

THE

10658

# MILITIA REPORTER;

CONTAINING

THE TRIALS OF

CAPT. JOS. LORING, JUN. ON THE CHARGES OF GEN. WINSLOW;	CAPT. AMOS BINNEY, ON THE CHARGES OF MAJ. OSGOOD;
CAPT. JOS. LORING, JUN. ON THE CHARGES OF MAJ. DAVIS;	CAPT. THOMAS HOWE, ON THE CHARGES OF MAJ. MESSINGER.

TAKEN FROM

AUTHENTIC DOCUMENTS,

For the information of the Officers of the Militia.

29028



BOSTON:

PRINTED BY T. KENNARD,  
78, STATE-STREET.  
1810.

ADVERTISEMENT.

*District of Massachusetts, to wit :*

**BE IT REMEMBERED**, that on the ninth day of August, in the thirty-fifth year of the Independence of the United States of America, Timothy Kennard, of the said District, has deposited in this office the title of a book, the right whereof he claims as Proprietor, in the words following, to wit :

“The Militia Reporter, containing the trials of Capt. Joseph Loring, Jun. on the charges of Gen. Winslow ; Capt. Joseph Loring, Jun. on the charges of Maj. Davis ; Capt. Amos Binney, on the charges of Maj. Os-good ; Capt. Thomas Howe, on the charges of Maj. Messinger. Taken from authentic documents, for the information of the officers of the Militia.”

In conformity to the Act of the Congress of the United States, entitled, “An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the Authors and Proprietors of such copies, during the times therein mentioned ;” and also to an Act entitled “An Act supplementary to an Act, entitled, an Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the Authors and Proprietors of such copies, during the times therein mentioned ; and extending the benefits thereof to the arts of designing, engraving, and etching historical, and other prints.”

WM. S. SHAW, Clerk  
of the District of Massachusetts.

**T**HE publisher, at the request of a number of military officers, was induced to issue proposals for the following pages, and is proud in saying his subscriptions have been much more numerous than he could have expected in so short a time.

The rage of party is at present so predominant, that few publications are issued which do not lean on one side or the other ; and it would be natural to suppose such is the complexion of these sheets. But it may be asserted that the whole of the text and notes are written with that impartiality which can give offence to none.

The illegality of the Legionary Brigade, arranged as it was in Boston, created dissatisfaction and dissention among the officers, which led to the following trials.—Governor Gore and his Council have supported these principles by deranging the Legionary Brigade, and destroying every vestige thereof ; even the Sub Legion of Light Infantry has been disbanded, and each Light Infantry Company attached to separate Regiments, and the Brigade is now recorded and numbered the *third* in the Adjutant-General’s office.

These arrangements have left the Major and Adjutant of Light Infantry without any troops, of course their commissions are a dead letter, and must evidently prove to every impartial man, that the three officers, thus tried, were correct in their opposition to such illegal and unconstitutional proceedings.

That errors may have crept into the work, the publisher does not pretend to deny ; but for the general tenor of it, copies of each trial have been obtained, attested by the respective copyists ; the whole coming from the hands of the Judge Advocates who officiated on said trials.



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*ERRATA.*—Page 106, 3d line from bottom, for 'especially,' read 'specially.' Page 139, 17th line, for 'make-right,' read 'make-weight.' Capt. Loring's memorial, page 154, should have been dated 'June, 1807.' Page 168, 20th line from bottom, for 'Nelson,' read 'Hudson.' Page 272, 4th line, for 'these,' read 'there.' Page 281, the 4th line should read thus, 'service, is, in my opinion, absurd.'



## CAPT. LORING'S FIRST TRIAL.

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*Minutes and Proceedings of a Division Court Martial, begun and holden at Boston, in the County Court House, on Tuesday, the 29th day of October, in the year of our Lord 1805, by order of the Honorable SIMON ELLIOT, Esquire, Major General of the first Division of the Militia of the Commonwealth of Massachusetts, so far as the Minutes and Proceedings relate to the trial of Capt. JOSEPH LORING, Jun. one of the Officers ordered to be tried by said Court.*

PRESENT—

LIEUT. COL. JOHN BARKER, 2d Reg. 1st Brig. 1st Division,  
PRESIDENT.

*Members.*

Major BARNABAS CLARK, 3d Regiment, 1st Brigade, 1st Division.  
Major OLIVER JOHONNOT, Sub Legion Artil. Leg. Brig. 1st Div.  
Capt. WILLIAM BARNES, 1st Reg. 1st Brig. 1st Division.  
Capt. HENRY PURKITT, Cavalry Legionary Brigade.  
Capt. ADAM KINSLEY, 2d Reg. 2d Brigade, 1st Division.  
Capt. MICHAEL HARRIS, jun. 1st Reg. 2d Brigade, 1st Division.  
Capt. JOHN ROBINSON, Bat. of Artillery, 1st Brig. 1st Div.  
Lieut. JOHN PRATT, 2d Regiment, 1st Brigade, 1st Division.  
Lieut. DAVID SHEPARD, 3d Reg. 2d Brigade, 1st Division.  
Lieut. ELISHA FRENCH, jun. 3d Reg. 2d Brigade, 1st Division.  
Lieut. LEWIS FISHER, Squadron of Cavalry, 2d Brig. 1st Division.  
Lieut. WILLIAM TURNER, 1st Reg. 1st Brig. 1st Div.

Capt. CHARLES DAVIS, of the Sub Legion Light Infantry, Legionary Brigade, *Judge Advocate.*

Lieut. GEORGE BASS, Adjutant to the Sub Legions of Infantry in the Legionary Brigade, acting as *Marshal* to the Court.



The following orders were produced and read by the Judge Advocate :

### DIVISION ORDERS.

*Boston, Sept. 23, 1805.*

A Division Court Martial will be held at the County Court House in Boston, on Tuesday, the 29th of Oct. next, at 10 o'clock, A. M. for the trial of Lieut. John J. Valentine, of the Infantry Legionary Brigade, charged by Capt. Jacob Canterbury of the Infantry of said Brigade, with disobedience of orders at various times : Also for the trial of Lieut. Nathan Bacon, of Infantry of the Legionary Brigade, charged by Capt. Samuel Curtis with disobedience of orders at different times.

*President,*

Lieut. Col. JOHN BARKER, 2d Regiment, 1st Brigade.

*Members,*

Major BARNABAS CLARK, of 2d Regiment, 1st Brigade.

Major OLIVER JOHANNOT, of Artillery Leg. Brigade.

Capt. HENRY PURKITT, of Cavalry Legionary Brigade.

Two Captains and three Subalterns of first Brigade.

Two Captains and two Subalterns of second Brigade.

*Judge Advocate*—CHARLES DAVIS, Esq. Capt. Sub Legion of Light Infantry Legionary Brigade.

Adjutant BASS will attend the Court. Brigadier General WINSLOW will cause all concerned to be seasonably notified, and the Judge Advocate to be furnished with the necessary papers.

By order of the Major General.

(Signed) JOHN T. SARGENT, *A. D. C.*

Brigade Orders of Sept. 25th ; Infantry Orders of Oct. 1st ; two Sub Legion Orders of Oct. 7th ; all predicated on the above Division Orders of Sept. 23d, were then read ; all of which relate to the trials of Lieutenants Valentine and Bacon.

Division Orders of Oct. 10, 1805, were read, in the words and figures following :

### DIVISION ORDERS.

*Boston, Oct. 10, 1805.*

Brigadier General Winslow, commanding the Legionary Brigade, having transmitted to the Major General a complaint against Captain Joseph Loring, jun. of the Sub Legion of Light Infantry of said Brigade, for disobedience of Brigade Orders of the 9th and 16th of September last past, and for unsoldierly and unofficer-like conduct on Boston Common, on the 30th of the same month ; likewise the said Brigadier states, that he has reason to believe, that the said Captain Loring did connive at, if not abet and procure the men under his command to mutiny, and to neglect and refuse to appear on said parade, and did not make use of all his influence as their commanding officer, that they might appear : All which conduct tends to the subversion of good order and military discipline in said Brigade, and is a bad example to all others to offend in like manner ; wherefore the complainant prays and requests, that such proceedings may be had in the premises, as the law directs, and that the said Captain Joseph Loring, jun. may be held to answer to the charges exhibited against him in the complaint, and such others as may be legally proffered against him, and be dealt with according to law.

A Division Order, bearing date the 23d Sept. last, appointing a Court Martial to be holden at the County Court House in Boston, on Tuesday, the 29th day of Oct. next, at 10 o'clock, A. M. whereof is President, Lieut. Col. John Barker, of the second Regiment of the first Brigade ; the Major General hereby appoints the same Court for the trial of the said Captain Joseph Loring, jun. upon the charges exhibited against him by Brigadier General Winslow.

Gen. Winslow will cause the Judge Advocate to be furnished with all the necessary papers, and all concerned to be duly and legally notified.

By Order of the Maj. Gen. First Division.

JOHN T. SARGENT, *A. D. C.*



## BRIGADE ORDERS.

Boston, Oct. 12, 1805.

The Division Orders above copied are communicated for distribution.

Per Order of the Brigadier General.

CHARLES CLEMENT, B. M.

The Circuit Court of the United States was in session, and occupied the Court Room of the County Court House; and the Jury Lobby, in which the Court Martial (owing to that circumstance) convened, not being of sufficient size to accommodate the several parties, witnesses, &c. a removal of the Court to some more commodious place became necessary. An adjournment to the Representatives' Chamber in the New State House, was therefore ordered, to which place the President, Members, and Officers of the Court forthwith proceeded. The Marshal having been first directed to give notice to all concerned, of the intention of the Court.

*Representatives' Chamber, New State House, Boston, Oct. 29,  
half-past 12 o'clock, P. M.*

The President, Members, and Officers, ordered on this Court Martial, were all present. Then the President and each of the Members of the Court, and the Judge Advocate in open Court, and before the Court proceeded to the trial of any officer, respectively had the oaths administered to them, as directed by the 35th section of an Act passed June 22, 1793, which Act is entitled, "An Act for regulating and governing the militia of the Commonwealth of Massachusetts, and for repealing all laws heretofore made for that purpose, excepting an Act, entitled an Act for establishing rules and articles for governing the troops stationed in forts and garrisons within this Commonwealth, and also the militia, when called into actual service."

Lieutenants Valentine and Bacon were called, &c. Capt. Joseph Loring, jun. another of the officers complained against, upon being called, observed to the Court, that he had not been legally notified of the *time* and *place* appointed for his trial; that he did not appear before the Court in his official capacity; and observed to the Judge Advocate, he did not wish his

being present, and stating those facts to the Court, should be considered an appearance on his part, arising from his having had official notice of the *time* and *place* appointed for his trial. He further observed, he had written a letter to the Major General on the subject, and he considered himself, and wished to be considered by the Court, merely as one of the spectators.

A letter from the Major General of the first Division, was then read as follows:

*Lieutenant Colonel John Barker, President of a Division Court Martial,  
sitting at the County Court House, in Boston.*

*Sir*—Herein you have enclosed a letter to me from Captain Joseph Loring, jun. the officer in arrest under charges exhibited by Brig. Gen. Winslow. You will observe, that he states in the letter, that he had not received the Division Orders of the 10th of October, appointing his trial by a Court Martial to be holden at Boston, on Tuesday the 29th day of October. If after a due examination, the Court should be satisfied of the fact as by him stated, they will direct the Judge Advocate to furnish the said Loring with a copy of those orders, and notify him of the time and place the Court shall adjourn to, and summon him to appear, allowing legal notice to him and all concerned.

Yours, SIMON ELLIOT,  
*Major General first Division.*

Dated Boston, Oct. 29, 1805.

The paper enclosed in the above, was then read as follows:

*Major General Elliot.*

*Sir*—Having received a Brigade Order of the 8th inst. putting me under arrest, for certain charges made by Brigadier Gen. Winslow, and presuming you must feel, that an officer remaining in this situation is greatly injured, not only as a soldier, but as a citizen; therefore am satisfied you will have the goodness to order a Court Martial by whom I may have a prompt



and impartial trial. I have been informed by some officers, that a Division Order has been issued for my trial at the County Court House, on the 29th inst. by the Court that sits on that *day*; but as I have no official information agreeably to the Militia Law, dated June 22, 1793, Section 35, which says, "Every Officer to be tried, shall have ten days notice given him of the time and place appointed for his trial; also every Officer shall have a copy of the charges exhibited against him ten days before the sitting of said Court," &c. &c.—presume it is countermanded, otherwise, there is inattention to your orders somewhere. Charges have been exhibited against me, and ten days have elapsed; but the time and place, I have no information, by authority, agreeable to law. Therefore I am satisfied you will discharge me from this arrest, or grant my above request, by appointing a Court Martial as soon as possible. The latter I should prefer, as every officer ought, who has endeavoured to do his duty for the good of the State, as I wish to have a full and perfect investigation of my conduct, when it is done agreeably to law.

With due respect, your most obedient and very humble servant,

JOSEPH LORING, JUN.

*Capt. of Light Infantry, per General Order.*

Audience of evidence was then moved for by the Judge Advocate, and granted by the Court.

Brigadier Gen. John Winslow, of the Legionary Brigade, was adduced as a witness on the part of the government, was sworn by the Judge Advocate, and was interrogated and answered as follows:

*Question.* Do you or do you not know, that Capt. Loring was furnished with a copy of the complaint exhibited against him, ten days prior to the convening this Court?

*Answer.* I do not know of my own knowledge; I presume he was; Maj. Clement was directed to furnish it.

*Q.* Do you or do you not know, that ten days previous to the convening this Court, Capt. Loring had legal notice of the time and place appointed for his trial?

*A.* I do not know. I rather suspect he had not.

Brigade Major Charles Clement, of the Legionary Brigade, was adduced as a witness on the part of the government; was sworn by the Judge Advocate, and was interrogated and answered as follows:

*Q.* Do you or do you not know, that Capt. Loring was furnished with a copy of the complaint exhibited against him, ten days prior to the convening this Court?

*A.* He was. I went to his house, and waited until nine o'clock in the evening. I left his house, not being able to find him. On my return home, I met him on the Turnpike Road, and handed him the Brigade Order.

*Q.* by Judge Advocate to same. What Brigade Order do you refer to?

*A.* The Order which placed him under arrest.

*Q.* same to same. Did that order contain a copy of the charges?

*A.* Yes sir.

*Q.* same to same. Do you or do you not know, that ten days previous to the convening of this Court, Captain Loring had notice of the *time* and *place* appointed for his trial?

*A.* The order containing notice of the time and place I handed down, but not particularly to Captain Loring.

Upon the Judge Advocate's repeating the last question to Major Clement, he replied, he could not answer that he had.

As it did not appear in evidence, that Capt. Loring had been legally notified of the *time* and *place* appointed for his trial, the Court upon consultation agreed upon an adjournment until Tuesday, the 12th Nov. 10 o'clock, A. M. then to meet at the Representatives' Chamber; and directed the Judge Advocate to fur-



nish Capt. Loring with a copy of the Division Order, dated the 10th October; also to give legal notice of the time and place appointed for his trial.

The Court was ordered to be adjourned to the time and place above determined upon, which was done in due form by the Marshal.

Pending the adjournment, the following notice was delivered by the Judge Advocate to Adjutant Bass, to be handed according to its direction.

Boston, Oct. 29, 1805.

*Captain Joseph Loring, Jun.*

*Sir*—I am directed by the Court Martial, now in session in this place, to forward to you a copy of a Division Order, under date of the tenth instant, which copy is enclosed. I am further commanded to notify you of the time and place appointed for your trial, on the complaint, which has been exhibited against you by Brigadier Gen. Winslow. In obedience to which last mentioned command, you are hereby notified, that the aforesaid Court Martial stands adjourned until Tuesday the twelfth day of November next, at ten o'clock, A. M. then to meet at the Representatives' Chamber in the new State House, of which *time* and *place* I do hereby notify you, and you will please to govern yourself accordingly.

Your humble servant,

CHARLES DAVIS,

*Judge Advocate of said Court Martial.*

*Tuesday Morning, Nov. 12, 1805.*

The Court met pursuant to adjournment. On the names of the President and Members being called, they all answered in their places. The Court was ordered to be opened, which was done in due form by the Marshal.

Capt. Loring appeared in Court, in his proper person.

The Judge Advocate then read all the proceedings of the Court, as they stand recorded.

Adjutant George Bass, of the Sub Legions of In-

fantry in the Legionary Brigade, was sworn by the Judge Advocate, was interrogated, and answered as follows:

*Question*, by Judge Advocate. Did you hand the several notices, which were given you pending the adjournment, to Capt. Loring?

*Answer*. Yes, I did.

The complaint exhibited against Capt. Joseph Loring, jun. was read to him in the words and figures following.

*To Simon Elliot, Esq. Major General of the first Division of the Militia of the Commonwealth of Massachusetts.*

John Winslow, Brig. Gen. of the Legionary Brigade in the first Division of the Militia of this Commonwealth, complains against Captain Joseph Loring, jun. of the Sub Legion of Light Infantry in the Legionary Brigade in the Division aforesaid, for disobeying a Brigade Order of the ninth September, ordering a parade on Boston Common, for review and inspection on the thirtieth of the same month; also for disobeying a Brigade Order of the sixteenth September, directing the Sub Legion of Light Infantry to appear on the said thirtieth, with sixteen sporting cartridges, both of which orders the said Capt. Joseph Loring disobeyed; and in an unsoldierly manner came on said parade, without any of his soldiers, and there entered a protest against said orders, by delivering to Captain John Brazer, senior officer of the Sub Legion of Light Infantry, a paper, containing statements, as facts, which were untrue, and unofficer-like for him to state, and containing objections to said orders totally contrary to their true intent and meaning. And the said Winslow further states, that he has reason to believe, that said Captain Joseph Loring, jun. did connive at, if not abet and procure the men under his command to mutiny against said orders, and to neglect and refuse to appear on said parade to discharge their duty as soldiers on said day, agreeably to the spirit and intent



of said orders, and did not make use of all his influence as their Commanding Officer, that they might appear ; all which conduct tends to the subversion of good order and military discipline in said Brigade, and is a bad example to all others to offend in like manner. Wherefore your complainant prays and requests, that such proceedings may be had in the premises, as the Law directs ; and that the said Capt. Joseph Loring, jun. aforesaid, may be held to answer to the charges exhibited against him in this complaint, and such others as may be legally proffered against him, and be dealt with according to Law.

(Dated) Boston, Oct. 8th, 1805.

(Signed) JOHN WINSLOW,  
Brig. Gen. Leg. Brig. 1st Div.

The Judge Advocate then asked Capt. Joseph Loring, jun. whether he were guilty or not guilty of the charges alledged against him in the above recited complaint ; Capt. Loring asked, if Gen. Winslow intended, that the latter part of the complaint, to wit, that part or clause beginning in these words, " and the said Winslow further states, that he has reason to believe", &c. would be considered as one of the charges. Gen. Winslow observed, he meant and intended that part to be a charge against Capt. Loring, and he expected to support that part as a charge by evidence.

Capt. Loring then handed a paper, containing as follows :—To the first charge I answer, I am not guilty. To the second charge I answer, I am not guilty. To the third charge I answer, I did make a protest against the arrangement of the day, so far as it respected my rank in placing me below certain Captains, the dates of whose commissions were posterior to mine. But I utterly deny I am guilty of making in that protest any statement, false, or unsoldier-like for me to make. To the fourth charge I answer, I am not guilty.

Capt. Loring was then asked by the Judge Advocate, if he had any objection to make against any one

or more of the Officers intended to compose the Court Martial for his trial, why he or they should not sit as members ? He answered, that he had. He was then directed to produce his cause of challenge in writing, that, that part of the Court, not objected to, might decide thereon. Capt. Loring produced a paper, which was read as follows : I object to Capt. Henry Purkitt's sitting on my trial ; because he has prejudged my cause without hearing evidence, and has expressed his conviction out of Court, that I ought to be found guilty. I respect him as a Soldier, but cannot consent on this occasion to accept him as my Judge. If the Court require it, I will produce evidence of Capt. Purkitt's having prejudged my cause.

JOSEPH LORING, jun. Captain.

The Court directed Capt. Loring to adduce what evidence he had in support of his challenge. Mr. James Liswell was adduced as a witness by Captain Loring, was sworn by the Judge Advocate, was interrogated and answered as follows :

*Question*, by Capt. Loring. Did you hear Captain Purkitt say, that I behaved improperly on the parade of the 30th Sept. in going on without my men ?

*Answer*. He did not say any thing about that.

*Q.* same to same. Did you hear Capt. Purkitt say I had done wrong, and ought to be broke ?

*A.* Yes Sir, I did.

Mr. Samuel Duncan Hallowell, was adduced as a witness by Capt. Loring, was sworn by the Judge Advocate, was interrogated and answered as follows :

*Q.* by Capt. Loring. Did you in conversation with Capt. Henry Purkitt, respecting my arrest and conduct on the 30th Sept. last, hear him say, I had done wrong and ought to be broke ?

*A.* I heard him say these words as nigh as I can recollect, that was, that Capt. Loring had done wrong, and he said furthermore, that if so be such doings were allowed, he hoped there would be a standing army.

*Q.* by Judge Advocate, to same. Did Capt. Pur-



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kitt say, he *hoped* or *expected* a standing army would be necessary, if such proceedings were allowed?

A. He *hoped*—I think those were the words.

The Court observed, it would take the cause of challenge, and the evidence adduced in its support, into consideration.

Capt. Loring then observed to the Court, that he had some objections reduced to writing, against the Judge Advocate, which, as they affected that gentleman, he would with permission read himself. With the consent of the Court and Judge Advocate, he read the paper, which is as follows:

*To the President and members of the Court Martial now sitting at Boston.*

I object to Charles Davis, Esq. as Judge Advocate; because I consider him *interested* in the event of my trial. There is a competition for rank between him and myself, which must be settled favorably for him, if the result of this trial is unfavorable to me. By the Court's leave I will state, that C. Davis, Esq. Captain of the Boston Light Infantry, was elected and commissioned to the command of that company many months subsequent to the date of my election and commission, as Captain of the Washington Infantry, then so called, and that accordingly whenever our respective companies paraded in the line together, I took the undisputed precedence of him. Notwithstanding this, an order from the Executive has been issued, whereby Capt. Davis has been ordered to take rank from a period a few months previous to the date of my commission, and about two years previous to the date of that, by virtue of which he now commands. Against this order I have in the most respectful manner remonstrated to his Excellency the Commander in Chief, and I will not permit myself to doubt, but I shall be reinstated in my rank, and that an order from the Executive will soon be issued, that in obedience to the Militia Law—all Officers shall take rank solely from the date of their commissions, except when two

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commissions are of equal grade and date, in which case their precedence shall be determined by lot. Although I believe Capt. Davis, in cases where he is totally disinterested, to be as impartial as other men, yet in this case I cannot but consider him as Judge and Advocate in his own cause.

JOSEPH LORING, jun. *Captain.*

*Boston, Nov, 12th, 1805.*

The Court then took Capt. Loring's challenge of Captain Henry Purkitt, together with the evidence adduced in its support, into consideration, and after full and mature deliberation, decided that the challenge was not supported, and that Capt. Henry Purkitt should retain his seat as one of the Members of the Court.

The Court having taken into consideration the paper offered by Capt. Loring, containing objections against the Judge Advocate, are of opinion, that it is not a paper for them to act and determine upon. They therefore direct the Judge Advocate to give Capt. Loring notice of their opinion, and further to suggest to him, that the application should have been made, or should now be made to the Major General, under whose orders the Court is convened.

The Court was ordered to be adjourned until Wednesday, the 13th inst. at 10 o'clock, A. M. then to meet at this place, which was done in due form by the Marshal.

*Representatives' Chamber, Wednesday, Nov. 13th, 1805.*

The Court met agreeably to adjournment, and all answered in their places, when their names were called. The Court was ordered to be opened, which was done in due form by the Marshal.

Capt. Loring appeared in Court in his proper person.

The following proceedings were then had respecting him.



Boston, Nov. 13, 1805.

It appearing to the Court here, that Capt. Loring has received official notice [of its opinion and direction respecting his objection to the Judge Advocate] the Court does direct the Judge Advocate to inform him, that it will not proceed to his trial until he has had a reasonable opportunity to make application to the Major General concerning his objection to the Judge Advocate. All which direction, &c. was immediately complied with, and Capt. Loring was furnished with the directions and information in writing, by the Marshal's giving them to him in Court.

Thursday, Nov. 14th, 1805. The following proceedings relating to Capt. Loring were had.

Capt. Loring appeared in Court in his proper person. A letter, of which the following is a copy, was handed by the President to the Judge Advocate, with a direction to read it to the Court. It was read as follows :

To Lieut. Col. John Barker, President of a Division Court Martial, sitting at the State House in Boston—

Sir—I have received a letter from Capt. Davis, the Judge Advocate, and herein enclose it, in which he informs me, that a certain paper has been handed the Court from Capt. Joseph Loring, jun. containing certain allegations and statements tending to shew his opinion and objections against Capt. Davis' acting as Judge Advocate on his trial, and that the Court did not deem it a proper subject for them to act upon, and referred him to me. No communication has been made to me by Capt. Loring on the subject.

It appears by the enclosed, that Capt. Davis is very desirous to be excused from performing the duties of Judge Advocate. If the Court upon inquiry shall find that Capt. Loring still retains his objections, you will please to give me information thereof, that I may adopt such measures as the nature of the case may require.

(Dated) Boston, Nov. 14th, 1805.

(Signed) SIMON ELLIOT,  
Maj. Gen. 1st Div. Massachusetts Militia.

The letter enclosed in the above was then read, and is as follows :

Boston, Nov. 14, 1805.

Hon. General Elliot,

Sir—Captain Joseph Loring, one of the officers ordered for trial by the Court Martial, now in session, has offered certain objections against my acting as Judge Advocate on his trial. The objections appear to be founded upon a *supposed* interest I have in the event of his trial. He alleges "there is a competition for rank between him and myself." I know not of such competition ; at least, there is none on my part. The paper, containing Capt. Loring's reasons and objections, was considered and decided by the Court, not to be a subject on which it was authorized to act. The Court, however, referred him to you, as the officer, by whose orders and authority the Court was convened, and gave him reasonable time to make his application, and offer his objections to you. I am sensible the statements, which Capt. Loring made in the paper he offered the Court are *incorrect* ; yet am I very desirous of being excused from serving as Judge Advocate on his trial. And although nothing has heretofore occurred between him and myself, which can add to or diminish from the innocence or criminality of the conduct imputed to and charged against him, still I cannot, with a proper regard to my own feelings, omit to urge my request, that you would excuse me from the duties of Judge Advocate on his trial, that my honour may not be attempted to be sullied by ill founded and groundless suspicion,

Yours, most respectfully and obediently at command.

CHARLES DAVIS, Judge Advocate.

Immediately upon the above papers being read, Captain Loring produced the two following papers, which were read as follows :



*Mr. President, and Gentlemen of the Court,*

Having been called on by the Judge Advocate to make any reasonable objections to any of the Court, I have availed myself of the privilege, which I thought was intended me. I made objections to Captain Purkitt on the ground of his having prejudged my cause *out of Court*, before he had in a judicial manner heard the evidence on both sides the question.

I produced, what I deemed sufficient to support my objection; but as the Court have overruled it, and determined that Captain Purkitt shall sit, it only remains for me to bow submissive to their decision, knowing that this Hon. Court are bound to consider me innocent, till I am proved *in Court* by legal testimony to be guilty, and confident that no evidence can be produced by my prosecutor, sufficient to convict me; provided his evidence against me is weighed in that impartial scale, which is becoming this Honorable Court.

(Dated) Boston, Nov. 14, 1805.

(Signed) JOSEPH LORING, jun. Capt.

*Mr. President, and Gentlemen of the Court,*

Having been called on by the Judge Advocate to make objections to any of the Court, I have availed myself of that privilege; and having (as I conceived it my right) made objections to Charles Davis, Esq. as Judge Advocate; and it having been determined by the Court, that they cannot with propriety take those objections into consideration, so as to act definitively upon them; but having been referred to the Major General, by whom the Court and Judge Advocate were appointed; I feel compelled to observe to this Honorable Court, that the competition for rank between Captain Davis and myself, which was the reason of my objection, must have been known to the Major General as well before the Judge Advocate was appointed, as it can possibly be now. I therefore waive the privilege proffered me, by this Honorable

Court, of applying to the Major General on the subject. I bow submissive to the decision of the Court, and am ready to meet the charges exhibited against me, hoping that the event of my trial may do away any improper prejudices, that may exist on the mind of any individual against me.

(Dated) Boston, Nov. 14, 1805.

(Signed) JOSEPH LORING, jun. Capt.

The Court ordered the following question to be asked Captain Loring:

Do you still retain your objections against the Judge Advocate?

To which question Captain Loring answered in writing as follows:

Captain Loring submits to be tried by the Court, as it is now composed, and with the present Judge Advocate.

The Court was adjourned until Friday, Nov. 15, 1805, 10 o'clock, A. M. then to meet at this place.

*Representatives' Chamber; Boston, Friday, Nov. 15, 1805.*

The Court met pursuant to adjournment. On the names of the President and Members being called, they all answered in their places. The Court was ordered to be opened, which was done in due form by the Marshal.

Capt. Loring appeared in Court in his proper person.

The Court not being satisfied with the answers Captain Loring had made to questions relating to his objections to the Judge Advocate, considering them as not being *explicit*, directed the following question to be asked him:

Capt. Loring—The Court direct the following question to be asked you; you will give an *explicit* answer one way or the other. Do you or do you not withdraw all the objections you have made against the Judge Advocate's acting in that capacity on your trial?



To which Captain Loring answered in writing as follows:—*To the President and the Court*—I am anxious for my trial as soon as possible without any further delay. I consider my objections are overruled by the Court, and I presume every preliminary is settled. It is not for me to withdraw objections, which the Court have overruled.

(Dated) Boston, Nov. 15, 1805.

(Signed) JOSEPH LORING, *jud. Capt.*

The Court took the above answer into consideration, and made the following communication to the Major General on the subject.

Boston, Nov. 15, 1805.

*Hon. Gen. Elliot*—

*Sir*—The Court Martial now sitting, not being satisfied with Captain Loring's answers to the questions asked him respecting his objections to the Judge Advocate; considering them as not being so explicit as they ought to be, upon consultation and full deliberation, this morning directed the following question to be put to him, accompanied with a direction to him to give an *explicit* answer one way or the other.

Friday, Nov. 15th, 1805, 11 o'clock, A. M.

Capt. Loring—The Court direct the following question to be asked you. You will give an *explicit answer* one way or the other. Do you or do you not withdraw all the objections you have made against the Judge Advocate's acting in that capacity on your trial?

Capt. Loring answered in writing as follows:

*To the President and the Court.*

I am anxious for my trial as soon as possible without any further delay.

I consider my objections are overruled by the Court, and I presume every preliminary is settled. It is not for me to withdraw objections, which the Court have overruled. (Signed) JOSEPH LORING, *jun. Capt.*

The Court would observe, that they *have not overruled* the objections Capt. Loring offered; that *in truth* they did not act upon them any further than to *suggest* to him to apply to you with the objections. The Court have taken the above answer of Capt. Loring into consideration, and are of opinion, *as he refuses to answer in any other manner*, that he does not withdraw his objections to the Judge Advocate. The Court would further observe, that under these circumstances it is the anxious wish and desire of Capt. Davis to be excused from acting as Judge Advocate on Capt. Loring's trial. The Court wait your decision on the above.

In behalf and by the unanimous request of the Court. (Signed) JOHN BARKER, *President.*

To which communication the Major General replied as follows:

*To the President of the Court Martial sitting at the State House.*

*Sir*—Your communication to me upon the subject of certain questions, put by the Court, this morning, to Capt. Loring, relative to his objections to Capt. Davis' acting as Judge Advocate on his trial, and his answer thereto, I have duly considered, and deeply regret that the progress of the Court has met with such impediments. Agreeably to Capt. Davis' anxious wish and desire, and under existing circumstances, I am induced to excuse him from acting as Judge Advocate on Capt. Loring's trial.

I shall immediately appoint a person to act in his place. The Court will adjourn, giving a suitable time, and notify me thereof.

(Dated) Boston, Nov. 15, 1805.

(Signed)

SIMON ELLIOT,  
*Maj. Gen. 1st. Division.*

The Court upon consultation agreed upon an adjournment until Tuesday the 19th November, at 11 o'clock, A. M. then to meet at this place. To which time and place the Court was adjourned in due form by the Marshal



*Tuesday morning, Nov. 19, 1805.*

The Court met agreeably to adjournment, and all answered in their places. The Court was opened in due form by the Marshal. Capt. Loring appeared in Court in his proper person.

Henry M. Lisle appeared in Court and produced a Division Order, by which it appeared he was appointed to act as Judge Advocate on the trial of Capt. Loring, in the place of Capt. Davis, who was discharged at his own request from being Judge Advocate on Capt. Loring's trial.

I certify, that the within are true copies of the proceedings of the Court Martial, so far as they have been had, relative to the trial of Capt. Joseph Loring, Jun.

CHARLES DAVIS, *Judge Advocate.*

*Boston, Nov. 19, 1805.*

We certify, that the above and foregoing are true copies of the proceedings had by the Court respecting Capt. Loring's trial, so far as they have been had to this day.

*John Barker, President; Barnabas Clark, Oliver Johnnot, William Barnes, Henry Purkitt, Adam Kinsley, Michael Harris, jun. John Robinson, John Pratt, David Shepard, Elisha French, jun. Lewis Fisher, William Turner.*

*Representatives' Chamber, Boston, Tuesday Nov. 19, 1805.*

The Court met agreeably to adjournment, and on being called all answered in their places. Capt. Joseph Loring, jun. appeared in his proper person, and on being called answered.

The Court was then opened in due form by the Marshal. Henry M. Lisle, Adjutant of Cavalry in the first Brigade of the first Division, then produced to the Court an order from the Major General of the first Division appointing him Judge Advocate to act, vice

C. Davis, Esq. excused, on the trial of Capt. Joseph Loring, jun. in the words and figures following.

### DIVISION ORDERS.

*Boston, Nov. 15th, 1805.*

Henry M. Lisle, Esq. Adjutant of the Squadron of Cavalry in the first Brigade, is appointed to act as Judge Advocate, vice Charles Davis, Esq. who at his own request is excused from acting in that capacity on the trial of Captain Joseph Loring, jun. The Division Court Martial, whereof Lt. Col. John Barker is President, having adjourned to meet at the State House in Boston, on Tuesday 19th inst. at 11 o'clock, A. M. Henry M. Lisle, Esq. is required to give his punctual attendance at the time and place of adjournment.

(Signed)

SIMON ELLIOT,

*Major General first Division.*

*Brigadier Gen. BADLAM.*

(COPY)

Transmitted by order of Brigadier General.

S. M. THAYER, *B. Major 1st Brigade.*

To HENRY M. LISLE, Esq.

Henry M. Lisle was then sworn as Judge Advocate, agreeably to law, by the President of the Court.

The proceedings of the Court were then read, as they respect Capt. Joseph Loring, jun. so far as they have heretofore been had.

The Judge Advocate then inquired of Captain Loring whether he had any challenge to offer against any of the Court, as it then stood composed; to which he answered, No, excepting what I have heretofore done.

The Judge Advocate then demanded of Capt. Loring whether he had any desire to commence his trial anew, or preferred it as the records now stood by the former Judge Advocate's certificate, viz. those of Charles Davis, Esq. making them a part of the record in this case.



To which he replied : I prefer going on with the trial, as it stands, making the records of the former Judge Advocate a part of it.

The original Brigade Orders of the 9th and 16th of September last were then produced by General John Winslow : thereon,

*Question*, by Judge Advocate to General Winslow, (being sworn.) Are the Brigade Orders at this time produced by you, the original orders of the 9th and 16th of September last ?

*Answer*. They are.

Those orders were then read by the Judge Advocate to the Court in the words and figures following, viz.

#### BRIGADE ORDERS.

*Boston, Sept. 9th, 1805.*

Captain Brazer will order the Sub Legion of Light Infantry under his command to parade on Boston Common for Review and Inspection, on Monday the 30th of September, the line to be formed at 10 o'clock, A. M. at which time the inspection will commence, and be attended to with the strictest scrutiny. It is expected that both Officers and Soldiers will be equipped in every respect according to law. The duty of the day will be communicated in after orders. The Brigadier requests the Officers under your command to meet him at James Vila's, on the 20th instant, at 7 o'clock, P. M.

*Per Order Brigadier General.*

CHARLES CLEMENT, B. M.

*Capt. John Brazer, Sen'r. Capt. Sub }  
Legion of Light Infantry. }*

#### BRIGADE ORDERS.

*Boston, Sept. 16th, 1805.*

The troops for duty under your command, the 30th instant, will appear without any cartridges with Ball ; in lieu thereof they will each man furnish himself

with sixteen sporting cartridges in addition to what will be furnished by the town.

*Per Order of the Brigadier General.*

CHARLES CLEMENT, B. M.

*Capt. John Brazer, Sen'r. Officer, }  
Sub Legion of Light Infantry. }*

*Question*, by Judge Advocate to General Winslow — Were those orders issued and transmitted by you to Capt. Brazer ?

*Answer*. They were.

*Q.* same to same. By whom did you transmit them ?

*A.* By the Brigade Major.

*Q.* same to same. Who is your Brigade Major ?

*A.* Charles Clement. I delivered them to him myself, and directed him to pass them down.

Charles Clement, the Brigade Major, was then sworn, and interrogated, and answered as follows :

*Q.* by Judge Advocate. Did you receive orders of Brigade from General Winslow of 9th and 16th of September last, to hand down ?

*A.* I did.

*Q.* same to same. Do you recollect the purport of those orders well enough to say whether they were a copy of those just read ?

*A.* I do ; they were.

*Q.* same to same. To whom were those orders directed ?

*A.* They were directed to Captain Brazer, as senior Captain of Sub Legion of Light Infantry.

*Q.* same to same. Did you deliver said orders to said Captain Brazer ?

*A.* I did.

Captain John Brazer was then sworn, interrogated, and answered as follows :

*Q.* by Judge Advocate. Did you receive Brigade Orders of the 9th and 16th of September last, from Brigade Major C. Clement, issued by Brigadier Gen. Winslow ?

*A.* I did.



Q. same to same. Were those orders such as have been just read by me from the original manuscript?

A. Yes, Sir.

Q. same to same. Did you hand those orders down to Captain Joseph Loring, jun.

A. I sent them down by an officer. I presume he delivered them.

Q. same to same. What Officer did you send them by?

A. Having no Adjutant, by an orderly Sergeant, James Ridgway, by name.

The original Brigade Order of duties for the 30th of September last was produced by Gen. Winslow: thereon,

Q. by Judge Advocate to General Winslow.

Is this order for the duties of 30th September last, the original? A. It is.

The order was then read by the Judge Advocate to the Court, in the words and figures following:

#### BRIGADE ORDERS,

For 30th Sept. 1805.

Lieutenant Col. Badger will order one gun from the Artillery at 10 o'clock, at which time the line will be formed immediately; the several Officers will take care to preserve a proper distance between their commands; on signal of two guns from the Artillery the whole Brigade will wheel by Companies to the right for inspection, and have their rolls ready for delivery. Lieut. Col. Badger has leave to dispense with the Chelsea Company's appearance in town on that day. After the review has taken place, the troops will be dismissed for refreshment; no man, neither Officer nor Soldier, will be allowed to be at a greater distance from the Common, than within hearing of the long roll. At a signal of one gun from the Artillery, every man, both Officers and Soldiers, will take their places in the line. Captain Davis' Company of Light Infan-

try, one Company of Artillery with their pieces, the 3d Sub Legion of Infantry under Major Stodder, with Capt. Dean's Company of Infantry from the Sub Legion will march under the command of Lieut. Col. Badger for the Heights of South Boston. The remainder of the troops will tarry on the ground and proceed as ordered, as it is intended to represent an engagement. The Officers commanding Platoons will be very attentive to their men, and not allow them to hurry in any of their movements, and be very particular in obeying the orders they may receive from their superior Officers, as every thing depends on attention. The Brigadier flatters himself that such perfect attention and good order will be observed, both by Officers and Men, that they will receive his most hearty thanks, as well as the applauses of those who may be spectators, among whom there will be probably many judges of military discipline.

By Order of the Brigadier General.

CHARLES CLEMENT, *Brigade Inspector.*

To Lieut. Col. Badger, Major Johannot, }  
Capt. Brazer, Capt. Purkitt. }

Question, by Judge Advocate to General Winslow. As this order bears no date, when was it issued, and for what purposes?

A. It was issued seven or eight days prior to the parade of 30th Sept. last, as an order of duties for that day.

Q. by Judge Advocate to Capt. John Brazer. Did you receive this last order?

A. I received from the Brigade Major, an order similar to the one last read; but I think it was either the day before, or the morning of the parade.

James Ridgway was then sworn, interrogated, and answered as follows:

Q. by Judge Advocate. Did you receive orders of the 9th and 16th Sept. last from Captain Brazer, to communicate to Captain Joseph Loring, jun?



*A.* I received a paper from Capt. Brazer for Capt. Loring. I don't know the contents of it.

*Q.* same to same. Did you receive it as Orderly Sergeant, and did Capt. Brazer inform you it was orders to be delivered to Capt. Loring?

*A.* I received it as Orderly Sergeant, with other papers, directed to Captains Messinger, Davis, and Loring. Captain Brazer did not tell me they were orders. I delivered all but Captain Loring's, and left his as I was directed, at his father's house.

*Q.* same to same. Were those papers sealed?

*A.* Yes, Sir.

*Q.* by Judge Advocate to Captain John Brazer. At the time you delivered Capt. Loring's order to James Ridgway, did you at the same time give him others for Captains Messinger and Davis, and were those orders sealed?

*A.* Yes, Sir.

Captain Charles Davis was then sworn, interrogated, and answered as follows:

*Q.* by Judge Advocate. Did you receive your orders of 9th and 16th Sept. from James Ridgway?

*A.* I did.

*Q.* by Judge Advocate to Capt. John Brazer. Did you pass down the orders for the duties of 30th Sept.?

*A.* I did not.

*Q.* by same to Capt. Ch. Davis. Did you receive your orders for duties of 30th Sept.?

*A.* I cannot at present say positively that I did.

Capt. John Brazer here stated, that he had misconceived what order had been referred to, supposing allusion was had, not to the one intended, but another, which was issued on the very day of parade; he therefore now says he regularly received the order for the duties of the 30th Sept. last. And Capt. Joseph Loring, jun. also acknowledges the regular receipt of that, and those of 9th and 16th Sept. last, in open Court.

The Judge Advocate therefore observed, that having exhibited the original orders and evidence of the regular reception of those orders, he should proceed to show the disobedience of those orders, and the unofficer and unsoldier-like manner in which Capt. Loring came on to the parade the 30th of Sept. last, as charged in the complaint.

*Q.* by Judge Advocate to Capt. Brazer. Were you on the field on 30th Sept. last, when Capt. Loring came on parade?

*A.* I was.

*Q.* same to same. In what manner did he come, and by whom was he attended or accompanied?

*A.* He came on the field with one Lieutenant, four Sergeants, drum and fife. His other commissioned officer acted as Adjutant for the day to that Sub Legion.

*Q.* same to same. Did you order him to fall in the line?

*A.* I did.

*Q.* same to same. What reply and observations did he make to you?

*A.* He went into the line, but made no reply or observations, as I recollect.

*Q.* same to same. Did Captain Loring hand you his commission before he went into the line?

*A.* He did.

*Q.* same to same. Did he make any remark at the time he handed you his commission?

*A.* He demanded of me a shew of commissions of the officers in the Sub Legion, and I ordered them to produce them, which they did, and I read them to Captain Loring and others.

*Q.* same to same. Do you recollect when Brigadier General Winslow came on parade?

*A.* I do.

*Q.* same to same. In what situation was Captain Loring then?



A. Capt. Loring was then in the front of the line, which was then forming.

Q. same to same. Do you recollect any conversation, which then passed between Captain Loring and Gen. Winslow?

A. I do. When the Brigadier came on the field, he asked me whether the line was formed. General Winslow asked me how Capt. Loring came to come on the field in the manner he was. I told him I had received a note from Capt. Loring, stating the reasons why he came on in the manner he did. He in that note excused himself for coming on the field so late, by saying he had waited half an hour longer on his parade, but none of his men came; and he came with non-commissioned officers, and drum and fife. Gen. Winslow ordered me to call him up to us out of the line, which I did. When he came up, Gen. Winslow asked him how he came in that manner. He replied much the same as he did to me, I presume; I don't recollect the words. Gen. Winslow told him he had no further service for him. Then Capt. Loring went out of the line, and fell back into the rear; after which he brought me a paper, which I delivered to General Winslow, and which is set forth in the complaint as a protest.

Q. same to same. At what time of the day did you hand that protest to Gen. Winslow?

A. About half past ten o'clock, I think.

Q. same to same. Don't you recollect handing it to Gen. Winslow at dinner time in the house?

A. I do not; it strikes me I handed it to him on the field. I may be mistaken; I believe Gen. Winslow read it while we were at refreshment at the house.

The protest was then shewn to Captain Brazer by Judge Advocate, with this question, viz. Is this the protest you mean?

A. I know the paper; I have no doubt of its being the same.

The protest was then read by the Judge Advocate to the Court, in the words and figures following, viz.

I, the subscriber, commanding a company by voluntary enlistment in the Legionary Brigade, do present this protest against the Orders issued for the arrangement of this day's review and inspection of the Brigade, so far as they degrade my commission and rank, by placing me under the command or rank of Capt. Daniel Messinger and Capt. Charles Davis.

1st. Because the Constitution says, Mass. law, folio 34, "And no officer duly commissioned to command in the Militia, shall be removed from his office, but by the address of both houses to the Governor, or by fair trial in Court Martial," &c.

2d. Because, being duly commissioned to command, the date of said commission must demand a higher station in rank, than is now appointed me; for the law expressly says, that every officer shall rank by the date thereof. And my election to the *volunteer* company I now command being regular, and returns made agreeable to law, received my commission, dated Aug. 15, 1803, signed by his Excellency Caleb Strong, Esq. Governor of the State, agreeable thereto. Therefore I have a right to claim a higher rank than said Capt. Daniel Messinger and Capt. Charles Davis, who ought to rank under commissions dated when *elected*, or those dated June 20, 1805, as all others of a superior date to mine the law does not contemplate, as they are not agreeable to said officers' elections and returns made by the companies they now command. And in my opinion it is contrary to the United States and State laws for any commission to give rank above mine, except by their date, and those dated agreeable to elections made by the company the officer commands. Therefore, do now, for the above, among many other reasons, protest against the orders that command me to take a station or rank contrary to what my commission, dated August 15, 1803, claims



for me and my company, and against all proceedings of any officer whatever that degrades me, or my officers' rank, in any one point or manner derogatory to the honour of officers, who have done their duty for the good of the State.

JOSEPH LORING, jun.

*Capt. Light Infantry, per General Order.*

*Boston, Sept. 30, 1805.*

To the officer who commands this 30th September, 1805, this is respectfully sent.

*Question, by Defendant to Captain John Brazer.*  
What was the station you ordered me to take in the line of the Light Infantry?

*Answer.* I ordered you to take the station that the General Order placed you in; that was, below Captain Davis and Captain Messinger.

Q. same to same. Was not the station into which you ordered me inferior to that to which you assigned me a year ago on parade? *A.* It was.

Q. same to same. Did not my commission bear a date earlier than that of Captains Messinger and Davis, below whom you ordered me to take station?

*A.* Capt. Loring's commission, in the eye I look on commissions, was dated earlier than either of theirs.

Q. same to same. Did I send up the protest till after I was ordered below Capt. Davis?

*A.* He did not.

Q. same to same. Was not the Sub Legion of Light Infantry composed of the same companies this year, that it was the last year? *A.* It was.

Q. same to same. Did I offer my protest against the place you had assigned me, till after Gen. Winslow had ordered me to quit the parade? *A.* No.

Q. same to same. Did I not march out of the line with silent music, and halt in the rear of the line before I sent the protest? *A.* You did.

Q. same to same. Did I not come on the parade in as soldierly a manner as the smallness of my company would admit; and did I not quit it in as respectful a manner as possible after the Brigadier General had ordered me to leave the parade entirely?

The Judge Advocate objected to the last question being asked in the manner stated, because it required not facts from the witness, but his opinion and judgment on one of the charges exhibited against Captain Loring in the complaint, on which the Court are to give judgment, and not a witness.

The President of the Court observed, it would be necessary to new modify the question, if Captain Loring wished to ask it. Capt. Loring then desired leave to withdraw it.

Q. by Judge Advocate to Capt. Brazer. Do you know that Capt. Messinger has done duty as a Capt. under you in the Light Infantry before Capt. Loring's company was raised?

*A.* He was in the line with me before Captain Loring's company was raised. I was the senior officer; I have been about ten years, he I presume about five years.

Q. same to same. Have you always commanded the Sub Legion when on the field, since the Cadets left it? *A.* I believe not.

Q. same to same. Who did when you did not?

*A.* That is a kind of mixt business; Gen. Winslow I presume did, when I did not.

Q. by the President of the Court to General Winslow. How long have the Cadets been detached?

*A.* I think it was in 1800.

At fifteen minutes before 3 o'clock, P. M. the Court adjourned until 10 o'clock, A. M. on the morrow.

*Representatives' Chamber, Boston, Wednesday, Nov. 20, 1805.*

The Court met agreeably to adjournment; and on being called, all answered in their places. The Court



was then opened by the Marshal. Capt. J. Loring, jun. on being called, appeared in his proper person, and answered. The proceedings of the preceding day were read to the Court by the Judge Advocate.

Gen. Winslow then informed the Court, in answer to the question last asked him yesterday, that he had ascertained that the Cadets were detached from the Sub Legion of Light Infantry on the 18th Oct. 1799.

Capt. John Brazer again interrogated, and answered as follows :

*Question*, by Judge Advocate. If in the eye you look on commissions, Capt. Loring's commission was dated earlier than either Capt. Messinger's or Capt. Davis', why did you not give Capt. Loring his rank as supposed by you in the Sub Legion ?

*A.* Because I had a General Order to the contrary.

*Q.* same to same. Did you inform Capt. Loring that you had that General Order ? *A.* I did.

*Q.* same to same. When did you first inform Capt. Loring you had that order ?

*A.* About the time I received it.

*Q.* same to same. When did you receive it ?

*A.* I received it on the sixth day of July last. It is dated on that day, and I passed it down on the tenth to Capt. Loring. I presume it might have been the eighth when I received it.

The original Order was then produced by Gen. Winslow.

*Q.* by Judge Advocate to Gen. Winslow. Is this the original order last mentioned by Capt. Brazer, a copy of which he says he received and passed down to Capt. Loring ?

*A.* It is the original, which I received.

The order was then read by the Judge Advocate to the Court, in the words and figures following, viz.

COMMONWEALTH OF MASSACHUSETTS.  
GENERAL ORDERS. *Head Quarters, June 20, 1805.*

The Commander in Chief, being authorized to complete the organization of the Legionary Brigade in the

first Division of the Militia, orders that the Sub Legion of Light Infantry hereafter consist of the aftermentioned four light companies, raised at large in Boston, viz. the Company commanded by Capt. John Brazer, the Company commanded by Capt. Charles Davis, the Company commanded by Capt. Daniel Messinger, and the Company commanded by Capt. Joseph Loring, jun. the said Capt. Davis to receive a new Commission as Capt. of Light Infantry, and to take rank from the date of his former Commission, as Captain in the Legionary Infantry ; Captain Messinger will also receive a new Commission, as Captain of Light Infantry, and to take rank from the date of his former Commission as Captain in the Legionary Infantry, and Captain Loring will also receive a new Commission as Captain of Light Infantry, and to take rank from the date of his present Commission. And the Major General will issue his orders agreeably to Law for the election of a Major to command said Legion of Light Infantry.

*By Order of the Commander in Chief,*  
(Signed) WILLIAM DONNISON, *Adj. Gen.*

FIRST DIVISION.

#### DIVISION ORDERS.

*Boston, July 4th, 1805.*

Brigadier General Winslow will take due notice of the General Orders above copied, also to augment the number of companies of Infantry agreeably to the General Order of 1798, and cause all vacancies in his Brigade to be filled up, and returns made on or before the seventh of August next.

*Per order Major General, 1st Division.*

JOHN T. SARGENT, *A. D. C.*

#### BRIGADE ORDERS.

*Boston, July 6, 1805.*

In pursuance of General Orders of 20th June, and Division Orders of 4th July, the Brigadier General



orders the Officers of the following Companies to meet him at the house of James Vila, Court Street, on Monday, the 22d instant, at 8 o'clock, P. M. viz. Boston Fusiliers, Winslow Blues, Boston Light Infantry, and the Washington Infantry, in uniform, for the purpose of choosing a Major to command said Sub Legion.

*By Order of the Brig. Gen. Legionary Brig.*

CHARLES CLEMENT, B. M.

*To Capt. John Brazer.*

*Question*, by Judge Advocate to Capt. Brazer. Are the orders I have just read the same as were received by you. and handed down to Capt. Loring?

*A.* It is.

*Q.* by Judge Advocate to Gen. Winslow. Is the Brigade Order of July 6, 1805, now produced by you, the original which was predicated and issued by you upon the General Order last read? *A.* It is.

*Q.* by one of the Court to Gen. Winslow. Did Capt. Loring receive his Commission agreeably to the General Orders?

*A.* I suppose the Brigade Major delivered it to Capt. Brazer; Commissions go through his hands; I don't know.

Same question by same to Capt. J. Brazer, who answered—I presume he did; I sent them down to him, Capt. Messenger, and Capt. Davis.

*Q.* by Judge Advocate to Capt. Brazer. Had you not several conversations with Capt. Loring respecting the parade of 30th Sept. last, prior to that day?

*A.* I don't recollect that I had any conversations with him at all; but I received a letter. The letter was then handed to the Judge Advocate, who read it to the Court in the words and figures following:

*Capt. John Brazer.*

*Boston, Sept. 18, 1805.*

*Sir*—Having received Brigade Orders of the 16th inst. handed down by you, dispensing with Powder

and Ball on the 30th inst. the day of Review and Inspection of the Brigade, and ordering 16 cartridges for sporting besides what the law grants: I therefore wish to be informed if it is meant by this order for my men to use the powder of the ball cartridges (which the law says they shall constantly be provided with, and which they had at the last muster) for this extra purpose; and if not, presuming the men don't furnish themselves, what fine must I demand, as I find the law don't contemplate any thing of the kind, for such deficiency? I will also thank you to inform me if Espontoons must be brought in the field.

With respect, I am your most obedient,

JOSEPH LORING, jun.

*Capt. John Brazer, Sen'r. Officer,*  
*Sub Legion of Light Infantry,*  
*Legionary Brigade.*

*Capt. Legionary Regiment.*

*Question*, by Judge Advocate to Capt. Brazer. Have you received any other communications, either oral or written, from Capt. Loring on the subject of the parade of 30th Sept. last? *A.* I have not.

*Q.* by defendant to same. Did you ever return me an answer in any way to the letter which has been just read, dated 18th Sept. last? *A.* I did not.

*Q.* by same to same. What was the reason you did not?

*A.* Because I consulted with Gen. Winslow, and he advised me not; he said the order spoke for itself, and if Capt. Loring did not obey it, he must take the consequences.

*Q.* by Defendant to Gen. Winslow. Did I not at the meeting of the Officers at James Vila's, July 22, 1805, present a protest against being ordered to the Sub Legion of Light Infantry, contrary to my enlistment, and because I considered myself degraded in rank?

*A.* Captain Loring handed me a paper that evening; I told him our meeting was for the election of a



Major, and that I should receive no papers of any kind. He then requested me to take it, and look it over; I did so, and handed it to the Major General the next day.

Q. same to same. What orders do you refer to in your charge in the complaint exhibited against me by the phrase "said orders"?

A. The orders of the 9th and 16th September last.

Q. same to same. Is the protest handed from me by Capt. Brazer to you, after I was dismissed from the parade, on the 30th September, the same which you refer to in your third charge against me?

A. It is.

Q. by same to same. Do you mean to declare in your complaint against me, that the protest, which has been read, is against your orders of the 9th and 16th September last, ordering the parade, &c. on the 30th?

A. The charge will speak for itself. I expect the Court will determine that, not me.

Q. same to same. Is there any thing contained in that protest making objections to the orders of the 9th and 16th?

The Judge Advocate queried as to the propriety of the question being asked, because the Court, and not the witness, should properly decide such a question, it being in fact, if answered, a judgment on one of the charges exhibited against the Defendant. The Court overruled the objection, and on the question being asked, Gen. Winslow replied, that the Court would determine that.

Q. same to same. What are the statements in the protest, which are untrue, and unofficer-like for me to make?

The Judge advocate objected to asking the question, for the same reasons he objected to the last, and thereon the Court determined that the question should not be asked.

Q. by same to same. Although I protested on the 30th Sept. after I was dismissed, against the arrangements of placing me in a station below what I conceived to be my right, did I not obey the orders to march into the line under Capt. Messinger and Capt. Davis?

A. I don't know what orders Capt. Loring received from Capt. Brazer; I conceive he did not obey mine, and should not have arrested him if I thought he had.

Q. same to same. Did you not order me through Capt. Brazer to come out of the line to meet you, and did you not dismiss me at that time?

A. I ordered Capt. Loring to come to me by the Adjutant of the Sub Legion, Mr. Munroe, and after some conversation, I dismissed Mr. Loring out of the line for the day.

Q. same to same. What was my station at that time in the line.

A. When I saw Capt. Loring in the line, he had the station of the third company.

Q. same to same. Was I not placed on 30th of Oct. 1804, on the left of the Sub Legion of Light Infantry? A. I rather think you were.

Q. same to same. Who was the officer of the day on the 30th Oct. 1804? A. I think I was.

Q. same to same. By whose order was I placed on the left of the Light Infantry on 30th Oct. 1804?

A. I suppose by Capt. Brazer's.

Q. same to same. Were Capt. Brazer's orders conformable to yours in this respect?

A. There was some dispute on the field that day about rank between Capt. Davis and Capt. Loring. Capt. Brazer had determined the rank before I came up, and it was agreeable to my opinion. Capt. Davis came forward, and said he would consent for that day, to avoid difficulty, and went on to do duty, but that he never would consent after that to the decision. I replied, that I thought the field was not a



place to dispute rank, that they must apply elsewhere, and I did not doubt he would have justice done him.

Q. same to same. Were you informed by Capt. Brazer that I made any dispute, or that I said any thing about rank on that day?

A. Capt. Brazer informed me there was a dispute; I did not think it could be with one.

Q. same to same. Did you not settle my rank with Capt. Brazer some time before you came on the field, 30th Oct. 1804?

A. I rather think I gave my opinion to Capt. Brazer a day or two before. Captain Loring was only detached for that day.

Q. same to same. What was that opinion given by you to Capt. Brazer before you went on the field?

A. That Capt. Loring would outrank Capt. Davis.

Q. by Judge Advocate to Gen. Winslow. When you came on parade on 30th September last, in what situation did you find the line, and what then took place respecting Captain Loring?

A. On parade, the 30th Sept. last, on Boston Common, on my coming up Winter street, found the line nearly formed, saw among a number of people who were opposite the line on the right six or eight men in uniform; on my nearer approach, and on the right of the line, found them to be Capt. Joseph Loring, jun. Lieut. Ezra Davis, with four Sergeants, and a drum and fife; Capt. Loring in a very short time came forward to Capt. Brazer, who commanded the Sub Legion of Light Infantry, and handed him a paper, which I supposed was a Commission, and asked Capt. Brazer some questions which I did not distinctly hear; Captain Brazer gave him his directions, on which he marched with his officer, four sergeants, and drum and fife, and took post in the line. I then directed Ensign Munroe, who was doing duty as Adjutant to the Sub Legion of Light Infantry, to request Capt. Loring and Lieut. Davis to come to me. On

their arriving where I could speak to them, I asked Capt. Loring what orders he had received for the parade of the day. He replied, he had received the orders directing him to appear on this day, and to form the line at 10 o'clock, A. M. on the Common. I then asked Capt. Loring where his men were. He said he did not know, he had ordered them to appear at 9 o'clock, and he had waited on his company parade half an hour, but none of them appeared, and he did not choose to wait any longer for them. I then asked Capt. Loring whether he commanded his men, or his men him. He answered, that he commanded his men. I replied, that I should have supposed it was directly the reverse; that it was very extraordinary conduct, and he would hear more of it in a few days. I then told him I had no further service for him for the day; that I did not stand in need of officers without men; he would therefore retire out of the line.

Q. by defendant to same. Did I not, when you dismissed me, inform you that I had my inspection roll, if you wished it?

A. I believe not, I have no recollection of it.

Isaac Rhoades was then sworn, interrogated, and answered as follows.

Q. by Judge Advocate. In what capacity are you in the Militia?

A. Orderly Sergeant of Capt. Joseph Loring, jun.'s company.

Q. same to same. Where was Capt. Loring's company ordered to parade on the 30th of Sept. last.

A. In front of the Green Dragon tavern.

Q. same to same. Is that their usual place of parade?

A. We have no usual place of parade. At the South End Gun house when we can have it; we could not that morning; sometimes at the Ropewalk.

Q. same to same. Did you ever before parade at the Green Dragon?



*A.* The company have met at the Green Dragon, but we never were ordered to parade there before.

*Q.* same to same. What have the company met there before for?

*A.* On evenings to do company business.

*Q.* same to same. Did Capt. Loring order the roll called on the 30th of Sept. last?

*A.* The roll was ordered to be called by Lieut. Davis.

*Q.* same to same. Was it called? *A.* It was.

*Q.* same to same. At what time?

*A.* At the time the notification specified.

*Q.* same to same. Was Capt. Loring there when the roll was called?

*A.* He was not; he came one or two minutes after.

*Q.* same to same. Did Capt. Loring continue any time before he marched his non-commissioned officers off? *A.* He did; an half an hour, or near.

*Q.* by Judge Advocate. Did Capt. Loring express any surprise at finding no men there?

*A.* Capt. Loring asked, when he came, if any men had been there, and if the roll had been called, and said he would wait half an hour. Did so. Then said he could not make men, and must go on the field as he was.

*Q.* same to same. Was not Capt. Loring's company out about the 16th Sept. last? *A.* It was.

*Q.* same to same. What was the number of rank and file?

*A.* Forty-six, I think, but won't be certain.

*Q.* same to same. By whose order were they then out? *A.* Capt. Loring's.

*Q.* same to same. Were they then informed that an order was out for the 30th of Sept. last?

*A.* I can't recollect that; the order was read to the company, but when, I can't recollect.

*Q.* by same to same. Was not Capt. Loring's company also out on the 17th or 18th Oct. last?

*A.* It was out on the 17th of Oct.

*Q.* same to same. How many rank and file were there then? *A.* I can't recollect.

*Q.* same to same. By whose order were they then out? *A.* Capt. Loring's.

*Q.* same to same. When was that order issued?

*A.* I can't recollect.

Josiah Bacon, jun. sworn, interrogated, and answered as follows:

*Q.* by Judge Advocate. In what capacity do you serve in the Militia?

*A.* As Clerk, and Sergeant to Capt. Joseph Loring, junior's company.

*Q.* same to same. Where was Capt. Loring's company ordered to parade, on 30th Sept. last?

*A.* At Green Dragon Hall.

*Q.* same to same. Is that their usual place of parade?

*A.* They have no usual place of parade; the company has paraded at Faneuil Hall, at the South End Gunhouse, and in front of the Rope Walk.

*Q.* same to same. Can Capt. Loring's company be drawn up in Green Dragon Hall?

*A.* I don't know.

*Q.* same to same. Where were they drawn up?

*A.* In the Street front of the Hall.

*Q.* same to same. Was the roll called?

*A.* Yes, Sir.

*Q.* same to same. How many of the company attended. *A.* The Captain, Lieut. and four Sergeants.

*Q.* same to same. Was Capt. Loring present when the roll was called? *A.* No, he was not.

*Q.* same to same. Did Capt. Loring express any surprise at finding no men there?

*A.* He came and inquired if no men had been there, and directed the Drummer to go down and beat the roll.

*Q.* same to same. Did you or did you not, generally attend the meetings of the company, of which you are a member, previous to the parade of the 30th Sept. 1805? *A.* I did.



Q. same to same. Did Capt. J. Loring, jun. attend any meeting of the company when you was present, previous to the parade of 30th Sept. 1805?

A. He did.

Q. same to same. Did you at any meeting of the company, or other time, when Capt. Joseph Loring, jr. was present, hear him make any observation intimating a wish that the privates of his company might absent themselves on the 30th Sept. 1805, the day of parade? A. I did not.

Q. same to same. Did you ever hear any of Capt. Loring's company say any thing respecting their wish or intention not to come out on the 30th Sept. last, in the presence and hearing of Capt. Loring?

A. I heard some members say they should not come out, at a meeting of the company at the South Gunhouse; but I believe it was not in the hearing of Capt. Loring, he being in another part of the Hall; and they gave as their reason, that they were so engaged in business, they preferred paying their fines.

Q. same to same. Did not the company, or a part of it, meet and vote not to come out?

A. Not to my knowledge.

Q. same to same. Have they met since the order of the 9th September without your being present?

A. Not to my knowledge.

Q. same to same. Did you not hear it said or determined that the fines of those who should not attend on the 30th September should be appropriated to pay for a dinner, and was Capt. Loring present?

