a half of the Canada shore; while the distance across the water to the shore of the United States, from any place between two or three miles below that point, cannot be less than 12 miles, and may be as much as seventeen miles.]

At this part of the cross-examination, the hour of 4 o'clock, P. M., having arrived, the President adjourned the court till 10 o'clock of the next day.

FIFTH DAY.

TUESDAY, MARCH 20, 1838.

The Court met pursuant to adjournment. Present, the same members as before. The CROSS-EXAMINATION of the witness *Prince*, by General Sutherland, continued.

20th Question. What is the distance between Amherstburgh in Upper Canada, and Monroe, in Michigan?

Answer. *What the distance is across the river, I cannot tell*; but I believe the distance between the shore of the United States, opposite Amherstburgh, and Monroe, is about twenty-five miles.

21st Question. When you came up with me at the time of my capture, was I on the *north* or *south* side of a line drawn from Amherstburgh in Upper Canada to the nearest point on the shore of Michigan; and if on the *south*, at what distance from such line?

Answer. It is impossible for me to answer the question without reference to a map; but I believe the prisoner was not on the *south* side but on the *east* side of such line.

It was here proposed by the Judge Advocate to produce J. Macauley, the Surveyor General of the Province of Upper Canada, and to examine him as a witness for the purpose of establishing where the boundary line was which had been settled by the government of the two countries.

To this General Sutherland objected, and insisted upon his right to proceed with the cross-examination of Prince. His objections were, however, over-ruled by the Court, and Mr. Macauley allowed to be called by the Judge Advocate.

J. Macauley, Surveyor General of the Province of Upper Canada, being duly sworn on the holy Evangelists, states to the Court:

That certain sheets, which were then produced in Court, (being parts of a map, purporting to show the line established by the Commissioners under the Treaty of Ghent, as the dividing line between the United States and the Province of Upper Canada,) were found by him in his office, remaining there as part of the records thereof—that the line laid down on the maps or sheets produced,

as the boundary line in the neighborhood of Amherstburgh, was not correct—that he knew this only by representation.

The Judge Advocate then stated to the Court that he had no further inquiries to make of Mr. Macauley; and he was directed to stand aside.

General Sutherland insisted upon his right to cross-examine this witness, but it was denied to him by the Court; and he was not cross-examined.

[Upon the production of the sheets, or drawings, which it was alleged would show the boundary line as settled by the commissioners under the treaty of Ghent, I at once perceived that the line as marked on those maps, would have placed me within the limits of the United States, even if I had been captured at the distance of a mile and a half from the Canada shore, at the place which Prince had testified he had taken me, and called the attention of the Court to this fact. It was then said by the members of the Court, that the line marked on the map was not correct, and Mr. Macauley asserted, “*that he had understood that the line was erroneously laid down on the sheets before the Court.*” It was then, also, alleged by the Court and by Mr. Macauley, that the sheets produced were but copies of the original maps; and they were thereupon immediately rolled up and withdrawn from the Court. I insisted upon my right to examine the maps, as they had been introduced as testimony against me; and to cross-examine Mr. Macauley in relation to them; yet, the Court refused me both, and Mr. Macauley picked up his maps and walked off with them.]

The CROSS-EXAMINATION of the witness *Prince*, was then resumed by General Sutherland.

22d Question. To what point of land did the schooner spoken of as being within half a mile of the place of my capture, lie nearest?

Answer. The nearest land was the Canada shore; but I am unable to designate the place for want of a name to it.

23d Question. Was it not within my power to have crossed over to the American side of the line, before you could have taken me?

Answer. I can only give an opinion on that point. I am of opinion that he could not.

24th Question. At what distance might I have seen you approaching me?

Answer. He might have seen us from the time we left the Canada shore in pursuit of him, if he had been on the look out.

[At the time of my capture I was so far from the Canada shore, that by me nothing distinctly could be seen on it. Neither tree, nor house could be discovered with the eye. The land held but one deep, dark and unvaried hue. When I first discovered Prince and his party, they were then from *six* to *eight* miles from the Canada shore, and yet so far from me that I mistook their character, and supposed their three sleighs to have been three persons walking upon the ice; and did not become aware that the objects were sleighs until they had crossed the fracture in the ice.]

25th Question. Previous to my examination before you and the other two magistrates, at Amherstburgh, as testified to by you, did I tell you that I had any communication to make to you or any one else?

Answer. He did not say so to me personally.

[See what Prince testified to in his *direct swearing*, in this respect.]

26th Question. At the time of the examination at Amherstburgh, (the 5th inst.) as testified to, did I not say that I had been on Navy Island with Mackenzie and Van Rensselaer, and that I had left them in disgust, or because I was entirely dissatisfied with all their proceedings; and that after I had left them, Mackenzie became one of my bitterest enemies?

[The object of this inquiry, and of the 27th, which follows, was to rebut any proof which might be offered to establish that part of the *Charge* which alleged, "that I was joined with William Lyon Mackenzie and other subjects, with whom I was in arms against Her Majesty, after the 12th of January," as well as to discredit Prince's pretended record of examination.]

Answer. He certainly did say, at the time of the examination at Amherstburgh, that he had been on Navy Island with Van Rensselaer and Mackenzie, and that he

was dissatisfied or disgusted with Mackenzie. *But he made no such remark with respect to Van Rensselaer ; nor do I recollect that he said that Mackenzie had become one of his bitterest enemies. He expressed dissatisfaction with Mackenzie, as to his military arrangement on the island. He also stated that Mackenzie had been plotting against him on Navy Island.*

27th Question. At the time of the examination at Amherstburgh, did I say that I had left Navy Island before the commencement of any hostile operations ?

Answer. I have no recollection of his having said so. But he stated he was second in command under General Van Rensselaer ; and I think he said he left the Island before the destruction of the Caroline. I think he stated, also, that he left on or about the 28th of December.

28th Question. Did I state to you on the examination at Amherstburgh, of which you have testified, that I had employed or joined persons or a party at Cleveland, Ohio, with whom I had come on to Gibraltar ; or did I state to you that I had come on from Cleveland, in the same boat with a party of unarmed men who came at their own instances ; and whose passage money was paid by citizens of Cleveland ?

Answer. I remember nothing that passed on that occasion, more than what is contained in the written statement before the Court. *It is not an examination—but it contains a voluntary statement of the Prisoner.*

[Prince had introduced this paper to the Court as the record of an examination before three Justices of the Peace of the Western District of U. C. ; and it had been denominated as such ; and when he found I was shaking its character by the cross-examination, he declined to answer further inquiries. Upon my insisting upon my right, (in accordance to their own laws,) to examine its credit as a record, the Court sustained him in his refusal to answer my inquiries, and Lieutenant Colonel Brown, put into his mouth the last sentence of his answer to my 28th question.]

29th Question. At the examination, you have testified to at Amherstburgh, did I not make statements which are not contained in the record of that examination you have produced ?—*OVERRULED.*

[Upon the presentation of this question it was objected to by the Court. The members declared that there had been *no record of examination* produced, though the paper, in fact, was headed as such; that the paper was but a memorandum of admissions. I then insisted that as my admissions had been given, in part, as evidence, I had a right to have them in full. The question I proposed was, however, refused to be put, and the President threw it back to me. The conduct, and the remarks of the members of the Court were so extremely unbecoming in the matter, that some of the spectators *hissed* them. This induced the President and the Judge Advocate to threaten that the Court should be cleared; and Prince seemed more vindictive than ever. I was determined, however, to push the inquiry, and endeavor to get out the facts, by varying the manner of the question.]

30th Question. Did I not tell you, on the examination at Amherstburgh, of which you have testified, that the paper that you then read me, though substantially correct as far as it went, did not contain the explanations I had given—to which you then replied, “that it would take too much paper and time to put it all down;” or words to that effect?

Answer. I said nothing of the kind. But when I had read over the statement, I asked him if he wished to add any thing more; and he stated that if he was aware of the exact position he stood in, with regard to us, he might be induced to offer his services to us; *which left an impression upon my mind that he was desirous of enlisting in our cause against the Americans.* All this was said after the statement had been read over to him, by me, and I looked upon it as a conversational remark and therefore did not add it to the statement.

[At the time of the examination, and ever afterwards, I denied the right of the British to put me on trial by their laws; and when before the three Justices of the Peace at Amherstburgh, I argued against the right of their government to try me, as I had not, as I urged, ever received protection from their laws. So, when Prince asked me, as he did, if I would make any further statements to them, I said, “*if I knew how I stood, I should, perhaps, be more*

at liberty to speak and to answer inquiries." Meaning to be understood, (as I believe I was,) "that if I knew that they would not put me upon trial, I should be free to answer inquiries." All the rest of Prince's answer to my 30th question, *is fabrication and falsehood.* Prince was aware that it was the Patriot portion of the audience who had hissed; hence he put forth that statement, (for it was no answer to my question,) as a hit upon their feelings.]

31st Question. Did you, witness, or any other person, at the time of the examination at Amherstburgh, of which you have testified, ask me to sign the paper produced and alleged to contain a record of my statements at that time?

Answer. *I did not ask him to sign it, nor did any other person in my presence.* In my practice as a magistrate, I generally take down the statements of prisoners and read over and explain them to them, and make a minute at the foot, of what they state, after having had the same read over and explained to them; and I never ask them to sign them.

32d Question. On the examination at Amherstburgh, of which you have testified, did I not tell you that I had had no connection with the Patriots, since the middle of February, at which time I had resigned the commission I had held with them?

On the presentation of this question, it was objected to by a number of the members of the Court; and after some conversation between General Sutherland, the Judge Advocate, and the members of the Court, the Court was ordered to be cleared; and when it was again opened, the Judge Advocate rose and said to him, "that he was instructed to inform him the Court had ruled that his question should not be put; and that they had further ruled that if he proposed another question which they deemed irrelevant, *he should not be allowed to propose any more questions for this witness to answer!*"

33d Question. Has witness ever examined the sword taken from me at the time of my capture. If so, describe it?

Answer. I have examined the sword, and it is a *tawdry Yankee sword.* It is remarkably sharp at the end, sharper than swords generally are, and appeared to have been recently ground and whetted. The scabbard is

washed or plated white, with devices on the outside ; and as he has asked me to describe it, *I add that it is of so fine and paltry a character, that I believe a British officer would feel himself disgraced by wearing it.* [Col. Kingsmill then put in his mouth,]—I consider it to be efficient to thrust with.

34th Question. Did I not tell you at the time of the examination at Amherstburgh, of which you have testified, that I had happened to have the sword in my possession by mere accident, and not with the design of using it for offence or defence ?

Upon General Sutherland proposing this question, the Court declared it to be irrelevant, and forbade his proposing any more questions for this witness to answer.

It was then proposed by the Judge Advocate to show by Prince, that a committee of the Legislature of Michigan had visited the place at which General Sutherland had been captured, and that they had determined it to be decidedly within the territory of Upper Canada.

To this General Sutherland objected, and rose for the purpose of stating his objections. But this was refused him, and the Court ordered to be cleared. On the Court being opened, General Sutherland was informed by the Judge Advocate, that the Court had decided, that the proposed examination of the witness Prince, should not be gone into ; though General Sutherland then consented that it might be. .

