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record from the Circuit Court of the United States for the District of Rhode Island, and on the questions and points on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, and it appearing to this court, upon an inspection of the said transcript, that no point in this case, within the meaning of the act of Congress, has been certified to this court, it is thereupon now here ordered and decreed by this court, that this cause be and the same is hereby dismissed, and that this cause be and the same is hereby remanded to the said Circuit Court to be proceeded in according to law.

*CHARLES WILKES PLAINTIFF IN ERROR, v. SAMUEL DINSMAN. [*89]

In a suit brought by a marine against the commanding officer of a squadron, in which the marine alleged that he was illegally detained on board after the expiration of his term of enlistment, it was competent for the defendant to give in evidence a letter which he had written to the Secretary of the Navy, relating to the circumstances of the enlistment.

An acquittal of the commanding officer by a court-martial, when tried for the same acts by order of the government, is not admissible evidence in a suit by an individual.

The act of Congress passed on the 2d of March, 1837 (5 Stat. at L., 153), authorized a reënlistment of marines to serve during the cruise then about to take place, they being included in the denomination of "persons enlisted for the navy." Prior laws recognize marines as a part of the navy.

Under the same act, the commander of the squadron had power to detain a marine after the term of his enlistment expired, if, in the opinion of the commander, public interest required it.¹

At the time of enlistment, the marine corps being subject to such laws and regulations as might, at any time, be established for the better government of the navy, it was a part of the contract of enlistment that the party should obey them, whenever passed. It was, therefore, no objection to such laws, that they were passed after his entering the service.

By the third article for the government of the navy, the commander is authorized to cause twelve lashes to be inflicted, for scandalous conduct, without a court-martial. Every successive disobedience of orders is a fresh offence, and subject to additional punishment.²

The commander had not only a right to cause corporal punishment to be inflicted, but to resort to any reasonable measures necessary to insure submission. He had, therefore, a right to imprison the refractory party on shore, if done without malice.

¹ FURTHER DECISION. *Dinsman v. Wilkes*, 12 How., 390, where it is held that his decision upon this question is conclusive, and non-conformance with

it by a marine, is ground for punishment.

² Punishment of refractory sailors in the navy is now regulated by Rev Stat., § 1624.

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The commander was acting as a public officer, invested with certain discretionary powers, and cannot be made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty. His position is quasi judicial.

Hence, the burden of proof that the officer exceeded his powers is upon the party complaining; the rule of law being, that the acts of a public officer, on public matters, within his jurisdiction and where he has a discretion, are to be presumed legal till shown by others to be unjustifiable.

It is not enough to show that he committed an error in judgment, but it must have been a malicious and wilful error.³

THIS case was brought up, by writ of error, from the Circuit Court of the United States for Washington county in the District of Columbia.

It was an action of trespass *vi et armis*, for assault and battery and false imprisonment, brought, in the Circuit Court, by Dinsman, a marine in the service of the United States, who served in the Exploring Expedition, which was commanded by Wilkes.

The facts were these.

On the 14th of May, 1836, Congress passed an act (5 Stat. at L., 23), authorizing the President to send out a surveying and exploring expedition to the Pacific Ocean and South Seas, and appropriating \$150,000 for the object.

³ CITED. *Townsend v. Jemison*, post, *720. *S. P. Kendall v. Stokes*, 3 How., 87; *Gould v. Hammond*, McAll., 235; *State v. Prescott*, 31 Ark., 39; *Spitznogle v. Ward*, 64 Ind., 30; *Edwards v. Ferguson*, 73 Mo., 686. But where the law requires the performance of a ministerial duty by a public officer, which duty he refuses to perform, he is responsible in damages to a person injured thereby, notwithstanding such refusal was based upon a mistaken idea as to his duty, and was made with honest intentions. *Amy v. The Supervisors*, 11 Wall., 136. *S. P. Brewer v. Watson*, 65 Ala., 88; *Olmsted v. Dennis*, 77 N. Y., 378, 382. Where, however, the performance of such duty by the officer is demanded in an abusive and insulting manner by the person entitled to its performance, the officer is not responsible for refusing to comply with the demand. *Boyden v. Burke*, 14 How., 575.

This principle of official non-liability is carried to its greatest extent when applied to the alleged wrongful acts of judges of courts of superior or general jurisdiction. Such officers

"are not liable to civil actions for their judicial acts even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously and corruptly." If, however, the wrongful act was done in the "clear absence of all jurisdiction over the subject-matter," the officer will be liable. *Bradley v. Fisher*, 13 Wall., 335, 351. "This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Ib.*, 350 n. *S. P. Lange v. Benedict*, 73 N. Y., 12; *Morton v. Crane*, 39 Mich., 526; *Pickett v. Wallace*, 57 Cal., 555. And the rule has been held to extend to arbitrators. *Jones v. Brown*, 54 Iowa, 74; s. c., 37 Am. Rep., 185; and to municipal officers appointed to award contracts to the lowest responsible bidders. *East River Gas Light Co. v. Donnelly*, 25 Hun (N. Y.), 614; and to grand jurors. *Turpen v. Booth*, 56 Cal., 65; s. c., 38 Am. Rep., 48.

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On the 21st of November, 1836, Dinsman enlisted in the marine corps of the United States for four years.

*On the 2d of March, 1837, Congress passed an act (5 Stat. at L., 153), entitled, "An act to provide for [*90 the enlistment of boys for the naval service, and to extend the term of the enlistment of seamen." The second section was as follows, viz. :—

"That when the time of service of any person enlisted for the navy shall expire while he is on board any of the public vessels of the United States employed on foreign service, it shall be the duty of the commanding officer of the fleet, squadron, or vessel in which such person may be to send him to the United States in some public or other vessel, unless his detention shall be essential to the public interests, in which case the said officer may detain him until the vessel in which he shall be serving shall return to the United States; and it shall be the duty of said officer immediately to make report to the Navy Department of such detention, and the causes thereof."

In October, 1837, Thomas Ap Catesby Jones, then commanding the vessels which were preparing to sail on the expedition, issued a general order, proposing to give three months' pay as bounty, and forty-eight hours of liberty on shore, to all the petty officers, seamen, and marines who should reënter for three years from the first of the ensuing November.

In the same month, viz. October, 1837, a contract was made between Jones and the non-commissioned officers and privates of marines, which was as follows :—

"We, the subscribers, non-commissioned officers and privates of marines, do, and each of us doth, hereby agree to and with Thomas Ap Catesby Jones, captain of the United States navy, in manner and form following, that is to say: In the first place, we do hereby agree, for the consideration herein-after mentioned, to enter into the South Sea surveying and exploring service of the United States, and in due and seasonable time to repair on board such armed vessel or vessels as may be ordered on that service; and to the utmost of our power and ability, respectively, to discharge our several services or duties, and in every thing to be conformable and obedient to the several requirings and lawful commands of the naval officers who may, from time to time, be placed over us.

"Secondly. We do also oblige and subject ourselves to serve during the term of the cruise; and we do severally oblige ourselves, by these articles, to comply with, and be

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subject to such rules and discipline of the navy of the United States as are, or that may be, established by the Congress of the United States.

*[91] "Thirdly. The said Thomas Ap Catesby Jones, for and in behalf of the United States, doth hereby covenant and agree to and with the said non-commissioned officers and privates of the marines, who have hereunto signed their names, and each of them, that they shall be paid for such services the amount per month which, in the column hereunto annexed, is set opposite to each of their names, respectively; and likewise to advance to each and every of them *three months' bounty*, the receipt whereof they do hereby acknowledge; and that they shall be punctually discharged at the expiration of the term of their enlistment, or as soon thereafter as each vessel of the expedition shall return to a port of safety in the United States.

Name.	Grade.	Pay per Month.	Signatures.	Witness.
Philip Baab	Private	\$7	his Philip  Baab mark.	James Edelin.
Samuel Dinsman	Private	7	his Samuel  Dinsman mark.	James Edelin."

On the 25th of October, 1837, a part of the bounty was paid, amounting to \$15, and soon afterwards the remaining \$6, making together three months' pay.

On the 20th of April, 1838, Lieut. Com. Charles Wilkes was appointed to the command of the squadron.

On the 2d of August, 1838, A. O. Dayton, the Fourth Auditor of the Treasury Department, wrote letters to the pursers of the vessels, directing them to charge the marines with the amount of bounty which had been paid to them, alleging that it was prohibited by law.

In the course of the month of August, 1838, the expedition sailed.

On the 1st of September, 1838, Captain Wilkes addressed a letter to the Secretary of the Navy, expressing surprise that the pursers had been directed by the Fourth Auditor to charge the marines with the amount paid to them as bounty, and informing the Secretary that he had ordered the pursers not to do so. With this letter were sent some other papers, illustrative of the transaction. The pursers obeyed the order of Captain Wilkes.

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In the months of November and December, 1840, the transactions occurred, which are set forth with great particularity in the bill of exceptions.

On the 24th of November, 1842 (the squadron having returned home), Dinsman brought this action against Wilkes. *In the mean time, however, a court-martial had been [*92 held upon Wilkes, one of the charges before which was "cruelty and oppression," founded upon the same occurrences which are set forth in the bill of exceptions. The finding of the court was, that the accused was "not guilty."

In March, 1845, the cause came on for trial before the Circuit Court, the counsel on both sides having previously agreed that the defendant might give the special matter in evidence as though it was fully pleaded. The jury found a verdict of guilty, and assessed the damages of the plaintiff at five hundred dollars.

The following bills of exceptions were taken in the progress of the trial:—

Plaintiff's 1st Bill of Exceptions.

Samuel Dinsman v. Charles Wilkes.

At the trial of this case, the plaintiff, to support the issues on his part joined, read in evidence, to have the same effect, by consent of parties, as if the original enlistment of the said plaintiff were produced, the certificate of Major Parke G. Howle, adjutant of the marine corps of the United States; and also read in evidence, for the purpose of showing the forms and mode of such enlistment, without objection, certain blank forms, used and adopted in all regular enlistments or reënlistments into said marine corps. And said Howle testified, he being examined as a witness, that, by the rules and regulations of said corps, the said forms of said enlistment were required to be indorsed by the recruiting officer, for the purpose of identifying the officer by whom such enlistment was made, and that such enlistment was regularly made.

The said plaintiff then gave evidence, further tending to prove, that he embarked, under orders as a private in said marine corps, in the United States Exploring Expedition, which sailed from the United States on or about the 18th day of August, A. D., 1838, under the command of the defendant, who was a lieutenant in the navy of the United States; that afterwards, while the United States ship *Vincennes*, one of the vessels of the said expedition, was at the island of Oahu, one of the Sandwich Islands, in the Pacific

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Ocean (from which American vessels frequently sailed to the United States), the term of four years, for which the said plaintiff had enlisted as aforesaid, expired and was fully ended; and the said plaintiff, then and there, to wit, on the 16th day of November, A. D., 1840, on board said ship, claimed of the defendant his discharge from the service of the United States, and refused to perform the duties required of him by *93] the defendant (still *commanding said expedition and said ship) and his subordinate officers; whereupon the defendant, then and there, committed the trespasses, as alleged in the declaration in this case on the part of the said plaintiff; and afterwards the said expedition and the said ship sailed from the said island, carrying said plaintiff on board of said ship, commanded by the said defendant in person; and that, while the said plaintiff was on board of said ship, as last aforesaid, he was repeatedly flogged and put in irons, by order of said defendant, for refusing to perform the duties of a marine on board of said ship, required of him by order of said defendant; and the said plaintiff was detained on board said ship, or some other vessel of said expedition, continually, by order of said defendant, and against his consent, until the return of said ship or other vessel to the United States, about the 15th of June, A. D., 1842, although the said ship touched at various foreign ports before her said return to the United States, and after the term for which said plaintiff had enlisted, as aforesaid, was completed and expired.