A. I did not.

Q. same to same. Have you collected fines from those who did not attend on the 30th Sept. last?

A. I have collected fines from forty-one.

Q. same to same. When did you begin to collect them? A. In about eight days after the parade.

Q. same to same. Was the fine from each and every individual alike, and the same the law exacts?

A. It was.

Q. by Defendant to same. Have you accounted with me for those fines, or have you paid them to any one by my order?

A. I have not. They are still in my possession.

Q. by same to same. Has not the dinner for the anniversary of the company been paid for, by an assessment for that purpose?

A. An assessment has been laid for that purpose; I presume it has been paid for; it is the Treasurer's business to settle those bills.

Q. by the Court. When was that assessment made?

A. On the 9th of Oct. an assessment was laid for two dollars each.

Q. by Judge Advocate. What was the amount per head for said dinner? A. I do not know.

Q. by same to same. By what calculation of expenses did you make out the bill or assessment on each member?

A. We had no bill; two dollars were deemed sufficient.

Q. by Defendant to same. Did the Company vote to dispose of thirty tickets to the members for their friends? A. Yes, sir.

Q. by Judge Advocate to same. Did they dispose of that number? A. I do not know.

Andrew Green was then sworn, interrogated, and answered as follows:

Q. by Judge Advocate. In what capacity do you serve in the Militia?

A. As Sergeant to Capt. Loring's Company.

Q. same to same. Did you at any meeting of the Company, when Capt. Loring was present, hear him make any observation intimating a wish that his Company might absent themselves on the 30th Sept. last?

A. No, sir, never.

Q. same to same. Did you ever hear any one or more of Capt. Loring's Company say any thing respecting their wish or intention not to come out on the



30th Sept. last, in the presence and hearing of Capt. Loring? *A.* No, Sir.

*Q.* same to same. Did not the Company or a part of it vote not to come out?

*A.* Not to my knowledge.

Luther Lapham was then sworn, interrogated, and answered as follows:

*Q.* by Judge Advocate. Did you at any meeting of the Company, or other time, when Captain Loring was present, hear him make any observation intimating a wish that the privates of his Company might absent themselves on the 30th of Sept. 1805, the day of parade? *A.* I did not.

*Q.* same to same. Did you ever hear any one or more of Capt. Loring's Company say any thing respecting their wish or intention not to come out on 30th Sept. last, in the presence and hearing of Capt. Loring? *A.* I did not.

*Q.* same to same. Were you at the meeting at the South Gun House, and did you hear any of the Company say they should not come out, but would pay their fines?

*A.* I did not, Sir, but was there.

*Q.* same to same. Had Capt. Loring's Company any meetings respecting turning out on the 30th September last? *A.* Not to my knowledge.

*Q.* same to same. Have you ever heard Capt. Loring say any thing respecting his Company not turning out on 30th September last? *A.* No.

*Q.* same to same. Did you ever hear Capt. Loring say any thing previous to the 30th of Sept. respecting his intention of protesting against the order of the 9th of September?

*A.* I don't recollect that I did.

*Q.* same to same. Did you ever hear Capt. Loring reprimand his Company for their not attending their duty on the 30th Sept. last agreeably to orders?

*A.* I never heard him reprimand the Company.

*Q.* same to same. Has not Capt. Loring, since the 30th of September last, dined with his Company at Charlestown? *A.* He has.

*Q.* by Defendant to same. Have I commanded the Company since the 30th of Sept. last?

*A.* No, Sir.

*Q.* same to same. Did I not dine with the Company as a private citizen? *A.* Yes, Sir.

*Q.* by Judge Advocate. Was it by invitation Capt. Loring dined with the Company?

*A.* I have no doubt of it.

*Q.* by Defendant to same. Did I not come late to the place where the company dined? and did not the Company leave it before I did? *A.* Yes, Sir.

*Q.* Did Capt. Loring come in uniform?

*A.* No, Sir.

Isaac Rhoades again interrogated.

*Q.* by Judge Advocate. Has not Capt. Loring issued an order for parade of his Company since the 30th of Sept. last? *A.* Yes, Sir.

*Q.* same to same. Did he in that order, reprimand his men for prior misconduct or neglect of duty?

*A.* Not in the order, but previous to giving the order, at Mrs. Marean's Hall, at a Company meeting for business. I think the 8th of Oct. in the evening.

*Q.* same to same. How did Capt. Loring reprimand them?

*A.* He stated to them the situation he was placed in, in consequence of their not coming out; that he had done his duty, and if they had neglected to do theirs they must take the consequences. He had ordered the Clerk to collect the fines, and if not paid, he should put them in execution.

*Q.* same to same. What was the date of the order which Capt. Loring issued since 30th Sept. last?

*A.* He ordered the Clerk to fill up notifications the same evening he gave orders for the turning out for the anniversary, which was the 7th, 8th, or 9th of October last.



At fifteen minutes past 3 o'clock, P. M. the Court adjourned, to meet at this place on the morrow, at 10 o'clock, A. M.

*Representatives' Chamber, Boston, Nov. 21, 1805.*

The Court met agreeably to adjournment, and on being called, all answered in their places. Capt. Joseph Loring, jun. on being called, answered in his proper person. The Court was opened in due form by the Marshal.

Samuel S. Green was then sworn, interrogated, and answered as follows :

Q. by Judge Advocate. In what capacity do you serve in the Militia ?

A. As a private and Treasurer in Capt. Loring's Company.

Q. same to same. Did you at any meeting of Capt. Loring's Company, or at any other time, hear Capt. Loring make any observation, intimating or expressing a wish that the privates of his Company should absent themselves from parade on the 30th Sept. last ?

A. I did not.

Q. same to same. Do you know whether Capt. Loring was informed by any person, that his men did not intend to come out on the 30th of Sept. last ?

A. I do not.

Q. same to same. Did you ever hear any of Capt. Loring's Company say any thing respecting their wish, intention or determination not to come out on the 30th of Sept. last ?

Capt. Loring objected to the question being asked, in the words and figures following :

Capt. Loring objects against calling any of his men to prove against him a mutiny, in which themselves are considered as involved, because this man must be considered as a partaker in his guilt, and no man ought to be called on to accuse, or in any manner im-

plicate himself in any criminal offence ; in this objection he conceives himself to be supported by the 12th article of the Bill of Rights in our State Constitution.

The Judge Advocate in reply observed, that it was very true no witness could be introduced to give testimony against himself, whereby he would be criminated and subjected to punishment ; but that the privates of Capt. Loring's Company were called not to give evidence against themselves individually, but against Capt. Loring, and that there was to his (the Judge Advocate's) knowledge, no Militia Law of this Commonwealth by which *privates* were liable to punishment, even on a voluntary confession for mutiny, unless when in actual service ; the law only subjected them to a fine for absence, which has already been incurred by their non-appearance on parade, and which was a subject for the Clerk of the Company to prove elsewhere. A Court Martial had no cognizance over the privates, nor could they be tried by any Court Martial whatever, under the existing laws of the Commonwealth.

The president ordered the Court to be cleared of spectators, which was done ; and the Court then decided, that the privates in Capt. Loring's Company should be admitted to prove any mutiny in the Company, but that no individual was bound to accuse himself.

The doors were opened, and Capt. Loring entered.

The same question by Judge Advocate to same witness, to wit : Did you ever hear any of Capt. Loring's Company say any thing respecting their wish, intention, or determination not to come out on the 30th of Sept. last ?

A. I have heard some of them mention that they could not come out on account of their business.

Q. by Judge Advocate. Did you ever hear any of them say they would not come out because the Company had not their proper rank ?



*A.* I do not recollect any such thing.

*Q.* by Judge Advocate. Do you know whether it was determined that the fines which should be incurred by the absence of any of the Company, should be appropriated towards an entertainment?

*A.* I do not.

*Q.* by Judge Advocate to same. Did you ever hear Capt. Loring say any thing respecting his Company's not coming out on the 30th Sept. last?

*A.* I do not recollect of ever hearing Capt. Loring say any thing.

*Q.* by Judge Advocate to same. Do you know whether Capt. Loring was informed by any person, that his men did not mean to come out on the 30th Sept. last? *A.* I do not.

*Q.* by Judge Advocate to same. Did you ever hear Capt. Loring reprimand his Company for not doing duty on the 30th Sept. last?

*A.* I recollect hearing him say he was placed in an awkward situation by his Company not appearing; that he had done his duty, and that they must abide by the consequences of their not having done theirs.

*Q.* by Judge Advocate. Where did Capt. Loring say this? *A.* I think at Mrs. Marean's.

*Q.* by Judge Advocate. When?

*A.* I can't tell exactly the time, it was after the 30th Sept.

*Q.* by Judge Advocate. Did Capt. Loring's Company or any of the members, sign any paper agreeing not to come out on the 30th Sept. or in any wise determine not to do so?

*A.* I believe some of them, or a part of them, agreed not to come out, but I don't recollect the particulars, how they agreed to it.

*Q.* by Judge Advocate. Do you know whether Capt. Loring in any manner had any information of that agreement? *A.* I do not.

*Q.* by Judge Advocate. Did you receive any or-

ders, or request, not to appear on parade on the 30th Sept? *A.* I did not.

*Q.* by Judge Advocate. Who engaged the music for the 30th Sept.? *A.* I did.

*Q.* by Judge Advocate. Why were not two Drummers and two Fifers engaged as usual?

*A.* Because I could not get them.

*Q.* by Judge Advocate. Had the company any meetings respecting turning out on the 30th Sept. last, either before or since that day?

*A.* I think some of them had, before.

*Q.* by Judge Advocate. Where did they meet?

*A.* I believe at the Green Dragon.

*Q.* by Judge Advocate. What did they then determine to do?

*A.* Some of them proposed not coming out, and some of them proposed drinking punch.

*Q.* by Judge Advocate. Was Capt. Loring present at that meeting? *A.* He was not.

*Q.* by the same. Was he informed of the proposals you mentioned, which then took place?

*A.* Not that I know of.

*Q.* by the same. What number was present?

*A.* I cannot tell.

*Q.* by the same. Was it a general meeting of the Company?

*A.* It was not by any order, but a social meeting of some members.

*Q.* by Defendant. Did you dispose of thirty tickets to the members of the Company for their friends, and did you receive the cash for them, for the use of the Company, in addition to the proceeds of the assessments made on the members of the Company?

*A.* I did not. I disposed of eighteen tickets, and received the pay for them.

*Q.* by Defendant. Was there not an additional assessment of two dollars laid by the recommendation of Lieut. Davis, to make up the deficiency of the



first assessment of two dollars to defray the expences of the anniversary dinner on the 17th Oct. ?

A. It was mentioned that there was money enough to pay for dinner and liquor, but not for music, and it was necessary there should be another assessment of two dollars to pay for music and old debts.

Q. by Defendant. When you told me you could not procure the customary music, did I not observe to you, the law required only one drum and fife, and if we could not get more it would answer ?

A. You did.

Q. by Defendant. Was not the music in this town and in the neighbouring towns in very great demand on the 30th Sept. so that it was very difficult for the various companies in the Brigade to have a drum and fife apiece ?

A. I believe it was ; I believe it was difficult, and could procure no more.

Q. by Judge Advocate. Have you any papers in your possession or keeping of the doings of the Company on the evening you mentioned they met at the Green Dragon ? A. I have not.

Q. by Judge Advocate. Had you not some time ago ? A. I never had.

Q. by Judge Advocate. How are the fines of your Company appropriated ?

A. All that I have received go to pay the debts of the Company, as far as they will go.

Q. by Judge Advocate to same. Were the fines of the Company appropriated to the defrayment of expences for dinner, or other entertainments ?

A. They were not.

Q. by Defendant. Were not the fines generally used for candles and paying for men who open the hall for the exercise of the Company ?

A. I can't answer for that ; I don't know ; they were generally appropriated for that ; whether they were enough or not I can't answer.

Q. by Judge Advocate to Gen. Winslow. Did Capt. Loring, or any one by his order, make known to you the situation of his Company, on the morning of the 30th Sept. previous to his coming on parade with four Sergeants, the Lieutenant and two Musicians ? A. He did not, Sir.

Q. by Judge Advocate to Capt. John Brazer. Did Capt. Loring, or any one by his order, make known to you the situation of his Company on the morning of the 30th Sept. last, previous to his coming on parade with four Sergeants, the Lieutenant and two Musicians ? A. He did not previous to his coming on.

Q. to Gen. Winslow by the Defendant. Was I not under the immediate command of Capt. John Brazer, Senior Officer of the Sub Legion Light Infantry on the morning of the 30th Sept. 1805 ?

A. I take it he was till I came on to the field ; while Col. Badger was on the field, I take it all the troops were under his command till I arrived there.

Q. to Capt. Brazer by Defendant. Was I not ordered by you to parade before the New State-House on the 30th Sept. at 9 o'clock in the morning, and is this the order ? (which was read to the Court in the words and figures following :)

[BRIGADE ORDERS, for 30th September, 1805, were then read, as in pages 32-33.]

SUB LEGIONARY ORDERS, *For 30th Sept. 1805.*

Capt. Loring will observe the preceding Brigade Orders ; and it is further ordered, that each Commanding Officer in the Sub Legion have his Company on the Common in front of the State House at 9 o'clock, on the 30th inst. as the Sub Legion of Light Infantry will be formed at that time. Ensign Munroe is appointed Adjutant for that day, and will be obeyed accordingly.

JOHN BRAZER,

*Sen. Officer Sub Legion Light Infantry.*

A. You was. It is the order.



Q. to Gen. Winslow by Defendant. Was not Capt. Brazer the Officer *immediately* over me, to whom, and through whom all communications from me ought to be made? A. No doubt of it.

Q. to Capt. Brazer by Defendant. Did I not make known to you, as my Commanding Officer, the situation of my Company on the 30th Sept. immediately on my coming into the parade? A. You did.

Q. by President of the Court to Capt. Brazer. Did Capt. Loring form with the Sub Legion?

A. He did not. The Sub Legion was not formed before the line was formed.

Q. by Defendant to Capt. Brazer. Did I not go into the place you ordered me? A. You did.

Court adjourned to 10 o'clock to-morrow.

*Representatives Chamber, Friday, Nov. 22, 1805.*

The Court met agreeably to adjournment, and the Members on being called all answered in their places. Capt. Loring, on being called, appeared in his proper person. The Court was opened in due form by the Marshal.

William Howe sworn and interrogated.

Q. by Judge Advocate. Had you any conversation with Samuel S. Green previous to the parade of 30th Sept. last, respecting the intention of Capt. Joseph Loring's Company not to come out on that day?

Capt. Loring objected to the question being asked, in the words following: The Government must not impeach their own Witnesses. If any person has a right to impeach the Witness of Government, it is myself.

The Court was cleared, and the Court decided, that testimony to impeach the credibility of Witnesses may be introduced, and that Capt. Loring's objection be overruled.

The Court was re-opened, and Capt. Loring appeared. The last foregoing question was therefore asked,

and the Witness answers:—I can't say it was previous to the 30th Sept. but I had some conversation with Samuel S. Green at his shop. I said to him, you had a row at the Green Dragon, had you not? He said some of them met, and agreed not to come out, unless they had their rank; and said if Capt. Loring would *resign, or was broke*, they would choose old Eben. Pratt, of Chelsea, and he was the oldest Captain in the line, and according to the idea, that Capt. Davis had taken rank of Capt. Loring, he would take the right on Boston Common. I mentioned to him, that if Capt. Loring knew of their meeting at Green Dragon Tavern, whether it would not break him; he said that Capt. Loring did not know of it, two or three times, and clapped his hand to his pocket, and said, I could shew by a minute I have in my pocket, that Capt. Loring did not know of it. We after that had some conversation, and he took the Militia Law from the shelf, and shewed me a Section respecting taking rank from date of commissions, and said it was singular that Capt. Davis' commission and Capt. Messinger's should be dated on the same day, and Capt. Loring's a year or two years before, and yet Davis takes rank of him. I told him Messinger was an older Capt. than Davis, and did not believe it.

He said the Company meant to come out on their Anniversary. He said he could shew me that they would not come out (unless they had their rank) in a Brigade Muster on 30th Sept. last. I asked whether they would come out on their Anniversary. He said they would; and if they could not come out with their Captain, they would with their Lieutenant; and if they could not come out with him, they would with a Corporal. I said, I shall win my ticket, and then went off.

Q. by Defendant. Are you not a Member of Winslow Blues, commanded by Capt. Daniel Messinger?

A. Yes, sir.



Q. by Defendant. When did Green say the meeting was at the Green Dragon?

A. He did not tell when it was; this conversation was not many days after the meeting at Green Dragon, to explain that I heard of it in carrying a notification to Dr. Wakefield.

Q. by same to same. When was that notification dated? A. I don't know.

Capt. Abraham Butterfield sworn and interrogated.

Q. Had you any conversation with Capt. Joseph Loring, jun. prior to the 30th Sept. last, respecting the parade which was ordered for that day?

A. I had, Sir. In the course of our conversation, the sudden death of Maj. Hatch of Boston was mentioned; some observations on the character of the man, together with the circumstance of his being deprived of his Commission by Court Martial, took place; immediately on which Capt. Loring observed, in a jocose manner, as I then thought, that I might have the opportunity of seeing him tried by a Court Martial within six months. I made some light reply to it, observing, I hoped he would be broke, or something like that, and asked him what he had done, or meant to do, to subject himself to a trial by Court Martial. He replied, that in consequence of certain arrangements having been made respecting the date of his Commission and of Capt. Davis's, Capt. Davis would now take rank of him, whereas last year he took rank of Capt. Davis. He proceeded to observe, that if he could not be allowed the rank which he took the last season, he should *march his men off the field*. There was nothing further in particular, that I recollect.— This was at Capt. Loring's house, on the 14th of Sept. last, I believe.

Q. by Judge Advocate. When you told Captain Loring you hoped he would be broke, did you say it from any inclination or wish you had that he might be deprived of his Commission, or as a jocose reply to

what you have said you at the time the conversation took place conceived a jocose observation of his?

A. I made it as a jocose reply to what I then conceived his jocose observation. I would further observe, that our conversation was very unguarded; we were disposed to pass a jovial hour.

Q. by Capt. Loring to same. Did I not receive you at my house as an old acquaintance, and did I not treat you with the hospitality of a friend, and was not my conversation with you open, candid, and without restraint? A. Yes, Sir.

Q. by Capt. Loring to Butterfield. Did I not observe to you, that no Officer in my opinion was obliged to obey orders if contrary to the Constitution and Militia Law?

A. I recollect his making such an observation.

John I. Rea sworn and interrogated.

Q. by Judge Advocate. Do you know any thing respecting any intention or determination of Capt. Joseph Loring jun.'s Company not to come out on the 30th Sept. last? A. I do not.

Q. by Judge Advocate. Did you not have a conversation with Mr. Samuel Jenks on that subject?

A. Not to my recollection.

Q. by Judge Advocate to same. Were not you a Member of Capt. Loring's Company previous to 30th Sept. last, and on that day? A. Yes, Sir.

Capt. Loring, on the Judge Advocate asking the above question, in writing observed as follows: I wish the Court would grant me a copy of that part of their records, wherein they have decided that the Government has a right to produce witnesses on its own side, and immediately produce other witnesses to invalidate their own testimony.

The Court said they would defer the consideration of this request.

Ensign Samuel Jenks sworn and interrogated.

Q. by Judge Advocate. Have you had any con-



versation with John I. Rea, the witness last produced, respecting the intention or determination of Capt. Loring's Company not to come out on the 30th of last September?

A. I have, Sir. It was in consequence of a conversation I had with Ensign James Alexander. I conversed with Rea, at the house of Mr. Richards, near the Market, on 17th Sept. last. After mentioning what had transpired between Ensign Alexander and myself, which was this, whether I had heard the news that morning of the determination of the Washington Light Infantry Company, commanded by Capt. Loring; I immediately replied I had not; asked him what it was? He said that they agreed one and all not to come out, excepting the Officers and Music. Furthermore, he said the privates were to pay their fines, and that was to be deferred to defray the expenses of the anniversary celebration, and that the Officers only were to come out with the Music. I mentioned this the same day in presence of Mr. Rea, Jonathan Willington, William Chandler, and several others. Mr. Rea said he did not care, it was none of his doings, but a plan of their Officers. I then asked him whether it was first instigated by their Officers; he told me it was: I called the attention of the Company present, as I expected at a future day an investigation would take place, and feeling it my duty, made a written communication to Gen. Winslow. Mr. Chandler said he had heard that the Company had taken a vote not to come out on the 30th of last Sept. Mr. Rea said nothing, but nodded his assent to it.

Q. by Defendant. At what time of day was this conversation with Rea?

A. About three o'clock in the afternoon.

William Chandler sworn and interrogated.

Q. by Judge Advocate. Were you present at the conversation testified to by Ensign Samuel Jenks?

A. I believe I was.

Q. same to same. Did you hear the conversation between him, the company, and John I. Rea?

A. I don't know that I heard the whole of it, but Mr. Rea and myself have had other conversations previous to that time on the same subject. Mr. Rea told me in my shop, that Capt. Loring's Company, which he belongs to, had met at the Green Dragon Tavern, and agreed not to come out on the 30th Sept. last. At the same time I believe Mr. Jeremiah Sprague was there, belonging to the same Company. I told them I guess'd they would come out; the Captain would not be so unwise as not to fetch his Company out on that day. Rea said he did not suppose the Captain wished them to come out to be degraded, as they should not have the same rank they had last year.

Q. by Defendant to Mr. Chandler. Did he say the Officers were with the Company at the Green Dragon Tavern, at the meeting referred to?

A. He said they were not. I asked whether the Officers knew whether they were met there. He said they did not know whether they did or not.

Q. by Defendant. Did you hear Jenks say he would go any lengths to have me broke?

A. No, Sir.

Col. Thomas Badger sworn and interrogated.

Q. by Judge Advocate. Had you any conversation with Capt. Loring, or any of his Company, respecting the intention of his Company not to turn out on 30th Sept. last?

A. I had no conversation with Capt. Loring. I had with some of his Company. I believe Mr. Lincoln. It was something general of a conversation, and reported about considerably, that Capt. Loring's Company did not mean to come out. I heard of it and talked to Mr. Christopher Lincoln and others of the Company. I told them I had heard such a thing, and hoped they would think better of it.

Christopher Lincoln sworn and interrogated.



Q. by Judge Advocate. Do you know any thing relative to the intention or determination of Captain Joseph Loring, jun.'s Company not to come out on 30th Sept. last ?

A. I know something relative to it. I heard several of the members say they would not come out. I know more, but won't tell it, unless I am asked particular questions.

The Court was cleared on the Witness Christopher Lincoln's answering as above, and determined that the Court will oblige the Witnesses to give evidence of all matters relative to the charges exhibited against Capt. Loring, and connected therewith ; but as the Court decided yesterday, no Witness is obliged to mention his own name, or criminate himself individually. The Court look upon the conduct of Christopher Lincoln as highly contemptuous to themselves and the Judge Advocate, by his refusing to give evidence, unless by answers to particular questions, and the Court will exercise their powers toward the punishment of any Witness who may hereafter be guilty of similar conduct before them.

The doors of the Court were then opened, and Captain Loring entered, when the foregoing determination was read.

The Witness then proceeded as follows :

I know, that part of Capt. Loring's Company did meet at Green Dragon ; I don't recollect the evening ; there was considerable conversation concerning turning out ; the Company there agreed not to come out. I don't recollect any thing being said about the appropriation of fines. I don't know that Capt. Loring had intimated to the Company that it would be agreeable they should not come out. Capt. Loring was not, to my knowledge, informed of the determination of the Company. I don't wish to have my answer stand so as related to the words " particular questions" above.

Q. by Defendant to Christopher Lincoln. Was I at the meeting of the Green Dragon ?

A. You were not.

Q. by Defendant to Christopher Lincoln. Do you know of my conniving at, abetting, or procuring the men under my command, not to turn out, the 30th Sept. 1805 ? A. I do not.

Q. by Judge Advocate. Was there more than one meeting at the Green Dragon, respecting the 30th Sept. last ?

A. I don't know of more than one.

Q. by Judge Advocate. Who warned that meeting ?

A. All the members ; one warned another ; I mean all that were there ; all the Company did not come.

Jeremiah Sprague sworn and interrogated.

Q. by Judge Advocate. Were you present at the meeting of the members of Capt. Loring's Company at Green Dragon Tavern respecting turning out on 30th September ?

A. I don't recollect any thing that took place there ; I can't recollect any thing that was said ; I didn't expect to be called in the case.

Q. by Defendant to Mr. Jeremiah Sprague. Did you drink the punch, or did you agree not to come out ?

The Judge Advocate objected to asking the Witness this question upon the very grounds which Captain Loring had yesterday urged, that it related solely to the Witness, and he could not be obliged to criminate himself, and also upon the decision of the Court. The Court determined that the question could not properly be put to the Witness.

Ezra Hawkes sworn and interrogated.

Q. by Judge Advocate. Do you know any thing respecting Capt. Loring's Company, or a part of them having met to determine on not coming out on 30th September last ?



A. Some of them met at Green Dragon Hall, I can't recollect the time, it was before the 30th Sept. last; I heard many of them saying they had determined not to come out on the 30th Sept. I don't recollect any thing being said of any part of the Company intending to come out. Capt. Loring was not, as I know of, informed of their determination.

Court adjourned to 1st Tuesday, 3d day of December, 11 o'clock.

*Representatives' Chamber, Tuesday, Dec. 3, 1805.*

The Court met agreeably to adjournment, and on being called, all answered in their places. Capt. Loring appeared in his proper person. The Court was then opened and the proceedings of the last day's sitting read by the Judge Advocate.

Q. by Defendant to Ensign Jenks. Did Brigade Major Clement and Capt. Messenger advise you to make inquiries respecting the mutiny in my Company, and to give information thereof to Gen. Winslow?

A. They did not, it was from a conscious discharge of my duty.

At Capt. Loring's request, the following letter is recorded, from Ensign Samuel Jenks, to Gen. Winslow.

*Boston, Sept. 20th, 1805.*

*Respected Sir*—Ever ready to discountenance disloyalty and insubordination, more especially in military matters, and being informed of the mutinous spirit prevalent in the Washington Light Infantry Company, (so called) commanded by Capt. Loring, I think it my duty to commit it to writing, and give the earliest notice of the same to my superiors, not doubting but that an investigation, at some future day, will take place, and that I may be called to evidence the same, if circumstances should make it necessary and my information be correct.

In the first place, that on or about the 17th inst. being then in the cabinet maker's shop of Ensign James Alexander, he asked me, if I had heard the news about the determination of the Washington Light Infantry Company. I told him I had not, and inquired what it was. He said "they had agreed, one and all, not to come out on the 30th inst. excepting the Officers and Music, and that the privates were to pay their fines and reserve them to defray their an-

niversary expences, as they did not like the new arrangement of rank, given to their Captain." In the afternoon following, happening to fall in company with several persons, I related the above, and was making some observations thereon, till interrupted by a reply from Benjamin Hallowell of the Fusiliers, when some words then ensued, in presence of Mr. Jonathan Willington, Mr. William Chandler, Mr. John Rea and others; I answered that if such conduct should be transacted by the Company, it would in my opinion have a tendency to dissolve the Company, and break the Officers; which drew the following further information and confirmation of the above from Mr. John Rea, (a member of the Company aforesaid) that he, the said Rea, said he did not care, it was none of his doings, but it was a plan of their Officers. I asked him if it was first instigated by their Officers. He said it was.

Mr. Chandler then said, he had heard that the Company had taken a vote so to do; which was assented to by Mr. Rea.

I then called the attention of the Gentlemen present, to bear in mind what had passed, as I expected if Capt. Loring and his Company should put in practice what they had threatened, that the present conversation would not be the last we should hear of it, to which they consented. Accordingly last evening, after the meeting of the Mechanic Association had dissolved, I communicated the above to Maj. Clement, Capt. Messenger and Capt. Phillips, at the same time informing them, it was my intention to commit it to writing and communicate it to your honor, as I thought it my duty; they agreeing with me in opinion, and wishing I would. I hope your honor will have the goodness to excuse my troubling you with so circumstantial and lengthy a detail, which I cannot but hope, for the honour of the gentlemen concerned, may never be wanted, and that it may appear that the Company mentioned are not in that state of insurrection and mutiny, which the present report would lead us to believe, but that they would reconsider their rashness, and turn out, and do themselves as much honour by due subordination to their superiors, as they have acquired by their former soldierly discipline and appearance.

I have the honour to be, Sir, with esteem, your honour's most obedient and very humble Servant,  
 SAMUEL JENKS.  
*Hon. John Winslow, Esq. Brig. Gen. of the first* }  
*Division of the Commonwealth of Massachusetts.* }

Capt. Daniel Scott sworn and interrogated, and answered as follows:

Q. by Judge Advocate. Had you any conversation with Capt. Loring, prior to the parade of 30th Sept. last, respecting that parade, or any thing appertaining to or connected with it?

A. Yes. But I wish for time to recollect the conver-



sation ; I could not under a week or ten days, to give the whole.

Q. same to same. Did you hear Capt. Loring say any thing respecting the intention of his Company not to come out on the 30th Sept. last ?

A. Not before the parade, but since he has repeatedly told me that he never knew any determination of theirs not to come out, but that he heard they were not coming out on Saturday evening, or the day before the parade, by one of his wife's brothers or sisters, as I understood it, having mentioned it at his house. Capt. Loring begged leave to correct the Witness, by saying it was his wife's brother ; the Witness therefore adds, "brother or sister" to this answer.

Q. by Defendant to same. Are you not my confidential friend, and is it not known that I am in the habit of conversing with you in the most free, unreserved and confidential manner ?

A. Capt. Loring can best answer the first part of the question ; to the latter part, I say, Yes, I presume so.

Q. by Defendant to same. Did you ever in all my intercourse with you, hear me utter any insubordinate or mutinous sentiments towards Gen. Winslow, or any body in authority over me ? A. No, Sir.

Lewis Glover sworn, interrogated and answered as follows :

Q. by Judge Advocate. Had you any conversation with Capt. Loring prior to the parade of 30th Sept. last, respecting that parade, or any thing appertaining to, or connected with it ?

A. I don't recollect any particular conversation before, but I have since.

Q. by same to same. What conversation have you had since, with Capt. Loring ?

A. I asked if he was knowing to his men not coming out ; he observed he was at Portsmouth at the time their meeting took place, and was unwell there.

Q. by Defendant to same. Did you see me within ten days of 30th Sept. 1805, the day of parade ?

A. I don't recollect.

Q. by Judge Advocate to same. Have you not had a conversation with James Elliot on this subject relative to Capt. Loring ?

A. I believe I have since the parade, nothing more than my opinion.

Q. by Defendant. Who is James Elliot ?

A. A man, born of a woman, I presume.

The Judge Advocate then informed the Court that there were many more Witnesses on behalf of the Government, but being all to the same points already inquired of, he should not introduce them, but, if during the trial any new testimony should be presented, he should offer it to the Court.

The Judge Advocate then called upon Capt. Loring to introduce any testimony he might have in his defence.

Josiah Bacon was introduced and interrogated, and answered as follows :

Q. by Defendant. Did I not give you orders, as Clerk of my Company, to warn my Company to appear on parade for Review and Inspection on the 30th Sept. 1805 ? A. Yes, Sir.

Q. same to same. Did you, or did you not obey those orders ? A. I did.

Q. same to same. What was the form of the notification, by which my Company was warned ?

A. This is ; which was handed to the Judge Advocate, and read in the words and figures following :

#### COMPANY ORDERS.

*Boston, Sept. 23, 1805.*

Mr.

Sir—You, being a Member of the Company, commanded by Capt. Joseph Loring, junior, are hereby ordered to meet on Monday, the 30th inst. agreeable to Brigade Orders of the 9th and 16th inst at the



Green Dragon Hall, at 8 o'clock A. M. with uniform, arms and accoutrements complete, including Knapsacks, Canteens, and 16 sporting Cartridges.

The Roll will be called at 9 o'clock, A. M. precisely.

*By Order of the commanding Officer.*

Clerk.

Q. same to same. What was the form of my orders to you predicated on the 9th Sept. ?

A. This is ; which was read in the words and figures following :

#### COMPANY ORDERS.

*Boston, Sept. 18, 1805.*

Agreeably to Brigade Orders and Sub Legionary Orders of Sept. 9th, 1805, you will order the Officers and Members of the Company, which I command, to parade for Review and Inspection, on Monday, the 30th Sept. 1805, at 8 o'clock. Roll to be called at 9 o'clock, at Green Dragon Hall. It is expected both Officers and Soldiers will be equipped according to law.

Yours, JOSEPH LORING, jun.

*Captain Sub Legionary Brigade.*

*Mr. Josiah Bacon, jun. Clerk of }  
Washington Infantry, so called. }*

N. B. Knapsacks and Canteens must be brought, with Cartridges and Balls complete.

Also, request a meeting on Friday eve, at the Gun House, say 27th Sept. at 7 o'clock, with arms.

*Received on the 18th inst.*

Q. same to same. Did you not send me your notification to correct, and did I not as usual alter it from Ball Cartridges to 16 Sporting Cartridges ?

A. You did, and I received it corrected.

Q. same to same. Did you know me directly or indirectly say any thing to connive at, abet and procure you or the men under my command to mutiny against the Brigade Orders of the 9th and 16th Sept. for the Review and Inspection of 30th September, so as to neglect and refuse to appear on said parade, to

discharge your and their duty as soldiers on said day, agreeable to the spirit and intent of said orders ?

A. I did not.

Q. same to same. Did I not, in preparing for this parade, show at the meeting of the 28th Sept. as much anxiety as usual about the parade, and did I not appear much dissatisfied to find so few men as 24 with arms that evening ? A. You did.

Q. same to same. Did Brig. Gen. Winslow, or Brigade Maj. Clement inspect me or my Officers on the 30th Sept. 1805, agreeable to order of 9th and 16th Sept. or the Inspection Roll which you signed ?

A. Not to my knowledge.

Q. by Judge Advocate to same. When had you the first information of the determination of the Company not to parade on 30th Sept. last ?

A. I don't know ; I don't know the Company ever made such a determination.

Q. same to same. When you went on parade at Green Dragon Hall, 30th Sept. last, did you expect the soldiers would be present for duty that day ?

A. I had no reason to expect they would not be there, meaning, I expected they would be there.

The Court adjourned till to-morrow.

*Representatives' Chamber, Wednesday, Dec. 4, 1805.*

The Court met agreeable to adjournment, and on being called, all answered in their places. Capt. Loring on being called, appeared in his proper person. The Court was opened and the proceedings of yesterday read.

Mr. Lewis Glover, a Witness interrogated yesterday, came into Court and stated, that he misconceived the question of "who is James Elliot ?" [asked by the Defendant] and now additionally answers thereto, that he is a gentleman of his acquaintance, who belongs to the corps he does.

Q. by Capt. Loring to Gen. Winslow. What are



the statements or facts in that paper which are untrue, and unofficer-like for me to state?

Judge Advocate observed to the Court, that in his opinion, that was a question which ought not be asked a Witness, because the Complaint contained the charges which Capt. Loring alluded to, and the Court were to decide what the statements of facts were by the regular course of the testimony and the paper itself.

The Court determined that the Defendant might ask the question.

A. The papers are before the Court, and they will be the judges.

Josiah Bacon again interrogated and answered as follows :

Q. by Defendant. Did I not inform you, by a communication delivered by Mr. Thompson, after giving you the Warrant for warning the men of my Company conformable to the Brigade Order of the 9th Sept. that the Cartridges with Balls were dispensed with? A. You did.

Q. by same to same. Did you see me in Boston between the 18th and 28th of last Sept.?

A. I did not.

Ezra Davis sworn, interrogated and answered as follows :

Q. by Defendant. In what capacity do you serve in the Militia?

A. As Lieutenant in the Washington Infantry, commanded by Capt. Joseph Loring.

Q. by Defendant. What took place on Saturday evening, the 28 Sept. at the South End Gun House?

A. On that evening I arrived at the South End Gun House at the time set by the Notification for the Company to meet; had the Company formed, and was going through the manual exercise, when Capt. Loring came in. After the men had gone through the manual exercise, I delivered the Company up to him. He then went through the exercise, after which

he let the Company rest, during which time I inquired respecting his health, &c. : he then informed me I must act as platoon Officer, as he should go through the manœuvres, which he would probably have to go through on the 30th. After exercising the men about an hour, the Gun House was cleared of spectators, telling them the exercise of the evening was over. He then requested the men to be very punctual in appearance on parade, on Monday, 30th Sept. as he should be obliged to be on the Common by half past nine, by an order which he had received from Capt. Brazer; and requested me to be at the Green Dragon before nine, if possible, or by nine, in order to have the Company formed by nine o'clock, as he lived at Chelsea. I don't recollect any other particulars respecting Company business.

Q. by Judge Advocate to same. Had you not heard, prior to the 28th Sept. last, that your men were generally not coming out on the 30th?

A. I never heard it, either directly or indirectly, from any member of the Company; some of Gen. Winslow's friends, the week previous to the 30th Sept. asked me if the Washington Infantry were coming out. I answered them I presumed so, as I had heard nothing to the contrary from any of the members. I heard it mentioned in common conversation with some of Gen. Winslow's friends.

Q. same to same. When you went on parade at Green Dragon Hall, on the 30th Sept. last, did you expect the soldiers would be present for duty that day?

A. I had no reason to doubt. It was their duty to obey their orders, as I did mine.

William Monroe sworn, interrogated, and answered as follows :

Q. In what capacity do you serve in the Militia?

A. I have an Infantry Commission, and act as Ensign to the Washington Light Infantry (so called).

Q. by Defendant. Did I not treat you as Adjut.



tant on the 30th Sept. in all my communications with you as a gentleman and soldier? *A.* Yes, Sir.

*Q.* same to same. Were you not at the meeting of my Company as Ensign thereof on Saturday evening the 28th Sept. 1805?

*A.* I was. When I went into the Hall they were marching in platoons, and Capt. Loring told them that was the way they would march in the salute; he told them he expected they would be equipped, and be on the field.

The Judge Advocate observed, that for his own reputation, and lest, by the face of the record, it should appear that he had sanctioned the whole testimony of Lieut. Ezra Davis and Ensign Munroe, he would here state, that he had informed the Court, previous to their introduction, that Capt. Loring could not legally introduce Witnesses to prove any thing which he himself had said in his own favour; that the confession of a man against himself, voluntarily made, was the highest evidence against him; and if in the course of examination of a Witness to prove a confession of guilt, a conversation should be mentioned by the Witness between a Defendant and himself, there the Court ought to receive the whole, or no part of it, that by a proper connexion it might be justly interpreted and construed; but this is not the case where a Defendant himself brings forward Witnesses to relate his own conversations in his own favour, and no Court ought to admit such testimony.

*Q.* same to same. Do you know of my conniving at, abetting or procuring my men to mutiny against the orders of the 9th and 16th Sept. for review and inspection the 30th Sept.? *A.* I do not.

*Q.* by Judge Advocate. Did you expect to see, on 30th Sept. last, Capt. Loring's Company on the Common, as a Company?

*A.* I did expect to see them, as I knew they had their orders. I was informed they were not coming

out, but their orders confirmed me in my opinion that they would.

*Q.* same to same. How long prior to the 30th did you hear the Company did not mean to come out?

*A.* Some time in the latter part of the week before, it might be as early as Thursday.

*Q.* same to same. Did you inform Capt. Loring of their intention?

*A.* Yes, Sir. The Saturday evening, going home, I told him I had been told so, and he observed he did not believe any thing of it.

Sylvester Thompson sworn, interrogated, and answered as follows:

*Q.* by Defendant. Do you know that I left Chelsea, the place of my residence, to go to Portsmouth, on Saturday, 21st Sept. last? *A.* I do, Sir.

*Q.* same to same. How long was I gone, and on what day of the week and month did I return?

*A.* You returned on Friday the 27th in the afternoon.

*Q.* same to same. Did you not remain, till 11 o'clock on Saturday evening, in Charlestown, waiting for me; and did I not go with you to Chelsea, and remain there till Monday morning, the day of parade?

*A.* Yes, Sir.

Andrew Dunlap sworn, interrogated and answered as follows:

*Q.* by Defendant. Did you see me at Portsmouth on Wednesday the 25th Sept. last, at Mr. William Neil's house? and what was my situation?

*A.* I went down to Mr. Neil's house on the evening of that day, and was informed that Mr. Loring was in the Compting-Room. I went to the Compting-Room, and found Mr. Loring sitting on a chair, apparently very much exhausted. I found from inquiries that Mr. Loring had been taken with a cramp in the stomach, and in about ten minutes after, he was taken with another. He appeared to be in great pain, and



It took two or three persons to hold him down. In the course of two hours he had frequent returns of the spasms. Dr. Pierpont was sent for, and recommended to Capt. Loring not to move for a day or two.

William Jennings sworn, interrogated, and answered as follows:

Q. by Defendant. Are you a member of the South End Artillery, and do you not take charge of South End Gun House? A. I do, Sir.

Q. same to same. Were you not at the Gun-House, Saturday evening, the 28th Sept. when my Company met for exercise?

A. I was, Sir. I opened the house, and the men met there as usual. Lieut. Davis took the command, and went through the exercise. Then Capt. Loring came: he gave up the command to Capt. Loring, and he went through the exercise again; he told them 'twas very necessary to pay all the attention they could, for they should have a great deal of duty to do on Monday; then he dismissed them for a few minutes; then the men were talking, as they commonly are; *some of them were talking of not coming out; not in the hearing of the Officers.* I asked them why they were not coming out, and told them it was a pity. They said they understood the Officers and Company were going to be degraded, and it would be a hard day's duty, and would rather pay their fines, as they were busy. *Capt. Loring then heard them talking,* and ordered them to fall in, told them they know'd their orders for Monday; some of them wished to have them read again, and it was; he told them then if there was any doubt in their minds about rank, it was not for them to decide it, and he expected to see every man in uniform for the duty of the day; if there was any dispute, they were to come on the field as soldiers, and have it decided there, or afterwards; he told them he expected to see them all there; if there were not five men, he would march on to the field at the time set.

Q. by Judge Advocate to same. What number of men were present at the Gun House, 28th Sept.?

A. About thirty.

Q. by Judge Advocate. Was Lieut. Davis present all the time you were there?

A. I won't pretend to say; I believe he went out a few minutes, I an't certain.

Q. same to same. Was Ensign Munroe present all the time?

A. He came about eight o'clock; he was not there in the first of the evening.

Brigade Major Charles Clement again interrogated.

Q. by Defendant. Did you inspect my Company on 30th Sept. last? A. I did not.

The Judge Advocate then read the 30th and 36th Sections of the Militia Law of this Commonwealth, passed June 22d, 1793, as relative to the present case. Capt. Loring then handed the Judge Advocate a paper containing the words and figures following:

The Judge Advocate having been good enough to point out to me the Statute on which the Complaint against me is founded, I think proper to apprize the Court and Judge Advocate, that I shall have occasion to refer in the course of my defence to the 8th Section of the United States Law, passed 8th May, 1792, which says, "All Commissioned Officers shall take rank according to the date of their Commissions." Upon the 29th Section of Massachusetts Militia Law, passed 22d June, 1793, which also says, "that all Officers when on duty shall take rank according to the date of their Commissions."

Upon the 31st Section of the same Law, which says, that at any muster, the several Companies shall form in Regiment, according to the rank of the Officers; which was read to the Court.

The Court was then ordered to be adjourned to 11 o'clock to-morrow, A. M. before which, Capt. Loring



having observed he had no more Witnesses to introduce, he was directed to be ready with his defence.

The Court was adjourned accordingly.

*Representatives' Chamber, Thursday, Dec. 5, 1805.*

The Court met agreeably to adjournment, and on being called all answered in their places. The Court was then opened by the Marshal. Capt. Loring appeared in his proper person and answered.

The whole proceedings of the Court to this day, from the commencement, respecting Capt. Loring, were read. Capt. Loring then, by leave of the Court, read his DEFENCE, which is as follows :

*Mr. President, and Gentlemen of this Honourable Court,*

The time that has been occupied in examining the multitude of Witnesses, who have been produced by Gen. Winslow, in order to support the prosecution, induces me to dispense with the examination of many Witnesses, whom I should have summoned, were it not for my belief that your patience, as well as my own, has already been put to a pretty severe trial.

It is now about two months since I was put under arrest ; during which time I have laboured under the anxieties inseparable from my situation, and have been entirely interrupted in my attentions to any other business.

Upwards of twenty Witnesses have been interrogated to furnish evidence against me ; and after all, what can there be collected from this mass of testimony, that can satisfy your minds beyond a reasonable doubt, that I am guilty of any particle of the charges exhibited against me ?

I am charged by Gen. Winslow with disobeying his Brigade Order of the 9th Sept. ordering his Brigade to appear on Boston Common, on the 30th Sept. for Review and Inspection.

I am also charged with disobeying another of his Brigade Orders, issued on the 16th Sept. requiring the Soldiers of the Legionary Brigade to appear with sixteen Cartridges for sporting, and dispensing with the twenty-four Cartridges with Balls with which the Law requires that every Soldier should be constantly provided ; and without which he is not in a condition to pass a legal Inspection.

I am also charged with coming on to the parade without any of my Soldiers.

If I did come on, without any of my Soldiers, it is highly probable I came on without the requisite number of sporting Cartridges : but it by no means follows, nor has it I trust been satis-

factorily proved to you, that I have disobeyed either his Order of the 9th, or his Order of the 16th Sept.

On the contrary, it appears by the testimony of the Clerk of my Company, a young gentleman of unimpeachable truth and integrity, who has been produced as a witness in support of the prosecution, that he did, in conformity to my warrant and command to him, notify and warn the members of my Company to appear in Arms and Uniform complete at the Green Dragon, at 9 o'clock in the morning of the 30th Sept. with sixteen sporting Cartridges. Notifications to this effect, were given to every individual of my Company, as seasonably as the Law requires. My notifications were at first predicated solely on the Brigade Order of the 9th ; they bore date of the 18th Sept. they were printed, and required my men to appear with Cartridges with Ball ; but after they were printed and before they were distributed to my men, I received the Brigade Order of the 16th Sept. requiring the troops to appear with sixteen sporting Cartridges instead of twenty-four Cartridges with Balls.

I immediately, on the receipt of the Brigade Order of the 16th Sept. altered my notifications in such a manner as to make them conform to the last received Order of the 16th Sept. I erased with my pen the printed words "*Cartridges with Balls,*" and inserted as well as I could, "*sixteen sporting Cartridges.*"

Notifications of this kind were delivered by my Clerk to all of my Company, and seasonably received by them.

I am conscious that I have done in this particular all that could reasonably be expected from me, or from any other Officer ; and all I ever did or can do in similar circumstances. I issued my Orders in obedience to the two Brigade Orders, which have been so often mentioned, and I put them in train (as I thought) to be faithfully obeyed. Perhaps it is true, as the General says, I did not make use of all my influence as Commanding Officer over my men, in order to induce them to obey the order I had thus issued. But, gentlemen, I know of no influence that is *necessary* or *becoming* for any Commanding Officer to use, in order to induce his men to obey his Orders : I have never been in the habit of using any influence, except what my positive Orders carry on the face of them. My Orders had always been punctually obeyed ; and I had no reason to suspect that they would not be obeyed in this instance, as they had always been before. But whatever might have been my belief or suspicions on this head, it was utterly out of my power to have done better, or in any degree different, from what I have done : for I left Boston on Wednesday the 18th Sept. the day I issued my Orders in the manner I have described.

I tarried at my house and with my family in Chelsea, from Wednesday the 18th till Saturday the 21st of Sept. employed about my own personal and commercial concerns. On Saturday



the 21st Sept. I left Chelsea, and set out on a journey to the eastward on business, which absolutely required my attention, and of a nature which could not admit of any further delay.

On this journey to the eastward I was employed from Saturday the 21st, till Friday afternoon, the 27th Sept. when I arrived, weary and in precarious health, at my house in Chelsea, where I continued till Saturday afternoon, the 28th Sept. I then came to Boston, and arrived here on Saturday evening, at 7 o'clock; attended with my Company at the Gun House at the bottom of the Common, for the purpose of instructing them in the duties, which they would probably be called on to perform on the Monday following. I spent about three hours with them, endeavouring to put them in a condition to make their best appearance on the day of parade. Every thing I said or did was in public before all those of the Company who were present, and the numerous spectators that thronged the Hall during the time I was with them.

I left Boston that evening, and went to Chelsea, where I remained till Monday morning, the much famed 30th Sept. and during the three hours I spent in Boston, I held no secret converse with any individual on earth; I neither said, or did any thing, but in the presence of all my Company, and of other disinterested witnesses, who did not belong to it.

Thus, Gentlemen, you perceive that for twelve days previous to the parade, viz. from the 18th to the 30th Sept. I was not more than three hours in Boston, and that during those three hours, all my conduct was open and aboveboard, that I was on a journey a whole week during those twelve days absence from Boston, a part of which week I was at Portsmouth in New Hampshire, confined to my bed with sickness, and in no condition to use influence over my men to prevail on them to obey my orders; much less could I be plotting the subversion of harmony and good discipline in Gen. Winslow's Legionary Brigade.

This, Gentlemen, is all I shall offer in vindication of myself against the charges for disobeying the General's two Brigade Orders aforesaid: and I leave it with you to find me innocent or guilty, according as the General's charges on these heads are supported or unsupported, or the statement I have thus far made shall appear to you to be true or false. With regard to my coming on to the parade in an unsoldierly like manner, and *without any of my soldiers*, as the General alleges I did, I will not waste time in endeavouring to refute a charge, which a thousand spectators know to be untrue; and which the prosecutor himself has invalidated by the abundance of oral and written testimony which he has offered in the course of my trial. He himself has declared, that I appeared on parade with *six or eight* of my men; which is as many as some other Captains did, who have not been arrested. The Court know, that I appeared with six men in complete uniform and discipline; and I could, if I pleased, call every field officer in the Brig-

ade to testify to the soldierly deportment with which I marched to that parade.

With regard to my conduct on the 30th Sept. having been at Chelsea from Saturday evening until Monday morning, I arrived at the Green Dragon, the place where I had ordered my Company to assemble, not quite so early as I had assigned for my Company to meet. When I arrived, I inquired with surprise, "*Where are the rest of my Company?*" The Lieutenant informed me that the roll had been called agreeable to the order, precisely at 9 o'clock; that himself, four Sergeants, and two musicians, were all that had appeared, and that they were ready to obey my orders. I then ordered the drummer to beat the long roll up and down the place of my Company parade in front of the Green Dragon. After a while, finding no more of my Company make their appearance, I said I could not *make men*, and instantly marched in an orderly and soldierly manner at the head of those, who had obeyed my orders, on to the Common, the place of the general parade. I arrived there in sufficient season before the line was formed. I sent a billet to Capt. Brazer, acting as Major, Commandant of the Sub Legion of Light Infantry, informing him of my unpleasant situation, and my readiness to obey his further orders in the best manner I could. He ordered me (through my Ensign, Mr. Munroe, who had been detached from my Company to act as Adjutant for the day) to stay where I was till further orders; and shortly after, on Capt. Messinger's coming into the Common, at the head of the Winslow Blues, Capt. Brazer ordered me to march into the line, and form with the rank of the third Company, which was below Capt. Messinger and Capt. Davis.

Believing my Commission, which bears date the 15th Aug. 1803, and which is the only Commission I ever qualified or acted under, to be of earlier date than that of Capt. Messinger or that of Capt. Davis, and knowing that I had outranked the latter gentleman a year before, I did not conceive I had my proper place in the line, although I took that which was assigned me, with all due submission and respect.

Thus, doubting the propriety of the order, which I thus submissively obeyed, I requested of my commanding officer that he would indulge me with a view of Commissions of those gentlemen, under whom he had placed me; at the same time I offered him mine, in order to its being compared with theirs; and then I obeyed his orders as punctiliously as he could wish, and marched into the line, when he ordered me, and where he ordered me.

Was it criminal? was it unsoldierlylike to demand a view of Commissions? if so, why was it granted? Why does every Officer carry his Commission in his pocket, except to be used as occasion shall require? The Law says, every Officer with a Commission shall rank according to the date of his Commission; and how is he or any body else to know the date of his Commission, unless he



has it ready to produce when called, and to combat the rivalry of those, who make claims to go above him? Why are the Officers required to take rank according to the date of their Commissions, unless there is to be some direct and instant mode of deciding by inspection and comparison of Commissions, which is the oldest?

The act of Congress, which provides for the uniformity of the Militia throughout the United States, which was passed May 8, 1792, expressly says, in the eighth section of that act, "That all Commissioned Officers shall take rank according to the date of their Commissions; and when two of the same grade bear an equal date, then their rank to be determined by lot."

The Militia Law of this State, passed June 22, 1793, is in exact conformity to the provision of the act of Congress which I have just read. Its requirements are in these words, (Sect. 30,) "At any Regimental Muster, the several Companies shall form in Regiments according to the rank of the Officers commanding them." And in a previous section it says, "that the rank of all Officers of a similar grade shall be settled according to the date of their respective Commissions."

Gentlemen, although my Commission bears date on the 15th August, 1803, the Commissions of Captains Messinger and Davis bear date June 20th, 1805, and although I had, in conformity with the opinion of Gen. Winslow, formerly outranked Capt. Davis, and although the Law was expressly in my favour, yet I peaceably and respectfully obeyed all orders coming from my superior Officers; I went into the place assigned, and at the time assigned, after the view of Commissions. I went peaceably and respectfully, because I knew that an Order of Council had been issued; on which a General Order was formed, and sent down, authorizing Captains Messinger and Davis, with Commissions posterior to mine, to take a rank superior to me.

This, Gentlemen, is an arrangement, which I have ever considered as injurious to my rights and my rank as an Officer; and ever since it has taken place, I have never ceased to bear testimony against it. I have taken every legal and respectful step in my power to be restored to a rank which I once held with honour, and which I trust I have never forfeited by any unmilitary conduct or neglect of duty.

I have sent a memorial to the Governor and Council, stating my complaint, and I sincerely believe that matters are in a train to replace me in my rank; and until I know the event of my application to Head Quarters, I consider it my duty to protest against any and all arrangements which degrade me from that rank which I have been accustomed to hold in the line, and to which I am entitled by the date of my Commission.

With these principles, and with these motives, I did, on the 30th Sept. forward to my commanding Officer the protest which has been read to you, and which Gen. Winslow seems to consider as a

Protest against his Brigade Orders, ordering the parade and ordering the sporting cartridges. But you, Gentlemen, are to decide whether or not the General has not mistaken its true intent and meaning. It speaks for itself; it is merely a protest against what I conceived my degradation. It was not offered with any view to subvert the good order and discipline of the General's Brigade. It was not offered until I had been ordered peremptorily and rudely to quit the Parade. It was not signed nor forwarded until after I had left the Line. It was not read by the General until after he had withdrawn from the Parade, although he said immediately on receiving it, and before he knew its contents, that *that Protest would be my destruction*. Like Jonah at the city of Nineveh, he has indiscreetly prophesied my destruction, and I really believe like Jonah he wishes me destroyed.

I rely with confidence upon the impartiality and the firmness of this Hon. Court, to save me from the powerful effects of his superior rank and influence against me.

I deny that there is any statement in that protest false or unofficer like for me to state. I have called on the General to point out the statements in that paper, which he alleges are false and unofficer like for me to state. He has not thought proper by his answers to my questions to give me an opportunity to evince my innocence; and I rely upon you, Gentlemen, to consider me innocent, until I am proved to be guilty.

The oath I take, when I accept my Commission, obliges me to execute the duties of my Commission, according to the Constitution and Laws. Indeed my Commission, on the very face of it, requires the same thing. I should have considered myself as culpably neglectful of my duty and my oath, had I done different from that which I have done. I declare I have acted from a conscientious endeavour to discharge my duty.

Perhaps all of you, Gentlemen, would in similar circumstances have acted different; perhaps you would have conducted better; but I trust you will not impute to me any criminality of intention, in an embarrassing situation, where every man, and even the best of men, is liable to err.

I believe it is unnecessary for me to say much on the last grand charge, containing the General's suspicions, that I was abetting and procuring my Company to mutiny against his two Brigade Orders.

I believe you are all men of candour, and that you cannot attach the smallest degree of credit to a charge so utterly destitute of proof. I declare, upon the honour of a soldier and a gentleman, that I was not, directly or indirectly, privy to the private determination of my Company, and cannot make myself accountable for any measures which they had taken during my absence from Boston, and absence from the State.

I believe the Court to consist of gentlemen of too much candour and liberality of sentiment to be biassed by any vague rumours, that



some men for their own private views and interest have been willing to circulate to my disadvantage. I presume you will judge merely according to the law and the evidence, and pass such sentence as your own honourable feelings shall dictate to be just.

I have thus, Mr. President and Gentlemen, committed to writing in a hasty manner, but as fully as the time allowed since yesterday's adjournment would permit, such a vindication of my conduct, as I trust will secure me an acquittal, *and an acquittal with honour*, from all the charges exhibited against me.

I believe every thing I have said is supported by the evidence which your records contain, and most of which has been drawn out on cross examination, even from the prosecutor, and the other witnesses who have been adduced in behalf of the government.

I do not rest my defence merely on the positive proof I myself have adduced in my own favour; I rely chiefly and with the greatest confidence on the insufficiency of the evidence against me to support any article or particle of the General's complaint.

I could, if permitted, bring testimony to prove that Gen. Winslow and his associates have long meditated my destruction and removal from command; and that he said that protest *should be* my destruction, even before he had read it, or could possibly know what it contained. I could prove that this prosecution is set on foot with motives and designs very different from that of a wish to promote the harmony and good discipline of the Brigade. But as the Court think it improper for me to go into Gen. Winslow's motives and intentions, I have contented myself not to attempt direct proofs of a point which the Court deem immaterial; and I leave it to be inferred from the whole manner and course of the testimony, which has been adduced against me. The sanctuary of friendship and the rites of hospitality have been violated; my bosom friends have been converted into spies and informers. They have been reluctantly compelled to appear before this Court, and relate conversations which took place between them and myself in my own house, in the bosom of my own family, at my own table, during the most convivial and jocular hours I have ever passed in my life, and when their own hilarity and cheerfulness laid open the most hidden recesses of my heart to their free inspection.

Many of the members of my own Company have been called on to furnish evidence to *convict their Captain of participating in their own transgressions*. And because Mr. Rea, one of my Company, would not (for he could not) tell any thing that could involve me with himself, one of Gen. Winslow's private confidential friends and correspondents, has been adduced to invalidate the testimony of Mr. Rea. With regard to Mr. Jenks (the associate and secret adviser of Gen. Winslow) I leave the Court to judge of his testimony as they please, and to make the inferences that must be obvious to every honourable and impartial mind.

Gentlemen, my cause is now with you; and I leave it with that confidence which my own conscious innocence inspires.

If any individual of you had any prepossessions against me, I know you have by this time laid them aside, and I do not doubt but the severe scrutiny, which my conduct has sustained, will effectually do away the vague rumours that had by my enemies been put in circulation against me, and prove to me an ample consolation for the long and painful anxiety with which I have waited the decision of this honourable Court.

JOSEPH LORING, JUN.

Capt. of Light Infantry, per General Order.

BOSTON, DEC. 5, 1805.

After the foregoing defence was read, the Court was cleared, and adjourned to the morrow 10 o'clock, in order to give judgment in the trials of Lieutenants Bacon and Valentine. The Judge Advocate on the trial of Capt. Loring was desired to attend on the day after.

*Representatives' Chamber, Dec. 7, 1805.*

The Court met agreeably to adjournment, and on being called all answered in their places. Capt. Loring appeared in his proper person, and answered. The Court was opened by the Marshal.

The Judge Advocate summed up the evidence both for and against Capt. Loring, and read his defence to the Court. The Court was then cleared of spectators, and the following question was put by the Judge Advocate to each of the members, beginning with the lowest in grade.

From the evidence which has been adduced, both for and against Capt. Joseph Loring, jun. and from what he has offered in his defence, are you of opinion that he is guilty or not guilty of the first article or specification of charge in the complaint of Brigadier John Winslow, exhibited against him? The Court decided that of the first specification of charge the said Joseph was not guilty. Upon the question being put in the same form upon the second article or specification of



charge in said complaint, the Court decided, that of the second specification of charge in said complaint, the said Joseph was not guilty. Upon the question being put in the same form upon the third specification of charge in said complaint, the Court decided, that of the third specification of charge the said Joseph was not guilty. Upon the question being put in the same form on the fourth specification of charge in said complaint, the Court decided, that of the fourth specification of charge the said Joseph was not guilty. Upon the question being put in the same form, whether said Joseph were guilty or not guilty of *any part* of the last, or either of the preceding specifications of charge in said complaint, the Court decided, that the said Joseph was in no part guilty thereof. It was therefore declared to be the opinion of the Court, that Captain Joseph Loring, jun. be acquitted of all and singular the charges or specifications of charges exhibited against him.

JOHN BARKER, *President*.

HENRY M. LISLE, *Judge Advocate*.

The Court adjourned till the tenth at 10 o'clock.

*Tuesday, Dec. 10, 1805.*

The Court met agreeably to adjournment, examined the records and copies of the Judge Advocate, certified the same as below, and then adjourned without day.

#### COMMONWEALTH OF MASSACHUSETTS.

We do hereby certify that the above and foregoing are true copies of the proceedings of the Court, of the evidence offered to it, and of its opinions and judgments.

Boston, Dec. 10, 1805.	{	JOHN BARKER, <i>President</i> ,	JOHN ROBINSON,
		BARNABAS CLARK,	JOHN PRATT,
		OLIVER JOHONNOT,	DAVID SHEPHARD,
		WM. BARNES,	ELISHA FRENCH, <i>jud.</i>
		HENRY PURKITT,	LEWIS FISHER,
		ADAM KINSLEY,	WM. TURNER.
		MICHAEL HARRIS, <i>jun.</i>	

HENRY M. LISLE, *Judge Advocate*.

On the 24th Dec. the following orders were issued.  
DIVISION ORDERS.

*Boston, Dec. 24, 1805.*

The Division Court Martial, whereof Lieut. Col. John Barker is President, is hereby ordered to convene at the County Court House in Boston, on Wednesday the 5th of February next, punctually at 11 o'clock, A. M. Per order of Maj. General 1st Division.

JOHN T. SARGENT, *A. D. C.*

*Boston, Feb. 5, 1806.*

The Court met agreeably to orders, and on being called, Capt. Adam Kinsley was found to be absent, and on ascertaining he was very sick, the Court adjourned to Tuesday the 25th inst.

On the 17th of Feb. 1806, the following orders were issued.

#### DIVISION ORDERS.

*Boston, Feb. 17, 1806.*

The Division Court Martial, whereof Lieut. Col. J. Barker is President, ordered to convene, and having met at the County Court House in Boston, on Wednesday the fifth inst. and then adjourned to Tuesday the 25th, in consequence of the absence of one of its members by sickness; the said member still remaining under severe indisposition, the meeting of the Court is hereby suspended until further orders. The Brigadier will cause this notice to be given to the several members of the Court with the utmost dispatch.

SIMON ELLIOT, *Maj. Gen. 1st Div.*

On the 20th of March, the following orders were issued.

#### DIVISION ORDERS.

*Boston, March 20, 1806.*

The Division Court Martial, of which Lieut. Col. John Barker of the second Regiment of first Brigade is President, is hereby directed to convene at the



County Court House in Boston, on Wednesday the 2d day of April next, precisely at 11 o'clock, A. M.  
SIMON ELLIOT, *Maj. Gen. 1st Div.*

— — —  
*Wednesday, April 2, 1806.*

The Court met agreeably to orders, and on being called all answered in their places. The following communication was received from the Maj. General.

*To the President and Members of the Division Court Martial, appointed for the trial of Capt. Joseph Loring, jun. on certain charges exhibited against him by Brig. Gen. Winslow, of the Legionary Brigade, First Division.*

GENTLEMEN,—I have attentively perused, and carefully examined the record of your proceedings on the trial of Capt. Loring, together with the papers, which accompany the same. After such examination and mature consideration, I feel it incumbent on me to declare to you, that from the evidence adduced on the trial, I should have expected a decision, different from the one you have seen fit to make.

The complaint against Capt. Loring charges him with an offence of a most dangerous tendency; an offence, subversive in its effects, of all subordination and discipline. But, Gentlemen, I do not by any means intend to be understood as saying, that because the complaint alleges offences of an aggravated kind, that it ought to operate as an inducement for conviction: on the contrary, our disbelief of the guilt or criminality of an officer ought, in some degree, to be proportionate to the enormity of the offence charged against him. But we ought not, in any case, to permit our disbelief to be so strong, as to resist that conviction which is produced by legal and uncontroverted testimony.

The utility of the militia to the defence, security and dignity of our country, essentially depends on its discipline. In this opinion I feel persuaded the Court will concur with me. With this impression, and impelled by an imperious sense of duty, I have deemed it necessary to convene you again to submit to your consideration some of the most forcible and prominent reasons, arising from the testimony offered you, which irresistibly compel me to form an opinion contrary to the one you have expressed in your decisions. I am further impelled to do this, that you may have an opportunity of reviewing your proceedings. I shall therefore proceed to lay before you some of the most operative reasons and objections, which influence my mind on this occasion. This will be done with all the respect due to your opinions, and with the hope you will allow my observations and objections their proper weight, and no more.

The complaint against Capt. Loring is, that he disobeyed Brigade Orders of the 9th and 16th Sept. 1805; and for unsoldierly and unofficerlike conduct on the parade, the 30th of the same month; and that he there presented a protest, containing false statements against the orders of his superior officers; and that he did connive at, if not abet and procure the men under his command to mutiny, and to neglect and refuse to appear on said parade.

