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A
LETTER
TO THE
RIGHT HON. LORD TENTERDEN,
JUSTICES BAYLEY,
LITLEDALE, AND PARKE,
ON
Martial, Military, and Civil
LAW;
AND
ON THE WORD "CRIME."

"Actio non est reus, nisi mens sit rea."—
Nothing is criminal but what proceeds from the heart.

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1829.

Letter, &c.

MY LORD,

CONSIDERING you have deprived me of my right to a Trial by Jury, by granting jurisdiction to a Military court, to take cognizance of a *Civil crime*, and believing that if there be a case in which, above all others, it becomes the Courts of Westminster to be particularly watchful over the rights of the subject, it is in the case of a court-martial deciding on the extent of its own jurisdiction. Your late decision "That an indictable misdemeanour at common law, is cognizable by a Military court, is certainly a new doctrine, hitherto unknown, but now necessary to be made public for the benefit of the community at large. Hitherto Martial law, Military law, and Civil law, have possessed different jurisdiction; and a Civil crime could not, formerly, legally be tried by a Military tribunal, until martial law was proclaimed.

A Military court-martial is the mere creature of the Mutiny Act, (which makes a wide distinction between *crimes* and *offences*.) and has not the smallest shadow of authority, but what is derived from that Act. All courts-martial are considered as criminal prosecutions at the suit of the Attorney General on behalf of the Public, and depredations on private property were not (until your late decision) considered cognizable by a Military court. If law was a science, and governed by principles, and not a mere matter of opinion, as it unquestionably is, how much trouble would be saved to yourselves, and what inestimable benefit would be conferred on the world at large; but, unfortunately for the community, no

one is acquainted with your law; and there is really as much injustice done within the walls of Westminster, as without them.

I do not dispute that a court Military has power to try any question, whether the party or the offences charged is subject to their jurisdiction. But the members exercise it at their peril; and it becomes them to have the most explicit and convincing proofs, that they have cognizance both of the *party* accused, and of the offence, before either one or the other are put upon trial. A military man may be accused of an offence not of a military nature, which, formerly, would not subject him to be tried by a military tribunal; and a civilian may commit a military offence, which, for the same reason, would not have subjected him to Military law, until martial law was proclaimed. If the rights of the subject is to be preserved, it is necessary that courts-martial should be kept strictly within their jurisdiction, and it is not only necessary to confine them strictly within the limits of their authority, with respect to *the person accused*, but also with respect to the offence with which they are accused.

It may be thought great presumption in me to differ from so great an authority as that of the learned Judges of the Court of King's Bench, but when a man is accused of a *civil crime*, and tried by a court-martial, who acquit him of that crime, but punish him as they think proper, "On suspicion of intending to commit a distinct offence with which he was not charged," he has a right to be guided by his own opinion, that the Court of King's Bench ought not to sanction it, and not by the opinions of others. If *neither the crown, the government, or the public*, can be injured by any act being done, it is not a *crime* cognizable by a court-martial, because a court-martial is a criminal prosecution for the benefit of the public. If I am accused of *an intent to obtain money under false pretences*, before such an offence is cognizable by a court-martial, it must be shewn, that it was to defraud the crown, the government, or the public; but if to either the crown or public I give security, and an offence charged cannot injure either, it would not be a *Military crime*, and therefore, not subject to Military

law. No court in the realm which is guided by the rules of law, can legally give judgment against a plaintiff on a verdict convicting him of an offence for which he was never arraigned or pleaded, and to which it was impossible for him to be prepared with any defence. Taking the verdict of a court-martial to be of the nature of a special verdict, the Court of King's Bench, in construing it, must confine itself to the facts expressly found, and cannot supply the want of them by any arguments, intendment, or implication whatever. Suppose a person indicted as *an accessory* before the fact, in fraudulently and feloniously advising and persuading A. B. to steal my goods, and the jury find that at such time and place A. B. did steal my goods, and that the defendant received the same goods, knowing them to have been stolen. This verdict I submit would be void, as finding a matter not at issue; and as trying and punishing are component parts of each other, and cannot fairly be divided if there is no jurisdiction to punish, or if any Court in the realm exceed their jurisdiction in punishing, they lose their jurisdiction to try, and their proceeding becomes from that moment illegal.

If it is in the power of Naval or Military Commanders to take up a man under pretence of some Military offence, and it be in the power of a Military court to give themselves jurisdiction over him; by deciding the offence and party accused to be both of a Military character, the liberty of the subject is at an end, and the Navy or Army may, as soon as its commanders shall think fit, become the sovereign power of this country. It is a principle of natural justice, and therefore it is a rule of the Law of England, that no man shall be put upon trial for any offence, before any court of jurisdiction, unless; previous to such trial, he has been distinctly and specifically charged with such offence, and called upon to answer it; for it is impossible for any man to come prepared to defend himself against a charge of which he is ignorant.

This rule was early recognised; and solemnly established by several judgments in parliament. The want of a previous charge, was the principal error upon which the judgment against the Mortimers, in the time of Edward the II. was reversed in Parliament, in the 1st

of Edward the III. So the like was done in the case of the Earl of Lancaster, in the 1st of Edward III. And in Hale, there are many instances and authorities to prove, that no man can be convicted or attainted of any *crime*, without first arraignment, and being put to answer it.

The specific charge before you was, "On suspicion of having fraudulently charged 26 supernumeraries a blanket each they never received, by placing the figure of 8 in the margin of the ship's books," which I still maintain, *as regards a Purser*, is not an offence cognizable by a Military tribunal. The learned Judges of the Court of King's Bench, however, have decided, that this accusation falls under the 36th Article of War, of the 22nd of George II. cap. 33, where they say, every species of *crime* is included. And supposing the learned Judges to be correct so far, yet no man ought to be convicted of any offence with which he was not specifically charged previous to his trial. "*An attempt to obtain money under false pretences*," is a distinct charge, with which I was not accused, and I complain of not having justice done me, by the original accusation being so egregiously wiredrawn. On the specific charge I was acquitted by the defendants, but found guilty "On a suspicion of intending to commit a distinct offence, with which I was not accused, in breach of the 24th Article of War. The specific charge was neither a Civil or Military crime. To make a crime cognizable by human laws, there must be both a will and an act; so that first to constitute a crime against any human law, there must be first a vicious will; and secondly, an unlawful act, consequent upon such vicious will, "*An attempt to obtain money under false pretences*," without stating from whom, is neither a crime or an offence against any law, and most assuredly not cognizable by Military law, without it can be shewn, that it was to defraud the Public. As all courts-martial are considered as criminal prosecutions in their behalf, "An attempt to defraud the men, is not an offence cognizable by the Naval Article of War, but according to the Mutiny Act of 1812, section 16, must be tried upon information, or indictment, in one of the Courts of Record, at Westminster.

On the 20th of February, 1806, Francis Moore, Esq. brought an action of trespass and false imprisonment against John Pollegreen Bastard, Esq. in the Court of Common Pleas, sitting at Nisi Prius, which was tried before Lord Chief Justice Mansfield, in which Mr. Sergeant Shepherd was counsel for the plaintiff, and Mr. Sergeant Best for the defendant.