The said plaintiff then rested his case.

And thereupon the defendant offered evidence tending to show, that, after the passage, by the Congress of the United States, of the act of 1836, making appropriations for the naval service, the President of the United States proceeded to carry the said act into effect, and appointed Thomas Ap C. Jones, a captain in the United States navy, to command the expedition authorized by said act; that the vessels designed for the expedition were assembled at New York, under the command of said Jones, and were there in the month of October, 1837, and on the 21st day of said October the said Jones issued his general order No. 2; that the said general order was read to the ship's crew of the ship Relief, on which ship the said plaintiff was at that time serving as a marine under his said enlistment; that it was read by the officer then in command of said ship, and by him placed in the "booby-hatch," a conspicuous part of said ship, to which all the men had access, for their perusal, and remained there during the greater part of the morning; that the said Jones also addressed an order to the pursers of the squadron, herein-

after appended; the defendant then produced to the court the following written papers, viz.: a paper purporting to be a contract between said Jones and the plaintiff, with other persons, and a paper purporting to be a receipt for bounty, and then proved to the court, by the subscribing witnesses thereto, that said papers were signed by the said plaintiff as they purport to be, and that before signing the same the said papers were read to said plaintiff; and that said first paper, purporting to be a contract as aforesaid, was prepared by order *of said Jones, and that the subscribing witnesses thereto were commissioned officers of the United States; and that, after the signing of said papers, the said plaintiff received, on the 25th of October, 1837, the sum of \$15, and subsequently the further sum of \$6, making \$21 in all, being a sum equal to three months' pay, and the same was paid to and received by said plaintiff as bounty; and the defendant further offered evidence to the court, tending to show, that from that time forth to his return to the United States, in the said month of June, 1842, the said plaintiff received from the said United States his monthly pay of \$7 per month, being the amount stipulated in the said shipping articles, over and above the sum of \$21, paid and received as aforesaid as bounty; and he further offered evidence to the court to show, that the said Jones resigned his said command before the sailing of the said expedition; and that, on the 20th of April, 1838, it was given to the defendant by order of the Secretary of the Navy of that date.

That said defendant sailed from the United States in the month of August, 1838, in command of the said squadron under the instructions of the President, which it is agreed may be read from the printed history of the said expedition.

That, about the time of the sailing of the said expedition, the pursers thereof received from the Fourth Auditor of the Treasury a communication, inquiring by what authority the said bounty had been paid to the marines, of whom one was the said plaintiff, and disallowing it in the accounts of said pursers, and requiring them to charge the same to the men on their pay accounts, and deduct the same therefrom, which said last communication was reported by said pursers to the defendant; and thereupon the defendant issued his order of the 14th September, 1838, now read to the court, which order was thereupon obeyed by said pursers, and the said "bounty money" never was charged to said men.

And the said defendant then offered to read in evidence to the jury the said written papers, so as aforesaid signed by the plaintiff, and also the said letter of said defendant, addressed

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to the pursers as aforesaid, in connection with each other, and with all the evidence hereinbefore stated; but the plaintiff, by his counsel, objected to the admissibility of the said written paper, purporting to be a contract or shipping articles, and also to the admissibility of the said receipt for bounty, and also to the admissibility of the said letter of the said defendant, whether the same are offered as independent evidence, or in connection with each other, or with other evidence; but the court overruled said objections, and suffered all of said papers and the said letter to be read *95] in evidence to the jury, as *competent testimony. And the said plaintiff excepts to the opinion of the court, and to the admissibility of each and every of said papers, and said letter so admitted, and claims the same benefit of exception as if each of said papers and the said letter were separately excepted to; and this, their bill of exceptions, is signed, sealed, and enrolled this 24th day of April, A. D., 1845.

W. CRANCH. [SEAL.]

To this bill of exceptions were attached the following papers, referred to in a preceding part of this statement, viz.:—

1. The date of enlistment, in November, 1836.
2. A blank form of enlistment.
3. An order from Commander Thomas Ap Catesby Jones to the pursers, directing them to pay three months' bounty.
4. The contract between Jones and the marines.

Defendant's 1st Bill of Exceptions.

On the further trial of this cause, and after all the evidence contained in the foregoing bills of exceptions, as well those taken by the plaintiff in his said first bill, as also those taken by defendant, and the rulings of the court therein contained, the defendant, further to maintain the issue on his part joined, offered to give evidence tending to show, that, after the sailing of the said squadron under his command, to wit, in August, 1838, from the waters of the United States, and after the receipt by the pursers of the said squadron of the said letter of the Fourth Auditor, inquiring by what authority the said pursers had paid the said bounty to the said marines, and requiring them to charge them therewith, the marines on board his said ship murmured at the said requisition of the said Fourth Auditor, and that said plaintiff was on board the said ship, and so continued up to the time of the said supposed grievances, without objection; and after

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the said supposed grievances he continued to serve as a marine in the said squadron, and received pay as such marine, until his arrival in the United States, where he was discharged. And, also, that Simeon A. Stearns was the non-commissioned officer in command of said marines during the whole cruise, from the time of their sailing to their arrival in the United States, there being no commissioned officer of marines attached to the said expedition; that he also acted as quartermaster of marines, and he was the only medium of communication, according to the rules and regulations of the service, between the said marines and the said defendant, commanding as aforesaid. And, thereupon, he offered further evidence to show *that the defendant, at the time he issued to the said pursers the said order, contained and [*96 set out in plaintiff's first bill of exceptions, not to charge the men with the said bounty, he communicated the said order, so issued by him as aforesaid, to the then Secretary of the Navy, by a letter, in the words and figures following, to wit (copied in the record), and accompanied the said offer with proof that the said letter was received by the said Secretary of the Navy; and also offered to read the said letter, (or report in the form of a letter,) made by the said Sergeant Simeon A. Stearns to the defendant, and referred to in his, the defendant's said letter, last mentioned, to the said Secretary of the Navy, accompanying the said offer with proof of the handwriting of said Stearns, and that he is now (if living) out of the jurisdiction of the United States.

And the plaintiff, by his counsel, objected to the reading of the same, or either of them, to the jury, and the said court refused to permit the said papers, or either of them, to be read in evidence to the jury; and thereupon the defendant, by his counsel, excepts to the said ruling of the said court, and prays that this bill of exceptions may be signed, sealed, and enrolled, according to the statute, which is done accordingly, this 25th day of April, 1845.

W. CRANCH. [SEAL.]

Defendant's 2d Bill of Exceptions.

And on the further trial of the said issues, the said defendant, after all the evidence contained in the foregoing bills of exceptions, made part hereof, and the several rulings of the court set out therein, offered in evidence the proceedings of a court-martial, held in the city of New York, (and which it is admitted was lawfully called and proceeded in,) for the trial of the said defendant, Charles Wilkes, on certain charges and

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specifications prepared against him by the Executive of the United States; and among others, upon the charge and specification hereinafter appended; and that the said court-martial duly proceeded to try the said Charles Wilkes on the said charge and specification, and that, on the trial thereof, the said Philip Baab, one of the plaintiffs in said trial, was examined as a witness, and the judgment of the said court on the said charge and specification was as hereinafter appended. And the said plaintiff agreeing that the said extracts may be made from the said record, and considered as if the whole record were herein inserted, objects to the reading of any part of the said record as evidence in this cause, except the statements of said plaintiff Baab, contained in said record, which the plaintiff's counsel does not object to, so far as they *97] are relevant to the issues *joined; and the court sustains the said objection, and refuses to permit the same to be given in evidence; and the said defendant, by his counsel, excepts thereto, and prays the court to sign and seal this exception, and to cause the same to be enrolled according to the statute, all which is done and ordered, this 25th day of April, 1845.

W. CRANCH. [SEAL.]

Specification referred to in the foregoing bill of exceptions, to wit:—

Charge 4th.—Cruelty and Oppression.

Specification.

In this, that the respective terms of service of Samuel Pensyl, Philip Baab, George Smith, and Samuel Dinsman, "private marines," then serving on board the United States ship Vincennes, having fully expired on the 16th day of November, 1840, the said Wilkes did refuse to give said marines their discharge, in conformity with the terms of their enlistment; that upon said marines declining to do further duty, the said Wilkes did cause them, on or about the 16th of November, 1840, to be put in double irons, and shortly after, on the same day, to be sent on shore at Honolulu, and to be confined in the fort at a place infested with vermin; that, upon the second day of their confinement, they were separated and kept in solitary confinement; that on the 27th of November, 1840, by order of said Wilkes, they were deprived of one-half their ration, which consisted mostly of "poe" and goat's meat; that on the 2d of December, 1840, the said marines were taken out and carried on board the United States ship

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Vincennes, in irons, except George Smith, who was taken on board the Peacock; that said Wilkes asked them if they would go to duty, and upon their respectfully stating that the term of their enlistment had expired, the said Wilkes then confined them in double irons in the brig, a place of confinement for prisoners in said ship; that on the 4th of December, he, the said Wilkes, had the said Samuel Pensyl, Philip Baab, and Samuel Dinsman seized up in the gangway, and inflicted on them one dozen lashes each; that he again confined them; that on the 7th of the same month, he had inflicted on them another dozen of lashes each; that after this system of lashing and confinement, for the preservation of their lives, the said marines were compelled, against the terms of their enlistment and against their free will, to do duty in the squadron, under the command of said Wilkes.

*Judgment of Court-Martial.

[*98]

Judgment of the court-martial on the above specification, referred to in defendant's second exception, to wit:—

The 4th charge.

That the specification of the 4th charge is not proven, and
That the accused, of the 4th charge, is not guilty.

Defendant's Statement of Evidence.

On the further trial of this cause, and after the evidence contained in the foregoing bills of exceptions on the part of plaintiff and defendant, and made part hereof, the defendant further gave evidence to show that the said squadron, under the command of the said defendant, continued on the said cruise, and proceeded to the great southern seas, and explored and surveyed the Antartic region as far as it was possible, and in that service the said ship Vincennes received extensive and serious injury; that, proceeding on her said cruise, the said ship Vincennes, in the month of September, 1840, arrived in the Port of Honolulu, in the island of Oahu, one of the Sandwich Islands, in the Pacific Ocean, and there came to anchor in the inner harbour, and close to the shore, and proceeded to refit and repair; that it was necessary to the safety of the ship, while undergoing these repairs, to be thus close to the shore, and in the inner harbour, and it would have been unsafe, if not entirely impracticable, to have made them elsewhere; that she had then made a long voyage, and had been constantly at sea for a long period of time, during which her

foremast had received such injuries that it was found necessary to take it out; her seams were open, and the whole hull required repairing, to be recaulked and painted; her hold had to be broken up, and her stowage overhauled; the water-casks were taken out, the sails taken off, and the ship almost stripped and dismantled; that about this time the period of service of some of the seamen who had not shipped for the whole cruise was about to expire, and the defendant, anxious to retain them in the service, addressed the ship's crew, and endeavoured to prevail on each of the seamen whose term of service was about to expire to reship, and, as an inducement to them, offered to give them liberty on shore; and as a reward to all those who had served so long and faithfully, and who were yet bound to continue on the cruise, in the exploration and survey of the Northern Pacific, he offered the same favour to them; leave was granted to all, and after their leave had expired, they set about overhauling and repairing the ship; while this work *99] was going on, *the natives, many of whom live almost in the water, were exceedingly troublesome, and surrounded the ship continually, and thus kept up a communication with the men on duty; that soon after the arrival of the said ship at said port, the officers charged with the exploration and survey, and with other scientific duties, went on shore, taking with them their instruments, and such men as were necessary to enable them to perform their duties; the defendant himself being also engaged at the observatory, on shore, pursuing his duty, aided by such officers and men as were necessary, yet keeping within sight of the ship, having a constant communication with her, and going on board as often as was found necessary, and throughout retaining the command; that the general charge of the ship was left to the first lieutenant, who, it is admitted, was a competent, faithful, intelligent, and vigilant officer, aided from day to day by such officers as could be spared from the discharge of other duties pertaining to the expedition; that the general object of the expedition was a peaceful voyage, to explore and survey coasts, seas, and islands, and to make such investigations as might be found practicable in aid of science; and these general objects being held the primary purpose, for the most part, the detail of the ship's service and duty was made subordinate to them, and thus more of the officers and men were for the time withdrawn from the immediate duties of the ship than otherwise would have been; that under these circumstances, while lying in the said port, the marines on board being employed, among other duties, in keeping guard over such men as were from time to time imprisoned in the