I view the whole of the conduct imputed to Capt. Loring, and charged against him in the complaint, as connected with the mutiny of his men, so much so, that with the strictest propriety it may be considered as a charge against him, *of conniving at, if not abetting and procuring his men to mutiny.*

After examining the record, and finding that the Brigade Orders of the 9th and 16th Sept. 1805, were proved to have been regularly issued to and received by Capt. Loring, I proceeded to examine if the mutiny of his men were proved. For unless the mutiny were proved, it would be useless to inquire if Capt. Loring had any concern in it. The result of that examination has been such, that no hesitation is felt in declaring to you, that I conceive the *mutiny* of the men to be fully and clearly proved. As mutiny is a crime generally planned in secret, it is often difficult to prove, and it is seldom such clear and satisfactory evidence of its existence is brought to light, as appears on the face of the proceedings of the Court.

Among the most obvious evidence of the *mutiny*, I would refer you to the testimony of Samuel S. Green, Christopher Lincoln and Ezra Hawkes, three of the privates of Capt. Loring's Company. They prove a meeting of the Company at the Green Dragon, and that an agreement was there made not to come out on the 30th Sept. as ordered. Other strong evidence of the *mutiny* arises from the various confessions, declarations, and conversations of a number of the Company made to and with others (not members of it) respecting the agreement and determination not to appear on the parade on the 30th September. These declarations, conversations, and confessions derive additional force from the circumstance of their having been made sometime *previous* to the 30th Sept. They are sworn to and described by Col. Badger, Messrs. Jenks, Chandler, Howe and others, as will appear on a recurrence to the record of those gentlemen's testimony. It also appears in evidence, that both of Capt. Loring's Subalterns, *previous* to the 30th Sept. heard of the determination of the Company not to come out on that day. And one of the Subalterns (Ensign Munroe) expressly swears, that he told Capt. Loring that he had received such information, and that he informed Capt. Loring of this on Saturday evening previous to the parade. There is further evidence of the *mutiny* in the testimony of Mr. William Jennings, who swears that he was at the South End Gun House on Saturday evening, the 28th Sept. while Capt. Loring was exercising his men; that he



there heard the men talking, and that they said, they did not intend to come out on the 30th, because they understood the officers and men were going to be degraded; that Capt. Loring heard them talking, and ordered them to fall in, and told them it was not their business to settle rank; that he expected to see every man in uniform on the morning of the 30th; but added, "If there were not five men, he would march on to the field at the time set."

Having been fully satisfied, from the testimony before alluded and referred to, that the mutiny was fully proved, it became my duty to examine if there were any evidence of Capt. Loring's participating in it.

To form a fair and correct opinion how far, and wherein Capt. Loring may be judged to have *connived at*, if not *abetted* and *procured* his men to mutiny, the *whole of his conduct*, and the different declarations and confessions, made by him, as they appear in evidence, ought to be taken into view. But before doing this, I think it proper to give my idea of the word *connivance*. As I understand it, it means *voluntary blindness, pretended ignorance, forbearance, &c.*

It now becomes necessary to lay before you some of the most prominent facts and circumstances, which appear in evidence, evincing the *intentions*, which Capt. Loring entertained, and the *declarations* of those intentions, he made prior to the 30th Sept. last, respecting the measures, he meant to adopt on that day. These *declarations* ought to have great weight, they being *indicative* of the *determinations* he had formed.

It appears by the testimony of Capt. Butterfield, that Capt. Loring, on the 14th Sept. last, had an opinion, that the conduct he meant to pursue, on the 30th of the same month, would expose him to a trial by a Court Martial. Capt. Butterfield swears, that Capt. Loring said to him, "That if he could not be allowed the rank, which he took the last season, he would march his men off the field."

Capt. Loring was then in possession of the General Order of the 20th June, 1805, which decided the relative rank of the Captains in the Sub Legion of Light Infantry. Does not this threat, together with his subsequent conduct; the protest he brought with him to the parade; and the conduct of his privates, which so well coincided with the declarations he made to Capt. Butterfield, plainly shew there was an intention, both on his part and on the part of his privates, to manifest his and their disapprobation and contempt of the orders which had been issued?

I cannot see what inducement, comporting with innocence and duty, Capt. Loring could possibly have, in providing himself (*before he came on the field*) with the paper he calls a protest. The subject and tenour of that paper perfectly coincide with the conduct of his men, and the determinations he had declared to Capt. Butterfield. The protest could not be calculated for any good purposes. It could effect nothing less than *embarrassment* and *insult*

to his superior officers. *He did not deliver it until he was ordered from the parade, and had quitted the line.* It could not therefore be intended to operate against his being assigned any *particular grade* in the line. The protest was not offered, as appears by Capt. Brazer's testimony, until *after* his place had been assigned to him, and he ordered into it, and had taken it, during all which time he kept it in his own pocket. It was totally unnecessary, in point of *precaution*, for by his own confession he had before that time memorialized the Commander in Chief on the subject of the General Order of the 20th June, 1805.

It was unquestionably the duty of Capt. Loring, and every other officer, peaceably to acquiesce in that order. There had been differences in opinion respecting the relative ranks of three Captains in the Sub Legion of Light Infantry. It was necessary that the rank of those officers should be determined, before the Sub Legion could be properly organized. Captains Messinger, Davis and Loring had commanded companies *under Captain's Commissions*, which companies did not belong to the Sub Legion of Light Infantry. Neither of them had ever resigned those commissions. All three of them were placed in the Sub Legion of Light Infantry. The question was, How ought they to rank? It was decided and ordered, that all of them should receive new commissions, as Captains of Light Infantry, and that all of them should take rank from the respected dates of their former commissions, which last commissions, as I before observed, neither of them had resigned. By this arrangement, they held the same relative rank with each other in the Sub Legion of Light Infantry, as they did when *out* of that Sub Legion. Neither of them, by that arrangement, could gain or lose any rank by being placed in or transferred to the Light Infantry. He, who was the oldest Captain, was to continue the oldest; and he, who was the youngest, was to continue the youngest. I have been induced to be thus explicit on this head, as the General Order of the 20th June, either from not having been properly understood, or from design, has been much misrepresented.

I would now, Gentlemen, request your attention to the other parts of Capt. Loring's conduct on the parade on the 30th of Sept. The way and manner in which he came on to the field on that day, is shewn by the testimony of Gen. Winslow and Capt. Brazer; both of whom swear that he appeared with one Subaltern, four Sergeants, one drum and one fife. It appears, however, that his other Subaltern was on duty that day, acting as Adjutant to the Sub Legion of Light Infantry. It must of itself be considered a very singular and suspicious circumstance, that on a particular day not an *individual private* of a large Company should appear on parade. This is rendered more striking by the testimony of Isaac Rhoades (the orderly Sergeant of the Company) who swears that the Company paraded on the 16th September last by order of Capt. Loring,



at which time, he says, 46 rank and file turned out. He also swears that the Company paraded again on the 17th October last, by order of the Captain, but the precise number of men, which appeared on that day, he did not recollect. It therefore conclusively follows, that Capt. Loring's Company did not mutiny against him. The Court will judge from the evidence, whether the men did not mutiny for him, and at his instigation, or with his connivance.

I would here, Gentlemen, turn your attention to some further testimony, which forces upon my mind the belief of Capt. Loring's conniving at the mutiny. It is the testimony of Gen. Winslow, Capt. Brazer, Capt. Scott, and Ensign Munroe. The two latter gentlemen both testify to Capt. Loring's being informed of the intentions of his men not to parade on the 30th Sept. last, and that this information was given him two days previous to the parade. It appears from the evidence both of Gen. Winslow and Captain Brazer, that Capt. Loring did not make any communication to either of them on the subject. And that neither of them knew the situation of Capt. Loring's Company on the morning of the 30th, until he appeared before the Brigade, on the day of the review, in the manner he did. It appears from this part of the record of the evidence, that Capt. Loring knew of the intentions of his men prior to the 30th. His duty undoubtedly was, to communicate the information, either to Capt. Brazer, under whose immediate command he was, or to Gen. Winslow. If Capt. Loring had any doubt that his men would not conduct, on the 30th, in the manner he was informed, before that day, they intended to, he could not have had any doubt remaining on the morning of the day of parade. Not an individual private was present at the Company parade. His not communicating the situation of his Company to either Gen. Winslow or Capt. Brazer fully satisfies my mind that he was accessory to and did connive at the mutiny.

It further appears in evidence, that Capt. Loring, notwithstanding he issued orders to his Company after the 30th Sept. yet he never did reprimand his men in orders for their conduct on that day. As to his telling the men that "their conduct had placed him in an unpleasant situation, but that he had done his duty, and if they had not done theirs they must take the consequences, &c. ; that he should order the Clerk to collect the fines;" all of it is certainly very far from amounting to a reprimand, expressing that resentment and indignation at their mutinous conduct, which an officer would express and shew unless he participated in it. It appears from the testimony of Samuel S. Green, that fining the men does not operate as punishment upon them. He swears that the fines are appropriated to defray the expenses of the Company. If there should be no fines, the expenses must be defrayed by assessments. If the fines are sufficient to meet the expenses, no assessment is necessary. So that it is quite the same to the men, in a pecuniary view, whether they pay for expenses in the way of fines, or assessments.

There is, Gentlemen, on the record a great deal of testimony connecting a long chain of circumstantial evidence in support of the complaint, which could be readily pointed out; but as my sole object in bringing the Court together again, is, that you may review the evidence for yourselves, I deem it quite unnecessary for me to be more minute, than I have been. I have generally alluded to some of the most leading and commanding part of the evidence, and given you to understand the impression it makes on me. But I hope and trust, you will not permit any of my remarks to have any effect on your minds, further than those remarks are supported by the evidence contained in the record of your proceedings.

I cannot, Gentlemen, rest satisfied that I have discharged the duty incumbent on me on this occasion, if I should conclude this communication without any observation on Capt. Loring's mode of defence during his trial. It seems to have been his design, through the whole of his trial, to impress the Court with an idea or sentiment, that he had not been fairly treated, and that the question of rank between him and others was still in discussion and in a train for settlement. The rank of the officers in the Sub Legion of Light Infantry was settled and fixed by a principle which was practised upon in our army during the revolutionary war, and extends throughout the whole militia of this Commonwealth. The principle is this, "That an officer transferred from one corps to another in the same rank should retain the seniority of rank, which he held prior to the transfer." But the subject of relative rank has nothing to do with the trial, and ought not to have any bearing in the investigation of Capt. Loring's conduct, as it respects the complaint made against him. Courts martial do not sit, nor are they ordered to determine rank. They are ordered and sit for the trial of military offenders. The rank of the officers of the Sub Legion of Light Infantry was determined on the twentieth of June, 1805, by the highest authority, and that determination is binding upon all. The General Order of that date establishes the point, and it has the same force and efficacy wherever and to whomsoever it applies, as any law of the country.

In any event, whether you see cause to adhere to your former opinion, or to revise and alter it, you are not obliged, nor will it be proper for you to give any reasons. And you will be careful not to divulge your own individual opinions, nor those of others (belonging to the Court) unless you are called upon by that authority whose right it is, under the law, to investigate and know them.

Your humble Servant,

SIMON ELLIOT, Maj. Gen. First Div.

Boston, Jan. 6th, 1806.

The foregoing communication from the Maj. Gen. was read and considered by the Court. The Judge Advocate then inquired of



each and all the members, whether they were possessed of any reason to induce them to alter the judgment of the Court heretofore set forth on record.

The Court then decided, that they had not any reason to alter their former opinion and judgment. The Court then adjourned *sine die*.

#### COMMONWEALTH OF MASSACHUSETTS.

We hereby certify the foregoing to be a true record of the proceedings of the Court.

JOHN BARKER, *President*.

HENRY M. LISLE, *Judge Advocate*.

On the 10th April, 1806, the following Division Orders were issued:—

#### DIVISION ORDERS.

*Boston, April 10th, 1806.*

The Division Court Martial, which was ordered to convene at Boston, on Tuesday, the twenty-ninth day of Oct. last, did then and there meet, and after going through the trials of Lieutenants Valentine and Bacon, proceeded to the trial of Capt. Joseph Loring, jun. of the Sub Legion of Light Infantry in the Legionary Brigade, upon certain charges exhibited against him by Brig. Gen. Winslow, viz. "For disobeying a Brigade Order of the ninth of Sept. ordering a parade on Boston Common for review and inspection, on the 30th of the same month; also for disobeying a Brigade Order of the 16th Sept. directing the Sub Legion of Light Infantry to appear on the said thirtieth, with sixteen sporting cartridges; both of which orders the said Capt. Loring disobeyed, and in an unsoldierly manner came on said parade without any of his soldiers, and there entered a protest against said orders, by delivering to Capt. John Brazer, the senior officer of the Sub Legion of Light Infantry, a paper containing statements as facts which were untrue and unofficerlike for him to state, and containing objections to said orders, totally contrary to their true intent and meaning: and that Gen. Winslow had reason to believe that the said Capt. Joseph Loring, jun. did connive at, if not abet and procure the men under his command to mutiny against said orders, and to neglect and refuse to appear on said parade, to discharge their duty as soldiers on said day, agreeably to the spirit and intent of said orders, and did not make use of all his influence as their commanding officer, that they might appear. All which conduct tends to the subversion of good order and military discipline in said Brigade, and is a bad example to all others to offend in like manner."

Capt. Loring appeared in Court and plead not guilty to the several charges above recited; and after examining divers witnesses

and documents offered in evidence both for and against him, the following question was put by the Judge Advocate to each member, beginning with the lowest in grade:

"From the evidence which hath been adduced, both for and against Capt. Joseph Loring, jun. and from what he has offered in his defence, are you of opinion that he is guilty or not guilty of the first article or specification of charge, contained in the complaint?"

"The Court decided that of the first specification of charge, the said Joseph was not guilty.

"The same question, applied to each specification of charge, was put in the same manner to the Court, and the Court decided that of the three other specifications of charge, the said Joseph was not guilty.

"Whereupon it was declared to be the opinion of the Court, that Capt. Joseph Loring, jun. be acquitted of all and singular the charges or specification of charges exhibited against him."

On the 24th Dec. last, the Major General, having satisfied himself of the correctness of the decision of the Court, as it respected the trials of Lieuts. Valentine and Bacon, gave his approbation to the same, and ordered it to be carried into effect; but not being satisfied with the decision on the trial of Capt. Loring, he was under the necessity of ordering the Court to meet again, that it might review its proceedings.

The Court for that purpose was ordered to convene on the 5th of Feb. but owing to the sickness of Capt. Kinsley, (one of its members) it could not act upon the communication the Major General had prepared. The Court adjourned itself to the 25th of Feb. in expectation that Capt. Kinsley's health would permit his attendance at that time; but on the 17th of Feb. in consequence of information from Dr. Samuel Danforth, who had visited the sick member at Canton, and had given his opinion that he would not be able to attend the Court at the expiration of its adjournment, the Major General suspended its meeting until further orders.

On the 20th of March, information being received that Capt. Kinsley would probably be enabled to attend by the 31st, orders were issued for the Court to meet at Boston, on Wednesday the 2d of April, when and where it did convene, and the opinion of the Major General was communicated. The Court then reviewed its proceedings, and saw fit to adhere to its decision.

The Major General has attentively perused and carefully examined the record of the proceedings of the Court, together with the papers, which accompany the same, all which have been transmitted to him for his approbation or disapprobation.

And, although it is a painful duty, yet after mature consideration, he feels it incumbent on him to declare, that from the evi-



dence, which appears on the record, he should have expected a different decision; and he cannot, consistently with his oath of office, give his approbation to the judgment and decision of the Court.

The Major General therefore *disapproves* of the same.

The Court, whereof Lieut. Col. John Barker is President, is dissolved.

Capt. Joseph Loring, jun. is discharged from his arrest.

*By order of the Maj. Gen. of the 1st Division.*

JOHN T. SARGENT, A. D. C.

#### NOTE.

IT is necessary to remind the reader, that Capt. Loring addressed a letter, in Jan. 1806, to his Excellency Gov. Strong, stating that he was still under arrest, but could not hear the result of his trial, and requesting his Excellency's interference; to which he received an answer from his Excellency, by the Adjutant General, "that he had no doubt but that General Elliot would do right."—Capt. Loring, and the members of his company, then addressed the Legislature, in Feb. 1806, in the form of memorials, which were referred to a committee, who reported, that the signers have leave to withdraw their memorials. For the further proceedings, we extract from Capt. Loring's "Facts and Documents," pp. 5, 6, 7, & 8, and publish his Memorial and Resignation.

"On the 20th of June, 1805, Gov. Strong ordered me to receive a new commission as Captain of Light Infantry. I was contented with the commission I then held, *conformably to my enlistment*, and refused to give up the rank it entitled me to, and did not qualify myself to the new commission with an interpolated clause.

"On the 28th of July following, I remonstrated to Gov. Strong against this order, and forwarded a copy of the Protest delivered Gen. Winslow the 22d of July, 1805, at the first meeting of officers after the General Order.

"About the 12th of March, 1806, I published a collection of facts, supported by documents, relative to the unpleasant situation in which I and my company then found ourselves.

"In June, 1806, I sent my resignation to Gov. Strong, with my reasons, (it being customary so to do) and stating that my situation was too much embarrassed for me to continue any longer a Captain in the Legionary Brigade. Although I requested to be discharged, Gov. Strong paid no attention to me, except that now and then, when spoken to on the subject, he would call me a *certain Capt. Loring, whom he did not know.*

"Capt. Davis, my competitor, was appointed Judge Advocate for the Division, in May, 1806. This gave him the rank of Major, but he still continued to do duty in the line, and to act as Capt. of his company, till he procured another arrest and condemnation.

"Believing that Capt. Davis' supposed superiority could not bear the test of investigation; and also, presuming that his office of Judge Advocate, (a Staff Officer) ought to disqualify him for discharging any duty in the line—On the 26th July, 1806, I returned to him the orders, which as Senior Officer pro tem. he had sent to me. This led to the correspondence between him and me, which terminated in an arrest and condemnation."

*To the Honourable Senate and House of Representatives of the Commonwealth of Massachusetts, in General Court assembled.*

#### THE MEMORIAL OF JOSEPH LORING, JUN.

RESPECTFULLY REPRESENTS,

THAT he holds a commission, as captain of the Washington Light Infantry, so called, an uniform company raised by voluntary enrollment, in the town of Boston, in obedience to division orders, June 7, 1803, signed by his Excellency CALEB STRONG, as Governor.

That after surmounting many difficulties in uniforming, organizing and disciplining said company, he paraded with them at a general review, on Boston common, on the 30th Oct. 1804; and took his rank agreeably to the date of his commission, and agreeably to directions from Brig. Gen. Winslow, which rank and date of commission carried him above capt. Charles Davis, commanding the company called the Boston Light Infantry, and whose commission bore date in June, 1804, nearly a year posterior to that of your memorialist.

The said capt. Charles Davis, was commissioned as a captain of a standing militia company of Ward No. 12, in Boston, on the 12th of April, 1803.

That he relinquished his command and ceased to act under his said commission, and was chosen captain of the Boston Light Infantry, in June, 1804; and received from his excellency the Governor, a commission bearing date in June, 1804; conformable to his election, and by virtue of the date of his last mentioned commission, took rank below your memorialist, on all occasions, and particularly on the public parade at the general muster on the 30th Oct. 1804.

But, may it please your honors, the Governor and Council, in June, 1805, saw fit to order, that the said capt. Charles Davis should receive a new commission, bearing date June 20, 1805, containing a clause in the body of said commission, that he the said Davis, should take rank from the 12th of April, 1803, the date of his first commission in the militia which he had long since resigned.

By which order and commission the said Davis was, in the opinion of your memorialist, authorised to supersede the subscriber, who had for about a year been considered as superior in rank to the said capt. Davis.

This order of the Governor, authorising an officer to take rank from a period different from that of the date of his commission, your memorialist has ever considered as contrary to the law of this commonwealth, passed June 22, 1793, which expressly says, "that all officers shall take rank



according to the date of their commissions, except in case of two officers of similar grade, having commissions of the same date: then, and in that case only, their relative rank shall be determined by lot or by prior pretensions." Relying upon this law of the commonwealth, your memorialist has never ceased, on all proper occasions, to bear testimony against an arrangement which he considers as calculated to supersede and degrade him, and to compel him to resign. But knowing it to be in pursuance of an order of the commander in chief, your memorialist has been determined to conform himself peacefully and respectfully to this arrangement, until by proper representations he can obtain the revocation of an order, thus unjustly operating to his disadvantage.—And not only to his personal disadvantage and mortification, but to the degradation of his whole company, who having voluntarily enrolled, uniformed, and equipped themselves, consider this as a grievance to themselves as well as to their captain.—And it is now found very difficult to induce them to turn out with that alacrity, spirit and pride, for which they were distinguished before the date of this order of the Governor, in June last, which has thus authorised the Boston Light Infantry, commanded by capt. Davis, to outrank and supersede the Washington Light Infantry commanded by your memorialist.

And your memorialist begs leave further to represent to the honourable Legislature, that on the 30th Sept. last past, being a day of general muster of the Boston troops, under Brig. Gen. John Winslow, on Boston common; after your memorialist had been dismissed from the field, he subscribed and forwarded a protest against being placed in the line below the said capt. Davis, whom he had formerly commanded, and one capt. Daniel Messinger (since that time promoted to the rank of Major, by the appointment of the governor) both of whose commissions bore date posterior to that of your memorialist, with similar unprecedented clauses, giving to each of them a rank superior to your memorialist, in the body of a commission of nearly two years more recent date than that of your memorialist.

To the alledged offence of presenting this protest, although drawn up in modest and respectful terms, your memorialist was, by Brig. Gen. John Winslow, on the 7th Oct. put under arrest; and a Court Martial was, by Maj. Gen. Simon Elliot, ordered for his trial; which court convened on the 29th Oct. 1805.

But through a neglect of the Brigadier General, or his Brigade Major, your memorialist did not receive the notice of the appointment of the time and place of trial within the time prescribed by law, which caused a delay till 19th of Nov. before the court entered on his trial. That after entering on his trial, the court continued till the 9th of Dec. examining witnesses against him and deliberating on the matters submitted by his prosecutor for their consideration. And your memorialist has reason to believe, that the court then, after a full examination of twenty witnesses, produced by the prosecutor, made up their opinion of his charges; and that they in due time and in due form, sent the result of their deliberations to the honourable Maj. Gen. Simon Elliot, the officer who ordered the court, and whose duty it is, or ought to be, seasonably to promulgate the sentence of the court, whether it be for or against the person on trial.

Now, so it is, may it please your honors, that although your memorialist, from his conscious innocence and uprightness of intention, is persuaded that the result of that enquiry would, if made known, prove in a high degree favourable to his character; yet the Major General of the first division has seen fit hitherto to suppress it, and thereby kept his prisoner's acquittal or condemnation a profound and impenetrable secret from him

and from his friends. By which means the character of your memorialist is hung up in an embarrassing suspense between guilt and innocence; and is liable to suffer injurious imputations from such of his fellow citizens as at a distance heard of his arrest and trial, and had not the opportunity of attending and witnessing the fatality and groundlessness of the complaint against him.

And your memorialist begs leave further to state, that after waiting for upwards of twenty days from the time the proceedings against him were handed to the Major General, viz. on the 24th Dec. he wrote a letter to the Major General, in decent and becoming language, requesting that the event of his trial might be promulgated as early as consistent with the General's convenience, and a tender regard to the wounded feelings of the person accused. To this application the Major General has never seen fit to vouchsafe an answer.

And your memorialist further states, that his business calling him to a distant part of the Union, he felt induced by a respectful letter, addressed to the commander in chief, to solicit his attention to a matter which he deemed within his cognizance, and by which your memorialist felt himself so essentially aggrieved.

But from no quarter has he yet obtained any relief, or even the slightest attention; although it is known that his situation is such as to make it very improper, and embarrassing to his affairs, thus to be detained in arrest for such an unreasonable and illegal length of time.

Wherefore may it please your honors, as there now appears no tribunal to which your memorialist can appeal with any prospect of attention and redress except to this honourable court, and having been under arrest nearly five months, ignorant of the event of the severe, tedious, and protracted trial, which he has been compelled to sustain, degraded from the rank which he had never forfeited by any unmilitary conduct, or neglect of duty; and unnecessarily detained by reason of arrest for nearly half a year, from the prosecution of his own private and commercial concerns: he most humbly requests this honorable court not to turn a deaf ear to this his respectful complaint—that they would, in their wisdom, their justice, their humanity, and their mercy, take some legislative steps (since all others seem ineffectual) to restore him to his rank, and to discharge him from an arrest under which he has been so long, unreasonably held, by which he has suffered great injury in his pecuniary concerns, and by which it is possible his good name (dearer than life to every man worthy of a commission) may labor under the most injurious imputations, unless some mode can be adopted whereby his condemnation or acquittal may be speedily known.

If it is expedient and proper that an officer should be put under arrest, and detained from the pursuit of his lawful business for half a year, it is hoped the legislature will see fit in their wisdom to grant him at least a pecuniary remuneration to which his commission would entitle him in actual military service.

But if, on the other hand, your honors should be of opinion that the time your memorialist has been under arrest is unreasonable, illegal and oppressive; he humbly hopes and trusts the legislature will interfere with their sovereign hand and restore him to his company, to his family, to his friends, and to the world, with that untarnished reputation which he has ever thro' life sustained, and to which his conscious innocence induces him to believe the event of his trial will ultimately prove favorable—and as in duty bound will ever pray.

JOSEPH LORING, JUN.  
Capt. Washington Light Infantry.  
(now under arrest.)

Boston, Feb. 21, 1806.



## COMMONWEALTH OF MASSACHUSETTS.

TO HIS EXCELLENCY THE COMMANDER IN CHIEF.

SIR—

HAVING served upwards of two years and nine months, as a Captain in the legionary brigade, first division of the militia of this Commonwealth, I am desirous of being discharged from said office, for the following reasons—viz.

- 1<sup>st</sup>. Because I consider myself *superseded* and *degraded* by the General Order of June 20th, 1805, ordering my company to be attached to the sub legion of light infantry, (contrary to their enlistment) and ordering Capts. Messinger and Davis to take rank over me and my company, by granting them new commissions, with interlineations, giving them rank prior, by years, to the dates thereof, and prior to the dates which legal commissions, conformably to their elections, could possibly give them; and, in my opinion, in direct violation of the Constitution, (chap. 2, sect. 1, art. 7) which says, "and that the Governor be entrusted with all those and other powers, incident to the offices of Captain General and Commander in Chief, and Admiral, to be exercised agreeably to the rules and regulations of the Constitution, and the laws of the land, and not otherwise."
- 2<sup>d</sup>. Because there was not ordered a *board of militia officers*, to hear both parties, and to determine the dispute of my rank, before that order was issued, which has ever been the custom in the militia of this state—And because I have remonstrated and protested against that order, (considering it was my duty by my oath, and in hopes it would have been modified) but cannot have any attention shown me, which every officer under the government is more or less entitled to.
- 3<sup>d</sup>. Because said order is, in my apprehension, calculated to supersede me, and for no other good or valuable purpose.
- 4<sup>th</sup>. Because that order places me under the command of officers, who, by their conduct towards me, have forfeited all claims to my respect.
- 5<sup>th</sup>. Because that order caused the degradation of my commission, by placing me under the command of officers with commissions of a posterior date; over one of whom I had been stationed Oct. 30th, 1804, by virtue of my said commission, being prior to the date of the one he acted under at that time, and which he voluntarily accepted when elected.
- 6<sup>th</sup>. Because the oath I took when I accepted my commission, obliges me to execute that commission according to the Constitution and Laws of the State; and I am, by the General Order of 20th June, 1805, compelled, as I conceive, to violate my oath, or else to disobey the orders of my superiors.
- 7<sup>th</sup>. Because I cannot consent to continue in a situation, where the path of my duty has been so embarrassed as of late, and without any cause or provocation on my part.
- 8<sup>th</sup>. Because I find it too embarrassing to be obliged to obey orders contrary to law, or else to be tried by a Court Martial, for disobedience of said orders; and when I ask for explanations of my superior officers, they cannot answer me, or will not notice me, purposely to create (in my opinion) complaints against me.
- 9<sup>th</sup>. Because I have been compelled to be tried for a crime under the *martial law* (although the Constitution says, "no person can in any case be subjected to law martial, but by authority of the legislature") by being arrested and charged by Brig. Gen. John Winslow, of the legionary brig-

ade, and ordered on trial before a Court Martial, by Maj. Gen. Elliot, of the first division, for the *crime of mutiny*, which is not known in the militia law.

10<sup>th</sup>. Because, in the first division, it appears to be the practice for alleged offences, to keep republican officers under arrest for half a year.

11<sup>th</sup>. Because the Major General of the first division, under whose command I am, has seen fit to disapprove of the judgment which an impartial Court Martial have passed upon me, and has published to the world, that there is an unspecified something in the records of their proceedings, from which he expected a different decision; thereby, in my opinion, conveying the idea, that the members of the court had not done their duty, and that I ought to have been condemned.

12<sup>th</sup>. Because I find an officer in the first division is not governed by the militia laws of the State, which say, "in every court martial held for the trial of an officer, not less than two thirds of the members must agree in the sentence or judgment of said court, otherwise the person charged shall be acquitted;" also, "and it shall be the duty of every officer, who shall appoint a court martial as aforesaid, to approve and disapprove of every sentence of such court martial"—Since the Major General takes the right, not only of holding an officer under *arrest*, after being *tried* and *cleared*, but of disapproving a judgment that is favorable to the prisoner; thereby making it needless for an officer to defend himself, or to support his innocence before a Court Martial, knowing it must depend upon the will of the officer who appoints that Court.

13<sup>th</sup>. Because, if this right is assumed and submitted to, in my opinion no officer's character can be safe, if he is in any way disagreeable to a superior officer, although he may do every part of his duty conformably to law.

14<sup>th</sup>. Because the right of election, in my opinion, is taken away from the sub legion of light infantry, to which I am ordered, by appointing a Major to command them without an election of the present officers—for the law, dated June 22, 1793, sect. 15, says, "and if any such corps raised at large shall be destitute of commissioned officers, and shall neglect to fill up such vacancies for one whole year after being ordered to elect them, such corps raised at large, shall be deemed disbanded," &c. &c.—And further, because the General Order of August 2d, 1798, is not, to this day, *countermanded*, which order did *organize* the brigade, conformably to a resolve of the Legislature; therefore, I presume to think, there is no law by which this corps can be governed or organized anew—(except by that, which was made by the Legislature of the State, or granted to the Governor and Council, by them to be made, in the year 1798, which resolve only permitted the organization of the brigade of Boston;) unless a new statute or resolve is adopted by this State or the United States, in lieu thereof.

For these, among many other reasons, my situation has become unpleasant and embarrassing; and I am reduced to the dilemma of being compelled, from a conscious rectitude of conduct, to disrespect some of my superior officers; or else disrespect myself.—In the one case, cannot yield that cheerful obedience that a subordinate ought to yield. In the other case, I cannot feel that conscious dignity and pride, without which a commission should never be retained.

I am sensible of the obligation enjoined upon me by the laws, to continue in the exercise of my office, until regularly discharged by your Excellency, or by the address of both houses of the legislature; and I shall not fail of fulfilling my duty *agreeably to law*—In the mean time I doubt not but your Excellency will candidly consider my request, and also my



peculiar situation as an officer, who ought not, (if he is to support his oath and honour) to command a company under his present commission.

Therefore, I feel confident, from these considerations, your Excellency will grant me a discharge.

With high respect, I am, your Excellency's most obedient, and very humble servant,

JOSEPH LORING, Junr.

*Capt. in Legionary Brigade.*

*Boston, June 15, 1806.*

## CAPT. LORING'S SECOND TRIAL.

*Minutes and Proceedings of a Division Court Martial, begun and holden at Boston, in the County Court House, on Tuesday the 28th day of Oct. in the year of our Lord 1806, by order of the Hon. SIMON ELLIOT, Esq. Maj. Gen. of the 1st Division of the Militia of the Commonwealth of Massachusetts, on the trial of Capt. JOSEPH LORING, Junr.*

THE Maj. Gen. having been informed by communication from the President of the Court, that Lieut. Obed Sherman, who was detailed as a member of this Court, was prevented by sickness from attending to the duties thereof, was pleased to issue the following order; in consequence of which, Lieut. Nicholas Pierce was detailed to serve in his room, and attend accordingly:

### DIVISION ORDERS.

*Boston, Oct. 28, 1806.*

Brig. Gen. Winslow will detach a Subaltern from his Brigade, to attend as Member of the Division Court Martial, whereof Lieut. Col. Apthorp is President, to serve in the place of Lieut. Obed Sherman absent by sickness.

(Signed) SIMON ELLIOT, *Maj. Gen. 1st Div.*  
*Brig. Gen. Winslow, Leg. Brigade.*

### BRIGADE ORDERS.

*Boston, Oct. 28, 1806.*

Lieut. Nicholas Pierce, of the Sub Legion of Artillery, is ordered to attend as a Member of the Division Court Martial, of which Lieut. Col. Apthorp is Presi-



dent, now sitting at the County Court House, for the trial of Capt. Joseph Loring, Jun.\*

(Signed) JOHN WINSLOW, *Brig. Gen. Leg. Brigade 1st Division*

*Lieut. Nicholas Pierce, Artillery.*

(Copy) CHARLES CLEMENT, *B. M.*

PRESENT—

LIEUT. COL. JOHN T. ARTHUR, Independent Company of Cadets,  
PRESIDENT.

*Members.*

Maj. JOSEPH BENT, 3d Reg. 1st Brigade, 1st Division.  
Maj. LUTHER METCALF, 3d Reg. Inf. 2d Brig. 1st Div.  
Maj. PETER OSBORN, Leg. Inf. Leg. Brig. 1st Div.  
Maj. JEREMIAH LINCOLN, 2d Reg. Inf. 1st Brig. 1st Div.  
Capt. EDWARD WILDER, 2d Reg. 1st Brig. 1st Div.  
Capt. JOSEPH JONES, 1st Reg. Inf. 1st Brig. 1st Div.  
Capt. SYLVANUS ADAMS, Cavalry, 2d Brig. 1st Div.  
Capt. WM. PETERS, 1st Reg. Inf. 2d Brig. 1st Div.  
Capt. DAVID COBB, Sub Legion Art. Leg. Brig. 1st Div.  
Lieut. NICHOLAS PIERCE, Sub Legion Art. Leg. Brig. 1st Div.  
Lieut. JAMES JONES, Cav. 1st Brig. 1st Div.  
Lieut. JOSHUA STETSON, 3d Reg. 1st Brig. 1st Div.

HENRY M. LISLE, Esq. Adjutant of Cavalry, 1st Brig. 1st Div.  
*Judge Advocate.*

LIEUT. ABRAHAM EDWARDS, Adjutant Sub Legion Artillery, Leg. Brigade, *Marshal.*

The following orders were produced and read by the Judge Advocate :

#### FIRST DIVISION.

DIVISION ORDERS. *Massachusetts Militia.*

*Boston, Sept. 22, 1866.*

A Division Court Martial is hereby appointed to be held at the County Court House, in Boston, on Tuesday the 28th day of October next, for the trial

\* Gen. Maltby and others made a report against Lieut. Gov. Lincoln, in the case of detaching Col. Badger and others; because he did not issue his orders through the regular channel; but in the important point of a regular detachment, to set on a Court Martial, which ought to be sacred, we find Lieut. Pierce especially ordered to attend, without Maj. Johnson, who commanded the battalion to which he belonged, having any knowledge thereof.—*Note by Capt. LORING.*

of Capt. Joseph Loring, Jun. of the Sub Legion of Light Infantry of the Legion Brigade, upon charges exhibited against him, by Charles Davis, Esq. Capt. in the said Sub Legion, for "*unmilitary conduct, neglect of duty, and disobedience of orders.*"

*President,*

LIEUT. COL. JOHN T. ARTHUR, Independent Company of Cadets.

*Judge Advocate,*

HENRY M. LISLE, Esq. of the Cavalry in 1st Brigade.

The *Members* to be detailed in the manner following, viz. From the 1st Brigade, two Majors, two Captains and one Subaltern—From the 2d Brigade, one Major, two Captains and two Subalterns—From the Legionary Brigade, one Major and one Captain.

Brig. Gen. Winslow will order one Adjutant to attend the Court as Marshal.

Per order of the Maj. Gen.

JOHN T. SARGENT, *A. D. C.*

(Copy) Sam. M. Thayer, *B. M. 1st Br. 1st Div.*

The President, Members and Officers ordered on this Court Martial were all present. Then the President and each of the Members of the Court and the Judge Advocate, in open Court, and before the Court proceeded to trial, respectively had the oaths administered to them, as directed by the 35th Section of an Act, passed June 22d, 1793, which is entitled, "An Act for regulating and governing the Militia of the Commonwealth of Massachusetts, and for repealing all Laws heretofore made for that purpose, excepting an Act, entitled, an Act for establishing rules and articles for governing the troops stationed in Forts and Garrisons within this Commonwealth, and also the Militia when called into actual service." Capt. Joseph Loring, Jun. on being called, appeared and answered in his proper person.

The complaint exhibited against Capt. Joseph Lor-



ing, Jun. was then read to him and the Court, in the words and figures following, viz.

To John Winslow, Esq. Brigadier General of the Legionary Brigade, in the 1st Division, of the Militia of the Commonwealth of Massachusetts.

RESPECTFULLY COMPLAINS—Charles Davis, senior Officer (in the absence of Maj. Daniel Messinger) of the Sub Legion of Light Infantry in said Brigade, against Capt. Joseph Loring, Jun. of the aforesaid Sub Legion, for “*unmilitary conduct, neglect of duty and disobedience of orders,*” of all which offences your complainant alleges, that the said Capt. Joseph Loring has been guilty, in many and divers instances, particularly in the specifications of charge therewith exhibited.

*Specification 1st.* For that your complainant on the 24th day of July last past, received certain Division Orders, under date of the 16th of the same month, together with certain Brigade Orders, under date of the 16th of the same month, which Division and Brigade Orders were directed to your complainant as “Senior Officer pro tem. of the Sub Legion of Light Infantry, Legionary Brigade,” which Orders with Sub Legion Orders predicated thereon, and bearing date the 26th day of the same July, your complainant, as was his duty, regularly transmitted to the said Capt. Loring, whose duty it was to receive the same. But the said Loring, at Boston, on the said 26th day of July, wilfully neglected his duty, and then and there, in an unmilitary and unofficerlike manner, all the orders before alluded and referred to, refused to receive.

*Specification 2d.* For that your complainant, on the 1st day of August, inst. as senior officer pro tem. of the said Sub Legion of Light Infantry, did make a communication in writing to the said Capt. Loring, concerning neglect of duty set forth in the first specification. In which communication your complainant did enclose Division Orders, of July 16th, 1806; Brigade Orders, of July 18th, 1806; and Sub Legion Orders, of July 26th, 1806; and by that communication your complainant did order and require the said Capt. Loring's compliance with, and obedience to, the said orders enclosed as aforesaid, notwithstanding all which the said Captain Loring did at Boston, on the 4th day of August inst. wilfully disobey all the orders before mentioned, and then and there in an unofficerlike manner did return said communication and order to your complainant, without having acted upon them.

*Specification 3d.* For that the said Capt. Loring, at Boston, on the 5th day of March last, he then and there holding and bearing a commission in the Militia of this Commonwealth, regardless of his duty as an Officer, and apparently with a design to destroy that harmony, subordination, and faithful obedience to orders among the Officers and soldiers of the said Militia, on which depend the

respectability and usefulness of our Military establishments; did compose, compile, and publish, or cause to be composed, compiled, and published, a certain Pamphlet, entitled “An exhibition of Facts, supported by documents, for the information of the Militia Officers of the State of Massachusetts,” with an address to the public, and certain notes of references contained in the same Pamphlet; and then and there the said Capt. Loring, regardless of his duty as aforesaid, the same Pamphlet, together with the said address and notes, made public, and distributed, or permitted, or caused to be distributed among the Officers and soldiers of the Militia of this Commonwealth; and your complainant alleges that the said Pamphlet, together with the address and notes or references aforesaid, contains many false statements of pretended facts, and many misrepresentations, all directly tending and calculated to disorganize the said Militia, to create jealousies and ferment discords among its Officers and soldiers, to encourage and sanction disobedience of orders, and to bring the Military establishment of this Commonwealth into contempt; and your complainant further alleges that the said Capt. Loring's “conduct” in publishing the said Pamphlet, with the said address and notes, at the time he did publish or cause the same to be published, was highly improper, unmilitary, and unbecoming him as an Officer; and so far from the said Pamphlet's having been intended to give correct information to the Officers of the Militia, it was directly and manifestly calculated to deceive and mislead all those who unfortunately might suppose it was a fair and honourable “exhibition of facts,” and believed it contained nothing but truth.

And your complainant further alleges, that the said Pamphlet, with the address and notes, published by the said Loring as aforesaid, is highly injurious to many Officers, and to your complainant in particular, as he is in the same Pamphlet and notes often named and represented in a manner reflecting on his integrity and honor as an Officer, and calculated to destroy the usefulness of your complainant's command in the said Sub Legion of Light Infantry.

For all which “*unmilitary conduct, neglect of duty, and disobedience of orders,*” in Capt. Joseph Loring, Jun. your complainant requests, that he may be put in arrest, and subjected to answer to the above complaint, and such other, or others as may be legally exhibited against him, and that such proceedings may be had in the premises as to law and military usage appertain.

CHARLES DAVIS,  
Capt. Sub Legion Lt. Infantry, Leg. Brig. and Senior Officer  
of the same Sub Legion in the absence of Maj. Messinger.  
Boston, Aug. 30, 1806.

Maj. Gen. SIMON ELLIOT,  
Enclosed is a complaint against Capt. Joseph Loring, Jun. of  
the Sub Legion of Light Infantry in the Legionary Brigade, first  
Boston, Sept. 16th, 1806.



Division, from Capt. Charles Davis, of said Sub Legion, Senior Officer pro tem. who I have arrested to answer to the charges set forth in said complaint, and I have served him with a copy thereof; must beg the favor that a proper Court may be appointed to try the same.

I remain with respect, Sir, your most humble servant,

JOHN WINSLOW,  
Brig. Gen. Leg. Brig. 1st Div.

Capt. Joseph Loring, Jun. was then asked by the Judge Advocate whether he was *guilty* or *not guilty* of the charges alleged against him in the above recited complaint?

Captain Loring answered, that thereof he was *not guilty*.

Capt. Loring was then asked by the Judge Advocate, if he had any objections or challenge to make against any one or more of the Officers intended to compose the Court Martial for his trial, why he, or they should not sit as members?

He answered he had.

He was then directed by the Judge Advocate to produce his cause of challenge in writing, that *that* part of the Court not objected to might decide thereon.

Capt. Loring then produced a paper, which was read, as follows:—

As I am called on, by the Judge Advocate, to offer objections to any of this honorable Court, I take the liberty to object to Col. Apthorp's sitting on my trial, either as President, or Member; because it cannot be his regular turn. The Company of Cadets furnished one officer at the last Division Court Martial, and Col. Welles, their former Captain was President of the last Division Court Martial except two.

Thomas Badger, Esq. Lieut. Col. Commandant of the Legion, is older in commission than Col. Apthorp, and has never been selected for any Court Martial.

Although I am not pleased with Col. Apthorp for my Judge, I do not object to him on account of any personal ill will; I should take the same freedom with

any member, that I believed was not regularly detached to this duty, according to an impartial roster.

It is allowed by all writers, that I have a right to challenge, for cause shewn to the satisfaction of the Court.—I will, if the Court please, read an authority from Adie's Treatise on Courts Martial,\* in support of my right to a peremptory challenge.

JOSEPH LORING, jun. Capt.

The Court was then cleared, and decided that the objections, offered by Capt. Loring, were insufficient, that the challenge was not supported, and that Lieut. Col. Apthorp retain his seat as President of the Court.

The Circuit Court of the United States was in session, and occupied the room in which the Court was ordered to sit; it therefore became necessary to adjourn the Court to some convenient place. The Court was therefore accordingly ordered to be adjourned forthwith to the Center School-house, in School-street; which was done in due form by the Marshal.

Center School-house, School-street, Boston, Oct. 28th. 1806,  
20 minutes past 3 o'clock, P. M.

The Court met agreeably to adjournment, and on being called, all answered in their places. Capt. Joseph Loring, on being called, answered in his proper person.—The Court was then ordered to be adjourned to this place until the morrow, at 9 o'clock, A. M.

Center School-house, School-street, Boston, Wednesday Oct. 29, 1806.

The Court met agreeably to adjournment, and on being called, all answered in their places. Capt. Joseph Loring, jun. on being called, answered in his pro-

\*“The nature of challenges I shall consider more particularly in the second part of this work, and only now make a few remarks on an opinion that has been entertained, that a prisoner has not a right to challenge a member of a Court Martial, without assigning reasons for so doing; and that if those reasons do not appear sufficient to the Court, the person so challenged has a right to sit as a member on the trial. An instance of this sort happened on the trial of Lord George Sackville, who excepted against Gen. Belford; and having, by desire of the Court, given his reasons for it, they were adjudged to be insufficient, and the General desired to take his place; but he, with great propriety, declined sitting as a member on the trial.”—ADIE, p. 116.



per person. The proceedings of the preceding day were read by the Judge Advocate to the Court; audience of evidence was then asked for, by the Judge Advocate, and granted by the Court.

Capt. Charles Davis sworn, interrogated, and answered as follows:

*Question*, by Judge Advocate. In what capacity do you serve in the militia?

*Answer*. I am a Captain in the Sub Legion of Light Infantry in the Legionary Brigade, acting in the line as Captain, but hold a Commission as Judge Advocate of the 1st Division with the rank of Major.

*Q.* by Judge Adv. Is this the order transmitted by you to Capt. Joseph Loring, Jun.?

*A.* It is. I received it directed to me as Senior Officer of the Sub Legion, and transmitted it accordingly to Capt. Loring, and the other Captains. The order was then read by the Judge Advocate to the Court, in the words and figures following:

#### DIVISION ORDERS.

*Boston, July 16, 1806.*

The Division Court Martial, ordered to be holden at Boston, in the County Court House, on Wednesday the 2d instant, for the trial of Lieut. Reuben Sanborn, of the Infantry in the Legionary Brigade, upon certain charges exhibited against him by Capt. Daniel Badger, of Infantry of the Legionary Brigade, then and there convened and organized as follows:

##### *President.*

Lieut. Col. BENJAMIN HAYDEN, 3d Regiment, 1st Brigade.

##### *Members.*

Maj. JAMES ROBINSON, Bat. of Artillery, 1st Brigade.  
 Maj. GEORGE ELLIS, 1st Regt. 2d Brig.  
 Maj. WM. SULLIVAN, Independent Company of Cadets.  
 Capt. EDWARD WILDER, 2d Regt. 1st Brigade.  
 Capt. BENJ. KINGSBURY, 3d Regt. 2d Brig.  
 Capt. NATHANIEL MINOTT, 1st Regt. 1st Brig.  
 Capt. JOHN COTTON, Sub Leg. of Light Infantry, Leg. Brig.  
 Capt. JOSIAH BENT, Squadron Cavalry, 1st Brig.  
 Lieut. ISAAC JOHNSON, Bat. of Artillery, 2d Brig.

Lieut. SCARLET HUDSON, 2d Regt. 1st Brigade.  
 Lieut. JOHN FRENCH, 3d, 2d Regt. 2d Brigade.  
 Lieut. JOSHUA C. CLARK, 1st Regt. 1st Brigade.

##### *Judge Advocate.*

CHARLES DAVIS, Esq. Judge Advocate of the 1st Division.  
 Lieut. JOHN WINSLOW, Jun. Adjutant of the Sub Legion of Lt. Infantry, Legionary Brigade, *Marshal* of the Court.

Lieut. Reuben Sanborn appeared in Court in his proper person, and on being called, answered: the Judge Advocate, after reading to him the complaint exhibited against him, asked him if he were *guilty* or *not guilty* of the charges therein alleged against him; Lieut. Sanborn plead that of the charges alleged against him in the complaint, he was *not guilty*.

From the evidence which has been adduced for and against Lieut. Reuben Sanborn, and from what hath been offered in his defence, the Court decided, that Lieut. Sanborn was guilty of such a part of the charges set forth in the complaint as is comprised in the words following: "That on the 23d day of April last, the said Reuben Sanborn, did receive an order from Capt. Daniel Badger, his superior Officer, which order the said Lieut. Sanborn did disobey; and further, that the said Lieut. Sanborn, on the 23d day of April aforesaid, did write and send an unofficerlike letter to the said Captain Badger." Whereupon the Court did adjudge the said Lieut. Sanborn to be guilty of "disobedience of orders," and also adjudged him to be guilty of "unmilitary conduct," in writing and sending the said letter as aforesaid.

*Thursday, July 3d, 1806.*

The Court, having taken into consideration the several offences of which it hath adjudged, and deemed Lieut. Reuben Sanborn, of the Infantry in the Leg. Brig. of the 1st Div. to be guilty, after full and mature deliberation being had, do sentence him to be removed from office, and do adjudge him incapable



of holding any military office, under this Commonwealth, for the term of two years.

(Signed) BENJ. HAYDEN, JUN. *President.*  
*Charles Davis, Judge Advocate of }  
 the First Division M. M. }*

The Maj. Gen. having examined and duly considered the minutes and proceedings of the Court, approves and affirms the judgment and sentence of the Court, and orders the same to be carried into effect, and the Court dissolved.

Per order Major Gen. 1st Div.  
 (Signed) JOHN T. SARGENT, *A. D. C.*

#### BRIGADE ORDERS.

*Boston, July 18, 1806.*

Transmitted by order of the Brigadier General.  
 (Signed) CHARLES CLEMENT, *B. M.*

#### SUB LEGION ORDERS.

*Boston, July 26, 1806.*

Transmitted by order of Capt. Charles Davis, senior Officer pro tem. of the Sub Legion of Light Infantry, Legionary Brigade.

JOHN WINSLOW, JUN. *Adjutant.*  
*To Capt. Joseph Loring, Jun.*

*Question,* by Judge Advocate. After transmitting the said order to Capt. Loring, did you in any wise hear from him, and what (if any) communication did he make to you on the subject of that order?

*Answer.* On the evening of the day I transmitted the order to Captain Loring, on my return to town, I received by somebody, whom I did not know, this letter, enclosing the order I had transmitted to Capt. Loring—which letter was then read by the Judge Advocate to the Court, in the words and figures following:—

*Boston, July 26, 1806.*

Capt. CHARLES DAVIS,

*Sir*—I received an order by a gentleman who I presume is appointed Adjutant of the Sub Legion of

Light Infantry. In the first place, Sir, I hold a commission granted by the government, dated Aug. 15, 1803, conformably to my election and enlistment for an Infantry Company, and which I now command, and if you hold one conformably to your election, and the roster of the State, it is dated June 7th, 1804, or June 20th, 1805. Therefore, Sir, you must suppose it would be derogatory for me as an Officer holding a commission under his Excellency Caleb Strong, Esq. Governor of this Commonwealth, dated August 15th, 1803, to receive orders from a Captain who marches under a commission that is posterior in date to mine. Therefore, Sir, I take the liberty to return you the order as I received it, with the date at the time it was handed me; as I cannot acknowledge you my superior Officer, without I perjure myself, as *my oath is binding*.—With due respect, I am your most obedt.

JOSEPH LORING, JUN.  
*Capt. of Infantry per Commission.*

Capt. Loring in open Court acknowledges the regular receipt of said order, that he wrote the said letter above mentioned to Capt. Davis, therein enclosing said order, and returning it to Capt. Davis.

*Q.* by the Court. On what day did you transmit said order to Capt. Loring?

*A.* 26th July, 1806.

*Q.* by Judge Adv. Had you any farther communication with Capt. Loring, relative to said order?

*A.* Yes, Sir. On the 1st of August, 1806, I made a written communication to Capt. Loring; this is it, which was read to the Court by the Judge Advocate, in the words and figures following:

*Boston, August 1, 1806.*

Capt. JOSEPH LORING,

*Sir*—You will observe, that I have been and am recognized by our superior Officers as being the senior Captain in the Sub Legion of Light Infantry; as such, it was my duty, Maj. Messinger being absent,



to transmit a copy of all orders, forwarded to me in that capacity, to each of the Captains or Commanding Officers of Companies in the Sub Legion. It is therefore your duty, as one of those Captains, to receive and comply with such orders, as I may, from time to time, during the absence of Major Messinger, transmit to you. I believe you must, upon reflection, form opinions very different from those, which it seems you entertained, when you made your communication to me under date of the 26th ult. With that belief, and with those feelings towards you as a brother Officer, which I hope and trust will ever actuate me, I give you further opportunity to do justice to yourself and your commission, by a performance of your duty. I therefore again transmit to you, enclosed, copies of Division Orders of the 16th, Brigade Orders of the 18th, and Sub Legion Orders of the 26th July last, and your compliance with, and obedience to, them is expected and required.

Yours,

CHARLES DAVIS, Senior Capt.  
and Commanding Officer of the Sub Legion of Light  
Infantry, in the absence of Major Messinger.

Capt. Loring acknowledges in open Court the receipt of this letter.

Q. by the Judge Adv. Did Captain Loring make any reply to your letter just read?

A. He did by letter. This is it. Capt. Davis then handed a letter to the Judge Advocate, which was read to the Court in the words and figures following:

Capt. CHARLES DAVIS,

Sir—I have yours of the 1st August, 1806, by which I am informed, that you received mine of the 26th ult. and I request you to observe, that I am recognized by the *Constitution* and *Law* as a Captain holding a commission, dated August 15th, 1803, signed by his Excellency Caleb Strong, Esq. and the United States and State Laws say, “that every Offi-

Boston, Aug. 4, 1806.

cer shall rank by the date of his commission,” and my oath obliges me so to do. Therefore, I cannot acknowledge you as my superior Officer, and cannot receive the path of my duty from an Officer, who I consider posterior in rank to me, because I think I know it myself, which duty is to support my commission. From these considerations, as well as my enlistment, I cannot receive an order in my situation from you; of course I am again under the necessity of returning you the Orders and your letter, it appearing to take an official form; knowing that I have always held the right to do justice to myself and my commission, I cannot assent that I do receive it from you.—With due respect, I am, your most obedient.

JOSEPH LORING, Jun.

Capt. of Infantry, per Commission.

Capt. Loring acknowledges in open Court, having written and sent the last read letter to Capt. Davis, and having returned to him the orders last forwarded, and his letter enclosed therein. The orders last forwarded to Capt. Loring by Capt. Davis, Capt. Loring acknowledges in open Court the receipt of, which last orders were read to the Court by the Judge Advocate.

[Division Orders, of July 16, 1806, &c. as in page 112, as far as the signature of Adj. John Winslow, in page 114, were then read to the Court.]

Question, by one of the Court to Capt. Davis. After Capt. Loring returned to you the first orders you transmitted to him, did you apply to any superior officer for directions?

Answer. I shewed the communications from Capt. Loring to a superior officer.

Q. same to same. Did you afterwards act in consequence of any directions from a superior officer?

A. I did act in obedience to the original Brigade Order of July 18th, 1806, finding that the Adjutant had omitted the direction to me in the first order



transmitted to Capt. Loring. The Brigade Order of July 18th, 1806, was then read by the Judge Advocate, to the Court, in the words and figures following:

### BRIGADE ORDERS.

*Boston, July 18, 1806.*

Transmitted by order of the Brigadier General.

CHARLES CLEMENT, B. M.

To Charles Davis, senior officer Sub Legion L. I.

*Boston, July 22, 1806.*

Adj. Winslow will transmit copies of the above orders to Captains Loring, Cotton, and Howe.

CHARLES DAVIS, senior officer Sub Legion Light Infantry, Legionary Brigade.

### SUB LEGION ORDERS.

*Boston, July 26, 1806.*

Transmitted by order of Capt. Charles Davis, senior officer pro tem. of the Sub Legion of Light Infantry, Legionary Brigade.

JOHN WINSLOW, Jun. Adj.

To Capt. LORING, Jun.

..... COTTON.

..... HOWE.

Major Charles Clement sworn, interrogated, and answered as follows:

Q. by Judge Adv. Are those Brigade Orders, just read, the original orders transmitted through you to Capt. Charles Davis? A. They are.

Q. by Judge Adv. Has there been any alteration made in the said orders, as it respects the direction to Capt. Davis since they were first issued?

A. There has: the word Major has been erased.

Q. by Judge Adv. When was that erasure made, and by whom?

A. The precise time I cannot say—it was made by the Brigadier, or myself, in my presence.

Q. At whose request?

A. The Brigadier's: he told me it was incorrect.

Q. by Defendant to same. Was the address of

that Brigade Order wrote at the time it was handed down, or was it wrote afterwards?

A. It was wrote at the time I copied the order and handed it down.

Q. to same by Judge Adv. Was the direction of the order, from the first existence of the order to Capt. Davis, directed to him as senior officer of the Sub Legion of Light Infantry? A. It was.

Capt. Davis again interrogated:

Q. by Judge Adv. Was the erasure of the word Major made in the Brigade Order previous to your transmission of your orders to Capt. Loring?

A. I think the erasure was made after the first copy was made to Capt. Loring, and am certain it was made before the second.

Q. by the Court to same. Was the erasure of the word Major made previous to the transmission of the first order to Capt. Loring?

A. I cannot, as I before said, be positive.

Q. same to same. Was it erased before the second order was sent to Capt. Loring?

A. It was, both in the original and copy, I am positive.

Q. by Judge Adv. to Capt. Davis. In what way and manner did you receive the last letter from Capt. Loring, which covered the orders you had transmitted to him?

A. The last communication I received from Capt. Loring, was handed me by a Mr. Bacon, I believe, who is Sergeant in Capt. Loring's company, as I stood in Court-street, without any seal to his communication covering mine and the orders, the seal of which had been opened and not sealed again.

Capt. Davis then produced a commission as Captain of the Legionary Brigade, bearing date 6th April, 1803, and another commission as Captain of a company in the Sub Legion of Light Infantry in the Legionary Brigade, dated 20th of June, 1805, ordering



him to take rank from the 6th day of April, 1803, the date of his former commission; both of which commissions were read to the Court.

Q. by the Court to Captain Davis. Had you any other commission in the Light Infantry, other than the commission you have now produced as Captain therein?

A. There was another commission which I had sent me, and objected to.\*

Q. same to same. Were you ever qualified under that Commission? A. Yes, Sir, I was.\*

Q. same to same. Did you ever act under that commission?

A. I never acted under that commission alone.

Q. same to same. Under what commission did you act if not under that alone?

A. I acted under my first Captain's, dated 6th April, 1803; that commission as evidence of my grade, and the other to shew the particular corps I was to command.

By order of the Court, a Captain's commission, dated June 7th, 1804, was produced by Capt. Davis, and read to the Court by the Judge Advocate.

Q. by the Court. When acting under the two commissions last mentioned, did you take undisputed rank, ranking according to the first?

A. No, I did not. It was disputed one day by Capt. Loring. Till Capt. Loring came into the line it was not disputed.

Q. by Defendant. Did you consult a superior Officer after you received my communications, and did that superior Officer direct you to return the orders as they were the last time sent with your communication?

\* Capt. Davis objected to his commission, no doubt, because it was illegal—Therefore, how could an officer qualify himself upon an improper commission, when he swears to support the Constitution and Laws!

Note by Capt. LORING.

A. It was my duty to obey the Brigade order I received, and to see that the Officers under me obeyed my orders, predicated thereon, and I did not consult with superior Officers on any other part of the orders but the word *Major*, and I made my communication to Capt. Loring from a sense of seeing my orders complied with, and a wish to avoid any trouble.

Q. by Defendant. Were you ever formed in the line of the Brigade, between the date of your commission, June 7th, 1804, and October 30th, 1804?

A. I do not recollect that I was.

Q. by Defendant. Did you not take rank with your company under me on the 30th Oct. 1804?

A. I did not. I was ordered into a place under Capt. Loring; I obeyed that order, but protested against that order as a precedent: I did not take the rank by my own will.

Q. by Defendant. Who did I dispute with about my rank on the 30th Oct.?

A. Capt. Loring had made his claim, and I objected to it.

Capt. Loring produced a Captain's commission dated August 15th, 1803, which was read by the Judge Advocate to the Court.

Q. by the Court to Capt. Davis. Do you know whether Capt. Loring has received any commission other than the one produced?

A. I do, from his own acknowledgment to me, he received a commission dated the 20th June, 1805, as Captain of Light Infantry, to take rank from date of the commission he has just produced.

Q. by Defend. Where was it, I made that acknowledgment?

A. In the Representatives' Chamber, in the New State House.

Q. by Judge Adv. by order of Court. Do you know whether Capt. Loring has ever acted under the



commission of the 20th June, 1805, which gives him rank from his former commission ?

*A.* I do, Sir : he acted in the choice of a Major for the Sub Legion of Light Infantry.\*

Lieuten. Henry Sargent, sworn, interrogated and answered as follows :

*Q.* by Judge Adv. Do you recollect Capt. Loring's having acted in the choice of a Major for the Sub Legion of Light Infantry, since the 20th June, 1805 ?

*A.* I do not recollect the day, but recollect his having acted in the choice of such a Major.

*Q.* by Defend. What commission did I produce on the evening at the choice of Major for the Sub Legion of Light Infantry ?

*A.* I don't remember seeing any.

A Pamphlet entitled "An exhibition of Facts, supported by Documents, for the information of the Militia Officers of the State of Massachusetts," was then produced to the Court : the publishing of which, on the 12th day of March, 1806, Capt. Loring acknowledges in open Court, it being the Pamphlet alluded to in the complaint. Capt. Loring objected to the Pamphlet going in evidence to the Court, because the particular parts or paragraphs thereof, which are alleged to in the complaint, have not been particularly designated therein, in the 3d specification of charge.

The Court was cleared by the Marshal, by order

\* As it respects Capt. Loring's receiving the commission of June 7th, 1805, it was delivered at his father's house, enclosed in a blank paper and sealed : and when he discovered what was in the enclosure, he let it remain, because he objected to it ; but he never qualified himself thereto, as Capt. Davis declared that he did—as to his acting in the choice of a Major, his exhibition of Facts, which was produced as evidence, says, pp. 29, note.—"At a meeting of the officers of the Sub Legion of Light Infantry at Vila's, June 22d, 1805, conformably to Orders, Captain Joseph Loring, Jun with his officers, attended ; Brigadier General Winslow presided, and before the officers proceeded on the business of election, Capt. Loring presented a protest, dated the same evening, against being attached to the Sub Legion contrary to the company's enlistment ; and because he was degraded in his rank as Captain of the Washington Infantry, by the Governor having ordered officers to take rank above him with commissions dated in June, 1805."

of the Court, and the Court decided that Capt. Loring was not held to answer to any part of the 3d specification of charge, excepting that included in these words, to wit : "and your complainant further alleges, that the said Loring's conduct in publishing the said Pamphlet, with the said address and notes, at the time he did publish or cause the same to be published, was highly improper, unmilitary, and unbecoming him as an Officer ;" and that the said Pamphlet shall not go in evidence, to support any part of the said 3d specification of charge in said complaint, saving that part above recited.

The Court was then opened, and Capt. Loring appeared in his proper person.

The Court then adjourned, to meet at this place on the morrow, at nine o'clock, A. M.

Center School House, School Street. Boston ;  
Thursday, October 30th, 1806.

The Court met agreeably to adjournment, and on being called, all answered in their places. Capt. Joseph Loring, Jun. on being called, answered in his proper person. The proceedings of the preceding day were read.

Capt. Loring then handed to the Court a paper, which was read by the Judge Advocate, in the words and figures following :

*Mr. President and Gentlemen of the Court,*

Is it the intention of the Court, that the 3d specification shall stand as it does ? Or will they order that part of it to be expunged, which they consider me not liable to answer to ? If it be allowed to stand on the record entire as it was first read, it will be necessary for me in my defence to answer the whole specification. As it now stands, it is drawn in the most exaggerated, extravagant terms ; and the most wicked and nefarious intentions are therein ascribed to me. When this trial is over the whole of the complaint will probably be published in Division Orders, and if I am found guilty in any part of that specification, the world will not know but that I was guilty of the whole. If, therefore, the specification is allowed to remain entire, it will be absolutely ne-



cessary for my character, to animadvert in my defence upon the whole of the specification as it now stands.

The Court therein decided that no part of the complaint be expunged.

The Pamphlet alluded and referred to in the complaint was then read verbatim et literatim to the Court.

The General Orders of 20th June, 1805, were read to the Court by the Judge Advocate, in the words and figures following :

(COPY.)

*Commonwealth of Massa.*

GENERAL ORDERS.

*Head Quarters, June 20th, 1805.*

The Commander in Chief, being authorized to complete the organization of the Legionary Brigade in Boston, in the first Division of the Militia, orders, that the Sub Legion of Light Infantry hereafter consist of the after mentioned four Light Companies, raised at large in Boston, viz. the Company commanded by Capt. John Brazer; the Company commanded by Capt. Charles Davis; the Company commanded by Captain Daniel Messinger; and the Company commanded by Capt. Joseph Loring, Jun. The said Capt. Davis to receive a new commission as Capt. of Light Infantry, and to take rank from the date of his former commission as Capt. in the Legionary Infantry; Capt. Messinger will also receive a new commission as Capt. of Light Infantry, and to take rank from the day of his former commission as Captain in the Legionary Infantry; and Capt. Loring will also receive a new commission as Capt. of Light Infantry, and to take rank from the date of his present commission; and the Major General will issue his orders, agreeably to law, for the election of a Major to command said Sub Legion of Light Infantry.