Mr. Sergeant Shepherd stated, "that the plaintiff in this action, Francis Moore, Esq. was lately Colonel of the Bedfordshire Militia, and he sought, through the gentlemen who were now impannelled for the purpose of justice, less to recover pecuniary recompense for the injury he had sustained, than to vindicate his integrity and rectitude, and to prevent the attachment to his character of that opprobrious inference to which the conduct towards him of the parties against whom he appealed was likely to give rise. The defendants, John Pollegreen Bastard, Esq. was Colonel of the Devonshire Militia and M.P. for the County, and was selected to bring this action against him, as being the President, and therefore most prominent constituent of a court-martial, all the members of which were equally liable and implicated in the offensive measure of which the plaintiff complained. The plaintiff, Colonel Moore, was put under an arrest by the defendant on a supposition of subordination of perjury; and he grounded his plea of false imprisonment in that he *had not subjected himself to the punishment, nor had the court-martial the power to inflict it.*"

Mr. Sergeant Best, after addressing the jury, *put in the Articles of War*; but Lord Chief Justice Mansfield decided that the Articles of War, collectively, *gave the defendant no jurisdiction*, and a verdict was entered for the plaintiff, damages 300 guineas.

In my case, the Articles of War, collectively, were admitted by the present learned judges of the Court of King's Bench, and jurisdiction granted to the court-martial by the 36th Article of War, although it was by the 24th Article the court actually claimed their jurisdiction at the court-martial, and the 36th Article of War was not even on the record in either case.

Another case I shall mention, which more clearly shews

that a depredation on private property is not cognizable by military law, and shall instance a case of James Bryan, John Johnson, and John Brown, of the "Ocean," in the year 1762, who were brought to a court-martial for stealing a purse, belonging to a seaman of the same ship, containing 36 guineas, which the members of the court declined to investigate as not coming within their jurisdiction, and the accused were afterwards tried at the Old Bailey and convicted. If a man be indicted for a rape at the Sheriff's Tour, or for treason at the Quarter Sessions, or brought to a court-martial, when neither the offence charged or the person accused is of the description of person or crime there amenable, on these or similar objections which presume the incompetency of his judges, he may by right except to the jurisdiction of the court, and even refuse to answer to his arraignment, even if called upon to answer.

In the year 1802, a most extraordinary power, contrary to the common established principles of law, was attempted to be introduced into the Bill brought into Parliament, appointing Commissioners for inquiring into the abuses in the Navy, &c. &c. and which absolutely passed rather precipitately through the several stages in the House of Commons. On its being read in the House of Lords, His Royal Highness the Duke of Clarence strongly opposed the Bill; and the clause, vesting a power in the commission to examine *persons on oath*, so as their answers might tend to criminate themselves, was strongly animadverted upon; and in consequence of the wise suggestion of the Lord Chancellor (Eldon), and the Lord Chief Justice (Ellenborough), the Bill passed with its Amendments, in a form more constitutional, and more consonant to the established doctrine of the laws of the realm in all matters of investigation, or of an inquisitorial nature. From what fountain such an attempt at illegal power flowed, or from what motive it originated, it is not my province to inquire. Suffice it to say, *that no zeal for the public good will justify any man, or set of men, however high in authority, to exercise their power beyond the letter and spirit of the law, and that every violation or encroachment that may*

be attempted to be made on the established and fundamental laws of the land, or on the rights and privileges of the subject, granting it were successful, must obviously be subversive of that harmonious system of laws, of which the weak are protected from the authority and passions of the powerful. It is also manifest, that by destroying any link of the great chain of causes and effects which bind men together, the energy of public opinion, the best cement of society would in proportion be impaired; hence the same power improperly exercised, or not duly checked, might with equal facility break link after link of the great chain of law by which we have for ages been protected, until ultimately there would be an inlet to every kind of innovation, and the whole fabric of our glorious Constitution would thereby be involved in one common ruin. "Every act of authority," says the great Montesquieu, "exercised by one man over another is tyrannic, unless it be absolutely necessary; and whenever any man is tried by a specific law, it is but just he should be punished by *that law, and no other.*"

Are men to be still tried, my Lords, in this once happy country, by equal laws? and will you really permit a military court to possess a greater jurisdiction than any court in the realm? Every man accustomed to judicial investigation must be sensible that a case may be proved, and appear wholly unanswerable, and yet may be completely overturned in the course of the defence.

Being now solely on the law of my case, I shall not at present comment upon the evidence produced at my court-martial, because the Court of King's Bench did, at the request of the defendants, refuse to enter on the merits, but choose to confine themselves to the law, not to any written law or penal statute, but to rest on *your* decision, which they of course counted upon as being in their favour.

Crimes and offences, I consider, are of two kinds; they are, offences against the common law, and also against positive institutions. A crime is the doing of some act; not only against the common law, but likewise in viola-

tion of some Act of Parliament; and an offence is in violation of some custom, or contrary to common law, without any criminality attached. The Court of King's Bench must have imagined, that *Man v. Owen* and others, was a prosecution by the plaintiff against the Government, and not a civil action against the members of a Military court; and when the said members claimed their jurisdiction to try a civil cause, they imagined it was during the time martial law was proclaimed, or surely, by their judgment, the rights of the subject would never have been so unconstitutionally infringed upon. That judges are not infallible, *all must confess*; and that law is a mere matter of opinion, no one can reasonably deny. Some years back, Lord Alvanly was trying a cause, and during its progress he positively insisted that he had never given an opinion on a certain subject contrary to that he was then delivering. Such is the imperfection of human memory, that his own signature was attached to the opinion so given; the book containing it was presented to him; at first, in the confidence of his own accuracy, he declined to inspect it; but at last, being modestly intreated, he was over persuaded, and he exclaimed, on examining the entry, "There it is as true as God's in Gloucester." Lord Mansfield was the great luminary of legal science, if I may call law still a science, and before he delivered an opinion he reasoned upon it to the utmost stretch of his capacious abilities. To him an instance occurred of the same kind as that I have just explained with respect to the other nobleman. This signature was shown to him, and the opinion of William Murray, Attorney-General, was diametrically opposite to that of William Earl of Mansfield, Lord Chief Justice of the Court of King's Bench. *Advantages have been taken of me which are unfair.* As former justices and chief justices have altered their opinion, after judgment has even been given, I sincerely hope the same will be done in my case; and as I have the opinion of Lord Mansfield, that a civil injury, a *fraud*, or a breach of trust in an individual, which does not concern the public, is not an indictable offence cognizable by a court-martial. Upon this decision I shall now rest, and conclude with observing,

if Lords Mansfield, Loughborough, Hale, and others, are right, the present Learned Judges of the Court of King's Bench must be wrong. First, I respectfully submit; that the accusation *against a purser* on suspicion of having *fraudulently* "charged 26 supernumeraries a blanket each they never received, is not an offence cognizable by a court-martial." Secondly, As fraud is provided for by the 33d Article of War, of the Act of 22d Geo. II. c. 33, which is a penal statute, such an offence, if even committed by a *purser*, is not a crime falling under the 36th Article of War, because the crime of fraud is mentioned in the 33d Article, and a specific punishment assigned for it; and although a *purser* is not named in the 33rd Article, *the offence of fraud is*; and as the words of the 36th Article are, "all other crimes *not mentioned*," &c. in that Act, must exclude crimes which are *mentioned*. No legal jurisdiction can be claimed by the 36th Article, to try a purser for fraud, mentioned in the 33rd, which the word "*other crimes*" in the 36th Article most fully demonstrates. If a purser dies at sea, his securities to the public die also, and his stores, &c. are taken charge of by the commanding officer of the ship, be he either a flag officer, captain, commander, or lieutenant, as the case may be, who, not having given any security to the public, can commit a fraud on the public; and such an accusation against either of these officers would be cognizable by the 33rd Article of War; so that the crime of fraud is most clearly named in the 33rd article, *although not as regards a purser*; and the 36th Article of War cannot fairly take cognizance of this offence, because it is named in the 33rd. Thirdly, I contend that the *Articles of War, collectively*, give no jurisdiction to try a party for any offence whatever; but the specific Military offence charged, must be tried and punished by the *specific Article*, which provides for it, *which specific Article alone gives the jurisdiction to try*. In my case, the members of the court-martial claimed their jurisdiction to try the specific offence charged by the 24th Article of War, which relates to embezzlement, &c., which is admitted by five of their pleas; but as in the special case submitted to you, the word "*twenty*"

four" is omitted purposely, and the sentence appears "in breach of the Articles of War," instead of "in breach of the 24th Article of War." Even this gives defendants no jurisdiction to try the specific offence charged, and this I submit to your Lordship's consideration.