ship, and before the happening of the events complained of in the declaration, on one occasion, a man confined in double irons, under charge of the marines, was during the night permitted to escape, having first managed to get his irons off; it being the duty of the sentinel to be close to and keep constant guard over him, and, the sentinels or guards being changed every two hours, it was found impossible to discover during whose watch the escape had been made; on another occasion, a man thus imprisoned was, against the rules, &c., of the ship, furnished with liquor, and, while under guard, permitted to get drunk; on another occasion, a man thus imprisoned under guard of the marines was permitted to make his escape, and it thus became evident to the defendant that there was among the marines on board great relaxation of vigilance and neglect of duty; and on the 16th of November, 1840, Baab and two other marines, separately and collectively, the defendant then being engaged in duty on shore, and the first lieutenant having charge of the ship, refused any longer to do duty as such *marines, pretending their term of [*100 service was up, and saying they wished to be sent home; that the first lieutenant immediately reported these facts to the defendant, who came on board and summoned the said Baab, and the other two marines, before him, and inquired of them if they still refused to do duty: they replied, as they had before to the first lieutenant, and did refuse; thereupon the defendant ordered them into custody, and directed that they should be sent on shore, and imprisoned in the fort on the island; that, a few days afterwards, Dinsman in like manner refused to do duty, and was sent to the said fort. The defendant then offered the evidence of four officers of the said ship, to show that it would have been unsafe, if not impracticable, in the then condition of the said ship, to have confined the said plaintiff on board; that the fort on the said island, in which the plaintiff was confined, was used as a place of confinement for the seamen of merchant-vessels lying in the said port; and that seamen who had been confined therein were enlisted in said port, and brought from said fort into the said ship Vincennes; that the governor professed Christianity, spoke English, and resided within the said fort, where he was visited from time to time by various officers of the said ship; that the prison of the said fort is nothing more than the houses erected for the military, and is composed of small huts or houses built in the native fashion, having the back toward the wall of the fort, with the front looking out upon an open space, in front also of the governor's house; that there are no doors to close these huts or cells, the climate

being so mild as not to require them, and, the doors being always open, they are thus allowed a freer circulation of air, and rendered more comfortable; that the furniture consists, in some instances, of a matting on the floor, matting around the walls, and a bunk filled with matting for sleeping; in others there is no mat on the floor, (the floor of all is of earth,) matting only on two sides, and a bunk filled with mats on the floor; that the food supplied to the prisoners is the common food of the inhabitants, and wholesome, palatable, and invigorating, consisting of a vegetable called "taro," and fish; that the plaintiff was allowed to go out once a day, out of the walls of the fort, under the charge of a native officer, and his irons were then taken off; that the sergeant of the marines, there being no commissioned officer in command, commanded them, and was also their quartermaster, and as such was bound to look after their comfort, and report their wants to the defendant; and according to the discipline of the ship, and the rules and usage of the service, he was the only person to whom the marines could look, *101] and through whom *they could communicate with the defendant; that the said sergeant did visit the plaintiff while in prison, and never did report that he was suffering from confinement or otherwise in want of proper food or raiment; that such report, if ever made, must have been made through the first lieutenant of the said ship, and never was made to or through him; they further showed, that, according to the discipline of the said ship, and the rules and regulations of the navy, it was the duty of said sergeant of marines to make report to said first lieutenant of every case in which any vermin of any sort or description were found upon any marine, or among his clothing, and no such report was made to the said first lieutenant by the said sergeant of or concerning the said plaintiff; and also that, in the execution of the duties required of the defendant and the officers and men under his command, in and by the instructions of the President, as set out in the said printed book, no part of the armed force employed in the said expedition was more important than the marines, who were not only required on board said ships for the ordinary duties thereof, but who were more essential for the protection of the officers and men on shore, while making explorations, surveys, and observations, and gathering the information and facts directed by said instructions; that their services were deemed at the time the said vessels were at Honolulu most requisite in the subsequent part of the cruise; that the said ships were then to visit the wild shores, and the officers and men to come into contact with the

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ferocious savages, of the Northwest Coast of America, where the marine force was especially needed; and it was deemed of the utmost importance to keep that force as large as possible, and that the after experience of the voyage confirmed these impressions; that it was with this view deemed essential to the public interest to keep said plaintiff on board said ship, and to require him to perform the duty of a marine; that the said defendant, with all reasonable despatch, proceeded with the repairing and refitting of the said ships, which was not completed until the survey and exploration of the said island of Oahu had been finished, and so soon as the said ship was in order the said plaintiff was brought on board; that, upon being brought on board, he was required by the defendant to go to duty, and refused, and was ordered to be imprisoned in irons; the next day he was brought up, the ship being then under weigh, and having left the said port, and again interrogated by the defendant, and required to go to duty; that he expostulated with said plaintiff, and explained his position, and his duty to punish him if he persisted in such refusal; that he called before said plaintiff the sergeant who commanded him, *and who had signed with him the said [*102 articles contained in the said contract marked A, and required him to state to said plaintiff explicitly the terms of that contract; that the said sergeant did, in fact, explain it to him, and inform him that he was bound to serve out the cruise; that plaintiff denied having signed any such contract, and refused to go to duty; that defendant pointed out to plaintiff how essential his services were to the public interest, and he still refused; that defendant then ordered him to receive twelve lashes on his bare back, and the punishment was accordingly inflicted in the manner pointed out in the rules and regulations of the navy; that defendant then ordered him to be released, and permitted to go at large among the crew, stating that he did so to give him an opportunity to converse with his comrades, and learn his obligations, and return to duty; that, on the evening of the same day, the sergeant again reported plaintiff as refusing to do duty; he was again called before defendant, and required to go to duty, and again refused, and was committed to prison as before, and the next morning again brought before defendant, required to go to duty, refused to do so, and was punished according to the said usage and discipline, and rules and regulations; that he afterwards went to duty; the defendant then further gave evidence, by the said naval officers, and other civilians attached to said expedition, and on board the said ship, that, on the several occasions of punishment aforesaid, the defen-

dant did not exhibit any appearance of violence or passion, but was calm, temperate, and cool, and expressed his regret at the necessity he was under of punishing the said plaintiff.

And the defendant further gave evidence, tending to show that said plaintiff was not confined in double irons, or separately, in the said prison, but was at large within the walls of said fort; and that said fort was a comfortable place of residence, and more so than the prison of the ship in the situation in which the said ship was during the time of said improvement; and further, that defendant had reasonable cause to fear the spread of the disaffection among the said marines; and the officers knew not whom to trust at the time and times of the imprisonment aforesaid of said plaintiff; and that, shortly before the imprisonment of said plaintiff, two marines on board the ship *Peacock* had been arrested, and sent on board the ship *Vincennes*; that, previous to the arrest of said plaintiff, he, with other men, had agreed among themselves, before they reached Honolulu, to demand their discharge as soon as the terms of their enlistment had expired, and they were in a port where they could be sent *103] home; that, on arriving at Honolulu, and after most of the seamen had reshipped, and no offer had been made to the marines to reship, they had a conversation, and required their sergeant to report to the captain that their terms were up, and they required to be discharged in that port where there were vessels to take them home; and that, while the said ship *Vincennes* and the *Peacock* were lying in the said port of Honolulu, two of the marines on board the *Peacock* were arrested for insubordination and disobedience, and they, together with an orderly seaman, were sent on board the *Vincennes*, about the 7th of October, and confined in the said ship *Vincennes* until a court-martial was convened for their trial, which was held on board the *Peacock*, and by which they were sentenced to be punished, which sentence was carried into effect; and after that time the said ship *Peacock* underwent a thorough overhauling, and very extensive repairs. While she was lying in the said harbour, and while she was undergoing such repairs, some of her men deserted from her; and it was long after the said court-martial, and after the execution of its sentence on the said two marines, and they were discharged from imprisonment, and returned to duty, that the said plaintiff refused to go to duty.

Plaintiff's Statement of Evidence.

After the evidence contained in the plaintiff's first exception, made part hereof, and the foregoing statement of defendant, the plaintiff further gave evidence, tending to show, that, at the time of committing the trespasses in the first count of the declaration alleged, and during all the time that said trespasses continued, the defendant could have securely confined said plaintiff on board the said ship Vincennes, without any difficulty and with safety to said ship Vincennes, her officers and crew; and further, that the said United States ship Peacock, and the other vessels belonging to said squadron, and under the command of the said defendant, were at the time of the said imprisonment of said plaintiff in said fort at Oahu, present in the harbour of Honolulu, at said island, and that said ship Peacock was lying within the distance of one hundred yards from the said ship Vincennes, at the time the said plaintiff was sent to be imprisoned in the said fort; and further, that said ship Peacock was at that time in a state of good discipline, and that said plaintiff could without any difficulty have been confined on said ship Peacock with perfect safety to said ship, her officers and crew, and that the defendant had no reasonable or probable cause to believe that he could not have securely confined the said plaintiff on board either of the said ships, *without any difficulty, [*104 and with perfect safety to said ships, their officers and crew, and without any danger of their causing mutiny, or insubordination.

And the said plaintiff further gave evidence tending to show that he was by order of the defendant imprisoned in the said fort, in a cell in said fort, in solitary confinement, for a period of 15 days (Baab 18 or 20 days); that said fort was a low, damp, filthy place, was the common prison for criminals and malefactors among said native inhabitants of Oahu, and the cell in which plaintiff was confined was dark and was not ventilated, and that the same was abounding in vermin; that said fort was distant a half mile from said ship Vincennes, during all the time of said imprisonment; that, during all the time the said plaintiff was so imprisoned in said fort, he was in double irons, by order of the defendant, and was under the control and discipline of the native governor of said fort, and the native sentinels therein; that, during said imprisonment, the only food allowed or supplied to said plaintiff was supplied by the native officers of said fort, and was only "taro" and fish, and nothing else; and that said fish was sometimes, when so supplied, in a rotten state, and

said "taro" was an unpalatable and unwholesome food to those unaccustomed to feed on it.

That, during the said imprisonment, a change of clothing, nor any part thereof, was not supplied to said plaintiff, but the same was refused to be supplied; and that he became filthy in his person, and when he was brought away from said fort, and put on board said ship Vincennes, by order of defendant, that said plaintiff was filled with vermin. That, during the whole of said imprisonment in said fort, the said plaintiff was abandoned by the defendant to the sole care, attention, and discipline of the native officers about said fort. That, during the whole time of said imprisonment of said plaintiff in said fort, the defendant securely kept and confined on said ship Vincennes, as prisoners, a chief of the Fejee Islands, and others of the crew of the said ship; and that on the said ship Peacock more than four or five prisoners were at that time securely confined; and gave evidence by the first lieutenant of said ship Peacock, tending to prove that, at the time of said imprisonment of said plaintiff in said fort, fifty-five marines could have been securely confined in said ship Peacock.

