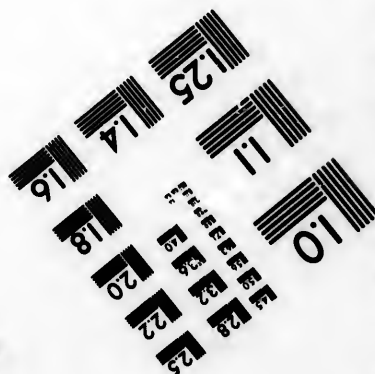
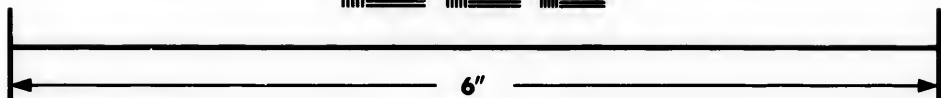
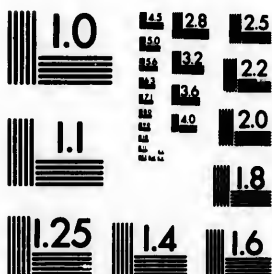


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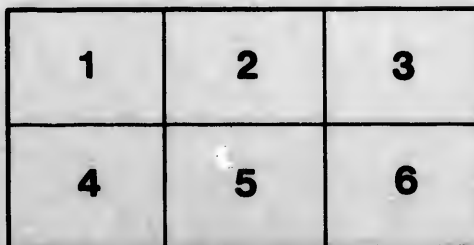
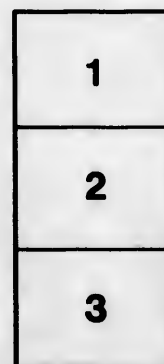
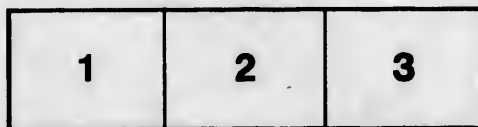
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*Captain R. L. Denison*

NOTICE

OF

THE TRIAL *W. D. D. M.*  
*22 March 1865*

OF

LIEUTENANT JOHN MAITLAND,

BY

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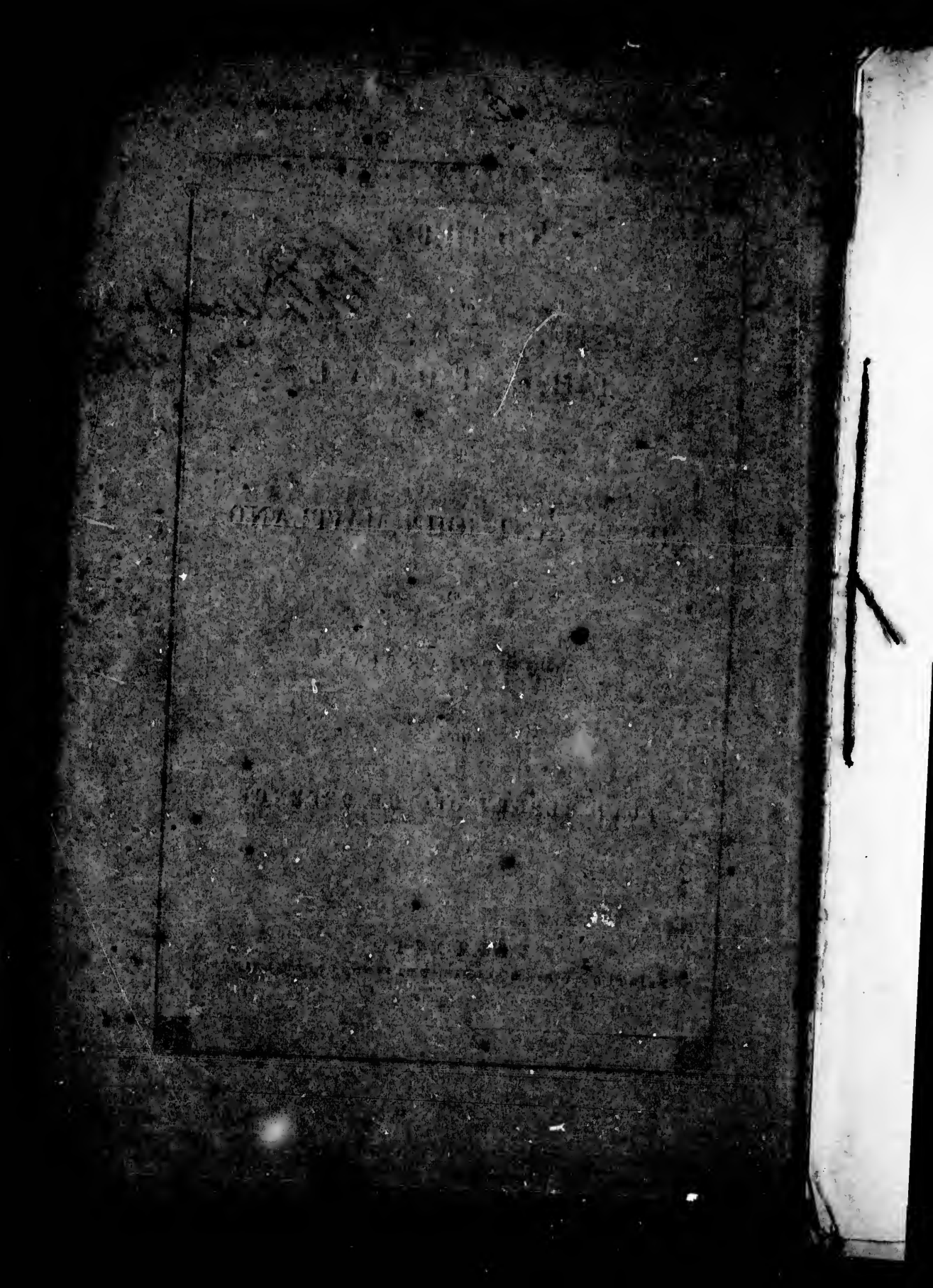
WITH A

FULL REPORT OF THE DEFENCE.

TORONTO:

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1841.



**NOTICE**

OF

**THE TRIAL**

OF

**LIEUTENANT JOHN MAITLAND,**

BY

**COURT-MARTIAL:**

WITH A

**FULL REPORT OF THE DEFENCE.**

**TORONTO:**

**PRINTED BY HUGH SCOBIE, WELLINGTON BUILDINGS.**

**1841.**



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## P R E F A C E .

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PUBLIC attention having been a good deal occupied by the Proceedings of the Court Martial, assembled to try Lieutenant John Maitland, upon certain charges preferred against him by Major Thomas Magrath, the Editor ventures to hope that the following pages may not prove unacceptable. It had been his intention to have presented the public with the proceedings in detail, but they have been swelled to such an inconvenient size as to render that design impracticable. And he regrets that impossibility the less, as the evidence quoted in the following pages has been carefully compared with the record of the Court, and is so fully stated as to enable the reader to form a judgment on the whole case without difficulty. The Editor forbears, at present, to make any comment on the patient temper and impartial spirit displayed by the gallant Colonel who presided over that Court during its whole proceedings. Those points will be canvassed elsewhere. Nor is it my purpose to impugn its verdict. However unlooked for, that verdict has pronounced Lieutenant Maitland to be guilty of a breach of military discipline. But the public will decide what the Court has left undecided. They will pronounce upon the moral guilt or innocence of the parties, and they will consider how far it is consistent with the honour of Her Majesty's service that matters should be allowed to remain in their present position.

TORONTO, 18th APRIL, 1841.

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\* \* \* THE evidence for the defence was not concluded for several weeks after the Court had opened; when Lieutenant Maitland, feeling himself unequal to the task, desired that his counsel (Mr. Blake) might be permitted to read his address, and cited in support of the application the case of Lieutenant Curtis, tried in January last, when such permission was granted as a matter of course. The Court, however, declined to comply with his request: and has thus, it is to be feared, by such high sanction, re-established a custom no less absurd than inconvenient.

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## DEFENCE.

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MR. PRESIDENT AND GENTLEMEN,—

I shall not follow the example of the Prosecutor in this case, by asking your indulgence for the minuteness of detail, to which I shall be obliged to descend in conducting my defence, because I am confident that I address those who are as deeply impressed as I can possibly be with the vital importance of the enquiry in which they are now engaged, not only to the individual accused, but to Her Majesty's service throughout the Province. And, Sir, I trust that I shall not be betrayed into the glaring inconsistency into which the Prosecutor has fallen,—who, while he expressed his sense of the painfulness of his situation as Public Prosecutor, and that too in a case where “the accused was an Officer, the establishment of whose guilt would in all probability be followed by the loss of his Commission,” and who would therefore one might suppose, have left the facts of the case to speak my guilt, did nevertheless found that guilt, not upon those facts, but upon his own frequent and strong expression of the hardihood of my conduct, the malignity of my feelings, and the baseness of my motives.

I, Sir, shall not follow that example, but I shall (without indulging in any invective against the Prosecutor,) ground my defence upon the facts of the case; and if in the opinion of the Court those facts shall not be considered sufficient to have warranted the conclusion which I have drawn from them,—nay, if the Court shall not be of opinion that those facts imperatively called upon me to pursue the course which I did adopt, in justice to myself, in justice to the public, in justice to the service to which I have the honor to belong,—then, Sir, I cannot consistently with my feelings condescend to ask their indulgence; because, however humble my rank, however infinitely beneath the notice of the Prosecutor it may have placed me, in his own estimation, and however truly humble it is compared with your rank, Sir, and that of many of the Members of the Court before which I am arraigned, yet, Sir, I can yield to none in my jealousy for the honor of Her Majesty's service; and I could never consent to hold by sufferance a Commission, of which in the opinion of those to whose judgment I shall most cheerfully bow, my conduct shall have rendered me unworthy.

I did not think, Mr. President, that I should have been obliged to call a witness to prove, that for several years past, my exertions had mainly contributed to the increase of the Race funds of the City of Toronto. I thought, and do still think, that (with the exception of the Prosecutor,) not one person will be found in the least acquainted with

the matter, who will not be able to answer the question "Have the Race funds been increased by Lieutenant Maitland's exertions, and if so, to any considerable extent?" unhesitatingly in the affirmative.

Sir, I became Secretary to those Races in 1836,—the subscriptions for that year amounted to sixty pounds. I have continued Secretary ever since; and in the year 1840 the Subscriptions amounted to five hundred pounds. In the year 1839, I had, up to the day of the Races, collected a considerable sum,—amounting to two hundred and ~~eighty pounds~~,—which I placed in the Farmer's Bank, to the credit of Colonel Mackenzie Fraser, the President. Subsequent to the day on which the Races commenced I received further subscriptions to a considerable amount, which were, as I alleged, and do still allege, paid to Major Magrath, with a balance of twenty eight pounds seven shillings and sixpence, a part of the fund placed by me in the Farmer's Bank at the disposal of Colonel Mackenzie Fraser, but which he did not require, and these sums were paid to the Prosecutor, in order that he as Treasurer to the Races, might pay all demands on the Race fund. It will not then, Sir, I think, be a matter of wonder that I continued to take in the Toronto Races after they had become of some considerable importance, the same interest which I felt in them when utterly insignificant. Nor will it, I think, be a source of surprise, that in the spring of the year 1840, I should have felt anxious that the account of the preceding year should be made up, not only as a guide to the Stewards in arranging for the then approaching meeting, but also for the purpose of shewing the public, that those subscriptions which I had received, and for which I felt myself responsible, had been duly applied. With this view I addressed to Major Magrath, upon the 30th April, the following note, which is in evidence before the Court:—

TORONTO, 30th April, 1840.

MY DEAR SIR,—

With all due deference, I herewith send you the statements (two) of my Racing Accounts for 1837 and 1838, as they may assist you in making out yours for 1839, but which perhaps ought more properly to have followed suit, and been in your possession ere this. I am happy to find that the balance of £8 6s. 6d. is in my favor, and hope you are in funds for the same reason.

It will most probably be wished to be known on Friday afternoon the sum that was raised last year, as a kind of guide for the present.

Yours, &c.,

(Signed)

J. MAITLAND.

Major Magrath, &c.

To this note Major Magrath replied, by the communication marked No. 3, also in evidence before the Court, expressing his inability to understand the accounts. To remove which hindrance I sent to Major Magrath a further note expressive of my opinion that no difficulty existed, which a little patience could not overcome. Up to the 6th of May, however, no account can have been furnished, because the following communication from myself under that date, is in evidence before the Court:—

*fifty six pounds  
fifteen shillings*

Toronto, May 6th, 1840.

Mr Dean Sir,—

I herewith send you (enclosed) Colonel Mackenzie Fraser's cheque (eight) and the statement from the Farmer's Bank, shewing a balance of £28 7s. 6d. currency, on 18th July, 1839, lying then to the credit of the Races, which sum as I mentioned. Col Fraser gave a cheque for in your favor some time after. These vouchers will still further enable you more easily to make out your statement for 1839.

I don't care how soon you send me that £8 6s. 6d —should ever the outstanding subscriptions be collected, of course they will be paid into the Race funds.

I have, &c.,

(Signed)

J. MAITLAND.

Major Magrath, &c.

Mr. President, I have troubled the Court with the reading of this note a second time, because it contains the important fact, that at that date, namely, the 6th of May, I had called the Prosecutor's attention distinctly to the fact, that he had received the disputed sum of £28 7s 6d. and that, by cheque from Colonel Mackenzie Fraser, on the Farmer's Bank.

The next link in the chain of evidence is the interview which took place at the house of the Prosecutor, on the 27th of June; and without entering into the particulars of that interview, as detailed in evidence by the Prosecutor, with which I shall be obliged to trouble the Court by and bye, this much I think I may say, that the unsophisticated fact, the fact I should think incapable of being explained away by sophistry is, that upon that occasion I charged the Prosecutor with the receipt of the balance of £28 7s. 6d., which he without qualification, without explanation denied. For, Sir, I am not concerned to enquire the specious reasoning by which the Prosecutor justified such general denial to his conscience,—that, Sir, is an account which he must settle with his Maker; to me the denial was general, unqualified, and with that alone I have to deal.

I shall not be thought hasty then, if I conclude that at this period at least, the Prosecutor had full notice, that I considered his neglect to furnish the accounts reprehensible; and further, that I charged him with the receipt of a sum of money which he denied. But if my note of the 6th May was insufficient for that purpose, and if the interview of the 27th June was insufficient for that purpose, at least my letter of the 24th of July ought to have fully awakened him to a sense of his position. That letter, Sir, is in evidence, and I am sorry to be obliged to trouble the Court with a repetition of it.

Toronto, 24th July, 1840.

Sir,—

I suppose you are aware that Mr. Boulton, your successor, has called upon me as well as yourself for an account, to shew how the Race fund stood before his acceptance of office, and you being in full possession of all the documents

and vouchers connected therewith should have long ere this done so, and not required any notice from that quarter, or from me. Yet, notwithstanding my repeated applications to you, both verbally and in writing, asking from you as acting Treasurer to the Races of June, 1839, a statement of the funds for that meeting, nothing of the kind, however, has been furnished, even after the lapse of twelve months; but as you have from time to time during that period frequently stated, on your being so called upon by me, your having sometimes lost, and then found the Subscription Book, a similar fate you also stated to have be-fallen the balance Sheet, and Original Entries for the Races, and last, though not least, various sums of money which have been recently received by you had quite escaped your memory, I have therefore (with the most charitable intention possible) to bring to your recollection facts connected with these matters, which will, I hope, refreshen and re-enlighten you on the subject.