I am, my Lord,

Your most respectful, and

Most obedient Servant,

H. S. MAN.

Walworth, Nov. 2, 1829.

MR. MAN'S STATEMENT TO HIS COUNSEL,

BEING THE GROUND OF

Mr. Brougham's Speech to the Special Jury, in the Cause of Man v. Owen and others, before the Right Hon. Lord Chief Justice Tenterden, 22nd Oct. 1827.

MY LORD AND GENTLEMEN OF THE JURY,

"The plaintiff in this cause has brought an action of trespass and false imprisonment against the Defendants, as members of a court-martial, held on him on board H.M. Ship, Prince Regent, in January, 1824, and after naming to you the ground of the Plaintiff's complaint, his Lordship will in the first instance tell you the law on the case, and you will then have to decide as to the amount you consider adequate for the injury the Defendant's illegal proceedings have caused him.

"Mr. Harry Stoe Man, the Plaintiff, has served his King and country in different parts of the world for many years, and after passing the various degrees in the Royal Navy, full 20 years ago, became a Purser. In March, 1823, the Lords Commissioners of the Admiralty appointed him Purser of the *Perseus*, receiving ship off the Tower, but as his joining that ship interfered with some private arrangements of the captain, he was told by that gentleman *not to accept the appointment*, as if he did, he the captain, would make it extremely disagreeable to him. Mr. Man feeling piqued at the remark, and satisfied he knew his duty and the rules and regulations of his majesty's service, equal to any officer of his rank and standing, paid no attention to the admonition, but upon receiving his warrant, joined the ship, and after giving *the usual securities* to government, took charge of all the stores, &c. and continued in that official situation, as Purser of the *Perseus*, until illegally dismissed by Defendants, in January, 1824; and the captain in fulfilment of his promise, upon the Plaintiff becoming an

officer under his command, did most assuredly annoy him all in his power ; and I shall now merely remark, that after repeated attempts to catch Plaintiff, after placing spies on all his actions, and after *three distinct accusations* to the Lords Commissioners of the Admiralty in the short space of time of three months, and in every instance Plaintiff being fully acquitted of all the charges, nevertheless so bent was the captain on the Plaintiff's destruction and satisfied he could not succeed by fair and honourable means, that he resorts to foul and illegal, and with the assistance of the present Defendants, at last accomplished his diabolical plan, namely, of *ruining the Plaintiff* for ever. As a deeper scheme for the destruction of any man was scarcely ever concerted, I trust I shall be excused the time I may occupy in exposing it, and as I shall state nothing but what I can prove, the Defendants have only to thank themselves for the situation they are now placed in, by lending themselves to this dark and wicked conspiracy.

"Several months after the Plaintiff had become Purser of the *Perseus*, he obtained leave of absence for a few days to take his family into Kent, and the day after he had left the ship, the captain, contrary to all law, or honour, the rules of society, or the rules and regulations of his Majesty's service, orders the Plaintiff's cabin to be broken open, and all his books and papers, both public and private, to be seized and examined, and an express is dispatched to Plaintiff to return instantly to London. Upon Plaintiff receiving this order it was promptly obeyed, and when he gained his ship, he was placed under an arrest by the captain, (which will be shewn you from the ship's log-book,) to prove the difference between the original arrest and the specific charge now brought before the Defendants, as members of the court-martial; for it will be seen, that Plaintiff was first put under an arrest, "On suspicion of having charged the men with blankets they never had," not 26 supernumeraries as stated afterwards, so that in the very first instance, the original arrest and the declaration differ, which it was the duty of the Defendants to have seen, as being judge, jury, and counsel for the prisoner, and to have dismissed

the complaint on this ground, if not on any other; but they did no such thing, for in defiance of a written protest handed to them by Plaintiff, objecting to their jurisdiction to try the specific offence charged, they put him on his trial, and came to a conclusion not justified by the evidence, by the law of the land, by either of the 36 Articles of War, or the naval printed instructions. So strict was Plaintiff's arrest, that he was a close prisoner, allowed no intercourse with any one, either on board or from the shore, a sentry was placed over him, and the officer of the watch and sentry ordered to visit him every four hours, day and night; and in fact, had he committed treason against the state, he would have been better treated, and more mildly dealt with.

"The Plaintiff in consequence of this usage, contrived, unknown to the captain, to send a letter to the Secretary of the Admiralty, stating the hardship of his case, and their Lordship's very properly called upon the captain for an explanation of his conduct. The Plaintiff's letter to the Admiralty will be found in the first page of the minutes of the court-martial, and the captain's letter preferring the specific offence named in the Defendant's plea directly following it. It may perhaps, be here necessary to observe, that the harsh and unwarrantable proceeding of the captain was to induce the Plaintiff to resign his situation and leave the ship, but the Plaintiff refused to do this; he made his complaints known to the Admiralty, and when their Lordship's called on the captain to explain his conduct, he (the captain) was taken by surprise, as he well knew Plaintiff had committed no offence against either the 36th Articles of War, or naval printed instructions, or any known law of the land, and if he did not shew some good ground for breaking open the Plaintiff's cabin, and seizing his books and papers, his own commission was in jeopardy, and he would most probably be dismissed his majesty's service instant. It therefore became necessary, that the charge the captain was about to prefer, should relate to the Plaintiff's books and papers he had unwarrantably seized, and finding (as he says) in the margin of one of the ship's books the figure of 8 against the names of 26 supernumeraries, which he also says

was put there by Plaintiff, he gets his clerk to write over this figure, the word *blanket*, and then addresses his letter to the Lords of the Admiralty, saying, "He had put the Purser (the Plaintiff) under an arrest on suspicion of charging 26 blankets to 26 supernumeraries, by putting the figure of 8 in the margin of an open list, &c. &c."

"Now it must be kept in mind, that the word *blanket* was written over the 8 by the captain's clerk, after the figure of 8 in the margin of the open list was put against the names of the 26 supernumeraries, who were at the time all discharged the ship and had received their pay tickets, which were correct, as is admitted by the clerk, and examined, so that had not the word *blanket* have been written over the figure of 8, there could not have been an accusation of this description; and by the captain's style of letter to the Admiralty, he actually misled the Lords Commissioners of the Admiralty, who naturally concluded these 26 supernumeraries were all on board the ship, and actually charged improperly a blanket, which was not the fact; as they had all been discharged and received their pay tickets some days previous, and their accounts closed, and the word *blanket* over the figure, was the act of the captain. The Lords Commissioners being thus deceived, ordered a court-martial to assemble and try the Plaintiff; "On suspicion of having fraudulently charged 26 supernumeraries a blanket each they never received, by putting the figure of 8 in the margin of the Ship's books," naming the Defendants as members.