And the said plaintiff further gave evidence tending to prove that the trespasses by floggings and imprisonments inflicted on said plaintiff, by order of the defendant, on said ship Vincennes, as alleged in the declaration in this cause, were immoderate, excessive, disproportionate to the offence alleged against him, and of greater severity than is allowed *105] by the rules and *regulations for the government of the navy of the United States, or the laws and customs in such cases at sea; and that the detention of the plaintiff on said ship or ships, by order of the defendant, after the expiration of his term of enlistment into the said marine corps, was not essential to the public interest, and that defendant had no reasonable or probable cause to believe that such detention was essential to the public interest. That, soon after the enlistment of said plaintiff had expired at the island of Oahu, and he had requested his discharge and leave to return to the United States, the defendant discharged about fifteen seamen, at their request to be discharged, and permitted them to go to the United States; that the marine guard of said ship Vincennes was larger in numbers and force of men, by three or four, than the usual and customary complement of marines on vessels of her class in the navy of the United States; that the defendant, of his own authority, and against his instructions from the President of the United States, deviated from the course of his

cruise, as directed in said instructions, and of his own authority prolonged the cruise of said vessels belonging to said exploring expedition.

Defendant's 3d Bill of Exceptions.

Whereupon the defendant prayed the court to instruct the jury, that if, from the evidence aforesaid, the jury shall find that the said plaintiff signed the said contract marked A, and afterwards received the bounty stipulated therein, and signed a receipt therefor, and remained and continued on board a vessel of the United States under the command of an officer of the United States navy, employed in the expedition in the said contract named, doing duty as a marine, and receiving wages therefor until the return of the said expedition to the United States in the month of June, 1842 (except when imprisoned as hereinafter stated); and that after the signing of said contract by said plaintiff, the defendant, then being an officer in the navy of the United States, by order of the President took the command of said expedition, and continued in command thereof during the whole cruise; that the said plaintiff sailed from the United States in the ship Vincennes, one of the ships of the United States navy detailed for the said service, and under the immediate command of the defendant; that the said ship, with the said defendant as commander, and the said plaintiff as one of the marines on board, sailed to the Southern Pacific Ocean and the South Seas, and during her cruise received such injuries and became so much out of repair as to render it necessary to overhaul and repair her; and that she reached the port of Honolulu, in the island of Oahu, in the month of *September, 1840, and was [*106 there, for the purpose of the said repairs and the safety of the ship, brought into the inner harbour and close to the shore; and while there for the purpose of said repairs and refitting, her foremast was taken out, her hold broken up, and other extensive work done on board; and that, while said repairs were being made, the defendant and other officers, and such men as were necessary for that purpose, were on shore, making such explorations, surveys, and observations as were required by the instructions of the President.

And that while said repairs were so as aforesaid being made, and the said defendant and other officers and men were so employed on shore, the marine guard on board said ship suffered men placed under their guard to escape, and another to get drunk while under guard; and afterwards the plaintiff, with other marines, severally and collectively refused to do

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duty on board said ship, and were therefore ordered by the defendant to be confined in a fort on the island, in charge of the natives of the island. And if they shall be of opinion further, from the facts and circumstances, and the whole evidence, that it would have been unsafe to confine the said plaintiff on board the said ship, and that the said fort was under the charge of a governor who spoke English, and was used as the place of confinement for the seamen of the merchant service, of this and other countries, in the said island; that the sergeant of marines was the officer in command of said marines and the plaintiff on board the said ship, and was also their quartermaster; and that it was his duty to report to the defendant the situation of the said marines, from time to time, and to look after their comfort; and that the said sergeant of marines visited the said fort while said plaintiff was confined there, and made no report to the defendant; that the prisons of the said fort had no doors to them, and the said plaintiff was kept as other prisoners were, and that they were again brought on board the said ship so soon as they could with safety be brought there; then such imprisonment was within the lawful authority and duty of the said defendant, and he is not liable therefor in this action.

And if they shall further find that the said plaintiff was brought from the said fort on board the said ship as soon as it was safe to bring him there, and, upon being brought on board, the said defendant, still being in command of said ship, required him to go to duty, and he refused to do so, and thereupon he had him confined in prison on board said ship, in irons, and the next day caused plaintiff to be brought before him, and remonstrated with him, and caused his immediate officer to explain to him his obligation, and the nature *107] of the contract, *and then required him to go to duty, and he refused, and thereupon he ordered him to be punished, and he was punished, according to the rules and regulations of the navy; which rules and regulations it has been agreed the jury may find; and after such punishment, directed him to go at large among the crew, that he might converse with them, and so learn his duty, and he did go at large; and on the evening of the same day again refused to go on duty, and was again imprisoned by the defendant; and was again the next day brought before the defendant, and refused to go to duty, and was punished as aforesaid; then it was lawful for the said defendant to punish the said plaintiff as often as, being called upon as aforesaid, he refused to go to duty; and the said defendant is not liable in this action for the said imprisonment and corporal punishment.

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Which instruction the court refused to give ; and, on refusing, assigned, as reasons therefor, and so instructed the jury, that the word "*unsafe*" seems too vague, uncertain, and equivocal to justify in law such an imprisonment in the fort on the island, in charge of the natives. I think the jury must be satisfied, by the evidence, that there was an urgent necessity of using the fort, in order to justify such imprisonment, especially if the jury should be satisfied there was another armed vessel of the United States in the port, in which the plaintiff might have been safely kept."

On the second part of the instruction prayed, the court said:—"I think it is not a sufficient justification to find that the punishment was according to the rules and regulations of the navy. In the petty offences which by those rules are punishable by flogging, there is a limit within which the officer has a discretion, which should be exercised soundly and reasonably ; and, in order to justify the officer, the jury must be satisfied that it was so exercised. In the case of such petty offences I think each punishment settles all previous offences of that kind. If, after such punishment, a new offence be committed, it will of course be liable to a new punishment. The shipping articles alone did not justify the corporal punishment. In no case, unless by express statute, can corporal punishment be lawful, unless it be reasonable, according to the aggravation and circumstances of the case, and the reasonableness must be found by the jury, or the punishment cannot be justified." To which refusal by the court to give the said instruction so prayed by the defendant, and also to the opinion and instructions so given by the court to the jury, the defendant, by his counsel, excepts, and prays the court to sign and seal this bill of exceptions, and to cause the same to be enrolled according to the statute ; which is done this 29th day of April, 1845.

W. CRANCH. [SEAL.]

*Defendant's 4th bill of Exceptions. [*108

And thereupon the defendant further prayed the court to instruct the jury, that if, from the evidence aforesaid, the jury should not find that the said plaintiff made the said contract and received the said bounty, but that he was, previous to the said alleged grievances, an enlisted marine on board the said United States ship Vincennes, a public vessel of the United States employed on foreign service under the command of the defendant, and that the defendant was the commander of the expedition on which she was employed, and the time of service

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of the said plaintiff, enlisted as aforesaid, expired while he was on board said ship on foreign service, and his detention was deemed essential to the public interests by the said commander, then it was lawful for the said defendant, commander as aforesaid, to detain the said plaintiff on board the said ship; and the said plaintiff was thereby made subject to the laws and regulations for the government of the navy; which instruction the court refused to give, in the form in which it was prayed, being of opinion, and so instructed the jury, that the burden of proof was on the defendant to show that the detention of the said plaintiff was essential to the public interests, and that it was not confided absolutely to the discretion of the commander; and thereupon the said defendant, by his counsel, excepts, and prays the court to sign and seal this bill of exceptions, which is done; and the same is ordered to be enrolled, according to the statute, this 30th day of April, 1845.

W. CRANCH. [SEAL.]

Defendant's 5th Bill of Exceptions.

Whereupon the defendant prayed the court to instruct the jury, that if, from the evidence aforesaid, the jury shall find that the said plaintiff, on the day of , enlisted as a marine in the naval service of the United States, and was never discharged therefrom by the President of the United States; and, being so enlisted, he was, during his term aforesaid, ordered on board the Vincennes, a United States man-of-war, under the command of the defendant, on foreign service, and while on board said vessel, on such foreign service, his term of service expired; and if, from the said evidence, the jury shall further find that the detention of the said plaintiff on board the said ship was essential to the public interests, then it was lawful for the defendant so to detain the said plaintiff as aforesaid, and, being so detained, he was thereby subject to the rules and regulations of the navy of the United States; and if the jury shall further find that the said plaintiff, being so detained *as aforesaid, refused to do duty *109] on board the said ship, upon being required to do so by the defendant, then it was lawful for the defendant to punish him with stripes, according to the said rules and regulations, for every offence not exceeding twelve lashes; and every such refusal was a new offence, for which he was subject to punishment; and every such punishment was a full satisfaction for every such offence to the time of the infliction thereof. Which instruction the court refused to give; and

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thereupon the said defendant, by his counsel, excepts thereto, and prays the court to sign and seal this bill of exceptions, which is done, according to the statute, this 30th day of April, 1845.

W. CRANCH. [SEAL.]

Defendant's 6th Bill of Exceptions.

Whereupon the defendant further prayed the court to instruct the jury, that if, from the evidence aforesaid, the jury shall find that the said plaintiff, on the day of , enlisted into the marine corps of the United States ; and afterwards, on the day of April, 1838, while in the said service, and during the said enlistment, was ordered on board the Vincennes, a vessel in the navy of the United States, and, as such marine, proceeded in the said ship on foreign service, under the command of the defendant ; and the time of service of the said plaintiff, enlisted as aforesaid, expired while he was on board the said ship on foreign service, and his detention was deemed essential, by the commander of the expedition in which he was engaged, to the public interests, then it was lawful for the said defendant, commander as aforesaid, to detain the said plaintiff on board the said ship ; and the said plaintiff was thereby made subject to the laws and regulations for the government of the navy, and being so subject, if he refused to do duty on board said vessel when required by said commander, then it was lawful for the said commander, in his discretion, to punish him under the rules and regulations of the navy, not exceeding twelve lashes for every such refusal, provided the said punishment was inflicted between each of said refusals, and he is not liable therefor in this action ; which instruction the court refused to give ; and thereupon the defendant, by his counsel, excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this 30th day of April, 1845.

W. CRANCH. [SEAL.]

Defendant's 7th Bill of Exceptions.

Whereupon the plaintiff, by his attorney, prayed the court *to instruct the jury, that if the jury believe, from the evidence aforesaid, that the said defendant could have [*110 securely kept and confined the said plaintiff on board the said ship Vincennes, or on board the said ship Peacock, with safety to the said ships, their officers and crews, then the defendant had no right to imprison said plaintiff in said fort in the island of Oahu ; and the jury may give such damages

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therefor as upon the whole evidence aforesaid they may think the said plaintiff entitled to, provided the jury shall find that the said ships Vincennes and Peacock were together, at the time of said imprisonment, in the said harbour of Honolulu, and were under the command of the defendant, and that said imprisonment in said fort was caused and continued by order of the defendant; which instruction the court gave as prayed; to which instruction the defendant, by his attorney, excepts, and this his bill of exceptions is signed, sealed, and ordered to be enrolled, this 30th day of April, 1845.

W. CRANCH. [SEAL.]

Defendant's 8th Bill of Exceptions.

Whereupon, the plaintiff further prayed the court to instruct the jury, that if, from the evidence aforesaid, the jury believe that the floggings and imprisonments of the said plaintiff, on board the said ship Vincennes, alleged in the declaration in this cause, were immoderate, excessive, unreasonable in degree, and disproportioned to the alleged offences, and that such punishment was severer in degree than the rules and regulations for the government of the navy of the United States, or the laws and customs in such cases at sea, authorize, then the plaintiff may recover such damages therefor as, upon the whole evidence, the jury may think he ought to have; provided the jury shall find that the said floggings and imprisonments were inflicted by order of the defendant; which instruction the court gave as prayed; to which instruction the defendant, by his counsel, excepts; and this his bill of exceptions is signed, sealed, and ordered to be enrolled, this 30th day of April, 1845.

W. CRANCH. [SEAL.]

Defendant's 9th Bill of Exceptions.

