

# PROCEEDINGS

OF THE

## NAVAL COURT MARTIAL

IN THE CASE OF

ALEXANDER SLIDELL MACKENZIE,

A COMMANDER IN THE NAVY OF THE UNITED STATES, &c.

INCLUDING

THE CHARGES AND SPECIFICATIONS OF CHARGES,  
PREFERRED AGAINST HIM BY THE SECRETARY OF THE NAVY.

TO WHICH IS ANNEXED,

AN ELABORATE REVIEW,

BY JAMES FENNIMORE COOPER.

NEW YORK:

HENRY G. LANGLEY, 8 ASTOR HOUSE.

---

1844.

# REVIEW

OF THE

PROCEEDINGS OF THE NAVAL COURT MARTIAL.

# REVIEW

OF THE

## PROCEEDINGS OF THE NAVAL COURT MARTIAL.

On the 14th of December, 1842, the United States brig Somers, Commander Mackenzie, arrived at New York, from a cruise to the coast of Africa. The vessel came up to the navy-yard, where she anchored, holding very little communication with the shore. One of her officers proceeded forthwith to Washington, with despatches; and, for a day or two, a species of mystery was observable in and about the vessel. Rumor, however, soon began to deal with the cause of this unusual privacy, and it was not long ere the truth, in its outlines at least, got before the nation.

It appeared that a midshipman, the acting boatswain (a rated boatswain's mate), and a seaman, had been hanged at sea, under a charge of mutiny, by the orders of Captain Mackenzie, supported by a written opinion of most of his officers. There had been no trial, scarcely an accusation, as respected one of the men executed, and what was the most extraordinary of all, no overt act of mutiny. The following would seem to be the leading facts of this grave and unusual occurrence.

On board the Somers was a midshipman, named Philip Spencer, a youth then in his nineteenth year. This young gentleman was the son of the secretary of war, and the grandson of one of the most distinguished jurists New York has ever produced. Midshipman Spencer, it was affirmed, had induced a person of the name of Wales, who was purser's steward of the brig, or what is called a forward officer, to mount on the booms with him, where the parties by using a little precaution would be out of ear-shot, and where the former abruptly opened a discourse by relating to the latter his whole scheme, first demanding an oath of secrecy. Agreeably to the subsequent evidence of Mr. Wales, Spencer intended to get possession of the brig, by a rising in the night, throwing the officer of the watch overboard, murdering all the remainder in their berths, or hammocks, and awing the uninitiated of the crew into submission by pointing the quarter-deck guns forward, and by other similar means of authority, or intimidation. Once in possession, Mr. Spencer intended to turn pirate, robbing the defenceless, ravishing the females, and murdering the men he might overcome.

Wales affirms that Spencer mentioned he had about twenty of the crew enlisted in this enterprise. The conversation took place on the evening of the 25th of November, the brig then being on her passage from the coast of Africa to the island of St. Thomas, Captain Mackenzie intending to go into the latter in quest of supplies, and out of regard to the health of his crew. (See record, p. 194, top of second column.)

The following morning, the conversation of Wales with Mr. Spencer was communicated to the first lieutenant, by whom it was laid before Captain Mackenzie. Mr. Spencer was arrested at quarters the same afternoon; he was immediately ironed and placed on one of the arm-chests, under the eye of the officer of the watch, there being but one marine in the brig, a sergeant, who acted as master-at-arms. This arrest occurred on the evening of the 26th November.

On the 27th, the main-royal-mast was carried away. In consequence of circumstances, which will appear in their place, Captain Mackenzie was induced to suppose that this mast was carried away by the connivance and acts of the mutineers with the hope of getting possession of the vessel in the confusion; and, imagining that he detected symptoms of plotting among certain of the crew that were aloft, busied in repairing damages, he arrested the boatswain's mate, whose name was Cromwell, and the seaman Small. These two men were also ironed, and placed on the quarter-deck. The signs of disaffection increasing, according to the views of Captain Mackenzie and some of his officers, four more of the crew, M'Kee, M'Kinley, Wilson, and Green, were placed in irons on the 30th, and put on the quarter-deck. These last arrests were pointed out by certain papers that were found in Mr. Spencer's razor-case, and to which he is said to have alluded in his communications to Wales, and by other circumstances that will appear as we proceed.

Captain Mackenzie now hesitated about arresting any more of the supposed mutineers; but imagining that he still detected proofs of an intention to rise among the portion of the crew that was at large, he began to mature a scheme, previously entertained, of executing some of the prisoners, in order to ensure the safety of the brig. The matter was formally referred to the officers, having however been for some time before discussed among some of them at least, one or two of the younger midshipmen excepted; and fortified by their approval of the step, Mr. Spencer, Cromwell, and Small, were hanged at the yard-arms on the 1st of December. From the moment of the executions, no further evidence of danger was seen, or imagined, the vessel arriving first at St. Thomas, and subsequently at New York, in due season.

Such is an outline of these memorable facts. The details we reserve for the comments which will follow. The reader will at once understand that there was no regular trial, but that the executions took place without any of the forms that are usually observed in cases of legal investigations. Oaths were administered to a few of the crew, who were examined or consulted by the council of officers, but the prisoners were not arraigned, nor was either privy to the proceedings that were going on.

The facts were revealed to the public through the ordinary channel of the newspapers. The first accounts were exaggerated and false, sustaining Captain Mackenzie's course in terms so extravagant as to betray the temper in which they were written, and to demonstrate that the object was to vindicate the act, rather than the justice of the country. Inquiry slowly brought the leading circumstances before the nation, differing in many essentials from the original statements,



though the journals that had blindly plunged into the subject found no difficulty in maintaining their first opinions, under every state of the facts. *Their* object was obviously to support one side of the question, let the truth lie where it might. The moving causes were political animosity, mercantile cupidity, and personal interests. That the cause was not a desire to support truth is self-evident, as men who merely wished this, would not have involved themselves in the dilemma of being obliged to maintain conflicting propositions.

The political malignancy which has been displayed in this transaction, in one journal at least, may justly be likened to that of the spirits of darkness. The world has probably never witnessed its parallel in a country pretending to civilization; demoniacal passions having been exhibited in a nakedness of deformity that is unusual even in our own greatly degraded press, unrelieved by argument, ingenuity, or decency of language. In the case of the particular press mentioned, the course taken defeated itself—a general feeling of indignation pervading the country, on the subject of its inhuman coarseness, its vulgarity, and its malignancy. But other presses were evidently influenced by the same motive, though conducted with greater ability and a more seeming moderation. The whole is to be attributed to the peculiar relation that Mr. Spencer, the father of the young officer who was executed, bears to one of the political parties of the country.

Mercantile cupidity had its share, as usual, in the course of a portion of the city press on this occasion. All mercantile communities are liable to these tortuous views of principles, on such subjects as are supposed to affect the fluctuating and sensitive interests of trade. As a body, men whose entire fortunes are constantly in jeopardy by the extent and hazards of their operations, are not to be trusted in matters that are supposed to conflict with their interests. The magnitude of the last proves too much for poor human nature; and in saying what we do of this class of men, we are not saying they are any worse than the rest of mankind, but simply that they are no better. Others, under similar inducements, would prove as weak, but no other large class of the community is as often, or as violently tempted. In the present case, it was supposed that ships and insurers would possess greater security by an oriental administration of justice, than by giving to the citizen a hearing before he was consigned to the gallows.

It is important to the well-meaning and disinterested American to reflect on many of the consequences of this influence of the mercantile class. The merchants are collected in towns, and form a concentrated body of great temporary power, when disposed to act unitedly. They control most of the leading presses around them, by means of their advertising and other patronage, and all our large towns being strictly commercial, it is no unusual thing for this body of men to take the initiative in public opinion, frequently giving it a false, though rarely a permanent direction. That individuals of this class, owing to greater firmness of principle, and more clear-sightedness in morals, rise superior to the mistakes of their contemporaries, is undeniable. Such men are honorable exceptions, and merely prove the existence of the rule. They deserve more than usual commendation, however, for acting right while strongly tempted to do wrong.

The personal interest that was used in the case of Captain Mackenzie was no more than was natural. This officer enjoyed probably a much higher literary reputation than he merited, and his literary associations gave him the advantage of possessing the support of many willing and ingenious pens. His place in the corps was not sufficiently high to create envy, or sufficiently low to produce indifference. Then he enjoyed a respectable local family connexion, which was active and effi-

cient in his behalf. We do not live in the age of Brutuses, and, as things are, it was to be expected that these connexions would espouse his cause, *per se aut nefas*.

Experience is daily setting at naught the most plausible inferences of human ingenuity. In nothing is this more true than in the workings of political systems. He who looks only to theory in politics will find stubborn results crossing his logic in a thousand ways that he least expects, the management of the affairs of the world being solely a thing of practice. The merely bookish philosopher in his speculations usually lays down the dogma of the independence of sentiment that ought to be the result of popular institutions, while the man of observation and experience knows that the tendency is to create so much community-power as almost to annihilate individuality.

To apply these principles. The theorist, in reasoning on the facts of the Somers mutiny, would be apt to pursue a thread of argument something like this: America is a country of equal rights, in which person and property are justly protected without reference to station or wealth. It is the boast of the meanest citizen, that the laws were designed for his especial protection. The state is, in a degree at least, his agent, and in no degree his tyrant. Now, here is an officer of that state who has used the authority he wields in the name of the state to take the lives of three of his subordinates without a trial—by his own account of the matter, *without a hearing*—without any overt act of mutiny, violence, or of resistance even in the gasp of death. He may be right; but the community demands that he show, in the clearest manner, the necessity which alone can justify so grave a step. If the name of an American citizen can not be a warranty that life will not be taken without the accusation, hearing, and condemnation, required by the law, of what use are our boasted rights? If the American is not assured of this privilege on board an American ship-of-war, which exists only to defend those sacred rights on the ocean, where can he be assured of its exercise at all. The whole nation stands in stern expectation of the justification that can alone excuse the deed: "Make evident the overwhelming necessity for exercising our authority for thus setting aside the action of our laws; for sending three of our number into eternity with so brief notice, by means of our own military force; for using that which we intended as an instrument of shielding the American on the high seas as an instrument of his destruction. We admit that circumstances may justify so extraordinary a departure from the safe rules of legal inquiry, but of the existence of these circumstances give us the clearest proof; we wait for it impatiently, prepared to hold you to a most rigid responsibility, and yet prepared to do you ample justice."

Such would be the speculations of the theorist. In Russia, men might think the emperor *ought* to feel thus, but none would dare to express an opinion concerning the justice of the state. In England and France, a natural sentiment heightened by the jealousy of power, would probably have impelled the bulk of the population of both countries to assume an attitude of so much menace, as might readily have induced their governments to incline toward a too little discriminating, if not to a too hasty decision, adverse to the conduct of the officer. In this country, the feeling has leaned the other way, no small part of the population seeming to be satisfied with an exhibition of authority on the part of a public functionary, that is flattering to a species of national pride which is more general than creditable. Men have talked among us, and we doubt not felt, as if they exulted that one "of our officers, on board one of our ships

has hanged three villains who had conspired to run away with one of our vessels !”

Of the three classes of feeling here described, the second is the safest and most conducive to justice. The time has been when the clamor of England might have proceeded too far; but in the present age, the justice of the nation, stimulated on the one hand by the distrust of hereditary power, and restrained on the other by the responsibilities and caution of the government, would be more likely to produce a just result in such a case as this, than either the stifled sentiment of Russia, or the self-satisfaction and passive indifference of our own country.

In no country but this, that has any claim to political liberty, would the government dare to pursue the course which has been taken by the government of our own in connexion with this matter. We think that a very cursory examination of the facts will make apparent the gross impropriety of the course taken by our own authorities.

An officer arrives from sea, and reports that he has used the authority derived from government to execute an American citizen, coolly and under the semblance of military discipline, without a trial, or even without a hearing. His officers sustain him in the deed, and were accessaries to it. If he is guilty, they are guilty; if he is innocent, they are innocent. The crew were the compelled instruments of these officers, who stood over them with arms in their hands, menacing the disobedient with instant death. Now what, in the eyes of reason and justice, should have been the course of those intrusted with the vindication of the laws under circumstances like these? Clearly, to have at once separated all the officers from all the men, to have put the latter under the charge of disinterested persons, with strict orders that they should not be tampered with; either for, or against; and then to have directed the necessary legal measures with the closest attention to impartiality and justice. Was this done? We all know it was not. A court of inquiry was convened, and during weeks of its session, the men, the only impartial witnesses in the case, were left immediately under the military control of those whose conduct was under investigation. It is idle to say that the officers were relieved by the responsibility assumed by their commander. They were accessaries before the act, and must in law, as in reason, stand or fall with him.

It is said that Captain Mackenzie, on his arrival at home, made a brief report of the event, and asked for a court of inquiry. It is unfortunate for all parties, if this statement be true, that his request was not instantly granted, as it clearly ought to have been, let the facts be what they might. It was enough that a man had been executed without a trial, to render a court indispensable. It is understood, however, that Mr. Upshur, then secretary of the navy, asked for the details, and obtained the report from Captain Mackenzie which has since been published; the most extraordinary document of the sort, perhaps, that ever was laid before the world. On this report we intend not to dwell, except as relates to its facts, and as it is directly connected with that obliquity of mind which we conceive to have been at the bottom of this unfortunate occurrence. There is, however, a passing remark due to Captain Mackenzie, in reference to his report. It has been said that he was blindly defended by a portion of the public journals, as soon as the fact of the execution became known, owing to a variety of influences of an improper character. It is but just to add that he was also blindly assailed; less, we think, from any determined hostility than from a natural horror of his act, and, in the end, from the opposition created by the brutal and every way unjustifiable

course of some of his supporters. Among other things falsely charged against Captain Mackenzie, one or two were connected with this report. It was said that, after the executions, he had ordered the crew to "give three cheers to God," meaning three literal cheers in honor of the Deity. Such is not the statement of the report, in which singing a psalm in praise of the Almighty is figuratively so presented to the crew. The last is bad enough, though purely a matter of taste, without dragging in the revolting misstatement. Then Captain Mackenzie is made, by many persons, to say to young Spencer, as a reason why he ought to be resigned, that, should he get home, his father's influence would protect him, and on that account he ought to submit to be hanged at sea. What Captain Mackenzie represents himself as saying was totally different. Mr. Spencer had expressed an apprehension that this affair would injure his father—a creditable feeling, and one that was touching, under the circumstances—and Mr. Mackenzie endeavored to lessen his regrets on this point, by stating that his father's influence would protect him, should he be carried home, a circumstance that would be more likely to injure the father than the execution of the son.

A court of inquiry, composed of Commodores Stewart, Jacob Jones, and Dallas, was convened in this case, December 28th. This court sat until January 19th, when it sent in its finding. Previously to the meeting of this court, however, or immediately after his arrival in New York, Captain Mackenzie put several more of his crew in irons, sending them along with the four survivors of those arrested at sea, on board the *North Carolina*, the guard-ship. This fact it will be important to remember as we proceed; the charges against the men last ironed, being that they were concerned in the transactions which induced the execution of Spencer, Small, and Cromwell. We repeat, it is a material circumstance to remember.

Nearly all the officers and crew of the *Somers* were examined before the court of inquiry, the exceptions amounting to some ten or twelve only. We regret that the record of this court has not been published, as it clearly ought to be, and we do not like to waste time on mere newspaper reports. It is safe, however, to say that no one, Wales excepted, testified as to any direct knowledge of any mutiny, at all. The testimony of Wales, as given before the court martial which terminated the proceedings, will be given in its place. Many of the others, including most of the officers, saw, or fancied they saw, evidence of a disaffected spirit in divers of the crew; certain acts were construed into such as were disrespectful and disobedient, if not mutinous; but no one of the men examined could, or *did* tell, of any direct knowledge, on his part, of an intention to seize the brig. Captain Mackenzie affirmed that many of these men *could* reveal important facts, if they *would*. Now, nothing is plainer than the justice of saying Captain Mackenzie ought not to have hanged a man without a trial, unless in possession of undoubted evidence to justify the deed, and, if in possession of such evidence, nothing was easier, under the known circumstances, than to have produced it. What the testimony offered really was, will be seen in the sequel; but it was a very unsatisfactory excuse for an officer who had resorted to so high-handed a measure, to find it necessary at all to complain that testimony was withheld on the investigation, that could have had no influence on his course, when he committed the act, inasmuch as it was no more forthcoming then, than now. Before an allegation of this sort could be at all received, or believed, it was clearly incumbent on Captain Mackenzie to show that these persons were connected with the plot, and, if able to do that, to have them punished.

Although we do not possess the means of going into a full analysis of the proceedings of the court of inquiry, they can not be passed over in total silence. About its finding there is no question; *that* having been published by authority. Neither can any objection be raised as to the witnesses examined, though some might be raised as to those who were *not* examined. It was proper, under the circumstances, to examine everybody who was in the brig. No one was on trial; but the object was to obtain the truth generally. It can not be said that the accused men ought not to be examined, for, on such a principle, a commander might arrest everybody who he thought would testify against him, and carry everything his own way. Besides, one or two of the accused *were* examined before the court of inquiry, though most were *not*! We could point out many other substantial objections to the proceedings of this court, but the whole of the main question, as it came up in the authorized testimony of the court martial, lying before us, we shall reserve our arguments for that. A few words on the finding of the court of inquiry, therefore, must close our present remarks.

The finding of the court of inquiry was a complete justification of the act of Captain Mackenzie, and of all concerned in it. Apart from those which arise generally from the state of the entire testimony, as it has been published, we have three particular objections to this finding. In one place the court says: "And that the brig at the time of the execution was, by the log, distant from St. Thomas 525½ miles, at which place she arrived on the 5th December, 1842."

Now, why is this fact stated with so much emphasis and minuteness? Of what particular importance was it to ascertain the precise distance between the Island of St. Thomas and the spot on the ocean where the executions took place, that this court should thus incorporate the fact, with their solemn finding in the premises? Some meaning must attach to it, else would it have been just as pertinent to have stated the distance between the spot on the ocean and the port of New York, or of Lisbon, or of Liverpool. It could not have been on the supposition that St. Thomas was the *nearest* port, the fact being notoriously otherwise. Antigua, Barbuda, Barbadoes, Martinique, Guadaloupe, and several other islands, were much nearer to the place of execution than St. Thomas; some of them not much more, if any more, than half the distance. It can hardly be the court meant that the Somers, being bound to St. Thomas, could not and ought not to have turned aside from her course, if, by so doing, the terrible necessity of using the power of the country to execute an American citizen without a hearing, could be avoided. Had such been the meaning of the court, it would have said so. The allusion to St. Thomas is specific; in some way, that island must have been supposed to bear a peculiar relation to the proceedings of Captain Mackenzie. To suppose the court makes the allusion without some motive, is to suppose it would trifle on a most solemn subject, and will not be believed.

It was to be wished that the court of inquiry had been more explicit on the subject of the allusion just mentioned. We have examined the point with care, and can discover but one solution of the difficulty, and that is connected with errors in law, morals, and all just political principles, that can not be too strongly condemned.

Some of the witnesses openly laid down the doctrine that, in their opinion, a man-of-war ought not to go into a friendly port to seek protection against a mutiny of her own crew. 'If a ship-of-war can not take care of herself,' they say substantially, 'there is no use in her being a ship-of-war.' Captain Mackenzie virtually admits, before the court martial, that he and his officers reasoned in the same



way. He hoped to find the *Vandalia* at St. Thomas, and should have gladly placed himself under the protection of *her* guns, but not under that of any *foreign* guns (see rec., p. 72). If the court does not adopt this reasoning, we can see no reasoning, short of a downright mystification, and of that we are far from accusing its members, that it does intend, in connexion with this distance. As the reasoning involves some of the falsest principles that could be received into a service, in our judgment at least, we intend to meet it at a little length. While it was confined to a youth, it might be pardoned as an exaggeration of inexperience and the commencement of his service, but, as adopted by a commander in the navy, and still more so, if thus indirectly recognised by three highly respectable and old captains, it becomes important to examine whether the principle be right or wrong, safe or dangerous.

In the first place, if the Somers sought to get under the protection of the guns of the *Vandalia* (see rec., p. 72), it is a clear admission that a man-of-war is not always competent to her own protection, since she may sometimes want another man-of-war to do her this important service. This is equally true, if she were to come into an American port with that object. Reasoning on the logic of the young witnesses to whom there has been allusion, in connexion with Captain Mackenzie's avowed intention to get under the guns of the *Vandalia* if he could, we find ourselves met by a palpable contradiction.

Then we all know it is not true that a man-of-war will not seek protection, in a friendly port, in grave emergencies. It is done constantly, in peace, or in war. Protection is sought in this way, from the elements, from the horrors of starvation, from enemies, and why not from mutineers? Does any one believe that Captain Mackenzie would not have stood for Guadeloupe, on this very occasion, if he had fancied he could save his own life, and those of his officers, by so doing, and that he could not save them in any other way? Unless so much be assumed, the question is narrowed down to this—ought Captain Mackenzie and his officers, in order to avoid the grievous necessity of hanging American citizens without a trial—nay, without a hearing—to submit to a mortification of their professional pride, to which they would certainly submit to save their own lives? Is the justice of the country of so much less importance than the lives of any dozen of its officers?

But, there was no just mortification connected with the affair at all. Could Captain Mackenzie have reached Antigua, or any other island, and had he gone to its governor and said, "Sir, I command a small American vessel-of-war, on board which, a mutiny exists. I am without marines, and dare not go on my own coast, with certain of the ringleaders on board. I can hang these men, and thus get rid of them, and assure the safety of my brig; but America is a country of laws; she is tender of the rights of the citizen, and most of all of his life; try the men I can not, and I prefer the humiliation of coming to ask your aid, to using an authority that has been committed to me in order to enforce the laws and principles of my country, in a way that may seem to do violence to both."—Would this be mortifying to any right-thinking man? Is there an American living, whose opinion is entitled to the least respect, who would not have pointed to such an act in exultation and honest pride, supposing that his own officer had acted thus, and a foreign officer had, at the same time, acted on the avowed principle of Captain Mackenzie? Would not the whole country, in such a case, have justly exulted in the superiority of its own system, its own political ethics, as opposed to those of the tyrants of Europe? But, running into a port, does not infer the necessity of asking aid of any one. A small craft might have been chartered, and

mutineers, under charge of a guard and an officer, placed in her, and a convoy been given to the nearest American port, and not a foreign officer known anything about it. Nay, had the islands been *neared*, some small craft would probably have been met at sea, with which this arrangement might have been effected, even without entering a port at all. If the prisoners could be hanged, they could certainly be transhipped. There always existed the ample excuse of sending the men home, in the month of December, under cover, in preference to leaving them exposed to the elements on the deck of their own brig. It is surely permitted to an American naval officer to exhibit humanity in some form or other.

Let us assume a new state of facts, and apply Captain Mackenzie's principle to it. The Somers is lying in a friendly port, when Mr. Wales reveals his secret. All the dangers exist, which Captain Mackenzie supposes to have existed on board his brig, on the 1st December. Now, he could not rely on the naked circumstance of being in a friendly port, without communication with its authorities, else would his decision not to seek the nearest friendly port rise up in judgment against him. If the mere fact of being in a port is security, where was the humiliation of going quietly into a friendly port, and anchoring? But the seizure might as easily take place in a port, as at sea. A man-of-war goes and comes without being questioned, and the plot could have been executed in a harbor as well as out on the ocean. The danger exists, then—it is necessary to suppose this, or there was no excuse for not running for the nearest haven—and something must be done to save the brig. The men could not be hanged in a neutral port, which would be an invasion of neutral territory; hanged they must be, or they will seize the brig; honor forbids asking protection, and no alternative would remain, under Captain Mackenzie's theory, but to go to sea in order to save the vessel, by hanging theingleaders! To this dilemma does his doctrine reduce him.

We do not affirm that the court means to maintain the untenable position that an American man-of-war is always to be sufficient for her own wants, agreeably to the unfledged notions of one or two of the witnesses, but we do say that we can see no other application of their fact, but that we have mentioned. A more pernicious principle than that avowed by Captain Mackenzie, in connexion with this point, can not well be imagined, and, if there are any in the country who believe he, or any other man, would carry it out, in a case directly affecting his own life, with his eyes open, we are not of the number.

The other point in the finding to which we especially object, is set forth in these words: "That Commander Mackenzie, under these circumstances, was not bound to risk the safety of his vessel, and jeopard the lives of the young officers, and the loyal of his crew, in order to secure to the guilty the form of trial," &c., &c.

Now, nothing can be more just than to say that Captain Mackenzie was not obliged to risk his own life, or that of his officers (the age we consider to be a mere *ad-captandum* allusion, an old man having precisely the same rights in the premises as a boy), in a clear case of danger. To affirm this, is simply to say that the question was, it is *your* life or *mine*, and, as *you* are the aggressor, and are clearly wrong, *you* ought to be the sufferer. It is the right of self-defence, and the evidence of that necessity being clear, there was no call for refinement in the reasoning. But the question here was, firstly, of the guilt; secondly, of the unavoidable character of the executions. Who will, or can say, the guilt of Cromwell was clearly established? It has been *guessed* at, not *proved*. Then how was it, as to the necessity, and what is the precise point at which a commander

is to be at liberty to say that his young officers are to cease to run any risk? We all must submit to certain risks, ashore or afloat. A man may imagine another seeks his life, may have the fullest moral conviction of the fact, but he can not be permitted to shoot the object of his dread to put an end to these risks, until he is driven to the wall. Any other doctrine than this, would soon make the country a slaughter-house. We conceive the only way in which this point can fairly tell in favor of Captain Mackenzie, is to say that he had no other means of saving his vessel, himself, or his officers, than to hang those he did hang. That is a justification no one will dispute; not even the law. Did the facts sustain him legally, they would sustain him morally; but to assume that men are to run *no* risks, or what they imagine risks, and particularly man-of-war's men, before they rig the gallows, is to assume what neither law nor reason will sustain. We take this portion of the finding to possess more of the character of an argument, than of a clear, dispassionate, legal decision. This doctrine of risks, completely developed, would soon destroy the best marine that ever showed its flag on the ocean.

While the court of inquiry was in session, the prisoners remained in confinement, ironed most of them, without any charges being brought against them. The truth is not to be concealed; they were dealt with as sailors, and not as citizens. It often happens on board ship, that severe and prompt measures become necessary, and military discipline sometimes unavoidably conflicts with civil rights. Pending the existence of the court of inquiry, there might have been a sufficient reason for keeping these men in confinement; there was none for keeping them in irons, we think, as is shown in the fact that some were not thus fettered; but, the moment that court ended, they were entitled to freedom, or to know the specific charges brought against them. No charges were brought, however; week passing after week in painful duration. In the meantime, an attempt was made to indict Captain Mackenzie for murder. The grand jury asked for instructions from the judge, on the question of law; and, after a solemn hearing of counsel, the court charged that it was not competent for a civil tribunal to interfere with matters that were pending before a naval tribunal, in consequence of which the bill was ignored.

We have no intention to extend this article unnecessarily, by dwelling on these proceedings in the district court. We shall briefly say, that, after examining the subject at some length, we are of opinion that the case belonged exclusively to the civil tribunals, though the court of inquiry was perfectly proper. So many questions were involved in the affair, that it was right the department should be put in full possession of the facts; but, this inquiry ought not, in the least, to interfere with the ordinary course of the justice of the country. Captain Mackenzie was not on trial, before the court of inquiry; he was not even arrested; so from having his sword taken from him, he continued in command of the *Somers*. Nor was his presence necessary for the legal proceedings of the investigation. He might have taken his hat and walked away, as the late Commodore Porter did from the court of inquiry in the *Foxardo* business, had he seen fit. Unless ordered to attend, with a view to facilitate the proceedings, he was under no legal obligation to be present, and, if ordered to be present, it was not as a prisoner, but rather as a witness. An officer is no more in the hands of the law, pending a court of inquiry into his conduct, than is the citizen, while a grand jury is hearing testimony in his case.

There is something unexplained connected with the proceedings of the department, during the brief interval that occurred between the publication of the find-



ing of the court of inquiry and the arrest of Captain Mackenzie, under the charge of murder. Something like a very supererogatory parade of impartiality appeared in the government journal because the enormous opportunity of two or three days was left for the friends of Cromwell to procure Captain Mackenzie's arrest by ordinary criminal process, the party, as it has been said, passing that time in a bailiwick where the usual course would not be effective against him. As soon as put under arrest by his military superiors, Captain Mackenzie had the pledge of a decision already made by the district court judge, that he would not interfere with a military tribunal. We should like to see these proceedings examined by some one who is more familiar with the facts than we are ourselves. It appears by the record, however, that the proceedings were so much hurried that the judge advocate was not prepared to open when the court martial convened.

There is another point connected with the finding of the court, to which we will advert. It says, that "during the confinement of the prisoners, sullenness, discontent, inattention to duty, disobedience of orders, often, as seamen know, and naval records prove, the sole precursors to open acts of violence and blood, were manifested by the crew," &c.

The reasoning of this sentence strikes us as singular and untenable. Mutinies have two general characters, the one of *disaffection*, the other of *conspiracy*. That of the *Hermione* was of the first class, that of the *Bounty* of the last. One proceeded from resentment, ill-treatment, and a desire for revenge; the other from a plot, conceived to carry out a favorite object. That symptoms of the feeling which produces the first class of mutinies should be discoverable, is as natural as it is that the mere conspirator should aim studiously at concealment. The mutiny of the *Somers*, if mutiny were seriously contemplated, was admitted to be of the latter class.

Shortly after the arrest of Captain Mackenzie (arrested *technically*; not *convinced*, though charged with murder, while the alleged mutineers, against whom to legal charges were ever brought, were mostly kept in irons and under the eyes of sentinels), a court martial was detailed for his trial. The whole proceeding was so singular as to deserve a notice. The charges will be found at length, p. 1 of the appended record.

These charges are five in number, viz., murder, oppression, illegal punishment, conduct unbecoming an officer, cruelty and oppression. The first three of these charges referred to the executions, in their specifications; the fourth referred to special treatment alleged to have been given to Mr. Spencer, and the fifth to alleged punishments inflicted on different individuals of the crew.

