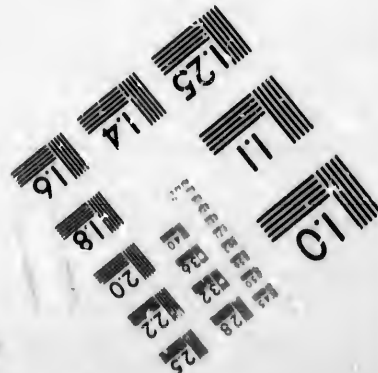
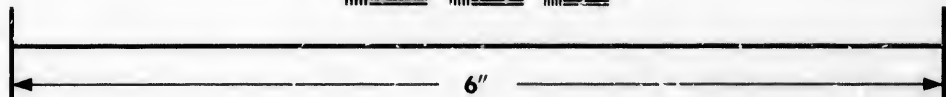
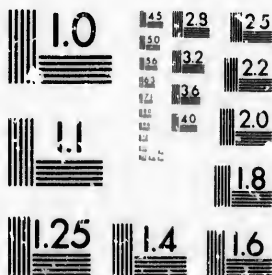


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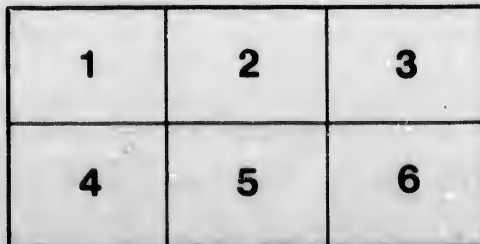
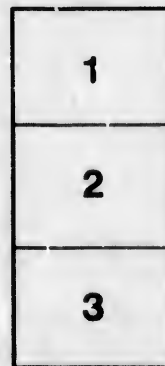
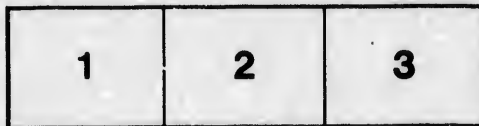
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# TRIALS

OF THE

## Fenian Prisoners at Toronto,

WHO WERE

CAPTURED AT FORT ERIE, C. W., IN JUNE, 1866.

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REPORTED BY

GEORGE R. GREGG AND E. P. RODEN.

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TORONTO:

PRINTED AT THE LEADER STEAM-PRESS, 63 KING STREET EAST,  
1867.

1717

YOUNG MEN'S CHRISTIAN ASSOCIATION

MEMBER LIST

1880

W. A. ...  
J. B. ...  
C. D. ...

...

REPORT OF THE TRIALS  
OF THE  
FENIAN PRISONERS AT TORONTO.

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Fall Assizes for the United Counties of York and Peel.

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Toronto, Monday, October 8th, 1866.

The Court of Oyer and Terminer and General Jail Delivery for the United Counties of York and Peel, was opened in this city at noon to-day with the usual forms, His Lordship the Hon. Mr. Justice John Wilson being the Judge named in the commission.

The SHERIFF (F. W. Jarvis, Esq.,) having called the Grand Jury panel, the following gentlemen answered to their names, and were sworn in as Grand Jurors in the usual manner:—

JOHN BOSWELL, Esquire,	JOHN ABEL, Esquire,
JAMES BAILEY, “	JAMES BOULTON, “
PARKER CROSBY, “	JAMES GRAHAM, “
RICHARD HAMILTON, “	P. HOWLAND, “
THOMAS KING, “	JAMES MEDCALFE, “
THOMAS MULHOLLAND, “	JOEL PHILLIPS, “
JOHN WATSON, “	WM. WELLS, “
W. A. WALKER, “	THOMAS WARD, “
JOHN REESOR, “	WM. RUTHERFORD, “

LEVI SNIDER, Esquire.

The Grand Jury chose Mr. John Boswell as their Foreman.

His Lordship, in the course of his charge to the Grand Jury, said—I am sorry to say I find a very long list of about ninety cases of a very unusual character, in which most of the accused are said to be citizens of the United States, but a few are alleged



to be subjects of Great Britain. These cases arose from an armed invasion of this Province, which is charged to have taken place in the night between the first and second days of June last, by an organized force, computed at between five and six hundred men, who crossed the Niagara river from the State of New York, and landed in this Province about a mile below Fort Erie, and remained there about a day. It is alleged that the prisoners now here were of this expedition, and were captured in that neighborhood, after the principal forces had returned to the State of New York. You are aware, as a matter of history, that for some years a conspiracy has existed in Ireland having for its object the overthrow of the Queen's Government there, and the establishment of a republican government in its stead. For this purpose illegal associations, called "circles" of the Fenian Brotherhood were formed, with power indefinitely to increase their numbers. These "circles" were not confined to Ireland, but extended to the United States of America, in which, more especially during the last quarter of a century, a vast emigration from Ireland had settled. These emigrants readily accommodated themselves to the circumstances of that republic, and by their industry and their numbers have acquired in many of the States both social and political influence; but wherever they have gone, they never forgot their kindred and their country. In their new homes they retained with deep devotion the memory of her music, her song and her scenery, and have cherished with intense feeling the undefined belief that Ireland had been wronged, and that the blight of the wrong still rests upon her. To these people and to those who sympathized with them the chiefs of this conspiracy in Ireland looked for material aid, and it is no matter of surprise that among such a people, Fenian "circles" should have been formed with great alacrity and success, and that enormous sums should have been contributed for its object. So far as we know, until the end of the late rebellion in the United States, Ireland was the only place where an armed resistance to the British Government was contemplated. About the period of the close of the civil war a division of the Fenian Brotherhood is said to have taken place. Soon after, it was said that one part adhered to the original scheme of making war in Ireland—the other to make an

invasion of the British American Provinces for two objects; one, to make them the base of operations against the Queen's Government in Ireland—the other to annex one or more of these Provinces to the United States. To us, who know well the spirit and temper of our people, the scheme in either view seems visionary and impracticable, but it found ready sympathy among that large portion of the American people who think that England acted in bad faith in regard to acknowledging belligerent rights to the Southern Confederacy, and in allowing those ships to leave her ports which that Confederacy commissioned to prey upon the commerce of the United States. With this class, quite apart from the ultimate objects of the Fenian conspiracy, the proposal to invade the Provinces found cordial co-operation, for they hoped that the United States would accord such belligerent rights to the invaders as would enable them to commission ships to prey on the commerce of England just as the South had done upon American commerce. Nor are the sympathy and co-operation of the American people less for a scheme which would annex these Provinces with the States of the Union. The native-born citizen of the United States seems earnestly impressed with the belief that the American type of a republican government is the very best; he seems to take it for granted that rational liberty can be enjoyed under no other, and that all nations would eagerly adopt it if they had the opportunity of shaking off the governments which oppress them. He appears to discredit the fact that, under a monarchical government, it is possible to enjoy freedom less trammelled by the tyranny of office and party than under a republican government. He thinks it impossible that here we can really be devoted to our beloved Sovereign and her Government—a Government which he affects to think is overbearing, perfidious, and envious of the power and greatness of the American nation. Unfortunately for our peace, we have been reaping the fruits of these opinions. Some of the really well-meaning of the American people, many of the unthinking, and a vast number of those who entertain the opinions to which I have referred have given their countenance, co-operation and aid to this Fenian Conspiracy. Nor is it at all improbable that the leaders of the two great political parties into which the United States is now

divided have countenanced the enterprise which they know cannot be successful—on the one hand to obtain the political support of those engaged in the conspiracy, where it has usually been given; and on the other hand, to divert it to the other party. Professing, as the American people do, to be a people who respect themselves—professing to be a nation which respects national rights—it seems a matter of amazement that this conspiracy, whose objects have been loudly proclaimed, has not been frowned upon by the American people and denounced by their press as an atrocity, especially upon us, which has no parallel in ancient or modern times, and as one dangerous to their own peace; for an organization formed to commit atrocities in one place may, by an easy transition, become one to commit outrages in another place, to which its direction may be turned. I mention these things to dispel erroneous opinions respecting the events which underlie and surround your enquiries on the present occasion, which for any other purpose would be out of place here, but they extenuate rather than aggravate the conduct of those men, whose imputed crime will form the subject of your investigations.

The accused are said to be chiefly of that young, reckless, unthinking class, but in part of an older and more depraved one, which are seen in the principal cities of the United States, and probably most of them joined this nefarious enterprise with the approbation of those to whom they naturally looked up, as a cause worthy of true manhood, the prosecution of which would yield, at least, excitement, and its consummation applause and renown. These considerations and others which they suggest will, I hope, tone down your minds to judicial calmness in the investigations now to come before you. Remember, the law presumes these men are innocent, and your duty is to consider them so until, by legal evidence, their guilt appears. They are charged with having feloniously entered Upper Canada on the first and second days of June last, with intent to levy war against Her Majesty, and with being found in arms against Her Majesty here. As you will presently see, they might have been tried by militia court-martial, but it is better they should be tried here, by the ordinary course of law, for, excepting the late invasions, and the continued threats

of their repetition, we are and have been in a state of profound peace. Moreover, war, its usages and tribunals, are alien alike to our agricultural and commercial people, who would have been shocked when they reflected upon it, that men should have suffered death upon the sentence of a court-martial.

The statute against which, it will be charged, they have offended is the 22 Vic., cap. 98, a consolidation of the 3 Vic., cap. 12, as amended by the 29 and 30 Vic., cap. 4. It enacts, That in case any person being a citizen or subject of any foreign state or country at peace with Her Majesty, be or continues in arms against Her Majesty within Upper Canada, or commits any act of hostility therein, or enters Upper Canada with design or intent to levy war against Her Majesty, or to commit any felony therein, for which any person would by the laws of Upper Canada be liable to suffer death, then the Governor may order the assembling of a militia general court-martial for the trial of such persons, agreeably to the militia laws; and upon being found guilty by such court-martial of offending against this act, such person shall be sentenced by such court-martial to suffer death, or such other punishment as shall be awarded by the court.

The second section enacts, That if any subject of Her Majesty within Upper Canada levies war against Her Majesty in company with any of the subjects or citizens of any foreign state or country then at peace with Her Majesty, or enters Upper Canada in company with any such subjects or citizens with intent to levy war on Her Majesty, or to commit any such act of felony as aforesaid, or if with the design or intent to aid and assist he joins himself to any person or persons whatsoever, whether subjects or aliens, who have entered Upper Canada with design or intent to levy war on Her Majesty, or to commit any such felony within the same, then such subject of Her Majesty may be tried and punished by a militia court-martial in like manner as any citizen or subject of a foreign state or country at peace with Her Majesty is liable to be tried and punished.

The third section enacted, That every citizen or subject of any foreign state or country, who offends against the provisions of this act is guilty of felony, and may, notwithstanding the provisions

hereinbefore contained, be prosecuted and tried before any Court of Oyer and Terminer and General Jail Delivery, in and for any county in Upper Canada in the same manner as if the offence had been committed in such county, and upon conviction shall suffer death as a felon.

By the act 29 and 30 Vic., cap. 4, the third section just quoted was repealed, and the following is to be taken and read as the third section of the first mentioned act:—Every subject of Her Majesty and every citizen or subject of any foreign state or country, who has at any time heretofore offended, or who may at any time hereafter offend, against the provisions hereinbefore contained, shall be prosecuted and tried before any court of Oyer and Terminer and General Jail Delivery, in and for any county in Upper Canada in the same manner as if the offence had been committed in such county, and upon conviction shall suffer death as a felon.

Now there is nothing in these trials to involve them in doubt or uncertainty. The simple question is, whether these men or any of them entered or continued in arms within this Province contrary to the provisions of these statutes. In these cases, as in all others where the intent is a material question, it may be proved by declarations of intention, or inferred from acts, for the general principle is that a man intended to do what he has done.

The counsel for the Crown must prove to your satisfaction that war was levied, and men were in arms against Her Majesty, contrary to the statute, and that the parties accused were engaged in it, or associated with those who were.

In case they are charged as American citizens there must be evidence which satisfies you that they are such citizens. If they are charged not as American citizens the presumption is, that they are Her Majesty's subjects until the contrary appears; and it will not probably be denied that they are subjects of Her Majesty.

I shall abstain from alluding to what was done after war was levied, for except as affording evidence of intention, it is not the substantive offence charged upon these prisoners, and your feelings ought not be excited by unnecessary detail, lest you be unfitted for calm enquiry.

In these cases, as in all others, the Crown undertakes to bring before you evidence to satisfy you of the guilt of every man accused. If it does not, ignore the bills. Do not hesitate a moment. Better far the guilty escape than the innocent suffer; better that no trial take place which would result in acquittal, than that the administration of criminal justice should be tarnished with the stain of a conviction which the law would not sustain.

As the good people and true from among whom you come were above the meanness of fear, when in the midst of danger and conflict, and were ready sternly to defend their homes, and to repel aggression, so now let the feeling of resentment find no place in your minds in the enquiries upon which you are about to enter; and thus show that you can administer law in its pure and benign spirit. In this way alone can you acquit yourselves with credit and approbation, in the sight of good men; and satisfy your own consciences in the sight of Him before whom all hearts are open.

You will now retire, and I am confident that you will enquire earnestly and seriously into every case submitted to you.

The Grand Jury then retired to consider the indictments laid before them by the Crown counsel.

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OCTOBER 17th, 1866.

The Court opened at half-past nine o'clock this morning.

During the course of the day the Grand Jury brought in true bills of indictment against three of the Fenian prisoners incarcerated in the old jail. The names of the prisoners are Robert Blossie Lynch, said to be a colonel in the "Fenian Army," from Louisville, Ky.; David F. Lumsden, who claims to be an Episcopalian clergyman, of Nunda, N. Y.; and John McMahon, a Roman Catholic priest, of Anderson, Indiana. Subsequently, the prisoners were arraigned. The prisoner Lynch is a middle-aged, medium-sized man with light greyish hair, moustache, and short beard. Lumsden is rather tall and genteel looking, of dark complexion and straight features, the face being cleanly shaven. He would pass for a respectable man, of about thirty-five or forty years of age. The prisoner McMahon is a quiet, wily looking man, with several ugly scars on his face and forehead, of dark complexion, medium height, and of about forty-five years of age.

The prisoner Lynch was first placed in the dock, and although on a somewhat defiant bearing, he listened attentively while the clerk of the Court, (Mr. W. A. Campbell,) read the indictment, as follows:—

“CANADA, County of York, one of the United Counties of York and Peel, to wit:

“The Jurors of our Lady the Queen upon their oath present that Robert Blossie Lynch, late of Louisville, in the State of Kentucky, in one of the United States of America, and now of the City of Toronto, in the County of York aforesaid, being a citizen of a certain foreign state, to wit, the United States of America, at peace with Her Majesty the Queen, with force and arms, heretofore, to wit, on the first day of June, in the year of our Lord one thousand eight hundred and sixty-six, and while the said foreign state was so at peace with Her Majesty the Queen, at the Village of Fort Erie, in the County of Welland, in that part of the said Province called and being Upper Canada, with divers other evil disposed persons whose names are to the Jurors aforesaid unknown, did unlawfully and feloniously enter that part of the Province of Canada, called and being Upper Canada, aforesaid, with intent to levy war against her said Majesty the Queen, contrary to the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her Crown and dignity.

“And the Jurors aforesaid, upon their oath aforesaid, do further present that the said Robert Blossie Lynch being a citizen of a certain foreign state, to wit, the United States of America, at peace with Her Majesty the Queen, heretofore, to wit, on the second day of June, in the year of our Lord one thousand eight hundred and sixty-six, and while the said foreign state was so at peace with Her Majesty the Queen, with force and arms, in the County of Welland, in that part of the said Province called and being Upper Canada having before that time joined himself to, and being then and there joined to divers other evil disposed persons to the Jurors aforesaid unknown, was unlawfully and feloniously in arms against our said lady the Queen, within Upper Canada, aforesaid, with intent to levy war against our said lady the Queen, contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen, her Crown and dignity.

“And the Jurors aforesaid, upon their oath aforesaid, do further present that the said Robert Blossé Lynch being a citizen of a certain foreign state, to wit, the United States of America, at peace with Her Majesty the Queen, heretofore, to wit, on the second day of June, in the year of our Lord one thousand eight hundred and sixty-six, and while the said foreign state was so at peace with her said Majesty the Queen, with force and arms, in the County of Welland, in that part of the said Province called and being Upper Canada, having before that time joined himself to and being then and there joined to divers other evil disposed persons to the Jurors aforesaid unknown, who were then and there unlawfully and feloniously in arms against our said lady the Queen, did unlawfully and feloniously commit an act of hostility against our said lady the Queen within Upper Canada aforesaid, in this that he, the said Robert Blossé Lynch, on the same day and year last aforesaid, in the County of Welland aforesaid, together with the said other evil disposed persons armed and arrayed in a warlike manner feloniously did assault and attack certain of her Majesty's liege subjects in the peace of our lady the Queen then and there being, with intent to levy war against our said lady the Queen, against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her Crown and dignity.”

The CLERK—What say you, prisoner at the bar—are you guilty or not guilty?

The PRISONER—Not guilty.

The CLERK—Are you ready for your trial?

The PRISONER—I am not, but I will be in a few days. My counsel, Mr. Martin, of Hamilton, will attend on whatever day his lordship may fix for the trial.

His LORDSHIP (to the prisoner)—I think you had better fix a day yourself. The Court will be satisfied with whatever day you may fix upon. The Court does not wish to hurry you, but you will have to remember that if you state a day the trial will have to take place on that day.

The PRISONER—I have received a letter from Mr. Martin, which that gentleman wishes me to hand to your lordship.



The prisoner handed an open letter to the Hon. J. H. Cameron, who appeared for the Crown. Mr. Cameron took the letter, and whilst glancing over it, his lordship stated that he desired to hold no communication with the prisoner unless that which could be made public in court. After reading the letter, Mr. Cameron returned it to the prisoner, but did not pass any remarks about its contents.

The PRISONER then said that he thought he would be ready by next Wednesday, and he was removed.

DAVID F. LUMSDEN was next brought into Court and placed in the dock. A similar indictment to that preferred against Lynch was read to him, and when asked if he were guilty or not guilty of the crimes charged he replied—"Not guilty."

The CLERK asked the prisoner if he were ready for his trial.

The PRISONER—No, not yet; the gentleman who is to defend me is not in town at present.

HON. J. H. CAMERON—Who is he?

The PRISONER—His name is Mr. M. C. Cameron.

Mr. McMICAL (Mr. M. C. Cameron's partner) then rose and requested the Court to allow him to attend to the matter. As soon as Mr. Cameron returned to the city, he (Mr. McMichael) would inform the Crown counsel what day the prisoner would be ready for his trial.

HIS LORDSHIP said that that would do.

The Prisoner was then removed.

JOHN McMAHON was next placed in the dock, and listened attentively whilst the indictment was being read to him, the document being similar in every respect to those upon which the two former prisoners were arraigned, the name of course being different. He also pleaded "not guilty" of the crimes with which he was charged in the indictment, and stated that he was not ready for his trial, but would be in a few days.

HIS LORDSHIP informed the prisoner that the sheriff would forward any letters for him which he desired, and his counsel might also get a copy of the process of the Court without extra charge.

The prisoner was then removed.

## TRIAL OF ROBERT BLOSSE LYNCH.

OCTOBER 24th, 1866.

The Court opened to-day at noon—his lordship the Hon. Justice John Wilson presiding.

The court-room was crowded with spectators, who appeared to take much interest in the proceedings, and the space within the bar was filled with members of the legal profession.

The counsel for the Crown were the Solicitor-General for Upper Canada (the Hon. James Cockburn, Q. C.), the Hon. John Hillyard Cameron, Q. C., Mr. Robert A. Harrison, the County Crown Attorney Mr John McNab), Mr. James Paterson and Mr. John Paterson; and for the prisoner Lynch it was understood that Mr. R. Martin, with whom was Mr. J. Doyle, had been retained. Mr. Kenneth MacKenzie, Q. C., with whom was Mr. W. B. Morphy, was present to watch the case on behalf of the American Consul.

HIS LORDSHIP—Do you appear, Mr. Martin, for the prisoner Lynch?

MR. MARTIN—Yes, my lord.

HIS LORDSHIP—Are you ready to proceed with the trial?

MR. MARTIN—I believe so, my lord.

HIS LORDSHIP—Are you going to proceed, Mr. Cameron, with the criminal business this morning?

MR. J. H. CAMERON—Yes, my lord, we are prepared to go on with the prisoner Lynch's trial, if his counsel is ready.

HIS LORDSHIP—Mr. McNab, I have received a letter from a prisoner of the name of George Wells, informing me that \$40 was taken from him at Port Colborne, for which no receipt was given to him. You will inquire into the matter.

MR. McNAB—Yes, my lord.

The prisoner Robert Blossie Lynch was then put forward for trial. He appeared quite unconcerned, but was courteous in his bearing towards the Court.

The CLERK then called the names on the petit jury panel. The first called was Abner S. Gould, sawyer, of the Township of East Gwillimbury, who was sworn, as also the second, John Clarke, yeo-

man, of York. The third, Andrew Graham, farmer, of Markham, was challenged by Mr. Doyle, on behalf of the prisoner. Henry Norris, yeoman, of Albion, was also challenged. David McDonald, farmer, of King, was sworn. John Lockie, storekeeper, of Yorkville, was challenged. John M. Bair, yeoman, of Scarborough', was sworn. Charles Fry, farmer, of King, was also sworn, as well as the next called, Thomas Marston, farmer, of Markham. James McMaster, farmer, of Etobicoke, was challenged. Oliver Lundy, farmer, of Gwillimbury, was sworn. James Wadsworth, farmer, of Etobicoke, was challenged. George Howard, blacksmith, of Streetsville; Wm. Atkinson, carpenter, of Aurora, and Ebenezer Anthony, farmer, of Chinguacousy, were also challenged. Roderick McLeod, yeoman, of Vaughan, was sworn. Donald Currie, farmer, of Caledon, was challenged. Alexander Neilson, farmer, of Scarborough', was next called and the oath was partially administered to him when he was challenged by Mr. Doyle.

MR. CAMERON remarked that this was improper.

MR. DOYLE said he had not noticed that the oath was being administered.

HIS LORDSHIP said he would allow the challenge if the Crown counsel did not object; but the proceeding was very irregular, and must not occur again. If a juror were challenged, it must be before any part of the oath was administered.

Philip Gower, farmer, of Whitchurch, was then called and sworn. Nathan Irwin, farmer, of King, was challenged. Robert J. Smith, of Yorkville, was also challenged. George Garrow, farmer, of King; George Granger, farmer, of York; and Wm. Corner, farmer, Georgina, were called in succession, and being unchallenged, were sworn.\*

The jurymen empanelled to try the prisoner were, therefore, as follows:—

Abner S. Gould, of East Gwillimbury;	Thomas Marston, of Markham;
John Clarke, of York;	Oliver Lundy, of Gwillimbury;
Daniel McDonald, of King;	Roderick McLeod, of Vaughan;
John M. Bair, of Scarborough';	Philip Gower, of Whitchurch;
Charles Fry, of King;	George Garrow, of King;
;	George Granger, of York; and
Wm. Corner, of Georgina.	

\*The challenges were made by the prisoner's counsel. The Crown did not challenge any of the Jurors.

The CLERK then read the indictment, and stated to the jury that upon it the prisoner had been arraigned; that upon his arraignment he had pleaded not guilty, and it was for them to try whether he was guilty or not guilty, and to hearken to the evidence.

Hon. Mr. CAMERON, Q. C., then opened the case for the Crown. He said—May it please your Lordship, Gentlemen of the Jury: The case of Robert B. Lynch, the prisoner at the bar, is one of very great importance, not merely to himself—and the importance to himself is as you are aware very great, for the issue of life or death depends upon your verdict—but it is of the very greatest importance also to the whole people of this Province, to our position as a colony of the British Empire, and also important as to the manner in which our future is to be cast, for it has a direct bearing upon the question as to whether we shall be allowed to pursue in quiet our peaceful avocations henceforth and for all time to come. The prisoner is indicted under a statute which was passed under very peculiar circumstances a great number of years ago. It will probably be in the memory of all of you, as it is in the memory of a great many people throughout the country, that in the year 1837 difficulties arose in both sections of the Province of Canada, and that in consequence of those difficulties armed bands of men both from within and without the Province arrayed themselves against the authority and government of the Sovereign. It then became necessary to mark the feeling of the people of the country for the vindication of the law against those who, from within and without the Province, were endeavoring to levy war against and destroy the government and constitution under which we lived. It was believed at that time that the general law of the land, and the position of those who were offending against that law, were not of a character they ought to be in order to enable those persons to be brought to that speedy justice which the inhabitants of the country felt ought to be dealt out to them. Accordingly a law was passed the effect of which was to erect a military tribunal for the trial of those persons, and the administrators of the law thought it necessary to bring to this more speedy trial those individuals who, under the circumstances, were pointed out by the law as its aggressors. Under that law, though not under some of

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the peculiar provisions of it which at that time it was thought advisable to pass, and which the executive had the discretionary power to put into force or not, as seemed most advisable, various parties—some of them from a foreign country, and some residents of the Province at the time of the commission of the crime—were tried by direction of the government of the day; and that law was deemed to be so necessary and beneficial that, though the occasion which demanded its enactment and enforcement rapidly and happily passed away, it was allowed to remain on the statute-book of Upper Canada, in order that if at any future time any persons engaged in similar attacks against the peaceful and unoffending people of the Province, they might, if the government thought it advisable, be made amenable to its provisions. That law provided that persons offending in the manner which I have pointed out might be tried by a court-martial composed of officers of the militia. It provided also that the crime of high treason, which those parties committed by so offending, should be dealt with only as a felony, although the consequences of a conviction were the same under it as if the party charged were found guilty of high treason; and it provided further that while the tribunal might be a military tribunal, a general court-martial of militia officers, the ordinary tribunals of the land might, if the administrators of the law saw fit, be made use of for the trial of parties so accused. The law therefore gave the alternative to the government of the Province either to require that a court-martial should try persons charged with the crime of which this prisoner is accused; or to leave to the ordinary tribunals of the land, and to the men who partly constitute those tribunals as jurors, to pass their opinion as to the guilt or innocence of the accused. Under that statute you are now empanelled to try the prisoner at the bar, after a period of nearly thirty years has elapsed from the time of its passage, in the belief by the government of the Province that the circumstances are much the same, and that it has become necessary to vindicate the law in his person and in that of others guilty of a like offence by bringing him and them within the jurisdiction of a civil court under that statute—not exercising the extraordinary powers conferred by the statute of summoning a court-martial for the trial, but giving him and others similarly

situated the same opportunities that any one of our people would have if brought to trial for offences of an ordinary character. The prisoner stands charged upon an indictment which contains three counts drawn up under that law to which I have alluded, and which declares to be a felony the offence which the prisoner is alleged to have committed. The statute, which declares it was enacted "for the protection of the inhabitants of Upper Canada against the lawless aggressions of citizens or subjects of foreign countries at peace with Her Majesty," contains three clauses. The first declares that

"In case any person, being a citizen or subject of any foreign state or country at peace with Her Majesty, be or continues in arms against Her Majesty, within Upper Canada, or commits any act of hostility therein, or enters Upper Canada with design or intent to levy war against Her Majesty, or commit any felony therein, for which any person would by the laws of Upper Canada be liable to suffer death, then the Governor may order the assembling of a Militia General Court-Martial for the trial of such persons, agreeably to the Militia Laws; and upon being found guilty by such Court-Martial of offending against this act such person shall be sentenced by such Court Martial to suffer death, or such other punishment as shall be awarded by the court."

The second section declares further that

"If any subject of Her Majesty, within Upper Canada levies war against Her Majesty, in company with any of the subjects or citizens of any foreign state or country then at peace with Her Majesty, or enters Upper Canada, in company with any such subjects or citizens with intent to levy war on Her Majesty, or commit any such act of felony as aforesaid, or if with the design or intent to aid and assist he joins himself to any person or persons whatsoever, whether subjects or aliens, who have entered Upper Canada with design or intent to levy war on Her Majesty, or commit any such felony within the same, then such subject of Her Majesty may be tried and punished by a Militia Court-Martial, in like manner as any citizen, or subject of

“ a foreign state or country at peace with Her Majesty, is liable under this Act to be tried and punished.”

The third section declares that

“ Every citizen or subject of any foreign state or country who offends against the provisions of this Act, is guilty of felony, and may, notwithstanding the provisions hereinbefore contained, be prosecuted and tried before any Court of Oyer and Terminer and General Jail Delivery in and for any county in Upper Canada, in the same manner as if the offence had been committed in such county, and upon conviction shall suffer death as a felon.”

This is the law under which the prisoner at the bar stands indicted. This is the law under which the three counts of the indictment have been framed—the first of which charges him with having unlawfully and feloniously entered the Province with the intent to levy war against Her Majesty; the second with having joined evil disposed persons unlawfully and feloniously in arms against Her Majesty, with intent to levy war against Her Majesty; and the third count with having committed an act of hostility in Upper Canada with the same intent and design, namely, upon certain of Her Majesty's subjects assembled to maintain the law and being in the peace of God and of Her Majesty. Upon this indictment it will be your duty to inquire whether any one of the three counts which it contains and which have been read to you is proven against the prisoner, by the evidence which will be brought before you. The consequences of the conviction in your minds that that proof is sufficiently brought home to the prisoner—the result of your verdict should it be to convict him of the charges laid against him—you, as a matter of course, know you have nothing to do with. The case of this man and of others who are similarly situated is, gentlemen, one of great peculiarity and, as I have before stated, of the highest importance. It is well known throughout the world that the government of the country to which we belong is at perfect peace with that of the United States of America. It is known that we have no quarrel or misunderstanding with the government and people of that country. It is known that as subjects of Her Majesty we are desirous of pursuing our own course in peace, that we are anxious to cultivate to the best of our ability all the arts of

peace, and that those arts shall be cultivated both at home and abroad; that we are desirous of doing all we can to extend and enlarge the future prosperity of our own country, in our own way and after the manner that will best serve our own purposes, and that we feel above all things that one of the chief aims and objects that we have in view is to remain at peace and amity with the powerful people who live to the south of us, and who in a great measure are of the same blood and bone as ourselves. That is the position which the people of this country occupy. We are at peace with the United States. We have no cause of quarrel with them, nor is there any reason so far as we are aware why their people or any portion of them should desire to make inroads and break in upon us and our country. We have no desire, and we know it is against the law, to break in upon them; and we feel therefore that if on any occasion hostile incursions should be made into our country by them, or into their country by us, it would be only when there must be some peculiar circumstances to justify such incursions—circumstances like those out of which war springs and which would array two great and kindred people in hostility against each other. Now, without these circumstances existing, these men—many of them subjects of Her Majesty by birth, and many of them claiming to be citizens of the United States and enjoying all the rights which citizenship in that country has given them—could have no right whatever, without cause of quarrel and while the two countries are at peace, to make a raid or incursion across the frontier, to kill our people who were sent out to uphold the law, to destroy our habitations, to levy war against the Queen, and to carry all the evils of war into the heart of our population. No idea they may entertain of the wrongs they believe another country to be suffering under, no idea they may have of the redress they suppose it lies in their power to make of those wrongs, could justify or even extenuate the crime, they are guilty of in coming in against us; and whatever they may allege as to the condition they and their countrymen occupy in their own native land, they can urge no complaint against the government or people of this country—they can assume on that ground no right to make an attack upon the peaceful inhabitants of this Province. We in this country as subjects of Her Majesty have



confidence in the manner in which the laws are administered ; and believing that equal rights, equal justice and equal protection are offered to all under the sway of our Sovereign, we find it hard to imagine how any body of men can have been induced to levy war in order to redress imaginary ills or grievances. But if there are men who have that feeling, that there are wrongs which ought to be redressed, that there are grievances which ought to be removed, and that it is advisable and justifiable for them to appeal to arms in order to procure that redress—if there are such men, we in this country could not help feeling that it is not in this Province they should attempt to carry out their design, that it is not here their battles should be fought, that it is not here they should commence acts by which they may hope some day or other to find themselves in a position to demand that redress to which they claim to be entitled. We all know from the history of Ireland within the last three quarters of a century that in that country there has been discontent, that there have been frequent difficulties of a more or less serious character, and that there has been a degree of burning hatred towards the government of the Empire which many of us are unable to understand, which we can see no reason for, and which do not in our minds justify the unlawful and seditious acts that many a time have been attempted in that country. We know that secret societies inimical to the government exist in Ireland, that they have on more than one occasion broken out into open war, and that they have been the cause of blood-shed, of ruin and of death to thousands. We know that all these things have been brought about by men whom we must suppose believed they were right, but who were thoroughly misguided and in some cases wickedly designing men. We know that on the last occasion on which these misguided men attempted to gain their ends by force, now nearly twenty years ago, they were in a moment scattered to the wind, and that the very place where they attempted to stand against the forces of Her Majesty was from that time forth the name for a laughing stock—a name that excited only contempt and derision. We know that since that time amelioration after amelioration has been made in the condition of the people of Ireland. We know that even if there are grievances which still remain it was not the

way to obtain their redress by rising in arms against Her Majesty ; that the vast majority of the people of Ireland, and nearly every man amongst its influential classes, have shown themselves adverse to that mode of settling their difficulties ; but we know that there is a minority who are determined to keep the land in turmoil, heart-burning and bloodshed, and who, as it now appears, are not satisfied with that, but are determined to extend that state of things to another and a distant land. We know that many of them have come to the neighboring country, where, as in this Province, they have full opportunities of hewing out homes for themselves in the woods, or otherwise earning for themselves an honorable livelihood ; and we know that they hope and dream of Ireland some day becoming a republic with a republican flag floating over it. But we believed till recently that, having had all the advantages of the institutions which others enjoyed in the land where they deliberately chose to place their lot and that of their children, they would not come to a land lying beside them, the people of which are as anxious as themselves to cultivate all the arts of peace and wish to go on conjointly and quietly with them in the paths of peace—we did not think, we did not dream, that they who complained of oppressive force in their native land would come to this country, where perhaps there are some people holding to some extent the same opinions as themselves in regard to the condition of Ireland, and endeavor to force the whole people of this country to forswear the allegiance which they desire to maintain, to bring into their happy homes all the horrors of war and bloodshed, to force them to arm themselves in defence of their firesides and families, and to seek to destroy a form of government and institutions of which they are proud, and which there is not one soul amongst them willing to exchange for any other form of government or institutions on earth. Now, gentlemen, you are aware that all these things are true as matters of history. You all know that all the reasons which may exist on the other side of the Atlantic for disaffection towards the government are no reasons which should have created so gigantic a conspiracy, with objects such as this seems to have, on this side of the Atlantic. We all know that while a friendly refuge and home is offered in the United

States to every man who desires to go there, and while like advantages are offered to all who choose to come to this Province, we did not expect, and until a few years ago we did not know, that men over in that country were not only engaged in plotting against Her Majesty and Her Majesty's government on the other side of the Atlantic, but that in the course of their plots they should endeavor to make use of this country as a stepping-stone or means to carry out the object of those plots. For the last few years we have heard, however, that such has been the case. We have heard that a small knot of men have entered into a conspiracy for the purpose of converting the kingdom of Ireland, one of the three United Kingdoms, into a republic. We have heard that as the conspiracy progressed a change by degrees came over its designs, and that its ramifications became more extended. We know that it spread from one section to another of the United States, until at length the rumor went abroad that in almost every state in the Union men were engaged in this vast plot, that large sums of money were supplied, and that all the means were prepared which were to bring about an act of hostility and violence against the dominions of the Sovereign. All of these preparations pointed to the kingdom of Ireland as the place where action ought to begin and the battle to be fought out; but after a time attention began to be directed to this country, and we heard that instead of Ireland being made the battle-field, Canada was to be made the scene of the fight, that we were to have incursions and raids in every direction, that our peaceful people were to be harried and worried—either to be kept under arms to repel raids or filled with anxiety at home for the safety of those who went out to repel the invaders; and we could hardly bring ourselves to believe that such a state of things could exist as that we were to be so attacked by bands of men crossing the borders of a country with which we were at peace—by men who had no possible cause of quarrel with this country, and who had no complaint whatever to urge against our government and people. In the spring of the present year the rumors of an intended attack took more life than ever before. Day after day, messages, and not only messages but men, came from the United States to inform our Government of the efforts that were being made, and the means employed to organize, for the

attack that was to come. These statements were of different kinds, but all pointed to the probability of a serious inroad into the country. At one moment we were told that we were to be attacked in the month of March; at another that the invasion would be made in April; and then again that the blow would be struck at the end of May or the beginning of June. We were further told that an attack would be made not only in one part of the Province, but in different parts of it at the same time, by armed bands who would seek to obtain a footing in this country; and that when that footing was once obtained, there would be little doubt that additional forces would come to hold the Province against all the power that might be sent against them. There are many who never believed such a thing could take place, who never believed that any body of men could be so mad as to make that attempt, who looked upon the whole thing as a delusion, and who never woke up to the fact that it was not a delusion until the alarm actually rang through the Province that those men, who were called Fenians, were amongst us, that they were already over our frontier, that they were carrying fire and sword into our tranquil habitations, and that several of the young men who went out in their vigor and their youth—some of them had hardly yet shed their boyhood and were but verging upon man's estate—had fallen before the hostile fire of these bands. We hardly credited the story at first, but at last the truth was forced upon us. We believed that as we were at peace with the United States, they were under obligation to prevent any such hostile incursion from their country into ours; that the good faith of their military commanders and their own natural anxiety to prevent an act that might lead to the most serious consequences, would render it impossible for such an incursion to be made; but notwithstanding this belief, we found that armed men, some of them in the uniform of the United States Army, had crossed over from their shore to ours and had engaged in murderous attacks upon our people. You, gentlemen, know the history of all that followed—that in a short time our people sprang to arms all over the country, that our volunteers in a few hours turned out in thousands with that spirit which has always influenced them to stand by the government of the country

to which they belong, that they marched forth to the frontier from every direction, and that everything went to show those misguided men who came over against us that there was no feeling—not simply in Canada, but in the whole of British North America—in their favor. You heard of no one who wished to join them—no one who desired them success in their lawless undertaking. You heard, it is true, wailing and lamentation and mourning throughout the land for our dead; but you heard no expression of sympathy—no, not even from those few among us who share in their sentiments with regard to Ireland—for the men who came over the frontier to carry this desolation among us. You heard of no effort to aid their enterprise, no one was known to countenance it in any way; but on the contrary, one general expression of horror and detestation arose against those who, claiming their right to be free in another part of the world, and to govern themselves according to their own wishes, came here to force upon us—a free people in the happy and undisputed exercise of our own political rights, and in the full enjoyment of our own free and liberal institutions—systems and governments and institutions which we repudiate, and which we will have nothing to do with. It was but a short time that those men remained upon our soil. They speedily found how mistaken they were in their belief that they would be joined by a large number of our people, and that numerous reinforcements would come from the United States to aid them. They found that the people of this country would not welcome them except in the warm manner in which they forced us to receive them. They saw, but too late, that the act which they had committed was one for which they would be held responsible to the law of the Province; and those who had so acted, who had pillaged our houses and shot down our fellow-subjects, were in the end only too glad to make good their escape by ignominious flight to the place from whence they came. But all of them did not get off in that manner. Some of them remained in our hands, hostages as it were for the acts of the others, and responsible to the law for the unlawful deeds they had done; and among them was the prisoner at the bar, who is put forward first for trial as the man who, under the name of Robert Plosse Lynch, had command amongst these

men, whose appearance is intelligent, whose knowledge ought to have taught him better than to have engaged with them in their lawless acts, who is apparently raised above the mere scum who formed the main body, and who stands here to-day to answer with his life, if found guilty, for the desolation and misery they caused, and for the death of those who fell upon the occasion to which I have referred. It is a solemn charge which stands against him; it is a solemn position in which he is placed, and it is a solemn duty which this court has to perform in reference to it. It is well for the prisoner that in the exercise of the duty which this court and you, gentlemen, have to perform, he has after all to be tried by that British justice and in presence of that impartial British tribunal which he and many others like him have so often regarded with contempt; for he knows, as he sits there, that he may feel sure of a fair and impartial trial according to the just forms of British law, that nothing will be unjustly or unfairly urged against him either in address or evidence beyond that which may properly be deduced from the statements made before the court, and proved on the oath of credible witnesses; and he may feel, and those who defend him may feel, that there is nothing which the Crown desires, either in the empanelling of the jury or otherwise—and it will have been noticed that it has not exercised its right of challenging—more than that the prisoner shall have as fair a trial as any man who may be brought before the court; that there may be no prejudices attempted to be raised against him in the position in which he is placed, although we cannot banish from our minds the recollection of the cloud and gloom that for a time hung over the country and which we would be more than men with natural feelings endowed if we could entirely forget. Gentlemen of the jury, the evidence which will be produced against the prisoner I will now briefly detail to you, stating at the same time how far it will be borne out by the witnesses. The indictment declares that we are at peace with the United States. That is a fact known to all, but as a matter of form I will have to ask the question of one of the witnesses in order to place it legally before you. The indictment declares that the prisoner is an American citizen. I will be able to show that fact in Lynch's own handwrit-

ing. The indictment declares that he came into Upper Canada with intent to levy war against Her Majesty. In bearing out by evidence the indictment upon this point you will understand that it is not necessary for the Crown to establish the fact that the prisoner or any particular person bore arms—that he was actually armed with a sword, a gun, a pistol or other weapon. If the Crown establishes the fact that there were men armed and banded together in a common cause to levy war against Her Majesty, and if men not armed were engaged in carrying out the common design, the presence of the latter with those who actually had arms in their hands and used them, makes them as much criminals as those who bore the arms. Very frequently the unarmed men so engaged are greater criminals even than the others, for it often happens that those who advise in such an undertaking, or who give instructions and are obeyed, are more guilty, even although without arms, than the men who stand by to do their bidding, and use the arms placed in their hands. Indeed, is not that the case in this instance, and are not the most culpable parties “President” Roberts, “General” Sweeny, and the other leaders who carefully abstained from putting their feet on Canadian soil, while they sent their dupes forward to carry out, if possible, the designs they had formed? It is not necessary, then, that it should be proved that the prisoner had a single weapon, or anything more than that he united himself with the others for the common purpose. When that fact is established—and what the common purpose was will be shown by the evidence relating to the collision between those so engaged and Her Majesty’s troops—when it is shown that the parties who came into the Province acted as charged, then you will have that made out which shows the intent of those parties, and the act of each of them becomes the prisoner’s own from the moment he entered the Province with them. Now, you will have these facts shown against the prisoner at the bar: that he was seen armed with the others, that he was referred to as a “colonel” in command, that he was spoken to by a person who subsequently recognized him, that he was recognized by other witnesses who will be called to identify him, that he gave orders and instructions in his capacity of commander as to the route the force was to pursue, that he was seen marching with these people

armed with a sword, that he was seen in their encampment, that he was seen returning after the fight at Ridgeway, and, in fact, you will have almost every movement of the prisoner traced from the time when he came over to Fort Erie on the 1st of June till his arrest on the 2nd. You will also have the design of these men to levy war against Her Majesty shown by the testimony of those who were with our forces at Ridgeway, who will state that they were attacked by men who came over from the United States and landed at Fort Erie, and that in that attack a number of Her Majesty's subjects were killed. You will also have a similar statement with regard to the attack at Fort Erie, from those who belong to what is called the Welland battery, the force engaged on that occasion. You will have evidence clear and distinct that those men so attacking Her Majesty's subjects were in large numbers, that they were variously armed with arms that were given out to them, and that the whole proceeding, from the time they came over till the moment they left, was a clear and evident attempt to subvert the Queen's government, to make war upon Her Majesty, in the belief that they would conquer this country, and then by some means or other go over the ocean and take Ireland. The prisoner's own statement is, that he came over here as a correspondent of some newspaper in the United States, and that it was his intention before leaving that country to accompany these men in that capacity in order to give the newspapers there some idea of the events and incidents of the invasion. Well, even according to his own statement he ought to have felt that it was a dangerous position for him to have placed himself in; but unfortunately for that statement, the evidence is too strong and conclusive against it. Several independent witnesses will come forward and tell you that the prisoner was not present in the peaceful capacity of a reporter for a public journal, but in that of a man with arms by his side, giving orders to others who obeyed him—of a man who came over with others armed and banded together to invade our peaceful country, to redeem and regenerate his country by destroying us in ours, and by compelling us to take over our heads a form of government and institutions which we repudiate, while at the same time he was claiming that his fellow-countrymen in Ireland should be relieved from the very thing he wished to force



upon us—a government and institutions which we do not love. That is the case against the prisoner at the bar. If I have taken a little more time than I ordinarily do in opening Crown prosecutions, you must know that the circumstances of this particular case require it. It was necessary that some short history—and I have made it as short and succinct as possible—should have been given to the jury of the events which have rendered this trial necessary; and having done that and submitted the testimony, the Crown will close the prosecution. The prisoner, defended as he is by an able young friend of mine, who has come from Hamilton to give the prisoner assistance, and by honorable gentlemen belonging to the Toronto bar, will have an opportunity of laying before you such facts and reasons and arguments as he may be able to advance, in order to show why the case for the Crown should fail, and why the grounds upon which the Crown rely for conviction should fail to establish and procure that conviction. The prisoner is as safe as man can be who is placed in the position of a defendant at that bar. He will have every advantage of a full, fair and impartial trial; and whatever may be the abhorrence of the crime with which he is charged—whatever may have been its results to our people, if it had not been checked in time—if the prisoner is able to show that in his case the charge is not well founded, we can only all of us say with the clerk of arraigns in olden time—"May God send you a good deliverance!"

*JAMES SEVERS, sworn, and examined by Mr. Cameron*—I am in charge of the old jail where the Fenian prisoners are confined, the prisoner at the bar being one of them. The letters produced were handed to me by him. The first one, dated the 4th of July last, is an original document, and the second, dated the 20th of the same month, is marked as a copy. Both are in the prisoner's handwriting. The first, the prisoner stated, he had copied, despatching the copy by mail; and the second he said he had copied from another that he had mailed.

*Mr. CAMERON*—I will read a portion of the first letter, my lord—the latter part having reference to some private matters:—

“MILITARY PRISON,

“Toronto, July 4th, 1867.

“MY DEAR MR. KERR,—I received yours of the 29th ult., and I assure you I was much pleased to hear from you, for I am not unmindful of your many kind acts to me and the interest you took in my welfare. Had I taken your advice I would not be in the predicament I am now placed in. But I had not the slightest idea that I could be interfered with, having gone into Canada as a peaceable American citizen without any hostile intention whatever, never having carried arms or done anything to offend a man, woman or child in Canada, they are our own Race and People and they never done anything to me. But Being out of employment I accepted the offer of Mr. McDermott to go as correspondent. I did not correspond any from the fact that the Fenians were some 8 or 10 miles in the country fighting when I was arrested at Fort Erie. I suppose you seen an acc't of the skirmish at a Place called Ridgeway or Iron Ridge. It was madness for their Leaders to have taken them there. Some 750 or 800 men to fight not alone the Militia and the Regulars at least 4000 strong But the Canadian People were up to a man in opposition to them, if they counted on any aid from the People of Canada you must have observed how much they were deceived. Nothing I could say could convey to you the indignation of all classes of Canadians at the Fenian raid into their country. But I will more fully give you an acc't of it when I have the Pleasure of seeing you. \* \* \* \* \*

“Your faithful friend,

“R. B. LYNCH.”

“(Copy)

The second letter is as follows:—

“MILITARY PRISON,

“Toronto, July 20, 1866.

“Brig.-Gen. O'Neill, Nashville—

“Sir,—I was arrested at Fort Erie, June 2nd, with others charged with being connected with the Fenian Army on their invasion of Canada, and tho' Protesting I was only so far as Being a Reporter to the Louisville Press thro' Mr. McDermott by whose instructions I came to Buffalo for the Purpose of Reporting the incidents, &c.,

&c., of the campaign. I have Mr. McDermott's affidavit with that of Mr. Shea to this effect, a few days since—Two Men from Fort Erie (one a Mr. Newbigging, in whose orchard you were encamped) identified me as being in Command at the Camp and Ranking as Colonel, which Statement he has Sworn to, the other whose name I don't know, identified me also and made and Swore to a statement that on the arrival of the Troops at Fort Erie I was in command and forming the men into Line on their Disembarking at the Wharf, I cannot for the life of me see who these men take me for and how they should be thus mistaken. But such will be their testimoncy on my Trial, which will come off very soon. In order to meet this evidence I must have affidavits to prove to the Contrary. I am therefore obliged to appeal to you as having Command of the Fenian Army which invaded Canada for an affidavit as to whether you had known me to have any Position or Command in that Army or in any manner connected with it either as a Commissioned officer, non-Commissioned officer or Private or that I could belong to it as such without your knowledge.

"General as this Evidence is very important to me I trust you will not delay in going before a Justice of the Peace and making this affidavit.

"I acknowledge that I was at the Camp at Fort Erie, But in the capacity of an American citizen without arms in Canad, with no hostile intention But solely on the Business on which I came there. I had a letter to-day from Mr. McDermott, informing me of your being in Nashville. as my Trial is supposed to come off Soon, your early attention to this will much oblige me. I am now in this Prison some 7 Weeks, there are about 90 Prisoners here charged with being connected with the Fenian movement.

"I have written also to Col. Starr for a Similar affidavit.

"I have the honor to be

"General,

"Yours faithfully,

"R. B. LYNCH."

WITNESS (resumed)—On the 31st of May last and since that time I am aware that the Government of the United States and that of the Queen of England have been at peace.