By order of the Commander in Chief.

(Signed)

WM. DONNISON, *Adj. Gen.*

Capt. Loring acknowledges in open Court the regular receipt of said General Order.

The Judge Advocate then called upon Capt. Joseph Loring, Jun. to introduce any Witnesses, or testimony he might please to offer. Capt. Loring answered that he should not offer any. The Judge Advocate then enquired of Capt. Loring whether he was ready to proceed to his defence? Capt. Loring replied, that he was not, and requested that he might be allowed time until Saturday next to prepare himself. The Court took his request into consideration, and ordered that the Court be adjourned to meet at the County Court House, in Boston, on Wednesday next, at 9 o'clock, A. M. The Court was accordingly adjourned to that time and place.

*Wednesday, Nov. 5, 1806.*

The Court met agreeably to adjournment, and on being called all answered in their places. The Court was opened by the Marshal. Capt. Loring, on being called, answered in his proper person. The Court then adjourned to meet forthwith at the Center School House, School Street, Boston.

*Center School House, School Street, Boston;*

*Nov. 5th, 1806, 10 o'clock, A. M.*

The Court met agreeably to adjournment, and on being called, all answered in their places. Capt. Loring, on being called, appeared, and answered in his proper person. The Judge Advocate then read the 36th Section of the Militia Law, passed June 22d, 1793, as applicable to the cause in hearing. The whole proceedings of the Court, hitherto had, were read by the Judge Advocate to the Court.\*

\* The Judge Advocate proposed to the Court, that Capt. Loring's Defence should be examined by him, before it was read, which Capt. Loring refused to allow. The Court considered the proposition and determined against it.



Capt. Loring then read his *Defence to the Court*, in the words and figures following:—

*Mr. President, and Gentlemen of the Court,*

BELIEVING it to be one of the most irksome of duties to sit on a Court Martial, I have endeavored to render your sitting as short as possible, by offering in the outset a plea that would have confessed every material fact that could be proved against me. Nothing has, I trust, been proved, but what I was on my arraignment willing to confess; but the honourable Court and Judge Advocate seemed to prefer the course that has been pursued, and that I should offer the more usual plea, that throws the burden of proof on the prosecutor, and makes it the bounden duty of the Court to consider me innocent until my criminality is established.

As nothing has been testified by any *disinterested* witness, but what I have been ever ready to confess; and as the Court have, by their judicious questions to the prosecutor, drawn forth almost every fact that I deem essential to my defence, I do not think proper to trespass on your valuable time so much as to adduce a single witness in my own behalf. If, gentlemen, your minds are now made up; if you consider my guilt as already proved, I may here sit down in silence, and resign myself to my fate; but, gentlemen, if your minds are yet open to hear what can be said on the other side of the question, I beg your candid and indulgent attention to what I will now offer in my justification.

I am a Captain, with a commission signed by his Excellency Caleb Strong, and dated on the 15th Aug. 1803. It is by virtue of this commission, and none other, that I command my company, and take my lawful rank, during the portion of the year that I am exempted from arrests.

The Militia Law of this Commonwealth, passed June 22, 1793, says, that "all officers shall rank according to the date of their commissions:" Before I entered on the duties assigned me by my commission, I took and subscribed the oath required by the constitution, that I would faithfully and impartially discharge and perform all the duties incumbent on me as Captain, according to the best of my abilities and understanding, agreeably to the rules and regulations of the constitution and the laws of this Commonwealth. The very words of my commission also command me to act conformably to the laws of this Commonwealth.

I am therefore compelled, by the express command of the Legislature, by the obligation of my official oath, and by the express words of my commission, to consider myself as a Captain, taking rank only from the commission, which I have qualified myself upon, and by virtue of which, I have undertaken to act as a Captain.

If any officer of *similar grade* with myself, with a commission of *later date*, sees fit, under any pretence, to usurp command over me, I consider myself bound in honor, in conscience, and in law,

not to allow his claims: his rank is surreptitiously obtained, and not to be conceded, without all honorable resistance, by any officer having rival pretensions.

Capt. Davis is, like myself, a Captain in the Militia. He, like myself, now commands a uniform company, raised at large. The difference between us consists in this—I was commissioned to the command of my company on the 15th of August, 1803; he was elected and commissioned to the command of his company on the 7th June, 1804. Both Capt. Davis and myself have taken the requisite oaths to act under these commissions. Prior to his election to his command he had been appointed to a Ward company as Captain a little more than a year, by virtue of a commission bearing date the 6th April, 1803.

Having thus acted as a Captain for a year and two months by virtue of his commission dated 6th April, 1803, he received a new commission, giving him command of his present company, on the 7th June, 1804.

And although previous to the 7th June, 1804, I could not but consider him my superior, yet from and after the 7th June, 1804, we then being both Captains of select, disciplined, uniformed companies, I consider myself, and I actually was, by nearly 10 months, his superior, viz. from Aug. 15th, 1803, to June 7th, 1804: And I have every reason to believe he considered me so also; for he never, to my knowledge, manifested any repugnance to my superiority; and in a Brigade muster, on Boston common, on the 30th Oct. 1804, *I marched as the second Captain, and he as the third*, in the Sub Legion of Light Infantry, to which I was attached for the day, by order of Gen. Winslow.

Had the several commissions, which gave Capt. Davis and myself our respective commands over our uniformed companies, been both dated on the 15th Aug. 1803, I should cheerfully have allowed him his prior pretensions, which would barely have privileged him from drawing lots with me; but if there be one day's difference in the date of commissions, prior pretensions cannot be regarded, and the oldest must prevail. This doctrine is in conformity to the express requirements of the Militia Law; and to the opinions of Adj. Gen. Donnison, communicated to his Excellency Gov. Strong, on the 27th May, 1805, and which has been read to you from the 23d page of my pamphlet of official letters and documents.

There was a General Order issued by his Excellency Governor Strong, on the 20th June, 1805, ordering Capt. Davis (without any new election) to receive a new Captain's commission, giving him *back rank* or *retrospective rank*, from the 6th April, 1803, the date of his first commission, which he had for upwards of a year either resigned, or else forborne to act under.

In conformity to this Gen. Order a new commission was issued to Capt. Davis. This commission is dated 20th June, 1805, and



contains an unusual interpolated clause, inserted in writings between the printed lines of a printed form of a commission, giving him authority to take the above described *retrospective rank*.

It is by virtue of this commission that Capt. Davis commands the company called "The Boston Light Infantry;" although a commission of this sort is not authorized by law, and is unprecedented in the Militia establishment of this Commonwealth.

This same General Order authorized *me* also to receive a new commission; but as no provision was made for giving *me* any prior rank to that which I already possessed, and as I was satisfied with the lawful commission and rank which I then held, and which I now hold, and which I have sworn to fulfil and maintain according to the best of my abilities and understanding, agreeably to the rules and regulations of the constitution and the laws of this Commonwealth. As I could not possibly accept a new commission without abrogating my old one, and as this would be to me for a time a removal from office; as I had been, on the 15th Aug. 1803, duly commissioned to command in the Militia, and as the constitution says "No officer duly commissioned to command in the Militia shall be removed from office, but by the address of both houses to the Governor, or by fair trial in Court Martial *pursuant to the laws* [PURSUANT TO THE LAWS] of the Commonwealth for the time being." As the Governor is, by the constitution, "entrusted with the powers of Capt. General and Commander in Chief, to be exercised agreeably to the rules and regulations of the constitution and the laws of the land, and *not otherwise*;" and as that General Order of the 20th June is not accordant with the laws of the land, neither of this Commonwealth, nor of the United States; for all these reasons connected together, I have been compelled to consider that General Order of 20th June, 1805, as unconstitutional, illegal, and void.

I have not acted on that Order myself with my free will and consent; and I ever have, and ever shall, according to the best of my abilities & understanding, by manly & honorable means, resist all claims of superiority usurped over me, under colour of that Gen. Order.

It is possible, that in conformity to that Gen. Order of the 20th June, a new commission, dated on the 20th day of June, containing an interpolated clause, giving me the same rank which I *now and have ever held*, may have been sent to me; but I residing at Chelsea, during the summer of 1805, I do assure this honorable Court that I have never accepted or received any such commission, much less have I ever qualified or consented to act under it. If I had ever received it, somebody must have delivered it to me, and it could be proved by better evidence, than the interested assertion of my prosecutor.

Gentlemen, much is to be learned by the manner in which a witness testifies: The complainant, who is interested, deeply interested, in the event of this cause, is the principal witness against

and acted under his second Captain's commission, dated 7th June, 1804, you saw his reluctance of testifying; you saw he had not, or pretended he had not that commission about him; he offered in its stead a certificate giving an account of six commissions which he has held and still holds, for he says he never has resigned any of them, and now acts as senior officer pro tem. by virtue of them all; he said, (if I rightly understood what he said) that from June 7, 1804, to June 20, 1805, he did duty by virtue of his commission dated 7th June, 1804, and whenever his rank came in question, he drew from his pocket his old dead commission dated April 6, 1803. Did any military officer, before Capt. Davis, ever carry two commissions in his pocket for the sake of claiming rank in his own Regt. by one, and doing duty by another? This, in my opinion, gentlemen, is an idea too preposterous for to be treated seriously.

However he is promoted, or wherever he is reluctantly transferred, he never yet resigned a commission, and his commissions never die.

He is, according to his theory of rank, one Ensign, one Lieutenant, three Captains, and a Major, at the same time. And if, by his regular and rapid promotion, he should ever become Governor of this Commonwealth, all his subordinate commissions will, I trust, avail him then, as well as they do now; and he must outrank every Commander in Chief that was ever known before.

Gentlemen, my first commission is my only commission, however others may commute their commissions, or affect to hold three commissions, and rank by them all. I chuse to retain mine, and the simple rank it gives me. I mean to stand or fall by my first and only commission.

Had I consented to throw away my present commission and (in obedience to the General Order of the 20th June) to receive a new commission of that date, I should have acquiesced in a principle that would have rendered every Captain in the State liable to be called on to throw up his lawful commission, and accept such a one as the Governor might at any time see fit to substitute in its stead. This would soon derange the system of the Adjutant General's office; it would introduce endless confusion, eternal and unsatisfactory disputes about rank—it would nullify the provision of the law, which wisely says, in order to prevent disputes, that all officers of a similar grade shall rank by the dates of their commissions; it would totally disorganize the militia, render all militia laws nugatory, and finally introduce into our free Commonwealth a government of men and not of laws, in direct violation of our constitution, which says, in the 30th Art. of the Declaration of Rights, that, "in the government of this Commonwealth, the Executive shall never exercise the Legislative and Judicial powers, or either of them; to the end it may be a Government of Laws and not of Men."



I have, in every instance, where it behoved me, protested against this General Order of the 20th June, and in no particular have I manifested an acquiescence in its principle.

Accordingly, in the evening of the 22d July, when I was ordered to meet with Brig. Gen. Winslow and the officers of the Light Infantry companies, for the purpose of choosing a Major for the Sub Legion of Light Infantry, I entered my protest with General Winslow, against being attached to the battalion of Light Infantry; if it were (in conformity to Gen. Orders of the 20th June) to be at the expense of my rank.

I also, on the 28th July, 1805, forwarded a remonstrance to Gov. Strong, against an arrangement at Head Quarters, which virtually suspended me, without any unmilitary conduct or neglect of duty, being laid to my charge; I say *superceded*, because a Captain, who, from the 7th June, 1804, to 20th June, 1805, had been *under*, was instantly, without any unmilitary conduct or neglect of duty on my part, placed *over* me.

Finding these precautionary measures of no avail, and finding myself, at the Brigade Muster, on Boston common, on the 30th Sept. 1805, ordered to take a station in the Light Infantry, inferior to that of Capt. Davis, although I had, on the same Boston common, on the 30th Oct. 1804, at a Brigade Muster, taken, as I believe, undisputed rank of Capt. Davis; finding myself thus superceded, and finding my men unwilling to turn out under me, on account of my being, as the world might think, a superceded and disgraced officer, I forwarded to Gen. Winslow, ere I left the field, a protest against the orders issued for the arrangement of that day's review and inspection of the Brigade, so far as they degraded my commission and rank, by placing me under the command or rank of Capt. Daniel Messinger and Capt. Charles Davis, each of whose commissions were posterior in date to mine.

For the alleged offence of presenting this protest, together with three other specifications of charge, I was arrested by Gen. Winslow on the 8th Oct. 1805, and brought to trial before a Court Martial, assembled in this place, on the 29th of the same month.

After a full and complete investigation into the nature of the charges against me, I was fully acquitted on every article of the complaint.—Not that I in any manner denied the making and offering that protest, but I presume the Court must have been of the opinion that the peculiar circumstances of the case were such as completely to have justified me in what I did.

That Court, I presume, fully and impartially considered the principle of that protest, in all its bearings and consequences, and passed such a judgment as induced me to believe that the matter would forever remain at rest, and that I should never be tried again on a like complaint.

In truth, gentlemen, I was so thoroughly tried a year ago, that unless some offence of a widely dissimilar nature could have been

alleged against me, I never expected to be tried again by a Court Martial.

But I find myself again compelled before another honorable Court, to give such an explanation of my conduct and situation, as circumstances have rendered necessary; and wait the decision with that composure of mind, which will best evince my conscious innocence.

Since the 7th June, 1804, I have considered Capt. Davis as voluntarily having gone below me; I therefore have no reserve in confessing I did refuse to receive, from Capt. Davis, the orders mentioned in the first specification; and I will now give my reason for so doing.

Those orders, as they first came to me, did not purport on the face of them to have been directed by any competent authority to Capt. Davis, as senior officer pro tem. of the Leg. Brigade: it did not appear that they had been transmitted to Capt. Davis as the channel of communication to the other Captains of uniformed companies; nor did it appear, by any thing those orders contained, that the Brig. General or the Brig. Major looked upon him as the organ of communication; and there was no reason to expect, but what those orders, if they had come to Capt. Davis from the Brigade Major, would also have come to me from the same hand.

The Brigade Orders of the 18th, and Capt. Davis' Sub Legion Orders of the 26th, predicated on Division Orders of the 16th July, which I am accused of having refused to receive, were in the words and figures following:

"BRIGADE ORDERS.  
Transmitted by order of the Brigadier General.  
Boston, July 18, 1806.  
CHARLES CLEMENT, B. Major."

"SUB LEGION ORDERS.  
Transmitted by order of Capt. Charles Davis, senior officer pro tem. of the Sub Legion of Lt. Infantry, Legionary Brigade.  
Boston, July 26, 1806.  
JOHN WINSLOW, Jun. Adjt."

To Capt. Joseph Loring."

These Orders were handed me in the afternoon of the 26th July, and I returned them with a respectful letter, setting forth the date of his and my commissions, and concluding, in as civil language as I was capable of, that I could not acknowledge him as my superior, without violating my oath of office. Another reason for my refusing to receive or rather returning those orders, is, I knew that Daniel Messinger, Esq. on the 14th Feb. last, was appointed Major Commandant of the Sub Legion of Light Infantry; to whom orders are directed from the Brigadier General, and by him communicated to the several Light Infantry Captains.

I knew that Major Messinger was the proper organ through whom all orders respecting the Light Infantry were to come to all Light Infantry Captains; and all orders coming to me indi-



rectly from the Brigadier, that did not purport to be directed to Major Messinger, and by Major Messinger to me, I did consider, and had a right to consider, as unauthorized, unofficial, and not entitled to be by me received and obeyed:—For, when a field officer is put in arrest, or in any manner incapacitated from acting in his official station, it is usual in the Legionary Brigade, for the Brigadier to announce it in orders; and the Brigadier at the same time designates the officer, who, as senior Captain, is to become the organ of communication between superior and inferior officers.

Accordingly, when the field officers of the Legionary Infantry were in arrest, in the Spring of 1804, it was announced in Brigade Orders, dated May 19, 1804, that the officers of the Legionary Infantry must obey Captain Samuel Stetson as senior officer, receive orders from him, and make returns to him.

This, gentlemen, being the practice in this Brigade, I had no reason to expect orders from any body, conformably to an order of the 15th February, but Major Messinger, until it was announced in orders, that Major Messinger was absent, or in arrest, or in some manner incapacitated from being the organ of communication between me and the Brigadier.

I hope, gentlemen of the Court, these reasons will appear fair and conclusive.

In answer to the second specification, I acknowledge that Capt. Davis did write a letter to me on the first of Aug. wherein he signs himself senior Captain and Commanding officer of the Sub Legion of Light Infantry, in the absence of Major Messinger.

He also again sent me Division Orders of the 15th July, but the Brigade Orders and Sub Legion Orders were new vamped, and different in their phraseology from those he at first sent me.

It will appear, on inspection, that this second set of orders now purported to be directed to C. Davis, senior officer Sub Legion Lt. Infantry: even the phraseology of his own order was altered from what it came to me at first.

His orders now purported to be transmitted by order of Charles Davis, Captain in, and senior officer pro tem. of, the Sub Legion of Light Infantry, Legionary Brigade.

These orders, I confess, purported to be directed to him, and the word *Major* in the direction of the Brigade Order to him, appeared by his modesty to have been erased.

Gentlemen, this letter of Major or Captain Davis to me, contains the first shadow of information I have ever had of the absence of Major Messinger. Having other avocations and concerns, than that of enquiring after other people's business, I did not know that Major Messinger was absent. I have other employments, than those of watching his motions, except when we are in the field together; and I cannot be blamed for not being apprized of a fact so important, and which, if true, I humbly conceive ought to have

been made known *officially* to the troops under his command, through some channel different from and higher than that by which it has been communicated.

I now perceive, in the newspapers, the name of Major Daniel Messinger, among the passengers arrived in the *Galen*, from London. I learn his absence and his return at the same time and by the same authentic source. When he left the country and how long he has been gone, I am utterly unable to say. I am sure, however, his residence abroad has been of very short duration.

Gentlemen, I have attempted to shew that I had a right to expect Sub Legion Orders would come to me from Maj. Messinger, if from any one in that Sub Legion; and I had no reason to expect them to come to me from any one else, until I had official notice of Major Messinger's absence: For, next to Major Messinger, I do not allow that there is any Captain of Light Infantry senior or superior to me in rank.

I sent back the orders mentioned in the complainant's second specification without an irritating remark, and without any departure from that respectfulness of manner which is due from one officer to another. And I trust to your candour, that my conduct will not appear to have been of that unofficerlike kind, which the complainant has laid to my charge.

Had I even known of the absence of Major Messinger, Captain Davis is the last man from whom I could expect to receive an order; because I did believe that Capt. Davis, sometime before the 7th June last, had accepted an appointment as a staff officer, with the rank of Major, which would, I presumed, have been a virtual relinquishment of his office of a Captain. It was announced in Division Orders of the 7th of June, in these words, "The Commander in Chief has been pleased to appoint Charles Davis, Esq. Judge Advocate for the 1st Division." Charles Davis, Esq. accordingly officiated as Judge Advocate on Wednesday and Thursday, the 2d and 3d of July last, at a Division Court Martial for the trial of Lieut. Sanborn; and the Division Orders of the 16th July, giving the result of that trial, and which I am charged of not receiving from Charles Davis, senior officer pro tem. actually contain his name, signed Judge Advocate of the 1st Division of Massachusetts Militia.

Charles Davis, Esq. was mentioned in the *Centinel* of July 5th, as one of the 4th July procession, with rank and title of Maj. Davis.

Judge Davis received his appointment pursuant to an Act of the General Court, passed on the 14th March, 1806, by which it is enacted, that in each Division a Judge Advocate shall be recommended by the Major General, and if approved by the Commander in Chief, commissioned by him with the rank of Major. It is made the duty of this Judge Advocate to attend all Courts Martial within the Division, except in case of inability or some legal impediment.



By the constant liability of this *Staff Officer* to be called on his official duties at any time, to any part of the Division, I presume to think there is an incompatibility between the two offices of Judge Advocate with the rank of Major, and of a Captain in the line at the same time.

I believe it is not usual in any service, where a permanent Judge Advocate is appointed, for the Judge Advocate to hold any command, or to become the channel of communicating any orders except those which belong to his own department. I had, therefore, a right to presume it was from an innocent error in judgment somewhere, or from a disposition to trifle with me, and add to my numerous embarrassments, that those orders were sent by Mr. Davis to me.

The Adjutant General and Quarter Master General are each of them *Staff Officers*, with the rank of a Brigadier General; but they neither of them officiate as Colonels of Regiments: nor have they any command whatever in the line.

I am informed that Adjutant General Donnison was, like Mr. Davis, a Captain of a Company at the time he received his present appointment in the General Staff; but he had too much modesty to wish to engross in his own person two incompatible offices; and that it was universally considered that his acceptance of his appointment in the General Staff was, ipso facto, a resignation of his command in the line.

It is unusual for a Major General's Aid de Camp to act as Captain; and I suppose the Judge Advocate would be on a similar footing.

Supposing the first Division of Massachusetts Militia were all to be called into actual service, is it supposable that Mr. Davis would or could draw the pay of a Major and of a Captain at the same time? Does not the law contemplate that the employment of a Judge Advocate is enough for one man; and is not the rank and pay of a Major quite a sufficient compensation for the services of a Judge Advocate?

Gentlemen, having had no official notice that Major Messinger had left the country; having had official and unofficial notice that Mr. Davis had been appointed Judge Advocate; and having reason to believe that I must of necessity be acknowledged the undisputed senior in rank to any Captain in the battalion of Light Infantry, I trust you will not find me guilty of either of the two first specifications.

Capt. Davis, in the course of three years past, has received three Captain's commissions, and one Major's commission.

If it is lawful for Capt. Davis to receive on the 20th June, 1805, a third Captain's commission, giving him retrospective rank, (skipping over his second Captain's commission) from the 6th April, 1803, the date of his first commission, why was not his second commission of a similar kind to that of his third.

If the commission which he received, bearing date on the 7th June, 1804, had given him retrospective rank from the 6th April, 1803, there would not have been quite so plausible a ground for resisting his pretensions to outrank me; but when he consented to receive and qualify himself upon a commission dated 7th June, 1804, he thereby virtually consented I should go above him; and I continued above him from June 7th 1804, till June 20th, 1805; and after that, for him, as a Captain, to be mounted over my head, is a matter that has given me, in my opinion, the most substantial cause of complaint.

The appointment of Judge Advocate, which had been conferred on Capt. Davis, afforded him an opportunity to extricate himself from the embarrassments with which we are both unhappily surrounded, and he might with honor to himself, by betaking himself to his appropriate sphere in the staff, have prevented my suffering any longer from the difficulties necessarily incident to our respective situations.

You will decide whether he has not been wanting in that delicacy towards me, in this respect, which would have done him more honour, than all the military fame he has acquired under all the unusually numerous commissions he has ever held.

I believe it to be a clear principle, that when an officer resigns or forbears to act under his commission, he relinquishes all rank and pretensions which that commission imparts, except over officers of a similar grade and date of commission with himself.

Gentlemen, it is a maxim with all Courts of Judicature, that it is better that ten guilty men should go unpunished, than that one innocent man should suffer: If, gentlemen, there has been any thing peculiar in my situation; if I have been so circumstanced, that any other man, situated like myself, might without any dishonourable intentions, have been liable to go wrong: if there are those circumstances attending my case (as there certainly are) which have caused many wise men, and honest military men, to differ in their opinion with regard to my duties and my rights of rank; if, gentlemen, you can prevail on yourselves to believe that I am not enamoured of contention for contention's sake; if you believe I am ready and willing to go right, if any body will enlighten my path; if, in fine, gentlemen, you can have a shadow of doubt on your minds respecting my guilt or innocence, you are bound in honour and in conscience to acquit a brother officer, of whom, till this trial, you never knew a dishonourable action effectually laid to his charge.

Gentlemen, I now come to the 3d specification, which charges me with having, on the 5th March last, published a Pamphlet, entitled "An Exhibition of Facts, supported by Documents," &c. &c.

I cannot but be surprized that, after a lapse of so many months, I should be brought to trial before a Court Martial, on account of that publication! I am surprized that Major Messinger did not,



before he went to Europe, arrest and bring me to trial for its publication, if in his opinion it contained any thing cognizable by a military tribunal! And above all, I am surprized that Maj. Davis, considering the friendly feeling towards me as a brother officer, of which he makes so great a display in his letter to me of the 1st of Aug. did not have the goodness to mention to me, that he felt himself injured by that book.

Gentlemen, the first manifestation of his feelings towards me, as a brother officer, is in the long, formal, and overcharged article of complaint, for which I am arrested, and now a prisoner on trial before you. Had he been frank enough to mention to me his dissatisfaction, I should with pleasure have done every thing in my power to set things right. But no man has ever called upon me, and I am not conscious that I have given Major Davis, or any other man, any reason to call on me as a criminal on account of that book.

Mr. Davis is not, to my recollection, any where mentioned in that book in a way derogatory to his honour or integrity; and had he had the goodness to have specified the particular passages of that book, with which he professes himself aggrieved, I would have been prepared to prove them all either innocent or true.

I assert it is neither intended nor calculated to do him any injury: if it has done him any, he could have shewn it.

I also assert that it has none of that wicked, malicious, disorganizing tendency to break up the militia institution of the State, which he ungenerously lays to my charge. The militia never was on a more respectable footing, (generally) than at present; and it is not in my power or inclination to alter its character. No Captain in the Commonwealth can feel a greater interest and pride in the character of the militia than myself, according to my feeble abilities; no Captain ever made greater exertions for its advancement; and no Captain ever objected more than I have, to the degradation of one officer, to the ambition of another.

I believe it cannot be necessary for me to detain you long in vindicating myself from this vague and indistinct charge. I know not to what particular parts of the book to direct my defence: I must, therefore, leave the whole book to speak for itself, and be its own vindicator. I am sensible you will not condemn my book, until you have read it with that cool, unbiassed, deliberate attention, which is absolutely necessary in order to pass a correct judgment upon the tendency of the book, and the motives of the author. You are welcome to condemn me and my book, if you can find it in your hearts so to do.

Although I believe I should be safe in not saying a word further, I will make a short statement of facts relative to the publication of that book.

I had been arrested by General Winslow, on the 8th Oct. 1805, for four high charged crimes and misdemeanors; one of which

was for protesting against being placed by him below Capt. Davis, at a Brigade muster on Boston common on the 30th Sept. 1805, when the date of my commission entitled me to be placed above him.

From the 8th to the 29th of Oct. (20 days) I continued under arrest, before I was brought to trial, and even then, owing to the neglect of Gen. Winslow or his Brigade Major, Mr. Clement, my trial met with an unnecessary delay; and it was not till the 8th of Dec. that it was finished; so that, from the day of my arrest, till the day of my discharge from the Court, was two months. At the expiration of twenty days after my trial was finished, to wit, on the 28th Dec. I sent a respectable letter to Gen. Elliot, requesting it as a favour that the event of my trial might be made known, and I relieved from my long and embarrassing arrest.

Gen. Elliot did not deign a reply. In January I wrote to Gov. Strong, requesting his interposition in my behalf, and after a lapse of some weeks, being enquired of by the Adjutant General, Gov. Strong made answer, "*he did not doubt Gen. Elliot would do right.*"

On the 21st Feb. I memorialized the General Court. The committee, to whom it was referred, did not think it proper for them perhaps to intermeddle with the official duties of Gen. Elliot, and finding myself, after a vexatious trial, without any relief, labouring under anxieties which my private affairs rendered peculiar to myself, having lost, by my long arrest, an advantageous opportunity of embarking on a foreign voyage, at the expiration of five months from the date of my arrest, I published the book for which I am now arraigned as a criminal to answer to Major Davis!!

I published the book to obviate the many slanderous aspersions that were put in circulation against me, while I was kept in the dark, from knowing the result of a tedious and long protracted trial, that had for months been clearly and decidedly in my favour.

From the beginning of Oct. the time of my arrest, until the beginning of March, my character was lacerated and bleeding, through the instrumentality of those who triumphed in my distress; and I had no means to defend myself against their misrepresentations, but to appeal to the public.

This I did some time after the 10th of March, and not before, as will appear by the record of the District Clerk, although the prosecutor alleges it to have been done on the 5th. In criminal prosecutions, the day is material; at least a crime must not be charged a single day before it happened: I certainly kept myself innocent till the 12th of March; and every moment that a man keeps himself innocent in the midst of temptations, is not guilty, and is entitled to credit for his integrity.

I published the book merely to defend my character, and, if possible, to accelerate my liberation from the grasp of oppression.



I had no design or wish to subvert the harmony or subordination that so happily prevails among that portion of the troops to which I have the honor to belong. Whatever may have been Mr. Davis' sentiments, the public sympathy was certainly strong in my favour; and I believe that the most impartial and honourable men in the community considered me driven to the course I took, not from the guilty, wicked, depraved, disorganizing motives, which Capt. Davis attributes to me, but merely from the peculiar and unprecedented necessity of the case.

Major Davis does not pretend that he is the only gentleman mentioned in that book: And does he pretend to step forth the common champion (by bringing me to a Court Martial) to vindicate the reputation of every gentleman, who, like himself, may labour under the supposed stigma of being named in my book?

Before I meet him as the common champion of them all, I must first know that they have authorized him to espouse the cause of their bleeding honour; and if I vanquish the champion, I must know whether, even after, the parties (whom he will call injured parties) will not still have the same demands upon me, as if Major Davis had never combated in their behalf.

I acknowledge myself answerable to Capt. Davis and to no one else, for any false, injurious observations I publish concerning him; but I can by no means allow that he has a right to call me to a Court Martial for the supposed crime of publishing any book; when, after my trial on his complaint, another person may have an equal right to call me to another Court Martial for publishing the same book; for so vague and uncertain is the charge of a pretended crime for publishing a book, that if one man can arraign me for it, twenty may with equal propriety; for a conviction or an acquittal in one trial will be no security to me against being harassed with the same charge, repeated twenty times over, in the same general and indecisive war.

In deciding upon this specification, gentlemen, I trust the following queries will arise in your minds:

1st. In a time of peace, and while the civil courts are open for the redress of every wrong and injury, is a militia captain liable to be called before a military tribunal for the alleged crime of publishing a book?

2d. Has one militia officer a right to call another to account before a Court Martial for any publication, without specifying the passages by which he professes and proves himself to be particularly aggrieved?

3d. If an officer is bound to answer in any Court, to the general charge of publishing a book, must not every individual, who professes himself injured, join in the complaint, or is the officer liable to be harassed with divers complaints for the same offence?

4th. Has every body a right to prosecute me for the alleged

crime of publishing that book? If every body has not a right to prosecute me, what peculiar right has Capt. Davis to undertake the business, in preference to any body else?

5th. Is Capt. Loring answerable to any body except to Maj. Messinger, conformably to General Order, for any unmilitary conduct, neglect of duty, or disobedience of order, of which he might have been guilty under the command of Maj. Messinger, and while he was in Boston?

6th. If I am called to account, and condemned as a criminal on the complaint of a man, who has no exclusive right to call me to such account, will my condemnation be a bar to the complaint of any other person who may be more particularly aggrieved, and have a fairer right to arraign me?

Gentlemen, this charge of publishing a book, made by Mr. Davis, and made at this particular time after Maj. Messinger's departure, and just before his return. I am persuaded you will consider as a mere make-right charge thrown into the scale to make up for the lightness of the other two.

Maj. Messinger is said to be a judicious officer and a good disciplinarian; if it behove the senior officer of the Light Infantry to bring me to an account for the supposed offence of publishing this book, does it also belong to the senior officer pro tem? If I am liable before a Court Martial, for this offence, why was I not arraigned long ere now? Why has it been treasured up in secret against me until this late hour? What reason can be assigned, except that in the opinion of the prosecutor it would not do to stand alone, and must be kept nearly a year, until two other charges of equal strength and solidity could be found to be sent into the world as supporters by its side?

To recapitulate—If, gentlemen, you should be of opinion that the order of 20th June is contrary to the Militia Law, which says, "all officers shall rank by the date of their commissions," and if, when the law and an order are at variance, you are of opinion that the law should prevail, you will, I hope, pay some respect to the precedent of my former acquittal, and say I am not guilty of the first and second specifications.

But, Gentlemen, even if you should be of opinion that orders are in all cases to be obeyed, and although your commission and oath make it your first duty to obey the laws, still I presume to expect your acquittal:

1st. Because I did not know of Maj. Messinger's absence, nor did I know that I was to expect orders (since my annexation to the Light Infantry) from any body, except Maj. Messinger.

2d. Because, even if Capt. Davis could, by fair construction, be considered as a Captain prior in rank to myself, I did expect (and had reason to expect) that Mr. Davis had abdicated his Captaincy, previous to the 7th June last, when he began and officiated



with the rank of Major in the Division Staff. He was then mentioned in Division Orders, not as Capt. Davis, but as Charles Davis, Esq. and he signed the proceedings of the Court Martial that tried Lieut. Sanborn, not as Captain and Judge Advocate, but simply as Division Judge Advocate.

3d. I sent back those papers which are called orders, merely as a precautionary measure, to prevent the reception of them operating to my disadvantage in the settlement of my rank, which has ever since 20th June, 1805, been as unsettled as Capt. Davis pretends his was between the 7th June, 1804, and the 20th June, 1805.

The dispute between Capt. Davis and myself is now before his Excellency the Governour and Council, and I have every reason to expect a speedy and decisive settlement in my favour.

Those papers were mere communications, giving the result of Lieut. Sanborn's trial; as they commanded nothing to be done, and as the public service could not possibly suffer by my insisting on the punctilio of my rank, which is yet in question and undecided, I thought myself by no means culpable in not receiving those orders from Judge Davis.

The two first specifications are the appendix to my trial, which engaged my unremitting attention all last autumn, winter and spring.—If I was wrong then, I am wrong now; If I was right then, I trust I am right now. I presume to hope, that an officer is not to be harrassed with repeated trials for supposed offences, which are similar in their nature, and that an acquittal on one trial will lead to an acquittal on another, in all cases where the charges are not in their nature dissimilar.

With regard to the third charge.—1st. I contend, that having published my book in the month of March, while Maj. Messenger was in Boston, and commanding the battalion of Light Infantry, I am, gentlemen, no more answerable to Capt. Davis for this pretended crime, than I am to either of you; and I contend, that if I am answerable to any body, I am not answerable to every body, and that I must be acquitted on all prosecutions for this supposed offence, until some officer appears as my prosecutor, to whom it of right belongs to call me to an account.

2d. That if any injury has happened or can happen to any body by the publication of my book, the common law is fully competent to redress it, and that a military tribunal cannot take cognizance of any matter that may properly be brought before a civil tribunal.

3d. I am not liable to be called, by Maj. Davis, before any tribunal for publishing any book, unless Mr. Davis is himself personally injured by the publication of that book. No man on earth received promotion faster than Maj. Davis; his blushing honors, both civil and military, bloom as luxuriantly on him now, as ever

they did, before my publication. He therefore has never been, and I believe never will be injured by me.

4th. My Exhibition of Facts, supported by official documents, contains no falsehoods nor misrepresentations concerning any body: the comments are not numerous, and follow the necessary consequences from the documents.

5th. If I have, in that book, slandered Mr. Davis, he has not thought proper to specify how or wherein I have slandered him; it is therefore not in my power to defend myself against this general charge.

If the book is not true, I cannot adduce any evidence of the truth of the book, other than that which the book itself contains. I assert the book in every particular to be true. If it is not, my adversary ought in some way or other, either public or private, to have pointed out the parts, that it was his exclusive and particular right to call me to an account for.

6th. With regard to the time of making that publication, it is introduced as an aggravating circumstance, that I made the publication at the particular time I did.

Gentlemen, I had waited and waited, and supplicated and prayed to know the result of my last year's trial; I had, by reason of my long and vexatious arrest, lost an advantageous opportunity of going abroad. I was suffering in reputation, and in my pecuniary concerns; my mind was under a continual irritation; but I believe I have conducted myself as temperately and discreetly as any body else would have done in my circumstances, and I am firmly of the persuasion, that the publication of that book was the only effectual means of shortening an arrest, that bid fair to last during the will and pleasure of those, in whose power I was, and who had, for five months, been detaining me from the pursuits of my lawful avocations.

The publication was commenced with the intention of making an effectual appeal to the Legislature for relief; but it could not be got through the press, until it was too near the close of the last winter's session, to have any thing done. I therefore altered my original design, and made my appeal to my brother officers of the militia, with whom my character was labouring under the most unjust imputations.

What Officer is there among you, gentlemen, who will not contend for his rank? And what man is there alive that will not, by every honourable exertion, endeavour to stand fair in the estimation of his fellow men? It is my constitutional right to petition the Legislature, and to use the freedom of the press. No individual on earth can call me to an account for the exercise of these rights; unless he proves himself injured.

My book develops some of the policy which has been pursued towards me and my company; it verifies the maxim quoted from



the immortal BECCARIA, and contained in its title page: "That in every human society there is a continual effort to confer on one part, the height of power and happiness, and to reduce the other to the extreme of weakness and misery." My book contains the truth, and nothing but the truth; and because it contains the truth, it is therefore obnoxious: like "*The Rights of Man*," it is to be cried down; it is to be branded as a libel; perhaps burnt by the hands of the common hangman and Capt. Davis, without being particularly interested, has volunteered himself to become the public prosecutor.

Gentlemen, if any thing I say should seem too harsh for the occasion, I hope the Court will pardon me, when they consider the dark insinuation in the complaint, that I have been guilty of many and divers instances of unmilitary conduct, neglect of duty, and disobedience of orders, other than those the prosecutor has condescended to specify; and when the Court consider, also, the aggravated language in which the third specification is drawn, and the iniquitous intentions therein most undeservedly ascribed to me.

Gentlemen, I do not deem it necessary to testify myself, or produce a single witness in my own behalf. I have at some length disclosed a plain, unvarnished state of facts that speak for themselves; facts that are public and notorious, and which no course of testimony could render more plain. If the Court believe my story true, they will give it what weight it deserves. If they believe it false, they will condemn me; provided the prosecutor has in their opinion made out his case, and added sufficient testimony to put my *criminality of intention* beyond a doubt.

I will now take the freedom to cite a few passages from approved writers, in order to show—*First*, The precision of time and circumstances necessary to be set forth in all criminal complaints—*and Second*, The degree of credit which is due to the witnesses adduced in support of the prosecutor. I shall then close my Defence.

Extract from M'ARTHUR'S Principles and Practice of Naval and Military Courts Martial, 2d vol.

"The particular facts charged, and in what manner committed, with the *time* and *place*, are directed to be clearly specified in all complaints for bringing offenders to trial by Courts Martial, upon similar principles as is directed by Courts of Law in all indictments. This specification of the crime or offence of which a person stands accused, is essential to the ends of justice, in order that he may have a fair opportunity of exculpating himself."—page 5.

"The time when the fact is charged to have been done, should also, if possible, be correctly set forth, more especially if the offence be of a capital nature. Thus the particular day of the month should be assigned which, with the specification of the place, may be essentially necessary to a prisoner's defence."—page 6.

"The offence itself ought to be set forth with clearness, precision, and certainty, and the same rule should be observed in complaints or accusations against offenders, as is practised in Courts of Law in indictments."—page 7.

"We have instances daily of the technical forms of our criminal laws sheltering delinquents from punishments, and saving them from the formal consequences of their crimes."—page 9.

Extract from ADIE'S Treatise on Courts Martial, page 175; also 4th vol. of Blackstone, page 368.

"The general rule that runs through all trials is this, that the best evidence the nature of the case admits of, shall always be required, if possible to be had; for if it be found that there is any better evidence existing, than is produced, the very not producing it, is a presumption that it would have detected some falsehood that at present is concealed."

Extract from M'ARTHUR'S Treatise on Naval and Military Courts Martial, 2 vol. page 46.

"The credibility of a witness diminishes in proportion to his hate or friendship for the accused."

Page 47.—"In our criminal Courts it is now considered a rule of law (and the same considerations should hold at Courts Martial) that if a jury entertain a reasonable *doubt* upon the truth of the testimony of witnesses given upon the issue which they are sworn well and truly to try, they are bound in conscience to deliver the prisoner from the charge found against him in the indictment, by giving a verdict of *not guilty*. This reasonable doubt may result from various causes, extrinsic of the evidence given upon oath; for a witness may be perfectly competent and swear positively to a charge, material to the issue trying, and yet not deserve credit from the Court or Jury. The infamy of his character, drawn from him upon a cross examination, or given in evidence against him by other witnesses; his *mistrust in the event of a trial or prosecution*; an apparent influence on his mind; and various other circumstances may render him unworthy of credit even on his oath. So the credit of a witness may be materially affected, or totally destroyed, by his manner of giving evidence. Repentment or partiality, when prevalent, are apt to show themselves in the voice and countenance of a witness; and when they do, they are circumstances which must impress suspicion upon the mind of a Jury. So it often happens that a witness destroys the credit of his testimony by inconsistency, by prevarication, by the manner of his representing facts, and often by *intruding his own sentiments and opinions*; Sometimes by an excess of warmth, sometimes by a solicitous reserve, and often by an *affectation of candour*. In all these and similar cases, his credibility is at least questionable, and unless his testimony be supported by clear and unsuspecting collateral proof of the facts



charged on the prisoner, *doubt must arise* in the minds of the jurors, and by the humanity of the law, where doubt is created, an acquittal ought to be the consequence."

Gentlemen, I will trespass on your patience no longer. Every comment on the law and the evidence of my case, that might be pertinent for me to make, will naturally suggest itself to your own intelligent minds. I am now ready and willing to confide my character, more valuable than life, to your protection. Although there are those, who, surrounded with patrons, pampered with luxury, and elate with promotion, laugh at my embarrassments, and consider my grievances a jest.

I confidently hope that when my situation, my motives, and my conduct are candidly investigated by an impartial Jury of my brother officers, they will say *no man in my circumstances could have conducted himself better*; and afford me, in their acquittal, an ample recompence for the difficulties I have been compelled to struggle with; and the unmerited calumnies with which I have been assailed.

JOSEPH LORING, Jun.

Captain.

Boston, Nov. 5, 1806.

The Judge Advocate then summed up the evidence and stated the law to the Court.

The Court was then ordered to be cleared of spectators, which was accordingly done, and the following question was put by the Judge Advocate to each of the members of the Court, beginning with the lowest in grade, viz. From the evidence which has been adduced both for and against Capt. Joseph Loring, Jun. and from what he has offered in his defence, are you of opinion that he is *guilty* or *not guilty*, on the first article or specification of charge in the complaint exhibited against him by Capt. Charles Davis? The Court decided that of the said first specification of charge the said Capt. Joseph Loring, Jun. *was guilty*. Upon the question being put in the same form upon the second article or specification of charge in said complaint, the Court decided that of the second article or specification of charge in said complaint, the said Capt. Joseph Loring, Jun. *was guilty*. Upon the question being put in the same form upon the third

article or specification of charge in said complaint, the Court decided, that on the third article or specification of charge, the said Capt. Joseph Loring, Jun. so far as he stands charged in the words following, viz. "And your complainant further alleges that the said Loring's conduct, in publishing the said Pamphlet, with the said address and notes, at the time he did publish or cause the same to be published, was highly improper, unmilitary, and unbecoming him as an officer," *was guilty*.

The Court having taken into consideration the several offences of which it hath adjudged and deemed Capt. Joseph Loring, Jun. of the Sub Legion of Light Infantry, in the Legionary Brigade, first Division of the Militia of the Commonwealth of Massachusetts, to be *Guilty*, after full and mature deliberation being had, do sentence him to be removed from office, and do adjudge him incapable of holding any military commission under this Commonwealth, for the term of three years.

JNO. T. APTHORP, *President*.

HENRY M. LISLE, *Judge Advocate*.

The Court was then ordered to be adjourned until the morrow, to meet at this place, at 10 o'clock, A. M.

Center School-House, School-Street, Boston, Thursday, Nov. 6, 1806.

The Court met agreeably to adjournment, and on being called, all answered in their places. The Court was then opened by the Marshal. The proceedings of the Court were read, and the records and copies of the Judge Advocate examined and certified by the Court, as below. The Court then adjourned without day.

.....

COMMONWEALTH OF MASSACHUSETTS.

We do hereby certify, that the above and foregoing are true copies of the proceedings of the Court,



of the evidence offered to it, and of its opinions, judgments, and sentence.

JNO. T. APTHORP, *President.*

JOSEPH BENT.

LUTHER METCALF.

PETER OSGOOD.

JEDEDIAH LINCOLN.

EDWARD WELCH.

Capt. JOSEPH JONES.

SYLVANUS ADAMS.

WILLIAM PETERS.

DAVID COBB.

NICHOLAS PEIRCE, JUN.

JAMES JONES.

JOSHUA STETSON.

HENRY M. LISLE, *Judge Advocate.*

*Boston,*  
*Nov. 6th,*  
*1806.*

## APPENDIX,

*Containing Papers relative to Capt. Loring's discharge from arrest.*

CAPT. LORING, after being discharged from the Court, had no further information respecting the result, excepting that he was unofficially informed that Division Orders were handed down, that he was, as a *Light Infantry officer*, guilty of the two first specifications of charge; and that he was also guilty in publishing his Exhibition of Facts supported by Documents, at the particular time in which it was published.

And from the same unofficial source he was informed, that the court sentenced him to be removed from office, and rendered incapable of holding any military office for three years.

The sentence he understood the Court sent to the Major General on the 5th or 6th of Nov. 1806, and he immediately approved of it.

During the session of the Hon. Legislature in January, 1807, he petitioned for redress of grievances. The resolve of the Legislature in his favour, and the report of the joint committee of both Houses who had his situation under consideration, is here subjoined; as also the objections of the Governor to the said Report and Resolve.

### *Commonwealth of Massachusetts.*

The Committee of both Houses appointed to consider the petition of JOSEPH LORING, jun. have attended that service, and beg leave to report:

That the said Loring states several articles of complaint—

1. *An order of the Commander in Chief, dated June 20, 1805, whereby he has been degraded in his rank.*

2. *That he has been tried for Mutiny, a crime not known in the Militia Law, and although honorably acquitted, has been a long time held in arrest.*

3. *That he and his Company have been transferred against their consent, and that their rights of election have been violated.*

4. *That he has been a second time arrested and tried, and has been sentenced to be removed, and disqualified from military office for three years, by a Court Martial not regularly detailed, and by this means deprived of a fair and impartial trial.*

These several articles of complaint appear to be well supported, but the order mentioned in the first article having occasioned the whole difficulty, has more particularly attracted the attention of the Committee.



In pursuance of General Orders of July 7, 1803, a volunteer company of *Infantry* was raised at large in the town of *Boston*, and the said Loring received a commission as Captain of said Company, dated Aug. 15, 1806, by virtue of their election; prior to this time, viz. on the 6th April, 1803, Charles Davis received a commission as Captain of one of the Ward Companies of Militia, and afterwards relinquished his said commission, and received another commission as Capt. of the Boston Light Infantry Company, dated June 7, 1804, by virtue of their election. In consequence of his acceptance of this late commission, he was placed on duty in a situation below said Capt. Loring, but said Capt. Davis still asserting his claim of rank, the Commander in Chief, with the advice of the Council, issued the said order of the 20th June, in the words and figures following:

“ Commonwealth of Massachusetts.

“ *General Orders.* *Head Quarters, June 20, 1805.*

“ The Commander in Chief being authorized to complete the organization of the Legionary Brigade in Boston, in the First Division of the militia, orders, that the Sub Legion of Light Infantry hereafter consist of the aftermentioned eight Companies, raised at large in Boston; the company commanded by Capt. John Brazer; the company commanded by Capt. Charles Davis; the company commanded by Capt. Daniel Messinger, and the company commanded by Capt. Joseph Loring, jun.—The said Capt. Davis to receive a new commission as Captain of Light Infantry, and to take rank from the date of his former commission as Captain in the Legionary Infantry; Capt. Messinger will also receive a new commission as Captain of Light Infantry, to take rank from the date of his former commission in the Legionary Infantry; and Capt. Loring will also receive a new commission as Captain of Light Infantry, and to take rank from the date of his present commission; and the Major General will issue his orders, agreeably to law, for the election of a Major to command said Sub Legion of Light Infantry.

“ By order of the Commander in Chief.

WILLIAM DONNISON, *Adj. Gen.*”

This order involves several important principles. It assumes the right of transferring officers from one company to another; of giving them rank, not derived from the date of their commissions, or from the election of the companies whom they may command—and also the right of a Commander in Chief, to take away the commissions of officers without their consent, and in a manner not heretofore known.

These several positions, although they may, in some degree, be applicable to an army, where the right of election does not exist, appear to your Committee wholly inadmissible under the existing military system of the *United States*, because this system confirms

the right of election in the Militia of this State, as guaranteed by the Constitution thereof, chap. 2d. sec. 1st. art. 10th.—“ the Captains and Subalterns of the Militia shall be elected by the written votes of the train band and alarm list of the respective companies, and such officers, so elected, shall be commissioned by the Governor, who shall determine their rank.” And because our Constitution says, “ And no officer duly commissioned to command in the militia shall be removed from his office but by address of both Houses to the Governor, or by fair trial by Court Martial pursuant to the laws of the Commonwealth for the time being.”

It may perhaps appear superfluous for us to remark, that the Constitution of the United States, and all laws made in pursuance thereof, are the supreme laws of the land, any thing in the Constitution or laws of any state to the contrary notwithstanding; or that the power of organizing, arming and disciplining the militia is vested in Congress.

The Government of the United States have enacted, that all officers in the militia shall take rank from the date of their respective commissions, except where several commissions shall be of even date, in which case they shall be determined by lot. If any discretion has ever been derived to the Commander in Chief to determine rank in a case like the present, it is wholly extinct under the existing militia law of the United States. This law is clear and explicit, and every person legally elected an officer in the militia, has a right to his commission by virtue of such election, and to his rank according to the date of such commission, and not according to the date of any commission which he may once have held.

From a full view of the case your committee are of opinion, that the before recited order of the 20th June, 1805, is not warranted by the Constitution of the United States, or of this Commonwealth, or any laws made in pursuance thereof; and that the said Joseph Loring, jun. is entitled to redress as far as may be in the power of the Legislature. We therefore offer the following resolve, which is submitted.

ELIJAH BRIGHAM, *Per order.*

*Commonwealth of Massachusetts.*

Whereas it appears that Joseph Loring, jun. a Captain in the Militia of the town of *Boston*, has been tried by a Court Martial, and sentenced to be disqualified from holding any office in the Militia for the term of three years; and whereas it appears that some of the proceedings relative to said Court Martial were irregular, and operated to the injury of the said Capt. Loring, who, on that account has petitioned this court for redress—Therefore,

*Resolved,* That so much of the sentence of the said Court Martial, as relates to the disqualification of the said Joseph Loring, jun. to hold any office in the Militia for three years, be, and the same hereby is wholly reversed and remitted; provided, however, that



this resolve shall not be construed to imply the assent of this Court to the legality of the proceedings of said Court Martial; and provided also, that it shall not be so construed, as to impede the said Loring in pursuing any legal measures for the further redress of the wrongs of which he complains.

In Senate, Feb. 20, 1807,

Read and passed.

Sent down for concurrence.

JOHN BACON, *President*.

In the House of Representatives, Feb. 24, 1807,

Read and concurred.

PÉREZ MORTON, *Speaker*.

#### GOVERNOR'S OBJECTIONS.

*Gentlemen of the Senate, and*

*Gentlemen of the House of Representatives,*

A Resolve was yesterday laid before me, which had passed both Houses, to reverse a part of the sentence of a Court Martial, against Joseph Loring, jun. After examining the Resolve, and the annexed Report of the joint Committee, in which the grounds for passing it are detailed, I think it my duty to withhold my approbation of it, for the following reasons:—

1st. Because the preamble of the said Resolve, and the report of the committee which accompanies it, and of which the resolve is a part, contains censures on divers persons, which, so far as I know, are wholly unfounded.

The preamble recites that Joseph Loring, jun. a Captain in the militia of the town of Boston, has been tried by a Court Martial, and sentenced to be removed from his said office, and disqualified from holding any office in the militia, for three years. That some of the proceedings relating to said Court Martial were irregular, and operated to the injury of the said Loring.—And the report aforesaid of the joint committee, among other things states, that by an order of the Commander in Chief, with the advice of Council, the said Loring has been degraded from his rank;—that the order has occasioned the whole difficulty, and is not warranted by the constitution or law. It further states, that the said Loring has been tried for mutiny, a crime not known in the militia laws;—that the rights of election have been invaded, and that he was tried by a Court Martial not regularly detailed, and by this means was deprived of a fair and impartial trial. The two Houses having accepted the above report, have made it a part of the record.

In the beginning of March, 1805, I laid before the then Council, representations from the Adjutant General, and Major General Elliot,\* relative to the rank of certain officers of light infantry com-

\* From reading this, one is inclined to believe that the Adjutant Gen. and Major Gen. Elliot, thought alike on this subject. The truth is, Gen. Donnison thought one way and Gen. Elliot the other.

panies; and on the 14th of the same month, the Council unanimously advised as their opinion, "That an officer transferred from one corps to another in the *same rank*, should retain the seniority of rank which he held prior to the transfer."†—This opinion was thought to be the true construction of the law, and conformable to the constant military usage, and the advice was accepted accordingly.

Afterwards, in May or June, 1805, upon a representation from the Adjutant General, proposing that the organization of the legionary brigade should be completed, and suggesting that there was some uneasiness in consequence of the above decision, and in particular that a Capt. Loring (who was a stranger to me, and probably to each of the Councillors) was dissatisfied with the rank which it assigned him. A new Council having been chosen, I again requested the advice of Council on the above subject. A committee was appointed to revise the opinion of the former Council, and to hear whatever could be alleged against it. That committee reported, and in conformity to their report, the Council on the 14th of June, 1805, unanimsly advised me to issue the General Orders of the 20th June, which is censured and condemned in the report of the said joint committee. The above order was supposed to be justified by the resolve establishing the legion, and by the authority given by the constitution and law, to the Governor and Council, to regulate the militia.†

If it is expected that by approving this resolve I shall criminate myself, I have certainly no right to censure the members of the Councils of the two last years. I believe it was the opinion of the public in general, that several members of Council in each of those years, were as competent to decide the point above mentioned, as any persons in the state: And to the memory of one of them, the House of Representatives has lately paid a grateful tribute of respect and veneration.

Nor have I any authority, by approving this resolve, to join in censuring the officers of the first division of the militia, and the members of the Court Martial. I am wholly unacquainted with the particular circumstances of their conduct, and the proceedings of those courts.—If they or any other officers of government have violated their duty, the constitution has provided effectual methods to punish them. But I do not conceive that a resolve of the Legislature is one of those methods; and if it is, still they should be entitled, *by the Bill of Rights*, to be heard in their defence.

2d. Because the two provisos at the end of the resolve seem to be of no use for the purpose expressed. But perhaps the first may

\* The true question was never submitted to the Council, or they intentionally evaded it. The idea of a transfer is wholly foreign to the case, that ought to have been submitted to them. A transfer is unknown in the militia. See Gen. Donnison's opinion in the files of the Council.

† Viz. conformably to the Laws of Congress and not otherwise.



be thought to imply a strong sense of the wrongs which Mr. Loring is supposed to have suffered; and the last may be construed as a legislative opinion that those wrongs are actionable.

3d. Because I am apprehensive that if this Resolve is passed, it will occasion great disorder and disorganization in the Militia of this State. Upon the Militia we principally rely for public security and defence; we ought therefore to pay some respect to the honour and feelings of those men, who sacrifice their private interest to support it. If we unnecessarily wound their reputations, we give just offence to every military man, and lessen the security which our country derives from a well regulated Militia. Should the State hereafter be divided into political parties, who will undertake a military office if he is liable to Legislative chastisement, without having an opportunity to be heard? Besides, a contentious man might be tempted to disobey and insult his superior officers, by the hope, that though punished for his offence in *due* course of law, he would be able afterwards to induce a majority of the Legislature to reverse the sentence against himself, and subject to lasting reproach those officers, whose duty had compelled them to be the instruments of his punishment.

4th. Because when an error is supposed to have taken place in the proceedings and judgment of a Court, I think the Legislature have never thought it just to afford even the remedy of a new trial upon an *ex parte* hearing of the case without notice of the other party. But to reverse the judgment and condemn the proceedings of a Court as irregular and injurious, upon such a hearing, is an exercise of Legislative power, of which I believe there is no example in this or any other free country.

5th. Because there is danger that if this Resolve becomes a Law, it will be made use of hereafter as a precedent, for controuling or annulling, by Legislative Resolves, the Constitutional proceedings of the Executive; and for condemning, at the pleasure of the Legislature, the proceedings of any of the Courts which are established by law. The Constitution declares, that the Legislative Department shall never exercise the Executive and Judicial powers, or either of them. This is a fundamental principle of the Government, and if it is subverted, the Constitution itself, and the liberty and safety of the people, are at an end.

6th. Because it appears to me, that censures contained in this Resolve and the Report annexed to it, have a tendency to diminish that mutual civility and respect in the several branches of Government, which the rules of decorum enjoin, and which the public interest and the reputation of the State render necessary. Indeed I can hardly conceive that the Legislature would have thus censured the Executives of the two last years, and the officers of the first Division of the Militia and of the Courts Martial, if the hurry which attends the closing part of a session, had not prevent-

ed that deliberate and cool reflection which the delicacy and importance of the subject required.

The Committee, I am convinced, have made divers mistakes, both as to facts and inferences, which I have not time to enumerate. I now transmit the said Resolve, together with the foregoing objections, to the Senate, where it originated, for the consideration of the Legislature.

CALEB STRONG.

Feb. 26, 1807.

#### CAPT. LORING'S MEMORIAL.

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts, in General Court assembled.*

Joseph Loring, Jun. respectfully remonstrates to your honorable body, against the treatment he has received, as a militia officer, holding a commission of Infantry, dated August 15, 1803, signed by his late Excellency Caleb Strong, Esq.

1st. Because he was ordered by a General order, dated June 20, 1805, to take a new commission, (*with an interpolated clause*) dated two years posterior to his first and only commission, (which he did not agree to, or receive) thereby placing him under an officer who he had before commanded, and causing him the said Loring to lose his legal and constitutional right of rank as an officer.

2d. Because the said order transferred him the said Loring, Jr. and his company to a Light Infantry corps, contrary to his and their enlistment, and without their consent.

3d. Because he was ordered to be tried for the crime of publishing a book of Facts and Documents, which, *if false*, might have been a crime, when law martial was declared; but is not known in the militia law of this State, or of the United States.

4th. Because the Court Martial that tried him was not regularly detailed: but in some instances were particularly appointed by superior officers; thereby annihilating his right to a fair and impartial trial, conformably to the spirit of our constitution; and because his challenges, with cause shewn to the Court, were not permitted to avail him any thing.

5th. Because he was condemned upon a commission he never held or qualified himself to; and to support this fact, as he has been informed, orders have been transmitted to his Subalterns; although he now holds his first and only commission, under which he has never committed a crime.

6th. Because he was held in arrest six months, by Major Gen. Elliot; four months of which were after he was acquitted of all the charges brought against him, by the Jury of his country; when Gen. Elliot saw fit to disapprove in orders the Court Martial's judgment; thereby causing the said Loring, Jun. to be injured in his character, which the constitution declares every man shall be protected in.



For these reasons the said Loring, Jun. complains against the order of the 20th June, 1805, considering it to be illegal, unconstitutional and void; and also against the conduct shewn towards him by superior officers—and more especially—because the organization of the Boston Brigade, conformably to a resolve of the Legislature, in 1798, was settled by an order of the late Governor Sumner, in that year; and no new resolve has ever been made, or even that order countermanded; therefore, all posterior orders, not conformable to that resolve and order, cannot support an *office* or an *officer*.

And the said Loring, Jun. further states, that since the order of 20th June, 1805, Capt. Townsend, Jun. in the 3d Division, commanded a standing company of Infantry, and was elected the 25th June, 1805, to a Light Infantry company, similar to that of Capt. Davis, but was obliged to resign his first command and receive a new commission, *without any interpolated clause whatever*; and he now takes rank by his Light Infantry commission, and his first commission avails him nothing.

Now the said Loring, Jun. presumes to hope that the honorable Court will, after examining the truth of the foregoing statements, (which he pledges himself to prove) be convinced and satisfied, that all the proceedings against him have been illegal and unconstitutional; and that they will, in their wise consideration, and for the good of the State, reverse the whole proceedings, and recommend the countermanding of that General order of the 20th June, 1805; agreeable to precedent of a former Legislature, in the year 1792, who did reverse, by a resolve, the *legal* proceedings of a Court Martial, which acted at that time; which resolve was approved by the late John Hancock, Esq. then Governor.

The said Loring, Jun. further requests the honorable Court to take into consideration the grievances, embarrassments and injuries he has experienced in his person and character, and grant him redress therefor, so far as their wise judgment may dictate, conformably to the constitution, which says, "The Legislature ought frequently to assemble for the redress of grievances and confirming the laws," &c.

JOSEPH LORING, Jun.

#### MEMBERS' MEMORIAL.

*To the Hon. Senate, and House of Representatives of Massachusetts.*

The subscribers humbly shew, that they are members of the Company formerly called the Washington Infantry; but since the 20th June, 1805, have been annexed to a body of troops in Boston, called "The Sub Legion of Light Infantry;" and from that circumstance have been denominated the Washington *Light* Infantry.

This annexation was contrary to our wish, and contrary to our enlistment, and was produced by a General Order, dated 20th June,

1805; and although that order positively never had our assent, it would not have been disagreeable to us, had it not involved in it (entirely unexpected to us) the loss of that rank which our Captain and our Company had held ever since the date of his commission and our enlistment.

Although that order of the 20th June, 1805, is called a *General* Order, yet it certainly is not general in its operation, and seems calculated only to put down one officer, and put up another, in a manner which we think the good of the service did not require.

It is needless to make a long statement of a case with which your honors are already generally acquainted; we therefore pray that your honors will so far interpose in our behalf, as to rescue us from the injurious effects of that "General" Order of the 20th June, 1805, and restore us and our Captain to that rank which we trust we have never forfeited by any neglect of duty, or disobedience of any lawful and constitutional order.

And as in duty bound will ever pray.

*Resolve, setting aside the proceedings of a Court Martial, relative to Joseph Loring, jun. June 20, 1807.*

The Committee of both Houses, on petition of Joseph Loring, jun. have attended the duty assigned them, and now report, That the said Loring received a Commission, dated August 15, 1803, as Captain of an Infantry Company, raised at large in the town of Boston, stiled the Washington Infantry—at this time Charles Davis commanded a Ward Company of Infantry in the same town, by virtue of a Commission dated April 6, 1803,—afterwards, *viz.*—on the 7th day of June, 1804, he was elected by the Boston Light Infantry, and received a commission as Captain of said Company, of the last date; and afterwards was placed in the line below said Captain Loring, in conformity to the dates of their respective commissions.—On the 20th June, 1805, a General Order was issued by the Commander in Chief, directing Captains Messinger, Loring, and Davis, to receive new Commissions; that Captain Davis should take rank of Captain Loring, notwithstanding the dates of their respective Commissions; and that Capt. Loring should receive a Light Infantry Commission to command an Infantry Company, although his Subalterns then held and still hold Infantry Commissions;—to this Order Capt. Loring objected, as unconstitutional and illegal, because it took from him a commission without his consent, and because it assigned to Captain Davis a priority of rank, not derived from the date of his Commission: he represented his case to the Commander in Chief without effect, and was arrested in October, 1805, for abetting his company to mutiny, and on other charges, of all which he was acquitted in December of the same year; but was held in arrest until April, 1806—afterwards said Loring forwarded to the Commander in Chief his wish that



he might be permitted to resign: this communication was laid before the Council, but not until he had been again arrested for refusing to acknowledge the said Davis as his superior officer, and to it he never received an answer. This last arrest was in September, 1806, and in the succeeding month, in pursuance of orders from Major General Elliot, he was tried by a Court Martial, sentenced to be removed from office, and disqualified from holding any military commission under this Commonwealth for the term of three years. The said Loring also complains, that the members of this Court Martial were not regularly detailed, and that by this means he has been deprived of a fair and impartial trial.

Your Committee are of opinion, That the General Order of the 20th June, 1805, is unconstitutional, because no officer, duly commissioned, can be removed from his office, but by the address of both Houses to the Governor, or by fair trial in Court Martial, and because the property of an individual cannot be taken from him but by legal process.

The power of organizing, arming, and disciplining the Militia, is expressly vested in the Government of the United States, and Congress have exercised this power by an act, passed May 8th, 1792; this act must be binding on the Militia of this Commonwealth; for the acts of Congress, made in pursuance of the Constitution of the United States, are paramount to our state laws, and even to our state Constitution. The people of this Commonwealth, in adopting the constitution of the United States, have declared the same, and all laws made in pursuance thereof, to be the supreme laws of the land, the constitution, or laws of any state to the contrary notwithstanding: The right of determining rank is incident to the power of organization, and has been positively determined in the 8th section of said act of May, 1792, in these words: "That all commissioned officers shall take rank according to the date of their commissions." The General Order aforesaid, having for its object, the establishment of rank in a manner repugnant to the said act of 1792, your committee are of opinion, must therefore be illegal.

