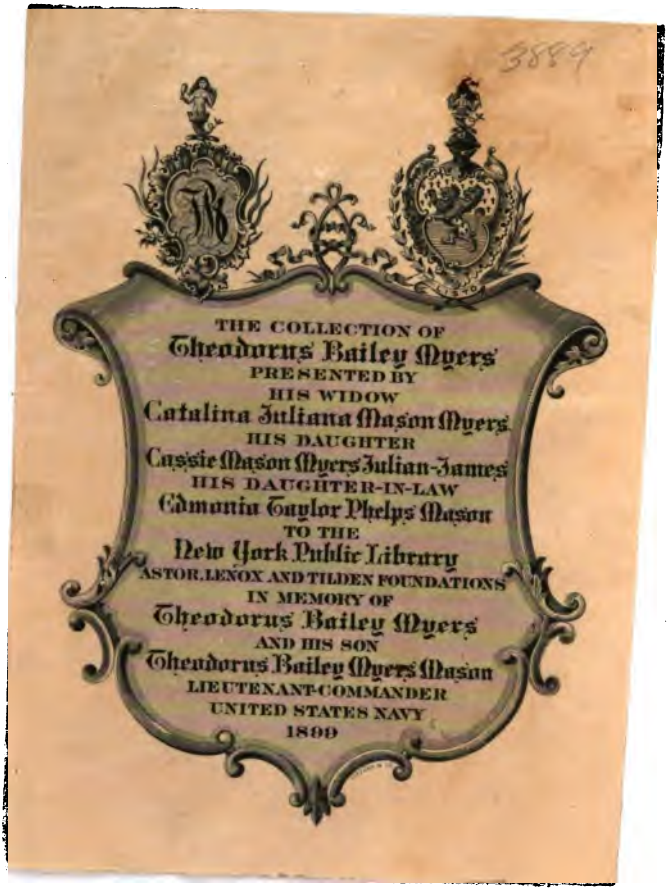

TRIAL

OF

COL. THOMAS H. CUSHING,

BEFORE A

GENERAL COURT-MARTIAL,

WHICH SAT AT BATON-ROUGE,

ON CHARGES PREFERRED AGAINST HIM

BY BRIG. GEN. WADE HAMPTON.

REPORTED BY THE LATE JUDGE ADVOCATE.

PHILADELPHIA:

PUBLISHED BY MOSES THOMAS, NO. 52, CHESNUT-STREET.

J. Maxwell, Printer.

1812.

ADVERTISEMENT.

It was the intention of the reporter to have given to the public the entire proceedings had in the trial of colonel Cushing. But such he found to be the mass of evidence,* written and parol, reduced to record in the case, as to deter him from that plan. Besides, it would be superfluous to publish the whole of the testimony in the form in which it was received; because those parts deemed material at the trial, will be found generally quoted, either in the defence or the replication. The interlocutory decisions which grew out of the evidence may be seen in the appendix.

* The evidence, including the papers exhibited, and the parole testimony reduced to record in the trial, is contained in upwards of *one hundred sheets* of MS.

* FURTHER PROCEEDINGS

OF

A GENERAL COURT-MARTIAL,

HELD AT BATON ROUGE, (W. F.)

OF WHICH COLONEL A. SMYTH IS PRESIDENT.

Friday, April 26, 1811.

THE court met. Present

COLONEL SMYTH, President.

Members,

Lieutenant-colonel Milton,	Major Mac Rea,
Major Bowyer,	Major Russell,
Major Darrington,	Major Nicholas,
Captain Morgan,	Captain Wallace,
Captain Bankhead,	Captain Atkinson,
Captain Piatt,	Captain Blue.

Supernumeraries,

Captain Machesney,	Captain Butler.

LIEUT. W. LEE, Judge Advocate.

COLONEL THOMAS H. CUSHING, of the second regiment of infantry, appeared before the court, and, on being asked if he was ready for trial, he stated to the court that he did not conceive himself in arrest; in support of which he read to the court the seventy-seventh article of the rules and articles of war, and laid before them a letter from general

* "Further," here refers to a previous trial, of a different person. Courts-martial are organized *de novo* in each successive case. REPORTER.

Hampton to colonel Covington, dated the 16th March, 1811, and an order, dated the 2d April, 1811.

The judge advocate read to the court the following letters:—

Letter from general Hampton to colonel Cushing, dated 18th February, 1811.

Letter from the same to colonel Covington, dated 20th February, 1811.

Letter from colonel Cushing to general Hampton, dated 4th March, 1811.

Letter from colonel Covington to colonel Cushing, dated 18th March, 1811.

Colonel's answer, of same date.

The court, upon consideration, determined that colonel Cushing is in arrest.

Colonel Cushing then stated to the court that he was not ready for trial, and requested the indulgence of the court until tomorrow, to show cause, &c.

The court granted his request, and adjourned, to meet again tomorrow at 9 o'clock.

Saturday, April 27, 1811.

The court met pursuant to adjournment. All present.

The court determined to be formed and organized prior to their deciding on colonel Cushing's motion for postponement.

The judge advocate accordingly demanded of the accused, whether he had any objection against, or challenge to make of, any of the members composing the court, and, if any, to state them as their names were mentioned.

COL. SMYTH, *President.*

The accused asked of the president, whether he had taken the oath prescribed and required in the twentieth section of the act entitled, "An act fixing the military peace establishment, &c." and, receiving an answer in the affirmative, he made no objection.

LT. COL. MILTON, *Member.*

The accused asked this member the same question which had been answered by the president, and, on receiving a similar answer, he made no objection.

MAJOR MAC REA, *Member.*

The same question and answer was asked of, and received from, this member, and the accused had no objection.

MAJOR BOWYER, *Member.*

The accused objected to this member, and stated for cause, that he had understood that major Bowyer had intended to bring charges against him, and that the present charges embraced some of the matter which he intended to prefer. Major Bowyer admitted the fact.

The court determined that the objection is valid, and major Bowyer was permitted to withdraw.

MAJOR RUSSELL, *Member.*

The accused put the question which had been answered by the president, to this member, who, answering in the negative, was on that ground objected to.

The court determined that the objection is not valid.

The accused made a further objection to this member, that he had been in the habit of slandering and calumniating his character for a number of years—that, in support of this fact, lieutenant-colonel Purdy is a material witness.

Lieutenant-colonel Pike, of the fourth regiment, being sworn to answer, states—

That he has heard major Russell, in various conversations, express himself unfriendly towards colonel Gushing, and that he believes major Russell is still unfriendly towards him.

The court determined that the last objection is valid, and major Russell was permitted to withdraw.

MAJOR DARRINGTON, *Member.*

The question which had been put to the president was asked this member, who answered in the affirmative.

The accused challenged this member, and stated for cause—

That major Darrington had made a deposition, parts of which have been completely disproved by various depositions of other officers, and that goes to prove a course of conduct highly derogatory to the character of a man of honour and a gentleman.

The court determined that they would not go into an inquiry of the statement, therefore overruled the objection.

The accused then objected to major Darrington, on the ground of his being biassed against him, since he made the above objections; which objections being resolved into the question—whether major Darrington is disqualified from sitting as a member, by reason of illwill towards the prisoner? The court determined, that major Darrington is disqualified, and he was accordingly permitted to withdraw. There not being a supernumerary to fill the vacancy occasioned by major Darrington's withdrawing—the court adjourned, to meet again tomorrow at 9 o'clock.

Sunday, April 28th, 1811.—The court met pursuant to adjournment. The following extract of a letter, from general Hampton, to colonel A. Smyth, dated, " Head Quarters, Baton Rouge, 27th April, 1811," was read by the judge advocate.

" In case the objections, made to the members of the court, detailed for the trial of col. Cushing, should prevail to an extent, that may make a further detail necessary, you will be pleased to order the brigade inspector to make them.

" I have the honor to be, sir,
" Your ob't serv't.
(Signed) " W. HAMPTON."

Col. A. Smyth,
Commanding at Baton Rouge.

The judge advocate read to the court, the following orders, to wit:

"*Baton Rouge, 28th April, 1811.*

"The brigade inspector, will detail from the officers on duty at this post, four additional supernumerary members of the general court-martial, now in session.

(Signed) "ALEXANDER SMYTH,
"Col. commanding."

ORDERS.

"Captain Wollstonecraft, capt. Clinch, lieut. Chambers, and lieut. Dorman, are the officers detailed as supernumerary members of the general court-martial, agreeably to the above order."

(Signed) "J. GIBSON:
"Capt. and brigade inspector."

The court took their seats as follows:—

COLONEL SMYTH, President.

Members.

Lt. col. Milton,	Major Mac Rea,
Major Nicholas,	Capt. Wollstonecraft,
Capt. Morgan,	Capt. Wallace,
Capt. Bankhead,	Capt. Atkinson,
Capt. Piatt,	Capt. Blue,
Capt. Machesney,	Capt. Butler.

Supernumeraries.

Capt. Clinch,	Lieut. Chambers.
Lieut. Dorman,	

The judge advocate proceeded in naming the members of the court, to the accused—to major Nicholas, captain Wollstonecraft, captain Morgan, and captain Wallace, the accused made no objection.

Capt. BANKHEAD, *member.*

The accused objected to this member, on the ground of his having been a member of a court-martial, which tried William Bence for desertion, which court ordered him to be delivered up to colonel Covington, and which sentence he, the accused, disapproved of; and further, that captain Bankhead had a furlough to return to the United States on business important to himself, as soon as this court was dissolved, and from his anxiety to get off, could not be altogether unbiassed in deciding the time he asked for.

The court overruled the objections to captain Bankhead.

To captain Atkinson, a member, there was no objection.

Capt. PIATT, *a member.*

The accused objected to this member, on the ground of his having been for a considerable time, and now is unfriendly towards him.

Captain Piatt rose, and informed the court, that he was acquainted with circumstances on which some of the specifications against colonel Cushing, were founded, and on which he had formed and expressed an opinion.

The court permitted captain Piatt to withdraw.

To captains Blue, Machesney, and Butler, members, there were no objections.

Capt. CLINCH, *a member.*

The accused objected to this member, on the ground, that according to the original order, the commanding officer should have detailed captains Gaines and Arbuckle, who are senior officers, and now at Baton Rouge.

The president of the court, as commanding officer, stated to the court that captains Gaines and Arbuckle being here as witnesses in this cause, and not attached to the troops under his command, he did not deem it proper to order them to be detailed for this service.

The accused replied, some other members of the court were witnesses.

The court overruled the objections of the accused.

The court was duly sworn, and consisted of

COLONEL SMYTH, President,

Members.

Lieutenant-colonel Milton,	Major Mac Rea,
Major Nicholas,	Captain Wollstonecraft,
Captain Morgan,	Captain Wallace,
Captain Bankhead,	Captain Atkinson,
Captain Blue,	Captain Machesney,
Captain Butler,	Captain Clinch.

Supernumeraries.

Lieutenant Chambers, Lieutenant Dorman.

The court proceeded to hear colonel Cushing's motion for postponement, on account of the absence of material and important witnesses, in support of which he produced an affidavit, (see affidavits attached to these proceedings,*)

* The following is the substance of the affidavits referred to:—Col. Cushing declared upon oath that he was not then prepared to come to trial on the charges, &c., inasmuch as he had not enjoyed an opportunity of compelling the attendance of certain witnesses, or of taking, in the manner prescribed by law, the evidence of nineteen persons enumerated therein. And he further declared, that he had used all the diligence in procuring testimony, which the nature of the case and of his situation would admit; that on the 25th of March, 1811 (the date of the arrest), he delivered to colonel L. Covington, then commanding officer at fort Stoddart, two lists of witnesses necessary for his vindication; but that it did not appear that any steps had been taken for procuring the attendance of any of them; that he verily believed that the testimony of the said witnesses will be, not only material, but all-important, and that he could not safely go to trial, on the said charges, without the testimony of the said witnesses, or of the greater part of them; that he hoped and believed that, with such an allowance of time as the situation of the said witnesses, and the powers vested in the commanding officer and the court, would render reasonable, he should be able to procure their testimony, or the testimony of so many of them as would tend to his complete exculpation; and that his application for a postponement of the trial was not made for the purpose of delay, but under a full persuasion that it would enable him to establish his inno-

and made a verbal statement to the court, to what particular points he required the testimony of each witness.

The court determined to commence the trial and hear the evidence of witnesses present, it being understood that *a reasonable opportunity shall be given* to produce all material witnesses.

The court adjourned, to meet again tomorrow at nine o'clock.

April 29, 1811.

The court met pursuant to adjournment, and, on being cleared, determined that the decision they had made yesterday, on the motion for postponement, should be rescinded, and that colonel Cushing be arraigned and plead, before they take into consideration the motion for postponement.

COLONEL THOMAS H. CUSHING,

Of the second regiment of the United States' infantry, was accordingly arraigned on the following charges and specifications, preferred against him by brigadier-general Wade Hampton.

CHARGE I.

Disobedience of Orders.

Specification 1.—In failing to give timely notice to the contractor to be prepared for the supply of the two rifle companies at cantonment, Washington, M. T. though he was required to do so, in my letter of instructions of the 22d of May, 1810, which directed the said two rifle companies to be held in readiness to march at a day's notice.

cence, and to the end that real justice might be done. Sworn and subscribed before the judge advocate, in open court.

"And the said colonel Thomas H. Cushing further deposeth, that a material point in his defence, in the prosecution against him, depending before the general court-martial, depends on each of the following witnesses:—Colonel L. Covington, major J. Fuller, and the late captain Houstoun; and that he cannot safely go to trial without each of the said witnesses." Sworn and subscribed as above.

Of the nineteen witnesses mentioned in the two affidavits, several were of the army and navy, others citizens of the United States, and two or three subjects of a foreign power, residing at Mobile. Major Fuller, of the army, was, at the time, far to the eastward (perhaps in Vermont), and others were in distant parts of the union. REPORTER.

Specification 2.—In failing to order the brigade quartermaster, lieutenant Hukill, to furnish the necessary and sufficient funds for the march of the said two rifle companies, at cantonment, Washington, under the command of major Fuller, of the rifle corps, though he was required, in my letter of instructions of the 28th of May, 1810, to order every proper detail relating to the march of the said two rifle companies.

Specification 3.—In failing to have Alexander Anderson, a musician, belonging to the band of the second regiment of infantry, and William Bence, a private, of captain Boote's company, second regiment of infantry, both of whom were deserters, who had delivered themselves up, under the proclamation of the president of the United States, given at the city of Washington, on the 29th day of January, 1810, delivered up to colonel Covington, of light dragoons, agreeably to the general order of the 8th of June, 1810.

Specification 4.—In permitting and suffering the officers' buildings at cantonment, Washington, M. T. and at the cantonment of the second regiment of infantry, near the town of Washington, M. T. to be made upon a large and extensive scale, and of huge and massy materials, in utter disregard and violation of the general order of the 15th of March, 1810, which required that officers should confine themselves strictly to the allowance for barracks, established by the regulations of the war-department, and that the building necessary to complete the allowance, should be put together of the slightest materials.

Specification 5.—In erecting, at great labour and expense, and of huge and massy materials, the buildings at the cantonment of the second regiment of infantry, near Washington, M. T. though, in my letter of the 6th of June, 1810, he was directed to have the huts, for both officers

and soldiers, at said cantonment, built upon a plan the most slight and cheap.

Specification 6.—In failing to proceed with three companies of the second regiment of infantry of his command, from the neighbourhood of Washington, M. T. to fort Stoddart, with the least possible delay, as he was required to do in my letter of instructions of the 10th September, 1810, by unmilitary, improper, unnecessary, and unwarrantable delay at cantonment, Washington, M. T., at the city of New Orleans, and at the town of Mobile.

Additional Specification.—In failing to proceed from fort Stoddart, M. T. with the least possible delay, as he was ordered to do in my letter of instructions to him of the 18th of February, 1811, under the plea of inability to travel by land, and continuing at fort Stoddart, in command, for some considerable time after the receipt of my said letter of instructions, notwithstanding he might have proceeded with facility in a conveyance by water.

CHARGE II.

Abuse of Trust and Misapplication of Public Property.

Specification 1.—In choosing, in the month of April, 1810, a site for the cantonment of the second regiment of infantry, remote and inconvenient, with a view to promote the interest of the proprietors of the land on which it was established, or one of them, at a great sacrifice to the regiment, and to the interest of the United States, contrary to the suggestions of my letter of the 8th of April, 1810, and those confided to the brigade quarter-master, lieutenant Hukill, of the same date, to be communicated when the letter was delivered.

Specification 2.—In attempting and endeavouring to enter into a contract with Messrs. Andrews and Wilkinson, calculated to promote the private interest and advantage of

these citizens, at the expense and injury of the United States, and to the dishonour of the army, by agreeing to conditions for the land whereon the cantonment of the second regiment of infantry, near Washington, M. T. is built, evidently having this tendency, which said contract was disclosed to me by his letter of the 23d of May, 1810.

Specification 3.—In erecting, at great labour and expense, and of huge and massy materials, the buildings at the cantonment of the second regiment of infantry, near Washington, M. T. though, in my letter of instructions of the 6th of June, 1810, he was directed to have the huts, for both officers and soldiers, built upon a plan the most slight and cheap; and in providing, on the ground of said cantonment, a greater quantity of materials than was warranted by my said letter of instructions of the 6th of June, 1810, with the view of benefiting Messrs. Andrews and Wilkinson, or one of them, the proprietors of the land on which the said cantonment is built, at the labour and expense of the United States.

Specification 4.—In building, or permitting to be built, at the cantonment of the Columbian Spring, at an unwarrantable expense of labour, and for occupying the same, from some time, in the year 1808, to the entire exclusion of the rest of the regiment, until the time of their abandonment, in April or May, 1810, military quarters for himself, of a size and magnitude greatly above the allowance, according to the regulations of the war-office, to officers of his rank, which, being at least sixty feet in length, and thirty-five feet in breadth, finished in a style of expense and labour unusual for military quarters, must have contributed considerably, by the oppression of the soldier in these labours, to that uncommon desertion, which, in that corps, prevailed between the periods before mentioned.

Specifications first and second of charge third, are additional specifications to charge the second.

CHARGE III.

Conduct unbecoming an Officer and a Gentleman.

Specification 1.—In loading and crowding, and suffering to be loaded and crowded, the transports which were to move his command of three companies of the second regiment of infantry to fort Stoddart, by my letter of instruction of the 10th of September, 1810, with an immense and prodigious quantity of baggage, and luggage of various kinds, vastly above the proportion allowed to officers by the regulation of the war-department, to the great inconvenience of the service, to the expense of the United States, and to the impediment of the movement designed by the said letter of instruction of the 10th of September, 1810.

Specification 2.—In ordering, some time during the months of April and May, 1810, a store-house and dwelling-house to be built, at the cantonment of the second regiment of infantry, near Washington, M. T. for Mr. John Hankinson (son-in-law to Mrs. Cushing, his wife), a sutler to the army, and in permitting and suffering a number of the soldiers of the second regiment of infantry, amounting, at different times, in the months of April, May, and June, to between four and twenty-seven to be employed, during the months of April, May, and June, in building, at the cantonment of the second regiment of infantry, near Washington, M. T. a store-house and dwelling-house for the said Hankinson, a sutler, and in permitting and allowing the said soldiers to be reported on daily duty, and to draw extra whiskey, at the expense of the United States, during the time in which they were employed in building, at the said cantonment, a store-house and dwelling-house for said Hankinson, a sutler.

Specification 3.—In artfully and insidiously, in his orders of the 28th September, 1810, respecting the proceedings of a general court-martial, in the case of captain John Campbell, of the second regiment of infantry, giving appro-

bation and sanction to the conduct of the said captain John Campbell, who, without any authority, but his own will, did, between the 15th and 18th of June, 1810, at the ford of St. Catherine's creek, M. T. and at the cantonment of the second regiment of infantry, near Washington, M. T. strike and beat Thomas Cox, a private of captain Boote's company, second regiment of infantry, by way of inflicting punishment; and incovertly, indirectly, and insidiously combating and opposing, in a manner calculated to defeat the principles of the general order of the 8th of June, 1810, which prohibited any officer from taking the law and the punishment into his own hands, and striking and beating the soldiers.

Specification 4.—In violating the sanctity of a private letter addressed to me, from, and franked by, Mr. Macon, a representative in congress, by breaking open the seal of said letter, and reading a part thereof, some time between the 20th of March and the 7th of May, 1810.