THOMAS NEWDIGGING *examined by the Solicitor-General*—I reside at Fort Erie and resided there on the 1st of June last. I recognize the prisoner at the bar. I think it was about three o'clock on Friday, the 1st of June, that I went into the Fenian encampment on my father's farm, near Frenchman's Creek. I went there for the purpose of seeing if I could not secure some horses belonging to my father, which they had taken. I asked the picquets at Frenchman's Creek if I could see Col. Hoy or Gen. O'Neil of the Fenian forces. They said Col. Hoy was at Fort Erie, but that I could see Gen. O'Neil, and they referred me to Col. Lynch, the prisoner at the bar. I saw him and he directed me to Gen. O'Neil's adjutant, whom he pointed out. The prisoner was dressed in civilian's clothing. The coat, I think, was the same as that which he now wears. He wore a black felt hat with a low square crown. He had a sword suspended by his side from a belt worn around his coat. I asked him how long the Fenians would remain there, and he said I knew as much as he did about that. They might remain there two hours, two days, or two weeks, but he knew no more, he said, than I did. I addressed him as Colonel Lynch, and he answered without correcting me. I should judge that there were then about eight hundred men in the camp. They all had arms, but at that time only the picquets carried them. Some of the men were washing, some bathing, some cooking, and others were employed in carrying rails and constructing breastworks. I saw arms about the camp—rifles, with bayonets attached. The band committed various outrages in the vicinity. They took three of my father's horses, slaughtered four of his sheep and eleven lambs, and took a row boat belonging to him as well as some harness. They brought no horses to the camp, but they took a number away with them. I saw the entire body previous to their landing on the Canadian side. They crossed by means of canal boats, on board of which they got at Pratt's dock on the American side. I was called out of bed by a neighbor employed in the customs, who informed me that the Fenians were crossing over. I then got up and dressed myself. It was a calm, bright night, and what wind there was came in a direction from the dock I have mentioned to our house. The custom house officer referred to said he had a person employed to

inform him of anything of that nature that might transpire during the night. When I got into the road I could distinctly hear the shouting of the Fenians. I could see the steam escaping from the tugs at Pratt's dock, and hear the shouting of men and the rolling of waggons on the dock. Just before daylight, the tugs started from the dock, having in tow each two canal boats, loaded with armed Fenians. They steamed across to the Canada shore, and the tugs shut down steam as if seemingly at a loss which place to proceed to. They apparently deliberated for a few moments, and then proceeding up the river landed at what is called the Shingle dock, on the Canada side, immediately opposite to Pratt's dock. It is called the Shingle dock, from the fact of there being a shingle mill on the wharf. There they landed, I should judge about a thousand of them, although they told me they numbered eighteen hundred, but I did not think they exceeded eight hundred or one thousand men. About nine o'clock in the morning they moved up from the dock to my father's farm, where they remained till some time during the night of the 1st. It was during the afternoon that I visited the camp. I do not know what time they left the camp, but at daylight the next morning there was only one man left there and he was engaged in destroying Fenian arms. These arms were rifles, which he destroyed by breaking and burning them. In one fire I counted eighty-seven rifle barrels. There were several other fires, but I did not count the arms in them. Rifles had been destroyed in them, but not to the same extent. The man was also destroying ammunition by throwing it into the creek. In one place afterwards we found nineteen cases of cartridges, each of which contained one thousand rounds of ball cartridge. In the creek at the mouth and in the river we found forty rifles in good condition. The cartridges were marked—"Watervliet arsenal, N. Y.,—extra good—one thousand ball cartridge, 1864." That was marked on all the boxes which I saw. They all seemed alike. The rifles were, all that I saw, marked "Bridesburg, 1864," on the lock, and "U. S." on the bayonet, stock and barrel. I found nothing further except canteens, satchels containing clothing, loose cartridges, and also hams, flour, feather beds and other things they had stolen from the neighbors. Some few of

the Fenians wore the United States uniform, and some green caps and jackets or shirts; but there was no national uniform, so called—they were not all dressed alike. They were all supplied with tin canteens, great numbers of which were found in the camp the next morning. After they left the camp I know nothing of their movements except what I have heard from others. They had several flags or banners—seven or eight, I should think. They were all green flags. Some of them had a crown surmounted by a harp, and others had different devices upon them. These flags were waving and some drums were beating as they moved down the river. They stated that they did not intend to molest private citizens, but it was the red coats they were after. I saw among them several persons whom I afterwards assisted in taking prisoner. Lynch was not among them. The first time I saw him as a prisoner was in jail on the 29th of July, when I recognized him as the person I had seen in the camp.

*Cross-examined by Mr. MARTIN*—I never saw the prisoner before seeing him in camp. I saw Gen. O'Neil there—or at least a man who was pointed out to me as Gen. O'Neil. He was dressed in a drab suit, and was without arms. He appeared to be a gentlemanly man—medium-sized, slightly built, of fair complexion, and one whom I should take to be a dry goods clerk rather than the general of a marauding expedition. (Laughter, in which the prisoner joined.) O'Neil was not so stoutly built as the prisoner, and I should say he was about thirty-five years of age. He wore no uniform or badge to indicate the command he held, and he was the last man whom I should have taken to be the leader. I think he wore a small-sized felt hat. He was the last man I would take to be General O'Neil. When I saw him he was examining a map of the County of Welland, surrounded by six or seven others somewhat better dressed than most of the Fenian band. Lynch was the only officer I saw wearing a sword. There was no uniform dress, and except for some United States army uniforms which were worn, and some peculiar green jackets, there was nothing to distinguish them from an ordinary gathering of about one thousand men. When they marched down the road they were all armed. Some were old men and several others youths not exceeding fifteen years of age. General O'Neil was the only

officer pointed out to me. I saw elderly men with grey hair and grey moustaches in the ranks. Some of them had no muskets, but were marching alongside as I suppose officers do. I cannot say whether these persons all wore swords or not, but I should think they did. I stood within a few feet of them as they marched down the road. When I went to the camp some of the men were washing their clothes, some bathing, some cutting down our trees, some picking chickens—(laughter)—and others employed at various occupations. The camp was in our meadow close by the road. They tore down about half a mile of our fences to form breastworks, and, of course, the men who were carrying them did not then wear arms. A number of persons crossed over from the American shore to witness the proceedings. Some of these I knew as residents of Buffalo, and others I did not know.

Mr. MARTIN—Well, those you knew you did not suspect, while those you did not know fell under your suspicion?

WITNESS—I would not take a stranger into my confidence about that time. (Laughter.) The interview I had with the prisoner in camp did not last more than a minute or two. I did not see him again till about the middle of July, when I came down here by Mr. Harrison's instructions to indentify prisoners whom I had been instrumental in arresting. The prisoner is a man whom I think I could recognize among thousands. When I saw him in camp he wore a hat.

Mr. MARTIN—Where did he wear it?

WITNESS—On the top of his head in the ordinary manner. (Laughter.)

His LORDSHIP—There must be no further merriment of that kind. This is no laughing matter.

WITNESS—The prisoner when I saw him had the same moustache and goatee that he wears now, and pretty much the same clothing. I am positive about his wearing a sword. It was an ordinary sword, with an iron or steel scabbard. He was walking up and down the road with the sword by his side when I addressed him. I appealed to him because Gen. O'Neil was engaged, as I saw by glancing over his shoulder, in examining a map. I see no difference between the prisoner and the man I addressed than perhaps he is now a little lighter in complexion.

To HON. MR. CAMERON—I conscientiously believe the prisoner to be the same man.

ARTHUR MOLESWORTH, *examined by Hon. Mr. Cameron*—I live on the bank of the Niagara river near Fort Erie. I recognize the prisoner as one whom I saw with the Fenians on the morning of the 1st of June. He was just behind them as they were going up to the village. He was armed with a sword in a steel scabbard suspended from a belt around his waist. He was talking with a man whom I knew lived across the river, and I overheard a portion of the conversation. This man said to the prisoner that his son had joined the Fenians, and that he wanted him to take care of him. Lynch said that he would. The men who were marching were armed with rifles and bayonets. They numbered, I judged, about fifteen hundred, walking four abreast. I saw some of them landing. They came from Black Rock, on the opposite side, in the State of New York. They cheered when they landed on the Canada shore, and I saw two flags waving. I was not in the camp, as they would not allow any one to be about it. They marched into the village before they went into camp.

*Cross-examined by Mr. MARTIN*—I knew nothing of the prisoner before seeing him on that occasion. I saw officers having uniforms, some of them United States uniforms, walking along beside the column. All the officers I saw had swords, but I did not notice any other distinguishing badges. The prisoner had no uniform. I noticed only three officers in uniform, but there may have been others. I think there were officers on both sides of the column, but I only saw those on one side. The man with whom the prisoner was talking lives in Black Rock. His name is Bailey. I saw the prisoner only about five minutes, and when he stopped talking with the man he followed after the column. He was dressed in the same way as now. I did not arrest him, but I saw him afterwards at the jail. I recognized him then, but I did not know anything about Mr. Newbigging having indentified him.

MR. HON. CAMERON—All the witnesses saw the prisoners separately, my lord. They were not allowed to go into the jail together.

WITNESS—I do not notice any difference in his appearance from what it was then. His complexion, moustache and beard are



about the same. Among the officers I saw was one who came to our house in want of his breakfast. He wore a uniform with green binding and had a black moustache. He was about the same size as the prisoner and had pretty much the same complexion, but he was a good deal younger. He was not the chief in command. I was standing close to the prisoner when he was talking to the man. It was then about eight o'clock in the morning.

TO HON. MR. CAMERON—I have no doubt in my mind that the prisoner at the bar is the same man I saw that morning, as I saw him very plainly.

JAMES STEPHENS, *examined by the Solicitor General*—I reside at Fort Erie and was in that neighborhood on the 1st of June last. I saw the prisoner there on that day. When I saw him first he was on the road getting his men in line to march. He was armed with a sword, but nothing else that I observed. He seemed to be in command of others. They had taken myself and others prisoners, and when he got his men into line we were ordered by him to fall into the ranks. I was about fifteen or twenty minutes in custody, and was in his presence during that time. After he had marched us about three quarters of a mile along the river bank he dismissed us. I did not hear any particular conversation among the men. Some of them were rather sassy. (Laughter.) They said they were going to Toronto and Quebec. One of them asked me how far it was across Canada—whether it was twenty miles, and I said I thought it was about seven. (Laughter.) They said they had come to take Canada, and when they had done it each of them was to have a good farm. (Renewed laughter.) I saw them all day marching around. I was held as a prisoner all day, with a guard over me and my house. They put a guard on me after they came back from the ferry. I saw only part of the force landing. I saw no fighting or acts of violence on Friday, because there was no one to fight with. I saw no fighting on Saturday. I was at home all that day, and I do not know what ground they then occupied.

THE SOLICITOR-GENERAL—How was it, if you live at Fort Erie, you did not see the fight at the ferry on Saturday?

WITNESS—Well, I was not much on my muscle, and I did not go to see it. (Laughter.) I live about a mile and a quarter from the Waterloo ferry, and about the same distance from Newbigging's.

*Cross-examined by Mr. MARTIN*—I saw the Fenians first about day-break when they took me prisoner. I saw the prisoner first about an hour afterwards. He was marching up and down the road talking to his men: I did not see him crossing, and suppose he came over with the main body. I do not know what boat he came in. He must have crossed in some boat, for he could not have waded. (Laughter.) No one seemed to be superior in command to him or to have more to say. He had the most "lip" of any of them. (Laughter.) He gave directions to the others and they seemed to obey.

Mr. MARTIN—What movements did you see them execute?

WITNESS—Well, moving things out of people's houses seemed to be the chief movements they made. (Laughter.)

Mr. MARTIN—You are sure the prisoner is the man who directed them?

WITNESS—Well, if I could see straight, and I think I could, he was the man who put the body in order. He first drew them up in column and then gave the order "Forward—March!" and they obeyed him. I do not know where they went after they left me. He had no uniform, but he wore a sword of the usual kind with an iron scabbard. After marching about half a mile he stopped the body and rested a while. He then again ordered them forward, and after going a little more than a quarter of a mile he again halted them. He then came along to where the prisoners were and said—"You individuals there, fall out to the right—you are dismissed!" We fell out as directed, and I was very glad of it, for I was not very good on the march. I am sure the prisoner is the same man; I would know him among a thousand. He is altered a little since then. He is rather faded out and looks slicker. (Laughter.) He was darker and more weather-beaten then, but there is no doubt he is the same man.

THOMAS MOLESWORTH, *examined by Hon. Mr. Cameron*—I reside at Fort Erie, and am the father of the second but last witness. I saw the prisoner on the morning of the 1st of June, and he had arms

on him. I saw him on Saturday some time in the forenoon about 11 or 12 o'clock. He spoke to me. Some said that he was a Fenian and he replied that he was a reporter for a paper, and that was the reason he was with them. This conversation took place about the time he was arrested. I have no doubt this is the same person I then saw.

*Cross-examined by Mr. MARTIN*—I got up about daylight and saw the Fenians from my window landing. They then marched up as far as my house. They came in a body. Some were riding. I remember one was riding. As far as I can recollect the man who was riding was in uniform. Some straggling ones came to get into my house. When they were marching up to Fort Erie I was in front of my house. When I saw them the prisoner, I think, was near the rear end of the column. I was inside the gate when they passed. The prisoner had a black felt hat on with a low crown. He had a short coat on also. It was about six o'clock on the morning of the 1st of June when he passed my house. I could not see whether he was acting as an officer or not. A great number of those who were acting as officers and marching alongside of the column were not in uniform. I do not remember that the prisoner had a sword. I recognized him when he was taken prisoner, as having seen him the previous day. The prisoner appeared to wear his beard differently on that day from that which he wears it now. His beard appeared to cover a larger proportion of his face than it does now. His face was browner than it is now. His moustache appeared longer then than now.

*WILLIAM MURRAY, examined by Mr. Cameron*—I have seen the prisoner before. I saw him on Friday, June 1st, about a mile and a half below Fort Erie. He was standing with several others who were armed. The prisoner had a sword by his side. I saw him in the afternoon a little down the river in company with some others. He was then armed with a sword. I saw them when they landed, and I then went to the telegraph office. I am in the Custom-house. I was at the fence of the camping ground. They appeared to be about 900 or 1,000 strong. They were all armed, and had flags and drums, and bayonets.

*Cross-examined by Mr. MARTIN*—I live at Fort Erie, and saw the prisoner about nine o'clock at the lower ferry. When they landed first they must have moved to the village and come back again, and then went to Frenchman's creek. The prisoner had a sword, and others had swords also. They were mostly dressed in black clothes and black hats. I was within fifty feet of them. There were not many middle-aged men like the prisoner. I saw only one other. He was talking with them. I had no conversation with the prisoner. I saw him next at Frenchman's creek. He was talking with another man dressed like himself with a sword and belt. This was during the afternoon of the same day. His hat did not hang over his eyes. It was a black hat, with a stiff brim. He looks a little paler now than he did then. He appeared to have a larger beard than he wears now. He appeared a little bolder then than he does now. (Laughter.)

*Major DIXON, examined by Hon. Mr. Cameron*—I am an officer in the Queen's Own. I left with the regiment for Port Colborne on the 1st of June and reached there the same day. Col. Dennis was then in command. I was in command of a company. We were ordered to start on Saturday morning from Port Colborne to meet Col. Peacocke. We left about five o'clock. We had about 800 men, composed of the Queen's Own, the 13th battalion of Hamilton, and the York and Caledonia rifles. We were all in uniform. The Queen's Own were in green uniform; the 13th battalion in red tunics, with the usual dark trowsers, and the York and Caledonia companies in rifle uniform. We disembarked at Ridgeway station in order to march. Our march commenced about six o'clock, and we marched about two miles when the leading files of our advanced guards came doubling back. We were all in the road. They put up their rifles with their shakoes on the bayonet to show that the enemy was in sight. Three companies were then thrown out as skirmishers. We advanced some distance when we heard a shot fired. The fire then became general. Our men took possession of a field with stumps in it, as they should do to take advantage of the cover. It was visible to any one attacking us that we were regular troops. I noticed two men fall about two yards in front of me. I saw some of my men wounded in the field—wounded by

those opposed to us. I saw the body opposed to us firing. I saw them through the woods. After a time the Queen's Own retired.

Private WHITE, *examined by Hon. Mr. Cameron*—I belong to the Queen's Own and was at Ridgeway. I was wounded in the arm and lost my arm in consequence. I was wounded in the retreat.

Adjutant OTTER, *examined by Hon. Mr. Cameron*—I am adjutant of the Queen's Own and was at the affair at Ridgeway. I was with the reserve with the commanding officer during the greater part of the fight. We marched up to battle in the morning. I saw some of our own men wounded, and one of the 13th, Lieut. Routh. They were wounded by the fire of the enemy, who must have known we were Queen's troops.

Capt. SCHOFIELD, *examined by Hon. Mr. Cameron*—On the 2nd of June I was lieutenant in the Welland Battery. We left Port Colborne in the morning on the tug Robb and came to Fort Erie, disembarked, scoured the country, and then came back to Fort Erie. We came in contact with the enemy about three o'clock in the afternoon in Fort Erie. We had three officers and fifty-four men. We were drawn up on Front street with the Dunnville naval brigade. The naval brigade had no uniform. The naval brigade was in front of us, and we saw some men down the river; then a man raised a white handkerchief and told us to surrender; then a shot was fired and afterwards a whole volley. Capt. King of the field battery was shot in the leg at the ankle; Lieut. Schofield was shot in the leg; private Bradley was shot in the thigh, and another was shot in the leg. Our men retreated and some of them took refuge in a house, and fired on the enemy. They then threatened to burn us up. Several of us were taken prisoners, and they kept us till about two o'clock in the morning. They said they were going to take the country, and that we were much mistaken about their number. We were placed in Dr. Kempson's drawing-room, and were guarded by five or six men; and about sixty were stationed over the road for three or four hours. There were about seven hundred men in the Fenian army.

*Cross-examined by Mr. MARTIN*—I was principally in company of the adjutant, Fitzpatrick. He appeared to be about twenty-six years of age. Several officers took tea with us. One of them had

no coat. When I was arrested by the men they took my sword and cross belt, and when being marched to the fort I met Fitzpatrick, who asked me if I were not an officer. I said yes. He then asked me where was my sword and belt. I told him and he brought me back, found the man who had my sword on, made him take it off and give it to me. I saw Dr. Donnelly, a surgeon in the Fenian army. He had no arms. Six or seven of the officers took tea with us. The man who claimed to be quartermaster had no coat at all. Some of the officers appeared young and others quite elderly. I did not see Gen. O'Neil. They told us they had from 800 to 1,250 men at Ridgeway, and that our forces were very much mistaken as to the force they had—that they had enough to drive our men from their position. When tea was ready Mrs. Kempson came up and said, "Gentlemen, tea is ready." We rather declined the tea. The Fenian officers then said, "Gentlemen, you had better go down to tea, and if there are any seats left after you fill the table we will take seats." We then went first. This was the force that was at Ridgeway. They treated us very well after they got us into their possession.

HON. MR. CAMERON—Yes, after they had shot your arms and legs off.

THOMAS RYALL, one of the Fenian prisoners, *examined by Hon. Mr. Cameron.*—I was at Fort Erie on the 1st of June last. I came on that day from Buffalo, and crossed over quite early in the morning in a canal boat drawn by a tug. There were a good many on board of the scow. The boat was well loaded down. I walked from Buffalo to Black Rock.

HON. MR. CAMERON—Where did you get your arms?

WITNESS—We got them in American water.

HON. MR. CAMERON—No, but did you bring them with you, or did you get them after crossing?

WITNESS—When we left the land we had no arms; as we crossed the river, arms were given out. We got them in American water. The ammunition was already distributed to us on the American side; saw no swords issued or revolvers. I saw some men have revolvers, but they said they were their own. Bayonets were issued also. There was ammunition in boxes also found for us on the Canadian side

The talk was to take Canada. All came over to fight, and to take Canada—that was the intention. After we crossed and rested, saw the prisoner walking up and down where the arms were stacked. He wore a sword. We marched off towards Fort Erie to Frenchman's creek on Friday afternoon. There was a hundred of a skirmish line went out before, and came back to the bank of the river, and remained there till the main body came back after dark. The main body also marched out into the country from this point on Saturday. I was with them and got very tired on the march. We marched a long way indeed. While we were marching a man, who was addressed as captain, came running back, saying we were going into action. I then thought it was about time to leave. Several others also stepped aside at the same time. (Laughter.) I left as they went into action, and went to Col. Peacocke's force.

*Cross-examine.* MR. MARTIN—I was born in the county of Kerry, Ireland, and have been in America about a year. McDonnell, of Tennessee, swore me in as a Fenian. I was sworn in on this side, immediately after landing. I do not remember the oath. It was about serving them loyally, or something of that sort. The last was "So help me God." I did not pay a great deal of attention to the oath. I have turned Queen's evidence. I do not expect to be hanged. I first told one of the turnkeys that I knew something of these men, and I suppose he told Mr. Harrison. I expect to get off for telling; but do not give my evidence to get off. I do not think that it was part of their oath that I was to keep their secrets. I do not remember this being in it. I was in McDonnell's company. I suppose O'Neil was commander. He was pointed out to me, and was a young man with rather light hair. I do not know the second in command. He came over about four o'clock in the morning. Some more came after me. I do not know Col. Starr. I do not know Col. Hoy. I know Shields; he was acting as captain. I do not know Capt. McNally or Col. Bailey. I was in the column formed when they landed on this side at daylight. I do not know who marshalled the men. I did not see any man form them in but their captains. I never served in a military capacity before. I saw no one except Shields give orders. He wore a felt hat and black coat, and had a heavy moustache and revolver. I did not notice whether he

had a sword or not. He was a stout man, about 35 years of age. His moustache was dark. Most of the officers that I saw were dressed in civilians' clothes. One that I saw at Frenchman's creek was not dressed in military dress, nor was it a civilian's. He had on a cloak and high boots. I saw a lieutenant there with a low black hat, who had a broken nose. Mostly all had black hats and dark clothes. Shields was the oldest man I saw at Ridgeway. At Fort Erie I saw Lynch, and some others as old as Shields. There were a few (one or two) who were as old as the prisoner, and about his age and size, but somewhat taller. I saw two in the lot answering this description. I saw the prisoner for the first time on the first of June. He was at Fort Erie, in the Fenian camp, about 9 o'clock. I cannot tell when he came over. I saw another scow load come over after us about 7 o'clock. The prisoner, when I saw him first, was walking up and down the Fenian camp near the arms. This was some distance from Fort Erie. I did not notice him when the men landed, nor when they formed after landing. The first I saw of him was when we got to Fort Erie. The arms were stacked and the fire lit for dinner when I first saw him. He was dressed in clothes similar to those he has on now. I did not know him at all. I appear against him because I saw him there. I do not know anything about any of the others except those indicted. I know John Meacham; I slept with him in the jail. I was not sent to sleep with those against whom I was to give evidence. I slept with none except Meacham and Foy. I had a conversation with Meacham about giving evidence. He wanted me to go and swear against O'Donoghue, and Langtry and John Lynch, because he had quarrelled with them in the evening. He told me to go and tell them I was going to give evidence against them that they might give me some money.

MR. MARTIN—Now, witness, did you not make such a proposition yourself? Did you not tell Meacham that if those you named would not give you \$20 each you would swear against them?

WITNESS (emphatically)—No, sir, I did no such thing. It was Meacham that made that proposition himself. Meacham did not ask me why I had turned Queen's evidence.

MR. MARTIN—Did you ever assign a reason?



WITNESS declined to answer.

HIS LORDSHIP—Mr. Martin, do you think you should put these questions about collateral matter in a case of this kind?

Mr. MARTIN then abandoned the question.

WITNESS continued—Meacham wanted me to go and give evidence against some of the other prisoners, but I would not, as I said I did not know they were among us. I know John Connor, and I had a conversation with him. I do not know John O'Connor, but know Pat. Connor in my wing of the jail. I had no conversation with him.

Hon. Mr. CAMERON—That's the case for the Crown, my lord.

HIS LORDSHIP—Gentlemen of the jury, as it is nearly six o'clock, and as you must be much fatigued, I will adjourn the Court till ten o'clock to-morrow; when the evidence for the defence will be proceeded with. The Sheriff will provide you with comfortable quarters, and you must avoid speaking to anybody on the subject under trial till your return to court, and indeed you should not even converse with each other on the subject whilst out of court.

THE COURT then adjourned and the jury were conveyed to a neighboring hotel, where they were locked up all night in charge of Sheriff's officers.

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OCTOBER 25, 1866.

THE COURT was opened at ten o'clock, and the trial of Robert Bloss Lynch proceeded with. Every available space in the court room was eagerly taken possession of by a large crowd of spectators that awaited the opening of the doors, and the most intense interest was taken in the proceedings.

Solicitor-General Cockburn, the Hon. J. H. Cameron, Mr. R. A. Harrison, Mr. John Paterson and Mr. John McNab, County Crown Attorney, appeared for the Crown, and Mr. Martin, of Hamilton, with Mr. J. H. Doyle, of Toronto, for the prisoner.

HIS LORDSHIP took his seat on the bench at fifteen minutes past ten, and summoned the attendance of the prisoner. The latter, though evidently feeling his disagreeable position keenly, endeavored to appear as buoyant in spirits as possible.

In the meantime several Fenian prisoners had been conveyed from the jail for the purpose of giving evidence for the prisoner, and were locked up under a strong guard in the prisoners' room.

HIS LORDSHIP (addressing the prisoner's counsel)—Are you ready to proceed, Mr. Martin?

MR. MARTIN—Yes, my lord! I want the Rev. John McMahon.

JOHN MCMAHON, (a Fenian prisoner,) *examined by Mr. Martin.*

—I am a clergyman, and have seen the prisoner at the bar before. I saw him on the first of June last at a place called Fort Erie. It was in the camp I saw him. I saw him taking down notes, and he said, if I am not mistaken, that he was writing for some paper in Louisville, Kentucky. He was writing with a pencil on a piece of paper, a book I think. I saw no sword or gun with him. He said that—

HON. MR. CAMERON—I object, my lord, to the witness giving statements purporting to have been made by the prisoner.

WITNESS—I saw him an hour after that. He was walking along looking about. I saw no more of him afterwards that I remember. I was with the Fenians after that, and until I was taken, but I saw nothing of him afterwards.

HON. MR. CAMERON—I have no question to ask the witness, my lord.

MRS. RYALL, *examined by Mr. Martin.*—I am the mother of Thomas Ryall, who was examined here yesterday as Queen's evidence.

MR. MARTIN—It is an unpleasant question to ask you, Mrs. Ryall, but do you think your son Thomas ought to be believed on his oath?

HON. MR. CAMERON—I object to that question, my lord.

MR. MARTIN—Well, then, what is his character for veracity?

WITNESS—He has a very poor character, indeed, sir. (Laughter.)

MR. MARTIN—Would you believe him on his oath?

WITNESS—No indeed, sir, I would not; and nobody should believe him on his oath, sir. We came to America about fifteen years ago, when Thomas was about eight years of age. After coming to Canada, we lived at Copetown, near Dundas, for about three years; and after going there we hired Thomas with a farmer, where he earned \$6 per month. We left Copetown and went to live at Paris, where we lived one year. After leaving there we went to Guelph; and have been since that time at Guelph, or

about a mile from it, on the property of Mr. David Allan. My son lived with us some time at Copetown and Paris; and a good length of time at Guelph—some four years. He was there when they were building the market house, and worked at it. He left me last April twelvemonth and went to the United States, and we never heard from him till we got a letter from the Sheriff that he was in Toronto jail.

Mr. MARTIN—What kind of a character was he when he lived at Guelph?

WITNESS—Well, indeed, sir, he was a very bad character—the worst in that part of the country at that time.

Mr. MARTIN—Ought he to be believed on his oath?

WITNESS—On my oath, sir, I would not believe him on his oath. (Loud laughter.) He has been away in the States a couple of times. And about two years before the last time he went away, he was also in the States, and we could get no good of him. He was a very bad boy entirely. (Laughter.)

*Cross-examined by* Hon. Mr. CAMERON.—My son has not been a good boy these past nine years; and I would not believe him on his oath.

Hon. Mr. CAMERON—Well, let us hear, what did he do?

WITNESS—He did everything that was bad. He was guilty of every crime that a man could be guilty of—except murder. (Laughter.)

Hon. Mr. CAMERON—Well, Mrs. Ryall, can you not tell us what these crimes were?

WITNESS—He was a drunkard, a blackguard, a liar, a smoker, a night-walker, and a waylayer. (Loud laughter.)

Hon. Mr. CAMERON—Whom did he waylay?

WITNESS—He and some other boys waylaid a man on the road one night, and Thomas was in jail for it.

Hon. Mr. CAMERON—Well, was he punished for this crime?

WITNESS—He was in jail for a few days and was let out on bail, I believe.

Hon. Mr. CAMERON—Let out on bail, was he?

WITNESS—Yes, sir, after he was found guilty. (Laughter.)

Hon. Mr. CAMERON—It could not have been a very serious crime

he was charged with when he was admitted to bail. That will do Mrs. Rvall.

Mr. MARTIN—Did he become a better boy after getting out of prison?

WITNESS—No, indeed, sir; he was as bad as ever till he went to the States, and he was always in trouble.

Mr. MARTIN—I wish, my lord, to recall Mr. McMahon, as I want to examine him on a particular point.

JOHN McMAHON *recalled and examined by Mr. Martin*—From the time I went with the Fenians in the morning till the arrest of the prisoner I did not see him. I saw a person in command of the Fenians very like the prisoner. They called him Captain, and he said he was from Indianapolis. He wore a blue coat, and by a stranger who did not know either of them one would be taken for the other. When I saw the prisoner there, his beard was not so large as it is now. The other man wore a cap and had a larger beard. The prisoner had a moustache and small goatee. I would know the other man if I saw him. The other man told me not to be afraid—that I would not be *mislisted* (molested.)

Mr. MARTIN—That will do.

Hon. Mr. CAMERON—No questions, my lord.

D. F. LUMSDEN, a Fenian prisoner, *examined by Mr. Martin*—I am an Episcopal clergymen. I think I saw the prisoner on the first of June a little below Fort Erie, where the Fenians were encamped. He had a book and pencil in his hand and appeared to be taking notes. My attention was directed to him in a particular way. I met a couple of gentlemen from Buffalo on the bank of the river, one of whom was a legal gentleman and a freemason, and I threw him a sign, after which we had a conversation. Pointing to the prisoner he said, "That little man was foolish to come over here with the Fenians as he runs a risk of being shot, and he told me that"—

Hon. Mr. CAMERON—We do not want to hear what he told you State what you know yourself, and not what anybody told you.

WITNESS—I saw no arms with the prisoner; and he did not seem to have a command. He was dressed in plain clothes.

Several others present were dressed in civilian's clothes. General O'Neil had on civilian's clothes. He was very like the prisoner, but taller.

*Cross-examined by* Hon. Mr. CAMERON—Gen. O'Neil is much younger than the prisoner—about twenty years younger.

DANIEL WHALEN, a Fenian prisoner, *examined by Mr. Martin*—I saw prisoner on the 1st June at Fort Erie, at the Fenian camp. We understood him to be a reporter for the Louisville *Courier*. I saw some of the officers who were in command. None of them that I saw resembled the prisoner. The prisoner wore a heavy moustache, but I did not notice that he had a beard. I saw no sword with him.

Hon. Mr. CAMERON—And pray, Mr. Whalen, how did you come there?

WITNESS—I was seduced to come over on Friday morning (laughter), and as I wanted to return to the other side, I stated my case to a person in hopes that he would assist me in getting back; and that person introduced me to the prisoner. I asked him to assist me in getting back again, and he told me that he had no command there—that he was only reporter for the Louisville press. He told me to wait till night and escape; but I could not get away.

*Cross-examined by* Hon. Mr. CAMERON—I met with an accident next day.

Hon. Mr. CAMERON—An accident, eh! what kind of an accident?

WITNESS—(pausing) I was shot in the neck with a Minie ball.

Hon. Mr. CAMERON—Where did the accident happen?

WITNESS—At Ridgeway.

Hon. Mr. CAMERON—A good many accidents of that kind happened to the Fenians at Ridgeway, I believe. (Laughter.)

PATRICK NORTON, a Fenian prisoner, *examined by Mr. Martin*—I saw the prisoner a short distance outside of Fort Erie in June. I saw him doing nothing but walking around like any other quiet citizen. He had no sword or other arms. I did not understand what he was doing. I saw some of the Fenian officers, one of whom resembled the prisoner at the bar, and he wore a sword. He had a command there. I do not know his name. I noticed the prisoner's

beard then; he had very little on the chin, only an imperial being there. He had a moustache. The officer that resembled Lynch wore a moustache like him but rather heavier.

*Cross-examined by Hon. Mr. CAMERON*—I came over to Canada on the first of June. I saw persons there with arms, but I was a peaceable man there walking up and down.

HON. MR. CAMERON—Did anything happen to you?

WITNESS—Yes, I met with an accident. (Laughter.)

HON. MR. CAMERON—What kind of an accident?

WITNESS—I do not think I should tell what it was.

HON. MR. CAMERON—Oh, we know what it was. Did you see the prisoner at Fort Erie?

WITNESS—I came over with another man, and I saw the prisoner at the Fenian camping ground; but I did not see him again till I saw him in jail in Toronto. I do not know that there was any other Lynch at the camping ground except the prisoner. I heard of nobody called Col. Lynch there. There was an officer there that looked like the prisoner, but I do not know his name or the rank he held. The man that looked like the prisoner might be captain or lieutenant or something of the sort.

THOMAS HENRY MAXWELL, *examined by Mr. Martin*—I saw the prisoner at the lower ferry at Fort Erie on the first of June last. He was standing there and had no arms. I heard he was a reporter at Louisville. I saw some of the officers of the Fenian force, but saw none among them who resembled the prisoner at the bar. I do not remember whether his beard was large or small then.

HON. MR. CAMERON—I really think Mr. Martin should have thought for a moment of the position he would be placing these witnesses in before he calls them. There is really nothing in the witness's statements except what he is stating against himself.

MR. MARTIN—I have no client but the prisoner at the bar, and consequently have only to deal with one case.

HON. MR. CAMERON—I feel it is only right to give warning.

MR. MARTIN—I have to thank the learned counsel for the suggestion, but if my client is innocent it is nothing to me who is guilty besides. I think the learned gentleman, Mr. Cameron, has conducted this trial in a way that could not be surpassed.

JOHN COONEY called.

Mr. MCKENZIE, Q.C.—I do not like to interfere, my lord, but I am witness's counsel, and as there is an indictment against him, I would merely wish to remind him that he is not bound to criminate himself.

Hon. Mr. CAMERON—I am satisfied, if I choose to pursue such a course, that the moment my learned friend (Mr. Martin) asks any questions about the parties being present at Fort Erie or in the Fenian camp, I can follow it up and ascertain from the witness why they were there.

Mr. MARTIN—But he can refuse to answer.

Hon. Mr. CAMERON—He cannot.

Mr. MARTIN—But you do not intend to ask him.

Hon. Mr. CAMERON—Oh! that's another question. I may do so if I desire it; but at the same time there is a certain amount of protection that should be thrown around these unfortunate men, who are called as witnesses.

JOHN COONEY—*examined by Mr. Martin*—I saw the prisoner at the bar on the first of June last. I took him from the Southern hotel, corner of Michigan and Seneca streets, Buffalo, and drove him to Black Rock ferry. It must have been about mid-day. I took his valise off my carriage and walked on board the ferry boat with it. On that occasion the prisoner wore an imperial and moustache, but he is greyer in the hair now than he was then.

Hon. Mr. CAMERON—Had he any beard?

WITNESS declined answering.

Hon. Mr. CAMERON—Had he only an imperial and moustache?

WITNESS—He had an imperial, sir. (Laughter.)

Hon. Mr. CAMERON—Was that all?

WITNESS—He had an imperial, sir. (Laughter.)

Hon. Mr. CAMERON—We are pretty well aware of that fact now. I repeat my question, had the prisoner any beard?

WITNESS (smiling.)—He had an imperial, sir. (Loud laughter.)

Hon. Mr. CAMERON—Did you come over in the same boat?

WITNESS—No, sir; my business was on the other side.

Hon. Mr. CAMERON—You never got over at all, then?

WITNESS—That's my business, sir. (Laughter.) Quite a number were over there (at Fort Erie) from the other side, as well as me.

Hon. Mr. CAMERON—That will do. I will not ask you any more questions.

PATRICK O'MALLEY, *examined by Mr. Martin*—I saw the prisoner on the 1st of June last on Exchange street in Buffalo about nine o'clock in the morning. I did not see him again till he was arrested. I knew Mr. Lynch very well when he was a book-keeper in Col. Bowden's liquor store, in Louisville. When I saw him in Buffalo on the first of June, I called to him across the street, and he took me and a friend of mine into a saloon and treated us. He told me that he had come on with a squad of Fenians from Louisville, as a reporter. I know him well, and would believe his word as soon as his oath, as he is a gentleman. I have known him for three years, and I never knew him to wear anything but the moustache and imperial he wore that morning when I met him in Buffalo.

Hon. Mr. CAMERON—I have no questions to ask, my lord.

MARTIN CORMACK, *examined by Mr. Martin*—I saw the prisoner on the 1st of June last at a shingle mill at the cross roads, Fort Erie. This was between eight and nine o'clock in the morning. He was standing there doing nothing. As far as I saw he had no arms. I never saw any officers with the Fenians. I saw a crowd at Fort Erie then.

*Cross-examined by Mr. Hon. CAMERON*—I am quite sure it was between eight and nine o'clock in the morning when I saw him. I am sure he is the man. I never saw him before that morning. I did not see any Fenians, and did not get into the Fenian camp. I went over on the upper ferry-boat about seven o'clock in the morning, and saw him near the upper ferry when I got there. I saw a crowd there then.

J. H. MEACHEM, *examined by Mr. Martin*—I saw the prisoner on the 2nd of June last on the tug-boat Robb after he was arrested. He had a small imperial and a heavy moustache. I know the prisoner Thomas Ryall. I would not believe him on his oath. He had a conversation with me in the jail about the prisoner at the bar.

Hon. Mr. CAMERON—I object to the witness stating anything about the conversation he had with Ryall, as the latter said dis-



tinctly that he had no conversation with the witness about the evidence he was going to give against the prisoner.

His LORDSHIP sustained Mr. Cameron's objection.

*Cross-examined by HON. Mr. CAMERON*—I never knew Ryall till I saw him in the jail.

HON. Mr. CAMERON—That will do.

DENNIS LENAGHAN, *examined by Mr. Martin*—I did not see the prisoner at the bar on the 1st or 2nd of June last.

HON. Mr. CAMERON—I have no questions to ask.

PETER MORRISON, *examined by Mr. Martin*—I saw the prisoner on the 2nd of June about 200 yards from Fort Erie. I only saw him when he was arrested. I was arrested before him. My acquaintance with him has only been since I met him in prison in Toronto.

HON. Mr. CAMERON—That will do—no questions.

MICHAEL PURTELL, *examined by Mr. Martin*—I did not see the prisoner on the 1st or 2nd of June last.

HON. Mr. CAMERON—I have no questions to ask.

PATRICK KEATING, *examined by Mr. Martin*—I remember being near Fort Erie on the 1st of June last, and I saw a man there named Stevens, who was examined here yesterday as a witness. I saw him about eight o'clock in the morning, after he had been made a prisoner by the Fenians. I should judge he was then intoxicated. I asked him who had arrested him, and he said the men who had him there. I asked the men why they had arrested him, and they replied by Col. O'Neil's orders. I saw O'Neil there. I might have seen other officers, but I did not take particular notice of them, as I did not know they were officers.

*Cross-examined by HON. Mr. CAMERON*—I only saw Stevens as a prisoner with the Fenians. He was the only prisoner I noticed.

CHARLES WELLS, *examined by Mr. Martin*—I saw the prisoner when he was brought to Toronto jail. I saw him on the same morning after we arrived from Brantford. I shaved him the first time he was shaved in Toronto jail. He had a slight moustache and an imperial on his under lip.

*Cross-examined by HON. Mr. CAMERON*—I was in the Brantford jail about seven days with the prisoner, and I came with him in the

cars to Toronto. He had a moustache and imperial, the same as when I shaved him in Toronto jail.

H. M. O'BRIEN (prisoner's attorney), *examined by Mr. Martin*—I know Robert B. Lynch, the prisoner at the bar. I knew him in my boyhood in Galway and Dublin. The county of Galway is his birth-place. I met him at a ball given in my father's house in Dublin. I met him several times afterwards before I left Dublin. He held a government situation then. He was head clerk in the Charitable Bequests Office.

This closed the evidence for the defence.

Mr. MARTIN then addressed the jury for the defence. He said :—May it please your lordship : gentlemen of the jury—I am sure you, as well as myself, had much pleasure in listening to the very eloquent address of the learned counsel for the prosecution at the commencement of the trial. But before I proceed to discuss the merits of the case, I desire on behalf of the prisoner, as well as for myself, to acknowledge the very great urbanity and fairness with which this trial has been conducted by the gentlemen in charge of the prosecution. They have given us every privilege and opportunity which they possibly could. They are all old friends of mine, and to have done less would not have been like them. In this case every man of us wants fair play and impartial British justice in a British court, whose judges are independent, by the terms of their appointment, alike of the undue influence of the Crown and of the mob, and where we are able to make the proud boast—a boast not capable of being made by all nations or by many—that our judiciary is, “like Cæsar's wife, “above suspicion.” We want you, gentlemen of the jury, to throw aside any prejudices you may have had before you came into the jury box, as this is a case of life and death. Such a thing as an unfair leaning of the bench against the prisoner, however unpopular the offence with which he stands charged, is not to be dreaded, as it is simply impossible. It is on you, gentlemen of the jury, that the great responsibility rests. The man in the prisoner's dock has not injured a hair on the head of any one. The most rabid witness for the prosecution does not say that he has. This is a serious affair ; you are asked to condemn a man who has not injured any

one of you. It is easy to condemn an innocent man, but not easy to undo the wrong. It would not be that man who has turned Queen's evidence, and who has probably already bargained with the Sheriff for his reward, who would be responsible; but you, gentlemen of the jury, who would give him the power to do the wrong. In a free country like this the life of the accused is placed in your hands; your verdict will hang or your verdict will acquit him. To execute that power properly is no light responsibility; it requires, especially in a case like this, your utmost efforts to free your minds from all outside influences; to free yourselves of all prejudices or opinions formed before you were empanelled upon this trial, or before you heard all the evidence for as well as against the prisoner. I hope, gentlemen, you will prove that the only thing wanted—an impartial verdict—will be given. If a man cannot get a fair trial, of what use is the law? We may ourselves be in power to-day, and to-morrow be in the prisoner's dock. Would we not want a fair trial in that case—to be tried by men who would keep the oath they took to "give their verdict according to the evidence, so help them God?" It is a great principle of law that a prisoner is presumed before trial to be innocent. He must be proved to be guilty, and the proof must be more than mere suspicion. If you, gentlemen of the jury, have any doubt on your minds, the prisoner is entitled to that doubt. You must not pronounce a man guilty whose guilt is doubtful from a desire to make an example. This is not entirely a case of ordinary law, though my learned friend addressed you as if it were so. In one sense it is so, but in another it is not. This law under which the prisoner is tried is not the ordinary law of the land. It has been changed on purpose for this occasion and after the fact. It has been changed to make that a crime to-day which was not a crime when it was framed.

Hon. Mr. CAMERON—No, no.

Mr. MARTIN—This statute under which the prisoner is tried was passed in 1837, and allowed the accused the right of appeal. This right was taken away by a new act passed this year. There is the more reason that you should give the prisoner the benefit of any doubt in your minds because he cannot appeal and have a new trial.

Hon. Mr. CAMERON—I cannot sit quiet while my learned friend makes such assertions. The right of appeal depends upon the discretion of the judge.

His LORDSHIP—Under the statute to which you refer, Mr. Martin, it is discretionary with the presiding judge to say whether he will or will not—in case the prisoner should be convicted—pass sentence upon him so as to exclude his right of moving for a new trial; but in any case I will not exercise any power I may have to deprive the prisoner of his right of appeal.

Mr. MARTIN—I admit, gentlemen of the jury, that such an expression of his lordship's intention materially alters the case; but, so far as the law is concerned, I was right in the course I took, because, if the prisoner can be deprived of his right to appeal, it was right for me to suppose he would be until I knew to the contrary. And even yet he may be, for it may be the opinion of the other judges that such should be the case. Gentlemen, before going any further I may say that as far as the learned counsel for the prosecution has addressed you on the evils of Fenianism, its wrongfulness, and the necessity of punishing those connected with it, I entirely agree with him. There is no party in Canada and scarcely an individual who has any different opinion on that subject. We have held the country many times before under very disadvantageous circumstances, and we are determined to do so in the future. The learned counsel for the prosecution went into many particulars of the Fenian society, the state of Ireland and of the Irish in the United States. It was not necessary for him to have gone into these matters so fully, though it was very natural that he should give a history of the whole affair. I know well that the intention in doing this was not to prejudice you unduly, yet it was the unavoidable effect of such a course to rouse up any lurking prejudices which may have existed in your minds. No doubt many of you feel strongly on the subject of Fenianism; but if any prejudices exist in your minds against the prisoner I beg of you to dismiss them. The prisoner is indicted as an American citizen. Now, the presumption is that every one is a subject, and it is a principle of law that, in proving citizenship, a prisoner's admission is not evidence against him. The presumption is that the prisoner

is a British born subject. There is no evidence to the contrary, except the admission of the prisoner in a letter written by him that he is an American citizen. There is no evidence to show that he is an American citizen, or if so that he is a naturalized citizen. I submit that it is a common thing for a man to call himself a citizen of the place in which he lives, meaning simply that he lives there. Now, with regard to the prisoner's responsibility for the events which occurred on the Niagara frontier in June last, I submit that it is not sufficient that a prisoner is shown to have been present where an offence was committed. If so, all the witnesses might be put in the dock as well as the prisoner. I submit that it would be a pretty state of things, if, of a number of spectators of a crime, those called as witnesses for the Crown were allowed to escape, and others considered as criminals. He must be aiding and abetting in some way or he is not a criminal. If the prisoner had given any other account of himself when he was arrested than that he was a reporter, the Crown would have brought that circumstance against him. When the prisoner tells the same story from beginning to end it is a strong circumstance in his favor. If he were guilty he would naturally have denied having been with the Fenians; but being there as a reporter, and having nothing to do with the Fenians, he was not afraid to tell the truth. It has been clearly proved that he was seen in Buffalo before coming to Fort Erie; and on the Buffalo side he would have had no interest in telling an untruth. As may readily be supposed his disposition would undoubtedly have been to boast of his connection with the Fenians when he was on the Buffalo side. But in Buffalo he told the witness that he had nothing to do with the Fenians, but was there as a reporter for a paper. You all know, gentlemen, that whenever in any country such events occur as occurred here in June last on a small scale, the newspapers which cater for the reading portion of the world are expected to employ reporters to attend the armies generally of both combatants; they are not particular whether it is regular national war are not. All the leading newspapers of Europe have reporters employed. They had them employed in the case of Garibaldi's invasion of Naples, which was just as illegal as the raid into this

country; also in the case of the Southern and Northern war, which was equally contrary to the laws of the United States; yet no one ever dreamed of hanging a correspondent of any European newspaper merely because he was seen in the camp or speaking to some of the army. What would we have thought of the people who would have treated harmless persons, who only went to chronicle the events that were passing, in such a manner? Would we consider them any better than blood-thirsty savages? And if we ourselves do what we would thus blame in others, how can we expect to escape the execration of the rest of the world; for though what we are now engaged in is being transacted in Canada, we cannot keep it secret. The eyes of the world are upon you, gentlemen, and you may expect to be judged by others as you would judge us. I know it is almost, if not altogether, impossible for any man, in the present excited state of the public mind in Canada to come into the jury box entirely free from prejudice and uninfluenced by the feeling that his neighbors expect him—if he has the opportunity—to make an example of those indicted as Fenians. This is a natural state of mind, under existing circumstances, and it is one I particularly wish you to guard yourselves against, for while it lasts a fair trial is impossible. A trial by men under such an influence would be no trial—it would be a sham, a mere pretence. All you can do will be to convict, irrespective of law or evidence, without a trial under the pretence of tyranny. It would be a crime alike contrary to your honor, your duty and your oaths, and I warn you of the probable existence of such a feeling in your minds, in order that you may entirely free your minds of it and approach the subject in that spirit in which alone it is possible for you properly to discharge your duty; for before you heard the witnesses sworn on this trial you could not have heard anything but reports which carefully excluded whatever might be favorable to the prisoner. We have men amongst us who fought with and expelled the foe, and that, too, at a time when a mean and cowardly party in England did all they could to discourage us and to scout the idea of England doing anything to assist us; and we have proved to the world that we have plenty of physical courage, and that we are determined, either with or without assistance, to fight for our rights to the

last extremity against any comer, however great the odds against us; but it lies upon you, gentlemen of the jury, to prove to the world what it does not yet know—because it has not yet been proved—that a Canadian jury has the high moral courage to resist and overcome their prejudices and acquit the innocent when the evidence makes it proper for them to do so, however unpopular the offence with which they stand charged. But, gentlemen, there is a great array of talent against us. The Solicitor General—the Hon. Mr. Cockburn—is opposed to us, as well as the great talent and experience of the Hon. Mr. Cameron. The prisoner, on the other hand, is but weakly defended, and I may therefore claim your utmost indulgence for him. With these observations I will direct your attention to the evidence on both sides with which you have to deal. You, gentlemen of the jury, have heard that we have applied for a safe conduct for witnesses from the other side, and that it would not be granted to us; not because the prosecution wished to prevent their coming, but because a safe conduct for them could not be legally granted. Now, in any common case, as of a dispute about a horse or a cow, the court would have issued a commission to take their evidence; but in a criminal case this cannot be done, although the life of a fellow being trembles in the balance on the event of the trial. This, I contend, should influence you in favor of the prisoner, that the bulk of the evidence we want cannot be obtained, and induce you to give the greatest consideration to the evidence for the defence which has been brought before you. If we were allowed to produce that evidence here the innocence of the prisoner would be proved beyond the shadow of a doubt. I have letters in my hand from those who did command in that expedition, and who are credible on their oath, who say that the prisoner was not one of them. One of the witnesses who gave his evidence in favor of the prisoner did so under very peculiar circumstances. This witness said under cross-examination that he was with the prisoner on that occasion and was hit with a ball. Now, I contend that the man who admitted that to his own disadvantage was an honest man. Yes, gentlemen of the jury, his veracity stood the test of danger to his life, as by that admission he knew he might be indicted for felony as well as

the prisoner. This man alleges that he came over to Canada unwillingly, and that when he spoke to the prisoner on the subject he advised him to return to Buffalo as fast as he could. Is it likely, gentlemen, that if the prisoner were there aiding and abetting the Fenians he would try to get them to go away instead of trying to obtain recruits? This is the strongest evidence, I contend, that it is possible to get that the prisoner was not there to aid and abet the Fenians, but merely, as he alleges, to report for a newspaper. It is evident from the statements of the witnesses that the prisoner exerted his influence to keep parties from joining the expedition. The very letter produced by the Crown to prove him an American citizen says that he was not one of the expedition, but a newspaper reporter. These letters are produced by the prosecution as evidence, and if their testimony is good in one point it is good in another. The evidence for the Crown is this—they have produced a number of witnesses to prove that the prisoner was seen in several places in company with the Fenians, and was bearing arms. Now, this is a question of identity, and you all know it is a very difficult matter to make out the identity of a criminal whom a witness never saw before in his life. You all remember that a reward was offered for the arrest of the criminal Townsend. People, you remember, became excited and twenty-four or twenty-five persons swore that a man named McHenry was Townsend, although they bore no resemblance to each other, and if McHenry had been far away from his friends and unable to produce witnesses who knew him he would have been convicted as the murderer Townsend. This shows you, gentlemen, how positively uncertain—how very unsafe, indeed—it is to rely upon any one who says that he has recognized a man whom he has only seen for a few minutes in a crowd. I presume, of course, that nearly all the witnesses for the Crown mean to tell the truth, but as they are only men they are liable to be mistaken. One informer, according to his own statement, has already taken a false oath, and his own mother, as you, gentlemen, are aware, swore that she would not believe him on his oath. This perjured man thinks that if he can prove the prisoner guilty he will save himself, and he gives evidence out of mere cowardice. Now, gentlemen of the jury,



I would ask you, as sensible men, is it safe to hang a man on the testimony of one who thinks he must give it to save himself? I think you will agree with me that is not a safe course to pursue, and I think I can show you that it is easy to reconcile the other evidence with the prisoner's innocence. One witness for the Crown is proved to have been in Buffalo at the time he says he saw the prisoner marshalling his forces on the Canada shore. As for the other witnesses, one of them was evidently intoxicated at the time. None of them who say they saw the prisoner were military men. As might naturally be expected they were very much excited. Their own property was in danger; they saw a great number of strangers, and their minds were greatly distracted with the wild ideas which prevailed on that occasion. It could hardly be expected that under these trying circumstances the witnesses could form as correct an opinion of what occurred as at other times when no excitement existed. Of course they would take little notice of the features of the men whom they saw, and from whom they were in danger of losing their lives. Their minds would be entirely taken up with the desire to save themselves and their property. I have no doubt several of these witnesses conscientiously believe they saw the prisoner as they describe. I know you will try to rid yourselves of the prejudices which every one of you must entertain from the general sentiment of the country on the subject. If you do not the trial of the prisoner is a mockery, the form of conviction is a mockery, and you, gentlemen, are convicting the prisoner before trial, because if you convict him on the strength of those prejudices you might as well have returned a verdict before you heard the evidence. I am confident every one of you wishes to do British justice towards the prisoner. People may say you should convict the prisoner in order to make an example; but you have no right to make an example for such a purpose. No man, according to British law, can be found guilty if there is reasonable doubt of his guilt. I adjure you by your oath, and by the eyes of the world which are upon you, to do your duty manfully and fearlessly in this case. Prove to the world that no Canadian jury can be brought to yield to prejudice. If the unfortunate prisoner were not a stranger here

without friends and without money he could perhaps have brought witnesses to prove his innocence. And do you think that those parties who, though afraid to come themselves, but who sent others to fight their battles, would leave the prisoner without a farthing if he were really a Fenian? Is not that one of the strongest circumstances in his favor? If he were one of them they would undoubtedly have helped him out of his present difficulties. Gentlemen of the jury, I hope you will take this circumstance into consideration, and give due weight to all the evidence which has been offered in the prisoner's favor. We do not ask this as a favor, but as British justice, to which we are entitled. You will observe, and no doubt will freely admit, that we labor under the great disadvantage of being followed in our remarks by one of the ablest and most eloquent members of the bar in this country, I mean the Solicitor General for Upper Canada. I hope you will not be led away by the eloquence of my learned friend. However you may admire his speech, however eloquent it may be, I hope you will remember those simple facts which no man can do away with. My learned friend is on the popular side, and he is known to you. I am a stranger; I have never been seen by you before, and you may never see me again; but I trust, gentlemen, you will go according to the evidence and the facts, and perform the duty you owe to your country, your conscience, and your God. The question, gentlemen, depends on this: The witnesses for the Crown are mistaken or they are not. I cast no imputation against the desire to do right on the part of any of these gentlemen, except that miserable informer, Ryall. All the rest, I doubt not, said what they believed to be the truth, but they were mistaken as to the identity of the prisoner. I am certain, they were mistaken in saying that he was where they say they saw him because he was in Buffalo at the time, and consequently could not have been at Fort Erie. You know, gentlemen, that it has been stated that a large number of the officers had swords such as the witnesses describe the prisoner to have had, and some of these officers are proved to have strongly resembled him. Another very important circumstance proves that the witnesses are mistaken as to the identity of the prisoner. You see the prisoner's beard now. Well, the reason he wears his beard as he does

now is that he foresaw that witnesses would mistake him for others, and he therefore let his beard grow. It has been proved, I hope, to your satisfaction, that when he was arrested he had nothing but a small imperial. The man whom the witnesses saw had his hat on, and his forehead therefore would be concealed. As the distinctive feature of the prisoner is his forehead no man would have a distinct idea of him without seeing it. Molesworth (the younger) stated that the prisoner then had a beard exactly like that which he now wears, except that it covered more of his face then. It is proved that there was a captain in the Fenian camp who had a dark coat similar to that which the prisoner is said to have worn; and I contend, gentlemen, that this is the man whom these witnesses saw and not the prisoner at the bar. The prisoner is said to have been recognized early in the morning on the Canada side, but he did not leave Buffalo till noon. The witness Newbigging states that he addressed a man whom he now takes to be the prisoner as Col. Lynch, and was not corrected; but there it nothing to prove that he addressed the prisoner as Col. Lynch.