"In obedience to orders, the Defendant, Owen, as president, and the other defendants, assemble on board H.M.S. Prince Regent, in Gillingham Reach, and caused the Plaintiff to be brought before them to be tried, on the specific charge, as before stated; and without even calling upon the Plaintiff to plead to the charge, without arrainging him upon this or any other supposed crime, without calling one of the 26 supernumeraries before them, who were the best evidence, with a full knowledge of all the facts I have stated to you, in defiance of a written protest, and the very means of his defence being withheld from him; namely, his books and papers, nevertheless the Defendants force him to trial, and actually acquit him of the spe-

cific offence with which he was charged, by finding him guilty of an intent to commit a distinct offence, with which he was not charged. The Defendants did not find the Plaintiff guilty of the specific and only accusation brought before them, but they convict him of an intent to embezzle, (which is proved by their pleas,) and more severely punish him by the 24th Article of War, which provides for embezzlement, than they could legally have done by the 33rd Article of War, which provides for the specific offence with which he was charged; had he been actually either of the officers therein enumerated, and as five of their pleas out of the seven admit this, they are now called upon to justify their acts, which neither by law or equity can be done. Now although we can pardon my Lords Commissioners of the Admiralty, in the first instance, for receiving the charge from the captain, and as hath been said before, being deceived by him, still no excuse can possibly be made for the Defendants, because the consequence of their doing so was at the time pointed out to them. They received the charge in violation of a written law, namely, the printed instructions, and the Plaintiff's protest, which was before them. The Lords Commissioners of the Admiralty ordered the Defendants to assemble and try the Plaintiff on a specific charge; but they gave them no instructions, or could legally give them any, to exceed their jurisdiction by finding Plaintiff guilty of a distinct offence with which he was not charged, or to violate the established law of the land, which by their sentence has been done. The naval printed instructions, under the head of courts-martial, p. 405, expressly states, "That all accusations or complaints, as the ground of a court-martial, shall be in writing, setting forth the particular facts, the time and place, and in what manner the offence was committed." In violation, however, of this law, the Defendants, without one of these facts being stated, without giving to the Plaintiff the names of the 26 supernumeraries, or even the time and place they were supposed to be charged, with a knowledge that the word blanket, which made the charge, was written by the captain's clerk, and that Plaintiff's books and papers which had been improperly siezed, and still were in the

prosecutor's possession, deprived him of a defence. Until Plaintiff knew the names of the supernumeraries he was accused of charging, and the time and place they were so charged, and his books and papers returned to him, it was impossible for Plaintiff to meet the charge. The specific accusation, as concerned a Purser, was not an offence cognizable by military law, and consequently not within the Defendant's jurisdiction.

First. The specific offence was not set forth agreeable to the printed instructions, and should have been rejected on that ground. Secondly. It was admitted that these 26 supernumeraries had all left the ship, previously to the figure of 8 being put against their names; and as in their several pay tickets no charge of a blanket was made, it was impossible after they had left the ship for any charge to be made; and as every individual examined by the prosecutor admitted no one was or could have been injured by the figure of 8 being put in the margin of any book, this charge was no offence against any law, and consequently not cognizable by a military tribunal. Thirdly. The court-martial opened their commission on the 7th of January, 1825, and pronounced sentence on the 8th of January, the day following, without adjourning from one day to the other, which in Hale's Hist. Plac. Cor. p. 498, and several other authorities, makes their sentence erroneous; this will be confirmed by the learned Judge on the bench, and I anticipate, both on the law and merits of the case, a verdict for the Plaintiff.

"The offence of fraud is provided for by the naval Articles of War, 22nd Geo. II. cap. 33, by the 33rd section; and although a Purser is not named in that Article, it is no mistake of the Legislature, because a Purser gives security to the public for the stores in his possession, and every individual article he receives from the government he is instantly debitted with, and if through carelessness or inattention any loss occurs, it must be solely to his own injury and not the public; but if the Purser dies at sea his securities die also, and the flag officer, captain, commander, or lieutenant, instantly takes charge of the stores remaining on board, who, not having given security to the government, can commit a fraud on the public, and the 33rd Article of War awards a punishment solely

for them; but the sentence passed on Plaintiff by the Defendants, is not the tenor of the 33rd Article of War, or any other Article of the Act of the 22d Geo II. cap. 33, and although the Defendants sentence Plaintiff by the 24th Article of War, which gives a discretional power, still this discretional power must be construed *in mitigation*, not *in aggravation*, of punishment, and as Plaintiff was not accused or pleaded to embezzlement or any offence falling under the 24th Article of War, under the 24th Article of War the Defendants had no jurisdiction of the specific offence charged, and their sentence is consequently illegal. The sentence was "to be dismissed H. M. service, and rendered incapable of ever serving his majesty, his heirs, or successors as a Purser, mulcted of all pay, rank, and allowances, in breach of the 24th Article of War." Gentlemen, the laws of England have hitherto made no distinction in their rewards and punishments, with the high or low, the rich or poor, and the peasant or the peer; the messenger or the admiral, committing the same fault, ought to be equally punished. But the Defendants have made a difference, for had the Plaintiff been a flag officer, captain, commander, or lieutenant, and actually committed and been convicted of a fraud, he could only have been dismissed his majesty's service agreeable to the 33rd Article of War; but because Plaintiff was a Purser, in addition to dismissing him, they mulct him of all his pay, rank, and allowances, render him incapable of ever serving his majesty, his heirs, or successors, as a Purser, in breach of the 24th Article of War, which Article relates to embezzlement, and is an offence he never committed, never was accused, arraigned or pleaded.

"Gentlemen, it is really necessary that you should be made acquainted with these facts, because we are not aware whether the Defendants intend to defend themselves on the merits, or on the law of the case; had we confined ourselves to the former, they might have rested on the latter; and had we gone on the latter, they may fly to the former. Courts-martial, by law, are considered criminal prosecutions at the suit of the Attorney General, on behalf of the public, and consequently, depredations on private property (which does not concern the public),

are not crimes cognizable by the 36th Article of War, or by a military tribunal. If these 26 supernumeraries (without names) had actually have been charged a blanket each they never received, it was not even then an offence triable by a court-martial, because it was no injury to the public, to whom the Purser gives security; but a depreciation on the private pay of the men, who would individually have suffered, but as the specific offence was not committed, or intended to be committed, as neither embezzlement was committed, or intended to be committed, as was admitted by all the evidence adduced on the trial, and the word *blanket* which made the charge, was written by the captain's clerk over the figure of 8 after the men had all been discharged and left the ship; if this does not prove a conspiracy, there never was a conspiracy; and I hope the jury will visit it with heavy damages.

"Now I state a fact that cannot be contradicted, that at this moment will be found the name of the Plaintiff in the books of every ship he has ever sailed in, and it is equally certain that he is now discharged, and his accounts closed; if, therefore, any person was to put the figure of 8 in the margin of either of these books against the Plaintiff's name, and another person was to write over the figure the word *blanket*, could the Plaintiff by any possibility be injured by it? or would it be a crime against any law, when no one could be benefitted or injured? and does it signify whether it is done five minutes after a party is discharged, or five years? for when once a man is discharged, and got his pay ticket, the books may be burnt, as his pay ticket resembles a check upon a banker, and if that is correct, which in the case of the 26 supernumeraries, it was admitted to be, it is sufficient, and the books, as concern them, become waste papers; but the Defendants have thought differently, they have acquitted Plaintiff of the specific offence charged, but inflicted a punishment for a distinct offence with which the Plaintiff was not accused, under the 24th Article of War, not warranted by the Articles of War for the most aggravated offence, or sanctioned by any law, martial, military, or civil. Had not the Defendants the written law to guide them; and can any error in judgment be allowed, when they were only required to keep to the very letter of it?