Specification 5.—In making highly unmilitary and improper comments upon the orders and instructions of his commanding general, of the 22d and 28th of May, 1810, and 23d of January, 1811, in his replies to these letters, dated the 5th and 20th of June, 1810, and 3d of February, 1811, and in pursuing this highly disrespectful conduct to his commanding officer, with the insidious design of throwing a false colour upon measures adopted for the public good, and of injuring the standing of his commanding general with the war-department.

Specification 6. [*Additional.*]—In exercising command at fort Stoddart, from the 18th until the 25th of March, 1811, in direct opposition and resistance to my letter of instruction to colonel Covington, of the 20th of February, 1811, directing him to repair to fort Stoddart, M. T. and to take command there, and notwithstanding my letter of instructions to him (colonel Cushing), of the 18th of Febru-

ary, 1811, to proceed to Washington, M. T. with the least possible delay.

Specification 7. [*Additional.*]—In taking, on or about the third of January, 1811, an improper and unauthorized attitude with his command, at or contiguous to the town and garrison of Mobile, and in taking a house for his family, and establishing his quarters, within the said town; occasioning thereby, besides the great delay, in violation of my letter of instruction to him of the 10th of September, 1810, an unnecessary alarm and apprehension to the officers of a foreign power, in amity with the United States.

To which charges and specifications the prisoner pleaded as follows, to wit:—

To charge first, and its several specifications—*Not Guilty.*

To charge second, and the first, second, and third specifications of that charge—*Not Guilty.*

To the fourth specification of charge second, the prisoner objected to plead, on the ground of its being barred by the eighty-eighth article of the rules and articles of war.

The court determined that the prisoner plead to the specification, and he accordingly pleaded—*Not Guilty.*

To additional specifications, first and second, of charge second, the prisoner pleaded—*Not Guilty.*

To charge third, and the first and second specifications of that charge, the prisoner pleaded—*Not Guilty;*

But objected to plead to the third specification of charge third, on the ground, first, That this court has not cognizance of the subject-matter laid in the specification; second, That if this court had cognizance of it, yet it is too general, inasmuch as the writing referred to is not set forth.

The court determined that the prisoner should plead to the specification, to which he pleaded—*Not Guilty.*

To the fourth specification of charge third—*Not Guilty.*

To the fifth specification of charge third the prisoner objected to plead, on the ground of its being too general, inasmuch as the letters referred to ought to be set forth.

The court determined that the prisoner should plead to the specification; to which he pleaded—*Not Guilty.*

To the sixth specification of charge third the prisoner objected to plead, on the ground of its containing nothing criminal; in support of which he read to the court the sixty-second article of the rules and articles of war.

The court determined that the prisoner should plead to the specification; to which he pleaded—*Not Guilty.*

To specification seventh of charge third the prisoner pleaded—*Not Guilty.*

The prisoner having pleaded to all the charges and specifications, the court proceeded to hear what he had further to adduce, in support of his motion for postponement, in addition to the statement he had made yesterday.

The court after deliberation, determined that they will postpone the trial of colonel Thomas H. Cushing, until the first day of August, 1811, in order to enable him to produce all witnesses, or testimony, which may be material to his defence.

The court adjourned to meet again tomorrow at nine o'clock.

Thursday, April 30th, 1811.

The court met pursuant to adjournment.

A motion was made to reconsider the decision of yesterday, on the motion for postponement.

The court postponed the consideration of this motion until tomorrow.

The court adjourned until tomorrow, at nine o'clock.

Wednesday, May 1st, 1811.

The court met pursuant to adjournment.

A message was received from the commanding general, desiring the judge advocate to wait on him at head quar-

ters. The court being informed thereof, consented to the judge advocate's waiting on the general, and for that purpose adjourned one hour.

The court met, pursuant to adjournment.

Captain Wallace, a member, being too much indisposed to sit longer, he was permitted to withdraw, and lieutenant Chambers, a supernumerary, after being duly sworn, took his seat as a member; the prisoner making no objections.

The judge advocate, made the following statement to the court:

"Mr. President,

"I am instructed by the commanding general, to state to this court, that he has hitherto, and still does consider it expedient for the good of the public service, that the trial of colonel Cushing should be prosecuted to a close, without postponement, and, that as prosecutor, he must object to any delay: but should this court determine notwithstanding, that a postponement is absolutely necessary, then, that less injury will result to the public service, by continuing this trial to the first of December next, than to the first of August.

I therefore, on the part of the prosecution, am enabled to say, that if a postponement is determined on, the prosecutor has no objections to this trial being continued to the first day of December next.

The court was cleared on the motion made yesterday, to reconsider, which was decided in the affirmative; and the court determined, that they will postpone the trial of colonel Thomas H. Cushing, until the first day of December next, in order to enable him to procure, and adduce all witnesses or testimony, which may be material to his defence.

The court adjourned to meet again tomorrow, at nine o'clock.

Thursday, May 2d, 1811.

The court met pursuant to adjournment.

The following letter was received by the judge advocate, and read to the court.

"*Baton Rouge, 1st May,* 1811.

"SIR,

"The general court-martial, of which colonel Smyth is president, was constituted to try the cases of colonel Cushing, and lieutenant colonel Sparks; until the former case shall be decided, the general has no new business to submit to the consideration of the court.

"By order,

(Signed) "W. S. HAMILTON.

"Lieut. 3d infantry, and aid de camp.

"*Lieut. W. Lee,*

"Judge Advocate."

The judge advocate stated to the court, that he had informed the parties of the determination of the court, to adjourn to the first day of December, 1811.

The court directed the judge advocate to furnish the commanding general with a list of the military witnesses, in order that they be directed to attend the court at their next meeting on the first December, 1811.

The court directed the judge advocate to summon, during the adjournment of the court, all witnesses who may be necessary or material, for the prosecution or defence of this trial.

The court adjourned, to meet again on the first day of December next.

Washington Lee, lieut. and judge advocate.

Baton Rouge, December 1st, 1811.

In pursuance of the adjournment of the general court-martial, whereof colonel Alexander Smyth, is president,

which took place on the 2d of May last, the following members attended, viz.

——— ———, President.

Members.

——— ———,	Major Mac Rea,
——— ———,	Captain Wollstonecraft,
——— ———,	——— ———,
Captain Atkinson,	Captain Blue,
Captain Machesney,	Captain Butler,
——— ———,	Lieutenant Chambers.

Lieutenant Dorman, *Supernumerary*.

Lieutenant W. Lee, judge advocate, the president of the court, and five members appearing to be absent, the members present, determined to attend again tomorrow, at the hour of 12, M.

December 2d, 1811.

Pursuant to the resolution taken by the members present yesterday, they attended again today, and it appearing that the president of the court, and five of the members were still absent, they determined to give no further attendance until called together by an order.

December 3d, 1811.

The judge advocate attended at the court room, and called over the names of the president and members, neither of whom answered or attended.

December 4th, 1811.

The judge advocate attended at the court room, and on calling over the names, lieutenant Chambers was the only one found to be present.

December 5th, 1811.

The judge advocate attended at the court room, and on calling over the names of the members composing the court, captain Butler and lieutenant Chambers, members, and lieutenant Dorman, supernumerary, answered.

The judge advocate read a general order, dated

"*Head Quarters, Creek Nation, November 24th*, 1811.

WASHINGTON LEE, Lt.

Judge Advocate.

"GENERAL ORDERS.

"*Head Quarters, Houmas, Feb. 10th*, 1812.

"The general court-martial, whereof colonel Alexander Smyth is president, which stood adjourned in May last, to meet on the 1st of December, but which on account of the absence of the president and many of its members, was unable to proceed to business, at the time to which it was adjourned, will convene at Baton Rouge, on the 20th March next for the trial of such prisoners as may be brought before it.

"As the absence of the president and such members as did not appear at the adjourned meeting, was occasioned by causes beyond the control of the general; as the time of their return is uncertain; and as the service imperiously demands a speedy termination of the business depending before the court, the general has deemed it expedient to add the following officers to the detail of supernumerary members, viz. colonels Covington and Constant, lieutenant colonel Purdy, and captain Gibson, from whom, in addition to the former detail of supernumerary members, the court is to be formed. In the absence of colonel Smyth, colonel Covington will preside in the court. Captain Winfield Scott, of the light artillery, will act as judge advocate.

"Colonel Cushing will attend the court at Baton Rouge, for his trial; and all military witnesses heretofore summon-

ed to give testimony in his case, whether on the part of the prosecution or the prisoner, are required to give their attendance: of which all commandants of posts, &c. will be pleased to take due notice, and govern themselves accordingly.

"By order.

(Signed) "C. K. GARDNER.
"Brigade inspector."

Baton Rouge, March 20th, 1812.

The court met pursuant to the above order, present;

COLONEL COVINGTON, President.

Members and Supernumeraries.

Colonel Constant,	Lieut. Col. Purdy,
Lieut. Col. Milton,	Major Mac Rea,
Capt. (now major) Gibson,	Captain Wollstonecraft,
Captain Morgan,	Captain Atkinson,
Captain Blue,	Captain Machesney,
Captain Butler,	Lt. (now capt.) Chambers.

Captain W. Scott, Judge Advocate.

The court, after reading the above order, without swearing in the new members, and judge advocate, adjourned until tomorrow morning 11 o'clock.

March 21st, 1812.

The court met pursuant to adjournment. In addition to the members and supernumeraries present yesterday, lieutenant (now captain) Dorman, supernumerary, appeared and took his seat.

The prisoner, colonel Thomas H. Cushing, second regiment United States Infantry, was brought into court, and the audience admitted.

The prisoner inquired, whether the court considered its present meeting, as a continuation of the court, whereof colonel A. Smyth had been president, or whether a new court was about to be organized. The court referred the prisoner to the general order, which had been read for its character.

Colonel Covington was then sworn, and took his seat as president of the court, in the place of colonel Smyth, absent, the prisoner making no challenge; and in like manner colonel Constant, lieutenant colonel Purdy, and captain (now major) Gibson, were sworn as members, to take the places of major Nicholas, captains Bankhead, and Clinch, absent members.

The president administered the usual oath to the judge advocate.*

The court then stood as follows:—

COLONEL COVINGTON, President.

Members.

Colonel Constant,	Lieut. col. Purdy,
Lieut. col. Milton,	Major Mac Rea,
Major Gibson,	Captain Wollstonecraft,
Captain Morgan,	Captain Atkinson,
Captain Blue,	Captain Machesney,
Captain Butler,	Captain Chambers.

Captain Dorman, *Supernumerary.*

Captain W. Scott, *Judge Advocate.*

March 22d, 1812.

The judge advocate opened the evidence in support of the prosecution, and closed the same on the 4th of April,

* Lieutenant Lee, had been the judge advocate in the former part of this trial. But on his being ordered to the city of Washington, on other duties, captain Scott was appointed special judge advocate to conclude the trial.

1812. The evidence on the part of the defence was then commenced, and on the 16th of April, 1812, the prisoner declared that he had concluded his evidence, and asked the court for seven days to enable him to prepare his defence.

April 24th.

The judge advocate stated to the court, that the prisoner had informed him, he was not yet fully prepared to deliver his written defence against the charges, &c. on which he was under trial; and therefore, prayed the court to indulge him with three days more."

April 26th.

The prisoner on being asked if he was prepared to make his written defence, replied as follows:—

Mr. President,

And gentlemen of the court,

However disagreeable it may be to appear before a court-martial, a prisoner, and in the light of a criminal, I am happy, that my conduct, which has been so much, and so loudly censured by a particular description of persons, for more than a year past, is at last to be inquired into; that after so long, and so injurious a delay, public justice will be done, upon a full, impartial, and dispassionate examination; and that it will be passed upon by men, equal to the task of investigating truth, however artfully concealed, and determining upon the intrinsic merit of military actions stripped of the glare, that is sometimes thrown upon them by success, or the false lights in which they are often placed by consequences. If I am guilty of all, or any part of the charges against me, I wish not to escape punishment; but, conscious of no crime, I hope, by your sentence, upon a candid comparison of the testimony, to have those stains wiped from my character, with which it has been suffered

to remain too long blotted, and to be restored with honor, to the arms of my friends, and of my country.

The first charge, is "disobedience of orders," and under seven distinct specifications. I will examine them, and the testimony, in the order in which they stand. And first, "in failing to give timely notice to the contractor, &c." In support of this, the contract, between the war department and James Morrison, general Hampton's letter to me of the 22d of May, 1810, and my letters to him of the 5th and 20th of June, 1810, with inclosures have been introduced; and from these it appears, that, between the 2d and 5th of June, I received an order from general Hampton, to hold two companies in readiness to march at a day's notice—that the contractor is not bound to furnish rations at any new position, or on a march, until after thirty days notice shall have been given; and that on the 16th of June, the contractor's agent received a written notice from me, to furnish the rations necessary for the rifle companies under the command of major Fuller, on their march from cantonment, Washington, to Tennessee.

If there were no other testimony in this case, the offence charged would have been made out; because it would then appear, that during twelve or thirteen days I had failed to give notice. But I must examine the testimony of major Brownson, the principal agent of the contractor, and see how the case will stand on a view of the whole ground. Major Brownson swears, that on the day we usually received our letters, I sent for him to come to my quarters, and informed him, that I had that day received an order to hold the rifle corps in readiness to march, and requested him to receive that as a notice, and to make his arrangements accordingly, which he did; and that on the arrival of the succeeding mail, or (more probably) the second, he received the written order of the 16th. That he considered the verbal notice, as the commencement of the thirty days allowed

by the contract. That he was ready for the march within that time, and that if he had failed, he should have considered the contractor "committed under the contract." On being asked, whether it "has been usual for commanding officers to give verbal notice to the contractor in the first instance, and afterwards to notify in writing," he answers, "yes, frequently; in some instances we have not got the written order until after the movement had commenced." This testimony does not contradict the written evidence relied on by the prosecutor, as suggested by the judge advocate, but it goes fully to show, that the earliest notice was given, and that it was done in the customary way. The order of the 22d of May, did not authorize me to move the rifle companies. It was a notice, that such an order would be sent by the next mail: and on the 16th of June, the very day on which this order was received, it was made known to the contractor, and all concerned. It was not in my power to compel the contractor to furnish rations on the march, at an earlier day, but by giving him a positive written order, to hire or purchase teams in the first instance. I might have run the government to an unnecessary expense of some thousands of dollars, as was done at cantonment, Washington, during the last year, when teams were held in readiness to move a detachment of troops to Tennessee, in expectation of an order which never reached them.

I will close my remarks on this specification, with a single observation. It is this—it was known to general Hampton, that major Fuller marched from cantonment, Washington, within thirty days from the receipt of his letter of the 22d of May, when this specification was penned.

Second, "The failing to order the brigade quarter-master, lieutenant Hukill, to furnish the necessary and sufficient funds, for the march of the two rifle companies, &c." In support of this, a letter from general Hampton, and the testimony of lieutenant Hukill, are introduced. The letter

of general Hampton contains this paragraph. "You will order the march of the two companies of the rifle regiment under your command at the cantonment, Washington, M. T. with the least delay, for the mouth of *Elk*, on the Tennessee, by the route of Colbert's ferry, on that river. You will endeavour to have as many teams selected, as will be sufficient for the detachment, but to confine them to the least possible allowance of baggage, camp equipage, &c. consistently with the health of the detachment, leaving the residue, surplus, clothing, &c. to come up by the first opportunity of a barge, that may offer, or can be devised. One of our public teams must, if to be spared, attend the detachment on its march, and if two can be dispensed with so much the better, as it will save the expense of hiring transportation, and the teams and carts will be very useful in putting up the proposed buildings and works. Those details with every other relating to the march, (which your experience will not fail to suggest,) you will please to order, keeping in view the necessity of observing the strictest economy in each arrangement." Lieutenant Hukill's testimony is in these words, "major Fuller was requested by colonel Cushing, to make an estimate of the necessary contingent funds to defray the expenses of the march, which he did; he made the requisition for these funds, (the amount not recollected) on the brigade quarter-master, to which colonel Cushing added his order for the advance, and which was advanced accordingly. To the best of my recollection the amount furnished was about 200 dollars." By the letter of general Hampton, the strictest economy is enjoined, and by the testimony of lieutenant Hukill, it appears that all the money required by major Fuller, was furnished. Had the charge been profusion, and waste of public money, perhaps there might have been some colour for making it, for it is possible that one half of the sum may have remained in the hands of major Fuller, to this day; but as there is no evidence of

any deficiency, or of delay in the movement, arising from this, or any other cause, it is not easy to assign a satisfactory reason for the introduction of this specification.

Third, " In failing to have Alexander Anderson, a musician, belonging to the band of the second regiment of infantry, and William Bence, a private, in captain Boote's company, second regiment of infantry, both of whom were deserters, who had delivered themselves up, under the proclamation of the president of the United States, given at the city of Washington, on the 29th of January, 1810, delivered up to colonel Covington of light dragoons, agreeably to the general order of the 8th of June, 1810." The testimony in support of that part of the specification, which respects Anderson is, that of lieutenant Davis, who says, Anderson was a deserter, who gave himself up under the president's proclamation, sometime in the spring of 1810, he believes, to me at Washington, but is not certain, as to this. He afterwards recollects that Anderson was brought to Washington, but does not know by whom, nor the time when he delivered himself up. Major Bowyer knows, that Anderson deserted from the second regiment, but does not know whether he gave himself up, or was taken at New Orleans. Lieutenant colonel Pike, says, Anderson delivered himself up to him, at New Orleans; that he was tried while there, and, as he thinks, for desertion; and, that he afterwards sent him to Washington, in charge of captain Machesney. After all this research, very little has been found respecting Anderson, and of that little, nothing in support of the specification. But there is one person in this army, who knows, and has given Anderson's history in public orders long before the date to which the specification refers. That person is brigadier general Wade Hampton, in whose order of the 4th of February, 1810, the *story is told.* I will now examine the case of Bence, and see whether it offers any thing more consoling to the prosecutor, than that of Ander-

son. Lieutenant Davis, says, Bence delivered himself up in March or April, 1810, he thinks to me, but is not certain. On his cross examination, being asked "did the same William Bence, who you say delivered himself up in March or April, 1810, ever belong to captain Roote's company?" He answers, "I always understood that he belonged to captain Campbell's company, and since that period I have paid him in captain Campbell's company." Being asked by the judge advocate, "what knowledge had you of Bence, before his original desertion?" He answers, "none at all." Major Bowyer knows nothing of Bence, prior to his desertion. The company belonged to him before it was Boote's, and Bence never did belong to it: that he commanded the second regiment, when my order of the 23d of June was published: that William Bence was in confinement for desertion at that time: that he did not send him to colonel Covington, because he considered him a deserter the second time: and that Bence was released from confinement, and returned to duty, on or about the 4th of September 1810." It will be seen, that by this testimony, nothing has been proved respecting William Bence, a private, in captain Boote's company, in the second regiment of infantry, the man described in the specification, and this part of it, must therefore fail. On this point I beg leave to read Mac Nalley's evidence, page 501 and 502. But if the prosecutor had been able to make out his description, and had proved that William Bence belonged to captain Boote's company, it would avail him nothing, for, by my order of the 23d of June, which is in your proceedings, it was made the duty of the commanding officer of the second regiment, to deliver Bence to colonel Covington, if he was entitled to the benefit of the general order. To him the selection and delivery of the deserters had been confided, and there is nothing before this court, to prove, that I knew or ever had heard, any thing of Bence's claim previous to my arrest.