[During the night, immediately after my capture, it had rained incessantly, and covered the ice at the head of Lake Erie, and in the vicinity of the place of my capture, with water to the depth of several inches. This must necessarily have obliterated every vestige of my tracks on the ice, as I had travelled over such spots as were least covered with snow, and for much of the route, over places where the snow had been entirely driven off by the wind ; and from the rotten and broken state of the ice in the immediate neighborhood of the place of my capture, on the morning, persons could not have approached it, or have come nigher than at the distance of five or six miles. This fact was known to Prince ; and he must have informed the Court, that I would be able to establish it, in case

they went into an examination of the matter. *See affidavits of John Farmer and Benjamin Crittenden in this Appendix.]*

Thereupon, the witness, Prince, was directed to withdraw, and he withdrew accordingly.

PRIDEAUX GIRTY, Captain in the Militia of the Province of Upper Canada, being duly sworn on the holy Evangelists, states to the Court :

That on the 4th inst. (4th of March, 1838,) he was returning from Pelé Island, with Colonel Prince and a man named Haggerty—that they were about a mile and a half from Big Creek, which is six miles below Amherstburgh, Colonel Prince said—“*that there were two objects on the ice*”—that they drove towards Amherstburgh, perhaps the distance of a mile—that they then discovered that the two objects were men—that he mentioned to Colonel Prince that he suspected they were persons wishing to avoid their guard, they (the men on the ice,) *being entirely below the usual place of crossing*, and recommended that they should pursue and ascertain who they were—that they then drove a short distance from the Canada shore, towards that of the United States; and then turned round and drove back again, having concluded to go up to Anderson’s at Hartly’s Point, to obtain fresh horses; and as they, (the men,) were approaching the Canada shore they thought they, (the men,) would be upon it by the time they returned; and that if they, (the men,) were not, that they might then pursue them; but, that they found that they, (the men,) were so near the shore, *and meeting two sleighs*, Colonel Prince asked the men with them if they would go out with them, that is with him and Mr. Haggerty—that they went into the sleighs and drove off rapidly—that he for a few moments halted at that place with his sleigh; and as he thought he discovered the persons were running he drove after them—that he was, perhaps, *at the distance of a quarter of a mile in the rear*—that the distance of a mile and a quarter, or not more than a mile and a half from the Canada shore, Colonel Prince came up with the persons they were pursuing—that he perceived

that the Colonel at the moment took a sword from the hands of the largest man of the two, whom he afterwards ascertained to be the Prisoner, Mr. Sutherland—that Haggerty went up to the smaller man and took his sword; this he, also, saw—that Colonel Prince and Haggerty with the two men then returned—that as soon as they met us, the Colonel said, “Girty, we have General Sutherland”—that he, witness, then immediately said, he knew the young man who was with them, having seen him before at Pontiac, at the head of a company of what they called the Patriot army—that he considered the distance from the Canada shore nearest to where Mr. Sutherland was captured, and from thence directly to the United States shore, to be about *eight* miles—that some call it *ten* miles. [The distance is over *thirteen* miles.]

That on the 19th of February, he attended the theatre at Detroit, and there saw Mr. Sutherland, that being the first time he ever saw him to his knowledge—that on his entering the theatre he saw him addressing the persons then present, encouraging the cause of the Patriots, *inviting his hearers to come forward for the relief of the oppressed Canadians*—that such were the terms of his address (1.)—that he, witness, left the theatre before the usual time of their dismissal—that next morning he went to Pontiac; and from thence to Ann Arbor; and from thence to Ypsilanti—that he then went to Amherstburgh, and then returned immediately to Monroe in Michigan, where, on Friday evening, the 23d of February, he saw Mr. Sutherland—that evening there was a number of the persons calling themselves Patriots, in the taverns of the village—that the next morning he saw Mr. Sutherland in the street—that witness immediately left the place and proceeded towards Amherstburgh, following up the rear of the Patriot army, until they crossed to Fighting Island, when he returned to Gibraltar and crossed the river to Amherstburgh, where he gave information of what he saw to Colonel Maitland—that he did not again see Mr. Sutherland, until he was captured on the ice—that on the morning of the 5th inst. (March, 1838,) he went with Colonel Prince and Major Lachlan to the fort, [Malden,]

(1.) This is all fabrication.

when Mr. Sutherland was brought before them—that he, Colonel Prince, then asked him some questions, and cautioned him particularly not to say any thing that would militate against him—that Mr. Sutherland said—“Gentlemen, I will tell you frankly:” and stated—“that he had been on Navy Island—and was second in command at that place—that he had, at a certain date,” which he does not now recollect, “left Navy Island and came up to Cleveland, and from that thence up to Gibraltar in Michigan, nearly opposite Amherstburgh—that Mr. Sutherland, also confessed that he was with the Patriots with a scow or boat, of which they had four or five, on the night of the eight of January—that he had the direction of them—that there had been some disagreement among them as to who should command—that he, witness, then stated that he saw those boats come up to the corner of Bois Blanc Island, and that he saw two discharges of cannon which took place from the boats—that Mr. Sutherland had further stated on his examination at Amherstburgh—“that he had landed on the morning of the *ninth* of January, on Bois Blanc Island, at the head of *fifty-three men*.

At this part of the examination, the hour of 4 o'clock P. M. having arrived, the President adjourned the Court till 10 o'clock of the next day.

SIXTH DAY.

WEDNESDAY, MARCH 21, 1838.

The Court met pursuant to adjournment. Present the same members as before.

Girty was again called by the Judge Advocate, who continued the direct examination.

The copy of the examination of the Prisoner, at Amherstburgh, was here put into the hands of the witness, Girty. He states that the same was taken at Amherstburgh in his presence—that Colonel Prince read it over to Mr. Sutherland, and asked him if it was correct, and

that he admitted that it was (1.)—that he, witness was one of the magistrates attending upon that occasion ; and that his name at the foot of the paper, is his signature.

The Court. [By Colonel Kingsmill.] How long have you lived in the Western District of Upper Canada ; and are you acquainted with the country about Amherstburgh ? If so, state what you know about it.

Answer. I was born in the township of Malden, in the Western District of Upper Canada, within two miles and a quarter of Amherstburgh ; and have lived there for about thirty years of my life. I am well acquainted with the coast along from Amherstburgh to Point Pelé, and in particular that part about two and a half miles below where I live, called *Bar Point* ; also, called *Hartly's Point*, which is the nearest point on the Canada shore to the place where Mr. Sutherland was taken. The nearest place on the United States shore, is *Point Mouillee*. To the best of my belief, and to be within limits, I state the distance from where Mr. Sutherland was captured to *Point Mouillee*, at four miles and a half ; and also that it is usually said to be about eight miles from shore to shore. I, also, again state that the distance from the Canada shore to where Mr. Sutherland was captured to be within a mile and a half.

[In his direct examination, Girty says, that the place where I was “ captured was not more than a mile and a half from the Canada shore.” This he repeats in his answer to the cross-examination by the Court. He, also, says in his direct examination—“ that at the place of my capture *he considered it* to be about eight miles from shore to shore.” But, also says, “ that it is called by some ten miles.” In his answer to the cross-examination by the Court he says, “ it is usually stated to be about eight miles from shore to shore.” He, also, says, “ that to the best of his belief, *it is four miles and a half* from the place where I was captured to the shore of the United States, at *Point Mouillee*.” Now, observe how these statements tally. If the distance across is ten miles, as Girty said, some call it, and I was four and a half miles from our shore, then I was captured five and a

(1.) See note 16 to the testimony deposed by Prince.

half miles from the Canada shore, instead of one and a half miles, as he swears. If the distance across is eight miles, as he swears, he understood it to be, and I was captured four and a half miles from our shore, I was captured at the distance of three and a half miles from the Canada shore, instead of one and a half, as he swears. Either of these statements establish the place of my capture to have been within the lines of the United States; for, the boundary line as established at that place, between the two countries, is located at the distance of only about one mile from the Canada shore. The distance from Hartly's Point to Point Mouillee is thirteen miles; and if it was true that I was captured at a distance of four and a half miles from Point Mouillee, I was then taken at a distance of eight and a half miles from Hartly's point, and all of seven miles within the lines of the United States.]

CROSS-EXAMINATION of the witness *Girty*, by General Sutherland.

1st Question. At what hour of the day did your party capture me?

Answer. I think it was between four and five o'clock in the afternoon.

2d Question. At the time of my capture did you observe a schooner frozen in the ice, in that vicinity? If so, what distance were you from the schooner at the time of my capture?

Answer. I saw a schooner frozen in the ice, *at the distance, as I should judge, of about two miles, or very near that.*

3d Question. Did you see any other schooner frozen in the ice, near where my capture took place?

Answer. *I did not.*

4th Question. Was there a travelled road on the ice between Point Mouillee and Hartly's Point?

Answer. Not in that direction.

5th Question. Did you see an island near the schooner you have mentioned? If so, what direction did the island bear from it; and how far distant was it from the schooner?

Answer. I did not see an island. *There is no island nearer the schooner than Bois Blanc, or Sugar Island, both of which lie at a distance from where the schooner then was of more than four miles.*

6th Question. Is not the island called the West Sister, to be seen from where the schooner lay, or from the Canada shore three miles below Hartly's Point?

Answer. In a very clear day you can discover it with the eye. It is not less than 15 miles distant from Hartly's Point.

[The true distance from Hartly's Point to the island called the West Sister, is about 15 miles, in a south-westerly direction. In clear weather, it can be very plainly seen from Hartly's Point, or from any place within three miles below, as I observed on passing along the Canada shore, on my way to Toronto, the day after my capture.]

7th Question. After you started in pursuit of me, what was your course on the ice? and what length of time elapsed before I was overtaken by Prince and his party after he had left the Canada shore?

Answer. It was nearly in a *southerly direction*. I think it could not be more than ten minutes from the time Colonel Prince got into the sleigh he met, until he overtook Mr. Sutherland.

8th Question. Was I running, or walking, when you may suppose I must have seen Prince and the sleighs in pursuit?

Answer. I was under the impression that Mr. Sutherland was running, and that he had run for more than a quarter of a mile.

[In his direct examination, it will be seen that Girty, (as well as Prince,) swears that I was going *towards the Canada shore*; and upon his cross-examination, that I was travelling in a *southerly direction*. Now, from the place where either Prince or Girty locate the ground of my capture, the Canada shore is situated *directly to the north*; and the situation of Portage, (Lower Sandusky,) is *nearly as direct to the south*. Sandusky, proper, lies to the east of south.

Again; in his direct examination, as it will be seen, Girty testified, "that he had halted; and that he had then

drove after me, as he thought he discovered that I was running"—[towards the Canada shore?] In his cross-examination, he also repeats, "that he was under the impression that I was running"—and had continued to do so for some distance.]

9th Question. At whose house in Monroe, did you see me on the Friday evening you have mentioned in your direct examination?

Answer. It was at a public inn. Whose, I do not remember.

10th Question. Did you say you followed the Patriot army from Monroe to Fighting Island? If so; did you then, or after, see me with the Patriot army; or do you know of my having any connexion with them after you saw me at Monroe, on the occasion you have mentioned in your direct examination?