In the course of the trial, the judge advocate laid down the law in such a manner as to reduce these charges to three; murder, oppression, and illegal punishment. The charge of general cruelty appears, however, to have been abandoned for the want of proof. It probably never had any legal foundation. Captain Mackenzie, then, was virtually tried on the three charges of murder, illegal punishment, and oppression, the specifications referring to the hanging of the three persons so often named.

The court sat nearly forty days, during which time one of the ablest of its members withdrew on account of indisposition. The accused was acquitted. The sentence was no sooner known than the journals began to circulate rumors of the manner in which the court had been divided. On the one side it was said the opinion was *unanimous*, and the finding an "*honorable acquittal*." This last assertion was audaciously persevered in, for a long time, directly in the face of the

phraseology of the finding itself, with the additional equally unfounded declaration that the president "approved" of the proceedings of the court.

Owing to circumstances that are too familiar to need repetition, the facts have been drawn out, on authority, and they appear to be as follows: On the charge of murder, three of the court voted that Captain Mackenzie was "guilty," and nine voted that he was "not guilty." As the law, to make up a finding that should touch the life of the accused, required a vote of two thirds, the vote would have acquitted Capt. Mackenzie on this charge, had it even stood seven against, to five for him. On the charge of illegal punishment, the vote appears to have been four, guilty; eight, not guilty. On the charge of oppression, the vote was an acquittal. The question of the phraseology of the general finding now arose in a conversation which made its importance apparent. All *must* now vote for "acquitted," as the accused had been found "not guilty" on each charge; but findings often being "*honorably acquitted*." On this last point the vote was taken, when nine voted for "acquitted," and three for "*honorably acquitted*." The finding of a simple acquittal was consequently sent into the department. Now, by the law, no "*sentence*" of a court martial—cases that occur out of the country, excepted—can be carried into *execution*, without the "approval" of the president. In this case there was no sentence, and, of course, no "approval" was necessary. A general order appeared from the department, stating that the finding was "confirmed," by the signature of President Tyler was not affixed. With this brief history of the facts, we proceed to a consideration of the merits of this important case.

In forming our estimate of the conduct of Captain Mackenzie and his officers, it is indispensable, first to ascertain on what points it turns. Many varying positions have been laid down in the premises. Some have contended that Captain Mackenzie was bound to show first, that a mutiny actually existed; second, that the parties executed were connected with it; third, that the executions were indispensable to the safety of the brig; and, in the last place, that every opportunity that was necessary, and which the safety of the vessel would allow, was given to the men hanged, to vindicate themselves from the charges on which they were executed. This, as we understand him, was substantially the ground taken by the judge advocate.

We do not conceive this to have been the true issue, though we subscribe in part to the last condition.

Others maintained it was sufficient for the vindication of Captain Mackenzie that he conscientiously *thought* the first three facts just named, existed. The persons were silent on the subject of the last condition; probably under a conscious consciousness it never was fulfilled. A variety of modified opinions have been given, varying between these two. We conceive the true issue, both in law and morals, to have been this. Captain Mackenzie was bound to show that such a case was presented to him, as JUSTIFIED him in BELIEVING in all the facts mentioned in the first of the two cases given, and then to show that he allowed the accused every opportunity of defence, that he was justified in believing could be given to them, with safety to his vessel.

The reader will see our issue does not turn on the literal facts of the case, but on the manner in which these facts, real or supposed, were presented to Captain Mackenzie. A contemplates a silly frolic, blackens his face, arms himself, breaks into his friend's house, in the dead of night, and attempts to frighten him. But B shoots A. Now if it can be shown that the frolic of A had been previously communicated to B, this would be murder. Some minor facts

exist to render it manslaughter, possibly; but it would be justifiable homicide, supposing B to have been deceived. Thus, with Captain Mackenzie; Mr. Spencer may have contemplated an idle mystification, but have mystified so profoundly as to justify his execution; were the other conditions of our issue fulfilled. In this case, there would have been no real mutiny, but merely sufficient appearances of one.

On the other hand, a mutiny might have existed without the facts of the case, as they were presented to Captain Mackenzie, justifying that officer in believing in the guilt of the parties, and consequently without justifying their executions, whatever might be the danger of the vessel. This is a point on which we know, from personal explanations, that one of the judges of Captain Mackenzie, or at least a member of one of the courts, differs from us. That gentleman seemed to think if guilt were *subsequently* proved, it was enough to justify Captain Mackenzie *on that point*, although he did not get the evidence until after the execution! Many lawyers would probably take the same ground, although we know it to be untenable in morals, and believe it to be so in law. We conceive the opinions of lawyers would be apt to be influenced by what would be, and ought to be done, in a case that approaches near to our own, in appearance, though it does not touch it. Thus, if A be indicted for an offence, under supposed circumstances, and it should turn out on the trial, that he committed the offence, but under another set of circumstances, he would be found guilty, provided the technicalities did not necessarily make another issue. This would be right, as the guilt of the party tried, would be the point to reach. But, in the case before us, the point to be reached, was the guilt or innocence of Captain Mackenzie, not that of Mr. Spencer. Jurors would be greatly influenced by such facts, doubtless; but ought they to be? Is this a case in which a man is to be justified by *guessing* at all, even though he *guess* right?

It is a poor rule that will not work both ways. Captain Mackenzie's friends would be the first to apply our issue in his behalf, should any proof unexpectedly appear to show, unequivocally, that Cromwell, for instance, was innocent. They would then fall back on our principle, and affirm that *appearances justified* Captain Mackenzie in believing him guilty. In this they would take fair grounds, so far as principles are concerned, and we can not see how Captain Mackenzie's conduct can be vindicated by facts that appear *after* the execution. We repeat, we know he could not thus be vindicated, in morals, and morality and legality, in questions like this, usually, if not uniformly, run in parallel lines. We do not dwell on this point because we deem it very essential to what is to follow, but merely that we may settle principles as we proceed. It is a nice question, we admit, on which much may be said on both sides. We should be willing to examine this case on the broader ground of the two, though we think in so doing we should concede a just principle.

Our issue, then, is this. Such a state of facts must be made out as would justify Captain Mackenzie and his officers in *thinking* the parties guilty, and in thinking the executions absolutely necessary in order to save the brig, *after giving the accused every opportunity of defence that was compatible with prudence*. To raise any issue short of this, would be a mockery of justice, and would be to maintain, in effect, that the life of the American citizen, on board an American man-of-war, is to be held on the tenure of his commander's notions, however wild or unreasonable. The reasoning must be such as to satisfy the common mind,

and the parties accused must have every available opportunity of defending themselves.

Having thus laid down our premises, as relates to what we conceive to be the true issue, we will attempt to settle one or two other principles of a very different character, before we enter on the investigation of facts. It has been said that Captain Mackenzie's literary pursuits had given him the support of many literary men. Among others of that class, has appeared a gentleman who has high claims to be heard, and who lays down the position, that the size of the Somers, was greatly against the officers in the event of a conflict with the crew! We conceive that nothing can be more erroneous.

The Somers is a brig of 266 tons. Attempts have been made to show that her cubic contents would greatly reduce this tonnage, as if that were a matter of any moment. The largest tonnage is obtained by measurements of her length and breadth, and, as both these refer to her dimensions on deck, they alone can affect the scene of the conflict.

The size of the Somers was, perhaps, as near as possible to that which was the most desirable for her officers, in the event of such a conflict. Had she been much smaller, all her officers and petty officers might not have been able to act together, and thus have lessened their efficiency; while, had she been much larger, there might have been too much to defend or to avoid, for so small a party. Place twenty men on a frigate's quarter-deck, and they could be turned, or assailed from so many points as to render them weak; but twenty, or even ten, armed men, on the quarter-deck of a brig of 266 tons, make a very formidable array, as opposed to any number of unarmed, or even armed men, that could approach, at a time. It is merely the old fact that a small body can defend a defile against an enemy that would overwhelm it in a plain.

The size of the Somers was favorable to her officers in another point of view. We see nothing to have prevented Captain Mackenzie from sending all but his officers below, of securing the gratings, and of carrying the brig across the ocean, if needed, with the gentlemen of the quarter-deck alone. The idea of men's knocking down bulkheads, with firearms thrust through the gratings, within six feet of their heads, strikes us as being a little forced. We believe a single sentinel would have kept the whole of the Somers' crew at a respectful distance, under such circumstances. No man is fond of "belling the cat," and a volley fired through a bulkhead, would give it particular sanctity. But admitting the officers' rooms were given up to the crew, they would still be prisoners. The magazine could be easily defended by the firearms above it, and what could the people do below? A few of them, if they proved turbulent, might have been shot through the gratings, and we think the first case of this sort, would have brought the remainder to their senses. As for Captain Mackenzie's ability to send all hands below, who can doubt it, when it is known that he made them hang three of their supposed ringleaders?

Some may think that the officers would not have been of sufficient force to handle the vessel, under these circumstances. Here the size of the Somers was clearly in their favor. Commodore Rodgers managed a frigate under still more trying circumstances, in 1799, and Chauncey actually brought a ship up to Sandy Hook, single-handed, having to cook, attend his sick, and take care of his vessel for several days, quite alone. To say that ten men and boys could not handle a vessel like the Somers in the tradewinds, is to say that they were unusually inefficient. But Captain Mackenzie was not reduced so low. All the

est of his crew, the petty officers, and a seaman or two, to the number of nine, and so much of his confidence as to be armed at the crisis of the execution, and they surely might have been relied on. This would have given all the force necessary to an easy control of the vessel. Then it is probable fifteen or twenty of the younger boys might have been picked out, who would have been of service either in doing light work aloft, or in keeping a lookout on the movements of the vessel and about whose fidelity there could be no question. The witnesses speak of a good many of this character.

We see no great difficulty in a vessel-of-war like the Somers, being kept completely within the control of her officers, *under ordinary circumstances*, even supposing a mutinous spirit to have prevailed, after the existence of the mutiny is known, and the ringleaders are in irons.

A mutiny detected is a mutiny suppressed. The king's name is a tower of strength. The wavering, the timid, the prudent, then all range themselves on the side of the law, that being the safest side. The dread of treachery usually exposes all the secrets. It is one of the remarkable features of this transaction that, Mr. Wales and Small excepted, no one has been disposed to betray the confidence of Mr. Spencer. With so many in irons and menaced with the gallows, not a man has been found willing to come forward, under the impulses of either contrition, fear, or cupidity, to reveal the secrets of this formidable conspiracy! This very unusual circumstance is, of itself, of a nature to throw a shade of distrust over the belief of its existence, to the extent, at least, that was apprehended. It is probably the only case of the sort on record.

While on this branch of the subject, we will endeavor to dispose of some other points that have proved stumbling-blocks to those who are unacquainted with ships. Grave pictures have been drawn of the risks run at night; of the danger of a rush aft, whenever an order was given to do any duty on the quarter-deck, and of the general hazards of the darkness. The answers to all these difficulties are very simple. In the first place, there was no necessity for darkness, every man-of-war possessing means of lighting her decks; in the next place, there was no necessity for a single individual of the crew coming on the quarter-deck at all. Captain Mackenzie appears to have had nineteen men and boys whom he armed, at the crisis, and these he doubtless put in watch and watch; and, if nine men and boys are not competent to do all that is to be done on the quarter-deck of a *brig* of 266 tons, how do so many merchant-vessels sail for years much shorter-handed? A rope might have been stretched across the deck, and an order given for no man to pass it, unless called by name, on the pain of death. This would have prevented everything like a surprise of the quarter-deck; did that fail, Mr. Spencer's own alleged expedient, that of two of the quarter-deck guns pointed forward, loaded with canister, would have rendered the quarter-deck of so *small* a craft, as inviolable as a sanctuary. The last expedient has often been resorted to, and we can recall no instance in which it has ever failed to command the deck. In a vessel of the Somers' size, and with guns as heavy (32lb. carronades), the gangways would be like two doors to pass in case of such a discharge. All the other guns might, if it were thought necessary, have been discharged, and the spare shot secured. We conceive that a vessel of the Somers' size, under such circumstances, even admitting a pretty widespread disaffection to exist forward, would have the chances, as nine to ten, in favor of her officers, and that risk, it strikes us, might have been run before an American citizen was hanged without a trial. To come to the facts; the testi-



mony of Wales is first in order, as the executions, with the leading attendant circumstances, are not denied.

The first thing that strikes us in the testimony of the purser's steward, is the abruptness with which Mr. Spencer opens his plot. Wales swears this was the first communication he ever had with Spencer on the subject (see record, p. 11), and yet the latter began with "Did I fear death? was I afraid of a dead person, and dare I kill a person?" An oath of inviolable secrecy was then asked and given. Without canvassing the probability of such a statement, we will assume its truth, and ask what is the just inference? Clearly, that he who could proceed thus, was not very formidable as a conspirator, unless indeed he thoroughly knew his man. An oath of secrecy, *after this strange introduction*, was asked and taken. Then followed the communication, of which an outline has been given. Among other things, Wales is told that *about twenty* of the crew (page 11, record) were engaged in the conspiracy. Spencer had all the details of the plot in writing, the paper being at that moment concealed in his neck-handkerchief.

As the reader will examine the record which accompanies this review, we shall not refer in terms to every line of our statements, but each will be found to be verified in its place. For the present, we will confine ourselves to these few facts.

When Captain Mackenzie arrested Mr. Spencer, the neck-hankerchief was searched in vain, but a paper was subsequently discovered in a razor-case. A fac-simile is to be found in the record, pp. 129, 130. Here then we get an insight, at once, into the probabilities of the extent of this conspiracy. The paper contains in all, thirty-two names. Of these, *four* are down as *certain*, *ten* are down as *doubtful*; *eighteen* are down as to be retained *volens volens*. The four *certain*, were Spencer, himself, Andrews, M'Kinley, and Wales. Among the *doubtful*, it will be seen that four names are marked, as being likely to be *induced* to join the plot, previously to its execution. The remainder of the *doubtful*, it is stated in the paper, would be likely to join when the vessel had been taken; if not, *they were to be forced*. Of the *eighteen* down as the *volens volens* men it is hardly necessary to speak. The paper itself acquits them of anything but being such persons as Mr. Spencer *wished to coerce*. There is not the slightest ground to be gathered from the paper itself, that one of them knew anything of the matter.

Here then we get the details of the conspiracy, as made out by its leader, down to the last moment of his liberty. The interview with Wales took place at night, just before the lights are out on board a man-of-war. His own name was probably put on the next day, or a few hours before the arrest, though the supposition has been hazarded, among a multitude of other absurdities that have been advanced in this case, that Wales's name *may* have been set down *before* the plot was revealed to him. This is said in face of the fact that Wales swears he had had no other conversation on the subject, and, by those, too, who attach importance to the paper. What is the document worth at all, if names were *not* down as *certain*, before the parties had been consulted? If this *may* be true of Wales, it *may* also be true of Andrews and M'Kinley, and yet no one on that side has thought of applying this violent probability to them!

Taking the paper as a guide, this conspiracy is reduced, as to any serious danger, to three individuals, Spencer, Andrews, and M'Kinley. Admitting the most, or that the four who it was thought would be *induced* to join previously to the execution, *had* been so induced, the serious danger was then confined

seven! This, even admitting it to be true, does not strike us as a conspiracy to derange the propriety of a man-of-war's quarter-deck, with the ringleaders in irons and all the details in the captain's own hands! But we do not think the four doubtful ought to be placed anywhere but where they are placed on the paper. The quick insertion of Wales's name proves that Spencer had a boyish anxiety to make his scheme look as formidable on paper as possible, and there can be little doubt his muster-roll was corrected at every plausible occasion. This was natural in itself, as connected with the wild romance that pervaded the whole alleged project, and it was necessary, if this paper were to possess any real usefulness. The circumstance that Mr. Spencer showed this paper to some of his brother midshipmen who could not read Greek, proves the sort of feeling that reigned in his mind, as respects this document, which he evidently regarded as boys are apt to regard things which first seem to connect them with active life. Doubtless he was correcting and making annotations, quite as fast as the facts would at all justify. There is nothing to show the contrary, while there is much to prove the fact was so. Wales swears he was told the whole thing was down on this very paper, and the presence of his own name speaks all that is necessary. Mr. Tiltson, p. 170 record, proves that Mr. Spencer was writing on this paper down to the day before his arrest. Even Captain Mackenzie, in his report, p. 195, left column near the bottom, says he was writing on a paper on the 26th.

Then Spencer had told Wales that *about twenty* of the crew were concerned in the plot. It is a melancholy proof of the character of the mind which sat in judgment on these proceedings, that Captain Mackenzie, in a letter formally submitted to the court of inquiry, says: "I believed then in the existence of a plot in which, by the declaration of Mr. Spencer, *at least twenty* of the crew were concerned."

Were the same proposition submitted to a million of men, it would be difficult to find one, that would not have substituted *at most* for Captain Mackenzie's "*at least*." Who, before, ever heard of a conspirator's giving the *minimum* instead of the *maximum* of his force to one whom he wished to enlist in his enterprise? We deem this instance of the reasoning powers of Captain Mackenzie important to the issue, inasmuch as we think it will be shown, as we proceed, that such is the habit of his mind. We go farther; we ascribe the great calamity that has befallen us, if it be a calamity to have a deep reproach rest on the justice and principles of a country, to be owing to a disposition in Captain Mackenzie to regard things as he has at first conceived them to be, and to act under his *convictions*, rather than under *the authority of evidence*.

It was under the testimony contained in the revelations of Wales, that Mr. Spencer was arrested. In arresting this young officer Captain Mackenzie did no more than his duty, though the *manner* of the arrest was a little too melo-dramatic for the practice of a man-of-war. The manner is related in the testimony of Wales, and in that of other witnesses. It is also to be found in Captain Mackenzie's report. Apart from the exaggeration of the appeal, we think it was unwise to arrest Mr. Spencer in so public a manner, and then to place him on the quarter-deck, in full view of the crew. We entertain no doubt that much the greater portion of the ominous conversations, groupings, shakings of the head, and strange looks, which seem to have awakened so much distrust aft, had their origin in the natural wonder of the crew, at seeing an officer in this novel situation; and he, too, not only a favorite forward, but one who was known to be the son of a minister of state. In our opinion, Captain Mackenzie would

have shown more judgment, had he sent for the young man into his cabin, and by a conversation endeavored to get the facts from him. He might have been ironed there, were it thought necessary, but what judge of human nature can suppose that a man of forty, possessed of authority, could not have got complete control of the feelings of a lad of nineteen, by means of kindness and judicious representations; more especially of one who manifested the disposition to repentance and confidence that it is acknowledged young Spencer manifested, a day or two later. Besides, something was due to the official station of the father, to the rank of the son, and to the extraordinary character of the evidence under which the arrest actually took place. There had been no overt act, the whole story was so wild and improbable, as to wear the appearance of a mythification, and it rested solely on the statement of one person, which statement Mr. Spencer had enjoyed no opportunity of explaining, or refuting, when he was ironed, and set up on the quarter-deck to be gazed at, by all on board. This course, too, was determined on, before the young man had heard his crime.

The procedure strikes us as failing in judgment on all points, and somewhat in generosity. Were there any real danger, such an exhibition would be apt to inflame and excite to action the remaining conspirators, whereas, the quiet appearance of the young man might have left them in some of that doubt and uncertainty which seems to have been such a source of uneasiness aft, as respects the conduct of the crew. There is nothing more demoralizing than doubt, or nothing more apt to awaken the energies than certainty. We feel great difficulty in believing that Captain Mackenzie would have pursued a similar course, had one of those connected with him "by blood or alliance" been accused by such a narrative as that of Wales.

After the arrest of Mr. Spencer, nearly twenty-four hours passed without the occurrence of any event to awaken new distrusts. The men collected in knots, it is said, and conversed together, separating as the officers approached, and would look aft at the prisoner seated on the arm-chest. These facts have been dwelt on by some commentators, in a way we think, to show they were striving after evidence of danger, rather than after sober truth. The Somers had out hundred and twenty souls on board her,—at least thirty more than she should have had—and it is scarcely possible that, with her boats stowed, and one third of the deck reserved for her officers, one hundred men could be on her remaining deck, without being in what is called knots. The size of the Somers becomes truly of moment, in estimating the importance of such a circumstance. Then, as to the men's separating as an officer approached, is it not usually done in a vessel of-war? Men may collect, and converse with an officer stationary among them; his pleasure is known, and he is understood to allow it; but nine times in ten, as he approaches, they open to learn what he wants. This is so usual a thing in a vessel, that we are surprised to see any stress laid on it. But admitting it were not, is there anything extraordinary in a man's looking aft, at an officer set up in double irons on the quarter-deck, and in canvassing the cause—his innocence or guilt—or in ceasing to utter their opinions in the ear of an officer? We should have considered a contrary course as affording much the strongest proofs of a conspiracy, as it would have been substituting something like a concerted denial for a very natural indulgence. Those who really had anything to conceal at such a moment, would be very apt to act with caution. Even the advocates of Captain Mackenzie dwelt on the fact that Cromwell assumed an indifferent air, and affected not to enter into the feelings of those around him, as a proof of



artifice, by not yielding to this natural impulse. In *his* case they overlook the admitted facts that he was a stern man, had some education, was acting as boatswain, and would have been departing from the practice of such men by indulging too much curiosity, in order to drag in an inference against *him*.

The turning point of the danger, according to Captain Mackenzie's account of the matter, and according to the drift of his defence, was the carrying away of the main-royal-mast. Previously to this accident, however, the men were inspected at quarters, it being Sunday, November 27. This inspection took place at 10 o'clock in the morning. It will be seen, on referring to the testimony of Wales, that Small, the seaman, was directly connected with the plan of Mr. Spencer, having communicated with the latter on the subject during the time he (Wales) was on the booms, and in his presence. Now, under the circumstances, it appears to us that Small would naturally have been the principal subject of Captain Mackenzie's suspicions. For some unexplained reason—unexplained, unless the facts that he was a strong, determined man, and intelligent for his station, and the circumstance that Spencer had been known to give him some money, be deemed a sufficient explanation—this gentleman fastened his eye on Cromwell, the acting boatswain, as one of the principal objects of his distrust. In his report Captain Mackenzie gives this extraordinary specimen of his own reasoning powers, as connected with the appearance of Cromwell and Small at this Sunday inspection, viz.: "The persons of both were faultlessly neat. *They* were determined that their appearance in this respect should provoke no reproof. Cromwell stood up to his full stature, his muscles braced, his battle-axe grasped resolutely, his cheek pale, but his eye fixed indifferently at the other side. HE HAD A DETERMINED AND DANGEROUS AIR. SMALL MADE A DIFFERENT FIGURE. *His appearance was ghastly*; he shifted his weight from side to side, and his battle-axe passed from one hand to the other, his eye wandering irresolutely, but never toward mine," &c., &c. See Rec. p. 198.

Here, then, were two men who manifested guilt, according to Captain Mackenzie, by directly contrary deportment. In order to escape his distrust, a man must be neither firm nor irresolute; look frightened, nor look determined; hold his battle-axe quiet, nor pass it from hand to hand; stand erect with his muscles immovable, nor shift his weight from leg to leg; look steadily, but indifferently, across the deck, nor let his eyes wander, without looking, however, at mine! Evidence like this, of the judgment that was brought to bear on this important case, awakens reflections of the most painful character. If to what has been shown, it be added that men are required to be faultlessly neat at Sunday musters, or Sunday inspections, on the pain of punishment, the picture will be complete.

Next comes the affair of the mast: The spar was carried away in the top-gallant sheeve-hole, in the afternoon of the same day—or Sunday the 27th. Capt. Mackenzie says it was done in consequence of "a sudden jerk given by Small, and another whose name I have not discovered." It may be necessary to explain to the landsman how this loss is supposed to have happened.

The Somers was a brig, a craft in which all the after-braces lead forward. Braces are ropes that are fastened to the two ends of the yards, and which are used to pull the yards round, to keep them steady at any desired angle to the wind, and, *when they lead aft*, to help support the yards. These braces must lead to some point that is pretty nearly on a level with their yards, or they could not well be worked, nor would they be of much support. A brig having no mast

abast the mainmast, her after-braces, preventers excepted, lead to the foremast, while her forward-braces lead to the mainmast, or to objects attached to these masts respectively. It is evident, therefore, that any strain on the forward-braces, of brig or ship, helps to support the yard, as this strain is *against* the direction of the wind; whereas a strain on the after-braces of a brig lessens the support, since it pulls in the direction of the wind. The same is true of all the mizen-braces of a ship which lead forward to the mainmast. Now Captain Mackenzie attributes the loss of his main-royal-mast to the fact that Small gave the brace a sudden jerk, the brace leading forward, and pulling in the direction of the wind, as described.

Captain Mackenzie says: "I did not dream at the time that the carrying away of this mast was the work of treachery;" but as he knew that moments of confusion were those in which conspirators would be likely to act, he used the precaution to see that the work of repairing damages should be conducted deliberately and without confusion. "To my astonishment," he goes on to say, "all those *who were most conspicuously named in the programme of Mr. Spencer* [meaning the papers in Greek characters], no matter in what part of the vessel they might be stationed, mustered at the main-top-mast-head; whether animated by some new-born zeal in the service of their country, or collected there for the purpose of conspiring, it may not be easy to decide. **THE COINCIDENCE CONFIRMED THE EXISTENCE OF A DANGEROUS CONSPIRACY**, suspended, yet perhaps not abandoned."

As we proceed, we shall here note another instance of the peculiar character of Captain Mackenzie's mind—the fact that all those most conspicuously named in the muster-roll of Mr. Spencer being assembled at the mast-head on this occasion was **CONFIRMATION** of the dangerous character of the mutiny.

In the first place, the inference is very remarkable for the premises. Cromwell was acting boatswain, and there is nothing surprising that he should go aloft, on an occasion like this, in a vessel with the peculiar crew of the Somers. Had he remained below, no doubt it would have been deemed a *confirmation* of the suspicion that he stayed on deck to profit by circumstances in the way of seizing the vessel. Anything may be tortured into proof, when men reason in this mode. As for Small, he was a captain of the main-top, and if any one was to go aloft, *he* clearly ought to have been there. Several mention that Golderman was one of those aloft. Cromwell, Small, Wilson, and Golderman, are the names most prominently given. Now the name of neither Cromwell nor Golderman appears on Mr. Spencer's programme at all! We know it is contended that the name of Andrews—there being no such person in the brig—was an alias for Cromwell; but it might just as reasonably be affirmed that it was an alias for any one of the officers, as to assert this without proof. To sustain a point by laying down certain things as possible, and then to demonstrate one possibility by another, is, to say the least, an exceedingly loose manner of getting at facts in a case of life and death. At the proper time we shall show that, according to all the *reasonable* probabilities, Andrews did *not* stand for Cromwell.

Nor is this all; Anderson, the captain of the fore-castle, was one of those aloft. Now this man so far possessed the confidence of Captain Mackenzie, that he was armed at the execution. The inference of Captain Mackenzie is, that certain individuals went aloft on this occasion *to conspire*: had he said to show supererogatory zeal and activity, in order to *conceal* their guilt, there might have been a show of plausibility in the conjecture; but in the aspect in which this gentleman presents the occurrence, it strikes us as being singularly distorted. So long as

one individual was among them who was not in their secret, how could men *conspire*, without betraying themselves, on the cross-trees of a brig, or in her top-mast rigging! Unless they went aloft with the purpose attributed, the whole conjecture fails. And would men be apt to go to a place where the chances were as twenty to one they could not be alone, with such an object? Anderson we have named as being aloft, and not in the conspiracy, and there might have been others, but the witnesses have mentioned those who were suspected, rather than those who were not. There were others; Gedney was there, and no one seems to suspect him; the boy Gagely must have been there, too, and he is spoken of in favorable terms. The fact of Anderson's presence came out incidentally, and not directly. But Golderman was aloft, and his name is not in the programme at all. To give the *coup de grace* to this conjecture, who can imagine men would select a spot which, just at the moment, was the point of general observation, as the scene of a conspiracy? It strikes us that men whose duty did not call them aloft, would have chosen a less public place.

Captain Mackenzie adds, in connexion with this point, and as a matter of moment: "The eye of Mr. Spencer travelled perpetually to the mast-head, and cast thither many of those *strange* and *stealthy* glances which I had heretofore noticed." This is not the least extraordinary of the very extraordinary reasoning that pervades the whole of the case. Nothing is more apparent than the fact, that Captain Mackenzie, in his report, intended to favor the world with a fine and memorable description, one that should be quoted in after ages for its thrilling incidents and graphic beauty. This is seen in his details, which would be the height of puerility without this conclusion, and which are not much better with it. To this ill-directed literary ambition we attribute the "strange" and "stealthy," aided a little, perhaps, by a natural cast in one of Mr. Spencer's eyes. But passing over these comic exhibitions of weakness, which might be smiled at but for their tragic connexion, can anything be more violent than the inference as to Mr. Spencer's motive? He was at sea, seated on an arm-chest, in irons, with nothing to do, and nothing but the vacant ocean to gaze at outward, and that only by "stealthy" glances, as the brig lifted or fell. A mast is carried away in full view of him, and it is thought extraordinary that he sought the very natural relief of gazing at what was going on at the main-top-mast-head! It is probable there was not a man on deck who did not cast "many strange and stealthy glances" aloft on this memorable occasion, and who might have cast more, had he not been otherwise occupied. We confess, had not Mr. Spencer looked aloft, we should have thought it so little in conformity with what one might expect, as to feel an inclination to distrust some deception in his conduct.

While on this point, we shall pursue this affair of the mast. By examining the testimony before the court, it will be seen the idea prevailed, that the mast was carried away by design, the ingenious theory that was set up in this connexion going on to maintain that Cromwell instigated Small to jerk the brace, the object being to throw the boy overboard, and then, when some of the most active and loyal of the crew were absent in a boat, and the vessel was in confusion, to rise and seize the brig. Captain Mackenzie admits in his report that he did not dream of treachery at the time, a circumstance which is sufficiently established by the testimony, page 171, where it will be seen he sharply reproved his nephew, Mr. O. H. Perry, for not attending properly to his duty on this occasion. But the most superficial examination will show the feebleness of all this theory of "treachery." The points attempted to be established are as follows:—

Cromwell instigated Small, to jerk the brace; an order existed never to jerk or pull upon the light braces which lead forward; Small belonged aft, and was never known to do duty forward before; the moment would have been favorable for the purpose of the mutineers.