Fourth, "In permitting and suffering the officers' buildings, at cantonment, Washington, M. T. and at the cantonment of the second regiment of infantry, near the town of Washington, M. T. to be made upon a large and extensive scale, and of huge and massy materials, in utter disregard and violation of the general order of the 15th March, 1810, &c." In support of this, the general order of the 15th of March, and the testimony of lieutenant Hukill, have been introduced. Lieutenant Hukill says, the buildings erected for the officers, at cantonment Washington, were generally on a large scale. He thinks they were unnecessarily large, having generally four rooms to a company, and some of them very large. The materials were not massy, and generally procured by the labour of the soldiery. He does not recollect who had immediate command at Washington, before the command of the district was given to me, on the 20th of March, but says general Hampton was in the neighbourhood at that period. He knows that the officers' quarters, or many of them, were erected after the 18th of March, but does not recollect whether I ever had the command of the cantonment before that day, or that I gave any orders respecting the quarters, except occasionally requiring him to furnish nails and tools. Permanent buildings for the officers, at the cantonment of the second regiment, he says, had not been erected when the regiment moved. I shall make no comments on this testimony, because I am confident that the general order of the 15th of March will be found to govern this case, independent of the opinions or recollections of lieutenant Hukill. It is in these words:— "Officers commanding regiments are directed to take the immediate superintendance of the buildings of their respective corps, and to finish them with all possible despatch. Officers are most strictly to confine themselves to the allowance for barracks, as established by the regulations of the war-department, and the buildings necessary to

complete this allowance, are to be put together of the slightest materials, and at the least possible labour and expense. The sweat of the soldier shall not be required to accomplish more." This order bears directly upon commanding officers of regiments at cantonment Washington, in the first instance, and, through them, upon the individual officers of their corps; and, if there has been any disobedience of it, they alone are responsible. I did not command a regiment at cantonment Washington, and I cannot, therefore, have disobeyed this order, unless it be in the construction of my own quarters, and these, it is not pretended, were of "huge and massy materials," or of a "size and magnitude above the allowance, according to the regulations of the war-office, to officers of my rank:" they cost the public, as I shall show in another place, about twenty-nine dollars! But, although not responsible for the conduct of the officers at cantonment Washington, in the discharge of a duty particularly assigned to them by their general, I did issue an order, on the 30th March, directing that "the buildings of the officers and men should be completed agreeably to the general order of the 15th of March, and that the drill should be suspended until this object was accomplished.

Fifth, "In erecting, at great labour and expense, and of huge and massy materials, the buildings at the cantonment of the second regiment of infantry, near Washington, M. T. though, in my letter of the 6th of June, 1810, he was directed to have the huts, for both officers and soldiers, at said cantonment, built upon a plan the most slight and cheap." In support of this, a letter from general Hampton, of the 6th, and acknowledged to have been received by me on the 26th of June, has been read. Lieutenant Hukill says, the buildings for the soldiers could not have been erected without great labour, "they being of *huge* and *massy materials*." He has no knowledge of the expense,

but conceives it could not have been great, as the houses were of logs, and but few materials purchased. The chimneys were of bricks of a large size, and made by the soldiers. Major Bowyer says, he arrived at the cantonment of the second regiment, and relieved captain Campbell in the command, on the 22d or 23d of June. He found the regiment engaged in building the cantonment, upon a plan which, he understood, had been given by me, and he was requested or ordered by me to proceed upon this plan. The quarters had four rooms to a company, twenty feet square in the clear, and were made of large logs, hewed on two sides, with cabbin roofs and dirt floors. He does not think them too large, or at all expensive, or that they could have been built on a cheaper plan, or with less labour. They might have been built lighter, by sawing the logs; but this would have required great labour and length of time. Two sets of company quarters were finished when he arrived, and there might have been materials enough for two more. A kiln of bricks was nearly ready for burning, and he ordered another of a larger size to be made; but he did not receive any orders from me on this subject, and (after I had left the district) he built chimneys to the soldiers' quarters with these bricks. He considered himself, and acted as the immediate commanding officer of the regiment, and, when left to exercise his own discretion, he would always build chimneys in soldiers' quarters with bricks. He has no doubt but labour might have been saved by common chimneys of cat and clay, but they would have been dangerous from fire; and he thinks bricks should always be preferred. This statement of major Bowyer, a witness for the prosecutor, is generally confirmed by captain Campbell, the superintending officer, and is not contradicted, in any instance, by him, or any other witness, unless it be by lieutenant Hukill, the leading witness for the prosecutor. Captain Campbell says, "He superintended the building of the

cantonment of the second regiment, or the greater part of it, and that it was commenced about the 20th of April, 1810. The ground was laid out, and the number and size of the company quarters given by me; and, after this was done, it was left to his discretion, to hew the logs, or put them up round, as might be most expeditious, and to use such other materials as his judgment might suggest. About half of the materials were got on the ground, and did not require a team to move them. The balance of the timber was got near the site, and no part of the logs hauled more than four or five hundred yards; ribs and weight poles were brought from a greater distance, in consequence of the scarcity of small timber. On the 25th of June, he thinks, there were four sets of company-quarters built, and the fifth under way; that there might have been materials enough to complete the fifth and sixth company-quarters, and that comfortable quarters for the winter could not have been made for the remaining companies, with less labour and expense, by changing the original plan on that day." It will be recollected by the court, that general Hampton's letter of the 6th was not received by me until the 26th of June, and that major Bowyer and captain Campbell unite in opinion "that nothing could have been saved, by changing the original plan on that day."

Sixth, "In failing to proceed with three companies of the second regiment of infantry under his command, from the neighbourhood of Washington, M. T. to Fort Stoddart, with the least possible delay, as he was required to do in my letter of instructions of the 10th of September, 1810, by unmilitary, improper, unnecessary, and unwarrantable delay at cantonment Washington, M. T. at the city of New Orleans, and at the town of Mobile." In support of this, it has been proved—first, That, on the 24th of October, 1810, I received the order of general Hampton of the 10th of September; second, That I did not leave Natchez until

about the 16th of November; third, That I reached New-Orleans on or about the 28th of November; fourth, That I embarked at New Orleans on the 12th of December; fifth, That I arrived off Mobile with part of my command, on the third of January, 1811; and sixth, That I left Mobile for fort Stoddart about the 10th or twelfth of February. It remains for me to account for this delay at cantonment, Washington, at New Orleans, and at Mobile. The witnesses examined relative to the delay at Washington are numerous, and I will not recapitulate their testimony, but briefly state what it proves; and first, It proves that, on the day I received general Hampton's order of the 10th of September, 1810, a general court-martial, of which lieutenant-colonel Pike was president, was sitting for the trial of an officer, and a number of other prisoners: second, That major Bowyer and lieutenant Davis, of the second regiment, were in arrest, and that every officer present with that regiment, with the exception of second lieutenants Brownlow, Seeley, Bogardus, and Stewart (the latter being then, and for six months before, on the sick report), were either witnesses or parties on the trial of these officers: third, that a new court-martial was immediately ordered, for the trial of major Bowyer and lieutenant Davis, and directed to sit, without limitation, as to time, as a number of the parties and witnesses were under marching orders: fourth, That the companies under marching orders were mustered and inspected, agreeably to the standing general order on this subject, and were paid for September and October, agreeably to law, and to the order of general Hampton of the 24th of August, 1810: fifth, That I declined returning from Natchez to Washington, to partake of a dinner which my brother-officers there were anxious to give me, as a mark of respect for my character and services, as an officer and a gentleman; and, sixth, That, on the very day the trial of lieutenant Davis was closed, and before the pro-

ceedings were ready to be put into my hands, I left Natchez with my command. From these facts it is evident, that I must have violated that sacred article of war, which says, "No officer or soldier, who shall be put in arrest, shall continue in confinement more than eight days, or until such time as a court-martial can be assembled," by taking off the witnesses necessary for the trial of major Bowyer and lieutenant Davis, and leave these officers to languish in confinement; new-model the regiment, and march with three second lieutenants, when ordered to go with three companies, or wait for the officers and men engaged as parties and witnesses on the trial of major Bowyer and lieutenant Davis. I preferred the latter, because I considered it the only legal and military course; and I trust this court will not find it any thing like unmilitary, improper, unnecessary, or unwarrantable delay. With respect to the delay at New Orleans very little need be said, since lieutenant Chamberlaine, the witness who proves the delay, proves also that it was produced, in the first instance, by the condemnation of two of the transports, and, in the second, by the necessity of substituting others in their stead, and repairing those not condemned; and major Carmick, of the marine corps, who is well acquainted with the state of the public vessels at that time, and with the regulations of the navy, and who lived with the commodore, on the New Orleans station, tells you, that my repeated applications to the commodore to hasten the departure of the transports, with my command, were viewed by that gentleman as more pressing than the occasion would justify, and that, if they were persisted in, an explanation would ensue. The testimony of lieutenant Brownlow and captain Campbell proves, that the rear of my detachment did not join me at Mobile, until the 24th or 25th of January, and that of major Carmick and lieutenant Brownlow, that it was not in my power to compel lieutenant Dexter to move me from that place to fort Stoddart, before the arrival of all the vessels under his

orders. These vessels did not arrive until the 24th of January, 1811, and before that day I had received the letter of the secretary of war of the 21st of December, directing me to cooperate with governor Claiborne, and authorizing me, as all his letters have done, to exercise very great, and almost unlimited discretion.

Seventh, *or additional.* "In failing to proceed from fort Stoddart, M. T. to cantonment, Washington, M. T. with the least possible delay, as he was ordered to do in my letter of instruction to him of the 18th of February, 1811, under the plea of inability to travel by land; and continuing at fort Stoddart in command for some considerable time after the receipt of my said letter of instructions, notwithstanding he might have procured with facility a conveyance by water." To recapitulate, arrange, and compare the testimony on this specification, is a most painful task! A task, which in any other situation but that, in which I am placed, I should most certainly decline, but which, situated as I am, I feel myself called upon to undertake. I will therefore, sir, endeavour to repress the emotions, which the occasion is calculated to excite, and will deny myself the use of expressions, which with whatever justice they might be applied to the conduct of another, it would be undignified in me to utter. The testimony introduced, commences with general Hampton's letter to me of the 18th of February, and my reply of the 4th of March, 1811, and is followed up by that of colonel Covington, lieutenant Hukill, and lieutenant Hamilton, aid de camp to general Hampton; and proves, 1st, That on the 28th of February I received an order from general Hampton to proceed to Washington, M. T. and to consider myself in arrest on my arrival there. 2d, That on the 4th of March, I informed general Hampton, by letter, which he received on the 18th of the same month, of my inability to travel to Washington, expressed my readiness to meet my accuser and his charges at any post or place pro-

per for my trial, and informed him that I would wait his further orders, on this subject. 3d, That I continued in the command of fort Stoddart until the morning of the 25th of March, at which time, I was placed under the guard of captain Gaines, by order of general Hampton. 4th, That there was not any kind of water transport at fort Stoddart, between the 28th of February, and the arrival of general Hampton's aid de camp, on the 21st of March. 5th, That I informed general Hampton's aid de camp, at fort Stoddart, of the cause of my detention at that post, and the information I had given to the general on this subject; and expressed a hope, that I might receive further orders before the aid de camp left the post, that, if I was to go by water, I might avail myself of his transport: and 6th, That when, in obedience to the order of general Hampton, I was sent from fort Stoddart, to Baton Rouge, under guard, the commanding officer was obliged to send an officer to Mobile for transport, the procuring of which, and fitting it up for the voyage, took up five or six days. I will now read the testimony of Dr. Pinkerton, one of the surgeon's mates who signed the certificate transmitted to general Hampton in my letter of the 4th of March, and who accompanied me from fort Stoddart to Baton Rouge.*

* As the defence omits the evidence of Dr. P. which was read in this place, the reporter has thought it his duty to insert it in the form of a note.

Surgeon's mate Pinkerton, being under examination, by the prisoner—

Q. "Did the witness accompany the prisoner from fort Stoddart to Baton Rouge, in April, 1811; was he in such a state of health at that time as would justify his travelling in the manner he did; and how did he stand the journey? A. I came round with colonel C. in a schooner to New Orleans. I had frequent opportunities of seeing the disease, and of witnessing the effects of the voyage. I discovered, as we progressed, that the tumour enlarged considerably, and became more painful, so much so, that the colonel frequently requested me to look at it. The tumour increased so much, as to render walking very difficult. In our passage from New Orleans to this place, (in a small barge,) when we would stop in the middle of the day to take refreshments, I have observed the colonel so stiff, and the tumour so painful as to render any sort of exercise painful. At the time we arrived here, the tumour became considerably larger than it was when we left fort Stoddart, Q. Did the witness during the journey, express his fears that the prisoner would not be able to reach Baton Rouge, with the transport pro-

On this testimony of Dr. Pinkerton, I have only to remark, that it speaks a language which cannot be misunderstood, and must fix a conviction of my wrongs, in every feeling breast!

The second charge, is "abuse of trust, and misapplication of public property," under six specifications. I will follow the course in their examination, commenced in the first charge. 1st, In choosing in the month of April, 1810, a site for the cantonment of the second regiment of infantry, remote and inconvenient, with a view to promote the interest of the proprietors of the land, on which it was established, or one of them, at a great sacrifice to the regiment, and to the interest of the United States, contrary to the suggestions of my letter of the 8th of April, 1810, &c."

To sustain this specification, it is incumbent on the pro-

vided for him? A. I did: I observed, that I thought it would be hazardous to prosecute the journey owing to the state of the disease, and advised the prisoner, if possible to postpone it for some time, and the reply of the prisoner was, he would prosecute it at all hazards. I felt apprehensive that something serious might take place, and thought it my duty to advise colonel C. of his situation. Q. by the judge advocate. Has the witness at any time subsequent to his signing the certificate, with Dr. Huston, respecting the prisoner's case, had reason to think himself mistaken as to the opinion therein expressed, as to the prisoner's disease? A. No, I have not. On the contrary, I have had reason to be confirmed in that opinion, from what I have since seen, being present when Dr. Daniel performed an operation on the part afflicted, to give temporary relief, when there was drawn off a large quantity of water, I think about twelve ounces. Q. By the same. Was the situation of the prisoner, while at fort Stoddart, such, as, in your opinion, rendered it manifestly hazardous to his health, to go passenger in the ordinary craft, which trade between New Orleans and fort Stoddart? A. I think it was. Q. By the prisoner. Did the temporary operation, performed by Dr. D. produce a cure, and supercede the necessity of a voyage to the United States for this purpose? The judge advocate objected to this question, because it referred to a period, subsequent to the date of either of the charges against the prisoner; and because it called for an answer more in the nature of a petition for a furlough, than an exculpation from any thing alleged against the prisoner. The prisoner insisted on the relevency of his question, and the objection was waved. The witness then stepped aside with the prisoner, to examine his case, and returned, and gave for A. No, I think not. The operation performed by Dr. D. was a temporary one; and upon looking at the part, I find the disease is returning again, and a different operation must be performed, before a cure is produced. Q. By the court. Is it your opinion, that a complete cure can be effected by an operation different from the one already made? A. Yes; but by a more serious and hazardous operation."—Extracted from the minutes.

secutor to prove, 1st. That the site chosen, was remote and inconvenient: 2d. That it was chosen with a view to promote the interest of the proprietors of the land, or one of them: 3d. That the interest of the regiment, and of the United States, were sacrificed or injured: and 4th. That it is contrary to the suggestions of his letter of the 8th of April, 1810. I will examine the testimony, and see whether all, or any of these counts, are made out. Lieutenant Hukill, the leading witness to this, and almost every other specification, says, "it is my opinion that the site was an inconvenient one." He has no knowledge that it was selected for the benefit of Andrews and Wilkinson. He does not know, that the regiment sacrificed any thing, except their labour in getting out materials near Washington, but which materials he afterwards recollects, were used by company officers at cantonment Washington. He says nothing about any sacrifice on the part of the United States. He has no doubt but another and better situation might have been obtained, and talks about one belonging to Mr. Grayson, which he has recently understood, might have been had, but is here put down by a damper from a member of the court, who asks "do you know that it was in the prisoner's knowledge at the time, any situation might have been procured, other, and preferable to the one selected by him?" To which he is obliged to answer "I do not." Lieutenant Davis has been called, and questioned by the judge advocate, about the materials left at cantonment Washington: but I do not consider these questions, or the answers, of any importance in this case: for, there is no question before this court, as to the propriety or impropriety of two cantonments. This point has been settled by the secretary of war, who says, in his letter to general Hampton of the 9th of March, 1810, "let me caution and enjoin it upon you, in no event to adjoin the old to the new troops." The next, and the last witness for the prosecutor on this specification, is major

Bowyer, an old officer who has seen about twenty years service. The major says, the cantonment was between three and four miles from cantonment Washington, and the road as good as new roads generally are; he supposed the road was made or opened by the public, and from appearances, with little labour: There were a number of springs, generally about the distance of a quarter of a mile, and the water as good as any in the country: he thought it a good situation, and was pleased with it at the time; and he has not changed his opinion: he does not recollect any other position that would have answered as well, or that could have been rented or got upon any terms."

The terms, "remote and inconvenient," used in the specification, have a relative signification; but there is no antecedent to which they are related. The place, person, or thing, from which the site is remote, and inconvenient, is not named, and there is no scale by which to measure the distance, or calculate the inconvenience. If it is intended to mean general Hampton's head quarters, whether at the Chicasaw agency, South West Point, Knoxville or Columbia, all of which were honoured with this distinction in 1810, there cannot be a doubt, but it was "remote and inconvenient:" but if cantonment Washington be intended, and from some of the judge advocate's questions, I am inclined to consider this his point, the charges and specifications prove that it was not remote; for in no less than six instances, we find these words, "cantonment of the second regiment of infantry, *near* Washington, M. T." Now, if it was remote and inconvenient from cantonment Washington, it could not be near Washington; and, if near Washington, it could not be remote and inconvenient from cantonment Washington. The prosecutor may take which side of the argument he pleases, but the testimony from his own document is six to one in favour of proximity. Respecting the interest of the proprietors of the land, of the regiment, and of the

United States, nothing has been proved; and it is a remarkable fact, that the only suggestion on this subject, in general Hampton's letter of the 8th April, is, that I should do, or not do, at my own discretion, that which the secretary of war had enjoined.

Second. "In attempting and endeavouring to enter into a contract with Messrs. Andrews and Wilkinson, calculated to promote the private advantage of these citizens, at the expense and injury of the United States, and to the dishonour of the army, &c." In this, as in the last specification, the prosecutor has much to prove before he can calculate on a verdict in his favour. He must prove, 1st, That I attempted to enter into a contract calculated to promote the private interest of Andrews and Wilkinson, at the expense and injury of the United States: and, 2d, That the contract so attempted and endeavoured to be entered into, would have tended to the dishonour of the army. The testimony here relied on by the prosecutor, is contained in my letter to general Hampton of the 23d of May 1810, and is in the following words: "I have engaged a situation for a cantonment for the second regiment, on Messrs. Andrews and Wilkinson's tract, three miles from this cantonment, and six miles from Natchez; and a large working party of the said regiment is now employed in erecting buildings for its accommodation: two companies are on the ground; a third will be there in three days; two more by the 10th, and the remainder of the regiment in all June. I am to have a lease of from two to three hundred acres of land, for six years, for which no rent is to be paid, but the whole of the buildings are to be given up in good order, and a certain proportion of the land is to be cleared and fenced, for every year we occupy it. So soon as the lease is executed, I will send you a copy. The situation is high and healthy; the water equal to any in the country; the timber good, and the communication with Natchez, easy and convenient." It is

a maxim of the law as well as a dictate of common sense, that "that which proves too much, proves nothing," and this maxim I trust, applies with full force to the case now under consideration. The charge is "attempting and endeavouring to enter into a contract." The evidence is, "that a contract had been entered into," the conditions agreed on are cited, and the lease promised, as soon as it can be executed. This variance between the testimony and the charge, is fatal to the prosecutor; because, by proving too much, the law says, he has proved nothing! But admitting for argument sake, that an attempt to make a contract is proved, where is the evidence, that the private interest and advantage of the owners of the land was to be promoted at the expense and injury of the United States? Or, that the conditions spoken of are dishonourable to the army? The United States by this bargain, obtained a lease of between two and three hundred acres of land for six years, in a high, healthy, well watered, and well timbered situation, within three miles of cantonment Washington, and six miles of Natchez, by an easy and convenient communication, for which they were to pay no rent, but were to relinquish to the owners of the land, in good order, at the expiration of the lease, all the improvements which they might think proper to make, and the letter says, they were to clear and fence a certain proportion of land for every year it was occupied; but what that proportion was, is not mentioned, and as the judge advocate has objected to the introduction of the lease, made and executed, by the parties, in pursuance of the bargain so made, and the court have thought proper to exclude it from their proceedings, it remains for me to explain, what was meant by clearing and fencing land. It has been customary in times of peace, to clear and fence land in the neighbourhood of posts and cantonments, for gardens for officers and soldiers, and this practice has been uniformly sanctioned and encouraged by the commanding ge-

neral of the army, and by the government, as conducing, in a high degree, to the health and comfort of the army; and in some instances, land has been cleared, fenced and cultivated by the soldiery, in corn fields for the support of public teams. It was therefore my intention, and the understanding between Andrews and Wilkinson, and myself, that land should be cleared fenced and cultivated, as gardens, for both officers and soldiers, and, if necessary in corn fields, for public use; but this was an understanding only, and it never was the intention of the parties, that this should form a condition of the lease, and the depositions of Andrews and Wilkinson prove this fact. If to clear and fence land by the labour of the soldier, and to cultivate it in gardens for his benefit, or in corn fields for public use, be dishonourable to the army, then, sir, I am ready to admit, that in some cases, but not in this, I have done and sanctioned that, which is dishonourable to the army; but, I must be permitted to add, that every officer, who has done this thing, or has employed the soldiery in opening roads, building bridges, &c. is equally guilty.