Answer. I did follow the Patriot army from Monroe to Fighting Island; but I did not see Mr. Sutherland with them; and I do not know that he had any connexion with the Patriot army after I saw him at Monroe.

11th Question. At any time on the same day and before my capture, did you observe me meet a sleigh going from the Canada shore to that of the United States—and the sleigh to stop with me for any time?

Answer. No.

12th Question. At the time of my capture, was it a clear sun-shiny day?

Answer. It was a tolerably clear or fair afternoon.

13th Question. At the time of my examination at Amherstburgh, did I not tell you that at some time in the early part of February last, I had dissolved my connexion with the Patriots of Upper Canada, as I then believed I had been deceived as to the intentions of the people of the Province; and that I had made a formal resignation of my command, and made the same known in Michigan. That I had determined to write a book for publication, giving a true account of the proceedings of the Patriots of Upper Canada; or words to that effect?

Answer. After the statement was made and signed by the magistrate, Mr. Sutherland spoke to this effect: [After the examination, as it was called, was shown to me,

I had no farther conversation with either Prince, Lachlan, or Girty, or in their presence.] “That he had resigned; that he was going east to write a book; *that if he knew how he stood with us he might be useful to us!*” [A vile perversion of the fact.] Which left an impression on my mind that he wished to be Queen’s evidence. [See note to Prince’s testimony on the same matter.] Also, to the effect that he had been deceived as to the intentions of the people of Upper Canada.

14th Question. At the time of my examination at Amherstburgh, in answer to an inquiry from Colonel Prince, did I tell him in your presence, that I had had no connexion whatever with the persons who had been in arms on Fighting Island, or on Pelé Island. That I was not aware of having ever seen any of the persons said to have been on Pelé Island, except Captain Van Rensselaer. That I had never in my life been on Pelé Island? Or, have you, at any time, heard me make such a statement?

Answer. I do not know that Colonel Prince ever made any such inquiries of Mr. Sutherland; nor do I recollect that any one else put any such questions to him at the time of the examination. I think that while he was on the ice, after his capture, I asked him if he had not been on Fighting Island; and he answered, “No.” I asked him then whether he knew the persons who had been shot on Pelé Island. He said that he did not know any other than Captain Van Rensselaer.

[I never spoke to or exchanged a word with Girty, until I was brought before him in the officers’ guard-room at Fort Malden. Nor did he speak to me, or make any inquiries of me on the ice.]

15th Question. Did I make any statement of facts at the time of my examination at Amherstburgh, which are not contained in the record of that examination now in court, and to which you have sworn?

Major Gurnett. There is no record of an examination in Court.

Captain Powel. It is no examination; but a confession.

General Sutherland. It has been sworn to as an ex-

amination ; and it has been called such, by the Court ever since its production.

Lt. Col. Brown. It has not. No body has called it an examination.

Col. Kingsmill. Mr. Sutherland, this paper is not regarded by the Court as a record of an examination, but merely as a memorandum of your confessions.

General Sutherland. Then, if the paper be considered a mere memorandum of the matters it is alleged I confessed, I have the right to have all those confessions ; and all that I said at the time, I have the right to show to the Court by this witness.

Col. Kingsmill. You can show nothing now, different from what the paper contains. If the paper did not contain all that you had stated, it was your time to have objected when it was read to you at Amherstburgh, by Col. Prince.

Major Gurnett. I'll not consent that the Prisoner puts any more questions to this witness, concerning that paper or his own stories.

The President, Col. Jarvis. This question cannot be put ; and as we have decided this to be irrelevant, you can put no more questions to this witness.

Judge Advocate. Captain Girty, you may stand aside. Thereupon the witness withdrew.

MATTHEW HAYES, Late a Sergeant in Her Majesty's 15th Regt. of foot, being duly sworn on the holy Evangelists, states to the Court :

That he went to Navy Island on the twenty-first day of December, 1837—that after he got there, William Lyon Mackenzie, asked him “ what brought him there ”—that he told him he came for the purpose of seeing the Island—that Mackenzie then told him that he could not leave the Island—that he saw General Sutherland on the beach when he landed—that there was a Mr. Gorham, whom he understood came from New-Market in Upper Canada—that he, (Mr. G.) told witness, that he came from New-Market—that Mr. Gorham acted as Aid-de-Camp to General Van Rensselaer—that he saw General Sutherland on Navy Island, from time to time, from the 21st to the 28th

or 29th of Dec.—that he cannot be positive which—that he was in the capacity of second in command of the Patriot forces—that he was Brigadier General—that he saw General Sutherland leave Navy Island—that it may have been on the 28th or 29th of Dec. but was not positive of the day—that General Sutherland carried a cavalry sword in the usual form—that there were no people in uniform on the island—that they were in general, armed with guns, swords, pistols and pikes—that some of the men had charge of cannon—that General Sutherland addressed the men on the Island the day he left it; and gave up the command he held there to Major Vreeland, who took his place—that in his address to the men, General Sutherland said, “they were embarked in a glorious cause,” and he “implored the God of battles to direct and prosper them.”

The Court. [By Lt. Col. Brown.] Have you before seen Mr. Sutherland since he left the island? If so; state when.

Answer. I have not seen him since he left Navy Island, until I came into Court here.

The Court. [By Lt. Col. Brown.] Did you see any other British subjects on Navy Island, whose names you did not know?

Answer. There were forty or fifty persons on Navy Island whom I understood were British subjects. Many of them told me so themselves. *I have had opportunities of conversing with them, and I have no doubt of their being British subjects.*

[All this was put into the mouth of the witness by Lt. Col. Brown and Major Gurnett. I objected to the testimony, (if testimony it could be called,) but my objections were overruled. What puzzled me the most was, to understand how *Hayes* could know any person to be a British subject *without ever knowing his name.*]

The Court. [By Col. Kingsmill.] Did they form a part of the hostile force on Navy Island?

Answer. Yes.

The Court. [By Major Gurnett.] Do you recollect a man named Switzer who was on the island?

Answer. I do not.

CROSS-EXAMINATION of the witness *Hayes*, by General Sutherland.

1st Question. Did you ever see me in conversation with William Lyon Mackenzie on Navy Island ?

Answer. Yes.

2d Question. At what place on the island ; and what was the subject of conversation ?

Answer. I saw Mackenzie in conversation with General Sutherland, at the place called Head-Quarters ; but the subject of the conversation I know not.

3d Question. Did you see me on Navy Island after the burning of the steamer *Caroline* ?

Answer. No.

4th Question. Where on Navy Island did you first see me ? Were there any peculiar circumstances in the meeting ? If so ; state them.

Answer. I first saw General Sutherland on the beach at the usual place of landing, near Head-Quarters. As to particular circumstances, there were none that I know of.

5th Question. Where on Navy Island did you first enter into conversation with me ; and what was the subject of that conversation ?

Answer. My first conversation with General Sutherland was on the beach near Head Quarters. The subject of the conversation I do not recollect.

6th Question. Who was in command of Navy Island while I was there ?

Answer. General Van Rensselaer. But he was sometimes absent, and then General Sutherland commanded.

7th Question. Do you know to what country General Van Rensselaer belonged ? or, do you know that he was a British subject ?

Answer. I understood that he was an American ; that is, a citizen of the United States.

8th Question. Were there any batteries on Navy Island at the time you say I left it ?

Answer. There was one on the western extremity of the island.

9th Question. Do you know of your own knowledge that General Van Rensselaer was absent from Navy Isl-

and, between the 21st and 29th of December last? If so; do you know that the absence of General Van Rensselaer was known to me at the time? and if so; on what days of the said month of December was General Van Rensselaer absent from the island?

Answer. He was absent to my knowledge. I also heard General Sutherland say he was absent. I stopped in the quarters of General Sutherland, and thus I came to know it. I cannot well remember the particular days.

At this part of the cross-examination, the hour of four o'clock P. M. having arrived, the President adjourned the Court till ten o'clock of the next day.

SEVENTH DAY.

THURSDAY, MARCH 22, 1838.

The Court met pursuant to adjournment. Present the same members as before.

The CROSS-EXAMINATION of the witness *Hayes*, by General Sutherland, continued.

10th Question. To what shore did I proceed when I left Navy Island? To the shore of the State of New-York, or of Canada?

Answer. To the shore of New-York.

11th Question. Did you learn from Willian Lyon Mackenzie, while on Navy Island, that he was on unfriendly terms with me, before, or at the time I left?

Answer. I did not.

12th Question. Did you learn from me, while I was on Navy Island, that I was unfriendly to Mr. Mackenzie; or, that I had any difference with him?

Answer. I did not.

13th Question. Did you know that William Lyon Mackenzie had said to me before I left Navy Island, that he, Mr. Mackenzie, wished me to go off from the island?

Answer. I did not.

14th Question. How, or by whom, or from whom,

were the provisions and military stores used by the force on Navy Island, procured or furnished?

Answer. I understood they were furnished by citizens of the United States. They were brought to Navy Island from the United States shore. They were brought both by citizens of the United States and by Canadians. Provisions were so brought to the island during the time General Sutherland was there.

15th Question. What Canadians brought provisions to Navy Island while I was there?

Answer. There was one M'Carthy, and one Coronan, who acted as boatmen. M'Carthy belonged to the Patriots on Navy Island, and Coronan belonged to the Caroline steamer. He told me so himself.

[The last sentence was put into the witness's mouth by Major Gurnett. M'Carthy was a citizen of the United States, and a native of the State of Pennsylvania, as I happen to know. Coronan, I know nothing of—there may have been such a man with the Patriots, and there may have not.]

16th Question. I understood you to state, yesterday, that you did not know the names of any of the persons at Navy Island, you supposed to be British subjects, except two. How do you account for the discrepancy?

Answer. I could not bring them to recollection yesterday.

17th Question. Who did the men, you have mentioned, inform you, furnished the provisions which were brought to Navy Island?

Answer. I do not know who furnished the provisions. The men told me they took them in at Schlosser.

18th Question. Did you say you came to Navy Island not with the intention, nor for the purpose of joining the Patriot forces there at the time; and that you was detained there against your will; and do you mean to testify that you went upon Navy Island merely to gratify your curiosity; and did you consider yourself a prisoner while there, detained against your will?

Answer. I went to Navy Island for the purpose of *not* joining the party; General Sutherland told me not to make myself uneasy, as I might stop with him in his quarters;

I do mean to say that I was detained there against my will. I do mean to say that I went to Navy Island merely to gratify my curiosity. I did consider myself a prisoner there, not being allowed to return in the boat, there being a guard on the beach, who had orders from General Sutherland, Mr. Gorham, and Mr. Mackenzie, to allow no person to leave the Island without their leave. [All these answers, save the first, the witness was helped to by Colonel Kingsmill, Lt. Col. Brown and Major Gurnett.]

19th Question. When did witness leave Navy Island; and under what circumstances?

Answer. I left Navy Island on the 4th of January, in the absence of Mr. Mackenzie, by obtaining leave of General Van Rensselaer; which I did on condition of returning that evening. General Van Rensselaer told me to go to Captain Harper, and obtain a pass from him; which I did, and took it to General Van Rensselaer, and he approved of it.