Hon. Mr. CAMERON—Yes there is; Newbigging swears to it.

Mr. MARTIN—Well, gentlemen, at all events, no christian name was given. Lynch is such a common name in the States that lynch-law is taken from it. There may have been a Col. Lynch there who was not the prisoner, and I am sure you will readily acknowledge that amongst one thousand or fifteen hundred men there may have been several Lynches. I doubt not the witness Newbigging may have imagined at the time that he heard the name of Lynch given to the man he then saw, having heard afterwards that there was a person of that name there. And indeed I do not think it at all likely that he would have taken notice of that particular name, under the circumstances. When Mr. Newbigging was told that there was a Col. Lynch to be identified in Toronto jail, he thought of course that he must have been the same man whom he saw at the Fenian camp. As there is nothing to be gained by the witnesses for the defence giving their evidence in favor of the prisoner, you should believe their testimony and bring the prisoner in not guilty; but even if you reject it the case is doubtful, and as honest, independent men, you must give the prisoner the benefit

of the doubt. Now, gentlemen, in conclusion I shall only leave the case in his lordship's hands, with this simple and solemn entreaty, that you will divest your minds of all prejudices, and, if you see that there is reasonable doubt of the prisoner's guilt, that you will act in accordance with your solemn oath, which you have taken in the presence of this court and of your Maker, and acquit him.

The SOLICITOR GENERAL (Hon. Mr. Cockburn) then addressed the jury in reply. He said:—May it please your lordship: gentlemen of the jury—The prisoner at the bar is being defended by counsel who has displayed a great deal of zeal and ingenuity in his defence. I am glad that he has done so—that he has exhibited that zeal and anxiety to bring out before the jury every point that could possibly bear in favor of the prisoner during this trial. The prisoner cannot say at all events that he is hastily tried or that his case has not received every consideration and justice at the hands of his counsel. I am glad too that the learned gentleman has stated that every opportunity has been offered by the prosecution in order to obtain a fair trial, and that there is nothing to show that any desire exists on the part of the Crown to prejudice the minds of the jury against the prisoner, but that on the contrary everything has been done to procure for him what he is entitled to in this or any other court in this country—a fair and impartial trial according to the evidence. Those who are engaged in this prosecution desire nothing more. They desire that everything that can be advanced in favor of the prisoner shall be laid before you, duly entertained, and gravely considered by you before deciding on your verdict. We feel for the unfortunate position occupied by the prisoner. We feel that he is undergoing a trial by the result of which his life may be forfeited to the law. We feel a due sense of the solemnity of the position and of the deep and painful responsibility that rests upon us all. It is a fearful and painful duty to perform, to decide a question of the life or death of a fellow-creature; it will be a painful duty to his lordship to impress upon you, gentlemen, the law which relates to this case; and it will be a painful duty for you to take that law and the facts into consideration, particularly if after fully considering them you feel it to be

your duty to find a verdict of guilty. But notwithstanding that this painful responsibility rests upon all engaged in this trial, we feel that the duty must be performed, and that as a grave outrage against the laws of the country and society at large has been committed, it is necessary to discharge that duty, both for the punishment of the past crime and to protect this country against further inroads of a like infamous, cruel and unjust character. It is necessary in order to vindicate the law that has been outraged. It is necessary in this court, and without regard to any feeling of sympathy—any feeling of false sympathy—towards the prisoner on the one hand, or of any threats of retaliation or revenge that may be made on the other, that the law shall be carried out and the duty falling upon us fairly and impartially discharged, in view of the evidence that has been adduced before us. The learned counsel has claimed on behalf of his client, in the first place, that he has not been properly charged in this indictment, because he claims that the prisoner is not a citizen of the United States. He is charged in the indictment as being a citizen of the United States, who entered this country for the purpose of committing acts of hostility against the Queen and the people of this Province. The prisoner now says that he is not a citizen of the United States, but that he is a British subject by birth, and that having been once a British subject he must be held by our law as always a British subject. Now, without regard to the question whether the prisoner is or is not a British subject, I contend that the case comes expressly within the direct meaning and operation of the law. The law proposes to deal with certain persons who came into this country with intent to levy war, be they subjects of the Queen or citizens of a foreign state at peace with England; and the prisoner at the bar, who is charged with being one of them, has himself in written language expressly claimed that he came into this country in the character of an American citizen. In the letters written by him, which were produced in evidence yesterday, he states distinctly that he came "into Canada as a peaceable American citizen, without any hostile intention whatever;" and in that character of an American citizen as described by himself the Crown has a right to charge him. We have the fact proved in his own handwriting that he entered this

country as a citizen of the United States, and that is all that is necessary to prove against him, for it is of no consequence whether he was at one time or is now a British subject. he is to all intents and purposes a citizen of the United States; for any person who has resided in that country for any length of time, who has made it his home, and who has acquired there a right of protection under its laws, becomes a citizen of the United States, and I feel that the evidence is sufficient in this case to prove the charge laid in the indictment which put forward the prisoner in the character of a citizen of the United States. Then, gentlemen, the learned counsel for the defence has set up a further point—not with any idea, probably, that it will operate on your minds as a valid defence, but still with a view perhaps to prejudice your minds and the public mind in regard to this prosecution. The learned gentleman has stated that the prisoner has been indicted and is now being tried under a law that has been made *ex post facto*—that it declares to be a crime that which was not a crime at the time of its commission. Gentlemen, I have to state that this not the case. I state it with all confidence, and I am sure his lordship, when he comes to address you, will confirm what I state. The prisoner is being tried under a law in regard to which there has been no change since it came into operation, so far as concerns its bearing upon citizens of the United States. This law has been in existence for the last twenty-five years, and as far as the prisoner is concerned it is now precisely as it stood originally, the only change that has been made in it not applying to him in this prosecution. Now, gentlemen, with regard to the evidence, I am sure that I state the opinion of almost every person who has attentively listened to the witnesses on both sides, when I state that the testimony—I regret that it is so, for the sake of the prisoner—could scarcely have been more pointed and conclusive. Five witnesses have been called for the Crown, every one of whom identified the prisoner as a person whom they saw at Fort Erie—a person who was present there apparently as an officer commanding a portion of the invading force, who gave directions in the same way as a military officer gives directions to his soldiers, and who was obeyed by them. Every one of those witnesses so recog-

nized him; and their intelligence, their evidently superior station in life, are such, I think, as to banish from your minds at once any suspicion as to their credibility. Indeed it is not contended by the learned counsel for the prisoner that there was any intention on the part of these witnesses to exaggerate or say one single word that they do not believe in their own minds to be perfectly true. That being the case you will bear in mind that every one of them when in the witness-box was asked particularly to examine the features of the prisoner, and every one of them after doing so stated beyond any doubt in their minds that the prisoner is the same man whom they saw at Fort Erie on the 1st and 2nd of June last, engaged in the acts which have already been mentioned. To rebut that testimony the learned counsel has called—whom? And here in the first place I may remark that, if the story that has been so ingeniously set up of the prisoner having come into the country in the capacity of a reporter for a newspaper is true, it might have been expected at any rate that there would have been some proof from his employer or the person who procured him to come here for that purpose, but no such person has been brought forward. There is no evidence whatever to show that he came to Canada in that capacity, except what he himself has stated, and that, you need hardly be informed, is no evidence at all. It would have been an easy matter for him to have brought here the editor or proprietor of the paper for whom he says he intended to have reported the proceedings, if his statement is correct that that was the object for which he came to this country. Then it is suggested by the learned counsel that those witnesses who have been called for the Crown to identify the prisoner are mistaken—that this is a question of disputed identity, and that the witnesses have mistaken the prisoner for some other man whom they saw at Fort Erie; and the defence then proceeds to give another account—which is put forth as the true account—of the prisoner's movements on the days charged. It is stated that he left Buffalo for Fort Erie at a later hour than that when he was seen by the witnesses for the Crown. They state that he was seen by them between the hours of eight and nine o'clock, apparently rallying and manœuvring his men, while it is urged by the defence that he did not leave Buffalo till noon. To sustain that

assertion, a cab-driver who carried him from one part of the city and put his valise on board the ferry boat is brought forward to swear that the prisoner did not leave Buffalo till noon. In addition to this, however, the defence brings in a witness, O'Malley, who, in the course of his statement on behalf of the prisoner, says that he saw him at Fort Erie at eight o'clock in the morning. This is what was said by one of the witnesses, not for the Crown, but for the defence, and in the face of it the theory must break down that the Crown witnesses are mistaken as to the prisoner's identity. It cannot be pretended, when one of the witnesses called for the defence corroborates what the Crown witnesses have stated that their evidence is not to be depended upon. Then, in weighing the evidence in order to decide between the two theories, you must look to the character of the witnesses. Those who have been called for the defence are all, naturally enough perhaps, anxious to save the life of one who is a fellow culprit with themselves. They have an anxiety to secure an acquittal not only for his own sake, but they know if it is secured how materially it will effect the prosecution hanging over their own heads. They know that if acquitted and discharged, the prisoner will prove a valuable assistant in procuring a release for themselves from the charge that hangs over them. You will see, therefore, that these parties have a strong motive for the evidence which they have given—a motive which must more or less influence their minds; perhaps not to the extent of making them deliberately commit the crime of perjury, but certainly to make them desire an acquittal for the prisoner, which they know would operate to their own advantage. Now, on the other hand, there can be no motive which would induce gentlemen called as witnesses for the Crown to exaggerate or say one word which would have the effect of increasing the difficulties the prisoner labors under in meeting this charge. The learned counsel for the defence complains, to a certain extent, that he has been trammelled in his defence, because he has not been able to call witnesses who could have proved, he said, that the prisoner's occupation and object in coming here were different from those charged against him. Well, I think you see at once that it is an extraordinary proposition to make that the prisoner, or any



other individual, should expect that General O'Neil, or any other leader of the invading band, should be allowed to come into a Canadian court of law without being held responsible for the crime which has been committed by him; and which, perhaps, he has been the chief means of inducing others who were his dupes to join him in perpetrating. It would be a monstrous thing to make such a concession, and it is an extraordinary expectation that the court would give a safe conduct to him to come here for such a purpose. Moreover, it could not be done, because it would be contrary to law, and the mere mention of such a complaint is not, I think, a reasonable thing to advance on behalf of the prisoner. But if the prisoner could have supposed for a moment that General O'Neil would have come here under these circumstances, that supposition is hardly borne out by the singular fact that the letter which the prisoner wrote to him, and which was produced in court yesterday, has remained unanswered by O'Neil from the time it was written until this moment. O'Neil seems to have treated the application with the same chilling neglect that he is, no doubt, prepared to treat all similar applications that may be made to him. It seems to be contended by the learned counsel that the position in which the prisoner appeared at Fort Erie made all the difference in his favor, and that the law will be satisfied, and he will be saved from the consequences of the crime charged against him, if it can be shown to your satisfaction that he was there as a press reporter. Now, I beg to differ altogether from the learned gentleman, and to say that there can be no distinction between members of the press and other persons, and that if they choose to accompany an unlawful band in an enterprise of this kind, and by their presence and countenance give aid and comfort to any such wicked organization, they become themselves *particeps criminis*, and are equally with the others chargeable with all the consequences that may follow the offence. The law declares that all who are assembled with rebels in arms against Her Majesty are guilty of treason. It matters not what capacity they assume—no matter whether they profess to fight with the pen or with the sword—if they are present and [give the rebels countenance and encouragement they are equally guilty with them

even although they never used or carried arms. Now, after looking at the evidence on both sides, it is somewhat strange that without relying on a single witness called for the Crown, there is evidence to be found, ample evidence, on the other side to convict the prisoner. One of the witnesses called for the defence, O'Malley I think it was, states that the prisoner admitted to him that he came from Louisville with a band of Fenians. We have evidence from one or two others of the prisoner's own witnesses to prove that on Friday, the first of June, he was at Fort Erie in company with the Fenians who crossed over from the American side; and we know—indeed it is not attempted to be denied—that he was there on Saturday, the 2nd of June, that he was arrested there after the Ridgeway affair—after that outrage was committed on our people by the band that he accompanied across the frontier. The evidence of these witnesses called for the defence is sufficient alone, without relying on the evidence adduced by the Crown, to warrant a conviction. The question for you to consider is, have you any reasonable doubts in your minds as to the identity of the prisoner? Do you suppose it possible that there was another man of the same name in that camp, and holding the same rank and authority in the band? You know from the first witness called for the Crown, Mr. Newbigging, that he was directed by some of the Fenians to Colonel Lynch; that he addressed him as Colonel Lynch; that he did not hesitate to accept that position, or object to being so called, but answered the witness as such; and that the man so addressed and who so answered is the prisoner at the bar. Now, you must either believe Mr. Newbigging's evidence or you must reject it. Was there anything in the mode of giving it which leads you for a moment to doubt its truthfulness? I do not believe there was. The question then resolves itself into this—have you any doubts in your minds that the prisoner was in company with those who crossed over, and that he was aiding and abetting them in the accomplishment of the unlawful enterprise in which they were engaged? It seems to me that the facts have been so clearly proved that you cannot hesitate to render a verdict for the Crown. I shall leave the case in your hands subject to the charge of his lordship, and satisfied that you know

your duty, whether it is a painful duty or not, and that knowing your duty you will do it fearlessly, faithfully and conscientiously.

HIS LORDSHIP, in charging the jury, said—You must not allow your minds to be affected by an idea as to the consequences of what your verdict will lead to. You have nothing to do with that, and you should disabuse your minds of it as far as possible. Now, this case presents little more difficulty than any ordinary criminal case. The Crown sets up a certain theory sustained by certain facts. That theory and those facts are disputed by the defence. The Crown sets up this—that war was levied by certain unlawfully armed men against Her Majesty ; that the prisoner was among those men, either armed like them or giving them countenance or encouragement ; and the Crown moreover undertakes to identify him as one who had command amongst them. The theory of the defence is that the Crown is mistaken in the man ; that he is not the person alleged to have had command, and that he was not there at the time charged. The principal witnesses, however, speak of him as being in command. The defence further says that he is proved to be a British subject, and not an American citizen as charged in the indictment. Now, with regard to war having been levied, there is the evidence of Mr. Dixon, Mr. White, Mr. Hodder and Mr. Schofield to show you that our troops were there ; that those persons with whom the prisoner is charged with being associated did come in contact with the troops and did kill some of them, did wound others and did take others prisoners ; that they were formed in battle array ; that they marched and were armed and commanded in military order. These are all circumstances which, if proved, constitute the offence of levying war and of being unlawfully in arms against Her Majesty. Now, the first question is, has the Crown satisfied you upon that point ? Were those persons who were there armed against Her Majesty, with intent to do some felonious act—some act calculated to overthrow the government established in this country ? Well, the evidence of those parties who have appeared before you points to that—namely, that those persons referred to were in arms against Her Majesty with intent to levy war. They did everything that the act of levying war can lead to—they killed some, wounded others and

took prisoners of others. That is levying war, and those are all the consequences that the levying of war can give. Now, that is the first point disposed of. The next is was this prisoner in command among those persons who thus levied war against Her Majesty? What is the evidence upon that point? You have first the evidence of Mr. Newbigging, who seems to be a very intelligent man, and who, without any apparent exaggeration, gave a very clear, straightforward and distinct account of the affair. He says that those persons marched as a body of military men usually marches, although they were not in military uniform, and that they were armed with rifles and bayonets, some of them having swords denoting superior rank among them. They came and pitched their camp in his father's farm, and commenced their warlike operations by taking possession of what lay in their way. They seized three of his father's horses, which fact it was that led him to come down to the camp and look after them. He says that with a view of getting them to take care of those horses—you can well understand why he should have that anxiety—he went down to the camp to see the person in command. He says that at that time the bridge at Frenchman's Creek as well as the camp was guarded by men who had arms in their hands and who seemed to act as sentries. He proves that fact, and his evidence is further proof that they were there in arms contrary to law. He then says that when he reached the camp he enquired for General O'Neil, who was reported to be chief in command of the body. He was informed that O'Neil was busy, and that Colonel Hoy was in the camp, but he was referred to Colonel Lynch. Newbigging then went up to this person to whom he was referred and addressed him as Colonel Lynch without being corrected, and he says that he had a sword slung from a belt by his side. Now, the principal point in this witness's evidence is whether the person so addressed was the prisoner at the bar. The witness says the prisoner is the man, and it is for you to say whether that statement should be received or rejected. Then, there is the evidence of Arthur Molesworth, who says that he saw the prisoner on the 1st of June early in the morning, that he noticed him particularly because he halted to speak to two men who were there, that it was close by his (the witness's) yard, that he had a

good opportunity of seeing him, and that he had a sword slung by his side in a steel scabbard. Young Molesworth, too, a son of this witness, speaks positively of the prisoner being the person who was there upon that occasion and arrayed in the manner described. He speaks of him as wearing a black felt hat, with a broader brim than those worn here, and a coat which could not be distinguished from that of any civilian. The elder Molesworth does not speak so positively as the younger, but he does say that he has no doubt the prisoner is the person whom he saw on that occasion. Against these witnesses the defence says nothing except that they are mistaken as to the man. Then there is the evidence of Stephens, who says that they took him prisoner at Fort Erie, at which he was not very well pleased, and that the prisoner was the man who made him go into the ranks and who dressed the men into line. He says further that after he was marched half-a-mile he was dismissed, and that the prisoner was the one who had charge of that part of the force, that he had a sword by his side, and that at his command they marched forward between eight and nine o'clock in the morning. Next there is the evidence of William Murray, who had two opportunities of seeing the prisoner—first in the morning and again in the afternoon—and that on both occasions he was armed with a sword; and he says he has no doubt that the prisoner is the man whom he then saw. These, then, gentlemen, are the persons who speak to the identity of the prisoner, and this is the case which the Crown makes out upon that point. Now, with regard to another point—that of citizenship. The prisoner claims, in the letters which have been read to you, to have come here as an American citizen, and the Crown says it will take him at his word. The question of law on this point has in former times led to very serious results. Although the theory of our law is that a man who is once a British subject is always a British subject, the practice has latterly grown up for the Crown not to prevent its subjects from becoming citizens of another country or to punish them for throwing off their allegiance. The Crown allows its subjects to become naturalized in another country without prejudice, and so far to relieve themselves from the allegiance they owe as subjects. In this case the Crown then has a right to try the prisoner as a

British subject, but as he has chosen to throw off his allegiance, the Crown says, as it has a right to say—"Well and good, we will treat you as an American citizen." The prisoner alleges that he did not come to this country to levy war, but for another and peaceful purpose; and it is stated further that he was not present at the place where war was levied at the time when he is alleged to have been seen there by the witnesses for the Crown. To sustain this statement, Cooney, a cabman, is produced by the defence, who states that on the first of June, at about twelve o'clock, he drove the prisoner from Buffalo to Black Rock, where he crossed the river. But this statement conflicts with that of another witness, Cormick, also produced by the defence, who says that he saw the prisoner at Fort Erie, between eight and nine o'clock that morning. Now, it appears that either one or the other of these witnesses must be mistaken. If Cormick is right, then his statement corroborates the case for the Crown. If Cooney is right, then his idea as to the time he saw the prisoner in Buffalo is against, not only a witness who is called for the defence, but also against the witnesses for the Crown, who state that they saw the prisoner at Fort Erie, and also saw him marching from there down the river bank, between eight and nine o'clock on the morning of the first. It is for you to say whether you believe the cabman, when he says that he drove the prisoner from Buffalo to Black Rock at noon, or, accepting the evidence of the other witnesses, assume that he is mistaken in making that statement. The defence suggests that the person seen by the witnesses for the Crown at Fort Erie was not the prisoner, but some man whose name is unknown, who was called captain, and who is said to have come from Indianapolis. It is suggested that this man resembles the prisoner, but that the witnesses are mistaken in assuming it to have been him. You will have to decide whether this theory can be reconciled with the facts testified on oath. Then with regard to the statement that the prisoner was there as a reporter for a newspaper, and that he was seen taking notes without being armed with a sword or otherwise, it will be your duty to consider whether it was not possible for him to have been in command of the invaders, and to have done the work of a reporter as well. But supposing that he was there as a reporter, and not bear-

ing arms, if it is a fact that he was there in furtherance of the objects of those who were armed, if he aided and abetted in the accomplishment of their designs, then the law will hold him to be just as guilty as if he actually had arms in his hands. If he was there by accident, as a mere stranger to the others, then it would be very proper to consider whether it would be fair to charge him in connection with their acts; but a man can occupy no such equivocal position as that in an affair of that kind. The law will not recognize him as a neutral. If he was there associated with them he became amenable to all the consequences of what they did. If he was there to aid and comfort them in any way whatever—as a spiritual adviser even, or as a medical man, or in any capacity which would give them encouragement and assistance, even although he did not bear arms—the law makes no distinction between him or any other who merely assisted about the camp, and those who actually bore arms and committed acts of hostility. The law holds all to be equally guilty. I had occasion at an earlier period of this assizes to explain to the grand jury the law upon this point, and it is perhaps hardly necessary for me now to refer again so minutely to it. If three or four men conspire together to kill another, and if one of them watches while the others commit the deed, the law holds the one to be just as guilty as they who actually shed the murdered man's blood. Again, if a party of men come together to rob a house, and if some of them enter to commit the robbery, and the others remain outside to give warning, if necessary, those who remain outside are held to be just as guilty of the crime of robbery as those who enter to carry it out. This is the principle of the law in regard to all enterprises of that kind. There can be no distinction between those who actually commit the crime and those who, by their presence and counsel, give aid and encouragement to its commission. A man cannot stand neutral while a nefarious act is being committed. He must either help the perpetrators or he must dissuade them from the act, and if he cannot dissuade them, he should no longer stay there with them, but endeavour to make those acquainted with the matter who would either prevent the commission of the act, or secure the punishment of the guilty parties. Well, in this case the prisoner went there, as he says, as a reporter, but if in that capacity he gave

courtenance and encouragement to the crime, he cannot say that even as a reporter he was there innocently. Those men went there on an unlawful enterprise, and being there with them, the prisoner was either for them or against them, just as the evidence may bear out. It can hardly be supposed that he was there in an unfriendly attitude to them, but rather to aid them by the statements in regard to their acts which he would make in the newspaper of which he alleges he was a correspondent; for, does any one believe that they would have allowed him to remain in their camp if they thought that he was there for a purpose prejudicial to themselves—if, for instance, he was there to report to the government of this country the acts which those men were committing? It is clear that they did not treat him in the sense in which newspaper reporters usually claim immunity, namely, on the ground that he intended to report fairly and impartially all that occurred; for in that case he would have had to make declarations which would not have conveyed an approval of the proceedings of those men, but would rather have censured them and caused them to desist from their unlawful undertaking.

Mr. MARTIN.—I would call your lordship's attention to the evidence of Whalen, who states that the prisoner dissuaded him from crossing over into Canada.

The SOLICITOR GENERAL.—Yes, but they were both found next morning at Fort Erie.

Hon. Mr. CAMERON.—He evidently did not act on the dissuasion.

The SOLICITOR GENERAL.—No, neither himself nor the man dissuaded.

His LORDSHIP.—The evidence of Whalen, to which the learned counsel calls my attention, is to this effect: "I remember seeing "prisoner on the first June last at Fort Erie, about one in the after-noon. He was half a mile from the village. He was walking from "the village. He was walking round. I understood he was a re- "porter for the Louisville *Courier*. I saw some of the officers in "command then. I saw no officer resembling the prisoner. I took "notice of his heavy moustache. I did not take notice of his "beard. If his beard had been as large as now I should have noticed "it." On cross-examination Whalen said: "I was seduced to come



“over on the Friday and found I was in a bad fix. I asked the advice of prisoner. He told me to stay till night and get away. He said he had nothing to do with it, only as a reporter. I met with an accident. I had a minie ball through my neck.” If you find that the prisoner was there, although as a reporter, in furtherance of the scheme the band had in view, then he was there aiding the enterprise, just as much, and probably more effectually, than any one who was there in arms. If you find, however, that he was there merely as a spectator, not doing anything wrong, or intending to do it, it may have some weight with you, even although he did not dissuade the parties from their designs, but you must consider whether in that case he would have been permitted to have gone into their camp and remained along with them. It is suggested by the defence that this is a case of mistaken identity—that the prisoner was there in the innocent character of a reporter, and is now mistaken for one who was in command of those men. Well, it is for you to say from the evidence, whether this suggestion should be accepted or not. Persons and things are identified by associations of ideas, and although those who speak as to identity may fail in their description of minute marks or signs, yet they may be clear as to the general appearance of the person or thing described. This we know is often the case in the ordinary intercourse of life. Your own experience must prove to you that you are often able to identify a thing without having a sufficient knowledge of it to describe every part correctly. It is for you then to apply that experience in this case, and to determine whether the statements of the witnesses who swear to the prisoner as being the person they saw in command at Fort Eric, are of so probable a character as to be received by you with confidence. I now come to the question as to the doubt which may arise in your minds to justify you in acquitting the prisoner. That doubt must be no fanciful idea, founded on some part of the evidence of lesser importance or upon the view you may take of that evidence. It must be a doubt of such a nature that were you to convict the prisoner it would afterwards cause you to feel alarmed as to the justness of your verdict. If the doubt is not a mere passing uncertainty upon some trivial point, but is sufficiently strong and distinct as would likely be the cause at some

future time of a feeling of uneasiness in regard to your verdict, then it would be a doubt of which you should give the benefit to the prisoner. It has been made a subject of complaint, by counsel for the defence, that application was made and refused to give certain parties safe conduct in order that they might come here to give evidence for the prisoner. I cannot see that the complaint is well grounded. I cannot pervert the law in order to tell those parties that they might come here without risk of prosecution; and the Crown cannot allow them to come here without holding them responsible for any acts which might be charged against them, because the Crown also cannot pervert the law to prevent their prosecution for acts done in violation of the law. It would have been wrong to have deceived those people with the hope that they might have come here free from the risk of prosecution, and therefore it was that I spoke plainly and conclusively upon the point when the application was made. I do not think that the counsel for the defence has any right to complain because those people were refused safe conduct to appear in this court. His lordship then read over his notes of the evidence, which, he said, he desired the jury should have placed clearly before them before retiring to consider their verdict. It was important that the statement made by each witness should be fresh in their memory when they left their box to deliberate. When he read the evidence of the witness Ryle he remarked—The evidence of this witness has been objected to on the ground that he is a notoriously bad character, and his mother has been produced here before you by the defence in order to impeach his veracity. He admits himself that he was an accomplice of those men, that he came over with them from Buffalo, and was taken prisoner about the same time with the rest. This being the case it is not safe perhaps to place much confidence in the statement he makes in regard to the prisoner, and if you see fit you may throw it out altogether and depend only upon the evidence of the other witnesses.

The jury then retired to deliberate upon their verdict, and were absent nearly an hour and a half. On returning to the court their names were called over, and

The CLERK put the question in the usual form—Gentlemen of the jury, have you agreed upon your verdict?

**THE FOREMAN.**—We have come to the conclusion that the prisoner is GUILTY.

The verdict having been recorded on the indictment.

**THE SOLICITOR GENERAL** said—I move, my lord, the judgment of the court on the prisoner at the bar for the crime of which he has been convicted.

**HIS LORDSHIP.**—Robert B. Lynch, have you any thing to say why the judgment of the court should not be passed upon you for the offence of which you have been found guilty?

**THE PRISONER**, who spoke in a firm and distinct voice, said:—Well, my lord, you must have noticed the inconvenience or at least the disadvantage that my counsel labored under in not being able to bring forward the evidence that would have proved effectually my having had no connection with the late Fenian raid into this Province. I state now, before your lordship, the bar, and all the gentlemen present, that I had never in any lot or capacity any part in the raid; that I came here in the capacity that I represented at the time I came into the country and since; that I had no idea that I was violating the laws of Canada or the neutrality laws of the United States, my own adopted country, and that I was not aware there was any objection to a reporter following the army and reporting for the press the incidents and events of the action. Had I known that it was an offence I would have been careful to remain on the other side. With regard to the manner in which the Crown has conducted the prosecution, I must say I think I have been fairly dealt with, and that Mr. Cameron and the other gentlemen who have appeared for the prosecution have acted very fairly towards me; and I think I should take this opportunity of saying so.

**HIS LORDSHIP.**—The reason I asked you if you had anything to say was to give you an opportunity of offering any legal objections you might have to the sentence of the Court being passed upon you. The facts of the case upon which you have dwelt are no longer open to discussion.

**THE PRISONER.**—With regard to the legal question I know nothing, except that I am innocent of the charge of which I am alleged to be guilty, and I pledge myself before Almighty God, before Whom I will appear some day, that I never saw the witness

Joseph Stephens, who testified yesterday, till I was brought into his house at the ferry on the 2nd of June last. I never spoke to the man or saw him before I was taken prisoner, although he has sworn that he spoke to me.

The crier of the court then proclaimed silence while his lordship passed sentence of death upon the prisoner at the bar.

His LORDSHIP (who was apparently much moved by the painful duty he had to perform) said—I am very sorry to find a man of your age and experience standing where you now stand. You must have seen a good deal of the world; and you are a man not without education and certainly not without intelligence. With regard to the offence of which you have been convicted, the evidence is perfectly clear and conclusive that you were there at Fort Erie, not as an unarmed reporter, but with arms and in some kind of command. What that command was does not distinctly appear. But if you were there only as a reporter, you would have known, if you had reflected for a moment, that no war had been proclaimed, that there was no war, that the invasion was an atrocious inroad upon this country, and that you were there to report to others who were interested in the success of the unlawful enterprise, and who would gloat and glory over the slain among our people. While a single word would have had the effect, or while there was a possibility that it would have had the effect of prejudging your case in the minds of the jury, I carefully abstained from uttering it; but there is no reason now why I should abstain from commenting upon your crime, because every presumption is that you are guilty, and it does not lie upon me to extenuate your fault or affect not to see it in its present dark light. You and those who were with you profess to have come here to redress the grievances of many centuries and to right the wrongs of an oppressed people. You alleged that the iron heel of the Saxon was pressed on the neck of the Celt hundreds of years ago, and that your object was to free your land from that oppression. If you had reflected you would have seen that you began to do this by attempting to inflict upon us the very injuries under which you complained your native land was suffering. Why should your iron heel be placed upon our necks? In what way did we hurt you that

you should endeavor to do us this grievous harm, and why should our homes be made desolate, our young men slain, and our farms pillaged by you? Will any man of sense answer these plain questions? Was it anything less than murder, was there any possible excuse for you to come here in the dead of night, to kill our people, to ravage our homes and to lay waste our farms and habitations, in order, as you say, to relieve the condition of Ireland? What right had you or who could have authorized any man to commit such a wrong as you perpetrated upon us? It is putting the matter in a very plain and clear light, just such a light as you must have perceived it in if you had thought for a moment before going into this mad and wicked enterprise. You stand there surrounded by the friends and relations of the men you slew on that occasion. If you came here as a reporter even, you were not guiltless, because your object was to encourage others to follow up if the attack was successful, or keep them away if the reverse. You could have had no other object than to slay our people and destroy our homes. Now, looking at it in that light, you cannot be surprised that the law should be enforced and that you should suffer its dread penalty, as I am very much afraid you will; for how could we punish the young, unreflecting, reckless men who were brought here by you and others like you, who placed confidence in you, who put faith in what you said—how, I say, could we, in justice, punish them if we allowed you the greater criminal to escape? You complain unjustly that those in command of the aggressors were not permitted to come here and testify in your behalf. Why should they be allowed to come here? I endeavored to explain to the jury, and you must have seen it clearly, that I could not pervert the law, and that if the Crown had pledged itself to give those men safe conduct, the pledge could not have been carried out, because, like all others who had committed crime, they were amenable to the law. In the course of your trial you have had all the justice that could possibly be expected; you have had the advantage of a strict observance of all the forms of law, and every one abstained from urging too hardly against you that which might fairly have been urged. But having been thus tried and found guilty I would

fail in my duty if I did not point out your crime in its true light, now that I am about sentencing you to appear before a Judge who sees things as they are. It is a very painful thing, the most painful thing that a man could be called upon to do, to doom a fellow creature to death; but the requirements of society whose rules you have outraged urge it upon me, and the law of the land demands that I should not shrink from the duty. If I could I would. As the law now stands you might be sentenced to immediate execution. The law puts that discretion in my hands; but inasmuch as that law was *ex post facto* as to you, I shall certainly not exercise any discretion I may have in order to shorten your existence one single hour. And, moreover, as you had a right before that law was passed to bring into court the whole question in appeal from the decision of this court, if there was anything wrong in the evidence or improper in the rulings of the court, God forbid that I should deprive you of that opportunity. You shall be dealt with just as the law was when you committed the offence; so that if there has been anything wanting in justice during your trial, or if in the opinion of my learned brothers the evidence does not sustain the conviction, you will have time and opportunity to appeal against it. If I have received evidence that I ought not to have received, or if I have put a wrong construction upon it in charging the jury, it will be open to you to complain of it; and in order that you may have the opportunity of doing so, the execution of the sentence will be delayed till the end of next term, just as if the law had not been passed authorizing immediate execution. It now remains for me to pronounce the dread sentence of the law. By the statute the crime of which you have been found guilty is punishable with death, and I can exercise no discretion. The sentence of the court therefore is, that you, Robert B. Lynch, be taken to the place from whence you came, and from thence, on Thursday, the 13th of December next, to the place of execution, and that there you be hanged by the neck till you are dead—and may God have mercy on your soul!

The prisoner, who received the sentence of the court with great composure, was then removed.

## TRIAL OF JOHN M'MAHON.

FRIDAY, October 26, 1867.

The court opened at ten o'clock this morning, and the building was soon filled by an anxious crowd of spectators. Mr. Justice John Wilson having taken his seat on the bench, and the Hon. Mr. Cameron, the Solicitor General and Mr. R. A. Harrison having arrived to conduct the case for the Crown, and Mr. M. C. Cameron for the defence, and the other members of the bar engaged by the American Government having also entered the court, some preliminary business was disposed of, after which an order was given to place the Rev. John McMahon in the dock.

John McMahon was brought into court and placed in the prisoner's dock. He was dressed in a new black coat, cut in clerical style, with black trowsers and vest. He wore around his neck the white band usually worn by clergymen of the Roman Catholic church. He was cleanly shaven, and altogether he presented a respectable appearance, although his face and expression were not very intellectual.

The CLERK then called the following jurors, who were sworn to try the case:—

George Hutchison, of Albion ;	Alexander Neilson, farmer, of
James McMaster, farmer, of Etobicoke ;	Scarboro' ;
Donald Currie, yeoman, of Caledon ;	Robt. J. Smith, of Yorkville ;
Andrew Graham, farmer, of Markham ;	James Wadsworth, of Etobicoke ;
Ebenezer Anthony, farmer, of Chinguacousy ;	Nathan Irwin, farmer, of King ;
Henry Norris, farmer, of Albion ;	Thomas Jackson, farmer, of Vaughan ;
	William Story, farmer, of Whitechurch.

The CLERK then read the indictment, the terms of which were similar to the indictment against Lynch, and to which the prisoner had pleaded not guilty, and instructed the jury that it was for them to hearken to the evidence, and determine whether the prisoner was guilty or not guilty.

Mr. R. A. HARRISON, on rising to open the case for the Crown,

said :—Gentlemen of the jury: The prisoner at the bar is charged with the offences mentioned in the indictment which you have heard read by the clerk of the court. The indictment contains three counts, in each of which he is charged as an American citizen. The first count charges him with having, as an American citizen, entered Upper Canada with certain evil-disposed persons with intent to levy war against her Majesty the Queen; the second, with having unlawfully continued in arms; and the third with being in Canada with other evil-disposed persons, while committing an act of hostility. This indictment was framed under a statute that has been in force in Upper Canada since the year 1840. In that year the legislature of Upper Canada passed an act declaring that in case any person, being a citizen of a foreign state or a subject of a foreign state, should enter Upper Canada with intent to levy war, and in case he continued in Upper Canada with intent to commit an act of hostility, every such person should be deemed guilty of felony. The same act also provided that subjects of Her Majesty, offending under like circumstances, would also be guilty of the crime of felony. That statute embraced three classes of persons—subjects of a foreign state, citizens of a foreign state, and British subjects or subjects of Her Majesty. The statute provided that subjects of Her Majesty were liable to be tried for the crimes I have mentioned by court martial, but citizens or subjects of a foreign country so charged might be tried by the ordinary tribunals of the country. An act was passed during the last session of the legislature, not making any new offence whatever, but simply declaring that in the case of persons who were subjects of Her Majesty, they might, like citizens of a foreign state, be tried before the ordinary tribunals. The act of last session created no new offence. In that respect therefore it is not retrospective. It was made rather in favor of subjects than against them, because it made the ordinary mode of trial apply to them the same as to citizens or subjects of a foreign state. I make this statement because it has been asserted that there has been *ex post facto* legislation as to the offence, and I think erroneously asserted for the reasons which I have mentioned. The prisoner at the bar, however, is on his trial charged as an American citizen, and the act of last session has no reference to



him: He is tried under the statute of 1840 as it has continued in the statute book from that time to the present. In order to constitute the offence, and to prove it before the court, it is not necessary to show that the prisoner himself, on the occasion referred to, was actually in arms. It is enough to show that a body of armed men entered the Province with hostile intent, and that while they were here the prisoner was among them aiding them or encouraging them. Now, so far as the prisoner himself is concerned, the evidence that will be submitted to you will show that on the occasion of the landing of the men called Fenians at Fort Erie, or shortly after their landing, he was amongst them; that he was apparently acting as chaplain to the force, and there will also be evidence that will go to show not merely that he was acting as chaplain of the force, but that he was actually armed, and apparently acting as a commander. It will be shown that he was intimate with the officers who appeared to have supreme control, and that he exercised more than the ordinary control amongst the men. If these facts be shown to you, gentlemen, they will have a strong tendency to lead your minds to the conviction that the prisoner is guilty. What excuse he may offer in explanation of his presence and conduct there I do not know. I intend to make no reference whatever to the circumstances attending the landing of the body of men calling themselves Fenians at Fort Erie. My learned friend, Mr. Cameron, who opened the last case tried, and whose address you probably heard, so fully referred to those circumstances that it is unnecessary for me again to speak of them. I have now briefly stated to you the nature of the charges against the prisoner, and the nature of the evidence that will be adduced in support of the charges. I would add that so far as the counsel for the Crown are concerned, their desire is that the prisoner—who I believe is a priest in holy orders—shall receive a fair and impartial trial. It is not our business or inclination to press the case unduly against him. Our aim is simply to bring before you the evidence which, in the opinion of the Crown, points to his guilt, and leave it to you to say whether or not you are satisfied that it establishes guilt. If after hearing it you have any reasonable doubt of his guilt, of course it will be your duty to give the prisoner the

benefit of that doubt, and acquit him.

JOHN WRAY was then called as the first witness for the Crown.

Mr. M. C. CAMERON—Is the name of this witness on the back of the indictment?

Mr. HARRISON—No, it is not. Mr. Wray was in court and identified the prisoner, and I now call him to give evidence.

Mr. M. C. CAMERON—I submit, my lord, that as this witness's name is not entered on the back of the indictment, he is not a competent witness.

His LORDSHIP—I suppose the name can be put on.

Mr. M. C. CAMERON—I submit, my lord, that in a case of this kind it cannot. As I understand it, it is a charge of the same character as the charge of treason, in which case, as counsel for the accused, I am entitled to know the names of all the witnesses before the trial. The indictment in this case, with the names of the witnesses endorsed upon it, has been sent to me, but this man's name does not appear, and I have had no intimation that he would be called.

Mr. HARRISON—If the offence charged were treason, my lord, my learned friend would be right. It is not treason, however, but a statutable felony, and I think we have a right now, as in other cases of felony, to put the witness's name on the indictment.

His LORDSHIP—So I think.

Mr. M. C. CAMERON—Will your lordship have the kindness to note the objection?

His LORDSHIP accordingly wrote down the objection, with his ruling that the evidence was admissible, and added that the objection had been taken after the witness had been sworn. His lordship then read the note he had made, whereupon:

Mr. M. C. CAMERON replied—Yes, my lord, but that does not prevent the evidence of the witness being declared inadmissible.

Mr. HARRISON then proceeded with the examination of the witness.

WITNESS (John Wray) said—I live at Fort Erie, and was there on the first of June last. I recognize the prisoner at the bar. I saw him at Fort Erie on that day. The Fenians landed on that day about a mile and a half below Fort Erie, and the prisoner was

amongst them. There were eight or nine hundred of them. Most of them were armed; but the prisoner had no arms. He was dressed in black clothes, and wore a black plug hat. It was about eight o'clock in the forenoon when I saw him. The Fenians, after landing, marched up through the village and halted within sixty feet of my house, for the purpose of taking breakfast. Some of them came into my house to take breakfast. They remained on the green a couple of hours. When they took their departure some of them left their valises behind them, but the prisoner ordered those who remained behind to pick them up.

MR. HARRISON—Who gave the order?

WITNESS—The gentleman at the bar, sir.

HIS LORDSHIP—What did he order them to do?

WITNESS—To pick up the valises. He said "the boys may want them, as we don't know how long we may have to stop in "Canada." They took up the valises, as commanded, and the prisoner went off with the main body. I saw the prisoner again on Saturday evening after we had the fight with the Fenians.

MR. HARRISON—Who were engaged in the fight?

WITNESS—The Fenians and a few of our volunteers who were there. Some of our men were wounded, but I did not see much of the fight, as the Fenians had taken me prisoner on that day. The Fenians seemed to have come from the direction of Ridgeway. I was a prisoner in their hands when I saw the prisoner at the bar. He was supporting a wounded Fenian or dressing a wound on the road. I believed the wounded man to be a Fenian, as he was not dressed in the uniform of our men. I did not hear the prisoner say anything to the wounded man. The next time I saw the prisoner was on the following Sunday, when he was brought down to the village a prisoner by the volunteers. I knew that at that time the government of the Queen and that of the United States were at peace.

*Cross-examined by Mr. M. C. CAMERON*—There were two ferries across the river: the railway and the general ferry. When I first saw the prisoner about a mile and a half from where the Fenians landed he carried a small satchel. I did not speak to him. When the Fenians went away from my place perhaps about half a dozen

valises were left behind. I do not know what they contained. Each Fenian had a gun—most of them were muskets. They wore all sorts of dresses. Some had American uniforms, some were in civilian's clothes; some wore one thing and some another. When I first saw the prisoner I remarked to a neighbor that he was either a priest or a doctor. When I saw him the next day attending the wounded man I thought he was a doctor.

Mr. HARRISON—Are you quite sure the prisoner is the same man that you saw on that occasion?

WITNESS—I am quite positive he is the same man.

ALEXANDER WILLCOX was next called as a witness.

Mr. M. C. CAMERON made the same objection to this witness as he had made to the last—his name not being on the back of the indictment.

His LORDSHIP noted this objection also, and suggested to the Crown counsel the propriety of entering the names on the back of the indictment.

Mr. M. C. CAMERON—These witnesses, my lord, have not been put out of court.

Mr. HARRISON—The witnesses who are in court came from Fort Erie, and have identified the prisoner as stated by the last witness.

Mr. M. C. CAMERON—Will your lordship be kind enough to note that this objection was also taken before the witness was sworn

His LORDSHIP—Certainly.

Mr. HARRISON then proceeded with the examination.

WITNESS said—I live at Fort Erie. I remember the morning of the first of June last. I saw the prisoner on that day at Fort Erie. He was standing talking to the Fenians who remained behind after the main body had left. I saw some satchels there, and the prisoner was trying to get the men to carry them to the main body. He said it was too bad to leave them behind, as the boys might want them and the clothes they contained. I did not hear him say anything more and I did not see him again.

Mr. M. C. CAMERON—You saw no fire-arms about him, I suppose?

WITNESS—No sir, I did not.

Mr. M. C. CAMERON—That will do, Mr. Willcox.

ALEXANDER MILLIGAN, *examined by the Solicitor General*—

I live at Fort Erie. I saw a considerable number of armed men there on the first of June last. I saw them about five o'clock in the morning, soon after they landed. I saw the prisoner at the bar amongst them. There was a lot of them in a tavern and the prisoner came in as if to induce them to leave it. He told them to take care what they were doing, but I did not hear him say anything else in particular. He was dressed in black, and had a revolver suspended from a belt by his side. I think he only told the men to take care of themselves. I had some conversation with the prisoner. He said we should not be frightened, as the Fenians had not come to harm any civilians. Some of his companions said they wanted to see the red-coats, and he added: "Yes, it is the red-coats we want to see." The reeve ordered breakfast for them, because General O'Neill said if it were not provided he would ransack the place. The prisoner said they did not intend to remain there very long.

The SOLICITOR GENERAL—Did you hear them say that they were going to advance into the country?

Mr. M. C. CAMERON—I object to that, it is a leading question.

WITNESS—I did not hear him say anything about their designs.

*Cross-examined by Mr. M. C. CAMERON*—The tavern I spoke of is kept by one Barney McNancy. I keep house in Fort Erie and live about fifty yards from the tavern. I was aroused that morning by a woman living next door. I looked out at the back door and saw the Fenians drawn up on the green near the school-house. I got my family up and dressed, and got them over to Buffalo as soon as possible. The ferry-boats were running then. After rousing the family I went out among the Fenians, going out by the front door and then passing around to the back of my lot. I remained with them about a quarter of an hour. I then went back to the house and remained not many minutes, when I went to the tavern. I returned to the house at intervals, but did not make much preparation for leaving. It was, I think, between five and six o'clock when I was in McNancy's tavern, which is quite close to the green, perhaps not more than ten yards from it. There were seven or eight Fenians in the tavern, and several went in along with me. I spoke to them and drank with them.