Now, we deny the reasoning as connected with every one of these propositions. As for the first, it is a fact, and was only to be established by direct affirmative evidence. The attempt completely failed—so completely, as almost to establish the negative. (See record, pp. 97, 98, 99, 100.) As for the second, it is proved that Mr. O. H. Perry said he told Capt. Mackenzie he understood the order was to "haul on the brace," though, when cross-examined by the commander himself, he says he understood it was an order for "a small pull," &c. (see record, p. 173), and that Captain Mackenzie publicly reproved him for his conduct. The third comes more within the category of a mental effort. As Small belonged aft, it was extraordinary he should pull upon a main-royal-brace. By referring to the evidence, it will be seen that Small was seated on the bitts forward, probably within five feet of the spot where the brace was belayed, possibly within two or three. A boy was actually on the royal-yard, and an officer calls out, if you want "to pull on the main-royal-brace," the object being to "steady" the yard while the boy was on it. A main-top-man is seated nearest the brace—he knows the object—knows what is to be done, ought to be done, at once—it is light work, and who will say he ought to hesitate? Nine men in ten, on board of any ship similarly situated, would have sprung to the brace. The circumstance that Small belonged aft, and never had hauled on a brace forward before, explains the reason why he might have exerted his strength, or *weight* (for that is the power used on a rope that leads up and down), on this main-royal-brace. The braces which led aft were hauled upon, and he may very well have acted under a habit. Then Small is described as the shortest man in the brig, and small men are apt to throw their weight upon light work. It is a natural resource of their means. As for the order itself, it is disputed; the witnesses of Capt. Mackenzie do not agree, any more than those for the prosecution. Next, the moment would not have been favorable, nor does it come within the bounds of any plausible possibility that it could have been seized by the mutineers. The order emanated from the mind of the officer of the deck, and could not have been anticipated. It follows there was no time for premeditation. The plot, if plot there was, must have been concocted between the moment when Mr. Hays first spoke and the pull on the brace. How long a period would this be on board a small brig-of-war? Ten seconds would be a large allowance; it might have been all over in five. It probably was in six or seven. Here, then, we are to make the violent supposition, that Small, in six or seven seconds, conceived and executed this design, his body in active physical exertion the whole time! The supposition strikes us as singularly absurd. It would have been far more rational to have thought, as Small was known to be uneasy and nervous, now standing on one leg, now on the other, that nervous excitement, and a desire to manifest unusual zeal, had led him to do more than his duty.

There is an unanswerable objection to the scheme, however, in the fact that a dozen much easier of execution and more likely to succeed, presented themselves. For this contingency the mutineers, in the nature of things, could not have been prepared, whereas Cromwell, if so disposed, might have prepared his men, thrown a boy overboard in the dark, given the alarm, and then executed his purpose, taking care that none of his own dependants should go in the boat. A billet of wood, in the dark, might have served as well as a boy, or fifty expedients of the

nature been adopted, every one of which would have been better than this of the royal-yard. It might be added that a boy on a royal-yard, in a vessel going large in the trades, would fall *inboard*, and not *outboard*, nineteen times in twenty; and, that a boy, so situated, especially on a *raking* mast, nine times in ten, would not come down at all. He would save himself by the rigging and the sail, as this boy actually did. Now, all these things are as familiar to seamen, as the figures of a quadrille to a young lady, and he would be as apt to reason and act on them, as any one on shore would act and reason on his most familiar habits. It appears to us, that there is nothing connected with this affair of the mast, to justify any part of Captain Mackenzie's reasoning. Nor is it clear the *jerk* did carry away the mast at all, though the strain of a taut brace might have been the feather to break the camel's back. We shall allude to this point again.

We pass next to the *necessity* of the execution, on the supposition of the guilt of all the parties, intending to consider the last point, at the conclusion of our analysis of the facts. In estimating this necessity, we intend to give Captain Mackenzie the full benefit of that which we conceive to be the true issue, or of the *justifiable* belief, at the time, of the existence of this necessity. Nothing would be easier than to show, *now*, that this necessity was imagined; the evidence all tending to prove that the conspiracy, so far as it existed at all, had no great extent. The question then is, how far the facts, as they were offered to Captain Mackenzie, at the time, *JUSTIFIED* him in *believing* in the necessity of these executions. There can be little doubt, if this point of his defence can be made out, this gentleman must be acquitted before God and man. We consider, however, the *guilt* of the parties indispensable to this necessity.

It may be well to remind the reader of two facts before we proceed to details. Much of the evidence on which this necessity is to be proved is matter of opinion; dependant on signs and symptoms that it is contended were sufficiently apparent to the eyewitnesses, but which it is difficult to impress on the public with its due weight and gravity. The other fact is the very material circumstance that the most important of these witnesses were as guilty, in the eye of the law, as Captain Mackenzie himself, if the latter were guilty at all; having been aiding and abetting in the whole transaction—accessaries before the fact. The first of these facts is entitled to its consideration on the one side, as is the last on the other. It is very possible that signs of disaffection may have existed in reality, that can not well be brought home to the minds of those who did not see them; still, it must be remembered that those on board the brig may also have been so distrustful as to exaggerate the proofs of danger, and to see grounds of alarm where none really existed. As we shall presently show that Captain Mackenzie, by his own subsequent course, has left the public justly to infer that he can not make out the guilt of those whom he brought in as prisoners, and those *arrested in port*, it leaves a strong probability that he and his officers *did* exaggerate this danger.

As respects the connexion of so many of the witnesses, with the guilt or innocence of their commander, something may be said on both sides. In the first place, it is not easy to suppose any malice on the part of the junior officers of the Somers against those executed, and certainly nothing was to be gained by hanging them. We are not to look for any interested motive, then, by way of explanation. The situation of the parties was peculiar, and it ought not to be forgotten that, in the clearest cases of guilt and danger, these very persons were the only witnesses on whom Captain Mackenzie could, in the nature of things, rely for the proofs of his justification. On the other hand, it should be borne in



mind that the fault of Captain Mackenzie, admitting that he erred, was probably one of judgment, coupled at most with some undue pertinacity of opinion; that these witnesses sustained him in all he did, and, consequently, that we are not to expect in a case of this gravity, when men have once committed themselves, they will be altogether as impartial and candid as if they had not. The distinction becomes material, when we remember that the witnesses were called on to testify, in their cooler moments, concerning acts committed in a crisis of strong feeling and presumed hazard.

The reader will better understand us, if we refer to certain points in the way of illustration. Some of the witnesses, in testifying to the danger, use expressions like this: "I thought so then, and I think so *now*;" thus identifying their present impressions, after every opportunity had been given to probe the conspiracy to the bottom, without discovering anything, with their impressions at sea, when subject to all the risks. Great confidence is manifested, also, concerning the guilt of Cromwell, as well as that of other individuals, who were brought in, in irons, a guilt which is inseparably connected with the danger, and yet the survivors have not even been tried, *unquestionably because they can not be convicted*. We deem this adherence to so much positiveness of opinion, under the circumstances, to be a consequence of the connexion of the witnesses with the transaction itself, and, without wishing to attribute to any one of them a deliberate design to invent, or even to conceal the truth, we think it scarcely human that they should not, in matters of opinion at least, and perhaps unconsciously to themselves, sometimes color it. What we mean, therefore, is simply, that while we should regard it as extremely unfair to view these persons as men who were testifying in behalf of a partner in ordinary guilt, we deem it unwise to consider them as *totally disinterested*. Their own characters, as men of prudence, clear-sightedness, and moral firmness, are unavoidably connected with the issue. Unless it be assumed men never fail in these qualities, the considerations just mentioned must be entitled to a good deal of weight.

It will probably be said, it is a strong circumstance in favor of Captain Mackenzie, that *all* his officers coincided in opinion on the subject of the necessity for the executions. Under ordinary circumstances, there would be great force in this argument; there is some, though we think much less, under those which actually existed. Had the Somers been an ordinary vessel-of-war, the officers would have been more independent of their commander, than happened to be the case with this brig. She was sent to sea with too much of the character of a family yacht, to come within the usual category of a regular cruiser. Captain Mackenzie tells us himself, in speaking of his officers, that "two of them were connected with him by blood, and two by alliance, and the four intrusted to my special care." Two of these gentlemen, we understand, were sea-officers who had charge of watches, and the two others were witnesses in the case, though not of the command that advised the executions. Any one familiar with a man-of-war, will at once admit the ascendancy of the opinions of sea-officers, in cases of this nature. The purser and surgeon, for instance, would be men of unusually decided character, giving to each department of a ship a very nearly undisputed sway, within its proper sphere. It must not be forgotten, that of the five sea-officers who signed the opinion in favor of the executions, four were just of an age to render them active assistants in quelling a physical attempt to seize a vessel, but to render them questionable counsellors, in a case of this fearful magnitude.

Had the question of life and death been referred, too, to the council that was convened on the 30th November, as a naked proposition to be decided by the unbiased judgments of its members, on the facts as they presented themselves at the time, the opinion given would carry more weight with it, than we conceive it entitled to receive, under the real state of the case. It appears by the evidence of Mr. M. Perry, and others, that the necessity of executing Spencer, Cromwell, and Small, was discussed among several of the officers, as early as the 28th, or two days before the matter was referred to the council, and three days before the opinion of that council was signed. The interval was abundantly sufficient to give a bias to the opinion of the quarter-deck, most especially when that quarter-deck was principally occupied by very young men, and to have caused the council to arrive at a foregone conclusion. So generally is the influence of military supremacy appreciated, that it is a standing law of courts martial to oblige their junior members to deliver their opinions first, commencing with the youngest, and ascending according to date or rank. In the civil courts, even, it is the rule of judges, when obliged to give jurors leave to separate before a case is finished, to direct them not to converse with each other, until the matter is finally submitted to their decision. So tender is the law on this point, that he who has expressed an opinion in a case is rejected as a juror, and rightfully, inasmuch as he has to overcome preconceived opinions before he can get to be even impartial. The evidence that is wasted in restoring the balance of his mind, might make the scale preponderate, had the beam been level when first received. According to the evidence, Lieutenant Gansevoort, Mr. M. Perry, and one or two more of this council, would have been rejected as jurors, after the opinions they had expressed of the necessity of hanging the individuals in question; and, while we do not say the necessity of the case did not make it proper to consult them, we do say that their opinions, *insomuch as they could be influenced by most of the testimony taken before the council*, are entitled to much less weight than if they had come fresh to the consideration of the subject. The same reasoning will probably apply to most, if not to all, the members of the council. It is in proof that three members of this council were of opinion of the necessity of the execution as early as the 28th; it is scarcely probable these early consultations were confined to these three, and did that council meet, its members holding preconceived opinions, they must have been more than human, if their inquiries were not quite as much directed to obtaining confirmation of what they already believed, as to obtaining the truth. When this bias was left to act on a tribunal before which *the accused had not even a hearing*, it is easy to imagine its effect. This fact, also, is of the last importance in another point of view. All the evidence of the necessity of the execution, that appears *after the 28th*, is thrown away, as respects these gentlemen, inasmuch as their minds were made up on previous facts. Then the *character of the evidence given*, speaks volumes!

But we are not left to mere conjectures on the manner how opinion was formed on opinion, in this grave transaction; the testimony of the parties themselves, removing all doubt. Even the witnesses before that council, justify their own opinions by those of others around them. We refer the reader generally to the depositions taken before the council (p. 151 to p. 158, inclusive). Anderson says (p. 154): "From what I heard from my shipmates, I suspected they were plotting to take the vessel." This man pretends to no knowledge of his own, and thought the vessel in no danger, at the time of the council, though he distrusted going on the coast. Stewart says: "I don't think the vessel safe, from

what I heard King, the gunner's-mate, say" (that is), "that he had heard the boys say that there were spies about." Henry King signs a paper, giving "a list of men whom he suspects of being engaged in this matter now—Golderman, Sullivan, and Waltham; believes that Cromwell was at the head of them; Mr. Spencer and Cromwell were engaged most of every fine watch, taking stars; believes that Small is engaged," &c.; and thus goes on *thinking, suspecting, and believing*, to the end of his deposition. Yet this man is *authority* for the opinions of others!

One or two *facts* are mentioned in these depositions, such as Mr. Spencer's general intimacy with Cromwell and Small, but in the main nothing is given but opinions. The *facts* will be noticed when we come to consider the guilt of the prisoners. Gedney's deposition, however, is worthy of notice. In the body of it, he says: "I heard him (Spencer) say to Cromwell, 'he would try that, and if he succeeded, well and good, and if not, he'd burst;' *know* that he had reference to a voyage, and spoke about a voyage to the northwest coast." This is all plain enough. The witness deposes Mr. Spencer was talking about a *voyage*, and that he had been speaking about a voyage to the northwest coast, and then he wound up by the remark of his intention to try some particular scheme, and if it succeeded, well and good; if not, he'd burst. The last is a common New York expression, which means, "I'll make or break." To this deposition he swears, and he signs it. But a *postscript* is added, in these words: "I now believe, that when he (Spencer) told Cromwell that 'he would try that, and if he succeeded, well and good, and if not, he'd burst,' that he alluded to taking this vessel." We presume no comment is required on such a deposition.

A more precious set of depositions was probably never flouted in the face of justice. Nine tenths of their matter would be rejected in the loosest court in Christendom. We hope they will be read, and we can not doubt their effect on every legal or logical mind. We shall have occasion to revert to them again, but at present, will add a few words on the subject of that of Wales.

In the first place, this deposition is dated November 26th, 1842, on the day Mr. Spencer was arrested. It may have been given as authority on which to ground the arrest, though that is a very novel course at sea, unless further unusual steps are meditated. As it stands in the record, it would seem not to have been sworn to.

The statement is generally that given in Wales's testimony before the court, though it differs in the order of events. In his testimony before the court (p. 12), he says: "Small then left; Mr. Spencer *then* made overtures to me, by saying, if I would join them, he would give me the post of third officer on board." In the deposition (p. 156), this offer is made after Wales had left the booms, and after Mr. Spencer had menaced him with death if he revealed what had passed; it is the last thing Mr. Spencer says in the interview, and is answered by Wales's saying he would talk with Mr. Spencer on the subject the next day. On the subject of his own engagement, Wales says, in this deposition or paper, "He (Spencer) then asked me if I would become one of their number; I did not tell him whether I would or would not, but rather leaned on his side," &c., &c.

Now this paper was Wales's statement at the time—the document on which the prisoners were hanged, so far as he (Wales) was concerned; and yet Mr. Wales is put down as "certain" on Mr. Spencer's programme—is one of the three, beside himself, on whom this young man fancied he could subvert depend. All this Captain Mackenzie saw, and we think his inference shows



have been that men were set down as "certain" on very insufficient grounds. The offer of making Wales third officer, seems to have been made under an apprehension he was only half won over. Why was this offer transposed, as to time, in the testimony before the court?

We wish to be understood. It is not our intention to say Captain Mackenzie ought not to have consulted these gentlemen at all. He had no other counsellors, and he did right in asking the opinions of the officers, before he took so grave a step as hanging three Americans without a trial. This does not change the character of the advice, however, and it is of that we have just been speaking.

We come next to the proofs of the necessity. These proofs have all the same general tendency, though they are a little varied by the experience of the different individuals. All, however, were founded on the presumed danger of a rescue. This much was indispensable, as mutineers already in irons, could scarcely be considered objects of apprehension from any other cause. It is true, the possibility of the prisoners getting their hands out of the irons is alluded to in the course of the proceedings; but, as fastening their arms at the elbows, behind their backs, would have rendered them incapable of doing any harm even if out of irons, it is to be presumed they were not hanged to avoid *this* danger. Mr. M. Perry particularizes his reasons for believing a rescue would be attempted; they were substantially as follows: Because those persons whose names were in the paper collected in knots, particularly in sight of the prisoners; because they did not obey orders with the same alacrity as they had done previously to Mr. Spencer's arrest; on account of the general disposition of those whose names were found on the paper; the carrying away of the mast, and, because, one night when he called out for "some of you," to come aft to haul in the spanker-sheet, a great many more than was necessary, fourteen or fifteen, came aft. On this occasion, he picked out two or three to do the duty, and told the rest to go forward, again, and they moved slowly away. The knots of men, too, would apparently change the subject of their discourse as he approached them. Now, of these persons, whose names were on the paper, the only two known, down as *certain*, were already in irons. Wales, of course, is excepted. As Cromwell and Small were also in irons, they completely cover the alias, or the name of Andrews. Wilson, McKee, and that supposed fore-top-man, were also in irons. This left but six whose names appear the least under suspicious circumstances, to be dreaded, as connected with the paper. So far as the paper was concerned, or could be at all received as authority for apprehension, only two of these six belonged to Mr. Spencer's category of those who would probably be *induced* to join the plot, *before* its execution. Men, in such a state of mind—and if the paper is to be taken as authority at all, it must be taken on its own authority—would not be apt to be the subject of just alarm after the plot was discovered, and the ringleaders in irons, when Mr. Spencer himself contemplated the possibility of *forcing* the remaining six into his scheme, and that only *after* he had the command of the vessel, it is a most violent supposition to suppose them very dangerous. As these six came within the category of those who Mr. Spencer deemed it probable would be *induced* to join *before* the execution of the project, he had only to make a cross opposite their names, to note the circumstance on his muster-roll. The promptitude with which Wales's name was enrolled, might afford a reasonable assurance that the mutiny was no worse than it seemed to be, by the programme, and even Captain Mackenzie admits (p. 195), that Mr. Spencer passed much time on the day of his arrest, in writing on, and examining a small piece of

paper, which he evidently supposes to have been one or both of those discovered in his razor-case.

As for the collecting in knots, looking at the prisoners, and apparently conversing about them, and changing the discourse as an officer approached, it strikes us as the most extraordinary reason for apprehending danger, that has been given. Had *not* the men done what was so very natural, it might have justly created suspicion. To suppose that a quarter-deck could be lined with men in irons, including a quarter-deck officer and the acting boatswain of the brig, and the people forward not talk about it, is, in itself, to suppose the latter to be influenced by some very unusual motive. That they changed their discourse as Mr. Perry approached is also probable, though it is not quite so easy to understand how he could *know* this fact, in a way to be able to swear to it, unless able to add what had been said before the change took place. We understand him to say, consequently, that he *thought* the conversation was changed. That the conversation *was* changed, we have no difficulty in believing, as men are not apt to let their opinions of the discipline of a vessel be known to their officers. It would be disrespectful, and insomuch mutinous, had they done so. But the subject of many of these conversations has been distinctly stated by several of the witnesses among the crew, and no harm has been found in it! McKinley swears he overheard the names read off the paper when found, and that he told several that their names were down on this paper of Mr. Spencer's, he, Mr. Spencer, being then in irons on the quarter-deck.

We consider this testimony as conclusive of the *general character* of these conversations, whatever may have been the facts in a few particular cases. Nevertheless, the officers have a right to the benefit of the *probabilities*, and these we think altogether against their reasoning. We apprehend their minds had taken a previous bias, and that they looked for confirmation of their suspicions, rather than for the sober truth.

As for the affair of the mast, we deem all the just reasoning to be opposed to that of the quarter-deck on this occasion.

The next point is the circumstance that the crew did not obey the orders, as promptly as before the arrest of Mr. Spencer. As this was one of the general arguments in favor of the necessity of the execution, it shall now be examined.

The accounts of the state of the crew are not uniform. Mr. Gansevoort tells us Captain Mackenzie remarked that the ship's company was in a state of good discipline, when the existence of the plot was first revealed to him, or, on the morning of the 26th November. Several of the officers testify that the discipline fell off while the brig was on the coast of Africa. This is an extraordinary fact, if true, to have escaped the eye of the commander. The island of Madeira is given by a good many of the witnesses as the place where the discipline began to fall off, while others put it materially later, and others treat the point somewhat lightly altogether. According to Mr. Gansevoort's testimony, Captain Mackenzie, himself, must have belonged to the latter class. The discrepancy in these opinions go unanswerably to show that the change could not have been very marked, and they leave the probability that many if not most of these opinions were formed *after* the revelation of Wales. A distinction must be drawn, moreover, between dissatisfaction and ordinary offences. We do not consider thievish or even surliness, a proof that men were engaged in a conspiracy to turn pirate. The dullest intellect would understand the necessity of feigning even unobedience, in the last case, rather than awaken suspicion by betraying dis-

tion. The conduct attributed to Mr. Spencer, by Captain Mackenzie, would be the natural course to pursue in such a state of things. Obsequiousness in face of the discipline, discontent and plotting out of sight.

It is an extraordinary fact that no one was punished for all this backwardness at duty, and surliness! The Somers was at Madeira, October 6th, and the revelation of Wales took place on the 26th November; yet no one was brought up for misbehavior, *on this point*, in these fifty-two days! There was abundance of flogging, but it was for stealing, fighting, and ordinary offences.

One of these punishments is worthy of being noted. A negro, named Waltham, was flogged for stealing, on the complaint of M'Kinley. The theft was not from M'Kinley, but from the *officers*. Now M'Kinley was one of Capt. Mackenzie's "favorite aversions." He was down on the list as certain, and Captain Mackenzie speaks of him as one so sagacious as to predict he would have gotten rid of Mr. Spencer and Cromwell, and commanded the brig, in the event of her having been turned into a pirate. Waltham was a *volens-volens* man, and of course to be propitiated, if the programme had any real virtue in it. Waltham, moreover, was a decidedly suspected man. The judge advocate asks Mr. M. Perry (p. 78 record) if he knew who reported Waltham the last time he was flogged for stealing, or on the 29th November, only two days before the executions, and after Cromwell's arrest. Mr. Perry thinks it was M'Kinley; whereupon this question was put, viz.:—

"After this report of M'Kinley, did you believe he and Waltham were accomplices together with Mr. Spencer?"

The answer is—"I did sir; *that being a particular reason for thinking so.*"

Here, then, Mr. Perry thinks the fact, that M'Kinley got Waltham flogged with a cat-o'-nine-tails, a *particular* reason for believing they were accomplices in this mutiny. This is important testimony, as showing the value of those *opinions* on which so much stress is laid. The reason is so *particular*, that ordinary minds can not readily grasp it. We suppose, however, that the young gentleman meant this: M'Kinley was so artful, as to imagine it might conceal his agency in the plot, if he got a suspected accomplice flogged, and that accomplice was sufficiently complaisant to submit to the operation! Well, admitting all this extraordinary shrewdness to have existed, would not minds so acute, and bodies so insensible, have been sagacious enough and steady enough to avoid betraying disaffection in their ordinary conduct?

We wish the reader to run over the whole of Mr. Perry's cross-examination, particularly from page 69 to page 75. It will give him a tolerably good idea of the value of the opinions that existed in the Somers at that grave moment. This witness and others speak of the exhaustion of the officers, as a reason for the necessity of the execution. Thirty-six hours seems to be the favorite period of the duration of their powers. This is inferring great homogenousness of constitution, the man usually holding out longer, under circumstances of trial, than another. What was there to cause all this exhaustion? These gentlemen were in watch and watch; so are thousands of others daily. We have ourselves, at a tender age too, been watch and watch for weeks and weeks, and had our rest broken night after night in addition, to help make and shorten sail. It is a common thing to be all hands all day, and watch and watch at nights, for long voyages. But these gentlemen had to carry pistols and a cutlass. Is this harder on the human frame than to add the labor of ship's duty to the watch and watch of ordinary sailors? But these gentlemen could not sleep on account of the uneasiness natural

to their situation. We intend to treat this matter fairly, and admit that such apprehensions might cause one's rest to be disturbed, without any imputation of a want of due firmness, though we think habit and weariness would soon bring relief. We have a better opinion of the physical powers of these gentlemen than they seem to have themselves. Besides, the necessity of the executions was settled in many of their minds, perhaps in all, on the 26th and 29th, when they could not have been as much exhausted as they appear to have been on the 1st December. In addition, to make this argument available, either in law or morals, they were bound to hold out as long as they could, and to take the chances of falling in with something, even though it were an American cruiser. There was no danger of their all breaking down at once, and the first failures would have given timely notice. As it was, even the two sick men, Garty and the doctor, were still able to keep watch, when the men were hanged. The argument is clearly untenable, by proving too much. The officers began to look *pale*, it is said; this was probably true, men fatigued, and who lose their rest, being very apt to lose their color; but Captain Mackenzie tells us that even Cromwell, the gigantic desperado, slaver, and pirate, looked *pale* as early as the 27th, though he still looked *determined*. In this respect, then, one side was not much better off than the other. As for the fatigue produced by walking so much, to which some of them allude, Capt. Mackenzie should have permitted them to sit down.

A reason given by Mr. Perry, for supposing that a rescue would be attempted, was, that Mr. Spencer, Cromwell, and Small, looked *unconcerned*, as if they expected a rescue. (See record, p. 62.) If required to distinguish between this species of unconcern and that which belonged to innocence, we apprehend the witness would have been embarrassed. Let us examine the point. The three men are in double irons, on the known charge of mutiny, and they do not look concerned. The question is, ought that unconcern to be ascribed to a confidence of a rescue, or to some other cause? In the first place, the chances of a rescue were small. The officers were armed, had command of the vessel, and had told them *their* brains would be blown out at the least sign of any attempt to communicate with the crew. Now, a good deal of delicate management would be necessary to get possession of a quarter-deck like that of the Somers, and the risk of the prisoners being killed in the struggle was so great, as to render them anything but unconcerned. They had been often told to lie down, look round, not to make signs, under the penalty of death, and we find it difficult to believe that, manacled as they were, they would regard the chances of a struggle for their rescue with unconcern. They might be willing to take the risk, but it must have troubled them, we think. On the other hand, what had they to fear in their present situation? Mr. Spencer declared, it is said, he intended to run away as soon as he got home, and, with a father who was a cabinet minister, he could not have apprehended much for his life. There had been no overt act of mutiny, and the whole affair, without the executions, would not have been remembered, probably, but a week or two after the brig got in. As for Small, he had made his confession, and might naturally expect to find at least mercy, while it is quite as reasonable to suppose Cromwell's unconcern proceeded from the consciousness of innocence, as from any other cause. Native resolution may very well have supported him; while, conscious of his own great physical powers, this man ought in reason to suppose he would have been one of the first sacrificed, in the event of an attempt at rescue. If he was so formidable as to need an array of officers—one with

pistol cocked and pointed at him—to arrest him singly on the quarter-deck, he must have believed he had little to hope on such an occasion.

The supposed evidence of an intention to rise, generally, is urged in vindication of the necessity of the execution. The conduct of Wilson, the sailmaker, is in particular mentioned by several of the witnesses, and, among others, by Captain Mackenzie. Wilson had a desperate-looking dagger, and had told one of the boys that he would cut his throat with it. This dagger, in Captain Mackenzie's report, is made to assume a very dangerous aspect, and it evidently had its influence on the opinions of most of the officers. The reader will find the explanation of all this at page 160 of the record. It would excite a smile, did not a painful feeling suppress it.

Then Wilson was seen sharpening his battle-axe. We confess, this struck us as a little ominous, for it was scarcely probable that any *one* man would make an unsupported attempt at a rescue. But Mr. Perry disposes of this ominous fact, by an answer he gives to the judge advocate at page 69. "If you thought his (Wilson's) conduct so suspicious, why did you not report it before?" was the question; meaning before his (Wilson's) arrest. Here is the answer: "I did not think his cleaning his battle-axe suspicious at *that time*—*'twas a usual occurrence.*"

This man Wilson seems to have liked Mr. Spencer, and he may have had some vague conversations with him; for it seems he went aft and reported *something* to Captain Mackenzie, which that gentleman pronounces in his report to have been "some lame and absurd confession," page 201; and he puts him in irons. It would have been more satisfactory had Captain Mackenzie let us know what this *something* was, that we might have judged of its value for ourselves. But, whatever may have been the intentions of Wilson, or the dangerous character of McKinley, both were in irons on the 30th, and neither could aid in a rescue. Both have been brought into port, and both have been discharged without a trial, though Captain Mackenzie had them weeks and weeks within his reach, as prisoners, within the waters of New York!

The position of the brig had something to do with the necessity of the executions. Mr. Perry is required to give the distance from some of the nearest islands, at meridian, each day, from the 26th November to the 1st December inclusively. This is done at page 75 of record. English Harbor, Antigua, is in 17 degrees 12 minutes north latitude, and 61 degrees 48 minutes west longitude. The executions took place in 17 degrees 34 minutes 28 seconds north latitude, and 57 degrees 57 minutes 45 seconds west longitude. Mr. Perry, on 1st December, makes Antigua 388 miles distant from the place of execution. (See record, p. 75.) Without going into a minute calculation, we will put the case so plainly any one can understand it. Between English Harbor and the place of execution there are but some twenty-seven statute miles of difference in the latitude. The difference in the longitude is 3 degrees 50 minutes 16 seconds. Now a degree of longitude in the 17th degree of latitude measures a trifle less than 66 English miles. Calling the difference of longitude 4 degrees, which it was not by about 10 miles, it makes the distance on the 17th parallel of latitude just 264 English miles, which will about cover the trifling variation of course occasioned by the twenty odd miles of the actual difference in the latitude. We suppose the Somers to have been about 250 miles from Barbuda and Antigua at the moment of the executions. There is something that requires explanation in these answers of Mr. Perry. For instance, he places the Somers at 388 miles from An-



Antigua on the 1st December. On the 30th November he places her at 620 miles. Of course she was 232 miles nearer on the first day than on the second. Now her run by log is given as only 191 miles in these twenty-four hours. The difference, of course, must have been owing to the current. It follows, had the brig's run been the same in the twenty-four hours that succeeded, and the current been the same, as doubtless it was, she would have been up with Antigua in the afternoon of the 2d December, or within the thirty-six hours that some of the witnesses seem to think marked the limits of all the officers' powers of endurance. This is a very important fact, and renders the theory, that a man-of-war is not to go into port even to charter a craft to receive prisoners, who must otherwise be carried on the American coast on deck, if not in bags, in the dead of winter, somewhat indispensable.