20th Question. Did you hold any rank, or did you exercise any office on Navy Island after I left there; or were you then and there ranked above a common sentinel?

Answer. General Sutherland said, that I was to act as Adjutant, *and I did so through fear*; and I continued to act in that office until a friend of Major Vreeland came to the Island, who was appointed to the office; I being displaced, in consequence of not acting efficiently.

21st Question. Did I ever make any threat to you on Navy Island? If so; what was it—and who was present?

Answer. No.

22d. Question. Are you a prisoner at this time in this Province, charged with the commission of high treason, or of any other offence against Her Majesty the Queen of Great Britain? If so; have you been promised, or do you expect a reprieve or pardon, or any mitigation of the penalties of your offence, in consideration of testifying on this trial against me; or have you directly or indirectly received any promise of benefit, or reward for so testifying; or do you expect the same?

Answer. I am a prisoner; *but I do not know on what*

charge; I have not been promised any pardon or mitigation of penalty; nor have been promised any fee or reward for testifying on this trial; nor do I expect any.

23d Question. Have you conversed with any person or persons engaged on or with this trial, or the prosecution of this suit against me in relation to what you should testify on this trial, or in relation to what you knew of my having been on Navy Island? If so; name the person or persons with whom the conversation was had, and the substance thereof?

Answer. Yes. I have had a conversation with the Judge Advocate. He said General Sutherland was a prisoner; and asked me if I knew him. I said I did know him to have been on Navy Island part of the time I was there. He asked me if I was satisfied to give evidence against him; and I said I was. Nothing else passed as I now recollect; I had no conversation with any one else on the subject.

24th Question. Was it usual with me while I was on Navy Island, to detain all persons who came there; and were those prevented from leaving without the consent of General Van Rensselaer?

Answer. Not in all cases. Those who were on the Island were prevented from leaving it without leave of General Van Rensselaer, General Sutherland, Mr. Mackenzie or Mr. Gorham.

25th Question. Were there any other persons besides yourself who came to Navy Island from motives of curiosity, detained there while you was there? If so; were any such persons appointed to offices? and was such a course usual?

Answer. There was one other person, who said he was detained against his will, who was appointed to an office, and he was the only one I know of. That person, I think was named Rodgers. I know that he wanted to go off but was prevented, and threatened to be confined as a prisoner if he attempted to get away from the Island.

26th Question. Was Rodgers on Navy Island at the time I was there?

Answer. Yes.

27th Question. What office did Rodgers hold?

Answer. He was told that he was to act in the capacity of Sergeant ; [and the witness was made to say, by the help of Colonel Kingsmill,] and he did act as Sergeant ; and he was compelled to do so.

28th Question. To what country did Rodgers belong ?

Answer. He told me that he was from Upper Canada, near Chippewa. I have to add that I have no knowledge, myself, of what country he was a native.

29th Question. You stated, as I have understood you, that you were afraid to leave Navy Island. What reason had you to be afraid ?

Answer. The orders on Navy Island were, that any person leaving the island without permission, was to be fired on, if they did not return when ordered.

30th Question. Did you hear me say while on Navy Island, that I had nothing to do with Mackenzie, and that I would have nothing to do with him ?

[The object of this question was two fold. 1. It was necessary to befog the Court, as well as the witness, as they *would not allow him* to answer any question which had a weight in my defence, if they could perceive the bearing. 2. It was essential for me to establish the negative of that part of the Charge which alleged, "that I was joined to William Lyon Mackenzie."

Answer. I never heard him say so.

31st Question. Did you ever apply to me for leave to go from the island ?

Answer. I do not recollect that I did.

32d Question. Did Mr. Mackenzie exercise any military command on Navy Island while I was there ; or did he assume to direct or command any person who acted as officers and soldiers on Navy Island, while I was there, to your knowledge ?

Answer. Nothing further than preventing people from leaving the island. I recollect that on one occasion, Mr. Mackenzie exercised this authority when General Sutherland was present. [This is a fabrication.] I think General Sutherland must have been close enough to hear. I was one of those who wished them to leave the Island.

33d Question. Do you know from what country and from what place the arms and munitions of war you saw

on Navy Island were brought, or by whom they were brought? If so; state.

Answer. I saw a company come to the island, consisting of about 40 or more individuals, Americans and Canadians, who were armed with muskets, rifles, swords and pistols. I think those came from Schlosser, in the state of New-York, to the Island.

[This statement to which I objected, as it was not an answer to my question, was manufactured for the witness by one of the members of the court.]

Here the CROSS-EXAMINATION of the witness Hayes, by General Sutherland, was interrupted by the Court.

The Court. [By Major Gurnett.] Are you aware that there was a provisional government established on Navy Island? If so; who were the members of that government?

Answer. *There was a proclamation on the island establishing a provisional government; and Mackenzie was chairman of it pro tem.* [This part of the answer was manufactured by Lt. Col. Brown.] I think that Nelson Gorham and Silas Fletcher were of the number.

The Court. [By Major Gurnett.] Were the military forces over which General Sutherland was seen to command, acting under the orders of that government?

Answer. Yes.

The CROSS-EXAMINATION of the witness Hayes, by General Sutherland, resumed.

34th Question. How do you know the fact, witness, that the military forces on Navy Island were acting under the orders of a provisional government, while I was there?

Answer. I was told by Mr. Mackenzie that he was the person who was the author of the proclamation published, and placed upon the island in different places. [This answer was manufactured for the witness, by Colonel Kingsmill, Lt. Col. Brown and Major Gurnett.]

35th Question. You have said that there was a provisional government on Navy Island. Please define the powers of that government; and state by whom granted; and by whom exercised; and what acts were done? You may answer, also, if the proclamation of which you have

testified, was circulated on Navy Island while I was there ; and what were the offices of the provisional government, and who received them ?

Answer. I know that they invaded a part of Upper Canada, and held it against the authorities of the British government ; [This was put in the witness's mouth by Major Gurnett ;] and that they had a flag flying with the word "*liberty*," and *two stars* on it. This power was granted by Mr. Mackenzie and others on the island. Of their acts, I knew them to fire on the inhabitants of Canada from the island. [This was put into the mouth of the witness by Lt. Col. Brown.] The hand-bill, or proclamation, was circulated on Navy Island while General Sutherland was there. Mr. Mackenzie was Chairman of the committee who framed the proclamation, but I cannot name the other officers. [This was put into the mouth of the witness by Major Gurnett.]

36th Question. Do you know, by whom the flag you speak of was put up on Navy Island ?

Answer. I do not. It was flying when I went there.

37th Question. Do you know, witness, by whose permission, or by what authority, General Van Rensselaer, myself, or any other citizen of the United States, were on Navy Island ? If so ; state it. Can witness say that they were not on Navy Island, by the order or permission of the Government of the State of New-York ; or of the Government of the United States ; or of the Government of Her Britannic Majesty ?

Answer. *They assumed the authority themselves, of their own accord.* [This was put into the mouth of the witness by Lt. Col. Brown and Major Gurnett.] I do not know that they had any from the government of the State of New-York, or from the government of the United States. [This was put into the mouth of the witness by the Judge Advocate.] *I know they had no authority from the government of her Britannic Majesty.* [*Ib.*]

38th Question. Have you stated on your direct examination, all that was material, said by me to the men on Navy Island, at the time I was about to leave ?

Answer. I do not recollect any thing more of importance.

39th Question. Was John S. Vreeland a citizen of the United States, to your knowledge ?

Answer. I have heard it said, he was ; but I do not know. I should think he was a citizen of the United States.

40th Question. You have testified that you saw William Lyon Mackenzie on Navy Island. Did you ever see him wear any kind of arms while I was on the Island ?

Answer. I saw Mr. Mackenzie carry pistols in his breast during the time General Sutherland was on the Island.

41st Question. At the time of the first conversation you had with me on Navy Island, did you not tell me that Mr. Mackenzie was your particular friend ; and that you had come to Navy Island to see him ; and that you had been persuaded by him to stay on the Island ?

Answer. I do not recollect any thing of the kind.

42d Question. What has been your occupation during the past year ?

Answer. I was attached to a schooner on Lake Ontario during the summer months. After leaving the schooner, I lived in Toronto until the 31st of October last.

43d Question. Had you been an inhabitant of the State of New-York for some months previous to your going upon Navy Island ? If so ; state how many months, and at what places you have resided in said State ?

Answer. I was not a resident or inhabitant of the State of New-York. But I was some time in Rochester, and some time in Buffalo, trading.

44th Question. Have you before testified or been examined concerning your having been on Navy Island, and about what transpired there ? If so ; did you then state, or testify concerning those matters as you have now testified ?

Answer. I came of my own accord to Waterloo, opposite Black Rock, and was there asked by Colonel Kirby, " what my business was ? " I told him that I had come from Navy Island, and showed my pass from thence. I told him all I knew of Navy Island. I was then sent to Chippewa, where I saw Col. McNab, in the evening with some other officers ; and I stated to him the same I did to

Colonel Kirby, as nearly as I could recollect. Colonel McNab then desired me to call on him again the next morning; and I called on him the next day, which was the 14th or 15th of January, when a magistrate was sent for, before whom I made a statement, like that which I made the day before, and *partly the same* as I have made before this Court. *The same in substance.* [This last sentence was put into the mouth of the witness by the Judge Advocate.]

45th Question. While on Navy Island, witness, did you tell me that Mr. Mackenzie had assisted you in getting some office in Toronto; and that he had done you many other favors?

Answer. No.

46th Question. Where were you, and in what business were you engaged, from the 4th of January, when you have testified that you obtained your pass on Navy Island, to the 13th of the same month, when you have testified you crossed to Waterloo?

Answer. After I left Navy Island, I discovered that I had left a coat of mine behind, and waited two or three days at Schlosser to recover it. I then went to Buffalo, where I remained until the 13th of January, when I crossed over to Waterloo.

It was then signified to the Court by General Sutherland, that the cross-examination on his part was closed. Whereupon, the Judge Advocate acquainted the Court that he rested the proofs on the part of the prosecution.

The Prisoner, General Sutherland, then being called upon by the Court for his defence, prayed the Court to grant him time until Thursday, the 29th day of March inst., to send for his witnesses, and to prepare a defence in writing; and the Court granted the same.

Thereupon the President adjourned the Court till Thursday the 29th day of March, inst., at 10 o'clock, A. M., of that day.

The Court met pursuant to adjournment on the 29th of March, and then from adjournment to adjournment, until the 18th day of April, when it was dissolved: it having found General Sutherland guilty of the Charge; and fixed upon him a sentence; though the preceding is a full and perfect report of all of the testimony adduced on the trial.

THE LAW ENACTED BY THE PROVINCIAL PARLIAMENT OF UPPER CANADA, ON WHICH THE PRECEDING TRIAL WAS PREDICATED.

An Act to protect the inhabitants of this Province against lawless aggressions from Subjects of Foreign Countries, at Peace with Her Majesty. Passed 12th January, 1838.