Does the minutes of the court-martial, which I shall present to you, prove the Plaintiff to have been fairly and legally convicted of the specific accusation, or can you be able to discover the smallest ground for the justification of their sentence, by either of their seven pleas, which say, Plaintiff was "accused and found guilty of embezzleing?" I ask, was he not accused of an intended fraud, and not of intending to embezzle, and is not fraud provided for by the 33rd Article of War, and embezzlement by the 24th Article? And although in common law embezzlement is a fraud, still, in the Military code, fraud is not embezzlement, as there is a distinct Article for each offence.

Having stated to you that I would make no assertion but what I could prove, it now becomes me to prove all I have asserted; and first I shall present to you the log-book of the *Perseus*, to shew the difference between the original charge for which the Plaintiff was first put under an arrest, and the specific charge afterwards presented and brought before the Defendants; secondly, you shall have presented to you the Naval printed instructions, to shew how the charge ought to have been worded, and how it was worded; and thirdly, you shall have the protest handed to you, which Plaintiff presented to the Defendants, objecting to their jurisdiction to try him by a court-martial. A copy of the minutes of the court-martial, and the 36 Articles of War, of an Act of Parliament of the 22nd of Geo. II. cap 33; all these will prove that the Defendants have acted illegally, unjustly, and most oppressively. By a reference to the minutes and the ship's log-book, you will discover that the specific charge brought before the Defendants, as members of the court-martial, and the original arrest, materially differ, which by law they ought not to have done. By looking at the Naval printed instructions, and the minutes, you will see that the charge is not a Military offence, and that the Defendants could not legally receive it; the particular, most essential, and necessary fact, that all these 26 supernumeraries had left the ship, with their pay tickets correct, and that the word blanket over the figure of 8, was the act of the captain's clerk, was entirely omitted; the time and place where the act was done, is no where to be

found, and in the minutes it will be seen that the Plaintiff was neither arraigned, or pleaded to any charge, which in all legal courts is indispensable. As, therefore, the log-book, the Articles of War, the Naval printed instructions, the protest, and the minutes and sentence, all confirm what I have stated, I shall not much longer detain you, but briefly name to you, the very serious injury the Plaintiff has sustained, and then leave him in your hands. One thing, however, I have omitted, which I consider essential you should know, and if you refer to the minutes you will perceive, that the Deputy Judge Advocate wrote to the Plaintiff, saying, "that if he had any evidence to adduce in his behalf which he wished subpoenaed, he was to send their names through the commanding officer, and they should be summoned. In consequence of this permission, the Plaintiff wrote, through his commanding officer, (Lieut. Wilson) requesting the 26 supernumeraries, or as many of them as possible, might be called in his behalf, which letter, according to Lieut. Wilson's note to the Plaintiff, which will be presented to you, was given by Lieut. Wilson to the captain; but the captain, so far from forwarding this letter to the Deputy Judge Advocate, suppresses this letter, and not one of these men were in court. The Plaintiff's evidence was actually suppressed by the prosecutor, although the men were in the harbour, and the Plaintiff in consequence deprived of their testimony. Now, as these men were the best of evidence, their presence was as requisite for the accuser as the accused, and no legal or fair conclusion as to the fact charged could the Defendants come to without them. With respect to Defendants plea, "that Plaintiff was accused and found guilty of an intent to embezzle," a very few words will suffice for an answer. First. The Plaintiff (as the specific charge proves) was never accused of embezzlement, or arraigned or pleaded to it, consequently could not legally be convicted of it; and although embezzlement is fraud, fraud is not embezzlement, and there is a distinct Article of War for each offence, namely, the 33rd for fraud, and the 24th for embezzlement, it will be impossible for Defendants to qualify their pleas on the merits of the case or upon the law,

“The injury to the Plaintiff by the Defendants proceeding are incalculable; by their claiming jurisdiction of the specific offence charged, they have deprived the Plaintiff of a trial by jury, the birthright of every true born Englishman; by their illegal sentence, all the Plaintiff’s past services, of upwards of twenty years to his King and country, is completely thrown away, and at the age of forty-five, he has again to commence the world, with a wife and five children, an impaired constitution, and an unmerited stigma on his character; at the Plaintiff’s death, his wife is deprived of her pension, and by the Defendants mulcting him of all his pay, rank, and allowances, they turned him into the world without a penny, a character, or any means of obtaining a livelihood; every person to whom he was indebted, upon hearing of his dismissal, demanded a settlement of their accounts; he was obliged instantly to discharge his servants, and from living in great respectability, is reduced nearly to want; his bankers, upon reading the sentence, desired Plaintiff to close his accounts with them, and the injury and disgrace is incalculable. The Defendants have deprived the Plaintiff of a valuable situation, they pass on him a sentence not warranted by either the Articles of War to the most aggravated offence, and they dismiss him in such disgrace, as may prevent him from ever again getting employment; they actually deprive him of what pay was due to him; they leave to be impressed on board any man-of-war, who may take him; they ruin his credit and character, and, in fact, have done him such an irreparable injury as nothing but your verdict can recompence.

MAN v. OWEN AND OTHERS.

(Copied from the *Times* Newspaper.)

Court of King's Bench, Guildhall, Oct. 22, before Lord Tenterden and a Special Jury.

"This was an action of false imprisonment, by Mr. Harry Stoe Man, formerly Purser of His Majesty's Ship *Perseus*, against Admiral Sir Edward Owen, Captain Parry, and several other Naval Officers, being the members of a court-martial, before whom the Plaintiff was tried upon a charge preferred against him by Captain James Couch, the Captain of the *Perseus*, 'On suspicion of fraudulently charging 26 supernumeraries a blanket each they never received.'

"Mr. Brougham, for the Plaintiff, said, that he had been a purser for a long time in the Navy, and had always borne a good character, and now, after many years service, he was compelled to come into court to seek reparation in damages for an injury which affected his feelings as well as his fortune. The main question the Jury would have to try was the extent of the jurisdiction of the court-martial by whose orders the Plaintiff was first put under arrest, and before whom he was tried, cashiered, and declared incapable of serving His Majesty in any other situation. The Plaintiff was not now at liberty to enter into the merits of his case, but he had a right to insist that the charge made against him was not cognizable by the court before whom he was tried, and if he were correct on that point, the defendants, notwithstanding they had acted under the authority of the Admiralty, were legally liable; and although they were morally justified if they proceeded in ignorance of the law, still their proceedings were altogether illegal, and the plaintiff had a right to recover.

"The hand writing of Admiral Owen and Captain Parry were proved to various documents, and a warrant from the Admiralty, dated January 10, 1805, to the Provost Marshal, for the apprehension of the Plaintiff, was also proved by Mr. Roose, from the Admiralty, who,

on his cross-examination by the Attorney-General, said, that warrants of that kind were, in the regular course of business, issued by the Admiralty if application were made for a court-martial. There was a document of the same sort on every trial, on every court-martial. It was the practice to issue it to the Provost-Marshall previous to bringing the party to a court-martial. It was the authority for holding the party in custody during the trial. That custody was more or less strict according to the nature of the charge—whatever offence might be charged, or however the charge might terminate, still, during the trial, the party charged was in the actual or supposed custody of the Provost-Marshall. The Act of Parliament regulates the manner in which the Provost-Marshall is to be paid.