According to Mr. Perry, the Somers, on the 28th, at meridian, was 872 miles from Barbadoes. On the 29th, this distance was lessened to 690 miles. The difference is 182 miles. From meridian 28th to meridian 29th, the run, by log, was only 144 miles, leaving 38 miles to be effected by the current, even had the brig been steering directly for Barbadoes, instead of running diagonally past. At meridian December 1st, Barbadoes is said to have been distant only 335 miles. This does not tally with our measurement by 100 miles, but we can not explain the matter. Let us calculate from November 28th. Between this day and December 1st, the brig ran, by log, 51½ miles. Add to this a drift of 38 miles each day, or 114 miles in all, and we place the brig only 247 miles from this island when the execution took place. A slight change in the course would have brought the brig's head in the direction of Barbadoes, and the set of the current was toward that island. Such calculations can not be minutely accurate, something depending on the wind and the sail carried; but the difference would not be very material. We think the printed record must contain some mistakes, as to these distances given by Mr. Perry, which strike us as wrong in more than one particular. There can be no question, however, as to the position of the Somers when the execution took place, that being laid down, with precision, in the charges. We conceive, and have maintained ever since the leading facts of this case have been accurately known to us, that the instant the commander of the Somers foresaw a probable necessity for executing the prisoners, it became his duty to stand for the nearest available port. Owing to the direction of the wind and currents, this might have been Martinique, or even Antigua, to either of which islands the Somers must have been materially nearer than she was at the time of the executions, had the brig been kept away as early as the 28th. Had this course been adopted, there is scarce a doubt that the Somers would have been in port in a very few hours, some twenty-four at most, after the memorable moment when the men were hanged!

The defence has foreseen this objection, and has produced its reasons against it. In the first place, the Somers would not have been executing the duty on which she was sent—the orders of the department would not have been followed to the letter! If true, this is a miserable answer; but it is not true. A part of the orders under which Capt. Mackenzie sailed is conceived in these words, and he ought to have known it—probably did know it—viz., no person shall “be deprived of life, liberty, or property, without due process of law.” Any order which contravened this order, became illegal, and he not only was not bound to obey it, but he has been sworn not to obey it. We do not mean an individual may not

legally take life, without the form of law, but we do mean, so far as *legal orders* are concerned, that this is the paramount order—the supreme law of the land.

Then the excuse of following the intentions of the department, in a case like this, can scarcely meet with too strong reprehension. The department never meant anything of the sort, and the *spirit* of all orders is to be obeyed; it was a time of profound peace, and the Somers was simply returning from the coast of Africa, where she had been with despatches. In this connexion, it may be well to say that all which is thrown out on the trial, about the “honor of the flag,” “going into action with credit,” and such rhodomontade, is worse than boyish on an occasion like this. It is pressing a principle which, even in moments of actual war, is always taken with certain allowances, into the service of a weak cause, by using it when it can only be used at all as a naked theory. Carried out, it would justify a clever first lieutenant in hanging a poor captain, in order to introduce better discipline, and make an inefficient ship efficient. The only circumstances that can render such a course at all plausible, viz., pressing danger of a conflict, it is notorious did not exist.

But, changing the course would have destroyed the confidence of the officers, say Captain Mackenzie’s witnesses. If it did, they must have been a very peculiar set of officers. Even supposing the *reason* not to be communicated to them, it is not easy to see why confidence would be lessened by going toward a place of comparative safety, instead of remaining out on the high seas. As it was, they were armed to the teeth, were pointing their pistols at the men and threatening to shoot them, and were existing in anything but a quiet, calm confidence of the power of discipline. They must have believed the danger to the last degree imminent, or they are guilty out of all question—guilty *en masse*—must have thought themselves, as it was, driven to the wall, and we can not see that their case would have been any worse by the discovery of a door through which they might retire, at need, carrying their assailants with them as prisoners. We never heard of an army that lost confidence by knowing that proper care had been taken to provide for its retreat, though drawn up in front of its enemies, in readiness for a pitched battle. But the *reason* would have settled the whole matter, as respects the officers. Had Captain Mackenzie let his reason be known, it would have been all-sufficient. It must have been a strange set of officers who did not understand the difference between going into port, in order to avoid the necessity of hanging men without a trial, and of going into port out of apprehension of the crew.

But, a change of course would have given the alarm to the men, caused them to think the officers frightened, and brought on the rescue. This, too, is said of a ship’s company in which all the navigators were in irons, and without the means of knowing anything about it. As for the men at the wheel, who can suppose they would think a change of half a point, or a point, in the course, meant anything so very serious. In running 800 miles, a very trifling variation in the direction makes a great difference in the result. The change might have been made gradually, or as changes are constantly made at sea. The variation of the compass compelled changes in the apparent course, and a little mystified conversation in hearing of the men, would have completely set their suspicions to sleep, had they even been awakened, which we think highly improbable. As for the crew’s fancying the officers frightened, it would have been easy for the last to convince them of their mistake. Had the disaffection been as bad as the witnesses seem to think, occasions were constantly offering. It would have been far better to

have brought on a collision with some of these disobedient mutineers, shot one or two on the spot, than to hang submissive men who were already in irons. The cat, properly applied, would have proved a convincing argument with the crew, as to who commanded. If Waltham was flogged on the 28th and 29th, the brig running northwest by west three quarters west, we fancy it felt to him very much as it would had the brig been running west by north three quarters north. As for the opinion that at the sight of land, the disaffected would certainly have attempted a rescue, we will ask if that is as reasonable as to anticipate the same consequences from the sight of the gallows?

The two rushes aft, that when Mr. Perry called some of the people to "lay aft," in order to secure the main-boom, and that when the call was to sway upon the maintop-gallant mast-rope, have been cited as instances of the danger, and, through the danger, of the necessity of the execution.

We think the case of the mast-rope, and of the tramping aft, might justify Mr. Gansevoort in believing a crisis had come, *under his previous impressions*, though we think the impressions themselves to have been insufficiently sustained. The conduct of Mr. Gansevoort, *always allowing for his impressions*, was spirited and good. It gives us sincere pleasure to be able to say this, for he bears an honorable name, and the reputation of his gallant old grandfather was a pledge that the heart of this young officer would be right, whatever might be his mistakes of judgment. It would require strong proof to induce us to distrust the courage of any who bear this highly respectable name. But Mr. Gansevoort admits himself it was all a mistake, and is rejoiced he did not fire. The subsequent explanations take this case quite out of the category of the mutinous symptoms. The tramping of a parcel of lads, who were chased with the colt, and who were started up from lying on the deck, is a natural occurrence, and has happened often without any intention of mutiny. We shall presently give our own theory, however, of the trifling disorganization that we make no doubt did exist in this particular crew.

Mr. Perry's case of the main-boom explains itself. The brig was rolling heavily, the boom was thrashing about, and the men came aft strong, and in a hurry, not knowing exactly what may have been the extent of the injury in the dark. Pistols had been seen, and one can tell what zeal they sometimes awaken. No attempt was made to throw Mr. Perry overboard, or to seize the quarter-deck, and, it strikes us, a little cool reflection ought to have satisfied everybody nothing of the sort was intended. The witnesses constantly imagine the mutineers not only to have been all *intention*, but weak enough to let that intention be constantly seen. To suppose *conspirators* so careless as to betray their disaffection at every turn is extremely unreasonable, while it was natural for a partially disorganized crew to act as these boys are described as having acted.

Our theory of the disorder which existed among the crew is as follows: We suppose Mr. Spencer to have spoken disrespectfully of his commander, and we do not doubt that Cromwell used the language attributed to him. It is by no means uncommon for commanders to fall under the strictures of their inferiors, and even though the language might be mutinous in strict construction, it is very seldom any harm comes of it. Cromwell appears to have been an exceedingly passionate and violent man, and he yielded to his temper indiscreetly. To suppose, however, his abusing the lacing of the jib as represented, to have any connexion with a conspiracy to run away with the brig, is to suppose the very man whose art and management are dragged in, to account for facts that can be accounted for in no other manner, was absolutely wanting in common sense. We can imagine Mr.

Spencer, admitting him to entertain the project that is imputed to him, might systematically undervalue his commander to bring him into discredit with the crew, and we can suppose the crew in a measure influenced by this loss of credit, without any design of mutiny, but we can not suppose Cromwell so mixed a character, as to be both cunning and the reverse, a fool and a sensible shrewd conspirator.

The placing of Mr. Spencer in irons, on the quarter-deck, was a great mistake at the commencement. The less the crew knew of the plot, the greater would be the visible effect it produced among them. The manner in which Cromwell was arrested, denoted demoralization of the quarter-deck, and a demoralized quarter-deck is sure to produce disorder and uncertainty all over the ship. We distinguish essentially between an unreasonable exaggeration of danger, and an unmanly dread of meeting it. The highest order of courage is doubtless that which sees danger only when danger exists, and then meets it steadily and with a perfect use of the faculties; but brave men, those who are ready to risk their lives on all suitable occasions, often see danger where there is truly none. The last is a mental rather than a physical defect, while the opposite quality is a union of high moral and physical courage.

We never heard of a stronger instance of exaggeration of danger, than the circumstances which attended the arrest of Cromwell. A single man was descending in the midst of a body of armed officers, and he is met by one of them with a cocked pistol, and told to walk aft! This was, at once, throwing away the supremacy of command, setting discipline altogether aside, and resorting to sheer force—using the ascendancy of the pistol instead of that of the law. It was a direct admission of apprehension of one sort, and such a departure from the quiet exercise of authority, as to be apt to induce the crew to see that they were existing under a new régime; one of force, and not one of law. Nothing called for this extraordinary course. There was no resistance, had been no resistance; and it would have been time enough to show a pistol, when a pistol was actually needed. Now this pistol went off. We have no disposition to use what may have been a perfectly accidental thing, especially as applied to a novel and peculiar species of arms, in the least unfairly. Still the report of this pistol must have been heard, and must have sounded odd in the ears of those who saw no other signs of mutiny than the peaceful arrest and unresisted ironing of the accused. Men who could make as great a mistake as this, lessening the dignity of command to the threat of the alarmed, would be apt to commit other similar blunders. Very young officers were given pistols, and went about the decks in a way to excite feeling among the crew. We have in evidence several instances in which menaces of putting portions of the crew to death were used, and it is probable many more occurred. Under such circumstances it is not surprising that the men got to be uncertain in their conduct, and, in the end, a little wilful. The great difficulty in accounting for the behavior of the people, which one witness describes as a *little stiff*, and which we suppose to have been the best term that could be used, on any other grounds, is the fact that conspirators, plotters, men who had the objects imputed in view, would have had a direct and obvious interest in pursuing another course. On the other hand, men, and boys in particular, can never be driven in this way without exciting, in a greater or less degree, a spirit of opposition.

It will not do to justify the necessity on evidence that can not be in some measure imparted. Anything short of that which admits of some description, is con-

jecture, and men are not to be hanged on conjecture. But, we have many points of evidence given to us in terms, and we may judge of the value of the indescribable part, by that which has been described. Nothing, for instance, can be more violent or improbable than Captain Mackenzie's conjecture about the motive which took the men aloft after the mast was carried away. So far as we can ascertain, all the men belonged there but Cromwell, Wilson, and Anderson. This, then, was taking top-men at hazard, and it is not to be believed Cromwell would seek a place to plot where one ignorant of his designs might, at any instant, intrude. It is a little surprising no officer went aloft; some one probably would have done so, but for the feeling that prevailed on deck, and this Cromwell ought probably to have expected. We think in most vessels-of-war, one of the midshipmen would have been there, even though none were stationed in the top. As for Mr. Perry's suggestion that the top was a very good place to create confusion, by throwing light sails, rigging, &c., on deck, it is something like affirming that a man was bent on murder because he had a pistol in his pocket. Most people would think the assertion met, by the fact, that the suspected person did not touch the weapon at all. Then a warfare between the light sails of a brig of 266 tons, and pistol and musket bullets could not be of a very doubtful issue.

There is another circumstance connected with the alleged disaffection of the crew, which it may be well to mention. That this disaffection was not very serious, is to be inferred from the facts, that some of the witnesses did not observe it at all; that Captain Mackenzie should not have seen it, though passing two thirds of his time on deck, or he would not have made the remark he did to Mr. Gansevoort; and the witnesses are almost too much of opinion as to the precise time when the disaffection made itself apparent. Nevertheless, they differ as to the degree. In addition to this, it is proper to say that it is openly stated out of doors, that *discontent* existed on board the Somers, on her first cruise, and that some difficulty had been prognosticated before the brig sailed, on this, her last cruise, in consequence of the condition of the vessel. Of this fact, we believe there is no doubt, our authority being very respectable. But there exists a singular proof that something of this sort was anticipated, a proof that Captain Mackenzie has himself been the instrument of laying before the world. That proof is this:—

It will be remembered that, pending the sitting of the court of inquiry, it was announced in the journals, evidence was found to show that Cromwell and another man of the Somers' crew, had been at a house in the Bowery before the brig sailed, and had there *predicted a mutiny would break out on board her, in her next cruise*. This was justly deemed an important fact, and a witness of the name of Rice was introduced to establish it. It was soon discovered, however, that Rice referred to a conversation held by a boatswain's mate of the name of Phelps, and before Cromwell had joined the Somers, and his testimony was not received. The character of his testimony, notwithstanding, is known, and it would have probably shown that this other man *predicted a mutiny, or trouble on board, of some sort or other*. We make no doubt that this prediction was connected with the previous discontent, and we find in this fact, and all that we learn from other sources, a sufficient explanation of the little stiffness and other signs of dissatisfaction that existed on board previously to the arrests. This was doubtless increased by what occurred in the brig after the arrests. We shall presently show why boys would be likely to get unruly in a vessel officered as was the Somers.

As the guilt of the prisoners was closely connected with the necessity of the executions, as well as with their justification, we shall next consider this important point.



The length to which this article is unavoidably extending, admonishes us of the necessity of doing this in the briefest mode that is compatible with clearness. As there can be little question that Mr. Spencer and Small were, to say the least, extremely indiscreet, sufficiently so to bring them within the provisions of the statute, we shall not waste our time on their cases. We do not admit that all which is charged against these two is made out in a manner fully to satisfy our mind, nor are we altogether disposed to receive their alleged confessions exactly in the light in which they are generally received; but that these two were engaged in a *seeming* plot, resembling the one described, we hold to be proved; though we greatly question if an attempt would ever have been made to carry it into serious execution. We shall reason, however, as if their guilt were established, on every point, reserving a few opinions as respects them for future remark.

The guilt of the five others, viz., of Cromwell, M'Kee, M'Kinley, Wilson, and Green, then, is the question before us. Of these five, the name of M'Kinley is down on Mr. Spencer's list, as *certain*; and those of Wilson, M'Kee, and Green, are among the *doubtful*; the first two with marks opposite, to denote that they would probably be induced to join in the plot before its execution. On the muster-bill, M'Kee's name appears as stationed at the wheel, M'Kinley at the arm-chest, and Wilson was designated as one of those who were to act in the cabin and steerage. The name of Cromwell does not appear on the programme, or station-bill; though it is maintained that the E. Andrews, on the list of certain, was probably intended for this person. We will take the case of this man, first, by itself. Of the others, we shall have very little to say.

The guilt of Cromwell is inferred from the very fact, that his name is *not* on this list. Who can E. Andrews be, if not Cromwell? it is asked, with something very like an air of triumph. When questioned on this subject, it is said Mr. Spencer answered that E. Andrews was the real name of Small. There can be no question that every fair logical inference would lead us to believe Mr. Spencer told the truth, reasoning on the supposition that the Greek papers were serious documents, as the following analysis of the facts, we think, will show:—

As the Greek character is used obviously to conceal all the names, we can see no more reason for supposing an alias was used for Cromwell's, than for that of any other person. The means taken to conceal this paper is a proof it was deemed entirely private. It was intended for Mr. Spencer's own use, or amusement, as he may have been influenced in his main object, and there was no necessity for adopting an alias. Cromwell, had he *seen* the paper, could not have told whether his name was on it, or not. Then E. stands for Elisha, which was Small's Christian name, and it does not stand for Samuel, which was Cromwell's Christian name. The inference that Cromwell was so very wily, as to insist his name should not go on the list, ill agrees with the accounts given of his general manner, which is supposed to indicate mutinous feelings at all hours and seasons. A man so excessively cautious and cunning would have manifested these qualities where they were most essential.

But there were *two* papers, detached from each other, as they were found in the razor-case. One of these papers contains the names of the "*certain*," "*doubtful*," and "*volens-volens*" men; and the other the station-bill, for the moment of execution. Neither Cromwell's nor Andrews's name appears on this last, while that of Small does. This point, of itself, would seem conclusive. The paper was got up for something, or for nothing. If for nothing, it is worth nothing; if for something, it must be viewed in relation to that particular object. Unless it

told the truth, it was worse than nothing. If Mr. Spencer made it a false record, it was only to deceive himself. Want of names was not its fault, but excess of names: Witnesses swear they believe one name at least is on the list of "doubtful," when the party was entirely innocent. Under such circumstances, why should any certain name be omitted? Is it to be supposed Cromwell, the giant, the desperado, would have nothing to do in the moment of trial? Captain Mackenzie's counsel took the extraordinary ground, in relation to this point, that Cromwell, doubtless, was to be *everywhere*—where he pleased—keeping up a general superintendence. Well, admit this; why did not the programme say as much. There was the same reason for stating this as for stating all the rest. It was a programme, a station-bill, one clearly intended to make as large a figure, *on paper*, as possible; and while one can believe an insignificant person might be forgotten, or not stationed, it can hardly be supposed a ringleader would be overlooked. Is it probable Mr. Spencer would put down his own name, and not Cromwell's? The fact that Small's name is introduced in the second paper—used twice, indeed—is a proof that there was no especial design to drop him on account of precaution; still his name, that of the man *known* to be among the "certain," is not down at all on the muster-roll, unless down as E. Andrews! Wales is enrolled almost as soon as enlisted, but Small is not enrolled at all, unless as Andrews, while the use of his name in another place unanswerably shows that *caution* was not the reason of the omission! In order to believe that Andrews meant Cromwell, it is necessary to believe that *his* alias was introduced without a motive. Such a fact could have been easily retained in the mind, while the station-bill required system and arrangement.

On the other hand, Mr. Spencer's avowed statement covers every difficulty. He said that Andrews was the real name of Small, and when told that, on the other paper, he had put the name of Small in two places, he appeared surprised, and stated that he was not aware he had done so. To us nothing seems more probable than the fact that Small, about to enter into such an enterprise, should see the necessity of an alias, and have told Mr. Spencer his true name was Andrews. Every man who embarked seriously in a scheme like that attributed to Mr. Spencer, would bethink him of sailing under false colors. The fact that Small told an untruth proves nothing, unless it proves that he deceived his leader. The initial, moreover, says a great deal. This explains everything, while the conjecture that Andrews is an alias for Cromwell, leaves various difficulties in the way. *Au reste*; the alias may have intended any one else, as well as Cromwell. It is no proof against any one, taken *per se*. So far, then, as the two papers are concerned, they would show that Cromwell was in no manner concerned in the plot. We have reasoned as we conceived Captain Mackenzie was bound to reason, on the supposition of the real character of the mutiny, and taking the papers as he found them.

The violent supposition that Cromwell was to be first officer, because Wales says he was offered the berth of third officer, has been made. As evidence, this is absurd; as a probability, worse. In merchant-vessels, mates are divided into first, second, third, and sometimes fourth officers; and it is said Mr. Spencer was to be captain, Cromwell first officer, Small second, and Wales third—the berth offered him by Mr. Spencer. Now, here are the unanswerable objections to this theory. In the first place, it is purely guess-work; then, man-of-war's men never speak of lieutenants as first or second officers. The third officer of a man-of-war would be her second lieutenant, and no one else, unless she had a commodore, or

a second captain on board. But what was to become of the man who was to be taken on board at the Isle of Pines, and who "was familiar with their intended business"? The reader will find Mr. Wales's own statement at page 156. It is as follows: "The brig was to proceed to Cape St. Antonio, or the Isle of Pines, one of these places, and there TAKE ON BOARD one who was familiar with their intended business, whom one of the conspirators was perfectly acquainted with, AND WHO WAS READY AND WILLING TO JOIN IN THE EXPEDITION." It is not probable such a man would serve under the purser's steward, and this leaves the necessity of cashiering Small, the seaman and navigator, in order to make Mr. Wales third officer, in the mercantile sense, and, at the same time, include Cromwell!

The bad conduct of Cromwell, his oaths, denunciations, disobedience of orders, menaces to kill this or that individual, and refusal to receive Mr. Gansevoort's single-sticks into the storeroom, &c., &c., strike us as singularly odd proofs of his guilt as a conspirator. Love of money is supposed to induce him to plot a mutiny, but not to be strong enough to induce him to conceal his feelings and intentions! At one time he flogs the boys, and then, when he has seriously embarked in the conspiracy, he plays with them, not in order to propitiate them, for most are to be thrown overboard, but to conceal his designs. Why not control his tongue, with the same object? This was not a conspiracy founded in resentment, but a speculation on crime. As for the boys, it would really seem, if Capt. Mackenzie rebuked him sharply, two or three times, as is sworn to, it is sufficient to account for his change of conduct. At all events, it silences the testimony on this point. The witnesses, moreover, swear to too much. They can all see that this change in Cromwell's deportment took place after the brig had reached Madeira, the place now chosen as the precise spot where Cromwell became enlisted in Mr. Spencer's projects, though it *had been at New York*, until Rice's mistake was discovered!

Cromwell's language, such as telling Dickenson his time was short, is common language enough among that class of men, and probably meant no more than that he (Dickenson) would not long have it in his power to take liberties with himself. These expressions are of every-day occurrence on board a ship, and are thought nothing of at the time, though vulgar men can easily distort them into serious things, when occasions occur. The witnesses admit they ascribed them to temper and habit when used. We look on all that relates to Cromwell's ordinary deportment and language as unworthy of serious refutation. No part of it demonstrates a mutinous intent (disrespect of his officers excepted), and the openness with which the man spoke proves, we think; he was influenced by temper far more than by any plot.

The intimacy between Mr. Spencer and Cromwell is deemed conclusive of the guilt of the latter. We hold the fact to be reasonably well established, though some of the witnesses think Mr. Spencer quite as intimate with Wales and others. Wales's own revelations demonstrate that Mr. Spencer believed him strongly his friend. Taking things in the abstract, we should think an intimacy between a midshipman and one acting as boatswain more creditable than an intimacy between a midshipman and a purser's steward. Neither is usual, though the former might proceed from a high professional feeling, whereas the latter could only be excused by the qualities of the individual. We have known regular old salts great favorites aft, and young officers frequently find both amusement and instruction in their discourse and opinions, but one can see little to be gained by a dissertation on

purser's slops. Still, the great intimacy sworn to between Mr. Spéncer and Cromwell is unusual. Our business now is to consider in what manner Capt. Mackenzie ought to have reasoned on it. He was right in *acting* as if he *supposed* Mr. Spéncer was concerned in a plot, whether there was a serious plot, or not; and, we think, he was bound to remember that the ringleader of a mutiny must be desirous of gaining recruits. Under such circumstances, it was natural that Mr. Spéncer should wish to gain over a man like Cromwell—one powerful, intelligent, determined, and a seaman. This might require much artful management on his own part, for it was not dealing with an ordinary, ignorant sailor. All this would explain what is called an intimacy, which Cromwell could not well decline, coming from the quarter-deck. Enough evidence was before Capt. Mackenzie, to show that some of these private conversations did not relate to any mutiny. Some of them certainly related to a voyage to the northwest coast, or the witnesses are foresworn. No man in his senses would talk of being a pirate on the northwest coast. That Mr. Spéncer, *with the mutiny in view*, may have attempted to establish an interest with Cromwell, by talking large on the subject of his commanding a vessel, and by promises of making Cromwell an officer (a fact by the way that is substantially established), either on board a slaver, or on board a trading craft, is plausible enough; but it will not do to infer that Cromwell *knew* of all his projects, admitting them to have seriously existed as represented, on such testimony. The first thing thought of by men, who seriously had determined on such a plot as this is assumed to have been, would be to foresee the necessity of avoiding any *appearance of an intimacy*. Even boys, in their daily roguery, say to each other, "Now we must not be seen too much together, lest *they suspect something*." This is the result of the ordinary consciousness of guilt, and it is a little remarkable that Captain Mackenzie, who imagined Cromwell had taken so many precautions to conceal his connexion with the conspiracy, had not taken this, *the most obvious of all!* There was, for instance, no reason for keeping his name off the programme, but an apprehension of consequences, *in the event of its discovery*; for, until discovered and translated, it could betray no one; and was it reasonable to infer, that one *supposed* to be so very cautious on this point, would be so exceedingly remiss on another that was obvious to all who chose to look about them? Cromwell is believed to have used much art to conceal his connexion with the mutiny, and for the sole reason that he might escape the consequences, should the project fail; and yet to have overlooked the very circumstance through which, in fact, **HE LOST HIS LIFE**, and from which, in the event of discovery, he had most to apprehend. We think any cool-minded, clear-headed man would have inferred that this intimacy, so far as it proved anything, proves the absence of any particular reason for caution on the part of Cromwell; and we might, as a fair argument, perhaps, add on that of Mr. Spéncer. *There was too much of it.*

Our limits will not allow us to quote all the evidence, but we see a great deal to satisfy us that Mr. Spéncer was talking and consulting with Cromwell about other projects than those connected with this mutiny. If his own statement to Mr. Gansevoort, p. 32, be received, where he says that he did not let Cromwell into his secret, because he did not believe he would join in such a scheme unless there was money on board, it leaves the fair inference that he had been sounding the character of this man the whole time, and had not been emboldened to give him his confidence. The explanation is natural, and by no means tender of Cromwell's character. Then Cromwell's situation in the vessel is to come into the account. As boatswain of such a craft, stern by nature, and educated to a

certain point, he had few associates, and the advances of one like Mr. Spencer, would not be apt to be repelled. *The wish of Mr. Spencer to enlist this man, is not to be confounded with the acts of the man himself.* It is evident Cromwell, for some cause or other, had not much respect for Capt. Mackenzie, and this disrespect may have been increased by the wily comments of Mr. Spencer, but all does not prove his connexion with the alleged mutiny.

The gift of fifteen dollars from Mr. Spencer to Cromwell, is supposed to be a circumstance in proving the guilt of the latter. *The gift* proves nothing beyond the fact that the money was bestowed. It was openly done, and it is not pretended that, *at the time it was given*, Cromwell agreed to join in the conspiracy. The *manner* in which it was done, Mr. Spencer's language, and all the circumstances of the moment, show that no bargain then existed; the money would have been paid privately, otherwise. The mere gift of the money, however, is no fact against Cromwell. At most, it only shows a desire on the part of Mr. Spencer to gain him over. We reason always on the supposition of the latter's guilt, as averred; but it in no manner shows that Cromwell was seduced by \$15, to risk his life in so wild and foolish an enterprise. The essential fact, is wanting. Mr. Spencer may have intended to make friends with Cromwell, with the alleged object in view, but it is not a fair inference to suppose that any man in his senses would be seduced by such a sum. To show that one man wishes to buy another, is not showing that he has succeeded.

It is said, however, that Cromwell gave this money to Garty to keep, and that, a day or two before Mr. Spencer's arrest, he asked for it back, under the pretence of using the glass in the drawer of which it had been placed, in order to shave, though he did not shave. Some importance has been attached to this circumstance; more, we think, than it merits, were it clearly established. In the first place, Garty himself says Cromwell asked for his *glass*, not for the money; the latter happening to be kept in the drawer of that glass. To suppose a man, bent on the projects imputed, would not think it wiser to let so petty a sum as fifteen dollars take the chances of being recovered after the rising, than to incur all the risks of the suspicion attendant on withdrawing it, is inferring that Cromwell was not very sagacious. The enterprise, if it really existed, was one of great magnitude, and fifteen dollars would scarce be thought of at all, by most men, as the crisis approached; or, if they were, we think nine persons in ten would prefer to let them remain with the sergeant, in order to quiet any distrusts. In a word, we think the inducement too trifling to be apt to influence a man like Cromwell, at such a moment. After the rising had succeeded, it would have been an easy matter for him to have got his glass, and with it his fifteen dollars. The mutineers would not be very apt to rob Samuel Cromwell, after he had risen to be first lieutenant, and this to obtain fifteen dollars of paper money, that could be of no use where they contemplated going. In addition, Garty explains his first evidence, by saying, that he meant Cromwell *did not shave himself*, having been previously shaved by the ship's barber, down to the time he reclaimed the glass. Cromwell, then, was in the *habit* of shaving; if he was shaved by the ship's barber, after he reclaimed the glass, why is it not shown? Sears was the barber, and a willing witness in the case. He was the lad at whom Cromwell had thrown a billet of wood, and it may be, after such a quarrel, Cromwell did not wish to trust his own throat so near the other's razor.

But, Garty says nothing of *the reclaiming of the money*, the only point in the least material, *before the council of officers.* This is a very important fact, for he



omitted, at that time, the only circumstance worthy of being related! Now, Garty was a foreigner, and a sergeant of marines. We ask the reader to run over his deposition, at p. 153, and he will see what sort of a mind Captain Mackenzie warmly recommends to be transferred, under such circumstances, from the berth-deck to the wardroom! The effect produced on such a man, unconsciously to himself even, by seeing a future opened to his hopes, which, did he live long enough, might place him at the head of the marine corps of this country, may be estimated more easily than the effect of fifteen dollars in inducing a human being to enter into such a project as that attributed to Mr. Spencer. It is extraordinary that Captain Mackenzie, when he wrote his report, knowing that a court of some sort or other must sit on him, did not comprehend the nature of the indiscretion into which he was falling, in earnestly recommending this sergeant, and eight of the petty officers of the Somers, all witnesses in his case, to be preferred to situations that would give them competencies for life, before the matter was investigated. While on this point, we will show the extent of the temptations that were thus inconsiderately placed before the minds of these men—what preferment they had reason to hope would be accorded to them, should Captain Mackenzie's conduct be approved, viz: Garty, from the ranks, to be an officer, with \$25 per month pay, and 80 cents per diem, rations, and the prospects of promotion. Wales, from purser's steward, at \$18 per month, to quarter-deck rank, and \$1500 per annum. Browning, Collins, and Stewart, petty officers, at \$19 per month, to be boatswains, with \$700 per annum. King, Anderson, and Rogers, petty officers, at \$19 per month, to be gunners, with \$700 per annum. Dickenson, petty officer, at \$19 per month, to be carpenter, with \$700 per annum.