Whereas, a number of persons, lately inhabiting the State of New-York, or some of the other United States of America, have within the said State of New-York, lately enlisted or engaged themselves to serve as soldiers, or have procured others to enlist or engage themselves to serve as soldiers, and have within the State of New-York, collected artillery, arms and ammunition, and made other preparations for a hostile invasion of this Province, under the pretext of assisting certain traitors who have fled from this Province to the said United States: *and whereas*, the said persons, without the authority of their Government, and in defiance of its express injunctions, *have actually invaded this Province, contrary to the faith and obligation of the treaties subsisting between the United Kingdom of Great Britain and Ireland and the said United States*, and during the continuance of the relations of amity and peace between the two countries: *and whereas*, it is necessary for protecting the peace and security of this Province, to provide for the prompt punishment of persons so offending: *Be it enacted*, by the Queen's most Excellent Majesty, by and with the advise and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of Great Britain, entitled "An Act to repeal certain parts of an act passed in the fourteenth year of His Majesty's reign, entitled 'An Act for making more effectual provisions for the Government of the Province of Quebec in North America,' and to make further provision for the Government of the said Province," and by the authority of the

same, *That if any person, being a citizen or subject of any Foreign State or Country at peace with the United Kingdom of Great Britain and Ireland, having joined himself before or after the passage of this Act, to any subjects of our Sovereign Lady the Queen, Her Heirs or Successors, who are or hereafter may be traitorously in arms against her Majesty, Her Heirs or Successors, shall after the passing of this Act, be or continue in arms against Her Majesty, Her Heirs or Successors within this Province, or commit any act of hostility therein, then it shall and may be lawful for the Governor of this Province to order the assembling of a Militia General Court Martial, for the trial of such persons agreeably to the Militia Laws of this Province, and upon being found guilty by such Court Martial of offending against this Act, such persons shall be sentenced by the said Court to suffer death, or such other punishment as shall be awarded by the Court.*

2. *Be it further enacted by the authority aforesaid, That if any subject of Her Majesty, Her Heirs or Successors, shall within this Province, levy war against Her Majesty, Her Heirs or Successors, in company with any of the citizens or subjects of any Foreign State or Country, then being at peace with the United Kingdom of Great Britain and Ireland, and offending against the provisions of this Act, then such subject of Her Majesty, Her Heirs or Successors, shall be liable to be tried and punished by a Militia General Court Martial in like manner as any citizen or subject of a foreign state or country at peace with Her Majesty, Her Heirs or Successors, is liable under this Act to be tried and punished.*

3. *Be it further enacted by the authority aforesaid, That the citizen or subject of any foreign state or country, offending against the provisions of this Act, shall be deemed guilty of felony, and may, notwithstanding the provisions hereinbefore contained, be prosecuted and tried before any Court of Oyer and Terminer and General Gaol Delivery in and for any District of this Province, in the same manner as if the offence had been committed in such District, and upon conviction shall suffer death as in cases of felony.*

An Act to amend, and reduce into one Act, the Militia Laws of this Province. Passed March 6th, 1838.

Whereas, the several laws now in force for embodying, organizing and training the Militia of this Province are, in many instances, defective and ineffective: *Be it therefore enacted*, by the Queen's most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in Parliament of Great Britain, entitled "An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign, entitled 'An Act for making more effectual provisions for the Government of the Province of Quebec in North America,' and to make further provisions for the Government of the said Province," and by the authority of the same, That from and after the passing of this Act, it shall and may be lawful for the Lieutenant Governor from time to time, to divide the Militia of this Province into such number of Regiments or Battalions as he may deem most conducive to the efficiency of the said Militia, and under his hand and seal to appoint a sufficient number of Colonels, Lieutenant Colonels, Majors, Captains and other officers, to train, discipline and command the said Militia, according to such rules, orders and directions, as shall from time to time be issued by him for that purpose; which officers of Militia shall rank with officers of Her Majesty's Forces serving in this Province, as junior of their respective rank.

32. *Be it further enacted by the authority aforesaid*, That when the Militia of this Province shall be called out on actual service, in all cases where a General Court Martial shall be required, the Lieutenant Governor, upon application to him made through the officer commanding the body of Militia to which the party accused may belong, or in case he be the accused, then through the next senior officer, shall issue his order to assemble a General Court Martial, which said General Court Martial shall consist of a President, who shall be a field officer, and not less than eight other commissioned officers of the Militia: *Provided always*, that in all trials by General Courts Mar-

tial to be held by virtue of this Act, the Lieutenant Governor shall nominate and appoint the person who shall act as Judge Advocate; and that every member of the said Court Martial, before any proceeding be had before the Court, shall take the following oath before the Judge Advocate, who is hereby authorized to administer the same, viz:—"You, A. B., do swear, *that you will administer justice to the best of your understanding, in the matter now before you, according to the evidence and the Militia laws now in force in this Province*, without partiality, favor or affection; and you further swear, that you will not divulge the sentence of the Court, until it shall be approved by the Lieutenant Governor; neither will you upon any account, at any time whatever, disclose or discover the vote or opinion of any particular member of the Court Martial, unless required to give evidence thereof as a witness by a Court of Justice, in due course of law: So help you God:" And so soon as the said oath shall have been administered to the respective members, the President of the Court is hereby authorized and required to administer to the Judge Advocate, or the person officiating as such, an oath in the following words:—"You, A. B. do swear, that you will not upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the Court Martial, unless required to give evidence thereof as a witness by a Court of Justice, in due course of law—so help you God:" And the Judge Advocate shall, and is hereby authorized, to administer to every person giving evidence before the said Court, the following oath:—"The evidence you shall give to this Court Martial, on the trial of A. B. shall be the truth, the whole truth, and nothing but the truth—so held you God:"—*Provided always*, that the Judgment of every such Court Martial shall pass with the concurrence of two-thirds of the members, and shall not be put in execution until the Lieutenant Governor has approved thereof.

An extract of the Militia Laws of the Province of Upper Canada, passed March 16, 1808,—and in force until the sixth day of March, 1838.

SEC. 23. *Be it further enacted by the authority aforesaid,* That when the Militia of this Province shall be called out on actual service, in all cases where a General Court Martial shall be required, the Governor, Lieutenant Governor, or person administering the Government, upon complaint and application to him made, through the Colonel, or officer commanding the body of Militia to which the party accused may belong, shall issue his orders to the said commanding officer to assemble a General Court Martial, which said Court Martial shall consist of a President, who shall be a field officer, *and twelve other commissioned officers of the Militia* : Provided always, that in all trials by General Court Martial, to be held by virtue of this Act, the Governor, Lieutenant Governor, or person administering the Government, shall nominate and appoint the person who shall act as Judge Advocate—and that every member of the said Court Martial, before any proceedings be had before that Court, shall take the following oath before the said Judge Advocate, who is hereby authorized to administer the same, viz :

“ You, A. B. do swear that you will administer justice to the best of your understanding, in the matter now before you, according to the evidence, and Militia Laws now in force in this Province, without partiality, favor or affection ; and you further swear, that you will not divulge the sentence of the Court, until it shall be approved by the Governor, or person administering the Government ; neither will you upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the Court Martial, unless required to give evidence thereof as a witness, by a Court of Justice, in the due course of law—so help you God.”

So soon as the said oath shall have been administered to the respective members, the President of the Court is hereby authorized and required to administer to the Judge Advocate, or the person officiating as such, an oath in the following words :

“You, A. B. do swear that you will not, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the Court Martial, unless required to give evidence thereof as a witness, by a Court of Justice, in the due course of law—so help you God.”

The said Judge Advocate shall, and he is hereby authorized to administer to every person giving evidence before the said Court, the following oath:

“The evidence you shall give to this Court Martial, on the trial of A. B. shall be the truth, the whole truth, and nothing but the truth—so help you God.”

Provided always, that the judgment of every such Court Martial shall pass with the concurrence of two-thirds of the members, and shall not be put in execution, until the Governor, Lieutenant Governor, or person administering the Government, has approved thereof: Provided always, *that no officer serving in any of His Majesty's other forces, shall sit in any Court Martial upon the trial of any officer or private man serving in the Militia.*

AFFIDAVIT OF THE STATE SURVEYOR OF MICHIGAN;
MADE DURING THE IMPRISONMENT OF GENERAL
SUTHERLAND IN UPPER CANADA.

STATE OF MICHIGAN, }
Wayne County. } ss.

JOHN FARMER, of the city of Detroit, in said county, being duly sworn, doth depose and say—that on the 9th day of March, 1838, he, this deponent received an order from the Governor of this State requiring him, (this deponent,) as surveyor, to take immediate measures to ascertain whether the arrest of Thomas J. Sutherland, a citizen of the United States, occurred within the jurisdiction of said State.

This deponent further saith, that he was at said city of Detroit on the 4th of March, 1838, the time he, Gen. Sutherland, was arrested by the British authorities—that he was therefore ignorant of the place of his arrest, and

consequently had to refer to others for information ; and as it was reported " that Benjamin Chittenden and David Thompson had stated that they saw Gen. Sutherland at Gibraltar, on the 4th of March last, the day of his arrest ; that they also saw him with a person supposed to be — leave our shore on foot upon the ice, in a direction for Sandusky, and that some time after the departure of him, Gen. Sutherland, they, Chittenden and Thompson, started in a sleigh from Gibraltar, on the ice for the city of Brest, and that after passing Point Mouillee, and about three or four hours, after the departure of Gen. Sutherland, they, Chittenden and Thompson, saw them about two and a half miles distant, and evidently on our waters, overtaken and arrested by persons in sleighs apparently direct from the Canada shore." Therefore, this deponent sought for, but not being able at that time to find Thompson, he called upon said Chittenden *only*, who not only confirmed said report, but also stated to this deponent that he presumed that he could find the tracks of Gen. Sutherland on the ice, by tracing which this deponent might arrive at the place of his arrest ; this deponent therefore employed said Chittenden, and also one E. S. Lathrop to assist him, and having provided himself with instruments for the purpose of determining accurately the situation of the place of arrest, providing its proximity to the national boundary line should render its jurisdiction uncertain or doubtful ; he, this deponent, with said Chittenden and Lathrop, proceeded forthwith to Gibraltar, thence by the direction of Chittenden to a place on the ice below Gibraltar where said Chittenden pointed out to this deponent the tracks of two persons leading towards the Canada shore, which were then supposed to be the tracks of Gen. Sutherland and — ; they were parallel and about three or four feet apart—those made by the person who had walked on the upper side were much larger of the two, confirming what Chittenden had previously stated, to wit—that Gen. Sutherland was much the larger man of the two, and walked on the upper side. These tracks this deponent traced to their termination, as he then supposed, a short distance from which, was a sleigh track apparently from Malden ; but which this de-

ponent could not arrive at nor examine, on account of the holes in, and the decomposition of the ice at this place, which was exceedingly rotten and covered from six to ten inches with water. This place, this deponent and also Chittenden and Lathrop then concluded was the place of Gen. Sutherland's arrest. It was, in the opinion of this deponent, within one and a half miles of the Canada shore, and in full view of Malden; the Queen's store house at which place could be distinctly seen between the main shore of Canada and Bois Blanc Island; and the light house on said Island bore north five degrees east. [I was not at all at this place described. I walked downwards, near the shore of Michigan, until I was out of sight of Bois Blanc Island.] This place then, supposed to be the place of his arrest, was so evidently within the jurisdiction of Canada, that this deponent, and also said Chittenden and Lathrop, deemed an actual survey and measurement entirely unnecessary. This deponent therefore drew up a report at the time, setting forth the result of said examination as aforesaid, which was signed by this deponent, and also by said Chittenden and Lathrop and which he, this deponent, delivered to the Governor, a copy of which this deponent, has not preserved, because he then believed that that was the place of Gen. Sutherland's arrest—and that it was so evidently within the boundaries of Canada, that its jurisdiction would not and could not be questioned. But as said Chittenden has, since the making of said examination, and the said drawing up and signing of said report, stated to this deponent that he, Chittenden, upon more mature reflection entertains strong doubts about those being the tracks of General Sutherland and —, which he pointed out to this deponent at said examination; and that if they were, that he, the said Chittenden, is of the opinion that the heavy thaw which succeeded their arrest, must have so obliterated the tracks at the time, and especially at the place of examination as to have prevented our perceiving them farther, and consequently have prevented tracing them to their ultimate termination, the place of their arrest; assigning as a reason that Gen. Sutherland had been travelling quite rapidly for three or four hours on the

ice, when he was overtaken and arrested, and that consequently he must have proceeded farther than four or five miles at the time of their arrest; and said Chittenden alleged as a further reason that he and said Thompson could not have seen them from Point Mouillee when arrested if they were arrested at the place of said examination.