At a meeting of the Stewards preceding these Races, Mr. Peter Buchanan, yourself and I, were appointed as Members of the Committee of Finance for the purpose of collecting funds to meet the expenditure caused on account of the Races. Mr. B. not having time to take part, this business fell upon you and I, and during the time we were so occupied, and throughout the Races, I have no particular observations to make. I paid all the subscriptions and entries received before the Races into the Farmer's Bank, in the name of Colonel Mackenzie Fraser, the President, which amounts covered the sums required to pay the different monies run for. On the Monday or Tuesday evening after the Races, I waited upon you at your quarters in Bay Street, by appointment, agreeable to your anxious wish, and paid over to you the monies I had further received, exceeding the sum of fifty pounds, (£50) and assisted in making at the same time a Balance Sheet from the Subscription Book, &c. &c., shewing a healthy state of the funds, which I also left with you. Many sums of money I know as a matter of course were afterwards paid by you, and many more received, some of them through me, and this went on for some months, when Mr. Heath came to the Military Secretary's Office and informed me that you were out of funds, and requesting that Colonel Mackenzie Fraser be asked to give you a cheque or order for the remaining money in the Farmer's Bank, (£28 odds) I instantly wrote the Colonel a note containing the substance of your message, and was always given to understand that you had received the amount from the Bank until the other day.

All this may be very fine sport to you, but to me it appears rather beyond a joke, that I should be caused all this trouble, and a great deal more, on account of your memory or carelessness, or some other cause. However, I must now inform you, that unless you *forthwith* make a *satisfactory statement and settlement* of your intrusions with the Race funds, I will consider it a duty I owe to the subscribers and to myself to call a meeting and lay the case before them.

I am, &c.,

(Signed)

JOHN MAITLAND,  
Secretary Toronto Races.

Major Magrath, &c.

This letter, Sir, having been received by the Prosecutor only on the 24th of July, the Court may not perhaps be surprised to hear, that he appeared at a meeting of the Stewards held on that day, not with

a clear statement of his account and refutation of my charges, but with this letter in one hand and a number of loose papers in the other; and these were handed to Mr. Boulton, the succeeding Treasurer, with a declaration, that "considering our *relative situation* in society, and my having served as *private* in his troop, he, the Prosecutor, could neither recognize, nor have any further communication with me." I say, Sir, that the Court may consider the conduct of the Prosecutor on that occasion, not unreasonable, under the circumstances. But surely at the next meeting on the 27th July, to the appointment of which he was party,—at that meeting called for the express purpose of investigating these accounts, then at least he will have appeared with a minute detail of every fraction received,—then he will not only have shewn the whole amount received, and his vouchers for the disbursements, but he will have spread out upon his accounts every particular of the place where, the person from whom, and the time when, he received such sum. Now, at least his memory will have been refreshed, and we will find him with a body of evidence, calculated to convince the Stewards that I who had embezzled these funds, was basely seeking to charge them upon him,—conduct for which I ought to be stripped of my Commission, and branded as a villian for ever! At that meeting, Sir, he appeared with this account in his hand:—

RACING ACCOUNT FOR 1839.

DR. *The Toronto Races with MAJOR MAGRATH, for 1839.* CR.

1839.	£ s. d.	1839.	£ s. d.
To amount of sundry bills paid per vouchers herewith,	£108 15 9	By amount received by Major Magrath for 1839, from sundry persons, per statement herewith . . . . .	26 10 0
Less unaccounted for	0 11 8	By amount paid Major Magrath by Mr. Maitland . . . . .	50 2 6
	108 4 8	By balance due to Major Magrath . . . . .	31 12 2
	£103 4 8		£108 4 8

(Signed)

THOMAS W. MAGRATH.

March 31st, 1840.

Which was not only perfectly silent as to the sum of £28 7s. 6d. but was accompanied by an unqualified, a thrice-repeated denial of its receipt.

Now, Mr. President, had I under these circumstances, stamped as I had been by the Prosecutor, as a person whom he could neither recognise nor communicate with, had I publicly accused him of that peculation which he sought practically, and so unfairly to lay to my charge,



by producing an account so general, and consequently (as he thought) so incapable of refutation as this, I do fearlessly say, that however I might have infringed Military Law, humanity at least would have pronounced me guiltless! How much less then, could I have been considered culpable, had I sent into the world for my own vindication, that Pamphlet, the letters composing which have been read; and the publication of which the Court will bear in mind forms no part of the charges against me. But, Sir, I did neither the one nor the other; I thought that the matter was of such a nature as to warrant the General Commanding in taking cognizance of 't, and under this impression I enclosed the Correspondence contained in the Pamphlet to Colonel Ward, the Commandant of the Garrison; and I shall take the liberty of reading to the Court the letter which I enclosed with it to that Officer, and his answers, as well that on receipt of them, as the one which accompanied them when returned:—

*Copy Letter to Colonel Ward.*

{ ASSISTANT MILITARY SECRETARY'S OFFICE,  
Toronto, 7th August, 1840.

SIR,—

I have the honor to transmit copies of correspondence, &c. &c., on the subject of certain transactions arising out of the Toronto June Race Meeting of 1839, with which several Officers at present in Garrison here are intimately connected.

I consider it my duty to put you in possession as soon as possible of these circumstances, which are now matters of notoriety.

I have the honor to be, &c.

(Signed)

JOHN MAITLAND,  
Lt. 4th Batt. In. Militia.

The Commandant of Toronto.

*Copy Letter from Colonel Ward.*

TORONTO, 8th August, 1840.

SIR,—

I have to acknowledge the receipt of your letter of yesterday's date, transmitting copies of a Correspondence, &c., on the subject of certain transactions arising out of the Toronto June Race Meeting of 1839, and having perused them, I consider it my duty to transmit them, which I shall immediately do, to the Assistant Adjutant General, to be laid before His Excellency the Major General Commanding.

I have the honor to be,

Sir,

Your most obedient humble servant,

(Signed)

W. C. WARD,  
Lt. Col. Royal Engineers.

John Maitland, Esq., Toronto.

## Copy Letter from Colonel Ward.

TORONTO, 11th August, 1840.

Sir,—

In returning the copies of a Correspondence, respecting certain transactions connected with the Turf Club, which you transmitted to me, and which were laid by the Assistant Adjutant General, before His Excellency the Major General Commanding, I have to inform you, that His Excellency has no controul over the proceedings of the Turf Club, and that he is of opinion that they must settle their own accounts and disputes amongst themselves.

I have the honor to be,

Sir,

Your most obedient humble servant,

(Signed)

W. C. WARD,

*Lt. Col. R. E. Commandant.*

John Maitland, Esq., Toronto.

Mr. President, I did on the 17th of August publish this Pamphlet. I felt that I was driven to it under the circumstances, and I suppose I may assume, that it contains in it nothing criminal, inasmuch as the Prosecutor has not made it the subject of one of his charges. It contains, Sir, those letters which I fear the Court has already too often heard.— It contains the statement of a fact that I asserted that Major Magrath had received £28 7s. 6d. from Colonel Fraser, that he denied that assertion, and it then states the proof of the truth of my assertion. And how is this Pamphlet met? Is it by a similar statement of facts rebutting those which I had put forward? Is it by a manly avowal that when he denied the receipt of the sum of £28 7s. 6d., (for he admits a denial on the 27th of June) he did so under a mistake which he subsequently detected?

He meets it, Sir, in neither way, but he appears before the public, with a declaration, that my whole statement had been "wilfully and maliciously" concocted by me to cover my own embezzlement. But, let us turn to the Pamphlet. It opens at page 1, with a repetition of the statement made before the meeting of the 24th of July, as follows: "I would premise, by stating the writer to have formerly served as Corporal in the Troop under my command, as a reference to the pay list now in my possession, attested by the signatures of Colonels Bullock, Halket, and Jarvis, and his receipted account will prove; and that he is now employed as a Clerk in the Military Secretary's Office."— And not to speak of the general style of the Pamphlet, we find at page 5, the following passage:—"It is perfectly correct that I received in addition, a sum 'exceeding £50, as stated in page 5.' That the subscriptions were received is true, but that Mr. Maitland paid them to me and did not retain himself, is not only false, but it is wilfully and maliciously false." The charge of peculation may seem black in the eyes of Officers and gentlemen, but methinks it fades away, it becomes pale, compared with the charges of embezzlement effected by the statement of wilful and malicious falsehoods of another.

At page 8, we find the following paragraph:—"By Mr. Heath's request I have also appended hereto, a 'correspondence' which speaks for itself, and which, if any thing can do so, must place Mr. Maitland in the unenviable position in which Mr. Heath properly places him, of having 'paid an utter disregard to the truth.'"

Sir, upon the appearance of this, I will say, *scurrilous* Pamphlet, I did publish the letter in the *British Colonist*, which forms the subject of the fifth charge against me, and I did send to the Stewards of the Races for 1839, appended to my statement of the accounts, the letter which forms the sixth charge against me,—at the same time demanding from the President a meeting, for the purpose of investigation. I felt, Sir, that the facts of which I have now sketched an outline, justified the conclusion which I had drawn from them, and I felt that the circumstances imperatively called upon me, in justice to myself, in justice to the public, in justice to the service to which I have the honor to belong, to pursue the course which I did adopt.

And now, Sir, I feel that, with these facts beneath me, I can stand erect, and set at naught, like the malignity and zeal, of even this public spirited prosecution. For, Sir, I am conscious, that truth, like the sea beaten rock, however it may be sometimes obscured around its base by the dark and boding tempest, does yet ever rear its summit in the open day, a beacon clear and eternal as nature itself. And, Sir, when he alleges that I charged upon him the receipt of sums, which I was conscious he had not received, I point to those facts, and I require him to inform the Court why he did not refute the charge,—why he denied the receipt of those sums,—and why he did not explain the fallacy into which I had fallen? But, Sir, when he claims from the Court indulgence for his memory for having denied the receipt of those sums, and for not having explained the cause from which that denial sprung, I present him his own Pamphlet, and tell him that if his memory enabled him to remember even his own case, I would call the blush of shame into his cheek. What, Sir, is the Court to be told, that after my letter of the 6th of May; that after the angry altercation of the 27th of June; that after the meeting of the 24th and the 27th of July, the Prosecutor can claim any indulgence for his memory as to a fact, which a reference to his "*own Cash Book*," in which all his money matters were regularly entered, has it seems set for ever at rest? And, Sir, when the Prosecutor defines for the Court, the word *peculation*, and asks, even if every thing I had stated were true, how I could justify the publication of such matter concerning "a Brother Officer," I again present to him his Pamphlet,—I point him to his accusation of me, compared with which, all that I have charged against him is innocence itself. I remind him of his declaration of the 24th July,—I point him to the first page of his Pamphlet, and I say shame! shame! Am I to be trampled on as a "Corporal," a "Clerk," so long as any fair purpose of investigation can be stifled; and do you now dare to demand against me the rights of a "Brother Officer?"

If we turn, Mr. President, from these general observations, to the evidence in detail, by which the Prosecutor has attempted to sustain the

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different allegations, we shall, I think, find at every step these general observations confirmed and elucidated.

With reference to the first charge I shall trouble the Court but with few remarks, because I think I may safely assert, that no force of imagination can strain the evidence adduced into proof of that charge; for the Court will observe, in the first place, that that charge is confined to a statement said to have been made by me on the 27th day of June last; and secondly, that the force of the charge lies in this, that I made that statement, "knowing it to be false." Now, when we examine the evidence, it does indeed appear, that I stated on the 27th of June, that I paid a sum of £28 7s. 6d. to Major Magrath, and that on his denying the receipt of it, I said I had paid it to Mr. Heath; but Major Magrath himself, does not in evidence here state, that I on that day charged him with the receipt of any sum of £28 7s. 6d. different from the one which he now admits that he did receive; for, at the close of his evidence in chief as to the first charge, when detailing the particulars of the rather singular directions given to Serjeant Holland, (upon which I shall have to trouble the Court with some observations at a future period,) he states to Serjeant Holland that he knew "*from my manner* I intended to charge him with a *second* sum of £28 7s. 6d.; so that Major Magrath's information was not derived from what I *stated*, but was a conclusion at which he arrived from "*my manner*;" and yet we find by his answer to the 44th interrogatory, that he did not explain to me on that occasion, that he admitted to have received any such sum. And when Mr. Heath is asked by the second cross interrogatory, "Was the sum of £28 7s. 6d. which Mr. Maitland said he had paid to Major Magrath, and then to you, the balance which remained in the Farmer's Bank to Colonel Fraser's credit?" he answers, "*I do not know*." And when he is asked by the third cross interrogatory, "what sum of £28 7s. 6d. did you understand Mr. Maitland to speak of?" he replies, "I did not know what sum it was." Now, Sir, the fact is, that a sum of £28 7s. 6d. had been paid to Major Magrath, and unless the Court will consider his conjecture, from *my manner*, or Mr. Heath's utter ignorance upon the subject, *as proof* that I meant a different sum, I am at a loss to conceive what evidence it is the Prosecutor relies on in support of his first charge. In truth, Sir, had I been called upon to defend myself solely on this point, I should have troubled the Court with very little enquiry on the subject. But it will I think be plain before I conclude, that my cross-examination as to the sum of £28 7s. 6d. was entered into with a view of rebutting the 5th and 6th charges, and not the *first*.

The Court will be pleased to observe, that the second charge is altogether unsupported by evidence. It states, that I alleged at a meeting of Stewards held in November, 1840, that I had paid to Major Magrath a sum of £8 5s., *I well knowing* at the same time that I had not paid that sum. Now the evidence is, that I did state on the specified occasion, that I had paid the sum of £8 5s. to Major Magrath; but I am at a loss to discover by what evidence it is proposed to shew the Court that I then knew I had not paid that sum, or by what evi-

dence such matter could be shewn; for I was then confident, and am still confident, that that sum was so paid.

Mr. President, I do not feel it necessary to investigate the evidence in support of the third charge, so minutely, as under other circumstances I might feel disposed, because, Sir, I think I shall be able to shew the Court that this charge is, (as are also the 2d, 4th, and 6th) bad in point of law. I think, Sir, I shall be able to shew, that those charges do not allege matter, which this or any other Court under our Constitution, can consider criminal, and upon which therefore I could be found guilty. But even should I be wrong in my view of those charges, I still feel, that like the last, this also is unsupported by evidence. Sir, I think I may safely state thus much as the result of the testimony of Colonel Mackenzie Fraser, Colonel Bullock, and Captain Arthur, the Judges who presided on the occasion mentioned; that I did then lay before them an account, in which I charged Major Magrath with the receipt of *various sums*,—that I stated to them (and indeed my account carried on the very front of it that statement,) that I was prepared to prove all the items so charged, and that I had in my hand documentary evidence, as to many of the sums; and even Mr. Heath, when asked by the 79th cross interrogatory, “Did Mr. Maitland say that he confined his statement that he had proof in his hand to the sum of £6 5s?” answered, “I don’t know that he said so, but my impression was, that he meant the sum of £6 5s.” But suppose the Prosecutor had proved that I had restricted my offer of proof to the sum of £6 5s. alone, of the various items in my account, I am still at a loss to discover where the criminality lies, for I then thought, and I must take leave to say, that my opinion still remains unchanged,—I say that I then thought, and I trust that this Court will think, when all the circumstances of the case shall have been laid before them, that the fair presumption is, that the sum of £6 6s. had been paid. But even though I be so unfortunate as to differ from Major Magrath, or from the Court, in my estimate of the degree of probability which amounts to proof, I have yet to learn the mode of reasoning by which such difference of opinion can be construed into *crime*.