Re-examined—The Provost-Marshall was under the command of the *President* of the court.

William Warmington examined by Mr. Lee.—Witness was on board the *Prince Regent* on the court-martial held on the Plaintiff, and saw him in custody. The members of the court were Sir Edward Owen, Captain Parry, and witness thought he heard Captain Lochyer's name called.

“ Cross-examined by the Solicitor-General.—Witness was only on board the *Prince Regent* for half an hour. Witness produced a book at the trial.

“ Lieutenant Chalmers examined.—Was on board the *Prince Regent two days during the trial*, and was occasionally in the room where the court was held. Witness saw Admiral Owen, Captains Parry, and Lochyer. By order of Admiral Owen witness brought the Plaintiff to the *Perseus*, which was lying off the Tower, from the *Prince Regent*, at Chatham, *the same evening the court-martial was dissolved*

“ Lord Tenterden—*The witness brought the Plaintiff to his own ship, that comes to nothing.*

“ Lieut. Chalmers examination continued.—Witness saw the Plaintiff in custody of the Provost Marshall *both of the days when the court was sitting.*

“ Cross-examined by Mr. Horace Twiss.—The Plaintiff was specified in his order as one among a certain number of persons who were to be carried on board the *Perseus*, *that order was afterwards destroyed.* The Plaintiff

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spoke to witness on the subject, and said he had no doubt that the Commodore intended it as a kindness, but it was his business to prove otherwise. Witness's vessel furnished the Plaintiff with a passage; but witness would not have taken him without the orders of the Commanding Officer. Witness belonged to the Prince Regent. The order distinctly named the Plaintiff as the late prisoner. Witness also carried back to the *Perseus* all the witnesses who belonged to the *Perseus*, and were sent down to Chatham to give evidence. He *carried them as passengers*.

" Re-examined.—The Plaintiff wished to go on shore. Witness did not put him on shore, nor did he distinctly refuse to do so. It did not come to this.

" Lord Tenterden.—On the evidence it appeared that all the witnesses had was an order in writing, and which merely amounted to a permission to take back the Plaintiff and the witnesses, and he certainly did not take them back as prisoners; and as to the act of the witness refusing to let the Plaintiff go on shore there was no new assignment.

" Witness again examined by the Attorney-General.—The *Perseus* was a ship in commission, the Plaintiff was Purser of it.

" Lord Tenterden.—Courts-martial were distinct from the ordinary courts of law, which were courts of permanent jurisdiction. The Admiralty ordering a court-martial did not appear to him to give authority to put the Plaintiff in custody, for all that had been proved might have occurred without any authority at all.

" Mr. Brougham submitted, that if the Lords Commissioners had no right to give the order for assembling the court-martial, on the charges preferred against the Plaintiff, that then all that the court-martial did was illegal.

" Lord Tenterden.—The question was, whether the offence charged, was an offence cognizable by a court-martial.

" Mr. Brougham.—My Lord, you are against us; we were tried and punished by the 21th Article of War.

" Lord Tenterden.—I confess I am warm, Mr. Brougham,

neither by the 24th or the 33rd Article of War, had the Defendants jurisdiction of the specific offence charged.

“ Mr. Brougham—That is my case, my Lord.

“ The Attorney General now addressed the Court on behalf of the defendants. He said, he was not quite sure that the point which Mr. Brougham had made would help him, for supposing the Admiralty to issue their warrant to assemble a court-martial, upon an offence not within the jurisdiction of the Admiralty, and that such court-martial pronounced an acquittal, the party charged, would be in custody during the trial, but he could not find fault either in the judgment, or in the members of the Court, the fault would be in those who assembled the court-martial; if that argument were correct, it follows, that the Plaintiff could not sustain his action, for the sentence pronounced had nothing to do with the case. The matter charged the making 26 false entries in the book, for the sake of making 26 false charges, for articles never supplied, was an offence, and he, the Attorney General, hoped it would always be an offence. All that was necessary for the defence was, to shew the warrant under which the Defendants had acted.

“ Mr. Rouse was re-called and examined, and produced the warrant for holding the court-martial. It was dated the 4th of January, 1825, and signed by Sir William Hope, and Mr. Keate Douglas.

“ Mr. Brougham in reply, endeavoured to shew, by reference to the 24th, 33rd, and 36th Articles of War, that the offence, being a depredation on private property, and the Plaintiff having given security to the public, to whom no injury could have happened, it was not a crime cognizable by the Articles of War, and in particular not by the 36th Article, because it was by the 24th Article at the court-martial, that the Defendants claim their jurisdiction, and the 36th Article was not on the present record.

“ Lord Tenterden expressed himself clearly against Mr. Brougham, observing, “ he had nothing to do with the sentence,”* and ordered the Plaintiff to be called.

Nonsuited accordingly.

* The Plaintiff contends, that as the punishing is a component part of the trying, they cannot fairly be divided, and as his Lordship admitted the sentence to be illegal, surely, under the 24th Article, Defendants were not sanctioned in what they did.

In the King's Bench.

BETWEEN

HARRY STOE MAN,Plaintiff,

AND

Sir Edward W. Campbell Rich. Owen, Kt. }
William Henry Webley Parry, and } Defendants.
Nicholas Lockyer. }

Michaelmas Term, 6th Geo. IV.

SPECIAL CASE.

This was an action of trespass commenced in Michaelmas Term, 1826. The declaration stated that defendants on the 7th day of January, 1825, together with certain other persons, being then under the control and command of the defendants, with force and arms made an assault upon plaintiff, and imprisoned, and caused, and procured him to be kept and detained in prison for three days. Special damages was assigned, having reference to the plaintiff's loss of rank, &c. as a purser in his Majesty's navy. The declaration contained two other counts, in each of which the same cause of action was differently stated. Damages £5000. In Hilary Term, 1827, defendants pleaded, 1st, the general issue, not guilty, and five other pleas; only the 2d and 4th of which it appears are material to be stated in this case, but either party are at liberty to refer to the pleadings. The 2nd plea states, the plaintiff was a purser in and belonging to the fleet of our Lord the King, in actual service, and full pay in said fleet, viz. an officer in and of his majesty's naval service, to wit, a purser in his said majesty's naval service, and as such purser and officer was employed in his said majesty's

In the King's Bench.

BETWEEN

HARRY STOE MAN, *Plaintiff,*

AND

Sir Edward W. Campbell Rich. Owen, Kt.
William Henry Webley Parry, and
Nicholas Lockyer..... } *Defendants.*

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naval service as purser of a certain ship of war of his said Majesty, to wit, the ship *Perseus*, and that said plaintiff, being such officer and purser in such actual service and full pay as aforesaid, and so employed as aforesaid, before the said time, to wit, on the day and year aforesaid, on board the said ship *Perseus*, the same then being within the jurisdiction of the Admiralty of England, to wit, in the river Thames, committed and was guilty of a certain offence and breach of his duty as such officer and purser as aforesaid, cognizable by a court-martial, to wit, of fraudulently and unlawfully charging 26 blankets against 26 supernumerary seamen to whom none had been issued; and of making, in order to such fraudulent charge, certain false entries in a certain book of the said ship *Perseus*.

And the pleas go on to state the complaint duly made to the Lords Commissioners of the Admiralty, within three years after the committing of the offence, and their Lordships order duly issued to assemble a court-martial, defendant, Owen, being president, the due summoning and assembling of the same; that defendant, with others, duly held the same for the purpose of trying the plaintiff on board the ship, *Prince Regent*, at Chatham; that the said court did truly try him for the said offence, and that having weighed and considered the evidence produced against the plaintiff, and his statement and evidence in his defence, the court was of opinion, that the charge of the said offence had been proved against the plaintiff; and in consequence, did adjudge him to be dismissed from his Majesty's service, and rendered incapable of ever serving as a purser in the royal navy of his Majesty, his heirs or successors.