In the declaration of rights, art. 17th, it is said, that the military power shall always be held in exact subordination to the civil authority, and be governed by it. It is also said, art. 22d, that the Legislature ought frequently to assemble for the redress of grievances. If the power of redressing all wrongs is inherent in our government, of which we think there can be no doubt, we think it must be obvious that this power, being vested in no other body, must rest in the Legislature, and may be exercised respecting the Military with as much propriety as towards the civil concerns of the Commonwealth. It will be recollected that this power has been constantly exercised in setting aside the proceedings of Judicial Courts, for apparent errors in their proceedings, or by reason of their not having had that fair and impartial trial which is con-

templated by the constitution. This is not assuming the Judicial power, if the citizen is not thereby deprived of a new trial.

The petitioner has proved, by the records of the Court Martial, and by original papers in the case, that the members were not regularly detailed, by reason whereof he has not had that fair and impartial trial to which every citizen is entitled. The regular detailment of the members of a Court Martial is as necessary to a fair trial as the regular impannelment of a jury; for if the principle of detailment by regular rotation is permitted to be infringed, the rights and characters of inferior officers, may be placed wholly at the mercy of superiors, whom they may be so unfortunate as to offend.

From these considerations, your committee are of opinion, that the proceeding of said Court Martial should be set aside, in order that the said Loring may have a fair and impartial trial; they therefore offer the following Resolve, which is submitted.

A. HILL, *per order.*

Whereas it appears that Joseph Loring, jun. a Captain of the Militia in the town of Boston, has been tried, sentenced to be removed from office, and adjudged incapable to hold any military commission under this Commonwealth, for the term of three years, by a Court Martial, begun and holden at Boston, on the 28th day of October, 1806, and whereas it appears that some of the members of said Court Martial were not regularly detailed, and that said Joseph Loring, jun. has not had that fair and impartial trial to which he was entitled, and has petitioned this Court for redress:

*Therefore Resolved*, That the proceedings of said Court Martial, relative to the said Joseph Loring, Jun. be, and the same are hereby wholly set aside.

In Senate, June 16, 1807,

Read and accepted. Sent down for concurrence.

SAML. DANA, *President.*

In the House of Representatives, June 17, 1807,

Read and concurred. PEREZ MORTON, *Speaker.*

June 20, 1807, approved,

JAMES SULLIVAN, *Governor.*

A true copy, attest—

JONATHAN L. AUSTIN, *Secretary.*

#### GENERAL ORDERS.

*Head Quarters, Boston, Sept. 7, 1807.*

The Governor has laid before the Council a copy of the commission of Joseph Loring, jun. as Captain of an Infantry Company said to be raised at large in the Legionary Brigade, First Division, dated the 15th day of August, 1803, with all the papers and documents within his knowledge, touching said Loring's command in, and connection with, the Brigade: and the letters, observations, and remarks of the Major General and Brigadier General upon the subject.



It appears that said company, though said to be raised at large, was not raised as a Light Infantry Company. The principles of the law of the United States, and of the law of this State, recognize Light Infantry companies as originating in voluntary enlistment only, and there are no authentic documents to show that the said company individually, ever engaged themselves by voluntary enlistment as a Light Infantry company, in that station, ever elected their officers, or had officers regularly appointed, who accepted and were qualified.

The Commander in Chief has no power, as he conceives, by law, to transfer a company of Infantry to a corps of Cavalry, Artillery, or Light Infantry, so as to change its nature and increase its expense, without its consent. But the Governor, by and with the advice and consent of the Council, has power, by the 4th section of the militia law of 1793, to make arrangements for the militia, and to alter the same from time to time, as shall be necessary; and it appearing to the present Governor and Commander in Chief, as well as to the Honorable Council, that the very unfortunate controversy respecting that company can be brought to a quiet termination under the form of a new arrangement easier than in any other manner:—

Therefore, it is ordered and arranged, by and with the advice and consent of the Council, that the company commanded by Capt. Joseph Loring, jun. be considered and recognized an Infantry Company, attached and belonging to the Regiment of Infantry of the Legionary Brigade, commanded by Lieut. Col. Thomas Badger, and subjected to all the duties and orders of an Infantry Company in that Regiment.

By order of the Commander in Chief.

(Signed) WILLIAM DONNISON, Adj. Gen.  
Maj. Gen. Elliot.

FIRST DIVISION. Boston, Sept. 12, 1807.

TRANSMITTED.

(Signed) SIMON ELLIOT, Maj. Gen.  
Brig. Gen. Winslow, Leg. Brig.

BRIGADE ORDERS. Boston, Sept. 16, 1807.

TRANSMITTED.

Per order Brigadier General. B. P. TILDEN, Brig. Maj.  
Lt. Col. Th. Badger, Sub Leg. Infantry,  
Leg. Brig. First Division.

INFANTRY ORDERS. Boston, Sept. 20, 1807.

TRANSMITTED.

Per order Lt. Col. Tho's Badger. GEO. BASS, Adj.  
Capt Joseph Loring, Jun. Infantry.

## CAPT. BINNEY'S TRIAL.

*Minutes and Proceedings of a Division Court Martial, begun and holden at Dedham, in the county of Norfolk, and Commonwealth of Massachusetts, at a place called the County Court-House, on Tuesday, the fifteenth day of November, in the year of our Lord one thousand eight hundred and eight.*

PRESENT—

LIEUT. COL. JOHNSON MASON, of the 1st Regiment, 2d Brigade,  
1st Division, *President.*

*Members—*

Maj. ABNER MORSE, of the Artillery, 2d Brigade,  
Maj. JOSEPH JONES, of the 1st Regiment, 1st Brigade,  
Maj. LEMUEL LOVELL, of the 2d Regiment, 1st Brigade,  
Capt. ELIAS COOK, of the 3d Regiment, 2d Brigade,  
Capt. JOSEPH FORD, of the 3d Regiment, 1st Brigade,  
Capt. HUMPHRY BICKNELL, of the Artillery, 1st Brigade,  
Capt. BENJAMIN WELD, of the Cavalry, 1st Brigade,  
Capt. LOT LEACH, of the 2d Regiment, 2d Brigade,  
Lieut. JOHN GOULD, of the 1st Regiment, 1st Brigade,  
Lieut. JOHN SAVELS, of the Cavalry, 2d Brigade,  
Lieut. LUTHER EATON, of the Lt. Infantry, 1st Reg. 2d Brig.  
Lieut. JOHN WHITE, of the 3d Regiment, 1st Brigade,  
Maj. CHARLES DAVIS, Judge Adv. of the 1st Div. *Judge Advocate.*  
Adj. GEORGE BASS, of the Infantry Legionary Brigade, 1st Division, *Marshal.*

All of the First Division.

The following orders were read :

COMMONWEALTH OF MASSACHUSETTS.

DIVISION ORDERS.

FIRST DIVISION.

Boston, Oct. 24, 1808.

Maj. Peter Osgood, of the Infantry in the Legionary Brigade, first Division, having transmitted a complaint against Capt. Amos Binney, of the Infantry aforesaid, for disobedience of orders and unmilitary conduct, as detailed in the several specifications of charge contained in said complaint—a Division Court



Martial, for the trial of said Capt. Amos Binney, will be holden at the Suffolk Court-House, Court-street, Boston, on Tuesday the 15th day of Nov. next, at 9 o'clock, A. M. The Court to be constituted as follows :

*President*, Lieut. Col. JOHNSON MASON, 1st Regiment, 2d Brigade. *Members*—two Field Officers of the rank of Major, three Captains and two Lieutenants from the first Brigade ; one Field Officer with the rank of Major, two Captains and two Lieutenants from the 2d Brigade. *Judge Advocate*, Maj. CHARLES DAVIS. A suitable officer to be detailed from the Legionary Brigade, to act as *Marshal* to the Court.

Brig. Gen. Winslow will give the necessary orders for furnishing the Judge Advocate immediately with all proper documents, and also for the officer under arrest to be served in season with a copy of the complaint, and due notice to be given him of the time and place of holding the Court.

*By order of Major General Elliot.*

JOSEPH PEIRCE, 2d, A. D. C.

DIVISION ORDERS. \*

FIRST DIVISION.

*Boston, Oct. 31 1808.*

The Division Court Martial, for the trial of Capt. Binney, which was ordered to be holden at the Court House, Court Street, Boston, on Tuesday the 15th day of Nov. next, at 9 o'clock, A. M. will, instead thereof, convene at the County Court House in Dedham, at the time and for the purpose above mentioned. All persons concerned will take notice accordingly.

*By order of Maj. Gen. Elliot.*

JOSEPH PEIRCE, 2d, A. D. C.

Capt. Amos Binney, of the Infantry, in the Leg. Brigade, the officer to be tried, upon being called, appeared and answered in his own proper person.

The names of the officers ordered on the Court were now read. The Defendant observed he had objections or challenges to offer against some of the

officers intended to compose the Court Martial for his trial ; and wished that the members objected to, might not be sworn until the validity of his objections should be decided upon. He named the following officers as being those he should object to, viz. Majors Morse and Jones ; Capts. Weld and Leach ; Lieuts. Savels, Eaton, and White.

The part of the Court not objected to, to wit, Col. Mason, (the President) Maj. Lovell, Capt. Cook, Captain Ford, Capt. Bicknell, and Lieut. Gould, respectively had the oath administered to them by the Judge Advocate, as directed by the 35th section of a Law of this Commonwealth, passed June 22d, 1793, entitled "An Act for regulating and governing the Militia of the Commonwealth of Massachusetts, and for repealing all laws heretofore made for that purpose, excepting an Act entitled an Act for establishing rules and articles for governing the troops stationed in forts and garrisons within this Commonwealth, and also the Militia when called into actual service."

Then the President administered to the Judge Advocate the oath as directed in the same 35th section of the Act aforesaid.

Capt. Binney now adduced his causes of challenge in writing, that the part of the Court not objected to, might decide thereon. Upon the causes being produced, it appeared that the objections of Capt. Binney rested entirely upon what he considered and alleged to be an irregularity in the detail of those officers objected to. The causes of challenge are paper No. 1, accompanying the proceedings. After this paper was read, the Judge Advocate called upon Capt. Binney to produce evidence, if any he had, in support of the objections he had made. Capt. Binney produced a paper, certified by the Adjutant General, as being a correct copy of the Divisionary Roster of the 1st Division, so far as it respects the Field officers, Captains, and Lieutenants of the first and second Brigades.



He also produced another paper, containing a copy of the Resolve of the General Court, passed June 20, 1807, setting aside the proceedings of a Court Martial on Capt. Joseph Loring, Jun. with General orders of June 26, 1807; Division orders of June 27, 1807; Brigade orders of June 29, 1807; Infantry orders of June 30, 1807; and Sub Legion orders of July 2, 1807, predicated thereon, and transmitted to Captain Amos Binney of the Infantry. This paper is No. 3, and accompanies the proceedings. Capt. Binney, after the above papers were read, was asked if he had any other evidence to adduce in support of his challenge, answered that he had not, except it might be to explain. Whereupon the Court was cleared, and after full deliberation, the following question was ordered to be put to each: Are you of opinion that the challenge adduced and offered by Capt. Binney is supported by evidence, and proved?

It was decided, that the objections offered as causes of challenge were not supported by evidence; and that the same be over-ruled; and that the members objected to, should be called in and take their places. The Court was then opened, and the officers, objected to as aforesaid, took their seats, and each respectively, to wit, Major Morse, Maj. Jones, Captain Weld, Capt. Leach, Lieut. Savels, Lieut. Eaton, and Lieut. White, had the oath administered to them by the Judge Advocate, as directed by the 35th section of the law of this Commonwealth, before referred.

Capt. Amos Binney, the Defendant, was now called, and answered in his proper person. Maj. Peter Osgood, the complainant, was also called and answered. The complaint was now read to the Defendant as follows:

*Boston, Oct. 10, 1808.*

Peter Osgood, Major, commanding the 1st Sub Legion of Infantry, Legionary Brigade, 1st Division of Massachusetts Militia, begs leave, most respectfully, to present his complaint against Capt. Amos Binney, of said Sub Legion, for unmilitary conduct

and disobedience of orders. 1st. For that the said Capt. Amos Binney did, on the 3d day of Oct. inst. send back to your complainant a Sub Legion order, dated Sept. 26, which order was predicated on Infantry orders, dated Sept. 22, directing said Sub Legion to parade on Boston common, for inspection and discipline. Your complainant condescended to send the said order the second time, which the said Capt. Binney did refuse to acknowledge and obey, which order it was the duty of the said Capt. Amos Binney to receive and obey.

2d. Your complainant was compelled, on the 8th inst. to send the said Capt. Amos Binney an order of arrest, to prevent any confusion that might take place on the parade, ordered on Monday the 10th inst. following; and sent an order to the next officer in the company to take the command and march said company on the parade. The said Capt. Binney did refuse to acknowledge said order of arrest, and did send the same back to your complainant, and did assume the authority to go on the said company parade, on the morning of the 10th inst. appointed for the inspection and discipline, and take the command of said company, and march them on the place appointed for the inspection, depriving the proper officer of the command of said company, and of his right. And your complainant was compelled to order the said Capt. Binney to leave the parade and relinquish the command of the said company to the proper officer; your complainant viewing such conduct to be an open violation of the oath of office, and the laws of this Commonwealth, which the said Capt. Binney and every other military officer is sworn to support and maintain. To pass by or overlook such conduct would be encouraging others to offend in like manner, and would have a manifest tendency to subvert all order and subordination in the militia, which is the natural bulwark of our country. Your complainant, therefore, requests, that proper measures may be taken, that the said Captain Amos Binney may be held to answer to the charges alleged against him in this complaint, as the law directs.

(Signed) PETER OSGOOD, Major, 1st Sub  
Legion Infantry, Leg. Brig.

To Lieut. Col. Thomas Badger,  
commanding the Sub Legions  
of Infantry, Legion. Brigade. }

The Judge Advocate then demanded of the Defendant whether he were guilty or not guilty of the charges exhibited against him in the complaint.

The Defendant observed, that before he plead, he wished it to be noted, that he had not been served with a copy of the complaint. The Defendant then



produced a paper purporting to be a copy of the complaint with which he was served. It appeared, upon inspection, that the *direction* of the original complaint to "Lieut. Col. Badger, commanding the Sub Legions of Infantry, Legionary Brigade," was omitted in the Copy.

The Defendant wished it might be recorded, that he had not been served with a copy of the charges according to law; and yet, that the trial might proceed. To this the Judge Advocate objected, saying, that he (the Defendant) must either persist in the objection, or waive it altogether. If he waived it, there would be an end of the matter; if not, the objection must be submitted to the Court for decision, and a decision had before the Court would proceed any further.

Whereupon the Court was ordered to be cleared; and then decided, that the paper produced by the Defendant, and alleged by him not to be a copy of the charges, was a *copy* of the charges, exhibited against him, within the meaning of the law. The copy produced by the Defendant is paper No. 5, among the papers accompanying the proceedings.

The Court was then opened, and Capt. Binney was called upon to plead to the complaint. Capt. Binney answered, that of the charges alleged against him in the complaint, he was *not guilty*, and put himself upon the laws of his country for trial.

The Defendant, at the first opportunity after the Court was formed, offered the paper No. 6, among the papers accompanying the proceedings, objecting to his being obliged to leave the Court when it was ordered to be cleared, &c. for consultation. The Court observed it would take the paper into consideration at some convenient time during the trial, and would give its understanding and an explanation of the necessity of the practice or custom alluded to.

At half past four, P. M. the Court was ordered to be adjourned until to-morrow morning, ten o'clock, which was done in due form by the Marshal.

Wednesday, Nov. 15th, 1808, 10 o'clock, A. M.

The Court met pursuant to adjournment, and were all present.

The Court was opened in due form by the Marshal. The complainant and Defendant were both called, and were present. The record of the proceedings had yesterday were read, and agreed by the Court and all parties to stand correct.

The Defendant, upon being asked, would not admit that he either received or returned the orders alluded to in the first specification of charge.

Audience of evidence was now moved for by the Judge Advocate, and admitted by the Court. Whereupon, Thomas Redman, adduced as a witness on the part of the government, was sworn by the Judge Advocate, was examined, interrogated, and testified as follows:

*Question* by the Court. Do you know any thing relative to the delivering the Sub Legion or any other orders to Capt. Binney, as set forth in the charges?

*Answer.* I think, on or about the 27th day of Sept. last, I received an order from Col. Badger, directing me, in the absence of Adjutant Bass, to distribute orders. The orders received by me I distributed personally in every instance excepting two. On the day after I received the order from Col. Badger, I handed in person to Capt. Amos Binney, Division orders of the 10th Sept. last, Brigade orders of the 19th of the same Sept. Infantry orders of the same 19th Sept. and Sub Legion orders of the 26th of the same Sept. signed by Maj. Osgood, and all directed to Capt. Binney. When I handed the orders to Capt. Binney he asked me what I had there? I said I presumed they were orders: He observed if there were Sub Legion orders



attached to them, he would not receive them. He said this while the orders were in his hands. He then opened the paper, and when he saw the Sub Legion orders, he began to tear them from the others. He then said he should send them back again: I answered not by me. Some further conversation passed of the same import as that above. I then left him with the orders in his possession.

On the evening of the same day, or the evening following, I received what I think was the same Sub Legion order of the 26th Sept. last, which I had delivered to Capt. Binney, and enclosed in a billet directed to me, and signed A. Binney. Here is the note or letter, and here are the orders, which came enclosed, and which appear to have been torn or separated from the other orders, which I gave Captain Binney. The same evening I received the billet, I gave the orders, which had been returned to me, (by Capt. Binney) to Maj. Osgood, and at the same time, I shew him the billet which had been sent me by Captain Binney.

The orders sworn to by Quarter Master Redman to have been delivered by him as aforesaid, to Capt. Binney, and the letter received by him from Captain Binney, follow:

COMMONWEALTH OF MASSACHUSETTS.

DIVISION ORDERS.

FIRST DIVISION:

*Boston Sept. 10, 1808.*

The troops having been reviewed and inspected the last Autumn by Brigades, they will, in the present Autumn, be mustered as is provided by law—"Instructed and disciplined under the direction of a Field officer."

A neglect in any platoon or non-commissioned officer, in not being provided and equipped according to law, must be noticed and punished promptly.

The commanders of Regiments, Squadrons, and Battalions will not suffer any companies under their

command to adopt a uniform not approbated by the Brig. General.

(Signed)

SIMON ELLIOT, *Maj. Gen.*

*Brig. Gen. Winslow, Legion. Brigade.*

BRIGADE ORDERS.

*Boston, Sept. 19, 1808.*

In pursuance of the above Division orders, Lieut. Col. Thomas Badger, Maj. Oliver Johonnot, and Maj. Daniel Messinger, will order the troops under their respective commands, to parade on Boston common, by Sub Legions, in the month of Oct. next, for inspection and discipline, giving due notice of the time to the inspecting officer.

Capt. Henry Purkitt will parade his troop of Light Dragoons, on the same day, with and under the command of Maj. Messinger.

(Signed)

JOHN WINSLOW, *Brig. Gen.*

*Lieut. Col. Thomas Badger.*

*Legion. Brig. 1st Division.*

INFANTRY ORDERS.

*Boston, Sept. 22, 1808.*

In pursuance of Division orders of the 10th, and Brigade orders of the 19th, present, the Majors commanding Sub Legions, will order their Sub Legions to parade on Boston common, for inspections and discipline, as follows: Major Osgood will order the Sub Legion, under his command, to parade on Monday the 10th day of October next. The line will be formed at 10 o'clock, A. M.

Major Stearns will order the Sub Legion, under his command, to parade on Tuesday, the 11th day of Oct. next. The line will be formed at 10 o'clock, A. M.

Major Stodder will order the Sub Legion, under his command, to parade on Wednesday the 12th day of Oct. next. The line to be formed at 10 o'clock, A. M.

The fourth Sub Legion, comprising the companies under the command of Captains Joseph W. Homer, Ammi Cutter, Samuel Hewes, and Lieut. David Providence, will parade on Thursday, the 13th day of Oct. next. The line to be formed by the senior officer, at 10 o'clock, A. M.; after which Major Osgood will take the command.



Capt. Joseph Loring, Jun. will order the company under his command, to parade on the common, on Monday the 10th day of Oct. next, at 10 o'clock, A. M. and will form under the command of Major Osgood, for inspection. The troops will appear without cartridges loaded with ball.

THOMAS BADGER, *Lieut. Col. Com'g*  
*Infantry, Legion. Brig. 1st Div.*

N. B. Sergeants Nathan Foster and Ebenezer Belknap are discharged.

Sept. 22, 1808.

In case Adjutant Bass does not come in town this week, Quarter Master Redman will distribute these orders.

THOMAS BADGER, *Lieut. Col.*

SUB LEGION ORDERS. *Boston, Sept. 26, 1808.*

Division orders of the 10th, Brigade of the 19th, Infantry orders of the 22d, are hereby communicated: to carry the same into effect, Captains Amos Binney, Dan'l Badger, Barzilla Nelson and Ebenezer Rhoades, with their officers and soldiers under their respective commands, will appear on Boston common, on Monday the 10th of Oct. next, at 10 o'clock, A. M. for the purposes as expressed in the above orders. The line will be formed at a quarter past 10 o'clock, A. M. Cartridges will be supplied on the parade.

PETER OSGOOD, *Major.*

*Boston, Sept. 28, 1808.*

Sir—Enclosed is a paper, signed by Major Osgood, which you placed in my hand this morning under pretence of handing me a Regimental order. As I know of no authority which authorizes you to distribute orders from Major Osgood, I have taken the liberty to return it to you, that you may send it to the place from whence it came, or otherwise dispose of it as you see proper. Your humble servant,

To Thomas Redman.

A. BINNEY.

After the foregoing orders were read, together with the letter from the Defendant, produced by the wit-

ness, Quarter Master Redman, the following questions were asked him:

*Question by Defendant.* Were you appointed, by Lieut. Col. Badger, Quarter Master to his Regiment?

*Answer.* I was appointed, by Col. Badger, Quarter Master. My commission, which I now produce, shews that it commissions me, as Quarter Master of the Infantry in the Legionary Brigade, first Division.

The commission produced by the witness shews, that he was commissioned as he states.

*Q. by Defendant to same.* Were the orders from Col. Badger, which appear to be in these words, "In case Adjutant Bass does not come to town this week, Quarter Master Redman will distribute these orders," your authority to act by?

*A.* They were, in addition to my having seen Col. Badger's original orders, from which the others were printed.

*Q.* same to same. Did I send back to you the orders which your Col. directed you to distribute?

*A.* No, Sir.

*Q.* same to same. Did not Major Osgood direct you to carry his orders to me again, and did not you refuse, because you conceived you had no authority from your Colonel?

*A.* He did not. Major Osgood never directed me to carry an order. I never conceive myself to be under the command of any of the Majors of the Sub Legions, unless I am placed there by the orders of my Colonel.

*Q.* by Court to same. Did Capt. Binney send back to you the order of Maj. Osgood, which was attached to Col. Badger's order?

*A.* I presume the order, which was enclosed in the letter Capt. Binney sent to me, was the same I gave to Capt. Binney. I gave him the same orders I received, with Major Osgood's orders attached to them. These orders of Major Osgood came to me from Capt.



Binney, and, as I believe, are the same which I gave him so attached, and which came to me separated from the others.

Maj. Peter Osgood, the complainant, was now adduced as a witness on the part of government, was sworn by the Judge Advocate, was interrogated, testified, and answered as follows :

Q. by the Court. Do you know any thing relative to sending the orders to Capt. Binney ? If you do, relate it.

A. I sent the orders relative to the parade, on the 10th Oct. last, of the Sub Legion under my command, with my orders predicated thereon, by Quarter Master Redman, to Capt. Binney, agreeably to Colonel Badger's order sent to me. After Mr. Redman returned to me the Sub Legion order from Capt. Binney, I think on the next day, I again sent the same orders to Capt. Binney by Sergeant Valentine Baxter, with a communication to Capt. Binney on the subject, by which I informed him I hoped he would retract from the position he appeared to be taking, that difficulty might be prevented : if he did not, I should be obliged to enter a complaint against him for disobedience of orders. I think it was on the next day I received, by the hands of one of Capt. Binney's Sergeants, a communication from Capt. Binney. This is the communication, and in this, the same orders were enclosed and sent back to me again. The Sub Legion orders, which are now before the Court, are the same which were sent by me to Capt. Binney both times. This is Capt. Binney's communication to me. The Defendant now produced the communication of Major Osgood to him : they were both read, and follow :

*Boston, Oct. 3, 1808.*

Sir—I have had a Sub Legion order, dated Sept. 26. 1808, returned by you, which order, as well as the officer that delivered it, you have undertaken to say is unauthorized to issue or deliver such orders. I shall not undertake to dispute that point. But you must recollect that I have been directed to order the Sub Legion,

under my command, to appear on Boston common for inspection and discipline, on the 10th of Oct. inst by Lieut. Col. Thomas Badger, who placed me to that command ; and you Sir, have repeatedly obeyed and acknowledged me as commanding officer of the first Sub Legion of Infantry, Legionary Brigade. I have seen no authority which hath displaced me from that command. Capt. Binney will not consider himself under any orders for the 10th of Oct. instant, unless it is Sub Legion orders, which I again send you, by the hand of Sergeant Major Valentine Baxter. I mention these things that you may have an opportunity to retract from your present position. and return to your duty.

PETER OSGOOD, Major, first Sub Legion  
 Capt. Amos Binney, first Sub }  
 Leg. Infantry, Leg. Brig. }

*Boston, October 3, 1808.*

Sir—I received your esteemed favour of this date on my company parade this morning. In attempting to pen a feeble answer to so valuable a communication, I beg you to be assured *now*, officially, as you have been heretofore, verbally, that, in the unhappy contest between us, I feel totally divested of every passion, unworthy of an officer, whose only pride consists in a faithful discharge of his duty agreeable to the constitution, and the requisitions of those laws he hath taken a solemn oath to support. And that towards yourself I cherish all the sentiments of respect due from one gentleman to another. and from a Platoon officer to one in your more elevated grade. I now shall notice the contents of your letter, and reply to some of the "positions" you have there assumed ; in doing which, I shall most studiously avoid every pointed reflection that may not be absolutely necessary to place truth above error, and correct procedure above a visionary phantom.

And first, you introduce the subject in these words, "I have had a Sub Legion order, dated Sept. 26, 1808, returned by you, which order, as well as the officer that delivered it, you have undertaken to say is unauthorized to issue or deliver such orders." I have undertaken to say and do now say that the troops under the command of Lieut. Col. Badger compose a *Regiment*, otherwise his commission is a dead letter ; and every transaction had under his direction is null. That you are one of Col. Badger's Majors I do acknowledge, and always have. That when Col. Badger orders any portion of his regiment into the field and places you over that corps, you then have a command, and there may issue your orders, which the troops and officers on duty must obey. But that, by virtue of your being a Major in the *Regiment* of Col. Badger, you have a right to intercept the orders of Col. Badger, between him and the several Captains in his regiment, and mutilate, add to, or diminish therefrom, and avail yourself of his Adjutant,



his Quartermaster, his Serjeant Major or any other regimental officer, to distribute them when so altered; I have denied, and still shall, as in duty bound contend for the "point."

I have also said, that the Adjutant of the Regiment who so far degrades himself as to become the bearer of letters or orders from any field officers, except the Colonel who appointed him, or the commanding officer of the regiment, is unfit to fill the office he holds; and were his Colonel to call him to an account he could not answer for his unmilitary conduct; especially as he pretends to act as an Adjutant to four or five field officers at one and the same time; a thing, if possible, more absurd than for a Lieutenant of a company to set up his claim to be a Lieutenant of every company in the same regiment.

Your next paragraph, "I shall not undertake to dispute that point," is a most complete concession of all that I ask, and in future having your own authority for it, I shall consider the "point" between you and myself forever settled. And whatever interest you may feel, or part you may hereafter take, in support of the *chimera*, I shall consider it as a gratuitous effort to assist your Majors in their usurpations, they having not yet so frankly conceded the point, and whose subaltern officers may, some time or other, see and act as becomes them, in resisting the usurpation. Hence your next paragraph, "but you must recollect that I have been directed to order the Sub Legion under my command to appear on Boston Common, for inspection and discipline, on the 10th Oct. inst. by Lieut. Col. Badger, who placed me to that command; and you, sir, have repeatedly obeyed and acknowledged me as commanding officer of the 1st Sub Legion of Infantry, Legionary Brigade."

Having before me what Col. Badger is pleased to call his *Infantry* orders, I now see, as I have from the moment I received them from the hand of Col. Badger's Adjutant pro tem, that you are ordered to parade the 10th. with the Sub Legion under your command. But as there are several sentences in that order which will bear more than one construction, I think it liberal in me or any other officer in his regiment to put that construction on any vague sentence which nearest comports with military organization and discipline. You no doubt possess the general order of Sept. 7, 1807, which communicates the decision of the Governor and Council, that Col. Badger is the Commandant of the *Regiment of Infantry of the Legionary Brigade*. As such, his orders are unquestionably regimental orders; but if he prefers to name them *Infantry orders* I shall not cavil about the terms, they are in essence regimental orders.—So when he directs Sub Legions to parade at different periods, there being no portion of a Regiment recognized by the Laws as a Sub Legion, liberality prompts to the construction that *Battalion* is meant *Battalion*, being a legal component

part of a regiment; and the company under my command being, by general consent, a part of the first Battalion of Col. Badger's Regiment, and Maj. Osgood being his eldest Major, I most cheerfully comply with the regimental orders of 22d Sept. last, and shall place myself under his command, agreeable to that regimental order, on the 14th inst. where I shall hold myself ready to obey any proper order he may there give. With respect to my formerly obeying you as commanding officer of the 1st Sub Legion, I do acknowledge that previous to the general order of the 10th March, 1808, I obeyed Sub Legion orders, although I always contended, that the system was unmilitary; but since the receipt of that general order, which declares *Legionary Infantry* to be a corps not known in the Laws, I have utterly refused to receive orders on the Legionary principle, and from you as Major of a Sub Legion; this you have long known, both verbally and by receiving back the orders you had sent by the Colonel's Adjutant. With respect to your assertion "I have seen no authority which has displaced me from that command," I presume then you have not seen the said General order of 10th March, 1808, covering the decision of the Governor and his Council, and virtually annulling the system of Legionary Infantry, and consequently displacing you from the command of a Sub Legion. Sir, I confess my total incompetency to fathom your meaning in the next sentence of your letter, in which you say "Capt. Binney will not consider himself under any orders for the 10th Oct. inst. unless it is Sub Legion orders, which I again send you by the hand of Sergeant Major Valentine Baxter." Can it be possible that you mean by this sentence to insinuate that you have the authority to revoke or countermand the division order of the 10th, Brigade of the 19th and Regimental order of the 22d, Sept. last, which I have received, and are now before me? Such a supposition would derogate from the military capacity of Maj. Osgood and cannot for a moment be admitted. What then is your meaning? surely I cannot comprehend it.

I thank you, Maj. Osgood, for the kind admonition in your closing sentence, wherein you say "I mention these things that you may have an opportunity to retract from your present position, and return to your duty." But what am I to understand by returning to my duty? Wherein have I swerved from it? What act of mutiny have I committed? How then return to my duty? Or am I to learn from this, that to hold an opinion different from an officer of a higher rank, is mutiny? Must no Platoon officer presume to exercise the powers of mind that his Maker hath endowed him with, by forming an opinion on military organization and discipline, without subjecting himself to the imputation of mutiny, from those officers who happen to rank in a higher grade? If so, farewell freedom! Our fathers fought and died in vain!



Having noticed all your "positions" and "points," I now enclose you the paper you did me the honour to address me under cover, through the medium of Sergeant Major Baxter--an officer belonging to Col. Badger's Regiment, if any officer at all, and add, that I believe it an assumption in you, to issue orders to me, except when on the field, by order of our Col. and you having conceded the point, I consider the question at rest forever; but if there is any truth in the busy voice of rumour, which says you are determined to bring me to a Court Martial, in case I continue to refuse your orders: I can only say, that to fall a sacrifice, in fulfilling the laws I have sworn to support, is to me preferable to holding any commission, and be obliged to aid in their violation.

I have the honour to be,

Your very humble servant,

Major Peter Osgood.

AMOS BINNEY, Capt.

Major Osgood then produced the order of arrest of Capt. Binney, which was read as follows:

*Boston, Oct. 8, 1808.*

Capt. Amos Binney, commanding the Infantry Company of Military District No. 1, in the Legionary Brigade, will consider himself under an arrest, and deprived of any military command; the charges will be exhibited in due season.

(Signed) PETER OSGOOD, Major 1st Sub Legion  
Infantry L. B.

The Complainant then produced the Letter from Capt. Binney, in which the order of arrest was enclosed, and returned to him, which was read as follows:

*Boston, Oct. 8, 1808.*

Sir—Having contended, that out of the field, you have not the authority to send me orders, relative to the organization and discipline of Col. Badger's Regiment, I take the liberty to enclose you a paper purporting to be an order of arrest, which you conveyed to me by the hand of Col. Badger's Sergeant Major, Baxter, and which I cannot consent to receive; because it would be relinquishing to you the "point" you have already conceded to me. I shall appear on Boston Common the 10th inst. agreeable to Regimental

orders of 22d Sept. last, unless countermanded by the Colonel, when and where I will obey any proper orders you may give. I am respectfully yours,

AMOS BINNEY, Capt.

Major Peter Osgood.

Q by Court to Major Osgood. Was the order of arrest returned to you by Capt. Binney, enclosed in the letter you have just produced? A. It was.

Q same to same. Did Capt. Binney, notwithstanding the order of arrest, come on to the field at the head of his company, on the 10th Oct. last?

A. He did; and I was obliged to order him away.

Q. Did he then obey you, and leave the parade?

A. He did; and the company was left under the command of the next officer present, Ensign Sampson.

Major Jacob Stearns, was now adduced as a witness on the part of the government, was sworn by the Judge Advocate, was interrogated, testified, and answered as follows:

Q by the Complainant. How have you issued your orders to your Sub Legion, and have they always been obeyed?

A. I have always considered Colonel Badger to be my next immediate superior officer, and all orders come to me from Col. Badger, and I always consider it my duty to issue my orders to the Captains or commanding officers of companies in my Sub Legion, which is Sub Legion No. 2, and this command was assigned me by Col. Badger.—I never knew an instance of any difficulty, until the present trial. My orders to the Captains and others under me in my Sub Legion have always been obeyed. I have been in commission as Major, and have commanded the 2d Sub Legion, more than four years, and it hath always been the practice to issue orders in the way in which Major Osgood issued the orders to Capt. Binney, and I never knew of any difficulty before.



Q. by Defendant to Major Stearns. What is the tenure of your commission?

A. It is as Major of Infantry in the Legionary Brigade, first Division.

Q. same to same. Does your commission say any thing of a Sub Legion? A. No, sir.

Q. Is the second Sub Legion a local command, and where is the evidence of its being numbered second Sub Legion?

A. My commission gives it the number, I being the second in rank.

Q. same to same. Presuming Maj. Osgood should resign, would you take the command of his Sub Legion, or would your Sub Legion be No. 1?

A. I presume in that case I should be the senior Major, and should be in Sub Legion No. 1, or the first Sub Legion.

Major Joseph Stodder was adduced as a witness on the part of the government, was sworn by the Judge Advocate, was interrogated, testified, and answered as follows:

Q. by Complainant to Major Stodder. How have you issued your orders to the Sub Legion under your command, and how have your orders been obeyed?

A. I have always considered Col. Badger to be my next immediate superior officer, and all orders come to me from Col. Badger, and I always consider it my duty to issue my orders to the Captains or commanding officers of the companies in my Sub Legion, which is Sub Legion No. 3, or the third Sub Legion, and this command was assigned me by Col. Badger. I never have known an instance of any difficulty until the present trial. My orders, to the captains and others under me in my Sub Legion, have always been obeyed. I have been in commission as Major three years last May, and it has always been the practice to issue orders in my Sub Legion in the way in which

Major Osgood issued the orders to Capt. Binney. I have never had any difficulty.

Q. by Defendant to Major Stodder. Does your commission say any thing of a Sub Legion?

A. No, sir.

Q. same to same. Is the third Sub Legion a local command, and where is the evidence of its being numbered the third Sub Legion?

A. My commission gives it the number, I being the Major third in rank.

Q. same to same. Presuming Majors Osgood and Stearns should both resign, would you take the command of the first Sub Legion, or would your Sub Legion be numbered one?

A. I presume I should in that case be the Senior Major, and should be in the first Sub Legion.

At half past 3 o'clock, p. m. the Court was ordered to be adjourned, which was done in due form by the Marshal, until to-morrow morning, 10 o'clock.

Thursday, Nov. 17, 1808.

The Court met pursuant to adjournment. Upon their names being called, they all answered in their places. The Court was ordered to be opened, which was done in due form, by the Marshal. The Defendant and Complainant were both called, and were present. Adjutant General William Donnison was now adduced as a witness on the part of the Defendant, was sworn by the Judge Advocate, was interrogated, and answered as follows:

Q. by the Defendant. When new Regiments are formed in the Militia, does not the Commander in Chief, describe in General Orders the local companies, that are to form such Regiments? and are they not always numbered in that General Order and recorded?

A. To the first question; by the Law of 1793, it appears that the Governor, with advice of Council, is empowered to form the Militia into Regiments, and



when the Council so advise, by direction of the Commander in Chief, the whole is issued in orders describing the Militia that is to compose it, and its number : sometimes it is described by Districts, and sometimes by companies.

*Q.* same to same. Has any General Order issued designating Sub Legions of Infantry in the Legionary Brigade, by describing the particular ward, or standing local companies, of which each Sub Legion was to be composed ?

*A.* I do not recollect any General Order touching that subject, but the order of August 2, 1798.

*Q.* same to same. Do not the troops under the command of Lieut. Col. Badger, compose a Regiment ?

*A.* The formation of the Legions being a matter of record, I cannot determine that question.

*Q.* same to same. Is there any record in your office of the Sub Legions of Infantry ?

*A.* This question is answered in my answer to the first question.

*Q.* by Judge Advocate to the same. What is the stile in which the officers of Infantry in the Legionary Brigade are commissioned ?

*A.* Shew me a Commission ; it will speak for itself. Here Major Osgood shew his Commission to the Adjutant General, the stile of which read Major of the Infantry, in the Legionary Brigade, 1st Division. The Adjutant General having looked upon it, observed, this stile applies to all the field officers of Infantry in the Legionary Brigade. The witness further observed, the stile of the Captains' commissions in the same Infantry, is Captain of a Company of Infantry in the Legionary Brigade.

*Q.* same to same. What is the stile of the Commissions of the officers of the Sub Legion of Artillery, so called ?

*A.* I think the stile is,—You being appointed Cap-

tain of a Company of Artillery in the Legionary Brigade.

*Q.* by the Judge Advocate to same. Is the term or word Regiment used in any of the commissions which issue from your office to any of the officers under Col. Badger's command ? *A.* Not at this time.

*Q.* by Defendant to same. Is the term Sub Legion used in any of the Majors' commissions of Infantry in the Legionary Brigade ?

*A.* No, nor in none of the others.

It having been observed by the Adjutant General, that he had lately received orders for making a large detachment from the Militia of this Commonwealth, and that his time in his office was very precious, the Court proceeded to his examination before the record of the proceedings had yesterday was read.

Upon the close of the testimony of the Adjutant General, the record of the proceedings had yesterday was read, and agreed to stand correct.

Lieut. Col. Thomas Badger was now adduced as a witness on the part of the Government, was sworn by the Judge Advocate, was interrogated, testified, and answered as follows :

I am commissioned Lieut. Col. Commandant of the Infantry, in the Legionary Brigade, 1st Division. I derive my authority from the Law or Resolve, passed June 29th, 1798, and the General Order of August 2d, 1798, which were issued, predicated thereon. By the General Order the Infantry in the Legionary Brigade is ordered to be formed into four Sub Legions, when there should be sixteen companies ; each Sub Legion of Infantry to be commanded by a Major, and the whole to be under the command of a Lieut. Col. Commandant.

There are now four Sub Legions of Infantry in the Legionary Brigade. Three of them are commanded by Majors. To the other Sub Legion, the office of Major is vacant.



Q. by Court to Col. Badger. Are your Majors selected by a majority of the votes of all the officers under your command?

A. They are; that is, when an election of Major is ordered, all the Captains and Subalterns under my command, are ordered to meet, and all have a vote.

Q. by Judge Advocate to the same. Do you call the orders you issue Regimental Orders?

A. I do not.

Q. same to same. Were the orders you issued on the 22d Sept. last, Regimental Orders?

A. They were called Infantry Orders, not Regimental Orders. I know not that any Regiment exists in the Legionary Brigade.

Q. by Defendant to same. Are the troops under your command a Brigade or Regiment?

This question was objected to by the Judge Advocate as being unnecessary, the same question being considered as having been answered before.

Whereupon the Court was ordered to be cleared, and after full deliberation being had, they decided that the question might be asked; and also decided, that the parties, upon returning into Court, be reminded not to burthen the record unnecessarily, and avoid, as far as they can, the asking of questions, the answers to which have been involved, or are contained in the answers already given in other questions.

The Court took this occasion also to give their opinion of the dissent which the Defendant offered, and which is referred to in page 164, and which is here copied.

*Mr. President, and Gentlemen of the Court,*—Having been ordered by this honorable Court to leave their presence, during the discussion of a question having no relation to my guilt or innocence, while the Judge Advocate is permitted to be present on behalf of the Government, I consider it my duty to dissent to the

practice; because in any question relative to the conduct and proceedings of the Court, which may be discussed with closed doors, new questions may arise, out of the one proposed, to the accurate determination of which, the Defendant should have the opportunity of being heard as fully as the Judge Advocate.

(Signed)

AMOS BINNEY.

*Dedham, Nov. 15th, 1808.*

The following is the opinion of the Court on the above dissent, which was handed with a direction to be recorded:

The dissent of Capt. Binney to the proceedings of the Court in ordering him to leave the same, while they are discussing questions in the presence of the Judge Advocate, in the opinion of the Court would, if sanctioned by them, be deviating from a well known practice, which is in the nature of things unavoidable, for the following reasons:

1st. For the Court to admit Capt. Binney to be present when a question is discussed, would disclose the opinion of the members, which every member is bound by his oath not to discover, unless required to give evidence thereof as a witness, by a Court of Justice in a due course of law.

2d. For the Court to order the Judge Advocate to leave their presence, during the discussion of a question, would be deviating from all custom, and make that part of the Militia Laws a dead letter, which requires the Judge Advocate to be under oath not to divulge the vote or opinion of any member of the Court, and who is an advocate for the Defendant as well as for the Commonwealth.

Therefore Capt. Binney must be mistaken respecting the usual modes of the proceedings of Courts Martial, or we presume he would have not entered his dissent to the proceedings of the Court in the manner he has.



Upon the Court's being opened, these decisions were read, the Defendant and Complainant having been first called, and answered.

The question objected to as before was now asked, Are the troops under your command a Brigade or Regiment?

*A.* by Col. Badger. By my Commission I was appointed Lieut. Col. Commandant of the Infantry in the Legionary Brigade, 1st Division.

*Q.* by Defendant to same. Have you not in the orderly book, a General Order of Sept. 7th, 1807, attaching Capt. Loring's Company to the Regiment of Infantry, Legionary Brigade?

*A.* There is such an order, but the date I do not recollect.

The following motion was now made by the Defendant:

*Mr. President and Gentlemen of the Court,*—As I cannot be furnished by Col. Badger with the General Order of Sept. 1807, from his orderly book, I request permission for time to procure a certified copy of it from the Adjutant General's office.

(Signed) AMOS BINNEY, *Capt.*

The Court observed he should have time and opportunity to produce it, if he wished.

*Q.* by Defendant to Col. Badger. How many companies of Infantry are there under your command? and which Sub Legion does Capt. Loring's Company belong to?

*A.* There are seventeen companies of Infantry under my command. Capt. Loring's Company is not attached to any particular Sub Legion.

*Q.* same to same. Did the General Order of August, 1798, authorize the raising of more than sixteen companies of Infantry? *A.* It does not.

*Q.* same to same. Did you not command the Company of Wards No. 1 and 2, in the year 1804? and

did not that Company, at that time, belong to the third Sub-Legion, so called?

*A.* Previous to Sept. 1804, I commanded the Company of Wards No. 1 and 2, and it did at that time belong to the 3d Sub Legion.

*Q.* same to same. Is the Company which I commanded on the 10th Oct. last, part of the same Company which you commanded in 1804?

*A.* Yes.

*Q.* same to same. By whose authority was my Company transferred on the 8th Oct. 1804, from what was called the 3d Sub Legion, to what is now called the first Sub Legion?

*A.* By the General Order of Aug. 2d, 1798, each Major commanding a Sub Legion was to give rank to the Sub Legion under his command. Capt. Binney's Company being assigned to the Sub Legion commanded by Major Osgood, and he being the oldest Major, made that Company to be in the first Sub Legion.

*Q.* same to same. Do your orders to the Captains in your 4th Sub Legion go first to the oldest Captains in that Sub Legion, as senior officer, there being no Major; and does he transmit them to the other Captains in his Sub Legion Orders?

*A.* They do not.

*Q.* same to same. Have you not received a General Order of the 10th March last, communicating the decision of the Governor and Council in these words, "that Legionary Infantry is a corps not known in the laws of the United States, which is the supreme law of the land"?

*A.* I do not recollect having seen such an order; but such a one may exist for what I know.

*Q.* same to same. Did not the Governor and Council refuse to commission a Major, elected by a majority of all the officers under your command, for the intended 4th Sub Legion, because your return of his election did not name the Regiment for which he was



called up by the Defendant, and was interrogated, and answered as follows:

Q. by the Defendant. By what authority were you placed to the command of the first Sub Legion, so called?

A. I was placed to that command by the authority of Col. Badger.

Q. same to same. Have you an Adjutant to distribute your orders to the commanding officers of the companies in your Sub Legion, so called?

A. I have not.

Q. same to same. Have you a *Sub Legion Orderly Book*, where your Orders are recorded?

A. I have not.

Q. same to same. Did not the Company under my command appear on the field, on the 10th Oct. 1808, in as complete order and under as good discipline as any other Company on the field?

A. I never entered any complaint against Capt. Binney, on account of the appearance of the Company he formerly commanded.

Q. same to same. Did you not observe to Ensign Sampson on the 10th Oct. last, after I had been ordered to leave the field, that the Company was as well equipped and under as good discipline as any on the parade?

A. I think it is probable I did. The Company appeared to me as well disciplined as any of the others.

Q. same to same. When was I arrested on the charges you have preferred against me?

A. I do not recollect the day; it was on a Saturday, the 7th or 8th last Oct. I gave the Order of Arrest to the Sergeant Major, and I presume he delivered it.

Q. same to same. Had I disobeyed any order when you sent me a letter by Baxter on the 8th Oct. stating that I was under arrest?

A. I conceive he had.

Q. same to same. What order had I disobeyed?

A. It was a Sub Legion Order, dated the 26th Sept. last.

Q. same to same. When did that Sub Legion Order direct me to appear on the Common?

This question was overruled by the Court as the Sub Legion Order, recorded in page 168, would answer it.

Q. same to same. If you considered me under arrest on the 8th Oct. why did you come to me on the Common, when I commanded my Company, instead of Ensign Sampson?

A. I considered from Capt. Binney's conduct two or three days before, and from his coming on the field at the head of his Company, that I might be obliged to use force; to prevent that difficulty, I went to Capt. Binney, and ordered him away, before I said any thing to Ensign Sampson.

Adj. Geo. Bass was now adduced as a witness on the part of the Defendant, was sworn by Judge Advocate, was interrogated, testified, and answered as follows:

Q. by Defendant to Adjutant Bass. What is the tenure of your Commission?

A. I am Adjutant in the Legionary Infantry, commanded by Col. Badger.

Q. same to same. Were you not commissioned as the Adjutant of the Regiment in the Legionary Brigade under Col. Gardner?

A. Yes, I was; and the Commission has since been altered.

Q. same to same. By whose authority was your Commission altered, and by whom was it altered?

A. I think the Brig. General requested me to carry it to the Adj. General's office. It was there altered, either by the Adj. General himself, or one of his clerks; I forget which.

Q. same to same. Are you now Adjutant to Col. Badger? A. Yes, I am.



The Defendant here produced an Order of Colonel Gardner, called a Regimental Order, dated March 12th, 1803, and wished the following clause of the order might be recorded:—The clause referred to follows:—"George Bass is appointed and commissioned Adjutant of the Regiment, and is to be obeyed accordingly; by order of the Lieut. Col. Commandant."

Zephaniah Sampson, Ensign of Capt. Binney's Company, was now adduced as a witness on the part of the Defendant, was sworn by the Judge Advocate, was interrogated, testified, and answered as follows:

*Q.* by Defendant. Did you receive my Company Order, to parade with the Company, on the 3d, 5th, and 7th of Oct. for Company duty, and on the 10th for inspection and Regimental exercise; and did you not accordingly appear, and march under me on the Common, on the 10th of said Oct. *A.* I did.

*Q.* same to same. Have you at any time complained to Major Osgood that I deprived you of your right to command my Company, on the 10th October?

*A.* I have not.

*Q.* same to same. Were you not at Maj. Osgood's house on Sunday night, on the 9th Oct. and did he not there give you assurances, that you might act on the succeeding day as you saw proper; and that he would not arrest you, do what you would on that occasion?

*A.* The words were not the same as above, but they purported the same thing.

*Q.* by Maj. Osgood, the Complainant, to the same. Did you not receive an order from me on Saturday the 8th of Oct. last, directing you to take command of the Company and march it on to the parade on the 10th, your Captain being under arrest? *A.* I did.

*Q.* by same to same. Was any body present with you at my house? If so, who were they?

*A.* There was: Capt. Rhoades was present, and Lieut. Cushing.

*Q.* by Judge Advocate to same. Was any one else present?

*A.* There was, but I presume none of them heard the conversation except those two.

Quarter Master Thomas Redman was again called up, and the following questions were asked him, and he answered as follows:

*Q.* by Complainant. Were you present at my house on Sunday evening the 9th Oct.? Did you hear the conversation between me and Ensign Sampson? If so, relate it.

*A.* I was present on that evening. I was not there all the evening. While I was there I heard conversation between Mr. Sampson and Maj. Osgood. I heard Mr. Sampson ask Maj. Osgood how he was to conduct on the next day? Maj. Osgood answered, you have your orders and must obey them.

*Q.* by Defendant to same. Did you not leave the room before Ensign Sampson; and might not a conversation have taken place between Maj. Osgood and Ensign Sampson, and you not have heard it?

*A.* I think Ensign Sampson left the house before I did; but I do not mean to say, but what conversation, such as Mr. Sampson has testified to, might have passed; but I do say, I did not hear any, except as I have above stated.

Aaron Mower, Sergeant, and Clerk of Capt. Binney's Company, was now adduced as a witness on the part of the Defendant, was sworn by the Judge Advocate, was interrogated, testified, and answered as follows:

*Q.* by Defendant. Did Ensign Sampson, on the Company parade, on the morning of the 10th Oct. last, make any objections to my taking the command of my Company?

*A.* He did not make any personal objections.

*Q.* by Complainant to same. Were any orders read before Capt. Binney's Company? If so, what were they? and was Capt. Binney present?



*A.* There was an order which came from Major Osgood to Ensign Sampson, respecting his taking the command of the Company. This order I read before the Company, at the request of Ensign Sampson, and Capt. Binney was present.

*Q.* by Judge Advocate to same. Was there any thing in the order you refer to, about Capt. Binney's being under an arrest? *A.* There was.

*Q.* by Defendant to Ensign Sampson. Did you not acquiesce in my taking the command of the Company on that day, after the order named by Sergeant Mower was read, in consequence of the conversation had between yourself and Major Osgood the night before?

*A.* I cannot say it was in consequence of the conversation I had with Maj. Osgood; but I did acquiesce, and marched as Lieutenant under Capt. Binney on to the Common.

Valentine Baxter was here called upon by the Defendant. He was adduced as a witness on the part of the Government, on the second day of the trial, and was then sworn by the Judge Advocate, and testified that on the 3d day of Sept. last, he delivered to Capt. Binney certain papers, under seal, directed to Capt. Binney, from Major Osgood, but the contents he did not know. When the witness had proceeded thus far, the Defendant produced the papers referred to, which rendered the testimony of Mr. Baxter altogether immaterial to the point, but Capt. Binney, wishing Mr. Baxter to be considered as a witness produced on the part of the Government, the record of the circumstance is here made, at Capt. Binney's request, that he may be so considered.

Valentine Baxter was now interrogated, and answered as follows:

*Q.* by Defendant. Were you not formerly a Sergeant of the Company I commanded, and did not Col. Badger give you a Warrant as Sergeant Major?

*A.* I was one of Capt. Binney's Sergeants. While I was so, I was requested by Major Osgood to take a Warrant as Sergeant Major of a Sub Legion, to which I consented, and did receive a warrant of that kind from the hands of Major Osgood. It is signed by Col. Badger.

*Q.* same to same. What is the tenure of the Warrant? Will you shew it?

*A.* Here is the Warrant. The witness produced his Warrant, the title of which was read as follows: "You being appointed Sergeant Major of a Sub Legion of Infantry, Legionary Brigade, and First Division of the Militia of Massachusetts,"—it appeared that the word Regiment, on the printed form, was erased.—The Warrant was signed Thomas Badger, Lieut. Col. Comdt. Sub Legion of Inf. Legionary Brigade, and countersigned Geo. Bass, Adj.

*Q.* same to same. Did Col. Badger ever give you orders to distribute the orders of his Majors?

*A.* No, sir. I never received any orders from Col. Badger.

Moses B. Foster was adduced as a witness on the part of the Defendant, was sworn by the Judge Advocate, was interrogated, testified, and answered as follows:

*Q.* by Defendant. Were you appointed Sergeant Major by Col. Badger, and will you shew your warrant?

*A.* Mr. Foster produced his Warrant, the title of which appeared, upon inspection, to be similar to that produced by the last witness, Mr. Baxter, and with the same erasure of the word "Regiment," and signed by Col. Badger.

*Q.* by Defendant to same. Have you not done duty generally to the troops under Col. Badger's command, without respect to any particular Sub Legion?

*A.* I have generally done duty in the second Sub Legion, under the command of Major Stearns. I have at times done duty in other Sub Legions by orders of Col. Badger.



Q. same to same. Have you or have you not carried orders from your Colonel direct to the non-commissioned officers in the third Sub Legion, without their being sanctioned by any Major?

A. I have carried, in two instances, discharges of non-commissioned officers in the third Sub Legion. They were sealed and given me by Col. Badger, to be handed to the two non-commissioned officers who were discharged. These orders had not the sanction of any Major that I know of.

Col. William Barnes was now adduced as a witness on the part of the Defendant, was sworn by the Judge Advocate, was interrogated, testified, and answered as follows:

Q. by Defendant. Do you command a Regiment of Infantry in the first Brigade, first Division, of the Militia of this Commonwealth? and how do your orders go to the Captains of that Regiment?

A. I do: I issue my orders to my Adjutant to hand them down to the Majors, and Captains of the several Companies under my command.

Q. same to same. Do your orders to your Captains pass through the Majors' hands?

A. No, they do not.

Here the Court was ordered to be adjourned until to-morrow morning, 10 o'clock, which was done in due form by the Marshal.

Saturday, November 19th, 1808.

The Court met pursuant to adjournment. The names of the President and members were called, and all answered in their places. The Court was then ordered to be opened, which was done in due form by the Marshal. The Defendant was now called and appeared, and answered in his proper person. The Complainant also was present.

The proceedings had yesterday were now read by the Judge Advocate, and were correct.

Ensign Zephaniah Sampson, a witness on the part of the Defendant, now suggested a wish to explain the answer he gave to a certain question asked him yesterday by the Defendant. The Judge Advocate repeated the question referred to, which is as follows:

Q. (repeated, which is the second question on page 190.) Did you not acquiesce in my taking the command of the Company on that day, after the order named by Sergeant Mower was read, in consequence of the conversation had between yourself and Major Osgood the night before?

A. Ensign Sampson explains in the following words: I did not acquiesce to go under the command of Capt. Binney on the 10th, entirely in consequence of the conversation I had with Major Osgood, but for that, with other reasons beside.

It was here by the Court, at the request of the Defendant, directed to be minuted, that Adj. Bass, a witness produced by the Defendant, was yesterday, pending his examination, asked by the Court if he had his commission with him? to which he answered he had not.

Capt. John Binney, a witness adduced on the part of the Defendant, was sworn by the Judge Advocate, was interrogated, testified, and answered as follows:

Q. by Defendant. Do you command a Company in the Corps of Artillery in the Legionary Brigade; and what is the tenure of your Commission?

A. I do. The witness here produced his Commission, the title of which was, "You being appointed Captain of a Company in the Battalion of Artillery in the Legionary Brigade, 1st Division, of the Militia of this Commonwealth."

Q. same to same. Is not the Corps of Artillery which you belong to, called a Sub Legion? A. It is.

Capt. Joseph Loring, jun. was now adduced as a witness on the part of the Defendant, was sworn by



the Judge Advocate, was interrogated, testified, and answered as follows:

Q. by Defendant. When you was attached to the Regiment commanded by Col. Badger, by General Order of 7th Sept. 1807, were you placed to any one of Col. Badger's Sub Legions, so called?

A. I was, by a General Order, dated Sept. 7, 1807, attached to the Regiment of Infantry of the Legionary Brigade, commanded by Col. Badger. Some time after I received Col. Badger's order, dated Sept. 19th, 1807, attaching me to the 4th Sub Legion, so called, and ordering my Company to parade for Inspection and Review the 22d Oct. I made some objections to the Colonel's right to attach me (but I am not positive that I made them to the Colonel.) Col. Badger issued another order, dated Oct. 5th, countermanding his order of the 19th Sept. The next order I received from Col. Badger was dated Oct. 19th, 1807, "that in consequence of my declining the command of the 4th Sub Legion as Major, which I was elected to, Capt. Isaac Cushing would take the command of those troops on the 22d Oct." (who was then the senior Captain on duty in Lieut. Col. Badger's Regiment). I paraded my Company on the Common conformably to order, when Col. Badger sent me orders to take the right of Major Osgood or his Sub Legion, which gave me my rank as eldest officer in the line of Infantry. I received orders in the course of the parade from Brig. Gen. Winslow, by his Brigade Major, and acted at the head of my Company as battalion and platoon officer.

Q. same to same, How do you receive your orders from your Colonel?

A. I receive them direct from the Colonel, by the hands of the Adjutant, without the sanction of a Major.

Q. same to same. Have you been ordered on a duty by your Colonel, which you considered illegal, and in consequence of your refusing to act as ordered, has he taken any notice of your conduct?

A. All that I know of it is, that my conduct is stated in the following paper, which is a copy of what was then signed. The witness here produced a paper, a copy of which follows, as an additional part of his answer to the last question:

"We, the undersigned officers of Infantry, although no law exists establishing Courts of Inquiry, do believe from customary usage, they have heretofore been appointed by the Commander in Chief, and the Major General, whose right it is by law to appoint General and Division Courts Martial; but we have never heard of a Regimental Court of Inquiry, established by a Lieut. Colonel, to examine into the conduct of commissioned officers. The Major General has in some degree sanctioned this investigation, by adjourning our first intended meeting, and ordering the Judge Advocate to attend the inquiry. We therefore thought it advisable, merely to investigate the facts so far as to record the declarations of individuals; and to receive the papers as they were produced conformably to the foregoing records, which we do hereby certify to be a just and true record of all our proceedings. And if we considered that we were legally organized as a Court of Inquiry, we could not refrain from doing justice to the officers complained of, by declaring that, in our opinions, they have acted in their different stations towards Sergeant Foster in a correct and officer-like manner, as it is possible for Militia Officers to act; and the motives of the different officers appear to us to have been actuated for the general good of the Company."

(Signed)

JOSEPH STODDER, Major,  
JOSEPH LORING, JUN. Captain,  
JACOB CANTERBURY, Captain.

Q. by Complainant to Capt. Loring. Do you command a standing company, or a company raised at large?

A. A company raised at large.

The Defendant here produced Division orders of Oct. 3d, 1804; Brigade orders of the 8th of the same Oct. Infantry orders of the same 8th Oct. and Sub Legion orders of the 11th of the same month; and wished the following extract to be minuted from the said Infantry orders of Oct. 8th, 1804, viz. "As no permanent assignment of the Sub Legions can be made at this time, Major Osgood will take command of the following companies, viz. The Chelsea Company, the Companies of Wards No. 1 and 2; of 3 and 4 and No. 5; which form one Sub Legion." The orders produced are Paper No. 7, accompanying the proceeding.

The Defendant there produced his commission, dated Oct. 5th, 1804, the title of which was; you being appointed Captain of 2



Company of Infantry, in the Legionary Brigade, 1st Division, of the Militia of this Commonwealth. It also appeared that he qualified himself before Major Osgood, who signed the certificate of qualification.—“PETER OSGOOD, Major of Infantry in Legionary Brigade.”

The Defendant now produced certified copies of certain papers from the Adjutant General's Office. Indulgence from time to time to obtain which was granted him, at his request, on the third day of the trial. (see page 182) The papers are described and referred to as follows: A paper, certified by the Adjutant General, as the form in which the record is made in the general Roster. This paper is No. 8, accompanying the proceedings.

Certified copy of General Orders of Aug. 2d, 1798.—This copy, certified by the Adjutant General, is Paper No. 9, and accompanies the proceedings.

The Defendant also produced a certified copy, from the Adjutant General, of the General Order of Sept 7th, 1807. This Paper is No. 10, and accompanies the proceedings.

He also produced the advice of Council to the Governour, given on the 20th Feb. 1808, to his Excellency, with his Excellency's opinion thereon, given March 10th, 1808, and General Orders of March 10th 1808; all these certified by the Adjutant General, are Paper No. 11, accompanying the proceedings.

He also produced a certified copy from the Secretary of State's Office of this Commonwealth, of the report of Committee on the petition of Joseph Loring, jun. with the resolve passed thereon, June 20th, 1807. This Paper is No. 12, and accompanies the proceedings.

He also produced a printed copy of the Petition of Turner Crooker and others, to the Governor and Council, with the advice of Council thereon, dated Jan. 13th, 1808, with the Message of the Governor to the Senate and House, dated Jan. 16th, 1808, with a copy of the resolve of June 29th, 1798, annexed to said Message. This Paper is No. 13, and accompanies the proceedings.

The Defendant was now asked by the Judge Advocate if he had any thing further to offer? He produced the following paper:

*Mr. President, and Gentlemen of the Court,*

Having closed the evidence that I have been able to produce in my defence, I think it but proper to state at this time, for the information of the Court, and that they may be able to take some minutes, that in my defence I shall advert to the Constitution of the United States, and of this Commonwealth: also to the laws of the United States, and of this Commonwealth, as follow:

*Constitution of the United States*, Art. 1st, Sec. 8th; Art. 6th; Amendments, Articles 7th and 8th.—*Constitution of Massachusetts*, Part 1st, Sec. 10th, 11th, 13th, 17th, and 30th; Part 2, Chapter 1st, Sec. 1st, Art. 4th; Chap. 2d, Sec. 1st, Art. 7 and 10th; Chap. 3d, Sec. 1st; Chap. 6th, Sec. 1st.—*Law of the United States*, of May 8, 1792, Sec. 3d, and 6th.—*United States Law*, March, 1803, Sec. 2d, and 3d.—*Law of Massachusetts*, of June 22d, 1793, Sec. 4th, 5th, 6th, 8th, 11th, 12th, 13th, 14th, 15th, 25th, 30th, 32d, 35th, 36th, and 39th.—*Law of Massachusetts*, of March 4th, 1800, Sec. 4th, 12th, and 17th; Law of March 14th, 1806, Sec. 3d, 4th, and 10th.

*Dedham*, Nov. 19, 1808.

AMOS BINNEY.

The Complainant was now asked if he had any thing further to produce? Answered that he had not at present, any thing further, excepting a certified copy of the resolve, passed the 29th June, 1798, authorizing the formation of the Militia of the towns of Boston and Chelsea into a Legionary Brigade; a certified copy of the advice of Council had on said resolve, on the 2d August, 1798; the General Order of the 2d Aug. 1798, issued thereon, and a certified copy of the advice of Council had Jan. 13th, 1808, on the Petition of Turner Crooker and others, on which the Message of His Excellency the Governour, to the General Court, of Jan. 16th, 1808, was founded. The certified copy of the resolve of June 29th, 1798, is Paper No. 14, and accompanies the proceedings.

The certified copy of the advice of Council, founded on said resolve, of Aug. 2d, 1798, is Paper No. 15, and accompanies the proceedings.

Certified copy of General Order of Aug. 2d, 1798, is Paper No. 16, and accompanies the proceeding.

Certified copy of the advice of Council of Jan. 13th, 1808, on which the Governor's Message of Jan. 16th, 1808, was founded, is Paper No. 17, and accompanies the proceedings.

Both the Complainant, and Defendant were now asked if they had any thing further to offer? They both answered, they had not.

The Defendant now moved the Court, for time to prepare his defence, and mentioned he wished until Wednesday next, the 23d inst. or after.

The Court granted until Thursday next, the 24th inst. and ordered the Court to be adjourned accordingly until Thursday morning, the 24th inst. then to meet at this place at 11 o'clock; which was accordingly done in due form by the Marshal.

*Thursday*, Nov. 24th, 1808.

The Court met pursuant to adjournment, and all answered in their places, when called. The Court was ordered to be opened,



which was done in due form by the Marshal.—The Defendant and Complainant were both called, and answered.