Were I to confine myself to the matter immediately alleged against me, in the 4th charge, a single observation would suffice. This charge is “Having stated at the time and place, and on the occasion last mentioned, that the said Major Magrath had not paid certain men of the said 1st Troop of Incorporated Dragoons the amount of a certain purse, called the Troop Purse, run for at the said Race Meeting in 1839, and won by certain men of the said Dragoons, and that he the said Lieut. Maitland had been informed by two men of the said Troop, who were entitled to receive a portion thereof, that the same had not been paid to them by Major Magrath, or any one for him, and that they had not received their proportion; he the said Lieutenant Maitland well knowing, when he made the said statement, that the said purse had been paid by Major Magrath, and that no man of the said Dragoons, entitled to receive any proportion thereof, had made any such declaration.”—Now, when Holland, M’Lean, M’Donald, believed at the time men-

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tioned in the charge, namely, in November, that the Troop Purse had not been distributed, I want faculties to perceive what *shadow* of proof has been adduced to shew, that when *I then* stated that the Purse had not been distributed, "I well knew that it had." When the very men entitled to the first, second, and third Purses have sworn that *they believed*, in November, that they had *not* received their proportions of the Troop Purse, and informed me of such belief; how can it be supposed that it is reasonable, probable, nay *possible*, that *I* could have known at that time, that it had been paid? And unless this is proved the charge falls to the ground. But with the permission of the Court, I must digress a moment, in order to remove an impression which was sought to be made upon the Court, by the line of examination pursued by the Prosecutor, as though I was laboring to instil into the minds of these witnesses the facts which I called upon them to prove. Had I, Sir, at a time when Major Magrath's accounts were undisputed, addressed these men on the subject of his payments to them, I should not have stood up now to defend such conduct. The truth, however, is, that I never spoke to any of the witnesses on the subject of the payment of the Troop Purse, until the very day on which the Stewards sat in November. On that occasion when those accounts were being investigated before a tribunal recognised by both parties, when each party adduced such evidence to substantiate his case as he thought most expedient—on that occasion, I say, it was not only competent to me, but my duty, when I understood that the Troop Purse had not been paid, to make the enquiry, which I accordingly did of these witnesses, and on their confirming such rumour, it was my further duty to bring them forward as witnesses of the fact. I have said that this matter is not pointed at in the fourth charge, but I have felt it due to myself to allude to it for the purpose of removing any injurious impression. Upon the manner in which the subject was introduced by the Prosecutor I shall make no comment. It will be borne in mind that the communications with M'Donald, proved by him, were of a very recent date, and were entered into with a view to my defence upon this trial.

The fifth and sixth charges, Sir, are general, alleging that I had published false, scandalous, and malicious statements, in which I accused Major Magrath of peculation. And although it will, I apprehend, be found that these charges must in point of law be viewed in very different lights, yet, inasmuch as the arguments which I am about to use, apply equally to each, I shall for the purpose of those arguments consider them as being *in pari materia*.

I hope, Sir, to be enabled to prove, not only from the evidence which I have myself adduced, but even from that adduced on the part of the prosecution, that these statements were neither false nor malicious. But before I enter into the detail of that evidence, I would ask the Court whether I am not entitled to draw that conclusion from the course which the Prosecutor has adopted, independently altogether of such investigation. The accounts appended to the letter on which the sixth charge is founded, prove that my opinion and statement of Major Magrath's conduct, in having received various sums of money which he



subsequently denied, were not founded upon the receipt and denial of the sum of £28 7s. 6d. and £0 5s. *alone*, but upon his receipt and denial of *various other* sums, as well as those; and Colonel Fraser has stated in his answer to the 18th cross interrogatory, when examined on behalf of the prosecution, that some of these items in that account had been proved by me to the satisfaction of the Court, before which the matter was investigated. Now, Sir, I ask whether it would not have been more consistent with the usual practice in cases of this sort,—I ask whether the Prosecutor would not have shewn a nicer sense of his own honor,—whether he would not have evinced a greater regard for the credit of the service, by calling for a Court-Martial upon *himself* first, and thus clearing himself of all the sums which I had charged upon him? Or if he shrunk from pursuing that course, was it not incumbent upon him at least to have taken every sum which had been disputed before the Court of Enquiry, and made it the subject of a distinct charge? Then, Sir, *his* failure in proving any one of such charges would have been the justification of my general statement as to his conduct? But seeing that he has thought fit to adopt neither of these courses,—seeing that he has thought fit to *select* from the different items of that account only *two sums*, which he found best suited to his purpose, I put it to the Court, whether I am not entitled to assume that he admits the correctness of the residue? And if it be admitted, that in any one instance the Prosecutor denied the receipt of money, which had in truth been paid, then are my statements upon which the fifth and sixth charges have been founded, proved to be at least true. But, Sir, I am not driven to rely upon this conclusion, however just, for my position will I think be found proved by the testimony of Colonel Mackenzie Fraser, Captain Arthur, Mr. Atkinson,—in fact by every witness present.

On reference to that testimony, it will be seen that I stated before the Stewards in November, that Mr. Domville had subscribed £5 to the Races of 1839,—that Mr. Domville had paid such subscription to me by a cheque for £7 10s. or thereabouts, I handing back to Mr. Domville the balance. It will further appear that I stated the whole cheque had been paid to Major Magrath either by Mr. Domville or myself, and that therefore, inasmuch as Major Magrath had only credited the Race funds with £5, it would be found that he was still indebted to that fund in the sum of £2 10s., the balance of the cheque. But Major Magrath met this charge by stating that he did not recollect to have received this cheque. The previous discussion on this subject, and those accounts, copies of which had been sent, as he has himself proved, to *all* the Stewards, had not it seems afforded him sufficient opportunity to *refresh his memory*. His cash book is silent, not only as to the receipt of this sum, but also as to its disbursement. He has himself no recollection on the subject, and Captain Magrath (as appears by his answers to the 34th and 35th interrogatory,) is produced to depose to a conversation said to have taken place at the Military Secretary's Office, for the purpose of shewing that the cheque had not been received by his brother. Yet, on the next meeting the cheque is produced, and it then of course became apparent that this charge is correct.

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A good deal of hilarity was exhibited when one of the witnesses for the defence stated that Major Magrath displayed some surprise and confusion when this cheque was produced before the Stewards on the second meeting. But will the Court be pleased to remember, that Major Magrath came to the enquiry after an interval of months allowed for recollection, and with my account in his hands, making that very charge in language not to be misunderstood. But if, notwithstanding this consideration, the Court should think it incredible that Major Magrath could possibly feel some little confusion when the cheque which had been denied on the first meeting was drawn from him on the second,—if the Court will agree with the Prosecutor, in considering the statement, that he displayed some little degree of feeling on that occasion, as a libel on his self-possession, and in itself sufficient to discredit the testimony of a witness, I shall of course bow to their superior judgment.

On reference, Sir, to the testimony of Colonel Fraser, and the several other witnesses examined as to the proceeding of that Court, it will further appear, that I did upon the same occasion charge Major Magrath with having received and not accounted for a sum of £1 5s., being the subscription of a Mr. Murchison. But here we find that the memory not only of the Prosecutor, but what is somewhat more extraordinary, of his *cash book*, is again at fault; for the Prosecutor states, that this sum had never been received by him; and his *cash book* when produced, says, that however strange it may appear, still true it is, that this entry certainly was not (as is usual) the notification of a visit already made to the Major, but the precursor of one intended to be made at some future period.

Now, Sir, to make no comment upon the singular entry in a *cash book* of "*money to be paid*,"—not to dwell upon the fact which must be obvious to every eye, that the words "*to be paid*," are written with different ink, different pen, and were to a moral certainty, made at a time altogether different from that at which the rest of the entry was made. Not to detain the Court upon these points, in themselves sufficiently worthy of notice, it will I think be found, on reference to the evidence of Mr. Robert Maitland, that at the time this entry was made, the sum of £1 5s. was not "*to be paid*," but had in the ordinary course of business been *already paid*.

It will be found also, that the receipt of the sum of £53 17s. 8d. was denied by Major Magrath in November, but as I shall be obliged to trouble the Court at some length on this sum, I shall at present only refer to it. It is not charged against me that I alleged that "Major Magrath had received these sums, *well knowing* that he had not received them," nor are these allegations of mine in any way impugned. Yet, Sir, although they have been studiously excluded, still if I have been enabled to shew the Court, that the receipt of these sums was denied by Major Magrath in November last, (for it is a matter of indifference what he now admits or denies,) and if I have proved that such denial was inconsistent with the truth, then I do very humbly submit that I have proved enough to shew that my statements are neither "*false nor malicious*."

Sir, before I enter into an investigation of the evidence as to the sum of £53 17s. 6d., I shall take the liberty of stating to the Court the facts as I allege them to have happened, and as they are said to have taken place by Major Magrath; and I shall then contrast the evidence with each, in order that the Court may be enabled to see with which state of facts it is most consistent. But, Sir, I cannot help pausing here for a moment, while I reflect upon my peculiar happiness, in being able to support my case, not by direct testimony *alone*, but by such a body of circumstantial evidence as nothing less than the hand of Providence could have supplied. Had I been driven to rest my defence upon *direct evidence* only, I should have felt much the painful position of the Court, in being obliged to decide between such conflicting testimony; but inasmuch as every minute circumstance which I have been enabled to call to mind, has when investigated, thrown additional light upon the subject, I do feel, that these scattered rays when collected into a focus, will prove of force sufficient to dispel every shadow of doubt from the least reflecting mind.

The Court will be pleased to bear in mind, that up to the 19th day of June, 1830, the day on which the Races commenced, I had paid all sums received into the Farmer's Bank to the credit of Col. Mackenzie Fraser. So far all are agreed. I state, that on that and the subsequent day, I collected upon the Race course a sum exceeding £53,—that on the third day of the Races I collected a sum of £25, and which being of inconvenient size as I was about to ride in the hurdle race, I took from my pocket and handed to Mr. Tod. I state further, that finding it unsuitable to pay the various small claims upon the Race funds at the Military Secretary's Office, Major Magrath offered to receive the monies and make the disbursements; to which proposal I acceded. That in consequence of this arrangement, I did on the 24th June, 1830, pay to Major Magrath the sum of £53 and upwards,—that I informed various persons who had applied to me for payment, that they must make application to Major Magrath, who was in possession of all the funds,—that in consequence of such information several persons did apply to him, and were accordingly paid, not only debts of recent date, but some of old standing,—that I did, (probably sometime in July, 1830,) pay to Major Magrath a further sum of £16 10s., being the amount of the Innkeepers' subscription,—that Major Magrath did through Mr. Heath, apply to me for the balance of the monies which had been deposited in the Farmer's Bank to the credit of Colonel Mackenzie Fraser, and that in consequence of such application I wrote to Colonel Fraser, who in compliance therewith sent a cheque to Major Magrath, upon which he received the balance, namely, £28 7s. 6d. Such are the facts as I allege them to have taken place.

Major Magrath on the other hand states, at page 5 of his pamphlet, that upon the evening on which I assert that I paid him the sum of £50 odd, I did really pay him a sum of £16 10s., and that with the exception of Mr. Cumming's and Mr. Eastwood's subscription, amounting to £5 5s. no other sums were paid him by me. He admits also, that he received a sum of £28 7s. 6d. from Colonel Mackenzie Fraser: but he states, that when he credited the Race funds with the sum of

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£50 2s. 6d., he did not mean to charge himself with a gross sum of that amount received from me in addition to these three items; but on the contrary, he says they were included in, and in fact composed the sum so credited. That Major Magrath did receive a sum of £50 2s. 6d. then, is not to be denied. He has himself always credited that sum in his accounts, but whether when he did so credit it, he intended it as a separate and distinct sum, or meant it to comprise the three items just mentioned, is the issue to be decided upon by the Court.

Now, Mr. President, I do not think it unworthy of observation, in the first place, that the natural mode in which an account of this sort would be made out, in which the three items were received from *different persons*, on *different* accounts, and at periods *widely different*, the natural way, I say, in which such an account would be transcribed (and that too drawn as Captain Magrath has sworn in his answer to the 20th interrogatory, from the very cash book produced,) is, not by giving credit for a gross sum, but by entering the *different* sums consecutively, as they appeared in the book. I have said, Sir, that a distinct entry of these three sums is what one would naturally expect; but the Court may perhaps be of opinion that the professional habits of the Prosecutor, unused to the vulgar details of business, will have sufficiently accounted for this deviation,—and such may be the case,—possibly my mind may attach too much importance to this circumstance, yet surely I am justified in expecting to find, on the 27th of June, a display of that manly, straightforward candor which has ever distinguished the character of a British Officer. We shall not I presume find him laying a snare to entrap a *Brother Officer*; or if some infirmity of nature shall have led him into so unworthy an act, his better feeling will have loathed its baseness,—we shall not at least find a serjeant summoned to chronicle and record it.

Now, Sir, may I entreat the attention of the Court to the *degree of information* possessed by Major Magrath on the 27th of June. Upon the 6th of May I had addressed a letter to him as follows:—

“I herewith send you (enclosed) Colonel Mackenzie Fraser’s cheques (eight) and the statement from the Farmer’s Bank, shewing a balance of £28 7s. 6d. currency, on the 18th of July, 1839, lying then to the credit of the Races, which sum as I mentioned Colonel Fraser gave a cheque for in your favor sometime after.”

In this letter I enclosed a statement from the Farmer’s Bank, which permit me to remark, cannot have escaped the observation of Major Magrath, as upon the alteration of that account, he subsequently founded a grave charge of forgery, and the principal entry upon which that charge of forgery was founded, is the following:—“*To balance drawn out by Major Magrath, £28 7s. 6d.*”

But this is not all; Captain Magrath has informed the Court, in his answer to the 20th and 21st interrogatories, that he had some days previous to the 27th of June, (at Major Magrath’s *particular and frequent request*,) made out the Racing Accounts, from the very book

spoken of, and at the moment of my arrival Serjeant Holland was employed in copying the account so made out.

Now, Sir, upon the 27th of June, on that occasion when so much angry discussion took place; on that occasion when it was thought necessary to despatch a messenger for Mr. Heath to contradict me; and on that occasion of which it was deemed expedient to direct Mr. Serjeant Holland to keep a written record,—how did the sum of £28 7s. 6d. come to be questioned? Let Major Magrath speak; for he was asked by the 18th cross interrogatory, "How did the sum of £28 7s. 6d. become a matter of question on the 27th of June?" and his reply was, "by Mr. Maitland asking me if I did not receive that sum from him, and he did not see it credited in the accounts." Is it then possible can any man in his senses believe, that if Major Magrath's statement be true, namely, that this sum of £50 2s. 6d. was originally intended to include these three items, he would not have afforded some explanation of a dispute, originating as he has himself described this to have done? Is it possible, if such statements are true, that with my letter of the 6th of May in his possession,—with the "forged" Farmer's Bank account in his hand, both pointing to the receipt of the sum of £28 7s. 6d. from Col. Mackenzie Fraser,—that after making up of the account by Captain Magrath at his frequent and earnest request, and with Serjeant Holland at the moment copying such account,—is it possible, I say, that if such statement were true, he would not have been prepared to state what sum he did receive from Colonel Mackenzie Fraser, and to inform me that such sum was included in the £50 2s. 6d.? Is there any man with a mind so curiously formed, as to believe, that if the sum of £50 2s. 6d. was then intended to include the sum of £28 7s. 6d., Major Magrath would not have thought during all that lengthened discussion,—would not have thought while Mr. Heath was being sent for,—would not have thought, while the accounts were being looked over, of opening his "cash book," (which was proved to have lain constantly on his table,) in which "all his money transactions were regularly entered," for the purpose of satisfying himself on the disputed point. But hear his own statement. He is asked by the Court at the close of his examination, (I think in the record it is called the 44th cross-interrogatory,) "Did you explain to Mr. Maitland, when he was at your house, that you included £28 7s. 6d. in £50 2s. 6d.?" and what is the reply? "No, I did not;" but he stops not here, he goes on to explain his reason,—"It was in consequence of a reference to my books that I ascertained positively that I had received the sum of £28 7s. 6d. from Colonel Fraser, and not from Mr. Maitland, after Mr. Maitland had left my house." And truly, I feel, that however singular the past history may have been,—however unaccountable the utter ignorance of Major Magrath may seem, notwithstanding the frequent premonitions to which I have so often alluded—however difficult of comprehension such things may be, they are not more extraordinary than the sudden illumination which succeeded them, nor in the least degree more unaccountable than the effect produced by such illumination. Major Magrath has sworn at the close of his evidence in chief upon the first charge "that when Mr. Maitland left the room, he told Serjeant

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Holland to make a memorandum of the conversation, telling him his reason for doing so was, that from Mr. Maitland's manner he wanted him (Major Magrath) to acknowledge another sum of £28 7s. 6d. beside that which he had received from Colonel Fraser, which he had already credited to the Race funds." Serjeant Holland swears, in answer to the 2d, 3d, and 4th cross interrogatories, that Major Magrath gave him this direction immediately after Mr. Maitland left, without consulting any book or paper. And Mr. Heath is asked, in the 7th interrogatory, by the Prosecutor, "Did you hear Major Magrath make any remark as Mr. Maitland left the room, or immediately after;" to which he answers "Yes," and then states the direction to Serjeant Holland. The rapidity of this reference clearly proves Major Magrath's familiarity with the item of £28 7s. 6d. I suppose! and its exact position in his books.