Mr. CAMERON—You did not seem afraid of them, but mixed with them in a very friendly manner then?

WITNESS—I was as social as possible with them. (Laughter.)

Mr. CAMERON—Come, now, did you treat them?

WITNESS—I offered to do so, but they refused, saying that they would treat, as they could afford it better than me. (Laughter.)

Mr. CAMERON—Did you take anything?

WITNESS—Yes, three or four glasses.

Mr. CAMERON—Can you usually stand three or four “horns” in the morning before breakfast? (Laughter.)

WITNESS—Yes.

Mr. CAMERON—How many do you think you could stand?

WITNESS—Well, I think I might stand about a dozen if I were put to it. (Laughter.) I remained there with them on and off till about nine o'clock. It was some time in the forenoon when I got my family off. I was not thinking particularly about the time. The Fenians put a guard on the place. I judge so because they walked up and down with guns and bayonets, which was not very usual in the village. I was at the door of the tavern talking to some of the men when I first saw the prisoner.

Mr. CAMERON—How many were with you at the door?

WITNESS—Not a great many—only three or four that I knew.

Mr. CAMERON—Where did you ever see them before?

WITNESS—I saw some of them in Buffalo, and others in Toronto years before.

Mr. CAMERON—Well, what did the prisoner say when he came up?

WITNESS—He told his companions to keep quiet and take care of themselves.

Mr. CAMERON—Were they making a noise at this time that they needed this caution?

WITNESS—No.

Mr. CAMERON—And you say that he had arms when he came up to the tavern?

WITNESS—Yes, he had a revolver, and I think he had a belt, though I am not sure about that.

Mr. CAMERON—But the last witness said he had no arms.

Mr. HARRISON—Oh, that was two or three hours afterwards.

when the other witness saw him in the village.

Mr. CAMERON—It was in the village this witness saw him, as understand him?

WITNESS—Yes, it was in the village. I saw the Fenians go away. They all left in a body except those that remained as sentries. They all started in a body from the same place. I saw the prisoner twice, I think—the second time in the same place, outside of the tavern. I was talking with some of them when I saw him. He told the boys to mind themselves. I lived at Toronto at one time, and worked at tailoring. I kept a tavern in Toronto at one time.

Mr. CAMERON—Did you ever leave Canada?

WITNESS—Yes, I left Canada on one occasion.

Mr. CAMERON—Suddenly, I suppose?

WITNESS—(turning to the judge)—Am I bound to answer that question?

His LORDSHIP—You are bound to give any reasonable account of yourself, but you are not required to say anything to criminate yourself.

Mr. CAMERON—Where did you go after leaving Canada?

WITNESS—I went to the United States.

Mr. CAMERON—How long did you remain there?

WITNESS—About a year, I believe.

Mr. CAMERON—When did you leave?

WITNESS—I think it was in January—I am not sure.

Mr. CAMERON—In what year?

WITNESS—It will be two years next January.

Mr. CAMERON—It was last January then that you ventured back to Canada and settled at Fort Erie?

WITNESS—Yes.

Mr. CAMERON—And you are not disposed to tell us why you went away so suddenly?

WITNESS—I don't know that it is requisite to tell you.

Mr. CAMERON—You can exercise your own judgment about that. At any rate you seemed to be hail-fellow-well-met with some of those people who came over in June.

WITNESS—I don't know that I was particularly known to any of them.

Mr. CAMERON—But you have said that you did know some of them—some whom you were supposed to treat, you remember? What time elapsed between the time you first saw the prisoner and the second?

WITNESS—It might be about a quarter of an hour.

Mr. CAMERON—And what time did the Fenians move away from the village?

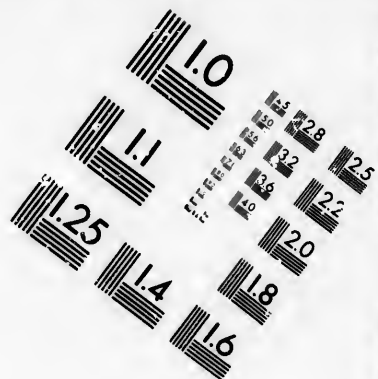
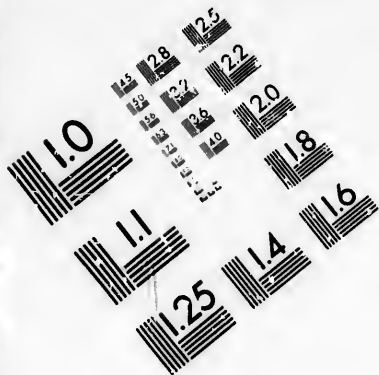
WITNESS—I cannot say exactly, but I think it was about nine or ten o'clock. It was about five o'clock in the morning that I first saw the prisoner, and between five and six o'clock when I saw him the second time. I cannot speak exactly as to the time. I was at home the previous night, but not all the evening. I was in McNaney's saloon, I think, that night. I went there between eight and nine o'clock, I expect, and left between ten and eleven. I did not hear then that the Fenians were likely to come over, and I did not expect that they would. I did not know then that they were gathering at Buffalo, and I heard nothing said about them. I might have had a glass of beer there, but I am quite sure I had not half-a-dozen. I do not recollect drinking at all that night, but I will not swear that I was not drinking. I went to the saloon principally to see a game of billiards. I think I was in bed that night by eleven o'clock. I did not go home with anyone from McNaney's. Those who were in the tavern when I left were pretty much people who belonged to the village. I think Joseph Squire was there when I left. I was not speaking to him particularly when I left. Two men named Thomas and Fairchilds were playing billiards when I went in. I was told just when I quit work that they were going to play that night. I think it was about five o'clock when I got up next morning. I took four or five "horns" between then and nine o'clock, but I am quite sure I was not drunk.

Mr. CAMERON—You are quite sure your vision was not obscured by what you drank?

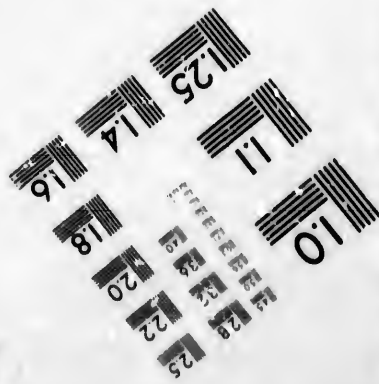
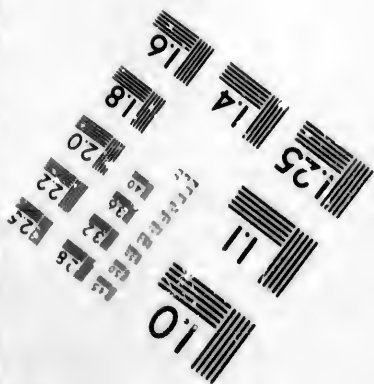
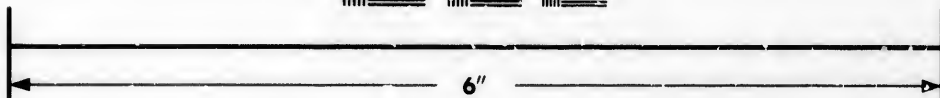
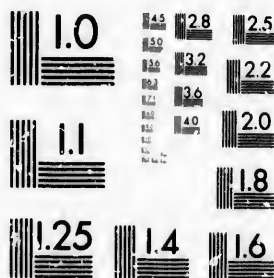
WITNESS—Yes, quite sure. I saw some of the residents of the place that morning near my house and all around about town. Among others I saw Pat Mooney and a man named Fiskette. Mooney was shouting at my door to come out and see the harp of







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old Ireland raised in Canada. I saw Mooney before I saw the prisoner.

Mr. CAMFRON—Now sir, I believe you have been employed in inducing soldiers to desert.

WITNESS—(energetically)—I never have. I deny it.

Mr. CAMERON—You did not leave the country for anything of that kind, then?

WITNESS—No, not for that.

Mr. CAMERON—It was for something else then?

The WITNESS declined answering.

Mr. CAMERON—Did you see a belt worn by the prisoner?

WITNESS—I am not exactly sure about the belt worn by the prisoner. He carried the revolver near his breast outside of his coat, so that anybody could see it. It was a good-sized revolver, but I don't know what kind.

*Examined by the SOLICITOR-GENERAL*—I first saw the prisoner between five and six o'clock. He told the men to take care of themselves and keep right. I saw the revolver upon him then. It was then he spoke about the red-coats. I was saying that I intended to take my family away, and he said to keep quiet, that they were going further, that it was the red-coats and not civilians they wanted to hurt.

The SOLICITOR-GENERAL—What was the reason you left the country?

WITNESS—I will explain that fully at another time, but I don't think it is necessary now.

*Cross-examined by Mr. M. C. CAMERON*—I was outside when the prisoner spoke to the men. I asked them inside whether it would be safe for me to remain with my family, and they said they did not intend to interfere with us. I spoke to others also, both inside and out, as to whether I should not remove my family. I did take them across to Buffalo some time during the day. I took no property with me there except some clothing.

JOSEPH NEWBIGINO, *examined by Mr. McNab*.—I live on the Niagara river, about two miles from Fort Erie. I was at home between the 30th of May and the first of June. I saw a body of Fenians landed at the lower ferry from a canal boat. Some of the

men were armed. I saw the prisoner at the Fenian camp on the 1st of June. I think it was somewhere about mid-day when I saw him. He was standing talking with some of the Fenians there. He seemed to be very friendly with them. I saw him talking to other parties; two or three of them were Fenian officers, and the others were not. The next time I saw him was in the afternoon when he was getting into a boat opposite our house with three others. One of them wore a United States uniform, one had civilians dress and the other had a Confederate uniform. One of them said to the prisoner, "Come, father, let us get into this boat." They started off in the usual course for Black Rock dam. They had to go up the river for some distance and then crossed. The next time I saw him was on Sunday morning under a guard of soldiers. I saw him almost every time I was at the camp—four or five times. That was on Friday. He was conversing with parties every time I was down at the camp.

*Cross-examined by Mr. M. C. CAMERON*—There were but a few of the villagers down at the Fenian camp on that day. I spoke to Gen. O'Neil.

Mr. CAMERON—Did you see any arms with the prisoner?

WITNESS—No, I saw none with him.

Mr. CAMERON—Why did they call the prisoner father?

WITNESS—I supposed they called him father because he was a priest.

THOS. L. NEWBIGGING, *examined by Mr. Harrison*.—I am a brother to the last witness. I saw the prisoner in the dock at the Fenian camp on the afternoon of Friday. It might have been three o'clock in the afternoon when he and a few others passed our house from the Fenians towards the village. After they passed our house one of those with Mr. McMahon hailed a boat with three boys in it, and said that if they would take them to Buffalo he would pay them for it. The boys then came to shore, and as the boat was too small, one of the boys remained on shore, and Mr. McMahon and his companions got into the boat. After the boat was pushed from shore I heard one of them say "Father, you had better take this seat," meaning the stern seat, which was the most comfortable in the boat. It was rowed up the river with the

intention of crossing to Black Rock dam or North Buffalo. I thought from the prisoner's dress that he was a chaplain. His dress was about the same as it is now but the coat was not so genteel. The hat was very much worn. I did not see him afterwards till I saw him in Toronto jail. All I saw of him that day was when he was going up the road and in the boat.

*Cross-examined by Mr. M. C. CAMERON*—I saw no arms in the boat in which the prisoner was.

CHARLES TREBLE SWORN:

Mr. M. C. CAMERON—The same objection is also made to this witness, my lord. His name is not on the list.

His LORDSHIP—I will note the objection.

WITNESS, *examined by Mr Harrison*—I live at Fort Erie. I was there on the first of June last. I think I saw the prisoner there, but I am not positive as to his identity. I think I saw him on the 2nd of June, in the afternoon, on Walnut street. It was after the engagement, but how long I can scarcely say. He was walking up the street alone. I was under the impression from his appearance—from his dress—that he was a priest. He had on a long coat such as is usually worn by priests. I could not swear that the prisoner is the same person that I saw then.

Mr. M. C. CAMERON—That will do, Mr. Treble.

GEORGE MCMURRICH, *examined by Mr. Harrison*—I am a captain in the Tenth Royal Regiment. I was at Fort Erie on Sunday, after the battle at Ridgeway. I saw the prisoner at a house about ten minutes walk from Fort Erie. He was at the house of a "Major" Cantie. Cantie was said to be a Major in the Fenian army. It was about nine o'clock in the morning when I saw the prisoner. A number of our men were with me. Dr. Jamieson, of the 47th regiment, and several others were present. Lieut. Dawson asked me to go over to Cantie's house in search of a wounded Fenian whom he heard was there. The prisoner was standing in the door when we got to the house. Dr. Jamieson asked him where he came from, and he replied from the States—somewhere. Dr. Jamieson was for letting him go, but I thought it best to place him under arrest, and I did so and placed a squad over him. He said he came there for the purpose of burying the dead. He said he

was in Buffalo and having heard that there were some dead men at Fort Erie he came over to bury them and perform his duty. He said he was on his way to Montreal to see the bishop. We found a dead Fenian, a Lieutenant Donaghan, in the barn; he was on his back on a stretcher. We found a wounded Fenian in the hay loft. The prisoner said he did not know that there were any Fenians at the house. He seemed to know there were some dead men there. We found another dead man near the house, in a work-shop. I then sent the prisoner to the 47th regiment.

*Cross-examined by Mr. M. C. CAMERON*—I was in the house only for a moment or two and did not hear the prisoner make the statement he is said to have made about not knowing that any of the Fenians were at Cantic's house. I heard him say he had no connection with the Fenians. I saw cross-belts in the cellar. They appeared to have been thrown down suddenly. I went into another room and found a sick woman and a young baby there.

*JOHN RIDOUT, examined by Mr. Harrison*—I saw the prisoner at Major Cantic's house on the garrison road near Fort Erie. The company I was with were out skirmishing, and Lieutenant Dawson, who was acting major, told us to go over and see if there was a wounded man at the house. I went over with others, and asked the parties at the house if there were any Fenians there, and they said no, there were none. I went into the cellar and found some cross belts and coats of the 13th battalion on the floor, as if they had been thrown down in a hurry. I then went to the back part of the house, and in a dark room found a dead Fenian. I also went up on the loft to examine it for Fenians, and a man named Kyler jumped up and asked me not to shoot him. I said I would not if he would come down.

*Cross-examined by Mr. M. C. CAMERON*—The prisoner told us he did not know whether there were any Fenians at the house. I found a bayonet and shako under a mattress. This was said to be a Fenian neighborhood.

*Examined by Mr. HARRISON*—When I saw the prisoner in the jail he did not deny having been with the Fenians.

DENNIS SULLIVAN sworn:

MR. M. C. CAMERON—I also object to this witness, my lord, for

the same reasons given with regard to the others.

**HIS LORDSHIP**—I will note the objection.

**WITNESS, examined by Hon. Mr. Cameron**—I belong to the Royal Canadian rifles, and have been one of the look-out party for two years at Fort Erie. I saw Jeremiah Cantie with the Fenians, near the lower ferry, on the 1st of June. He had a six-barrelled revolver in his possession. When the Fenians left Cantie left also.

**JOHN MEDCALF SWORN :**

**MR. M. C. CAMERON**—I also object to this witness, my lord.

**HIS LORDSHIP**—I will note the objection.

**WITNESS, examined by Mr. Harrison**—I belong to the Queen's Own, and was with the regiment at Ridgeway. I am employed in the sheriff's office in this city. The battle took place a little beyond Ridgeway. The volunteers were attacked by the Fenians. I saw Ensign McEachren lying dying, and another man was shot by my side. The shots came from the Fenians. I saw the prisoner for the first time in jail in this city, and I told him that what he might say to me would be used against him. I held out no threat nor hope. The conversation we had was to the effect that he was a Roman Catholic priest, was born in the county of Monaghan, Ireland, and that he came over from Buffalo on the 1st of June. He said he was a citizen of the United States, and resided in Maddison, Indiana. He said when he got to Fort Erie the Fenians took his hat and cloak from him and compelled him to go to Ridgeway to act as chaplain for them; and that he was within about half a mile of the battle field; that he attended to the wants of the wounded by binding up the wounds of both the Fenians and British. He said he heard the confessions of five wounded Fenians who died on Saturday. He said he attended to the wants of the Fenians and British indiscriminately. Several Fenians were killed, he said, but he could not tell the number. Four were killed at Fort Erie; he said that Col. Bailey of the Fenians was mortally wounded, having received three balls in his body. He told me that when he was arrested a list of some boys he wished to send to a Mr. Vaughan was found on his person, but that there was no list of a Fenian company found on him. He said he had some pistol bullets of his own and slugs which he picked up at Fort Erie. He had some wafers un-



consecrated, some oils and a bottle of peppermint. He said he had no arms of any description, and that he was no Fenian.

*Cross-examined by Mr. M. C. CAMERON*—He told me all this at one conversation. He told it first to D. C. McNab. The latter asked him if he had any statement to make, and what he stated was taken down in writing. He stated all along that the Fenians forced him to go with them in his spiritual capacity and as a medical adviser also. The battle took place on the 2nd of June. I was not wounded. I went down to Fort Erie on Monday.

EDWARD HODDER SWORN :

Mr. M. C. CAMERON—The same objection to Mr. Hodder, my lord.

WITNESS, *examined by Mr. Harrison*—I am not in the Queen's Own. I saw the prisoner at Major Cantic's house, near Fort Erie. I was going along the road with some others, and we heard that there was a wounded Fenian in a house near by. Dr. Jamieson asked for a volunteer to assist him, and I volunteered. The house was outside the skirmish line and the doctor asked for a guard. Lieut. Davidson sent a corporal and a guard with us. When we got near the house, the prisoner was at the door, but he went in when we approached. Dr. Jamieson asked the prisoner what he was doing there. He said he came from Buffalo and was on his way to Montreal, that somebody had stolen his vestments, and that he was waiting to get more. Dr. Jamieson asked me what I thought of the story, and I said I thought it very unlikely. Dr. Jamieson then spoke to Captain McMurrich, and the prisoner was arrested. The prisoner was asked where the wounded man was, and he denied all knowledge of Fenians. A woman and a young girl whom we saw at the house also denied any knowledge of them. A wounded man and a dead man were then found there, however. I found one in the barn behind the house.

*Cross-examined by Mr. M. C. CAMERON*—Dr. Jamieson asked if there were any Fenians there, and the prisoner said no. That is the answer he gave Dr. Jamieson. When we were going up to the house he was near the door, and when we came close up he went inside the door. He told Dr. Jamieson that he had come from Buffalo; that he was going to Montreal, that somebody had stolen his vestments, and that he was waiting for more. I did

not hear him tell Capt. McMurrich that he understood there was a dead Fenian there, and that he had come to bury him. There were two women and a young girl in the house, all of whom denied that there were Fenians there. To my recollection the prisoner said—"There is no such man here," when we asked for a wounded man. After the prisoner told his story, Dr. Jamieson asked him—"What are you doing here?" We were then ordered to surround the house, and I went to the barn, and upon looking through a broken board I saw a dead Fenian. I then went back to tell Dr. Jamieson, and upon returning found our own men there. Dr. Jamieson found a pocket-book and some papers in the dead man's pockets. Mr. Ridout found a wounded Fenian in the loft. The prisoner, when asked if there was a wounded Fenian there, said there was none. Dr. Jamieson found a song in the dead man's pocket, which he admired. Some of the words were—the shamrock shall grow no more in Ireland.

WM. CRUMP SWORN:

MR. M. C. CAMERON—I object to this witness, my lord. His name is not on the list.

HIS LORDSHIP—I will note the objection.

WITNESS, *examined by Mr. Harrison*—I have seen the prisoner at the bar before, in the latter part of last month in Toronto jail. He told me he came over with the Fenians to dress their wounds. In the first place he said to me, "do you recognize me?" When I said I did not, he seemed very pleasant, and said what I have stated now in court. I think that is about all he said. In the first place I saw the prisoner and half a dozen Fenians praying, and I did not want to disturb them. (Laughter.) I afterwards came back, and the prisoner spoke to me.

*Cross-examined by Mr. M. C. CAMERON*—

MR. CAMERON—Well, Mr. Crump, what brought you to the jail?

WITNESS—I went there to see the prisoners.

MR. CAMERON—To see the prisoners, eh? Was that all?

WITNESS—Well, I went there to gratify my curiosity, and I thought if I could benefit my country it would be of use for me to go. I was passing the cell door when several of the Fenians were at prayer, and when the prisoner got up from his knees he asked

me if I recognized him. I said no. He then said he had a mark on his chin which he had a long time. I said I did not recognize him.

Mr. CAMERON—Why did you go to the jail?

WITNESS—I went there partly through curiosity and partly to serve my country. I am a loyal man—an Englishman, (laughter;) and I thought I might serve my country. I went to the jail partly out of curiosity. (Laughter.) I think if I had been able to see into futurity I would have been proud that I went there that day. (Loud laughter.) I had no conversation with any legal man before going there. (Laughter.)

Mr. CAMERON—Now you have given us part; give us the other part of your reason.

WITNESS—Well, then, I might say, if it came to the point, I went out of curiosity—almost entirely. (Laughter.)

Mr. CAMERON—But what else?

WITNESS—Well, coming to the point.—(Loud laughter.)

CRIER OF THE COURT—Order!

Mr. CAMERON—You have not told us why you went to the jail.

WITNESS—I think I went entirely out of curiosity. (Laughter.) I got a statement from one of the other prisoners.

Mr. CAMERON—Tell us all about it. From whom did you get the other statement?

WITNESS—I got one from the Rev. Mr. Lumsden.

Mr. CAMERON—You had a fancy for the clergy, eh?

WITNESS—Well, I am a member of the Church of England. (Loud Laughter.)

Mr. CAMERON—Oh, you deal with the clergy, then, entirely?

WITNESS—Oh, now, Mr. Cameron, don't quiz me. (Laughter.)

Mr. CAMERON—Did you speak to any one else in the jail?

WITNESS—Yes, I did; but I was afraid to go through the wards unless the turnkey was with me, as I saw a very powerful man there—an awfully big man. (Laughter.)

Mr. CAMERON—Did the prisoner tell you that he dressed the wounds of the Fenians?

WITNESS—Yes, he told me he came to attend to the wounds of the Fenians.

Mr. CAMERON—Did he tell you that he dressed any ?

WITNESS—No! (Laughter.) Now, Mr. Cameron, I do not want to be made a laughing-stock of by you.

Mr. CAMERON—Really, Mr. Crump, you are the funniest man I ever saw. You seem to think that when you make the people in the court laugh that I am the cause of it. Now, Mr. Crump, would you tell me what business you follow ?

WITNESS—I am a commercial traveller. I have been a salesman in Mr. McMaster's, and if you want to find my character you had better go there and ascertain for yourself.

Mr. CAMERON—Had you any other business ?

WITNESS—(Excitedly) Yes, and I am a respectable man. (Laughter.)

Mr. CAMERON—I do not want to find out anything about that ; but I want to know if you ever wanted to illuminate the world ?

WITNESS—I have been travelling with coal oil lamps for Noah L. Piper, and you, Mr. Cameron, have seen me at Cobourg. (Laughter.)

Mr. CAMERON—Yes, I thought so ; that will do.

Hon. Mr. CAMERON—That is the case for the crown.

Mr. M. C. CAMERON—I am not going to call any witnesses for the defence.

Hon. Mr. CAMERON—Then go on ; I will speak after you.

Mr. M. C. CAMERON—I do not think you have a right to do so.

Hon. Mr. CAMERON—In all crown cases the statute gives the crown prosecutor authority to address the jury last if he desires to do so.

HIS LORDSHIP—I believe so, too.

Mr. M. C. CAMERON—Yes, if authorised in writing, and if you say you are so authorised, I suppose it is all right.

Mr. M. C. CAMERON then proceeded to address the jury. He said:—May it please your Lordship and Gentlemen of the Jury, my learned friend, in opening this case for your consideration, told you there were three distinct counts in the indictment, charging the prisoner in three different ways, with complicity in the Fenian raid ; and the first charge is, that being a citizen of the United States, he entered Canada in arms, to levy war upon Her Majesty.

The second is, that he joined himself with divers other evil-disposed persons in arms, with intent to levy war against Her Majesty. And the third is, that he committed an act of hostility against the Queen by assaulting and attacking certain of Her Majesty's subjects, with intent to levy war against Her Majesty. As to the first charge, and in connection with that charge is made the statement that he is a citizen of the United States. Dealing with that as it is presented in the first instance, I submit that the Crown has failed to give any evidence that the prisoner entered Canada in arms. I will read the count in the indictment in order that you may see the order in which the offence is charged, and I will submit that he cannot be convicted under the indictment. Assume, as charged, that he is an American citizen. In that case, unless it is established that he himself has been in arms, the statute is entirely against his conviction; and though it may be an offence against the law of the land, for which the prisoner may be tried, to be associated with others who are in arms for the purpose of levying war or other treasonable acts, under this peculiar statute, those present must be in arms, and it will not do to say merely that he was in company with those who were in arms. Now, the charge is, that the prisoner, being a citizen of a foreign state, to wit, the United States of America, entered Upper Canada with intent to levy war on Her Majesty, and the language of the statute is as follows,—[Mr. Cameron here read the clause of the statute under which the indictment was framed.]—From this it is manifest that a person associated with others who are in arms, but who commits no act of hostility, is not amenable under the statute quoted. Then, the next clause of the statute, as I submit, applies to cases where British subjects are doing certain illegal things, and provides that if a man joins himself to them to aid in doing these things, he shall be held responsible, and I submit that under the statute as it now stands, it is necessary to establish that the prisoner was here in arms, that if he was associated with those persons for the purpose of discharging any duty which might attach to the peculiar position which he held without intending to aid the design; and I submit that if he, as a clergyman, was along with them, administering the consolation of religion to the

dying and wounded, he is not within the meaning of the statute. It is contended for the prisoner at the bar that he stands in that position, and that he did not come at all in a condition that would tend to aid the invaders in any way, that he was not there for the purpose of taking the lives of any of Her Majesty's subjects, and that he was there only for the purpose of hovering around during the battle, to administer to the dying of either our friends or of the people with whom he was associated. Again, he has not thought fit to exercise the right to challenge. I am not aware that any of you belong to the same religion he does. Except in one instance, no challenge has been made, and that case was where the prisoner's attorney represented that the party challenged made use of expressions in reference to the case which were so strong that it would not be safe that any man's life should be trusted in his hands. You may, therefore, be very much opposed, many of you, to the Catholic religion not one of you, I suppose, are followers of that religion; but you are bound to consider the position in which the prisoner was placed. It is part of the case here on behalf of the crown that he was here as a priest; and the single circumstance to militate against him is the statement of Mulligan; and in reference to him, I think there is not one that could set his testimony in the case to establish that the prisoner was in arms against that of the other Crown witnesses. I submit, then, that whatever your prejudices may be against the ministers of the Catholic church, if there is any who have such prejudices among you, that they ought to be dispelled from your minds. I am one of those who do not entertain prejudices against any man for his religious belief; because I would consider it to be a shame on my part to assert that all others must be wrong and I right. Thus I have put the position in which the prisoner must stand; and even if you are satisfied that he came to Canada with those parties, you would still have to be satisfied that he came for the purpose of aiding them, and not for the purpose of ministering to the wants of those who might be injured. We have found that ministers on both sides during the great war in the United States were allowed to mingle among the armies unmolested, as non-belligerents, and if they were not now entitled to be considered in that character, it

would be against the civilization of our age. With regard to the circumstances under which the prisoner is here, the evidence on behalf of the crown is from gentlemen who say that about seven o'clock on the day named a body of armed men arrived at Fort Erie, and that when they got to town the prisoner was seen there, not with arms, but only with a valise in his hand. This is what one Mr. Rae said. Another party said that he recognized the prisoner ordering some parties to take up certain sat-hels, saying the boys might want them; and that others said, speaking of the same conversation, instead of saying, that he ordered the thing to be done, he understood him to mean that the parties might want clothing. It was said that the prisoner came over to aid and comfort those invaders, and be with them, so that if any of these men were hurt or wounded on that occasion, he should comfort or succour them. The question is, was he there simply as a Christian minister, or endeavoring to aid and encourage those engaged in the undertaking. Can you say that a minister, under the circumstances in which he was placed, surrounded by wounded men could have acted differently, or that, in so acting, he was engaged in anything like a hostile encounter. Now, we have it that he is seen at the Fenian encampment, at Newbigging's place, and both these gentlemen spoke clearly and conclusively that they saw him there in the encampment without arms. Then, we have him observed by two men, Rae and his companion, without arms; and later in the day, in the encampment at Newbigging's farm, he was also seen without arms. After that again we find him going away to a boat, as testified by Newbigging. He was, apparently, leaving at that time and was going to Buffalo, as was represented. The boat certainly went in that direction. There is no further trace of that boat afterwards. No one speaks of having seen the prisoner again until after the engagement had taken place at Fort Erie. And what was he doing there then? He was there, not with arms in his hands but attending to wounded persons. He was engaged in the ministrations of his church, or in dressing the wounds of the Fenians, as it is represented. The next seen of him we find him at the house called Major Cantie's. He is asked what he is doing, and various versions of his answer have been given. And here I would call

your attention to the fact that it is very difficult to place implicit reliance in anything coming second-hand from a man. Here we find different persons listening to the same statement, at the same time, and yet giving entirely different accounts of it. The first witness called on behalf of the crown to identify the prisoner, when he was arrested at Major Cantie's house, speaks of him being questioned by Dr. Jamieson, and of the former replying that he came from Buffalo to discharge his duties as a priest with the Fenians, and because he had heard there was a dead person there. Further, Mr. McMurrieh says that, when asked the question, the prisoner said he did not know there was a wounded Fenian there. Mr. Hodder, who was present at the same time, and heard the questions and answers, says that the prisoner said positively "no;" meaning that he was endeavoring to conceal the fact that there was a wounded person there—the inference being that he was aiding and assisting in the undertaking in seeking to prevent the wounded falling into the hands of those looking for them. The two statements are not reconcilable. There is no evidence to show that he did know there was a wounded person there. Whether, as an American citizen or British subject, the prisoner stands here so far entitled to the protection of the law that the presumption is in favor of his innocence till it is clearly and satisfactorily established that he is guilty; and the prisoner stands here with that presumption as strong in his favor as if he were a subject of Her Majesty. Having that presumption in his favor, he therefore is not called on to bring evidence in his own behalf. He has simply to answer the evidence brought forward; and if that does not prove strong enough to convict him, without leaving any reasonable doubt on the minds of those empannelled to try him, then he is as much entitled to an acquittal as if he brought the strongest evidence to show that he was not there. No one presumes to say that they saw him come there. He says he came over intending to go to Montreal, and it is matter of evidence that there is constant communication between the United States and the Canadian shore by means of ferry-boats, and that he could have crossed that way. Therefore, when he makes the statement, there is nothing improbable in it. He says, further, according to



the evidence of the crown, that he was forced to join these parties; But the crown says that statement is inconsistent with the facts; for we find him voluntarily engaged in performing certain acts—not being at all under coercion at the time. You have it declared, as a matter of fact—whether it were consistent or not with his allegation of innocence—that he was there at the time. Now, it is quite probable that most of those engaged in the raid at that time were Roman Catholics. They were not wholly and solely of that creed, but it is generally believed that very many of them belonged to it. We also know that those professing this religion lay great weight on the administration of the rites of the church, when they are in danger of dying. Therefore, is it not at all improbable that we should find that the prisoner, being on the Fort Erie side of the Niagara river, should be found acting as he had been. It is not unnatural or unlikely that being there he would be found administering the consolation of religion to wounded or dying men. There is nothing but Milligan's statement to cause you to put an unfavorable construction on his conduct. There is nothing except that and that other statement which the prisoner is represented by Mr. Crump to have made in jail. According to that witness, the prisoner's own statement was that he came over here to dress the wounds of such as might be sufferers on the battle-field. I ask you what weight you can attach to the testimony given by a man in that way and under these circumstances. Take his general statement as against this—a statement made not merely once, but as given by Dugald C. McNab and Metcalf. There he told what he was doing, and he made the same statement time and again. But Crump goes to see him and he suddenly tells quite a different story. He says he came over with the Fenians to dress the wounds of such as might be wounded. Is it at all likely that within one month of his trial he would make a declaration of that kind—stronger against himself than any made by him at any previous time. In looking at this point, I ask you to consider the manner of the witness Crump, when he made the statement in the witness box. I have no doubt the prisoner did state that he dressed the wounds of Fenians. But that he ever told Crump he came over specially for that purpose is, I submit, not at

all probable. A man of his intelligence would not be likely to make any declaration of that kind ; and I say it would be unsafe and unfair to any man standing in the box as the prisoner does, to attach any weight or importance to the declarations of such a witness as Crump. We have his own counter declaration, which the crown chooses to use, and which is consistent with the facts shown in evidence, and from that it appears that he might have been there without being in actual hostility—without being a Fenian in principle or act. He was there, he tells us, because he was on his way to Montreal, was stopped in his progress, and was caused to remain with these men in arms. Again, in Canada, it is said, he joined himself to certain evil disposed persons in arms, bringing the offence under the second section of the act, which, I contend, does not apply to citizens of the United States ; and the prisoner is not charged in any other sense. On this indictment, I contend that he could not be found guilty of any of the charges, being a subject of Her Majesty. I shall submit that the evidence establishes that he was in point of fact a subject of Her Majesty at the time he crossed to Canada, for you have no evidence in reference to the matter more than his own statement. There is no evidence that he is a citizen of the United States. There is no evidence even of what is meant by a citizen of a foreign state. The statute speaks of citizens or subjects. But there is no evidence given to show what constitutes a citizen of the United States, or whether this person was a citizen, nothing more than his own statements. He says he was born in Ireland ; and that constitutes him a British subject. As a matter of law, it has been held that a man who is once a British subject continues to be a British subject, notwithstanding a change of residence or his becoming a citizen of another State. But then it is said that he said he was a citizen of the United States ; that is the statement Metcalf makes in reference to him. Therefore you have only his own admission with reference to it, and you are asked to take that admission against him. But what he says in his own favor you will be told to disregard. You will be told as a matter of fact when he makes an assertion in his favor, it is not to be relied on. But it will be for you to decide that point, gentlemen. And,

in this connection, I would call your attention to certain remarks made by a very renowned judge. He said, and well said, and it has been repeated by many distinguished men since—"it is better that five guilty men should escape punishment than that one innocent man be found guilty and punished." That statement is one that commends itself to our reason. It is one that commends itself to our merciful sense of what is right and wrong. You are there empannelled not to press any point against the prisoner. You are there under the Constitution under which he is tried, to give him the benefit of every reasonable and just doubt; and I ask you can you see so far into men's hearts and minds as to be able to determine positively that the statement which is made against the prisoner is true, while that which is in his favor is false? Can you say on your oaths, that he, a minister of the Gospel, who had been discharging those trusts and duties which we say ought not to be discharged but by those men fully feeling the awful responsibility of their position—men who pre-eminently believe in truthfulness—can you, from the evidence produced, believe him to be guilty of the falsehood which has been represented? Other persons had been captured and forced to serve in a similar way and he was not better able to resist the Fenians than any of Her Majesty's subjects, who were captured and detained, nor perhaps as well. It is for you, gentlemen, to judge of the conflicting statements. It is for you to say whether that which tells against him shall be accepted, and that in his favor be discarded—that the one report is true and the other report false. But, recollect, when you are discharging that duty that if you declare the statement in his favor to be false, you are thus deciding in view of consigning a fellow creature to the gallows. The third count of the declaration charges—that being a citizen of a certain foreign state, at peace with Her Majesty, the prisoner assaulted and attacked certain of Her Majesty's subjects with intent to levy war. What do we find as a matter of evidence with regard to that charge? There is no evidence that he committed any such breach of the law. On the second of June, it is a fact that he was seen without arms in his hands. He is observed merely attending wounded persons. Now, I ask you, can the evi-

dence satisfy you that he has been guilty of an act of hostility by assaulting Her Majesty's subjects, with intent to levy war; or was he engaged simply in ministering to the wants of wounded persons? This man, having been seen in company with Fenians, they charge that he was associated with them. What is the evidence on this point? Newbigging says he was down at the Fenian camp several times that day and spoke to the commander, Gen. O'Neil, and several other persons. Now, supposing Newbigging stood in the dock and that evidence was preferred against him, would you take him to be a Fenian? Would such evidence warrant you in finding him guilty? Did the mere fact of communicating with the Fenians on that day constitute a man a Fenian? Then Milligan must have been a double-dyed Fenian; for he was not only talking with them, but drinking with them and treating them. Yet there is no charge preferred against him for being engaged in that way. I submit that any man who was there for a peaceful purpose is not in any worse position than a doctor who goes to the battle-field to dress the wounded. The prisoner says he is no Fenian. Humanity would revolt at the idea of any one passing by wounded men—Fenians or no Fenians—without rendering them assistance. And if our people had treated the Fenians in any other way, they would have been denounced throughout the length and breadth of the land as a disgrace to our humanity. But our brave men in the field acted nobly in this respect. They took care of the wounded Fenians, and attended to their wants just as well as those of our own friends. I say, then that if our people do this and may not be charged with being criminals, then this prisoner at the bar ought not to be considered as in arms and an invader, because he was there attending wounded men, even although they had been arrayed in arms against Her Majesty. With regard to Milligan's statement that the prisoner had a revolver, I would remark that that witness is the only one who states that he saw it. The questions arise, did he then see the prisoner at all on the occasion referred to; is he confounding him with some one else; or if he did see him, is he representing truly the manner in which he saw him? On the night before, you find, he says that he sat up late, and that on the next morning he

took several glasses of liquor before breakfast. Is such a man, think you, one whose recollection can be depended on in any shape or way? I say it is altogether unsafe to rely on it as against that of every other crown witness. Milligan will not go so far as to indicate the color of the belt in which, he says, the prisoner kept the pistol, or even whether he had a belt at all or not—showing how defective his memory must be. Can you place credit on such testimony? If you are men with such strong prejudices against Fenians that it is only necessary to accuse a man of being one of them, to cause you to find him guilty, then you may do so. But if, as I hope you are, prepared to act justly and impartially, you will be very careful how you will value testimony such as that. Of course, you must have some feeling of indignation at the Fenian atrocities which have been committed. Throughout the length and breadth of the land there is but one sentiment with regard to the acts of these Fenians. They are justly regarded as being as villainous a herd of men as ever disgraced our common humanity. That is my feeling towards these men. But in a court of justice my feeling is that they and every one connected with them are entitled to have their cases fairly and dispassionately considered, with no more prejudice against them than would exist against any one charged with crime under ordinary circumstances. You must not allow any prejudices you may have against Fenians to weigh with you in considering this case; for the prisoner tells you fairly and squarely that he was not one of them—that he was a clergyman, whose duty it was to minister to persons *in extremis* the consolations of religion—consolations which were surely needed. If these were the bad men we suppose and believe them to have been, then I say they did want the ministrations of religion—if religion could be of service at that time. Our belief may be that the ministrations of religion were not of service at that time. But others, we know, entertain a different belief. The Roman Catholics say that the Church should control the thought of its people, and we, as Protestants, while disputing that right, should be prepared to accord the right to those who think differently from us to judge and think for themselves. That being accorded, the prisoner

with faith in the administration of his Church, must have felt that, had though we believe them to be, they needed him at their side. For much as we condemn their acts—and enemies of ours though they be—we should be sorry to think of these men being sent from time into eternity unprepared for their last end, and without having an opportunity of receiving those various consolations of religion which he could offer them. I have now, I think, referred to all the circumstances connected with this case which seem to require any allusion on my part at the present time. I appeal to you on behalf of the prisoner, who does not stand before you as having been actually in arms, or prepared to take away the life of any individual in the community—or prepared to shed the blood of any of Her Majesty's subjects—and I say he is entitled to the most favorable consideration which you can give his case. The evidence does not, I submit, establish that he was in arms or associated with those in arms, or that he committed the alleged act of hostility by attacking any of Her Majesty's subjects. But on the contrary, if his statement is to be believed, he was there as a peaceful minister of the Gospel, to give the consolation of religion to those who most needed it, and I would repeat to you that which counsel should always do in a criminal offence, that it is the bounden duty of the jury to give a prisoner the benefit of any reasonable doubt that they may entertain. That is your duty, gentlemen. We cannot fritter away the rights of parties charged before us by saying that is a matter of fact to be proved by them; you should not speculate in reference to it. I say you must take all the circumstances into account. I am aware that his lordship will say, in all probability, that you are not to conjure up doubts. But I do not ask you to do so. I simply ask you, as thinking men, to take the story and say, whether, honestly and fairly and without reasonable doubt, you can come to the conclusion that it was a falsehood, where it worked in favor of him. If you do so you consign him to the gallows. And I submit that though you have nothing to do with the punishment of the prisoner, still you are responsible for your verdict, and cannot leave out of sight the circumstance that your verdict affects the whole future of his life. You cannot let that out of your consideration. You are the par-

ties who punish. You pronounce the words that render punishment a mere matter of clock-work or machinery to follow. And now, in conclusion, I call upon you, gentlemen, in the name of British justice, to give the prisoner the benefit of every reasonable doubt the case presents.

Hon. J. H. CAMERON replied on behalf of the Crown. He said:— May it please your lordship: gentlemen of the jury—The prisoner cannot say that he has not been most ably and eloquently defended. He could have found no one probably at the bar in this country who was better fitted to take up his defence, and I am sure no one could more ably and eloquently have urged every point that could have been advanced on his behalf, than my learned friend and namesake who has just sat down. But I think my learned friend is mistaken both in the view of the law which he offers for the guidance of the court, and of the facts which he offers for your instruction; and it is my duty, in a case of this momentous consequence, to endeavor to place before both the court and jury the law and the facts in the manner in which they strike the Crown, subject to the opinion of the court upon the law, and leaving you when you retire by-and-bye to decide which is the more correct view according to the evidence. Now, I say in the first instance, as a proposition of law, that my learned friend's view of the counts of this indictment is wrong—that there is no necessity whatever that the prisoner at the bar or any person engaged in the raid, and tried separately and singly, should be proved to have been actually in arms on the occasion. The statute does not require it, and the law requires no more than the statute demands. The statute declares that if a party enters Upper Canada with intent to levy war, that is an offence. It says that if a man be and continue in arms in Upper Canada, that is also an offence. And it further says that if a man enters Upper Canada with intent to levy war, and commits a felony, which in ordinary times is punishable with death, that is also an offence. But it says further that all these are separate crimes, each of which may be charged separately against a prisoner accused of them. In this case the count upon which we rely more than on any of the others is that which charges the prisoner with having entered

Upper Canada with intent to levy war. If that intent is proved, then the prisoner is liable to be found guilty of the felony charged. It is not necessary to show that he entered the country actually in arms, nor that he continued in arms, because there is no law more clear than that, in the highest crime known to our laws—the crime of treason—the mere fact of a man being with a party committing treason, even if he takes no part in the overt acts, is just as guilty, if by his presence he aids and comforts them, as the man who fires a gun and kills a subject in the pursuit of the treasonable purpose. The law holds him responsible because he is there aiding the general design. It would be a mistake if the law were not so. It would be entirely wrong if men engaged in the commission of crime could shelter themselves under the pretence that it was not their hand that inflicted the blow, that took away the articles stolen or that forged the paper—that they did not commit the crime, but that they merely stood at a distance and watched while others committed it, prepared to give them advice as to how it should be done, or warning in case they should be interrupted. If the law were of that nature such men would be held to be innocent, although, perhaps, they were the very means of preventing from parties coming forward to avoid the completion of the crime, while only they who actually struck the blow or stole the article would be held to be guilty. The law, which was devised for the protection of society, could recognise no such doctrine. It was too wise, it preserved too well the safeguards of society, to permit any man to procure or encourage the commission of a criminal act and allow him to go scot free on the plea that his hand was not the hand that actually committed the deed. Therefore his lordship, when he addresses you, will tell you that my learned friend's law is in that respect entirely wrong, that there is no necessity to prove that the prisoner himself bore arms; and his lordship will tell you moreover that if he was here with a body of men who bore arms and continued in arms in this country with intent to levy war, he is as much guilty as the men who fired the shots that killed our fellow-subjects at Ridgeway and wounded them at Fort Erie. That is the law; it is well that it should be the law; and it is well that all should know it is the law, so that before any one



lends countenance to the commission of a crime he may know that he cannot hope afterwards to shelter himself under the excuse that he did not actually commit it. My learned friend says also that this man is not to be regarded as a citizen of the United States, but that having been once a British subject he must always be held to be a British subject. It is true that it has been a doctrine of our law that "once a subject, always a subject," and the doctrine of our law has not been changed in that respect but according to the law of England the power the Crown exercises in regard to that law places no ban and makes no charge against a man who, having been a subject, offers allegiance to another country, where on one side he receives protection and on the other yields allegiance. The law of England does not interfere with such a man's position or make his act a crime; but now and then, with regard to subjects residing in a foreign state, the Crown issues proclamations advising them as to the course they should pursue in case of war. There is nothing, however, in the law of England that prevents any man from receiving the protection of or offering his allegiance to another state, or that prevents him calling himself a citizen of that state, while his allegiance to his own country continues. The statute which has lately been passed clearly and plainly lays down the distinction between a citizen of a foreign state and a subject, because it distinctly declares that citizens or subjects of a foreign state—distinguishing between that class and those who are subjects residing in that state—have no right to come over to us, and levy war; and should they do so, whether they are subjects of Great Britain or not, being citizens of that country they may be charged as such, if the Crown chooses to sink the fact that they are subjects. That is what the Crown does in this case. We do charge that the prisoner came from the United States as a citizen of that country, and therefore comes under the very provisions of the law as a citizen of a foreign state who invades our shores, and if shown to be guilty must suffer the consequences. That is the law, and if there has been any mistake in regard to it my learned friend knows that it is open to him in another tribunal to make objections to it and obtain the benefit of the mistake from that tribunal. Well, then, I think that my learned friend's law

upon both of these points will be declared by his lordship to be incorrect—that neither was it necessary that we should prove the prisoner to have been in arms, nor that we should prove more than we have in regard to his citizenship. Now we come to the prisoner's own declarations and to that which is really the main point in the whole of this matter, as to whether you believe he is guilty of the facts charged or not. I agree that the benefit of every reasonable doubt ought to be given to the prisoner. I agree that where you find that there are really reasons in your minds that would make you feel a solemn doubt as to whether you ought to convict the prisoner or not, it is your duty to give him the benefit of the doubt. But it is only that kind of a doubt which the law recognises the benefit of which my learned friend is entitled to claim from you. In order to come to a solution of any doubt that may exist in this case we have to examine all that the prisoner has himself said and all that my learned friend desires that you should take from his statements. I wish to lessen in no one particular whatever weight those statements may possess; but at the same time I am bound to lay before you the manner in which they were made by the prisoner and the variations to be observed in them according to the evidence that has been placed before you. We have heard nothing to show that our witnesses are unworthy of credit. My learned friend assumes nothing against them except that which may be drawn from their manner and conduct in the witness-box, and we have a right, in the absence of testimony to the contrary, to assume that they are men of truth and good character who have endeavored to explain to you, to the best of their recollection, what really occurred. Now, we all well know how frequently men who see the same transaction will vary in their accounts of it, and I am never surprised at these discrepancies, because men standing in different positions in regard to a scene which is being enacted before them, or whose minds are not probably worked up to the same point of keen interest and observation, or with their attention perhaps not fixed in precisely the same way, will afterwards give different accounts of the same transaction. Not only the events of every-day life but history tells us that that is the case, for it is one of the common results of the fallibility of

human judgment. But although there may be that difference in the accounts of any particular event, we may at the same time have no doubt as to the fact itself. Thus no one can doubt the fact that the prisoner was at Fort Erie at the time stated. We are all satisfied on that point. There is no doubt that every one of those witnesses who swore to his presence saw him as stated, the only question in regard to his identity being that which arises in reference to the position in which he was seen. In respect to that the prisoner made statements to different people; and my learned friend says that if the Crown takes the statement of an accused person, they must take it all, that they cannot sift it and say one part is true and the other is not. That is mistake both in point of law and of fact, because we know that a person in jeopardy will often make a statement that is partly true and partly false in order to screen himself. It is proper and right in such a case for the jury to sift the statement and take that part which is true, rejecting that which is manifestly false. The law upon this point reads thus:—"It seems now to be settled that the whole of the "prisoner's statement must be taken into consideration by the jury, "who are not bound to take what he has said in his favor to be "true, because it is given in evidence by the prosecutor, but are to "weigh it, with all the circumstances of the case, and determine "whether to believe it or not. The jury may, therefore, believe "one part of the prisoner's statement and disbelieve another. "They may believe that part which charges the prisoner and "reject that which is in his favor, if they see sufficient grounds "for so doing. In determining whether the statement be true or "not, the jury should consider whether it be probable or impro- "bable in itself, and be consistent or inconsistent with the circum- "stances of the case. If what he said in his own favor was not con- "tradicted by evidence offered by the prosecutor, nor improbable "in itself, it will naturally be believed by the jury, but they are not "bound to give weight to it on that account, but are at liberty to "judge of it like other evidence by all the circumstances of the "case." Now, gentlemen, that is exactly the case here; and if my learned friend had one continued statement of the same character from the prisoner—if one single statement made by him had only

been offered by the prosecution—my learned friend's position would have been infinitely better than it is now; but we are bound to point out to you that not only have the different statements made by the prisoner not coincided, but that they absolutely conflict. We have him on one occasion stating that he came over from Buffalo with the Fenians for the purpose of dressing their wounds and ministering to their spiritual wants. We have him on another occasion stating that he came over on the ferry on the 1st of June, when he was seized and arrested by the Fenians and kept amongst them against his will; and on a third occasion we find him stating that he was on his way to Montreal and found himself unable to proceed further, after reaching Fort Erie, in consequence of the disturbance caused by the raid. Now, we have here three distinct statements made by the prisoner. Which of them is true? Did he come over with the Fenians, or was he seized by them, and, as he says, were his vestments stolen and himself detained, or was he on his way to Montreal and accidentally detained at Fort Erie? Is it probable that any one, desiring to go to Montreal from Buffalo, would go by the way of Fort Erie, when he could go directly eastward from Buffalo?

Mr. M. C. CAMERON—What is the difference of fare between that and other routes?