Third, "In erecting, at great labour and expense, and of huge and massy materials, the buildings at the cantonment of the second regiment of infantry, near Washington, M. T. though, in my letter of instructions of the 6th of June, 1810, he was directed to have the huts, for both officers and soldiers, built upon a plan the most slight and cheap, and in providing, on the ground of said cantonment, a greater quantity of materials than was warranted by my said letter of instruction of the 6th of June, 1810, with the view of benefiting Messrs. Andrews and Wilkinson, or one of them, the proprietors of the land on which the said cantonment was built, at the labour and expense of the United States." The first part of this forms the fifth specification of the first charge, and has been answered and put down under that head. The second part remains to be examined.

and the testimony introduced is that of lieutenant Hukill and major Bowyer. Lieutenant Hukill says, "there was a large quantity of plank and bricks provided on the ground, but he does not know that it was for the benefit of Andrews and Wilkinson; and there remained a considerable quantity of bricks, burnt and unburnt, as well as plank, at the time the second regiment moved. He does not know the quantity of the bricks, or their value. He supposes there was from thirty to fifty thousand feet of plank, which sells, in that country, at from twenty to twenty-five dollars per thousand. He does not know on what plan the officers' quarters were to have been built, or whether there were more materials than was necessary to complete them. He supposes that the whole expenditure at the cantonment could not have exceeded five hundred dollars, and that was for nails, iron, and steel, of which axes were made for the quarter-master's department, tools, a team or two to haul the materials to the spot, and for forage; which last article would amount to one hundred dollars at least, though he does not know the quantity furnished. Major Bowyer says, that there was made, on the ground, from one hundred and thirty to one hundred and fifty thousand bricks, but that the last kiln, which had about eighty thousand in it, was not burnt. If he recollects right, bricks were selling at Natchez at from eight to ten dollars per thousand. There might have been from sixty to eighty thousand feet of plank made on the ground, a quantity of which had been used for bunks, windows, and doors. He does not know the price of plank, but supposes it to have been from three to four dollars per hundred feet; but, as this was of poplar, and not as valuable as cypress, he may be mistaken. He supposes that half the materials were provided after the 25th of June, and says, most of the plank were intended for officers' quarters." By this testimony, which abounds in suppositions and conjectures, very little is proved. It does,

however, prove, that plank and bricks were made, and left on the ground by major Bowyer, when he marched with his detachment of the regiment, in November, or early in December, 1810; but, as no data have been given by these witnesses, by which to judge of the quantity so made and left, it must, for the present, rest on their conjectures. It proves, also, that the whole amount of expenses for the cantonment, including teams, forage, tools, and iron and steel, of which axes were made for the quarter-master's department, did not exceed five hundred dollars, and it does not squint at an intention to promote the interest of Andrews and Wilkinson, or either of them. On this testimony I might rely with perfect safety; but, as it is in my power to demonstrate how widely these gentlemen have missed the mark, in their conjectures respecting plank, I must solicit your patience, while I examine the testimony of captain Campbell, the superintending officer. Captain Campbell tells you, "That the cantonment was commenced under his superintendance, about the 20th of April, and that he ceased to superintend on the 29th of July; that they never had more than four whip-saws at work, and often none at all; that so much time was lost by taking off the men to prepare for musters and inspections, by drunkenness, confinement, courts-martial, sickness, and rainy weather, that the whole amount of labour could not have exceeded two saws kept at constant work, and cutting one hundred feet each per day, which is the highest rate of sawing: that the sawing commenced about the first of May, and ceased with the publication of my order of the 26th of October;" and he supposes that about one half of the planks sawed, were used in the soldiers' quarters, and in the temporary quarters of the officers. From the first of May to the 26th of October there are one hundred and fifty-two working days; two saws, kept constantly at work, and cutting one hundred feet each per day, during one hundred and fifty-two days, would

yield thirty thousand four hundred feet of plank, and no more; and, of the whole quantity sawed, one half being used in the manner captain Campbell supposes, fifteen thousand two hundred feet only could have been left on the ground unappropriated. What then becomes of the conjectures of major Bowyer and lieutenant Hukill? But why do I dwell on this subject? Is it not fully proved that, as commanding officer of the district, I had barely given a general outline of the cantonment, and left the management and construction of it, with all its details, to the commanding officer on that ground? And does it not follow that, if there has been any abuse of trust, or misapplication of public property, that officer is alone accountable for it?

To the fourth specification of this charge no testimony has been offered, and therefore no remark will be made.

Fifth, or first additional.—"In loading and crowding, and suffering to be loaded and crowded, the transports which were to move his command of three companies of the second regiment of infantry to fort Stoddart, by my letter of instructions of the 10th of September, 1810, with an immense and prodigious quantity of baggage and luggage, of various kinds, vastly above the proportion allowed to officers by the regulations of the war-department, to the great inconvenience of the service, to the expense of the United States, and to the impediment of the movement designed by the said letter of instructions of the 10th of September, 1810." In support of this, lieutenant Hukill says, "I have no hesitation in saying that some of them were crowded," and he "believes that most of the officers had more baggage than is allowed by the regulations of the war-department." He was present when the baggage was put on board; at which time he believes I was in Natchez. Being asked, "Do you know that the prisoner did put on board these transports any baggage or luggage, other than his arms, clothing, bedding, books, and papers, and the neces-

sary provisions for his voyage?" He answers "No!" And to this question—"Do you know that the prisoner did give to any officers under his command, permission to put on board the said transports any other articles than those mentioned in the preceding question?" He answers, "I do not." Lieutenant Brownlow received some cherry plank, and some square pieces, out of one of the five vessels at Mobile, as part of the baggage of the company to which he belonged. He received no orders from me on this subject, nor does he know to whom the plank and square pieces belonged, or that I ever claimed or received them. I was at Mobile when they were taken to fort Stoddart.

This testimony proves nothing, and it would be a waste of time to comment on it.

Sixth, or second additional. "In ordering, some time during the months of April and May, 1810, a store-house and dwelling-house to be built at the cantonment of the second regiment of infantry, near Washington, M. T. for Mr. John Hankinson (son-in-law to Mrs. Cushing, his wife), a sutler to the army, and in permitting and suffering a number of the soldiers of the second regiment of infantry, amounting, at different times, in the months of April, May, and June, to between four and twenty-seven, to be employed during the months of April, May, and June, in building, at the cantonment of the second regiment of infantry, near Washington, M. T. a store-house and dwelling-house for said Hankinson, a sutler, and in permitting and allowing the said soldiers to be reported on daily duty, and to draw extra whiskey, at the expense of the United States, during the time in which they were employed in building, at the said cantonment, a store-house and dwelling-house for said Hankinson, a sutler." In support of this, lieutenant Davis and lieutenant Hukill have been called. Lieutenant Davis says, "In the spring and summer of 1810, there was a store-house and dwelling-house built for Mr. Hankinson, by men

reported on daily duty, and drawing extra whiskey; there was a corporal and fourteen men worked at the store-three or four days, during which time they put up the logs, put on the roof, cut out the doors and windows, and sawed down the corners: then there was three men worked about two weeks, finishing the store-house: one end of it was floored and ceiled; there was a counter and shelves put up in it, doors and window-shutters made, and windows faced. After that there was a corporal and seven men set to work, to build the dwelling-house, and worked at it about three weeks. These men were all reported on daily duty during this time. He heard me say, at the time I ordered the store and dwelling-house to be built for Mr. Hankinson, that it was for one I got from him at Washington, which Mr. Hankinson had built at his own expense. He recollects that I refused to answer any questions relative to Mr. Hankinson's house, before the court-martial at cantonment Washington, for the trial of captain Campbell." Lieutenant Hukill says, "At the time the second regiment were building quarters, at cantonment, Washington Mr. Hankinson built a small store-house, and commenced a dwelling-house at that place; and that, after a new cantonment was selected for the second regiment, I mentioned to him that I would take the building Mr. Hankinson had erected for quarters for myself, and have others put up at the second regiment, for Mr. Hankinson, in lieu of them; that I was then living in a hospital-tent at cantonment Washington, at which place no quarters had been built for, or assigned to, the commanding officer, and that the expense of putting these buildings in order, for my accommodation, did not exceed twenty dollars. He has seen soldiers at work on Mr. Hankinson's buildings at the second regiment, and has given his opinion of the relative value of these and of those occupied by me at cantonment Washington;" but he winds up the story by saying, "He does not

know who ordered them built, or permitted the soldiers to work on them." This testimony, admitting that of lieutenant Davis to be true (but which I shall prove to be false in part), proves, first, That fifteen men were employed three or four days on Mr. Hankinson's store, and drew extra whiskey, say four days, is sixty rations; three men two weeks, say fourteen days, forty-two rations; and, on the house, eight men three weeks, say twenty-one days, one hundred and sixty-eight rations, and amounting, in all, to two hundred and seventy rations of extra whiskey, which, at three cents two and an half mills per ration, the contract price, cost the United States eight dollars seventy-seven and an half cents: and second, That, for this eight dollars seventy-seven and an half cents, and the not "exceeding twenty dollars," expended at cantonment Washington by lieutenant Hukill, the United States have received the buildings at cantonment, Washington, in which the commanding officer of the district was quartered, and transacted the public business, for more than six months, in the year 1810, and which buildings could not be erected by any private individual, for less than five hundred dollars. I will now examine the other side of the question, and see how this bargain has affected Mr. Hankinson, this favoured son-in-law of *Mrs. Cushing, my wife.* Mr. Wooldridge, a witness well known to every member of this court, says, that he was the agent or clerk of Mr. Hankinson at cantonment Washington, and at that of the second regiment, from the 20th of March to the 25th of August, 1810; that Mr. Hankinson, at his own expense, did build a store-house, and commence a dwelling-house, at cantonment Washington, which he afterwards delivered to me, as commanding officer, and in which I lived in 1810; that he purchased nails and other articles for these buildings, and for others built for Mr. Hankinson, at the cantonment of the second regiment, and that he paid soldiers for working on the last-mentioned

building, when off duty, and on Sundays; that he does not know the amount of expenses in erecting these buildings, but believes they cost Mr. Hankinson from seven hundred to seven hundred and fifty dollars, and that this belief arises from what he does know, and from the information of Mr. Hankinson, who told him at the time, that the estimate which he produced, and amounting to that sum, was made from his books; and that after Mr. Hankinson left the cantonment, in November, 1810, his buildings were claimed and taken possession of by the commanding officer, as public property. Captain Campbell proves, that I did not authorize him to do more to the buildings of Mr. Hankinson, that an equivalent for those he had given up at Washington, and that nothing more was done: that Mr. Hankinson found the materials, and paid the three men who did the inside work to the store; that he found all the nails, and part of the boards, used in the house, and, after it was given up to him by captain Campbell, that he continued to expend money upon it, in the purchase of materials, and hire of soldiers to work upon it. Lieutenant Bogardus proves, that the buildings of Mr. Hankinson were claimed as public property, and taken possession of, by the commanding officer; and Mr. Hankinson swears, "that for the use of the store at cantonment Washington, from the 20th of March to the middle of May, and of the house and store at the cantonment of the second regiment, from the middle of May to the 20th of November, he has actually paid seven hundred and twenty dollars, exclusive of many little items not charged in his books." I have said that the testimony of lieutenant Davis is false, in part, and, as I have now gone through with all the specifications to which he has been called, I will proceed to establish this fact: and, first, He has said that Alexander Anderson delivered himself up under the president's proclamation of the 29th of January, 1810.

General Hampton's order of the 4th of February, 1810, proves, that Anderson did not deliver himself up under the proclamation, and establishes the falsehood of lieutenant Davis's assertion. Second, He has said that I refused to answer questions before a general court-martial, at cantonment Washington, relative to the house of Mr. Hankinson; and the falsehood of this assertion is proved by the testimony of lieutenant-colonel Milton, captain Campbell, and captain Atkinson, all of whom say, I "did not refuse." Third, He has said that the three men who worked two weeks in finishing the inside of Mr. Hankinson's store, were reported on daily duty, and drew extra whiskey. Captain Campbell, who commanded the cantonment, and superintended the buildings at the time, and who signed all the returns and abstracts, says, the men employed in finishing Mr. Hankinson's store were hired by him; that they were not reported on daily duty, and did not receive extra whiskey; and for the rest I refer the court to the general order of the 6th of April, 1811.

I come now to the third and last charge—"conduct unbecoming an officer and a gentleman," and under seven specifications, the first and second of which have been examined, as additional to the second charge.

On this occasion my prosecutor appears to have some doubts as to the character of my offence, whether it be "abuse of trust, and misapplication of public property," or "conduct unbecoming an officer and a gentleman;" but it must be one or the other, and to swell the black list, and make sure work, he has determined to prosecute under both heads.

Third. "In artfully and insidiously, in his orders of the 28th of September, 1810, respecting the proceedings of a general court-martial, in the case of captain Campbell, of the second regiment of infantry, giving approbation and sanction to the conduct of said captain Campbell, who, &c." and "in covertly, indirectly, and insidiously combating and

opposing, in a manner calculated to defeat the principles of the general order of the 8th of June, 1810, which prohibited any officer from taking the law and the punishment into his own hands, and striking and beating the soldier." To this specification I objected, because it goes into an inquiry as to my conduct when acting in a legal capacity, as a judge and approving officer, on the proceedings of a general court-martial; because, by the articles of war, I was fully authorized to act and decide on the said proceedings, according to the dictates of my own conscience, and because, although there might be error in my decision, there could not be any guilt, for which I was accountable to any other tribunal but my God and my conscience; and I read a passage, to this point, from 2d Espinasse, page 23d, in these words: "If words have been used in the course of legal proceedings, no action will lie for them." But the court overruled the objection, and I am bound to respect its decision. The general order of the 8th of June, and my order of the 28th of September, have been read. The paragraph relied on, in the general order, is in these words [see third paragraph]: and it is proved by captain Nicholas, the acting brigade inspector, and a number of other witnesses, that this order had not been published on the 18th of June, the day on which captain Campbell was charged with striking Thomas Cox. The proceedings of the general court-martial, in the case of captain Campbell, as published in my order of the 28th of September, prove that he was not charged with a breach of the general order of the 8th of June, and that his conduct, in the case of Cox, was an instance of the practice which, the order says, had become habitual, and which it was intended to stop for the future. My order of the 28th of September has no allusion to the general order of the 8th of June: it does not oppose or combat the principles contained in it, nor does it contain any thing covert and insidious, or in any way calcu-

lated to defeat the principles of it. But it states the relative situations of captain Campbell and Thomas Cox, and the custom of the army on the 18th of June; and it disapproves of certain opinions disclosed by the sentence of the court, because of their tendency to subvert military subordination, and to encourage and invite disobedience of orders. These opinions were, that, for any personal chastisement which any officer might have inflicted on a soldier, previous to the publication of the order of the 8th of June, and while it was the custom of the army to punish slight offences in this way, he might now be tried and punished, and that the soldier might destroy the property of his officer with impunity, and the inevitable consequence of sanctioning these opinions would have been, that every soldier who had been so punished within two years, would apply for and demand the arrest of his officer, and that the private property of the officer would be held by the precarious tenure of the soldier's good will. I trust I have said enough on this subject, and I will close my remarks with a single question. If it be lawful to try and punish an officer for any reason he may give for disapproving of the sentence of a court-martial, what officer will ever hereafter have the hardihood to comment on and disapprove of such sentence, however absurd, contradictory and illegal it may be?

Fourth. "In violating the sanctity of a private letter, addressed to me, from and franked by Mr. Macon a representative in Congress, by breaking open the seal of said letter and reading a part thereof, sometime between the 20th of March, and the 7th of May, 1810." The testimony in support of this is, 1st. A letter from me to general Hampton, dated 7th of May, 1810, and in these words—"I have the honour to enclose seven letters, which have been taken out of the office for you since my last; that which is franked by Mr. Macon, I supposed might have some relation to the public service, and I therefore opened it; it however, ap-

peared on opening it, to be a private letter, and I immediately closed it up without reading it through." 2d. The evidence of colonel Covington, giving an account of a conversation with me, respecting the letter, confirming what I wrote to general Hampton on the 7th of May, and nearly in the same words; and 3d. That of general Hampton himself, who says, the paper produced by the judge advocate, is the letter which he received under cover with mine of the 7th of May. "There was round the letter of Mr. Macon, an envelope; it had been sealed with wax and therefore not retained when the letter was endorsed and put away. The letter was franked by Mr. Macon. I could not determine whether it had been wet and rubbed, before it was enclosed to me, but when I received it, it appeared to be wet and rubbed." Being asked, "did the witness by a message through captain Houston, his brigade inspector, authorize the prisoner to open public letters and act upon them?" He answered "no, not to my knowledge, recollection, or belief. I had no doubt but colonel Cushing had the right, as second in command, after he had assumed it, to open military letters addressed to the commanding officer: the letter in question was received as a sacred one by me. It was well known that a friendship existed between Mr. Macon and myself, as between two public friends." Here we have the whole testimony in the case, and it proves, 1st, That after general Hampton had given up the command of the district to me, I had a right to open all military letters addressed to the commanding officer: 2d. That the letter franked by Mr. Macon and opened by me, had about it an envelope, which has not been produced: 3d. That I opened the letter, under an impression that it was a public one, and such as general Hampton swears I had a right to open: 4th, That on opening the letter and discovering it was private, I immediately closed it up, and did not read it: and 5th, That on the same morning, I gave to colonel Covington, my second

in command, the very same information, I afterwards gave to general Hampton when I sent him the letter. Is not this testimony conclusive evidence of my innocence and honour, in this transaction? The letter was considered by me, to be of that description which general Hampton says, I had a right to open. But it may be asked, where is the evidence of this? To which I answer, "in possession of or destroyed by my prosecutor! The envelop, sir, is the evidence of the fact, and had this been produced, as it ought to have been, it would have been seen that the letter was addressed to general Wade Hampton, commanding the army, Washington, M. T." And why was not this envelop produced? My prosecutor says, "it had been sealed with wax, and therefore not retained when the letter was indorsed and put away." Sealed with wax and therefore not retained! And is this a satisfactory reason for keeping back a paper, which would have been conclusive evidence of my innocence or guilt? No, sir, I trust it is not, and that the withholding this most important paper, will convince every member of this court, that there is "something rotten in Denmark!"

Fifth. "In making highly unmilitary, and improper comments upon the orders and instructions of his commanding general of the 22d and 26th of May, 1810, and 23d of January, 1811, in his replies to these letters dated the 5th and 20th of June, 1810, and 3d of February, 1811, and in pursuing this highly disrespectful conduct to his commanding officer, with the insidious design of throwing a false colour upon measures adopted for the public good, and of injuring the standing of his commanding general with the war department." In support of this, it is incumbent on the prosecutor to show, 1st. That my letters to him of the 5th and 20th of June, 1810, and 3d of Feb. 1811, contain highly unmilitary and improper comments upon his orders of the 22d and 28th of June, 1810, and 23d of February, 1811; and 2d. That this course has been pursued with the insidious de-

sign of throwing a false colour on his measures, and injuring his standing with the war department. And how has this been shown? The letters referred to, and many others which have passed between general Hampton and myself, have been read. It is not pretended that the information contained in my letters was untrue, or that my opinions were not correct; and by referring to our correspondence at large it will be found that general Hampton had frequently called on me for information and for my opinions; and that I had been in the habit of furnishing both. The "insidious design" is not proved, and it cannot be understood, from any thing contained in the letters. The letters of the war department which have been read, prove the great solicitude felt by the government for the health and preservation of the troops, at cantonment Washington, in 1810, and that the strictest economy should be practised in supplying them with provisions; the united voice of all the witnesses who have mentioned Mobile proves, and a recurrence to the map of that country must confirm the truth and propriety of all I have said in my letter of the 3d of February, and this specification must therefore fall.