The record of the proceedings was now read and agreed to be correct. The Defendant was now asked if he wished to offer a defence in writing? He answered that he did, and produced a written defence, which defence the Defendant, with the permission of the Court, read himself in the words and figures following:

*Mr. President and Gentlemen of the Court,*

HAVING served more than four years as a Captain in the Militia of this Commonwealth, (and, if I may be allowed to say it, to the approbation of my superiors, and usefully to the Government) it is at this period my fate to be arraigned before you, on charges preferred by Major Peter Osgood, implicating my honor as an officer, and my character for truth and allegiance to the Government. Although this situation may be considered, by those unacquainted with the cause, degrading to my reputation as an officer, and humiliating to my pride, yet I embrace it as a happy moment, wherein I have an opportunity to evince my loyalty to the State, my steady adherence to the oath of office, and my firm attachment to the constitution and laws of my country, which as an officer I have sworn to support. Conscious of my own innocence, and relying on the justice and honour of my Judges and Jurors, I enter on my defence with confident anticipation of a result, that shall rescue my reputation from unmerited reproach. My defence shall be directed to your reason and judgment, without meanly attempting to interest your generous feelings as officers, or fondly calculating on your sympathies as men. It shall be couched in terms that an officer may use without reproach, and that men of honor may hear without a blush.

I am happy that the complainant has found materials to constitute no more than *one* charge against me, viz. "unmilitary conduct and disobedience of orders;" and this, though the most extensive in the whole catalogue of military offences, embracing a field without bounds, comprehending the private as well as the public deportment of an officer, the *minutia* and detail of his relations, duties and obligations to his superiors, his inferiors, himself, and the Government, affords a foundation for no more than two specifications of charges; containing first a proposition of fact, and second of principle. The fact to be established is, that I sent back to the complainant certain Sub Legion Orders, which he had lawfully and regularly sent me, and which it was my duty to receive and obey, but which orders I refused to receive, acknowledge and obey. The second is a proposition of principle, that in me it was "unmilitary conduct" to refuse his orders at the time I did it, and to take the steps I did consequent of that refusal.

To prove the fact to you that I duly and regularly received his Sub Legion Orders, the complainant introduces Quarter Master

Redman, an officer of Lieut. Col. Badger's Regimental Staff, who by his own evidence never was authorized to distribute any orders, except those of his Colonel, which by him I duly received and have obeyed, and which seems to be conceded by the complainant himself, inasmuch as he, after the return of his order on the 28th Sept. through the same medium that he sent it, relinquishes his claim on the Lieut. Col.'s Quarter Master to distribute his Sub Legion Orders, and presses into his service Mr. Valentine Baxter, who, it appears by his mutilated warrant, is no officer at all. But for the accuracy of this selection there appears not the least shadow of authority, as the warrant which he holds gives him no title to be the Sergeant Major of any Regiment; of course he is not authorized to act in that capacity, agreeable to law; and it appears, from his statement, he felt ashamed of the drudgery, and when interrogated by me, on the delivery of the complainant's sealed communications, what paper he handed me, and from whom he received them, he at the several times and uniformly answered, "It is a letter." From whom? "A gentleman."

That I did receive the paper purporting to be a Sub Legion Order, and also that said to be the Order of Arrest, I never denied, and is abundantly evident by the correspondence which passed between us, and which is now a part of your record; by which it must clearly appear to the Court, that the object I had in view in so sending that order back, was not insubordination, disrespect of superiors, subversion of military order, violation of the oath of office, or of the rules and regulations of the constitution and the laws; but a steady and tenacious adherence to that oath of office, those laws and that constitution, which I am charged with having violated.

But that I obeyed that order, as far as it was conformable to Regimental Orders, the complainant has proved himself; for he tells you in his evidence, and even makes it a part of his specifications of charges, that I did appear on the common, with my company, on the 10th Oct. and that my company was as well equipped and under as good discipline, as any company on the parade; or to use his own words, that he had no cause of complaint: and that then and there he gave me an order to leave the parade, which I quietly and cheerfully obeyed; for in that situation I held myself bound to obey his orders. You, gentlemen, will however remark, that the Sub Legion Order, in a degree, went to countermand the Regimental Order, that part I did not obey; and how the complainant can justify himself in issuing an order that countermanded any part of his superiors', I leave the honorable Court to judge. The reasons for sending back to him what he has termed an Order of Arrest, which he sent me through the same unauthorised channel is also explained, in part; in the correspondence.

You have seen, gentlemen, that my company, by universal consent, composed a part of the first Battalion of Col. Badger's Regt.



or, as the complainant and his assistants please to call it, Sub Legion; that I duly received the Regimental Order in the manner directed by the Lieut. Colonel, and in the same manner that other Captains received the same orders, that is, by the hand of Q. M. Redman, the Adjutant being absent. By that order I was directed to appear on Boston common, with the company under my command, on the 10th Oct. and that Major Osgood would have the command. That I made every necessary exertion and arrangement to comply therewith, by notifying my company, and actually parading three times the preceding week, to instruct the men in the various evolutions and exercises, that might be expected to be performed on the 10th, is established by Ensign Sampson and my Clerk; but that on the 8th the complainant sent his Order of Arrest, which was also sent back, and for the reasons set forth in the correspondence is also clear, which will be a more proper theme of discussion under the second general head of my defence where *principle* will be considered. But as to the fact, when the complainant was asked what order I had disobeyed when he sent that arrest, he was afloat, and without anchorage on which to fix his answer, but equivocally replied, it was his Sub Legion Order.

But, gentlemen, the complainant would gather strength in support of his charges, from the fact of my having received his Sub Legion Orders previous to the receipt of the General Order of the 10th March, 1808. But how does that fact appear? Does he support it by proving that he ever served me his Sub Legion Orders with his own hand? Surely not! Does he prove to you that he has any officer under him, authorised to distribute his orders, or that he has any record of orders by him issued? Gentlemen, it is proved he has no such officer: to be sure the Col. or his Majors did petition for authority to appoint Adjutants to Sub Legions, which petition was very properly rejected, and the Majors left to carry orders for themselves, if they chose to issue any. How does it appear they have any record of the orders they issue? I will tell you, gentlemen—Col. Badger's Adjutant, *Bass*, records the Major's orders on the Col.'s Regimental orderly book. Is this evidence of a proper record for the Majors? or is it not rather evidence of unmilitary conduct? First in Adj. Bass to encumber the records of his Colonel with the unnecessary and illegal order of inferior officers; and second in the Colonel to permit his Adj. to commit, with impunity, such offences? For, if the orders of three or four Majors are inserted on the Regimental records, by the same rule the orders of his seventeen Captains may appear there recorded. If the Adjutant should a little extend the doctrine of implicit obedience to superior officers, and the said seventeen Captains should order the Adjutant to record them—if this should be the case, as it is proved to be now in part, what a grand deposit of absurdities would be found in the Regimental book! So absurd is the idea of once passing the boundary line of duty and system, that

the correct officer starts back at the thought! But he who attempts the experiment, is most assuredly *lost* in a labyrinth of difficulties.

But I am willing to admit, and I have acknowledged in the correspondence, that previous to March 10th, 1808, I received and obeyed those kinds of orders, and why? the reason is simple. On 3d of Oct. 1804, I was called, by the almost unanimous vote of the company of wards Nos. 1 and 2, to their command. At that time I was totally unacquainted with the organization of the Legionary Brigade, having paid very little attention to military matters. With many urgent persuasions I was induced to accept the office. Being ignorant of its duties, my first step was to get such information as was necessary for the moment, having received an order to parade with the Brigade, on the 30th of that month, even before I received my commission. I applied to Col. Badger, and from him got such instructions as led me to receive orders in the way the complainant states, and what better, for the time, could I do? But as I necessarily paid some little attention to the subject, from that period, in order to enable myself to discharge the duties of the office, I soon perceived the whole system was contrary to the laws organizing the militia. What was my course after I had gained this information? Did I supinely acquiesce in the unconstitutional system? No, gentlemen: I took every step, within the bounds of prudence, to effect an alteration, by petitioning for an alteration, by remonstrating to superior officers against their proceedings, under the present erroneous organization, and by every argument in my power, to induce other officers, superiors and inferiors, to join issue and pray for an alteration. Many have taken sides with me in the proper mode to effect the object, and in the last Autumn near 50 subscribed a petition to the Governor and Council, to have the Brigade formed into Regiments according to law; and the only reason it was not subscribed by the Colonel and all his Majors, was, because *he* declared it premature in point of time, candidly acknowledging, that the laws were violated by the arrangement, and actually petitioning themselves, some time after, for a similar alteration.

But to acknowledge that I have acquiesced in the system, after receiving so high authority on the question of illegality as that of the Commander in Chief, would, in my humble opinion, be the strongest possible evidence of *ignorance*, or incapacity to appreciate the tenor and meaning of my oath of office. My opinion, however, was not altered by that authority, but confirmed; and since that date, I have received no orders that did not come from the Colonel direct, except one, when he was from town, and Major Osgood issued it as commandant, in the Colonel's absence. This may be proved by Adj. Bass, who carried the orders back to the Major, and told him that I refused to receive them in that channel; and by Col. Badger himself, who cannot deny, that in July I informed him that his orders had not come to me: But it



also appears, by Adj. Bass, that he has delivered all the orders; he cannot, however, say that I received them; for, if he has left orders for me at any store, wine-cellar, or butcher's stall, it surely does not follow that they were duly received.

You have, gentleman, the evidence of Majors Osgood, Stearns, and Stodder, that Sub Legion orders are issued and received; but what will the complainant make in his favour from this evidence? Is it that because the orders so go, it is "unmilitary conduct and disobedience" in me not to receive them? This, Gentlemen, fairly brings me to the second head of my defence, involving the proposition of principle.

In examining the principle involved, I will recite those parts of the complaint which seem to point it out, and are in these words:

"Your complainant condescending to send the said orders the second time, when the said Capt. Binney did refuse to acknowledge and obey; which orders it was the *duty* of the said Captain Amos Binney to receive and obey.—The said Capt. Binney did refuse to acknowledge the said Order of Arrest, but sent the said — back to your complainant, and assumed the authority to command the said company on the morning of the 10th, and marched them on to the place appointed for the inspection, depriving the proper officer of the command of the said company, and of his right. Your complainant was therefore compelled to order the said Capt. Amos Binney to leave the parade, and relinquish the command of said company to the *proper officer*.—Viewing such conduct to be an open violation of the *oath of office and the laws* of the Commonwealth, which the said Capt. Amos Binney and every other military officer is sworn to support and maintain."

In this part of my defence I will attempt to illustrate the several points which appear spread on the face of the charges against me, which assume a foundation in principle.

- 1st. Refusing to perform my duty when ordered.
- 2d. Assuming a command that did not belong to me.
- 3d. Depriving another officer of his right—and
- 4th. Violating my oath of office and the laws.

These four points in the accusation are all contained in the general and indefinite charge of "unmilitary conduct."

With your permission, gentlemen, I shall take the liberty of speaking particularly to the three first points, but more largely on the fourth, as in that point the authority, the privileges, and the honor of every member of this Court, as well as my own rights, are founded.

1st. Did I then refuse to perform my duty when properly ordered to do it? Gentlemen, the only proper order which I ever received respecting the duties of the 10th of Oct. came from Col. Badger to me by the hand of his Quarter Master, his Adjutant being from home. This order came to me in the same manner, and by the same hand, that the Colonel's orders went to Capts.

Homer, Cutter, Hewes, and Lt. Provence of the 4th Sub Legion, so called, and to Capt. Loring, of no Sub Legion at all, and was a printed paper throughout, having no written signature affixed to it. This paper I received as an order, and noted at the bottom the time, place, and manner of receiving it, and made immediate arrangements to obey it. A few days afterwards, when the Colonel had been informed his orders were distributed, without the signature of himself or Adjutant, he gave his Quarter Master written directions to go and sign those in the hands of four or five particular officers; but mine were never signed: that, however, is not my fault. I felt no disposition to take advantage of the neglect of any officer, and, as I said before, put myself in a situation to obey it; but the order of complaint, handed at the same time with the Colonel's, was sent back to Quarter Master Redman in a polite note, wherein I stated that I knew of no authority by which he delivered orders from Major Osgood. Thus far it seems we all agreed in one opinion, for Quarter Master Redman was not again troubled to bring that or any other to me since. This was done on 28th Sept. I heard no more of orders until the morning of 3d Oct. when on my company parade, the same Valentine Baxter brought to me a sealed paper. I think my company was then at ordered arms, when Mr. Baxter appeared before me with his hand extended, and presented a paper. I asked him what he had there? He answered, *a letter*. I asked him who it was from? He smiling answered, *from a gentleman*. I replied, it was rather singular that he would consent to be the bearer of a letter, and refuse to tell who it was from. I, however, took it, and put it in my pocket, where it remained till my company was dismissed, when I broke the seal, and found it to be from Maj. Osgood, covering the same paper he had before sent by Mr. Redman. On the same day I wrote an answer, and enclosed the paper first sent by Major Osgood, giving my reasons for so doing, and concluding with the observation that I should obey the Colonel's order, appear on the common on the 10th, and there be ready to receive Maj. Osgood's orders. On the 8th, Mr. Baxter came to my house and presented me another paper. I asked, what have you got now? He replied, another letter. I asked, from whom? He answered, *a gentleman*. I told him I was very sorry he was ashamed of his employment; hoped he got well paid for his trouble. This paper stated that I must consider myself under arrest, and that the charges would be forwarded to me in due time. As I was then unconscious as I still am of having done any thing to merit such treatment from any officer, more especially from one whom I had contended, for more than six months, had no authority to send it, and as the tenor of that order was calculated to put it out of my power to obey the Colonel's order, and a neglect of so doing would lay myself liable to be truly arrested, by a proper authority, I quickly determined to send that paper back, which I accordingly did on



the same day ; and on the 10th, agreeable to orders, marched my company on the common, where I waited the orders of the complainant to form the line for inspection, as he was ordered to command. He came on the field soon after the time, when I told him I was ready there to obey his orders. He replied he had no duty for me to do, and directed me to give up the company to Ensign Sampson and leave the parade, which I did.

Gentlemen, if my conduct, embraced by the first point, does not sufficiently justify itself by the explanation and the evidence you have had to the point ; that is, that none of the orders alleged to have been disobeyed, were sent by regular and legal officers, you will reserve your further opinion to the observations that may be made on the last point.

The second point that appears on the charges is, that I assumed a command that did not belong to me. Gentlemen, were I to retort the allegation, I have no doubt of being justified by your decision ; for it is abundantly evident, from the orders and papers in the trial, that I at that time had the command of the Company ; and also that I had disobeyed no order whatever, by reason of which I could be arrested and deprived of that command.

To the third point, you have the evidence of my Ensign (Sampson) that he was deprived of no right, as the Complainant states ; that the Company was paraded on the morning of the 10th, by my order ; that he appeared and marched *under me, by my order* ; that he had made no preparations to take the command on that morning, not procuring an inspection roll, as he would have done, if he had considered himself Commanding Officer, and been ready for the inspection : for when inspected, he had no roll to return in consequence of my having been arrested by Major Osgood on the field. And it would also further appear, if the whole facts were out, that Major Osgood found himself in an error in dismissing me from the field, without demanding first the inspection roll of my Company ; which has caused him no inconsiderable trouble since, by taking such steps, many weeks after the inspection, to obtain an accurate inspection roll of the Company, as no law or precedent would justify him in. But more of this in the proper time and place.

If Major Osgood had considered his arrest of the 8th valid, and had ordered the Ensign to take the command of the Company, and march them on the field for inspection, why not arrest the Ensign for his neglect ? The reason is obvious ; and Sampson supports the idea, that Osgood being hasty, on reflection found he had overleaped the bounds of his authority, and was willing to consider his proceedings null ; and consequently, in a conference with Sampson at his own house, on Sunday night, he gave Sampson the privilege of considering the order which he had received, either valid or void, as Sampson should prefer ; and at the same time assured him, that, take which course he would, he should not be arrested for that conduct. Sampson took him at his word, and chose

to consider the order as it should be considered, null and void : hence he now testifies, he has not been deprived of any right by me. But that I had a legal and proper right to command that Company, and order Sampson to obey, I will more particularly shew under the fourth point.

My defence to the three foregoing points is ultimately derived from the relative rank of Col. Badger, Major Osgood, and myself. Col. Badger is the officer to whom exclusively belongs the right and power to issue orders to the officers of his Regiment ; and Major Osgood stands in the same relation to the Colonel as the Ensign of my Company does to me ; and I stand in the same relation to the Colonel as my men do to me. To illustrate, Col. Badger issues orders to the several Captains in his Regiment, directs his Adjutant to pass them to each Captain, and also serve each of his Majors with a copy. So Capt. B. issues his orders to his men to parade at a certain time and place, directs his Orderly Sergeant to notify each man belonging to his Company, and also to serve his Lieutenant and Ensign with a copy. Does one of the Colonel's Majors assume the right to mutilate his orders before they are distributed to the Captains, and perhaps countermand them in part ? And because the Captain refuses to comply with such unmilitary conduct, will the Major arrest and have that Captain broke ? So may the Lieutenant or Ensign of any company assume the right to mutilate the orders of the Captain, and perhaps countermand them in part ; and if the men refuse to obey such mutilated orders, will the Lieutenant have a right of action against the men for such disobedience of orders, while the Captain is present ? I trust not : and if the Lieutenant proceeds, he will quickly find himself non-suited ; certainly so, if the man proves he obeyed his Captain's orders. And would it end here ? No. The Captain, feeling his rights infringed, would call his Lieutenant to an account of his conduct. How stands the simile between the Colonel and the Captain ? The Major has assumed this right ; the Captain refused to admit the propriety, and is arrested, but proves he obeyed the Colonel's order : Does the Major sustain his charges ? I trust not, because the Colonel is and has been all the time present. But will the Colonel call his Major to an account for his interference with his orders ? Stay—that is to be learnt yet.

Gentlemen, there are two tests by which you can ascertain the truth, and adjudge me guilty or not guilty of the charges. The *first* is the laws of the land, made expressly for the government of the militia. These are decisive and infallible in all cases to which their provisions extend. The *second* is the usages and practices of officers, where those laws are adhered to in the organization. The last may sometimes be erroneous, but is still worthy of high regard. To both I appeal ; and this brings into view the fourth point in the complaint : that is a violation of the oath of office and the laws.



As all authority in our land is originally in the people, permit me, gentlemen, to lead your minds from the chaos of power, scattered over the yet unmeasured extent of our nation, residing in undefined portions in the millions of men that compose our happy country, to the *Sanctum Sanctorum* of individual right, where *power and authority*, by the will of the people, have received substance, *form and action*.

The sacred fountain of power, to which every individual of the nation now looks for protection, and in which we all deposit our confidence, is stiled the Constitution of the United States. This palladium of our rights we have all sworn to support. On this we will fix our attention, and enquire for the provisions that establish my defence, beyond the power of individual malice to affix the stigma of guilt. Gentlemen, the attachment you bear to this immaculate roll is deeply engraven on your hearts: May the extracts which I shall make be as strongly imprinted on your minds, and my cause is safe.

*Article 1. Section 8.*

Congress shall have power "To provide for organizing and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress."

*Article 6.*

"This constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land, and the Judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding."

*Amendment, Article 7.*

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or publick danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of his life or limb; nor shall be compelled, in any criminal case, to be witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for publick use, without just compensation."

*Article 8.*

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and publick trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favour, and to have the assistance of counsel for his defence."

These, gentlemen, are the provisions of the constitution, as they relate to my case. You will doubtless remark first, that Congress have the original right of making laws for the organization of the Militia; the States reserving the right of appointing the officers, and training the Militia agreeably to the rules prescribed by Congress. And, 2d. That the laws made by Congress, by virtue of this constitution, are paramount or above the laws made by any State. 3d. That you, as judges on my trial, are bound to try me agreeably to the laws which Congress have made, notwithstanding the constitution, the laws, or any *resolve* of this State, may seem to support the Complainant in his charges against me. In the 4th place you will observe the provision, that I should be tried in the district where the offence is alleged to have been committed, and not without due process of law; to have compulsory process for evidence in my favour, if asked; to be tried by an impartial jury, and to have counsel in my defence.

Gentlemen, my original intention was to make objections to you against being brought from the vicinity of the place where the offence, if any, was committed. You here perceive the constitutionality of the objection; but as I was loath to give you trouble, I have waved that objection. I shall not fail, however, to draw your attention to the subject, and remind you that I have considered it both an infringement of my right, and a precedent that should not be suffered to escape the notice of *those eyes* who have the authority to correct the procedure. It has subjected me to much *expense* and trouble that I was not bound to incur; and in effect amounts to purchasing justice and a fair reputation, which should be mine without the cost. You also here perceive the fallacy of those reasonings, which would induce you to believe you can acquit your consciences agreeably to the oath you have taken, by trying me on charges of criminality without a steady and attentive eye to the laws of the land; and that you are under the oath of God, to decide my case as upright judges and impartial jurors. I will now for a moment draw your attention to the law of Congress, predicated upon the authority given them by the constitution.

By the act passed May 8th, 1792, Sect. 3, it is provided. "That the Militia of the respective States shall be arranged into Divisions, Brigades, Regiments, Battalions, and Companies, as the Legislature of each State shall direct. And each Division, Brigade, and Regiment, shall be numbered at the formation thereof; and a record made of such numbers in the Adjutant General's office in the State." "And each Division, Brigade, and Regiment, shall respectively take rank according to their number; that if the same be convenient, each Brigade shall consist of four regiments"; "that the said Militia shall be officered by the respective States, as follows: To each Regiment, one Lieut. Col. Commandant; and to



each Battalion one Major"; "that there shall be a Regimental staff, to consist of one Adjutant, one Quarter Master," and "one Sergeant Major."

*Law, passed March 2, 1803. Section 2.*

"Any notice or warning to the citizens so enrolled, to attend a Company, Battalion, or Regimental muster or training"; which shall be according to the laws of the State in which it is given, shall be deemed a legal notice of his enrolment."

*Section 3.*

"To each Regiment one Chaplain."

From these laws you are already informed what the organization of the Militia should be. If, however, you have in the course of the trial been led to suppose a different organization has been established in this State; such, for instance, as *Legionary Infantry* or the more frequent and easy term *Sub Legions*, you are bound by the constitution and your oath, to pay no other attention to such organization than by your decision, shall at least imply that the organization is unconstitutional, and of course not obligatory on any man to adhere to. What then is the arrangement prescribed by Congress? Brigades, Regiments, Battalions, and Companies, and that they be numbered. Have we then this arrangement? Partially. We have a Brigade, but it is not numbered, and it has no rank in the Division; but some officers, high in rank, will tell you that the Legionary Brigade will outrank the first Brigade, in as much as in case the Division was paraded in line, it would act as light troops. How preposterous the idea! What, an unorganized Brigade composed of Infantry, Light Infantry, Cavalry, and Artillery, to act as light troops to that Division which has its full quota of that denomination of soldiers? And where, pray, are these troops to be placed when the Legionary Brigade, consisting of a good proportion of artillery, are detached as light troops to the Division? Will the officers of those corps so far acquiesce in the chimera as to relinquish their rights? No, gentlemen, it is mere nonsense to suppose it. But how the officers of the 1st and 2d Brigade are to reconcile themselves to the idea of the Legionary Brigade outranking them, is a question for those to answer who are interested, be the decision of that contest as it may, you, gentlemen, clearly see that this monster of a Brigade, has no rank at all at present.

Have we then Regiments, gentlemen? We have one Lieut. Colonel Commandant. When he is asked what his command is, he tells in his orders and verbally on oath, it is *Infantry* or *Leg. Infantry*, a corps you know nothing of in the laws, which are to be considered superior to all others. But has not this Lieut. Col. troops enough in his command for 2 or 3 large Regiments? Yes, gentlemen, he has now seventeen Companies, averaging 120 men each, quite sufficient for three Regiments or twenty-four Companies. He also has three Majors, &c. 4th one elected, but, thanks to the Commander in Chief, we find his orders on your record;

by which he has arrested the progress of this monster, by declaring the unconstitutionality of it, and refusing to commission a man field officer to a Sub Legion, because there appeared to be no Regiment properly established, to which he belonged. But is it true that Col. Badger is not commandant of a Regiment, although there are seventeen Companies in it? Hear the Commander in Chief: He declares, in General Orders and his Message, that his command is a Regiment, and that he is the Lieut. Col. of that Regiment. But what is the opinion of this Colonel himself? Let us gather it from his conduct, for we all know that actions speak louder than words, and much less equivocal. We see Col. Badger confirming the appointing of his Adjutant, and actually appointing a Quarter Master, Chaplain, and two Sergeant Majors. This looks something like being a double Colonel, having two Sergeant Majors; but that, however, is not the fact, he is no more than one; and that he is one, the functions he exercises sufficiently prove; for he not only makes the appointments of Regimental Staff officers, but he receives the returns from all the commanding officers of the companies in the Brigade, there being no other Colonel. He also warrants the non-commissioned officers of his Regiment, and discharges them according to law.

But have we any Battalions? No. No Battalions? What then? Why Sub Legions. This will not do, unless we alter the constitution. Which then shall be done of two things, alter the constitution, or discard the idea of these Sub Legions? Away with all Sub Legions, when they come in contact with the constitution, and let us stand or fall by that. Gentlemen, were I disposed to indulge a moment in pleasantry, a ludicrous thought strikes my mind: we can find no officer in this Brigade who is willing to avow himself Colonel of the Regiment. From this circumstance one would be led to ask the question, what is a Colonel? We have all no doubt heard of the vulgar adage, that it takes nine of a useful and respectable branch of mechanics to make a man. So here, if it is not indecorous to draw a simile, one Lieut. Colonel, three or four Majors, one Adjutant, one Quarter Master, and more or less Sergeant Majors, cannot make one Col. Commandant of a Regiment.

But gentlemen, before I proceed further, a thought strikes my mind. I read in the extract from the United States laws, that the Militia of the States were to be arranged into Divisions, Brigades, Regiments, &c. as the Legislatures thereof should direct.

Now then let us turn to the laws of this Commonwealth, and see how they have directed, and if it be conformable to the supreme law of the land; because you know if it is contrary to that law, it is void; and you as judges are bound to declare it so. But as we turn over the pages we will take a peep into the con-



situation of this State first, and see if any thing there has any bearing on the question. It seems to me we shall find several articles that ought to be noticed and recorded for our guide in all our military as well as civil conduct.

First, then, we see, in the Declaration of Rights, Article 10, words as follow :

“ Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws.” *That means me, gentlemen ; I have a property in my commission, which I demand should be protected by you according to standing laws : so if the laws govern your conduct, I fear not the frowns of men.*

*Article 11, reads,*

“ Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs, which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it ; completely, and without any denial ; promptly, and without delay, conformably to the laws.”

The first part of this article seems to savour of the idea, that if I should sustain injury or wrong by the decision of this trial, I could have recourse to the laws for redress, if I should be adjudged by the wishes of men, and not conformably to the laws, (but the laws only can govern). That citizens ought to obtain justice without purchase, has some bearing on my case, as I have hinted in another place ; for if I get justice on this trial, it will seem something like purchasing it, by the unnecessary expense I am put to, in being ordered so far out of the District, where the crime is charged to have been committed.

*Article 13.*

“ In criminal prosecutions, the verification of facts, in the vicinity where they happen, is the greatest security of the life, liberty, and property of the citizen.” This has a full bearing on my case ; for if I could have met these charges, in the vicinity of the place where the facts happened, it would have been a very great security of my property, in saving to me the expense of myself and witnesses. And to me it is an enigma, how Dedham Court House can legally be said to be in the vicinity of the Gun House on Copp’s Hill, in Boston, where the crime I am charged with, was committed, if ever. But as it is *possible*, though not *probable*, this may be the subject of discussion at another time and place, I will not hold your attention longer to it at this time.

*Article 17.*

“ And the military power shall always be held in exact subordination to the civil authority, and be governed by it.” This is a very important consideration, and is a most happy provision in

my case. For, by the civil jurisprudence, a man is always held to be innocent until he is proved to be guilty. And as in this point of view I stood before you at the commencement of this trial innocent, I feel an increased confidence, that I have not been, nor shall I be proved guilty. And here, gentlemen, is another consideration. You now as a court martial, possess military power ; but in the exercise of that power, you are under the civil authority, and are bound to be governed by it.

*Article 30.*

“ The Executive shall never exercise the Legislative and Judicial powers, or either of them, to the end, that it may be a government of laws, and not of men.”

This has a full bearing to my trial ; for if the Legislative power have not established the Sub Legions of Infantry, and given the Majors the right to issue their orders, the Executive could not do it without violating this article, as they would annul the government of laws, and establish one of men.

Examine then, gentlemen, among the papers on record before you, if any Legislative act established local commands for Majors of Sub Legions, as they have done for Regiments throughout the Commonwealth, by naming the particular Companies that shall compose each Regiment. See, gentlemen, if you can find any authority higher than Col. Badger’s, that organized these Sub Legions, and placed my Company to that called the first.

*Chapter 1. Article 4. Section 1.*

“ The General Court” have power “ to set forth the several duties, powers, and limits of the several civil and military officers of this Commonwealth, and the forms of such oaths or affirmations, as shall be respectively administered unto them for the execution of their several offices and places.”

Here, gentlemen, we see a provision, that the General Court shall set forth the duties and limits of the military officers. They accordingly have set forth the limits of Divisions, the limits of Brigades, and the limits of Regiments : which power has been exercised strictly, conformably to the United States constitution ; and they have prescribed the oath of all officers, which I will by and by read you. But they never have, nor ever can set forth the limits of Majors of Sub Legions ; their command being as completely under the direction of the Colonel, as that of a lieutenant is under a Captain of a Company. And if the Colonel undertakes to set forth their limits, he being an executive officer, has not the right to do it ; for in so doing, he exercises the Legislative power, and it becomes a government of men, and not of laws.

*Chapter 2. Article 10. Section 1.*

“ The field officers of Regiments shall be elected by the writ-



ten votes of the Captains and Subalterns of their respective Regiments."

This is a salutary provision, and must not be lost sight of; for it shows the manner of the election of Colonels and Majors. Col. Badger, Majors Osgood, Stearns, and Stodder, were elected by the written votes of all the officers in the Regiment. And clearly shews, that none but the Colonel has a permanent local command. For it would be a gross absurdity to suppose 51 officers should be assembled to choose a Major, to take a local and permanent command of any 12 of those officers. Whereas, if this provision had contemplated a local command for the Major, it would have been thus expressed: and the officers of each Battalion respectively, shall elect the Major of their own Battalion. But as the case now is, Major Osgood was elected by the whole, and is liable to be placed to any part of the Regiment, conformably to his rank, that the Colonel thinks proper; which completely does away the idea of a local command.

*Same Article.*

"And no officer, duly commissioned to command in the Militia, shall be removed from his office, but by the address of both Houses to the Governor; or by fair trial in a court martial, pursuant to the laws of the Commonwealth for the time being. Also the commanding officers of Regiments shall appoint their Adjutants and Quarter Masters."

Here you have a confirmation of the authority of the Colonel to appoint his Adjutant and Quarter Master. But unless he is Colonel of a Regiment, he has no such power; from which the inference is clear, that Col. Badger commands a Regiment, he having exercised that power. You also see a provision for removing an officer from office, by a fair trial, in a Court Martial, pursuant to the laws, but no provision to try an officer without reference to the laws, as some would have you think.

*Chapter 3. Article 1.*

"The tenure that all commissioned officers shall by law have in their offices, shall be expressed in their respective commissions."

If Major Osgood legally holds a commission, the tenor of which stiles him Major of the 1st Sub Legion of Infantry, my whole defence falls to the ground. But if the tenor of it does not so express it, my position is correct, and I have gained my point; for here is a positive regulation of the Massachusetts constitution, not incompatible with the constitution of the United States, that all commissions shall have the tenure expressed on the face of them. If my own commission does not say that I am Captain of a *Company*, it is void; for it otherwise might be construed, that I am Captain of a *Brigade*; and if Col. Badger's does not express a Regiment, it might be construed, that he is Colonel of a *Platoon*. So, if Major Osgood's does not express

a Regiment, it might be construed, that he is Major of a *Section*, or rather, to follow the gentlemen in their romantic ideas, he must be stiled, if any thing, Major of a Cohort.

*Chapter 6. Article 1.*

"And any person, appointed or commissioned to any judicial, executive, military, or other office, shall, before he enters on the business of his office, take and subscribe the following declarations, oaths or affirmations, viz.

"I, A B, do truly and sincerely acknowledge, profess, testify, and declare, that the Commonwealth of Massachusetts is, and of right ought to be, a free, sovereign, and independent State; and I do *swear*, that I will bear true faith and allegiance to the said Commonwealth; and that I will defend the same against traitorous conspiracies, and all hostile attempts whatsoever; and that I do renounce and abjure all allegiance, subjection, and obedience to the king, queen, and government of Great Britain (as the case may be) and every other foreign power whatsoever: and that no foreign prince, person, prelate, state, or potentate, hath, or ought to have, any jurisdiction, superiority, pre-eminence, authority, dispensing, or other power, in any matter, civil, ecclesiastical, or spiritual, within this Commonwealth; except the authority and power which is, or may be vested by their constituents, in the Congress of the United States: and I do further testify and declare, that no man, or body of men, hath or can have any right to absolve or discharge me from the obligation of this oath, declaration, or affirmation; and that I do make this acknowledgment, profession, testimony, declaration, denial, renunciation, and abjuration, heartily and truly, according to the common meaning and acceptation of the foregoing words, without any equivocation, mental evasion, or secret reservation whatsoever. *So help me God.*"

"I, A B, do solemnly *swear* and *affirm*, that I will faithfully and impartially discharge and perform all the duties incumbent on me, as \_\_\_\_\_, according to the best of my abilities and understanding, agreeable to the rules and regulations of the constitution and laws of this Commonwealth. *So help me God.*"

One more oath, in the following words, is taken and subscribed with the foregoing, by every officer under this Government, viz.

"I, A B, do solemnly *swear*, that I will support the constitution of the United States. *So help me God.*"

Gentlemen, here you have the sacred oaths, which every officer takes on receiving his commission. These are the oaths that the Complainant has charged me with having violated. But on reviewing my conduct with respect to the Complainant, you will clearly perceive, that the complaint originated in my *tenacious* adherence to those oaths, that no man, or body of men, can absolve me from. Hence my resistance of what I have consid-



ered the infractions of others. Had every officer in the Legionary Brigade considered those oaths as positive and binding as I have done, I am confident we should enjoy a very different arrangement from what we have; and much if not all the difficulty that has existed there, for the last ten years, would never have happened.

Do we see any thing in these oaths to support the doctrine so strongly inculcated in the Legionary Brigade, that we have sworn to obey superior officers, let their orders be right or wrong, legal or illegal? I trust not; but abundant proof that it is the duty of every man, to support the constitution, first of all considerations, and then discharge the duty of his office agreeable to those laws made under that constitution. I am fully sensible of the importance of a due subordination to superiors, in all military establishments, in order to render the *military*, in the hands of the *civil* authority, the grand bulwark of our nation. But when officers, in a high rank, so far forget the obligation of their oaths of office, as to issue orders incompatible with the laws and constitution; the inferior officer having taken the same oath, and being under the same obligation to preserve inviolate the constitution and the laws, as his superior officers are, he is put to the disagreeable and unhappy alternative of either disobeying the unconstitutional orders thus sent him, or breaking the laws, violating his oath, and thus perjuring himself. What course shall be taken by an officer thus unpleasantly situated? Judge ye, gentlemen, will that officer, duly impressed with the moral obligation of an oath, hesitate for a moment between the extremes? and will he not justify his conduct to his conscience, his country, and his God, by disobeying the order, and adhering to the laws, confidently casting himself upon a jury of his peers for support and protection, against the consequences that may ensue?

And now, gentlemen, we come to the laws of this Commonwealth. Let us examine what directions the Legislature have made, conformable to the laws of the United States, which are superior to all others.

*Act of June, 1793. Section 4.*

"That the Governor, by and with the advice of the Council, be, and hereby is authorized and empowered to form and arrange the Militia into Divisions, Brigades, Regiments, and Companies; and from time to time to make such alterations therein as shall be necessary; and if the same be convenient, each Brigade shall consist of four Regiments, each Regiment of ten Companies, and each Company of 64 privates. And each new Division, Brigade, and Regiment, shall be numbered at the formation thereof."

Here is the direction of our State Government, that the Gov-

ernor and Council comply with the law of Congress, and organize the Militia into Divisions, Brigades, and Regiments; but no authority for the formation of Sub Legions. You also here perceive the Governor and Council have power vested in them to make such alterations as shall be necessary, from time to time. This power is exercised when necessary to raise new Divisions, new Brigades, new Regiments, and new Companies, by subdividing such as already exist. You no doubt recollect, that within the last two years, they have raised a new Division out of the 8th and 10th, which they numbered the 4th, conformably to the laws of the United States; and we hear frequently of the establishment of new Regiments; such, for instance, as that of the troops of Charlestown, recently established, as the 5th in the 1st Brigade of the 3d Division. And, gentlemen, you have heard of the formation of new Brigades. Such was the formation of the 1st Division, in 1798, when that Division was divided into *three* Brigades, and two of them were numbered, viz. the first and the second; but the other being to all intents and purposes, as the Adj. General justly observed, a *non-descript*. Was not that worthy of a christening, by numbering it the third, as it should have been at the formation, agreeable to this law? This *non-descript* Brigade, however, being the subject of a special Resolve, I will save my comments thereon until I shall quote the Resolve, and the General Order issued thereon, and pass to the 5th Section, where we find these words:

"Where any vacancy of Colonel now is, or shall hereafter happen, then the field officers of each Regiment, to consist of a Lieut. Col. Commandant, and two Majors." "That there shall be a Regimental Staff, to consist of one Adjutant, one Quarter Master, to rank as Lieutenants," and "one Sergeant Major."

Here, gentlemen, is the authority for the Commander in Chief to commission a Lieut. Col. Commandant to a Regiment, and two Majors. But we see no authority to commission Colonels, without defining the corps they are to command, or to give commissions with the rank of Lieut. Col. Commandants to Brigades, Battalions, Companies, Platoons, or Sections of Infantry. Hence the inference is strong, that every Lieut. Colonel is Commandant of a Regiment, notwithstanding he may be ashamed or unwilling to avow it.

And here also is the authority of a Lieut. Col. of a Regiment, to appoint his Regimental Staff; but no authority is found here for a Colonel of *Infantry*, to appoint such officers under him. It then follows, by implication, if not as matter of fact, that Thos. Badger, Esq. is Lieut. Colonel of a Regiment, or all his official proceedings and appointments are void, and those officers' commissions mere dead letters, having no efficacy in law.



*Article 8.*

"All non-commissioned Staff Officers and Sergeants, shall receive warrants, under the hand of the commanding officers of their respective *Regiments* or *Corps*."

You have heard and seen in evidence, that Col. Badger has exercised this prerogative of a Colonel of a Regiment, by issuing warrants to the non-commissioned Staff Officers and Sergeants of his Regiment; and although, by evidence of Foster and Baxter, it would seem that his officious Majors had made the appointments of them as officers, yet, by the above term *Corps*, they have not claimed or exercised the power to warrant those officers themselves: knowing, as no doubt they did know, that that term *Corps* signified a Battalion of Artillery, or Squadron of Cavalry, whose commanding officer has an equal power, by a fair construction, with a Colonel of a Regiment, to warrant such officers: therefore they have virtually relinquished their claim to be *commanding officers of Corps*, and have left it to their Colonel to sign those warrants. But, gentlemen, how has he done it? You have seen, by exercising his Herculean powers, and first mutilating and erasing a part of the rules and regulations established by the Government and sent to him for compliance, and which he had sworn to support and maintain, then inserting such interpolations as suited his pleasure and convenience. Thus has he "wrapped it up," as the saying is, and you have noticed the manner of his justification.

*Article 11.*

"That no officer of the Militia shall be discharged, except by the Commander in Chief, on the request of such officer in writing, or on the address of both Houses of the Legislature, or by being disbanded by law, or by a judgment of a Court Martial."

You, then, gentlemen, have now the power to remove me from office, in the way last mentioned. But this you cannot do unless after a fair and impartial trial. Although I am bound by the principles of honor and justice to acknowledge, that the conduct of each and every gentleman on my trial has been fair and impartial, yet, gentlemen, I can by no means concede, that the detail of my judges has been strictly fair and conformable to military etiquette: For it is a known fact, that one of the honorable gentlemen of this honorable Court has served on a similar duty, about four years since, when there were other gentlemen of the same rank in the same Brigade, who had never served; and from the other Brigade officers, much younger than those whose turn it was, have been detailed. But, gentlemen, as those facts (by your decision) have not been supported by the evidence accompanying my challenge, I beg to be understood, that I impute no blame to any one of you; and it is now left for superior officers to justify their conduct to themselves.

*Article 12.*

"That the Governor, by and with the advice of Council, be authorized to form the Cavalry of each Brigade into Squadrons and Battalions; and each Squadron shall be commanded by a Major, and each Battalion shall be entitled to a Lieut. Colonel, Major, Adjutant, and Quarter Master."

*Article 13.*

"And when there are two full companies of Artillery, they shall form a Battalion in each Brigade, and be entitled to a Major, Adjutant, and Quarter Master."

These last extracts are recited to obviate the impression (if any should arise) on the mind of any gentleman of the Court, who may be more conversant with the practice of issuing orders in the several Corps of Artillery and Cavalry. Gentlemen will undoubtedly perceive a clear and definite distinction between those Corps and the Infantry: For, by this law, those Battalions of Cavalry and Artillery are entitled to a Major commandant, and they have their Adjutants and Quarter Masters; and they, being under no Colonel, necessarily issue orders as commandants to their several Captains, by the hand of their own proper Adjutants, not being beholden to the Colonel of any Regiment for those officers. But not so in the Infantry, because they are by law differently organized, viz. into Regiments; to each of which there is a Colonel, from whom orders issue to the Captains composing those Regiments, without any further reference to Majors than merely to serve them with a copy of Regimental Orders, that they may know what duty their Colonel has assigned them, and be ready to obey. But when those Majors of Regiments are on the field, by order of their Colonel, with any number of the companies in their respective Regiments, then and there they have a command, and may issue orders even through the Colonel's Adjutant, or verbally themselves, which orders the Captains on the same duty must obey. This statement is clearly supported by the evidence of Lt. Col. Barnes, and were any additional evidence necessary, beyond your own knowledge of the fact, I could adduce the unanimous testimony of every Commandant and Adjutant of every Regiment in the Commonwealth.

Here, gentlemen, my case is fairly brought into view. You see by the orders of my Colonel, on your record, that I was directed, together with three other Captains in Colonel Badger's Regiment, to parade with our companies on Boston common, on the 10th Oct. for inspection; and that Major Osgood was to command this corps when assembled. To this order of my Col. Major Osgood chose to attach one of his own, that went to countermand a part of my Col.'s, so far as respects the time of forming the line. This order of Col. Badger, with its appendages, was handed down to me by Q. Master Redman, by the express and written



directions of his Colonel. When he brought it, and I found this appendage of the Major, I refused to receive it, alleging at the same time, as Mr. Redman states, that Major Osgood had no right by law to send it, and Redman no authority to bring it. But as he refused to take it back, I detached the useless part from my Colonel's order, and enclosed it in a polite note to Mr. Redman, as I knew of no military relation between Major Osgood and him, or myself and him, and omitted the title in the address to Mr. Redman, and signed myself A. Binney, as a *citizen* to a *citizen*; and this accounts for Mr. Redman's delicacy for titles in his evidence. Major Osgood consequently received back his famed Sub Legion Order, and was at a loss what next to do, but after due deliberation and advice, he hit upon a happy expedient, as he supposed, to place the same a second time in my hand, expecting to obtain by stratagem what he could not effect in open combat. He accordingly concealed the bait under cover of a sealed communication, in which many excellent arguments on military discipline may be seen, and some serious and friendly admonitions may be found; but whether or not they were well timed, is not for me now to judge. One thing, however, is certain: He had forgotten the contents of that letter, and having no copy, he has, under oath, made some gross *mistakes*, to say the least of them; for he has testified, that, in that letter, he informed me, if I did not retract from my position concerning his orders, he would arrest me, or words to that effect; but the letter has since spoken for itself, and nothing of the kind appears. This letter, containing the famous Sub Legion Order, was brought me by the hand of Mr. Baxter, who I know had no directions from his Colonel to carry about the letters and orders of any Major, and which Mr. Baxter has confirmed under oath. I lost no time in answering that communication, and somewhat enlarged upon the topics and arguments it contained, and again enclosed the illegitimate offspring of illegal power, and sent it altogether to the Major, by my Sergeant, Mower. Here the matter rested until the 8th Oct. when he sent me a new fangled order, well known, however, in the non-descript Brigade, which ordered me into arrest; but the incompetency of the Major to create an order that would absolve me from my duty to my superior and his, and whose express orders I was under to appear on the field on the 10th, as well as in the illegal manner it was sent, viz. by the same Mr. Baxter, justified me in sending it back without delay, in a polite letter, in which I informed him I should appear, according to my Colonel's order, and then and there hold myself ready to obey any proper order he might give. The Hon. Court having heard this letter several times read, will judge how far the Complainant was correct in his answer to my question, "why he first came to me on the parade, if he considered me under arrest, and Sampson, as commanding officer of the Company," when he said, that from my conduct for a few days previous, he

expected I should use force to resist him. *O shame*, Maj. Osgood, how unwarrantable this suspicion, and how wide from my known character for deference to superiors, when regularly in authority over me! and how completely unjustifiable from the letter you received from me, but two days before.

The Court have seen that I was arrested by Major Osgood, according to his own account, on the 8th, when I had disobeyed no order of his, or any other officer; but because I refused to disobey the order of my Colonel, and decline going with my Company on the parade, as directed by him. Thus stand the facts, and now again to the law.

*Article 14.*

"That at all Regimental Musters, the Companies commanded by the two oldest Captains shall act as Light Infantry Companies, except where Light Infantry Companies have been already raised by voluntary enlistment, and one or more Companies shall be attached to such Regiment."

This is an express requisition of the law. But by the present arrangement of the Legionary Brigade, it is totally disregarded; for there are now three Light Infantry Companies, raised by voluntary enlistment; but instead of being placed to the Regiment, as they should be, they are formed into a separate corps by themselves, and have a Major and Adjutant, although no law exists allowing such an arrangement or such officers.

*Article 15.*

"And the Commanding Officer of every such Company, raised at large, shall annually, in the month of April, make out a list of all the men in his corps, and deliver the same to the Commanding Officer of the Regiments in whose District such corps is or may be raised."

To strengthen my position, that Col. Badger commands a Regiment, within the meaning of the law, he has testified, he receives such returns in the Legionary Brigade as Colonel of the Regiment. Even the spotless Company of *Independent Cadets*, and the self-styled *Ancient and Honorable Artillery*, who in other respects affect to be above all law, how submissive to this hesitating Lt. Colonel.

*Article 25.*

"That every Captain or Commanding officer of a Company, shall make a return of his Company, comprehending every man belonging to said Company, with all the arms and equipments belonging to them, to the Commanding Officer of the Regiment, in the month of May, annually."

Agreeable to this requisition, the returns of Commanding Officers of Companies are, and always have been, made to Col. Badger, since Sept. 1804, as Colonel of a Regiment, and he makes his returns accordingly, in the month of June. But if he is not Colonel of a Regiment, why all this trouble of receiving and making returns? Notwithstanding he may deny it, as you have heard, this



one circumstance proves that he is, *ipso facto*, Colonel of the Boston Regiment.

*Article 30.*

"That every Captain or Commanding Officer of a Company, who shall refuse to call out his Company as often as the law requires," "or who shall excuse his men for unnecessary absence, shall be tried by a Court Martial, and if thereof convicted, he shall be reprimanded in orders, or removed from office, at the discretion of said Court."

This section provides a penalty for neglect of duty, or extreme lenity towards his men for not appearing on duty when ordered. The penalty is removal from office or a *reprimand* in orders; but as I am not charged with either of those faults, the provision does not apply to me, and the quotation is made for no other purpose, than to shew the Court that I have done my duty in both these respects, otherwise there no doubt would have been on your records, a charge of this sort; so that it appears that I have at least done my duty, and perhaps in some cases more correctly than those who are so ready to complain against others.

*Article 35.*

"That the Maj. Generals or Commanding Officers of Divisions, each within his own Division, shall appoint Courts Martial for the trial of Captains, and all officers under that rank." "And the officer who shall appoint a Court Martial, shall at the same time appoint a suitable person to act as Judge Advocate, whose duty it shall be impartially to state the evidence both for and against the officer under trial; to take accurate minutes of the evidence, and all the proceedings of the Court." "And every officer to be tried, shall be put in arrest, so as to be suspended from his office; and shall have a copy of the charges exhibited against him, ten days before the sitting of the said Court." "In every Court Martial for the trial of an officer, not less than two thirds of the members must agree in the sentence or judgment of the Court, otherwise the person charged shall be acquitted." "Before any Court Martial shall proceed to the trial of any officer, the Judge Advocate shall administer to the President and each of the members, the following oath, viz.

"You, Z Y, do swear that you will well and truly try the cause now before you, between this Commonwealth and the person to be tried," &c.

This section provides for the institution of Courts Martial, by the Major General of each Division, with power to name a Judge Advocate; but it defines the duty of that officer, and prescribes the oath of the members. This oath, you will notice, is exactly similar to that administered to Jurymen in Courts of law, except the clause respecting divulging the opinions of each other, and which I have omitted. I would, however, remark, that most Courts Martial have given this clause of their oath, a construction so ex-

tensive as to very much embarrass their proceedings, or lay themselves under the necessity of deviating from their own construction. For instance, during any trial by Court Martial, when a question of order, admissibility of evidence, opinion of law, or precedent, is agitated, the Court must be cleared for their decision, or they violate the broad construction given the oath; but how often, and properly too, do those Courts decide these minor questions with open doors, where, from the very nature of the case, the opinions of each other are publicly revealed. The very essence and intent of this oath being, to guard the members of a Court Martial, against the ill blood that may be excited, in consequence of the opinion of members, on the grand question of guilt or innocence of the prisoner: it is right and proper that the Court should at this decision be alone; that the necessary secrecy should be observed and kept. But when questions, having no relation to the guilt of the prisoner, are discussed, it should be public, and before all the parties, that every thing may be open and fair, as is the case in our civil Courts, until the case is finally given off to the Jury, when they retire, and are alone until they make up the verdict.

The duty of the Judge Advocate is simple and plain, viz. *Impartially* to state the evidence both for and against the Defendant, and to take accurate minutes of the evidence, and *all* the proceedings of the Court. The ill health of Major Davis has been a sufficient apology for any omissions the Court have observed, the duty of that gentleman being *laborious*, though *simple*; but he might have saved himself *some* trouble, if he had as strongly insisted on categorical answers from the witnesses for the Complainant, as he did from those of the Defendant.

That I was put in arrest agreeable to this section, *some time or other* previous to this trial, I do admit, but that it was on the 8th Oct. as the Complainant said he *presumed* it was, when he answered my question, I do deny; for I was then under an order of Col. Badger, the superior officer of Maj. Osgood, as well as myself, and while under such an order an inferior officer could not arrest me, but must have made his complaint to the Colonel, who must, when *he* arrested me, have discharged me from the prior order. And it is also contradicted by himself; for he actually came to me on the field, on the 10th, in his character as Maj. Commandant for the day, as large as life, and there, after enquiring by whose orders I appeared, and having received my answer, that I was there by Col. Badger's order, and then waiting to receive his, as Commandant of the day, he gave me a verbal, though very positive order to leave the parade, give my Company to Sampson, and consider myself in arrest. This order I readily obeyed, as you have heard by his own mouth; but that I was served with a correct copy of the charges, as is above provided, I think does not appear, although as I stated to the Court, I was willing, for the sake of time, it should be so considered, on condition that the fact should appear on the



record ; as the Court overruled that objection, the object I had in view was effected, and the fact there appears.

There is one other point in the above section that is worthy of notice ; that is, that two thirds of the members must agree in a sentence, or I must be discharged. That I shall be discharged by a unanimous decision, I am fully confident, which renders any further observations unnecessary.

Section 35.

" That every officer, holding a Commission in the Militia, who shall be accused of any unmilitary conduct, neglect of duty, or disobedience of orders, or who shall, *when on duty*, appear, or behave in an unofficer-like manner, *shall be liable* to be tried by a Court Martial, and if found guilty, to be sentenced by said Court ; to be *reprimanded in orders, or to be removed from office, for life, or for years, according to the aggravation of the offence*"—" which sentence shall remain in force unless reversed by the General Court."

Here, gentlemen, is the extent of your powers, and they are discretionary ; to remove from office, or reprimand in orders ; or to acquit with honor. Although this last power is not expressed in the section, yet it is most clearly implied ; otherwise, a trial is a mere mockery of justice. Among the offences above enumerated, you see two, which the Complainant has introduced into his charges—unmilitary conduct, and disobedience of orders.

Was it then unmilitary in me to refuse orders from an officer having no right to issue them, and especially when they came by the hand of gentlemen not authorized to bring them ? and *more* especially, when by receiving and obeying those orders, I should put it out of my power to obey such as came from a proper authority, and in an authorized channel ? Was it disobedience of orders to reject those of Major Osgood, who has no right to send them, and obey that of Col. Badger, whose only right it is ? And that I did promptly and punctually obey his, is proved on all sides.

I will suppose a case, Mr. President. You shall order Captain Harris, of your Regiment, with three other Companies, to parade together at Medfield, on the 10th of Oct. at 10 o'clock, A. M. for the purpose of attacking an enemy, and at the same time place Maj. Ellis to command them while on the field. Maj. Ellis receives your order, and undertakes to alter it. He actually directs those Captains to appear at the place named by you, at 3 o'clock, P. M. instead of the time you directed. This alteration to your order is forwarded to Capt. Harris, by some unauthorized person. When Capt. Harris receives it he compares it with your own, and finds your's is countermanded, as respects time. Capt. Harris, viewing the conduct of Maj. Ellis an interference with your orders and his own rights, sends back to Maj. Ellis his illegal order in a polite note, and informs Maj. Ellis that he cannot receive his orders until on the field, as directed by yourself, when and where he will be

ready to obey him. Maj. Ellis argues that he is superior to Capt. Harris, thinks himself ill treated, and sends Capt. Harris an arrest. Capt. Harris also sends this arrest back to Maj. Ellis, and informs him that he will obey your order, by appearing at the time and place you have directed, and there wait further orders from Maj. Ellis. Maj. Ellis goes on the parade at the time, and orders Capt. Harris to leave the field, and consider himself in arrest. Capt. Harris respectfully obeys. Maj. Ellis prefers charges against Capt. Harris, and on the trial all these facts come out ; by which it appears, in consequence of the Major's interference, the battle was lost, and the enemy escapes. Capt. Harris obeyed the proper orders he received. Will not you, as a military man, pronounce, that charges for unmilitary conduct, and disobedience of orders, does not lay against Capt. Harris, acquit him with honor, and leave Major Ellis to clear up and whitewash his character for military conduct in the best way that he can.—This is my case, under the charges against me.

Gentlemen, it does not follow as matter of course, that, because I am charged, I must be sentenced : This doctrine is now obsolete. I will quote you several instances which, as military men, you have no doubt read for yourselves.

First, Maj. Gen. Howe, of the American army, was charged, by the State of Georgia, " For sacrificing, by his conduct, the *capital* and the *troops* of that State, on the 29th Dec. 1778 ; and also, for ordering the troops, at Sunbury and Augusta, to evacuate those posts, which, with his own forces, were crossed the Savannah, to the State of South Carolina, leaving the State of Georgia at the mercy of the British troops, without any continental troops to encourage and protect the inhabitants." He was tried by Court Martial, at Philadelphia, Dec. 6, 1781.

The Court found the charges supported by the evidence, but were of opinion that those measures were necessary and *military*, and therefore did acquit him of both the charges, with the highest honor.

Another : One Col. Henley, of the American Army, was tried by Court Martial, at Cambridge, 20th January, 1778, on charges for heinously criminal, unofficer-like language and conduct, unbecoming a man, the most indecent, violent and vindictive, and of intentional murder of unarmed men.

The Court heard the evidence, which did not fully support the charges, and are of opinion that Col. Henley be *discharged*.

Gentlemen, I could adduce you numerous instances of officers being arraigned on charges for unmilitary conduct and disobedience of orders, who, after an impartial investigation of facts, have been acquitted by Courts Martial, with the honors due to their rank ; but, as I deem the two foregoing sufficient for an example, I will pass on and examine further into the laws.



## Section 39.

"And Adjutants of Regiments shall receive a reasonable consideration for their services, to be allowed by the General Court." By virtue of this provision, Adjutant Bass, of Col. Badger's Reg. has annually presented his account to the General Court for compensation; and although he has not received suitable pay, considering the extra duty performed for officers he had no right to serve, yet he has never been rejected on the score that he did not serve a Colonel of a Regiment; nor has he pretended to that authority that he held a commission as Adjutant to a corps not known in law, as a mere hint of the kind would have been cause to reject his claim.

*Law of March 4, 1800. Section 12.*

" . . . . which certificate, if approved and countersigned by the officer commanding the Regiment, Battalion, or Squadron, shall entitle to a full exemption from military duty, for the term specified." This is another prerogative of a Colonel of a Regiment that Col. Badger has exercised, and is an additional evidence that he is commandant of a Regiment.

*Law of March 14, 1806. Section 3.*

"And to each Regiment one Chaplain, who shall be appointed by the Lieut. Colonel Commandant of the Regiment."

By virtue of this law, Col. Badger lost no time in appointing the Rev. Dr. Baldwin his Chaplain, who has officiated in that character with the Colonel's Regiment. This, without another single circumstance, is proof positive of the fact of his being Colonel of a Regiment, or that his commission, as I have before said, is a dead letter, and all the transactions had under it are void.

*Section 4.*

"That it shall be lawful for the Lieut. Colonel of a Regiment, to reduce any Sergeant or Clerk of his Regiment to the ranks, by advice of the Captain of the Company to which he belongs, first giving notice to the Sergeant or Clerk, as the case may be."

By virtue of this law, Col. Badger has held his Court on a certain Sergeant of his Regiment, on charges brought by his Captain; and though he was not reduced to the ranks, yet the very act of holding the enquiry is abundant proof that he would have exercised the power, if he thought proper, having no doubt, at that time, that he was Colonel of a Regiment. And it was on this occasion that he ordered a Regimental Court of Enquiry, consisting of a Major and two Captains, on the conduct of another Captain and his two Subalterns, at the request of the same Sergeant; which order, appointing said enquiry, was *questioned* as being illegal, and a suitable return accordingly made, which return denying the legality of that order, is now a part of your record, and which has never been noticed by the Colonel, so as to call those officers to account for disputing his right to make such an order.

*Mr. President and Gentlemen of the Court,*

Having examined every chapter, section, sentence, and word of the constitution, and laws of the United States, and of this Commonwealth, for the provision and authority to justify the arrangement and formation, which is set up for the troops of the Capital, we find nothing to support the system, but many sections and sentences that directly oppose such formation, and which you have noticed as violated by this sublunary organization. This being the fact, we cannot withhold our astonishment, that such a monster should have crept unperceived in amongst us; and which once having seen, we are obliged to resist, or lay ourselves under the imputation of cowardice and fear, and submit at discretion, like slaves, or stand forth the champions of the constitution and the laws; and as *men*, as *officers*, and like *soldiers*, true to their trust, wrest from an untimely oblivion, those rights and honors, the constitution and the laws, which our fathers, in lieu of hereditary titles and distinctions, have bequeathed us as an imperishable legacy, and which we have sworn to preserve, and hand down whole and entire, to the rising generation.

But, gentlemen, lest my ardent soul should lead myself and you from the object of your enquiry, I will turn to the record of your proceedings, and search for those scraps of authority, on which the Complainant founds his power. The first is a paper adduced by myself for the purpose of exposing its absurdity, and controverting its legality. This paper is called the General Order of Aug 2, 1798, predicated upon a Resolve of the Legislature, authorizing the Governor and Council to form from the troops of Boston and the little town of Chelsea, a military monster, *stiled, named, and christened* the Legionary Brigade in the first Division. By the Resolves you will see that first of all, the residue of the troops of the said first Division, were to be formed as the law directs. They were thus formed, and according to law, numbered at the formation, and called the 1st and 2d Brigade, which now do honor to the officers commanding them, and reserving to the Commonwealth the Brigade of Boston, No. Nothing, which, by some enigmatical play and power upon the meaning of words, was to be considered higher than No. 1, which the simple old fashioned way of reckoning in *the law*, was thought higher than Legion. However, this being done by the proper authority, and according to the same old fashioned meaning of the law, and the 1st and 2d Brigade established, they on the next day began with the troops of Boston, and proceeded to direct that the then nine Companies of that Regiment should be *augmented* to 16 Companies, to be formed into 4 Sub Legions, of 4 Companies each; that each Sub Legion should have a Major, whose Commission should give their respective Sub Le-



gions rank in the line, and that the whole should be commanded by a Lieut. Col. Commandant. That this was a masterly wise arrangement, is clearly proved; for, by the evidence of these Majors, and the Colonel himself, we learn that the Sub Legion, which, to-day is the 1st, may to-morrow be the 4th, and that or any other the next day, may be No. Nothing. For any one casualty by death, sickness, or wounds, would transpose the numbers of the whole; and were all the Majors to resign, these Sub Legions would be numbered nothing at all: for when there is no Major, there being no Commission to give them rank, they can have no number.

Gentlemen, this famous General Order of Aug. 2d, 1798, being now a part of your record, and a part of the evidence in the case, merits particular attention; for it has made as much noise in the military circles of this Commonwealth, as the decrees of the famous Bonaparte has in the political world; and has been considered by some as the military *Pandora box* of Massachusetts, whence all the evils and troubles that have disturbed the Militia of the Capital for the last ten years, have flown; and certainly has been the cause of more vexatious Courts Martial and expense to the Government than all the laws enacted for the regulation of the Militia besides. By some it has been viewed as the entering wedge of a party, to bring the Militia establishments into contempt and disgrace, and destroy the whole organization, or render its regulations so complex and multifarious as to require the study of years to qualify a gentleman, of modest abilities, to render himself useful to the State, in a military capacity; or by degrees destroy the system of defence, that has been so justly considered the bulwark of our liberties. By others it has been considered as an innovation, dangerous in its tendency, unjust in its provisions, chimerical in theory, and impossible to reduce to practice. It being contrary to the supreme laws of the land, is the more to be feared, watched against, resisted, and, if possible, suppressed, while young; lest, being fostered by ignorance, and fed by pusillanimous compliance, it should at maturity produce a cockatrice egg, which, hatched by party passions, should bring forth a *serpient*, too big and too subtle to be mastered; which would in a short time devour or destroy our military and civil rights, and with them our freedom and our strength. But, gentlemen, be not frightened from your duty, which will prompt you to destroy this monster in embryo, by crushing it in the egg ere it crawls abroad to consume the vitals of your power, and your rights and privileges fall a prey to his rapacious jaws. It is denounced by the Governor and Council, and knocked on head by a Committee of both Houses of the Legislature, and it now remains for you to give the finishing stroke, by stabbing it to the vitals, and rescuing your happy country from the death it may aim to inflict. What, then, are the features of this

hideous form? It being a non-descript, we cannot paint its character no way so properly as by drawing a comparison with the *comeliness* of *uniformity* and the beauties of *system*. View, then, the provisions of this General Order, and compare them with the laws made for the organization of the Militia—you cannot but observe the striking contrast.

Gentlemen, I hold it honorable in a citizen, a gentleman, or a christian, for the sake of peace, to concede small points, and accommodate small disputes; but not so with an officer or a soldier, his duty and honor consists in disputing every inch of ground his opposers may strive to acquire; he is to spill his life rather than concede an honorable point. What was the dispute concerning rank previous to 1798, between the officers of Suffolk and Norfolk? You all remember that dispute, and the manner in which it was settled. The Norfolk gentlemen were the victors in the combat, and obtained their rights, and were organized according to the laws, with the rank for which they contended. But how with those of Suffolk? They humbly acquiesced in a system totally contrary to law, and which gave them no legal rank, to cover the mortification of a defeat; but, gentlemen, did they lose all? No, they gained as much as they had a right to expect, and had their organization been legally made—instead of the 1st Regiment in the 1st Brigade, for which they contended, they were constituted a Brigade of themselves, which was, and should have been numbered the 3d Brigade, at its formation, divided into Regiments, and the whole difficulty was at an end.