Hon. Mr. CAMERON—I know nothing of the difference of fare, but I only ask is it a natural conclusion that a person intending to go to Montreal from Buffalo would cross over to Fort Erie? Then, as to the second statement made by the prisoner, that he was compelled by the Fenians to remain with them, it is disproved by the fact which has been sworn to that at three o'clock on the afternoon of Friday he got into a boat with three other parties to go to Buffalo. He went away in that boat on Friday. If there was compulsion used to make him remain with the Fenians, how was it he returned to be arrested on Saturday? Did he come back, as he himself said, to dress the wounds of the Fenians? Did he know that they were going out on Saturday morning to fight the Queen's troops at Ridgeway? Did he come to aid and assist them as their spiritual adviser? Does not the evidence point distinctly and clearly to that being the case? Can any one doubt that

he returned voluntarily to give those reckless and criminal men the aid and comfort of his presence and encouragement in their wicked work? Is there a doubt that he was seen there binding up the wounds of the injured Fenians, and giving them consolation, and that he was arrested on Sunday morning at Major Cantie's place near Fort Erie? How did he get back there, after leaving in a boat on Friday, if it was not voluntarily and to aid the Fenians? Is there not, on a whole review of the evidence, reason to believe that those parts of his statements which make against himself are true, as the Crown states, and that those parts which make in his favor are untrue? Why, gentlemen, apart altogether from the statement of Milligan, who saw the prisoner actually in arms, nothing more is required, in my judgment, to justify conviction than the fact, which cannot be denied, which indeed is admitted by my learned friend, that the prisoner was there to aid the wounded among the Fenians and to give religious consolation to the dying; thus to the best of his ability, and perhaps far more powerfully and effectively than many with arms in their hands, giving aid and assistance towards the accomplishment of the wicked designs those men had in view. It is nothing to you whether he went as a Roman Catholic or as a Protestant clergyman. It is enough for you to think of him as a minister of religion, giving him all the power and influence that the character of a minister of religion will confer upon him. Think of him not as a Roman Catholic minister, but, if possible, as a minister of the religion of Christ; and then consider what his position was amongst those men, and ask yourselves whether, under all the circumstances, the poor miserable dupes who were led to commit these crimes against our country, should be put forward, convicted and punished, while those men should be set free who, like the prisoner, although not actually in arms, counselled and advised them, and to whom they looked as to a superior for instruction and guidance, for aid in their difficulties, and for comfort in their last extremity? If those men hardly dared to go into the conflict without their spiritual advisers by their side to ease their troubled minds as well as to bind up their wounds—if those men felt it necessary to have the aid of their ministers in their unholy enterprise—it was surely the duty of

men like the prisoner who wielded influence among them to hold aloof from them, to warn them of the criminal nature of their designs, and to refuse them aid and encouragement in the pursuit of them. Is it to us to appeal, whose homes have been desolated and whose young men have been struck down, that the minister of religion should be allowed to escape because, although he did not actually bear arms, he gave the influence of his holy office to those who carried fire and sword and desolation into our happy homes and firesides? Is that the ground upon which he should be held guiltless, while those poor wretched creatures, few of whom can read or write, who have no high incitements to urge them on in the path of usefulness and honor, and who are the mere dupes of wary and wicked conspirators, are convicted and punished for the acts committed at the suggestion of others? No, it is no ground to say that because he is a minister of religion he should be allowed to go free; and the very words spoken by my learned friend, that those men would go into the battle with greater comfort and confidence because of the presence of their spiritual adviser, afford one of the strongest reasons why this man should not have been there to give them the additional incitement to courage which would follow a knowledge and assurance that wounded their condition would be alleviated and dying their souls would be cared for by a minister of their religion. No, instead of the minister of religion—no matter to what religion he belongs, whether Protestant or Roman Catholic—being entitled to consideration, he should the more surely be held to account if he places himself in the position of one who aids in the commission of a great wrong upon a peaceful people. Under ordinary circumstances the character of a minister of the gospel ought and does shield him from many things to which others are exposed; but the sanctity of the office he holds ought not to shield the prisoner from the responsibility of the position in which he deliberately placed himself—the position of one who aided, assisted and encouraged those men who came to this country to harra our people, to ruin our homes, and if possible to destroy our government and free political institutions. No, gentlemen, if the evidence leads you to the conclusion that the prisoner was

aiding and comforting those who were levying war upon us, then whether he had arms in his own hands or not, whether he was a minister of the gospel or not, he is guilty of the charges in the indictment and must be so declared. It is no matter to you what the consequences may be in case of conviction. It is true that according to your verdict so will punishment be meted out; but it is part of the law of the country that men who like you are empannelled to try a person charged with crime, shall not take into consideration the consequences which may follow their verdict. If you have a reasonable doubt as to the guilt of the prisoner, do not let any prejudices or feeling deter you from acquitting him; but if, on the other hand, the evidence leads you to the belief that, in contradiction of his own statement, he is one of those who advised and encouraged the men who committed that outrage upon our people, then you must banish from consideration every thought but the thought of doing your duty.

His LORDSHIP then charged the jury saying—You have to deal with the facts set before you in evidence, and I have to deal with the law as it bears upon the subject. As a matter of law I shall state to you that it is not necessary that every man should be found in arms in order to be held guilty of the offence of levying war. The statute does not mean that. It means that every one who comes into the country with intent to levy war is guilty of felony, whether he actually bears arms or not. The other reading of the law is impressed by the counsel for the defence; but I have left my reading of it open, so that if he thinks I am wrong he may have the opportunity of obtaining the opinion of my learned brothers on the point. At present, however, you are bound by my reading of the law, and I say therefore at the beginning that it is not necessary, in order to establish the charge of levying war, to show that the prisoner bore arms at all, but it is only necessary to show that he was associated with others and engaged in the general enterprise. If he was there involuntarily and against his will, then he is not guilty. The opinion is not to go abroad as founded upon authority that because he is a priest wearing the robes of his office he might with impunity go there with those men. The fact that he is a priest will not protect him in the commission of an

unlawful act, nor would a doctor, although there to dress the injuries of the wounded, be entitled to protection under similar circumstances. In legitimate warfare there are certain rules observed by all civilized nations: the dead are decently buried, the wounded attended with care, the prisoners treated with humanity, non-combatants such as chaplains and medical men are not interfered with while in the proper pursuit of their humane calling, and private rights and private property are respected. But this was not war in that sense, nor were these men a regular army. If anything at all they were a band of marauders who came from a country at peace with us, to commit an assault upon an unoffending people; and although perhaps they had the sympathy of a large number of the people of that country, still their act was a violation of the laws of that country as well as of our own. That fact should be borne in mind, because there have been a good many things urged which it would be proper to urge if there had been legitimate warfare, but which have no force otherwise. Now, the Crown undertakes to prove that these parties came to wage war upon Her Majesty, and the charge against the prisoner is that he was one of the parties who came with that intent. His answer to that is that he was not one of them; first, he says that he was there, not to levy war, but as a minister of religion, and again that he was there against his will. As regards the first part of his answer, what is the evidence? The first witnesses who speak of his being there are Rae and Willecox, who speak of him as being there soon after the landing, and their attention was called to him from this circumstance: Rae says that the main body had moved forward, leaving some stragglers behind; some of the main body had left their valises, and the prisoner said to these stragglers "Take up these valises, because the boys may want them." Well, does that show that he was there against his will—that anybody was compelling him to go with the main body? The defence says that he was detained there by force, but if you believe this witness you must believe that he was not there as a prisoner or under any compulsion, but as an aider in the general design. That is the first fact for you to judge upon. Does the evidence show that the prisoner came there against his will or to



aid them in their projects? If he came there voluntarily to aid them, then he is guilty under the first count of the indictment—he is found associating with them and furthering their aims, and having done that he is just as liable as if he had borne arms and were found fighting in the front of the battle. It must be observed that the learned counsel for the defence does not impugn the evidence of either of these witnesses. Then as regards the witness Milligan, who also saw the prisoner there, it is for you to say how far you can rely upon his statements; if you cannot rely upon them with confidence—that is, reasonable confidence—then reject his evidence. Milligan says that the prisoner was in arms with the rest, and if you can believe him it would appear that he was personally armed; but that is not a material fact, for as I read the law it is not necessary, as I have told you, to prove that he was actually in arms in order to establish the intent. Milligan says that the prisoner was advising the men to take care of themselves. Why? for what purpose? If they had come over in foolish ignorance of the law, or in wilful violation of it, would you not have thought that he would have told them to go back again, if he had not been in favour of what they were about to do? If he was not there to aid them, would he not have told them that their enterprise was illegal and advised them to return? Well, after getting breakfast they moved down to Newbigging's farm and there constructed their camp. We find the prisoner in the camp along with them. Is he there by compulsion? Is there any evidence of that? He is seen talking with the officers of the force, those apparently who were in command of the camp. One of the Newbiggings says that he saw him there; that he afterwards proceeded with two or three others to the bank of the river; that there they saw two boys rowing a boat down the river; that they hailed it and asked the boys to take them over the river; that the prisoner then embarked with the others; that they declared their intention of going to the American shore; and that one of them called him "Father," and said "You had better take his seat." The witness saw no more, but the other Newbigging saw them cross in the course usually taken by boats passing to the American shore, and the inference is that they went over to the other side. That was

on the afternoon of Friday the 1st. We hear nothing more of the prisoner, according to the evidence, till he is found at "Major" Cantie's house—a man who is proved to have joined those people when they came over, and who has not been heard of since. He was found there after the battle at Ridgeway. Three of the witnesses spoke to him there, and he does not appear to have given exactly the same account of himself to all of them. Mr. McMurrich says that the prisoner told him that he came over to bury the dead and perform his duty, that he was on his way to Montreal, and that he did not know if there were any Fenians in the house. Mr. Hodder and the other witness say that the prisoner was asked if there were any Fenians there and he replied "no"; that afterwards a dead and a wounded Fenian were found in the house; and that the prisoner said he had lost his vestments and was wanting to get others. Now, these two statements might be construed very differently as against the prisoner, but when both are taken together they point to the inference that he had knowledge of the operations of the Fenians, and desired to conceal it. You are asked by the Crown, is it likely that, if one man were dead in the barn and another wounded in the house where Fenians were sure to find sympathy and succor, the answer given by the prisoner was believed by him to be true, that there were no Fenians there, taking into consideration his own avowal that he was there to bury the dead, to dress the wounds of the wounded and to give spiritual consolation to the dying? Is it likely that he was there in the character he wants you to believe he bore—that of chaplain or priest—and yet was ignorant of the presence of these men? The Crown says that it is not likely, and that he was prevaricating and telling what was not true. Now, as to people giving different accounts of the same thing, it is very often honestly done and without intention to pervert the truth. For example, if you discuss among yourselves what I may say in a particular case briefly, few of you will be able to cite the very words I used. One will say that I said one thing, and another that my words were different in this or that particular. Two of you would not perhaps agree as to the exact terms I employed. But what I said would leave a certain impression—

my meaning would be conveyed by that impression, and there might be no doubt about my meaning, although you could not repeat the very words I used, except you had been trained as some are to catch the words literally as they fall from one's lips. So it is that cases have occurred where two or three or perhaps a dozen of persons have given a different account of words spoken or events witnessed. Some of them may have got the exact words uttered or the idea which they represented, but the probability is that no two of them agreed that the idea was expressed in precisely the same terms. The safest rule is to take the general impression conveyed by the words used. It is for you to find what was really the truth with regard to the prisoner's statements. Was he really correct or not when he represented himself as having had nothing to do with the inroad upon this country? In forming your judgment upon that point you will consider all the circumstances which have been testified before you. Now, as to the witness Treble, his statement is not to be relied upon, because he does not swear to the identity of the prisoner. I think, therefore, that you will be safe in throwing aside his evidence altogether. Then, in respect to the objection about American citizenship, I think it is right that I should put the matter clearly before you. In more ancient times the Crown of England would have prevented its subjects from migrating from England, but it has been the modern policy for many years rather to facilitate their going if by doing so they thought they could better their condition. The population in many places had become too great in proportion to the means of subsistence, and it was therefore thought wise to permit the emigration of those who desired to leave the country. The Crown has not in late years dictated as to where its subjects should go or how they should conduct themselves. They have been allowed to go to the United States, which invited to its shores the people of all the countries of Europe, to become subject to that country, and to acquire the rights of citizenship. The rule of law is and always has been that once a subject always a subject, and that doctrine carried to an extreme as between England and America led, in fact, to the war of 1812, for it arose in this way, that Great Britain claimed the right, being mistress of

the seas, to visit American vessels and take from them sailors, being English subjects, to man its fleets. America resisted that claim on the ground that those persons were citizens of the United States; and although the war was begun on account of that question it was at last settled without any settlement or determination upon that very point. The law is now, therefore, unsettled in regard to that question, and England has of late allowed any subject to go to any part of the world he pleased, without treating his act as a crime or holding him responsible for throwing off his allegiance. Now, in this case, the Crown does not claim the prisoner as a subject, but takes him at his own word, as I think it has a right to do, as a citizen of the United States. It is put to you in this way: there is his own declaration that he is a citizen of the United States; that as a citizen of the United States he came from Buffalo to administer consolation to dying Fenians; we treat him as such, and as a citizen of the United States he is arraigned before you. The defence says, on the other hand, that because the Crown does not treat him as a subject he is not amenable to the statute. I have put the point at issue clearly before you, and I hope I will not have to go over it again in that way. We now come to the testimony of those gentlemen who were at Ridgeway, and who state that men, subjects of Her Majesty, were killed there and others wounded. It was not necessary to prove that those things were done in order to constitute the crime of levying war. It was enough to show that the parties who committed those acts came into this country armed and arrayed against the authority of the Crown. That would have been a sufficiently decided act of war to make good the indictment. But the Crown goes further, and shows that not only was war levied in that way, but that the necessary results of war followed, and that there was an actual conflict between Her Majesty's forces and those who were armed and arrayed against them. It is charged against the prisoner that he said to individuals there—"You need not be alarmed; we do not want to hurt you, but we want to hurt the red-coats." The next day they did meet the red-coats, and while he was there to encourage the band he was ready to flee for shelter should anything occur to make shelter desirable. Now, with regard to his charac-

ter of priest, I may say that all men, and probably the uneducated more than the educated, are somewhat superstitious; and there are those who will often venture to do things, to enter into certain enterprises, which they would shrink from if they had not the sanction of religion and were buoyed up with the certainty, in their own minds, that they would not die unregenerated. It is not surprising therefore to find that men who engage in such nefarious undertakings as these should feel encouraged by having among them those who would bind up their wounds and afford them spiritual comfort in their dying moments. If you find that the prisoner was there for the express purpose of giving them to understand that if anything occurred to any of them he was ready to bind up their wounds, to receive their dying confessions and to absolve them of their sins—and in his capacity of priest he was bound to grant them absolution if their confessions were sincere—and if these were means by which others were induced to join and follow the fortunes of the band, then he was giving them all the aid and comfort necessary to make him to all intents and purposes a party to the enterprise. The question then is, was he there for that purpose? The Crown says that he was. The defence, on the contrary, says that no one should be convicted of the charge of levying war under such circumstances, and it is urged that the doctors who dressed the injuries of the wounded might just as well be arraigned and convicted. But those who offer this objection do not make this distinction: that a doctor, hearing of casualties after a conflict of this kind, might go to the assistance of wounded parties, especially if he had previously dissuaded them, as was his duty, against their unlawful enterprise; but it would be improper for him to accompany them before the battle, thereby giving them that encouragement and comfort in their design that might be afforded by his presence. If we permit strangers to come into this country and enjoy the protection of our laws, they owe certain duties in return which they cannot evade. It is their duty, as it is that of the subject, when they see a crime being committed, either to prevent it or give information in order to procure the punishment of the guilty parties. Now, the prisoner came here either with an innocent or with a criminal purpose. If he came inno-

cently, the moment he knew that it was the object of those men to tread down our laws and carry war into our country, it was his duty to turn them, if possible, from their design, and failing in that to go away from them and inform the authorities of their unlawful aims. If he failed in that duty, even although all he says be true—that he kept them from being drunk, thereby preventing the commission of greater outrages, that he bound up their wounds, that he consoled the dying, and that he did everything which as a humane man and a priest he should have done;—even were all this true, I say, if he failed in the duty he owed to the law which was being outraged, he was guilty of aiding them in their enterprise and doing all in his power to promote it, just as much as if he was armed with pistol, sword or other weapon. Now, then, does the evidence point to that as being the case? If it does, then he is guilty; if it does not, he is innocent. He says he was forced to join them and was detained by compulsion; but where is the least evidence of that? A man may have been forced to join the band, and indeed some of the witnesses who have been examined before you were held as prisoners; but do you find evidence of compulsion in the fact that the prisoner was marching in the rear, that he gave orders for the valises which had been dropped to be picked up, and that that having been done he again fell quietly into the rear and marched on with the rest? Is there any evidence of coercion there? If not, where is it? You have it only in his own assertion. The rule of law with regard to statements made by accused parties is that you give them the benefit of those statements as far as they are shown to be true or consistent with the facts; but if they are proved to be untrue and inconsistent with the facts, then you are to give no credence to them whatever. Then, you will recollect that the prisoner followed the band to the camping ground and was seen there by some of the witnesses. Was there any coercion used to keep him in the camp? Was he heard to protest that he was there against his will? Nothing of the kind. He was found there associating with the officers in command, with no apparent restraint over his movements. At three o'clock on Friday afternoon he was seen going quietly in a boat to Buffalo. Who or what compelled him to go back from Buffalo to the Can-

dian side? Who took him to Ridgeway afterwards? Was it upon compulsion that he returned and remained till Sunday, when he was arrested at Cantie's house? There is no answer in the evidence as to that. It has been said that if there is any doubt in your minds you should give the prisoner the benefit of it. It is true, that is your duty. If you find on a careful survey of the evidence, that there is anything to create a doubt in your minds, then it is your duty to acquit him. But it is not your duty to conjure up imaginary doubts. A doubt which would justify you in acquitting him is something that would alarm your minds afterwards in case of conviction and lead to belief that you had been wrong in your verdict—not such doubts as ingenious counsel may suggest, but what may fairly arise on viewing all the circumstances of the case. If two or three men were spectators of a fight it is probable that the account given by each of the transaction would differ from that given by the others in certain particulars more or less important; but because of that variance which would arise from the different aspects in which the transaction was viewed, would any one say that it had not occurred at all? The clear picture the Crown wants to make out is that the prisoner came there of his own accord. He wore the priestly robe and was regarded with all the reverential feeling that ordinary men bestow upon the wearer of that robe. He was there, even according to his own showing, to bind up the wounds of the stricken, and to whisper the consolations of religion into the ears of the dying. He says that that was his duty. Well, that idea of his duty may have proved one of the greatest possible incitements to the others to prosecute their unlawful undertaking. If that was the case, was he not giving them all the aid and encouragement a man could give? Was his conduct consistent with the conduct of a man obliged to go there and remain with them, or do not all his acts point to the conclusion that he was there voluntarily? If he was there by accident while on his way to Montreal, as he asserts in one of his statements, and if while there he saw a dying man and aided him in his last extremity, one would hardly be warranted in saying he was guilty of levying war; but is that the fact, or is it only a pretext afterwards thought of to color the crime with which he is charged? It is for

you to determine this question according to the evidence. I have made such remarks as will, perhaps, allow you to see your way clearly through the ingenious mist which may have been thrown around the case by counsel. I will now read the evidence, and it is your province to believe what you please and reject what you please as unworthy of credence. If all the circumstances lead you to doubt that the prisoner was there to aid the enterprise, then you should not convict him. The policy of the law is not to convict an innocent man, but to not allow a guilty man to escape on any pretext he may set up. The prisoner, you should bear in mind also, is entitled to be considered innocent until the Crown step by step shows him to be guilty. In some parts of the world it is the object of criminal prosecutions to find an accused party guilty by every means that can possibly be employed. He is interrogated by the Judge, urged to make statements which may be tortured into evidence against him, and by other means entrapped into admissions of guilt. In this country we do not allow that, and such modes of enquiry are unknown. We rather err, if we err at all, in the other direction, and surround the accused with every protection. The people who speak our tongue have always been and are tenacious of their personal rights and jealous of their liberties. They would not suffer the law to condemn a man on suspicion; and when, therefore, an accused person is placed upon trial the law holds that until his conviction every presumption is in favor of his innocence, and after he is pronounced guilty every presumption is in favor of guilt. A man stands erect and clear until the voice of society, speaking in the recognized manner and with the recognized authority, declares him to be guilty. With regard to the legal objections that have been raised, you have nothing to do with them; if they are good your verdict, should it be for conviction, will not be sustained. It is every man's right to have legal evidence and only legal evidence adduced against him, and also to have no informality or other error in the conduct of his trial. These, however, are not matters which fall within your power to determine. His lordship then read over carefully his notes of the evidence and concluded:—That is the whole case. Here is the evidence. Apply your mind and judgment to it dispassionately. The consequences



of your verdict are nothing to you or to me. It is for you simply to determine whether this man is guilty or not guilty. Lay aside all feelings that might warp your judgment. If there be a doubt, such a doubt as would alarm you afterwards in case you should convict the prisoner, give him the benefit of it. But you must bear in mind also that you are bound not to raise a doubt in order to prevent you from doing your duty.

MR. M. C. CAMERON—I submit that your lordship misdirected the jury when you stated to them that the duty rested upon the prisoner, when he found himself among those men, to have dissuaded them from their enterprise, and prevented a breach of the law.

HIS LORDSHIP—I did so state it.

MR. M. C. CAMERON—Well, I submit, my lord, that no such duty rested upon the prisoner. There was a moral duty, no doubt, but there was no legal duty of that kind.

HIS LORDSHIP—You may consider that a misdirection, if you please, but I have no objection to its being withdrawn.

HON. MR. CAMERON—There was no misdirection in saying that it was the prisoner's duty to dissuade men from doing an unlawful act.

MR. M. C. CAMERON—Well, that is not the way it was put.—Your lordship said that he was bound to prevent them from carrying out their design, and that if he failed to do that the responsibility for the consequences rested equally upon him as upon the others.

HIS LORDSHIP—No; I said that if he failed in that, then it was his duty to leave them and give information to the proper authorities. I say further that it is the duty of one who sees that a felony is about to be committed to prevent it, if he can, or if he cannot to give notice, if he has an opportunity, to those who may prevent it.

MR. M. C. CAMERON—I submit further, my lord, that under the first count of the indictment the prisoner must be shown to have had the intent to levy war when he came into this country; that under the second count he must be shown to have been actually in arms with intent to levy war upon Her Majesty; and that this should have been stated in your lordship's direction to the jury. I

submit too, in regard to the third count of the indictment, that your lordship should have directed the jury that there is no evidence of any act of hostility having been committed by the prisoner with intent to levy war upon Her Majesty.

HIS LORDSHIP—I have directed upon that point already.

Mr. M. C. CAMERON—Well, I object to the direction.

HIS LORDSHIP—If the objections are put into writing I will receive them.

Hon. Mr. CAMERON suggested that the jury should retire.

HIS LORDSHIP gave directions accordingly, and the jury retired.

Mr. M. C. CAMERON—I object to the jury retiring, my lord, until my objections to the direction are heard; and I submit that it is a misdirection for your lordship to instruct them to retire.

Hon. Mr. CAMERON—These objections are matters of law with which the jury have nothing to do. It is right, therefore, that, as in all cases of felony, the jury should retire before they are argued.

Mr. M. C. CAMERON—I object further, my lord, that the second count of the indictment sets out that the prisoner was himself in arms, with intent to levy war, while the evidence does not prove the fact or the intent.

Hon. Mr. CAMERON—The count is that he was in this country in arms against Her Majesty.

Mr. M. C. CAMERON—The intent to levy war must have been in the mind of the individual at the time he entered the country in order to establish the count. I submit, further, that if the prisoner came into the country, not with intent to levy war, but simply to administer religious consolation to persons who might be wounded or dying, then he committed no offence which comes within the meaning of the statute.

HIS LORDSHIP—My reading of the law, as I stated to the jury, is that if the prisoner came into the country as a priest, for the purpose of aiding and comforting those who bore arms, then he came precisely on the same footing as if he, himself, had borne arms in his hand. If I am wrong in that reading of the law, then the whole charge to the jury fails.

Mr. M. C. CAMERON—The way in which your lordship puts it

is, that if the prisoner came to administer spiritual comfort to those who might be wounded, it was an offence which comes within the statute; but I hold that it must be shown that he came here with intent to levy war.

HIS LORDSHIP—Well, perhaps I misdirected on the whole statute?

MR. M. C. CAMERON—These, at any rate, my lord, are the objections I raise on behalf of the prisoner. I hope your lordship will note them, but if you decline I certainly will not put them into writing.

HIS LORDSHIP—Oh, if you put it on that ground I will not decline to note them. Let us hear your first objection.

MR. M. C. CAMERON—Well, I object, first, that your lordship charged it as a duty legally incumbent upon the prisoner to have interceded with those men against the commission of the acts contemplated, and that having failed to do so he is responsible for the consequences.

HIS LORDSHIP—But I have withdrawn that direction.

MR. M. C. CAMERON—Well, I wish it to appear on your lordship's notes that the jury were so charged, and that the direction was afterwards withdrawn.

HIS LORDSHIP noted the objection.

MR. M. C. CAMERON—I submit, my lord, that under the first count of the indictment your lordship should have directed that at the time the prisoner entered the country it was with the intent, not to levy war against Her Majesty, but to administer the consolations of religion, and that being the intent, he is guilty of no offence under the statute. I submit that under the second count your lordship should have told the jury that they must find that the prisoner was actually in arms before he could be convicted of intent to levy war as charged. I submit that under the third count your lordship should have directed the jury that the prisoner could not be found guilty of levying war unless he himself committed an overt act of hostility against Her Majesty, not that he was there with others who did. If he were indicted for treason, then he would be liable for the acts of the others, but not otherwise. But if he is liable to all the consequences of treason, he ought to have

all the benefits of one who is so charged, in which case only those witnesses would be called against him whose names were on the back of the indictment.

HIS LORDSHIP—Well, my ruling with regard to the two last objections was very emphatic—that he is answerable for the consequences of all the others did if he was there to aid and comfort them.

MR. M. C. CAMERON—I further take exception to the charge, that your lordship should have told the jury, that there was any evidence to prove that the prisoner is a citizen of the United States; and I submit that the citizenship meant in the statute must be proved as constituting citizenship in a foreign country, and that as the prisoner's statement is, that he is a British subject, he must be indicted as such.

HON. MR. CAMERON—Why should his statement that he is a British subject be better than his other statement, that he is an American citizen?

MR. M. C. CAMERON—I submit that the Crown is bound to prove the fact of citizenship.

HON. MR. CAMERON—Well, we take his own statement as proof, although we would prefer that he should be tried as a British subject rather than as an American citizen.

MR. M. C. CAMERON—I do not like what your lordship stated about clearing away the mist that ingenious counsel had succeeded in throwing around the case; but I do not raise this as an objection on a point of law, although, a remark of that kind was perhaps more prejudicial to the prisoner than the most direct charge against the law.

HON. MR. CAMERON—Perhaps my learned friend does not like to be referred to as ingenious.

HIS LORDSHIP—The remark was not applied to the learned counsel. If he thinks so he is mistaken. It was in reference to the mist that often surrounds cases of this kind.

MR. M. C. CAMERON—Your lordship will recollect that you spoke of the mist thrown around the case by ingenious counsel.

HIS LORDSHIP—I did not say "ingenious counsel," but I think it is so. I should be doing your talent great injustice if I should think otherwise.

The jury returned to the court-room about seven o'clock, after an absence of three-quarters of an hour. The clerk, having called over their names, asked them if they had agreed upon their verdict, whereupon the foreman replied that they had agreed upon a verdict of GUILTY. This verdict having been recorded upon the indictment,

HON. MR. CAMERON—I move, my lord, that the judgment of the court be passed upon the prisoner at the bar.

HIS LORDSHIP—John McMahon, have you anything to say why the sentence of the court should not now be passed upon you for the felony of which you have been convicted?

The PRISONER (whose voice was at first low and broken, but afterwards firmer and more distinct) addressed the court as follows:—According to the testimony given against me, if it was true, I would have nothing to say, my lord; but I do declare here that I am unjustly charged and convicted—I am not guilty. At the time that Milligan and Sullivan swear that I was at Fort Erie, before you and God and all present I was in Buffalo. I was honestly going on my journey to Montreal, and I am not guilty. I beg your lordship's pardon if I say anything that is not pleasant or agreeable. If I was guilty I would submit, but if you execute me my blood will cry to heaven for vengeance upon those that are the cause of my death innocently. I was going after my brother's affairs to Montreal. I left my own house at half-past seven o'clock on Wednesday the 30th of May last to go on that journey I took the railroad car at eight o'clock, went to bed, came on my way straight, and arrived at ten o'clock on Friday night the 31st of May in Buffalo. I went to the Franklin House, stopped there, had bed and breakfast, went to visit my friends, Mr. Maurice Vaughan and his brother Dan. Vaughan. It was the moment of nine o'clock when I crossed over on the ferry-boat on my way to Montreal. I was looking for the railroad office to get a ticket, but what with one excitement and—(here his words were inaudible)—so I am innocent my lord. I cannot plead guilty. I am innocent.

The crier of the court then proclaimed silence while his lordship passed sentence of death upon the prisoner.

HIS LORDSHIP—John McMahon, the jury have found you guilty on evidence which, I think, admits of no doubt. That you were a participator in the acts of those people, that you forwarded their designs, and that you were willing to lend them all the assistance in your power, is but too clear; and it is a painful fact that you, a clergyman of a church whose creed is peace and whose ministers in all ages and every land—to their credit be it spoken—have done all in their power to prevent bloodshed and war, as it became them to do;—that you, a clergyman of that church, should stand in the position you occupy to-day. So far you have forgotten what was due to the professions of your church in that respect, and so far as you gave countenance to those men you forgot the mission with which you were charged, and that was peace. If you had come here, as you would now lead us to believe, quietly to administer the consolations of religion to the dying man, and to whisper into his ear forgiveness of his sins, as you no doubt honestly believe you have the power to do, you would not have stood in the peril you are now exposed to. If you had waited till there was a conflict, and then sought permission to cross over to perform your Christian mission, all you would have had to do to enable you to come here innocently, would have been to remain on the other side till you were told that something had happened—that there were dying men requiring your religious offices; and then if you had come across the frontier, declaring what your intentions were, I am sure there would be none to prevent your carrying out your object. However inimical they might be to your church, however much they might detest the crime of these people, there is not a man in the Province who would have said no to your journey. But that was not the way you came to this country. On the contrary, you came here as a priest giving all the sanction you could to the acts and designs of men who had faith in your religious ministrations, who had faith in your church; and they went on boldly in their unholy purpose, no doubt aware that you were close at hand to assist them if wounded and to give them forgiveness if they fell. There is little, very little reason to doubt that. Now, that being the case, is it not plain that you should be held to a strict account for what you

did ; is it not sad and painful that one in whom those men placed so much reliance, one who they believed possessed such great powers, should have given encouragement to wage war upon us, to desolate the homes of our people, to plunder and rob and slay as they did? I have indeed a very painful duty to perform—one that I would gladly avoid if I could ; but, I have no alternative, no discretion in the matter. The doom of the law is death for the crime of which you have been found guilty, and I but sit here humbly to carry out that law and to pronounce its penalties. If you have anything to say why mercy should be extended to you, you will have time to apply for it. If in the course of the trial I have said a word that ought not to have been said, you will have ample opportunity of complaining of that, for though the law *ex post facto* authorizes me to sentence you to immediate execution I will not exercise that discretion, because I would not by any discretion of mine cut short your life by a single hour. At the time when you committed this offence you were not, under the law as it then stood, liable to be sentenced to execution until at any rate one term of court had elapsed after conviction. But the legislature—or its wisdom, perhaps, I should say—left it to the judge who tried these cases to order the execution of the sentence sooner if he thought it necessary to do so. In my opinion it is not necessary. I do not think it is advisable to do anything hastily in connection with these trials. A gross outrage was done upon us ; but we are a people who love to be guided by law, and law is never hurried in any of its operations. So that in that view of it you will have the full term which shall elapse before the carrying out of the sentence in which to make any complaint you may have to urge against anything I have directed or charged as law, or against any other mistake that may have been made in respect to this trial. If I have fallen into any mistake in my view of the law, I shall be happy to be put right ; if I have made any mistake in regard to the facts, I shall be as pleased as you to find that I am wrong. The execution of the sentence will therefore be delayed, or rather the time will be extended, so that you will have opportunity to make application if you wish to avail yourself of it. You have had a fair and impartial trial. The jury, I think, have come to a right conclusion upon the facts

presented to them; and as for the law, I may be wrong in the view I take of it—for man is always fallible—and for your sake I hope I am. I have no desire to harrow your feelings with any further observations. Anything that I can say would, I am aware, have little effect upon you as you stand there; but I must add this—that if you had acted as a clergyman of your church is expected to act, as clergymen of your church have acted in all ages of its history, you would have been earnest in dissuading those men from engaging in what they did, you would have set your face resolutely against the undertaking, and you might probably by your determined opposition have prevented them from taking one step in their unlawful designs. I do not say that you failed in your duty, and that you forgot your holy mission, when you failed in that respect. As I said before, you will have time to apply for a full consideration of your case by my brotherjudges if any error has been committed here by me; and you will have time and opportunity also, before your sentence is carried out, to apply to your Maker for the forgiveness of your sins. The sentence of the court is that you, John McMahon, be taken hence to the place from whence you came, and from thence, on Thursday, the 13th day of December, to the place of execution, and that there you be hanged by the neck till you are dead—and may God have mercy upon your soul!

The prisoner, who betrayed no emotion during the address of his lordship, was then removed.



## TRIAL OF DAVID F. LUMSDEN.

SATURDAY, NOV. 3, 1866.

The court was opened this morning, and although the crowd of spectators, seeking admission, was not as large when the doors were opened as on previous occasions, yet, as the day advanced, persons kept crowding in until the chamber was inconveniently filled. Mr. Justice John Wilson having taken his seat on the bench, the proceedings were commenced. The Hon. J. H. Cameron, Q.C., Mr. R. A. Harrison, and Mr. John McNab, Crown attorney, appeared for the Crown, and Mr. M. C. Cameron, Q.C., Mr. Kenneth McKenzie, Q. C. and Mr. Fenton appeared for the prisoner.

The prisoner, the Rev. David F. Lumsden, was then brought in and placed in the dock. He appeared in a black suit, cut in clerical style, and wore a white tie around his neck. Upon entering the dock he bent his head forward for a few minutes, as if engaged in prayer.

Mr. Thurston, the American consul, was present during the proceedings; and Mrs. Lumsden, a young and lady-like person, sat near her husband's counsel, and, as might naturally be supposed, she was buried in grief and anxiety. Bishop Coxe, of Buffalo, and several American gentlemen, and the Rev. Dr. Fuller, Rev. Mr. Darling and a number of other clergymen, of Toronto, were also present, and appeared to take much interest in the proceedings.

The CLERK then called the following jurors, who answered to their names, and were sworn in to try the case:—

William Atkinson,  
George Howard,  
Mathew Waites,  
John Wilson,  
Philip Gower,  
Roderick McLeod.

William Collins,  
John Spink,  
Henry Hosmer,  
Edmund Stephens,  
Hugh McEachren,  
George Grainger.

The CLERK called the names of Thomas Jackson and James McMaster, but they were challenged by the prisoner's counsel on the ground that they had already served as jurymen on the previous Fenian trials.

The CLERK, after the jury had been empaneled, read the indictment, the terms of which were similar to those of the indictments against Lynch and McMahon.

Mr. JOHN McNAU, County Crown attorney, upon rising to open the case for the Crown, said:—Gentlemen of the jury: After the trials which have taken place in this Court it will not be necessary for me, in opening the case, to take up much of your time by making such extended remarks on the case as would have been necessary had this been the first of the series coming before the Court. You have all heard many of the circumstances connected therewith, and, therefore, it will not be necessary at this stage of the proceedings that you should hear more from me than a statement of the evidence to be brought before you in relation to this particular prisoner. He is charged in the indictment with three separate and distinct felonies, viz.: with unlawfully entering the Province; with being in arms therein with intent to levy war, and with committing an act of hostility in the Province with the same intent.—And it will be contended that though we should not be able to show that the prisoner ever carried arms on the occasion, and with the design alluded to, still there will be sufficient evidence laid before you to find him guilty of one and all the counts; there will be evidence to show that he was taking part with the Fenians—sympathizing with them, acting in concert with them, and conducting himself in other ways which could justify you in coming to the conclusion that he was one of that party who so entered Canada and continued in arms, and committed acts of hostility. The first evidence we will bring before you will show the prisoner to have been walking with the invaders, in company, or apparently in communication with a man on horseback at their head, in the village of Fort Erie. That was early in the day. Again he will be shewn to have been in the Fenian camp, on Newbigging's farm, during the day, about dusk or dark. He was there to all appearance one of themselves—talking, and apparently advising with the officers, and being evidently in authority and exercising a certain amount of control. For the purposes of this trial we contend that it matters not whether he was in command as an officer, who intended to conduct the military movements, or whether he was there as a clergyman, administer-

ing spiritual consolation, advice or encouragement. Subsequently we find him in conversation with Mr. Newbigging, touching property taken by the Fenians; and it will be shown that he had a certain amount of influence with the Fenians to enable him to do certain things to benefit the Newbiggings. We will prove this to you that on one evening he arranged to invite himself and the leading officers of the party to the Newbiggings, and there took tea, and that on leaving he expressed himself in such a way as led to the supposition that he was one of them. It will not be pretended, I think, that he remained with the Fenians during the nights of the 1st and 2nd of June. The next evidence I propose to offer brings us to the morning of the 2nd of June, when he is still on the Canadian side, and remained there some little time till arrested. We will prove his statement, if admissible, after his arrest; but I shall not now state what he said after his arrest, as it may turn out that, being in custody, there may be something which will exclude its admission as evidence. This is almost the sum of the testimony to be brought before you. We will also be able to put in a writing, with his signature to it, which we contend shows that he then, and by that writing, represented himself as a person in authority in the Fenian body. In all the counts, you may have observed, the declaration is made that he is an American citizen; so that it will be necessary for us to show that he claims, or did claim, to be such; otherwise we could not bring him before you under this indictment. In this, as in all other trials, the Crown is bound to make out a case. I do not know what the defence may be, but the Crown will, at all events, be bound to make out a case beyond all reasonable doubt; and if such reasonable doubt should remain on your minds after having heard the evidence, then you are bound to give it in favor of the prisoner, and acquit him. But if we make out for you a clear, satisfactory case, beyond reasonable doubt, it will be your duty, remembering your oaths, to give a verdict in accordance with the evidence, and find him guilty. In deciding on your verdict it will be your duty to consider the evidence fully, fairly and impartially, without being biased on the one side or the other by anything which has been said to you or which you may have read in the newspapers or elsewhere. I will now proceed to call witnesses.

GEORGE DAGGER was the first witness called.

Mr. M. C. CAMERON—I object, my lord, to this witness, as his name is not on the back of the indictment.

HIS LORDSHIP—I over-rule the objection.

Mr. M. C. CAMERON—I may as well state here, my lord, that I intend to object to all witnesses of the same kind that may be produced, because I submit that their names should have been placed on the back of the indictment.

GEORGE DAGGER *was then sworn and examined by Mr. McNab*—I live at Fort Erie, and I saw the prisoner on the Friday morning, when the Fenians first came over, on the garrison road, about two miles from the landing place. He was shaking hands with Fenian officers, who were on foot, and who wore swords. He then walked away, and I did not see him again till I came to Toronto. There must have been between six and seven hundred men there then.

*Cross-examined by Mr. M. C. CAMERON.*—I am a laborer; I reside at Fort Erie, and work on the Grand Trunk railway. I was called up from my bed at three o'clock on the morning of the first of June by Mr. Goldie, of the railway, who said that the Fenians were coming.

Mr. CAMERON—Well, what did you do then?

WITNESS—I stayed at home to look after the children. I stood on the outside of the door doing nothing. I was not hiding away anywhere that morning, but I live in a lonesome place. (Laughter.) I did not see the Fenians land. When I saw them they were coming by my door at about half-past five o'clock in the morning. I was standing outside about half an hour before they came along. I got breakfast before they came. I took a bite of bread and some tea before they came up. I saw about five or six hundred Fenians coming up the road; and one of them was on Dr. Kempson's horse; others were afoot. They were on the road on the flats, about as far away from me as from here to the otherside of the court house. They came up in military order and halted. All the citizens about my place ran away.

Mr. M. C. CAMERON—There is a strange story about your hiding in a hog-pen. (Laughter.)

WITNESS—That was not the case on Friday. It was on Saturday. (Laughter.)

Mr. M. C. CAMERON—Then on Friday you were disposed to do nothing, and on Saturday you got into a hog-pen. (Laughter.)

WITNESS—Yes, after doing my duty like a man as long as I could, I ran off, and if you were there you would get into a hog-pen too. (Laughter.) I saw the prisoner first on Thursday, and he was pretty well "tight." I saw him at Mr. Smith's taking a glass of liquor. It was not at Smith's, but at Seth Harris'. I saw him take the liquor. I know the prisoner because he wore a long coat and plug hat. I saw no others there with that costume—people around there can't afford it. (Laughter.) I was at Seth Harris' on that Thursday morning between eight and nine o'clock. I do not know who else was there. I drink to excess once in a while, but I was not drunk during the Fenian excitement. After leaving Seth Harris' I went to work. The coat the prisoner had on that morning was larger than that he wears now. I was taken prisoner by the Fenians about ten o'clock, but they let me go when I told them the British troops were coming, and that they had better clear. The Fenians came up like a crowd of blackguards, as they were. (Laughter.) I then thought it necessary to go and protect my children. I felt they were not safe, and feel they are not yet. I saw the Rev. Mr. McMahon there also. I am sure I saw the prisoner there with the Fenians. I didn't know the prisoner's name, but he is the man I saw there. I saw him afterwards in jail in May or June.

Mr. M. C. CAMERON—When did the Fenian raid take place?

WITNESS—The second of June, I think.

Mr. M. C. CAMERON—And yet you said you saw the prisoner in jail in May. That will do.

*Examined by Mr. McNAB*—About 800 or 900 Fenians came over the hill on the 2nd of June after the Limeridge fight: and I do not think more than 60 or 70 volunteers went to meet them at Fort Erie. The volunteers were dispersed. I man named Bradley and Dr. King wounded. Three wounded Fenians were carried across the river to Black Rock. I saw the prisoner shake hands with a man who was on horseback at the head of the Fenian

column on Friday, after which he fell to the rear. That was the last I saw of him.

CHAS. TREBLE, *sworn and examined by Mr. Harrison*—I saw the prisoner at Fort Erie, where I live, on the 1st of June, early in the morning, but he appeared to be with no one in particular. I was in conversation with A. r. Calder, of Buffalo, agent of the Grand Trunk company, and he attempted to intrude his conversation on us. Not liking his appearance, as he seemed under the influence of liquor, we moved off, but he followed and came up again and said, "Why dont you two gentlemen go to Buffalo and get a couple of regiments of soldiers and drive these Fenians away?" We again requested him not to intrude, and he left. I saw him again in the Fenian camp in the afternoon on the Newbigging farm, but he did not appear to exercise any control. Some members of the town council were with me. Next morning, the 2nd, when the Welland Field battery left for the Fenian camp he followed them apparently alone. It was understood that a number of the Fenians were trying to make their escape from the quarter to which the battery was going.

*Cross-examined by Mr. M. C. CAMERON*—The Fenians left the village to go to the camp about ten o'clock on Friday morning, and it was after that I saw the prisoner. I should think it was between four and eight o'clock we were at the Fenian camp. I saw a number of gentlemen from Buffalo in the Fenian camp, who went there out of curiosity—so I presume. It was about seven or eight o'clock next morning that I saw the prisoner follow the battery, but I did not think a number of the inhabitants followed the battery on the 2nd of June. I saw the prisoner brought up on the tug Robb. He got out on the dock, approached Mr. Dennis, and then appeared to recognize me, and I was of the impression that he said "There's a gentleman that knows me." He and Mr. Dennis then came up, and Lumsden said to me, "You know me." I said that I did not, but mentioned where I saw him. Dr. Trowbridge, of Buffalo, was there, but he did not appear to be participating in the raid. On the contrary, he seemed to be acting the part of a good Samaritan. The prisoner presented a dissipated ap-

pearance when I saw him; he was very much bloated, but looks very much better now.

WM. LEWIS *sworn and examined by Mr. McNab.*—I live at Fort Erie. I saw the prisoner there several times in saloons and taverns, two or three days before the raid. I saw him again in the Fenian camp on the first of June, when I was bringing up a load of provisions. He was speaking to several persons, some of whom were officers. On the last day of May he came into a billiard saloon in Fort Erie, and there was some difficulty between him and several other persons. On the following day, when I was at the Fenian camp, he saw me and asked me if I was in a better humor than I was in yesterday, and told me not to be afraid, as nobody would hurt me. I saw him in conversation with the officers, but as I was at some distance from them, I could not tell on what terms he was with them. Previous to going down with provisions I saw General O'Neil at Fort Erie, and heard him tell Dr. Kempson, the reeve, that he must have some provisions from him, and that if they were not furnished he would turn his men loose in the village. The doctor deemed it better for the people to furnish provisions and have the Fenians go into camp than have them in the houses. Parties were appointed to gather and take provisions to the camp. After gathering up "grub" General O'Neil ordered me to take it to the camp. I then went after more. It was on this occasion when I went with provisions that I saw the prisoner in the camp.

*Cross-examined by Mr. M. C. CAMERON.*—I am quite positive that I saw the prisoner the day before the raid in the afternoon. I think I saw him also on the Wednesday previous. There was many of the villagers up at the camp looking on and talking with the Fenians.

JOHN ANTHONY *examined by Mr. Harrison.*—I live about a mile-and-a-half from the Fenian camp. My team had been impressed, and I said that if they took it I would drive it myself. I did so, and I saw the prisoner, and told him I wanted to take my team away. He spoke to Gen. O'Neil, and the latter told me if I would draw another load of ammunition across to Fenian camp I might go and feed my team. I did so, and then took my horses away. I saw the prisoner again on Saturday going up from Fort Erie to the camp.

He shook hands with me and asked me how I was. I saw him again when he was being put on board the tug Robb.

*Cross-examined by Mr. CAMERON*—When I saw the prisoner in the camp he walked up to my wagon as a friendly person. He was dressed rather genteel—about the same as he is now. I spoke about my horses and he went to Col. O'Neil. Some of the villagers and a few parties from Buffalo were in the camp and laughed at me because I was drawing Fenian arms.

*THOMAS NEWBIGGING, sen., examined by Hon. Mr. Cameron*—I own the Newbigging farm at Fort Erie. I saw the prisoner on the first of June. My horses had been taken by the Fenians, and my son Joseph went after them, and came back in company with the prisoner and introduced him to me as a person who had represented himself as the chaplain, and who said he would use what influence he had to get the horses returned. I said if he would I would take it as a particular favor. He said he had not much influence with them, as he was a Protestant, and nearly all the men were Roman Catholics. He also said he was no Fenian; that he had only come over to restrain the men from licentious acts, &c., for the good of the Canadians. He told me he did not wish the Fenians to know that, and hoped I would not betray him. He appeared to fear that I would betray him, and observing this I felt insulted and told him if he thought I would betray him he had better not tell me any more; but if he had any more to tell me to come to the house. We went into the house, and he said if I would give him \$25 he might be able to get the horses back, because as he was amongst a strange lot of fellows he could only approach them by bribery. I told him candidly that I had given all my loose money to a friend to take care of it for me. He asked for an order on that person for the money, which I refused. He made no further demand. I then told him that as his men had been anxious to see the red coats they would be gratified if they waited a little while. I told him that if a fight took place I would stand by my property; that if I fell I would not miss my horses, and that if I survived I knew the Government would make good my losses. I then went to the camp and the prisoner said he would do all he could for me. He suggested that I should invite the officers to tea,



as it might do me good in getting back my horses, but I refused, as my wife was ill. He then invited the officers himself to take tea at my house, and Col. O'Neil, Col. Starr, Capt. O'Leary and the prisoner himself, therefore came up to tea. The conversation at the table was general—nothing being said about the object of their visit. The prisoner gave me a protection paper—as follows:—

“June 1st, 1866.

“Let no man touch anything on this estate. By order.

“Col. STARR.

“Indorsed by his chaplain,

“D. F. LUMSDEN.”

Soon afterwards I saw some parties going into the stables, and I went out to test the value of the protection paper, but when I did so I had no occasion to speak to the men as they were coming out of the stable. The parties remained to tea about half-an-hour. In the evening I heard that the Fenians had driven off my cattle. I spoke to the prisoner to do what he could to get them back. He at first refused, but then complied, and went and pointed out Col. O'Neil, who gave me a verbal order to take my cattle away. When I returned to the house the prisoner was in the company of Mr. Murray and Mr. Smith, of Buffalo—friends of my own. As both gentlemen were about to return to Buffalo the prisoner proposed to go with them, but whether he went or not I do not know. On the following morning, the 2nd of June, I saw the prisoner at the camp ground. I remarked that the aspect of things had changed since yesterday. He replied that he had been led to believe the Fenians had 120,000 men in Canada. I then told him that as he had acted the part of a friend to me the previous day I would advise him to get out of the country as soon as possible. He said he had done nothing to implicate him; that he had come simply to report matters as a reporter from some newspaper. I did not find the Fenians in the camp in the morning.

*Cross-examined by Mr. CAMERON*—The prisoner only acted the part of a friend throughout. If I had been in his position on Saturday I might have made my escape.

*JOSEPH NEWBIGGING sworn and examined by Hon. Mr. Cameron*—I am the son of the last witness. I saw the prisoner in the Fe-

nian camp on the first of June, and when I was speaking to Col. O'Neil about protection for my house he came up, touched me on the shoulder, and said he would make it all right. After this the Fenians took fourteen of our sheep and kined them. They had our cattle also but gave them back. The prisoner came with me to our house, and when about crossing the bridge a Fenian presented a bayonet, and refused to allow us to pass. Mr. Lumsden then put up his hand; said he was the chaplain; that it was all right. Some one from behind sung out, "all right: pass those men," and we were allowed to pass on. Mr. Lumsden told me he was no Fenian; that he had only come for the purpose of doing good. I said that if that was his object it was certainly praiseworthy. He did not explain his position as chaplain. I introduced him to my father and did not see him again.

*Cross-examined by Mr. CAMERON*—The sentinel at the bridge did not seem to know the prisoner, but when the party from behind said "pass those men," we were allowed to proceed.