Sixth, or fisrt additional. "The exercising command at fort Stoddart from the 18th until the 25th of March, 1811, in direct opposition and resistance to my letter of instructions to colonel Covington of the 20th of February, 1811, directing him to repair to fort Stoddart, M. T. and take command there, and notwithstanding my letter of instructions to him (colonel Cushing) of the 18th of February, 1811, to proceed to cantonment Washington, M. T. with the least possible delay." It has been proved and admitted by me, that I did command fort Stoddart from the 18th to the 25th of March, the order of general Hampton directing me to proceed to Washington, notwithstanding; but my letter to general Hampton of the 4th of March, with enclosures,

and the testimony of Dr. Pinkerton and others, to the additional specification to the first charge have, I trust, given a satisfactory explanation on this subject. The order of general Hampton to colonel Covington could have no possible bearing upon me, and it has therefore been rejected by the court. I had been ordered to fort Stoddart with my regiment, and was the senior officer on duty there, from the 18th to the 25th of March, and by the 62d article of the 1st section of the rules and articles of war, it was not only my right but my duty to command, "unless otherwise specially directed by the president of the United States."

Seventh or second additional. "In taking on or about the 3d of January, 1811, an improper and unauthorized attitude with his command at, or contiguous to, the town and garrison of Mobile, and in taking a house for his family, and establishing his quarters within the said town, occasioning thereby, besides the great delay in violation of my letter of instructions to him of the 10th of September, 1810, an unnecessary alarm and apprehension to the officers of a foreign power in amity with the United States." The evidence relied on by the prosecutor in support of this specification, is contained in my communication to general Hampton of the 19th of January, 1811, and proves, 1st. That after a series of adverse winds and weather, in a passage of forty-nine days from Natchez, I reached Mobile bar with part of my command, in five gun vessels, at 5 o'clock P. M., passed the fort between six and seven, and anchored a short distance above it before eight, on the 3d of January, 1811: That our vessels were not hailed, and that I had no communication with the Spanish commandant on the 8th of the month: 2d. That previous to my arrival, a lawless collection of citizens from the Mississippi Territory, headed by Reuben Kemper and others, had menaced the town and fort of Mobile and other places under Spanish authority; and that lieutenant colonel Sparks had sent captain Gaines to Mobile with fifty

regulars, and demanded the town and fort, in the name of the United States: That this demand had been refused by the commandant, who, nevertheless, permitted captain Gaines to land his men on the public wharf, in full view of the fort which commanded it, and to quarter them a short distance north of the town: That in consequence of the refusal of the Spanish commandant, a company of militia (mounted riflemen) had joined captain Gaines from the Missisippi territory; and that lieutenant-colonel Sparks was preparing to follow with his whole regular force, and four or five companies of militia, to take the Spanish fort by storm. 3d. That these movements had excited a general apprehension and alarm at Mobile: That the commandant had shut himself up in the fort with his whole military force, and threatened to fire on, and burn the town: and that the inhabitants had generally fled for safety, either to the fort or the country. 4th. That in a letter written at Petit-Bois Island, on the 28th of December, and forwarded by judge Toulmin, (one of the most enlightened, patriotic and virtuous citizens in the Tombigbe country,) I directed lieutenant-colonel Sparks to countermand his orders for sending the militia to Mobile, and to keep them within the Missisippi territory until my arrival. 5th. That between the 3d and 15th of January I took a house for myself and family near the north end of the town, and encamped the troops a little in my rear, after which the inhabitants generally returned, in full confidence of protection and safety. 6th. That by letters of the 27th and 28th of December, from his excellency governor Claiborne, the agent of the United States for taking possession of West Florida, I was informed of his anxiety to put a stop to the ravages of Kemper and his associates, and requested to cooperate with him, to the full extent of my means in effecting this object; and that the said governor and agent did, by his said letters approve of the movement of captain Gaines, and regret that his de-

tachment had not been more numerous. And 7th. That these letters of governor Claiborne, which reached me on the 8th of January, authorized me to open a correspondence with the Spanish commandant, which I did; and that the fruits of this, and of the position I had taken near Mobile, were the reestablishment of a friendly and social intercourse, between the American army and citizens, and the Spanish authorities and subjects in that quarter. And *what*, let me ask, is there in all this, which goes to prove, that I had taken an improper and unauthorized attitude, and occasioned thereby an unnecessary alarm and apprehension to the officers of a foreign power?

There cannot be a doubt, that some of the measures of my predecessor, were unauthorized and premature; and that these, and other circumstances, had produced a state of things, highly injurious to the interest and honour of the United States; and it would seem to follow as a necessary consequence and a first duty on my part, that I should endeavour to remove the difficulties which had intervened and reestablished that harmony and good understanding between the United States and Spain, which had been interrupted by the mistaken policy of one of our officers, whose credulity on this occasion had made him the dupe, and in some measure the victim of designing men; and by the unauthorized acts of an aspiring band of American citizens. This I have done, and I trust, that on a full examination of my conduct, in all its bearings, in relation to this transaction, it will be found that I have rendered essential service to my country, and added dignity and honour to my name and character.

I have now gone through with this long list of charges and specifications, and, I hope convinced every member of this court, not only of my complete and entire innocence, but that the charges are false, futile, vexatious, and groundless.

Perhaps I ought to take some notice of a letter from general Hampton to colonel Covington of the 16th of March, 1811, the order for my arrest, and the mittimus under which I was transported under guard, in the hold of a small schooner, with a Spanish flag flying over my head, from Fort Stoddart to New Orleans; and from New Orleans to Baton Rouge, in a row boat of twenty-two feet from stem to stern; but I will wave this and proceed to inquire, *What is the sum of my offence?* Is it because I did not join with Daniel Clark, Tom Power, and other choice spirits, in their nefarious attempt to ruin the man, with whom I had lived in habits of the strictest official and confidential intimacy for more than twenty years; and whom I had assisted to put down rebellion, and prevent a civil war? Had I done this, the very acts which have been alleged against me as crimes, might have been applauded, and instead of being degraded to the level of a private soldier, transported three hundred miles under guard, when sinking under the pressure of the most painful and dangerous disease, and made to languish in confinement more than twelve months, I might have basked in the sunshine of my prosecutor's favour, as every officer of this army has done, who pursued this dishonourable course.

The characters and conduct of great and good men, are not appreciated with justice by the age in which they live. Even Washington, the great, the godlike Washington, had enemies while he lived. So Wilkinson, the brave, the patriotic, the virtuous Wilkinson, has been and now is, persecuted, vilified, and abused! But, when the passions, the prejudices, and the intrigues of these times shall have passed away, the faithful page of history, will do him justice; and in comparing the condition of man, in this and other climes, it will teach posterity to exclaim—We too had been slaves, had not a Wilkinson dared to snatch the happy constitution, under which we live, from the traitor's grasp!

"And while along the stream of time, his name,
"Expanded, flies, and gathers all its Fame:
"Oh! may my little bark, attendant sail,
"Pursue the triumph, and partake the gale:
"When Envy, stung to death, shall grant repose,
"And sons shall blush, their fathers were his foes."

(Signed) T. H. CUSHING.

Baton Rouge, 26th April, 1812.

The judge advocate then asked the court for three days to make his written replication to the prisoner's defence.

April 29th.

The court met at the hour to which it was adjourned, absent one of the members; who reported to the president, that he was unable to attend in his place, that day, from indisposition. The judge advocate stated, that such had been his own imperfect health, and the mass of evidence to be collated, that it would be impossible for him to be prepared with his written replication, by the morrow. He would, therefore, ask the president to adjourn the court over to the day after the morrow. The president accordingly adjourned the court, to meet at 10 o'clock on May the 1st; it being understood that no further indulgence would be granted on the ground last stated.

May 1st,

"The judge advocate made the following written replication to the prisoner's defence."

Mr. President,

And gentlemen of the court,

You are called upon to determine, perhaps, the most important case that has ever been agitated on the waters of the Mississippi; and after a long and solemn inquiry, you have now made a near approach to the final decision on the

issue, in question, between the United States and colonel Thomas H. Cushing, the prisoner at the bar.

Distant, however, as you are from the busy world, your proceedings have not escaped the public attention. Notices of this trial (I will not say by whom,) have gone abroad, and the public prints in distant parts of the Union have teemed with doleful accounts of the wrongs and sufferings, of the innocence, worth, and services, of the object of this prosecution. The public sympathy has been thus excited—these publications have found their way into this country—and (may I not add?) have fallen into the hands or have been read within the hearing of every member of this court! Sir, but for the high respect I bear to the integrity and independence of this tribunal, it would be my duty, on the part of the United States, to make an affidavit to the facts alluded to, and to ground thereupon a motion for postponing the decision of this case: but I will not for a moment believe that publications so false and infamous in their character and tendency, can have the designed effect upon such as understand the true history of this prosecution. And what is that history?

In the month of February, 1811, the commanding general of the department, believing that the prisoner had failed in his duty, as an officer, in repeated instances, issued an order requiring that he should repair without delay to Washington, M. T. then the central post within the western department of the army, and consider himself in arrest on his arrival at that place; informing the prisoner, at the same time, that an officer would wait upon him, on the completion of his journey, to receive his sword and to serve him with a copy of the charges on which he was to be tried. This order (dictated by the most delicate respect for the feelings of the prisoner, as a soldier; which permitted him to proceed from fort Stoddart to the place of his destination, with his sword by his side; when, according to the

usual forms in like cases, he ought to have been deprived of his side arms at fort Stoddart;) the prisoner declined obeying; alleging, in his reply to that order, that he was unable to travel through the wilderness, and that he could not command the means of transportation by any other route; although, as commanding officer at fort Stoddart, at the time, he might have hired a conveyance by water, either at that place or within its neighbourhood, for Natchez by way of New Orleans as his successor in the command, in fact, afterwards did, for the transportation of the prisoner to Baton Rouge. At the same time the prisoner declined proceeding to Washington, he preferred a request to the general that the court to be ordered for his trial, might convene at some post more convenient for his attendance.

On the receipt of this reply, to a peremptory order, the original court, of which the present is but a continuation, having already been appointed to convene at a given place, the commanding general had but one course left for him to pursue; unless, indeed, he had been of the opinion that it were easier for the mountain to move to Mahomet, than for Mahomet to move to the mountain; and accordingly, on the 16th of March he ordered that the prisoner should be arrested at fort Stoddart, and brought round under the charge of an officer, who, as provost-marshal should be responsible for his appearance before the court appointed for his trial. The order for the arrest is directed to colonel Covington, who superceded the prisoner in the command of fort Stoddart, and is in these words:

"*Head Quarters, Baton Rouge, 16th March*, 1811:

"SIR,

"Colonel Cushing has refused to obey my orders for placing himself in arrest. He invites the alternative which he knows I must recur to, and he shall be gratified. You will immediately arrest him, and place him in charge of an

officer, who must be held responsible for his appearance before the general court-martial ordered to convene at this place, for his trial, on the 5th of the next month. You will afford to this officer such means as may be in your power to carry this order into effect.

"The route and mode of travelling will be at his choice; but he is to be held responsible for their success. The nature of the service and of the country admit not of the accommodation of stage coaches or steam boats. But I have no objection to the prisoner being allowed every practicable accommodation for his journey, and that the expenses of the same should be defrayed by the military agent; but his arrival by the day fixed for his trial must not be hazarded by such accommodation. You will forward such witnesses as the prisoner may reasonably desire, from a view of the charges which are enclosed for him, so far as such witness may be subject to your orders. But if you can have lieutenant Hamilton present, and will put into his hand the charges to enable him to cross examine the witnesses, the judge advocate concurs with me in consenting that all depositions thus taken by the prisoner before a magistrate and in presence of Mr. Hamilton, shall be admitted by the court. It will be to the prisoner the surest mode of obtaining his testimony. It will save a deal of expense, and least injure the interest of the service. You will send me a list of such witnesses in this quarter, whose attendance he may desire; and, such as are of the army shall be instructed to attend. Captain Gaines and lieutenant Luckett are to be sent forward as witnesses against lieutenant colonel Sparks, who is to be tried before the said court. The former is the personal friend of his colonel, and would no doubt discharge the unpleasant duties hinted at in this letter with more delicacy towards the prisoner than another. On that account I wish it to be confided to him, should he be present. It is required that you should have the prisoner served with a

copy of this letter by captain Gaines or some person who can testify it before the court, together with a copy of the charges to which it refers."

This order, which bears upon the face of it the strongest proofs of attention and even solicitude for the accommodation of the prisoner, as far as the good of the service would permit; and which was rendered indispensable by the prisoner's own default with respect to the previous order of the 18th of February, has been regarded and represented by him, as the instrument of his oppression and disgrace. Sir, the appointment of a provost-marshal is a matter of course in all trials which take place in the armies abroad, and in our own navy it is a matter of common form. In the instance in question, the officer appointed to perform that service was the personal friend of the prisoner, or at least selected because it was believed that he was such. In fact, the term *prisoner*, applied to the accused, in all military trials, presupposes the accused in the custody of the marshal of the court. Where then is the injustice of this case? To the querulous it is a happiness to complain.

So much for the *manner* of the prisoner's arrest. I shall not here speak of the incidents of his arraignment—because, having succeeded in most of his captious objections to the members of his court, he cannot now, I apprehend, with any attention to decency, make that part of his trial a distinct subject of complaint.

But the prisoner has been deprived of his liberty, and suffered to languish in confinement more than twelve months! The deprivation of liberty in an American citizen is a subject too deeply interesting to the army and the nation to be heard with indifference. Liberty! Mr. president—Liberty!—There is a holy magic in the term. There is no tongue so rude as to despoil it of its sublimity;—no heart so humble that does not leap in accordance to the sound: who, then, has done to the prisoner this mighty

wrong? and what are the facts upon which this high-sounding complaint has gone forth to the world?

The prisoner has been arrested; that is, deprived of his sword, and confined within a circumference of six miles about the garrison and town of Baton Rouge. And, since early in February last, these limits have been extended so as to comprehend the greater part of the Orleans and Missisippi territories. The article of war, on the subject of arrests, is explicit, that "whenever any officer shall be charged with any crime, he shall be arrested, and confined in his barracks, quarters, or tents, and deprived of his sword by the commanding officer," without any distinction or proviso whatsoever. The deviation from the law in this case must, therefore, be regarded as an indulgence extended to the prisoner, and not a right which he might have claimed.

The protracted length of this trial is indeed a subject of general regret, and to no individual more than to the commanding general of this department. But who could have foreseen its duration? and with what justice can the prisoner now charge the delay upon the prosecutor?

On the 26th of April, 1811, when this court was about to be sworn in the present case, the prisoner submitted a motion for the postponement of his trial. The court determined first to be organized. The prisoner then repeated his motion. The court decided the prisoner should plead to the charges and specifications preferred against him, before they would decide on the motion for postponement; which the prisoner accordingly did, and then his motion came fully before the court. The prisoner having previously filed two affidavits in support of his application, on the 29th of April, 1811, the court decided, that "they will postpone the trial of colonel Thomas H. Cushing until the first day of August, 1811, in order to enable him to produce all witnesses or testimony which may be material to his defence."

On the first day of May the judge advocate entered on the minutes the following statement:—

"*Mr. President,*

"I AM instructed by the commanding general to state to this court, that he has hitherto, and still does, consider it expedient for the good of the public service, that the trial of colonel Cushing should be prosecuted to a close, without postponement, and that, as prosecutor, he must object to any delay; but, should the court determine, notwithstanding, that a postponement is absolutely necessary, then, that *less injury* will result to the public service by continuing this trial to the first of December next, than to the first of August.

"I, therefore, on the part of the prosecutor, am enabled to say, that, if a postponement is determined on, the prosecutor has no objections to this trial being continued to the first day of December next.

"The court was cleared, on the motion made yesterday to reconsider, which was decided in the affirmative, and the court determined that they will postpone the trial of colonel Cushing, until the first day of December next, in order to enable him to procure and adduce all witnesses or testimony, which may be material to his defence."

Here the court will perceive that the prisoner submitted motion on motion, and filed affidavit upon affidavit, in favour of adjournment. The court, at length, believing the prisoner to be serious in the wish he had expressed, adjourned for three months, the prisoner having specified no definite period in either of his affidavits. But, the judge advocate having made the above statement to the court, from which it appeared that the prosecutor, as such, objected to any adjournment, and from the same statement it appearing also to the court, that the commanding general thought an

adjournment to the first of December less prejudicial to the service than an adjournment for three months—the court did adjourn for the longer period, either for the greater accommodation of the prisoner, or out of respect to the interests of the service; for neither reason is expressed in the decision—nor does it appear that any objection was made at the time by the prisoner.

The next step in the trial is seen in the following order:

"GENERAL ORDERS.

"*Head Quarters, Creek Nation, Nov. 24, 1811.*

"The commanding general having been informed that several members of the general court-martial, which was to convene by adjournment at Baton Rouge, on the first of December next, will then be unavoidably absent, on duties assigned them by an authority superior to the general's; that court will accordingly adjourn to some day so distant as to allow of the reassemblage of all its members: the term of adjournment, however, not to exceed one or two months."

This order reached Baton Rouge by express, a few days after the first of December. On that day there was no court. December second, 1811, the judge advocate attended, and made the following entry:—

"Pursuant to the resolution taken by the members present yesterday, they attended again today; and it appearing that the president of the court, and five members, were still absent, they determined to give no further attendance until called together by order."

After the arrival of the general within the western department of his command (in December last), it is not understood, nor is it pretended by the prisoner, that any dis-

tinct application was submitted, having for its object the completion of his trial. On the 10th of February, 1812, however, a general order was issued, appointing the 20th of March for the convention of this court, and detailing, at the same time, four officers of high rank to take the places of such of the original members (including the president) as might be absent on the day mentioned in the order; the president, and several of the members, being notoriously beyond the control of the general at the time.

On the 20th of March that court met, and organized itself according to order, which court, gentlemen, you are.

Mr. President,

Having gone through the history of this very tedious and protracted trial, we now come to the merits of the case. But here let us pause for a moment, and take a general view of the circumstances before us. You are sitting on the banks of the Missisippi, but your proceedings will extend to the St. Lawrence. You may pronounce your judgment in a moment; but the rank of the prosecutor and of the prisoner, the importance of the issue to be tried, and, I may add, the dignity of the tribunal that decides, will give to your proceedings fame and durability. Who does not wish the accused were innocent? who will not grieve if he be guilty? It is for you, gentlemen, to make the solemn decision, and let the prisoner stand or fall by his own guilt or innocence, by the law and the evidence.

CHARGE I.—*Disobedience of Orders.*

1. The proof of the first specification (which see p. 12.) rests upon general Hampton's letter of the 22d of May, 1810, addressed to the prisoner, and the letters of the prisoner to general Hampton, dated the 5th and 20th of June, 1810, with the enclosures of the latter. The prisoner admits, in his defence, that these papers would of themselves prove a

delay if there was no other evidence in the case; and the other evidence which he relies upon, is derived from Mr. Brownson, the contractor's principal agent, who swears that a verbal notice was received from the prisoner in sufficient time. The court will recollect when this witness was under examination, that I objected to his parole evidence, because, there did appear upon the face of it a manifest contradiction to the written testimony recorded in the case; and to those parts of it too, which consist in the prisoner's written notice to the witness, and the witness's reply.

On the 20th of June the prisoner writes to general Hampton, and encloses certain papers. He says (speaking of the movement of the rifle detatchment mentioned in the specification) "they will leave this cantonment, so soon as the contractor's agent shall have made the necessary arrangements for their subsistence on the march. My letter to the secretary of war, of this date, with inclosures, will show the steps which have already been taken in this business." Does the pretended verbal notice (mentioned by the witness) constitute one of *the steps already taken?* There is no hint of such a step in the communication; and yet (if, in fact, it had been taken) it was too important to be omitted in a formal official report of *the steps already taken!* The enclosure particularly alluded to, in the communication, is the prisoner's order for the march of major Fuller's command, to which order, is subjoined the notice to the contractor in these words:—"The contractor's agent will make the necessary arrangements for supplying provisions on the route, which will be by the post road to the Chichasaw agency, and from thence to Colbert's ferry." This notice of the prisoner does most completely exclude the idea, that any previous verbal notice had been given. If such had been the fact, the language of the written order would have been, The contractor's agent will *go on to complete his arrangements*, &c.