This deponent would therefore, also, observe that if those were the tracks of Gen. Sutherland, and if they were beyond the place of said examination, that he, this deponent is fully of the opinion, that the ice, at this place and immediately beyond, in its vicinity, was so extremely rotten and full of holes, as to have rendered it very hazardous, if not impossible, to have pursued them further, even if their tracks had continued visible; and this deponent further observes, that the snow which had been quite deep on the ice at the time of the arrest, was at and beyond, in the immediate vicinity of said examination, so nearly exhausted by the thaw which succeeded the arrest, and the ice at this place was so covered with water, so open in spots and filled with air-holes, in a certain direction, that this deponent is of the opinion that the tracks of Gen. Sutherland, would not have been legible farther, if they had continued on from this place in the same direction, or if they had turned towards the centre of the Lake, or towards a certain vessel lying in sight of, and about five or six miles from this place, but their tracks would have been legible if they had been turned towards the American shore. It is therefore possible, (even if those were his tracks,) that this was not the termination, or the place of the arrest, as they might have turned at or in the vicinity of this place, towards and in the direction of a vessel frozen in the ice, which this deponent saw, and should think was about five or six miles distant. If this was the vessel, (and this deponent saw no other,) within half a mile of which it is reported that Prince states he arrested Gen. Sutherland, and if he was arrested within half a mile of this vessel, then this deponent has no doubt he was arrested within the jurisdiction of the United States; for this deponent is clearly of opinion that this vessel lay at least a mile and a half, if not more, westerly of the national boundary line. This

deponent would also further observe, that in his opinion it would have been utterly impossible for said Chittenden and Thompson, to have seen the arrest of Gen. Sutherland, by the British, from Point Mouillee, if they were arrested at the place of said examination aforesaid, and further this deponent saith not.

JNO. FARMER, *Surveyor, &c.*

Detroit, June 21, 1838.

Subscribed and sworn before me, }
this 21st day of June, 1838. }

D. E. HARBAUGH, *Justice of the Peace.*

AFFIDAVIT OF BENJAMIN CHITTENDEN.

STATE OF MICHIGAN, }
Wayne County. } ss.

BENJAMIN CHITTENDEN, of the city of Detroit, in said county, being duly sworn, doth depose and say, that he is personally acquainted with Gen. Th. J. Sutherland, a prisoner in Canada, and was so acquainted with him, Gen. Sutherland, at the time and when he, Gen. Sutherland, (in company with one ——,) left Gibraltar, in a direction for Sandusky, which was about 12 o'clock on the 4th of March, 1838; and about an hour and a half after their departure, he, this deponent with one David Thompson, left Gibraltar in a sleigh for the city of Brest, lying but seven miles below Swan Creek, and that after travelling an hour, or an hour and a half from Gibraltar, he, this deponent, passed Gen. Sutherland on the ice, 7 or 8 miles below Gibraltar, and after so passing them, he, this deponent frequently stopped his horse and looked back, and saw Gen. Sutherland; and being well acquainted with the course and distance from the mouth of the river to Pelé Island, he, this deponent, then observed to said Thompson, that by the direction of Gen. Sutherland, he could not be bound to Pelé Island. This deponent further says, that about four o'clock, P. M. of the same day, and after passing Point Mouillee, he, this deponent, saw Gen. Sutherland about two and half miles distant from said

deponent, and evidently on our own waters, and far from the boundary line, he, this deponent saw Gen. Sutherland stop and stand still, and at the same time, he, this deponent, saw sleighs with persons therein drive up to, and arrest Gen. Sutherland ; which sleighs, this deponent had for some time seen approaching him ; and this deponent further says, that he is certain that Gen. Sutherland stopped some minutes before, and stood still until the sleighs drove up, and the persons therein arrested him ; and that he, Gen. Sutherland, did not run on the approach of the sleighs, as is reported to have been stated by Col. Prince, who arrested him.

This deponent further says, that he was called upon for information relative to Gen. Sutherland's arrest, and at request, accompanied John Farmer, the Surveyor, on the 10th of March, 1838, for the purpose of examining the place of Gen. Sutherland's arrest, and that although he, this deponent, signed a report, the result of said examination, as set forth in the affidavit of said Farmer ; yet nevertheless, he, this deponent, upon mature reflection and deliberation entertains strong doubts about those being the tracks of Gen. Sutherland, which he, this deponent pointed out to said Farmer, which he and said Farmer traced, and upon which the report of said examination was founded, as set forth in the affidavit of said Farmer ; because this deponent was below Point Mouillee when he saw Gen. Sutherland arrested, from which place this deponent is now confident he could not have seen Gen. Sutherland when arrested, if arrested at the place of examination on the 10th of March, as set forth in the report of said examination, referred to in the affidavit of said Farmer.

This deponent further says, that if those were the tracks of Gen. Sutherland, which he pointed out to said Farmer, at the time of the examination on the 10th of March, that then, he, this deponent, is clearly of the opinion that the thaw which had taken place subsequent to the arrest, but previous to the examination, must have so obliterated the impression of Gen. Sutherland's tracks at and beyond the place of examination, as to have prevented the tracing of them to the place of arrest. This de-

ponent thinks the appearance of the sleigh tracks referred to in the report, could not have been that of Prince's; and that if those were the tracks of Gen. Sutherland referred to in the report of the examination, that, then, Gen. Sutherland must have changed his direction at the place of examination, and proceeded towards a certain vessel which was frozen in the ice, and the only one at the head of the Lake—and which said deponent saw during the examination on the 10th of March, and which said deponent should think, and knows, was five or six miles distant—and as far as the eye could reach. If this was the vessel within half a mile of which it is reported that Prince has stated he arrested Gen. Sutherland, and being the only one in that vicinity, then he must have been arrested on our own waters, for this deponent thinks said vessel was not less than *two and a half, or three miles* westerly of and from the boundary line.

BENJAMIN CHITTENDEN.

Subscribed and sworn before me, }
this 22d day of June, 1838. }

J. W. HUDG, Justice of the Peace.

LETTER TO LORD BROUGHAM.

TO THE RIGHT HONORABLE LORD BROUGHAM, *a Peer of the Realm of Great Britain.*

MY LORD—I am wholly unable to determine what apology I ought to make for the liberty I have taken in addressing your Lordship with this communication. Indeed, I know not that I have any apology to give, save the motive with which the communication is made; and upon this, alone, I have founded the hope that your Lordship may be induced to take into consideration—and to act upon the matters herein presented.

It is due to frankness, my Lord, as I think, that I should state, before proceeding further with this my communication, that I was, myself, among the number of those American citizens, who, in 1837 and 1838, took a part with the inhabitants forming a revolutionary party in the Canadas; and that with the Revolutionists of those Provinces, in the capacity of a military officer, I assisted in the effort which was then made to subvert the authority established therein by Her Majesty's Government. My reasons for having been concerned in those operations will be found in what I am now about to offer in behalf of a number of my fellow-citizens, who, like myself, were concerned in those revolutionary movements of the Canadas; and who, having been taken in arms by Her Majesty's military forces, have been transported to Van Diemens Land, one of the penal Colonies of Great Britain, and there reduced to the condition of common felons; as well as in certain papers and publications which I shall endeavor, herewith, to cause to be put into the hands of your Lordship.

According to the information of which I am possessed, the number of my unfortunate countrymen who were captured during the late civil commotions in the Canadas and who now remain in the hands of Her Majesty's Government, must somewhat exceed one hundred. These men, as it is represented on good authority, have been placed in a convict station, with thieves, robbers, burg-

lars and others of the vilest of the overflowings of the prisons of the British Empire ; and that thus associated, they are made to do penance in the same manner as those who have been convicted of crimes embracing moral turpitude. As they were taken in arms against Her Majesty's Government, the right of that government to detain them as prisoners, so long as Her Majesty shall please, is not to be disputed ; but I contend, my Lord, that persons taken under the circumstances that my countrymen were captured, cannot, in justice, be regarded as felons—and that the reducing of them to the condition of such—and the making them the companions of foot pads and house breakers, is not only a violation of rules adopted and pursued by the people of the most enlightened nations, but that it is an uncalled for severity and a cruelty unnecessary to the case ; and tending to defeat the very object for which punishments are declared by the laws of the British nation. Her Majesty's Government may call them *pirates* and *robbers*, and condemn them to the punishment of felons, but those, my unfortunate fellow citizens can never be made to regard themselves as such. They had acted only from motives of giving a generous assistance to what they believed was a struggle for liberty ; and while they are loaded with chains and incarcerated in dungeons, they will esteem themselves *martyrs to the cause of freedom*. I am, also, my Lord, from information, induced to believe that those men have been condemned upon proceedings which would in no manner bear a legal scrutiny.

We had had it presented to us from the pages of the history of our own country, that when the Canadas were wrested from the French nation, they were rather conquests to the people of the American Colonies, (now the United States,) than to the British Government ; and, therefore, when we had reflected that it was our forefathers who mainly contributed to make the Canadas—what our territories were then—British Colonies, we could not deem it wrong to give the people of those colonies assistance in an attempt to make their country what ours is now—*Free and Independent States* !

We had lately beheld the whole American people vying with each other to do honor to the persons, and to

glorify the names of those illustrious foreigners who came to this country and embarked with our forefathers in their early and hazardous struggle for liberty and independence ; and we had seen monuments to commemorate their services in the cause of our forefathers, put up at the expense of our government ; which was to us a prompting of a desire to earn the same honors for ourselves.

However, my Lord, this was not enough to induce the action of myself, or of any of my unfortunate fellow-citizens. Nor were we moved to interfere with the political affairs of the Canadas, until we had beheld a civil commotion begun and in full operation in those Provinces ; and our services had been solicited by men on whom the people of the Canadas had conferred the highest honors within their gift.