Whereupon, the plaintiff further prayed the court to instruct the jury, that if the jury believe, from the evidence aforesaid, that the detention of the plaintiff, as alleged in the declaration in this cause, after the term of his said enlistment in the marine corps had fully expired, was not essential to the public interests, then such detention was unlawful, and the *111] plaintiff is entitled to recover such damages therefor as, in the opinion of the jury, from the whole evidence, he ought to have; provided the jury shall find that the said plaintiff was detained by order of the defendant; which instruction the court gave as prayed; to which instruction the

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defendant, by his counsel, excepts; and this his bill of exceptions is signed, sealed, and ordered to be enrolled, this 30th day of April, 1845.

W. CRANCH. [SEAL.]

The case came up to this court upon these bills of exceptions, and was argued by *Mr. Bradley* and *Mr. Toucey* (Attorney-General), for the plaintiff in error, and *Mr. May*, for the defendant in error.

The points raised by *Mr. Bradley*, the opening counsel, which were contested by *Mr. May* and sustained by the Attorney-General, were as follows:—

I. The court erred in ruling out the evidence in the first exception, because,—

1. The papers were official reports by the defendant, *ante litem motam*, tending, (1.) to show that the reënlistment was recognized by the government, and that the government approved the detention of the men during the cruise, as being essential to the public interest; (2.) to rebut any presumption of malice.

II. The court erred in ruling out the evidence of the court-martial, because,—

1. It was a bar to any recovery by the plaintiff.

2. It tended to meet every presumption of malice, by showing that his conduct had undergone a judicial investigation for these matters before a competent court.

3. It tended to show a complete recognition and sanction by the government of all the acts complained of, and it then depends upon the authority of the government.

III. The court erred in refusing the prayer stated in the third exception; and also in the instruction they gave.

1. If the word *unsafe* was too indefinite, the prayer might have been refused; but the qualification and instruction that there must be “an urgent necessity” was equally indefinite, and is not in itself accurate.

2. The rules and regulations of the navy import a justification.

IV. And there is error in each and every one of the other exceptions.

1. Because the question of detention is within the discretion of the commander, and imports a justification. If not *conclusive, it is *primâ facie*, and the burden of proof [*112 was on the plaintiff to impeach it, and aver and prove malice.

2. (1.) Because, if he was lawfully detained, the plaintiff was lawfully subject to the rules and regulations of the navy,

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and for refusing to go to duty he was liable to be punished not exceeding twelve stripes, by order of the commander, for every such offence, and the refusals given in evidence were independent and substantive offences. (2.) A refusal to go to duty is not such a disobedience of orders as necessarily implies a mutinous spirit or intent. There is a discretion in the officer to determine whether it is one of those petty offences which tend to corrupt the morals of the crew, and which may be punished by order of the commander, or of that higher grade which requires severer punishment.

3. Because the court limited the question of "safety" to the ships, officers, and crews, without regard to the prisoner himself; and the word *safety* is equally indefinite with the word *unsafe*.

4. (1.) Because they submitted to the jury the interpretation of the rules and regulations of the navy, and to find also "the laws and customs at sea governing the national vessels of the United States." (2.) Because the contract of enlistment and the reënlistment given in evidence subjected the plaintiff to the rules and regulations of the navy, independent of any laws and customs at sea, except in cases not provided for by said rules and regulations; and this case was provided for by them.

5. (1.) Because the ninth exception either excludes from consideration the effect of the reënlistment, which the court was bound to interpret; or if it is left open by the phrase, "if he did so detain them," it is too obscure, and the jury may well have been misled by it into the supposition that the court had taken that matter from them. (2.) It does not put the detention on the ground of constraint, and being against the will of the plaintiff.

With respect to the first exception, *Mr. Bradley* cited the acts of Congress referred to in the statement of this case, and contended that Dinsman had voluntarily made a contract by which he agreed to obey all the laws for the regulation of the navy, and, at all events, the evidence ought to have gone to the jury to rebut the presumption of malice.

2d exception. The judgment of the court-martial was sanctioned by the President, and consequently Wilkes's detention of Dinsman was approved. Perhaps it was not a legal bar to the action, but was good evidence to show that Wilkes was acting under a sense of duty, and not actuated by malice. Bull. N. P., 19. 12 Mass., 579.

*113] *3d exception. The terms of reënlistment were the same as the original except in two points, namely, that it provided for a term of service in the Exploring Expedition,

and for an indefinite time. Could not Congress legislate for this? They passed an act to regulate the Exploring Expedition, and the contract with Jones was in fact a contract with the United States. We say, therefore, that the chastisement which was inflicted was authorized by law. The opinion of the court below would destroy all discipline in the navy. On the subject of imprisonment on shore in the merchant service, and to inflict corporal punishment, he cited Shee's *Abbott on Shipping*, ch. 4, part 2, p. 177; 1 *Ware*, 18, 19, 207, 230, 371, 503; 1 *Story*, 106; 4 *Mason*, 511, 512; 5 *Mason*, 193; 1 *Sumn.*, 397, 398.

Under the contract, therefore, without reference to the statute, Wilkes had a right to inflict this punishment.

But the navy regulations also justified it. The marine corps is a part of the navy. *Naval Laws*, 100, 156, 164. The act of 1837 necessarily gave the commanding officer a discretion to judge whether or not the interests of the service required the detention of Dinsman. If the jury were satisfied that he deemed it expedient to do so, it was enough. The law protected him unless malice was shown, and it was for the other side to prove malice.

5th exception. Every refusal to do duty was a fresh offence. *Rules and Regulations for the Navy*, Art. 3, 14, 30. Act of April 23, 1800.

7th and 8th exceptions. The power of the officer over the man, and the interpretation of the navy regulations, were not matters of fact for the jury. They were questions of law. The court ought to have decided whether or not the contract of reënlistment was binding.

Mr. May, for defendant in error, recited all the facts in the case, and proceeded to examine what were the rights of Wilkes in the case, and how acquired. The earlier laws were almost all repealed by the act of June 30, 1834. See *Naval Laws*, 156.

The enlistment took place on the 21st of November, 1836, and was for four years. Consequently it expired on the 21st of November, 1840. But it has been argued that a reënlistment was made, to extend over the entire cruise. There is no authority in any law for such a contract; none which justifies an indefinite enlistment. If there is, let it be shown. The agreement with Jones was not a valid contract. Jones had no authority to make it. Besides, the man was already enlisted *for four years, and whilst thus in service was [*114 incapable of making another and different contract.

The act of March 2, 1833, provides that no bounty shall be

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allowed, and the Fourth Auditor was right in taking this view of it. The contract was therefore in violation of law, and cannot be binding. Even supposing the contract with Jones to be good, it was only with him personally, and did not pass to his successor. Where a public contract is made under legal authority, and in the line of duty, by an officer, it is binding. 1 Cranch, 363. But Jones had no legal authority.

It is argued that this contract is like those which are made in the merchant service. The form of these is given in Abbott on Shipping (Story's ed.), page 550. The term of service is required to be fixed for the protection of seamen.

Suppose that the contract of reënlistment with Jones was valid, what were Wilkes's rights under it? They must be only what Congress gave by the act providing rules and regulations for the navy. Do these authorize an imprisonment out of the ship? Let the other side show any such.

But it has been said that the act of 1837 gave to Wilkes a right to detain this man. That act relates only to seamen and boys. It does not include marines, either in the title or body of the law. Whenever any act of Congress intends to include the marine corps, it always says so. The late Attorney-General, Mr. Legaré, gave an opinion that marines were not included in this act. The act was passed after the enlistment was made, and cannot be retroactive. The enlistment took place on the 14th of November, 1836, and the act was passed on the 2d of March, 1837. On the subject of retrospective laws, *Mr. May* cited 1 Gall., 139; 4 Serg. & R. (Pa.), 408; 2 Peters, 657; 6 Cranch, 174; 16 Mass., 245.

Wilkes's rights over Dinsman were not unlimited or despotic. They were regulated either,—1st by statute; 2d by usage.

(*Mr. May* then examined the statutes and navy regulations, and contended that the authority which he had exercised was not justified by them.)

2d. Usage.

The authorities show that the power of a captain is not unlimited. 2 Carr. & P., 148; Shee's Abbott on Ship., 177, 178; 1 Hagg. Adm., 272; 2 Stark., 452; 1 Cowp., 161; 14 Johns. (N. Y.), 119; Gilp., 232; 4 Mason, 511, 512; 1 Story, 106; 1 Ware, 18, 19, 372, 503; Pet. Adm., 174, 175; Ware, 224, where the whole subject is traced; 1 Woodb. & M., 267.

If the master inflicts an unusual punishment, he is responsible. It is very doubtful whether he can lawfully confine a *seaman in a foreign jail. The eighth article of the *115] Constitution of the United States says, that cruel and unusual punishments shall not be inflicted; and the question

whether or not a punishment is one of this forbidden class is a question of fact for a jury.

1st exception. Wilkes wished to read his own letter to the Secretary of the Navy. This was not proper evidence, and could not even mitigate damages, because it afforded no proof of the state of his mind, two years after it was written, when these severe punishments were inflicted. The exception does not state the purpose for which it was offered. It is now said that it was to show that the government approved his conduct. But there was no evidence offered below, that the Secretary of the Navy approved of or even answered it.

2d exception. Dinsman was no party to the record of the court-martial by which Wilkes was acquitted. Bull. N. P., and 12 Mass., 597, have been referred to; but, in both these cases, the plaintiff was a party to the proceeding. The opinions of officers of the court-martial are no evidence of Wilkes's state of mind; and, besides, there were many other charges upon which he was tried.

3d exception. The prayer here is based upon the contract with Jones. But this contract was void, and therefore the court below was right. There is no authority anywhere given by law, by which an officer of the navy can confine a man on shore. The rules of the merchant service do not apply, because vessels of war have ample means of imprisonment within themselves. The prayer proposed to submit to the jury whether or not Dinsman was punished according to the rules and regulations of the navy. But this was a question of law. The rules, &c., were not offered in evidence, and therefore the jury could not decide.

4th exception. The act of Congress does not leave it to the mere *arbitrium* of an officer whether to detain a seaman or not. The burden of proof is upon him, to show that the detention was essential to the interests of the service. The act of Congress directs the officers to "report to the navy department," and implies therefore that he is responsible for his acts.

5th exception. It has been said that every refusal to do duty is a fresh offence. If this argument be sound, a man might be whipped to death for refusing to perform duty after the term of his enlistment had expired.

6th exception. This depends on the same principle.

7th and 8th exceptions. If the above principles are correct, the prayers in these exceptions are even less beneficial than we had a right to expect, and are not erroneous.

*9th exception. We are not bound to prove malice. The law infers it from the acts done. 3 East, 599; 1 [*116

Greenl. Ev., § 34; 2 Id., § 94; 1 Sumn., 399; 2 Starkie, Ev., 904, 905.

Mr. Toucey (Attorney-General), for the plaintiff in error.

The letter to the Secretary of the Navy and the proceedings of the court-martial, mentioned in the first and second bills of exception, were improperly ruled out. The letter was an official letter relating to public duty. The court-martial had acquitted Captain Wilkes.

The third bill of exceptions, as to the plaintiff's imprisonment in the fort.

The court refused to let the defence rest upon the point of the safety of the ship to which the plaintiff belonged; but put the validity of the defence upon urgent necessity, as something more than the mere safety of the ship. The clause, "especially if the jury should be satisfied there was another armed vessel of the United States in the port, in which the plaintiff might have been safely kept," does not qualify the charge; because, if the jury did not find this, the charge still remained. Here the court says the *safety* of the ship is not a sufficient justification for removing a mutineer to the fort, but there must be an *urgent necessity*, and that would justify it. The jury must necessarily have been misled by this instruction, and great injustice done to an officer who looked to the safety of his ship as the first and principal point of duty.