The reply of the contractor (also enclosed by the prisoner) is of the like strongly exclusive character. He replies—"I am this moment presented with a copy of an order of this date for furnishing," &c.—"I shall without delay, proceed to make the necessary arrangements, which will of course take some time, but you may rely on a supply within the thirty days allowed by the contract." There is here, no intimation whatever, that a previous verbal notice had been received and acted upon: on the contrary, we find the agent speaking of the notice as of something new, and sticklng for the thirty days allowed by the contract. Thirty days, from what period? —From the 16th of June, sir, the date of the written notice and the reply: the papers will admit of no other possible construction.

When the witness was before the court, under examination he stated, that he was "requested to consider the previous verbal notice, as private or confidential, and to make his arrangements accordingly." And, on the motion to reject his parole evidence, an explanation was offered, that, the reason for enjoining secrecy upon the witness was, if the contemplated movement of the detachment had been made public, it might have occasioned desertions. This explanation is not repeated in the defence, nor indeed, was it worth a repetition; for where was the necessity of reserve in the contractor's reply to the written notice, when that reply was *private*, and in answer too to the prisoner's *public order* which told the whole story? If secrecy was necessary at the time it is pretended the verbal notice was given, that necessity still existed on the 16th of June; yet, on that day the prisoner published to the whole army the destination of the rifle detachment; that is, more than ten days before it marched.

The prisoner in his concluding remarks on this specification, gives a new character to his defence. He states, that it was not in his power to compel the contractor to furnish

rations on the march at an earlier day, without a positive written order; which, he insinuates, might have run the government to an unnecessary expense, as happened in some other instance. Yet his commanding general had written to him—"A post I am directed to establish in the neighbourhood of the Musele Shoals, requires two companies from the cantonment Washington. You will have those of the rifle regiment ready to march at a day's notice."—"The contractor *must have notice* for their supply." Upon the whole, the court cannot but perceive in this transaction, a breach of orders aggravated by an attempted justification.

2. The support of the 2d specification, (which see p. 13.) depends on the letter of general Hampton of the 28th of May, 1810, and on the official correspondence between colonel Cushing and major Fuller, which was enclosed by the former in his letter to general Hampton under date the 11th of July, 1810; and on the testimony of lieutenant Hukill. Major Fuller left cantonment W. with his command about the 27th of June. Having proceeded a short distance, he writes to the prisoner—"The same necessity that compelled me to request the additional team from your command, must compel me to ask for an additional sum of money to defray the expenses of the team. The unavoidable accident of breaking one of my carts down, and one of the wheels of the other (which, by the way, was not worth a cent more than the iron when it moved from Washington) obliged me to halt at this place, from two o'clock Sunday, until this morning to repair. I wish the sum necessary may be forwarded to me by mail at the agency." On the next day major F. writes again to the prisoner—"I enclose you Mac Raven's certificate of the expense of my team to the agency. You will judge of my situation. I arrived at this place at two o'clock, P. M., this day, with fifteen men that I could neither leave nor get on, only in their sickly pace. I shall only make those applications that my feelings will justify me in."

"N. B.—Mac R. says that he is not authorized to furnish me with any thing at present, but that he will, on proper authority, furnish me through. My provisions will be expended by the time that I arrive at the agency." Mac R.'s certificate, as to the sum deemed necessary to support the detachment on its march, can only be regarded by the court as the estimate of major F. himself, as grounded, in whole, or in part, upon that certificate. The sum thus estimated was seven hundred and fifty dollars. On the 10th of July, the prisoner replied—"I have received your letters of the 4th and 5th instant, and am sorry, that it is not in my power to send money for the support of your teams through the wilderness. My command is limited to this cantonment, the 2d regiment, F. Adams, and F. Claiborne; and beyond these your authority is as ample as mine." The prisoner then recommends that bills be drawn on the secretary of war, taking care to accompany them by such evidence of the necessity of the expenditure, as to secure a prompt payment." Draw bills on the secretary of war, and sell them (I presume) in the Chickasaw nation!—for the letter is addressed to major F. at the "Chickasaw agency." I shall not dwell on this absurdity, nor stop to dispute with the prisoner, whether his authority extended to Gibson-Port (the place from which major F. made the demand) but shall at once lay before the court the mandate the prisoner was under, to furnish major F's command, without regard to place, with whatever the necessities of the march might require. General H. in his letter to the prisoner of the 28th of May, speaking of the march of major F. adds, "those details, with every other relating to the march, which your experience will not fail to suggest, you will please to order; keeping in view the necessity of the strictest economy in each arrangement." Economy, in expenditure is the opposite of waste; but the prisoner, in this instance, seems to have understood by the term, the keeping and the holding of that

which was within his control. The prisoner attempted to show by lieutenant Hukill (the witness who proved the advance of $200 to major F. in the first instance) that he, lieutenant H., as brigade-quarter-master, was authorized by the general, to withhold money from the prisoner's order, in certain cases. This witness answered the prisoner "At the time the rifle regiment were ordered to march, the general ordered me to give all the necessary aid from my department, which might be required by colonel Cushing to facilitate the movement of that detachment.

The prisoner has more than once styled lieutenant H. "the leading witness for the prosecution." Lieutenant H., Mr. President, is an officer of intelligence, and as brigade-quarter-master, had at the time, an extensive acquaintance with the operations of the army. He has, therefore, been called to several points in this trial, but the court must have been struck with the fulness and the liberality of his testimony; which, like the manly countenance of the witness, challenges from every one faith and admiration.—Major Fuller's letters require no support; but, in fact, they are to be considered the prisoner's own; he encloses them to general H. without the expression of a doubt as to their accuracy.

The evidence in support of this specification is, therefore, complete. It proves, that notwithstanding the order of general H., major F. was, in the first instance, furnished with but $200 to defray the expenses of his detachment from cantonment W. to the Muscle Shoals, a distance of near 400 miles: that early on the march, and while yet in the neighbourhood of the prisoner, major F. represented the embarrassments of his detachment, and applied for a further sum of money, which he estimated to be necessary to enable him to reach his destination: that the prisoner refused to supply this demand, and sent that refusal to the Chickasaw agency, in the wilderness, with the advice that major F. should draw bills on the war department to sup-

ply the accumulating exigencies of his command.—The court cannot mistake the character of this transaction.

3. The third specification (which see p. 13.) respects the deserters. It appears, from the evidence, Mr. President, that Anderson, one of them, was not, though a deserter, entitled to the benefits of the president's proclamation; and that this fact might have been known to the prosecutor, if it were possible for him to recollect the name of every soldier mentioned in any of his orders.

The prosecutor, in this case, sir, is as little interested in the decision which the court may give, as any other gentleman of the army. As the commanding general of the department, he was of course better acquainted with most of the official acts of the prisoner, than another; and, therefore, partly upon that knowledge and partly upon official information derived from others, he felt it to be his duty to prefer charges against the prisoner and to bring him to a trial. The general having sent to the court the information he thus possessed, he has given himself no further trouble as prosecutor in the case. The charges thus exhibited are in the nature of a bill of indictment found by a grand jury, on probable and *ex parte* evidence; and if the prosecutor has been mistaken, as to a part of a single specification, it is what might have happened to any other human being. But it is only in the case of Anderson, that this specification has erred: Bence was a deserter, and entitled to the benefits of the president's proclamation.

The general order of the 8th of June, 1810, directs "the deserters who have surrendered themselves under the proclamation of the president of the United States, of the 29th of January last, within the territories of Orleans and Mississippi, to be placed under the disposal of colonel Covington of the cavalry. The officers of every description, having these men within their control, are directed forthwith to deliver them to the colonel, who has the general's particular in-

structions respecting their organization, agreeably to the promise which accompanied the president's proclamation." That promise was from the general himself. Speaking to the deserters, he said, your wants shall be provided for, and in a new corps, where the chidings of your former comrades will not be heard, you shall be permitted to serve out the term of your enlistments." Under that proclamation, and the promise of the general, Bence came in from his desertion. Major Bowyer, a witness to this point, when asked by the court, "was Bence entitled to the benefits of the president's proclamation, previous to what you consider his second desertion?" answered, "if my memory serves me, he was." And from an order dated the 4th September, 1810, issued by colonel Cushing, while commanding a district, the following are extracts—"William Bence, a private of captain Campbell's company, 2d infantry, charged with repeated desertion from the service of the United States, particularly on the 27th April, 1810—the prisoner pleads not guilty. The court find the prisoner guilty of the charge exhibited against him; and sentence him to receive twenty-five lashes, and to make good the time lost by desertion; and that he be delivered over to colonel L. Covington of the light dragoons."—"The commanding officer disapproves of the sentence passed on William Bence, and orders that he be released from confinement and return to duty." On taking the evidence to this specification, the admission of the prisoner was recorded, that "Anderson and Bence were not delivered over by him to colonel Covington." But it is also recorded, that colonel Cushing issued an order on the 23d June, 1810, for the delivery of the deserters, who were at cantonment 2d regiment, to colonel Covington; and, that major Bowyer, the commanding officer at that cantonment, did not deliver over Bence under that order; because B. was at the time in the guard house under a charge for a subsequent desertion. We find, however, from the order

of the 4th of September, that B. after his trial, for what major B. considered his second desertion, again reverted to the authority of the prisoner, who set aside the sentence of the court, and ordered the man *to duty*—notwithstanding the court had directed that he should be delivered over to colonel Covington; and notwithstanding the general order of the 8th of June which still remained in its original force. That it was the province of the prisoner to confirm, or to set aside that sentence, will not be denied. The sentence, as published in the order, is cited to prove, that on the 4th of September, if not before, it was within the knowledge of the prisoner, that Bence was a deserter entitled to the benefits of the president's proclamation, which fact, connected with the admission of the prisoner, that this man was not delivered over by him to colonel Covington, does, most conclusively establish the guilt charged in the third specification.

There is, however, a remaining point in the prisoner's defence of a different character, and one on which he seems principally to rely, to wit—William Bence is described in the specification, as belonging to captain Boote's company of the 2d regiment, whereas, from the evidence, he appears to have belonged to captain Campbell's of the same regiment. If the prisoner himself were arraigned as *John* Cushing, colonel of the *first* regiment of infantry, there would be a misnomer, and also an error in his addition; and the prisoner might avail himself of either mistake in his plea, but not afterwards. But Bence is a *third* person, not the object of this prosecution, and therefore the same nicety with respect to *him*, is not required by the law. All that the law does require, in the description of third persons, mentioned in indictments, is a *convenient certainty*. Now, it is not pretended, that there is an error either in the name, or sirname of the person in this case; or in the regiment to which he belonged: but he was of Campbell's company, and not of

Boote's! Sir, we have been frequently told by the prisoner, that courts-martial are courts of honour, not bound by the technical rules of the common law: and the prisoner has been heard to invoke the justice of this tribunal upon the merits of his whole case. The court will recollect who it was that first introduced legal authorities in this trial; and the court may also recollect why they were by the same party immediately after disclaimed. The prisoner, however, has once more resorted to the decisions of the common law; and in support of his objection to the description of Bence has cited *Mac Nally's rules of evidence*, p. 501-2. The title of the chapter referred to, is this—"Of proving the certainty of the *place* laid in the indictment;" and the rule of evidence under which he finds his cases seems equally inapplicable to the present question:—" where a *place* certain, is made a part of the description of the fact charged in the indictment against the defendant, the least variance as to such place is fatal." All the cases relied upon by the prisoner turn upon some mistake either in the name or sirname of the person in whose house the offence is charged to have been committed; but it is the *house* which is the object of inquiry, and as houses are generally known by the names of their owners, hence it became material that such names should have been correctly stated in the indictments. Neither of the cases cited speak of the effect of an error in the *addition* to a sirname: and it is not pretended in the present question, that *Bence* is not the sirname of the person described, and *William* his christian name. Therefore, the cases in *Mac Nally* do not come up to the wishes of the prisoner; and surely a military tribunal will not require a technical nicety in its pleadings, which is even unknown in the ordinary courts of law.

The court must perceive a breach of orders in the proof of this specification.

4. Specification the 4th, (which see p. 13.) relates to the officers' quarters at the two cantonments, M. T. It

appears from the evidence, that permanent buildings for officers at cantonment, 2d regiment, were never erected, although the materials were prepared. That part of the specification, is therefore, abandoned. The officers' quarters at cantonment Washington, were on a large scale, having generally four rooms to a company. There are in the infantry one captain and three subalterns to a company; but it rarely happens, that more than two of these are present at the same time. But let it be admitted, that all the company officers were together; the buildings erected at cantonment Washington, according to the evidence, exceeded the allowance of quarters as established by the war office, by one and a half rooms to each company; which in one regiment would make an excess of fifteen rooms; and there were several regiments at the cantonment. The witness also stated, that many of the rooms were unnecessarily large. The general order of the 15th March, 1810, takes the regulations of the war department, on the subject of quarters, as its basis; enjoins a strict conformity thereto, and directs that officers commanding regiments take upon themselves the immediate superintendence of their respective buildings. On the 20th March, 1810, the command of the cantonment devolved upon the prisoner. It then became *his* duty to give a general superintendence to the duties of the cantonment; and accordingly, he issued an order on the 30th of March, calling the attention of the officers to the general order of the 15th, upon the subject of quarters. And why were not those orders obeyed? Had not the prisoner the authority to enforce obedience? Was he not on the spot? and did he not frequently warn lieutenant colonel Pike, that some of the gentlemen of the consolidated regiment might be brought to an account for the structure of their quarters? This fact proves that the prisoner was aware of the breach of the general order. Why was this departure, thus noticed, not brought at once within the rule of that order? Be-

cause, says, the prisoner, commanding officers of regiments were directed by the general to take upon themselves the immediate superintendency of the working parties of their respective corps. This *immediate* superintendency of regimental commanders, was very much a thing of course; and by no means superseded the necessity of a general superintending control. Can it be pretended, that the prisoner, responsible in the first instance, discharged his duty by merely issuing an order requiring that a general order should be obeyed—both of which were suffered to remain dead on the file? If this be correct military doctrine, then, every officer of the line may devest himself of the duties of his station by simply assigning them over to the next below him in rank; and so on, down to the lowest in grade, until all responsibility be lost by extention and minute ramification. A principle so preposterous would contradict every idea of service, and military organization. No, sir, the prisoner having egregiously failed to vindicate the general order of the 15th of March, the breach of it is now visited upon himself.

5. Mr. President, I have found myself so much limited in time, and literally so much weakened by labour and indisposition, during this trial, that it has been impossible for me to give that full consideration to all of the specifications under the several charges which their individual importance required. Some of them, therefore, will be omitted in this replication, and others but slightly touched upon.

The leading facts in support of the fifth specification, (which see p. 13.) are these:—that the prisoner gave the plan and generally superintended the erection of the cantonment 2d regiment: that the buildings erected for the soldier's quarters were of a durable kind, having brick chimneys; and that an immense quantity of planks and bricks were prepared for the quarters of the officers: that much labour and time were expended in these operations, which

indicated the intention of the prisoner to render the cantonment durable and complete: that when two company huts were built, and materials for one or two others prepared, the prisoner received the letter of general Hampton of the 6th June, 1810, directing, that the utmost economy in labour should be observed, and that the huts for both officers and soldiers should be built of materials the most slight and cheap: that this order was received on the 26th of June, (by acknowlegment) but, in fact, on the 23d, as appears from the prisoner's letter of the 27th of June, in which he states that he received by the same mail the letter of the 6th, and the order of the 8th of June; and it is in evidence that the prisoner acted on the order of the 8th, in his own order of the 23d of June, which was addressed to major Bowyer; and lastly, that it is not in evidence that the prisoner at any time, acted on the letter of the 6th of June, as it respects the cantonment, but suffered the buildings to go on according to his original design, perfectly regardless of the injunctions contained in that letter. Major B. told the court, he would always prefer to have brick chimneys to soldier's quarters, *when left to his own discretion:* but the letter of the 6th of June left the prisoner no discretion—therefore, *he* should have acted as he was commanded.

6. The sixth specification, (see p. 14.) charges upon the prisoner, an unmilitary and unwarrantable delay, in his movement with a part of his regiment from the neighbourhood of Natchez to fort Stoddart, in the fall and winter of 1810-11. The order of general Hampton which put the prisoner in motion, is dated Columbia, S. C. "September 10th, 1810," and is as follows:—

"SIR,

"With three companies of the 2d regiment of infantry, which you command, you will descend the river with the least possible delay, and proceed to fort Stoddart with all

possible expedition. You will add these three companies to the garrison and assume the command of that post." In another part—"In addition to the details I have specified you will not fail to adopt such as shall be best calculated to give the most prompt and entire effect to the main purpose of the movement." And from a previous communication from the same (of the 3d of September,) the prisoner was fully apprized of the apprehension and alarm which existed in the quarter to which he was directed by the letter of the 10th. On the receipt of this order, (on the 24th of October) the prisoner commenced the bustle of preparation, and in about one hundred and twenty days thereafter, arrived safe at fort Stoddart with the whole of his command! Let us not here, Mr. President, marvel at this delay; but rather look into the evidence for its cause. It may be, that the winds of Heaven were adverse; that the sea was perilous and impracticable, and that the prisoner had an affair of etiquette and diplomacy to settle by the way. Whatsoever may have been the cause I am afraid it will not afford the best possible evidence of the fullness of our preparations for war when it shall appear in this inquiry, that it cost one of our oldest officers, whose military resources have been considered (at least by his friends) as inexhaustible, four months to accomplish a movement by water of some five hundred miles—aided, too, as he was, by transports from the navy. But it is known to us that he set out, and that he arrived, and however tedious the passage we will follow him in the voyage.

The first difficulty the prisoner had to overcome, I humbly apprehend was one of his own creation. The court-martial ordered by him for the trials of major Bowyer and lieutenant J. Davis, was not in session on the receipt of the order of the 10th of September, whatever simple persons might imagine from the ingenious acknowledgement the prisoner makes of that order, in his letter of reply dated the 31st of October. The order appointing that court is dated

the 27th of October; and it has been shown, that the letter of the 10th of September, had been received *three days before.* Captain Arbuckle, a witness, to this specification, told the court, that the command of the prisoner might have moved sooner, but not if it waited for the trials." What then, it will be asked, was the mighty matter alleged against major Bowyer and lieutenant Davis, which suspended an important movement and paralized the operations of the army? Was it treason, or mutiny—or was it both? In the case of major B. the court acquit him of the several charges and specifications exhibited against him, and "pronounce the prosecution to be unfounded, malicious and vexatious." Lieutenant D. was sentenced to be suspended "for the space of six calender months," which the commanding general immediately remitted. These are the facts of the case. If the trials had been indispensable could they not have been prosecuted before a court formed of the remaining officers on the Missisippi? Might not major Bowyer and lieutenant Davis have been carried round with the prisoner to fort Stoddart? Could a great military genius have devised no mode by which to do justice to the parties and at the same time to prosecute his movement in obedience to a most urgent order? But captain Campbell was the prosecutor, in both cases, and *who is captain Campbell?**

I will not waste the time of the court by a minute consideration of all the evidence brought forward by the prisoner, as explanatory of the delay which took place before his embarkation at Natchez. What though there were musters and payments?—that new clothes were repacked, and old clothes inspected?—for such is the evidence. These, sir, were but minor impediments, lost in the greater one which grew out of the trials. I know that lieutenant-colonel Pike told this court, that "in time of war *we* make our movements more rapidly than in time of peace." But

* The son-in-law of colonel Cushing.

will lieutenant-colonel Pike, will any other military man, risk his reputation so far as to say that, with a most urgent order in his pocket for a prompt and expeditious movement, he would halt a moment for the ordinary inspections and payments of the army? Was it not known to the prisoner, from the letter of the third of September, that the Tombigbee country was in a state of alarm, and that that was the cause of his direction thither? Indeed, the strength of expression contained in the order of the 10th, justified every apprehension for the safety of that country. The prisoner introduced captain Nicholas, to prove his anxiety to get off from Natchez, because he (the prisoner) declined dining with certain officers, at cantonment Washington, who designed him "a mark of respect." This is the language of the witness; to which the prisoner has subjoined, in his defence—"for my character and services as an officer and a gentleman." But, sir, whether the prisoner dined at Washington or at Natchez, it is very certain that he did not move, with his command, from the latter place, until about the 16th of November; that is, twenty-three days after the receipt of the order of his general.