In this list, the pay of the seven last-named beneficiaries is put at the lowest sum, for those who are employed. When *unemployed*, they would receive \$500 per annum each; when employed in ships-of-the-line, or in navy-yards, \$800 each per annum: this, too, in addition to exchanging the uncertainty of mere shipped berths for warrants.

Now, we are not disposed to discredit men because they happen to be in humble situations in life. We really think that *some* of these men, on the whole, seem to swear honestly, but their testimony before the council is weakness itself, as respects any indications of the mind that ought to control their notions. Still, some of them relate a great deal more after this temptation was placed before their eyes, than they did before, and we are disposed to remind Captain Mackenzie, when he presses the fact of the fifteen dollars into the account against an unfortunate man who has been hanged without a hearing, as a reason for believing he would turn pirate, that he has, unwittingly we think ourselves, offered far stronger inducements to his own witnesses to see things as he wishes them to be seen. It is scarcely too much to say, that the man of Captain Mackenzie's rank and years, who could make this grave mistake of judgment—we deem it to be just *that*, and no more—does not come before the world with a very high claim to be received as one whose opinions are to be taken *ex officio*, as infallible. At all events, it is just as fair to assume, that the tempting hopes he has placed before his own witnesses produced their results, as to suppose Cromwell was bought by these fifteen dollars, to desert a wife he evidently loved, and to enter on a life of murder and rapine.

None of the remarks which are said to have fallen from Cromwell, in his different conversations with Mr. Spencer, have the least the character of pertinent testimony. By compressing into a few pages the casual replies and observations,

and this without the context, that fell from a man in the course of two months, a little of an air of importance is given them; but, in the first place, not one of these sayings amounts to direct self-accrimination in itself, and every one of them may have been perfectly innocent. Take the observation about the Isle of Pines, for instance. In the face of the fact, that no piracies are now committed, or have been committed within the last fifteen years, this place is spoken of as if it were proof a man is a pirate who talks of visiting it! We think it probable that slaving seamen are found there, but this is a different thing from piracy. The witnesses speak of a man's going in a slaver, as a crime, as enormous as piracy, with a species of pretending morality of which there seems to have been rather too much in the Somers.

We have no desire even to seem to defend slaving, but it would be weakness not to affirm what is true, under the facts of this case, that a man might go all his life in a slaver, and yet recoil from piracy. It is but little more than thirty years since slaving vessels sailed openly to and from this country. At the commencement of this century, the trade was general, and men did not hesitate to avow their connexion with it. By a clumsy, and we think an illegal anomaly, slaving is pronounced to be piracy by our laws, but this will not give it the moral character of the latter crime. Right and wrong are not so totally dependant on the statute-books, and, if they were, men's opinions must have time to follow the tortuous teachings of such a school. We are no advocates of slavery or slaving—we believe both to be adverse to human interests, and in some respects to human rights—but we see a vast difference between going to the Isle of Pines to ship in a slaver, and going there to ship in a pirate.

Now, admitting all the eavesdroppers swear to be true, which can not be the case, as they often contradict each other, it is possible to make out a plausible theory, which would lead to the opinion that Mr. Spencer had talked with several of the crew on the subject of embarking in slaving voyages, and, among others, with Cromwell. We do not say there is evidence of the fact, but there are fragments of evidence which, when united, might furnish a better foundation for such a conjecture, than for any of the theories that have been advanced in behalf of Captain Mackenzie. It is not necessary, however, to suppose Cromwell had enlisted in even such a scheme, in order to repel any evidence that has been produced. Of the last, there is none that would authorize a magistrate on shore even to commit the man, though prudence may have justified Captain Mackenzie in confining him, at sea. We have even our doubts of this last; for, rightly managed, we are of opinion Cromwell might have proved a most valuable ally to the legal authority of the ship, and prevented the very calamity that has occurred.

As for the remarks where Cromwell is made to say he would disguise the brig by shipping the bowsprit aft, &c., &c., they can only excite pity among cool-minded seamen. If such casual replies are to justify hanging a man, there would be few sailors left. Both question and answer are quite common. We have heard both, with our own ears, fifty times at least.

We perceive that Captain Mackenzie's counsel, whose argument we are endeavoring now to follow, ascribes to Cromwell the advice of cutting away the booms, and throwing away the launch, which accords with Wales's account of Mr. Spencer's plans. We do not believe any seaman would have given the first advice at all. The booms that were to be cut away were nothing but spare spars for the brig, and even a pirate might owe her safety to spare spars. To say she could get them from prizes is absurd, since the necessity for them would be most

apt to occur when she was running from, not for. Besides, if she took them on board, when she fell in with a prize, in what would she be better off than by keeping on board those she had, which were of the right size, and all ready to be used. *Au reste*, although Mr. Griffen assumes this fact, we do not find that it is proved. Something of the sort, in connexion with *slaving* is, as regards the *launch*, but not as regards the *booms*. A slaver might want the space occupied by the *launch*, for gratings, in order to admit air below, but a pirate would be a great fool to destroy his launch, of which he would have much the same need as a vessel-of-war. The project has much more of the romantic character of the inexperience of Mr. Spencer himself, than of the maturer reason and greater practice of Cromwell. We do not believe the stories, for we do not believe a seaman would give the advice, particularly about the spars, or booms; these last being nothing but spare yards, masts, &c., carried to meet emergencies, and those of the right size and very best quality. Nothing would be gained by throwing them away, while much would be lost.

Cromwell's absence of mind and thoughtfulness, after Mr. Spencer's arrest, are urged as a reason for believing in his guilt; Mr. Griffen says *before*, but most of the testimony is afterward. Now, neither fact is proved except by the opinions of those, who certainly utter their opinions very loosely. The calling the wrong watch, and this is sworn to have been after Mr. Spencer's arrest, is much the strongest proof of absence of mind, though it is not an unheard-of thing. It is like any other piece of forgetfulness, in an eternal round of the same duties.

Cromwell had been intimate with Mr. Spencer; he knew from Mr. Gansevoort the reason of the arrest, and superficial reasoners would be apt to infer a connexion between them from the fact. No one could see an associate put in irons, on board a man-of-war, and on such a charge, without perceiving that it might induce suspicions of himself, and consequently reflection, if not uneasiness. Then Cromwell was jealously watched, and that would naturally add to his feelings. He must have seen that King and Dickenson were consulted, while he was watched and distrusted.

The interviews with Small were just as natural, if the different conversations with Mr. Spencer had been about *slaving*, or about the northwest coast, as if about this mutiny. It will not do to infer only the *worst*, when another solution of the difficulty is just as probable.

The disobedience of the standing order of the ship, and his *stubborn perseverance in disobedience* the morning preceding his own arrest, would be the act of a fool, were he implicated in the plot, and did he meditate a rising. Such a thing might have occurred from a hundred causes, each of which would be more plausible than the one assigned.

The opinions of the officers and men, founded on various reasons that are given, are too numerous to be gone over in detail, but we think he that examines the record will say that a set of more frivolous reasons was never given on a trial for a man's life. They are just of the character that distrust always gives to the imaginings of dulness, and would better become the gossiping of village wonder-mongers, than the conjectures of discreet men, reasoning about human life. In enumerating Captain Mackenzie's misconceptions of facts, we shall incidentally allude to some of them.

The declaration of Small to Mr. Gansevoort, p. 33, is generally thought to be one of the strongest proofs of Cromwell's guilt. We see nothing in this declaration, even as it is given at second-hand, by Mr. Gansevoort, and without the

means of cross-examining the man who is said to have made it, to justify this opinion. In the first place, Mr. Gansevoort told Small that they had taken more prisoners, and then inquired if there were any persons forward, from whom they had reason to apprehend danger. Small answered, it "was a hard thing for him to say." Two meanings might be attached to this reply, viz., that it was *difficult* for him to tell who was, or who was not concerned in the plot, not knowing who had engaged in it, or that it would be *hard* on his feelings to betray his associates. We must look to the context for the explanation, and that clearly solves the doubt, though we think the first the most obvious construction, on the face of the answer. Mr. Gansevoort goes on, and asks if Cromwell is not implicated. Small answers again it was a hard thing for him to say, and *then he goes on to reason the matter*, enumerating the motives for thinking he was. Cromwell and Mr. Spencer were very intimate; that he had seen the last give the other money, more than he would like to give or lend him either. This is anything but reserve of feeling; it is a downright attempt to show that Cromwell ought to be suspected, and demonstrates that Small's hesitation proceeds from doubts, and not from disinclination to tell everything he actually knew. Pressed still further, he adds, "If any one on board is [in the plot] he is." All this must be taken together, or not taken at all. Evidence it is not in any shape, but taken in connexion, it leaves only the fair inference that Small had *reasoned* himself into his conclusion, not that he *knew* the fact. Nor is it probable he did know it, if the views of the officers themselves are just, admitting that Cromwell were actually concerned. They contend Cromwell's caution was so great, and his influence over Mr. Spencer so strong, as to prevent the last from putting his name on the paper, a document in Greek, and exclusively in Mr. Spencer's possession, and yet not strong enough to prevent him from betraying his name to others! The testimony of Wales, too, goes to show that Mr. Spencer did not mention any names. He either had no more confederates, or he used singular caution. It is true he called up Small, his whole force most probably, but, to the man, before whom he is said to have laid bare his whole terrible secret, he could only parade his "about twenty." He had gone too far to recede, had told so much as to render it indispensable to tell everything he could to secure his recruit, and, we think, if he had really possessed any more allies to help to bring about such a result, he would have produced them; particularly one as formidable as Cromwell. If he had told Small of Cromwell's adhesion, we think he would have told Wales. They were to be officers alike, were down alike as *certain*, and were entitled to equal confidence. The conversation, too, lasted for hours. It is fair to presume he used the greatest caution, or that he had no confederate but Small.

Then, this statement comes to us at second-hand, and evidently through one disposed to believe the worst of Cromwell; nay, through one to whose own exculpation from a participation in an act of the gravest responsibility, the guilt of Cromwell is indispensable. If there be any doubt in the matter, we think the man who was hanged without a hearing, and, beyond all question, unnecessarily so hanged, has quite as good a right to its benefit as his executioners. The character of the mind of a witness is always of moment, too, and never more so, than when he becomes the vehicle of other men's thoughts. At p. 41, Mr. Gansevoort is asked this question:—

"Was Mr. Spencer, on the 26th of November till the time of his arrest, engaged in the usual duties of an officer of his station?"

To this question Mr. Gansevoort gives the following answer:—

"I believe that he was engaged in the usual duties of his station, except when in the fore-top, having India ink pricked into his arm, and his menacing look on the Jacob's ladder."

Now a witness who could answer such a question in such a manner—having that answer written down and read to him for correction, may very well have misunderstood Small, especially when he was intensely bent on ascertaining Cromwell's guilt.

Those who are curious in such matters will find the history of the Jacob's ladder transaction at p. 32.

We conclude this point by referring to page 33, where it will be seen Mr. Gansevoort admits he had discussed the necessity of hanging Cromwell on the 28th, the conversation with Small having occurred on the 29th, if not on the 30th. So says Mr. Gansevoort; we who can look coolly at this matter, see that it must have been on the 30th, even while the council was sitting, as the prisoners who alone could be alluded to by Mr. Gansevoort in the dialogue, were made on the forenoon of the last day. When it is remembered what was going on below decks, this testimony, to say the least, is to be received with great caution. The fact that Mr. Gansevoort could not tell when a conversation was held, though held after certain prisoners were made, which time was well known, goes to illustrate his testimony in general.

The alleged fact that Mr. Spencer showed the Greek paper to Cromwell is held to be conclusive evidence of the latter's guilt, even by some of those who admit it is the only testimony. If this testimony were clear, and out of all controversy true, it would be insufficient to convict Cromwell. Mr. Spencer showed this paper to others, spoke of it even, declared his unwillingness to let them know its contents, and, we fancy their friends would think the circumstance a very inadequate explanation, had they been hanged on such a fact, without a hearing!

But, the man was hanged without the fact of Cromwell's having ever seen the papers being communicated to any of the officers! To this all the boys who speak on the subject, distinctly testify. This disposes of the point, so far as Captain Mackenzie is concerned, in a moral sense, out of all doubt, and we think legally, also.

Let us reason a little on the testimony. That a paper was shown by Mr. Spencer to Cromwell is probable. Several boys swear to having seen this done at different times. Other witnesses, however, say they have known Mr. Spencer and Cromwell take the stars together, and to have been often employed in this manner. If they took the stars together, calculations probably followed. Edward English, one of these boys, says, p. 84, "I saw him show a paper once; he sat on the fore-forecastle; Mr. Spencer had a paper and pencil in his hand, as though he was writing down something that Cromwell had just told him; Mr. Spencer said, 'Yes, yes;' that is all I saw at that time." Now, this boy certainly did not identify the paper, but was rather of the opinion that what he saw in court was not the paper. Had he actually seen the Greek paper in Mr. Spencer's hand, it is almost morally certain he could not have identified it, and without this identification, the testimony, at best, is only conjecture. The boy himself, admits that he did not take particular notice, that he was merely passing the spot, and it requires no great reasoning powers to see that his testimony, beyond the general fact that he saw a paper, is of no weight. We have never seen these papers, but we gather they are leaves torn from a blank book. If so it is probable more were torn, leaving a general resemblance among all thus used.



There was a witness of the name of Clark who testified to Mr. Spencer's showing Cromwell a paper that he described as resembling one of the Greek papers, *before the court of inquiry*, but who, Captain Mackenzie seems to think, was inveigled away before the sitting of the court martial. We have turned to this boy's testimony, as it is given in the Tribune's report of the proceedings of the court of inquiry, but do not find it more to the point, than that of the boys who testified before the court martial. One objection to the statement of the boy, *as given in the newspaper*, is this: Mr. Spencer is said to have twice shown the paper, asking Cromwell the first time, if it would do. Cromwell answered, "it would do very well." The boy saw Mr. Spencer show Cromwell the same paper a second time. "Cromwell said it was better." "Spencer pointed with his finger to the paper, but did not hear him say anything."

Now, as this boy heard Mr. Spencer ask "if it would do?" and heard Cromwell's answers both times the paper was shown, it follows he was near enough to hear what passed. The reader will see at once it will leave the necessity of believing that *Cromwell understood the Greek character, or the paper could not have been the Greek paper*. This is not all; the real paper is far more difficult to read than real Greek. It is written in a mystified Greek character, as applied to English words. One English letter is used for another Greek letter; thus the name of M'Kinley is spelled M'Kenlu. These departures from as close analogies as the two alphabets would allow, run through both papers, and would embarrass even a scholar in reading them. To suppose, however, that Cromwell could read these papers is absurd; and to show them to a man who could not read them, *without translating them*, is equally absurd. The only argument that is left therefore, in connexion with this point, is to suppose that Mr. Spencer laid these papers before Cromwell to help his own memory, while he made his own oral explanations. Much of the testimony is opposed to this inference, though one circumstance has been thought to show Mr. Spencer was writing down the names of the crew, at Cromwell's dictation. As respects Clark, however, it is necessary to believe Cromwell could read the paper, for hearing so much, he must have heard more, had more been uttered. There are several objections to the supposition of the dictation of names. Some of these exhibitions of the papers to Cromwell are said to have occurred some time before the arrest, and, in the nature of things, a paper like the programme must be constantly undergoing alterations. Thus it is shown that Mr. Spencer was writing on a paper supposed to be one of the Greek papers, as late as the very day on which he was arrested, a circumstance, which, in itself, must destroy the apparent identity with a paper seen any number of days before. This fact, of itself, would be fatal to the evidence of the boys, since a paper that has been altered, where there are no means to prove what alterations have been made, can never be received in proof. Now, it is probable that Cromwell corrected Mr. Spencer's mathematical calculations, and there is no violent improbability in supposing that this is what they were about when the boys saw them. Men turn their heads when calculating, and say, "yes, yes," when ideas are given them. The plus and minus of a sum in algebra, may have been the crosses and Greek characters of the boys; or, Mr. Spencer may have really had some of his "nor-westers" on paper, as well as the programme of the mutiny. The circumstance that he drove some of the boys away when they attempted to overlook him, proves nothing. Officers are not apt to submit to such impertinence from a crew. Clark's testimony, as we find it, would seem to establish that it was not the Greek paper he saw, and another paper being shown to be used, upsets all the theories about these papers.

But the fatal objection to these papers, is the admitted circumstance that the officers knew nothing about them until the brig had reached New York! They were not included in the case, as it was made up for Captain Mackenzie's consideration on the 1st December, 1842.

Next all the objections present themselves, that are unavoidably connected with the probabilities of the boys having *imagined* much that they have sworn to. The main facts may be true, but the collaterals colored or supposed. Here the ill-judged course of the department, in leaving these witnesses under the military control of those whose professional prospects, at least, were more or less dependant on their testimony, becomes vividly apparent. The fact that Captain Mackenzie virtually asked to be left in command of his brig—a new proof of that officer's weakness of judgment—ought to have brought the whole subject before the secretary's mind, and it is extraordinary, one who has been a judge did not foresee the importance of immediately removing all who advised the execution, from the Somers. This should have been done even in the interest of Captain Mackenzie, who, under such circumstances, would have been in a much more eligible position than that he now occupies. We think it is impossible to read the testimony of these boys, and not believe that they have fancied much of that to which they swear. We shall presently show how loosely they testify.

Another great objection to this testimony of the papers alleged to have been shown to Cromwell, is that a man who has been hanged without a hearing, is asked to prove a negative! *Why* was not this man questioned on the facts supposed to be connected with his guilt? Throwing in everything that has been brought against him, there is nothing but circumstantial evidence. Now, all circumstantial proof falls short of absolute proof; in its nature, it is ever susceptible of explanation. A man was once hanged in England, because he was found drawing a knife out of a dead man's body. In the end it was admitted that another person put it in, and that the man first hanged was innocent. A few additional circumstances, added to the leading circumstance mentioned, cost an innocent man his life. Just-minded men, are not apt to punish, on *any* evidence short of that of their own senses, without a hearing; on circumstantial testimony, NEVER. Which of us would flog a child, discharge a servant, or a dependant of any sort on circumstantial evidence, without giving the party implicated a hearing? In cases in which his legal rights were ample, we think no man of a rightly-balanced mind—certainly no man fit to command a vessel-of-war—would do such a thing. How was it with Cromwell?

Cromwell was put in irons on the 27th November. On the 28th the necessity of his death began to be the subject of conversation. On the morning of the 30th it was deliberately referred to a council of the officers. About ten, on the morning of the 1st December, the report of the council and the evidence were laid before the commander, and about one, P. M., the man was hanged. Now, in all this time, there is no evidence that Cromwell was asked if he could explain a single circumstance, while there is a good deal of evidence that leaves reason to suppose he was not. If he *were*, Captain Mackenzie's report is disingenuous—nay, virtually, false; if he were *not*, in the name of holy justice, what are we to think of the transaction! We make no doubt, Cromwell was not questioned at all. Small was questioned about his *guilt*, but the man himself had not even a hearing that he might assert his *innocence*. Time did not press; circumstances did not press; there sat the prisoner, for weary days and nights,

almost within reach of his superior's arm, and he was sent to the gallows unquestioned, on purely circumstantial evidence. On circumstantial evidence was this man hanged, unheard, and evidence that would scarcely have justified a magistrate on shore for recommitting him for further examination. When the act is done, when the press has thrown itself with malignant fury into the controversy, when men begin to talk of vindicating the laws of the land, weeks after the deed, the witnesses having been shut up most, if not all, the time under the military authority of those involved in the issue, eight or ten boys are brought forward, for the first time, to give their recollections under the influence of all these occurrences. We can make our own conjectures concerning these papers, and far more plausible conjectures they would be, than those assumed by the defence, but, they must ever remain conjectures. The only two who could give us a certain clue to the truth, are dead, unheard.

It may be well to add that one of the boys swears that the paper he saw had crosses on it, instead of the ordinary letters. Greek characters no more resemble crosses than do our common English characters.

On the other hand, are there no proofs, no presumptions of innocence? Yes, abundance. In the first place, the project was too wild, too impracticable, for a man of Cromwell's years, experience, and knowledge, to embark in. With the ocean dotted with cruisers, including steamers, a few weeks must have terminated the career of the Somers, and with it that of her crew. The remark Mr. Spencer is said to have made, when he first told Mr. Gansevoort of Cromwell's innocence, manifests far more knowledge of human nature than is shown by the officers of the Somers. "I did not think he would join unless *there were money on board.*" One can understand that such a man as Cromwell has been described to be, *might* run away with *money*, but what could he do with the *Somers*? As for keeping at sea, any length of time, in the present state of the world, it is out of the question, and two or three acts of piracy, would have brought the vessel to the notice of every marine in Christendom, and insured her capture. Dead men *do* tell tales. It is possible that one, inexperienced as Mr. Spencer, may not have seen this; Small is almost admitted to have been of feeble mind, but, it was different with Cromwell. The last, had he been rascal enough to embark in such a scheme, was probably not fool enough. Then, he was just married, manifested strong regard for his wife on more than one occasion, particularly in connexion with the \$15, and his dying words, and was not a mere reckless wanderer on the earth. Until the contrary is *proved*—not *asserted*, merely—he has just as good a right to be placed in the category of those who have friends and homes as pledges of their conduct, as Captain Mackenzie himself.

As for the attempt to drag in a particular speech of Cromwell's (before the court of inquiry), in order to show his general indifference to virtue, and in connexion with his wife, we can hardly trust ourselves to write about it. It was unknown to Captain Mackenzie when he hanged the man, in the first place. Then, such language is common in the mouths of common sailors, and passes for mere bravado. We have heard it often, almost verbatim, and from men whom we knew felt differently. The excuse for thus harrowing the feelings of a woman who may have been perfectly innocent, nay, who is said to be respectable, was to destroy the sympathy of the public in the fate of her husband! If Captain Mackenzie could not destroy this sympathy by his evidence of guilt, what sort of case has he? The very attempt to defend himself by such means denotes a consciousness of weakness. His act had been committed, and he was

bound to justify it by direct and unequivocal evidence; not by harrowing the feelings of a woman. We have heard much of the honor of the service, in connexion with this mutiny. We will tell these gentlemen who have used this language, that the credit of the navy was quite as much connected with the exclusion of such unmanly testimony, as in vamping about the ability of a man-of-war's being able to take care of herself. The imputation itself is amply rebuked by the language of the dying man concerning his wife. Captain Mackenzie says he invoked the name of his wife; but, McKinley swears he invoked the "God of the Universe to look down upon his wife."

Cromwell manifested no concern after his arrest. This fact is admitted, and tortured into evidence of his expecting a rescue. His unconcern, ironed as he was, hands and feet, we take to be proof of innocence. Had there been an attempt at rescue, he would probably have been the first man shot, and this, we think he must have known.

Then Mr. Spencer asserted his innocence twice, certainly; how much oftener, it is out of our power to say. He did this once, with his explanations; and once when he had been told himself, that he had but ten minutes to live. The last assertion, coming through the evidence it does, is admitted to have been solemn, full, and earnest. Captain Mackenzie confesses it staggered even him! Was the proof against Cromwell, then, so light, that mere assertions of innocence could shake it? What sort of proof was this? It was very much of the character of the proof that again restored it to its original influence, viz.: The assertion of Mr. Gansevoort, that one or two petty officers asserted there could be no doubt of Cromwell's guilt, with something about the d—d fool's being on one arm-chest, and the d—d rascal on the other; and all backed by such depositions as the reader will find in the record! Here was Mr. Spencer, about to die, with reason to believe ten minutes would close his career, solemnly affirming the innocence of Cromwell, while he admitted his own guilt—guilt as respects a conversation at least. Cromwell, himself, asserted his innocence to the last, and yet the "no doubts" of the deponents before the council, deponents who would be ridiculous but for the sad results, is deemed a sufficient answer. Mr. Spencer had professed a readiness to tell all, had admitted his own failings; had said his Greek paper went beyond the facts of the case, and yet Cromwell's name was not on it, had not said a word in favor of Small, but he asserted Cromwell's innocence, at the moment when he had himself, just been told, he was in ten minutes to die! It is pitiable, pitiable, to see on what evidence, all these strong corroborating circumstances are set aside.

Captain Mackenzie has one of his remarkable reasoning processes for getting rid of the dying assertion of Mr. Spencer. He went to the latter and told him what the petty officers had said, and he assures us a demoniacal expression took possession of the young man's countenance. After this Mr. Spencer said no more of Cromwell's innocence! The two even passed so close to each other as to touch, and yet neither spoke to the other. Mr. Spencer asked Wales and Small to forgive him, but he did not ask Cromwell. The last made no appeal to the first to come again to his succor! This disposes of the matter.

Now, it is not probable that such arguments were ever before offered in defence of such a point. In the first place, Small and Wales had something to forgive to Mr. Spencer, according to the theory of the mutiny, while Cromwell, if innocent, had not. Captain Mackenzie was the man for him to forgive, were he now guilty. Then why should Cromwell appeal to Mr. Spencer? This unfortunate young man had already solemnly asserted his innocence, openly, and in a way to



stagger Captain Mackenzie, and he was powerless. *He could not save his own life; much less that of another.* Cromwell kept asserting his innocence to the last, TO THOSE WHO ALONE COULD RELIEVE HIM; and, alas! he asserted it in vain. THEY HANGED HIM WITHOUT ANY OTHER HEARING THAN THESE DYING PROTESTATIONS!

The idea that Mr. Spencer, in his last moments had nothing else to think of than the fate of Cromwell, putting the demoniacal feeling quite out of the question, is painfully preposterous. He had his own errors to absorb his soul, the mercy of God to implore, home, parents, kindred, the world he was about to quit, and that he was about to enter, to engross every faculty. The death of Cromwell was not one of his sins to press him down, or to disturb him; were the man innocent, others must answer for *that*.

Any person who has ever had occasion to investigate a report, will estimate the value of the testimony that was given in this case. To those familiar with the effects of cross-examinations, the thought that men were hanged without a hearing—and this, in a legal sense, is as true of Mr. Spencer and Small, as it is of Cromwell—must bring keenly painful pictures to the mind. We have seen cases that stood plausibly fair, on the examination in chief, completely and righteously broken down, under the full investigation. This is of daily occurrence in the courts, and it shows how lamentably naked is the case before us. It is no answer to say, Captain Mackenzie could not tell the facts, as he was situated; he was bound to forbear, so long as the absolute certainty of all the points stated in our issue was covered with any doubts. *Fiat justitia ruat cælum*, meant in his case, you are to sacrifice the Somers before you do an unjust thing. The preservation of that brig was far from being the first object in morals.

Cromwell's asking forgiveness of Mr. Gansevoort, adds weight to his protestations of innocence, as it shows he was not altogether hardened, and did not wish to die unforgiven. To suppose, however, that he alluded to the mutiny, infers a contradiction. He was probably conscious that his temper may have often vexed a first lieutenant. The wish to drag in this circumstance in confirmation of guilt, proves how weak the defence found its case to be.

Our limits will barely permit us to allude to the guilt of the four others mentioned. Against Green and M'Kee we find nothing like evidence at all. A casual remark of the last is sworn to, but it comes from one of the boys, and it is not incompatible with the clearest innocence. Against Green there is literally nothing, unless his name's being on the list of *doubtful* can be thought proof. As we have no other clue to the standard established in Mr. Spencer's mind, on this point, than the characters of the different parties and the proofs against them, we must look to these for the explanation. If Wales could be set down as *certain*, on the facts as made out by himself, a perfectly innocent man may very well be supposed to be *doubtful*. Gedney seems to be altogether exculpated by the officers, and his name is on the list; is even next to Green's. Howard, also, is completely exculpated by Mr. M. Perry, certainly, and he is on the same list. As respects Wilson and M'Kinley we find nothing to criminate them, but the testimony of Tyson. See record, p. 111. Even this does not prove that the *last* ought to be down as *certain*, BUT THE CONTRARY. If M'Kinley preferred a slaver to any other scheme, it shows he had *not* enlisted in the alleged conspiracy. See record, p. 111. In our analysis of testimony, we shall show how Tyson is contradicted, on a material point, by Sears. We attach little importance to his testimony, which is improbable on its face. But these four men were in irons; had



submitted themselves, and could not effect their own release, much less rescue the three others.

As respects the dagger, its appearance in the vessel is explained by the testimony of the purser, who, it seems, *bought it himself*, and gave it to M'Kinley, who subsequently sold it to Wilson. This very affair of the dagger shows the value of reports and conjectures, on the one hand; and the importance of cross-examinations, on the other. It is one of the most startling facts in Captain Mackenzie's report, and yet, when explained, it is literally nothing.