*THOMAS NEWBIGGING sworn and examined by Hon. Mr. Cameron*—I saw the prisoner coming up the road with my brother on Friday. My father went down to get our cattle in the afternoon. When the cattle were coming back I was at the fence. The prisoner said if it had not been for his intercession with the Fenians, we would not have got them back. I saw the prisoner on Saturday morning in company with my father, but did not see him again till I saw him in jail.

*THOMAS MOLESWORTH sworn and examined by Mr. Harrison*—I saw the prisoner more than once on the first of June passing my place at Fort Erie. He was not in company with any person in particular. He was coming from the direction of the shingle dock and he said he was reporter for the New York *Herald*. He said he had been an officer in the British army, and had served in the Crimea.

*Cross-examined by Mr. CAMERON*—After this conversation I invited the prisoner into my house. Several Fenians were marching past my place, but not in regular order. Some of them had arms.

*DR. KEMPSON sworn and examined by Mr. McNab*—I am reeve of Fort Erie. The first time I saw the prisoner he was in the Fe-

nian camp, about seven o'clock on Friday evening, 1st of June. We had a meeting of the town council in the afternoon for the purpose of making arrangements to protect the village during the night, and we resolved to go down in a body to the Fenian camp to ask for a guard. We went down in a boat, and when coming back we met the prisoner at Newbigging's. I was under the impression that he was a chaplain in the Fenian army. Just before the attack on Saturday I saw him on the dock, where the tug Robb was at anchor. I was engaged at the time, and somebody told me that the prisoner said he was a relative of mine. He was brought before me, and I told him I knew nothing of him except that I had seen him the day before at the Fenian camp. He was arrested according to my directions.

Mr. M. C. CAMERON—No questions.

Col. DENNIS *sworn and examined by Mr. Harrison*—I saw the prisoner on Saturday, 2nd of June last. He was brought off the dock at Fort Erie, to the tug Robb, which I was commanding, and delivered to me as a Fenian prisoner. I said to him when he came on board that I was surprised to see a respectable looking man like him charged with Fenianism, and asked him what account he had to give of himself. He replied that he was not a Fenian, that he had been in the Fenian camp, but that he had gone there thinking it was his duty to take care of and comfort the wounded and dying, and that he was a minister of the Episcopal Church. I asked him for proof of his being a Protestant clergyman, and he handed me a letter from Bishop Potter. I said, after reading it, that that was all very well; but I could not understand how a Protestant clergyman could be of any use among such ruffians, whom, if they had any religion at all, were Roman Catholics. He said he had passed himself off as a Roman Catholic priest. I asked if he knew anybody in Fort Erie, and he said he knew the Rev. Mr. Greenham there, and could get a certificate from him that he was a Protestant clergyman and not a Fenian. When we got to Fort Erie I allowed him to go to see Mr. Greenham to get the certificate. He came back, and I found with some diffculty that he had not been to see Mr. Greenham.

JOSEPH SCHRYER *sworn and examined by Mr. McNab*—I live at

Fort Erie, and was acting as chief constable there on Saturday, June 2nd I arrested the prisoner, and put him on board the tug Robb.

*JOHN MEDCALF sworn and examined by Mr. Harrison*—I belong to the Queen's Own Rifles, of this city, and was at the Ridgeway fight on the 2nd of June. The governments of Canada and the United States were then at peace. The Queen's Own, the 13th Battalion, and two rifle companies were attacked by a body of armed Fenians. I saw Ensign McEachren lying wounded, and, afterwards, dead, and I saw a man shot dead at my side. I saw the prisoner in the jail. He told me he was an American citizen; that he was born near Edinburgh, Scotland; that he was an Episcopal clergyman, and had resided at Nunda, New York State; that he had come with the Fenians to see if he could be of any use to the people in Canada, and strive to save property; that he was arrested on the bank of the river, at Black Rock, while waiting for a boat to carry him over to Buffalo; that he had been to see Mr. Greenham, but that he was not at home, and that he was not a Fenian, and did not belong to them. I held out no inducement to him to make the above statement.

The evidence for the prosecution being closed, witnesses were called for the defence.

*JAMES FULLER sworn and examined by Mr. M. C. Cameron*—I am a physician, and practice medicine in Syracuse, New York. I have known the prisoner since the 8th of June, 1865. He held the position of Rector of Trinity Church there. He left Syracuse about the middle of last May. I was senior warden of Trinity Church, Syracuse, and was intimately acquainted with the prisoner. I am an Englishman by birth. I believe the prisoner is a Scotchman. During the time he was in charge of that church he was decidedly anti-Fenian. He was accustomed to drink too much at times. His character otherwise was good. He left voluntarily and against an urgent remonstrance by the parish.

*HON. MR. CAMERON*—I object, my lord, to these statements of opinion being received as evidence, because they refer to a period long before the time of the Fenian raid.

*MR. M. C. CAMERON*—I submit that I have a right to put a di-

rect question to the witness to ascertain what the prisoner's views were on the Fenian question before he left Syracuse.

Hon. Mr. CAMERON—I still object to allow as evidence expressions of opinion made long before the offence with which the prisoner is charged.

His LORDSHIP—I must rule against the ground taken by the prisoner's counsel.

WITNESS—When the prisoner left Syracuse he was going to Nunda, in Livingstone county, in the same state.

GEORGE MORGAN HILL *sworn and examined by Mr. M. C. Cameron*—I reside in Syracuse, and am the rector of St. Paul's church there. I have known the prisoner since the autumn of 1844. I was a classmate of his in Hartford College from that time till the summer of 1847, and was on intimate terms with him. He came from Edinburgh, Scotland. From 1847 I did not see him for eighteen years. In July, 1865, he came to Syracuse to seek a situation there. His character during all the time I knew him was entirely unexceptionable. He was a man not at all likely to join the Fenians. When the citizens of Syracuse heard of his arrest they were thunderstruck, and thought it incredible. There was much excitement about it in the city.

BISHOP COXE *sworn and examined by Mr. M. C. Cameron*—I am the Bishop of the Episcopal Church in the Western Diocese of New York. My impression is that the prisoner came to Buffalo in June last to answer my citation. He had rendered himself subject to discipline for intemperance. His first appearance at Buffalo was before this, of his own accord, to complain of himself with humiliation and contrition for intemperance, and he seemed to be truly sorry and penitent for his misconduct. This was, I think, in March of the present year. Finding him so penitent, and supposing that this was his first fall, I sent him to Nunda, intending to allow him to remain there if he conducted himself well. Almost immediately after, contrary to my expectations, he misconducted himself in a similar way again. I was then obliged to give notice to Bishop Potter, of New York, who was his Diocesan, of the conduct of his presbyter. On the 30th of May I had an interview with

Lumsden, and advised him to request a suspension and not be tried for his offence. I also sent a letter to Bishop Potter, advising the latter to suspend him, as his usefulness as a clergyman was at an end. It is my impression that the prisoner said at this interview that he thought of going to Canada to get a situation. He also said he would go and live at Fort Erie, as it was cheaper to board there than in Buffalo.

*Cross-examined by Hon. Mr. CAMERON*—When the prisoner was at Hartford I was rector of St. John's church there. I always heard him spoken of as a clergyman of great usefulness.

*Mr. GREENHAM sworn and examined by Mr. M. C. Cameron*—I am the rector of the church at Fort Erie. The prisoner came to me on the evening of the Tuesday before the raid, and introduced himself to me as a brother clergyman from the States. I asked him to walk in. He told me he had come to Buffalo to see Bishop Coxe, and had some thoughts of applying for a church in the diocese to which I belonged. He did not stop with me that night, but said he had better go back to Buffalo. On Wednesday morning I saw him in the street at Fort Erie. He presented a disreputable and dissipated appearance, and I avoided coming in contact with him. On Friday morning, June 1st, I saw him in front of my house talking excitedly and trying to induce the villagers to resist the Fenians. He told the villagers to shoot them down, and said that even the women would fight. "I called out to him and said, "Mr. Lumsden you are giving very bad advice. It is perfectly absurd to think that a lot of unarmed villagers could resist these men. If they should happen to kill one of the Fenians it would be the signal for a general massacre." He said, "Well, my Scotch blood cannot stand it," and he went away. On Saturday, I was taken prisoner by the Fenians, and so was Dr. Trowbridge, of Buffalo. While a prisoner, I heard Gen. O'Neil talking with Dr. Trowbridge, of Buffalo, and O'Neil said to him that he knew the prisoner and did not wish to have anything to do with him, as he was a British spy.

*Mr. HARRISON*—We had better have the doctor here, and let him speak for himself.

*A. P. COOK sworn and examined by Mr. M. C. Cameron*—I reside in Brooklyn, Michigan, and have known the prisoner as a cler-

gyman for several years. I saw him at the Mansion House in Buffalo, on the evening of the 31st of May last. There was considerable Fenian excitement in the city at the time. The prisoner and I had a conversation together, from which I did not gather that he was connected with the Fenians—rather the opposite. He did not appear to have been drinking then. I do not know whether he went to bed or not, but supposed he did.

JOSEPH W. WHITNEY *sworn and examined by Mr. Cameron*—I am the proprietor of the Mansion House, in Buffalo. The prisoner stayed in my house on the 31st of May last, according to my register. I recollect his being there. He left between six and seven o'clock on the following morning. He arrived in the evening of the previous day.

*Cross-examined by Mr. HARRISON*—I saw the prisoner, to the best of my recollection, in the hotel, between six and seven o'clock, on Friday morning. He had no baggage. He did not settle his bill, and had not given up his room when he left.

LEWIS L. HODGES *sworn and examined by Mr. Cameron*—I am the proprietor of Tift House, in Buffalo. The prisoner was in my house on the 1st of June last, according to my books, but do not recollect what time he came. His name is not written in the handwriting of any of my clerks, and I suppose it is in his own. While in my house, I noticed him in a state of intoxication. He left next morning.

Rev. Mr. HILL being called, identified the handwriting of the prisoner on the hotel registers of the Mansion and Tift Houses, Buffalo. He stated also that the prisoner had a wife and several children.

J. S. TROWBRIDGE *sworn and examined by Mr. Cameron*—I am a medical practitioner, and reside in Buffalo. I went over from there to Fort Erie on Thursday, the 31st of May, on an excursion with some friends. On Friday I was over again alone. I have no acquaintance with the prisoner. After the fusilade between the Welland battery and the Fenians had occurred, I was attending to the wounded—more particularly to Dr. King. I afterwards saw Mr. and Mrs. Greenham prisoners in the hands of the Fenians. I asked Colonel Hoy, of Buffalo, whom I knew, to release them, as

Mr. Greenham was a clergyman. Colonel Hoy said he would be glad to do so, but could not without the consent of his superior officers, and directed me to General O'Neil, who was on horseback. I spoke to O'Neil, and he charged me with being a Presbyterian clergyman and a spy.

HON. MR. CAMERON—I object, my lord, to the words of General O'Neil being repeated, as they are not evidence.

HIS LORDSHIP—The proper way to prove what Gen. O'Neil said is to bring him here.

MR. M. C. CAMERON—My lord, he is not here, and we cannot bring him. (Laughter.)

NELSON FORSYTH *sworn and examined by Mr. M. C. Cameron*—I have been acting as reeve of the corporation of Fort Erie for about five years. I reside there and know the prisoner at the bar. I saw him at Fitch's House, Fort Erie, on Tuesday evening, the 29th of May. He conversed with me and said—

HON. MR. CAMERON—We cannot have that conversation, because it took place before the act. If it had occurred at the time of the raid and then showed the character in which the prisoner came over, I would have no objection.

MR. M. C. CAMERON—But we can show that a declaration in reference to an act before the act was committed can be received. I am going to show why he was there.

HON. MR. CAMERON—My learned friend cannot do so.

HIS LORDSHIP—How is it evidence with reference to his being at Fort Erie on the 1st of June? I cannot receive the evidence.

MR. M. C. CAMERON—This will show his reason for being there on the day named. If your lordship refuses to receive it, I wish the objection noted.

WITNESS continued—I saw the prisoner on the morning of the following day (Wednesday), I saw him again on the morning the Fenians arrived. I had been up to the Fenian camp myself. I saw him in conversation with a Mr. Kingsford. When I came up he shook hands with me, and said "Good morning Mr. Forsyth." This was between eight and nine o'clock. He stood and conversed with Mr. Kingsford. He said, "What are you about, why don't you get troops and repel these raiders from the soil? The women would



even fight." He spoke earnestly at the time. While we were in conversation, a drunken Fenian came up. Lumsden said, "What are you doing here?" The Fenian said, "I will not talk to you, I will talk to the priest." "Mr. Lumsden then said again earnestly, "What do you want here?" The Fenian said, "we came to fight for Irish liberty," or something of that sort. Lumsden then said to us, "I will go over and talk to him alone, and tell you what he says." We overheard them talk, and the prisoner said, "you had better be in active business." Lumsden came back and told what had passed, and it was similar to what we heard. The prisoner was either affected by liquor or excitement. I saw him again, on the following day, in front of the tug Robb. I made the remark, at the time, "I am surprised that man was arrested."

*JAMES BLAKE sworn and examined by Mr. M. C. Cameron*—I think I saw the prisoner on the 2nd of June. My impression is that this is the man. I never saw him before or since. I saw him as he was leaving the ferry boat, W. M. Thompson, on Saturday morning. I was about to take the boat for Buffalo at the same time. He made a very strong impression on my mind, because he said to me, "you are safe now, Mr. Consul, the troops are here." I think a steam boat had come down there with a small force of volunteers before this time.

*Hon. Mr. CAMERON*—The Welland battery was not there till the afternoon. The Robb came down, I think, before twelve o'clock—how much before I do not know.

*MOSES SUMMERS sworn and examined by Mr. M. C. Cameron*—I reside in Syracuse, and publish and edit a newspaper. I have known the prisoner since October 1865. He was then rector of a church in Syracuse. He was intemperate during that time; in other respects he had a good character. I was acquainted with men who avowed themselves as head-centres of the Fenians there. I know that Lumsden was an avowed opponent of Fenianism. I heard of his arrest with a good deal of surprise. He was well known in the city. I got up a paper, signed by many of our prominent men, in his favor.

*Lieut. SCHOFIELD sworn and examined by Mr. M. C. Cameron*—I was connected with the Welland Battery on the 2nd of June. I

arrived at Fort Erie on that day, between eight or nine o'clock. I suppose we remained there an hour. Our company landed and scoured the country for some little distance. I saw the prisoner there. He was at one time in conversation with us. He was about the first man I saw when I landed, and the last man I saw when I left. He made a statement about his being there. When we saw him he came and talked to us, and not being acquainted with the incumbent of Fort Erie, I thought it was him. He offered to do all he could for us, and this caused me to leave with the impression that he was such. After we left he followed the right division as far as the lower ferry. On the road towards the ferry I made some enquiries, and asked some people if he was the incumbent, and was told he was not. When we returned, some person came on board with the prisoner in charge, and gave him to Col. Dennis. I had not much conversation with him. He was the first person who told me of our troops being repulsed. This was after he went off the boat to obtain evidence of who he was. In conversation, he said he was among the Fenians, and was suspected of being a spy, and again that we suspected him also and arrested him. After he went off to look for the Rev. Mr. Greenham he came back. I had no opportunity to investigate anything he told me.

Hon. Mr. CAMERON—He gave you no reason to believe that he was in the Fenian camp?

WITNESS—No; none.

Mr. M. C. CAMERON—That is the case for the defence, my lord.

Mr. M. C. CAMERON then addressed the court and jury on behalf of the prisoner. He said:—May it please your lordship—gentlemen of the jury: This is the third of the Fenian trials that has come before this court, and it certainly presents very many singular features. It becomes your duty to consider everything advanced before you, both on the side of the prosecution and on that of the defence, before determining whether the prisoner was implicated in the Fenian raid or not, by giving assistance and encouragement to those who at that time committed that outrage upon our shores. You will observe from the indictment that the accusation is of a threefold character—that three counts are charged, each of

which is a distinct and separate offence. The first, as it is presented for your consideration, is that the prisoner entered Upper Canada for the purpose and with the intent of levying war upon Her Majesty,—that the prisoner, when he entered Upper Canada, on the morning of the 1st of June last, had at that time the object in view of levying war against Her Majesty. The second count charges him with being in arms in Upper Canada, conjointly with other persons, for the purpose of levying war against Her Majesty; and the third count charges him with having committed an act of hostility in Upper Canada against Her Majesty—with having assaulted certain of Her Majesty's subjects and thereby levied war against Her Majesty. These are the three counts of the indictment, each and every one of which charges the prisoner with the intent to levy war. Now, I presume, the jury understand that the intent is something which is harbored in a man's mind at the time he commits any act, and that in this case the intent must be established and found to your satisfaction, or the person accused cannot rightfully be convicted. You will have to consider, then, whether he entered Upper Canada with the intent to levy war, whether he was in arms in Upper Canada with intent to levy war, and finally whether he committed an act of hostility—whether he committed an assault upon Her Majesty's subjects—with a like intent to levy war. I submit that the prosecution has completely and entirely failed to establish that the prisoner, when he put foot on Canada soil, had any intention whatever to commit any offence against the laws of Canada or the Empire of Great Britain. I submit, further, that the prosecution has completely and entirely failed to establish that the prisoner was in arms in Upper Canada with the intent charged; and I submit as a proposition of law, with which, however, you have nothing to do, that for the purpose of establishing the second count of the indictment it was absolutely necessary for the prosecution to show that the prisoner himself was personally in arms with intent to levy war. Thirdly, I submit, that the prosecution has completely and entirely failed to establish that the prisoner committed an act of hostility. It is not pretended, either by any statement made by the prisoner himself or by others, that he was at all at Ridgeway, where the battle or act of hostility took place. It is not pretended by

any evidence brought before you that when the British troops—the Welland battery, as it is called—were fired upon by the Fenians at Fort Erie, the prisoner took any part in the assault. On the contrary it would appear that at the time when he came to Fort Erie he was not associated with the Fenians in any shape or way whatever. It will be urged, no doubt, on the part of the prosecution that there were certain circumstances connected with the prisoner's conduct that are at variance with the probability of his innocence; and one of the strongest circumstances that will be pressed upon you is the fact that he signed a certificate of protection, as it is called, in the character of chaplain to the band of ruffians who invaded the province on that occasion. Now that is the position in which the prisoner is placed before you; but I submit, gentlemen of the jury, that you are to take also in connection with the declarations made by the prisoner himself, the acts that he committed—whether they were acts of hostility or acts of favor and grace to Her Majesty's subjects; whether he was feloniously aiding and abetting the invaders, or doing all he could to assist those who were in peril on that occasion; and to deduce from those acts what his object was in being there—that it was the object which he declared it to be, and which he reiterated time and again to the Newbiggings and others, to whom he said that he was no Fenian, that he had no feeling in common with them, but that he desired to do all he possibly could to protect the peaceable citizens in that place. Now, is there any evidence whatever, except the fact that he signed that paper in the manner that it is represented he did, to show that he did really possess the character of chaplain to the Fenians?—Is there any evidence to show when it was that he became such chaplain, and can it not be shown that he came to Fort Erie on an entirely different errand? I submit that it is a gross injustice—but it is the law of the land as ruled by his lordship, and to that ruling I have to submit—that a man's antecedents and long-expressed opinions, which would have shown him to be as bitterly opposed to this Fenian organization as any man could be cannot be testified to here in his favor; and when he would have been able to prove, if the evidence had not been overruled by the court, that his whole soul was directly in opposition to that organization, he does not, be-

cause of that ruling, stand in the position of one having a fair, just and impartial trial. It has been of late in our courts of law the practice to extend and enlarge the rules of evidence in a manner not formerly permitted. At one time the law was so unjust that no person interested in any transaction under the cognizance of the court could give any evidence whatever in regard to it. It was so unfair too in its operation that persons convicted of offences were thereafter precluded from giving testimony, no matter what their general character may have been. But the legislature in its wisdom, seeing the injustice frequently done by excluding testimony of that kind, changed the law in order that those persons might give evidence, it being considered that the jury trying the question could safely be left to determine, from the manner in which such testimony was given, and the bearing of the person in the witness box, whether he was reliable or not, and whether credit should be given to his assertion. Now, it is stated as a ground for excluding the testimony I proposed to offer—and perhaps there is force in the observation, but still it might simply be left to the jury as an observation, of the force of which they might themselves judge—that a man might so act and speak prior to the commission of a crime as afterwards to give color to the assertion of innocence, that he might in fact prepare the way for escape from the consequences of crime by making declarations at variance with the act which he designed to commit. But that is a thing which might safely be left to the jury to decide—for they are always able to discover whether or not the expressions were made as a cloak to cover the act contemplated. Now, in this case, you are aware that great excitement has existed in the United States in consequence of the war between the North and South, since which these Fenian raids have been in contemplation; and in consequence of the probability at one time of an outbreak between Great Britain and the United States, there was much feeling in the latter country against the British empire. Under these circumstances, the sentiments of a man in the United States who expressed himself favorable to Great Britain, rather than to the country in which he was residing and in which he obtained a subsistence, ought to be received in his defence, because if he had a partiality for British institutions, although a resident in the United

States, it is not likely that he would voluntarily place himself in the position of an offender against the laws and the government of Great Britain—a position which must be revolting to a person holding the office and entertaining the opinions of Mr. Lumsden. So when evidence of that kind is excluded I submit that the jury do not get the whole of the circumstances that they ought to be possessed of in order to come to a just and proper conclusion. But you have to deal with this case in the manner in which it has been placed before you now. Well, the rule of law is that it is not the act of a man which makes him guilty of crime, but in connection with the act there must be some intention, unless the offence is against some statute of the land which expressly declares that it is not necessary to establish the intent. I will read to you an observation made by Chief Justice Kenyon, to show you what view that eminent judge took of the necessity of showing that the act and the intent went hand in hand; and in making that observation Chief Justice Kenyon was only applying the principle of a well understood maxim of the law in the judgment he was then giving. The case was that of Fowler against Paget, to be found in 7 Term Reports, page 514. The plaintiff was suing the defendant for damages because the defendant had, as it was alledged, maliciously obtained against him a motion in bankruptcy. The law then provided that if a man left his home in a manner whereby his creditors should be delayed in getting their debts, he committed an act of bankruptcy; but the court ruled that the man must have had the intent of committing an act of bankruptcy before he went away. The plaintiff in the case had gone to a distant place for the purpose of collecting a debt from a person who resided there, and he was absent eleven days, being a longer period than he had expected, and in the meantime his creditor obtained a motion in bankruptcy against him. It was held that there was no act of bankruptcy on the part of the plaintiff in going away, and this was the language of Chief Justice Kenyon:—"It is a principle of natural justice and of the law of our land, that *actus non facit reum nisi mens sit rea*—the intent and the act must both occur to constitute the "crime." And so here, in the case of this gentleman who stands now in the fearful position of answering for his life simply because

on that occasion he desired to serve his fellow-men who were in peril, you must find that he was there at Fort Erie with the criminal intent of aiding and abetting the undertaking of those who were engaged in levying war, and not for the purpose of assisting and succouring Her Majesty's subjects. Now, apart from the signing of the paper that has been produced, and which the accused signs as represented, you do not find him doing anything that others have not done without being suspected of being Fenians. You have it as a matter of fact from Dr. Trowbridge himself that he interceded with Col. Hoy, who referred him to General O'Neil, with whom he also interceded, for the purpose of obtaining the release from custody of the Rev. Mr. Greenham. Now, the act of Dr. Trowbridge in the case was just as much an act of intercession as that of the prisoner when he asked O'Neil to let that man, who was there with his waggon carrying arms to the Fenian camp, go away with his horses, which he represented were in want of food. Dr. Trowbridge, who rendered very good assistance to those unfortunate men who received wounds on that occasion, who did service for which we as British people should be grateful—acts of kindness, not only at Fort Erie, but afterwards in Buffalo, to Captain King especially, who had the misfortune to receive a wound that rendered amputation necessary—Dr. Trowbridge, then, was just as guilty of complicity with the Fenians in making that application to O'Neil to allow Mr. Greenham to go away, as was the prisoner who made a similar application to the same person at another time. That is one of the circumstances that has been referred to in proof of the prisoner's guilt. Another is, that he gave an invitation to certain officers of the Fenians to tea at Mr. Newbigging's house. Mr. Newbigging has told you—and here I must remark that no one could complain of the manner in which the Newbiggings, father and son, have given their evidence against the prisoner. These gentlemen have shown themselves to be men of probity and character, who desired to unduly press nothing against the prisoner, who wished neither to extenuate nor set down aught in malice, but to lay the whole matter down just as it occurred;—Mr. Newbigging the elder, has told you that the prisoner remarked to him that it would probably serve him and secure the release of his horses from the ser-

vice of the Fenians, if, as an act of grace and courtesy, he invited those officers to tea. Now, I would ask you, as reflecting men, to consider whether there was anything in that circumstance to show complicity with the Fenians, whether it was natural or unnatural that the prisoner should have so acted, whether it indicated an intention on his part to do wrong, or whether it indicated just what a reasonable man, like Mr. Lumsden, might have suggested for the purpose of doing a service to Mr. Newbigging. If it was an equivocal position in which the prisoner placed himself, and simply equivocal, then the jury is bound, under the obligation they have taken, to acquit him, because no man should be found guilty in a manner which admits of doubt. If an act has an equivocal appearance—if viewed in one light, it indicates a prisoner's guilt and in another his innocence—you are bound to give the benefit of the doubt to the prisoner—not regarding the act as one of crime, but as an act of innocence. That is the rule of law, and you are bound to observe it. Now, passing to a further consideration of the facts, what do we find? That on the night of Friday the 1st of June, according to Mr. Newbigging, Mr. Lumsden, the prisoner, went away from his house in company with Smith and Murray to go to Buffalo. What do we find in support of that statement? Why, we find by reference to the books of the Tift House in Buffalo that the name of Mr. Lumsden appears there in his own handwriting, in such a position that it could not have been put there unless at a late hour that day; and we find in addition, that on the following morning, Saturday, the prisoner returned to Fort Eric and was seen by Mr. Blake landing from the ferry-boat, his first observation being "We are safe now," because he saw that some British soldiers were then present. You will observe therefore that at the time the battle was going on at Ridgeway the prisoner was not and could not have been there, if the statements made by Mr. Hodges and Mr. Blake are correct, and that he had no hand whatever in that act of hostility. On the contrary he made the declaration then that he was no Fenian, that he was desirous of giving all the assistance in his power to the authorities on this side, and that his heart and soul were with us in our efforts to expel the invader. Were there any other circumstances to show that these expressions truly indi-



cated the position of the prisoner? I believe that there are. We have it as a matter of fact—and it is much to be regretted that a gentleman who belongs to a profession so distinguished and so much to be venerated as that of the church, that a gentleman filling the sphere of usefulness which according to the evidence of Bishop Coxe, and others, the prisoner was filling so creditably in all respects except for his unfortunate habit of intemperance;—I say, we have it as a lamentable fact that Mr. Lumsden had lapsed in regard to sobriety and occupied the position of one who could not control his desire for strong drink. In consequence of that fault, he was summoned by his Bishop to Buffalo. He went there and afterwards crossed over from Buffalo to Fort Erie to see the Rev. Mr. Greenham. Mr. Lumsden saw that gentleman on the 29th of May, and was at his place on that day, afterwards returning to Buffalo and having an interview with Bishop Coxe on the 30th of May, according to a memorandum entered in Bishop Coxe's book. The prisoner, who in consequence of that unfortunate habit of his was no longer fitted for usefulness in the place where Bishop Coxe had sent him, appears then to have gone to Fort Erie to see whether he could not find employment on this side of the frontier. The Fenian invasion then took place, and there is evidence—although I think Lewis, who gives that evidence is mistaken—that the prisoner was at Fort Erie on the afternoon of Thursday the 31st of May. In that statement the witness may be right or he may be wrong, but it does not signify whether the prisoner was there that afternoon or not. On the night of the 31st of May, or early on the morning of Friday the 1st of June, the Fenians crossed over; but we find that on that night Mr. Lumsden was at the Mansion House in the city of Buffalo, in company with Mr. Cook, who said that he met Mr. Lumsden between nine and ten o'clock that night and was with him till eleven or twelve o'clock. The proprietor of the Mansion House tells us too that he had a bed and slept there that night.—Now, supposing that the prisoner was identified with the Fenian organization, was there any object why he should have concealed the fact? Was it not a matter of fact that those who were engaged in it—O'Neil, Hoy and all of them—boasted of it, were proud of it, flaunted themselves in military uniform if they had uniform, pa-

raded with music and banners, and showed themselves to be just what they were? Had Mr. Lumsden then, if he was with and of them, any occasion to conceal the fact? Had he any reason for resorting to those methods for the purpose of covering his real designs? Did he go to bed on the night of the invasion and remain there till morning just as a mere blind? Did he call any one to witness that he slept there that night, in order to make a case that he might afterwards show to prove that he had no connection with them? No, there was no preparation of that kind, for we find that he simply went to bed without drawing any special attention to the fact. Well, he is found the following morning at Fort Erie. If we take the statement of Dagger he must have been there at a very early hour; but in all probability that witness has mistaken some body else for the prisoner, because, according to Whitney, the proprietor of the Mansion House, he slept there that night and left in the morning between six and seven o'clock. Then, he is afterwards seen in the village, and by whom? By Mr. Greenham, who says he heard him trying to induce the villagers to rally for the purpose of resisting the Fenians. Mr. Greenham makes the representation to him that that would be a wild proceeding, because a few unarmed villagers would never be able to stand before so many armed men. Mr. Lumsden, in reply, declares, "My Scotch blood is up," and then walks away. Well, he is next found in the Fenian camp. What does that fact amount to? Was every man who was seen in that camp a Fenian? If so there are a good many then in court to-day who ought to be placed upon their trial for complicity with the Fenians. Why, it was a military spectacle, and like all such displays drew many to witness it; and so people from the neighboring country and many from Buffalo came to see it. We have the fact, then, that strangers were there—not strangers armed like the Fenians, and participating in their designs, but strangers who had nothing in common with them, and who were there merely to see what the Fenians were doing. Does that indicate any crime, then—the mere fact of men being seen in the Fenian encampment? If it does not indicate crime in the prisoner's case, what is it that does indicate that he was implicated with them? Is it the act of grace he committed in his desire to assist the man Anthony? The court

will not allow us to give evidence of the suspicions thus attached to the prisoner when he was with the Fenians in their camp, but you saw by the testimony of one of the Newbiggings that when the prisoner sought to leave the camp he was challenged by the sentinel and not allowed to get out. It seems to have been more easy to get into the camp than to get away from it. You will have seen from the evidence that though it was a military encampment the organization was not very complete. They did not keep it with that care which would be observed in a regular military camp expecting the approach of an enemy. No one halloing "Let that man pass," would induce a sentinel to allow a person to go out of a camp if there was anything like strict watch and guard kept, or military discipline maintained. The prisoner said "I am the chaplain," but the sentinel did not know whether that was his character or not, and refused to allow him to proceed until some one called out from behind to let him pass. Now, suppose that the prisoner went there and offered to become chaplain and actually did become chaplain to that force, while his intention was, not to assist the Fenians, but the British forces sent to oppose them—in that case you could not find him guilty of being in arms with intent to levy war against Her Majesty. Was it an act of war to endeavor to induce Gen. O'Neil to surrender those horses belonging to Mr. Newbigging? Was it being in arms with intent to levy war, was it committing an act of hostility with intent to levy war, to do the same thing? These are questions which you will have to ask yourselves; and I submit that in the evidence offered to you the Crown has failed to show that the prisoner was with those men with intent to levy war on that occasion. There will be certain legal questions connected with this and the previous trials which will afterwards be raised—one of which will be directed against the whole proceedings in these cases. I shall submit that the act of Parliament under which the prisoners are being tried is not now in force in reference to offences of this kind, because it is superseded by a later act of the Imperial Parliament; and I shall submit that the two acts cannot be allowed to stand together, but that the charges against these parties must be laid under the Imperial act. You, however, have nothing to do with that question of law; you are to deal only with

facts. One of the facts you have to deal with is the intention of the party accused in entering the Province, and that is a grave question for your consideration. You are to say, in view of the circumstances brought before you in evidence, whether as a matter of fact the prisoner entered Upper Canada with intent to levy war; whether he was in arms in Upper Canada with the same intent; and whether he committed an act of hostility, by assaulting Her Majesty's subjects, with the same intent. I would like you to consider the evidence carefully and then place your finger, if you can, upon a single act of the prisoner that constituted an act of hostility and of levying war against Her Majesty. You have noticed that not one solitary individual speaks of him as having arms about his person. Indeed the Crown does not pretend to say that he was personally in arms, which I think it is bound to show before a conviction is sought on the second count of the indictment. Further, I submit that when you are asked to determine a question of this kind against the prisoner, you ought to have evidence that is free from any reasonable doubt. I would observe here that as in the case of the prisoner Mr. McMahon, who is a Catholic priest, none of the jurors were challenged—except one for a particular cause—on account of their religious sentiments; and I believe that Mr. McMahon was tried by a jury composed entirely of Protestants. You are, however, I believe, not so constituted, having among you men of both denominations. Mr. Lumsden was quite willing to place his case in the hands of Catholics as well as Protestants, and therefore did not challenge those of the jurors who were not of his own religious belief. He feels that there is no reason why he should distrust any one because he belongs to a different Christian denomination from himself. He feels that if they are good members of any branch of the Christian church, and are guided by the principles of Christian justice and charity, they can not conscientiously convict one who had no intention of doing wrong. He has therefore offered no objection to any juror because of the particular form of his Christian belief. Now the position in which you stand is, perhaps, a very painful one. It is represented throughout the city that there is no use in offering a defence for any man who may happen to have the misfortune to be charged with complicity in the

Fenian raid; that there is a foregone conclusion to distrust and discredit every such person, and that whatever excuse he may offer, no matter how reasonable, it is to be regarded only as evidence of his guilt. It is painful when such is found to be the fact—when declarations of that kind are made on the streets—when the free source and fountain of justice is sapped in that manner—when men's minds are so prejudiced that the very people of the country in which the trials are being conducted say it is impossible to obtain a fair and impartial trial. If that is the prisoner's misfortune on this occasion, he will have to put up with it. You are the tribunal which the law of the land places there for the trial of the men who are charged with complicity in that outrage by the Fenians; but at the same time you are there as the protectors of the rights and liberties of these men, not to destroy them. That is the position in which you stand; and if the declaration is true that a jury can not be found in this country who, under any circumstances, will not give the benefit of a doubt to men charged with Fenianism, then I say the country has sunk so low that it would be well if its government were overturned, for no hords of ruffians like the Fenians could by any possibility make it worse. But I hope it is not so. I hope I am speaking to men who feel an honest desire to do justice—not to men who resemble demons determined to destroy human life rightfully or wrongfully. If we are resolved to find the prisoners guilty in every case, we would be worse than those men who came here with arms in their hands, for they would at any rate meet us in battle man for man, where every one would have a chance for his life. If it is the determination of the juries in these cases to take away life at all hazards, then indeed I say there is no hope for the country. I will here refer to another maxim of the law which should have weight with you on this occasion, and it is this—“*Semper tutius est errare in puniendo ex parte misericordie quam, ex parte justitie*”—it is always safer to err on the side of acquittal than on the side of punishment; on the part of mercy than on the side of strict law. That is a maxim which the law courts lay down, and whenever it is violated there is a wrong done far greater than when a criminal puts a pistol at the head of another and blows his brains out. Gentlemen of the jury, the prisoner at the bar stands

there to answer for his life; but it is not he alone who stands before you to be effected by the verdict you are to render. There are others who stand in a position of peril—others near and dear to the prisoner, others who have received their life from him, and one who has vowed to be his partner and helpmate so long as life shall permit them to live together. There are his wife and helpless children who at this moment are resting in dreadful suspense, anxiously thinking of what a British jury may do in reference to the husband and father who has chosen to assume the position of an American citizen—thinking that in a British court of justice he will receive that fair trial which it has been our boast to give to every man charged with crime; and it is for you to say whether their expectations of that fair British trial are to be disappointed by men who have forejudged their father's case, condemned him in advance to the gallows and them to misfortune, misery, and despair. I am very well aware that in coming to your decision it is not the innocent that you are to regard; for if a man commits a crime he does it with a knowledge that his punishment will bring punishment also to the innocent who are connected with or dependent upon him.—Nevertheless, those who strike the blow, those who condemn the prisoner by their verdict do an injustice upon the wife and children if they fail to give the accused the benefit of every reasonable doubt. I appeal to you to consider the antecedents of this gentleman—to consider what you have heard announced that those antecedents have been in direct antagonism to the Fenian organization, and that they show that he had no feeling whatever in common with its members. Then, having considered those facts, you will find that he came here with no intent to act in concert with those parties—you will find that although he was seen in their midst it was with no design to aid but rather to oppose them; and I submit that the evidence is not forthcoming, that if the prosecution should ransack the United States and Canada from end to end they would never find the first man to say, that Mr. Lumsden placed himself in communication with O'Neil or any one else belonging to the Fenian organization with a view of serving the infamous undertaking in which they were engaged. It is said that, if innocent, the prisoner might have brought the officers of the organization—O'Neil, Starr, Hoy and others—

here and placed them in the witness-box to testify. Is that the fact, or is it not the fact? Does any sane man think that O'Neil would dare trust himself to appear in this Province after what he did at Fort Erie; and if he could not do so without risking himself to almost certain condemnation, how is it possible for the prisoner to bring forward witnesses for the purpose of establishing that he had no connection with them? The defence, then, has to deal with the circumstances as they are presented; and although we could have given you the declarations of O'Neil as to the prisoner's object among the Fenians, declarations that were made at a time when O'Neil could not have contemplated that Mr. Lumsden would ever be in the hands of the law in this province—we were not allowed to do so, because it is said that the rules and practice of the law in regard to evidence prevents the reception of such declarations. Is it fair that this should be so? Can you say that if that evidence had not been ruled out, a doubt would not have arisen in favor of the prisoner? Gentlemen of the jury, your position is a responsible one, and the position I occupy as the counsel of the accused is also a responsible one. I have felt great anxiety in regard to it, and should I fail to lay the prisoner's case before you in the manner which presents its best aspect to the court, and to you, I would be doing him a grievous wrong. I have, however, exercised my judgment, and employed what legal knowledge I possess, to the best of my ability. If I fail to place the case before you in its best light, your responsibility is not removed or lessened on that account. If the learned judge on the bench, in the charge which he will presently deliver to you, takes too strong a view of the evidence on one side or the other, your responsibility is not thereby removed, because whether I fail in my duty or not, whether the learned judge presses the evidence against the prisoner or not, you, after all, are the parties who are to pronounce the verdict by which this gentleman is to live or die. It may be said that that responsibility is of a light and trivial character, and that counsel wastes the time of the court when he makes observations of this kind. It may be so, but I would not stand in the position of the man who pronounced a verdict of guilty upon a fellow-man, when his life might have to be given up in consequence of that verdict—no, not for millions would

I pronounce that verdict, unless the evidence were as clear as the sun at noon-day. I believe there is such a thing as remorse which ever afterwards affects the mind of that man who wrongfully deprives a human creature of his life. I do believe that the man who strikes a dagger into another's breast will ever after, till his dying day, feel remorse like the agony of the damned. I do believe too that those bound by the law of the land to stand in the position of judge between the accused and the Crown will, if they forget to give the benefit of every reasonable doubt in favor of the prisoner, be gnawed and racked by those feelings of remorse which must necessarily follow—aye, and that a dread spectre will constantly appear between such a man and the noon-day sun, to harass his waking as well as his sleeping hours. This spectre will be ever present, and that man's eyes at night will not fail to see the victim that he sacrificed, because neither sleeping nor waking does the agony of remorse fail to make itself felt; that man will for all time be harrowed with remorse for having lightly tampered with that which no human power or agency can restore, for having destroyed God's image on earth by pronouncing a verdict of guilty, and thereby taking away that which the Creator alone can give—human life. (Sensation.) Before closing my remarks, I will read from Lord Hale a few cases to show how difficult it is to determine aright in certain circumstances, and to show that when they have the clearest evidence before them juries may still be wrong and do a very great injustice. This particular case is given by Lord Hale:—"If a horse be stolen from A and the same day B be found upon him, it is a strong presumption that B stole him, yet I do remember that before a very learned and wary judge in such an instance B was condemned and executed at Oxford assizes, and yet within two assizes after C being apprehended for another robbery and convicted, upon his judgment and execution, confessed that he was the man that stole the horse, and being closely pursued desired B, a stranger, to walk his horse for him, while he turned aside upon a necessary occasion and escaped; and B was apprehended with the horse, and died innocently." Now, gentlemen of the jury, you can fancy in such a case how you would laugh if it were presented to you without authority of this kind. Supposing one of



you, a farmer, should lose your horse, and soon afterwards find the animal in the possession of another, would you not laugh at that man's excuse, as a farce, if he said he was simply holding it for another who was nowhere to be discovered? Yet such a case, as you have seen, has actually occurred, and I would ask you to consider whether the story there given is more probable than that which Mr. Lumsden told you in explanation of his presence at Fort Erie? That gentleman said over and over again—"I am no Fenian, I form no part of their band, I am here not to serve them, but to serve these people who are attacked"—and every act that he did shows the truth of that statement. You cannot say—"Oh, that is all nonsense. It is a very good story to induce fools to believe, but it is not a story for wise men like us to credit";—you cannot say that, because the world, although it may have grown wiser in its own conceit, is possessed of very little more wisdom than when the case I have read to you was decided. Another case to which I will refer you is one in which a man endeavored to commit a trick, and lost his life in consequence of it:—"An uncle who had the bringing up of his niece, to whom he was heir-at-law, correcting his niece for some offence, was heard to say, 'good uncle do not kill me;' "after which time the child could not be found, where upon the uncle "was committed for suspicion of murder, and admonished by the "justices of assize to find out the child by the next assizes, against "which time he could not find her, but brought another child as "like her in person and years as he could find, and apparelled her "like the true child, but, on examination, she was found not to be "the true child. Upon these presumptions he was found guilty "and executed. But the truth was, the child, being beaten, ran "away, and was received by a stranger, and afterwards when she "came of age to have her land, came and demanded it, and was "directly proved to be the true child." I have referred you to two cases in which men lost their lives innocently, circumstances appearing against them. I will now tell you, gentlemen, that in this case all the antecedents of Mr. Lumsden favor his innocence. You have heard stated his acts at Fort Erie against the Fenians. You have found him in the Fenian camp speaking to O'Neill just as other innocent persons spoke to him, and you have found that he made

statement there to O'Neil which induced that person to promise to give up the horses that had been taken from Mr. Newbigging. Can you say from these acts that the prisoner is a Fenian? Can you say that the giving of that paper was not, like the other acts of which you have evidence, a device of his in the hope of being of service to the Newbiggings? You will understand that many of those engaged in the raid were persons who, in all probability, were incapable of reading. Those were the persons most likely to be about for the purpose of plunder, and if they went to Newbigging's house, and were shown that paper, and had it read to them, it might have been the means of saving his property, though Mr. Lumsden, in giving it, had no connection whatever with the invaders. You have found too that the prisoner had been dissipated for some time, that he had been in a state of intoxication, and that when at Fort Erie he was suffering, in all probability, from the consequences of the liquor which he had indulged in for some time previous, and that in fact he was laboring under a species of insanity. You find him there under influences of the kind, and not perhaps in the best condition to ascertain what was the best means of serving those to whom he was friendly on that occasion. You find that he did not consort with the Fenians—that he did not stay with them on our shores as others did, but that he went to Buffalo at night and stayed there. You do not find him connected with them in any way more than that he was about their camp; but even there, as Mr. Newbigging says, he did not seem to be on terms of familiarity with them, as he would undoubtedly have been, if he had been associated with them in their enterprise. He interceded with them to restore Mr. Newbigging's property, just as Dr. Trowbridge interceded for the Rev. Mr. Greenham, and said to O'Neil that he ought not to make war upon clergymen and others of that class. I suppose O'Neil felt it would be wrong, for, as I understand, he released Mr. Greenham from custody. In all probability that was the feeling of O'Neil, that civilized nations and people would scarcely be disposed to make war upon clergymen. I think we would scarcely be doing justice to ourselves, and to our manhood, if we desired to take the life of a man for an offence against us, that man not having been shown by the evidence to have participated in any

act whereby life was destroyed or property stolen in our country. It is much to be regretted that clergymen, such as two of these prisoners are, are subject to charges of this kind. If enough of armed men were not caught to make an example of by punishing them, I would have let those who were noncombatants at least escape. Here, however, is one of them before you, gentlemen of the jury, and I submit that you must be satisfied that there is no reasonable doubt that his story is false, when he says that he was not there to assist the Fenians; and that you must be satisfied that his whole conduct, prior to, and during the raid, was nothing but falsehood and deceit, for the purpose of concealing his real sentiments and intentions. If you are such sight-seers as to be able to penetrate the inmost recesses of this man's heart, and discover falsehoods written there, you will find him guilty; but it strikes me that it is very difficult, indeed, to determine what are the workings of a man's mind, and thereby pronounce upon his guilt or innocence. If you are to determine the prisoner's cause by circumstances, then let circumstances have their full weight; and if you do that, you, as honest men, who desire to administer justice as the constitution and the laws lay it down, will give this man the benefit of the doubt that those circumstances must create. You have it in evidence that the whole village council of Fort Erie, with the exception of one man, went down to the Fenian camp for the purpose of soliciting protection for the place. Was soliciting protection in that way an act of criminality on their part? No; but here is a man, who, because he was heard to solicit protection for others in the same way, is accused of complicity in the crime of those men who levied war. God help this country if a conviction follows an accusation upon this ground! If that were so it would be the greatest curse that could fall upon the land that that outrage was committed at Fort Erie—not because of the injury done by the outrage itself, but because it will be shown to have so changed the minds of our people as to make them forget the law, forget justice and forget mercy—to make them follow their own passions rather than to set the captive free when mercy, reason, and all the circumstances should lead them to find a verdict of acquittal. I cannot see into your minds, gentlemen of the jury, and what I say to you may appear ridicu-

lous and absurd. You may have suspicions as to the prisoner's innocence, and when suspicion is entertained, everything, even the slightest circumstance, often tends to corroborate that suspicion. But I entreat you, on behalf of mercy, on behalf of those who are dependent upon this prisoner—I entreat you above all in the name of Justice—not to allow prejudices to weigh on your minds; and to remember that a day of reckoning will come for all, and that those who forget mercy, may themselves be denied mercy when it will be needed by all. I will leave the case in your hands, feeling that you have listened to me patiently; and I trust in God that when you retire to consider this matter you will weigh it carefully, honestly, and conscientiously, and not with a desire to condemn a human being to the gallows, though he may have the misfortune to stand in an equivocal position. Under any circumstances the responsibility rests with you.