That the defendants with the other members of the court-martial did, within the Admiralty's jurisdiction, to wit, in the said port, on board the said ship, cause plaintiff to be taken into custody, with no unnecessary violence and detained on board said ship during such trial, for purpose of said trial, as they lawfully might for the purpose aforesaid, which are the same supposed trespass.

The 4th plea is the same with the 2nd, except that instead of averring the plaintiff had committed the offence mentioned in the 2nd plea, it merely avers complaint in writing to have been made to the Admiralty, of his having committed that offence. The replication joins issue

on the 1st plea, and as to all the other pleas *de injura*, where upon the 2nd, 3rd, 4th, 5th, and 6th, issues are joined.

At the adjourned sittings for London, after Trinity Term, 1827, the cause came on to be tried at Guildhall, before the right honourable Charles Lord Tenterden; upon which trial all the facts stated in the 4th plea were proved or admitted, and all the facts in the 2nd plea, except the fact therein stated, that the plaintiff had committed the offence with which he was charged; and it was also proved to be the invariable practice in all naval courts-martial, for the party accused to be in custody during the trial.

The Plaintiff was nonsuited.

In Michaelmas Term last, the Lord Chief Justice was, upon hearing the attorney or agents, pleased to order, that instead of the nonsuit in this cause, a verdict should be entered for the defendants on the 2nd and 4th issues, and for the plaintiff on the other issues.

In Hilary Term following, this honourable Court was pleased to grant a rule to shew cause why the judgment in this cause, should not be entered for the plaintiff, on the whole of the counts in the declaration, notwithstanding the verdict, which will be coming on to be heard. This honourable Court suggested that the points in question in this cause should be made the subject matter of a special case, and a rule for that purpose was thereupon made.

The naval Article of War, namely, the 36th, mentioned in the statute 22nd Geo. II. cap. 33, upon which the defendants principally rested, is as follows;—"All other crimes not capital, committed by any person or persons in the fleet, which are not mentioned in this Act, or for which no punishment is hereby directed to be inflicted, shall be punished according to the laws and customs in such cases used at sea."

The question for the opinion of the Court is, whether under the circumstances above stated, the defendants be entitled to judgment. If the Court should be of opinion that they are not, such order to be made herein as the Court shall seem fit.

Signed R. V. BARNEWALL,

W. H. MAULE.

In the King's Bench, June 4th, 1829.

Report of the Argument and Judgment on the Special Case, in the King's Bench, sitting under the King's Warrant, after Easter Term, 10th Geo. IV. June 4th, 1829.

MAN v. OWEN, Knt., and Others.

ARGUMENT ON THE SPECIAL CASE.

Mr. Barnewall stated the special case as follows;—

This is an action for an assault and false imprisonment. The defendants pleaded the general issue, not guilty, and five other pleas. The pleas are, first, that plaintiff was accused of an offence cognizable by a court-martial, namely, "On suspicion of having fraudulently charged 26 supernumeraries a blanket each they never received, by putting the figure of 8 in the margin of the ship's books;" and the defendants' other pleas state, that the plaintiff was convicted of an intent to embezzle, the offence with which he was not accused,) and the question now to be decided is, whether the specific offence charged, falls under the 24th Article of War, by which Article the defendants claimed at the court-martial their jurisdiction.

My Lords, The pleas go on to state, that he was accused and found guilty of embezzling, and that he was tried for this offence by a court-martial. The 4th plea is the same as the 2nd, and states, that he committed the offence, and that he made a certain false entry.

Mr. Justice Bailey—They become the same effect if you have not proved him guilty of the offence.

Mr. Barnewall—We state that this was not an offence for which, by the Articles of War, he was liable to be tried by a court-martial; I do not know that there is any

necessity for me to state more, than that the offence stated in the two pleas, was one for which, by the Articles of War, he was not liable to be tried by a court-martial. Now, my Lords, the offence is, "that he being a purser, in his Majesty's fleet, unlawfully and fraudulently charged 26 supernumerary seamen a blanket each they never received, by putting the figure of 8 in the margin of an open list; and that the defendants, as members of the court-martial, found the plaintiff guilty, in breach of the Articles of War, and sentenced him to be dismissed his Majesty's service, mulct of all his pay, rank and allowances, and rendered him incapable of ever serving his Majesty, his heirs, or successors, as a purser in his Majesty's navy. Such is the sentence stated in the special case; but at the trial, before the defendants, it was expressly named by them, in breach of the 24th Article of War; but as we have no means of looking at the original record, the most material fact is omitted, namely, the 24th Article, and we are obliged to receive the sentence as it stands in the special case.

Mr. Justice Bayley—The plaintiff was not accused of embezzlement, but of improperly charging 26 seamen, on board the ship *Persens*.

Mr. Barnewall—The offence with which he is charged was so stated; an attempt to represent that he had provided a given number of blankets for these seamen, and had issued them to obtain the price from government of these blankets, and that he had made a false entry in a book for that purpose.

Mr. Justice Parke—I suppose he would be allowed a deduction from the pay of the men.

Mr. Barnewall—I apprehend that would be the consequence; the offence was, that he attempted to obtain 8s. from government,* for the blankets for these seamen, that would be the result. Now, my Lords, I apprehend, at common law, that would be an indictable misdemeanor, and then I apprehend it comes to this, whether by

* This a mis-statement of Mr. Barnewall, the government could not have been injured, because the offence charged, was a depredation on the private pay of the men, not government.

the Articles of War, this individual, a purser in the royal navy, was liable to be tried by a court-martial, for such a misdemeanor as this, and that depends upon the Articles of War, contained in the 22nd Geo. II. cap. 83. Now, my Lords, that being a statute which takes from a party the right of being tried at common law by a jury, I apprehend must be construed strictly; there are I think in that statute, 36 of what are called Articles of War, in which the different offences are described, for which the party is liable to be tried by a court-martial. Some of them are offences connected with the profession of military men, such as disobedience of orders, which is made a capital offence, and several others, which I need not mention, the material Articles, as I apprehend which will be referred to here, will be the 24th, the 33rd, and the 36th. I apprehend these are the material Articles; the 24th, says, that there shall be no wasteful expence of any powder, shot, ammunition, or other stores, in the fleet, nor any embezzlement thereof. Now, I only refer to that because I do not know whether it will be contended this is a charge of embezzlement. There is nothing like embezzlement here; because this is an attempt of a man to appropriate money to his own purposes.*

Mr. Justice Bayley—*An attempt to obtain money by false pretences.*

Mr. Barnewall—Yes, my Lords, and I now come to the 31st. The 31st applies to the muster books; now there is no charge here, of making a false entry in the muster books, therefore, that does not apply to it. I now come to the 33rd Article, in which I apprehend, the crime imputed by the charge against the plaintiff is contained, but which does not apply to a purser. The 33rd Article is, "If any flag officer, captain, commander, or lieutenant, belonging to the fleet, shall be convicted before a court-martial, of behaving in a scandalous, infamous, cruel, oppressive, or fraudulent manner, unbecoming the character of an officer, he shall be dismissed from his Majesty's service." Now, I apprehend, the offence imputed to the plaintiff, was an offence of having in a fraudulent manner, &c.; but he is not included in this Article of War, for he is neither a flag officer, captain, commander,

* Not from the government, but from the men, which makes all the difference.

or lieutenant, and therefore, the offence with which he is charged is not described; but he was not a person under that Article at all liable to be tried by a court-martial. Now comes that Article, which is the principal question in the case, whether it was within the 36th Article? Now, my Lords, the 36th Article is, "all other crimes not capital, committed by any person or persons in the fleet, which are not mentioned in this Act, or for which no punishment is hereby directed to be inflicted, shall be punished according to the laws and customs used at sea."