There is a point connected with the guilt of all the prisoners, exclusively of those who were executed, that is really inexplicable. Four were put in irons at sea, because it was thought there was danger of their rescuing the three originally arrested. Several more were put in irons, as soon as the brig got in. Captain Mackenzie speaks decidedly of the guilt of several of these men, as in the following language, p. 201, viz. :—

"M'Kinley also down among the certain, AND BEYOND A DOUBT CORRECTLY, was now arrested." Well, this man M'Kinley, after remaining weeks and weeks in irons, was discharged by *habeas corpus*, because imprisoned without any charge. He actually appeared as a witness on the trial, and has never been even prosecuted! The strongest case of guilt among the surviving conspirators, one THAT ADMITTED OF NO DOUBT, is allowed to pass unpunished, even unprosecuted. Captain Mackenzie had every inducement of duty and self-respect to demonstrate the truth of what he had officially reported, and yet the offender goes harmless. Observe the remarkable dilemma in which the country is placed, before the nations. Three men are hanged by an American vessel-of-war, without trial or hearing, because they were ringleaders in a mutiny, and it was *certain* there was so much danger of a rescue by their fellows, as to create a necessity for the execution. We did arrest four of the most dangerous of the other conspirators, but we were obliged to stop there, as we had not room to keep more prisoners, or officers to watch them. Well, the vessel is saved, she reaches port, comes within the complete protection of the law, when the guilty are permitted to go at large, and the justice of the country remains unvindicated. So long as you are beyond law, the gallows is active; but justice sleeps, in America, the instant she assumes the forms of legality! Not only was Captain Mackenzie's reputation, and those of his officers, concerned in the due punishment of the remaining mutineers, but the character of the country. We all know they have not been; we all know no attempt, even, has been made to bring them to trial. The correspondence given at the end of the record, p. 245, substantially tells the story.

The evidence abounds in material contradictions, proving beyond a question, its general want of precision and value. Take the case of the mast, as an instance. King, who is an out-and-out witness for the defence, says, p. 145: "The order on that occasion, was to 'haul through the slack of the weather-royal-brace, and to leave the lee one slack.'" He meant, doubtless, the "weather main-royal-brace." There can not well be a mistake about such an order. Either the man heard it, or he invented it.

Mr. O. H. Perry says, p. 173: "The order, as I understood it, was 'A SMALL FULL of the weather main-royal-brace.'" It is worthy of remark that this young gentleman says, same page, that he told the commander, as he thought, *that he understood the order* to have been "to HAUL on the brace." M'Kinley, who says he was near Mr. O. H. Perry, on the fore-castle at the time, says that the order from aft was to "haul on the weather main-royal-brace;" adding, however, that he

did not remember the exact words, but that "Mr. O. H. Perry gave orders for half a dozen to clap on the brace." See record, p. 178.

Now, Mr. Hays, the officer who gave the order, says "I gave the order to let go the weather main-royal-brace." Page 211.

King swears as positively, and with as much confidence to this order, even as to particulars, as to any other fact. M'Kinley admits he could not give the words of the order from aft, but swears precisely to the order of Mr. O. H. Perry. This young gentleman, himself, confesses he told the commander he understood the order differently from what he had actually understood it to be, and Mr. Hays says farther, p. 211, that he had heard Mr. O. H. Perry say afterward, that he had understood the order to be to "haul on the weather main-royal-brace." Mr. O. H. Perry, p. 173, says he "passed the order for a small pull of the weather main-royal-brace," which, by referring to Mr. Hays's testimony, it will be seen, WAS NOT THE ORDER TO BE PASSED.

Inglis, one of the witnesses, who swears to have seen Mr. Spencer show Cromwell a paper, &c., p. 109, says that "Small and W. A. King went to the brace, Mr. Rodgers was officer of the deck." "The orders were given by Mr. Rodgers. I believe they were to take a small pull on the weather main-royal brace."

Q. "Did you see King and Small pulling?"

A. "Yes, sir."

Q. "Did King stop pulling at the order to belay?"

A. "Yes, sir; he was holding on behind-hand. Small was swigging off."

Q. "Where was Small when the order was given to pull, sitting, or standing?"

A. "In the starboard gangway, he was sitting on the gun-slide."

King also says, page 145, in answer to a similar question, "Cromwell and Small were sitting on the bitts."

Inglis says farther, p. 110, that Cromwell "was on the forecastle."

Corney says, p. 98, "Small was with me, he was seated on the bitts. The officer of the deck said 'a small pull at the weather main-royal-brace;' I went to it, and Small came too, and we were hauling on it, and the officer of the deck said 'Belay,' &c., &c. He [Small] was standing about two feet off, that is, two feet from the bitts, when the order was given to pull upon the brace."

On such testimony it is attempted to justify the hanging of a man without a hearing! This affair of the mast was the turning point of the danger. It is probable that Mr. O. H. Perry did give an order to haul upon the brace, since Mr. Hays swears he heard him say after all was over that he so understood the order, and because he admits himself, that he thought he had told the commander that he so understood the order. As for King's testimony, it is difficult to find any medium in his account of the order, between truth and invention. Small probably heard an order to "haul on the brace," and acted under the knowledge that he was a suspected man, he having been sent for to the quarter-deck and questioned, at the time of Mr. Spencer's arrest; a fact, Captain Mackenzie has entirely omitted in his report. There is not the least evidence that Cromwell had anything to do with the matter, at all. King, the gunner's mate, swears he was seated near Small on the bitts, but Corney denies it, says, in one place, Small was not seated at all, and Inglis, the boy, says he saw Cromwell, at the time, and he was on the forecastle.

Again: At p. 62, Mr. M. Perry is asked, by Captain Mackenzie, to describe the manner of the prisoners during their confinement? Here is his answer:

"It appeared to be perfectly easy; that they feared nothing; IT APPEARED AS IF THEY EXPECTED A RESCUE. Mr. Spencer was GENERALLY TRYING TO LOOK FORWARD AMONG THE CREW, against positive orders, and ALL showed a confidence, APPARENTLY AS IF THEY THOUGHT THERE WOULD BE A RESCUE." Any one can see this is proving too much. Mr. Perry may have *thought* the confidence of which he speaks proceeded from this cause, but how can he *know* it? We will now put this statement in contrast with that of Captain Mackenzie, himself; see record, pp. 199, 200: "Having noticed Mr. Spencer's attempts to hold intelligence with the crew, I directed all the prisoners should be turned with their faces aft. I also directed that no tobacco should be furnished," &c. As Mr. Spencer's efforts to "look forward," as described by Mr. Perry must refer to a time *after* Mr. Spencer's face was turned aft, this establishes the fact that he and Captain Mackenzie refer to the same period. Now, for the main circumstance. "The day after Mr. Spencer's tobacco was stopped," adds Captain Mackenzie, p. 200, "*his spirits gave way entirely. HE REMAINED THE WHOLE DAY WITH HIS FACE BURIED IN HIS GREGO, and when it was FOR A MOMENT raised, IT WAS BATHED IN TEARS!*" We shall not pretend to say which of these statements is true, but it is evident one is not.

At p. 134, Mr. Rodgers says that Mr. Spencer "*appeared embarrassed,*" when questioned about carrying his day's work in his neck-handkerchief. Captain Mackenzie, in reference to the same inquiry, says, p. 197: "It is a convenient one," he replied, "*with an air of bland deference.*" Here two of the officers differ so much as to view an *appearance*, and two thirds of the mutiny rests on appearances, one as *embarrassment*, the other as *bland deference*.

Mr. M. Perry is asked if he saw Cromwell aloft, and what he was doing, p. 63. Answer: "I observed Cromwell and Wilson; Wilson was on the main-top-sail yard, doing nothing; *Cromwell on the cap at work.*" This contradicts various accounts that Cromwell was doing nothing. Cromwell and Wilson were the only two aloft, until Anderson was sent up, who did not regularly belong there. Cromwell probably went aloft, because it was extra service, in which some one was wanted to lead, and there was nothing out of the way in an active young man, like Wilson, going aloft, on such an emergency. The supposition that a man on the top-sail-yard could be plotting with another on the cap, is an absurdity. Their heads must have been ten or fifteen feet asunder.

It will be seen at p. 84, that the boy English did not recognise the Greek papers, as those he had seen Mr. Spencer show to Cromwell. He at first says: "I should know the papers, I should know the *color*;" and when the paper is shown him, he says, "It appears to me the other was yellower than this; I could not say *certain*." Captain Mackenzie, who was examining him in chief, then asked him if these were the papers shown him at the court of inquiry, where we understand he swore distinctly to the papers. The answer was: "*I think the paper shown me at the court of inquiry looked yellower; I could not say for certain; they might be the same.*" To us it appears evident, the boy expected to be put to a severer ordeal than he had met before the court of inquiry, and, not knowing the paper in fact, was afraid of committing himself. It will afford some proof of the manner in which this case has been sustained, if we add that attempts were made in some of the journals to explain away this failure of English, to recognise the papers, by saying that the cabin of the North Carolina where the court of inquiry sat, was darker than the room in which the court was then convened, and consequently that the paper looked yellower in the first, than

in the last. This silly reasoning seemed very satisfactory to certain minds. The point for English to establish was whether the paper he then saw, were the same he had seen Mr. Spencer show to Cromwell, when all the parties were in the open air! Nothing is clearer than that English could have recognised the papers, if he actually knew them. Besides, he distinctly admits he did not take particular notice of the papers he saw Mr. Spencer show Cromwell, and it follows he could not identify them.

Tyson is much the most important witness, next to Wales, to sustain Captain Mackenzie. He swears to a *fact*, a rare thing in the case, which rests principally on *opinions*; and what is more, he swears to it, *previously to the executions*: whereas, the evidence about the handspikes, the knife, the papers, and indeed two thirds of all that appears, is produced only after the brig has reached New York. The substance of this testimony was, p. 155, that on the evening of the 25th, he overheard a conversation between M'Kinley and Wilson, the substance of which might very well give Captain Mackenzie reason to infer they were connected with the mutiny, if mutiny there were, and justify him in arresting the men. The objections are, that the men were arrested *before* the evidence was given, and that the evidence may have been in consequence of the arrests, instead of the arrests being in consequence of the evidence; and that this testimony of Tyson's makes M'Kinley say he preferred going in a slaver, to embarking in the enterprise which is supposed to be the mutiny, M'Kinley being one of Mr. Spencer's four *certain* men. If Captain Mackenzie believed Tyson, we think he was bound to suppose the Greek paper, so far as it related to M'Kinley, a very unsafe document to hang men on. But M'Kinley distinctly denies that the conversation took place as represented, though he admits he and Wilson did converse together, for a few minutes, near the place indicated, and on that night. It is then a question of veracity, and the characters of the witnesses become material.

It has been stated to us that Sears and Anderson were the two most truthful witnesses who were examined among the crew. The former and Tyson testify to what occurred in an interview between themselves and Cromwell and Small, at the bits, just after Mr. Spencer's arrest. The testimony of Tyson, on the this point, will be found at p. 111. He swears distinctly that Cromwell told him that the arrest was for "a supposed mutiny," and then went on to tell him that "it was a plan to kill the captain and officers, and take the vessel." On a cross-examination he adheres to these facts. Now Sears swears it was *Small* who gave the answer, and not Cromwell, pp. 115, 116. This raises a great doubt of the accuracy of Tyson's statement. This doubt is increased when he comes to be *cross-examined* about the affair of the conversation between M'Kinley and Wilson, p. 112. Here he says he was lying near a gun, when the two approached and turned him over, and spoke to him, after which they went on to hold the conversation mentioned, within three feet of him. Now, he swears that he had had a quarrel with Wilson, that M'Kinley commenced the discourse by a caution to Wilson *on the subject of spies*, then turned him over, *conversed with him, and then went on with the other conversation!* This is certainly very improbable. Judging from Tyson's testimony we should think him an unsafe witness. He says the dialogue took place about seven in the morning, *when it was not very light*: before the moon had risen. This was on the night, or morning of the 26th November. As the executions took place in latitude seventeen degrees thirty-four minutes, five days later, and the brig was standing west-northerly, she must have been in about twelve north latitude, where a degree of longitude

measures but two or three statute miles less than on the equator. The sun consequently, would have been up, before seven. In a word, the whole of this young man's evidence strikes us as very questionable, so far as regards details. If true, however, it puts M'Kinley among the *doubtful*, instead of among the *certain*.

Snyder was a witness for the defence. Page 224, he swears: "Mr. Spencer asked him [Cromwell], how he thought the brig would do for a *slaver*." Captain Mackenzie: "Did Mr. Spencer ask Cromwell how she would do for a *slaver* or a *pirate*?" Answer: "Yes, sir; for a *slaver*, or a *pirate*; he said *both*." Here Captain Mackenzie rested, and the judge advocate commenced a cross-examination. Question: "When did you first tell of this?" Answer: "At Commodore Perry's house." Question: "Have you deserted from the Somers since her arrival?" Answer: "Yes, sir." Question: "Have you been punished for it?" Answer: "No, sir, not yet; *I do not know whether Mr. Spencer said slaver or pirate*; I can't recollect which *one*; he said *one*, or the other." This is the character of a good deal of the evidence, we think.

Any one, in the least familiar with life, will know how to appreciate that sort of evidence which depends on the conjectures, distrusters, hearsays, and signs, that vulgar minds imagine, when they once begin to have their attention called to any particular object. It is notorious that things are then seen which never had an existence, or which obtain all their importance from the imagination of the observer. The most natural and innocent acts are tortured into proofs of guilt, and sayings, looks, and gestures, are all interpreted in a way to suit the notions and preconceived opinions of the looker-on. This is just as true of things past, as of things present. The desire to be of importance in moments of excitement, to know something, to have something to tell, is also inherent with the vulgar, and seldom fails to generate testimony.

One instance more of discrepant testimony must suffice, though we could furnish a hundred. In speaking of Wales, Captain Mackenzie says, p. 210, "I had a trifling difficulty with him, *not discreditable to his character*, on the previous cruise to Porto Rico." In reference to this difficulty, Mr. Heiskell was asked, p. 162: "Was it of a *delicate nature*?" Answer: "Yes, sir." Question: "Did it concern Mr. Wales's character?" Answer: "After he had explained it, I should think not." Question: "When did he explain it?" Answer: "I do not know—some time since, I believe." Question: "Was it *before* the arrest?" Answer: "I think Mr. Wales spoke of this matter before the arrest." Question: "Shortly before the arrest?" Answer: "*I won't pretend to fix upon a time*." At page 23, Wales himself is asked: "Did you have any difficulty with Commander Mackenzie at Porto Rico, and what was it?" Answer: "I had a difficulty, but *decline explaining it*." At p. 26, Captain Mackenzie asks Wales if this difficulty, which he himself calls *trifling*, was not generally known in the brig, evidently to leave the inference that on account of this trifling difficulty Wales, without any previous sounding, was supposed ready to unite in the murders, *piracies*, &c., contemplated by Mr. Spencer! In his report, p. 210, he says unequivocally: "On *that* account, he was singled out, and tampered with."

Referring the reader generally to the testimony, as the most satisfactory mode of ascertaining its value, we will now proceed to a brief analysis of Captain Mackenzie's report, as it is connected with the facts that have been proved. It is to Captain Mackenzie's mind and motives that the world is to look for the solution of this unusual and sad occurrence, and the best clues we have



both of these, are to be found in his own account of the events. The report commences at p. 194, rec. It is dated December 19th, or eighteen days after the execution.

The first feature that strikes us in this report, is its positiveness on points about which grave doubts exist, after every opportunity has been given for inquiry. To this may be added the habit of giving to mere *assumptions* the force of proof. When Cromwell is arrested, Captain Mackenzie says, at p. 199, he was questioned as to a *secret conversation he had held, THE NIGHT BEFORE*, with Mr. Spencer, and he denied having had the conversation, saying it was Small. "Cromwell was the *tallest* man on board, and Small the *shortest*," adds Captain Mackenzie. "Cromwell was immediately ironed, and Small *thus pointed out by AN ASSOCIATE* to increased suspicion, was also sent for, interrogated, and ironed."

We confess this statement puzzled us. On its face, one would suppose Cromwell, the *tallest* man on board, had been seen in secret conversation with Mr. Spencer, *after the latter's arrest*—a circumstance of grave import, beyond a question, if unexplained. It made us distrust his innocence, more than anything else. As Mr. Spencer was ironed at evening quarters (before dark) on the 26th, and Cromwell was arrested on the evening of the 27th, Captain Mackenzie's language admits of no other construction. *There is not a particle of proof of the fact*, and it would certainly not have been overlooked in the testimony, could so material a circumstance be verified. We can not even find any proof that Cromwell was questioned at all, when ironed; but that he had held a secret conversation with Mr. Spencer, the night before, is as much disproved as silence can prove a negative, in all the investigations that have since succeeded.

Cromwell's answer, and all the circumstances of the case, might lead us to suppose that he understood Captain Mackenzie to allude to the conversation between Small, Wales, &c., on the booms, if any such question were put to him. On this supposition, Cromwell's answer was perfectly natural. Mr. Spencer's arrest, and its cause, were known to Cromwell, Mr. Gansevoort having communicated them to him, in common with the other petty officers; it is altogether likely that Small mentioned the occurrence of his having had the conversation, for he had been publicly questioned on the quarter-deck about it, when Mr. Spencer was ironed; and, it strikes us, Cromwell's reply was just what might have been expected. Captain Mackenzie's account, as it stands, can hardly be true, since no one alludes to it at all, in the evidence. Still, it has a most ominous appearance in the report, and we confess carried great weight with us, when we first read it. The point is, that Captain Mackenzie gives the department and the public, through his official report, reason to believe that Cromwell had had a secret conversation with Mr. Spencer, after the latter's arrest, or on the night of the 26th, when he does not even attempt to prove any such thing in the subsequent investigations. Cromwell's name is nowhere connected with any attempt to communicate with Mr. Spencer, after the latter's arrest.

Then, the manner in which Captain Mackenzie reasons, in this connexion, is worthy of remark. "Small, *thus pointed out by AN ASSOCIATE* to increased suspicions," &c. Here Cromwell's guilt is *assumed*, as an additional reason for arresting Small!

On the same page (199), the reader will find Captain Mackenzie's extraordinary reasoning on the subject of McKinley's having got Waltham flogged on the 29th, to which we have alluded in connexion with the testimony of Mr. M. Perry. Wal-

tham, a prisoner for an ordinary offence, had told M'Kinley where three bottles of wine could be found; "his object being, *no doubt*," says Captain Mackenzie, "to furnish the means of excitement to the conspirators, to induce them to *rise*, release Waltham, and get possession of the vessel. M'Kinley was down on the programme as certain, and as stationed at the arm-chest. He reported Waltham to the first lieutenant, an extraordinary denunciation *under the circumstances*, probably occasioned by his desire to relieve himself from suspicion." Waltham was flogged for this new breach of discipline, and we confess, under all the peculiarities of this very peculiar sort of reasoning, we are surprised M'Kinley escaped the same punishment. This is one of the instances in which a conspirator flies from the extremes of sullenness, missing of musters, &c., to such a masterpiece of duplicity, as to get a confederate flogged.

Three bottles of wine would make but little impression, we fancy, on twenty sailors—Captain Mackenzie's *minimum* of the conspiracy, in the first place. Then, a sufficient reason may be found in Waltham's wish to get a drink. The wine was out of his reach, and M'Kinley might have sufficient good-fellowship to remember the man who had given him the information. But the fact is not as stated. M'Kinley swears (p. 178), that *he told the wardroom-boy*, Robbins, of Waltham's proposal; and, as Mr. Gansevoort confirms this account, we presume his statement is true. This just relieves M'Kinley from the extravagant supposition of Captain Mackenzie, while it removes any notion of a wish to conceal the delinquency of a fellow. In a word, the whole transaction, *as it occurred*, was of the most natural sort, and clears M'Kinley from all just distrust, as much as such a transaction can. There was not the concealment natural to a conspirator—there was not the officiousness of an assumed honesty. It was simply one wardroom-boy telling another of the *tricks* of a third. In addition, Captain Mackenzie sees the very finesse of villany in M'Kinley's course, because his name was down on the list of certain, instead of entertaining any doubts of the accuracy of the list, on account of the natural behavior of the suspected man. As for Waltham, he was the last down of the *volens volens* men, showing conclusively, if the Greek paper shows anything, he was one of those who presented himself *last* to Mr. Spencer's mind, as being desirable to retain even *against his own will*.

At p. 200, Captain Mackenzie says: "During the night, *sedition words were heard through the vessel*," &c., &c. If so, why have not these words been proved, and why have not the offenders been punished? At p. 200, is this: "Mr. Wales detected Charles A. Wilson attempting to draw out a handspike from under the launch, *with an evident purpose of felling him*," &c., &c. If so, it is to be regretted that Mr. Wales did not shoot the fellow on the spot. But, how stand the facts? In the first place, in his evidence before the council, Wales *does not allude to the subject at all*. Under a cross-examination (p. 25), he admits that he was standing about midway the trunk, on the quarter-deck, while Wilson was at the stern of the launch, forward of the mainmast, a distance from him of nearly or quite thirty feet! The *motive*, consequently, was pure conjecture, and such, in fact, Wales admits it to be. That it was conjecture on insufficient grounds, is probable from the circumstance that no corroborating fact is shown; no other evidence of an intention to rise at that particular instant is seen; that Wilson might have been shot by either of the armed officers, one forward, one aft; that he could hardly hope to have walked aft these thirty feet, carrying the handspike, and escape detection; and that he *was* seen, even before he got it out of the launch. *As for the lame excuse of Wilson, why is it not given, that we may judge of it?* *As*

innocent man, who is met with a cocked pistol, and a threat of having his brains blown out, for handling a handspike on board ship, may be excused for a little incoherency. When there is so much incoherency, and so many mistakes made, *after* the events, with every motive for precision and accuracy, it is fair to suspect some confusion in the orders given at the time.

On the same page (200), Captain Mackenzie alludes to the missing of their musters, by two or three of the men, in the following words, and as a strong evidence of an intention to rise: "*That they should have been asleep at all, that night, was not likely,*" he says. Here he *assumes* guilt to *prove* guilt! "*That they should have missed their muster on that particular occasion, having never done so before, otherwise than intentionally, was impossible.*" This is valuable, as giving us an insight into Captain Mackenzie's views of the *possibilities*. All this obtains its true character when we read the explanation of M'Kinley (p. 177), one of those implicated. This young man says he and M'Kee turned in and out together, and that they relied on each other for calls; that M'Kee did not call him that morning, in consequence of being obliged by the officers to lie down on deck, where he fell asleep. This is certainly not only *possible*, but it is highly *probable*, as the precise moments of changing the watches were those most apprehended, and the officers may very well have thought it best to keep one watch close until the other was up. But, Captain Mackenzie's reasoning on the subject is the most extraordinary of all. "There was probably an agreement to meet, around the officer of the deck, and commit some violence," he says. These men who contemplated violence, would first draw suspicion and punishment down on themselves, in order to accomplish their ends. After the revelations these men, if concerned in the plot as described, must have suspected ~~to~~ be made, did they suppose any officer in his senses would call up half-a-dozen delinquents at a time, expressly to give them this advantage over him? As nothing of the sort *was* attempted, it is reasonable to suppose nothing was meditated. As for the general *impossibility* of men's missing their muster at that time, we think the fact of pistols being pointed at the men, in one instance fired, the arrests, the ordering and counterordering, and all the disorganization attendant on such a course, were just the measures to produce uncertainty, indecision, and the very evils of which there was complaint. Others missed their musters, who were not *suspected*!

At p. 201, the reader will see Captain Mackenzie considered his own letter to the officers, as referring to them the question of life and death of "three of their fellow-creatures." This is conclusive as to the *expectation* with which that reference was made.

On the same page, Captain Mackenzie adds: "Wilson having failed in his attempt to get up an outbreak in the night," &c., &c. Here Wilson's guilt is quietly assumed, and yet we are astounded with the fact that no attempt has been made to punish the man. No evidence of any such attempt is given, unless Wales's improbable story of the handspike be taken as such, and that occurred in the morning. On the same page, speaking of Wilson's knife or dagger, he says it was "short, and gradually spreading in breadth; sharp on both sides; *it was of no use for any honest purpose*; it was only fit to kill," &c., &c. Mr. Heiskell, the purser, admits he purchased this dagger for M'Kinley, p. 160, who confirms the fact, p. 176. It is to be presumed, this gentleman fancied it might be differently employed. Captain Mackenzie says, p. 198, Mr. Spencer's eyes cast "strange and *stealthy* glances" to the mast-head, when the royal-mast was carried away. Mr. Hays, p. 213, on the same subject: "His eyes were *constantly fixed aloft*."

Speaking of M'Kinley, p. 201, Captain Mackenzie says: "He is, in fact, the individual who, if the mutiny had been successful, would have made way with all his competitors, and risen to command." This man is now at large, after having remained weeks in irons by Captain Mackenzie's orders!

At p. 202, he says: "Those who (*though known to be very guilty*) were considered to be the least dangerous, were called out and interrogated," &c., &c. Now, this statement is true or untrue. If true, why has not Captain Mackenzie done his duty, and preferred charges against wretches **KNOWN TO BE VERY GUILTY**; if untrue, what is the value of his report?

It strikes us Captain Mackenzie is not quite as ingenuous as he lays claim to be, when he says, p. 202, after receiving the report of the officers recommending the execution: "I at once **CONCURRED** in the justice of this opinion." Any one, who looks at his own statement, p. 201, where he speaks of his unwillingness to let the younger officers give opinions affecting the lives of "three fellow-creatures;" his letter, in which *he does not speak at all of the necessity of hanging the prisoners*, and the answer of the officers, must be satisfied there is a *sous entendu* about this affair, which renders the profession of this gentleman's prompt "concurrence" a little supererogatory.

But his report settles this point. In it, he says distinctly, *that he made out the station-bill for the execution, the night previously to the day on which he received the opinion of the officers*—p. 203. Then he speaks, p. 202, of two other prisoners, to whose cases "the attention of the officers had been invited." By whom? Not in his published letter, which was written by his own admission, before any more arrests had been made. This proves there were communications with the council that were not of record.

Perhaps the most extraordinary part of this very extraordinary report is Capt. Mackenzie's account of his proceedings, after Mr. Spencer had solemnly asserted Cromwell's innocence, himself so near death. It is at pp. 203, 204. He told Mr. Gansevoort to consult the petty officers. Now he had the depositions of these petty officers in his possession, and we find it difficult to believe that any man of sense can attach the least importance to them as evidence, those of Wales and Tyson excepted. Captain Mackenzie then returns to Mr. Spencer, and instead of *questioning him* about Cromwell, instead of asking an explanation of their intimacy, of anything, indeed, that had been alleged against the boatswain's mate, he tries to stir up the devil within him, by drawing a picture of what Cromwell would have done with him, excited a curiosity in this unhappy youth to know what the crew had said about him, and repeated the opinion of one of the petty officers about the fool and the knave on the two arm-chests. The termination of this scene, is thus given by Captain Mackenzie himself: "This effectually aroused him; his countenance assumed a demoniacal expression; HE SAID NO MORE ABOUT THE INNOCENCE OF CROMWELL." Then follows some of Capt. Mackenzie's logical inductions. Here are his words:—

"He might, perhaps, have wished to save him in fulfilment of some mutual oath. He more probably hoped he might yet get possession of the vessel and carry out the scheme of murder and outrage matured between them." This, be it remembered, is said of a man ironed, hand and feet. "It was on Cromwell that he had APPARENTLY TRUSTED in FULFILMENT OF SOME AGREEMENT FOR A RESCUE, and eloquently pleaded to Lieutenant Gansevoort, when Cromwell was ironed, for his release, as altogether ignorant of his designs and innocent." Now, had this been true, of what use could such an agreement be with

a man in Cromwell's situation? The reasoning speaks for itself. As for the accuracy of the statement about the *eloquent pleading*, it is certainly not sustained by Mr. Gansevoort's testimony, which has nothing of the superlative about it. Although he had seen his commander's statement, here are *his* words on the subject (p. 32): "That evening Cromwell and Small were confined. Mr. Spencer sent for me and asked if Cromwell was confined about any connexion that he might have with him. I told him he was. He said he was innocent; he did not think Cromwell would join him, unless there was money on board, or words to that effect. It was my impression that he was very anxious to have him released." Now, certainly, Mr. Gansevoort is nowhere an unwilling witness, and is it probable, had Mr. Spencer said more than has been here stated, that it would have been suppressed? The opinion thrown in at the close of his evidence must pass for what it is, the opinion of a man, who, by his own showing, was looking out to discover the *guilt* of the parties whom it was intended to execute.

The exaggeration of feeling and morality that prevailed in the brig, is apparent throughout the report and the evidence, we think, and it may have the effect of mystifying certain persons who are unacquainted with ships and sailors. Of this character, is the story told by Collins to the boys, at Captain Mackenzie's instigation, after the execution, concerning the money in the India-man, p. 207. This man Collins had told a story of having been in a ship, in which there was a box of doubloons, and of his not letting the fact be known until the vessel got in. Upon this Cromwell laughed, and said "had the case been his he would have run away with the box." The puerility of all this might excite a smile, did it not, like so many other points in this melancholy affair, suggest the thought how pitiable it was that no better justification offered for hanging a man, or no better moral presented to enforce, through the example of his execution, than what was to be gained by such a story as this. We are of opinion had Collins told his story of the doubloons to one hundred sailors, quite fifty would have made some such idle remark as this attributed to Cromwell. On shore, even, it would have been made by thousands who would not dream of performing what they said.

We have limits for only one more of Captain Mackenzie's decided assumptions. Speaking of Cromwell, p. 208, he says: "HE ONLY could answer to the description of the individual alluded to by Mr. Spencer, as having been *already in the business*!" Those who have not had as much occasion to analyze the accuracy of Captain Mackenzie's references and quotations as have fallen to our share, may be surprised at the boldness of this statement, when they come to look into the fact. Mr. Spencer made his revelation on this point to Wales, whose statement, of course, is all Captain Mackenzie's authority for what he says. Wales says: "The brig was to proceed to Cape St. Antonio, or the Isle of Pines, one of these places, and THERE TAKE ON BOARD, one who was familiar with their INTENDED BUSINESS," &c., &c.—p. 155. Now Cromwell COULD NOT be the man, for he could not BY POSSIBILITY, "answer to the description." And yet Captain Mackenzie, with Wales's deposition on the subject at his command, DOES NOT HESITATE TO ASSERT THE CONTRARY, in order to make out his case.

We could greatly extend this analysis of Captain Mackenzie's report, but enough has been said to put the reader strictly on his guard.