But, Sir, singular as this sudden illumination may seem, so sudden that no person was able to trace its progress, so great that it at once dispelled a darkness which had prevailed for months,—singular as all this may appear, it is not in the least more singular than the remarkable effects which it produced. For what use is it natural to expect Major Magrath would have made of this newly acquired knowledge? Is it, or is it not natural to expect, that he would have taken the book, and pointed out to Mr. Heath the entries which had thrown so much light upon the dispute? Yet Mr. Heath says, in his answer to the 44th cross interrogatory, that he was ignorant of the fact that Major Magrath had received the sum of £28 7s. 6d. from Colonel Fraser on the 27th of June. Is it not natural to suppose, that he would have taken the book and pointed out to Holland, those entries which justified him (Major Magrath) in the dispute with me, and warranted the memorandum he had ordered to be made? But Serjeant Holland has sworn, in his answer to the 6th interrogatory, that no entry was pointed out to him. Was it too much to expect from a "Brother Officer," that he should have taken his pen and apprized me of the mistake into which I had fallen, "from not seeing the £28 7s. 6d. credited on his account?"

And now, Sir, I earnestly and solemnly ask the Court, are these things true? If Major Magrath's statements be true, certain it is, that no vestiges remain by which to distinguish the footsteps of *Truth* from those of *Falsehood*. For I can with the utmost truth declare, that if no point remained upon which to rest my defence, except Major Magrath's account of the transaction of the 27th June, I would most fearlessly rely upon it; for it contains inconsistencies so numerous, so glaring, and so insurmountable, that I protest I would not dare venture into Court to prove them, with a hope of being believed. They should have remained for ever in oblivion, had they not fallen from the lips of the Prosecutor himself.

Mr. President, I have said, that the fact of the receipt of a sum of £50 2s. 6d. by Major Magrath is admitted, but that the question, *was that sum when entered to the credit of the Race funds, intended to comprise the three items spoken of; or was it separate from them?* remains



to be decided by the Court. Before entering upon the evidence, however, which brings us down to the meetings in July, I must beg the attention of the Court to the fact, that this case has at no period assumed any very definite shape in the mind of the Prosecutor himself.— Had I no evidence but that which has been delivered by the witnesses before the Court, it might perhaps be possible for the ingenuity of man to cast a shadow of doubt upon the truth. Though I can hardly conceive this possible. But, Sir, I have happily lived to verify the wise aspiration of the man of sorrows, when in the bitterness of his soul he exclaimed, "Oh! that mine adversary had written a book!"

*Mine adversary, Sir, "has written a book,"* and from it I shall shew the Court, that the memory of the Prosecutor, (especially as to the sum of £28 7s. 6d.) has constantly varied with every variation of circumstances, and that his case has been again and again patched and mended, to suit these varying circumstances. Let us then consider the view which the Prosecutor took of my charge against him as to the sum of £28 7s. 6d., when he published that Pamphlet on the 20th of August, 1840. At page 4, he states, "So stands the charge; and the question is thus broadly put, have I embezzled £28 7s. 6d. of the Race funds, or have I been falsely accused by a wilful slanderer. In three several shapes Mr. Maitland has recently advanced this accusation; 1st, that he paid me £28 7s. 6d. himself; 2d, he asserted before Mr. Heath and Serjeant Holland, that he gave Mr. Heath £28 7s. 6d.; and 3d, in the pamphlet he avers that it was paid me by Colonel Fraser, by cheque on the Farmer's Bank in my favor. Whether each of these substantially different charges refers to a distinct sum of £28 7s. 6d., or whether Mr. Maitland, with characteristic sagacity, has made his statement in three different forms, to afford a chance of *one at least proving correct*, must be left to himself; suffice it for me to meet it in its last tangible shape."

Now, Sir, I should say, that it is tolerably clear from the wording of this whole passage, that Major Magrath knew perfectly well that only *one* sum was intended, because, Sir, he says, "in the pamphlet he avers that *it* was paid me by Colonel Fraser." Now, if Major Magrath was under an impression that two or more sums were charged against him, the expression "*it*" would never have found place in that paragraph. But it cannot at all events be denied, that he then professes that his mind is undecided upon this point. On reflection, however, Major Magrath finds that he has denied the receipt of a sum of £28 7s. 6d., and therefore, unless it was asserted that he had received *two* sums of that amount, his denial must prove untrue; and consequently we find him at page 6, stating:—

"Soon after Colonel Fraser's return I waited on him, and for the first time found that the £28 7s. 6d., as stated by Mr. Maitland, and having been paid by him, Mr. Maitland, first to Mr. Heath, and then to me, to be one and the same sum that I had received from Col. Fraser, for J. Maitland and P. Buchanan, which was at the time Mr.

Maitland brings the charge against me credited to the Races, and included in the sum of £50 2s. 6d."

We find here several propositions worthy of notice, some expressed directly, and others by implication. It is stated, that up to the period of Colonel Fraser's return, Major Magrath had believed that I had charged *two* sums of £28 7s. 6d. against him. That upon the occasion of his interview with Colonel Fraser, his mind was disabused of that idea; for he then found that only *one* sum was intended. And lastly, it is implied that Major Magrath had always admitted the receipt of £28 7s. 6d. from Colonel Fraser. But replete as this paragraph is with matter, I cannot help feeling surprised, that inasmuch as the Prosecutor found it expedient to point out the *time when* his mind was disabused as to the erroneous notion of *two* sums being charged upon him, he did not also hint at the *manner in which* that change was brought about. I cannot help feeling surprise, that while he fixed accurately the moment when his mind was at length opened to a perception of the fact (which no person but himself ever doubted) namely, that the only sum I ever charged upon him was the balance which had lain at the Farmer's Bank to Colonel Fraser's credit,—I feel surprise, I say, that he did not also explain the *means* by which his sudden, though very late conversion, was effected. For when we turn to the particulars of that interview with Colonel Fraser, we do not find him explaining to Major Magrath any of my views on this matter. Indeed it does not appear to the Court that Col Fraser had been apprized of these views, as he had just returned after a lengthened absence. Major Magrath has himself informed the Court, that his receipt was not shewn to him; so that all that passed during this interview, (so far as we are informed) may be stated shortly thus. Major Magrath made some enquiries of Colonel Fraser as to the sum of money which had been in the Farmer's Bank. Colonel Fraser said it had been paid to Major Magrath. The Major declared he did not recollect it. To which Col. Fraser replied, that he must be under a mistake, as he *held his receipt*. What it was in this conversation which so suddenly disabused Major Magrath's mind of his former erroneous idea, and convinced him that I only intended to charge him with the receipt of *one* sum of £28 7s. 6d. remains for his ingenuity to explain.

But, Sir, we must not stop here, for singular as it may appear, yet true it is, that we have within the short compass of nine pages, a *third* view of the case, essentially different from either of those before stated.

The arbitrators, (as Major Magrath pleases to call them) though I beg once for all to refer the Court to the 8th page of his own pamphlet, to shew that they are in reality no arbitrators, but merely volunteers, I having no concern in their appointment. These gentlemen, however, had found that Major Magrath had received a sum of £28 7s. 6d. and that that sum was included in the sum of £50 2s. 6d. The Prosecutor of course, with characteristic sagacity, must make the most of this verdict in his favor, consequently we find him at page 9 stating: "This extraordinary charge may be thus summed up; I am accused of



receiving £28 7s. 6d. from Colonel Fraser, and of subsequently denying its receipt. I have proved to the satisfaction of the arbitrators, that the balance with which I credited Mr. Maitland £50 2s. 6d. was correct, and was made up of three sums, one of which was the very sum of £28 7s. 6d. received from Colonel Fraser.

"Now, unless another sum of precisely the same amount can be shewn to have been received by me, and *this has not ever been asserted*, my refutation of the slander is complete."

We find then, that he sets out professing his inability to decide whether I meant to charge him with the receipt of two sums of £28 7s. 6d. or of only *one*. He would next explain away his denial, by declaring, that up to the period of Col. Fraser's return, he conceived himself to be charged with *two* sums, and he then for the first time, was made aware of the fact, that the balance in the Farmer's Bank *alone* was said to have been received by him. And lastly, in order to make the finding of the "*arbitrators*," namely, "that the sum of £28 7s. 6d. received from Colonel Fraser, was included in the sum of £50 2s. 6d." conclusive, he stoutly avers that it had "*never been even asserted*," that he had received a sum of exactly similar amount to the £28 7s. 6d. admitted to have been received from Colonel Fraser, and already credited to the Race funds.

Amidst these ever-varying statements, which have not at any two periods remained the same, it becomes a matter of some importance, that we should establish upon what footing it is that the Prosecutor has launched his case in *this Court*, in order that we may see how that case is substantiated by the evidence; and I may safely say, that every member of this Court must have seen, (independently of any reasoning of mine,) that the case with which the Prosecutor has come into the Court is, that I *did* charge upon him the receipt of *two* sums of £28 7s. 6d.; because the Prosecutor having denied the receipt of *one* sum of £28 7s. 6d. must, (unless he compromise his truth) shew that there was another sum of £28 7s. 6d. in question, beside the one which has been proved to have been received.

But although I may be wrong in arguing from these premises, to the conclusion that the case is launched on the ground that I had charged *two* sums of £28 7s. 6d. upon Major Magrath, yet I cannot at least be mistaken in the conclusion itself. Because, unless it is launched on that ground, the first charge is perfectly futile; nay, it is more, it is a prostitution of the power of this Court for the purposes of private malice, without even a shadow of reason. For Major Magrath cannot be ignorant that the criminality of an act consists wholly in the intention.

Now, Sir, when I charged Major Magrath on the 27th of June with the receipt of £28 7s. 6d., if I intended to charge him only with the receipt of a specific sum, (namely, the balance in the Farmer's Bank, a sum which he admits to have received,) I am at a loss to

know how any awkwardness in my mode of expressing such intention could constitute a *crime*. It is then plain, that if the Prosecutor's case be not this, that I charged him with the receipt of *two* sums of £28 7s. 6d. then has he come into Court, stating in his first charge, what he knew to be false, a case which I will not presume.

When we look at the evidence too on the part of the Prosecution, we shall find Mr. Heath stating, in answer to the 57th cross interrogatory, that I *did* charge Major Magrath "with the receipt of *two specific sums* of £28 7s. 6d." And we find the Prosecutor in the 6th interrogatory in chief asking Colonel Airey the following question: "Did John Maitland on that occasion insist that there was another sum of £28 7s. 6d. beside that credited in the £50 2s. 6d.?" A question which from its peculiar and artful frame would in all probability have drawn from any witness less clear-sighted than the one then under examination an answer prejudicial to my case. But as I shall be obliged to enter minutely into Colonel Airey's testimony by and bye, I merely state the question now for the purpose of drawing attention to the case which the Prosecutor meant to have established.

With reference to Mr. Heath's evidence as to my charging two sums, inasmuch as I find it opposed by *all the other* testimony in the case, I shall not trouble the Court with any minute investigation into it. I shall, however, with permission of the Court, state it to be my firm persuasion, that Mr. Heath did not mean in any one particular to pervert what he thought to be the truth. But while I most gladly make this declaration, I must also in justice to myself state my further persuasion, that the frequent conversations, which from his habits of intimacy he must have held with Major Magrath on this subject, have in his mind assumed so much of the appearance of the recollection of past transactions, that he is unable to draw the line of distinction, and that consequently his evidence will not be entitled to that weight which under other circumstances it would undoubtedly carry.

I think I shall be able to shew the Court, that this observation on Mr. Heath's testimony is just, by referring to *one* or *two* instances of his *utter ignorance* upon points which had not probably been the subject of conversation, but which could not *possibly be unknown* to any person having such a knowledge of those transactions, as to render his testimony of any value. I asked Mr. Heath, in the 47th cross interrogatory, "Are you aware that it was a matter of question on the 27th of July, 1840, that Major Magrath had received £28 7s. 6d. from Col. Fraser?" His answer is, "I do not know whether it was or not."

Again I ask him, "For what particular purpose was that meeting called?"

"I really can't say, I do not remember."

Again, "Was Colonel Airey in the Chair both days, 24th and 27th of July?"

"I cannot positively assert it."

But though the Court should be of opinion that I have concluded hastily on this point, I am sure they will not think that I have shrunk from a closer investigation, in consequence of the difficulty of the task, but that they will consider his whole testimony themselves, and then I feel assured it will receive its due weight, and no more.

Mr. President, permit me now for a moment to refer to the facts as they are deposed to, on the part of the prosecution. Let me remind the Court, that this account of Major Magrath's (giving credit as it does for a sum in gross, instead of specifying the three items of which that sum is said to have been composed,) had on the 27th of June led me into a mistake; because, Sir, I shall for the purpose of my present argument consider Major Magrath's statement to be true, and I shall consider my having charged Major Magrath with a sum of £28 7s. 6d. to have been a mistake, arising from the mode in which that account had been extended. Let me remind the Court, that this mistake was not then explained to me. Let me remind them, that that account had been drawn out by Captain Magrath a few days previous to the 27th of June from those cash books, to whom therefore these items must be familiar. Let me remind the Court, that Major Magrath has sworn, that upon the 27th of June he did himself refer to his books, and find out the exact sum received from Colonel Fraser. Let me remind them of my letter of the 24th of July, charging Major Magrath with the receipt of £28 7s. 6d., the balance of Colonel Fraser's account, in addition to the sum of £50 2s. 6d.; and taking all this statement to be true, what am I entitled to expect from Major Magrath, on the 27th of July, at the meeting appointed by himself to investigate this very account? Am I unreasonable if I require Major Magrath to have produced this account, which had already caused one mistake, drawn out in detail, as it should have been originally written? Do I ask more than common experience warrants, if I demand that Major Magrath should have appeared at that meeting with an account so plain, and with an admission of the money received from Colonel Fraser, so unequivocal, that *no Steward* should have left that meeting with the shadow of a doubt upon his mind? Are these the natural, the inevitable consequences which would flow from those facts if true? and shall I not be warranted in concluding, that when those consequences were wanting,—when this sum of £50 2s. 6d. is again credited in bulk, instead of being admitted in a manner so clear and unequivocal, as to leave no shadow of doubt on the mind of any one present, is denied so pointedly, so distinctly, as to leave no room for doubt,—to cause the most decided impression upon the mind of every Steward present, of Colonel Airey, of Captain Arthur, Captain Markham, Mr. Boulton,—am I not, (I say) warranted in concluding these statements to be false?

But, Sir, if the statements of this transaction by the Prosecutor up to the meetings in July, be found inconsistent, let us see how his account of the proceedings at these meetings tallies with the evidence of the other witnesses.

Major Magrath is asked in the 37th cross interrogatory, "Did you explain it to the Stewards, at the meeting of the 24th July, 1840, that

you had admitted to have received the sum of £28 7s. 6d. from Colonel Fraser?" To which he answers:

"I did explain to the Stewards, that the £28 7s. 6d. that I got from Colonel Fraser, together with all the money I received on account of the Races, was included in the sum of £50 2s. 6d. then before Col. Airey in the account."

He subsequently corrects this by confining his explanation to Col. Airey, as Captains Arthur and Markham were "not attending."

Again, at the 42d cross interrogatory, "Did you declare that the sum of £28 7s. 6d. had been received by you from Colonel Fraser, and that that sum was included in the gross sum of £50 2s. 6d., at the meeting of the 27th July, 1840?" To which he replies:

"I did. When asked by Colonel Airey if I had received the sum of £28 7s. 6d., I said I had, and that I included it in the sum of £50 2s. 6d."

