Wilkes Vs. Dinsman

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Appellant : Wilkes

Respondent : Dinsman

Judgement :

Wilkes v. Dinsman - 48 U.S. 89 (1849)
U.S. Supreme Court Wilkes v. Dinsman, 48 U.S. 7 How. 89 89 (1849)

Wilkes v. Dinsman

48 U.S. (7 How.) 89

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES

FOR WASHINGTON COUNTY IN THE DISTRICT OF COLUMBIA

SYLLABUS

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 2 March, 1837, 5 Stat. 153, authorized a reenlistment 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.

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 offense, and subject to additional punishment.

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.

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 willful error.

This 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 14 May, 1836, Congress passed an Act, 5 Stat. 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.

On 21 November, 1836, Dinsman enlisted in the Marine Corps of the United States for four years.

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On 2 March, 1837, Congress passed an Act, 5 Stat. 153, entitled, "An act to provide for 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 reenter 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 noncommissioned officers and privates of marines, which was as follows:

"We, the subscribers, noncommissioned 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 hereinafter 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 everything 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 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. "

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"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 noncommissioned 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."

image:a

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

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

On 2 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 1 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.

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

On 24 November, 1842, the squadron having returned home, Dinsman brought this action against Wilkes.

In the meantime, however, a court-martial had been held upon Wilkes, one of the charges before which was "cruelty and oppression," founded upon the same occurrences which are set forth in the bills 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 reenlistments 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 endorsed 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 18 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 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 16 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 the defendant, still commanding

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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 15 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 21 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, hereinafter 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

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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 25 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 20 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 14 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 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 in evidence to the jury, as competent

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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 24 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 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 noncommissioned 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 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 25 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 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 are relevant to the issues

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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 25t 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 16 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 16 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 27 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 *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 4 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. "

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" *Judgment of Court-Martial* "

"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 aforegoing 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 Antarctic 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 harbor, 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 harbor, and it would have been unsafe, if not entirely impracticable, to have made them elsewhere; that she had then made a long voyage, and 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 endeavored 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 favor to them; leave was granted to all, and after their leave had expired, they set about over-hauling and repairing the ship; while this work was going on,

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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, "

brk:

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 costs, 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 16 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

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marines, pretending their term of 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;

brk:

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, and through whom

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they could communicate with the defendant;

brk:

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 ferocious savages, of the Northwest Coast of America, where the marine force was especially needed;

brk:

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 dispatch, 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 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 defendant 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

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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 7 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 harbor, 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 the 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 harbor 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 he 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,

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without any difficulty, 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 Fiji 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 offense alleged against him, and of greater severity than is allowed 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,

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1840, and was there, for the purpose of the said repairs and the safety of the ship, brought into the inner harbor 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 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 of the contract,

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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 to 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."

"Which instruction the court refused go give, and, or 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 offenses 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 petit offenses I think each punishment settles all previous offenses of that kind. If, after such punishment, a new offense 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 29 April, 1845."

"W. CRANCH [SEAL]"

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" *Defendant's 4th Bill of Exceptions* "

"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 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 30 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 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 offense not exceeding twelve lashes; and every such refusal was a new offense, for which he was subject to punishment; and every such punishment was a full satisfaction for every such offense to the time of the infliction thereof. Which instruction the court refused to give; and 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

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to instruct the jury, that if the jury believe, from the evidence aforesaid, that the said defendant could have 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 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 harbor 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 30 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 offenses, 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 plaintiff,

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

"W. CRANCH [SEAL]"

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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 the punishment on a subsequent day, after another request and refusal by him to obey. And also, in the meantime, 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 agreement 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 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 14 May, 1836, 5 Stat. 29, sec. 2), for purposes of commerce and science, very valuable to the country and not entirely

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without interest to most of the civilized 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 aegis 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 reenlisting or contracting to serve till the expedition should terminate.

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

It was also official correspondence of the commander in respect to official matters, and seems to have been justifiable as evidence on that account. 1 Greenleaf on Ev., sec. 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 offense, the parties then being the same likewise, and the tribunal acquitting competent to examine and acquit. *Aspden v. Nixon,* 4 How. 467; *Burnham v. Webster,* 1 Woodb. & Minot 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. Buller, N.P. 19; *Hannaford v. Hunn,* 2 Carr.

& Payne 146, *semble.*

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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 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 2, 1837, which is supposed to reach a case of this kind and to have justified a contract of reenlistment made by the plaintiff, which extended beyond the original term and till after the punishment complained of. 5 Stat. 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 enlist persons to voluntarily reenlist to serve until the return of the vessels."

See 3d section of Act of March 2, 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 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 reenlist and engage to serve during the term of the cruise. Thereupon many did so reenlist 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. Their very name

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of "marines" indicates the place and nature of their duties generally. And beside the analogies of 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 27 March, 1794, 1 Stat. 350, sec. 4. Their pay was also to be fixed in the same way as that of the seamen. Sec. 6, 351.

So it was again by the Act of April 27, 1798. 1 Stat. 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, 11 July, 1798, 1 Stat. 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 reenlistment 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 reenlist 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 making proposals and paying a bounty to both marines and seamen who would reenlist. 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 reenlist 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 reenlistment and engagement, the commander had power to detain the plaintiff after his original term expired if in his opinion the public interest required it. In the second section of the law, 5 Stat. 153, it is enacted

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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."

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 interest," 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. 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 30, 1834, 4 Stat. 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 regulations 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.

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 30, 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. 47, and this on 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 nonconformity 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 inflict on him twelve lashes without the formality of a court-martial. 2 Stat. 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, *ibid.,* 49, and no more stripes were given here for anyone 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 been settled in a penal prosecution that a like act, when prohibited,

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if distinctly repeated, even on the same day, constitutes a second offense, and incurs an additional penalty. *Brooks qui tam v. Milliken,* 3 D. & E. 509.

Again, if this disobedience could not be considered a technical offense under either of the articles already referred to, it surely is an offense 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. 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. & Min., and case there cited, and 9 Law Reporter 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. 117, sec. 10; Abbott on Shipping 177; *Jay v. Allen,* 1 Woodb. & Min. 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.

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The William Harris, Ware 367, and *The Nimrod, id.,* 9; *Wilson v. Mary,* Gilpin 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 neglect on his part, instead of being a volunteer, as in most of the cases of collectors and sheriffs made liable. 2 Strange 820; 6 D. & E. 443. Now in respect to those compulsory duties, whether in reenlisting or detaining on board or punishing or imprisoning on shore, while arduously endeavoring 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 entrusted 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."

25 U. S. 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. & Payne 158, note; 4 Taunton 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 Greenleaf on Ev., sec. 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 Moore 111; *Vanderheyden v. Young,* 11

Johns. 150; 6 Har. & Johns. 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., sec. 35-37, but that the officer, being entrusted with a discretion for public purposes, is not to be punished

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for the exercise of it, unless it is first proved against 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 willful oppression, or, in the words of Lord Mansfield in *Wall v. McNamara,* that he exercised it as "if the heart is wrong." 2 Carr. & Payne 158, note. In short, it is not enough to show he committed an error in judgment, but it must have been a malicious and willful error. *Harman v. Tappenden,* 1 East 562, 565, note.

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, note, 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 misbehavior by a public officer in his duty. Now I think that it cannot be called misbehavior unless maliciously and willfully done, and that the action will not lie for a mistake in law. . . . By willful, 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 Caines 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 be

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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 *mala 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, 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 *prima 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.