We conclude that the world will never know the literal merits of this extraordinary transaction. The testimony comes to us through such channels as to cause a doubt of its accuracy, if not of its motive; and there is, and probably



ever will be, something of mystery connected with many of its details. That the officers of the brig viewed one side of the case too intently, to give due weight to the other, we fancy few dispassionate men will now deny. This may have been natural to the inexperience and moral dependency of most of them, and inasmuch excusable; but taking their commander's own mode of regarding the facts, as it is exhibited in his own report, he will probably be judged, hereafter, by a severer standard. We can not but think he has not made out a justification of the necessity, and that he has signally failed in establishing the guilt of Cromwell. We are far from being satisfied with the remainder of the case, but our reasoning has been based on the supposition that, not only is Wales's statement true, but that Mr. Spencer actually intended all that is imputed to him.

Our theory on the subject of the state of the crew, is very simple. We believe that the people got together in knots, as described, to converse about the sight of Mr. Spencer in irons, on the quarter-deck. Then succeeded the revelations and rumors, conjectures, criticisms, and some surliness, perhaps, as a consequence. It is not to be supposed that the quarter-deck and petty officers monopolized all the gossiping. The pistol, with menaces, followed, and a species of disorganization of the crew came next. We do not think the last amounted to much, or was very widely spread, and, as applied to the majority, it may have been more owing to uncertainty than even to discontent. Mr. Gansevoort admits, p. 37, he told the crew they might get their "brains blown out before they were aware of it."

In this state of things, Captain Mackenzie conceived the idea of executing his three prisoners. It was talked about, and several of the older officers agreed it would be necessary, *if more prisoners were made*.—See record, p. 49. *On the morning of the day when the council convened, AND AFTER THE LETTER CONVENING IT WAS WRITTEN, FOUR MORE PRISONERS WERE MADE.* These were some of the men who have since been suffered to go unprosecuted. The council was evidently apprized of the necessity, and of the mode contemplated to meet it, and, in this frame of mind, it proceeded to make its inquiries, without giving the accused a hearing. Pending the sitting, Mr. Gansevoort had one, or more interviews with Mr. Spencer, with the avowed object of getting further evidence, through the young man's unsuspecting conversation, OF HIS GUILT. This is a startling fact, but it rests on Mr. Gansevoort's own testimony, p. 45. The want of art that is manifested in letting such a circumstance be known, may amply prove sincerity of purpose; but what man who confessedly commenced an inquiry with such an object, ever failed of seeing something to corroborate his previous opinions? Something of the same sort is stated, p. 47, in order to get admissions from Small that might implicate Cromwell. In a word, want of head has been the predominating weakness, according to our views, throughout an affair that is destined to make a dark page in the history of the country, and which leaves a blot on its system of jurisprudence.

As for the proceedings of the council, were it not for the fearful consequences, they could meet with nothing but pity and contempt, from every legal mind on earth. Take away Wales's statement, and that would oblige the officers to regard the Greek paper as the measure of the danger, there is scarcely anything to sustain them but the lowest gossip, and opinions founded on such gossip. Tyson's deposition may perhaps be entitled to some little attention. The value of many of these gossiping opinions were known, too, as is seen, for instance, in the statements of Mr. Gansevoort before the Court of Inquiry, where some of the petty

officers speak of knives and other things which they suspected to be stowed away, and which an examination showed were not so stowed away. Then there is the statement of King, who swears confidently to a very particular order concerning the main-royal-brace, when everybody else, *including the officer who gave the order*, gives a very different account of the matter. This is the most important of the witnesses among the petty officers. Another of these witnesses says:—"I don't think the vessel is safe with these prisoners on board; *this is my deliberate opinion, from what I've heard King, the gunner's mate say; that is, that he had heard the boys say there were spies about.*" Take Dickinson's answer, pp. 148, 149, concerning the construction he put on Cromwell's threats, until *after the arrest*, when he admits he viewed them differently, as a specimen how men of this stamp regard facts.

The looks and signs were quite natural, as the circumstances are related, though probably like everything else they, too, have been seen through a distorted medium. Mr. Spencer was liked among the crew; an officer who pursued his course could not fail to be, for a time at least, and that those who pitied him, felt for him, fancied him ill-treated perhaps, should look at him and manifest sympathy, is quite in the nature of things.

Nor do we conceive it at all necessary, admitting Mr. Spencer seriously intended all that Wales has alleged, to suppose any material portion of the crew concerned in the affair. It is admitted by Captain Mackenzie's witnesses, his own nephew among others, that names are down as doubtful, while they think the parties, in one instance quite, in another substantially, innocent. It would be a just inference to believe that feelers were thrown out, and that the approaches at first would be gradually made. It is asking too much to wish us to think the knowledge of the mutiny could have been much extended, with the certainty, after an examination under oath, of every soul in the brig, ten then in prison excepted, that no one could let the fact be known. All experience shows that state's evidence is seldom wanting, in an affair in which many are implicated. One fact, too, in relation to the testimony of Wales, must be kept constantly in mind. By his own statement, Mr. Spencer commenced his revelations by inquiring if he (Wales) would be afraid to kill a man—if he would hesitate about taking human life, saying he did not doubt his *courage*, and consequently applying the question to his *principles*. Now, after such a beginning, Wales invokes the name of God to protest he would keep the secret that was to follow.

A portion of the accompanying record is given to an investigation of the fact whether Mr. Spencer dictated a letter to his friends, which letter, if ever dictated, it is understood has never been received. Mr. O. H. Perry, the young gentleman who carried the official account to Washington, is stated to have said, while at the seat of government, that such a letter was written. Captain Mackenzie offered his own affidavit to show that no such letter was written, and the court admitted this affidavit to record, though not as proof. It will be found at p. 192, together with a copy of the notes taken by Captain Mackenzie, according to his statement, and which notes, he would give us to infer, had been mistaken for a letter.

We shall not affirm that Captain Mackenzie did write any letter of the sort supposed, though several of the witnesses appear to have imbibed this notion. We shall give some of the most prominent points connected with this branch of the subject, and leave the reader to draw his own inferences.

At p. 192 of record, will be found the commencement of Captain Mackenzie's report of what passed, in *private*, between himself and Mr. Spencer, after the for-

mer's announcement of the latter's approaching execution. It terminates at p. 205. Now this report contains *no statement that Mr. Spencer dictated anything to Captain Mackenzie*, which was to be written as the dying declarations of the young man. It contains no other than this incidental admission that anything, indeed, was then written by Captain Mackenzie, without a word explaining why and for what purpose it had been written, viz.: 'He [Mr. Spencer] read over what had been written down: I had stated hurriedly in the third person, 'He excused himself by saying that he had entertained the same ideas in the John Adams and Potomac.' He asked that that might be corrected: 'I did not offer it as an excuse, I only stated it as a fact!' *More than an hour had now elapsed during the continuance of this scene,*" &c., p. 205. At page 172, the reader will find a remarkable portion of the record. The judge advocate had been examining Mr. O. H. Perry on the subject of the letter supposed to have been written by Mr. Spencer to his friends, by means of a dictation to Captain Mackenzie. It is important to remember this fact; as it gives more weight to Captain Mackenzie's subsequent admissions. In the record of the dialogue that passed in consequence of Captain Mackenzie's interrupting the judge advocate, it will be seen that Captain Mackenzie was distinctly asked if Mr. Spencer "did dictate to you [him, Captain Mackenzie] what to write?" "Yes, he did," Captain Mackenzie answered, "*the substance of it is in my report—my official report.*" This admission was subsequently made in a formal manner, and embodied in the record. It must consequently be taken as proved. Usually a "dictation" of the thoughts and messages of an individual take the form of the first person singular. It is very remarkable if these "dictations" of Mr. Spencer did not, as a whole, follow this general rule, that Captain Mackenzie should have said, as he does in the foregoing quotation, from p. 205, "I had stated hurriedly **IN THE THIRD PERSON,**" &c., &c. The words "**IN THE THIRD PERSON**" are perfect surplusage, useless and without meaning, unless the remainder of the document, letter, or memorandum, were in the *first person*. It is not easy to see why Captain Mackenzie should have used them at all, unless on this account. Now the memorandum which Captain Mackenzie swears, p. 192, was all he wrote on the occasion meant, is written principally in the *third person*, so far as Mr. Spencer is concerned. But one expression, indeed, in that part of it which Captain Mackenzie swears was written *before the execution*, is in the *first person*, and that is the very last sentence. It is in these words: "I am afraid this will injure my father."

Again: Any one can compare the report with the memorandum. The part of the former that tallies with the commencement of the memorandum, will be found at the bottom of the first column, p. 204. The first discrepancy is important. In the *report* Captain Mackenzie makes this young man say: "I deserve death for this and many other crimes. There are few crimes that I have not committed." The memorandum says, "deserved death for this, and other sins." We presume Captain Mackenzie need not be told that *crime* is not necessarily *sin*. This looseness awakens distrust. The distinction is very important, considering the words as a confession, under all the circumstances of this extraordinary case.

But the point to which we attach the most importance is the meagerness of the memorandum, as compared with the time admitted by Captain Mackenzie to have passed in this private interview, and the time sworn by several witnesses, seemingly to have been consumed in making them. According to the report itself, an hour must have passed, most of which time Captain Mackenzie

was occupied in private with Mr. Spencer. The witnesses agree in thinking the period during which they thought the former busied in writing to Mr. Spencer's dictation about half an hour. The part of the memorandum which Captain Mackenzie swears was written previously to the executions, is very brief. The question then arises, how was the remaining time occupied? Captain Mackenzie accounts for a small portion of it, by what he has related in his report, and there still remains, to say the least, we should think, quite half an hour, or more, of private dialogue concerning which we have no explanation. If Mr. Spencer really "dictated," where is the matter dictated?—or, if he merely conversed, what did he say? Captain Mackenzie's whole report, and it contains his own remarks as well as Mr. Spencer's, could all have been uttered in a very few minutes, and the memorandum, so far as relates to this interview, is still more meager. We have great difficulty in believing that any material portion of that which passed, as to quantity at least, is reported, and if anything is suppressed, what is it? We might add, that the memorandum as given, is a singular document to have been *dictated* and *revised*—Captain Mackenzie says Mr. Spencer read it—by an educated young man, as his dying message to his friends, or indeed for any other purpose. Mr. Spencer must have had difficulty in even understanding it.

Now two of the witnesses swear that Captain Mackenzie, in an address he made to the crew, said that Mr. Spencer had been telling untruths just previously to his death. M'Kee says, p. 215: "He [Captain Mackenzie] read Mr. Spencer's letter; he said he was satisfied that the young man had been lying to him for half an hour before his death," &c. Green says, p. 218: "I heard the commander say: 'This young man died with a lie in his mouth;' 'I don't know that he meant Mr. Spencer more than any one else.'" There can be no doubt, if the words were used, Mr. Spencer was meant. If lies were told, where are they? What were they?

It will probably be said that M'Kee and Green were two of Mr. Spencer's conspirators, and are not to be believed. We apprehend that this is neither law, nor reason. It will not do to say that an officer can bring accusations against a portion of his crew that are never followed up by prosecutions, and affirm that the accused are to be discredited in consequence. On this principle a commander could never be convicted of any crime, since he had only to put the witnesses he feared in irons, until his own trial was over, to obtain impunity. On paper, the testimony of M'Kinley, M'Kee, and Green, appears quite as probable, to say the least, as that of the witnesses for the defence; better, we think, than *most*, and quite as credible as the best. Then the fact is one not likely to be invented.

But setting aside this obviously just claim of these witnesses to stand as fairly before the community as others of their class and intelligence, let us see if their testimony is altogether without support. Dr. Leacock was asked, p. 220: "Did you hear any statement [from Captain Mackenzie], that Mr. Spencer had been telling the commander falsehoods before he died?" "I think I did hear some such observation as that." This is the evidence of an unwilling witness, we think, and in its substance, it corroborates the statements of M'Kee and Green. Well, where are these falsehoods? Not in this report, it is to be presumed—not in the memorandum. If omitted, then is the memorandum a defective record, and as such to be regarded with distrust. It may be true it contains *all* Captain Mackenzie wrote; but the question is if it contained all that *passed*.

One of the parties to the dialogue is dead, and the other has the whole matter in his own hands. That Captain Mackenzie is not infallible as authority is shown



by the looseness of his statements, about the secret conversation between Mr. Spencer and Cromwell on the night of the 26th, that of "crime" for "sin," and other similar mistakes. But, giving this gentleman the fullest benefit of his own explanations, we will reason a little in his own manner.

Mr. O. H. Perry believed what he said at Washington, and probably would then have sworn to it; and without a hearing Captain Mackenzie would have stood in the awkward dilemma of being convicted of having suppressed a letter from one of the persons executed, a letter written by himself, and through his own agency! Cromwell might have cleared up every one of the circumstances that made against him, in the minds of the officers, had he too been heard. It is not only possible, but probable, that the cases of the other two, would, to say the least, have been colored differently from what they now are, had the same opportunity been extended to them. If Mr. O. H. Perry, too, were mistaken in this fact, he may be mistaken in others, and there being no reason for believing in any intentional misstatement as connected with the affair of the letter, on the part of this young gentleman, if he made this mistake, others, in all that relates to their opinions, the signs, symptoms, and other omens, may have made other mistakes.

We know of persons, good judges of evidence too, experienced members of the bar, who doubt of there having been any serious design of a mutiny on the part of even Mr. Spencer. They think the whole the idle mystification of a youth practising on Wales, and possibly on Small, and the accessories to have been either invented, or imagined by the different witnesses. We have had one of these theories, and that from a perfectly disinterested quarter, laid before us, and we have no hesitation in saying, that it is far more plausible than most of the theory of the mutiny that has been given to the public by Captain Mackenzie. It assumes that Mr. Spencer was mystifying Wales, and that his Greek paper was prepared for the purpose. There is certainly good reason for believing that these papers, or one of them at least, was not in the neck-handkerchief at the interview on the booms, as Mr. Tillotson testifies to seeing Mr. Spencer put such a paper in his locker, where it was found next day. This occurred just about the time Wales swears he and Mr. Spencer got upon the booms. As respects the *value* and *identity* of these papers, this fact is material, since it shows the paper was written up to the last moment, and renders it almost morally certain the boys who pretend to have seen the paper some time previously, could not have recognised its face at least; and as for papers with geometrical figures on them, on board ship, it would be very unsafe to assume there was but one!

The improbability of the story is urged against its truth. As Mr. Spencer was seen with a tumbler of brandy immediately before the interview on the booms, a portion of which Small drank, if not all, it has been thought that the whole mystification was carried on under the influence of this liquor. We confess, however, that the reasoning does not strike us as satisfactory. We think the Greek paper too *meager* for mystification; that, in such a case, it would have been made more terrific, and not so truthful. Its moderation is in favor of its genuineness, while we think there is proof that its owner made it as formidable as he could, observing any respect for facts. We believe, therefore, a plot existed in the mind of this young man, quite likely with as much of imagination in it, as of reality, but still a plot. We greatly doubt if an attempt would ever have been made to carry it into execution. The very fact that he is said to have entertained a similar plan on board a ship like the *Potomac*, throws a shade of distrust over the seriousness of the design; for the idea of converting a frigate of the largest class



into a pirate, in the present state of the world, is so preposterous as almost to defy credulity. It is true the same argument, though differing in degree, can be urged against the scheme with the Somers, for we do not remember to have heard of a pirate, at large, on the open sea, and away from some particular coast, since the general peace. The South American troubles converted a few quick privateers into rovers, possibly. A cruising pirate is a thing almost unheard of in these later times, and it is certain one could not exist a twelvemonth without detection and destruction. The piracies of which we occasionally read in the public prints, are merely running away with vessels to rob, very different things from a regular lawless corsair. This is one of the affirmative reasons we have for believing Cromwell was not in the plot at all, having too much sense. It is quite likely Mr. Spencer ~~sounded~~ <sup>sounded</sup> him, he may even have had hopes of prevailing in the end, but it is not easy to imagine he would have succeeded.

We incline to the opinion that Mr. Spencer told the truth, when he said this scheming on such projects, was a mania with him; a morbid state of feeling, of which he found it difficult to get rid. It really seems to us that a youth making these admissions, expressing penitence, under nineteen years of age, and who admitted the ties of family, might have been managed for four or five days without hanging him!

Had the petty officers been armed, and put in two watches, to be stationed on the quarter-deck as guards over the prisoners, and a body to act in meeting an outbreak, with an officer at their head, it is difficult to imagine that the Somers could not have reached even St. Thomas.

But, the most inexplicable part of the conduct of Captain Mackenzie, is the extraordinary manner in which he kept aloof from all investigations into the facts. A few words at the different arrests, the hour passed principally with Mr. Spencer, and the annunciation of the executions, seem to have been the extent of his personal inquiries. Why did he not demand the particulars of a plot of which the existence was admitted? Or did Mr. Spencer give any particulars, and were these the falsehoods he had been telling? Even Mr. Gansevoort seems to have limited his inquiries to Small, to obtaining some concession that might implicate Cromwell. No close and general investigation took place, though conversations often occurred. The simple question, "Do you know of any person concerned in this affair?" was not put to Small, though a leading question was asked him, and a very equivocal answer obtained, with the avowed intention of obtaining proof against Cromwell! Then, why was Cromwell himself not questioned? The proof—if it merit such a name—on which this man was hanged was just this: His general intimacy with Mr. Spencer, a circumstance that might have proceeded from the desire of the latter to sound him, without any guilt in the former, or Mr. Spencer may have had the same dread of Cromwell, as was entertained aft; the affair of the mast, a violent absurdity in its inception, and which is totally broken down in the cross-examination, and which never was anything but a most improbable conjecture; the \$15 given Cromwell; certain language and exhibitions of temper, that betray anything but a plot; and the opinions of some of the petty officers that he was a desperate fellow! All the rest of the evidence, such as it is, is *ex post facto*. When it is remembered that the executions took place to quiet apprehension, because, as Captain Mackenzie himself expresses it, p. 202, "The risks and uncertainty of the preceding night had determined me that another such should not be passed," it is unaccountable that no attempt was made to question Cromwell. He had not kept the gift of the money

a secret ; laid little restraint on his temper ; acted openly enough, or the witnesses are foresworn, and yet no attempt, not even the smallest, was made to ask explanations, not a solitary question appears to have been put to him ! It almost seems that there was a fear he might exculpate himself.

As for Small, we think it evident he was of more feeble mind than common. Liquor may have done this. But, weak or not, it was hardly necessary to hang a man who felt as he is described to have felt, at the moment of execution. We think, even then, Captain Mackenzie might have felt certain that he was in command of his brig, and stayed his hand.

The great evils that are to result from the Somers affair, are the blot it will leave on the jurisprudence of the country, the false principles to which it has given currency, its example in the way of discipline, and the abuses of power to which it may lead.

On the first of these heads we think it unnecessary to say much. When men are hanged with impunity, no trial having been had, to avert a danger that was inseparably connected with the guilt of others, and these last named guilty escape, *even unprosecuted*, after being completely within the grasp of the law, it is impossible for the character of the country to remain untarnished. Unless the guilt of the men named were *known*, it was a crime to hang the others ; if *known*, they should be punished. We can understand it will be contended that, the guilt of the executed being established, strong suspicions of the guilt of the others, will be sufficient. We do not admit this reasoning. A case must be made out to *justify* these distrusts, and nothing short of *knowledge*, or what the officers had proper reason to believe *knowledge* of the guilt, is sufficient. This, we think, entirely wanting, as the record will show. At most, it was only one man's *opinions*, justified by other men's *opinions*. Now opinion begets opinion, especially in moments of excitement—in this case, the fact is actually sworn to—and no man is safe when matters are pushed to extremes on such loose grounds.

As for discipline, a low and discreditable feeling induces many to think this despotic exhibition of the power of the quarter-deck, will have the effect to sustain it, and to strengthen authority. Were the fact so, it would be authority unjustly obtained, and as such to be repudiated. But, it is not so. Discipline is the result of the authority exercised, in the name of the state, by the few over the many. Its entire virtue exists in its legality, without which it can have no salutary or permanent existence. It is true that dread may temporarily be struck into the breasts of a crew, by an execution, but, in the end, the principles connected with the affair, the facts of the case, the merits or demerits of the procedure, are all certain to be canvassed and understood, bringing the whole down to the standard of a severe necessity. The essence of all discipline in this country, is strictly legality.

As respects example, the effect can only be injurious. Imagine it to have been known on board the Somers when Mr. Spencer was arrested, that a scene similar to that which subsequently occurred on board the brig, had actually taken place in another vessel, would Cromwell, supposing him to have been the man alleged and guilty, quietly have submitted to be ironed, with the prospect of being hanged without even a hearing ? Cases may occur, in which stern necessity shall justify an officer in going beyond the law, as it would justify Captain Mackenzie were his case good, and in which the crew may feel it safest to fight for their lives at once, rather than to yield the first advantage, pointing to this very example for their justification.

It is the height of weakness to set up anything but an overruling necessity, as the justification of Captain Mackenzie's course. It was self-defence, it was crime, or it was a grave misunderstanding of his situation, of his duties, and of the danger. As relates to discipline, in every point of view it must be pernicious. It will take years to eradicate the injurious influence it must have on the minds of the seamen of the country. Thousands, who are not disposed to think ill of Captain Mackenzie, think he was too precipitate in the case of Cromwell at least, and seamen must long have misgivings of their fate, when circumstances throw distrust on them, while they remember that at least one American seaman, died protesting his innocence, executed without a hearing, and without an overt act of mutiny.

The effect of such an instance of authority, on the minds of others, an authority exercised without the forms of law, while there remains a doubt concerning the guilt of all the accused, or of the necessity of the act, can not be anything but pernicious, so far as imitation is concerned. Restraint, in such cases, is for the overbearing and vicious, not for the moderate and good. Prudent men never exceed the due limits of their power, while the indiscreet, selfish, unjust, and exaggerated, no small portion of the human family, fall into this error sooner than into most others.

It will be seen we have made an issue differing from that presented by the judge advocate. This gentleman, if we rightly understand him, throws everything on the *facts* of the case, while we believe the *justifiable* view of the *apparent* facts, after due inquiry made, is the controlling feature. In one thing we fully concur with Mr. Norris. It was incumbent on Captain Mackenzie, admitting the danger of a rescue to be established, to use every available means to ascertain, not the *guilt* merely, but the *guilt* or *innocence* of the men executed. This, in a case of circumstantial evidence, could not be done, without giving the party implicated a hearing. In our view of the matter, the violation of justice connected with a departure from this sacred principle, is of more importance to the country, than the preservation of a dozen brigs. It is striking at the root of all right, and setting a precedent, which, if sustained and followed, would destroy the social compact. When we say "*justifiable view* of the *apparent facts*," we mean *just inferences* drawn from *sufficient evidence*; not guess-work, conjecture, or opinion and mistakes. We only differ from Mr. Norris in this: he makes the truth or falsehood of the real facts, the test, while we think Captain Mackenzie entitled to the benefit of any error by falling into wrong conclusions, by means of false testimony, but, which testimony he was justified in believing true. The distinction we make can be shown in the case of the sentinel who shot a man under false notions of his duty. The court decided that the sentinel was responsible for his mistakes. This was clearly right; but, had such a case offered to the sentinel as would *justify* him in *believing* that the man killed was bent on sinking the ship, for instance, we conceive the sentinel would have been acquitted, though still mistaken in the facts. We conceive a sentinel could be punished by military law, for not having done his duty, in a certain state of facts, as they presented themselves, though the facts actually tended to deceive him. We say this with deference to the judge advocate, who probably is a much better lawyer than we can lay any claim to be, and who, so far as one can judge from the record, is a man of acute mind, and every way disposed to do his duty. As for the point of law which made it incumbent on Captain Mackenzie to give the prisoners a chance of being heard before the council, we have said nothing, because we think it beyond all contro-

versy, and because it is so strongly presented in the record. This was the great point in the case of Governor Wall.

As we have intimated that, in our view, want of judgment, and a disposition to view one side of a case so intensely as to forget it may have another, lie at the root of this matter, we will illustrate the power of discretion that Captain Mackenzie possesses, by evidence drawn from facts that have been incidentally shown in the course of these very proceedings. In doing this, we will present a point connected with the falling off of the discipline of the brig, which has weight with us, and which we have specially reserved to be introduced in this connexion.

The Somers goes to sea with two more officers in her steerage than she was intended to carry, or could properly accommodate. She has on board a lieutenant, a passed midshipman, acting as master, and six midshipmen, three of whom are warranted, and three are acting. Two of these midshipmen, Messrs. Rodgers and Thompson, had been in the navy five years and less than nine months, when the execution occurred; one four years, and less than nine months; and the three acting midshipmen about a year, thirteen months, and five months. The officers, in the first place, are put in *four* watches, giving one of these watches to a young gentleman, who had not been in the service five years. It is unusual, we believe, to have the officers in more than three watches in small vessels, and midshipmen less frequently than those of higher rank. In order to give Mr. Hays a watch, Mr. O. H. Perry was ordered to do midshipman's duty, and this with a crowded steerage. The motive may possibly be reversed, and this arrangement made to allow Mr. O. H. Perry to do midshipman's duty. Now, we conceive Captain Mackenzie had no legal right to make his clerk, though his nephew, act as a midshipman, unless in a case of vacancy and necessity, and then only by rating him as such. This fact alone may have led to dissatisfaction. The sensitiveness of men to rank is great, and they will sooner obey an indifferent captain than a clever lieutenant. This was ordinary service, and no extraordinary rules were necessary. It is shown, that Captain Mackenzie rebuked Mr. O. H. Perry, his clerk, doing midshipman's duty, with a crowded steerage, when the mast was carried away, for his carelessness. Had not Mr. O. H. Perry been set at duty that did not belong to his station, neither the carelessness nor the rebuke would have occurred. The reason why Mr. Perry was thus employed, is obvious enough. He bears a distinguished name, a naval name, belongs to a naval family, and doubtless wished to enter the navy regularly, and advance as others advance. A recent law of Congress, however, prevented any appointment except to fill vacancies, and Mr. O. H. Perry goes to sea as his uncle's clerk, taking his chances of preferment. The name and family claims of this young gentleman might possibly justify Congress in passing a special act to admit him to the service, but Captain Mackenzie was bound to take the law as he found it. As it was, he assumed an authority, with no sufficient reason, that the secretary himself was prohibited from exercising.

The Somers had a peculiar crew; substantially one of apprentices. Of 120 souls on board, 96 were under age. Boys can not govern boys; the last notoriously require the authority of men. On board a vessel-of-war, there are, or ought to be, two principal officers in each watch; one of whom—the superior—usually remains on the quarter-deck, and the other, on, or near, the fore-castle. The first is commonly a lieutenant, the last an old midshipman, a passed midshipman, or, in very large vessels, frequently a young lieutenant.

Of all sorts of crafts, one manned with apprentices most required steady and



experienced officers. The very equipment and officering of the Somers denote ignorance and want of judgment. The vessel was unsuited for such a crew, which she could not conveniently berth. A lightly-sparred sloop-of-war would have been far more appropriate, and the officers ought, in particular, to have been chosen for their steadiness, experience, and absence of exaggeration of character. How far Captain Mackenzie advised the arrangement under which the Somers went to sea, it is out of our power to say; its responsibility, however, rests with those who ordered it. We conceive a worse one could not have been made. As respects the judgment with which the officers were employed in the watches, Captain Mackenzie is the arbiter. By that arrangement, he put four youths, the oldest of whom was not nineteen, and the three others ranging from sixteen to seventeen, in charge of his brig's fore-castle. Now, to us, there is nothing surprising if a little carelessness and wilful conduct became apparent forward, with such boys in charge of boys. In order to effect this Captain Mackenzie made his clerk do midshipman's duty! Cromwell, for instance, a seaman, a navigator, is made to serve under a boy of sixteen, who had not the least legal right to command him, and who, by his own showing, could not understand a delicate order from the quarter-deck when given to him. We say no legal right to command, for authority can only be deputed in a prescribed form, and this form was not observed. Captain Mackenzie was arbitrarily and unnecessarily invading a positive provision of law, when he made his clerk act as a midshipman. In all this, we see great want of judgment. By the very best distribution of his officers, Captain Mackenzie would have had a badly-constituted authority for such a crew; but he selected the worst, transcending the law to do so. The secretary of the navy can not give a letter of appointment until a vacancy occur; but, Captain Mackenzie, with family objects in view, assumes the right to depute the authority and responsibility that such a letter would convey, to one nowise empowered, in law, to receive it.

Let us follow up this evidence of a want of judgment. In his report, he recommends this clerk to fill the vacancy made by the death of the officer executed. Not satisfied with this, he sends this boy to Washington, with his original account of the transaction, as if purposely to thrust him into a situation to attract attention. In a case of this sort, it was clearly proper to send one who could answer questions, and make all necessary explanations; but Captain Mackenzie sends a boy. We see the consequence of this ill-judged act, in the difficulty about the letter. Comment is unnecessary. The mildest construction that these facts warrant, is a lamentable deficiency of judgment.

Add to the foregoing, his whole report—his request to be continued in command of the Somers; his recommendation of his own witnesses to advancement in their profession, previously to his own trial; his virtual adoption of the doctrine that an American man-of-war is always to be sufficient for her own wants, *except in cases in which she can get under other American guns*; his application of even this principle, absurd, contradictory, and untenable as it is, to this particular case, when the case involved no necessity for any contrary course, and, in short, all his reasoning, most especially in reference to the *proofs* of the guilt of Cromwell, and we see no alternative but the darkest and most revolting crime, or gross deficiency of judgment. The last we suppose to be the true solution of the difficulty, coupled with certain circumstances that we shall presently mention.

In examining this case, it must be remembered, that such is the character of the mind that was called on to judge of the nature of the crisis that had occurred



on board the Somers. If, on the one side, it be deemed fair to introduce testimony of Cromwell's previous bad character as evidence of guilt, it is certainly fair, even though compelled to go beyond the record, to cite instances of the character of the judgment that presided over a case, in which a large portion of the defence is limited to opinions, appearances, conjectures, and inferences. We do not, however, go beyond the record.