Now, Sir, let us turn to Colonel Airey's answer to the 5th cross interrogatory. The question runs thus:

"Did I understand you to mean in your answer to the 5th interrogatory in chief, that Mr. Maitland charged Major Magrath with £28 7s. 6d. in addition to the sum of £50 2s. 6d. included in his account?" And this is the answer:

"Major Magrath implied, that all the monies he had received were included in his account, while Mr. Maitland insisted that the £28 7s. 6d. received of Colonel Fraser, was separate, and in addition to the amount so credited. At one of the meetings of the Stewards, Mr. Maitland said, that he paid Major Magrath £28 7s. 6d., or thereabouts, which Major Magrath denied having received from Mr. Maitland. As President, I observed, that it was a matter of little moment whether he had received it actually from Mr. Maitland *in person*,—upon which great stress appeared to be laid,—or whether he had received it through Mr. Mr. Maitland's intervention. To this Major Magrath stated, that all the sums that he had received, formed part of an amount of which the sum total was £50 2s. 6d., or thereabouts. To which Mr. Maitland replied, that the £28 7s. 6d. to which he alluded, was either different from, or in addition to the component parts of that amount, in which Major Magrath said that £28 7s. 6d. was included."

Hear him again, at the 6th cross interrogatory:

"I wish to direct your attention to your answer to the 7th interrogatory, and to ask you whether Major Msgrath ever gave the Stewards a positive answer, that he had admitted to have received the sum of £28 7s. 6d. from Colonel Fraser?"

"He positively said, that he had not received it from Col. Fraser's hands."

Again, he is asked in the 7th cross interrogatory, "Did he positively state, that Colonel Fraser had paid him the sum of £28 7s. 6d. in any way?"

"No, he did not. He denied positively that he had received it from Colonel Fraser; but in his answer *he implied* that he had received so much from Colonel Fraser, *because* he insisted that that sum would be found a component part of the sum credited in the account,—the sum of £50 2s. 6d."

I have been fearful, Sir, of trespassing too long on the attention of the Court, and have therefore taken the evidence *by sample*, rather than enter into that general and minute investigation which I could have wished; and I trust the Court will indulge me while I refer to one or two answers of the other witnesses on the point. Major Magrath's receipt to Colonel Fraser is produced to Mr. Boulton, and he is asked when he first saw it? and that question is followed at the 16th interrogatory by the following question:

"Was the existence of that receipt consistent with Major Magrath's statement, at the meeting in July?" Which was answered thus:

"Decidedly not. The impression on my mind, when the receipt was produced, for the £23 7s. 6d. was, that it was at direct variance with what Major Magrath said, with respect to that sum, at the July meeting of the Stewards. Mr. Maitland charged him with having received £23 7s. 6d. in addition to the £50 2s. 6d. and Major Magrath denied it."

He is then asked, "When he first knew that the sum of £50 2s. 6d. was composed of the items into which it is now divided?" And he answers:

"At the meeting held in August."

He is next asked, "Whether he knew it at the meeting in July?" To which he answers:

"No."

If we now turn to the evidence of Captain Arthur, we shall I think find the same facts more clearly, because more succinctly expressed.—He is asked at the 7th interrogatory, "How many sums of £23 7s. 6d. did Mr. Maitland charge Major Magrath with having received at the meeting in July?"

"One sum."

At the 8th interrogatory, "What sum of £23 7s. 6d. did you understand that to be? I mean was the source from which it was derived mentioned?"

"I understood it to be a check from Colonel Fraser for that amount."

At the 9th interrogatory, "Did Major Magrath admit that he had received that sum?"

"He denied having received that sum."

At the 10th interrogatory, "Did Major Magrath inform the Stewards that he admitted to have received the sum of £28 7s. 6d. from Colonel Fraser?"

"He did not."

At the 11th interrogatory, "When did you first see the receipt from Major Magrath to Colonel Fraser?"

"On Colonel Fraser's return from Lower Canada."

At the 12th interrogatory, "Did you consider the existence of that receipt consistent with what Major Magrath stated in July?"

"Directly at variance."

Captain Markham is asked by the 6th interrogatory, "Was the sum of £28 7s. 6d. spoken of by Mr. Maitland on that occasion, as having been paid to Major Magrath, and not accounted for by him?"—To which Captain Markham replies, not directly, but by giving an explanation of the whole matter as he remembered it to have occurred.

Mr. Maitland said, that Major Magrath had received a sum of £28 odd, or thereabouts, which he did not account for in his accounts. Major Magrath produced his account in which he credited the Club with a gross sum of £50. Mr. Maitland then said, 'in addition to that sum already mentioned, you received a sum (to the best of my recollection) of about £28 odd.' Major Magrath said, 'no.'

And he is asked at the 8th interrogatory, "What sum of £28 odd did you understand that to be; I mean, was the source from which it was derived mentioned?"

"To the best of my recollection, it was a cheque on some Bank, given by the previous President, Col. Fraser."

Mr. President, I would most willingly have cited every tittle of Captain Markham's evidence, had I not hesitated to trespass too long upon the attention of the Court; because I feel, that if he had been the only witness examined upon the trial, my defence would have been found written in his testimony as with a sun-beam. His evidence differed indeed as was natural, in *minor* points, from that of the other witnesses; but in the main all agree. His evidence bears the stamp of originality. In it he stated to the Court, clearly and succinctly, the strong impression which the transaction had made upon his mind; and from that statement, no ingenuity on the part of the Prosecutor,—no perseverance on the part of some members of the Court, to whose mind that statement was not conclusive, could induce him to move.

And now, Sir, permit me for a moment to return to the question put to Major Magrath, and his answer before cited.

"Did you declare that the sum of £28 7s. 6d. had been received by you from Colonel Fraser? and that that sum was included in the gross sum of £50 2s. 6d. at the meeting of the 27th of July, 1840?"



"I did. When asked by Colonel Airey if I had received the sum of £28 7s. 6d. I said I had; and that I included it in the sum of £50 2s. 6d."

And let me ask the Prosecutor how I am to understand that answer? Is it a quibbling prevarication, intended to produce an impression on the mind of the Court, which the truth must dispel? Or is it a plain statement meaning what it imports? I care not which alternative he selects. If it be a quibble, a prevarication,—the explanation of which will by and bye call forth a display of ingenuity on the part of the Prosecutor,—I have no remark to make. The assumption is his condemnation. But if it be a plain statement meaning what it imports, I ask the Court whether I have not proved it false? I appeal to the whole evidence of Colonel Airey, of Mr. Boulton, of Captain Arthur, Captain Markham, and I ask the Court whether I have not proved it false? Has not that body of clear, unimpeachable evidence shone out like the meridian sun, and dissipated the mists and vapours which for a while obscured and deformed the truth.

But, Sir, it is sought to explain away that denial on the part of Major Magrath, by confining it to a denial of the receipt of a sum of £28 7s. 6d. in addition to the sum of £50 2s. 6d.; and then this denial so explained, is again by implication converted into an admission of the receipt of that sum included in the £50 2s. 6d.; and upon this view of the case I will first observe, that I am not concerned to prove its fallacy. For if I have shewn the Court, that Major Magrath did not plainly inform the Stewards that he had received the sum in dispute,—the balance which had lain in the Farmer's Bank,—the sum said to have been received on Col. Fraser's cheque. If I have shewn the Court that he did not avow that, and further, that he did not state that that identical sum was one item of which the £50 2s. 6d. was composed, then the foundation of my argument remains firm as truth itself, and no power on earth can shake it. I care not what is established by implication; but were I concerned to meet that quibble, I feel that I could most triumphantly do so, out of the mouth of every witness for the prosecution, and without the assistance of one particle of the evidence adduced on the part of the defence.

I may perhaps, without subjecting myself to the charge of prolixity, remark here, that when I found the Prosecutor guarding his statement, "that he had explained this matter to the Stewards," by saying that he "had explained it to Col. Airey, and that Captains Arthur and Markham stood aloof and were not attending;" and when I found Mr. Heath, in answering a similar question, say, "He did explain it, *addressing himself to the President*,"—from that moment (I say,) though I had not conversed with Captain Arthur, Captain Markham, or Mr. Boulton on the subject, I felt confident that such statement could not be true,—I felt confident that such statement would prove false, upon the clear principle, that a man who has made a plain statement of a simple transaction, will never feel it necessary to guard himself against the possibility of contradiction, by swearing who attended to him and who did not. Seeing, however, that the Prosecutor felt it necessary to guard

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his evidence so cautiously, I must confess, that my astonishment was at its height when I found the anxious pertinacity with which he sought to prove what it was that he had stated at that meeting, out of the mouth of whom?—of Captain Markham, who had (according to the Prosecutor's own evidence) paid no attention to what passed on the occasion mentioned. But, Sir, I will not refute that fallacy by appealing to the evidence either of Captain Arthur or Captain Markham, because they possibly found nothing in the scenes then presented to attract attention, or distract the even tenor of that conversation in which the Prosecutor has described them to have been absorbed!! But, Sir, I will appeal to *Colonel Airey*,—I will appeal to the man to whose peculiar attention all the Prosecutor's statements (as well direct as implied) were addressed; and when Major Magrath's pamphlet is placed in his hand, and he is directed to read the paragraph which says, "In presence of Colonel Airey and all the Stowards, on the 24th of July, I did state, and do still, that I *never did* receive the sum in question from Colonel Fraser, in addition to the sum at that moment credited to the Races; and it must appear to every one, that Mr. Maitland wanted me to acknowledge the same sum twice." And when Colonel Airey is asked at the 9th interrogatory, whether any such statement as that was made, what is his reply? "I have *no* recollection of Major Magrath's denying having received the sum of £28 7s. 6d. *in addition*, because I do not remember the conversation's taking that turn."

I have now, Sir, concluded my observations upon the testimony of these gentlemen; but I cannot pass on to the consideration of the evidence adduced on the defence, without expressing to the Court the very keen sense which I feel of the injustice done me by the Prosecutor, in not having called these witnesses on opening his case. They, Sir, were not the dependants, the friends, the relations of the accused. These gentlemen occupy the most exalted station in this country. Their testimony was above imputation. They were not the mere casual observers, the uninterested spectators of the facts which they have related and the scenes which they have described. They were the very best witnesses. The persons whose business and duty it was to know and decide upon the very point at issue. And I assert, without fear of contradiction, that the conduct of the Prosecutor, in declining to call such witnesses, was what would have imperatively commanded any Judge, sitting in a court of criminal justice, had I been arraigned before him as a *felon*, to have ordered my acquittal. And am I to be told, that this is the Court, this the sort of proceeding in which the Prosecutor is to be allowed to bring forward *half* a case? Does the Constitution extend its protecting shield over us, when our lives, our liberty, our property is at stake? and does it leave us altogether defenceless when those interests are attacked which are dearer than life itself? Is the Prosecutor to pursue towards me with impunity in this Court, a line of conduct which would have insured the acquittal of a *common felon*?

Mr. President, had that evidence been adduced by the Prosecutor, I should not have troubled the Court by calling a *single witness*, because the only testimony upon which my condemnation could proceed, upon which it could be grounded, would have been shewn to be unworthy of

belief; but inasmuch as I have been obliged to call those witnesses myself, I have felt it to be my duty to bring forward such further evidence as I deemed conducive to my defence. And truly when I reflect upon the clear and convincing evidence of the denial of the receipt of the sum of £28 7s. 6d. proved by those who ought to have been the witnesses of the Prosecutor; and when I add to that testimony the denial of it at the Farmer's Bank, before two of the officers of that institution; (and then at least the denial was simple,—then at least the Prosecutor ceased to work by rules of "addition;") and when I look to the denial of the receipt of the sum before Mr. Robert Maitland; when I consider that such denial was continued up to the time of Colonel Fraser's return, as is palpable from Colonel Fraser's evidence; when I consider these things, I cannot help admiring the hardihood of the conduct of the Prosecutor, who has dared to come into this Court to seek my condemnation, on a case necessarily based on his uniform admission of the receipt of that money.

Sir, had my defence rested on my brother's testimony solely, I should perhaps be induced (however reluctantly) to trouble the Court with some observations; but happily his evidence (as in every other particular, so especially in this,) will be found so firmly based in truth, and so strongly supported by circumstantial evidence, that I do not feel it necessary here to make a single remark. I must, however, before passing on to the next branch of the case, say a word or two on the subject of these cash-books, which some gentlemen have thought entitled to so much weight. I shall not trouble the Court with the enquiry whether these books are or are not legal evidence, in support of this prosecution, though I apprehend that it could be shewn upon very plain principles that they could not be used as evidence against me; but I shall without any investigation upon that point, proceed to enquire to what weight they are entitled, considering them receivable as evidence. Now, Sir, if these books are of any force against me, that force must be derived from an argument somewhat of this sort. There is found in these books no entry of a sum of £50 2s. 6d., but the three items spoken of do together equal £50 2s. 6d., therefore the credit of £50 2s. 6d. in Major Magrath's Racing accounts must be intended to have been composed of these three items; and I am prepared to admit, that under certain circumstances, this argument would be one of the most conclusive nature. But in this case, as it is detailed in the evidence for the prosecution, the argument is not only utterly powerless, but seems to me to be an insult to common sense. Had these books contained, as Major Magrath declared they did, "a regular entry of all his money matters for the last two years," one might indeed conjecture from the absence of an entry of the sum of £50 2s. 6d., that no such sum had been received. But when I asked Captain Magrath to point to the entry of Mr. Domville's cheque, of Mr. Dunn's subscription, Mr. Cayley's, Mr. Hewson's, Mr. Dixon's, Mr. Strachan's, &c. &c.,—and when I was informed that no such entries were to be found in these books,—when in short we learn that the omission to enter sums relative to the Races seems to have been the general rule, and the entry of such sums the exception,—however fairly we might argue from the omission that the sum had been received,—I must confess that I feel at a loss to

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conjecture how such omission affords any ground to conclude that it had not been received. But then it is said Captain Magrath caught very early glimpses of the conspiracy which I had formed against his brother; and he has informed the Court that my straitened circumstances, and other matters which he more darkly hinted, had induced him to disapprove of such entries being made in these books, and to advise Major Magrath to discontinue them; and the Prosecutor informed the Court, when he stopped my examination of Captain Magrath, as to the entry of these sums, and admitted that they were not to be found in his cash book; that it was in consequence of such hints from the witness that these entries were omitted; and in meeting this argument, I do not mean to consume the time of the Court, by dwelling upon the difficulty which I felt, while this witness was being examined, (and which difficulty reflection has not diminished) in accounting for the *modes in which the regular entry of monies received by Major Magrath, could forward that conspiracy which I had formed against him; nor shall I make any comment upon the spirit in which that witness made his relation. The Court will no doubt remember those remarks, although some of them were not entered upon its proceedings, and will judge more impartially than I can, whether they fell from the lips of one constrained by a solemn sense of that oath which he had taken, or whether they proceeded from the unrestrained passion of a malignant heart.*

But, laying aside these difficulties, it will I apprehend tax the ingenuity of the Prosecutor in some small degree, to explain how the prudent forethought of Captain Magrath, which had been excited by the discovery of certain Race entries in this general cash book, can account for the omission of Mr. Domville's cheque. That, Sir, was the first sum received by Major Magrath on account of the Races,—yet there is no entry either of its receipt or payment; and in truth, the total oblivion into which the matter of this cheque had sunk, on the occasion of the meeting of the Stewards in November, suggests the passing thought, that however these omissions might enable the Prosecutor to carry into effect a *conspiracy against me*, (if I am not guilty of too gross a breach of courtesy in just supposing such a thing possible for argument's sake) it is not very conceivable how my schemes could be furthered by such means. But how can this acquiescence on the part of Major Magrath, in the prudent caution of his brother, be made to account for the omission of the very first sum which ought to have been entered? Can the Captain have foreseen that the sums of £16. 10s. and £28 7s. 6d. would be entered; and further, that such entries would materially assist a certain conspiracy about to be formed against the Major? (For the payment of Mr. Domville's money preceded the Major's appointment as Treasurer;) and foreseeing these things, can he have instructed the Prosecutor to omit the first sum received, and then to make the *subsequent* entries to warrant the omission of the first? Or is the whole a piece of new material manufactured to patch and mend the old covering already worn out? If it be so, I think I may venture to say, that the Scripture prediction will befall it,—namely, “that the new will take from the old, and the rent will be made worse.”