The court refused to charge the jury, that, if the plaintiff refused to go to duty, and was punished for it according to the rules and regulations of the navy, it was a sufficient defence; but charged affirmatively, that this was not a sufficient justification. The court charged very correctly, that, "in the petty offences which, by those rules, are punishable by flogging, there is a limit within which the officer has a discretion"; and then charged the other way, that the jury must judge whether he exercised that discretion soundly and reasonably. In other words, that he has no discretion which he can exercise, but the jury must exercise it for him, upon the testimony of witnesses, after the occasion has passed away.

The court further instructed the jury, that the shipping articles alone did not justify the corporal punishment, and that the reasonableness of it must be found by the jury. The shipping articles in this case is the contract of enlistment. The plaintiff expressly agreed to be subjected to the rules and discipline of the navy. If punished in a given case precisely according to those rules, the act is justified by the agreement,
 *117] and the *charge that its reasonableness must be found
 by the jury is misapplied and erroneous. The ques-

tion of "reasonableness" arises in those cases only where the law authorizes the application of reasonable force. But where the law, and the consent of the party, authorize the application of force according to certain definite rules, the only question is, whether it has been applied according to those rules.

The fourth and ninth bills of exceptions may be considered together.

By the fourth, the court refused the instruction, that, if the plaintiff's detention was deemed essential to the public interests by the commander, the defendant, as such commander, had a right to detain him, and that the plaintiff was thereby made subject to the rules and regulations for the government of the navy. The court further instructed the jury affirmatively, that the burden of proof was on the defendant, to show that the detention of the plaintiff was essential to the public interests, and that it was not confided absolutely to the discretion of the commander.

By the ninth, the court, at the plaintiff's request, charged, that, if the jury believed the detention not essential to the public interests, the plaintiff might recover.

The act of the 2d of March, 1837 (5 Stat. at L., 153), provides, "that when the time of service of any person enlisted for the navy shall expire when he is on board any of the public vessels of the United States employed on foreign service, it shall be the duty of the commanding officer, &c., to send him to the United States in some public or other vessel, unless his detention be essential to the public interests, in which case the said officer may detain him until the vessel in which he shall be serving shall return to the United States; and it shall be the duty of said officer immediately to make report to the Navy Department of such detention, and the causes thereof." It further provides, that the person so detained "shall be subject in all respects to the laws and regulations for the government of the navy, until their return to the United States, and all such persons as shall be so detained, and all such as shall voluntarily reënlist to serve until the return of the vessel in which they shall be serving and their regular discharge therefrom in the United States, shall, while so detained, and while so serving under their reënlistment, receive an addition of one fourth to their pay." Are the marines comprehended in these terms? The words are, "when the time of service of any person enlisted for the navy shall expire." Marines are enlisted for the navy. The court assumed they were within the law. They are preëminently within its reason, and are precisely

*118] within its *letter. The contract with them was only commensurate with the power conferred by that act. It was to take effect after the existing term expired; it was not material when it was made; it might be necessary to make it before the cruise; it is enough that it secured consent to what the law authorized.

The charge of the court absolutely excluded the agreement to serve during the cruise; it submitted to the jury the question which the commander was authorized by the act of Congress to decide, and by his duty as an officer required to decide. The question is one of discretion, a question of government, a mere political question. It must be decided before the person or crew could be detained. The necessity is a present one, in foreign parts. The duty is devolved on the commander to act one way or the other, to send the men home, or detain them according to that decision. It is expressly made his duty to report the causes of the detention, that is, the grounds of the decision, which would be impossible unless he made it. The power to be exercised of detaining the men is expressly conferred on him. It is the declared consequence of its exercise, that they shall be subject to the rules and regulations for the government of the navy. Others are to act upon that decision thus made, and are not required to revise it, or permitted to question it. It is the duty of all the subordinate officers, and of the crews of the different ships, to obey the orders of the commanding officer founded on that decision, and such order is not only a sufficient warrant for their obedience, but they are liable to the penalty of death if they disobey it. It is the duty of the Treasury Department and Pension Office to act upon it. The power itself, in its essential character, is a practical power of government. It is part and parcel of the executive power, as applicable to the navy, and belonging to its officers. Without its certain exercise, there could be no authority or discipline. It is impossible that the grounds of the order should be submitted to a jury before it be known whether it is to be obeyed. Nor can they be submitted to a jury upon evidence. It would not be practicable to prove them. No one knows what those grounds are, except the officer who makes the order. They lie often within his own knowledge exclusively, and he cannot be a witness. They are often the result of his sagacity and foresight, as well as observation, and are incapable of proof. It is the greatest absurdity to suppose that an act of Congress has left it doubtful, and to be ascertained afterwards by the verdict of a jury, whether a fleet in actual service is a voluntary association, or a legally organized body

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under the government of law; whether the crews of a squadron are in the naval service or not; whether the commander or any of *his subordinate officers have any lawful command; or that these questions are to be decided, [*119 perhaps years afterwards, in each particular case, according to the uncertain and varying opinions of a jury. And the cruelty of it would be as great as its absurdity. It would be a refinement of cruelty to require an officer to act upon a combination of circumstances incapable of proof, and upon his own knowledge, judgment, and sagacity, and then punish him for want of proof, or perhaps for being wiser than twelve men ignorant upon the subject. The government has a general power independent of the act. The true view is, that the point was decided by the government. The action of Commodore Jones here at home in the presence of the government; the payment of the bounty; the action of the Treasury Department in paying the men as in the service; the absence of any disapproval; the approval of the acquittal on the charge for detaining and coercing them. Whether the matter was decided by the President personally through the Navy Department, or through the commander of the expedition, the same result follows,—the decision is conclusive upon the judicial department. As to the rule relative to the discretion of a public officer, when it is made his duty to decide and to act, and of others to act according to that discretion. The question is an important one. It involves a great principle, essential to the powers of government. The discretion within the limits assigned to it, though in an executive officer, partakes of the character of judicial discretion. The authorities are conclusive. *Drew v. Colton*, 1 East, 565, in note; *Seamen v. Patten*, 2 Cai. (N. Y.), 312; *Vanderheyden v. Young*, 11 Johns. (N. Y.), 150; *Martin v. Mott*, 12 Wheat., 19; *Decatur v. Paulding*, 14 Pet., 497; *Kendall v. Stokes*, 3 How., 97, 98; *Brashear v. Mason*, 6 How., 101, 102.

The court also held, that when, in the discharge of his duty to the best of his judgment, the commander had decided to detain the men, it was to be presumed that he had acted wrong, and the burden of proof lay upon him to show that he had acted right. In *Martin v. Mott*, this court lay down the contrary rule.

The fifth bill of exceptions.

The court refused the instruction, that, if the jury should find the detention of the plaintiff essential to the public interests, it was lawful for the defendant to detain him, and, for a refusal to do duty, to punish him according to the rules

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and regulations of the navy, with stripes not exceeding twelve, &c. In such case clearly he was liable to be detained; he was subject to the rules and discipline of the navy; he was liable to be punished for mutiny or insubordination under those rules. The *act of 30th June, *120] 1834 (4 Stat. at L., 712), provides, "that the said corps shall, at all times, be subject to and under the laws and regulations which are or may hereafter be established for the better government of the navy, except when detached with the army by order of the President."

The instruction refused in the sixth bill of exceptions is similar to the last, except that it was lawful for the commander in his discretion to punish, under the rules and regulations of the navy.

The seventh bill of exceptions.

The court, at the plaintiff's request, instructed the jury, that, if the defendant could have securely kept and confined the plaintiff in the Vincennes or the Peacock, with safety to the ships, their officers and crews, the defendant had no right to imprison the plaintiff in the fort. The breadth of the proposition is, that, had it required the exclusive attention of every officer, seaman, and marine to have kept and confined the plaintiff on board safely, the defendant could not justify sending the mutineer to the fort during the stay at the island. The jury could not do otherwise than convict, under this instruction; because it was doubtless possible for the commander, officers, and men safely to confine one man on board either of the ships, and save them, their officers and crews, from destruction.

The eighth bill of exceptions.

At the plaintiff's request, the court charged, that, if the punishment was immoderate, excessive, unreasonable, disproportioned, severer than the rules of the navy or the laws and customs in such cases at sea authorize, the plaintiff might recover. This excluded the commander from the protection of the rules and regulations for the navy. If, in the opinion of the jury, the punishment was immoderate, &c., and, though not more severe than the rules and regulations of the navy authorized, yet more severe than the laws and customs in such cases at sea authorized, they were directed to convict the defendant.

By the instructions given and withheld, the defendant was deprived,—

1st. Of the benefit of showing the sanction of his government in every form known to the laws.

2d. Of the fundamental rule of the safety of the ship, as a

guide to the officer exercising discretionary power conferred for that end.

3d. Of the benefit of the renewed contract of enlistment, by which the men agreed to be detained during the cruise.

4th. Of the benefit of the act of 1837, giving him power to detain the men abroad, after the expiration of their terms, when the public interests require it.

*5th. Of the protection of the rules and regulations [*121 for the government of the navy, when acting within them.

6th. Of the discretionary use of the consular prisons, when necessary in the suppression of mutiny.

7th. Of the usual presumption in favor of the exercise of official discretion.

8th. And finally, of legal protection in the upright exercise of discretionary power conferred on him as a public officer for public ends, where the law imposed on him the duty to exercise it.

1. The commander of the Exploring Expedition was a public officer, intrusted with power which it was his duty to exercise, and it was his right to show on the trial that he acted by direction of his government, or with its sanction.

2. The safety of the ship or squadron was a fundamental rule to guide him in the exercise of the discretion which the law had given him. It is the law of the highest necessity.

3. After the passage of the act of March 2d, 1837, it was competent for him to make with the men the agreement of October, 1837, that they would serve during the term of the cruise, and until the vessel should return to a port of safety in the United States.

4. Independently of this contract, he had legal power under the act to require the men thus to serve. Thus intrusted with certain power for a public object, it was his duty to exercise that power according to his view of the exigency, that is, according to his view of present circumstances, and he is protected by the law which imposed that duty, if he discharged it uprightly.

5. Whether the case be one of renewed contract, or of detention under the act, the marines, during the period of such service, were subject to the rules and regulations established for the government of the navy, and liable to be punished for mutiny or insubordination according to such rules and regulations, and the officer conforming to them is justified by them.

6. Within those rules and regulations he has the power of confining an offender, and as they do not limit him to any particular place of confinement, and it is admitted he may

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use the consular prison, it is necessarily intrusted to him to determine whether the ship's prison or the consular prison shall be used for that purpose; and if he decide that question in good faith, with pure motives, he is not answerable for any error in judgment.

7. If his decision may be reviewed and reversed by a jury upon the mere question of expediency, there is neither law, reason, nor propriety which forbids the commander to remove *122] a mutineer from the squadron to the consular prison, though it *may be possible to confine him in some one of the ships with safety. Even in the case of a private vessel it may be done, if it be safer or better to do so, or a great offence has been committed. *Wilson v. The Mary*, Gilp., 32; *Magee v. The Moss*, Id., 233; *United States v. Wickham*, 1 Wash. C. C., 316; *Thorn v. White*, 1 Pet. Adm., 168; *Abbott on Shipping*, Story's ed., 137.

8. It is to be taken, *prima facie*, that a public officer has done his duty. It is not to be presumed that he has been guilty of an act of infidelity to the public trust committed to him. As declared by this court in *Martin v. Mott*, every public officer is presumed to act in obedience to his duty, until the contrary be shown. The *onus probandi* does not lie on him.

Mr. Justice WOODBURY delivered the opinion of the court.

The original action in this case was trespass by a marine in the Exploring Expedition against its commanding officer.

It will be seen, by the statement of the case, that the injury complained of was a punishment inflicted on the plaintiff by the defendant, in November, 1840, near the Sandwich Islands, for disobedience of orders, or a refusal to perform duty when directed.