Nor until we had beheld that the Government established therein by Her Majesty, had failed to give security to life and property, (the only legitimate purpose of Government,) and that robbery, arson and murder was being perpetrated in every section of the Provinces, with boldness and impunity.

Nor until we had beheld large numbers of women and children, who had been driven from their homes in the Canadas, by the violence of the soldiery employed therein by Her Majesty's Government, thrown destitute upon our borders, appealing to our sympathies for the bread of existence.

Nor until we had beheld a large foreign army landed in the Canadas, and marched through their territories, not to defend the people from the aggressions of foreign enemies, but to subject them to political slavery.

Yet, when all these matters had passed before our eyes ; and when we had listened to the tales of wrongs and grievances which were related to us by all of the vast number of people who had come among us from the Canadas, and which we believed, because they were similar to those tales we had heard from our forefathers, who had themselves been British Colonists ; and when we had been made to believe that the people of the Canadas were about to make a hearty struggle for liberty, we were

not even then prepared to embark in those movements, so unfortunate to us all, (for I too, my Lord, have been a prisoner in the hands of Her Majesty's Government for many dreary months,) until public meetings of our citizens had been held along the whole borders from Maine to Michigan; at which meetings clergymen, members of congress and of the state legislatures, judges, justices of the peace, lawyers, physicians, and others of the most respectable of our citizens presided as officers; and the most eloquent of our countrymen were speakers—who in their addresses, declared the struggle of the Canadians, “not alone the cause of the people of those Provinces—but ours—of free government—and of all mankind. The cause of true religion, and of God!” and they bade us “go to the aid of the Canadians; to go by ones—by twos—and by threes;” and they proclaimed it “*to be a cause glorious, even to fail in;*” while our people put their hands to their pockets to furnish the means; and having given arms to numbers of the young and chivalrous of our country, them they sent off to fight in the cause of political freedom. Therefore, if we were guilty of wrong, it was equally the wrong of those who sent us; and if we have offended, it was no more our offence than that of the whole American people.

But as it must be known to your Lordship, in this the people of the United States did no more than has been done by British subjects in almost every country on the face of the earth, where there has been presented the same state of political affairs which existed in the Canadas in 1837 and 1838.

All that we had proposed in aid of the people of the Canadas we had seen given by British subjects in aid of the people of all of the revolted colonies of Spain in South America: By British subjects in aid of the people of a revolted colony of Portugal, on the same continent.

All that we had offered in support of the revolutionary movements of Canada, we had seen given by the British subjects in aid of a revolution in Spain: By British subjects in aid of a revolution in Portugal; and by British subjects in aid of a revolution in Circassia.

All that we had aimed to effect in the Canadas, we

had seen effected by British subjects in carrying out a revolution in Greece : By British subjects in carrying out a revolution in Portugal.

Then, if we may put confidence in the public accounts of the day, as often as any of the British subjects who have been engaged in revolutionary movements of other countries have been captured by their adversaries, Her Majesty's Government have sent commissioners to intercede for them and to prevent their being subjected to punishment ; and in many instances their liberation has been demanded in the name of the power of the British nation.

In view of all these matters, my Lord, it is an opinion adopted by a large majority of the people of the United States, that Her Majesty's Government have no justification for the treatment bestowed upon our fellow citizens now prisoners in their hands. Indeed, my Lord, we must regard the course of the French people adopted on a recent occasion as a rebuke to Her Majesty's government for their conduct in this matter ; inasmuch, as that when within a very recent date, an expedition having been fitted out in London and embarked on board a British vessel, sailed direct from thence for the coast of France, where the expedition was landed and an attempt made by it to effect a political revolution in that country ; and when the expedition had failed entirely, and every person belonging to it was either killed or taken prisoner ; yet not an individual who fell into the hands of the French Government, of that expedition, as prisoners, was condemned as a felon ; but each and every one of them taken, has been detained as political prisoners.

It is difficult, my Lord, to suppose a government like that of Her Majesty's, could entertain vindictive feelings towards any individuals whom they have in custody as prisoners ; and the more especially towards those who are known to possess no political influence whatever ; and who in the matters in which they have been implicated, were but subordinates and of the rank and file. Then, can it be for the honor, or in any manner accrue to the benefit of the British nation longer to detain in the condition of common felons the American citizens whom Her

Majesty's Government have sent to Van Diemens Land? If it can, I believe the world will be unable to discover wherein.

All civil commotion in the Canadas is declared to be at an end; and it has been proclaimed by the Governor General of those Provinces, that he no longer fears a renewal of the frontier disturbances; and the military power of Her Majesty's Government is now so well established in the Canadas, that it is not remaining with the things possible that the people of those Provinces should be found able, however much inclined, to make the first step towards a change of their political institutions by an appeal to arms, unless assisted by the Government of some powerful nation, having the resources necessary to organize and sustain large naval and military forces.

For a long series of years previous to the breaking out of the civil commotions in the Canadas in 1837, there had subsisted the most amicable relations between the citizens of the United States and the people of those Provinces; and it is now not less for the interest of the people of those Provinces, than that of the citizens of the United States, that all causes for recollecting the part each may have taken in those civil commotions, should be effaced.

It might be asked, my Lord, why it is left for private citizens to interfere for the release of our countrymen, now prisoners in the hands of the British Government; and why their liberation has not been asked for by the Government of the United States? But, to this supposed inquiry, I answer, that while our institutions and laws leave the individual citizen free to go from the country and unite himself in arms with any people to whom his likes or interests may direct him; and with them carry on war against any other nation or people, they peremptorily prohibit those administering our Government from recognizing such person as a citizen of the Republic, or of interfering in their behalf, whenever they may become prisoners in the hands of their adversaries. Consequently, no application for the liberation of my unfortunate countrymen can be expected to come from the Government of the United States. It is only by private citizens of this country, united with the benevolent of

Great Britain, that any application may be made in their behalf.

I would also suggest to your Lordship, that the further detention of my unfortunate countrymen not only seems to work a hardship and a wrong to the individuals, but from the existence of their extensive family connexions, which are scattered along our whole frontier; and the deep sympathy which is felt for them by a great majority of the American people, I believe I am correct when I advise your Lordship that it is likely to engender a lasting and uncompromising hatred between the people on the different sides of the frontier lines; and to create with the people within our borders, a spirit of retaliation, which in case of a war between the United States and Great Britain, would be the foundation for unnecessary bloodshed and the exercise of the severest cruelties; and for a return to the usages of the savage people of a darker age, under which *but few prisoners are taken*—and no courtesy or kindness afforded to any. Their sufferings may, likewise, be made the capital, to be used by some reckless aspirant for fame, for another volunteer military movement in behalf of the liberties of the Canadas, though such could only bring injury to the Government of both countries, and misery and distress upon the people. Therefore, for the avoiding of these matters, which all must desire—and in behalf of the American citizens now prisoners in the hands of Her Majesty's Government, I request that your Lordship will be pleased to take an early occasion to bring their case again to the consideration of Her Majesty's Ministry, so that they may be liberated and permitted to return to their country and friends: or that they may be, at least, relieved from their present intolerable condition.

With the highest consideration for your Lordship,

I am, my Lord,

Your Lordship's obedient and humble servant.

TH: J. SUTHERLAND.

NEW-YORK, January 1, 1841.

CAPTIVE PATRIOTS, NOW IMPRISONED AT VAN DIEMANS LAND.

A LIST OF THE NAMES OF THE AMERICAN CITIZENS TAKEN AT
WINDMILL POINT, NEAR PRESCOT, IN UPPER CANADA.

From Jefferson County, N. Y.

NAMES.	RESIDENCE.	NAMES.	RESIDENCE.
John Bradley,	Watertown,	Daniel D. Hustis,	Watertown,
Orlin Blodget,	Philadelphia,	Garret Hicks,	Alexandria,
Chauncey Bugby,	Lyme,	David House,	"
Geo. T. Brown,	Le Ray,	James English,	Adams,
Richard Bell,	Antwerp,	Andrew Leeper,	Antwerp,
Nelson Colton,	Orleans,	Joseph Lafort,	Lyme,
Lysander Curtis,	Lyme,	Daniel Liscome,	Charmont,
Robert G. Collins,	"	Andrew Moore,	Adams,
John Cronkhite,	Le Ray,	Foster Martin,	Antwerp,
Moses A. Dutcher,	Brownville,	Ira Polly,	Lyme,
Luther Darby,	Watertown,	William Reynolds,	Orleans,
Aaron Dresser,	Alexandria,	Orin W. Smith,	"
Leonard Delano,	Watertown,	John G. Swanburgh,	Alexandria,
Elon Fellows,	Dexter,	Henry Shew,	Philadelphia,
Emanuel Garrison,	Brownville,	Thomas Stockton,	Rutland,
John Gilman,	"	Riley Whitney,	Lyme.
William Gates,	Lyme,		

From Oswego County, N. Y.

David Allen,	Volney,	Jehiel H. Martin,	Oswego,
John Berry,	Oswego,	Alanson Owens,	Palermo,
Joseph Lee,	Palermo,	Samuel Washburn,	Oswego.

From St. Lawrence Co. N. Y.

John Holmes,	Madrid,	Edward A. Wilson,	Ogdensburgh,
John Monisette,	Ogdensburgh,	Jacob Herald,	"
John Thomas,	Madrid,		

From Onondaga County, N. Y.

Philip Algire,	Salina,	Calvin Matthews,	Lysander,
Hugh Calhoun,	"	Chauncey Matthews,	Salina,
Michael Fryer,	Clay,	Jacob Paddock,	"
G. A. Goodrich,	Salina,	Hiram Sharpe,	"
Nelson G. Griggs,	"	Nathan Whiting,	Liverpool,
Hiram Loop,	Liverpool,	Jerry C. Griggs,	Salina.

From Erie Co. N. Y.

Asa M. Richardson, Buffalo.

From Lewis Co. N. Y.

Stephen S. Wright, Denmark.

From Cayuga Co. N. Y.

Thomas Baker,	Hannibal,	Patrick White,	Auburn.
Benj. Woodbury,	Auburn,		

From Herkimer Co. N. Y.

William Goodrich, Norway.

From Oneida Co. N. Y.

James Pierce, Marshall.

From Warren Co. N. Y. | *Residence not known.*
 Solomon Reynolds, Queensbury, | Joseph Stewart.

A LIST OF THE NAMES OF THE AMERICAN CITIZENS TAKEN AT
 OR NEAR WINDSOR, IN UPPER CANADA.

From Cuyahoga Co. Ohio.

James P. Williams,	Cleveland,		James Williams,	Cleveland,
Samuel Snow,	Strongville,		Charles Reed,	"
Simeon Goodrich,	Cleveland,		Robert Whitney,	"
Robert Marsh,	"		Oliver Crandall,	"
David Day,	"		John L. Guttridge,	"

From Wood Co. Ohio.

Mitchell Monroe, Toledo.

From Lorain Co. Ohio.

Allen B. Sweet,		John Sprague.
William Nottage,		

From Wayne Co. Michigan.

Daniel Anthony, Detroit.

From Washtenaw Co. Michigan.