But let us pass to the next premise of this syllogism,—namely, that the three items exactly compose the sum of £50 2s. 6d.; and upon this I would first observe, that I am not driven to prove the entry “from Col. F. Race’s account, £28 7s. 6d.” to be false. The proposition which I am concerned to maintain is, that the entry of £50 2s. 6d. in the Race account, was *originally* intended as an entry of a *gross sum*, and had no reference to these items. But I think I may say thus much, that the arguments by which I have attempted to maintain the one proposition, might be brought to bear, without any great stretch of ingenuity, on the other. Having mentioned the entry, “Murchison per Maitland ‘to be paid,’ £1 3s.,” and having contrasted that entry with Mr. Maitland’s testimony, I shall here only mention it, though it is well deserving our utmost attention. Let us see, however, whether we cannot find some other pretty evident marks of fabrication in these remarkable books. I know, Sir, that these are hard sayings,—I know that under other circumstances I should run some risk of prejudicing my cause by the mention of them, but the Court will not, I am sure, forget that this is no ordinary trial; this is not a case in which the implication of the Prosecutor can have no tendency to secure the acquittal of the prisoner. I am not indulging in *recrimination*,—my dearest interests, my *all* is at stake. My innocence cannot consist with *this*. It is therefore that I say these things. Would to God I could, for the honor of the service, for the honor of humanity, bury them in oblivion!

Will the Court then be pleased to look at that second book produced, and say whether the destruction of so considerable a portion of it would not awaken in the Court (under any circumstances) a lively suspicion; but most especially, when the person producing the book so mutilated, is desirous of proving, that all the entries in that book added together, amount to a certain sum, and no more? Will the Court be pleased to examine that book, and say whether the frequent blanks to be found in almost every page of it, is not a circumstance to awaken in the mind of the Court a most lively suspicion? Look at the entries themselves. Contrast it with its predecessor, though even that is far from immaculate. But if the Court should not deem these considerations deserving of that weight to which I have been always taught to consider them entitled, I call on the Prosecutor at least to shew, how all that prudent caution which caused the omission of Mr. Donville’s cheque, *lest my conspiracy should succeed*,—which caused the omission of Mr. Dunn’s of Mr. Cayley’s, of Mr. Hewson’s of Mr. Strachan’s,—of every thing in fact, except the very items required to compound the exact sum of £50 2s. 6d.—why, I ask, was this prudence forgotten at the *eleventh hour*? Why, just as the plot is thickening, do we find *this*, the last subscription (Mr. Cummins’) said to have been received on the 20th of February, 1840, entered in judgement against me? Why? But this is not all. With a precision becoming books so faithfully kept, 5s. cannot be added to Mr. Cummins’ subscription without the addition of an &c.; and when required to explain to whom the &c. referred, Major Magrath informed the Court, that I, when I paid this sum, stated that the 5s. was Mr. Eastwood’s subscription. How fortunate that the amount of 5s. should

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have been withheld for *two years*, and then come to light exactly when required, to complete the sum of £50 2s. 6d. For Mr. Eastwood when produced, swears, that he never attended the Races but once, and that he did on that occasion, and on that occasion only, (which was in the year 1837,) subscribe 5s. to the Races. So that having kept the sum from the year 1837 to 1839 in my pocket, at length (moved, I suppose, by the stings of conscience,) I dropped it from my avaricious grasp!—The conclusion, Sir, is worthy of the premises, therefore the sum of £50 2s. 6d. must have been intended to have been originally composed of these items. But I have said so much in disproof of this position before, that I dare now only mention it to the Court.

Mr. President and Gentlemen, I shall introduce the few remarks which I mean to offer upon the evidence for the defence, by directing the attention of the Court to the brief histories of this case, as related by the Prosecutor, and by myself. These histories are expressed in figures, (if I may so speak). I have had the honor of laying several copies upon the table, for your information, Sir, and that of the other members. The facts have been in each case in part derived from the same source,—namely, from Major Magrath's admissions of the payments made by him, and the dates of such payments in evidence before the Court. But in other parts,—namely, as to the receipts by Major Magrath, those facts have been derived in his history from his own evidence and admissions; in mine from the evidence of the defence.







MAJOR MAGRATH'S Receipts as stated by him.

	Dr.	£ s. d.	£ s. d.
1839.	To Mr. Donville's subscription.....	5 0 0	
June 29.	" money collected by Messrs. Bell & Baker, Innkeepers.....	16 10 0	
July 6...	" Mr. Atkinson's subscription.....	2 10 0	24 0 0
Aug. 13.	" cash from Col. Fraser, races account.....		28 7 6
1840.	" cash, Cummings' subscription, &c.....	5 5 0	
Feb'y 14.	" subscriptions collected after the month of August, 1839.....	19 0 0	
	" Balance due to Major Magrath.....	31 12 2	
			108 4 8

MAJOR MAGRATH'S Receipts as stated by Mr. JOHN MAITLAND and Mr. ROBERT MAITLAND.

	Dr.	£ s. d.	£ s. d.
1839.	To cash of Captain Meade, 43d Regiment.....	6 5 0	
June 20.	" the money collected on the 1st and 2d days of the Races.....	53 17 6	
"	" Mr. Donville's cheque.....	7 10 0	
" 27.	" Balance left (after paying sundry accounts) of the money deposited in Mr. Tod's hands which was collected on the 3d day of the Races.....	3 8 3	

MAJOR MAGRATH'S Payments as admitted by him in paper filed in evidence, marked A. B.

	Cr.	£ s. d.	£ s. d.
1839.	Moore, cartage, two loads.....	0 15 0	
June 19.	Stewards' bar bill on course.....	1 15 0	
"	By order of Mr. Maitland to 93d Band.....	6 5 0	
" 20.	By order of Mr. Maitland, Troop Purse.....	6 0 0	
"	Paid Mr. Maitland money lost by him or overpaid.....	2 10 0	
"	Uncurrent money handed me by Mr. Maitland.....	1 5 0	
"	Three men's expenses remaining at course three days	0 15 0	
"	Two carpenters four days.....	2 0 0	
"	Troop for refreshment and drink whilst on duty during races.....	2 0 0	
"	Paid, but cannot account for, and to be charged to him	0 11 1	
"	Watson's single waggon broken.....	1 10 0	
" 23.	Mr. Heath, as per receipt.....	6 15 2	
" 28.	S. M. Carr and S. Holland for collecting subscriptions	2 0 0	
"	Account book.....	0 5 6	
" 29.	Order of Major Markham to Mr. Scarlett.....	10 15 0	
July 6...	By order of Mr. Maitland to Mr. Atkinson.....	10 0 0	45 1 9
" 18.	Do do Mr. Willard.....	4 7 6	
"	Do do Mr. Meredith.....	6 0 0	
August 1	Do do Mr. G. Duggan.....	35 0 0	
1840.	Mr. Maitland, balance due him for 1838.....	55 7 6	100 9 3
April 6..	Less unaccounted for.....	8 6 6	108 15 9
			0 11 1
			108 4 8

MAJOR MAGRATH'S Payments as admitted by him in paper filed in evidence, marked A. B.

	Cr.	£ s. d.	£ s. d.
1839.	Moore, cartage, two loads.....	0 15 0	
June 19.	Stewards' bar bill on course.....	1 15 0	
" 20.	By order of Mr. Maitland to 93d Band.....	6 5 0	
"	By order of Mr. Maitland, Troop Purse.....	6 0 0	
"	Paid Mr. Maitland money lost by him or overpaid.....	2 10 0	
"	Uncurrent money handed me by Mr. Maitland.....	1 5 0	
"	Three men's expenses remaining at course 3 days.....	0 15 0	
"	Two carpenters 4 days.....	2 0 0	

**MAJOR MAGRATH'S Receipts as stated by Mr. JOHN MAITLAND and Mr. ROBERT MAITLAND.**

	Dr.	£ s. d.	£ s. d.	£ s. d.
1839.	To cash of Captain Meade, 43d Regiment.....		6 5 0	
" 20.	" the money collected on the 1st and 2d days of the Races.....	53 17 6		
" "	" Mr. Donville's cheque.....	7 10 0		
" 27.	" Balances left (after paying sundry accounts) of the money deposited in Mr. Tod's hands which was collected on the 3d day of the Races.....	3 8 3		
			71 0 9	
July 6.	" Mr. Atkinson's subscription.....		2 10 0	
" "	" Money collected by Messrs Bell and Baker, Innkeepers.....		16 10 0	
				90 0 9
Aug. 10.	" Captain Cummins' subscription.....		5 0 0	
" 13.	" Amount of Colonel Fraser's cheque for balace in the Farmer's Bank		28 7 6	
" "	" Subscriptions collected after the month of August, 1839.....		19 0 0	
1840.				1 5 0
April 6.	" Mr. Murchison's subscription.....			
				143 13 3

To amount to be accounted for by Major Magrath brought down 41 8 7

*Discoveries lately made, also to be accounted for by Major Magrath.*

" Short credited on Mr. Donville's cheque..... 0 2 2½

" Overcharge on payment made to Mr. Willard..... 0 2 6

" Mr. Joseph Heughen's subscription..... 0 10 0

" Mr. John Dodsworth's do..... 0 10 0

" Mr. Henry J. Williams' do..... 0 10 0

" Mr. Henry B. Williams' do..... 0 10 0

43 13 3½

	Cr.	£ s. d.	£ s. d.	£ s. d.
1839.	Moore, cartage, two loads.....		0 15 0	
June 19.	Stewards' bar bill on course.....		1 15 0	
" "	By order of Mr. Maitland to 93d Band.....		6 5 0	
" "	By order of Mr. Maitland, Troop Purse.....		6 0 0	
" "	Paid Mr. Maitland money lost by him or overpaid.....		2 10 0	
" "	Uncurrent money handed me by Mr. Maitland.....		1 5 0	
" "	Three men's expenses remaining at course 3 days.....		0 15 0	
" "	Two carpenters 4 days.....		2 0 0	
" "	Paid, but cannot account for, and to be charged to him		0 11 1	
" "	Watson's single waggon broken.....		1 10 0	
" 23.	Mr. Heath, as per receipt.....		6 15 2	
" 28.	S. M. Carr and S. Holland for collecting subscriptions		2 0 0	
" "	Account Book.....		0 5 6	
" 29.	Order of Major Markham to Mr. Scarlett.....		10 15 0	45 1 9
July 6.	By order of Mr. Maitland to Mr. Atkinson.....		10 0 0	
" 18.	Do Mr. Willard.....		4 7 6	
" "	Do Mr. Meredith.....		6 0 0	
Aug. 1.	Do Mr. G. Duggan.....		35 0 0	55 7 6
				100 9 3
1840.				8 6 6
April 6.	Mr. Maitland balance due him for 1838.....			108 15 9
				6 0 0
	Less amount charged for Troop Purse.....		0 11 1	6 11 1
	Less unaccounted for.....			102 4 8
				41 8 7
	By amount to be accounted for to the Racing fund by Major Magrath			143 13 3

**MAJOR MAGRATH'S Payments as admitted by him in paper filed in evidence, marked A. B.**

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I have before touched upon the inconsistency of the Prosecutor, in pursuing the course which he has adopted instead of first calling for a Court-Martial upon himself, in consequence of which we are now witnesses of rather an anomalous proceeding; for while the party accused is permitted to screen himself by his own evidence, I (who am in fact the accuser) cannot be heard to support my charge. But not to dwell longer on this point, let us see which of the statements is most consistent with the nature of the thing itself, and with that part of the evidence which is undoubted. If Major Magrath's statement be true, he will at the time he paid Mr. Scarlett, have received but £21 10s. while he will have paid £41 1s. 9d.; that is, he will have been at the date of that payment, £23 11s. 9d. out of pocket. He will, when he paid Mr. Atkinson, (who has been examined before you) have been £31 1s. 9d. out of pocket. And at the date of his payment to Mr. Duggan, he will have expended £100 9s. 3d. having then only received £24; that is, he will have paid from his own funds £76 9s. 3d.

Sir, it is not my purpose to argue, that the payment of this sum by the Prosecutor out of his own pocket was *impossible*; nay, I shall not press the Court with any argument founded on the improbability of such a proceeding; nor shall I urge upon your consideration Major Magrath's well-earned character for prudence, as increasing that probability in a tenfold degree. But what I do say is, that such a supposition is at perfect variance with all the evidence in the case. Can any man believe, that when Mr. Scarlett called upon Major Magrath, on the 29th of June, and received *his* demand, such payment was made not from Race funds, but from the Prosecutor's private purse? Who that heard Mr. Atkinson's clear and explicit statement, will so outrage his own common sense, as to allow any amount of direct testimony to persuade him, that at the time of that payment, the Race fund was indebted to Major Magrath £30 and upwards? How is it possible to make such a state of things consistent with the payments of that stale debt to Mr. Willard, in the manner he has detailed in evidence,—a debt due for 11 months upon my note of hand. But when Mr. Duggan asks Major Magrath for the £35 due to him, and that too an old debt, (of the propriety of paying which, at all, out of the funds of that year, the Prosecutor entertained serious doubt) how is he answered! Is he informed of the desperate state of the finances? Does Major Magrath inform Mr. Duggan, that he was a creditor himself for a larger amount than Mr. Duggan, and consequently could not discharge his claim?—Quite the reverse. Major Magrath does not then put forward any claim against the Turf Club, but he pays Mr Duggan, "stating, that as he is not sure how the Racing accounts stand, Mr. Duggan must repay, if it should turn out that the funds were insufficient." Uncertain how the Racing accounts stood! Why, Sir, will it be believed, that at that period Major Magrath had received but two solitary sums, amounting together to £24; so that we are to believe, that with the sum of £24, which had indeed been disbursed before it was received, the Prosecutor had paid £66, and yet was not certain, when Mr. Duggan demanded his £35, whether enough did not remain to pay that too. But what is the language of Mr. Heath, when he called at the Military Secretary's Office in August? Does he complain to me of the injustice

done to Major Magrath, by appointing him Treasurer in June, and leaving him from that time up to August to pay large sums of money out of his own pocket, while a balance remained in the Bank unappropriated? Does he expostulate with me? Does he say, you appoint the Major in June, with hardly enough in hand to pay the small debt incurred on the race course, and yet you send down to him Mr. Scarlett, Mr. Atkinson, Mr. Willard, Mr. Duggan, to obtain payment of large sums, while you have not now in *August*, exerted yourself to procure for him the balance in the bank? Nothing of the sort. Hear Mr. Heath himself speak. He is asked at the 29th cross interrogatory, "Did you ever ask Mr. Maitland in the Military Secretary's Office to give you funds for Major Magrath?" and his answer is "No, but I said (having come there on troop business,) Major Magrath said the other day he was out of money, and if you have any, you had better give it to him." Heard Major Magrath say the other day he was out of funds! Why, Sir, if his statement be true, he never was *in funds*. He is appointed Treasurer the 25th—we find him paying Scarlett on the 29th, four days after, being then £24 out of pocket; up to the time of the payment to Mr. Duggan he had received no further supply, and yet, at the date of Mr. Heath's application he tells you, he had heard the Major say the other day he was out of funds.

Non ego."

"Credat Judæus appella

There is besides on the face of this account, a palpable inconsistency; for although the first sum of money admitted to have been received is £16 10s., on the 29th of June, yet we find credit taken between the 20th and 24th of June, for the sum of £1 5s. uncurrent money "*handed to me by Mr. Maitland*,"—so that the payment of the uncurrent money by me, and also the repayment to me of £2 10s. which I had overpaid, must have preceded any receipt by Major Magrath.