Hon. J. H. CAMERON replied for the Crown. He said:—May it please your lordship: gentlemen of the jury—My learned friend seems to think that it is rather strange on the part of the Crown that of the three trials that have taken place, two of them should have been of parties whom he terms non-combatants. I am sure he must have seen from the course of the former trials as well as of this, why it was that the Crown singled out these parties to be first arraigned before the court for trial. I am sure that the whole country and himself must fairly understand that reason, and that there can be no mistake in any quarter about it. The Crown selected the men who were represented to them as being the leaders and inciters of the men in custody. If these parties had been passed over, and the rank and file of the band had first been placed on trial, then the Crown would have been liable to the charge of impropriety, to which they do not lay themselves open by doing what they believe to be right and endeavoring to bring to justice those who were in arms and who advised and encouraged the invasion, before proceeding against those who were the mere dupes of the leaders. There is no desire on the part of the Crown to place upon the prisoners any *onus* which they ought not to bear; there is no desire to deprive them of the benefit of any doubt which they should reasonably have, and there is no wish that they should

not receive every particle of consideration and the advantage of every right which the law, the constitutions of the country and the principles of justice fairly give them. On the contrary, I feel that in the trials which have already taken place the Crown has not strained a point against the prisoners, but has yielded as far as it could; and that in those which are to come it will yield in the same manner, except when the counsel for the defence attempts to strain the law in favour of the prisoner and attempts to give it a construction which it will not bear, for in that case we will have to resist and explain the law impartially as it bears upon the case. My learned friend tells you that the prisoner was unfairly dealt with because evidence which was offered here of his declarations and acts in a foreign land was excluded by the court and not allowed to be submitted to you for your consideration. But my learned friend knows that the law of this country is not applicable to those acts in any case, and that no declarations which bear upon those acts can be or ought to be admitted in evidence. He knows also that the rule applied in this case is the same as is applied in a simple case of petty larceny. The rules of evidence are the same in all cases whether they are high or low, great or small cases, whether the consequences of conviction be merely a day's imprisonment or the taking away of a human life. You and I and the judge are all alike bound by those rules of evidence, from which we cannot depart, and no appeal to your feelings or passions can in the least degree affect the ruling which the judge is bound to give in his opinion of the law, or the obedience which you as jurors are bound to give to that ruling. It is therefore vain to declare that injustice has been done to the prisoner when by a rule of law statements are excluded which in law are not evidence at all. The rule has been so clearly and distinctly laid down as to the declarations a prisoner may make that it is quite enough to point to the ruling of the judge without referring to those cases in law where the precedents are given. Now, my learned friend has alluded to certain matters of circumstantial evidence in this case, and argues that evidence of this kind is delusive and should not be taken as sufficient to condemn the prisoner. It may happen that in one case out of a thousand a mistake occurs and a man is wrongfully convicted on such evi-

dence. That has happened and may again happen as long as fallible men have to pronounce upon acts which they themselves do not see. We all form our conclusions upon the evidence which is offered by our senses. We may be mistaken as to what we see—we may not get the right versions of what we hear. In all the transactions of life we are liable, with the fallible judgments of men, to be deceived. But it is no reason why we should not believe our eye-sight or our hearing, because some time our eye-sight may be mistaken or our hearing may lead us astray. We are not to apply any general rule to cases of circumstantial evidence, but decide each according to the facts presented. You are therefore to ask yourselves whether the circumstances which have been proved against this man are trustworthy. Is there a doubt that the prisoner was at Fort Erie on the 1st of June, when the Fenians were there? Is there a doubt that he wrote that paper which has been produced before you? Is there a doubt that he was present with the Fenian officers at Newbigging's taking supper, and that he declared he was a Roman Catholic priest instead of a minister of that Church which it ought to be his glory and his pride to serve in? There can be no doubt in all this. It is established by my learned friend's own case, as well as by that of the Crown. It is not therefore a case of purely circumstantial evidence with which you have to deal, but one in which my learned friend has properly brought before you the true basis upon which you must determine your judgment. It is quite true the prisoner is charged here in three counts of the indictment—one with having entered the Province with intent to levy war against her Majesty; the other with having continued in the Province with a like intent; and the third with having committed acts of hostility with the same intent. Any one of these counts is an offence which the law declares to be death. If guilty of one, the prisoner is guilty of all so far as the consequence of guilt is concerned. The crime is the same in each case, the penalty is the same; and, gentlemen, he may be convicted of each and all of these counts without having actually borne arms or engaged in the conflict that took place. He is equally as guilty as the prisoners who were tried before if he aided or assisted, counselled or advised in the acts of those men. But in order to

establish that guilt, it is necessary, as my learned friend has said, that you should be satisfied that he did all those acts with the intent and design of levying war against Her Majesty, because the mere fact of his being there is no offence under the terms of this indictment unless it is coupled with the intent necessary to constitute a crime; and unless that intent is shown to your satisfaction, without any reasonable doubt in your mind, then the prisoner is entitled to the benefit of that doubt, because without the intent the crime cannot possibly be complete. You can understand that, and see the importance the law always attaches to the intent, by looking at the manner in which it views cases of another character. A man kills another. The mere fact is no crime in itself—the homicide may be justifiable, it may be accidental, or it may be murder. It is the absence of evil intent that makes it accidental or justifiable. The act may have been committed in self-defence; the intent then is not to do murder, but to save life. It may have been accidental, and there is then no intent at all. If it is murder, it must be shown that there is a malicious, deliberate intent to take away the party's life. You will see therefore how necessary it is that the intent should be established to the satisfaction of the jury. Now, with regard to the prisoner at the bar, it is necessary for the Crown to show you that he had the intent of levying war against Her Majesty in order to convict him of the crime with which he is charged; and it is not his part to show you that he had not that intent. The law presumes the prisoner to be innocent, and unless we can prove him to be guilty it is your duty to acquit him just as it was our duty to put him upon his trial, after finding him in the circumstances in which he was found. But, if he is to be acquitted upon a doubt, it is not a mere fanciful doubt of which you are to give him the benefit; but one which supposing you were to give a verdict convicting him, would make you hesitate in your minds as to whether the prisoner was guilty or innocent—would lead you to think that after all the prisoner might have been innocent, and that the verdict should have been given in his favor. Now, gentlemen, it is for us to tell you what we believe the Crown has established in this matter. It is not for us to press the case against the prisoner, or to ask you to come to a conclusion which the evidence will not

bear ; it is enough for us to place the evidence before you, to say what in our opinion it proves, and to leave his lordship to weigh it impartially when he comes to address you. We say then, that it is established that actual war was levied against Her Majesty in this Province ; that men came into the country to invade us, bent upon a hostile purpose, and having no right to come here with such intent ; that they engaged in conflict with our troops, subjects of Her Majesty ; that in that conflict men were shot down, killed or wounded ; that the effect of that was that war was levied by men who wanted to overthrow the power and authority of the Crown. We say that the prisoner was there aiding and assisting in the levying of that war ; and we tell you as a matter of law—which you need not take from us, but which will be told you also by the Court—that it is not necessary to show that the prisoner was in arms personally ; that he was personally aiding in any act of hostility, but that in point of fact if he was aiding, assisting or counselling those who were in arms, he is equally as guilty as if he carried a sword or a pistol, or fired the shot that killed any of those who fell in repelling the invaders. No man guilty of crime can be allowed to shelter himself by declaring that it was not his hand that struck the blow : for if a man stands by and watches the commission of crime—aiding, counselling and advising those who commit it—by our law, and wisely by our law, by the law of the country of which the prisoner claims to be a citizen as well as by the law of the land of his birth, that man is declared to be a criminal equally with the man whose hand did the deed. Therefore, as his lordship will tell you, there is no difference between the crime of the man who killed a soldier at Ridgeway and the act of the prisoner, though he were miles away at the time, if he was aiding, assisting and counselling those who committed that outrage upon our people. Now, what is the evidence as to that? My learned friend says the prisoner is a minister of the gospel, whose mission is peace. He says he belongs to the Episcopal Church of the United States, and according to his own statement, it was with the view of offering spiritual consolation to the wounded and dying that he went there among those people—not to give aid merely to the members of the organization, but also to those of our own people who might fall in



the conflict with them. My learned friend says that that was the prisoner's object, but you do not find him making that declaration in every case and holding to it. At one time he tells Mr. Molesworth that he is a reporter for the New York *Herald*. Then he says that that is not the case, but that he was seeking some mission in Canada. Again we are told, and we hear it with great regret of one holding his sacred office, that his habits of life had brought him into a position in which he did not know what he was doing, and it is given as an excuse why he should not be visited with the penalty due to the crime of which he is charged; that those habits had rendered him unconscious of the whole matter. Well, gentlemen, we cannot help feeling that under any circumstances—whether he should go from that dock a convicted felon or acquitted of the crime charged against him—it is a matter of regret that one who wears the garb of a minister of the gospel should have so far forgotten himself as to allow that enemy to steal into his brain which tends to destroy man altogether; but, however much we may regret it, we know that drunkenness is no excuse for crime. It would be an unfortunate thing if we should allow ourselves to say that a man, by drunkenness, places himself in a position in which he is incapable of judging of what he owes to his fellow men, and is freed from all responsibility for what he may do in that state. The law does not, and cannot recognize drunkenness as a palliation for wrong-doing. Indeed, instead of that, it rather regards drunkenness as adding to the crime a man may commit. There cannot then, in this case, be any excuse that from the circumstance of habitual dissipation, the prisoner did not know what he was about and should not be held to account. But is it the case that he was in such a condition? Was he intoxicated when he signed the document, taking upon himself the state and character of chaplain of the horde of ruffians who came over to destroy us? Was he sober or not sober when he went amongst those people as a Roman Catholic priest, forgetting and denying the church to which he belongs? Was he there aiding, assisting and comforting them, or was he not there for that purpose? Did the belief of those people, that he was there as a minister of the gospel to counsel and advise them, strengthen them in their purpose and encourage them to carry fire and sword amongst us? Surely, if in his capacity as minister of the

gospel, he desired to do what was right, one would think he would have told those men to abandon their unlawful design and return to the place from whence they came. But it is for you to judge upon all those points, and to say whether he aided and assisted those men or not, with a full knowledge of their real intent. If, in your opinion he did aid and counsel them—if in your opinion he did act in that direction and with that intent—then it is as much your duty to pronounce a verdict of guilty as it is mine to lay the evidence before you. My learned friend spoke to you in the most impassioned manner of the regret he would feel, and of the horror that would come over the whole country, if you were to give a verdict that would not afterwards be justified; but we must not allow ourselves to be influenced merely by appeals to the feelings. We have had two trials of this kind already, and we have had declarations made by the prisoners themselves, that nothing could be more fair and impartial than the manner in which those trials were conducted. There is no reason to believe that our people will not give all who are accused a fair trial, and there is no whisper even to impugn the impartiality of those who are to try these cases. The Crown presses for no conviction, and has no desire that the jury should convict the prisoner, unless they feel satisfied after hearing the evidence of his guilt; but, at the same time the Crown says that no such appeals should be allowed to effect us. Depend upon it that the true policy, not merely with regard to those who sit in the jury-box, but with regard to us as a people, and to the government, is to act according to our own belief of what is right, without the slightest dread in the world of the consequences that may follow. Every act we do in our lives we are responsible for, either here or hereafter, and we must never be afraid to act according to the strict rule of what we believe to be right. We have to judge of these cases then according to the evidence, and to take heed of nothing beyond the evidence—no prejudices, no passions, no fear of the consequences of our decision. We have to make up our minds to act in accordance with the convictions of truth forced upon us, and having done that we must be content to leave the consequences with the Almighty. You know your verdict, if one of guilty, can alone be followed by sentence of death as prescribed

by the law. You cannot help that sentence, and the judge has no power to lessen it. You know that a verdict of acquittal will send the prisoner forth to rejoice the hearts of his wife and his children; and we will be glad if you can conscientiously return such a verdict. We are all desirous, notwithstanding that a horde of ruffians invaded our land and threatened to destroy our free government and institutions, to show that every man is safe in a British court and before a British jury; and we have no desire unduly to press upon you one jot or tittle of evidence against the prisoner, while, at the same time, we cannot allow the law or the evidence to be unfairly strained in his favor. If you find in your hearts a doubt, a reasonable doubt, as to his guilt, no one will rejoice more that he should have the benefit of it, than those whose duty it was to place him at the bar for trial; no one will be more glad to see him restored to that position which those who knew him told us he formerly occupied—an ornament of the church to which he belongs, no longer to be seduced from the path of morality and holiness by that demon of drunkenness, which after all, is the root of all the evil that has befallen him.

HIS LORDS. then charged the jury. He said—It very seldom happens in this country that counsel finds it necessary to remark to the jury upon the ruling of the court upon points of law. Your duty is to deal with the facts presented to you—mine with the law bearing upon those facts; and I can no more pervert the law, than you the facts, and do my conscience justice. The counsel for the defence complains that I have ruled out evidence which would have borne in favor of the prisoner. Now, supposing a man were put upon his trial for stealing or for murder, would it be evidence that he did not commit the crime, for another to come forward and say—“I have heard him express abhorrence of theft, and say that the man who committed murder ought to be hanged.” Indeed, might not this language be used in order the better to screen *him* from the consequences of his subsequent act? So it is in this case—evidence as to what the prisoner may have said at a former trial, has no bearing upon the question as to whether he is or is not guilty of the crime charged against him. The law limits evidence of this kind to the *res gesta*, the thing itself. Everything that relates to that thing is evidence, but what occurred before that is not evidence

Now by that rule the evidence offered by the counsel for the defence has been excluded and that ruling ought not to be a cause of complaint to the jury, because it is not wrong. With regard to another statement made by counsel I never before heard it alleged that a fair trial could not be obtained in this province for any man charged with crime—I certainly never before heard such an allegation made in this or any other court in the land. The prisoner at the bar is charged in the first count with having entered the province with intent to levy war against the Crown; then in the second count, he is charged with having joined himself to other evil disposed persons in arms, in this province, with intent to levy war; and in the third count he is charged with having committed an act of hostility, with intent to levy war on Her Majesty. Now, as I have instructed previous juries, it is not necessary, in order to constitute the offence charged, that the prisoner should have borne arms on that occasion. If you find that some persons bearing arms were in the Province, with that intent—and that is the first thing you have to inquire into—and that the prisoner was aiding, assisting and counselling them, then he was in arms just as well as the rest of those with whom he was associated. Suppose, for instance, that a number of parties entered into a conspiracy to murder a man or to rob a house. Those who watched, stood on guard, counselled, or aided in any way, were just as guilty in the eye of the law as those who actually committed the crime. So in regard to this prisoner, if you find that he was there aiding, counselling and abetting those who were engaged in levying war, the law holds him guilty of the offences charged in the indictment. A number of armed men landed at Fort Erie on the 1st of June last, encamped near that place, and afterwards marched to Ridgeway, where an act of hostility was committed against Her Majesty. The first point is therefore made out, if you believe the facts, as stated in the evidence. The next question is whether the prisoner was there, aiding and assisting those parties. What is the evidence upon this point? The prisoner was seen by the first witness, shaking hands with the officers in command—one especially who was riding Dr. Kempson's horse, and then with other officers, associated with him. He was next seen, at the camp, walking

about, and it is for you to say whether he was there as a stranger as has been suggested, or as one acting with the persons in the camp. He was next heard of at Newbigging's, to whom he gave the paper that has been put in. Now, whether he was chaplain or not, in fact this paper is evidence that he regarded himself as having something to do with them, in that capacity, and the rule of law is that, until it is satisfactorily explained and made to appear otherwise, a man is presumed to be what he professes to be. This paper then, which has been proved to be in the prisoner's handwriting, represents that he was chaplain to that force, and that he endorsed the order of one of the officers in command giving protection to certain property. The Crown relies upon that as evidence showing that he was associated with them, and acted with them in the accomplishment of their object. Now, does it satisfy you on that point, as far as it goes? The next point relied upon by the Crown is his invitation to the officers to take tea at Mr. Newbigging's house. Are you satisfied that this fact establishes the prisoner's connection with them? The evidence in the first instance rather points to his having been in the camp, the first day and the following night; but the evidence for the defence seems to show that he returned to Buffalo in the evening. It is for you to consider whether what he did on all these occasions bears out the idea that he was of them, aiding them, assisting them, and counselling them in the way charged. If the evidence does bear out that idea, then no matter whether he was there in the character of a chaplain or anything else, he is guilty of being in arms. Now, what is the answer of the defence, to that? The prisoner says that he bore a very respectable character, that he was a clergyman of the Episcopal church, and that he conducted himself very properly until he fell into the bad habit of intemperance. Finding that the habit overpowered him, he resigned his office at Syracuse, the people, however, wishing him to remain. He then sought and obtained employment at Nunda, where he thought that perhaps his usefulness would not be impaired; but soon the old habit appeared, and the Bishop gave him to understand that he wished to see him at Buffalo. From these facts, gentlemen, you learn that the man felt, no doubt, that he was a kind of a vagabond on the face of the earth, and it is just

possible that falling into those bad habits he got among those people not knowing rightly what he did. But the law does not allow drunkenness to be set up as an excuse for crime, because, when a man's habits lead him to do wrong, it is a voluntary act on his own part; it is his own misconduct that puts him in the way of doing a wrongful act. The fact that the prisoner contracted bad habits, is, however pressed upon you, and you will, of course, give it consideration; and if the man was really intoxicated, of which there is no evidence, then you are placed in a position of some difficulty. The law does not allow drunkenness to be given as an excuse for crime, but no man of reflecting mind, will fail to see a distinction thus—that if a person placed himself in a position in which he committed an act which he did not originally contemplate, it may become a question whether it might not be unjust to say that he is to be held responsible for all the consequences of that act. However, none of the witnesses speak of him being intoxicated when he committed the acts charged as showing his complicity with those who were the criminals on that occasion. All of them point to his having been sober on those occasions—looking, it is true, like a man who had been dissipating, and who bore what is known as a “seedy” appearance. Perhaps he was reckless, and that is the most that can be said of his conduct in reference to this question of drunkenness. Having made these observations I will read over the evidence, and offer any comments that may be necessary to make it clear. You should give it your grave consideration. It does not lie in the mouth of the prisoner to say—“I have been a good man, and was a good man before I fell into this trouble, and therefore I ought to be acquitted.” Evidence as to character should weigh with a jury only, when it becomes a question whether a man would do a certain act charged against him—not when the facts pointed to his having committed the act. If the crime appeared in so doubtful a light as to make it somewhat uncertain that the person charged committed it, and if that person could show that before he was so charged he bore a good character, then, evidence of that kind would entitle him to the benefit of the doubt. But if you found that a man with a good character fell into the habits the prisoner seems to have contracted, then he was the sort of man who was

prepared to do almost anything that fell in his way, and it was no excuse for him to say that before he had learned those habits he was a man who had borne a good character, and would not have committed a crime. If the evidence leaves no doubt on your minds as to the guilt of the prisoner, it is your duty to find a verdict accordingly; but if it leaves a reasonable doubt—not a fanciful doubt, or one conjured up by ingenious counsel—then it is equally your duty to give the prisoner the benefit of that doubt. The counsel for the defence has alluded to the fact that the future prospects of others, as well as of the prisoner, depends upon your verdict. Well, that is a thing which you ought not take into consideration. One of the safeguards of society is that men have certain ties which operate in restraining them from acts of misconduct. Men may be found who would willingly risk their own reputations, but who would be sorry to have a stigma cast upon their wives and their children. This is one of the securities for the well-being of society; and when a man disregards those ties, and does wrong, although it is true that the family suffered according as the husband and father suffered, still that ought not to be taken into consideration in cases of this kind. A man ought not to be excused from crime, because he has a wife and children. No doubt, it is very lamentable that any of his crimes should fall upon them, but the law cannot help it, and he should consider it before he exposes them to the danger. I will now read over the evidence, in order that it may refresh your memories. Having done so, his lordship dismissed the jury.

MR. M. C. CAMERON—I renew my objections, my lord, that I took on the trial of McMahon, and make also an additional objection. It is, that as the Imperial act 11 Vic., Cap 12, provides for offences against the Crown similar to this, it must override the Canadian act, which was passed previous to it, and under which these prisoners are being proceeded against.

HIS LORDSHIP—I will make a note of the objections.

The jury retired to consider their verdict at twenty minutes to six, and returned at eight o'clock, with a verdict of NOT GUILTY.

The prisoner was then discharged.

## TRIALS OF OTHER PRISONERS.

TORONTO, Nov. 5, 1866.

The court opened at noon to-day—His Lordship Mr. Justice John Wilson presiding.

**BENJAMIN PARRY**, a youth of sixteen years of age, was put forward for trial upon an indictment charging him as an American citizen, and containing three counts, as in previous indictments, with having invaded this country, on the first of June, with intent to levy war, &c., on Her Majesty.

The Hon. J. H. Cameron, Q.C., Mr. R. A. Harrison and Mr. John McNab, appeared for the Crown, and Mr. Kenneth McKenzie, Q.C., Mr. James Fleming and Mr. H. B. Morphy for the prisoner.

The evidence for the prosecution showed that the prisoner was arrested with the others at Fort Erie, and for the defence it was shown that he came with the Fenians from Cincinnati, for the purpose of seeing his uncle, who lived near Fort Erie; that he was at Ridgeway when the firing commenced; that a man asked him to hold his gun, and then ran away; whereupon the prisoner also threw down his arms and retreated.

Verdict—NOT GUILTY.

TORONTO, Nov. 7, 1866.

The court opened at ten o'clock to-day—His Lordship Mr. Justice John Wilson presiding.

**WILLIAM SLAVIN** was placed in the dock. He was charged in the indictment as an American citizen, with having invaded this country with intent to levy war, &c.

The Hon. J. H. Cameron, Mr. R. A. Harrison and Mr. J. McNab appeared for the Crown, and Mr. McKenzie and Mr. James Fleming for the prisoner.

The evidence for the prosecution showed that the prisoner was armed with a Fenian rifle when he was arrested near Fort Erie on the 2nd of June.

**Mr. McKenzie** submitted to the court that there was no evidence to sustain the charges in the indictment. The prisoner had not been proved to have been at the battle of Ridgeway, nor at



Fort Erie when Colonel Dennis engaged the Fenians, and as a matter of law he could not be tried under the statute 29 and 30 Vic., cap. 4., as that Act was passed on the 10th of August, subsequent to the time the alleged offence was said to have been committed.

HIS LORDSHIP overruled the objections, on the ground that the statute referred to was in force at the time the offence charged was committed, so far as regarded American citizens, but that it had been amended, and at once re-enacted, so as to include British subjects.

Verdict—GUILTY. Sentenced to death.

TORONTO, Nov. 8, 1866.

The court opened at ten o'clock this morning—His Lordship Mr. Justice John Wilson presiding.

PATRICK O'NEIL, a lad of eighteen years of age, was placed in the dock and put forward for trial. There were six counts in the indictment; the 1st, 2nd and 3rd charging him as an American citizen with having invaded this country on the first of June, with intent to levy war, &c. on her Majesty; and the 4th, 5th and 6th charging him as a British subject with high treason.

The same counsel as in the previous cases appeared for the Crown and for the prisoner.

Before the prisoner pleaded Mr. McKenzie moved to quash the indictment on the following grounds:—

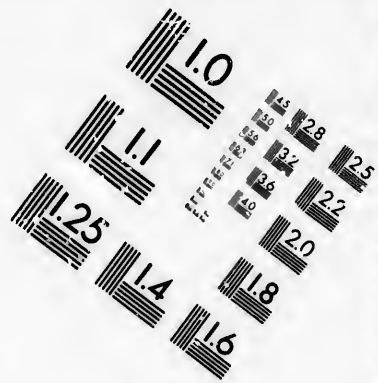
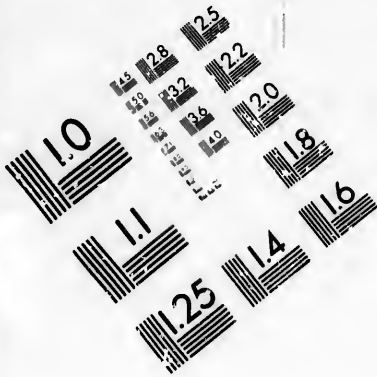
1. On the grounds of misjoinder of counts; that under the first, second and third counts, he is charged as an American citizen, under the first clause of this act.

2. That he is charged, in the fourth, fifth and sixth counts, as a British subject, under the second clause of this act. That in the sixth count he is charged with what amounts to high treason.

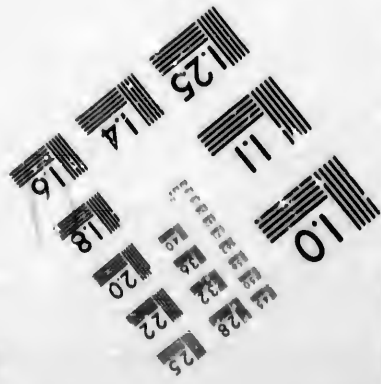
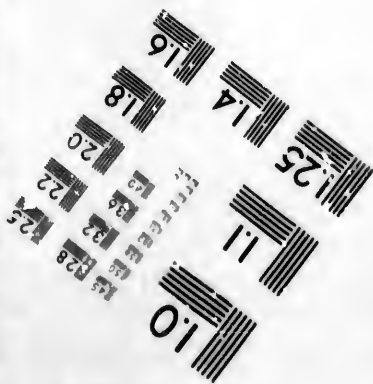
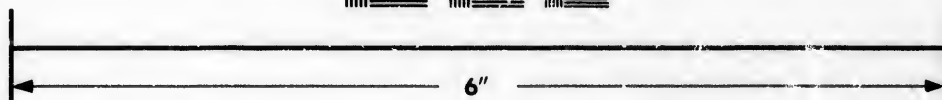
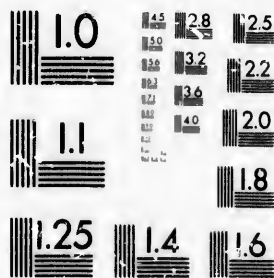
3. That a man cannot be a citizen of a foreign state, and a British subject at the same time. There could not be distinct offences charged in the same indictment.

4. That it appears on the face of the indictment that offences charged therein against the prisoner were committed in the county of Welland, and the indictment therefore could not be legally preferred against him under the statute 29 and 30 Vic., cap. 4, sec. 3 in this





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court, it being a court for the united counties of York and Peel; the authority of the statute, being restricted to single counties, and that the indictment and verdict are illegal.

MR. R. A. HARRISON contended that Mr. McKenzie had placed a wrong construction on the interpretation clause, and that as to the second ground, his Lordship had already overruled that objection, by his decision on the application of the same nature, that was made the previous day.

HIS LORDSHIP overruled the objections raised by Mr. McKenzie.

MR. MCKENZIE asked for time to consider what course he would pursue—whether to demur or advise the prisoner to plead over.

HIS LORDSHIP granted the request, and the prisoner was removed.

PATRICK McGRATH was then placed in the dock, indicted as an American citizen with having invaded Canada on the 1st of June, and committed an act of hostility against Her Majesty.

The same counsel as in the previous cases appeared for the Crown, and also for the defence.

The evidence showed that the prisoner arrived at Fort Erie on the 1st of June, and stood sentry over Dennis Sullivan, a soldier belonging to the Royal Canadian Rifles, who was arrested by the Fenians, but as the evidence for the Crown proved the prisoner to be a British subject the case broke down.

HIS LORDSHIP, therefore, instructed the jury to bring in a verdict of NOT GUILTY.

The jury having acted as instructed, the prisoner was handed over to the sheriff, the Crown counsel having decided to indict him as a British subject for high treason.

The grand jury came into court a short time afterwards with a true bill against Patrick McGrath, charging him as a British subject with high treason.

MR. MACKENZIE said he would advise the prisoner to plead *autrefois acquit*.

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TORONTO, Nov. 9. 1866.

The court opened at ten o'clock this morning—His Lordship Mr. Justice John Wilson presiding.

DANIEL DRUMMOND was placed in the dock charged as an Amer-

ican citizen, with having invaded Canada on the 1st of June, with intent to levy war, &c., on Her Majesty.

Mr. R. A. Harrison and Mr. J. McNab appeared for the Crown, and Mr. Mackenzie and Mr. Fleming for the prisoner.

The evidence for the prosecution showed that the prisoner was arrested about three miles from Fort Erie, on the 2nd of June, and that a loaded revolver was found in his possession. It was not shown, however, that he had any connection with the Fenians.

Verdict--NOT GUILTY.

TORONTO, Nov. 10, 1866.

The court opened at ten o'clock to-day—His Lordship Mr. Justice John Wilson presiding.

WILLIAM HAYDEN was placed in the dock, indicted as an American citizen, with having invaded Canada on the 1st of June with intent to levy war, &c., on Her Majesty.

Mr. R. A. Harrison, Mr. J. Patterson and Mr. J. McNab appeared for the Crown, and Mr. McKenzie, Mr. Fleming and Mr. Morphy for the defence.

The evidence showed that the prisoner was seen at Fort Erie on the morning of the 1st of June, armed with a Fenian rifle and fixed bayonet, that he said the country was taken and the rule of the hated Saxon was extinct.

At the close of his LORDSHIP'S charge, and after the jury had retired,

Mr. McKENZIE took the following objections to the charge:—

1. That the proof lay on the prisoner to show that he had not been there.
2. Can there be any doubt but that he was among them at Lime-ridge or Fort Erie?
3. The fact that he was riding up and down at a distance from the Fenian camp, extorting money showed that he was acting on his own account, and not in connection with them.
4. The plunder was the incident and not the object.
5. That the Crown proved that the prisoner was engaged in private plunder. It should give strong evidence to show his object was public war.

HIS LORDSHIP stated that Mr. McKenzie had misunderstood his charge to the jury. However, he would make a note of the objections.

Mr. McKENZIE offered other objections similar to those made in the case of Slavin.

Mr. HARRISON contended that the learned counsel had placed a wrong construction on the statute.

HIS LORDSHIP, in overruling the objections stated that he had disposed of them in a former case.

The jury returned with a verdict of GUILTY. Sentenced to death.

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TORONTO, Nov. 12, 1866.

The court opened at ten o'clock to-day—His Lordship Mr. Justice John Wilson presiding.

WILLIAM DUGGAN was placed in the dock, indicted both as an American citizen and a British subject, with having invaded Canada on the 1st of June, with intent to levy war, &c.

The Hon. J. H. Cameron, Mr. R. A. Harrison, and Mr. J. McNab appeared for the Crown, and Mr. Mackenzie, Mr. Fleming, and Mr. Morphy for the defence.

The evidence showed that the prisoner had been arrested on a warrant whilst he was in bed, in a house near Fort Erie. He was employed as a laborer on the Buffalo and Lake Huron railway. It was not proved that he had any connection with the Fenians.

Verdict--NOT GUILTY.

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TORONTO, Nov. 13, 1866.

The court opened at ten o'clock to-day—His Lordship Mr. Justice John Wilson presiding.

DANIEL WHALEN was placed in the dock, indicted as an American citizen, with having invaded Canada, with intent, &c., on the first of June.

The same counsel appeared as in the previous case for the Crown and for the defence, with the addition of Mr. Fenton for the prisoner.

Mr. McKENZIE, on behalf of the prisoner, challenged the array in the following form :—

In the Court of Oyer and Terminer, and general jail delivery, in, and for the United Counties of York and Peel, the 13th day of November, in the year of our Lord, one thousand eight hundred and sixty six :—

THE QUEEN vs. DANIEL WHALEN—And now as this day come, as well the said John Alexander Macdonald, who for our said Lady the Queen, prosecutes in this behalf, as the said Daniel Whalen in his own proper person and the jury thereupon empaneled, likewise come; and thereupon the said Daniel Whalen challenges the array of the said panel, because the said panel was arrayed, returned and made up by Frederick William Jarvis, Esquire, now and at the time of the making of the said array, sheriff of the united counties of York and Peel, from an illegal and insufficient petit jury list. And the said Daniel Whalen shows and states to the court here, the following grounds against the legality and sufficiency of the petit jury list from which the said panel was arrayed, returned and made up.

That is to say, the said Daniel Whalen says that the several names inserted upon the said petit jury list, from which the said panel was empaneled, returned and made out, were not selected from the petit jury for the year of our Lord 1866, in open court, at a General Quarter Sessions of the peace for the united counties of York and Peel.

That the several names inserted upon the said petit jury list from which said panel was arrayed, returned and made up, were not selected from the roll of the petit jury at any sitting, or at any adjourned sittings of the court of Quarter Sessions of the peace, for the united counties of York and Peel, or in the presence of the chairman of the Quarter Sessions of the peace for the united counties of York and Peel, or in the presence of any presiding member of that court.

That the names inserted upon the said petit jury lists to serve as petit jurors for the superior court, in, and for the united counties of York and Peel, were not selected from the roll of petit jurors for the superior courts, for the year aforesaid, by three or more selections, as the law directs, but by a less number than three.

That, although the court of Quarter Sessions of the peace of the united counties of York and Peel, held at the City of Toronto, to wit, on the 12th day of December, A. D. 1865, adopted a resolution affirming the expediency of selecting a full jury list for the superior courts, for the year of our Lord, 1866, still a full petit jury list was not selected.

That a great number of persons qualified and competent for the performance of the duties of petit jurors for the superior courts, in, and for the united counties of York and Peel, whose names are inserted upon the proper roll of petit jurors for the year A. D. 1866, for the said united counties, to wit, 500 names, were not proposed for selection, or selected and transferred upon the said petit jury list, as the law directs, but on the contrary thereof, were omitted and left off, and other names were selected and transferred in their place and stead.

That the chairman of the Quarter Sessions of the peace, for the united counties of York and Peel, and the clerk of the peace for the same united counties, have not certified under their hands in the jurors' book for the united counties of York and Peel, for the year of our Lord, one thousand eight hundred and sixty six, immediately after such petit jury list.

That the petit jury list, from which the said panel was arrayed, returned and made up, was not on any day, or at any time, duly selected and transferred from the proper roll in open court, as the law directs, and that the



said petit jury list is not certified in any manner whatever on the said book, by the said chairman and clerk of the peace.

That the several names entered upon the said petit jury list from which the said panel is arrayed, returned and made up, were not selected and transferred from the proper jury roll, in the order and manner as demanded by sec. 53 of the act respecting jurors and juries.

That the names and additions of the several persons inserted upon the roll of petit jurors for the superior courts for 1866, were not openly and audibly called aloud by the clerk of the peace, as proposed to be selected to serve as petit jurors for the superior courts, nor did the chairman of the Quarter Sessions, nor any member of that court put to the other selectors the question whether the said names or any of them should be selected for the petit jurors of the superior courts, as directed by law, before their names were inserted upon the petit jury, and from which the said panel was arrayed, returned and selected.

HIS LORDSHIP refused the challenge, on the ground that sufficient cause had not been shown by Mr. McKenzie to support it.

The trial of the prisoner was then postponed till to-morrow.

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Toronto, November 14, 1866.

The court opened at ten o'clock to-day—His Lordship Mr. Justice John Wilson presiding.

DANIEL WHALEN was placed in the dock, and his trial proceeded with.

The evidence showed that the prisoner was engaged in the fight at Ridgeway, and that he was wounded in the neck and shoulder. Verdict—GUILTY. Sentenced to Death.

JOHN QUINN was then placed in the dock, and replied through his counsel that he was not ready for his trial.

Mr. McKENZIE moved to have the trial postponed till the following assizes, and put in an affidavit in support of his application.

HIS LORDSHIP held that the affidavit was insufficient, and the Crown insisted on proceeding.

Mr. McKENZIE challenged the array.

The HON. MR. CAMERON traversed the challenge, and HIS LORDSHIP appointed Messrs R. P. Stephens and C. V. Varmoll as triers, who, upon being sworn in disposed of the matter in dispute, by finding for the Crown.

The trial of the prisoner was then proceeded with; he being indicted as an American citizen, with having entered Canada on the first of June, to levy war on Her Majesty.

The evidence showed that the prisoner was at the fight at Ridge-way.

Verdict—GUILTY. Sentenced to death.

Toronto, Nov. 15, 1866.

The court opened at ten o'clock to-day—Mr. Justice JOHN WILSON presiding.

THOMAS SCHOOL was placed in the dock, charged in the 1st, 2nd and 3rd counts of the indictment as an American citizen, with having invaded Canada on the first of June, with intent to levy war, &c., on Her Majesty, and in the 4th, 5th and 6th counts he was indicted as a British subject for high treason.

The same counsel as in the previous case appeared for the Crown, and for the defence.

The evidence for the prosecution, showed that the prisoner was under arms with the Fenians at Fort Erie on the 1st of June.

Verdict—GUILTY, on the 4th, 5th, and 6th counts. Sentenced to death.

PATRICK DONOHUE was then placed in the dock, indicted as an American citizen, with having invaded Canada on the 1st of June, with intent to levy war, &c.

The same counsel appeared as in the former cases for the Crown and for the defence.

The evidence showed that the prisoner was arrested in a tavern at Fort Erie, having arrived there on Sunday, the third of June. He had no firearms.

Verdict—NOT GUILTY.

MR. MCKENZIE gave notice that he would apply to the Court of Queen's Bench, for a new trial in the cases of the convicts Lynch, Hayden, Slavin, Whalen, and Quinn.

The court then adjourned till after Term.

Toronto, Jan. 11, 1867.

The court resumed the trials to-day—His Lordship Mr. Justice MORRISON presiding.

TIMOTHY KIELY was placed in the dock, charged as an American citizen, with having invaded Canada on the 1st of June, 1866, with intent to levy war, &c., on Her Majesty.

Hon. Mr. Cameron, Mr. R. A. Harrison, and Mr. J. McNab appeared for the Crown, and Mr. K. McKenzie and Mr. James Fleming for the prisoner.

The evidence for the prosecution showed that the prisoner was arrested in a hay loft on the premises of an alleged Fenian sympathizer, named Cantie, near Fort Erie. The prisoner was in the fight at Ridgeway, and was wounded in the arm.

Verdict—GUILTY. Sentenced to death.

JOHN SMITH was placed in the dock, charged as an American citizen, with having invaded Canada on the 1st of June, with intent to levy war, &c., on Her Majesty.

The same counsel as in the previous case appeared for the Crown, and for the prisoner.

The evidence showed that the prisoner crossed over to Fort Erie on Saturday afternoon, and was arrested on Sunday. He had not been in the company of the Fenians.

Verdict—NOT GUILTY.

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TORONTO, Jan. 12, 1867.

The court opened to-day—His Lordship Mr. Justice MORRISON presiding.

PATRICK O'NEIL, a young lad, was placed in the dock, indicted as an American citizen, with having invaded Canada on the 1st of June, with intent, &c., and as a British subject, for high treason.

The same counsel appeared for the Crown, and for the prisoner, as in the previous case.

The evidence for the prosecution showed the prisoner to have been with the Fenians at Fort Erie, armed with a rifle and bayonet.

Verdict—GUILTY of high treason.

PATRICK McGRATH, who was acquitted in the court of Oyer and Terminer, was again placed on trial.

MR. MCKENZIE contended that as the prisoner had already been tried and acquitted, he could not be again tried for the same offence in the present court.

The Crown joined issue on the plea, and a jury was empanelled to try the question.

Mr. McKENZIE contended at some length, that the prisoner could not be tried twice for the same offence.

His LORDSHIP said that Mr. McKenzie would have to let the prisoner go to trial, and if he were convicted, then leave would be reserved for the consideration of the higher court.

It was therefore endorsed on the indictment, that the jury find for the Crown on the special plea.

The prisoner was then arraigned and tried.

Verdict—GUILTY. Sentence deferred.

TORONTO, Jan. 14, 1867.

The court opened this morning—His Lordship Mr. Justice MORRISON presiding.

THOMAS H. MAXWELL was placed in the dock, indicted as an American citizen, with having invaded Canada on the 1st of June with intent to levy war, &c., on Her Majesty, and as a British subject, for high treason.

The same counsel appeared for the Crown, and for the prisoner, as in the previous case.

Mr. McKENZIE objected that the jurors had not been summoned under precept for the county of York.

His LORDSHIP noted the objection.

The evidence for the Crown, showed that the prisoner was formerly a resident of Toronto, that he had been in the battle at Ridgeway, and was wounded.

Verdict—GUILTY of high treason. Sentence deferred.

JAMES BURKE was placed on trial indicted as an American citizen, with having invaded Canada on the 1st of June, with intent to levy war, &c., on Her Majesty.

The same counsel appeared on both sides, as in the previous trial.

Mr. McKENZIE made an objection, as in the previous case.

The evidence for the prosecution showed that the prisoner had been with the Fenians at Fort Erie on the 1st of June, that he was clad in a United States army uniform, and was armed with a Fenian rifle and fixed bayonet.

Verdict—GUILTY. Sentence deferred.

PATRICK NORTON was then placed in the dock and withdrew his plea of not guilty, and pleaded guilty, stating that he did not think he would get a fair trial.

HIS LORDSHIP deferred passing sentence on the prisoner.

TORONTO, Jan. 15, 1867.

The court opened at ten o'clock this morning—His Lordship Mr. Justice MORRISON presiding.

PATRICK KEATING was placed on his trial.

Hon. Mr. Cameron, Mr. John McNab, and Mr. John Patterson appeared for the Crown, and Mr. McKenzie and Mr. Fleming for the prisoner.

Mr. McKENZIE claimed that the prisoner should be tried by a jury half alien.

HIS LORDSHIP granted the request, but after a learned discussion it was decided to proceed with an ordinary British jury—the prisoner being indicted as a British subject for high treason.

Mr. McKENZIE requested his Lordship to note that he made the same objection to this case, as he had to the former juries.

HIS LORDSHIP took a note of the objection.

The evidence showed that the prisoner had come to Canada on his way home, to see his father, who lived in Welland.

Verdict—NOT GUILTY.

JOHN O'CONNOR was then placed in the dock.

Hon. Mr. Cameron, Mr. R. A. Harrison, Mr. McNab, and Mr. Patterson, appeared for the Crown, and Mr. Patrick McCurrie, of Guelph, defended the prisoner.

The indictment contained six counts, the first three charging him as an American citizen with having invaded Canada on the 1st of June with intent to levy war against Her Majesty, and the last three as a British subject for high treason.

The evidence for the Crown showed that the prisoner was with the Fenians at Fort Erie on the 1st of June, and that when he was arrested he carried a sword.

Verdict—GUILTY. Sentence deferred.

DANIEL QUINN was next put forward for trial.

Hon. Mr. Cameron, Mr. Harrison, and Mr. McNab, appeared for the Crown, and Mr. McKenzie and Mr. Fleming for the defence.

The evidence for the Crown showed that the prisoner was one of the Fenians that had landed at Fort Erie on the 1st of June, and that he stated that the Fenians had changed the name of Canada to that of the Irish Republic.

Verdict—GUILTY. Sentence deferred.

TORONTO, Jan. 16, 1867.

The court opened this morning—His Lordship Mr. Justice MORRISON presiding.

JOHN ROGAN was placed in the dock charged under the six counts in the indictment.

The prisoner stated that he desired to be tried by a jury half alien.

A jury composed of six British subjects and six American citizens was then empaneled to try the case. The same counsel as in the previous case appeared for the Crown and for the defence.

Hon. Mr. CAMERON stated that the Crown had elected to try the prisoner on the first three counts, charging him as an American citizen.

The evidence for the prosecution showed that the prisoner kept guard over a house at Fort Erie on the 1st of June, he being armed with a Fenian rifle and fixed bayonet at the time.

Verdict—GUILTY. The jury recommended that the death sentence might be commuted.

JAMES SPAULING was next placed in the dock, indicted under the six counts.

The same counsel, as in the previous case, appeared for the Crown, and for the defence.

A jury, composed of British subjects and American citizens was empaneled to try the case.

The evidence showed that the prisoner had no particular connection with the Fenians.

Verdict—NOT GUILTY.

WILLIAM BAXTER was next placed in the dock, indicted as an American citizen.

The evidence for the Crown showed that the prisoner was at Fort Erie with the Fenian body, that in company with them he entered a house and demanded breakfast, and that in prison he was looked upon as a simpleton by his fellows.

The jury could not agree, and were locked up over night.

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TORONTO, Jan. 17, 1867.

The court opened this morning—His Lordship Mr. Justice MORRISON presiding.

The jury that was locked up last night, in the case of WILLIAM BAXTER, returned into court with a verdict of NOT GUILTY.

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TORONTO, Jan. 18, 1867.

The court opened this morning—His Lordship Mr. Justice JOHN WILSON presiding.

PETER PAUL LEDWITH was placed in the dock, indicted under the six counts. The prisoner stated that he was an American citizen, and claimed to be tried by a jury half alien.

Col. Thomas Steel was the only American, however, that answered when the jury list was called, and the jury had therefore to be completed with British subjects.

The same counsel appeared for the Crown, and for the prisoner, as in the former case.

The evidence for the prosecution showed that the prisoner was arrested at Fort Erie, on the 2nd of June, he being armed with a Fenian rifle.

Verdict—GUILTY. Sentence deferred.

JAMES MACDONAGH was put forward for trial. He claimed to be an American citizen, and asked for a jury half alien.

Only three American gentlemen, however, could be found in court. The jury panel was consequently filled up with British subjects.

It was not shown in evidence that the prisoner was armed when he was arrested at Fort Erie, on the 2nd of June, though it was stated that he was seen in the Fenian camp the previous day.

Verdict—NOT GUILTY.

TORONTO, Jan. 21, 1867.

The court opened at noon to-day—His Lordship Mr. Justice JOHN WILSON presiding.

THOMAS COONEY was placed in the dock, and having stated that he was an American citizen, claimed to be tried by a jury half alien.

The same counsel appeared on both sides, as at the previous trial.

The evidence showed that the prisoner was at the fight at Ridgeway, on the 2nd of June.

Verdict—GUILTY. Sentenced to death.

GEORGE J. MATHEWS was put forward for trial, he being indicted as an American citizen. He claimed to be tried by a jury half alien.

The evidence showed that the prisoner was arrested at Thorold, in September, 1866, by some of the members of the Governor General's Body Guard, he having stated that he had been sent over from Buffalo, as a scout by a body of Fenians that were going to make a second raid upon Canada. It was stated by a witness for the prosecution that the prisoner was at Fort Erie on the 1st of June, but a witness for the defence proved an *alibi*.

Verdict—NOT GUILTY.

TORONTO, Jan. 22, 1868.

The court opened this morning—His Lordship Mr. Justice MORRISON presiding.

MICHAEL PURTELL was placed in the dock, charged under the usual counts.

The same counsel as in the previous case appeared for the Crown, and for the prisoner.

The prisoner pleaded GUILTY, and the verdict was taken on the 4th, 5th, and 6th counts, charging him as a British subject with high treason.

The prisoner was sentenced to death.

OWEN KENNEDY was placed in the dock, indicted as an American citizen. He therefore claimed to be tried by a jury half alien.

Hon. Mr. Cameron, Mr. R. A. Harrison, and Mr. McNab, appeared for the Crown, and Mr. M. C. Cameron, Mr. K. McKenzie, and Mr. Fleming appeared for the prisoner.



It was stated in evidence that the prisoner was seen in the company of a number of armed Fenians at Fort Erie, on the 2nd of June, and that he retreated to the woods, was pursued and arrested.

Verdict—GUILTY, with a recommendation to mercy. Sentence deferred.

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TORONTO, Jan. 24, 1867.

The court opened this morning—His Lordship Mr. Justice MORRISON presiding.

THOMAS KING was put forward for trial, charged as an American citizen, with levying war against the Queen.

Hon. Mr. Cameron, Mr. McNab, and Mr. J. Patterson, appeared for the Crown, and D. B. Read, Mr. McKenzie, Mr. Fleming, and Mr. Morphy appeared for the prisoner.

The evidence showed that the prisoner was on guard at Fort Erie, and that he was armed with a Fenian rifle and bayonet. The evidence, however, not being very definite, the jury returned a verdict of NOT GUILTY.

JOHN GALLAGHER was placed in the dock, charged as an American citizen with having invaded Canada to levy war on Her Majesty.

Hon. Mr. Cameron, Mr. McNab, and Mr. J. Patterson, appeared for the Crown, and Mr. McKenzie and Mr. Fenton for the prisoner.

It was stated in evidence by a Fenian convict that the prisoner came from Cincinnati with the Fenians to invade Canada. Verdict—GUILTY. Sentence deferred.

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TORONTO, Jan. 25, 1867.

The court opened this morning—His Lordship Mr. Justice MORRISON presiding.

WILLIAM ORR was placed in the dock, charged as an American citizen, with levying war on Her Majesty.

The same counsel, as in the previous case, appeared on each side.

It was shown in evidence, that the prisoner, when arrested, on the 2nd of June, at Fort Erie, was armed with a Fenian rifle, but he stated that he was looking for stragglers, (meaning Fenians.)

HIS LORDSHIP advised the jury to acquit the prisoner.

Verdict—NOT GUILTY.

**BARNEY DUNN** was placed in the dock, indicted as an American citizen.

The prisoner claimed to be tried by a jury half alien—a request which was complied with.

The same counsel, as in the previous case, appeared on each side.

**Mr. McKENZIE** took the same objections to the Canadian half of the jury as he did in other cases.

**HIS LORDSHIP** noted the objections.

The evidence for the prosecution showed that the prisoner was with the Fenian body at Fort Erie, and stood guard over a soldier of the Royal Canadian Rifles, whom the Fenians had taken prisoner.

Verdict—GUILTY. Sentence deferred.

**FREDERICK FRY**, a Swiss, was placed in the dock, charged with levying war against Her Majesty, but the evidence was of so trifling a nature that his lordship directed an acquittal.

Verdict—NOT GUILTY.

**JOHN HUGHES** and **JAMES DIAMOND** were placed separately in the dock, but **Hon. Mr. Cameron** stated that the Crown had relied for a conviction upon the evidence of a Fenian prisoner, named **Ryan**, who had escaped from prison. Consequently the Crown would prefer no evidence.

The prisoners were then discharged.

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Toronto, Jan. 29, 1867.

The court opened to-day—His Lordship **Mr. Justice Morrison** presiding.

**JOHN GRACE** was placed in the dock, charged as an American citizen, with levying war on Her Majesty.

The prisoner claimed to be tried by a jury half alien, but subsequently withdrew his request, and asked for a jury from the ordinary list.

**Hon. Mr. Cameron** at first raised an objection, but subsequently consented, provided his Lordship saw fit to grant the request.

**HIS LORDSHIP** granted the request, and the trial was proceeded with.

The evidence for the prosecution showed that the prisoner was arrested on the 2nd of June at Fort Erie, but it appeared by the evidence for the defence that the prisoner had no connection with the Fenians, he having gone to the Canada side that morning to see the excitement.

Verdict—NOT GUILTY.

JOHN COONEY was placed in the dock, and the jury was empaneled.

HON. MR. CAMERON then held a conversation with two of the principal witnesses, after which he rose and stated that as the witnesses could not satisfactorily identify the prisoner, he would place them in the box to show that fact, and then ask for the discharge of the prisoner.

The witnesses were then placed in the box, and said they could not fully identify the prisoner.

HON. MR. CAMERON then asked that the prisoner be discharged. HIS LORDSHIP discharged the prisoner.

TORONTO, Jan. 30, 1867.

The court opened to-day—His Lordship Mr. Justice MORRISON presiding.

HON. MR. CAMERON moved the sentence of the court upon the following prisoners:—PATRICK NORTON, W. H. MAXWELL, PATRICK O'NEIL, JAMES BURKE, DANIEL QUINN, PAUL PETER LEDWITH, JOHN O'CONNOR, JOHN ROGERS, OWEN KENNEDY, BARNEY DUNN, and JOHN GALLAGHER.

MR. MCKENZIE asked that the sentence about to be passed on OWEN KENNEDY be delayed till the next sitting of the court, as he had no doubt there had been a mistrial, and he desired to take exceptions in the higher courts.

HIS LORDSHIP replied that he did not see that the prisoner would be deprived of any advantage by the sentence being passed upon him. The jury had recommended the prisoner to mercy, and he would forward it to the Executive. He then sentenced the prisoner to be hung on the 5th of March.

HIS LORDSHIP also sentenced the other prisoners to be hung on the 5th of March.

## JUDGMENTS IN APPEAL.

## THE QUEEN AGAINST JOHN M'MAHON.

COURT OF QUEEN'S BENCH, DEC. 1, 1866.

DRAPER, C. J., delivered the judgment of the Court of Queen's Bench in his case. The prisoner was indicted, tried and convicted at the last assizes for the united counties of York and Peel, under the consolidated statutes of Upper Canada, ch. 98, which enacts that in case any person becoming a citizen or subject of any foreign state or country, at peace with Her Majesty, be, or continues in arms against Her Majesty, within Upper Canada, or commits any act of hostility therein, or enters Upper Canada with design or intent, to levy war against Her Majesty, or to commit any felony therein, for which any person would, by the laws of Upper Canada, be liable to suffer death, may be tried by a militia general court martial, or (S. 3) may be prosecuted and tried by any court of Oyer and Terminer and general jail delivery, in and for any county in Upper Canada, in the same manner as if the offence had been committed in such county, and, upon conviction, shall suffer death as a felon.

The indictment contained three counts, charging, first, that the prisoner late of Buffalo, in the State of New York, one of the United States of America, being a citizen of a certain foreign state, to wit, the United States of America, at peace with Her Majesty the Queen, on the 1st of June, 1866, and while the said foreign state was so at peace with her said Majesty the Queen, at the village of Fort Erie in the county of Welland, in that part of the said province, called and being Upper Canada, with divers other evil disposed persons, whose names are to the jurors aforesaid unknown, did unlawfully and feloniously enter into that part of the Province of Canada called and being Upper Canada, with intent to levy war against her said Majesty the Queen, contrary to the form of the statute, &c., and against the peace, &c. The 2nd count commenced in a similar manner, and charged that the prisoner, having before that time joined himself to, and being then and there joined to divers other evil disposed persons, to the jurors aforesaid unknown, was unlawfully and feloniously in arms against our said Lady the Queen, within Upper Canada aforesaid, with intent to levy war against our said Lady the Queen, contrary to the form, &c. The 3d count commences similarly, charging that the prisoner having before that time joined himself to, and being then and there joined to, divers other evil disposed persons, to the jurors aforesaid unknown, and was then and there unlawfully and feloniously in arms against our said Lady the Queen, did unlawfully and feloniously commit an act of hostility against our said Lady the Queen within Upper Canada, in this, that the prisoner on, &c., together with the said other evil disposed persons, armed and arrayed in a war-like manner, feloniously did assault certain of her Majesty's liege subjects, in the peace of our Lady the Queen, then and there being with intent to levy war against our said Lady the Queen against the form, &c.