The remaining ninety-seven days, consumed in this movement, it is difficult to distribute, with impartial justice, between the prisoner, the winds, and the waves. It appears, however, that some time was lost in New Orleans, on account of the transports. I shall, therefore, decline taking the pleasures of the city with the prisoner, and pass on immediately to Mobile, where we shall arrive on the third of January, of the new year, as has been determined by all the witnesses. At this place the prisoner lands, takes a house, opens a correspondence, and establishes a levee. The graphic view of this latter ceremony, as given by one of the witnesses, affords a curious specimen of his talents, in that way, as well as of the prisoner's minute knowledge of the etiquette of diplomacy; but the testimony is too

long for insertion, and I must therefore deny myself the pleasure of repeating it. The court will recollect when lieutenant Chamberlain, the witness alluded to, was before them, I made no attempt to suppress the representation of the ridiculous pageant, or interview, between the prisoner and a Spanish lieutenant, disguised under the imposing title of commandant (although an account of the lord mayor's show would have been as pertinent to the issue), because the prisoner seemed to have his mind bent upon the introduction of the scene, and, as he has since told us, in his defence, that his halt at Mobile "added dignity and honour to his name and character," I am now happy that I have done nothing to stop the growing expansion of his fame.

But, Mr. President, why halt at all at Mobile? Had the nature of the order to the prisoner been changed, either as to promptitude or place of destination? He says, in his defence, that the testimony of major Carmick and lieutenant Brownlow prove, that it was not in his power to compel lieutenant Dexter, of the navy, to move his (the prisoner's) command from Mobile to fort Stoddart, until the arrival of all the transports under the orders of lieutenant Dexter, which happened on the 24th of January, 1811. True, major Carmick said, that according to the rules of the navy, and the transport service, it was not the right of the prisoner to command the commodore; but where is the evidence that the commodore made any difficulty. The other witness referred to, speaks of a subordinate naval officer, under the orders of lieutenant Dexter, who, at another place, refused to move with lieutenant Brownlow, and some few troops, embarked on board of two gun-boats; but does this prove that, because an inferior naval officer could not move, without the orders of his superior, that, therefore, that superior would not depart from Mobile without his inferior? The court will hear the whole of the evidence read at the proper time, when it will not appear that any

difficulty was made by lieutenant Dexter at Mobile: besides, the greater part of the troops marched up by land to fort Stoddart, a distance of only forty or forty-five miles.

There is, then, no sufficient explanation of the delay at Mobile, from the third to the 24th of January. But a letter from the secretary at war, dated the 21st of December, 1810, has been introduced by the prisoner, with the placid remark, that it authorized him, "as all of his letters have done, to exercise very great, and almost unlimited discretion." It is not a little remarkable that this letter is addressed in the alternative—"Colonel Cushing, or the commanding officer, fort Stoddart;" so that the compliment (if it contain one) was not necessarily personal, as it might have fallen to another—which turned out to be the case. The great object, however, for which this letter is adduced is to show, that it changed the duty of the prisoner under the order of the 10th of September, and, of course, that he was not bound to depart from Mobile after its receipt, if it left him at discretion to remain. And the prisoner further states, in his defence, that this letter; of the 21st of December, was received by him *before* the 24th of January, 1811. Here, Mr. President, I am under the necessity of announcing that this assertion is untrue! That letter was not received by the prisoner, until the fourteenth day thereafter; that is, not until the seventh of February, the day before he left Mobile, as appears from under his own hand: "February 25th, 1811," the prisoner writes to general Hampton—"On the seventh instant I had the honour to receive a letter from the secretary of war, of which I inclose a copy." These papers are all in court, and on comparison it will be seen that the enclosure of the letter of the 25th of February, is an exact copy of the letter from the secretary, dated the 21st of December, 1810.

It has been several times said, or intimated, on this trial, that the conduct of the prisoner, while at Mobile, has

since been approved by the secretary at war. In answer to a letter written to the latter, by the former, dated Mobile, the 15th of January, 1811 (and which encloses the whole official correspondence of the prisoner while at that place) the secretary makes the following laconic reply:—"War-Department, February 18, 1811. Sir, your letters of the eighth and 15th ult. have been received, with their enclosures. A furlough of six or eight months, may be granted to captain Schuyler."

The force of the order of the 10th of September, 1810, was, therefore, in no wise broken or diminished, by any thing received by the prisoner from the war-department, at least prior to the seventh of February, 1811. On the day following he embarked at Mobile; but he had previously received certain communications from governor Claiborne, through the hands of lieutenant-colonel Sparks, the commanding officer, fort Stoddart.

On the part of the army of the United States, I must here beg leave, Mr. president, to protest solemnly against the principle, that a governor of a state or territory may, of his own mere authority, command or order an officer of that army. And, in favour of this position, I am happy in having it in my power to quote the authority, both of the department of state and the department of war. In the instructions given to governor Claiborne for taking possession of West Florida, the secretary of state says to him—"If, contrary to expectation, the occupancy of this territory, on the part of the United States, should be opposed by force, the commanding officer of the regular troops on the Mississippi will have orders, from the secretary at war, to afford you, on your application, the requisite aid." Accordingly, the secretary at war, on the 21st of December, 1810, writes to "Colonel Cushing, or the commanding officer, fort Stoddart," making the troops under his command subject to the application of governor Claiborne, for a specific object.

And this is the important letter which the prisoner states that he received before the 24th of January, and which, it is shown, he did not receive until the seventh of February, 1811.

All the evidence, therefore, which has been so unnecessarily introduced, respecting governor Claiborne and his despatches—the alarm of the inhabitants of the town of Mobile—of Kemper and his associates—and even the courtly civilities interchanged between the prisoner and the Spanish lieutenant, may fairly be thrown out of this inquiry. The single question will be—Did the order of the 10th of September, 1810, warrant the halt and delay at Mobile? The court cannot fail to convict the prisoner, in the language of the specification, of "unmilitary, improper, unnecessary, and unwarrantable delay at the town of Mobile," from the third of January to the seventh of February, 1811; and it has also been shown that twenty-three days were, in like manner, consumed in the neighbourhood of Natchez—making, in the whole, a delay of fifty-eight days! I have now, Mr. President, concluded the remarks I had to offer on the subject of the sixth specification.

7. Seventh, or additional specification (which see, p. 14). Having spoken of the subject-matter of this specification, in the preliminary remarks, I submitted to the court, as to the history of this prosecution, I shall add but little more in this place. A physician, sir, speaks from his skill in his profession; and, without meaning to question the honour or credit of doctor Pinkerton, both of which are entitled to respect, I must be permitted to remark, that there does appear, in his testimony on this subject, something more of the friend than the physician. He seems to have entertained greater apprehensions for the prisoner's health and safety than were felt by the object of his solicitude. This is what frequently happens to the humane of the faculty; they are alarmed at symptoms which the subject of

them regards with calmness and indifference. I have been induced to make this reflection, Mr. President, from one or two particulars which fell out on taking the evidence to this specification. The prisoner asked this question of lieutenant Luckett—"Was any public boat or vessel at fort Stoddart, March, 1811, in which the prisoner could have been transported to Washington, New Orleans, or Baton Rouge?" which was answered in the negative—and of lieutenant Hamilton—"Did the prisoner state to you, in the conversation that you have related, that, if he should receive the general's orders to proceed by water, he would avail himself of the opportunity of these transports (then just arrived at fort Stoddart), and express a hope that the general's reply to his communication might reach him before the departure of them?" *A.* "It appears to me that he did." From these questions, asked by the prisoner, a shrewd suspicion does arise, that the plea of inability to travel by *water* was *an after-suggestion*. The court will say who was the better judge of the prisoner's case—he himself, or the doctor.

CHARGE II.—*Abuse of Trust and Misapplication of Public Property.*

1. The first specification (which see, page 14.) respects the choice of a site for cantoning the second regiment. The court, on the motion of the prisoner, have decided, that the verbal instructions (mentioned in the specification) of the commanding general, confided to the brigade quarter-master, to be delivered to the prisoner, should not be given in evidence, although such instructions might relate to the peculiar objects within the department of the quarter-master. I lament this decision, Mr. President; not because it goes far to shut out the evidence in support of this allegation of the charge, but because I esteem it an unfortunate precedent on a great military question, and one which deeply affects the authority of all commanders-in-chief.

The evidence, taken, however, does show that the site selected was broken or rolling; so much so that the floors of the soldier' quarters (such as were in the hollows) were subject to be flooded and broken up, in great rains; that the water used for the most common purposes was remote, and that the cantonment was otherwise inconvenient, because, at the time it was selected, it was covered with the heaviest timber, and the communications between it and Natchez and Washington not the most facile and pleasant.

A place is said to be remote and inconvenient, when it is beyond the usual distance from objects of local and common necessity. The cantonment of the second regiment seems to have laboured under many disadvantages of that sort. It was remote and inconvenient with respect to water; the springs and creeks were a quarter of a mile off. It was remote and inconvenient from the place at which articles of contract were supplied; Natchez was six miles off. And it was remote and inconvenient from the other cantonment; it was a bad road that connected the two sites, four miles in length. There are some slighter shades of evidence applicable to this count, which the court will have before them when the whole of the proceedings are read.

2. The second specification (which see, p. 14.) is for "attempting and endeavouring to enter into a contract with Messrs. Andrews and Wilkinson, calculated to promote the private advantage of these citizens, at the expense and injury of the United States, and to the dishonour of the army, by agreeing to conditions," &c.—the evidence in support of which lies within a narrow compass, and is principally from under the prisoner's own hand. On the 23d of May, 1810, he writes to general Hampton thus:—"I have engaged a situation for a cantonment for the second regiment, on Messrs. Andrews and Wilkinson's tract," &c.—"I am to have a lease of from two hundred to three hundred acres of land, for six years, for which no rent is to be paid; but

the whole of the buildings are to be given up, in good order, and a certain proportion of the land is to be cleared and fenced, for every year we occupy it. So soon as the lease is executed, I will transmit you a copy."

The charge is for "attempting and endeavouring to enter into a contract," and for "*agreeing* to conditions," &c. The evidence—"I have *engaged* a situation; I *am* to have a lease; so soon as the lease *is* executed, I will," &c. The contract then was not complete. The terms had been agreed upon; the lease was afterwards to be executed. What then becomes of that ingenious conceit of the prisoner that that which proves too much proves nothing? This, perhaps, might be applied to a particular witness introduced on the part of the defence. As he is not present, I will not make the application: but I must be allowed to defend the prisoner's own letter against that aspersion. I will tell the court why the lease, as originally contemplated, was never executed. In answer to the letter of the 23d of May, general Hampton, in the tone of indignant authority, wrote thus to the prisoner:—"I cannot perceive your reasons for yet withholding all the terms and conditions of that contract; but you have disclosed enough to call forth my prompt and decided determination to stop, instantly, all operations of the troops under it. The soldiers of the United States shall clear land and make fences for no individual citizen upon earth. I regret, as much as you can, a circumstance that may embarrass the measures you are taking to promote the comfort of your particular regiment; but these conditions, in my view, are perfectly unjust, unlawful, and unmilitary. They never shall have a sanction, nor be permitted, under my authority. If Messrs. Andrews and Wilkinson will consent to take a reasonable annual allowance, as a compensation for the timber and rent of fifty acres of their land (having reference to the former terms of the Columbian spring, and the first fifty acres leased of Mr.

Grayson), I can consent that the troops should remain on the ground, and go on with the buildings." This letter is dated the sixth of June, 1810, and was received by the prisoner (as has been elsewhere shown) on the 23d of the same month.

The prisoner notices, in his defence, the rejection of the lease between himself and Messrs. Andrews and Wilkinson, "made and executed," he says, "by the parties, in pursuance of the bargain so made. I presume him to mean, as disclosed in his letter of the 23d of May. The only fact known to this court, respecting that lease, is, that it was executed in July, 1810; that is, after the receipt of general Hampton's letter of the 6th of June; and upon that fact the court rejected the paper. The depositions of Messrs. Andrews and Wilkinson on this subject have been introduced. The court rejected that of Mr. Andrews, except as to the single part in which (speaking of the land in question) he deposes—"a very small part of which had been rented out for the two preceding years, by Mr. Wilkinson and myself, for sixty dollars per annum;" and if I had called the attention of the court to the deposition of Mr. Wilkinson, I think it probable it would have rejected *in toto*. These gossiping deponents delight to speak of many things. The first very gravely tells you of what happened in the Mississippi territory, while he himself was in Virginia, and Mr. Wilkinson tells us what he said to the prisoner, and what the prisoner said to him; that he was in doubt, and consulted his neighbour Burling, and the advice which his neighbour gave thereupon—all of which is told upon oath, as if *that* could make it evidence to this court. No, sir; the court will winnow these depositions of their chaff, and see what remains.

Mr. Wilkinson states that "the terms on which the land was let to the public are those contained in the lease." But does this prove that the terms contained in the lease are, or are not, the same disclosed in the prisoner's letter of the

23d of May? If the deposition confirms that letter, it is superfluous; and the court would not permit it to contradict the letter; because this is the highest possible evidence against the prisoner in his own case. What then are the terms, as disclosed in that letter, and which are charged as dishonourable to the army?

The first fact that strikes us, in this branch of the inquiry, is this—"*no rent is to be paid.*" What! have Messrs. Andrews and Wilkinson made a donation to the United States? No such thing, sir; the whole of the buildings are to be given up, in good order, and a certain proportion of the land is to be cleared and fenced, for every year we occupy it." A certain proportion is to be cleared and fenced, and for every year! And this stipulation is made a part of the bonus, too; for if (as has been pretended) the clearing and fencing were to have been at the discretion of the officers, why stipulate to clear a certain proportion, and for every year? Well was it exclaimed, that the soldiers of the United States should clear land and make fences for no individual citizen upon earth! Every body knows the difference, in value, in this country, between cleared and uncleared lands; and the witnesses have told you that the tract in question was covered with the heaviest timber.

The prisoner triumphantly states—"It must be proved that I attempted to enter into a contract calculated to promote the private interest of Andrews and Wilkinson, or one of them." It appears, from the deposition of Mr. Wilkinson ("one of them"), that he is to the prisoner the "son of a friend;" and we also learn, from the prisoner's defence, that he has been in the habits of intimacy with a certain *old friend*, for more than twenty years, and with whom he poetically anticipates to sail down the stream of Time in a bark with sails! Let me tell the prisoner, Mr. President, that the motives and the feelings of the human heart can only be known to others by *acts*, and if it appear, from the

evidence, that the agreement, if executed, would have been dishonourable to the army, and beneficial to the proprietors of the land, the court will infer the motive suggested in the specification.

I ought not, however, to conclude this subject without one remark more:—If the prisoner had been an indifferent witness in this case, and had said all contained in his defence upon oath—the court possibly might acquit him of this specification. But the court will recollect who is the prisoner at the bar; and that, whatever figure his declarations may make in print, they are not to be regarded as evidence within these walls.

3. The first part of the third specification (which see p. 15.) is included in the fifth of the first charge and has been noticed under that head. The remaining allegation is for providing on the ground of the cantonment 2d regiment, a greater quantity of materials than was warranted by the letter of general Hampton of the 6th June, 1810; with the view of benefiting the proprietors of the land, or one of them. That part of the letter here referred to, is in these words:—"It is here proper to remark, that in the present state of things, there is little probability of their [the troops] remaining long upon the ground, and that the huts for both officers and soldiers, are to be built upon a plan the most slight and cheap. They ought to be received by the proprietor in the condition in which they may be when the troops are finally removed." It has before been remarked, that the prisoner never acted upon this letter as it respected the buildings at the cantonment, although the letter was received as early as the 23d of June. The operations of the cantonment went on as before. A brick-kiln that had been prepared, was now burned; and another of an enormous size put up and left ready for the match, when the regiment moved from the ground. The whole number of bricks thus burned and prepared amounted to between one

hundred and twenty, and one hundred and fifty thousand; and were estimated by major Bowyer, to be worth from eight to ten dollars per thousand. Lieutenant Hukill, supposes there were from thirty to fifty thousand feet of planks also *left* by the regiment; and major B. estimates the whole quantity sawed at the cantonment, to between sixty and eighty thousand feet; a part of which had been used in doors, windows and bunks, for the soldiers' quarters. Suppose one half of the planks used for these purposes (which is the opinion of major B.) the remainder very well squares with the estimate of lieutenant H. as to the quantity *left on the ground.* The planks were poplar, and therefore, not as valuable as pine, which the witness estimated at three or four dollars per hundred feet. From the evidence it appears that the greater part of this building material was also provided after the 23d of June.

The prisoner has attempted, by calculation founded on *data* derived from captain Campbell, to lesson the estimate of planks as given both by major B. and lieutenant H. The uncertainty of that witness's testimony is not a little remarkable. I might at random, take any of his answers as a specimen. On the subject of the saws for instance employed in this work:—"I *believe,*" says captain C., "they commenced sawing, *perhaps, about* the 1st of May, 1810, and the business was carried on till the order came, ordering colonel Cushing to fort Stoddart—I *don't recollect the time exactly, perhaps* the latter part of October." The court will say whether mere calculation derived too, from testimony of this *doubtful* tenuity shall overturn the concurring estimates of major Bowyer and lieutenant Hukill.

Major B. said in his evidence, that the prisoner requested him to pursue the plan of the cantonment as commenced, and that in a military point of view, he considered the request as an order. But the great leading fact, in this question, is this—the prisoner received the letter of the 6th of June,

on the 23d of the month, and that he entirely disregarded its injunctions. Major B. told the court, that he was the commanding officer at the place, and that the only order he received from the prisoner, on this subject, was to finish the cantonment, on the plan on which it was commenced. The court must perceive how strongly the evidence under this specification, supports the suggestion contained also in the preceding one—that these things were done with a view of benefiting Messrs. Andrews and Wilkinson, or *one of them*.

4. The fourth specification of the same charge, is mentioned to be dismissed with a remark: The prisoner availed himself of the limitation contained in the 88th article of the rules and articles of war, and the court sustained the motion to reject the testimony.

5. The evidence in support of the 5th (or first additional) specification (which see p. 16.) shows generally, that the transports were much crowded; and, in the opinion of lieutenant Hukill, most of the officers had more than the established allowance of baggage. Lieutenant Brownlow knew of no unnecessary baggage until his arrival at Mobile; at that place, however, he took out of one of the transports some cherry-tree planks and square pieces of the same timber.

6. I should, Mr. President, have passed over, with but a few brief remarks, the 6th (or second additional) specification (which see p. 16.) had the prisoner not impeached, in his defence, the credit of lieutenant J. Davis; a witness examined more particularly to this point. The following are the grounds of impeachment:—"First, he has said, that Alexander Anderson delivered himself up under the president's proclamation of the 29th January, 1810." This is not the evidence of the witness in his own words: and what is yet more uncandid in the prisoner, he has overlooked in this accusation of credit, many things which the witness did say, lieutenant D. said—"I do not recollect positively, the cir-

cumstances of their [the deserters] coming into camp, but think they delivered themselves up to colonel C., though they might have delivered themselves up to some other person before they came into camp." But to a previous question—"Were they received under the president's proclamation, as deserters?" the witness had said, "I *believe* they were." And this is the answer which the prisoner has seized upon and quoted, as if the witness had positively said, in terms, that "Alexander Anderson delivered himself up under the president's proclamation of the 29th of January, 1810." Lieutenant D. spoke of both deserters, and it is not pretended, even by the prisoner, that his *belief* with respect to Bence (one of them) is not correct. But it has since appeared, from other testimony, that Anderson, though a deserter, and brought into camp, near about the same time with Bence, was yet unlike Bence in this—he was not entitled to the benefits of the proclamation; because, he (Anderson) had delivered himself up to governor Claiborne, a short time before the proclamation was published.—Another material part of lieutenant D's testimony which the prisoner has overlooked in this question, is the explanation which he promptly and spontaneously offered to the court with respect to Anderson. Lieutenant D., a witness examined yesterday, requested to explain a part of the testimony he then gave respecting the deserters A. and B. The witness now recollects that A. was brought to Washington, but does not know by whom. The witness does not know the time that A. delivered himself up, before he was *brought to camp*." Now on the *precise day* on which the man surrendered himself depends the entire question, whether it was before, or after the proclamation was published; and the witness does not know *the time:* therefore, lieutenant D. has not sworn in terms, nor in substance, that A. Anderson delivered himself up under the president's proclamation of the 29th of January, 1810.