Let us now turn from that statement so filled with improbabilities, —I had almost said *impossibilities*—to consider the other history compiled from the evidence of Mr. R. Maitland, and see how that narration accounts for the various phenomena in the case; and *first*, if Major Magrath was paid £53 or £54, on the 24th of June, 1839, then we find him taking credit about that time for £1 5s. bad notes, and for a sum of £2 10s. paid to me,—so that the gross sum would be reduced to about £50, the very amount credited by Major Magrath. But see how exactly this statement tallies with the payments, as set out by Major Magrath himself. We shall not then find Major Magrath paying Mr. Scarlett, in a mode so utterly irreconcilable with his testimony,—we shall not find him £23 out of pocket at the date of that payment; for he will then have received £71 0s. 9d., and paid £45 1s. 9d. Mr. Atkinson's testimony will not then present an insurmountable barrier as it does to the belief of Major Magrath's hypothesis, but will be in perfect keeping with our statement, for he too will have been paid from Race funds; and instead of being obliged to account for that sudden and most unprecedented liberality of Major Magrath, which induced him to seek out, and pay my promissory notes of such old standing, (one



being due 11 months, the other *two years*,) we shall have assigned to us the less difficult task of believing, that having Race funds in his hands, he discharged those old demands; for, at the time he paid Mr. Duggan, he will have received £90 0s. 9d., and paid £100 9s. 3d. And then Mr. Heath's statement at the time that he visited the Military Secretary's Office,—namely, that he heard "the Major say the other day that the disbursements exceeded the receipts," instead of being perfectly inexplicable, falls in easily and naturally with this state of things. We will not then have a balance *left in the Bank for months*, while Major Magrath was paying *old debts* to a large amount out of his own pocket, but we will have that balance asked for and received, as soon as the other funds were exhausted. And lastly, when the sum of £8 6s. 6d. was paid me, we shall find Major Magrath indebted to the Race funds in a sum of £20 or £30, as I always asserted, instead of those funds being indebted to him in a similar amount.

And now, Sir, I do feel that this statement is so clear; that it accords so perfectly with the whole testimony in the case, and is illustrated so fully by the casual testimony which I have been enabled to adduce; it accounts so exactly for the payments proceeding "*pari passu*" with the receipts, (instead of leaving the matter in that inextricable confusion in which the other statement has placed it,) I feel all this so sensibly, that I will not consume the time of the Court with any comment on the subject. *One glance at the account* will have more effect than whole volumes of argument.

But I cannot conclude without making an observation or two on the testimony of Mr. R. Maitland; and the Court will first of all be pleased to observe, that the conversation of the 24th of June, 1839, deposed to by the witness, was not a *single, isolated* conversation, which having taken place, was never again brought before the memory of the witness for *fourteen months*, (as the Prosecutor would represent it,) but it was a conversation, the main features of which were *again and again* brought back to his mind, by a variety of circumstances detailed in evidence. The conversation of Tuesday recalled it. The applications of the various persons during the week recalled it. The direction to Mr. Scarlett, to Mr. Atkinson,—the explanation to Mr. Duggan,—all these circumstances recalled and fixed it in his memory. And having made this general observation. I shall not trouble the Court with an investigation into the detailed manner in which he gave his evidence,—with *dates and places always* specified,—thus throwing open the widest field to the cross-examination of the Prosecutor, which was certainly urged to a rather extraordinary extent. Had I, Sir, presented a *false witness* to prove the payment of the sum of £50, *three sentences* would have effected the object, without fear or cause of contradiction. But I might appeal to every part of the cross-examination as a test of the clearness and truth of that witness' testimony. The deduction of Mr. Murchison's subscription from my lodging money, was pressed with no ordinary pertinacity; and now, I am entitled to say, that unless Major Magrath can produce some written evidence to contradict

him,—unless he can produce such testimony to shew, that that deduction was not made from the period ending 31st of March, 1840,—unless he does so, I can triumphantly say, that the cross-examination has proved the accuracy of that witness' memory to a *perfect demonstration*. But I do not feel it necessary to labour the argument on this head, because I can confidently say, that never was a witness presented to a Court, every particle of whose testimony was so borne out and verified by all the other testimony in the case,—testimony preserved for me in a manner so casual and unexpected, as I cannot help again saying, that I consider it as the interposition of the hand of Providence for the demonstration of *truth*. I am not so ignorant of the proceedings in Courts of Justice, as to flatter myself Mr. Maitland's evidence cannot be distorted and cavilled at; but I appeal confidently to the evidence of Mr. Scarlett, Mr. Atkinson, Mr. Beckman,—to the different payments,—in short, to all the evidence in the case, as the clearest demonstration of its truth. Upon Mr. Heath's account of the meeting of the 28th July, I shall make no comment. The Court will not forget the awful pause which preceded his reply to the 21st cross interrogatory, when examined on the defence. "State, to the best of your recollection, what was the sum mentioned by Major Magrath as Mr. R. Maitland was leaving the room?" Did Mr. Heath, after all that had been said and written,—after his long examination in the Court, did he really forget that £50 2s. 6d. was the sum credited by Major Magrath, or was that pause for effect? The Court must judge. Upon the testimony of Mr. Dodsworth, Mr. Heughen, Mr. Williams, I have no observation to offer. The sums subscribed by these gentlemen also escaped Major Magrath's memory, at least after they were paid, for the Race fund is not increased by them, though up to the period of payment the memory of them seems to have been retained with sufficient clearness.

Mr. President and Gentlemen, such is the evidence, and such are some few of the observations, which have seemed to me necessary to its elucidation. I have deemed it my duty to meet this case fairly upon the evidence, lest in declining to do so, I might seem to shrink from the closest investigation; but having discharged that duty, it becomes necessary that I should lay before the Court the grounds upon which I submit, that an acquittal must upon many of these charges be recorded. Upon the first charge, Sir, I have probably said more than enough, because when I take Major Magrath's pamphlet in my hand, and when I find him admitting, that upon the return of Colonel Fraser to this city in August, he discovered that the sum which I had said on the 27th of June, that "I had paid first to Mr. Heath, and then to him," was in truth the same sum which he now admits, that the *only* sum charged against Fraser; when in short he admits, that the *mode of my expression* can be screwed up into *crime*. Unless indeed we mean to originate a new system, in which the *intention* of the speaker shall be considered a matter of indifference, and his *expression* alone as worthy of notice.

I have said, Sir, that the 2d, 3d, 4th, and 6th charges are, as I am advised, bad in point of law, and I am now to submit these reasons

which have convinced me that they allege no matter which this (or any other Court can, under our Constitution) consider criminal. I am aware, Sir, that it is the spirit of our Constitution to prevent, in all cases, the redress of injuries by individual force, and by requiring an appeal to the *laws*, rather than to the *passions* of individuals; to secure the harmony and peace of civilised life, instead of that endless confusion which must ever be found amongst men living in a state of nature.— And, Sir, I am not ignorant, that the law of England under which we happily live, is no less careful for the protection of our *characters* than of our *properties*. But the same Constitution which has forbidden us to take the law into our own hands,—which has substituted an appeal to the laws in the place of individual force,—has been especially careful to rescue every such appeal to a competent jurisdiction from the charge of criminality; because if that Constitution which deprives us of the natural protection of individual force, and substitutes in its room an appeal to some competent jurisdiction,—if that Constitution I say, were to permit such appeals to be followed by the penal consequences sought to be entailed on me by this prosecution, then, Sir, instead of *free men* living under the protection of the laws, we should become the slaves of the most refined tyranny. For if an appeal to a competent jurisdiction can be conspired into crime, where, I ask, shall we for the future find those who will dare to drag into light the deeds of the great and powerful? If such appeal be followed by those penal consequences, then, Sir, the weak and unprotected will continue to be trampled on by those who “move in different spheres of society.” The wrongs which become in proportion to the rank of those who perpetuate them the more heinous, will in that exact proportion remain unredressed; and then, Sir, peculation will for ever go unpunished. But, Sir, I assert that such is not the policy of the laws under which we live. That is not the spirit of the institutions for which we are contending. But the encouragement of such appeals, by every individual in the community, is apparent throughout our whole system; and least the weak and unprotected should be deterred from the discharge of their public duty, those institutions have declared, and the laws have declared, that such appeals to justice shall be most sacredly guarded, and that consequently the movers of them shall be protected from attack, *even though the subject matter of such appeals should prove to be false*. I am not ignorant, Sir, that the law gives a remedy for a malicious prosecution, but this is not that case, and even to such action a *probable* cause is a perfect defence.

When, then, I reflected upon the position of the parties to this proceeding—when I remembered that the one was the *Treasurer*, and the other the *Secretary*, hound to account to the public for the just administration of a fund in which the public was interested,—when I saw each of the parties charge upon the other, malversation in his office,—and when I saw the President in the discharge of his duty calling together the Stewards (the appointed guardians of this fund,) to decide upon these different charges,—and when I beheld both parties appearing before, and submitting themselves to the Court thus constituted,—when I heard the Judge who presided on that occasion, read that letter which constitutes the 6th charge against me, as the *indictment*, if I may so speak, upon which Major Magrath was to be tried,—(for, Sir, I was

then the Prosecutor),—and when I found those Judges declaring, that *some* of the charges at least, so preferred, were proved, I must confess that I felt unable to conceive how the present Prosecutor could make that letter the *indictment* as it were upon which that investigation proceeded,—(for the Court will remember, that the circulation of this letter has been confined to the Stewards),—I felt at a loss to conceive how he could make a few particular instances specified in proof of that indictment, the ground of any procedure against me in a Court of justice. But, Sir, firmly as I was impressed with the conviction, that this proceeding would be found unwarranted by law, I could not nevertheless contemplate this Court for weeks together gravely considering such charges, without entertaining some apprehension lest we should be found in the intricacies of this enquiry to have lost sight of the spirit of our Constitution and the letter of our law.

Mr. President, I might elucidate and enforce these principles, by arguments derived from every part of our history, but I have already troubled the Court so long, that I forbear to do more than cite an authority which will (I think) be found to justify the positions I have laid down. I allude to "*Bailey's case*," tried in the Court of King's Bench in the year 1778.

The prisoner in that case, Sir, was a Captain in the Navy, and he filled the place of Governor of Greenwich Hospital. He saw, (or fancied that he saw) in the Lords of the Admiralty, conduct unworthy of the trust reposed in them, and finding it impossible by repeated applications to arouse these persons to a sense of their duty, he did print and circulate amongst the General Directors of the Hospital, (and they in fact comprised all the rank and station in England,) a pamphlet containing the gravest charges against these Lords of the Admiralty, and amongst them, against the Earl of Sandwich, then first Lord and President of that Board. Whether this Captain in the Navy was "*attached*" to the first Lord of the Admiralty, or whether he was not, the case is silent. But when we remember that as Governor of Greenwich Hospital he drew "*fuel and light*," the fair presumption is, I think, (in accordance with the arguments used here,) that he was *so attached*. Sir, the circulation of that printed pamphlet caused the suspension of Captain Bailey from his office of Governor, and was made the subject of a criminal proceeding against him before a Court of Justice. And now, let us see what it was that he charged against the first Lord of the Admiralty, as stated to the Court by his own Counsel. *This charge, Sir, is found in his pamphlet amongst many others, of even graver import against that personage:—"That the present first Lord of the Admiralty has, to serve the base and worthless purpose of corruption, introduced his prostituted freeholders of Huntingdon into places destined for the honest freeholders of the seas."*

In opening his case to that Court, over which the venerable Lord Mansfield presided, Lord Erskine said:

"My Lord, I will point to the proof of all this; I will show your Lordship that it was his duty to investigate; that the abuses he has investigated do really

exist and arise from the ascribed causes; that he has presented them to a competent jurisdiction, and not to the public; and that he was under the indispensable necessity of taking the step he has done."

And Now, Sir, I shall trouble the Court with no comment of my own, but shall simply read the argument of Lord Erskine, upon which Captain Bailey was restored to his office, and the criminal proceeding against him crushed in its inception:—

"My Lord, a man can not be guilty of a libel who presents grievances before a competent jurisdiction, although the facts he presents should be false; he may indeed be indicted for a malicious prosecution, and even there a probable cause would protect him, but he can by no construction be considered as a libeller.

"The case of Lake and King in 1st Leveux, 290, but which is better reported in 1st Saunders, is directly in point; it was an action for printing a Petition to the Members of a Committee of Parliament, charging the Plaintiff with gross fraud in the execution of his office; I am aware that it was an action on the case, and not a criminal prosecution; but I am prepared to shew your Lordship, that the precedent on that account makes the stronger for us. The truth of the matter, though part of the plea, was not the point in contest; the justification was the presenting it to a proper jurisdiction, and printing it, as in this case, for more commodious distribution; and it was first of all resolved by the Court, that the delivery of the Petition to all the Members of the Committee was justifiable; and that it was no libel *whether the matter contained were true or false*, it being an appeal in a course of justice, and because the parties to whom it was addressed had jurisdiction to determine the matter; that the intention of the law in prohibiting libels, was to restrain men from making themselves their own judges, instead of referring the matter to those whom the constitution had appointed to determine it; and that to adjudge such reference to be a libel, would discourage men from making their own enquiries with that freedom and readiness which the law allows, and which the good of society requires. But it was objected, he could not justify the *printing*, for by that means it was published to printers and composers; but it was answered and resolved by the whole Court, that the printing, *with intent to distribute them among the members of the Committee*, was legal; and that the making many copies by Clerks, would have made the matter more public.

"I said, my Lord, that this being an action on the case, and not an indictment or information, made the stronger for us; and I said so, because the action on the case is to redress the party in damages, for the injuries he has sustained as an individual, and which he has a right to recover, unless the Defendant can shew that the matter is true, or, as in this case, whether true or false, that it is an appeal to justice.

Now, My Lord, if a Defendant's right to appeal to justice could, in the case of Lake and King, repel a Plaintiff's right to damages, although he was actually damaged by the appeal, how much more must it repel a criminal prosecution, which can be undertaken only for the sake of public justice, when the law says, it is for the benefit of public justice to make such appeal? And that case went to protect even falsehood, and where the Defendant was not particularly called upon in duty as an individual to animadvert,—how much more shall it protect us who were bound to enquire, who have written nothing but truth, and who have addressed what we have written to a competent jurisdiction?"

Such, Sir, are the arguments upon which Captain Bailey was acquitted and restored to his command. Of the force of these argu-

ments to maintain the general proposition of law, which I have had the honor of submitting, and of their applicability to the present case the Court will judge.

Before observing in conclusion, Mr. President, on the 5th and only remaining charge against me, I would beg of the Court, if possible, to blot from their memory every particle of evidence adduced on the defence. I would beg of them to allow me to bring before their minds the principal facts of the case, upon the assumption that Major Magrath's statements as to his receipts are *true*, and mine *incorrect*. And first, Sir, let me direct your attention to the position in which I stood in the spring of 1840. It cannot, I think, be argued with any degree of fairness, that then at least I had any motive for charging Major Magrath with the receipt of any sums which I did not honestly think had been paid to him; for I do not suppose that any desire to increase the Race funds can be considered as a sufficient motive for such conduct, and I have as yet perceived in the evidence no traces of that conspiracy which Captain Magrath had foreseen. A desire to screen my own embezzlement cannot possibly have actuated me, because *no man accused me*. Nay, it would appear from the evidence, that the secret was buried in my own bosom. Under these circumstances did I involve the matter in mystery? Did I keep back my statements until the affair had lain so long dormant, that Major Magrath could not have been expected to retain any recollection of it? And did I then bring it forward with an invidious and malignant design to entrap him? Did not my letter of the 6th of May, plainly state to Major Magrath the sum which I alleged he had received, the source from which that sum was derived, and the mode in which it had been paid? Can any man look at the Bank account enclosed in that letter, and say, that the entry of the cheques there added, was intended to entrap, and not inform?—Does the hand in which these entries are added, resemble that in which the amount is drawn out? Does the careless manner of the addition bespeak fraud? What then is Major Magrath's conduct with all this light before him? What is his statement to myself on the 27th of June? What is his statement at the Military Secretary's Office? What is his statement at the Farmer's Bank? He upon all these occasions denies the receipt of that sum. What construction the Court may put upon these denials of Major Magrath, it is not for me to enquire; but they have been so frequent, and in such various forms, that I feel I may for the purpose of my present argument, assume them to have been, (*as they were understood to be at the time,*) *general*. At the Farmer's Bank, it would seem that Major Magrath only denied the receipt of that sum from *Colonel Fraser*. On the 27th of June he only denied it from *me*. And on the 27th of July, he denied the receipt of it from *Colonel Fraser as well as from myself*. But then that was only meant "*in addition*." These explanations may be deemed satisfactory to the Court, and I have no desire to cavil at them, because I think that when all those to whom the denial was expressed, understood it to be unqualified, I cannot be blamed for falling into the general error. Understanding then his denial to be unqualified as I did, I ask whether my letter of the 24th of July was unwarranted? Would any member of this Court have written less strongly under the same circumstances?—



And now the question presents itself,—Who cast the first stone? My letter of the 24th of July was private; but how is it met? It is taken by Major Magrath to a meeting of the Stewards, and there made public in the manner described in the evidence. The Stewards who were present at that meeting have all been examined; and have stated upon oath, that Major Magrath's then statement as to the sum of £28 7s. 6d. was inconsistent with truth; and the production of the letter was prefaced by the most insulting expressions to myself, which I must take leave to say were *equally untrue*. For, although it be true that Capt. Magrath, who had *not* been with the troop during the whole period of my service, was subsequently appointed to the commission which I had been led to expect, and drew that pay which I had hoped to have received; and although it be true, that I was then driven to the alternative of signing the pay-list as "*Corporal*," or contenting myself without *any pay*, yet it was also true, that for the whole period of my service, I acted as *Adjutant*, and not as "*Corporal*," and had during all that time the *unspeakable honor* of being the mess-mate of *Major Magrath*!