Mr. McKenzie has moved for a new trial. The first ground taken is that there was no legal evidence to prove that the prisoner was a citizen

of the United States of America, while there was direct evidence, on the part of the Crown, showing that the prisoner was a natural born British subject.

The evidence touching this question was that the prisoner stated to John Metcalf (a witness) that he was a Roman Catholic priest, born in Monaghan, in Ireland. That he was a citizen of the United States, and came over from Buffalo on the 1st of June, and landed at Fort Erie. The prisoner also stated to William Crumb (another witness) that he came over with the Fenians to dress the Fenians' wounds. It was otherwise proved that a body of Fenians landed at the lower ferry at Fort Erie, and that they came in canal boats towed by tugs. These men were armed. The prisoner also said to another witness that he came from some place in Illinois, in the States. The argument in support of this objection was, that the Crown had made the statements of the prisoner their only evidence on this point. That they were therefore bound to take his statement as true that he was a British born subject; from which fact it was alleged, that by the law of England he could never relieve himself from the duties and obligations of native allegiance, and the law of England in that particular was the law of Upper Canada. The additional assertion made by the prisoner could not, though taken to be equally true, affect the legal consequences of the first. The native allegiance of necessity, was the earliest, attaching from his birth. The citizenship of the United States could only be of subsequent adoption under some assumed law of the United States, conferring such power of adoption upon the subjects or citizens of other governments, which law was not proved. Nor could the court judicially take notice of it; and whatever its power in the United States, it had none in the British dominions, and when the prisoner was within them, he was by law a British subject to all intents; and if he violated our laws, he did so as a British subject, not as a foreign citizen.

DRAPER C. J.—In *Aeneas Macdonald's* case (Foster 59) the court laid it down that it is not in the power of any private subject to shake off his allegiance, and to transfer it to a foreign prince. Nor is it in the power of any foreign prince, by naturalizing or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the Crown. But that learned writer suggests the question how far "prudential considerations grounded on reasons of state, or even the principles of natural equity may, under certain circumstances, induce the Crown to dispense with a vigorous execution" of that law. And he adds that cases may be put which will be considered exceptions to the general, but "not universally true" rule. It is, however, needless to go behind the conclusion of Blackstone:—"Natural allegiance, is, therefore, a debt of gratitude which cannot be forfeited, cancelled or altered by any change of time, place or circumstances." The prisoner's counsel, however, apparently seek to invert this rule, and to deduce from it an obligation on the part of the sovereign to recognise the continuance of the relation of subject; notwithstanding a distinct repudiation of the relation, and an assertion of a *status* entirely at variance with it. And thus they claim that the prisoner, who is charged with and convicted of acts which involve a most flagrant breach of duty as a subject, may insist that the Crown must recognize him in that character, though merely to vary the language of the charge or the technical character of his crime. The authorities cited and

commented upon, all refer to the duty and responsibility of a natural born subject. None of them show that it is compulsory on the Crown to treat him, who has cast off his allegiance, as still a British subject, or that the Crown having the right to deal with him as a traitor cannot proceed against him as guilty only of felony. In Hale's Pleas of the Crown it is said, the King may, if he pleases, proceed against a traitor for felony, and anciently a pardon of all felonies discharged some treasons.

A natural born subject may, by his own voluntary acts deprive himself of the exercise of rights, which in that capacity he might otherwise claim. Thus if he voluntarily resides and comes on business in an enemy's country, he is disqualified as an alien enemy to sue in our courts, and he would still be liable to punishment for acts of treason. If therefore, a subject can, by his own act, deprive himself of a privilege inherent at his birth-right, I do not see how the fact of his being a natural-born subject can be set up so as to prevent his being treated as a naturalized citizen of a foreign state, if, as a fact, he has become so naturalized.

Then, the proof that he is an American citizen is of precisely the same force and certainty as that of his being a natural-born subject of Great Britain. Both rest upon his own declaration and admission. The two characters are not *per se* inconsistent, or contradictory, however conflicting the obligations which arise from them may be. A man may be, by birth, a British subject, and by naturalization an American citizen. If complications and difficulties arise from the two-fold character they result from his own voluntary act. But this consideration has no bearing on the question, whether he can, in the adopted character become amenable to the laws of this province for an offence committed within its limits. The offence, as charged in the indictment, can only be committed by a citizen or subject of a foreign state. I think the prisoner's declaration evidence against him that he is such a citizen, and I think further that he may in that character commit the offence charged, notwithstanding he was born in the British dominions.

In considering this objection, the case of Woodburne and Ccke, where one of the prisoners objected that he could not be convicted of an offence against the Coventry Act, because his intention was to commit murder, occurred to me as presenting an analogy, and I confess I cannot see upon what principle it can be held that a criminal can be heard to say, I have committed high treason, therefore I cannot be tried for felony which the facts proved against me show I have committed, for these facts and my being a British subject by birth, amount to high treason. This case is the stronger because, if the prisoner appeared clearly to be a British subject, and there was no evidence that he was an American citizen, he would still be indictable under our statute law, for substantially the same felony with some variation of statement. Then his zealous counsel might have objected, that the more liberal view of modern times seems to recognize a right in every freeman to elect, not merely his place of domicile, but his sovereign or government, and with his person transfer his allegiance also, and that the court should not fetter such right with the antiquated doctrine of allegiance by birth being indestructible by the act of the subject. I am of opinion this objection is untenable.

The second and third objections are disposed of by what has been said upon the first.

The fourth, fifth, sixth and seventh objections resolve themselves into the question whether there was evidence of an intent to levy war against

Her Majesty in Upper Canada, of being in arms, or of committing an act of hostility, with that intent in Upper Canada, and that the prisoner was one of those that entered Upper Canada, or was in arms, or committed an act of hostility with that intent. The evidence given is—That on the first of June last, at an early hour, about 800 men landed at Fort Erie in arms, coming in canal boats towed by tugs, the inference being irresistibly that they came from the United States. That the prisoner was seen amongst them, according to some witnesses, armed with a revolver, as early as six in the morning, according to other testimony, about nine and afterwards. In the afternoon of that day he went from the Canadian side in a boat, with three others, apparently making for Black Rock, on the American side. He was treated with some little consideration by his companions, and addressed as "Father." The prisoner was arrested on the morning of the 3rd June, at the door of a house a short distance from Fort Erie. He was asked if there were any wounded Fenians there. According to one witness he said he did not know, according to two others he denied it expressly. A wounded man, with one not wounded, were found in the loft, and one dead man in the barn, another in a workshop, apparently strangers. The prisoner was then asked to account for himself, and said he had been in Buffalo and had heard of something happening here, (*i. e.*, Fort Erie) and came to do his duty in burying the dead. That he came from Buffalo on the 1st of June, landed at Fort Erie, where the Fenians took his carpet bag, and compelled him to go to Ridgeway to act as chaplain for them. That he was within half a mile of the battle-field, and attended the wants of the wounded both Fenian and British, and heard the confession of five wounded Fenians who died on Saturday. He asserted he had no arms of any description, and was no Fenian. No arms were found on him. He also asserted that he was on his way to Montreal to see the bishop, and as some one had stolen his vestments, he was waiting to get more. On the Saturday, as was sworn, the prisoner was talking with the Fenians in their camp, two or three being their officers, and seemed friendly with them. When the Fenians moved on that day from Fort Erie, some of them left their valises behind, and the prisoner said, "Pick up the valises, the boys may want them; we do not know how long we may stop in Canada." The men picked up the valises, and the prisoner followed them. He spoke to the men, and told them to take care of themselves, and said to some bystanders, "Don't be afraid, we do not want to hurt civilians." Some one said they wanted to see red coats, and the prisoner said yes, that was what they wanted. It was also proved that the Canadian volunteers in uniform were attacked at Limeridge by the Fenians, and some were killed, some wounded. This was on the second day of June. In the house where the prisoner was arrested, on the third of June, were found some belts and coats; the belts were those of the 13th, a Hamilton volunteer regiment. The house was inhabited by one Cantie, who was said to be a major in the Fenian service, and who was not seen there since the invasion. One witness spoke of the harp of Ireland having been hoisted by the invaders. It was proved that there was peace between her Majesty and the United States. It was sworn that the Fenians, about 800, landed at Fort Erie on the first of June, mostly armed, that they came up marching through the village, and after two hours marched on.

Upon this evidence, it appears to me that the old expression *more querino arriati* is properly applicable to these people whom the witnesses

speak of as Fenians. Their landing in arms; their talk about seeing red coats; their marching with officers in military array; their attack upon the volunteers in uniform are all matters upon which there is more or less evidence, and though as to their having banners displayed, the evidence is very slight and inconclusive, yet upon the other points enough was proved to go to the jury to establish the intent of these parties to levy war upon her Majesty; for it was evidence of war actually levied and made.

At the same time I cannot refrain from saying that I think it is to be regretted some evidence was not given to explain what the word "Fenians" imported. It seems rather to have been assumed that everybody, the court and jury included, understood it. Almost every witness used it as a familiar expression, and it is very probable that the sense in which they used it was the sense in which the bystanders understood it. But it was a matter requiring proof, if that term explained the acts of the accused or of those among whom he was as an associate, such proof might have prevented the possibility of question whether the acts proved amounted to a levying of war against the Queen. Still I have no doubt whatever that there was evidence which the learned judge was bound to leave to the jury, and sufficient, if believed by them, to establish an intent to levy war against the Queen in Upper Canada, and that there was also sufficient evidence to be left to the jury that the prisoner entered Canada in connection with these persons, and made common cause with them. Considering even that he carried no arms, a point upon which the testimony of the witnesses is not uniform, he would be so joined to and part of the body, be guilty of their acts of hostility and of their intent, and so guilty of the felony created by the statute. Most of the objections taken to the learned judge's charge to the jury, and urged as misdirection on his part, are his ruling that there was evidence to go to the jury on the points already discussed by me. I need hardly say, that as to those matters, I certainly concur with the learned judge, and am of opinion there was no misdirection. It may, however, be as well to note that one objection so taken is, that the learned judge directed that if the prisoner came to administer the consolation of religion to those engaged in an unlawful expedition, that he committed an offence against the statute. The learned judge reports that he directed that if the prisoner was there to sanction with his presence as a clergyman, what the rest were doing, and then to administer spiritual comfort to them, and was ready to administer spiritual consolation to the wounded and dying, and to help the wounded and dying, or was there with them and of them supporting and counselling them, he was in arms as much as those who were (i. e. carrying arms). This is very different from the exception taken, and is I think, correct in substance. It expresses, though in different language, what I have already stated as my conclusion as to there being evidence to connect the prisoner with the acts of hostility and the intent to levy war. It remains only to consider the affidavits. I waive any discussion respecting them, except as to the bearing and effect of the material statements contained therein and their sufficiency to justify the court in granting a new trial. I assume them to be properly sworn and rightly received and examine them accordingly. They are three in number. The first is that of the prisoner who describes himself as late of Anderson, in the state of Indiana. He states that he had no knowledge of the nature of the evidence



against him, and was consequently taken by surprise and unprepared for his defence, that the evidence of Sullivan and Milligan against him is untrue, particularly in reference to the statement that he carried a revolver, and he can produce witnesses to contradict this statement and to show that Milligan's character for veracity is not good; that it was sworn against him that he crossed to Fort Erie at an early hour on the first of June, whereas he can prove he was in Buffalo until nine on that morning; that he is entirely innocent of any participation in the invasion of this province in June last by the Fenians, and of the offence of which he has been convicted: that he has always been opposed to Fenianism, has on every occasion discountenanced the movement by every means in his power. The second affidavit is made by Maurice Vaughan, of the city of Buffalo, in the United States of America, merchant; and the third by Daniel Vaughan, also of the city of Buffalo, merchant. The former states that he has known the prisoner for the last eighteen years, and expresses a highly favorable opinion of him, and that he saw the prisoner at his (deponent's) store in Buffalo, about half-past seven on the morning of the first of June, and told him the Fenians had invaded Canada on the night previous and that a battle was imminent, and prisoner expressed his determination to forego the time-being, his intended visit to Montreal—of which he had spoken to deponent—and in his capacity of priest to visit the scene of battle, and be prepared to administer the extreme aids of his holy religion to such of the wounded or dying as might need them. The deponent stated that several of his personal friends were among the invaders, and gave the prisoner a list of names of his friends whom he wished the prisoner to look after. He swears that he was asked to attend at prisoner's trial, but declined, as he did not deem his evidence would be important; but hearing that it had been sworn prisoner was in Canada on the morning of the 1st of June, before seven o'clock, he makes this affidavit, and will if possible, attend any trial of the prisoner. The other affidavit corroborates the assertion that the prisoner was in Buffalo after 7 o'clock on the morning of the 1st of June, and after stating that prisoner told him that he was going to Montreal, adds that he accompanied the prisoner from Buffalo to Black Rock, opposite to Fort Erie, on his way to Canada, and separated from him at Black Rock between 8 and 9 on the morning of the 1st of June. He gives the same reason for his non-attendance at the trial, as the previous deponent, and says he is prepared to attend any court to give evidence to the above effect. The two points of contradiction in the evidence against the prisoner relate to his being armed, and to his being among the invaders in Canada at an early hour, 5 or 6 o'clock on the morning of the 1st of June. The first allegation is in my judgment for reasons already given of no importance, unless as affecting the credibility of the witness or witnesses who stated it; the second is the only matter of fact referred to in the affidavits of the two Vaughans.

Assuming that these two deponents had been at the trial and had contradicted Sullivan and Milligan, and had been believed by the jury, it would not, in any view of the evidence have affected the verdict, for it was not material to the question of the prisoner's guilt or innocence of the charges contained in the indictment, whether he joined the invaders early on that morning, and crossed with them, or whether he came after them and joined them in Canada at a later hour. The fact that he was there at nine, and his subsequent conduct remains, and the proof of this is given

by other witnesses than Sullivan and Milligan. I cannot omit to notice that the prisoner has abstained from any observation upon the evidence of his having gone back from Canada to the United States, or if he did so, to explain his return or attempt to reconcile it with his assertion proved at the trial, that the Fenians compelled him to go to Ridge-way to act as chaplain for them. I abstain from comment on some of the statements contained in the affidavits of the two Vaughans. They certainly are suggestive, and at a trial must have lead to some morespecial inquiries. On the whole I am of opinion that no ground taken by the prisoner's counsel as a reason for granting a rule to show cause is sustained, and that upon the principles which govern us in granting new trials, we could not make such a rule absolute in this case. I agree with what was said in *Regina v. Fick*, 16 C. P. U. C. 388, that unless there be some probability that the rule, if granted, would be made absolute, it should not be granted at all. I refer to the cases of the *Queen v. Chubb*, 14 U. C. C. P. 32, and the *Queen v. Hamilton*, 16 U. C. C. P. 340. In the latter it was held that the discovery of evidence to impeach the testimony (*a fortiori*) the character for veracity of a witness examined at the trial, is no ground for a new trial. In the former, that affidavits of facts which were not shown to have become known since the trial, were not admissible on a motion for a new trial. Both these cases were elaborately discussed by the Bench and at the Bar, and the authorities exhaustively considered. The other grounds of application I have, as fully as time permitted, carefully examined and weighed. I cannot arrive at any other conclusion than to refuse the rule.

#### THE QUEEN AGAINST LYNCH.

HAGARTY J., delivered the judgment of the court in this case. This case differs from the case against M'Mahon, chiefly in the fact, that after it was proved for the prosecution that the prisoner had declared himself on at least two occasions since his arrest, in writing, that he was an American citizen, and came to Canada as such, his counsel called a witness to prove that he was born within the Queen's allegiance. The learned judge told the jury that where there was evidence of a prisoner being born a British subject and he declared himself or claimed to be a citizen of the United States of America, that the rule of law was, once a British subject always one. But as the British government had not held a man culpable for becoming a citizen of another state, the jury might properly take the prisoner at his word, and it would be better to consider him a citizen of the United States if he claimed to be one. The motion for a new trial is on the grounds similar to those in the M'Mahon case. An affidavit of the prisoner is filed. He swears that he was taken by surprise on the trial, having no knowledge of the evidence against him, and consequently unprepared for defence. That he was not in arms, and did not wear a sword, as was sworn to by Molesworth, Stevens and others. That he believes they mistook him for a person named "Hoozier" who was present at the raid, and who did wear a sword and was in command of a number of Fenians. He can produce evidence of this, and that the person referred to bears a striking resemblance to him, and that he might easily be mistaken for him. That he came to Canada on the occasion referred to simply as a reporter for the *Louisville Courier*, and had

nothing to do with the invasion, and he can prove this by the evidence of Mr. McDermott, of Louisville, his employer. That he can also show by the evidence of Col. O'Neil, and others, belonging to what is called the Fenian brotherhood, that he never was a member of that organization, and had no act or part in the invasion of Canada, provided a safe conduct be granted to said O'Neil, and the other witnesses referred to. That he is wholly innocent of the felony for which he has been tried, and that his innocence can be made to appear by the evidence aforesaid, if an opportunity is allowed for a new trial. The evidence against the prisoner is very strong. The landing of a large body of invaders from the American side of the river, their being armed with rifles and bayonets, marching in order, having officers over them, some in uniform, some in plain clothes, with green flags with harps, and drums. That they took prisoners and confined them; that they said they were going to take Canada and have farms; that two fights took place with the Queen's troops at Fort Erie, and near Ridgeway, and men were killed on both sides. Five witnesses identified the prisoner as being with the invaders; that he had a sword; that he marched with the men. One witness said he was spoken of by the men as Colonel Lynch, and that he was addressed by that name. Another said he seemed to be in command. Another that he had heard him give the word of command. He was not in uniform. He stated to some that he was a newspaper reporter. The evidence of prisoner's identification, and of his being, acting in aid of, and in concert with, the body of invaders that came over from the United States, is much stronger than in the M'Mahon case. That the object of those persons was to wage war against the Queen, and that they actually did so, seems to be established beyond reasonable doubt, and also such acts and such purpose could have but one meaning, viz., that charged in the indictment. It is not easy to see how on such evidence the learned judge could have done otherwise than to have told the jury that there was evidence to support the indictment, if they gave credit to the witnesses. Assuming that we may receive the affidavit of the prisoner, it seems to us wholly insufficient to warrant our interference. He names no person who can be produced to contradict the testimony of his wearing a sword, a matter in itself not essential. From the day of his arrest, he has apparently based his defence on the allegations that he was a newspaper reporter, and a non-combatant, and if such a defence were available, he ought to have been prepared to establish it. It would be contrary to all our practice as to affidavits of surprise, and as to the existence of fresh evidence, to consider the statement before us of sufficient ground for interference. The prisoner we think wholly mistakes the nature of the charge against him, when he urges his character as a newspaper reporter to establish an immunity from the consequences of being present in apparent co-operation with the invaders. If a number of men band themselves together for an unlawful purpose, and in pursuit of that object commit murder, it is right that the court should pointedly refuse to accept the proposition that responsibility for their acts does not extend to the surgeon who accompanies them to dress their wounds, to the clergyman who attends to offer spiritual consolation, or to the reporter who volunteers to witness and record their achievements. The presence of any one in any character aiding, abetting or encouraging the prosecution of the unlawful design, must involve a share in the common guilt. The judgment of the court in the

preceding case applies to the objections urged on behalf of this prisoner as to his nationality. Affirmative evidence of his having been born in Ireland was given. There was direct proof that the body of the invaders came from a foreign country with which we were at peace, and *prima facie* we think they might be reasonably assumed to be citizens or subjects thereof. The prisoner declared that he came over as a reporter for an American paper, and that he was an American citizen. It appears to us that the Crown may properly allow him the political status which he claims for himself, and that if the sovereign within whose allegiance he may have been born, does not insist to treat him as a traitor on that doctrine of extreme right, there is nothing in the case presented to us calling for our interference on this ground. He could be tried on the same law in Upper Canada as a British subject, for the same felony as that for which he has been convicted, and an indictment slightly varying the former description of the persons with whom he was acting, in levying war or entering the province to levy war, &c. Were we called on to declare the law on an indictment for treason against a born subject, we should have most likely to adopt the view of the prisoner's counsel. As it stands before us the sovereign waiving her extreme right, and prosecuting the prisoner as a foreigner, we see no just ground for holding the direction of the learned judge to be erroneous in law, or the finding of the jury unwarranted by the evidence. As the case is reported to us we do not find that any complaint was made at the trial of the learned judge's direction to the jury on this point, nor did the prisoner's counsel ask that the point of his nationality should be submitted as a question to the jury. Nor that the counsel pressed the jury or asked them to acquit on that ground. Nor did the prisoner in his affidavit in applying for a new trial, assert that he was a British subject, or that he claimed such position or desired to have it submitted to another jury. We think there should be no rule.

#### THE QUEEN AGAINST THOMAS SCHOOL.

MORRISON, J., delivered the judgment of the court in this case.—In this case the indictment differs from the indictment in the cases of M'Mahon and Lynch, in which judgments have just been delivered. It contains six counts; the three first being counts similar to those in the cases of M'Mahon and Lynch, charging the prisoner as being a citizen of a foreign state and in the last three counts charging the prisoner as being a subject of her Majesty, &c. This case was also tried at the last York and Peel assizes before Mr. Justice John Wilson. After the case was called on, Mr. K. McKenzie, Q. C., the prisoner's counsel, objected to the indictment because it contained the two sets of counts, and he contended that the prisoner should not be called upon to answer both sets, and that the Crown should elect on which set of counts it would proceed upon. On the ground that the prisoner was thereby forced to defend himself against two distinct offences, and was thereby embarrassed in his defence. The learned judge overruled the objections and declined to put the Crown to an election. The prisoner was found guilty on the fourth and fifth counts, and acquitted on the other counts. During the present term Mr. McKenzie moved this court for a rule *nisi* to set aside the verdict, and for a new trial, the verdict being contrary to law and evidence, and the weight of evidence, and he based his application upon eleven grounds. He also moved on the ground of surprise, and in support of the latter

ground filed an affidavit of the prisoner. As to the first seven grounds taken, which are objections in various ways, that there was no evidence to shew that the prisoner intended to levy war against the Queen, and for misdirection and nondirections in respect thereto. Similar objections were taken in the cases of M'Mahon and Lynch; it is, therefore, unnecessary to discuss the merits of such objections as the judgments in the cases I refer to fully dispose of them. The eighth objection is, that the Imperial act 11 and 12 Vic., cap. 12 overrides the Provincial act under which the prisoner was convicted. Upon an examination of the Imperial statute I see nothing whatever to sustain the objection. The ninth objection is, that the weight of evidence went to show that the prisoner's presence at Fort Erie was under compulsion. The evidence taken at the trial shows beyond doubt that the prisoner was at Fort Erie; that he was armed with a rifle and bayonet; that he formed one of a guard detailed to take charge of prisoners taken by the invaders, and that he acted in that capacity. Five witnesses were called and examined on the part of the prisoner to show that he was intoxicated at the time he left Buffalo, and when he crossed the river at Fort Erie. All the evidence went to the jury, and it was a matter solely for them to decide. The prisoner in his affidavit, filed on the motion, admits that he was at Fort Erie and bore arms as stated on the trial, but stated he was there on compulsion and bodily fear from the threats of the Fenians. He shows no ground of surprise while the line of defence set up at the trial goes far to negative any such ground upon this ninth ground, as well as that of surprise taken on the twelfth ground. I see no reason for granting a rule. Nor do I see anything in the tenth objection, that there was no evidence that the persons with whom the prisoner joined himself were citizens of the United States as alleged in the fourth count. The objection is met with the proof that the persons referred to came from the United States, and as said by my brother Hagarty in the Lynch case, they may be reasonably assumed to be citizens thereof. As to the eleventh objection which was strongly pressed by Mr. McKenzie—that the learned judge refused to require the Crown to elect whether it would proceed against the prisoner as a British subject or as a citizen of the United States, and that the prisoner was thereby forced to defend himself against two distinct offences, and was thereby embarrassed in his defence, the case of the Queen vs. John Mitchell & Cox 1 is an authority in support of the learned judge's ruling. In that case the prisoner was indicted under the Imperial statute 11 and 12 Vic. cap. 12. The indictment contained ten counts and at the trial the prisoner's counsel, Sir Colman O'Loughlen objected as in this case, that the indictment charged the prisoner with two distinct felonies, viz., compassing to deprive and depose the Queen from her style, honor, and royal name of the Imperial Crown of the United Kingdom, and compassing to levy war in order by force and constraint to compel her Majesty to change her measures and counsels. And it was contended that the indictment should be quashed or that the Attorney-General should elect as to which of the counts he would proceed upon. After argument on the part of the prisoner's counsel, Baron Lefroy, in giving judgment says:—"We do not think it necessary to call on the Attorney General as we have had a full opportunity of considering the subject in consequence of the amendment which was very fairly made yesterday evening by Sir Colman O'Loughlen of the grounds on which he intended to rest his ap-

plication, and we think it of great importance where we find the law well settled and an established practice, not to appear to entertain any doubt upon it." We are called upon either to quash the indictment, or put the Attorney General to his election as to which of the counts he will proceed upon. It is admitted not to be an objection which will vitiate an indictment that it contains several distinct charges, even of felony. But it is said that if it appear before the prisoner has pleaded or the jury be charged, that he is to be tried for separate offences, it has been the practice of the judges either to quash the indictment lest the prisoner should be confounded or prejudiced in his defence, or to put the prosecutor to his election on which charge he will proceed, but that these are matters of discretion. We quite concur in the statement of the prisoner's counsel that there are several compassings charged in this indictment and that they are charged as distinct felonies. But the authority to which I am about to refer will show clearly that there is no grounds on that account for either quashing the indictment or making a case of election. We have looked through all the cases on this subject. One of the latest, we think, lays down the rule in such a manner as to commend itself to the judgment as well from the reasonableness of it, as from the high authority of the two learned judges, who decided the case upon great deliberation. Mr. Baron Parke and Mr. Justice Patteson (*Rex v. Blackson et al* 8th C. & P. 43) and in applying the rule there laid down, he says "there is no repugnancy in the different offences charged, they constitute but one *corpus delicti* laid in different ways; the overt acts are the very same which are charged in support of all the counts, except the two last. If the prisoner is prepared to meet them as applied to one, he is prepared to meet them as to the rest. As the offences therefore charged are in no wise repugnant, nor does there appear to be anything by which the prisoner could be embarrassed or prejudiced in his defence, we cannot see any ground either for quashing the indictment or putting the Attorney General to his election, and the motion must consequently be refused." It is the usual practice when it is uncertain whether the evidence will support the charge as laid to insert several counts in an indictment. What this prisoner was called on to meet was the levying of war or the intent to do so. The question of his being a British subject or a citizen of a foreign state could not have embarrassed him in his defence, for as said in the case cited: if he was prepared to meet the one set of counts he was prepared to meet the other. The learned judge reports to us that when the objection was taken at the trial he stated to the prisoner's counsel, he could not see in what way the prisoner's defence was embarrassed. It was for the prisoner to say whether he was a British subject or a citizen of the United States: that if he claimed to be one or the other the learned judge said he would put the Crown to an election, and that the Crown was prepared to do so, but that the prisoner's counsel declined; afterward on the trial the question of his being a British subject was not disputed. I am therefore of opinion that there should be no rule.

#### THE QUEEN AGAINST WILLIAM SLAVIN.

COURT OF COMMON PLEAS, DEC. 1, 1866.

ADAM WILSON J., delivered the judgment of the Court of Common Pleas in this case. The prisoner, Wm. Slavin, was tried at the last assizes for the united counties of York and Peel, before Mr. Justice John Wilson,

and convicted on the second count of the indictment for that he "being a citizen of a certain foreign state, to wit the United States of America, at peace with her Majesty the Queen, heretofore, to wit on the second day of June in the year of our Lord one thousand eight hundred and sixty-six, and while the said foreign state was so at peace with her Majesty, with force and arms in the county of Welland, in that part of the province called and being Upper Canada, having before that time joined himself to, and being then and there joined to divers other evil-disposed persons to the jurors aforesaid unknown, was unlawfully and feloniously in arms against our said lady the Queen within Upper Canada aforesaid with intent to levy war against our said lady the Queen contrary to the form of the statute in such case made and provided and against the peace of our lady the Queen her Crown and dignity." The statute under which this prosecution has been carried on is chap. 98 of the consolidated statutes for Upper Canada. The act so consolidated was originally passed in the 3rd year of her Majesty's reign, but the effect of the revision, classification and consolidation by chap. 1 of the consolidated statutes intituled "an act respecting the consolidated statutes for Upper Canada" passed on the 4th of May 1859 was "to all intents as though the same [the consolidated statutes] were expressly embodied in and enacted by this act to come into force and have effect on, from and after such day." The first section of chap. 98 declares that "in case any person being a citizen or subject of any foreign state or country at peace with her Majesty, be or continues in arms against her Majesty within Upper Canada, or commits any act of hostility therein, or enters Upper Canada with design or intent to levy war against her Majesty, or to commit any felony therein, for which any person would by the laws of Upper Canada be liable to suffer death, then the Governor may order the assembling of a militia general court martial," &c. And the third section of the act (as amended by the 30th Vic. cap. 4) provides that every such person may, nevertheless, "be prosecuted and tried before any court of Oyer and Terminer and General Jail delivery in and for any county in Upper Canada, in the same manner as if the offence had been committed in such county, and upon conviction, shall suffer death as a felon." The count seems to have been drawn from the 2nd section of the statute, which applies only to subjects, and from the 1st section which applies only to foreigners compounded together. Such a count has entailed much more proof on the Crown than need have been assumed, but still when proved there is left a distinct statutable offence, stated against the prisoner, of being in arms against the Queen. It was proved that the prisoner was a citizen of the United States and crossed from Buffalo to Fort Erie in a skiff on Thursday the 31st of May, between 6 and 7 in the afternoon, and that a man he did not know paid his passage over. That on Saturday the 2d of June, about 4 o'clock in the morning he was about a mile below Newbigging's, which is about a mile lower down than where the main body had crossed, with a rifle and bayonet similar to those which the Fenians then had and which he said he had picked up on the road. He said he was tired and asked for a place to lie down. He said he had been out all the previous night; that he had been with the Fenians, but he was not one of them, and he said that he had left them at a place which was said to be about three miles from Limeridge, and that he lay by the fence till the main body had

passed and he then returned. The other general facts of the case are that a large body of armed men who are spoken of by the witnesses as Fenians, crossed over from Buffalo to Fort Erie on the morning of the 1st of June and marched in the course of that night and the next morning to Limeridge, where a fight took place between this body on the one side and the Canadian volunteers who had been called out to repel this descent and outrage by the other, and that many persons were killed and wounded in the engagement on both sides. The volunteers were in uniform and proper martial array. It was a contest between two organized forces. Her Majesty's forces on the one side and these invaders on the other. Mr. McKenzie, Q. C., has applied for a rule, calling on the Attorney General to show cause why the verdict against the prisoner should not be set aside and a new trial granted, for causes which are set out at considerable length in the motion paper, but which may be fully stated as follows:—

- 1st. That there was no legal evidence at the trial that the prisoner was a citizen of the United States of America, as alleged in the indictment;
- 2nd. That the prisoner intended to levy war against the Queen;
- 3d. That he was in arms in Upper Canada with intent to levy war;
- 4th. For the reception of improper evidence on behalf of the Crown, of a collision having taken place between Her Majesty's volunteer troops and the armed body of persons which crossed from Buffalo, and of the circumstances connected therewith, although the same took place in the absence of the prisoner and several hours after he was arrested;
- and 5th. Because the Imperial act of the 11th and 12th Vic., chap. 12, provides for offences against the Crown similar to those alleged against the prisoner and overrides the Provincial act under which the prisoner was tried, and which was passed previously to the said Imperial act. As to the 1st objection, it was sworn that the prisoner said he was an American citizen, a native of New York, and that he had been in the American army, and there was no evidence whatever in contradiction of this. The admissions and declarations of the prisoner were, unquestionably, evidence against him. As to the 2nd objection, it was shown that several hundreds of armed men came from the shore of the United States and landed in this province at and about Fort Erie. Very shortly after the prisoner himself came from the same place; that the prisoner was with them all the night of the 1st of June, and that he was early on the morning of the 2nd of June seen carrying a rifle and bayonet similar to those which the above armed men had, and altogether different from those which were used by any of Her Majesty's troops, which he said he had found upon the road. It was also shown that this armed body was organized, that it encamped and marched in military order; that it took prisoners and fought Her Majesty's troops upon that day, and killed and wounded several of them. This was evidence, more or less, against the prisoner, and although there was evidence also very favorable for him, it was nevertheless impossible to say there was no evidence that he intended to levy war. We do not discuss the ground taken by Mr. McKenzie, and argued so strongly upon this point, that this intent was not to be collected from any act or act, whatever; not by being armed; not by marching in military array; not by taking prisoners; not by fighting Her Majesty's troops; nor even by wounding and killing them; for it can scarcely be necessary we should say, that *bellum per cussum* is some evidence of an intent to levy war, and perhaps it might justly be considered as the most unequivocal and con-



vincing evidence of such an intent. It was argued that this intent could not be gathered by any other means than by the passing of a resolution, or by some verbal or written declaration, plainly expressing that the purpose was to levy war. We say nothing further on the point. As to the 3rd objection—The evidence shows as to the fact that the prisoner was in arms at 4 o'clock on the morning of the 2nd of June, and that he had been with the foreign armed body during the night before; that is, that he was with the same armed body which fought Her Majesty's troops a few hours afterwards. It is true he said he had found the rifle and bayonet that morning on the road, and it is true there was evidence that he was not actually armed the night before; but the jury had to pass upon this conflict of testimony. It is quite sufficient for us that we are not able to say there was no evidence that the prisoner was in arms in Upper Canada in the manner stated in the indictment. This point was argued as if it were necessary the prisoner should have had arms actually upon his person at the time in question. We do not adopt this view of the statute. We think that every artilleryman in charge of a gun, though carrying no arms upon his person, may properly be said to be in arms; that two persons having only one rifle between them, may, although one of them alone is carrying it, be said to be in arms; that an officer commanding a number of men who are armed, may although he carries no arms himself, be considered to be in arms. All who are concerned in and are present at the commission of an offence are principals, and are alike culpable in law. As to the fourth objection, we think that whenever a joint participation in any enterprise is shown, that any act done in furtherance of the common design is evidence against all who were at any time concerned in it, and therefore the fighting which took place on the day that the prisoner was arrested, and after his arrest was some evidence that such fighting was contemplated by the parties while the prisoner was with them before his arrest. In Frost's case (9 C. and P. 150) Tindal, C. J., said: "It may also be shown by acts done afterwards what the common design was." The last objection does not exist in fact; for the provincial act of 1840 was by the consolidation in 1859 re-enacted and is therefore later in point of time than the Imperial statute referred to. The question as to any conflict between them does not therefore arise. We do not profess to have scanned the evidence with the view of saying whether the jury might or might not, fairly considering it, have rendered a verdict of acquittal. We have already declared on several occasions that this is not our province under the statute; it is sufficient for us to say that there was evidence which warranted their finding, and it is quite impossible for us to say in the terms of the motion that there was no evidence against the prisoner. A new trial is then asked for upon the grounds disclosed in the affidavits filed. One of the affidavits which is made by Mr. Fenton of this place relates to his searching and enquiring for an order of the executive council under the statute of the last session, authorizing the trial of the prisoner to be held which is of no consequence now, as this ground of motion has been abandoned by the prisoner's counsel. The only other affidavit is the one which is made by the prisoner himself, and it is in these words, so far as is material to the present question. "That I had no knowledge of the nature of the evidence to be produced against me, and by reason thereof was taken by surprise. I say that I am innocent of the charges upon which I was indicted, and particularly the charge of being in arms against Her Majesty the Queen.

I am informed and believe that every effort was made by my attorneys to procure the attendance of Mr. Macleod, a most material witness for me at my said trial, but without avail. If a new trial be granted by this honorable court I shall be able to secure the attendance of said Macleod as well as other witnesses who have offered to give material evidence in my behalf, and I verily believe that I shall be able to show that I had nothing whatever to do with the invasion of this province by the Fenians in the month of June last." That the prisoner "had no knowledge of the evidence to be produced against him" is no ground of surprise, for no one is obliged by pleading or otherwise to disclose the evidence by which his case is to be supported; it is sufficient that the party is fully apprised of the case or charge which it is proposed to prove against him, and he must then, being so informed, prepare himself to repel it. We cannot conceive a simpler case than the present to be answered, if it be capable of being answered, and accordingly all the evidence which was given by the prisoner was directly applicable to the point of his defence; but the jury were not satisfied with it. No false swearing or exaggeration is imputed to the Crown witnesses and no kind of ground is shown upon which we could properly interere to avoid this verdict. If a new trial were to be granted upon such an affidavit no verdict could ever stand, and the rule of law would practically be that every case must be tried at least twice before it should be considered to be final. Before concluding our observations we wish to refer to some of the passages of the charge to the jury of Chief Justice Tindal on the trial of Frost, a charge which has been described as "the model and exemplar of judicial discrimination and impartialty," and which places upon a true and just footing the kind of evidence which may be admitted and relied upon for the purpose of proving the intent with which a party has done or has attempted to do particular acts charged against him and which unanswerably disposes of the argument of the prisoner's counsel that no *act* whatever, however violent or hostile, no battle or fighting with the Queen's troops, however serious, could be used as evidence of an intent to levy war. We quote from the short-hand notes of the trial taken by Joseph and Thomas Gurney and published in London in 1840—At page 689 the Chief Justice said: It is not, however, an unreasonable thing, and it daily occurs in investigations, both in civil and criminal, that if there is a certain appearance made not against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon for his own sake, and his own safety, to state and to bring forward the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence; therefore the learned counsel of the prisoner, although he entered his protest against his being necessarily required to make such a statement, proceeds to say, that the case of the prisoner at the bar was one that was perfectly innocent, that is, perfectly innocent so far as regards the crime of high treason. He stated that it was never intended by the prisoner either to take the town or to attack the military, which latter act was purely accidental; that all that was intended was, to make a demonstration to the magistracy of Newport and the county, the strength of those persons who were called Chartists, for the signal purpose and design of inducing the magistrates either to procure the liberation of one Vincent, and three other persons, who had been convicted of some political offence, and were then confined in Monmouth jail, or, at all events, to procure a mitigation in their mode of treatment whilst under imprisonment." At page 695 he says: "If

there had been no other evidence against the prisoner at the bar except the fact of the conflict that took place between the soldiers and the mob, who were led on by him, certainly it would have been very important to see whether they had any knowledge that there were soldiers there at all, and to show that they had an object perfectly distinct from any wish to attack the soldiers; that they meant nothing but to rescue certain prisoners who were confined in the inn. But this is not the whole of the evidence that will be before you on this point; because you must take into your consideration, when you are determining upon the intent and purpose of the prisoner at the bar, not only what took place at the immediate moment of the conflict at the Westgate Inn, but also the information which he had received just before from the witness Coles, that some of the soldiers had gone to the Westgate Inn; the conversation in Frost's presence on that occasion; and still further, the general evidence relating to the bringing down so large a body of men into the town. This must have been done with some intent or other; what that was you will have to determine upon the whole of the case." At page 748 it is stated that the mere demand by an armed mob that Her Majesty's troops, whilst they were under arms and acting in preservation of the peace, should surrender themselves as prisoners was not only an act of a very hostile nature, but that it amounted to high treason; and at page 764 it is stated that "a premeditated design to attack the soldiers, will constitute high treason." There are also many other passages in this admirable charge, containing a clear exposition on this important part of the law, which quite warrant us in forming the opinion we have expressed, but which in no instance countenance the doctrine which was put forward by the prisoner's counsel. In the *Queen vs. Finkle* (15 c. p. 453) the inexpediency of granting rules nisi in criminal cases, where there was no probability of their being made absolute, was referred to, and acting on the views then expressed, we think we ought to refuse the rule. The rule will therefore be refused and the conviction is affirmed.

### THE QUEEN AGAINST PATRICK McGRATH.

COURT OF QUEEN'S BENCH, MARCH 9, 1867.

DRAPER, C. J., and HAGARTY, J., delivered judgments in this case. The prisoner was indicted under the third section of Consol. Stat. U. C., ch. 98—that it, under the section substituted for the third section of the original act, and directed to be taken and read as such third section, by the statute 29-30 Vic., ch. 4, sec. 2. The substituted third section read thus:

"Every subject of Her Majesty, and every citizen or subject of any foreign state or country, who has at any time heretofore offended or may at any time hereafter offend against the provisions of this act, is and shall be held to be guilty of felony, and may, notwithstanding the provisions hereinbefore contained, be prosecuted and tried before any court of Oyer and Terminer and General Jail Delivery, in and for any county in Upper Canada, in the same manner as if the offence had been committed in such county, and upon conviction shall suffer death as a felon."

The third section, for which this was substituted, contained substantially the same provisions, but extended only to citizens or subjects of any foreign state or country.

By the first section of this act (ch. 98) any citizen or subject of any foreign state or country at peace with Her Majesty, who is or continues in arms against Her Majesty within Upper Canada, or commits any act of hostility therein, or enters Upper Canada with design or intent to levy war against Her Majesty, or to commit any felony therein for which any person would, by the laws of Upper Canada, be liable to suffer death, may be tried and sentenced by a Militia General Court Martial.

The second section is, that if any subject of Her Majesty, within Upper Canada, levies war against Her Majesty, in company with any subjects or citizen of any foreign state or country then at peace with Her Majesty, or enters Upper Canada in company with any such subjects or citizens with intent to levy war on Her Majesty, or to commit any such act or felony as aforesaid, or if with the design or intent to aid or assist he joins himself to any person or persons whatsoever, whether subjects or aliens, who have entered Upper Canada with design or intent to levy war on Her Majesty, or to commit any such felony within the same, such subject may be tried by a Militia Court Martial, in like manner, &c.

Under this act the prisoner was indicted at the court of Oyer and Terminer and General Jail Delivery held in and for the County of York, on the 13th January, 1867, before Morrison, J., charging him as a subject of Her Majesty, that he on, &c., at &c., in Upper Canada, in company with divers citizens of the United States of America, then at peace with Her Majesty, feloniously did enter Upper Canada with intent to levy war against Her Majesty, against the form, &c.

The second count stated that certain persons entered Upper Canada with intent feloniously to make war on Her Majesty, and that the prisoner feloniously joined himself to such persons with intent and design to assist them in levying war.

The third count stated that the prisoner, in company with divers citizens of a foreign state (as before), who were unlawfully and feloniously assembled, armed, and arrayed in a warlike manner against Her Majesty, did feloniously levy war against Her Majesty, &c.

To this indictment the prisoner pleaded *autrefois acquit*, on which the Attorney General joined issue.

It was proved that at the court of Oyer and Terminer and General Jail Delivery held for the County of York, the prisoner had been, on the 8th of December, 1866, tried upon an indictment for felony, the first count of which indictment charged him, "being a citizen of a certain foreign state, to wit the United States of America," on, &c., at &c., and while the said foreign state was at peace with Her Majesty, with feloniously entering Upper Canada, with divers other persons, with intent to levy war against the Queen. The second count charged that the prisoner, being a citizen of a certain foreign state (as in the first count) having before then joined himself, and being then and there joined to divers other persons, was feloniously in arms against Her Majesty, within Upper Canada, with intent to levy war against the Queen, &c.

The third count began like the other two, and alleged that the prisoner, having before joined himself and being then joined to divers other persons who were feloniously in arms against Her Majesty, did feloniously commit an act of hostility against Her Majesty within Upper Canada, in this, that, he and the said other persons, armed and arrayed in a warlike manner

feloniously did assault and attack Her Majesty's liege subjects, in the peace of our lady the Queen then being, with intent to levy war against Her Majesty.

Proof was given of the identity of the prisoner with the person tried on this indictment in December, and the evidence given against him on that trial was substantially proved, and also on that trial, evidence was given that the prisoner was a British subject, and that the learned judge (John Wilson, J.) who then presided, directed his acquittal.

Upon this the prisoner's counsel contended the jury should be directed to find for the prisoner. The learned judge held that the plea was not sustained, and the jury found for the Crown. The prisoner then pleaded not guilty, and was tried and convicted, and the learned judge reserved the case for the opinion of this court.

J. H. Cameron, Q. C., and Robert A. Harrison, for the Crown, cited *Regina v. Green*, 7 Cox 186; *Regina v. Knight*, 9 Cox 437; *Regina v. Connel*, 6 Cox 178; *Regina v. Drury*, 3 C. & K. 190, S. C., 3 Cox 544; *Regina v. Dingman*, 22 U. C. R., 283; *Rex v. Coogan*, 1 Leach C. C. 448; *Rex v. Welsh*, 1 Moo. C. C. 175; *Vaux's Case*, 4 Co. 44 a; *Wrote v. Wiggles*, Ib. 45 b; *Com. Dig.*, Indictment, L.; *Regina v. Charlesworth*, 9 Cox 58.

K. McKenzie, Q. C., contra, cited *Re v. Sheen*, 2 C. & P. 634; *Rex v. Willey*, 1 M. & S. 184; *Regina v. Austin*, 2 Cox 59; *Vandorcomb's case*, 2 Leach C. C. 720; *Rex v. Clark*, 1 B. & B. 473; *Rex v. Birchenough*, 1 Moo. C. C. 477; *Regina v. Gould*, 9 C. & P. 364.

DRAPER, C. J.—If the prisoner might have been convicted upon the first indictment, although in fact he was acquitted by a mistaken direction of the judge, he may plead *autrefois acquit*. As where S. was indicted of burglary laid upon the 1st August, and the evidence shewed it was done on the 1st of September, and not on the first of August, and thereupon he was acquitted, and again indicted, laying the true day, it was held he ought not to be tried again "for he *mought* have been found guilty on the first indictment"—2nd Inst. 318.

Therefore, if the substituted section in substance and effect makes it indifferent whether the prisoner was a citizen of a foreign state, for that the offence and felony are the same, then his acquittal when charged as a foreigner, though by direction of or in accordance with the opinion of the judge who tried him, is an acquittal of the felony, and he cannot be put a second time in peril on account thereof.

The words are *every subject* of Her Majesty, and *every citizen or subject* of a foreign state, who has, &c. It is contended that these words mean neither more nor less than *every person*, who has, &c.

But the section goes on thus, "who has at any time heretofore offended or may at any time hereafter offend against the provisions of this act, is and shall be held to be guilty of felony," &c.

As the act originally stood, a British subject could only be tried by court martial for the compound offence described in the second section, and that second section does not constitute the compound offence a felony. If it has done so, I apprehend the trial might have been before the ordinary tribunals as well as before a court martial.

The second section is not in express terms altered by the latter statute, nor, as far as I see, was it the intention to alter it further than by declaring the offence, defined to be felony. It is a felony not simply consisting of levying war in Upper Canada against the Queen, or of entering into Up-

per Canada with intent to levy war, or to commit any felony therein punishable by death; but the doing these or some other acts in company with foreigners, with the intents mentioned, or either of them; and this enactment is confined to British subjects.

The first section points at the subjects of foreign states at peace with Her Majesty, and does not combine the acts which in the second section are made punishable with an association with British subjects. Under it foreigners may be tried and convicted, though none but foreigners have offended. British subjects do not commit the statutable felony unless by reason of their association with foreigners.

The offence against the acts committed by a British subject, requires proof, not only of the *status* as such subject, but also of the joining with foreigners in the commission of it. The same evidence, irrespective of national *status*, which will convict the foreigner, would not convict the subject; a man indicted under this act as a foreigner is entitled, on proof of his being a subject, to an acquittal, because as against the subject additional averments and proofs are necessary.

I think, therefore, that the substituted section does not make the change in the law which was suggested, and that the new third section must be construed as intended to preserve the distinction between the offences committed by a foreigner or a subject of Her Majesty.

But apart from this, it is contended that the substance of the offence charged in both the indictments is the same. I think the authorities lead to a contrary conclusion.

If A. commits a burglary, and at the same time steals goods out of the house, if he be indicted for larceny only and be acquitted, yet he may be indicted for the burglary afterwards. And *e converso*, if indicted for the burglary with intent to commit larceny, and he be acquitted, yet he may be indicted for the larceny, for they are several offences, though committed at the same time. See 2 Hale, 245, where other analogous cases are also put, and among them this: that a man acquitted of stealing the horse, hath been arraigned and convicted of stealing the saddle, though both were done at the same time. In more modern times Vandercomb's case (2 Leach 708) sustains the same doctrine, and contains a reference to leading authorities down to that period. I refer also to *Regina v. Gisson* [2 C. & K. 781] *Regina v. Green*, (2 Jur. N. S. 1146), and *Regina v. Knight*, (1 Leigh & Cave, C. C. R. 378).

A comparison of the two indictments brings to view variances which are substantial, not mere differences of time, *place* or quantity, such as by averment, might always be shown to be merely form, and not of the essence of the offence charged. It is quite true that on the first indictment, if he had been a foreigner he could have been legally convicted, but inasmuch as the evidence then given proved he was a British subject, his life never was in legal peril upon it. It is not enough to say that possibly on the first trial he might have been unable to prove his actual *status*, and so risked being convicted. We must deal with the facts as it was proved then, and as is now for the purposes of this case incontrovertibly established by the confession of the present indictment, that the prisoner is a British subject; if so, his peril on the first was imaginary, not real, for only a citizen or subject of a foreign state at peace with Her Majesty could have been legally convicted thereon.

I should willingly have adopted the opposite conclusion, and have given the prisoner the advantage he claims from his previous acquittal, if I had not formed a clear opinion that the law is the other way.

The conviction must be upheld and (if not already done) sentence of death must be pronounced upon the prisoner.

HAGARTY, J.—I think the prisoner was not in legal peril on the first indictment, and if shown to be a British subject could not be lawfully convicted thereon.

A careful examination of the statute shews that the offences are laid differently as to foreigners and subjects, and that an indictment in the same form will not equally answer for both; and if the indictment charging him as a foreigner had been amended by calling him a subject, it would have made it bad on demurrer or in arrest of judgment.

He obtains his acquittal exclusively on the fact of his not being a foreigner, and when subsequently indicted as a subject cannot urge such acquittal as a defence. His *status* was a material fact of averment.

In that view it is unnecessary to discuss the amount of evidence required to establish or negative such *status*, nor whether in fact the same evidence of acts done that would have sufficed to convict the foreigner, might not probably have in most of the cases proved the crime against the subject.

MCRRISON, J., concurred.

Conviction affirmed.

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ERRATUM—On page 84 the figures 1867, in the date line, should be 1866.

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