The plaintiff claimed, that the term for which he was bound to serve as a marine had then expired; that the defendant had no right or justification to detain him longer on board; and that, his refusal to do duty longer being the only reason, and an insufficient one, for punishing him at all, under such circumstances he was entitled to recover damages of the defendant for subjecting him to receive twelve lashes, and for a repetition of punishment on a subsequent day, after another request and refusal by him to obey. And also, in the mean time, for putting him in irons, and confining him in a native prison on the island of Oahu.

The defendant pleaded the general issue; and by agree-

ment of parties, any special matter was allowed to be given in evidence under that issue.

Various questions of law arose during the trial, which are presented on the record in nine separate bills of exceptions by the defendant, and one by the plaintiff. Some of them are of an ordinary character; but others possess much interest, and are important in their consequences, but not only to these parties, but to the government and the community at large.

In a public enterprise like the Exploring Expedition, specially authorized by Congress in 1836, (see Act of Congress of 14th May, 1836, 5 Stat. at L., 29, § 2,) for purposes of commerce and science, very valuable to the country, and not entirely without interest to most of the civilized [*123 world, it was essential to secure it from being defeated by any discharge of the crews before its great objects were accomplished, or by any want of proper authority, discretionary or otherwise, in the commander, to insure, if possible, a successful issue to the enterprise.

It is not to be lost sight of, however, and will be explained more fully hereafter, that, while the chief agent of the government, in so important a trust, when conducting with skill, fidelity, and energy, is to be protected under mere errors of judgment in the discharge of his duties, yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty, or any species of oppression, founded on considerations independent of public ends.

The humblest seaman or marine is to be sheltered under the ægis of the law from any real wrong, as well as the highest in office. Considerations connected with these views are involved in most of the points ruled by the court below.

But the first and second exceptions taken by the defendant raise incidental questions, which it may be better to dispose of separately, before proceeding to the principal points involved.

One of these questions is the propriety of rejecting a letter written by the defendant, in relation to the bounty given to the seamen and marines on their reënlisting or contracting to serve till the expedition should terminate.

As this letter related to that material transaction, and was a part of the *res gestæ*, it seems competent. *Ridley v. Gyde*, 9 Bing., 349, 354; *Hadley v. Carter*, 8 N. H., 40; *Aiken v. Bemis*, 2 Woodb. & M.

It was also official correspondence of the commander in

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respect to official matters, and seems to have been justifiable as evidence on that account. 1 Greenl. Ev., § 491.

The other question relates to the propriety of excluding the proceedings of a court-martial, which, after the return of Captain Wilkes, was convened, and acquitted him of this among other charges.

We think that such proceedings were not conclusive on the plaintiff here, though a bar to subsequent indictments in courts of common law for the same offence,¹ the parties then being the same likewise, and the tribunal acquitting competent to examine and acquit. *Aspden et al. v. Nixon et al.*, 4 How., 467; *Burnham v. Webster*, 1 Woodb. & M., 172. And though sometimes, yet questionably, they have been deemed a bar to civil suits for damages, where the plaintiff was the prosecutor before the court-martial for that injury. Bull. N. P., 19; *Hannaford v. Hunn*, 2 Carr. & P., 146, *semble*.

*124] *But here the parties were not the same, nor the plaintiff a complainant before the court-martial, and the courts of common law have jurisdiction over the wrong, though committed at sea. *Warden v. Bailey*, 4 Taunt., 70-75; 1 MacArthur on Courts-Martial, 268; *Wilson v. McKenzie*, 7 Hill (N. Y.), 95; O'Brien on Military Law, 223, *semble*; *Luscomb v. Prince*, 12 Mass., 579.

The remaining exceptions relate first to the leading question, whether the duty of service by the plaintiff had expired when the punishment for the disobedience of orders was inflicted.

It is conceded that the term of his original enlistment for four years had then terminated. But after that term commenced, in 1836, Congress passed a new law, March 2d, 1837, which is supposed to reach a case of this kind, and to have justified a contract of reëlistment made by the plaintiff, which extended beyond the original term, and till after the punishment complained of. 5 Stat. at L., 153.

This new law, to be sure, speaks in its title of the "enlistment of seamen"; but in the body of it provision is made as to the "service of any person enlisted for the navy."

It is enacted there, that it shall be lawful to enlist persons to serve for five years, and a premium is given to such as "shall voluntarily reëlist to serve until the return of the vessels." (See 3d section of act of March 2d, 1837.)

In the present instance, the Exploring Expedition having been detained in this country by obstacles in the preparations, and a change in the commander, till it became probable the original terms of service of the seamen and marines

¹ DISAPPROVED. *United States v. Cashiel*, 1 Hughes, 558.
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would expire before the cruise ended, the Secretary of the Navy, in September, 1837, after the above act passed, and before the squadron sailed, authorized "a bounty to the petty officers, seamen, and marines," who would reënlist and engage to serve during the term of the cruise. Thereupon many did so reënlist and engage to serve, and among them the plaintiff, and the bounty was paid to them all on so doing, in October, 1837.

The papers admitted to show this, though excepted to by the plaintiff, we think entirely competent.

After this it would be very difficult to hold that the plaintiff had not legally become liable to serve during the cruise, instead of merely his original term of four years. Because, though marines are not, in some senses, "seamen," and their duties are in some respects different, yet they are, while employed on board public vessels, persons in the naval service, persons subject to the orders of naval officers, persons under the government of the naval code as to punishment, and persons amenable to the Navy Department.¹ Their very name *of "marines" indicates the place and nature of [*125 their duties generally. And, beside the analogies of [*125 their duties in other countries, their first creation here to serve on board ships expressly declared them to be a part "of the crews of each of said ships." Act of 27th March, 1794, 1 Stat. at L., 350, § 4. Their pay was also to be fixed in the same way as that of the seamen. Sec. 6, p. 351.

So it was again by the act of April 27th, 1798. 1 Stat. at L., 552. And they have ever since been associated with the navy, except when specially detailed by the President for service in the army. See Act of Congress, 11th July, 1798, 1 Stat. at L., 595, 596.

Thus paid, thus serving, and thus governed like and with the navy, it is certainly no forced construction to consider them as embraced in the spirit of the act of 1837 by the description of persons "enlisted for the navy."

The reason of the law on such occasions for reënlistment applies with as much force to them as to ordinary seamen, because, when serving on board public vessels where their first term seems likely to expire before the cruise ends, their services may, under the public necessities, be equally needed with those of the seamen till the cruise ends; and hence all of them may rightfully reënlist for the cruise, at any time, in anticipation of this.

Such was the construction put on this section at the time by the Navy Department and navy officers on board, by

¹ QUOTED. *Reid v. United States*, 18 Ct. of Cl., 638, 640.

making proposals and paying a bounty to both marines and seamen who would reënlist. But what is calculated to remove any doubts as to the justice of this view is, that such was the construction adopted by the plaintiff himself, and fully acquiesced in by his conduct in voluntarily agreeing beforehand to reënlist for the cruise, and receiving the bounty for it, and sailing under that engagement.

He thus waived any doubt, and, proceeding to sea under such new engagements supposed to be authorized by the act of Congress, he would seem to be morally as well as legally estopped to deny their validity, and the liabilities to duty and to punishment consequent upon them. *Volenti non fit injuria.*

If, however, the legal right of the commander was imperfect to require and enforce longer performance of duty under the engagements, there is another provision of the act of March, 1837, by which it seems quite clear that, without such voluntary reënlistment and engagement, the commander had power to detain the plaintiff after his original term expired, if, in his opinion, the public interest required *126] it. In the second section of the law (5 Stat. at L., 153) it is enacted, that, "when the time of service of any person enlisted for the navy shall expire while he is on board any of the public vessels of the United States employed on foreign service, it shall be the duty of the commanding officer to send him to the United States in some public or other vessel, unless his detention shall be essential to the public interests, in which case the said officer may detain him until the vessel in which he may be serving shall return to the United States." &c., &c.

Now, considering the marines as embraced in the spirit, if not the exact letter, of this provision, for reasons heretofore assigned, connected with its language and object, and their position in conjunction with the navy, it would follow that the commander, supposing the detention of the plaintiff on board "essential to the public interests," could rightfully direct him to remain; and in the event he did so, as is averred here, the third section of the act of 1837 provides that the plaintiff should be "subject in all respects to the laws and regulations for the government of the navy, until" his return to the United States. 5 Stat. at L., 153.

There is still another statute, which, in our view of it, adds more strength to these conclusions. It is an act as early as June 30th, 1834 (4 Stat. at L., 713), and by the second section it provides as to the marine corps, "that the said corps shall at all times be subject to and under the laws and regu-

lations which are or may hereafter be established for the better government of the navy," &c. That corps thus, in some respects, became still more closely identified with the navy. The term "the better government of the navy" need not be restricted to mere punishment, or to courts-martial, but may include any provision by law intended to secure the safety of the crew and vessel, and insure due subordination and sound discipline in any exigency of the public service. The continuance of all serving on board till the cruise ended was afterwards wisely provided for, when required "by the public interests." The plaintiff was, therefore, bound to submit to it. He must be presumed to have known this provision before his new contract of enlistment, and before he sailed, and indeed to have known before his first enlistment that he was to be subject to any new laws which might be enacted for the better government of the navy, and hence that the defendant, after the act of 1837 passed, could continue, under the public exigencies, to require the performance of duty by him till the cruise ended, and to punish him when disobedient,—if not overstepping the limits prescribed by the naval code, and the usages consistent therewith which prevail in maritime service. [*127] Nor was it competent for him to object to this detention, as if retrospective in its operation, being authorized by an act passed after his first enlistment, because before that enlistment, Congress, June 30th, 1834, had enacted, as before cited, that the marine corps should be subject to and under the laws and regulations which are or *may be hereafter* established for the better government of the navy.

Having thus ascertained that the defendant had further jurisdiction over the plaintiff, and it being admitted that the latter refused to perform his orders, and, in the language of the fourteenth article, that he disobeyed the lawful orders of his superior officer (2 Stat. at L., 47), and this on an important subject, and under circumstances likely to extend to many more of the crew, and to end in mutiny or an abandonment of the expedition, if not suppressed with promptitude and decisive energy, the next inquiry is whether the punishment was inflicted within the license of the law.

It is not the province of the judiciary to decide on the expediency or humanity of the law, but merely its existence and the conformity or non-conformity to it by the defendant.

Where a private in the navy, therefore, is guilty of any "scandalous conduct," the commander is, by the third article of the laws for the government of the navy, authorized to

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inflict on him twelve lashes, without the formality of a court-martial. 2 Stat. at L., 47.

If disobedience was not such conduct, but, under the fourteenth article, exposed the offender to severe punishment by a court-martial, the plaintiff could hardly complain that it was mitigated to only the twelve lashes which the captain was authorized to inflict without calling such a court, by article thirtieth, as well as article third (*Id.*, 49), and no more stripes were given here for any one act of disobedience than the third and thirtieth articles warrant.

Nor were they accompanied by any circumstance of unusual severity or of cruelty, either in the manner or the instrument employed. After an interval of two or three days, according to the counts in the writ, as well as the proposed proof, and after explanations and exhortations to duty, and time given for reflection, followed by renewed disobedience, the same number of stripes was repeated, because deemed necessary in order to enforce duty.

After another interval for like purposes, on a subsequent day, upon a new refusal, the punishment was again inflicted, and the plaintiff thereupon returned to duty.

If precedents were needed to justify this course, it has *128] been settled in a penal prosecution that a like act, when prohibited, *if distinctly repeated, even on the same day, constitutes a second offence, and incurs an additional penalty. *Brooks qui tam v. Milliken*, 3 T. R., 509.

Again, if this disobedience could not be considered a technical offence under either of the articles already referred to, it surely is an offence in nautical service, and one of much magnitude at times, and the thirty-second article provides that all crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea. 2 Stat. at L., 49.