The circumstances, coupled with error of judgment, which we think have had an influence on this sad transaction, are these. After the arrest of Mr. Spencer, it is evident from the testimony that Messrs. Mackenzie and Gansevoort began to see an enemy in every bush. We do not wish to say that they were frightened in the abject sense, but, that their minds were in that condition in which they were most disposed to exaggerate. The affair of the mast occurred, and we conceive no stronger evidence can be given of the state of the minds of these two gentlemen, than the fact that they should imagine mutineers went aloft to plot; with the certainty, too, of having some among them who were not in their secret. It can be gleaned from the evidence that Mr. Gansevoort was in constant communication with some of the petty officers, who, by their own showing, were advisers of the worst sort. These men both feared and disliked Cromwell, and the last soon got to be a bugbear to the commander and his first lieutenant. It was determined to arrest him, and the preparations that were made for that purpose speak volumes. The fact that a single man was met with a cocked pistol, as he descended in the centre of a group of armed officers, betrays the exaggerated feeling which prevailed. It is, altogether, the most unofficer-like procedure we ever heard, or read of, if we remember that not a single overt act of mutiny had occurred. It is not sufficient to say, we *thought* the mast was carried away to seize the brig, we *thought* the plotting aloft was to seize the brig; no attempt had been made to seize the brig, and the just conclusion from the facts is, that none was contemplated. In a word, nothing had occurred to induce this casting aside of the ordinary composure and dignity of acknowledged authority.

Then a pistol went off. Small is arrested; after which occurred the rush aft, when the mast-rope was manned. Mr. Gansevoort met the men with a cocked pistol again, and was very near shooting Wilson. Captain Mackenzie ran below and got his pistols, and there was another scene.

This last alarm proved to be unnecessary, but it had produced a scene. A night, with its reflections, followed, and every one must see that the exhibitions already made on the quarter-deck left the necessity of supposing a very serious condition of things, to shield the commander and his lieutenant from severe nautical criticism. Let us suppose, for instance, that the matter had ended there; the prisoners had been brought in, and precisely the same results had followed, as respects the remainder of the crew, as have notoriously followed, and what would have been the gossip of the service? Right or wrong, and in some respects we think they were right, though, in the main, very wrong, these gentlemen would have been fortunate to escape downright ridicule.

Now, we are far from supposing that either of the gentlemen implicated, distinctly and coolly admitted to himself the dilemma in which he was placed, but we can easily understand that men so situated would yield to the influence of such facts, in a measure unconsciously to themselves. Accordingly, the next day, we find the mutiny assuming a character so grave, as to raise the question of life and death, in relation to the prisoners already made. It is true, this question was connected with the necessity of arresting more prisoners; but more pris-

oners were not arrested until it had been decided to call a council, and those thus arrested, have been set at liberty since, without even a trial! The reader must not suppose that anything material had occurred, between the time when Cromwell was arrested, *on suspicion*; and that in which the officers began to discuss the contingency of hanging him, to make his case any worse. It must always be borne in mind, that much the greater portion of the testimony that has since appeared in this affair, was not in the least alluded to, at the time the question of hanging was first raised. This was on the 28th, and King's absurd story about the handspikes, Wales's also, all that relates to the papers seen by the different boys, and indeed all the testimony of the crew, such idle gossip as passed between the petty officers and Mr. Gansevoort excepted, was still in the womb of time. *It would seem to be established by the testimony, that when the question of life and death was first agitated, very little more evidence was in Captain Mackenzie's possession, than he had at the moment of Cromwell's arrest.* We conceive that this circumstance proves a good deal, and manifests that some extraordinary cause was influencing the parties.

There is another fact, that deserves to be mentioned particularly: There is no evidence to show that Captain Mackenzie, in his own person, ever questioned any of those, whose opinions delivered through Mr. Gansevoort, had so much influence. When staggered by Mr. Spencer's solemn assertions of Cromwell's innocence, he permitted Mr. Gansevoort to consult these petty officers, and took even their worthless opinions *at second hand*! If this does not argue a "fixed idea," it seems to us to argue something even worse.

The manner in which Captain Mackenzie relates the arrest of Cromwell, in his official report, too, to us carries an air of consciousness. It is a failing of this report that it is childishly minute. And, yet, Captain Mackenzie says not a word of Mr. Gansevoort's presenting a cocked pistol at Cromwell, &c., but gives this account of the matter, p. 199: "*I met him at the foot of the Jacob's ladder surrounded by the officers, guided him aft on the quarter-deck, and caused him to sit down,*" &c. Even the accidental explosion of the pistol that went off in Mr. Gansevoort's hand is mentioned out of its place, and in these words, p. 209: "*The single accidental explosion that took place [after saying that the officers carried their pistols 'cocked for hours together'], was from a very delicate weapon, a repeating pistol, in the hand of the first lieutenant, when I was arresting Cromwell in the night.*" Now this course is pursued in relation to these two events, by the man who is so graphically minute as to say, when describing the executions, p. 207: "*At length Browning saluted me, and said, 'Mr. Spencer says he can not give the word,'*" &c. Now Mr. Gansevoort, before the court of inquiry, according to the Tribune's report, and we presume *such a fact* would hardly be invented, says: "*As soon as he [Cromwell], came upon the Jacob's ladder, I cocked my pistol and pointed it at him, and when he got on deck, I told him the captain wished to see him. When he came to the captain he was ordered to sit down,*" &c. Here, then, these two gentlemen seem to contend for the honor of this exploit, in the first place, certainly giving very different accounts of the affair, and then it is worthy of remark, that Mr. Gansevoort, who, if the Tribune's report be true, volunteered this statement, before the court of inquiry, is silent about his own agency in the affair before the court martial. The discrepancy is significant, and throws a shade of discredit on either the report or the testimony of Mr. Gansevoort, while the consciousness that is seen in all that relates to Cromwell's arrest is we think manifest.

By referring to the depositions taken by the council of officers, it will be seen that the witnesses sustain their *opinions* by the necessity of guarding so many prisoners; prisoners, of whom the majority were put in irons, simultaneously with the sitting of the council, and, of which majority, scarcely a shadow of evidence exists against one, while the whole four, after weeks of confinement in port, have since been left to go unprosecuted.

In this connexion it is important to ascertain the true character of the council; whether it were a body convened to *guide*, or to *sustain* the decision of the commander. If the last, distrust is thrown over all its proceedings. The circumstance that the subject of the executions was discussed as early as the 28th, the council meeting on the morning of the 30th, tells a great deal, composed as the council was, of a lieutenant in the confidence of the commander, and who had gone through the scenes of the arrest, and of the mast-rope with him, *pari passu*; of a purser who had been in the navy less than sixteen months, and who probably was then in his first vessel, a sea-service of some six or eight months; an assistant surgeon, nervous from ill-health; and four midshipmen, one passed, the captain's nephew; another, whom he admits to be connected with him, and under his especial care; and the two others very young gentlemen, though under no particular circumstances to attract remark. Now it strikes us, if this council, were intended to *guide*, or to materially influence Captain Mackenzie's decision, he would have waited for that decision before he made up his own mind *what* was to be done, and *how* it was to be done. That he did not, can be established by his own showing. The ambition of the author has let us into the secrets of the commander, in more than one instance. At p. 203, Captain Mackenzie tells us in his report: "The officers were stationed about the decks, ACCORDING TO THE WATCH-BILL I HAD MADE OUT THE NIGHT BEFORE, and the petty officers were similarly distributed, with orders to cut down whoever should let go the whip; with even one hand, or fail to haul on it when ordered." As the report of the council was not made until about eleven of the day of the execution, this proves unanswerably how far it influenced Captain Mackenzie's decision.

Our own opinion, judging from all the facts as they are exhibited in the testimony, is that Captain Mackenzie exaggerated the danger, exactly as we think we have shown he has exaggerated the facts, in a report written a fortnight after the executions.

We hope that one good effect, at least, will result from this affair. The trial of cases like this, should at once be put exclusively, except in those beyond the reach of the tribunals, into the hands of the civil courts. Military men are not qualified, as a rule, for such an investigation. This is shown by several questions in this very case, that were put by members of the court. At p. 86, the question was asked whether Captain Mackenzie discovered any "unmanly fear," and whether the Somers were "in a state to sustain the honor of the American flag," previously to the executions. It is not easy to see what either of these questions had to do with the issue. Men are not to be hanged, in order to put a vessel in a state to do honor to the American flag, unless guilty, and there exists other necessity for taking their lives. There is no reason why an officer of a man-of-war should be put on a different footing, under a charge of murder at sea, from a merchant-officer. Had the last been tried, and three of his jury found him guilty he would not have been acquitted. On the other hand, nine might have hanged Captain Mackenzie.

Then few laymen understand, and ~~they~~ feel the wise distinction between legal

and moral malice. Still it was a distinction that was very important in this case. It is true the judge advocate pointed out all this, and pointed it out distinctly and well, but he was so situated that it did not come from him with the same authority it would have come from the bench. It is understood one more member of the court voted for guilty of illegal punishment, for instance, than voted for guilty of murder, and we take it for granted that this member drew a distinction between legal and moral malice, that the law does not, and ought not to recognise. Beyond a question, if Captain Mackenzie were guilty of any crime, as connected with the executions, he was guilty of murder. The malice *prepense* applies only to the intent to kill, and as there can be no question when a man is deliberately *hanged*, that the intent was to take his life, if the killing were not *justifiable*, or excusable, it could legally be nothing else. Questions of moral guilt would arise, in such a case, and the decision on that point would be very likely to be in Captain Mackenzie's favor; but this would be solely a question for the exercise of the pardoning power.

To say that none but professional men could understand such a case, is idle. The same reasoning would render a jury of doctors necessary in all cases of poisoning, and a jury of shoemakers on all disputes about boots. The result of this very case shows how professional men can differ, leaving the strong probability that professional *prejudices* had more to do with some of their votes, than professional knowledge. There is another point connected with the organization of this court that has never been publicly alluded to, we believe. Three gentlemen were detailed for the court originally, who were subsequently excused. It has been stated that several of the officers originally selected, frankly said that their opinions were adverse to Captain Mackenzie, having read the testimony before the court of inquiry, and asked to be excused. We never heard that this was the case with either of the three gentlemen named in the first order, and therefore venture no opinion as respects *them*; but we know from the best authority, it was the case as respects one captain, who was not named in the first order, only for this reason. This was all perfectly right; but were there not gentlemen on the court who had openly, and strongly, and warmly expressed their opinions the other way? Was due care taken on this point? This is one of the evils which result from the encroachments of the press, which will soon overshadow all that is left of justice in the country, unless checked. The record of no court of inquiry ought to be published until the case is finally disposed of, nor, as we think, the evidence in any trial. Nothing is gained by it, but catering to a vicious taste, or morbid curiosity, while much may be lost to the rightful administration of justice.

We have dwelt less on the evidence in this case, than we might otherwise have done, did it not strike us as being so strongly characterized as generally to let its true value be seen. The circumstances were such as imperiously to require indisputable affirmative evidence—so far as the human mind can judge of evidence by the ordinary signs—both of the necessity of the execution, and of the guilt of the parties executed; and any one accustomed to analyze facts may judge for himself, how far these conditions were fulfilled. It is worthy of remark that the judge advocate, p. 223, after examining several of the boys, to show that they had never detected any symptoms of an attempt at a rescue, or heard anything of the mutiny, offered to introduce any person the defence could name, as a witness for the government, to establish the fact more fully than it had been done. This leaves the just inference that the case of the defence is complete, so far as it had evidence



in reserve. It may be added that Anderson, much the most respectable of the petty officers, and who was sent aloft immediately when the mast went, testifies as follows at p. 225, in reference to what was passing aloft, and in reference to the mode of talking about the decks, after the arrests, in answer to this question, viz.: Question: "Were those people up there talking in their usual tone?" Answer: "In a low tone; the same as they and the rest of the crew talked about the decks; I SAW NO ALTERATION IN THEIR TALK ABOUT THE DECKS," &c. It is necessary for the reader to understand that loud talking is not allowed on the deck of a man-of-war, even among the officers. Anderson was then asked if he could have heard what was said, and his answer was: "Yes, sir." This is the opinion of one who was in the confidence of the officers, and who had been directed to keep an eye about him. This man saw no attempt to communicate with the prisoners. His account of *facts*, so far as it goes, is entitled to respect.

We have taken a view of this affair that will probably give satisfaction to those who hold extreme opinions on neither side. We are quite conscious a case much stronger than that we have presented, and one sustained by very plausible arguments, and a respectable show of testimony, might be brought against Captain Mackenzie and several others in the *Somers*, while we do not think less than what we have here shown ought, under any circumstances, to be adduced against their course; but we have preferred to keep within such limits as we think the facts will warrant, in the fullest manner. We have had some occasions for understanding the mind of Captain Mackenzie, and we ascribe more to its peculiarities, perhaps, than total strangers and severe judges might be disposed to yield.

There is one marked point, however, on which we think Captain Mackenzie's defence has failed signally, in a moral sense at least, if not in a legal. He should have been prepared to defend his course, by the facts as they offered at the time of the execution. Instead of this, *recourse* has been had, not only to testimony about which he knew nothing, on the 1st December, but to all sorts of charges, imputations, and circumstances, that might be supposed to affect the character of the men hanged, even though totally unconnected with the mutiny. Cromwell has been particularly marked out for this sort of attack, though the only charge of this nature which could be put to the test of proof, altogether failed on inquiry. It would also seem that Small was never in a slaver, the testimony of Mr. Holbrook (p. 53), leaving this point almost beyond a doubt. One of the charges against Small, too, was that he *had said* he once killed a "nigger" on the coast of Africa. With his dying breath he affirmed he had never killed a man, leaving the inference probable that every light saying of the prisoners had been dragged into the account against them, and that some had doubtless been invented. A clear and justifiable case ought to maintain itself most strictly on the merits. The guilt of all the parties should have been incontestable—the danger of a rescue beyond a question, and the necessity of taking this particular step so clear as to silence cavilling. *Facts*, not *opinions*, should have been relied on, and facts of so clear a character as to admit of no dispute. A vessel-of-war makes the apology of doubt, distrust, and uncertainty, with a miserable grace. The argument of the danger to commerce, and of the ravages contemplated by the mutineers, though it figures so largely in the defence, is one of the poorest that could be offered, being in truth a reflection on the understanding of the community. If the legal conditions of a proper defence were fulfilled, it was unnecessary; if not fulfilled, the reasoning falls of its own weight. A man who felt secure of his facts and principles, ought to disdain to use *tricks*. Captain Mackenzie, and no other man



has a right to hang a fellow-creature, where a doubt exists of the *justice* and *necessity* of the measure, because ships *may* be robbed at sea. If there be no doubt, the latter argument is supererogatory.

There is one point in connexion with Mr. Spencer, to which we have already alluded, but about which we have hesitated uttering the thoughts that suggest themselves. Mr. Gansevoort acted throughout with a perfect intelligence with his commander. This much the latter himself admits. Let the reader regard the facts. On the 28th, some of the officers begin to discuss the necessity of executing the three prisoners, should more arrests occur. On the 29th, Mr. Spencer broke down in spirits, passed the day in tears, expressed penitence, and a desire to disburthen his mind. On the morning of the 30th, the letter was written to the council, and soon after four more arrests *were* made—arrests of men who have not even had charges brought against them. At p. 45, will be found the following question and answer, between the Judge Advocate and Mr. Gansevoort:—

Q. "Why, and on what day, did you take Mr. Spencer the papers found in his locker?"

A. "I am under the impression it was on the 30th; for the purpose of HIS PROVING MORE CLEARLY HIS GUILT; I took him the paper that he might translate it, so I could understand it; MY OBJECT WAS TO OBTAIN FROM HIM AN ACKNOWLEDGMENT OF HIS GUILT."

Not by a frank explanation—not by telling him what was in progress, but, evidently, to use on an occasion like that which subsequently occurred. Here was this young man, then, furnishing materials for his own condemnation, unconscious of the danger he ran. A youth of nineteen, ironed hands and feet, destroying himself in the confidence of penitence, while his admissions were borne away to a secret conclave, that only waited for testimony to pronounce its doom, and to obtain the "CONCURRENCE" of a commander who had drawn up the programme of the executions, hours before that doom was rendered! We only hope that those who boast of American justice, and who delight to put it in brilliant contrast with that of other lands, will sometimes recall these facts, in connexion with the result of this trial.

It strikes us, nothing but such an admission was wanting to complete the features of a case in which men were sent to the gallows, with no obstacle to prevent, without giving them a hearing! The application to Small, touching Cromwell's guilt, was much of the same character as to design, though less offensive to fair-dealing, while the testimony was infinitely less conclusive.

If an act like this can be justified at all, it is only by the extremest jeopardy. It certainly can not by a case of danger that is proved by means of queries, conjectures, opinions, and inferences, that subsequent investigations have falsified in a hundred ways; and which needs *ex post facto* evidence to render it in the least plausible.

We owe it to ourselves to say, that the record has reached us so irregularly, while the publishers pressed so fast for copy, as to render our examination of this mutiny less compact and lucid than we could wish. The case was not wholly before us when we began to write, and we confess that the testimony, as it has become more fully developed, has wrought some modifications of our views, which will possibly be apparent to the reader. As the changes have been adverse to the case of Captain Mackenzie, however, we have not thought them of sufficient importance to rewrite the earlier portion of our article. As an instance of what we ~~must~~ take the affair of the mast. All the

evidence in the record that refers particularly to this transaction did not reach us until the remarks in the commencement of this article were forwarded to the publishers. Those remarks were founded on well-established *general* truths, and we have seen no sufficient motive for cancelling them; but the *particular* facts that appear on the cross-examinations, give a color to the affair that goes beyond our general reasoning; which, however just we may conceive it to be in itself, and however applicable to what we conceive it was the duty of Captain Mackenzie, to see and infer, is not as broad as this evidence will sustain. The following statement will justify our assertion. Mr. O. H. Perry admits, p. 173, in reference to the reproof he received from the commander, on the subject of the mast, "I said [that is told Captain Mackenzie], I think, I understood the order to have been TO HAUL on the brace." It is true he swears, on the same page: "The order as I understood it was 'A SMALL PULL on the weather main-royal-brace.' I passed THAT order." But this last explanation is given only to the court; to Captain Mackenzie *at the time*, Mr. O. H. Perry gives reason to think he "understood" the order to have been to "HAUL" on the brace; leaving the fair inference he passed *that* order, and that Small acted under a precise command to do exactly what is imputed to him. Notwithstanding this statement of Mr. O. H. Perry, Captain Mackenzie in his report, and in all his subsequent proceedings, gives the world reason to believe that the mast was carried away by design—*contrary to orders*, in effect! We can see but one possible explanation of this course of Captain Mackenzie's (we mean short of imputing *crime* and *malice* to him), and that is by supposing subsequent explanations with Mr. O. H. Perry, had let him into the secret of the real facts, and that he knew Mr. O. H. Perry did *not* understand the order, as he had told him at the time, he *did*. Mr. Hays, however, testifies, p. 211, that *he had heard Mr. O. H. Perry say, as recently as after the arrival in port*, "that he understood the order to be to HAUL on the weather main-royal-brace." If so, it is improbable he told his uncle a different story. The men were hanged *at sea*, and so far as they were concerned, it is probable Mr. Perry's first statement remained uncontradicted. At all events, it was incumbent on Captain Mackenzie to explain this affair. Even giving him the benefit of subsequent explanations with this young gentleman, the contradictions in Mr. Perry's account, should have thrown great distrust on his statements. We could wish to treat the expedients of a mere boy, who was probably alarmed at what had occurred under his orders, with due lenity, but this does not touch the point as respects Captain Mackenzie; who owed it to himself to explain why he put such a construction on the conduct of Small, when he had so much reason for believing the man merely obeyed a positive order. Then Mr. Perry says he really passed the order for "a small pull" on the brace, when, in truth, *no such order had been given to be passed*. This last fact must also have been known to Captain Mackenzie, as Mr. Hays swears his own order was only a repetition of one received from the commander, p. 211.

All this Captain Mackenzie must have known of himself, or seen by the evidence before the court, and yet he allows language like this to be incorporated in Mr. Griffin's defence of himself, viz.: "The carrying away of the main-top-gallant-mast, by the sudden and violent jerk of the weather-royal-brace by Small, who had just left the side of Cromwell, *EVIDENTLY BY DESIGN*," &c., &c. It may be well to add here, there is no evidence to show that Cromwell was near Small, on this occasion, except that of King, who swears *in detail*, to a positive, and somewhat complicated order from aft, which the officer aft [Mr. Hays] swears

as positively he did not give. Two boys also swear Cromwell was *not* there; one saying he saw him, at the time, in *another place*. But the point here, is to reconcile Captain Mackenzie's course in connexion with this matter, to Mr. O. H. Perry's statement to himself. One thing would seem to be certain; the accounts of the orders on this occasion, are so contradictory, as not to justify any man in affirming that Small acted with a design.

We are aware our law will be called in question on two points, viz.: On the subject of the virtue of what may be called *ex post facto* evidence, in vindicating the acts of a man; and, on the right of a man-of-war, to exercise jurisdiction over her own crew, in a foreign territory.

As respects the first, we will put a case. A and B quarrel and separate. A gets a dagger, and distinctly declares an intention to stab B, on the first favorable occasion, *in order to resent injuries already received*. B provides himself with a pistol, and makes a similar declaration, but under circumstances to render its communication to A impossible. The parties then meet; B approaching A, professing a readiness to apologise for what had passed, looking amiable, and giving no grounds for apprehension by his conduct. A, in execution of his original design, stabs B, and kills him. The fact of B's private intentions comes out on trial, making it evident that if A had not killed B, the latter would have killed A. Now, would this make the act of A self-defence?

Malice is an ingredient in all crime. As God alone can read the heart, the law wisely infers malice in certain states of the facts. But, when the party himself avows malice, and his acts corroborate the truth of his declarations, will it avail him that another is as wicked and as lawless as himself?

We know that this *ex post facto* evidence ought to be received so far as it goes to corroborate previous evidence, though with great discretion even in such instances; but we think it ought not ever be received, as *substantive proof*. The last is all we contend for.

As respects the national jurisdiction, we think we have not been understood. We use it only by way of illustration, in order to show the dilemma to which Captain Mackenzie might be reduced by laying down the position, he would not ask succor from any foreign power. Our ground is that he would have been obliged to go to sea to hang his prisoners, inasmuch as he could not legally have executed them in a foreign port. This is denied by one of those who have seen our sheets, as being opposed to international law.

We very well know that national law prevails on board a ship-of-war in a foreign port; but certainly not without limitations. It is a maxim of all municipal law that every man must exercise his own legal rights, in a way not to infringe those of other persons. The comity of nations renders this principle rigorously binding in all cases of international rights. The laws of New York, for instance, forbid public executions, as opposed to the public good, and as offensive to proper feeling. We should conceive it to be a gross violation of the comity of nations, for an English or French ship-of-war to execute men off the Battery, in the ordinary course of her legal discipline and judgments. Such an act would need grave explanations, and would only be justified on the plea of necessity. But Captain Mackenzie's case would have been far worse. No man can believe we should tolerate the conduct of the commander of an English brig, who should hang three men at his yard-arm, *without a trial*, because he could not submit so far to humiliation, as to ask the authorities of the place to extend to him the usual protection of their jurisdiction. The whole country would receive such an excuse as an

insult to aggravate the original wrong. We conceive that a vessel-of-war has no more right than an individual to resort to the law of nature, in a foreign port, until all legal means have failed; and, whatever may be her privileges in other matters, it is certainly as much within the legal powers of the local authorities of New York to suppress violence on board a ship-of-war, as it would be to prevent two belligerents from fighting a battle in the port. It will scarcely be contended that the local authorities have not a legal right to prevent the crew of a foreign ship-of-war from cutting each other's throats.

To conclude: we conceive that he who would come at the merits of the Somers mutiny, as they are connected with the facts shown by this record, must bear in mind the following leading circumstances, viz.: That the affair of the mast was the occurrence which directly awakened the feeling that produced the executions; that there is more reason for believing that Small obeyed an order in *hauling* on the brace, than that he did *not*, and that Captain Mackenzie had virtually been given to understand as much, on the 27th November; that the question of executing Mr. Spencer, Cromwell, and Small, *provided more prisoners were made*, arose as early as the 28th; that Captain Mackenzie wrote his letter convoking a council on the morning of the 30th; that *after* writing this letter, M'Kinley, Wilson, M'Kee, and Green, were arrested; that the four last named were brought into port as prisoners, some of whom Captain Mackenzie affirmed in his report were *KNOWN* to be guilty, were several weeks in confinement, most of them in irons, no charges being ever brought against one of them all; that Cromwell was never questioned as to his guilt, except by a few remarks made when first confined, and was never asked to explain any of the circumstances which formed the justification of his execution, though in irons on the quarter deck of the brig, nearly four days before he was hanged, and quite three *after the question of his death was first agitated*; that most of the evidence by which the execution of this man has been attempted to be justified before the court, has been first revealed by the several witnesses, *since the vessel arrived in port*; that Captain Mackenzie does not appear to have inquired into the facts *personally*, short conversations at the time of the arrest excepted, until after his decision to hang the man, and then only by taking *through Mr. Gansevoort the opinions of the petty officers concerning Cromwell*; that he made out his station bill for the executions on the night of the 30th, some twelve or fifteen hours before the report of the council was read to him, and consequently all the evidence given before that council, such as it was, had been received; that no overt act of mutiny had been committed; that the prisoners, in every instance, submitted to be put in irons without the smallest show of resistance, the crew looking quietly on; that at the executions there was no resistance; and that a man, supposed by Captain Mackenzie to be seriously implicated, and one of those he arrested after reaching port, was flogged at the gangway, as late as the 29th, nothing unusual occurring, even in appearance, at his punishment. It is all important to remember that if any mutinous conduct among the crew, such as to justify the executions, actually existed, it is susceptible of being proved, and that in neglecting to punish offenders for conduct which induced consequences so serious, Captain Mackenzie tacitly admits he can not prove it, or he grossly neglects doing his duty.

As relates to the evidence, we would point out to the reader the explanations concerning the battle-axes; the two rushes aft, on neither of which occasions was anything like a rescue attempted; the affair of the knife, a dagger, which Captain Mackenzie in his report speaks of as "only fit to kill," but which the purser

bought and presented it to his cot-boy, a difference of sentiment that goes to show the value of some of the opinions given; the contradictions, and positiveness under contradictions, of most of the boys who testify about the papers, as well as the almost moral certainty that, under the circumstances, these boys could not have recognised the Greek papers, so as to swear to them, had they been even the papers they saw in the hands of Mr. Spencer; the reasons there are for supposing that these papers were constantly undergoing alterations; and the great probability there is that the only crosses which appear on the Greek papers, were put there very shortly before Mr. Spencer's arrest; the value of Tyson's testimony, as contradicted by Sears, and as shown on his own cross-examination; the testimony of Anderson in particular, a witness without exaggeration, and one who evidently wished to tell the truth; the manner, persons, times, and places, when, where, and how, and to whom, most of the boys first revealed the facts they relate; the confident manner in which many of the witnesses speak of appearances and circumstances concerning which there is a moral assurance there ought to be at least doubts; the after-thoughts that pervade so much of the testimony; the exaggerations of opinion that are to be found in it; the whole evidence of King, the gunner's mate, and the confidence and particularity with which he swears to an order about the main royal brace, when clearly no such order was ever given; the motive owned by Mr. Gansevoort, for questioning Small concerning Cromwell and Mr. Spencer touching himself, after the council assembled; the discrepancies that exist between Captain Mackenzie's report, and various points in the evidence; the confident absurdities that are hazarded by many of the witnesses as connected with their own powers to interpret looks, signs and expressions of the human countenance, as well as the general disposition which exists to prove too much; the points on which the witnesses say they do not remember, as opposed to the points on which their memories are minutely accurate.

Most persons who condemn the course of Captain Mackenzie and his officers attribute it to fear. This solution of the difficulty is so natural, as to be the first to suggest itself. Such, however, is not our opinion. In the first place, we do not believe there was anything of which a man accustomed to sailors and ships, would have been seriously afraid. Then we think, the conduct and opinions of the officers generally, were not those of alarm; as for instance, in the dilatory proceedings of the council, which were hardly reconcilable with prudence, under the circumstances of danger and jeopardy it is attempted to set up. But we doubt if men frightened would have dared to meet the crisis, as it was certainly here met, admitting that the danger existed; and least of all do we believe the puerile theory of the disgrace of going into the nearest foreign port, would have resisted a moment against the attacks of fear. The reader will remember we distinguish between the exaggeration of danger, and the unmanly dread of meeting it. We suppose the tendency of the commander to regard one side of a question, suddenly took the direction of magnifying this mutiny. We think it evident Mr. Gansevoort had a strong disposition that way from the first. We believe the opinions of the two to have influenced all the rest of the quarter-deck. Under these opinions occurred the "scenes" of which we have spoken, when the previous impressions gathered intensity from the necessity of the case, and the executions followed.

Many imagine that Captain Mackenzie's report betrays the evidence of a disposition to glean personal renown, from the manner in which it is pretended he saved his own life and those of his associates. The feebleness of this extraordinary document renders its writer obnoxious to very injurious suspicions certainly,



and this among the number; but the mental obliquity, so very obvious throughout the whole affair, renders any ordinary analysis of human motives exceedingly precarious. God alone can say how far any selfish feeling was mixed up with the mistakes of this terrible transaction. The act was, unquestionably, one of high moral courage, one of the basest cowardice, one of deep guilt, or one of lamentable deficiency of judgment.

#### NOTE.

Since this review has been in type, our attention has been drawn to certain detached passages in the opinions of the judge advocate, which go to show that that gentleman holds the same opinion we do ourselves on the subject of the nature of the *appearances* that would justify Captain Mackenzie's course.

At pages 288 and 283, the names of Anderson and Browning are confounded together in a way that may mislead the reader. This has arisen from the fact that a portion of the record had not reached us, and we followed newspaper reports—always unsafe guides—for a small portion of the testimony. The name should read Anderson, throughout, and this man was a captain of the fore-castle, and not a boatswain's mate. There is, however, some reason for believing that Browning, the boatswain's mate, was also aloft when the mast was carried away, though we can not at the moment lay our hand on the evidence.

The point is simply to show that confessedly *innocent* men were aloft, and that the officers ought to have foreseen this, as well as the strong improbability that the conspirators would choose a place so liable to interruptions of this nature, to plot in.

THE END.