Hiram Barnham,	Ypsilanti,		James D. Few,	Ypsilanti.
----------------	------------	--	---------------	------------

From Erie Co. N. Y.

John Simons,	Buffalo,		Ezra Horton,	Buffalo.
Joseph Horton,	"			

From Madison Co. N. Y.

Eleazur Stevens, Lebanon.

From Niagara Co. N. Y.

John W. Simmons,	Lockport,		Truman Woodbury,	Lockport.
------------------	-----------	--	------------------	-----------

From Monroe Co. N. Y.

John C. Williams, Rochester.

Residence not known.

John W. Brown,		Elijah Woodbury,
John B. Turrell,		James Achason,
Horace Cooley,		Joseph Stewart,
William Montague,		John S. Maybee,
Samuel Hilkey,		Henry G. Barnum.

A LIST OF THE NAMES OF THE AMERICAN CITIZENS TAKEN AT
 SHORT HILLS, IN UPPER CANADA.

From Chautauque Co. N. Y.

Linus Wilson Miller.

Residence not known.

Erastus Warner,		Norman Mallory,
Samuel Chandler,		John Vernon,
Benjamin Waite,		James Van Waggoner.
Geo. B. Cooley,		

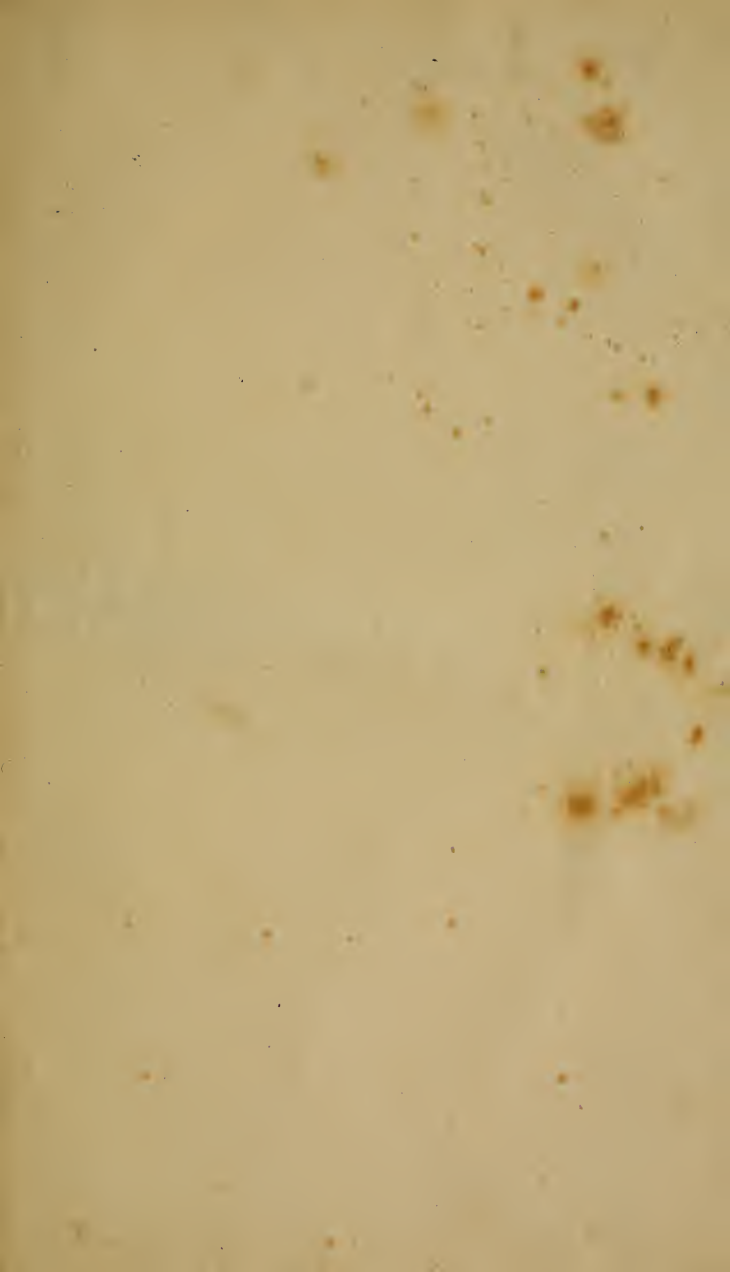
☞ Of the American citizens captured in Lower Canada, no list of names has been obtained.

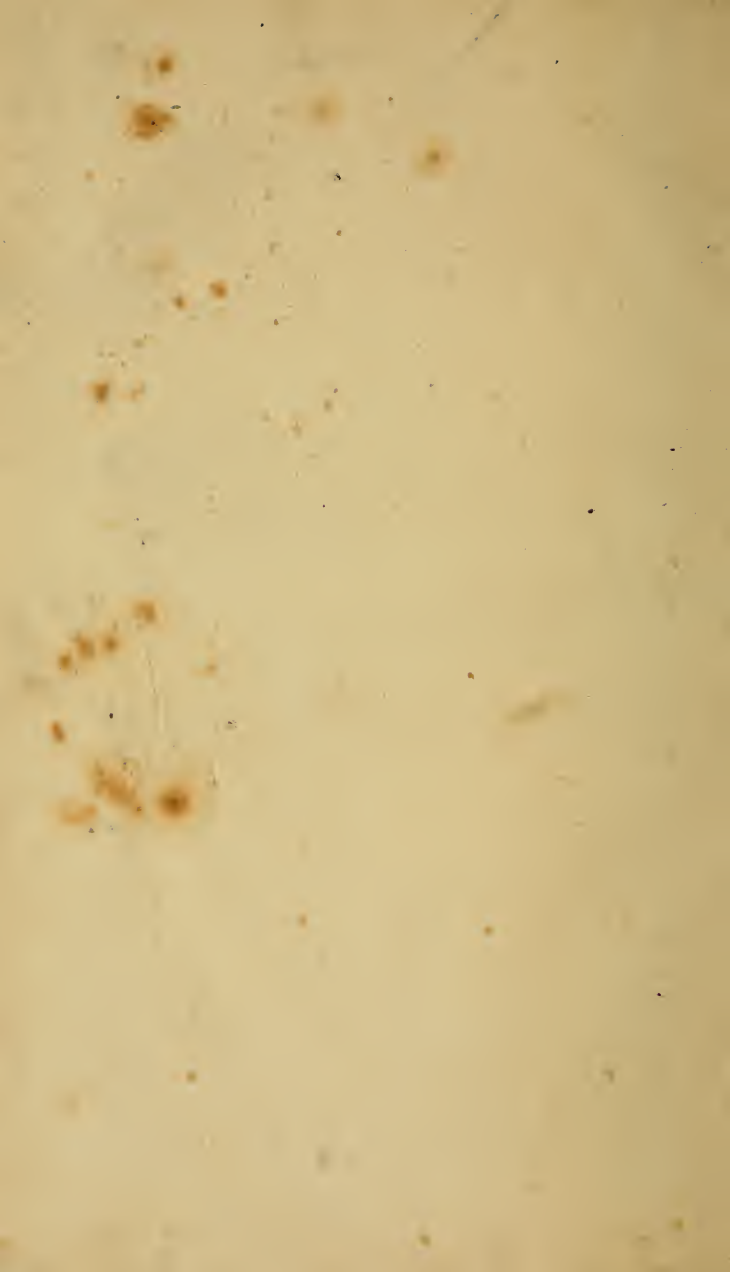
CONTENTS.

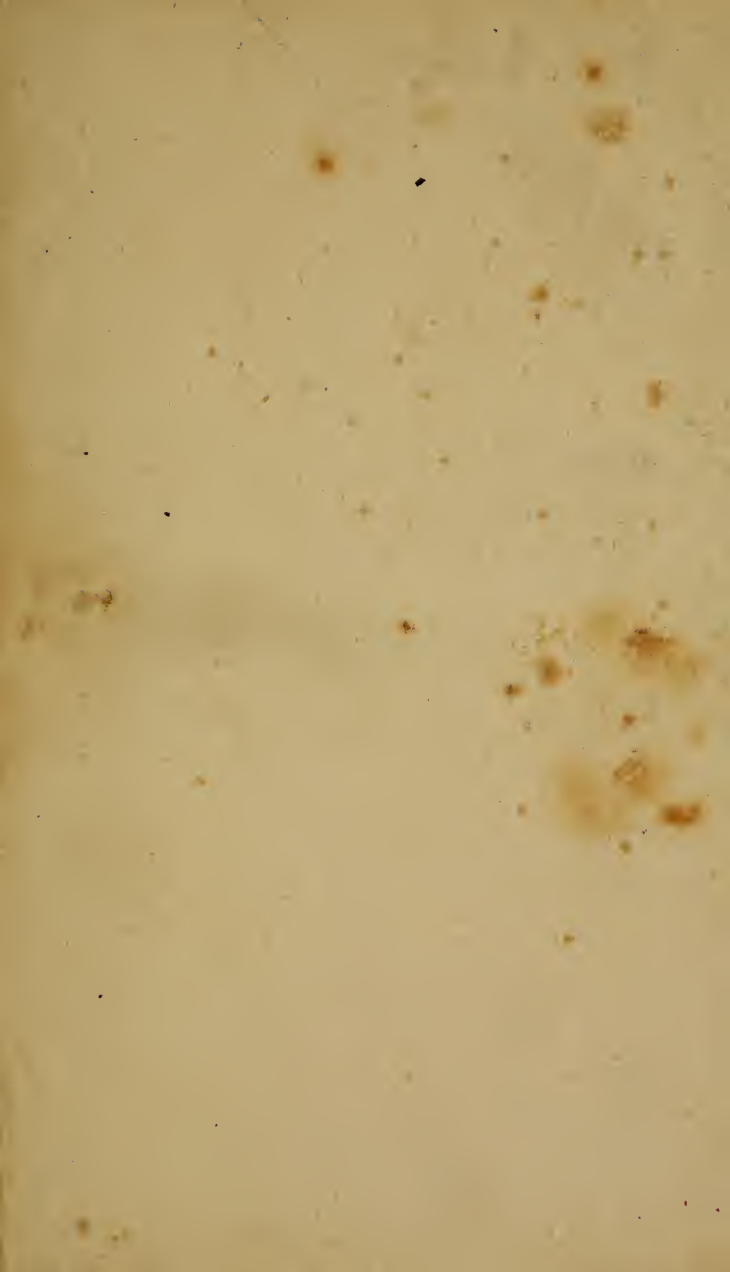
	PAGE.
Advertisement,	3
Dedication,	5
Letter to the British Queen,	9
Letter to Lord Durham,	21
Letter to Sir George Arthur,	75
Letter to Lord Glenelg,	79
APPENDIX.	
Members of the Court,	98
Preliminary Proceedings,	99
Report of the Testimony,	104
Act of the 12th of Jan.	147
Militia Laws,	149
Affidavits,	152
Letter to Lord Durham,	159
Captive Patriots,	166



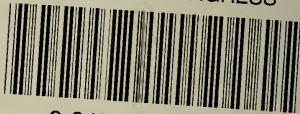








LIBRARY OF CONGRESS



0 017 395 133 4