This General Order of 1798, directed the nine Companies of the Boston Regiment to be formed into 16 Companies; but we have the Colonel's evidence that he has 17 at present. How the gentlemen transpose their positions! At one moment they pin their fabric upon that order, and the next they acknowledge they have violated its provisions. Thus you see they also have considered that order in its only proper point of view; that is, to mean any thing or nothing, as best suits their convenience. But these 16 Companies were to form 4 Sub Legions, and have each a Major, who should give them rank. But not a word of these Majors, having the local and established command of any of them, or to transmit the orders from the Brigadier to the Captains, by means of their own Adjutants. *No*; this, however, is expressly reserved to the Col. Commandant of the whole, and for that purpose he has his Adjutant and an Orderly Book. We next observe the direction of this order, that the Cadets and Fusiliers, with two other Companies to be raised at large, should form a Sub Legion of light troops: what, and they have a Major? *O no*; they are to be commanded by the senior officer present, belonging to the said corps; the said senior officer to have power, at all times, whether in the field or out, to regulate and gov-



ern the said Sub Legion of light troops, as Commanding Officer thereof. Here, gentlemen, is a special delegation to the Commanding Officer of this light Sub Legion, implying authority to send his orders to the Captain of that Sub Legion. But there is no provision of this kind for the Complainant and his associates, to regulate and govern their Sub Legions, whether in the field or not. Had there been, you would have seen them grasping at the semblance of authority, and laying the whole burden of their song upon it; but the provision, with respect to their power, is very different; all the Sub Legions shall be commanded by a Lieut. Colonel; and this Lieut. Colonel has told you, that his orders, to many of his Captains, go to them direct, and not through the senior officer of what he calls his 4th Sub Legion, clearly shewing, that Sub Legions, without a Major, is a mere shadow, having neither a name or number. So, if it should happen, that these three Majors should die, be broke, or resign, you, gentlemen, and the Colonel too, might hunt in vain, for this *ignis-fatuus* Sub Legion would sink back into chaos, leaving no trace behind. In support of this position you have the evidence of the Adjutant General, who says, no such corps are known on his records; and as further evidence, you have the head of the Roster of each corps in the Brigade, where Sub Legion of Infantry is not found to exist. And as the Adj. General tells you no other General Order than this of 1798 has issued respecting these Sub Legions, you will soon be ready to believe there is no such thing.

There is one other provision in that order, that is for establishing a Sub Legion of Artillery. This appears to have been done; and there is a corps known by that name. But, gentlemen, when you have the evidence of the officers of that corps, and see that they are commissioned as Captains of a Company in the *Battalion* of Artillery, what inference will you draw from the fact; that the officers appointed to that corps refused to accept a commission in a corps the laws of the land never organized; or that the officers filling those commissions knew of no such corps. One or other of these inferences must be drawn; and in either we see that the whole fabric is a mere castle in the air, having no foundation in the laws.

Again: This order gave to Major Gen. Elliot power to issue his orders to form this Legion and these Sub Legions, but you have no evidence that any authority above Col. Badger's has formed them; for the complainant himself says he was placed to the first Sub Legion, by Col. Badger, on the 8th Oct. 1804, and you have the identical order of Col. Badger, by which it was done, now upon your record; by which it appears that assignment was merely a temporary arrangement, for one day; but the complainant has, in his wisdom, affected to believe it was permanent, and conducted accordingly. How great has been his mistake! For Col.

Badger had no right and power to do it, and it was never done. I have so far argued, on the ground that this order itself was legal. I will now point your attention to the resolve on which it was predicated. You there see that this formation was to be made according to the laws, so far as they would apply to such Legionary Corps. The laws might apply to this Legion had it been formed agreeable to their provisions; but as it was formed altogether contrary to the laws, they cannot be bent to support it, and consequently the whole superstructure tumbles into nonentity.

But, gentlemen, how might these troops have been formed, and the laws been preserved inviolate? They might have been formed into the 3d Brigade, and numbered; this Brigade into two Regiments, the 1st and 2d; and numbered as the laws direct: These Regiments, having each a Lieut. Col. Commandant and two Majors, they might have been subdivided into eight Companies each of Infantry, two each of Light Infantry, making in all twenty Companies; the Artillery might have been augmented to four Companies, and have formed a Regiment, with a Lieut. Colonel and a Major. Thus arranged, the command of the Brig. General would have been legal and respectable, having three Colonels, six Majors, and twenty-four Captains under him. How is it now? You have seen it is a system having neither *top*, *bottom*, or *sides*. It is an incongruous, heterogenous mass of crudities, that requires the experience and talents of a chymist and philosopher to define its component parts. Under its present shape and consistency, it never could amalgamate with the residue of the troops of the Division; their formation being respectable and regular, and this without *system* or *order*.

Considering the extraordinary character of the times in which we live, our attention should unremittingly be fixed on the safety of our country: For a people who are free and are determined to remain so, a Militia, well armed and uniformly organized, is their best security; especially at this crisis, when we every moment expect a call on this valuable defence of our rights, to repel the invasions of our enemy. I ask, then, are the militia of the first Division organized in the manner that would enable them to unite their energies, to resist a powerful foe, at any point they may attempt a landing, within the extensive limits of this Division? The answer is plain—they are not. You heard the Adj. General observe, he was much engaged in detaching the quota of this State of 100,000 men, for the use of the Gen. Government, to be in readiness at a moment's warning. We will suppose, then, that there shall be ordered from the 1st and 2d Brigade 700 men, and from the Legion 350; the first will be formed into one Regiment, and properly officered, the last into one of those Sub Legions, and officered accordingly; the whole shall take the field; the officers of the Legion will claim rank of the rest, and they will dispute the claim: Thus organized, the first battle to be fought is between



themselves, which shall take the right. Meantime the enemy, ever watchful for your local dissensions, will come in and settle the dispute themselves; and thus the State lose the benefit of its forces, in consequence of the diversity of your organization. Gentlemen, you have already seen the evil tendency of such a system, and you are now ready to lend your aid and to assist in a new order of things. Declare, then, that the present illegal and unwarrantable organization of this Legion must be done away, or their usefulness to the State will be lost.

Gentlemen, the next paper, to which I would call your attention for a moment, is the General Order of Sept. 7, 1807, which was so astonishingly forgotten by Col. Badger, but a certified copy of which I have since obtained, and is now upon your record. By this paper I would shew, the opinion of the Governor and Council; for I would here have you remark, that they, by the very nature of their offices are only Executive officers, to carry into effect the laws of this Commonwealth, and not qualified to judge and decide upon the laws of the U. States; that is a province of this hon. Court, delegated to you by the 6th Art. of the Constitution of the U. States, which I have before read to you, and which says, that "the Judges in every State shall be bound by the laws of the United States, any thing in the constitution and laws of any State to the contrary notwithstanding. You, then, in this case, are judges in my trial, and bound by the United States law; so that you plainly see the Governor and Council, in any case affecting the laws of the United States, can only give an opinion—whereas you may judge and decide. The Governor, then, in this order, quotes the law of this State, and says, by the 4th Section he is authorized to terminate difficulties under the form of a new arrangement. This he proceeded to do, and placed the Company of Capt. Loring to the Regiment commanded by Lieut. Colonel Thomas Badger, and says that Company shall be subjected to all the duties and orders of an Infantry Company in that Regiment.

The next paper is the Order in Council, of January 13, 1808, which was produced by the complainant, to shew that this formation was considered legal by that Council: But as the Judge Advocate undertook to explain the opinion of the Governor himself, I quickly produced that paper, and the whole of the opinions, as well as the petition which I once before hinted at, is now fairly before you. This Order in Council only goes to support my position, that the Governor, being an Executive officer, could not new organize this Brigade, while that resolve remained in force, for the same reason; but in this report they clearly imply, that a new arrangement was necessary, and recommend it to be referred to the General Court for their consideration. This was done, as by the message annexed to that report and petition will appear. In this message you have the opinion of the Governor, that the one Regiment, of which this Brigade is composed, is too large and

unwieldy; proceeds to recommend an alteration, and after quoting the laws of the United States, which he says are the supreme laws of the land, and stating the organization they have directed, he has these remarkable words: "But if the resolve was against the laws of this and the United States, it was void, and there is nothing to justify those who have acted under it, nor is there any such Brigade." And then concludes his message by saying, "This, I apprehend, may be all settled properly in this way—to arrange the militia of Boston and Chelsea anew, by dividing them into as many Regiments as may be expedient, and to cause the same to be officered agreeably to the constitution of this and the laws of the United States, and to give the Brigade and Regiments their proper numbers; then the whole evil will be cured."

There is one other paper that merits a few observations, in consequence both of its features and the trouble it cost me to obtain it. You remember I questioned Col. Badger, concerning receiving a General Order of March 10, 1808, declaring Legionary Infantry (such as he pretends to command) to be a corps not known in the laws of the United States, which is the supreme law of the land. You have not forgotten the equivocal manner of his answering this and another question on the same order, when he said he might have received it, but did not recollect its provisions or contents. That he did receive this order and communicate it to all the Captains in his Regiment, is a fact; and how is it possible he should have forgotten an order that in effect struck a blow at the root of all his greatness, when it said his corps was illegal and not known in the laws of the land? Could he have forgotten that that order refused to commission a Major to one of his Sub Legions, because he had not named the Regiment for which the said Major was elected? If he really had forgotten it, every soldier and officer in his Regiment well remembered its contents, and have been ever since much surprised that he did not improve so grand an opportunity to retrieve his military fame, by issuing his orders thereafter in a legal manner, and heading them as they should be, *Regimental Orders!* But some men are fond of their own absurdities, hug their own errors, and are loath to retract from an opinion, although unsupported by reason.

Gentlemen, there are many other papers before you which it is impossible for me particularly to notice, as I have not copies. As they are before you, and will be again read before you make up your final decision, they will no doubt have their proper bearing in the case. It is now unnecessary for me to recapitulate the evidence in the trial; for it has been of such a nature as to make a strong and lasting impression. By all which you will perceive that the points of my defence have been founded on a broad foundation, and supported by the laws of the land, which are your unerring guide in this decision. If any observation and comment of mine should seem to bear hard upon any gentleman, I can only reply, that I



believe it a sound maxim in military as well as State affairs, to hold all men "enemies in war—in peace, friends," and the immediate conflict over, I am robbed of my anger, and they seize my good will.

I now submit my cause to your decision, in the fullest confidence, that your justice will vindicate my honor, and establish my innocence, leaving my military character unsullied with the slightest suspicion of unmilitary conduct, or the smallest tincture of a crime. My honor is in your hands, it is a sacred deposit; but I know, I *feel* it will be returned unimpaired, and that your decision will be an acquittal with the *highest honor*.

AMOS BINNEY.

*Dedham, Nov. 24, 1808.*

These proceedings took until near sun setting, when the Court was ordered to be adjourned until to-morrow morning, ten o'clock, which was done in due form by the Marshal.

*Friday, Nov. 25th, 1808.*

The Court met pursuant to adjournment, and upon being called, all answered in their places. The Court was ordered to be opened, which was done in due form by the Marshal.

The Complainant and Defendant were both called and answered. The Judge Advocate now summed up and stated the case, upon which the Court was ordered to be cleared. After which, the following question was put to each member, beginning with youngest officer, or lowest in commission:

From the evidence which has been adduced both for and against the Defendant, and from what has been offered in his defence, are you of opinion that he is guilty or not guilty of the first article or specification of charge contained in the complaint exhibited against him?

It was decided that the Defendant was *not guilty* of the first article or specification of charge.

Upon the question being put in the same form and manner as the preceding, upon the second article or specification of charge, it was decided that the Defendant was *not guilty*.

It appearing that a competent number of the mem-

bers do not agree. Capt. Amos Binney, the Defendant, is acquitted, by virtue of the laws in such cases made and provided. JOHNSON MASON, *President*.

CHARLES DAVIS, *Judge Advocate*.

.....  
COMMONWEALTH OF MASSACHUSETTS.

*Dedham, November 25th, 1808.*

We do hereby certify, that the above and foregoing are true records of the proceedings of the Court, and of the evidence offered it.

JOHNSON MASON, *President*.

CHARLES DAVIS, *Judge Advocate*.

Whereupon the Court ordered the Marshal to be called in, and upon his appearing directed him to adjourn the Court without day, unless called together again by order of the Major General, which was done in due form by the Marshal.

JOHNSON MASON, *President*.

CHARLES DAVIS, *Judge Advocate*.

.....  
COMMONWEALTH OF MASSACHUSETTS.

DIVISION ORDERS.

*Boston, Dec. 16, 1808.*

The Major General, having had transmitted to him the minutes and proceedings of a Division Court Martial, begun and holden at Dedham, in the county of Norfolk, at a place called the County Court House, on Tuesday the 15th day of Nov. in the year of our Lord 1808, conformably to Division Orders of 24th and 31st Oct. 1808, whereof JOHNSON MASON, Esq. Lieut. Col. Commandant of the 1st Regiment in the 2d Brigade, is President, for the trial of Capt. Amos Binney, of the Infantry in the Legionary Brigade, upon charges exhibited against him by Maj. Peter Osgood, of said Infantry in said Brigade, for disobedience of orders and unmilitary conduct; the result of which is as follows, viz. "It appearing that a competent number of the members do not agree, Capt. Amos Binney,



the Defendant, is acquitted, by virtue of the law in such cases made and provided."

(Signed) JOHNSON MASON, *President.*

"CHARLES DAVIS, *Judge Advocate.*"

"Dedham, Nov. 25, 1808."

The Major General, having attentively examined and deliberately considered said minutes and proceedings, he should, from the evidence before him, have expected a more complete decision by the Court; he also conceived that the members of the Court proceeded illegally and irregularly in suffering themselves to separate upon the question of challenge, and in allowing the oath to have been administered to a part only, when seven of their brethren were not present; he therefore most decidedly pronounces his disapprobation. He orders Capt. Binney to be released from his arrest, and the Court Martial to be dissolved.

*By order of Maj. Gen. ELLIOT.*

(Signed) JOSEPH PEIRCE, 2d, *A. D. C.*

## PAPERS

ACCOMPANYING THE PROCEEDINGS

### NO. 1—CAUSES OF CHALLENGE.

*Mr. President,*

*and Gentlemen intended to compose the Court on my trial,*

Being called upon to object against any Member of the Court, sitting on my trial (if I see, cause I embrace the opportunity conceded to me as my right,—And object against Maj. Jones, Capt. Weld, and Lieut. White, of the First Brigade; Maj. Morse, Capt. Leach, Lieut. Eaton, and Lieut. Lovell, of the Second Brigade. Because they are not regularly detailed from the Division Roster, as they should have been. In support of this objection, I produce to you a certified copy of the Division Roster, so far as respects the Field Officers, Captains and Lieutenants of the First and Second Brigades, from which the Court was ordered to be detailed.

You will see by the Division Order, instituting this Court, that there was ordered from the First Brigade, two Majors, three Captains and two Lieutenants. By a recurrence to the Roster, you will see that Majors Lovell and Bailey, Captains Ford, Savearns, and Bicknell, and Lieutenants Gould and Glover, were the regular and proper officers that should have been detailed from the First Brigade, they being the oldest in those grades that have not yet served on a similar duty. But from the names now read to me as my Judges and Jurors, I find that Maj. Jones is ordered instead of Maj. Bailey. Capt. Weld instead of Capt. Savearns, and Lieut. White instead of Lieut. Glover. You will also see by the same Roster, that Maj. Comstock, Capt. Hartthorn, and Capt. Cook, and Lieuts. Pond and Drake, are the regular and proper officers that should have been detailed from the Second Brigade; they being the oldest in those grades that have not served on a similar duty. But from the names now read to me, as my judges, I find that Maj. Morse is ordered instead of Maj. Comstock, Capt. Leach instead of Capt. Hartthorn, Lieuts. Eaton and Savelle instead of Lieuts. Pond and Drake. I shall produce to you a copy of the Resolve of the General Court, which was handed down to me in orders, and is in the following words and figures.

[See Resolve of the Council, in page 157, immediately after the signature of A. Hill.]

Gentlemen, from the documents and observations, you will readily perceive the validity of my objections; for if I should con-



sent to proceed to my trial without offering them, and this honourable Court should decide that I am innocent of the charges, the Complainant in this case, would have the opportunity of charging officers with improper conduct, for which they might be obliged to answer, in consequence of the irregularity of the detail; whereas if you should decide that I am guilty, the door would be left open for my appeal to the General Court, to set aside all your proceedings.

Gentlemen, be assured that I am induced to make these objections from no personal or malicious motives. But being arraigned, and now to be tried on charges for unmilitary conduct, I do declare that I have, to the best of my ability and judgment, strenuously adhered to military etiquette in all my official conduct; and for which I have now to answer, being totally unacquainted with each and every member of the Court, one only excepted, my objections cannot be imputed to personal motives.

Dedham, Nov. 15, 1808.

AMOS BINNEY.

[Here follows a *Divisionary Roster*, which the publisher, conceiving of little purpose, and being very lengthy, thinks it needless to insert.]

No. 3—is a RESOLVE, setting aside the Court Martial on Capt. Loring;—see appendix to Loring's trial, pages 157 and 158.

No. 4—is MAJOR OSGOOD'S COMPLAINT, as in pages 162, and 163.

No. 5.—IMPERFECT COPY OF CHARGES.

Boston, Oct. 10th, 1808.

Peter Osgood, Major, Commanding the first Sub Legion of Infantry, Legionary Brigade, first Division of Massachusetts Militia, begs leave most respectfully to present his complaint against Capt. Amos Binney of said Sub Legion, for unmilitary conduct and disobedience of orders.

*First*—for that the said Capt. Amos Binney did, on the third day of Oct. inst. send back to your Complainant a Sub Legion Order, dated Sept. 20th, which order was predicated on Infantry Orders of Sept. 22d. directing said Sub Legion to parade on Boston Common for Inspection and discipline. Your Complainant condescended to send the said order the second time, which the said Capt. Amos Binney did refuse to acknowledge and obey, which order it was the duty of said Capt. Amos Binney to receive and obey.

*Secondly*—your Complainant was compelled, on the 8th inst. to send the said Capt. Binney an order of arrest, to prevent any confusion that might arise on the parade ordered on Monday the 10th inst. following, and sent an order to the next officer in the com-

pany to take the command, and march said company on the parade. The said Capt. Binney did refuse to acknowledge said order of arrest, but sent the same back your Complainant, and assume the authority to go on said Company parade on the morning of the 10th inst. appointed for the Inspection and discipline, and to take the command of said company, and march them on to the place appointed for the Inspection, depriving the proper officer of the command of said company and of his right. Your complainant therefore was compelled to order the said Capt. Amos Binney to leave the parade, and relinquish the command of said company, to the proper officer. Your Complainant viewing such conduct to be an open violation of the Oath of Office and the Laws of the Commonwealth, which the said Capt. Amos Binney and every other Military Officer is sworn to support and maintain, to pass by or overlook such conduct would be encouraging others to offend in a similar manner, and have a manifest tendency to subvert all order and subordination in the Militia, which is the natural bulwark of our country.

Your Complainant therefore requests, that proper measures may be taken that the said Capt. Amos Binney might be held to answer to the charges alleged against him in this complaint, as the law directs.

A true copy, (Signed)  
George Bals, Adjutant.

PETER OSGOOD, Major,  
First Sub Legion of In-  
fantry, Legionary Brig.

No. 6—is Capt. Binney's DISSENT, as in pages 180 and 181.

No. 7—DIVISION ORDERS.

Boston, Oct. 3, 1804.

Brig. Gen. Winslow will give orders for a Review and Inspection of the Brigade under his command, on Tuesday the 30th inst.

(Signed)

{ Per Order Major General, 1st Division,  
JOHN T. SARGENT, A. D. C.

BRIGADE ORDERS. Boston, Oct. 8th, 1804.

In obedience to Division Orders of the third inst. Lieut. Col. Badger will order the Sub Legions of Infantry under his command, to parade on Boston Common for Review and Inspection, on Tuesday the 30th Oct. The line must be formed precisely at 10 o'clock, A. M. at which time the Inspection will commence, and be attended to with the strictest scrutiny. It is therefore expected, that both officers and soldiers will be equipped in every respect according to law. The duties of the day will be communicated in after orders. The officers composing the Sub Legion of Infantry are requested to meet the Brig. General at Wyman's in State-street, on Monday Evening, the 15th inst. precisely at 7 o'clock, without uniform.

By Order of the Brig. Gen.

GO. BLANCHARD, Brigade Inspector.



## INFANTRY ORDERS.

Boston, Oct. 3th, 1804.

In obedience to Division Orders of the 3d. and Brigade Orders of the 8th inst. above copied, the Majors commanding Sub Legions will order the several companies composing the same, to parade for Review and Inspection, on Tuesday the 30th Oct. The line will be formed precisely at 10 o'clock, A. M. The commanding officers of Sub Legions will enjoin it on the Captains and Commanding Officers of companies, to order their men to appear with every Article the Law requires (except powder and ball) clean and in good order, as the inspection will be attended with the strictest scrutiny. It is recommended that the men wear blue coats and white under-clothes; they will also notice the request of the Brig. General, that the Officers meet him at Wyman's in State-street, on Monday Evening, 15th inst. on special business.—As no permanent assignment of Sub Legions can be made at this time, Maj. Osgood will take the command of the following Companies, viz. the Chelsea Company; the Companies of Wards No. 1 and 2, of 3 and 4, and No. 6, which form one Sub Legion. Maj. Stearns will take command of the Companies of Wards No. 7, of No. 8, and of No. 8 and 9, which will form another Sub Legion. The Companies of Wards No. 10, 11 and 12 will form the third Sub Legion, and will be under the command of Charles Clement as Senior Captain. The duties of the 30th Oct. will be communicated in after Orders.

By order of Lieut. Col. Thomas Badger,  
Go. Bass, Adjutant.

## SUB LEGION ORDERS.

Boston, Oct. 11th, 1804.

The Captain or Commanding Officer of the First Sub Legion, viz. Capts. Thayer, Stodder, Pratt and Binney, will comply in every respect with the above copied orders, and will also order their several Companies to parade on the Sub Legionary parade in Salem-street, on Tuesday the 30th Oct. at 9 o'clock, A. M. The line must be formed precisely at 9 o'clock.

By Order of Maj. Osgood,  
GEORGE BASS, Adjutant.

NO. 9—LEGIONARY BRIGADE. FIRST DIVISION.  
Infantry in the Legionary Brigade.

Names.	Rank.	Date.	Residence.
Thomas Badger,	Lt. Col. Com'dt.	Sept. 6, 1804,	Boston.
Peter Osgood,	Major,	ditto	ditto.
Jacob Stearns,	ditto	ditto	ditto.
Joseph Stodder,	ditto	May 13, 1805,	ditto.
George Bass,	Adjutant,	Feb. 21, 1803,	ditto.
Thomas Redman,	Quarter Master,	March 7, 1806,	ditto.
Isaac Cushing,	Captain,	Sept. 23, 1802,	ditto.
Jacob Canterbury,	ditto	Aug. 17, 1804,	ditto.

## LEGIONARY BRIGADE.

## FIRST DIVISION.

## Sub Legion of Light Infantry.

Thomas Howe,	Captain,	March 10, 1806,	Boston.
Henry Sargent,	ditto	March 31, 1807,	ditto.

## Sub Legion of Artillery.

David Cobb,	Captain,	May 20, 1805,	Boston.
Nathan Parker,	Lieutenant,	ditto	ditto.

Adjutant General's Office, Boston, Nov. 17, 1803.

I hereby certify, that the foregoing is the form in which the record is made in the General Roster. W. M. DONNISON, Adj. Gen.

## NO. 9—GENERAL ORDERS.

Head Quarters, Roxbury, Aug. 2d, 1793.

In conformity to the resolution of the General Court, passed at their last Session, and the advice of Council of this day, authorising the Commander in Chief to form the whole of the Militia in the towns of Boston and Chelsea, into a Legionary Brigade, he therefore Orders, that the nine Companies, which now form the 1st Regiment in the 1st Division, be augmented to 13 or 16 Companies as Maj. Gen. Elliot shall find most practicable; and if he shall form them into 13 Companies, it is further ordered that the said 13 Companies shall form 3 Sub Legions of foot—to say, two of four Companies each, and one of five Companies; the latter to include the Militia in Chelsea. But if the Militia aforesaid shall be augmented to 16 companies, then they shall be formed into four Sub Legions of four companies each. Each of the Sub Legions shall be commanded by a Major, who will give rank to his Sub Legion respectively, and the whole shall be commanded by a Lieut. Col. Commandant. That the Companies of Cadets and Fusiliers in Boston (with one or two other companies to be raised at large in Boston, under the direction and at the discretion of Gen. Elliot) form a Sub Legion of Light Troops, to be commanded by the Senior Officer present, belonging to said Corps. The said Senior Officer to have power, at all times, whether in the Field or not, to regulate and govern the said Sub Legion of Light Troops, as commanding Officer thereof. That Maj. Gen. Elliot be authorised to raise one other Company of Artillery in Boston, which when raised, together with the company already established in Boston, form a Sub Legion of Artillery, and be commanded by a Major. And that the company of Cavalry, at present under Capt. Amory, to be attached to and form a part of said Legion. The said Legion, when formed, shall constitute a Brigade, and be commanded by a Brigadier General, and shall be attached to, and form a part of the First Division of the Militia of this Commonwealth; and Maj. Gen. Elliot will give all necessary orders and directions for forming and organizing said Legion conformable to this Order.

By Order of the Commander in Chief.

WILLIAM DONNISON, Adjutant General.



No. 10—is the General Order, as in pages 157 and 158.

No. 11.

His Excellency the Governor asks the advice of the Council on the Papers and Letters accompanying the return of Turner Crooker's election, as Major of the Legion of Infantry.

The Council have examined the Papers and Letters, with the return aforesaid, and think it inexpedient to advise the Governor to commission said Crooker, for the following reasons:—*First*, Because there is no Regiment named, of which said Crooker was elected Major, as by return there ought to have been. *Secondly*, Because it appears, by return of Papers aforesaid, that said Crooker was elected as Major of the Legionary Infantry, a Corps not known in the Militia Law of the United States, which, by the Federal Constitution, is the Supreme Law of the Land. With respect to commissioning said Crooker as Major of a Regiment not in existence, as such at the time of his election, would be to take from the Captains and Subalterns the right of choosing their field officers after they should be formed into a Regiment, a right expressly given them by the Constitution of Massachusetts.

In Council, Feb. 20th, 1808, read and accepted.

JONATHAN L. AUSTIN, *Secretary*.

*Council Chamber, March 10th, 1808.*

The Governor having deliberated upon the return made of the election of Turner Crooker, as Major of the Legion of Infantry, and having considered the foregoing advice of Council thereupon, and having considered therein, and directs that the Adjutant General deliver a certified copy of the determination to the Major General of the First Division.

(Signed) JAMES SULLIVAN.

GENERAL ORDERS.

*Head Quarters, at Boston, March 10th, 1808.*

The foregoing is authentic, and is transmitted to Maj. Gen. Elliot, of the First Division.

By Order of the Commander in Chief. WM. DONNISON.

No. 12—is the Resolve, setting aside the proceedings of the Court Martial, relative to Joseph Loring, jun. as in pages 155, 156 and 157, with the executive resolve.

No. 13.

To His Excellency the Governor and Commander in Chief of the Commonwealth of Massachusetts, and to his Honourable Council.

We, the undersigned commissioned officers of the Militia of the town of Boston and Chelsea, commonly called the Legionary Brigade, and commanded by Brig. Gen. John Winslow—Respectfully represent to your Excellency and Honors, that the Militia

of Boston and Chelsea have for a number of years past been formed into a Legionary Brigade, contrary (as we humbly conceive) to the Laws of the United States, and of this Commonwealth. For the law of the United States, passed May 8th, 1792, section 3d, says, that "The Militia of the respective States shall be arranged into Divisions, Brigades, Regiments, Battalions, and Companies, as the Legislature of each State shall direct; and each Division, Brigade, and Regiment shall be numbered at the formation thereof, and a record made of such number in the Adj. General's office in the State, and when in the field, or in service in the State, each Division, Brigade, and Regiment, shall respectively take rank according to their number, reckoning the first or lowest number, highest in rank." And the law of this State, passed June 22d, 1793, sec. 4th, recognizes this arrangement, and directs that "The Governor, by and with the advice of Council, be authorized and empowered to carry this arrangement into effect, and that the Divisions, Brigades, and Regiments be numbered, their numbers recorded, and that they rank by their numbers.

That the said Brigade is not numbered, and of course cannot take rank by its number, which, in case of actual service in the field, would cause unpleasant disputes concerning its station in the line, and may possibly deprive the country of the services of so important a part of the Militia, as the First Division; at a moment when its undivided energy may be suddenly required on a great emergency; its rank by number being no where specified or designated, to be correctly known.

That the present arrangement, being contrary to the express provision of the laws, has had, and still will have, a tendency to create jealousies and animosities between the officers of the different corps, and more particularly between the standing or local Companies of Infantry, and the Light Infantry or Volunteer Companies raised at large; because the Volunteer or Light Infantry Companies at present, are formed into a Sub Legion, (so called) and are said to be commanded by a Major, who has appointed an Adjutant; both officers are unknown in any existing laws governing the Militia, and because, by the 14th section of the Act of 1793, it is provided, That Light Infantry Companies, which have been raised by voluntary enlistment, shall be attached to Regiments.

That by the Inspection Rolls of the several Companies of Infantry within the Brigade, returned last May, it appears, there are 2150 effective men, liable to militia duty, exclusive of Light Infantry, Artillery, and Cavalry.

From the foregoing considerations, we most respectfully petition your Excellency and Honors, that the said Legionary Brigade may be re-organized, numbered, and divided into three Regiments, and the light troops be attached to the Regiments conformably to law.



That orders may issue, authorizing two other Companies of Light Infantry, which, with the three Companies now organized, and the uniform Company called the "Washington Infantry," be attached; two Companies to each Regiment, allowing 64 men to each Company; and that the remaining 2022 men be formed into 24 Companies of Infantry, instead of 16, as at present, which will allow 84 men to each Company, and admitting only three-fourths of the men enrolled shall appear to do duty they will then be sufficiently large as the law contemplates, viz. 64 men to each Company; and considering the rapid increase of population in this town, we are induced to believe that even 3 Regiments of 10 Companies each, 8 of Infantry, and 2 of Light Infantry, would in a short time be found to leave the local Companies too large; for we can state with confidence, that now there are 16 Companies, many of them will exceed 100 men, who actually appear at Company Musters—Your Petitioners are aware, that there may be some objections to this organization of the Brigade, although strictly according to law.

*First*—Because of the ideal loss of rank which the Brigade may sustain when placed in its legal rank and position. *Secondly*—Because of the Major and Adjutant of Light Infantry, who would be left without command, as their offices (if legally created) would be abolished. But we beg leave to observe to your Excellency and Honors, with regard to the first objection; That before the Resolve of June, 1798, the whole of the troops of Boston and Chelsea, formed into one Regiment, having an unsettled contention with the Militia of Norfolk about their rank, this one Regiment was by that Resolve moulded into a Brigade; and although it is, and should have been numbered the 3d Brigade in the 1st Division, at the formation, undoubtedly ranks higher in the estimation of military gentlemen, than it would have done, had it obtained the rank of 1st Regiment in the 1st Brigade.

To the second objection we could observe, that no legislative act whatever, establishes a Major and Adjutant of Light Infantry; and as the Light Infantry are, and in our opinions ought always to be, used as a necessary appendage to a Regiment, and when in actual service, if ordered on special duty as a flying corps, have an officer detached from the line to command them, as the nature of the case may require, and when discharged from that duty, they return to the several Regiments to which they belong. We would observe also, that the General Order of 1798, organizing the light troops into a Sub Legion, says—"This Light Infantry corps shall be commanded by the senior officer present, belonging to said corps." Notwithstanding there is no Legislative act authorizing the office of Major of Light Infantry; notwithstanding it was contrary to the General Order of 1798, and notwithstanding there was no election to this office (as we are informed), the late Commander in Chief appointed an officer to command the Companies of light troops, with the rank of Major, and he from similar motives, and with the

like authority, has appointed an Adjutant, with the rank of Lieutenant, which we humbly conceive is contrary to the laws, and of course void.

We therefore pray the attention of your Excellency and Honors, to the foregoing petition and representation, that you would take them into your wise consideration and grant the prayer thereof.

And as in duty bound will pray.

<i>Turner Crooker, Captain.</i>	<i>John Sweetser Little, Lieutenant.</i>
<i>Amos Binney, Capt.</i>	<i>Ezra Davis, Lieut. Volr. Comp.</i>
<i>Daniel Badger, Capt.</i>	<i>James Alexander, Ensign.</i>
<i>Ebenezer Rhoades, Capt.</i>	<i>Zephaniah Sampson, Ensign.</i>
<i>Jacob Canterbury, Capt.</i>	<i>Edward Hart, Lieutenant.</i>
<i>Samuel Hewes, Capt.</i>	<i>James Ridgway, Lt. Bost. Fusil.</i>
<i>Ephes Ellery, Capt.</i>	<i>Aherton T. Penniman, En. Bos. do.</i>
<i>Josiah Cushing, Lieutenant.</i>	<i>Benjamin Goodwin, Lieutenant.</i>
<i>Josiah Snelling, jun. Lieut. Inftry.</i>	<i>Lemuel Colburn, Lieut.</i>
<i>David Providence, Lieut.</i>	<i>John Sullivan Perkins, Ensign.</i>
<i>William Barry, Ensign.</i>	<i>William Simonds, Ensign.</i>
<i>Samuel Howe, Lieutenant.</i>	<i>Frank Roberts, Lieutenant.</i>
<i>Jos. Loring, jr. Capt. Vol. Comp.</i>	

The Committee, to whom was referred the petition of a number of officers of the Militia of the towns of Boston and Chelsea, commonly called the Legionary Brigade, praying that the said Brigade may be formed anew, on the same principles and in the same manner as other Brigades of the Militia are formed—beg leave to report as follows, viz.

By a Resolve of the General Court, passed June 20, 1798, the Governor, with the advice of Council, was authorized to form the whole of the Militia of the towns of Boston and Chelsea into a Legionary Brigade, in such manner as he should judge most expedient.

Conformably to this Resolve, the Legionary Brigade was so formed; and as the said Resolve has not been repealed, it appears to your Committee, that previous to the issuing any order respecting the same, the said petition ought to be laid before the General Court for their consideration.

All which is respectfully submitted.

WILLIAM EUSTIS, *per Order.*

In Council, Jan. 13, 1808—The above Report being read, was accepted.

JONA. L. AUSTIN, *Secretary.*

True copy—Attest,

JONA. L. AUSTIN, *Secretary.*

*Gentlemen of the Senate, and*

*Gentlemen of the House of Representatives,*

By this Message I send to you the petition of Turner Crooker and others, officers in the Legionary Brigade in the 1st Division of Militia in the Commonwealth. This is transmitted according to the advice of the Council, a copy of which, attested by the Secretary, is also laid before you.



You will observe, that the petition is for a dissolution of, or a change in that Brigade, and that the reason assigned is, that the same Brigade is formed, as the petitioners conceive, against the laws of this, and the United States. I laid the petition before the Council for their advice upon the legality of the establishments of the Brig. in its present form. You will observe that the advice given is, that the Brigade, being formed pursuant to a Resolve of the General Court, passed on the 29th of June, 1798, the establishment is legal, and that the Governor and Council cannot decide it to be otherwise, while that Resolve remains in force. I acquiesce in this opinion, because the Constitution of the United States does declare, that Congress shall provide for the organization and discipline of the Militia. The Congress, in virtue of this power, on the 8th March, 1793, passed an act, that the Militia should, within one year from that time, be arranged and organized by the Legislatures of the respective States, into Divisions, Brigades, Regiments, &c. and that each Division and Brigade should, at the time of its formation, be numbered, and take rank in the field according to its number. The Legislature of this State, on the 22d of June, 1793, passed an act delegating this authority in the same words, nearly, to the Governor, to be executed, by advice of Council.

It appears, by the Orderly Book of the Adj. General, that the whole of the Militia of the 1st Division remained unorganized until after the passing that Resolve. It is suggested, and no doubt with truth, that this was occasioned by a dispute between Boston and other towns, concerning rank; the expedient of creating a Brigade without number or rank might arise from the exigency of the contest—Be that as it may, the measure was then acquiesced in, and the Resolve has been practised upon as legal for ten years; the petitioners now hold and exercise offices under it, and in their memorial state themselves officers in the Legionary Brigade, but if the Resolve was against the laws of this, and the United States, it was void, and there is nothing to justify those who have acted under it; nor is there now any such Brigade.

According to the opinion of the Council, with which my own accords, the Supreme Executive have no power to decide upon the question whether an act of the Legislature is wrong or not; I cannot therefore attempt a new organization of the Militia of Boston and Chelsea, while that Resolve, a copy whereof, which I send with this message, remains in force. To repeal it directly, would expose those who have exercised authority under it.—A proviso in their favour may be good, as to claims of the Government, but as to the right of private citizens, it is on other principles. To admit that the Legislature pass an unconstitutional law, and an *ex post facto* act, deny those who are injured a remuneration, would subvert one of the most valuable principles in the Constitution. This, I apprehend, may be all settled properly in this way. The peti-

tioners suggest, with truth no doubt, that the one Regiment of which this Brigade is composed is too large and unwieldy. If the General Court should pass an act, in addition to the Militia laws, providing that the Governor shall be authorized, with the advice of the Council, (the Resolve of the 29th of June, 1798, notwithstanding) to arrange the Militia of Boston and Chelsea anew, by dividing the same into as many Regiments as may be expedient, and to cause the same to be officered agreeably to the Constitution of this, and the law of the United States, and to give the Brigade and Regiments their proper numbers, the whole evil, if any exists, may be cured.

(Signed)

JAMES SULLIVAN.

Council Chamber, Jan. 16, 1808.

The Committee of both Houses, appointed to consider that part of His Excellency's Speech respecting the Militia, and to whom was also committed the memorial of Gen. Elliot, praying that the Militia of the towns of Boston and Chelsea be formed into a Legionary Brigade, beg leave to report thereon the following Resolution which is submitted:

JOHN READ, *per order.*

#### COMMONWEALTH OF MASSACHUSETTS.

*Resolved*, That his Excellency the Governor, with advice of Council, be and hereby is authorized to form the whole of the Militia of the towns of Boston and Chelsea, into a Legionary Brigade, in such manner as he shall judge most expedient, which Legionary Brigade, when formed, shall be under the same rules and regulations, in all respects, as is provided by the constitution and the laws, for regulating and governing the Militia of this Commonwealth, so far as said regulations may be applicable to such Legionary Corps. *Provided, nevertheless*, That the foregoing Resolve shall not be carried into effect, until the Governor, with advice of Council, shall have organized the residue of the first Division of Militia, of which the said towns of Boston and Chelsea now form a part, into two Brigades, in such manner as shall, in the opinion of the Commander in Chief, be best calculated to produce harmony in said Division.

In Senate, June 25, 1798, read and accepted.

Sent down for concurrence.

SAMUEL PHILLIPS, *President.*

In the House of Representatives, June 26, 1798,

Read and concurred.

EDWARD H. ROBBINS, *Speaker.*

June 29, 1798. Approved,

INCREASE SUMNER.

TRUE COPY—Attest,

JONATHAN L. AUSTIN, *Secretary.*



No. 14.

## COMMONWEALTH OF MASSACHUSETTS.

*In Senate, June 25, 1798.*

*Resolved*, That His Excellency the Governor, with the advice of Council, be and hereby is authorized to form the whole of the Militia in the towns of Boston and Chelsea into a Legionary Brigade, in such a manner as he shall judge most expedient, which Legionary Brigade, when formed, shall be under the same rules and regulations, in all respects, as is provided by the constitution and laws, for regulating and governing the Militia, of this Commonwealth, so far as said regulations may be applicable to such Legionary Corps. *Provided, nevertheless*, That the foregoing Resolve shall not be carried into effect, until the Governor, with advice of Council, shall have organized the residue of the first Division of Militia, of which the said towns of Boston and Chelsea now form a part, into two Brigades, in such manner as shall, in the opinion of the Commander in Chief, be best calculated to produce harmony in said Division.

Sent down for concurrence.

SAMUEL PHILLIPS, *President*.

In the House of Representatives, June 26, 1798,

Read and concurred.

EDWARD H. ROBBINS, *Speaker*.

June 29, 1798. Approved,

INCREASE SUMNER.

Secretary's Office, }  
Oct. 24, 1808. }*A true copy of the original.*Attest, WM. TUDOR, *Sec'y of the Commonwealth*.

No. 15.

## COMMONWEALTH OF MASSACHUSETTS.

*In Council, August 2, 1798.*

His Excellency laid before the Council, a resolution of the General Court, passed at their last Session, authorizing the Governor, with advice of Council, to form the whole of the Militia in the towns of Boston and Chelsea into a Legionary Brigade, and asked the advice of the Council, whether he should carry the same into effect. The Council took the matter into consideration, and thereupon advised, That His Excellency be requested to issue his orders to form the said Militia into a Legionary Brigade, in such manner as he shall judge most expedient, agreeably to the said resolution of the General Court.

*Secretary's Office, Oct. 24, 1808.*

The above is a true Copy, as recorded in the Record Book of the Council, page 83.

Attest, WM. TUDOR, *Sec'y of the Commonwealth*.

No. 16—is GENERAL ORDERS, the same as paper No. 9, in page 239.

No. 17—is the Report of the Committee, signed WM. EUSTIS, as in paper No. 13.

No. 18—is Major Osgood's ORDER OF ARREST, to Capt. Binney, as in page 174.

No. 19—is Capt. Binney's letter, in answer to Major Osgood's enclosing the arrest, in pages 174 and 175.



## CAPT. HOWE'S TRIAL.

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*Record of the proceedings of a Division Court Martial, begun and holden at Roxbury, in the County of Norfolk, and Commonwealth of Massachusetts, on Monday, the 8th day of January, in the year of our Lord one thousand eight hundred and ten, at a place called the house of Abraham Pierce, innholder, in said town.*

### PRESENT—

LIEUT. COL. GEORGE ELLIS, 1st Regiment, 2d Brig. 1st Divis.  
*President.*

### *Members.*

Maj. JACOB STEARNS, Infantry, Legionary Brigade.  
Maj. SAMUEL BAILEY, Squadron of Cavalry, 1st Brig.  
Maj. ABNER ELLIS, 1st Regiment Infantry, 2d Brig.  
Maj. ELISHA FRENCH, 3d Regiment Infantry, 1st Brig.  
Capt. AMOS BINNEY, Infantry, Legionary Brigade.  
Capt. DANIEL BADGER, Infantry, Legionary Brig.  
Capt. NATHANIEL GUILD, 3d Reg. Infantry, 2d Brigade.  
Capt. SAMUEL WEBB, 3d, of 2d Reg. Infantry, 1st Brig.  
Capt. STEPHEN WALES, Battalion of Artillery, 1st Brig.  
Lieut. EDWARD HART, Infantry, Legionary Brig.  
Lieut. SAMUEL BRASTOW, Light Infantry, annexed to the 2d }  
Regiment, 2d Brigade. }  
Lieut. EBENEZER GODDARD, Jun. 1st Reg. Infantry, 1st Brig.  
Major CHARLES DAVIS, Judge Advocate of the first Division,  
*Judge Advocate.*  
Adjutant JOSEPH HARRINGTON, Squadron Cavalry, 1st Brigade,  
*Marshal.*

The following Orders were produced by the Judge Advocate, and read :

### COMMONWEALTH OF MASSACHUSETTS.

DIVISION ORDERS *Canton, Dec. 21, 1809.*

A Division Court Martial is hereby appointed to be held at the house of Abraham Pierce, Innholder in Roxbury, on Monday, the eighth day of Jan. next,



at 10 o'clock, A. M. for the trial of Capt. Thomas Howe, of the Sub Legion of Light Infantry, Legionary Brigade, on the Complaint of Maj. Daniel Messinger, Commanding Officer of said Sub Legion, for unmilitary conduct, neglect of duty, and disobedience of orders, as detailed in the several specifications of charges contained in said complaint. The Court to be constituted as follows:

*President*, Lieut. Col. GEORGE ELLIS, 1st Regiment, 2nd Brigade, 1st Division, M. M. *Members*—two Majors, two Captains, and one Lieutenant from the first Brigade; one Major, one Captain, and one Lieutenant from the second Brigade; one Major, two Captains, and one Lieutenant from the Legionary Brigade. *Judge Advocate*, Major CHARLES DAVIS. *A Marshal* to be detailed from the first Brigade, to attend the Court.

Lieut. Col. Thomas Badger, senior Officer of Legionary Brigade, will furnish the Judge Advocate with all documents necessary to lay before the Court; and also the Officer under arrest, with a copy of the complaint in season; and also due notice of the time and place of said court's setting.

(Signed) ELUAH CRANE, *Maj. Gen. 1st Div.*  
*To Major Charles Davis, Boston.*

Then the President and Members of the Court, and the Judge Advocate in open Court, and before the Court proceeded to the trial, respectively had the oaths administered to them, according to the provisions of the law of this Commonwealth, passed June 22d. 1793, entitled "An Act for regulating and governing the Militia of the Commonwealth of Massachusetts, and for repealing all laws heretofore made for that purpose, excepting an Act entitled an act for establishing rules and articles for governing the troops, stationed in forts and garrisons within this Commonwealth, and also the Militia, when called into actual service."

The Complainant and Defendant were severally

asked if they had any objection or challenge to make or offer against any of the Officers intended to compose the Court Martial for this trial. Whereupon Capt. Thomas Howe (the defendant) observed, that he had no challenge to offer. Maj. Daniel Messinger the complainant, observed, that he had, and produced his cause of challenge in writing, as follows:

"Objection by Maj. Messinger to a part of the Court, as follows: Capt. Amos Binney, Capt. Daniel Badger, and Lieut. Edward Hart; they having formed and expressed an opinion, by petition, that may materially affect the decision of this Court, as I expect to prove."

(Signed) DANIEL MESSINGER.

The original paper accompanies the proceedings, and is marked No. 1.

The Complainant was here directed to produce his evidence in support of his challenge, that that part of the Court, not objected to, might decide thereon. Whereupon he produced a printed paper, purporting to be a copy of a petition to the Governor and Council, signed by the gentlemen objected to, and by other Officers, in January, 1808, with a report of a Committee of the honorable Council, signed by William Eustis, dated Jan. 13th, 1808, with a message of his Excellency James Sullivan, the then Commander in Chief, predicated on that petition, and the advice of Council, upon the acceptance of the aforesaid report of their committee, which message purported to be directed to both houses of the Legislature, and is dated January 16th, 1808.

It was objected on the behalf of the Prisoner, that the petition, purporting to have been signed by the officers challenged by the prosecutor, could not be received in evidence in support of his challenge, in as much, as it did not appear to be a certified copy of a record, but the Court after deliberation directed it to be read; which being done, and Capt. Binney, Capt. Badger, and Lieut. Hart being asked if they did sign



the Judge Advocate; and the Judge Advocate demanded of him, whether he was guilty or not guilty of the charges contained in the complaint; the complaint, is paper No. 5, and accompanies the proceedings.

The Defendant, in answer to the charges, plead in writing as follows: To the first specification of charge I answer, I am not guilty. To the second specification of charge, I answer, of unmilitary, willful, un-officerlike, and illegal conduct, neglect of my lawful duty, I am not guilty. To the third specification of charge, I answer, of unofficerlike, wilful, and illegal conduct; of neglecting my lawful duty, or of setting in defiance any lawful authority whatever, contrary to the tenor of my Commission, and contrary to the laws, military usage, and dignity of this Commonwealth, and subversive of that order and discipline, upon which our Government rests for protection in the last resort, I am not guilty—and put myself on my trial, relying on the Constitution and laws of my country.

(Signed) THOMAS HOWE.

The original accompanies the proceedings and is paper marked No. 6.

This plea, or answer, was considered by the Court as a sufficient denial of the whole charges contained in the complaint, and as tantamount to the general plea of "not guilty."

The Judge Advocate here moved the Court for audience of evidence, which was granted by the Court, and due notice and declaration thereof, was made by the Marshal in open Court.

The Court observed, they would take the specifications of charge, contained in the complaint, into consideration in the order in which they were set forth in the complaint, whereupon the first specification of charge was read.

Then Maj. Daniel Messinger, the Complainant, adduced as a witness on the part of the Government,

was sworn by the Judge Advocate, was interrogated, testified, and answered as follows:

I did not receive any return from Capt. Howe, nor from any one else of his company, the last May, nor have I received any return of his company from him, nor any one else, since that time, until the present.

*Question*, by Court to witness. Did you or did you not, the May before the last, receive a May return from Capt. Howe?

*Answer*. I did receive a return from him the May before the last, and also, the year before, May return for 1807; and the year before the one last mentioned, a May return for 1806. Here are the three returns. The witness here produced three company returns, signed by Capt. Thomas Howe, (the defendant) the first dated May 27th, 1806, another dated May 25th, 1807, and the other dated May 31st, 1808.

*Q.* by Court to same. To whom were these returns addressed?

*A.* They came inclosed, directed to me. Copies of the three returns here alluded to, accompany the proceedings, and are marked A, B, and C. The return for May, 1806, is marked A; the return for May, 1807, is marked B; and the return for May, 1808, is marked C.

*Q.* same to same. Do you command the Sub Legion of Light Infantry?

*A.* I do, here is my Commission. Maj. Messinger here produced his Commission, which was a Commission to him as Maj. of the Sub Legion of Light Infantry, in the Legionary Brigade, first Division, and was dated February 14, 1806.

*Q.* by Court to same. How, or in what form, was the directions of the returns to you, which you have produced?

*A.* They were addressed to me agreeably to my Commission, which I have here exhibited.

*Q.* same to same. How many companies are there



at present in the Sub Legion under your command?

*A.* Three.

*Q.* same to same. Have all the Captains, excepting Captain Howe, made regular returns to you since you have been in commission as Maj. of the Sub Legion of Light Infantry? *A.* They have.

*Q.* same to same. Were you appointed by the Executive, or were you chosen to the office you now hold? *A.* I was appointed.

*Q.* same to same. Do you know of the officers of the Sub Legion of Light Infantry being ordered to meet for the choice of a Major? *A.* I do.

*Q.* same to same. Was Captain Howe at that meeting? *A.* He was.

*Q.* same to same. Did he vote? *A.* He did.

*Q.* same to same. Was there any choice?

*A.* No, not one could obtain a majority of the votes, and I was appointed, as I suppose, on account of the electors not being able to make a choice.

*Q.* same to same. How many times did the electors ballot in the choice of a Major?

*A.* I cannot state positively; but not less than four or five.

*Q.* by Defendant to witness. Did they neglect or refuse to ballot?

*A.* They neglected to make a choice.

*Q.* by Court to same. Were the electors present at more than one meeting?

*A.* But one, to my knowledge.

*Q.* same to same. How much time did elapse after the meeting for the choice of Major, and your being appointed? *A.* I really cannot tell.

*Q.* by Defendant to same. Was not the meeting dissolved because the officers could not make up a choice?

*A.* We were dismissed, but in what manner I do not recollect.

*Q.* By Court to same. Was the number of the Commissioned officers in the Sub Legion of Light In-

fantry, the same at the time of your appointment as it was at the time of the attempt to choose?

*A.* I am not certain; but it seems to lay on my mind, however, that Capt. Brazer resigned in the mean time.

The second specification of charge was now read by direction of the Court; the Complainant was directed to produce the evidence he had to offer in support of the specification.

Whereupon he produced Division Orders of the 13th Sept. 1809, directed to Col. Thomas Badger, senior officer of the Legionary Brigade, and Brigade Orders of the 15th Sept. 1809, directed to Maj. Daniel Messinger; Light Infantry, Legionary Brigade, and Sub Legion Orders of the 16th of the same Sept. directed to Capt. Thomas Howe, which last orders were predicated on the aforesaid Division and Brigade orders. These several orders are contained in paper No. 7, and accompany the proceedings.

The Complainant also, at the same time, produced and offered in evidence a communication or letter, signed by Capt. Thomas Howe, and admitted by him before the Court, to be his signature, and bearing date Sept. 18th, 1809; in this letter or communication was enclosed, the Division, Brigade, and Sub Legion Orders, contained in paper No. 7, before referred to. The communication or letter is No. 8, and accompanies the proceedings.

When the Complainant and the Defendant both observing that they had nothing further to offer as particularly applicable either to the defence or support of the second specification, the Court proceeded to the third specification.

The third specification of charge in the complaint was now read; whereupon the Complainant produced and offered in evidence a communication or order signed by him, and bearing date the 19th Sept. 1809, and by him transmitted to the defendant; this com-



munication or order is paper No. 9, and accompanies the proceedings. The Complainant also produced a communication, bearing date Sept. 21st, 1809, signed by Capt. Thomas Howe, and directed to the Complainant; the communication was acknowledged by the defendant to be his hand writing before the Court. This communication is paper No. 10, and accompanies the proceedings.

Maj. Messinger now produced a copy of the petition signed by Capts. Binney and Badger, and Lieut. Hart and others, with the report of the committee of the Hon. Council, and the acceptance of that report by the Council, Jan. 13th, 1808, and other papers connected therewith, certified by the Secretary of State. These were produced thus certified, in compliance with the direction of the Court, set forth on the fifth page of this record.\* These papers, thus certified, are No. 11, and accompany the proceedings.

The Complainant also produced certified copies of a Resolve passed June 29th, 1798, and General Orders of August 2d, in the same year; these are contained in paper No. 12, and accompany the proceedings. He also produced a certified copy of General Orders of June 20th, 1805; this paper is No. 13, and accompanies the proceedings.

Here the Court was ordered to be adjourned, until to-morrow morning, ten o'clock, which was done in due form by the Marshal.

*Wednesday, Jan. 10th, 1810, 10 o'clock, A. M.*

The Court met pursuant to adjournment, and all answered in their places; the Court was ordered to be opened, which was done in due form by the Marshal. The Complainant upon being called, answered. The Defendant appeared in Court in his proper person. The record of the proceedings had yesterday, and all the papers referred to them, were now read.

Maj. Messinger now observed to the Court, that he

\* See page 253.

had a General Order of Oct. 18th, 1799, to shew (as he said) that the Commander in Chief, and the Hon. Council, had, in the exercise of the powers vested in them by the Resolve, passed June 29, 1798, made alterations in the arrangement of the Sub Legion of Lt. Infantry, by which a part of the General Order of Aug. 2, 1798, was countermanded. He further stated, that from Aug. 2d, 1798, until Oct. 18th, 1799, it appeared that the Sub Legion of Light Infantry was commanded by a Field officer, and that the Cadets, being detached, left the Light Infantry with only two Companies, and that it remained in that state until the General Order of June 20th, 1805, by which it was completed with four Companies; and ordered by that order to have a Major to command the Sub Legion. The General Order of Oct. 18th, 1799, is paper No. 14, and accompanies the proceedings.

The Complainant now observed, that since yesterday, he had taken some pains to ascertain the fact of the time Capt. Brazer resigned, and that he was now able to answer the question asked him yesterday; as to the number of electors in the Sub Legion of Light Infantry, being the same at the time he was appointed Major, as it was at the time of the attempt to choose, with more certainty.

The Court directed the question asked yesterday to be repeated, viz. was the number of the Commissioned Officers in the Sub Legion of Light Infantry, the same at the time of your appointment, as it was at the time of the attempt to choose?

*Answer.* During that time, Capt. Brazer had his discharge.

*Question,* by Defendant to Complainant. Is the Volunteer Corps you claim to have the command of attached to any Regiment?

*A.* I will refer the Court to the Resolve of 1798, and the General Orders predicated thereon, for that subject.



*Q.* by Court to same. Was the vacancy occasioned by Capt. Brazer's resignation filled up before your appointment? *A.* It was not.

*Q.* by Defendant to same. Do you, or do you not, receive your orders direct from the Brig. Gen. or the Commanding Officer of the Brigade? *A.* I do.

*Q.* same to same. Did you, or did you not, as senior officer, command the Corps which you now command before you were appointed Major?

*A.* After the resignation of Capt. Brazer, the command devolved on me of course.

*Q.* by Court to same. Did Capt. Howe ever make any complaint to you, or to any one else, to your knowledge, as to his being commanded by you; until the occurrence of those circumstances, which gave rise to the complaint you have exhibited against him?

*A.* Never any formal complaint.

*Q.* by Defendant to same. Was you, or was you not at my house on Friday evening, Dec. 3d, 1808, and did I not express my dissatisfaction at your commanding me?

*A.* As to dates I do not recollect; but I do recollect in conversation with Capt. Howe, I think it was in the fall of 1808, he did express to me his doubts as to the legality of my command.

*Q.* same to same. Was it not a few days after Governor Sullivan's funeral, when you were at my house, attended by Capt. Wheeler?

*A.* The time I allude to as to having the conversation, I still think was in the fall of 1808, and previous to the fall parade.

*Q.* same to same. At what time and place?

*A.* It was at Capt. Howe's own house.

*Q.* same to same. Have I been under your command on the field since the decision was known on Capt. Binney's trial? *A.* I do not recollect.

A question was here made, as to the time Capt. Binney was discharged from his arrest: it was agreed to

have been some time in the early part of Jan. 1809.

*Q.* Has the Sub Legion of Light Infantry been ordered to parade since the early part of Jan. 1809?

*A.* It has not.

The Complainant now moved that the Defendant may produce his Commission. The Court directed the Defendant to produce his Commission, which he did. It was a Commission to him as Captain of a Company in the Sub Legion of Light Infantry, Legionary Brigade, and was dated the 10th day of March, 1806. He was qualified April 14, 1806, before Robert Gardner, Esq. Justice of the Peace for Suffolk County.

The Complainant and the Defendant were now asked, if either of them had any thing further to offer the Court. The Complainant answered, he had not any thing further, which he at present recollected.

The Defendant produced an analysis, or paper, containing the heads of his defence, which paper is No. 15, and accompanies the proceedings.

It was here admitted, that the Defendant did, some time in May last, make his Company May Return to Col. Badger, but that Col. Badger did return the same to the Defendant some time in the same month, enclosed in a written communication, signed by Col. Badger. This communication, with a certificate on the back thereof, Defendant produced: the same is paper No. 16, and accompanies the proceedings. Defendant also produced General Orders, under date of Sept. 7, 1807, which orders, as he said, would prove that Col. Badger was the Commanding Officer of a Regiment. This paper is No. 17, and accompanies the proceedings. He also produced a representation from the Hon. Gen. Elliot, to His Excellency the Governor, and his Honorable Council, under date of Oct. 22, 1804. This paper is No. 18, and accompanies the proceedings. He also produced an order of the Hon. Council, of June 14, 1805. This paper is No. 19, and accompanies the proceedings.



Q. by Defendant to Complainant. Did you, or did you not, send an arrest, signed by yourself, to Lt. Ridgway, since the arrest received by me from Col. Badger? *A.* I did.

The Defendant now produced Division Orders of Nov. 24, 1809, and Brigade Orders of Dec. 1, 1809. The orders are paper No. 20, and accompany the proceedings. He also here produced a report of the Hon. Council, of Feb. 20, 1808, and General Orders of March 10, 1808. These papers are attached to each other and are marked No. 21, and accompany the proceedings.

Major Jacob Stearns, one of the members of the Court, was now adduced as a witness, on the part of the Defendant, was sworn by the Judge Advocate, was interrogated, testified, and answered as follows:

Q. by the Defendant. Were you not appointed by the Maj. General, to the command of the 2d Regiment in the new arrangement lately made? *A.* I was.

Q. same to same. Did not Capt. Loring return your orders, and send you a communication, dated Sept. 17, 1809, refusing to obey you as a legal Major of the 2d Regiment of the Legionary Brigade? *A.* He did.

Q. same to same. Was he arrested for disobedience of orders? *A.* He was not.

Capt. Joseph Loring, jun. was now adduced as a witness, on the part of the Defendant, was sworn by the Judge Advocate, was interrogated, testified, and answered as follows:

Q. by the Defendant. Did you not remonstrate to the Commander in Chief against the appointment of a Major to the 2d Regiment?

*A.* I did, sir, Nov. 10, 1809. The Defendant here produced a report of the Hon. Council, made Dec. 19, 1809, and General Orders issued the same day. This paper is No. 22, and accompanies the proceedings.

Capt. Amos Binney, one of the members of the Court, was now adduced as a witness on the part of

the Defendant, was sworn by the Judge Advocate, was interrogated, testified, and answered as follows:

Q. by Defendant. Were you not arrested and tried for returning orders to Major Osgood, because they came through an illegal channel?

*A.* I was arrested by Maj. Osgood and tried. In my defence I contended the orders came illegally to me.

The Complainant and Defendant were now again asked if they had any thing further to offer in evidence. The Complainant answered he had not. The Defendant answered, he had nothing further to offer in evidence, but he submitted to the Court a paper, containing the numbers of certain articles of the Constitution, and sections of the militia laws of this State, and the militia laws of the United States, which, he said, he should quote in whole or in part, in his defence; this paper is No. 23, and accompanies the proceedings.

The Defendant now made a motion in writing as follows: "I move the Hon. Court to grant me time for my defence; I should wish the Court to allow me until Monday next, as my business calls my great attention on Saturday. The Court allowed the Defendant until Tuesday the 16th inst. at 10 o'clock, A. M. and directed him then to produce it in writing.

The Court was now ordered to be adjourned, until Tuesday next, 10 o'clock, A. M. which was done in due form by the Marshal.

*Tuesday, Jan. 16, 1810, 10 o'clock, A. M.*

The Court met pursuant to adjournment, and all answered in their places. The Court was ordered to be opened, which was done in due form by the Marshal. The Complainant, upon being called, answered. The Defendant appeared in Court, in his proper place. Then the whole record of the trial, and all the papers appertaining thereto, were read.



Defendant now produced an order, under date of March 23, 1809, which the Court permitted to be read. This order is paper No. 24, and accompanies the proceedings.

The Defendant now produced his defence in writing, which he first read himself; and immediately after the Judge Advocate read the defence, which is in the words and figures following:

*Mr. President and Gentlemen of the Court,*

CONFIDENT as I am, that I have to the utmost of my abilities and understanding endeavored to serve my country in the Militia of this Commonwealth; that my zeal in support thereof was never abated, and that my intentions to advance its prosperity and dignity could be doubted by no one; I little thought at this time of life, or any other, that I should have been arraigned before a Military Court, charged with imaginary crimes, which *ignorance*, aided by *vanity* and *pride*, would *labor* to set up against me; by which my military character, for one moment, might be held in suspence, by any of my fellow citizens.

The honor of a soldier can in no way be so feelingly attacked, as when his character is called in question, by charges tending to reflect on his military conduct, however ambiguously, or however technically arranged, by any pettifogger. Happy I am to appear before you, gentlemen, because I feel conscious you will judge me with that impartial judgment, that becomes members of a Military Court, emphatically stiled a Court of Honor, who act in the double capacity of judges and jurors: I am satisfied, from the patience and candor that you have shewn towards me, you feel disposed to try me agreeably to the rules and regulations of the Constitution and laws of my country, which you have sworn to *support* in your separate stations. Every American freeman, who is conscious of his innocence, when placed in my situation, will rejoice to be tried; for such considerations will ever support him in the worst of times; and will cause him highly to esteem his country, which grants him such privileges, and more particularly *that invaluable one*, trial by jury. Privileges, gentlemen, granted by our declaration of rights, which no officer can wrest from us, without destroying that parchment roll on which they are inscribed; and not then without usurping and establishing a power completely despotic; which, thank God, no true-born son of America will ever permit, without sacrificing his property and life in defence thereof.

Gentlemen, the charges against me appear at first view to be great; but strip them of their technical form and they amount to nothing, more or less than that I have disobeyed the order of an *illegal* Major, who now appears as my prosecutor.

I shall, gentlemen, first endeavor to notice the charges conjured up against me; which my prosecutor has miserably attempted to support, and in my opinion failed; although repeatedly prompted *by his Knight of the woful countenance*; against which charges I shall defend myself, by referring you, gentlemen, to the evidence produced to you, and now on your files; agreeably to the general statement or the analysis thereof, (as the Judge Advocate pleases to call it) offered in opening my defence, and with some remarks thereon; altogether forming my whole defence.

The 1st specification of charge declares, "For that the said Capt. Howe did wilfully neglect, and in an unofficerlike manner, did wholly & wilfully refuse to make a return of the state of his Company in the month of May last past, to your Complainant; and has also ever since neglected and refused to do it, although by law, and according to the formation of said Sub Legion, and the nature of your Complainant's command thereof, it was the duty of the said Howe, to have made such return in said month of May last, to your Complainant, as has been the uniform usage and custom of the several Captains of Companies composing said Sub Legion."

Gentlemen, I presume to hope, that your minds are already satisfied, that so far from being guilty of this charge I have done the duty required of me, by the laws of my country. Mass. laws, June 22, 1793, sec. 25, says, that "every Captain or Commanding Officer of a Company, shall make a return of the state of his Company, comprehending every man belonging to said Company, with all the arms and equipments belonging to them, to the Commanding Officer of the Regiment in the month of May annually."

Section 15, the same law says, "And no such corps raised at large, shall at any time bear a greater number of men on their rolls, than the law allows necessary to constitute them; and the Commanding Officer of every such corps, shall annually, in the month of April, make out a list of all the men's names belonging to his corps, and deliver the same to the Commanding Officer of the Regiment or Battalion, in whose district such corps is or may be raised; and all such corps raised at large, not annexed to any particular Regiment, shall be subject to the orders of the Commanding Officer of the Brigade in which they shall be respectively raised; and shall make their elections and returns in the same manner as other corps of the Militia."

But, gentlemen, if you have any doubts, I will call your attention to the certificate of Col. Badger; who certifies that I did make my return to him, and he saw fit to send it back; this circumstance seemed to enliven the spirits of my prosecutor; which I willingly assented to, by producing the evidence myself wherein Col. Badger saw fit to give his opinion, which opinion it was agreed by the Judge Advocate, ought not to have any influence on the Court.



Gentlemen, will any of you allow, that Col. Badger is the expounder of our laws? He is a gentleman too fond of peace and harmony to contend against innovations, that are continually creeping into our military establishments; therefore, no doubt to save himself trouble, he sent my return back, and forgot to examine the laws. The laws, gentlemen, are positive and decisive, that the *Man returns* shall be made to the Lieut. Colonel or Commanding Officer of the Regiment; which *I have done and fully discharged my duty*, and it was not in my power to force Col. Badger to keep my return.