In the discipline of the merchant service, where an act of disobedience is persisted in, and endangers the due subordination of others, the captain is justified, not only in punishing personally, but in resorting to any reasonable measures necessary to produce submission and safety. See *Cobley v. Fuller*, 2 Woodb. & M., and cases there cited, and 9 Law Rep., 386.

Under this portion of the inquiry arises also the question as to the ruling about putting the plaintiff in irons, and about the confinement of him on shore in a prison of the natives.

This appears to have been done under the same aspect of the case, looking to the preservation of sound discipline, and

the safe imprisonment of the plaintiff till he consented to return to his duties.

It appears that several other marines in the squadron were taking like insubordinate ground with the plaintiff, and that the escape of two prisoners confined on board had already been allowed; that many more appeared anxious to quit the vessels, doubtless under the seductive attractions of the islands near; that several of the officers and men were engaged at a distance in making scientific observations; and that, under such circumstances, a confinement of the plaintiff on shore for a few days might be a prudent precaution to prevent a defeat of the chief objects of the expedition.

This, therefore, without proof of malice, is not actionable, nor does it amount to putting a seaman on shore in a foreign country to desert him there, contrary to the act of Congress, as that must be done maliciously, and then is properly punishable by statute, no less than on principles of admiralty law. (4 Stat. at L., 117, sec. 10; Abbott on Shipping, 177; *Jay v. Allen*, 1 Woodb. & M., 268; *United States v. Netcher*, 1 Story, 307.) But if it was only to imprison him there for a few days, and, under all the circumstances, was considered by the defendant to be with more propriety and safety than in the squadron, it was justifiable, unless accompanied by malice. *(*The William Harris*, 1 Ware, 367, and *The Nimrod*, [*129 Id., 9; *Wilson v. The Mary*, Gilp., 31; 3 Kent, Com., 182.)

As to the cleanliness of the prison, the healthfulness of the food, and the general treatment while there, the evidence is contradictory, and is not now a matter for our decision.

The only remaining consideration, in order to dispose of all which is left in any of the exceptions, is the competency of the commander to decide on these various questions without being amenable to the plaintiff in an action at law for any mere error of judgment in the exercise of his discretion, which may have been involuntarily committed under the exigencies of the moment.

In order to settle this point correctly, it being in itself a very important one, as well as running through several of the exceptions, it will be necessary to advert to the circumstances, that Captain Wilkes was not acting here in a private capacity and for private purposes; but, on the contrary, the responsible duties he was performing were imposed on him by the government as a public officer. In the next place, those duties were not voluntarily sought or assumed, but met and discharged in the routine of his honorable and gallant profession, and under high responsibilities for any omission or

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neglect on his part, instead of being a volunteer, as in most of the cases of collectors and sheriffs made liable. (2 Str., 820; 6 T. R., 443.) Now, in respect to those compulsory duties, whether in reënlisting or detaining on board, or punishing or imprisoning on shore, while arduously endeavouring to perform them in such a manner as might advance the science and commerce and glory of his country, rather than his own personal designs, a public officer, invested with certain discretionary powers, never has been, and never should be, made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty. (See the cases hereafter cited.)

Nor can a mandamus issue to such an officer, if he is intrusted with discretion over the subject-matter. (*Paulding v. Decatur*, 14 Pet., 497; *Brashear v. Mason*, 6 How., 102.)

His position, in such case, in many respects, becomes *quasi* judicial, and is not ministerial, as in several other cases of liability by mere ministerial officers. 11 Johns., 108; *Kendall v. United States*, 12 Pet., 516; *Decatur v. Paulding*, 14 Pet., 516. And it is well settled that "all judicial officers, when acting on subjects within their jurisdiction, are exempted from civil prosecution for their acts." (*Evans v. Foster*, 2 N. H., 377; 14 Pet., 600, App.)

Especially is it proper, not only that a public officer, situated *like the defendant, be invested with a wide discretion, but be upheld in it, when honestly exercising, and not transcending, it as to discipline in such remote places, on such a long and dangerous cruise, among such savage islands and oceans, and with the safety of so many lives and the respectability and honor of his country's flag in charge.

In such a critical position, his reasons for action, one way or another, are often the fruits of his own observation, and not susceptible of technical proof on his part. No review of his decisions, if within his jurisdiction, is conferred by law on either courts, or juries, or subordinates, and, as this court held in another case, it sometimes happens that "a prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object." "While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the fact upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance." 12 Wheat., 30.

Hence, while an officer acts within the limits of that discretion, the same law which gives it to him will protect him in the exercise of it. But for acts beyond his jurisdiction, or

attended by circumstances of excessive severity, arising from ill-will, a depraved disposition, or vindictive feeling, he can claim no exemption, and should be allowed none under color of his office, however elevated or however humble the victim. (2 Carr. & P., 158, *n.*; 4 Taunt., 67.)

When not offending under such circumstances, his justification does not rest on the general ground of vindicating a trespass in private life, and between those not acting officially and not with a discretion. Because then, acts of violence being first proved, the person using them must go forward next, and show the moderation or justification of the blows used. (2 Greenl. Ev., § 99.)

The chief mistake below was in looking only to such cases as a guide. For the justification rests here on a rule of law entirely different, though well settled, and is, that the acts of a public officer on public matters, within his jurisdiction, and where he has a discretion, are to be presumed legal, till shown by others to be unjustifiable. (*Gidley v. Palmerston*, 7 Moo., 111; *Vanderheyden v. Young*, 11 Johns. (N. Y.), 150; 6 Har. & J. (Md.), 329; *Martin v. Mott*, 12 Wheat., 31.)

This, too, is not on the principle merely that innocence and doing right are to be presumed, till the contrary is shown. (1 Greenl., §§ 35-37.) But that the officer, being intrusted with a discretion for public purposes, is not to be punished *for the exercise of it, unless it is first proved against [*131 him, either that he exercised the power confided in cases without his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or wilful oppression, or, in the words of Lord Mansfield, in *Wall v. McNamara*, that he exercised it as "if the heart is wrong." (2 Carr. & P., 158, note.) In short, it is not enough to show he committed an error in judgment, but it must have been a malicious and wilful error. *Harman v. Tappenden et al.*, 1 East, 562, 565, *n.*

It may not be without some benefit, in a case of so much interest as this, to refer a moment further to one or two particular precedents in England and this country, and even in this court, in illustration of the soundness of these positions.

Thus in *Drewe v. Coulton*, 1 East, 562, *n.*, which was an action against the defendant, who was a public returning officer, for refusing a vote, Wilson, J. says:—"This is, in the nature of it, an action for misbehaviour by a public officer in his duty. Now, I think that it cannot be called misbehaviour unless maliciously and wilfully done, and that the action will not lie for a mistake in law." "By wilful I understand contrary to a man's own conviction."

"In very few instances is an officer answerable for what he does to the best of his judgment in cases where he is compellable to act, but the action lies where the officer has an option whether he will act or no." (See these last cases collected in *Seaman v. Patten*, 2 Cai. (N. Y.), 313, 315.)

In a case in this country, *Jenkins v. Waldron*, 11 Johns. 121, Spencer, J. says, for the whole court, on a state of facts much like the case in East:—"It would, in our opinion, be opposed to all the principles of law, justice, and sound policy, to hold that officers called upon to exercise their deliberate judgments are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice." Similar views were again expressed by the same court in the same volume, (p. 160,) in *Vanderheyden v. Young*. And in a like case, the Supreme Court of New Hampshire recognized a like principle. "It is true," said the chief justice for the court, "that moderators may decide wrongly with the best intentions, and then the party will be without remedy. And so may a court and jury decide wrongly, and then the party will also be without remedy." But there is no liability in such case without malice alleged and proved. *Wheeler v. Patterson*, 1 N. H., 90

Finally, in this court, like views were expressed, through Justice Story, in *Martin v. Mott*, 12 Wheat., 31:—"Whenever a statute gives a discretionary power to any person, to *132] be *exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statutes constitute him the sole and exclusive judge of the existence of these facts." "Every public officer is presumed to act in obedience to his duty, until the contrary is shown."

Under these established principles and precedents, it will be seen that the rulings below must be held erroneous whenever the court departed from them, and required the defendant, as on several occasions, to go forward, and in the first instance to prove details rebutting any error or excess.

As, for illustration, to prove in the outset facts showing a necessity to detain the plaintiff, before the latter had offered any evidence it was done from malice or without cause; or to prove that the prison on shore was safer and more suitable for the plaintiff's confinement than the vessels, under the peculiar circumstances then existing, until the plaintiff had first shown that no discretion existed in the defendant to place him there, or that he did it *malâ fide*, or for purposes of cruelty and oppression; or to prove that the punishment inflicted was not immoderate, and not unreasonable, when it is admitted to have been within the limits of his discretion,

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as confided to him by the articles for the government of the navy. On the contrary, as has been shown, all his acts within the limits of the discretion given to him are to be regarded as *primâ facie* right till the opposite party disprove this presumption.

The judgment below must therefore be reversed, and a *venire de novo* awarded, and the new trial be governed by the principles here decided.

HUGH M. PATTON, ADMINISTRATOR, AND HUGH M. PATTON AND OTHERS, HEIRS OF ROBERT PATTON, DECEASED, APPELLANTS, v. JAMES TAYLOR, ADMINISTRATOR, AND JAMES TAYLOR, JOHN W. TIBBATS AND ANN W. HIS WIFE, GEORGE T. WILLIAMSON AND JANE M. HIS WIFE, AND HORATIO T. HARRIS AND KETURAH L. HIS WIFE, HEIRS OF JAMES TAYLOR, DECEASED.

A bill in chancery filed by the purchaser of land against his vendor, to restrain the collection of the purchase-money, upon the two grounds of want of title in the vendor and his subsequent insolvency, without charging fraud or misrepresentation, cannot be sustained.

Relief will not be given on the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue in the pleadings.¹

¹ DISTINGUISHED. *Fehrle et ux. v. Turner*, 77 Ind., 535. CITED. *Baker et al. v. Nachtrieb*, 19 How., 130; and see post, *159 n; *Hart v. Hannibal &c. R. R. Co.*, 65 Mo., 509; *Blanks v. Walker*, 54 Ala., 117; *Chapman v. Lee*, 55 Id., 616; *Harding v. Commercial Loan Co.*, 84 Ill., 251; *Jones v. Fulghum*, 3 Tenn. Ch., 193; *Strong v. Waddell*, 56 Ala., 471; *Wyatt v. Garlington*, Id., 576; *Dietz v. Mock*, 47 Iowa, 451; *Tobin v. Bell*, 61 Ala., 125; *Oakes v. Buckley*, 49 Wis., 592; *Ryerson v. Willis*, 81 N. Y., 277, 280. A general allegation of fraud and duress will not suffice. *Sullivan v. Sullivan*, 21 Law Rep., 531.

It is an established rule in equity, that when the vendor of lands has not the power to make a title, the vendee may, *before the time of performance*, enjoin the payment of the purchase-money, until the ability to comply with the agreement is shown; but then the court will give a reason-

able time to procure the title, if it appears probable that it may be procured. *Galloway v. Finley et al.*, 12 Pet., 264. Compare *Buford v. Guthrie*, 14 Bush (Ky.), 690; *Schilling v. Short*, 15 W. Va., 780.

But except in special cases, a vendee *in possession* cannot, at law or in equity, contest the payment of the purchase-money by showing an alleged defect of title; he must rely on the covenants, if any there are, in his deed. *Wanzer v. Truly*, 17 How., 585. But where fraud and insolvency on the part of the vendor are shown, the vendee may resist payment by cross-bill, setting forth the defects of title, and charging the fraud and insolvency. *Leird v. Abernathy*, 10 Heisk. (Tenn.), 626; or he may have an injunction against the collection of the unpaid balance of the purchase-money. *Houston v. Hurley*, 2 Del. Ch., 247. The purchaser cannot recover back the price paid, or resist its payment, so