We will next consider the prisoner's second objection to the credit of lieutenant Davis:—"He has said that I refused to answer questions before a general-court-martial, relative to the house of Mr. Hankinson." The trial of captain Campbell is here alluded to, in which case, as in the present instance, the houses of Mr. Hankinson, formed one of the subjects of inquiry; and in that trial, colonel Cushing was a witness, and lieutenant D. the prosecutor. In the present case, lieutenant D., when examined to this point, was asked, "Did you ever hear the prisoner say by whose orders these men [mentioned in the specification] were reported on daily duty, and employed on this work?" "Yes; I heard the prisoner say, he had directed the store-house and dwelling house to be built, but do not recollect to have heard him say, he ordered them on daily duty." And again, "When colonel C. said, that he permitted, or ordered the houses to be built for Mr. H., did he, at the same time, assign any reason for so doing?" "Yes, I believe he did; and that was, that he built the store-house and dwelling-house for Mr. H., for one he got from him at cantonment W.; which Mr. H. had built at his own expense." Q. "When colonel C. stated, that the houses for Mr. H. were built by his order, and that he received a house from Mr. H. in exchange for the new ones built, did he make any further declaration upon that subject? A. I recollect he objected to answer any questions, and said it was not improbable he might be called before some tribunal at a future period to answer for this transaction, or conduct, or words to that effect. Q. When and where were these observations made? A. They were made before the general court-martial at cantonment W. for the trial of captain Campbell." From lieutenant D.'s own showing then, it appears, that the prisoner did not refuse to give evidence before that court on the subject of the houses: but lieutenant D. has said in terms, that colonel C. "objected to answer any questions." The point is imma-

terial, but the witness obviously means *further* questions. He had already told the court much of what the prisoner had said as a witness on that trial, when the judge advocate asked—did colonel C. "make any *further* declarations upon that subject?" And then it was, that lieutenant D. replied, "I recollect he objected to answer any questions," for a reason assigned. Lieutenant D. it will be remembered was the prosecutor of captain Campbell, and, as such, no doubt wished to put some further questions to colonel C. while he was under examination, with respect to the houses; which questions, the latter declined answering, *lest he should criminate himself*. This is the part of the witness's testimony which has provoked the accusation against his credit; and herein he is fully supported by captain Atkinson; another witness in this trial. Captain A. told the court, that he sat on the trial of captain C. and that, "the prisoner did depose before that court, that the buildings for Mr. H. at cantonment 2d regiment, were erected by his order. He explained the reason wherefore he had given that order, and said notwithstanding, he might be called to an account for it, or words to that effect."

The remaining objection to the credit of lieutenant D. is founded on a supposed contradiction, between the testimony given by him, in this case, and captain Campbell; a witness called in the defence. Captain C.'s credibility may be endangered by the opposition (if there be any) but I see no cause of uneasiness to lieutenant D.

Upon the whole, the court must perceive, that a most violent, unjust, and malicious attack, has been made upon the honour and veracity of lieutenant J. Davis. The prisoner, however, has been correct in one of his anticipations—the day of trial has at length arrived; and it will be for you, gentlemen, to say, what has been the character of the prisoner's conduct with respect to the buildings of Mr. Hankinson, his near connexion, at cantonment 2d regiment.

CHARGE III.—*Conduct unbecoming an Officer and a Gentleman.*

4. We now came to the fourth specification, which see p. 17.) of this charge, which accuses the prisoner of having violated the sanctity of a private letter, addressed to general Hampton, and franked by Mr. Macon, a representative in congress. The prisoner writes to general Hampton, "Columbia Spring, 7th May, 1810." I have the honour to enclose seven letters which have been taken out of the office for you since my last. That which is franked by Mr. Macon, I supposed might have some relation to the public service, and therefore I opened it; it however appeared on opening it to be a private letter, and I immediately closed it up without reading it through." And colonel Covington examined to this point, states—that sometime in the month of April or May, 1810, he was at the prisoner's quarters cantonment Washington, and found him writing. On entering, the prisoner held up a paper and observed, that he had opened a letter addressed to general Hampton, from a member of congress, and the witness thinks Mr. Macon was mentioned. *I asked him why he had done so, and what he meant to do in the case?*" The prisoner replied, that he was authorized to open all public letters addressed to general Hampton, and under that authority had been induced to open the letter, supposing it to contain something interesting to the army. The prisoner did not produce, or state to the witness the precise authority under which he felt himself at liberty to open public letters addressed to general Hampton, and the prisoner stated that the letter opened, appeared to contain something about the occurences at *Terre au Boeuf*. The witness further said, that the paper shown to him as the letter of Mr. Macon, was wet and rubbed, or appeared to have been wet and rubbed. This conversation took place at cantonment Washington, and before the visit made about that time by the prisoner to the Co-

Hamblen spring. General Hampton was called and asked a single question, by the judge advocate—"Is the paper now shown to you, the letter of Mr. Macon enclosed to you by the prisoner in his letter to you of the 7th May, 1810?" to which the witness replied in the affirmative. This letter, thus identified, without being read, has been submitted to the *inspection* of the court to determine by that mode of trial, whether it had been rendered illegible by rubbing or otherwise. The court must have been fully satisfied of the perfect legibility of the letter. On being questioned by the prisoner, general Hampton told the court, that he considered it the right of the prisoner during his absence from the department in the spring of 1810, to open military letters addressed in the alternative—*or* commanding officer; but that he viewed the letter in question as a sacred one, and that it was well known that a friendship and an intimacy existed between himself and Mr. Macon, as between two public friends. Being further questioned by the prisoner, as to the envelop of Mr. Macon's letter, general Hampton answered, it had been sealed with wax, and as his custom is, in such cases, he had not preserved the envelop when he had put the letter away, on file. Such are the principal features, if not the whole of the evidence to this point. On a question of such serious import to the prisoner, I have thought it best, Mr. President, rather to be tedious than subject myself to the possibility of mistake. The prisoner, however, in his defence has mistated or rather added to the testimony several most material facts. His third fact, which he pretends to have deduced from the evidence, is of that character. He says, he "opened the letter under the impression that it was a public one, and such as general Hampton swears he had a right to open." Sir, general Hampton has made no such declaration to this court. He told you that he had no doubt but colonel Cushing, "when principal in command had a right to open military letters

addressed to the commanding officer?' And where is the evidence to prove the letter in question was a *military letter* addressed to the *commanding officer?* Does not the prisoner himself tell you in his letter of the 7th of May, that the opened letter bore in its superscription the *frank of Mr. Macon?* Does he therein pretend that he opened the seal because it was addressed to general Hampton, *or commanding officer*—or, that he "supposed it a *military* letter? The third position of the defence is, therefore, not only unfounded, but at war with the evidence. The prisoner has committed a similar mistake in what he offers as his fifth fact deduced from the testimony. He assumes—"That on the same morning [of the day the letter was received] I gave to colonel Covington, my second in command the same information I afterwards gave to general Hampton." This is another important variation from the testimony; colonel Covington did not know whether he had the conversation with the prisoner on the subject of the letter, in April or May—he has said nothing of the precise day, or whether it was post day or not. But a fact more material than any yet adverted to, upon this subject is entirely unexplained and omitted by the prisoner in his defence. He has not informed the court, why the letter broken open at cantonment Washington, was not transmitted from that place but carried down with him to the Columbian Spring, a distance of forty-five miles! The letter of the prisoner to general Hampton, which transmits Mr. Macon's, is dated at the Columbian Spring! Let us then, Mr. President, recur again to the explanation of this act, as deliberately offered by the prisoner in the first instance, and from which it is now too late for him to depart, to wander in the mazes of subtlety. In his letter of the 7th of May, he tells you that the enclosure "*franked by Mr. Macon,* I supposed might have some relation to the public service, and *therefore* I opened it." What official relation, let it be asked, could the prisoner

suppose Mr. Macon to have to the army? Could it be imagined that the letter called for a report on the state of its discipline—or that a member of Congress had issued his instructions for the service of the field? Any supposition of that sort were too preposterous for belief or repetition. No, sir, the prisoner well knew the high character and station of the writer; and the name of MACON, which carries with it throughout the world, respect and veneration, served in this instance, to doom the unfortunate sheet that bore it to outrage and violation. Sacred friendship!—private and political confidence, were ripped up and exposed to the prying eye of unhallowed Curiosity! The thinnest wafer, is an invincible bar to the strong—if armed in honour. But in the guilty hands of secret violence, the brittle wax flies as it is touched—and like the rifled flower of virginity—it is gone forever!

5. The allegation contained in the fifth specification (which see, p. 17.) depends for its proof on the correspondence particularly mentioned therein, and well deserves the serious consideration of the court. Literally from the want of time, I find myself unable to offer a comment upon the evidence.

6. The sixth specification (which see, p. 17.) involves a principle essentially important in military organization, and the rights of command. I regret extremely, Mr. President, that circumstances do not permit me to give to this question that full consideration I had intended, and which its professional importance certainly demands.

The prisoner has admitted (and it is otherwise in proof) that he did exercise command at fort Stoddart, from the 18th to the 25th of March, 1811, the period charged in the specification. The correspondence between him and colonel Covington, under date the 18th of that month (which is in evidence) will show, that colonel Covington, on his arrival at fort Stoddart, disclosed the instructions he had to super-

sede the prisoner, and demanded to be invested in the command of that post. The verbal testimony of colonel Covington is to the same effect. It is also in evidence, that the prisoner had received, on the 28th of the preceding month, the letter of general Hampton, commanding him, without delay to repair to cantonment Washington, with a view to his arrest. Under the plea of inability to travel by land (as has been elsewhere seen) this order was not obeyed; and again, on the 18th of March, when colonel Covington claimed the command of the post, under the instructions of the general of the 20th of February, the prisoner did not yield to that demand, because colonel Covington was the junior officer! Thus two of the orders of the general were set at defiance, by what, no doubt, the prisoner considered a happy exercise of his *old experience* and ingenuity. But, sir, the court will not be amused by such ridiculous shifts. The prisoner was, or was not, able to obey the order of the 18th of February. If he was able to obey it, in point of health, his non-obedience should cost him his commission. If he was not able to obey the order, because he was sick (and, therefore, unfit for duty) why did he not yield the command of the post to colonel Covington, when the other order of the 20th of February was communicated, accompanied too by the proper demand? Sir, the vulgar mind is not unfrequently amused to see the superior deprived of the prerogatives of his station, by the stratagem or finesse of the inferior; but that is an humble delight, in which this court cannot be presumed qualified to participate.

The prisoner has recited and relied upon the sixty-second article of the rules and articles of war, to show, that it was his right to command at fort Stoddart, as long as he remained there the senior officer. True, sir, as long as he remained *for duty;* but the very instant he received the order of the 18th of February, he ceased to be on duty *at*

that post. If he was for duty, he should have marched in obedience to orders: if he was sick, with what pretence could he withhold the command from colonel Covington, who had been sent thither expressly to assume it? The prisoner is here placed in a dire alternative; take either side, and it is fatal to him.

7. The evidence applicable to the seventh, or concluding specification (which see, p. 18.) has been so fully noticed in another place, that I am here relieved from the labour of again recalling it to view.

Mr. President, I have now gone over the several charges and specifications exhibited against the prisoner; and if the whole of them have not been fully established, I fear it will be found, in the conclusion, that more, much more, is proven upon the accused, than will comport with the fame of his character, or the honour and dignity of the service. Many of you, gentlemen, have sat in judgment upon humble subalterns—perhaps have stripped them of the badges of honour, and sent them into disgrace: whatever imperious duty may demand, you will likewise execute in the present case. Mercy, too far indulged towards a prisoner, is a wrong to the public. And, Mr. President, there is a time when humanity, even humanity! bathed in tears, and sickened with pity, must yield herself up a sacrifice on the altar of public JUSTICE!

The court met from day to day, and sat in conclave until the fifth of May, 1812, when its definitive sentence was pronounced, as follows:

All the evidence being read (whether on the part of the prosecution, or the defence) applicable to charge the first, and the seven specifications attached to that charge, and after due deliberation had thereon—

The court find the said colonel Thomas H. Cushing not guilty of the first, second, third, fourth, and fifth specifications of that charge.

On the sixth specification of the same charge, the court find the said colonel Thomas H. Cushing guilty of improper delay at cantonment Washington, M. T. and guilty of improper and unnecessary delay at the town of Mobile; but the court acquit the said colonel Thomas H. Cushing of that part of the said sixth specification which respects the delay at the city of New Orleans.

The court acquit the said colonel Thomas H. Cushing of the additional specification of the same charge.

The court find the said colonel Thomas H. Cushing guilty of the first charge.

On the second charge, and the six specifications attached to that charge (after hearing all the evidence, both for the prosecution and the defence, and after due deliberation had thereupon) the court are of opinion that the said charge and specifications are not supported, and therefore acquit the prisoner, the said colonel Thomas H. Cushing, of all and each of them.

In like full and deliberate manner the court took into consideration the third charge, and the seven specifications attached to that charge.

The court acquit the said colonel Thomas H. Cushing of the first, second, and third specifications of that charge.

On the fourth specification of the same charge the court find the said colonel Thomas H. Cushing guilty.

The court acquit the said colonel Thomas H. Cushing of the fifth specification, and of the sixth, or first additional specification of the same charge.

On the seventh, or second additional specification of the same charge, the court find the said colonel Thomas H. Cushing guilty of taking an improper and unauthorized attitude with his command, contiguous to the town of Mobile; but the court acquit the said colonel Thomas H. Cushing of having given an alarm and apprehension to the officers of a foreign power, in amity with the United States.

On the third charge, the court find the said colonel Thomas H. Cushing guilty of conduct unbecoming an officer, but do not find the said colonel Thomas H. Cushing guilty of conduct unbecoming a gentleman.

For the breach of orders and unofficer-like conduct thus found, the court sentence the said colonel Thomas H. Cushing to be reprimanded in general orders.

The brigadier-general commanding feels much regret at finding himself called upon to offer a comment on the opinion of a court so highly respectable for its rank and intelligence, and that reluctance shall prevent his touching but a single point.

The third charge is for conduct unbecoming an officer and a gentleman, and the court finds the prisoner guilty of the fourth specification to this charge—in these words: "In violating the sanctity of a private letter, addressed to me from, and franked by, Mr. Macon, a representative in congress, by breaking open the seal of said letter, and reading a part thereof." Does the court pronounce this conduct unbecoming an officer, yet not unbecoming a gentleman? The general, in endeavouring to reconcile so apparent an inconsistency in this decision, can only view it as a sacrifice at the shrine of mercy. Thus has the court eluded the imperative provision of the eighty-third article of the rules and articles of war. Be it so. The general confirms the sentence of the court, in the form it has reached him, and proceeds to fulfil its obligation.

What officer of high rank and long experience in the army, could find himself convicted (by a court which should so unequivocally have manifested a tenderness towards him) first, of disobedience of orders, in points so essential to the public service, and to the credit of the army; and secondly, of conduct unbecoming an officer, in other points, without experiencing feelings which no set of words could heighten. The general will not suppose colonel Cushing destitute of

these feelings, and, in extending to that officer the reprimand awarded by the court, he has only supposed it necessary to rely upon those feelings.

Colonel Cushing is released from his arrest, and directed to resume his sword.

The general court-martial, of which colonel Covington is president, is dissolved.

By order.

CH. GARDNER,
Lieutenant and brigade-inspector.

The following extracts from the minutes of the trial, give the interlocutory points settled by the court on taking the evidence.

1st. Lieutenat Hukill being called by the judge advocate in support of the 1st specification, charge the 2d, (which see *antea* page 14.)—"On motion of the prisoner, the court decided, that any verbal suggestions communicated by general Hampton to colonel Cushing, through the brigade quarter master, should not be given in evidence, unless it should be first shown that lieutenant H. the brigade quarter master, was the regular organ through whom orders pass; or that colonel C. was on this occasion specially instructed by the general to receive verbal orders through him."

"The judge advocate on this point had contended, that as lieutenant H. was an officer *on the staff*, duly appointed in general orders, and *all persons required to obey and respect him accordingly*, that, therefore, he was a proper organ through which the commanding general might communicate his orders, at least, as to all objects within the peculiar department of the said staff officer. Agreeably to the decision of the court the witness was instructed to leave out of the evidence he might give, the verbal instructions alluded to in the specification."

2. "Specification 4, charge 2, (which see *antea* page 15.) being read—on motion of the prisoner, the court considered the question; whether they will receive evidence in support of such part of the specification as relates to a period more than two years before the date of the original general order convening this court? (see the 88th article of the rules and articles of war,) and decided that they will not, and that the witness who may be introduced to this point shall be instructed accordingly."

3. Specification 3, charge 3, (which see *antea* page 16.) having been read—"the prisoner moved the court to stop the evidence in support of the specification, upon the ground, that, the subject matter of the specification related to the conduct of the prisoner, while acting on the proceedings of a general court-martial, of which he was the sole and proper judge, and for which he could not be amenable.

"The judge advocate replied, that although the offence charged upon the prisoner in this specification might have grown out of a judicial, or legal act, yet, if in the performance of such act, the prisoner had gone out of his way to censure a general order, in so far would his conduct be extra-judicial, and liable to the animadversion of this court, should they find that to be the fact after hearing the evidence."

"The court decided they would hear the evidence."

4. Copies of certain letters, from general Hampton to colonel Cushing, having been read in support of the prosecution (the letters being in the nature of orders, and notice having been given to the accused in each case to produce the originals) colonel C. gave like notice to the prosecutor to produce certain original letters of *his*, or that copies would be offered in evidence, on the part of the defence. One of these being offered—

"The judge advocate objected to the reading of the letter, because a copy of a paper cannot be made *better* evi-

dence than the original, by giving notice to the opposite party to produce the original. In this case the original itself is not evidence, because it would be to admit the prisoner's own declarations in his own case:—this court have already decided, that the verbal declarations of the prisoner should not be given in evidence in his defence; and there is no objection that applies to the verbal declarations of a party, that does not apply with equal or greater force to his written declarations.

"The court overruled the objections of the judge advocate."

It may not be improper here to add, that colonel Cushing, in support of his motion, introduced the printed trial of general St. Clair, in which case the letters of the prisoner were read in the defence. But it does not appear, from the report of that trial, that any objection was made to the introduction of the letters, or that the rule of evidence involved was at all considered by the court.

5. "The prisoner offered in evidence a deposition of colonel Osmun, a citizen of the Missisippi territory, notice, in the following words, having been given.

"*Baton Rouge, Feb.* 13, 1812.

"SIR,

"IT is my intention to ascend the river to Natchez, in the steam-boat, which is expected here from New Orleans, in three or four days; but I shall not fail to be at this place by the 20th of March. While at Natchez, and its neighbourhood, I shall take the depositions of his excellency, governor Holmes, colonel B. Osmun, Mr. Joseph B. Wilkinson, Mr. Robert Andrews, and Mr. John Hankinson, to be used in my defence against the charges on which I am now in arrest; and I give you this notice, to enable you to cross examine these witnesses, if you think proper." Signed by the prisoner, and addressed to brigadier-general Wade Hampton."

"The judge advocate objected to the sufficiency of this notice, under the seventy-fourth article of the rules and articles of war, because it is too general; it does not specifically mention the time and place, when and where the depositions were to be taken. The neighbourhood of Natchez is the given place, and twenty or thirty days the given time within which the depositions were to be made. It had, therefore, been impossible for the prosecutor to avail himself of his right to cross examine the deponents, unless he had gone to Natchez with the prisoner, and had watched his movements while in that neighbourhood—a supposition too indecorous to be made.

"The court overruled the objections of the judge advocate."

6. "The prisoner offered to read a contract, under seal, between himself, on the part of the United States, and Messrs. Andrews and Wilkinson, respecting the land whereon the second regiment had been cantoned; the contract appearing to be dated in July, 1810.

"The judge advocate objected to its being read in evidence, because the date of the paper is subsequent to the period referred to in either of the allegations against the prisoner, on the subject of the said cantonment.

"The court decided that the paper should not be read."

7. "The prisoner offered in evidence the deposition of Mr. Robert Andrews.

"On hearing the deposition read to the court, the judge advocate objected to the recording of it; because, upon the face of it, it appears to be founded on what the deponent understood from others, and because it refers to the verdict of a jury, in a civil action, which, if relevant to this case, ought itself to be produced to the court.

"The court made this discrimination in their decision: so much of the deposition as went to show the value of a part of the same tract of land whereon the cantonment of

the second regiment was erected, should be referred to as evidence."

8. "The prisoner again offered in evidence the lease between himself and Messrs. Andrews and Wilkinson (which had been rejected by the court on a former day), upon the ground that the lease is an enclosure of his letter to general Hampton, bearing date the 4th of July, 1810, which letter has been since read.

"The court would not receive the paper."

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