Some officers have contended both in and out of Courts Martial, that Lieut. Col. Badger did not command a Regiment, before the late arrangement. Gentlemen, should any of you possess this sentiment, it must be done away, when you read the last paragraph of the General Order, issued by advice of Council, dated Sept. 7th, 1807, which says, "therefore it is ordered and arranged, by and with the advice and consent of the Council, that the Company commanded by Capt. Joseph Loring, jun. be considered and recognized an Infantry Company attached and belonging to the Regiment of Infantry of the Legionary Brigade, commanded by Lieut. Col. Thomas Badger, and subjected to all the duties and orders of an Infantry Company in that Regiment."

Also an order dated March, 1809, which says, "The Commander in Chief, in pursuance of the advice of Council, orders that in future, whenever any Regiment or Company shall be divided by the Governor and Council, the field and staff officers of such Regiment, and the officers of such Company, shall remain and be attached to the original Regiment, or Company, and the new Regiments so created, as also the new Companies, shall respectively have new officers, to be elected agreeable to the provisions of the law, either from the new corps, or from among the original field or Company officers, as the electors may deem proper.

By order of the Commander in Chief.

WILLIAM DONNISON, *Adj. General.*"

Both of which orders prove evidently, that he was and now is a Lieut. Colonel commanding a Regiment, as he now commands the original Regiment, with his Majors; who were arranged by Maj. Gen. Crane, to the 2d and 3d Regiments; but the present Governor and Council did not agree to that arrangement; and ordered Maj. Stearns and Maj. Stodder to their former stations, conformably to the order before mentioned. Therefore, gentlemen, it must be clearly my duty, let these troops be stiled what you please, to make my return to Lieut. Col. Bidger, as commander of the Regiment; in whose district my men were raised; whether the law means the Commanding Officer of such corps or each individual Captain of such corps; because the order predicated on the resolve of 1798, says, they shall be commanded by the senior officer, and not by an *illegal* Major; and if those troops are regularly organized by the Constitution and

laws, I must be the senior officer. It is contended that the Artillery and Cavalry make their returns to the Brig. General, (of this fact I am not acquainted;) therefore it is the right and duty of the Light Infantry to do the same; by no means, gentlemen, the Artillery and Cavalry have express statutes to form them, viz. Massachusetts laws, passed June 22, 1798, sect. 12, that "the Governor, with advice of Council, be and hereby is authorized to complete the Cavalry in each Brigade of the Militia, to two full Companies or troops, and the Cavalry in each Brigade, when completed, shall be formed into Battalions or squadrons." Sect. 13, "That the Governor, with the advice of Council, be and hereby is authorized to complete the Artillery in each Brigade of the Militia, to two full Companies, and when thus completed, shall form a Battalion in each Brigade, and be entitled to a Major, Adjutant, and Quarter Master." Laws, March 14, 1806, sect. 10, "That in each Brigade, where 4 Companies of Cavalry or Artillery have been or hereafter shall be established, they shall be formed into a Battalion, and shall be entitled to a Lieut. Colonel and one Major."

Gentlemen, from these extracts from the laws, you must evidently see, that the Artillery and Cavalry have separate establishments, and must be considered in each Brigade as parts of a Lieut. Colonel's command, until completed, of course it may be proper for them to make their returns to the Brigadier, as commanding separate establishments from the standing Infantry.

But, gentlemen, it is not so with the Light Infantry; for there is no statute whatever, that gives them a separate command, or establishment, from the Infantry; but more of this hereafter.

The second specification of charge says, "For that your Complainant, on the 16th day of Sept. last past, received certain Division Orders, under date of the 13th of the same month, together with certain Brigade Orders, under date of the 15th of the same month, which Division and Brigade Orders, with Sub Legion Orders by your Complainant, predicated thereon, and bearing date the 16th of the same September, your Complainant, as was his duty, regularly transmitted to the said Capt. Howe, whose duty it was to receive, obey, and execute the same: But the said Howe, at Boston, on the 18th day of Sept. wilfully neglected his duty, and then and there, in an unmilitary, wilful, and unofficerlike manner, refused to receive, obey, or execute the orders before mentioned and referred to, although, by law, it was his duty to have received, obeyed, and executed the same according thereto."

Gentlemen, I presume to think you have abundant proof on your records, to show, that this charge must fall to the ground, if our constitution and laws govern the Militia of this State. But, gentlemen, to place the subject on its true merits, it may be necessary to relate the facts, as they respect the organization of the Legionary Brigade, which I respectfully remind you I shall prove, by extracts of evidence on your records.



The Resolve of the General Court, passed June 25th, 1798, for the formation of this Brigade, expressly declares, "That His Excellency the Governor, with advice of Council, be and is hereby authorized to form the whole of the Militia, in the towns of Boston and Chelsea, into a Legionary Brigade, in such manner as he shall judge most expedient, which Legionary Brigade, when formed, shall be under the same rules and regulations, in all respects, as is provided by the constitution and laws for governing and regulating the Militia of the Commonwealth, so far as said regulations may be applicable to such Legionary Corps." Upon which the General Order was issued, bearing date August 2, 1798, organizing the Militia of Boston and Chelsea into a Brigade, in which is the following clause :

"That the Companies of Cadets and Fusiliers, in Boston, with one or two Companies to be raised at large at Boston, under the direction and at the discretion of Maj. Gen. Elliot, form a Sub Legion of light troops, to be commanded by the senior officer present, in the field and out, belonging to said corps."

Capt. Messenger, then or afterwards, commanded one of the standing Companies of foot, composed of Ward No. 10 ; nearly all the Captains in the standing foot Companies at that time, had put part of their Companies in uniform, and often trained the uniformed men by themselves ; Capt. Messenger had done so, and called his uniformed men the Winslow Blues. The Sub Legion of Light Infantry, at the formation of the Legion, consisted of the Cadets and the Fusiliers, with one or two other Companies to be raised at large, in Boston, under the direction of Major Gen. Elliot. One Company of Light Infantry was afterwards raised by Capt. Sargent, in pursuance of a clause in the General Order ; the Company of Cadets were afterwards detached, as I am informed, by order of the Council, and a General Order predicated thereon, from the Leg. Brigade, to be a separate corps. About this time, viz. April 30, 1801, Maj. Gen. Elliot issued an order detaching Capt. Daniel Messenger, with his *uniformed men*, from the standing foot company of Ward No. 10, to form a company of Light Infantry, in the Sub Legion of light troops. Capt. Messenger and Lieut. Cotton acting under their old commissions.

Some time in the fall of 1804, Gen. Elliot sent the communication which says, a Company commanded by Capt. Joseph Loring, Jun. raised at large, and now attached to the Infantry in the Legionary Brigade, Gen. Winslow is *very desirous* to have transferred to the Sub Legion of Light Infantry, which would complete the number of Companies requisite, and that *they should be commanded by a Major* ; and then the Brigade would be completely organized. Brig. Gen. Winslow thinks it necessary that there should be another Adjutant to the Infantry, and one to the Light Infantry.

This communication, gentlemen, with others from the Adjutant General, were referred to a committee of Council, who reported

June 14, 1805, as their opinion, that his Excellency should direct the Adj. General to issue an order to the Maj. General, in which are these expressions—"and the Brig. General of the Boston Legionary Brigade, will issue his orders agreeable to law, to the officers of the said Sub Legion to assemble for the purpose of electing a Major to take the command of said Sub Legion." Upon which the General Order, dated June 20, 1805, was then issued, arranging the Sub Legion, and ordering new commissions ; which order says, "The Maj. General will issue his orders agreeable to law, for the election of a Major to command said Sub Legion of Light Infantry"—Thereby imposing a duty which the Maj. General could not perform, by ordering the election of a Major of Light Infantry agreeable to law, as no law allowing such an officer existed, and the Governor has no authority to create offices. The Maj. General gets over the difficulty, by quoting the words of the order in part ; but the superior discernment of Gen. Winslow was requisite to blunder into the accomplishment of his purpose without law—without precedent—without justice.

Division Orders were then issued, dated July 4, 1805, by Gen. Elliot, in which are the following words : "Brig. Gen. Winslow will take due notice of the general orders above copied, also to augment the number of companies of Infantry, agreeably to the general order of 1798, and cause all vacancies in his Brigade to be filled up."

The moment now arrived for Gen. Winslow to gratify himself and his favorite, my prosecutor, to the injury of other officers ; which has been the real cause of all difficulties, instead of following the express words of Gen. Elliot's order, viz. "will take due notice" and "cause all vacancies to be filled up"—he issues a Brigade Order (contrary to all authority given) to choose a Major to command the said Light Infantry, where no such vacancy existed ; for this corps was always commanded by the senior officer in the field. The order was as follows :

"BRIGADE ORDERS. July 7, 1805.

In pursuance of General Orders of the 20th June, and Division Orders of the 4th July, the Brig. General orders the officers of the following Companies to meet him at the house of James Vila, Court street, on Monday, 22d inst. at 8 o'clock, P. M. viz. Boston Fusiliers, Winslow Blues, Boston Light Infantry, and Washington Infantry, in uniform, for the purpose of choosing a Major to command said Sub Legion.

Per order of Brigadier General.

(Signed)

CHARLES CLEMENT, *Brig. Major.*"

Some of the gentlemen of the Court have no doubt received this order, regularly handed down. Gentlemen, the officers met according to orders, and Capt. Loring protested against being attached to the Sub Legion ; but Gen. Winslow declared he had nothing to do with that, but must follow his orders ; and then ordered the officers to bring in their votes in a specified time ; after balloting



a number of times, there appeared to be no choice, and the meeting was dissolved by the Brig. General. Soon after, Capt. Brazer resigned his command, Lieut. Jenks was absent, and Capt. Loring was held under arrest, although the Court had acquitted him; when an order was issued as follows:

"COMMONWEALTH OF MASSACHUSETTS.

*In Council, Feb. 14, 1806.*

His Excellency nominated Capt. Daniel Messinger, as Major to the Sub Legion of Light Infantry in Boston; the officers after several trials made no choice; to whose appointment the Council advised and consented,

Attest, JOHN AVERY, *Sec'y.*

February 15, 1806—Transmitted per order of the Commander in Chief. (Signed) WILLIAM DONNISON, *Adj. Gen.*"

Gentlemen, the foregoing documents will clearly show the authority, which formed the Light Infantry into a separate command; and if the formation was agreeable to the laws, still there is no authority whatever, granted by the *Legislature*, Governor and Council, or Maj. General, to elect a Major to command these troops.

Gentlemen, the order of 1798, plainly declares that the Light Infantry shall be commanded by the *senior officer present, in the field and out*. The General Order of June 20, 1805, predicated on the report of the committee, accepted by the Council, orders, "and the Maj. General will issue his orders agreeably to law, for the election of Majors to command said Sub Legion;" and, gentlemen, the Maj. General, in transmitting these orders, waves the idea of a *legal Major of Light Infantry*, and only orders *all vacancies to be filled up*—Wherefore, you must plainly perceive, that there is not the least shadow of authority, for electing a Major contrary to law, except from Brig. Gen. Winslow. Gentlemen, you have the evidence before you in the case of Capt. Crooker, which is extremely pointed to the question as to the right of the *Governor's commissioning* an officer after being elected to any corps not established by law, which is in these words:

"His Excellency the Governor asks the advice of the Council on the papers and letters accompanying the return of Turner Crooker's election as Major of the Legion of Infantry. The Council have examined the papers and letters, with the return aforesaid, and think it inexpedient to advise the Governor to commission said Crooker, for the following reasons:

First, Because there is no Regiment named, of which said Crooker was elected Major; as by return there ought to have been.

Secondly, Because it appears by the return and papers aforesaid, that said Crooker was elected as Major of the Legionary Infantry, a corps not known in the militia law of the United States, which by the *federal constitution, is the supreme law of the land*. With respect to commissioning said Crooker as a Major of a Regiment not in existence, as such, at the time of his election, it would be to

take from the Captains and subalterns the right of choosing their field officers, after they should be formed, a right expressly given them by the constitution of Massachusetts.

In Council, Feb. 24, 1802—Read and accepted by the Council.

Attest,

JONA L. AUSTIN, *Sec'y.*

*Council Chamber, March 10, 1808.*

The Governor having deliberated upon the return made of the election of Turner Crooker, as Major of the Legion of Infantry, and having considered the foregoing advice of Council, thereupon readily concurs therein, and directs that the Adjutant General deliver a certified copy of the determination to the Major General of the First Division.

(Signed)

JAMES SULLIVAN.

Gentlemen, I will now call your attention to the Constitution and Laws, which are in direct contradiction to the appointment of a field officer or Major of Light Infantry. Constitution, part. 2d, chap. 2d, sect. 1st, art. 10, says, "The Captains and subalterns of the Militia *shall be elected*, by the written votes of the train band and alarm list of their respective Companies of twenty-one years of age and upwards: the field officers of Regiments shall be elected by the written votes of the Captains and subalterns of their respective Regiments. The Brigadiers shall be elected in like manner, by the field officers of their respective Brigades; and such officers so elected, shall be commissioned by the Governor, who shall determine their rank; and if the electors of Brigadiers, field officers, Captains, or subalterns, shall neglect or refuse to make *such elections*, after being *duly notified* according to the laws for the time being, then the Governor, with advice of Council, shall appoint suitable persons to fill such offices. And no officer *duly commissioned* to command in the Militia, shall be removed from his office, but by the address of both Houses to the Governor, or by fair trial in Court Martial, pursuant to the laws of the Commonwealth for the time being." Massachusetts Law, June 22, 1793, sect. 5, "To each Regiment one Colonel, one Lieut. Colonel, one Major; provided; nevertheless, where any vacancy of Colonel now is or shall hereafter happen, then the field officers of each Regiment to consist of a Lieut. Col. Commandant, and two Majors."

From these extracts, gentlemen, your minds must be satisfied, that field officers cannot be elected, but by the Captains and subalterns of their respective Regiments, and no Regiment has a right to more than two Majors; and if there is no law, detaching the Light Infantry, how can my prosecutor be legally appointed a field officer? In fact, gentlemen, there cannot be a law of this State, made contrary to the United States' laws, that will be binding, as it respects the Militia.

The United States' Law, passed May 8th, 1792, sect. 4, says, "That out of the Militia enrolled, as is herein directed, there shall be formed for each Battalion, at least one Company of Grenadiers,



Light Infantry, or Riflemen, and to each Division there shall be at least one Company of Artillery, and one Troop of Horse."

Therefore, gentlemen, how can these troops legally be detached from the Regiment or Regiments, if these shall be formed for each Battalion of Infantry, one Company of Light Infantry or Riflemen? The 6th sect. Massachusetts Laws, June 22, 1793, says, "That each and every Maj. General be, and hereby is empowered, and it shall be his duty to give all such orders, as shall from time to time be necessary, consistent with the law for electing Brig. Generals, field officers, Captains, and subalterns, within his respective Division." Has he issued one in favor of my prosecutor? No, gentlemen.

The 7th section of the same law says—"That every person who shall be *lawfully* entitled to be commissioned to any office in the Militia of this Commonwealth, shall, at the time of receiving his commission, take and subscribe the oaths and declarations required by the Constitution."

The Constitution, as before recited, says, "and no officer *duly* commissioned to command in the Militia shall be removed from his office," &c. &c.

These extracts, gentlemen, must mean something or nothing. I presume, they have no reference to such a person as my prosecutor; for he is not *lawfully entitled*, nor *duly commissioned*; wherefore his commission must be a dead letter; for the word *duly*, means properly and regularly.

Gentlemen, I think I have sufficiently shown to you, that my prosecutor was not constitutionally and lawfully appointed. I will now shew you that, presuming there was a similar statute for the establishment of the Light Infantry, as there is for the Artillery and Cavalry, he could not be appointed a Major to a Volunteer corps.

Massachusetts Laws, June 22, 1793—Section 15th, says, "And if any such corps, raised at large, shall at any time be destitute of Commissioned Officers, and shall neglect to fill up such vacancies for one whole year, without doing duty as the law directs, then in either case, as aforesaid, such corps shall be deemed disbanded, and the men which belonged to such delinquent corps, shall be enrolled in the standing Company in which the individuals thereof shall respectively reside.

Gentlemen, the word *Corps* means a body of soldiers, one, two, and three Companies or more; of which number the Light Infantry consists. Therefore, let my prosecutor contend for his command, in any manner, the laws are against him.

Gentlemen, as to the right of officers to disobey illegal orders, or orders through an illegal channel, you have sufficient proof, in the cases of Maj. Osgood and Maj. Stearns. On the complaint of the former, the officer was tried, and plead (as he declares to you) in his defence, against the orders coming through an *illegal channel*; and you, gentlemen, appeared to be satisfied of his clearance and discharge, by the Court which tried him.

Major Stearns tells you, gentlemen, that he was appointed to the second Regiment, by the late arrangement; that Capt. Loring (who was arranged to the second Regiment, by Maj. Gen. Crane,) did send back his orders, with a communication, setting forth they were illegally transmitted; and that Capt. Loring was not arrested for disobedience of orders.

Capt. Loring tells you he sent a remonstrance to the Commander in Chief, against the appointment of a Major in the 2d Regiment; and, gentlemen, you have a General Order, issued by the Commander in Chief, approving the arrangement, in part, and placing the Majors from whence they came.

In addition to this, gentlemen, I have heard that the Maj. General received from the present Commander in Chief, a General Order, for filling the vacancy of Brig. General; which, to this day, has not been transmitted; whether because it is illegal or not, I am not able to say.

Gentlemen, to illustrate, I will suppose two cases:—

1st. Suppose there were four Companies of Riflemen, and Maj. Gen. Crane should state to the Governor, that he wished Captain Fairbanks, a favourite officer, to be appointed a Major to those Rifle troops; are any of you, gentlemen, ready to say, if he was *so appointed*, that it is the duty of a legal officer to obey him?

2d. Should Maj. Gen. Crane issue *prohibitory* orders, the like to Gen. Elliot's of the 28th Sept. 1803, that no troops should parade the next year in his Division, would it not be contrary to our laws? Would not every Captain be liable to a trial by a Court Martial, for not obeying the laws, which declare, that it is his duty "to call his Company three days in each year for Company discipline, and once on the first Tuesday in May annually"? If the Captains did obey the laws, would they not disobey Gen. Crane? The answers are clear.

Gentlemen, I wish not to implicate any Governor and Council, or any Commander in Chief; but I must declare, that when I am so well acquainted with our Constitution and laws as to know, that I am ordered to do duty by an *illegal* officer, appointed contrary thereto, I will refuse to obey him, let his commission be signed by Christopher Gore or Levi Lincoln. I believe, gentlemen, that Gov. Strong, by the persuasion of Gen. Winslow, who had the name of a brave and experienced officer, granted his assent to this usurped right, in favour of my prosecutor, without examining the consequences that might follow; and General Winslow no doubt thought, that *Constitution* and law were of no consequence, in comparison with gratifying the vanity of his adopted military child, who gratefully returned the favor, by appointing the General's son his Adjutant.

Thus, gentlemen, you see the mystery; but where is the honor of an officer, who holds a commission by such means? It cannot be supposed that a Governor should perfectly know every thing



that concerns the Militia; but an officer who was declared the best and most correct officer in the Brigade, if true, ought not to be supported for his duplicity.

Where is the gentleman and soldier who values his reputation, that would hold a commission, not granted to him by our Constitution and laws? Where is the gentleman and soldier that would honor the officer, who endeavored to impose on the public, for what he is not? Is not a private station more honorable?

The third specification of charge, says—"For that your Complainant, on the 20th day of Sept. last past, as Major and Commanding Officer of the Sub Legion of Light Infantry, did make a communication in writing under date of the 19th, to the said Capt. Howe, concerning the organization of the said Sub Legion, and setting forth the authority whereby your Complainant was commissioned the Major and Commanding Officer thereof, in which communication your Complainant did enclose the said orders, which the said Howe before refused to receive, as above specified, to wit, Division Orders of Sept. 13, 1809—Brigade Orders of Sept. 15, 1809, and Sub Legion Orders of Sept. 16, 1809; and by this said communication your Complainant did, as it was his duty to do, order and require the said Capt. Howe's compliance with, and obedience to the said orders enclosed as aforesaid; notwithstanding all which, the said Capt. Howe did, at Boston, on the 21st day of Sept. last past, wilfully disobey all the orders before mentioned, and then and there, in an unofficerlike manner, did again return said orders to your Complainant, without having acted upon them, as thereby ordered; thereby wholly neglecting his duty, wilfully disobeying said orders, and setting at defiance the lawful authority and command of your Complainant, in evil example to all others, in like manner to offend, contrary to the tenor of the said Howe's commission, and contrary to the laws, military usage, and dignity of this Commonwealth, and subversive of that order and discipline upon which our Government rests for protection in the last resort."

In answer to the last charge, and in support of my plea, I shall state, gentlemen, that for some time I had suspicions, that my situation in the Militia was not correct; but as I did not wish merely from the opinion of others to form a judgment, that would militate with any of my superior officers, I remained perfectly easy, until I heard the result of the trial at Dedham, which I attended chief of the time, and found by the evidence (when read) the contents of the Resolve of 1798, which satisfied me, (after examination at the Adj. General's office) that my prosecutor was not legally appointed to the command; and the further I examined, the more I was convinced that I was imposed upon, by being placed in the situation I was.

I therefore, gentlemen, determined, the first moment that I was called upon to act by my prosecutor, that I would address him on the subject, in some way or other, and state my claims. Therefore I addressed a billet to Mr. Winslow, and received an answer from

my prosecutor; when I sent to him another communication, stating the laws and Constitution upon which I grounded my conduct, and this was done to save trouble and expense.

Now, gentlemen, what am I guilty of to support such a charge?—It appears that I have offended contrary to the tenor of my commission, and contrary to the laws.

You have, gentlemen, seen a difference in the commissions, which evidently prove, that there is no fixed form by law; and our Governor may alter the form as he sees fit: therefore it was wisely ordered by our Constitution, that every officer shall, before he enters on the discharge of his duty of office, take and subscribe the following oath—

"I, A. B. do solemnly swear or affirm, that I will faithfully and impartially discharge and perform all the duties incumbent on me as \_\_\_\_\_, according to the best of my abilities and understanding, agreeably to the rules and regulations of the Constitution and the laws of this Commonwealth. *So help me God!*"

My commission says, that I must discharge my duty according to the laws, and follow the orders and instructions of my superiors: if it were otherwise, would not my oath be more binding? the oath I subscribe before my God?

Gentlemen, what advantage as evidence my commission can give my prosecutor he is welcome to it; but I did suppose, conformably to the Constitution, that no man should be obliged to give evidence against himself.

Gentlemen, I must now call your attention to the evidence of my prosecutor, and also the manner in which he gave it: what queries I made to him, were answered in a manner too glaring not to be perceived—after putting to him questions, to which I could get no direct answer; among which I asked him, "by what authority he held his commission?" to which he answered, "the resolve and order would determine." I also asked him if he had commanded me in the field since Capt. Binney's trial? to which he answered he did not recollect.

Gentlemen, can it be possible that a candid and correct officer (with his Adjutant prompting him, and his Orderly Book at his side) should not recollect so simple a fact? Such evidence ought to be carefully taken, should it have any bearing on your minds—to say Macomb, folio 131.\*

\* An unwilling and reluctant witness, who speaks with caution, answering nothing, but what is forced out of him, by repeated and circuitous interrogations is unworthy of the same credit that is given to one who openly and fairly declares all he knows upon the point. On the other hand, a witness who amplifies in his testimony, unnecessarily enlarging upon circumstances unfavorable to a party, who seems to be gratified by the opportunity of furnishing condemnatory evidence, or manifestly betrays passion and prejudice in the substance of his testimony, or in the manner of delivering it, is to be listened to, with equal suspicion of his veracity.



The idea of a man, when he commences a citizen soldier, or officer in the Militia, making a temporary relinquishment of the privileges of a citizen, is unbecoming a citizen of these United States.

Declaration of rights, Art. 10, "In fine, the people of this Commonwealth are not controllable by any other law than those to which their constitutional body have given their consent."

Art. 11. "Every subject of the Commonwealth, ought to obtain right and justice freely and without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws."

Art. 12. "No subject shall be arrested, imprisoned, despoiled, or deprived of his property or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; and the Legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury."

Art. 17. "And the military power shall always be held in exact subordination to the civil authority, and be governed by it."

Art. 18. "The people" "have a right to require of their law-givers and magistrates an exact and constant observance of them, in the formation of the laws necessary for the good administration of the Commonwealth."

Art. 28. "No person can, in any case, be subjected to law Martial, or to any penalties or pains, by virtue of that law, except those employed in the army or navy, and except the Militia in actual service, but by authority of the Legislature."

Art. 30. "In the Government of this Commonwealth, the Legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men."

These authorities, gentlemen, will evidently prove, that unless we are in actual service, and under martial law, our civil rights are in no part done away. In the United States' service, where the soldier enlists, and the officer takes a commission to serve agreeable to the rules and articles of war, no doubt they make a temporary relinquishment of the privileges of a citizen, while their engage-

If a witness takes upon himself to remember with the greatest minuteness, all the circumstances of transactions long since past, and which are of a frivolous nature, and not likely to dwell in the memory, his testimony is rendered thereby very suspicious—as on the other hand, a witness affirming his total want of recollection of the most material and striking circumstances of a recent and remarkable fact, which happened in his own presence, is deserving of very little credit in those particulars which he pretends to remember.

ments continue. But not so with Militia officers or soldiers, for every grade in the Militia have express laws to govern them; and the idea that all orders must be obeyed in the Militia as in regular service, I think I have fully explained to be observed.

Gentlemen, the feeble support the charges have had, either from law or evidence, would lead me less to animadvert on them, than to commiserate the situation of my prosecutor, in his weak attempt to establish a principle of government by men, instead of laws—a principle directly opposed to that Constitution, which, in the presence of God, we have all sworn to support. But as I respect law, and as the prosecutor has now become a legislator, and may have the greatest hand in the framing of laws, by which we may all be much affected, I think it may be a good lesson, in the beginning of his legislative career, to learn, that the Constitution is reserved by the people as a barrier between them and the Legislature—lest not recollecting in his elevation, that his power is limited to that compact, we might hear of Field Marshals or Lieut. Generals of his appointment and commissioning—all of which he has as legal a right to appoint and commission, as any Governor has to appoint and commission a Major of Light Infantry; neither the one or the other being agreeable to law. Considering my prosecutor as a law-maker, I cannot conceive what his feelings must be, to assume a command under a commission, he must know to be contrary to our laws, if he knows any thing.

Gentlemen, my name stands recorded among the first that raised the Company in 1787; which I had the honor to command before I was arrested by the complaint of my prosecutor. I have had the honor, by elections, to be risen progressively to my present station, and have endeavored to discharge my duty to the best of my abilities.

Gentlemen, I now leave my character, as an officer, in your hands, and hope I shall have permission again to wear my sword; and if my country calls, be ready to obey.

THOMAS HOWE, *Capt. I. B. F.*

*Roxbury, Jan. 16, 1810.*

It being evident that the remaining proceedings could not be closed before sun down, the Court was ordered to be adjourned until to-morrow morning, 10 o'clock.

*Wednesday, Jan. 17, 1810, 10 o'clock, A. M.*

The Court met pursuant to adjournment, and all answered in their places. The Court was ordered to be opened, which was done in due form by the Marshal.



The Complainant, upon being called, answered. The Defendant appeared in Court, in his proper person. The Judge Advocate now summed up the evidence for and against the Defendant, and stated the case to the Court. After which the Court was ordered to be cleared of spectators; which being done, the following question was put to each of the Members, beginning with the lowest in grade:

From the evidence which has been adduced, both for and against Capt. Thomas Howe, and from what has been offered in his defence, are you of opinion he is guilty, or not guilty, of the first article or specification of charge, exhibited against him in the complaint of Maj. Daniel Messinger? The Court decided, that of the first article or specification of charge, the said Thomas was *not guilty*.

Upon the question being put in the same form upon the second article or specification of charge contained in said complaint, the Court decided, that of the second article or specification of charge in said complaint, the said Thomas was *not guilty*.

Upon the question being put in the same form on the third article or specification of charge contained in said complaint, the Court decided, that of the third specification of charge in said complaint, the said Thomas was *not guilty*.

Upon the question being put in the same form, whether the said Thomas was guilty or not guilty of *any part* of the charges contained in the complaint exhibited against him by Maj. Daniel Messinger, the Court decided, that the said Thomas was in no part guilty thereof. It is therefore declared to be the opinion of the Court, that Capt. Thomas Howe be acquitted of all and singular the charges or specifications of charges exhibited against him.

GEORGE ELLIS, *President*,

CHARLES DAVIS, *Judge Advocate*.

COMMONWEALTH OF MASSACHUSETTS.

We do hereby certify, that the above and the foregoing are the true records of the proceedings of the Court, of the evidence offered to it, and of its decisions and judgments.

George Ellis, President,	Nathaniel Guild,
Jacob Stearns,	Samuel Webb, Ad.
Samuel Bayley,	Stephen Wales,
Abner Ellis,	Edward Hart,
Elisha French, Jun.	Samuel Brastow,
Amos Binney,	Eben'r Goddard, Jun.
Daniel Badger,	Charles Davis, Judge Adv.

Roxbury, Jan. 17, 1810.

DIVISION ORDERS.

Canton, Jan. 30, 1810.

Having received from Maj. Charles Davis, Judge Advocate, the records and documents of the proceedings of a Division Court Martial, whereof Lt. Col. George Ellis was President, for the trial of Capt. Thomas Howe, of the Sub Legion of Light Infantry, Legionary Brigade; and after maturely considering the same, I hereby disapprove of the sentence of said Court, wherein they say Capt. Thomas Howe is not guilty;\* and said Court are hereby discharged: Capt. Thomas Howe is discharged from his arrest: The Division Order for filling vacancies, which expired on the first day of Jan. 1810, is renewed, to continue in force until the first day of June next, of which all concerned will take due notice.

(Signed)

ELIJAH CRANE, *Maj. Gen.*

\* The reader will observe, that the doings of a legal Court Martial were disapproved of by Maj. Gen. Crane, no doubt because it acquitted Capt. Howe. Can it be possible, that the Major General wishes to support officers illegally appointed and commissioned, and condemn officers because they support the Constitution and Laws? which was evidently Capt. Howe's intention—And the late arrangement of Gov. Gore and his Council, is proof positive that Maj. Messinger (so called) and his Adjutant, were illegal officers; therefore Capt. Howe's conduct was correct in every instance.

It must be noticed, that Gen. Crane, although ordered by Gov. Gore, with advice of his Council, to fill up the vacancy of a Brigadier General, refused to obey the order, or at least paid no attention to it; although it correctly reminded him of his duty, which, it is presumed, Gov. Gore, with the advice of Gen. Cobb, would not have done without it was their right so to do. Still we find the same Maj. Gen. disapproving the sentence of a legal Court Martial, for no reason that can be devised, except that Capt. Howe was not declared guilty for disobeying the *illegal* orders of an *illegal* Major.



## PAPERS

ACCOMPANYING THE PROCEEDINGS

No. 1.—OBJECTIONS, BY MAJ. MESSINGER, TO A PART OF THE COURT,  
AS FOLLOWS :

Capt. Amos Binney, Capt. Daniel Badger, and Lieut. Edward Hart ; they having formed and expressed an opinion, by petition, that may materially affect the decision of this Court, as I expect to prove.

DANIEL MESSINGER.

No. 2.

*Mr. President, and Gentlemen of this honorable Court,*

The constitution of this Commonwealth, in the Declaration of Rights, says, part 1st, Article 2th, "And every subject shall have a right to produce all proofs that may be favourable to him, to meet the witnesses against him face to face, and to be fully heard in his defence by himself or his Counsel, at his election."

Martial law is not declared, and we have express statutes for governing the Militia, made in pursuance of our constitution, which do not take away any part of the civil rights of an officer. It must be acknowledged, in some military Courts this privilege has been refused ; but at the Court of Inquiry, which sat on the complaint against Capt. George Little, of the navy, it was allowed, as I have been informed.

The statutes, which govern our Militia, differ materially from those which govern our Militia, when in actual service. They also differ from the articles of war, which govern the United States' troops, to which every officer assents by his signature thereto, and every soldier by his enlistment. By many well informed men it is supposed, that this assent virtually takes away part of the civil right of the officer and soldier. Wherefore I cannot suppose their rules will apply to a military Court in time of peace, without there is a declaration of Martial law. I therefore presume to think, that I have a right to Counsel, and with due respect do now request that it may be allowed me, and I hope this honourable Court will see cause to grant this my request.

I am, with respect, gentlemen, your humble servant.

THOMAS HOWE, *Capt. I. B. K.*

No. 3.—TO THE COURT.

*Gentlemen,*

In obedience to Regimental Orders of the 27th Dec. predicated upon Division Orders of the 10th Dec. appointing a Court Martial, for the trial of Capt. Thomas Howe, I appeared on the eighth inst.

and was qualified and took my seat as a member. The Court being sworn, Maj. Messinger, the Complainant, excepted against me, because, in his opinion I had pre-judged the case ; and to support his objection, a printed paper was produced, purporting to be a copy of a petition signed by myself with others addressed to the Governor and Council, in Jan. 1804, praying for a new organization of the Legionary Brigade, and stating that the then present organization was illegal. This paper, although not in an official form, was acknowledged by me to have been signed, and the Complainant was asked by myself if he had any other evidence to support his opinion of my pre-judging ; he replied that he had now no additional evidence, but was firmly of that belief from circumstances, particularly that of my having been tried on a similar complaint as that against Capt. Howe ; I then informed Maj. Messinger, that I had in Court a certified copy of my trial and defence ; if he expected he could prove any thing from those papers, they were at his service ; he thanked me for the offer, and declined accepting it. The Court was then cleared, and after full deliberation on the question, (myself remaining totally silent) they overruled the objection. I then stated to the Court the delicacy of my situation, sitting on a Court Martial where one of the parties believed me to have pre-judged the case, and that although I acknowledged to have signed a petition, and to have been tried by Court Martial, for disobedience of orders in the Legionary Brigade, yet felt conscious I had not pre-judged the question between the Complainant and Defendant, for I could not possibly be yet possessed of the evidence in the case. Notwithstanding, as this was a question that might hereafter implicate my honor, I asked the indulgence of the Court to adjourn over for two days, to give me an opportunity to apply to the Major General for a discharge from this Court. The Judge Advocate then stated that I was on the Court by orders ; that the objections against me having been overruled, I was, in the eye of the law and military usage, as fair a member as any one of the Court not objected to. The Court decided I could not be indulged with an adjournment, but must keep my seat. To obviate any observation that may hereafter arise on this subject, implicating my impartiality or honor, let the decision of the Court be for the Complainant or the Defendant, I feel it my duty thus formally to renew my request that it be made a part of the record, that I wish to be excused from sitting longer on this Court in this trial.

AMOS BINNEY.

*Roxbury, Jan. 9, 1810.*

I, the subscriber, feeling myself delicately situated, and no partiality or prejudice on my mind, and to save the time of the Court from further formality, coincide in the above, so far as the same is applicable to me.

DANIEL BADGER.

*Roxbury, Jan. 9, 1810.*



## No. 4.

Knowing the feelings of any person, having a cause to be tried by a Court where there is a supposed partiality, and being one of those who have been challenged, it is my wish that it should appear on the records, that I do set here contrary to my inclinations, to perform the duty assigned me; but in justice to myself, I will declare that I have no prejudice whatever for or against the party to be tried, not knowing the question, or any thing concerning the dispute whatever.

EDWARD HART.\*

## No. 5.

To Thomas Badger, Lieut. Colonel of the first Regiment of Infantry, and Senior and Commanding Officer of the Legionary Brigade, in the first Division of the Militia of Massachusetts—

Respectfully complains, Daniel Messinger, Major and Commanding Officer of the Sub Legion of Light Infantry in said Brigade, against Thomas Howe, Capt. and Commanding Officer of a Light Infantry Company in the aforesaid Sub Legion, for unmilitary conduct, neglect of duty, and disobedience of orders; of all which offences, your Complainant alleges that the said Captain Thomas Howe has been guilty, particularly in the following specifications of charge herewith exhibited:

*Specification first*—For that the said Capt. Howe did wilfully neglect, and in an unofficerlike manner did wholly and wilfully refuse to make a return of the state of his Company, in the month of

\* The right of challenging an officer, as member of a Court, where cause is shewn, must be just, and the removal virtuous. It must be a pleasure to every one, that Capts. Binney and Badger, and Lt. Hart, have so far supported this principle, by their requests to be excused from sitting as members of the Court; although *the prosecutor, in behalf of the government*, excepted against them. And it must be wished, that we could also have recorded the same conduct in former trials, which no doubt would have a tendency to an insertion of this constitutional and valuable right of challenge in the late law—which to every officer is of the utmost consequence, in guarding his character by a fair and impartial trial, guaranteed by that law and constitution.—It is easy for officers, (under the influence of their superiors, who appoint them on Courts Martial) to retain an officer objected against, let the objections be what they may; more especially when some officers consider, that when they are ordered to sit on a Court Martial, they have no authority to remove the officer objected to—More particularly when those, that do believe in this, too often feel a delicacy in hurting the feelings of an officer placed in this situation.—If the former Major General (Elliot) is correct in his censure on the Court that tried Capt. Binney, there is an end to the right of challenge—for he says, "he conceives that the members of the Court proceeded illegally and irregularly, in suffering themselves to separate upon the question of challenge, and in allowing the oath to have been administered to a part only, when seven of their brethren were not present." This means, if it is correctly understood that a challenge can be of no avail, for most assuredly the seven members objected to were the majority of the Court.

May last past, to your Complainant, and has also ever since neglected and refused to do it, although by law, and according to the formation of said Sub Legion, and the nature of your Complainant's command thereof, it was the duty of said Howe to have made such return, in said month of May last, to your Complainant, as has been the uniform usage and custom of the several Captains of Companies composing said Sub Legion.

*Specification second*—For that your Complainant, on the 16th day of Sept. last past, received certain Division Orders, under date of the 13th of the same month, together with certain Brigade Orders, under date of the 15th of the same month, which Division and Brigade Orders, with Sub Legion Orders, by your Complaint, predicated thereon, and bearing date the 16th of the same Sept. your Complainant, as was his duty, regularly transmitted to the said Capt. Howe, whose duty it was to receive, obey, and execute the same; but the said Howe, at Boston, on the 18th day of Sept. wilfully neglected his duty, and then and there, in an unmilitary, wilful, and unofficerlike manner, refused to receive, obey, or execute the orders before mentioned and referred to, although by law it was his duty to have received, obeyed, and executed the same according thereto.

*Specification third*—For that your Complainant, on the 20th day of Sept. last past, as Major and Commanding Officer of the Sub Legion of Light Infantry, did make a communication, in writing, under date of the 19th, to the said Capt. Howe, concerning the organization of the said Sub Legion, and setting forth the authority, whereby your Complainant was commissioned the Major and Commanding officer thereof; in which communication your Complainant did enclose the said orders, which the said Howe before refused to receive as above specified, to wit, Division Orders of Sept. the 13th, 1809, Brigade Orders of Sept. the 15th, 1809, and Sub Legion Orders of Sept. the 16th, 1809; and by this said communication, your Complainant did, as it was his duty to do, order and require the said Capt. Howe's compliance with, and obedience to said orders, enclosed as aforesaid. Notwithstanding all which, the said Capt. Howe did, at Boston, on the 21st day of Sept. last past, wilfully disobey all the orders before mentioned, and then and there, in an unofficerlike manner, did again return said orders to your Complainant, without having acted upon them as thereby ordered; thereby wholly neglecting his duty, wilfully disobeying said orders, and setting at defiance the lawful authority, and command of your Complainant, in evil example to all others in like manner to offend, contrary to the tenor of said Howe's commission, and contrary to the laws, military usage, and dignity of this Commonwealth, and subversive of that order and discipline upon which our government rests for protection in the last resort.

Wherefore your complainant prays, that you would cause said Capt. Howe to be put under an arrest, and that you would give due



information thereof, and of the above specifications of charge against him, to the Major General of the first Division, in order that a Court Martial may be ordered, to try the said Howe upon the said charges, and be dealt with concerning the premises as to law and justice may appertain.

DANIEL MESSINGER,

*Maj. Sub Leg. Lt. Infantry, Leg. Brig.*

THOMAS BADGER, Lt. Col. Comd't Infantry,  
Senior Officer Leg. Brig. 1st Div. M. M.  
Boston, Oct. 12, 1809.

No. 6—is Capt. Howe's answer to the charges of the complainant, as in page 254.

A—Return of Capt. Thomas Howe's Company in the Sub Legion of Light Infantry of the Legionary Brigade, 1st Division of Militia.

Commissioned Officers.

- 1 Captain
- 2 Lieutenants
- 1 Ensign

Non-Commissioned Officers.

- 4 Sergeants
- 4 Corporals
- 2 Drums and Fifes
- 43 Total rank and file

Boston, May 26, 1806.

Arms and Accoutrements of all the men belonging to the Company.

- 43 Muskets
- 43 Bayonets with Scabbards
- 43 Cartridge Boxes with Belts
- 43 Iron Rods
- 43 Bayonet Belts
- 129 Flints
- 43 Wires and Brushes
- 43 Knapsacks
- 1032 Cartridges with Balls
- 43 Men in cloth uniform

THOMAS HOWE, Capt. I. B. F.

B—Return of Capt. Thomas Howe's Company, in the Legionary Brigade, first Division of Militia.

Commissioned Officers.

- 1 Captain
- 2 Lieutenants
- 1 Ensign

Non-Commissioned Officers.

- 4 Sergeants
- 2 Drums and Fifes
- 32 Total rank and file

The above being a true return from May inst.

Boston, May 25, 1807.

THOMAS HOWE, Capt. I. B. F.

C—Return of Capt. Thomas Howe's Company, of the Legionary Brigade, first Division of Militia.

Commissioned Officers.

- 1 Captain
- 2 Lieutenants
- 1 Ensign

Non-Commissioned Officers.

- 4 Sergeants
- 2 Drums and Fifes
- 34 Total rank and file

Arms and Accoutrements of all the men belonging to the Company.	38 Bayonet Belts
38 Muskets	114 Flints
38 Bayonets	38 Wires and Brushes
38 Cartridge Boxes	38 Knapsacks
38 Iron Rods	912 Cartridges with Balls
	38 Men in cloth uniform

The above compared and corrected from the May Roll of 3d instant.

Boston, May 31, 1808.

Attest,

AARON RICHARDSON, Clerk.

No. 7.

Canton, Sept. 13, 1809.

DIVISION ORDERS.

The Brig. Generals or Commanding Officers of Brigades in the 1st Division of Massachusetts Militia, are directed to issue their orders to cause all vacancies of commissioned officers, which now are, or may hereafter exist, until the 1st day of Jan. next, in their respective Brigades, to be filled up; that is to say, to have the vacancies of Captains and Subalterns filled up first, and then the vacancies of Lieut. Colonels and Majors; and to make return thereof accordingly, without delay; when the line of field officers is completed, orders will be issued for filling the vacancies of Brigadier Generals.

(Signed) ELIJAH CRANE, Maj. Gen. 1st Division.

To Lieut. Col. Badger, senior officer of the Leg. Brigade, Boston.

BRIGADE ORDERS.

Boston, Sept. 15, 1809.

In compliance with the foregoing Division Order, Maj. Daniel Messinger will direct all vacancies of Captains and Subalterns that are or may exist in the troops under his command, and make return on or before the 15th day of Oct. next.

(Signed) THOMAS BADGER, Lt. Col. Comdt. of 1st Reg. Inf. and sen. officer Leg. Brig.

To Maj. Daniel Messinger, Lt. Inf. Leg. Brigade.

SUB LEGION LIGHT INFANTRY.

SUB LEGION ORDERS.

Boston, Sept. 16, 1809.

Pursuant to Division Orders of the 13th, and Brigade Orders of the 15th inst. Cpts. Thomas Howe and George Wheeler will direct all the vacancies that now exist, or may occur in their respective commands, to be filled, and make return on or before the 10th day of October next.

By order of the Commanding Officer.

JOHN WINSLOW, jun. Adjt.

To Capt. Thomas Howe.



No. 8. Boston, Sept. 18, 1809.

Sir,—The enclosed papers, purporting to be orders from the Commanding Officer of the Sub Legion of Light Infantry in the Legionary Brigade, and signed by yourself as Adjutant, are enclosed to you for your further disposal, as you may think proper. If by any law or resolve of the Legislature of this Commonwealth, there is any corps in the Legionary Brigade legally Light Infantry, I am the senior Captain thereof, and as such, it is my province to issue orders to the several Companies composing the corps of Light Infantry, which I shall do, when they are received from the Commanding Officer of the Brigade, and save you the trouble of interfering with the affairs of my command.

I am yours,  
THOMAS HOWE, *Capt. Ind. Bost. Fus.*  
Mr. John Winslow, jun.

No. 9.

Boston, Sept. 19, 1809.

Sir,—Your communication, addressed to John Winslow, jun. was handed me yesterday, covering the orders transmitted to you by him in his official capacity, and according to my directions. I am surprised at the sentiments thereby conveyed, and think they must have arisen from a misapprehension of the spirit and tenor of prior orders: Therefore, for your further information, I request that you would deliberately consider the Resolve of the Legislature, under date of June 25th, 1798, giving to the Commander in Chief discretionary powers (his determination to be sanctioned by his Council) for organizing the Legionary Brigade; next the General Orders of August 2d, of the same year, originating in the said Resolve; then the General Orders of June 20th, 1805, virtually countermanding, in part, this first order of August 2d, 1798—new organizing the Sub Legion of Light Infantry, and directing the choice of a Major to command the same; you will find the object of this order but partially attained, and it will appear on further examination, that the Commander in Chief did me the honor to nominate me to the Council on the 14th Feb. 1806, and that to my appointment as the Commanding Officer of the Sub Legion of Light Infantry, he was advised, and had their consent. I was accordingly commissioned Major of Light Infantry, by authority as valid does Mr. Winslow hold his commission. I believe upon reflection you will form opinions very different from those you have entertained, when you made the communication above alluded to. I hope and trust that you will be actuated by a sense of your duty—I therefore again transmit to you Division Orders of Sept. 13th, Brigade Orders of Sept. 15th, and Sub Legion Orders of Sept. 16th, 1809; and your compliance with, and obedience to them, is expected and required. I am, sir, with respect, your obedient humble servant,

DANIEL MESSINGER, *Maj. of the S. Leg. of Lt. Inf.*  
Capt. Thomas Howe.

No. 10. Boston, Sept. 21, 1809.

Sir,—Your communication of the 19th inst. in reply to one I sent to Mr. John Winslow, jun. was left at my house yesterday, and received. I am somewhat surprised at the sentiments therein contained, and believe you must have drawn your conclusion from a misapprehension of the tenor and meaning of the Constitution and law, which I am under oath to support.

After thanking you for the references you have given me to a certain Resolve, and two General Orders, I have to request your deliberate consideration of the Constitution and laws, faithfully compared with the said Resolve and orders, and I believe that upon reflection you will form opinions very different from those you have avowed. But lest it should not be convenient for you to turn to the section relevant to the subject, I will refer you to such as may be necessary for your better information.

Constitution, chap. 2d, sec. 1, art. 10, says, the Captains and Subalterns of the Militia shall be elected by the written votes of their respective Companies; the field officers by the Captains and Subalterns; the Brigadiers by the field officers, and the Maj. General by the Legislature; and it is only in cases of neglect and refusal of the electors to choose such, that appointments can be made by the Governor.

The 4th section of the law of 1793, provides for the organization of the Militia (Infantry) into Divisions, Brigades, Regiments, and Companies; the 12 and 13 sections provide for Battalions and Squadrons of Cavalry and Artillery. But there is no law in the statute book authorizing Battalions or Sub Legions of Light Infantry. Compare with these the Resolve of June 25th, 1798, which authorizes the Governor and Council to form the Militia of Boston into a Legionary Brigade, and search for the discretionary powers you have named. This Resolve expressly says, the Brigade shall be under the same rules and regulations in all respects, as is provided by the Constitution and laws for regulating and governing the Militia of this Commonwealth. Where then is the authority for a Major of Light Infantry or of a Sub Legion? The General Order of August 2d, 1798, says, the Light Infantry shall be commanded by the senior officer in the field or out. There is no Major named in this order. In the General Order of 20th June, 1805, something is said to be sure about a Major; but when you read that order again, you will there find these words: "And the Maj. General will issue orders agreeable to law, for the election of a Major, to command said Sub Legion of Light Infantry." What law? The Maj. General found no law to justify such an order to elect a Major of Light Infantry; and he very wisely issued his, without saying one word about a Major, or Light Infantry. See it in these words: "and cause all vacancies in his Brigade to be filled up, and returns made;" &c. But there was no vacancy of a Major of Light



Infantry, because the office was never created; and if the office did exist, what Captains or Subalterns ever chose you to fill it? Capt. Brazer's honorable discharge is dated Oct. 10th, 1805—You say that the object of the order of 1805, is but partially attained. Very true, sir. I have long believed the object of that order was to make you a Major; but as there is no law to sanction that object, it never has or will be attained. You say also, that the Commander in Chief, in 1805, did you the honor to nominate, and the Council advised to appoint you to the command of the Sub Legion of Infantry. If it is any honor to have been mocked with an appointment to an office that the laws have not created; then you have been indeed highly honored. You say, you hope and trust that I shall be actuated by a sense of my duty, and that my compliance and obedience to your command is expected and required. Actuated by a sense of duty, predicated upon the Constitution and laws of the land, I am induced to enclose the papers you sent me by Mr. John Winslow, jun. which I hope and trust, when you have duly reflected, you will not again trouble me.

Very respectfully I am yours,

THOMAS HOWE, *Capt. Ind. Bost. Fus.*

Daniel Messinger, *Esq. Maj. by appointment.*

No. 11—is the representation to the Governor and Council, signed by Turner Crooker and others, as in pages from 240 to 248.

No. 12—is the same as No. 14, in page 146, with the following additions:

GENERAL ORDERS. *Head Quarters, Roxbury, June 30, 1798.*

The foregoing Resolve is transmitted to Maj. Gen. Elliot, of the first Division.

By order of the Commander in Chief.

WILLIAM DONNISON, *Adj. Gen.*

#### COMMONWEALTH OF MASSACHUSETTS.

*In Council, August 2, 1798.*

His Excellency laid before the Council a Resolution of the General Court, passed at their last session, authorizing the Governor, with advice of Council, to form the whole of the Militia in the towns of Boston and Chelsea into a Legionary Brigade, and has received the advice of Council, whether he should carry the same into effect. The Council took the matter into consideration, and thereupon advised, that his Excellency be requested to issue his orders to form said Militia into a Legionary Brigade, in such manner as he shall judge most expedient, agreeably to the said Resolutions of the General Court.

A true copy from the minutes of Council.

JOHN AVERY, *Sec'y.*

GENERAL ORDERS. *Head Quarters, Roxbury, Aug. 2, 1798.*

In conformity to the Resolution of the General Court, passed at their last session, and the advice of Council of this day, authorizing the Commander in Chief to form the whole of the Militia in the towns of Boston and Chelsea into a Legionary Brigade; he therefore orders, that the nine Companies which now form the 5th Regiment in the 1st Division, be augmented to 13 or 16 Companies as Maj. Gen. Elliot, shall find most practicable, and if he shall form them into 13 Companies, it is further ordered, that the said 13 Companies shall form three Sub Legions of foot; to say, two of four Companies each, and one of five Companies; the latter to include the Militia in Chelsea. But if the Militia aforesaid shall be augmented to 16 Companies, then they shall be formed into four Sub Legions, of four Companies each; each of the Sub Legions shall be commanded by a Major, who will give rank to his Sub Legion respectively; and the whole shall be commanded by a Lieut. Col. Commandant. That the Company of Cadets and Fusiliers in Boston (with one or two other Companies to be raised at large, in Boston, under the direction, and at the discretion of Gen. Elliot) form a Sub Legion of light troops, to be commanded by the senior officer present, belonging to said corps; the said senior officer to have power at all times, whether in the field or not, to regulate and govern the said Sub Legion of light troops as Commanding officer thereof.

That Maj. Gen. Elliot be authorized to raise one other Company of Artillery in Boston, which, when raised, together with the Company already established in Boston, form a Sub Legion of Artillery, and be commanded by a Major; and that the Company of Cavalry at present under Capt. Amory, be attached to and form a part of said Legion. The said Legion when formed shall constitute a Brigade, and be commanded by a Brigadier General, and shall be attached to and form a part of the 1st Division of the Militia of this Commonwealth. And Maj. Gen. Elliot will give all necessary orders and directions for forming and organizing said Legion, conformable to this order.

By order of the Commander in Chief.

WILLIAM DONNISON, *Adj. Gen.*

*Adjutant General's Office, Boston, Jan. 4, 1810.*

I hereby certify, that I have carefully compared the foregoing copy of a General Order, with the record in the General Orderly Book, and find the same to be a true copy. The foregoing copies of the Resolve and advice of the Council, also agree with the entry thereof in my office.

Attest,

WILLIAM DONNISON, *Adj. Gen.*

No. 13—is the General Order, as quoted in page 148.



## No. 14.

GENERAL ORDERS. *Head Quarters, Boston, Oct. 12, 1799.*

On the application of Maj. Gen. Elliot, of the 1st Division, requesting that the Independent Company of Cadets, may be taken out of the line of the Legionary Brigade, commanded by Brig. Gen. Winslow—The Commander in Chief having taken the advice of Council thereupon, hereby orders, that the Independent Company of Cadets be detached from the Legionary Brigade, and be placed on their former footing.

Maj. Gen. Elliot will also take notice, that the Lieut. Governor, with the advice of Council, has appointed William Walter a Captain of Infantry, in Wards No. 1 and 2, of the Legionary Brigade.  
By order of the Commander in Chief.

WILLIAM DONNISON, *Adj. Gen.*

*Adjutant General's Office, Boston, Jan. 6, 1810.*

I hereby certify, that the foregoing is a true copy from the General Orderly Book.

WILLIAM DONNISON, *Adj. Gen.*

## No. 15.

*Mr. President and gentlemen of the Court.*—As it is now my right to produce evidence in support of myself, against the charges exhibited against me by my prosecutor, I shall endeavor to take up as little of your valuable time as possible; nor shall I trespass on your patience any longer than the nature of the charges, and my necessary defence will require.

In support of my first plea, I shall show, that I did make my return in May last, to whom I consider is the legal officer, Lieut. Col. Badger.

In support of my second plea, I shall show, that my prosecutor is an illegal officer, and is not commissioned according to our Constitution and laws; and as soon as my abilities and understanding caused me to be convinced that my prosecutor was so illegally commissioned, it was my bounden duty by my oath, to contest his claims of command over me.

In support of my third plea, I shall endeavor to show, that it was my duty, and becoming a good officer to send the communication which I did; thereby to endeavor to save further trouble or expense to the State, which has already been burthened enough by the expense of Courts Martial, to no good purpose, in my opinion.

In establishing these positions, I shall rely, gentlemen, on a variety of oral and written evidence; some of which you have on record, and some are as follow:

1st. My return which was made in May, certified by the proper officer, and voucher to prove he was the proper officer.

2d. The Resolve, and the order predicated on that Resolve, by the Commander in Chief, in 1798, which declare that the troops of Boston should be formed agreeable to law, and that the senior offi-

cer should command those troops called Light Infantry, in and out of the field, and which do not contemplate the office of a Major.

3d. The Constitution and laws, which are in direct contradiction to the existence of such an officer, and in no way or manner whatever, have granted authority to any Executive to establish such an office.

4th. The order of Council of June 14th, 1805, which does not allow a Major unless agreeable to law.

5th. Evidences that my prosecutor has virtually acknowledged he was no Major, by not arresting me; which he has endeavored to effect since against Lieut. Ridgway, by sending him an arrest.

6th. That my prosecutor, if his command was lawful, which I positively deny, was not constitutionally and lawfully appointed, because the proper officers did not appear at the election, mentioned on your record to elect field officers.

7th. The laws, which give no authority to the Governor and Council to appoint officers to volunteer corps.

8th. A General Order, which says, that the Governor and Council have expressly declared, that although a Major was elected by Captains and Subalterns, yet he was not commissioned, because the office was not known in the laws of this State or of the United States.

9th. That it is the right and duty of an officer to disobey illegal orders (which has been done) and all orders transmitted through an illegal channel.

These are nearly all the evidence I shall produce, except quotations from the Constitution and laws.

Jan. 16, 1806.

THOMAS HOWE, *Capt. I. B. Fus.*

## No. 16.

*Sir.*—I think there must be some mistake in your return of May Inspection coming to me. I believe it has been customary heretofore, that all Company returns of inspection be made to Major Messenger, as Commanding Officer of the Sub Legion of Light Infantry, and by him made up and forwarded to the Commanding Officer of the Brigade.

Until a new organization of the Brigade is made, I think it will be best that returns, &c. should take their old course.

THOMAS BADGER, *Lt. Col. Infantry.*

*Capt. Thomas Howe, Fus. Leg. Brig.*

January 9, 1810.

## TO WHOM IT MAY CONCERN.

This may certify, that some time in the month of May, 1809, Capt. Howe did send a return of the inspection of his Company to me; conceiving it ought to be sent to Maj. Messenger, I did return the same to Capt. Howe, enclosed in this paper.

THOMAS BADGER, *Lt. Col. Infantry.*



No. 17—is the *General Order*, respecting Capt. Loring's Commission, &c. as in pages 157 and 158.

## No. 18.

To His Excellency Caleb Strong, Esq. Governor and Commander in Chief of the Commonwealth of Massachusetts.

Sir—Respectfully I beg leave to state to your Excellency, that in General Orders, bearing date Aug. 2, 1798, organizing the Militia of Boston and Chelsea into a Legionary Brigade, there is the following clause: "That the Companies of Cadets and Fusiliers in Boston, with *one or two* Companies to be raised at large in Boston, under the direction and at the discretion of Major Gen. Elliot, form a Sub Legion of light troops, to be commanded by the senior officer present, belonging to said corps."

On the 18th April, 1801, Brig. Gen. Winslow made application to have a Company, commanded by Capt. Daniel Messinger, detached from the Infantry, and to be attached to the light troops, for reasons expressed in his letter, a copy of which is herewith enclosed. Conceiving myself fully and sufficiently authorized by the discretionary power above quoted, I had no hesitation in complying with his request, and issued an order to that purpose, on the 30th of April, 1801, a copy of which is in the enclosed paper. No difficulty appeared to arise from this measure until very lately. Gen. Winslow informs me that he has met with some disappointment at the Adjutant General's office, in not being able to obtain a Commission for Capt. Messinger that shall accord with his present command: it occasions an unpleasant embarrassment, and I pray your Excellency to take the subject into consideration and decide thereon.

A Company commanded by Capt. Joseph Loring, Jun. raised at large, and now attached to the Infantry in the Legionary Brigade, Gen. Winslow is very desirous to have transferred to the Sub Legion of Light Infantry, which would complete the number of Companies requisite, and that they should be commanded by a Major, and then the Brigade would be completely organized. Brigadier Gen. Winslow thinks it necessary that there should be another Adjutant to the Infantry, and one to the Light Infantry.

These communications are most respectfully submitted, by your Excellency's most obedient and very humble servant,

SIMON ELLIOT, *Maj. Gen. 1st Div.*

Boston, Oct. 22, 1804.

## COMMONWEALTH OF MASSACHUSETTS.

*Secretary's Department, Jan. 6, 1810.*

The foregoing is a true copy of the original letter, as on the file of the honorable Council, under date of the 14th June, 1805.

Attest,

WM. TUDOR, *Secretary of the State.*

## No. 19.

## COMMONWEALTH OF MASSACHUSETTS.

The Committee of Council, to whom were referred the communications of Maj. Gen. Elliot and the Adj. General, on the subject of organizing the Sub Legion of Light Infantry of the Legionary Brigade of the town of Boston, respectfully report, as their opinion, That his Excellency should direct the Adj. General to issue the following order to Maj. Gen. Elliot, that the said Sub Legion consist of the following Companies, viz. the Boston Fusiliers, commanded by Capt. Brazer; the Boston Light Infantry, commanded by Capt. Davis, who will receive a commission as Captain of Light Infantry, and take rank from the date of his commission as Captain in the Boston Regiment; the Winslow Blues, commanded by Capt. Messinger, who will receive a commission as Captain of Light Infantry, and take rank from the date of his commission as Captain in the Boston Regiment; and the Infantry Company, commanded by Capt. Loring, who will also receive a commission as Captain of Light Infantry, and take rank from the date of his present commission: and the Brigadier General of the Boston Legionary Brigade, will issue his orders agreeably to law, to the officers of the said Sub Legion to assemble for the purpose of electing a Major, to take the command of said Sub Legion.

Read and accepted.

A true copy of record as amongst the proceedings of Council, under date of June 14th, 1805.

WILLIAM TUDOR, *Sec'y of State.*

*Secretary's Office, Jan. 8, 1810.*

## No. 20.

## DIVISION ORDERS.

*Canton, Nov. 24, 1809.*

Upon the complaint of Maj. D. Messinger, you are ordered to arrest Capt. Howe, of the Fusiliers.

(Signed) ELLIJAH CRANE, *Maj. Gen. 1st Division.*

To Lt. Col. Thos. Badger, senior officer  
of the Leg. Brigade, Boston.

## BRIGADE ORDERS.

*Boston, Dec. 1, 1809.*

In obedience to Division Orders of the 24th ult. above copied, Capt. Howe, of the Fusiliers, is under arrest, on a complaint exhibited against him by Maj. D. Messinger.

THOMAS BADGER, *Lt. Col. Comdt. of  
1st Reg. and sen. officer Leg. Brig.*

To Capt. Thomas Howe.

No. 21—is the same as No. 11, in page 240.



*Council Chamber, Dec. 19, 1809.*

The Committee on militia affairs having examined the returns of Maj. Gen. Crane, of the arrangement made by him in the Legionary Brigade of the first Division, agreeably to a Resolve of the General Court of the 15th of June last—

*Report,* That the Council advise his Excellency the Governor to approve of said arrangement, except as to the annexation of Majors Stearns and Stodder to the second and third Regiments; and as to those officers, that his Excellency be advised to direct Major Gen. Crane to annex them to the first Regiment in the Legionary Brigade, which will be conformable to the regulation established by the General Order of the 23d of March, 1809; and that the arrangement so amended, be recorded in the Adj. General's office.

The Committee further report, that on due examination of the several remonstrances and petitions against the elections of officers, and courts of inquiry occasioned by the late elections in the Legionary Brigade in Boston, it appears that the Maj. General has regularly and properly adjusted the differences in the respective Companies; and by his return of the arrangement of the Legionary Brigade of Infantry, has annexed Capt. Loring's Company to the first Regiment of said Brigade.

GENERAL ORDERS. *Head Quarters, Boston, Dec. 19, 1809.*

The Commander in Chief having taken the advice of Council as aforesaid, approves of the arrangement made by Maj. General Crane, except as to the annexation of Majors Stearns and Stodder to the second and third Regiments; and as to those officers, Maj. Gen. Crane will annex them to the first Regiment in the Legionary Brigade, which will be conformable to the regulations established by the General Order of the 23d of March, 1809; and the arrangement so amended will be recorded in the Adj. General's office.

On the subject of the several petitions, remonstrances, and proceedings, mentioned in the aforesaid advice of Council, it appearing that Maj. Gen. Crane has regularly and properly adjusted the differences, as therein mentioned; and by his return of the arrangement of the Legionary Brigade, has annexed Capt. Loring's Company to the first Regiment of said Brigade—Therefore, all officers and others in the Militia whom it may concern, will govern themselves accordingly.

By order of the Commander in Chief.

WILLIAM DONNISON, *Adj. Gen.*

*Adjutant General's Office, Boston, Jan. 6, 1810.*

I hereby certify, that the foregoing is a true copy from the General Orderly Book.

WILLIAM DONNISON, *Adj. Gen.*

*Mr. President, and Gentlemen of this honorable Court,*

In the course of my defence I shall have occasion to call your attention to the following articles of our Constitution, and sections of our Laws, in whole or in part:

*Declaration of Rights*, part 1, articles 10, 11, 12, 17, 18, 20, 28, 29, 30.—*Constitution of Massachusetts*, part 2, chap. 1, sect. 1, art. 4; chap. 2, sect. 1, art. 7, 10; chap. 6, art. 1, 11.—*Massachusetts Laws*, June 22, 1793, sect. 5, 6, 7, 12, 13, 15, 25; March 14, 1806, sect. 11, 12.—*United States Laws*, May 8, 1792, sect. 3.

*Roxbury, Jan. 10, 1809.*

THOMAS HOWE, *Capt. I. B. E.*

GENERAL ORDERS.

*Head Quarters, Boston, March 23, 1809.*

The Commander in Chief, in pursuance of the advice of Council, orders, that in future whenever any Regiment, or Company, shall be divided by the order of the Governor and Council—the field and staff officers, shall remain and be attached to the original Regiment or Company; and the new Regiment so created, as also the new Companies, shall respectively have new officers, to be elected agreeably to the provisions of law, either from the new Corps, or from among the original field and company officers, as the electors shall deem proper.

By order of the Commander in Chief.

(Signed)

WILLIAM DONNISON, *Adj. Gen.*

*Adjutant General's Office, Jan. 15, 1810*—The foregoing is a true copy.

Attest,

Wm. DONNISON, *Adj. Gen.*