The matter having been thus published to the world by the Prosecutor, and the Major-General considering it an affair proper to be decided by the Race-Club, I did (on the return of Colonel Fraser) feel bound in duty to myself, to meet what every body understood to have been a denial of the receipt of the sum of £28 7s. 6d. by the publication of that receipt which had been given to Colonel Fraser by Major Magrath when the sum was paid. Of this act, he who had thrown the first stone,—who had published my letter with a denial of the truth of my assertion, had not I think just reason to complain. But who is guilty of the next irregularity? Upon the return of Colonel Fraser I applied to have a meeting of the Stewards for the purpose of investigation, and Capt. Arthur has also in his evidence deposed to my frequent complaints and earnest desire for enquiry. Major Magrath, however, prefers an appeal to the public, and sends abroad a publication, in which he not only accuses me of embezzlement effected by the invention of "*wilful and malicious falsehoods*;" and glories in having demonstrated my utter disregard to the truth; but with a malice which needs no comment, adds to the publication, and gives to the world a report upon my accounts of 1837 and 1838, with which he has himself stated that he had no earthly connection.

Sir, I objected to the Court receiving evidence as to the accounts of 1837 and 1838, not because I shrunk from an investigation of them, but because I considered the receipt of such evidence to be contrary to the most elementary principles of law; for I apprehend, that the published paper, styled, "*Sketch of the winding up of the Race accounts for 1837*," will appear to ordinary minds sufficiently plain. It speaks for itself. And to any mind not endowed with that profound metaphysical discernment displayed by Major Magrath,—to any mind less gifted with the power of drawing these refined distinctions, by which every thing that the world took to be false, is clearly proved to be true, and all that the world held true, is with equal clearness shewn to be false,—to any mind, I say, less enlightened, the report of Messrs. Stanton

and Cameron must appear equally inexplicable. Of the accounts of 1857, I shall only say, that it has never been usual to keep any other than the Subscription-book and the vouchers; but if Mr. McKnight, who kept the monies and made the disbursements for the year of 1857, could be produced, I am certain that if he could not produce vouchers, he could at least depose to the proper application of his receipts. And now, I will simply ask the Court, whether I was bound by any law, divine or human, to allow the grave charges contained in that pamphlet to remain uncontradicted? Can it be considered for the honor of Her Majesty's service, that even a "Corporal" should allow such charges to remain uncontradicted, during the interval which must have elapsed between that publication and the investigation in November? Was it not my solemn duty to myself, to the public, to my Sovereign, to repel those charges, directly, and at the same tribunal before which Major Magrath had arraigned me,—namely, the tribunal of Public Opinion? But, even though the Court should conclude that in taking this step I have been guilty of a breach of Military law, yet I do trust, that the consideration of Major Magrath's conduct, (of which I have just sketched the outline,) will ensure to me this concession at least,—that it was an error committed under such gross provocation, as the feelings of our common nature have ever been found unable to endure!

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A B P E Z D I X

## A P P E N D I X .

} ADJUTANT GENERAL'S OFFICE,  
Toronto, 8th April, 1841.

### MILITIA GENERAL ORDER:

Before a General Court-Martial of Militia, held at Toronto, on the 8th day of February, 1841, and continued by adjournment until the 19th day of the ensuing month, Lieutenant JOHN MAITLAND, of the 4th Battalion of Incorporated Militia, was arraigned on the following charges, viz:—

Scandalous and infamous behaviour, unbecoming the character of an Officer and a Gentleman, in the following instances, viz:—

*First.*—Having stated at the City of Toronto, on or about the 5th June, 1840, in the presence and hearing of George B. Holland, Serjeant of the First Troop of Incorporated Militia Dragoons, that the said Lieutenant John Maitland had paid to the said Major T. W. Magrath the sum of £28 7s. 6d. currency, he the said John Maitland at the same time well knowing that he had not so paid the same.

*Charge the Second.*—Having stated at Toronto aforesaid, on or about the 19th day of November, 1840, in the presence of Colonel Alexander Mackenzie Fraser, Assistant Quarter Master General to the Forces, Colonel Sir Allan Napier Macnab, Third Regiment of Gore Sedentary Militia, Colonel Richard Bullock, Adjutant General of Militia, and Captain Frederick Leopold Arthur, Aid-de-Camp, that he the said Lieutenant John Maitland had paid to the said Major Thomas W. Magrath the sum of six pounds five shillings, currency, being the amount of the subscription of certain Officers of Her Majesty's 43d Regiment, to the City of Toronto and the County of York Race Meeting, for the year 1839, he the said Lieutenant John Maitland well knowing at the same time that he had not so paid the same.

*Charge the Third.*—Having stated at Toronto, on or about the 19th day of November, 1840, at a Meeting of the Stewards of the City of Toronto and York County Race Meeting for the year 1839, that he the said Lieutenant Maitland was prepared with proof, that the said Major Magrath had received the sum of six pounds five shillings, currency, being the amount of the last mentioned subscription of the Officers of the 43d Regiment, for the purpose of endeavouring to entrap the said Major Magrath into the admission of the receipt thereof; he the said Lieutenant Maitland at the same time having no such proof, and being well aware that the fact was contrary to his said statement.

*Charge the Fourth.*—Having stated at the time and place, and on the occasion last mentioned, that the said Major Magrath had not paid certain men of the said First Troop of Incorporated Militia Dragoons the amount of a certain purse, called the Troop Purse, run for at the said Race Meeting in 1839, and won by certain men of the said Dragoons, and that he the said Lieutenant Maitland had been informed by two men of the said Troop, who were entitled to receive a proportion thereof, that the same had not been paid to them by Major Magrath, or any one for him, and that they had not received their proportion; he the said Lieutenant Maitland well knowing when he made the said statement, that the said purse had been paid by Major Magrath, and that no man of the said Dragoons, entitled to receive any proportion thereof, had made any such declaration.

*Charge the Fifth.*—Having written and published, or caused to be written and published, at Toronto, on or about the 31st day of August, 1840, in a public newspaper called the "*British Colonist*", a false, scandalous, and malicious letter, with intent to injure and defame the character of the said Major Magrath, as an officer and a gentleman; expressing therein and thereby, that a certain statement published as the result of the examinations of the Toronto Turf Club Accounts for 1839, was a most bungling and barefaced attempt to cover the peculation of the said Major Magrath.

*Charge the Sixth.*—Having written and published, at Toronto, on or about the 10th day of October, 1840, a false, scandalous, and malicious statement, tending to injure and defame the character of the said Major Magrath, as an officer and a gentleman, in reference to the Race funds of the City of Toronto and County of York Race Meeting for 1839; whereby he accused the said Major Magrath of having attempted peculation of the said funds,—such conduct being contrary to the rules and regulations of Her Majesty's service, and subversive of good order and military discipline.

The Court having maturely weighed and considered the evidence in support of the charges against the Prisoner, John Maitland, Lieutenant 4th Battalion Incorporated Militia,—his defence, and the evidence adduced in support of it,—is of opinion, that with regard to the first charge, he the Prisoner, John Maitland, Lieutenant 4th Battalion Incorporated Militia, is not guilty, and do therefore acquit him of the same.

With regard to the second charge, the Court is of opinion, that the Prisoner, John Maitland, Lieutenant 4th Battalion Incorporated Militia, is guilty.

With regard to the third charge, the Court is of opinion, that the Prisoner, John Maitland, Lieutenant 4th Battalion Incorporated Militia, is guilty.

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With regard to the sixth charge, the Court is of opinion, that the Prisoner, John Maitland, is guilty.

The Court having found the Prisoner guilty of the second, third, fourth, fifth and sixth charges preferred against him, which being in breach of the Articles of War and the Militia Act now in force in this Province, do sentence him, the Prisoner, John Maitland, Lieutenant 4th Battalion Incorporated Militia, to be Cashiered.

The Court having performed its duty, cannot separate without recording its opinion upon the description of defence attempted to be set up by the Prisoner, to wit, that he had received a provocation sufficient to justify on his part a breach of Military discipline—a doctrine subversive of the fundamental principle by which all armies are governed, and entirely at variance with those authorities which are equally binding upon Military and Civil Tribunals.

Yet notwithstanding this attempt upon the part of the Prisoner, no testimony has been produced by him, even if his position had been tenable, sufficient to justify the Court in acquitting him of any one of the charges of which he has been found guilty.

His Excellency the Governor General has been pleased to approve and confirm the finding of the Court.

Mr. John Maitland will cease to receive pay in Her Majesty's service from this date.

The General Court-Martial, of which Colonel Vanoughnett, 5th Battalion Incorporated Militia, is President, is dissolved.

By command.

(Signed)

RICHARD BULLOCK,  
*Adjutant General Militia.*

17th June 1864  
The following is a list of the names of the persons who have been admitted to the office of the Secretary of the Board of Education since the 1st of January 1864.

Mr. J. C. ...  
Mr. ...

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Mr. ...  
Mr. ...

The following is a list of the names of the persons who have been admitted to the office of the Secretary of the Board of Education since the 1st of January 1864.

Mr. ...  
Mr. ...

Statement shewing the Total Amount of Receipt and Expen

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1839.	To amount of money paid into the Farmer's Bank by Mr. Maitland, (to the credit of Col. Mackenzie Fraser, President of the Races,) between the 21st day of May and the 18th day of June, 1839, as per Bank Statement, being the amount of subscriptions collected before the Races, and the entrance for the Plates .....		
June 19.	" Cash received by Mr. Heath,—viz: six entrances at 10s. each, for the Race for a Jockey Saddle—four Hacks—which Saddle was won by Cash's bay mare, .....		
" 20.	" Cash received by Mr. Heath,—viz: four entrances at 10s. each, for the Race for a Jockey Saddle for Ponies—which saddle was won by Mr. Hovcutt's bay pony .....		
" 21.	" Cash of Captain Meade, 43d Regt., paid to Major Magrath, .....		
"	" Amount collected by Mr. Maitland and Major Magrath on the Race Course, on this the third day of the Races, and deposited by Mr. Maitland in the hands of A. Tod, Esq., before riding in the Hurdle Race .....		
" 24.	" Amount collected by Mr. Maitland and Major Magrath on the Race Course, on the first and second days of the Races, (19th and 20th June, 1839) and handed over to Major Magrath by Mr. Maitland, on the evening of this day, Monday .....		
July	" Money collected by Messrs. Bell and Baker, Inkeepers, paid to Major Magrath through Mr. Maitland .....		
Aug. 10.	" Captain Cummins' subscription paid to Major Magrath through Mr. Maitland .....		
1840.	" Outstanding subscriptions received by Major Magrath .....		
April 6.	" Mr. Murchison's subscription paid to Major Magrath .....		
	" Amount to be accounted for, brought down	46	3 7
	<i>Discoveries lately made, also to be accounted for by Major Magrath.</i>		
	" Short credited on Mr. Domville's cheque .....	0	2 5
	" Overcharge on payment made to Mr. Willard .....	0	2 6
	" Mr. Joseph Heughen's subscription .....	0	10 0
	" Mr. John Dodsworth's do .....	0	10 0
	" Mr. Henry J. Williams' do .....	0	10 0
	" Mr. Henry B. Williams's do .....	0	10 0

1839.

Statement shewing the Total Amount of Receipt and Expenditure of the Funds of  
COLONEL MACKENZIE FRASER,

1839.		£	s.	d.	1839.
	To amount of money paid into the Farmer's Bank by Mr. Maitland, (to the credit of Col. Mackenzie Fraser, President of the Races,) between the 22d day of May and the 18th day of June, 1839, as per Bank Statement, being the amount of subscriptions collected before the Races, and the entrances for the Plates .....	258	15	0	
June 19.	" Cash received by Mr. Heath,—viz: six entrances at 10s. each, for the Race for a Jockey Saddle—for Hacks—which Saddle was won by Cash's bay mare, .....	3	0	0	June 25.
" 20.	" Cash received by Mr. Heath,—viz: four entrances at 10s. each, for the Race for a Jockey Saddle—for Ponies—which saddle was won by Mr. Howcutt's bay pony. ....	2	0	0	
" 21.	" Cash of Captain Meade, 43d Regt., paid to Major Magrath, .....	6	5	0	
"	" Amount collected by Mr. Maitland and Major Magrath on the Race Course, on this the third day of the Races, and deposited by Mr. Maitland in the hands of A. Tod, Esq., before riding in the Hurdle Race. ....	25	0	0	
" 24.	" Amount collected by Mr. Maitland and Major Magrath on the Race Course, on the first and second days of the Races, (19th and 20th June, 1839,) and handed over to Major Magrath by Mr. Maitland, on the evening of this day, Monday. ....	53	17	6	
July	" Money collected by Messrs. Bell and Baker, Innkeepers, paid to Major Magrath through Mr. Maitland .....	16	10	0	
Aug. 10.	" Captain Cummins' subscription paid to Major Magrath through Mr. Maitland. ....	5	0	0	
1840.	" Outstanding subscriptions received by Major Magrath	26	10	0	
April 6.	" Mr. Murchison's subscription paid to Major Magrath	1	5	0	
		396	2	6	
	" Amount to be accounted for, brought down	46	3	7	
	<i>Discoveries lately made, also to be accounted for by Major Magrath.</i>				
	" Short credited on Mr. Domville's cheque.	0	2	2½	
	" Overcharge on payment made to Mr. Willard. ....	0	2	6	
	" Mr. Joseph Heughen's subscription. ....	0	10	0	
	" Mr. John Dodsworth's do. ....	0	10	0	
	" Mr. Henry J. Williams' do. ....	0	10	0	
	" Mr. Henry B. Williams's do. ....	0	10	0	
		48	13	3½	

1839.

Expenditure of the Funds of the City of Toronto and York County June Race Meeting, 1839.

COLONEL MACKENZIE FRASER, President.

£ s. d.		1839.	£ s. d.		£ s. d.
			By amount of the cheques drawn by the President of the Races (Colonel Mackenzie Fraser,) paying Plates, &c., including the balance transferred to Major Thomas William Magrath on 13th Aug. 1839..	256 15 0	
			Less amount so transferred to Major Magrath	28 7 6	
256	15	0			228 7 6
		June 25.	By cash deposited in Mr. Tod's hands accounted for.....	25 0 0	
3	0	0	Paid Mr. Domville, A. D. C. difference of cheque..... £2 10 0		
			Paid the balance to Major Magrath when handing him the following accounts discharged....	3 8 3	
				5 18 3	
			Mr. Dalton's account paid by Mr. Maitland.....	5 8 0	
			Messrs. Watkins & Harris' do do	0 13 9	
			Mr. Stanton's do do	4 0 0	
			Messrs. Wragg & Co's do do	6 0 0	
			Mr. Scobie's do do	3 0 0	
				19 1 9	
			By amount of sums claimed by Major Magrath as paid by him.....	108 4 8	
			Less amount charged for Troop Purses....	6 0 0	
				102 4 8	
			By Amount to be accounted for to the Racing fund by Major Thos. W. Magrath.	41 8 7	
			By amount (the saddle entrances) to be accounted for to the Racing fund by Mr. Heath.....	5 0 0	
				46 8 7	
396	2	6			396 2 6
8	7				
2	2				
2	6				
0	0				
0	0				
0	0				
0	0				
48	13	3			