Now, my Lords, first of all, it must be a crime; now I say that the word crime, though it is not generally a term used in our law books, being generally between felonies and misdemeanors; but the word crime, rather implies an offence of a higher description, than a common misdemeanor. I am taking the word crime by itself; suppose the word capital did not accompany it; there is a book for which the profession is very much indebted to a learned Sergeant; the title of which is, *A Treatise on Crimes and indictable Misdemeanors*. I admit the word crime, is used to distinguish felonies from misdemeanors, but if there is any difference between crimes and misdemeanors, your Lordships in a penal statute, will restrict crimes to these offences which are strictly within it; but it goes on, "with other crimes not capital," what right have I to infer from that? I have a right to infer, that the Legislature meant the word crime to relate to capital *military offences*, if they did not put in the word capital.

Mr. Justice Bayley—What do you consider to be the criminal law.

Mr. Barnewall—That comprehends all offences. In the other books I have been looking at recently, I do not find the word crime, but offences against the King's government, offences against religion, and so on; the statute which created the offences, states the offence shall be punished so and so. The word crime does not seem to be a term in law; but if crimes would include every species of offences, as the word "capital" was not included, it was meant only to include those of a certain description, not only those which are not capital, but those which are mentioned in this Act. Now I submit, that the offence with which the plaintiff is charged, is mentioned in this Act; it is mentioned in section 33, as behaving in

a fraudulent manner, but not mentioned as applying to a purser. Then the 36th section applies to offences not capital, which are not mentioned in this Act, or for which no punishment is hereby directed to be inflicted. Now I find the offence with which this individual is charged before the court-martial was an offence mentioned in the Act, but the punishment, was to be inflicted upon other persons, and not upon him.

Mr. Justice Bayley—With a view to this plaintiff not mentioned in the Act?

Mr. Barnewall—With a view to a purser, not mentioned in the Act undoubtedly.

Mr. Justice Bayley—One section proved for crimes committed by flag officer, captains, and lieutenants; there the person by whom that description of crime is committed, enters into the contemplation of that clause.

Mr. Barnewall—I say this clause must be construed strictly. It is a statute taking away from the party, the right he has to be tried by a jury.

Mr. Justice Bayley—Admiralty jurisdiction; the right of a trial by jury would not apply, except as it is given by statute.

Mr. Barnewall—If he happens to be away; here he happens to be in the river Thames.

Mr. Justice Bayley—But there would be the same rule if he were in the river Thames or any where else; because you would not construe the 22nd Geo. II. in one way, as to conduct at sea, and in another way, within the limits of the county, within the Admiralty jurisdiction.

Mr. Barnewall—If the statute is to be construed strictly, I apprehend it is not within the 36th section; because in the first place, it is not a crime, from the word *capital* being coupled with it, and being a crime before-mentioned in the Act, this is not applicable to a purser.

Mr. Justice Parke—The consequence of behaving in a fraudulent manner, seems explained by the words that accompany it; behaving in an unofficer-like way, which would not be punishable by a court-martial.

Mr. Barnewall—The offences punishable with death, would not be punishable at common law.

Mr. Justice Parke—It provides against the unofficer-like conduct of flag officers, captains, commanders, and

lieutenants; but does not allude to offences punishable at common law.

Mr. Maule, for the defendants.—I submit to your Lordships, there is no reason why the judgment should not follow the verdict, which has been given for the defendants, upon the second of these pleas. My Lord, perhaps I may refer to the opinion which was pronounced by Lord Tenterden, who tried this cause, who stated he had not the smallest doubt upon the subject, though he gave leave to move. He stated more than once, upon the case being argued by Mr. Brougham, upon the same ground as Mr. Barnewall now argues it, he entertained not the smallest doubt upon the subject, and certainly I cannot see any thing in the argument, which have been brought before the Court, by Mr. Barnewell, which have any tendency to raise a doubt. Your Lordships will see, if the plaintiff was not tried by a court-martial for an offence of this kind, as far as it is a breach of the military discipline of the navy, he would be altogether dispunishable; there is no jurisdiction at all to try him. If committed within a borough or county, it might be a misdemeanor at common law, he might be tried by a common law jurisdiction, but supposing that it was committed at sea, there would be a great difficulty in trying him, for your Lordships know the Admiralty jurisdiction, in respect to misdemeanors, is extremely doubtful. There has been cases I knew formerly, which were on the best advice abandoned, on the ground of there being either no jurisdiction at all, or one that was so doubtful and inconvenient, that it was impossible to prosecute a misdemeanor in the Admiralty Court.

Mr. Justice Parke.—They try misdemeanors every day at the Old Bailey.*

Mr. Maule.—That is by a late Act of Parliament. It is within a very few years that has been enabled to be done. Formerly, misdemeanors were dispunishable at sea, but this is a question of military law, and it would be a strange thing indeed, if the offence stated in the indictment was not an offence against military law.

♦ It is very doubtful whether a soldier or a sailor can be tried by a court-martial for a misdemeanor.

Mr. Justice Parke.—It must be construed with reference to the state of the law, when the Act passed.

Mr. Maule.—Yes, my Lord, he is stated to be guilty of an offence, or stated to be charged with an offence and breach of his duty as such officer and purser, and cognizable by a naval court-martial, to wit, of fraudulently, and unlawfully charging 26 blankets against 26 supernumerary seamen, to whom none had been issued, and making an order to such fraudulent charge, an entry in a certain book of the said ship, *Perseus*. Now we submit, in the first place, to your Lordships, in answer to the only ground that my learned friend, Mr. Barnewall, has stated: I would submit, in the first place, that that is very clearly written in the naval Articles of War, and it would be a strange thing, indeed, if such a crime was not within the Articles of War; it would be strange if a naval court-martial had not jurisdiction to try an offence of this description, committed by a purser; and I submit to your Lordships, upon looking at the general scope of the Act of the 22nd Geo. II., which was an Act for amending, explaining, and reducing into one Act of Parliament, the laws relating to the government of his Majesty's ships, vessels, and forces, by sea. It seems to me, to be the intention of this Act of Parliament, to provide a mode of trial for every breach of the military discipline of the navy; at all events not to leave unprovided for, so glaring a breach of public duty as was charged against the plaintiff. With respect to the argument, which is the only one now relied upon by my learned friend, and was also the only one relied upon at the trial, I felt some difficulty at first in understanding it; because the 36th Article says, "All other crimes, not capital, committed by any person or persons in the fleet, which are not mentioned in this Act, or for which no punishment is hereby directed to be inflicted, shall be punished according to the laws and customs in such cases used at sea." Now, with respect to the verbal criticism upon the word *crime*, I apprehend, that nothing can be more clear, than that crime comprehends misdemeanors; and if we were disposed to take it with critical exactness, I should be disposed to say, "all other crimes," would necessarily mean, in the original language of the law, misdemeanors only, because felonies are capital; they are generally capital.

Mr. Justice Bayley—They were at that point of time, if the party could not read; if he could not get through the *nich rem*.

Mr. Maule—He might not be able to read, or might not be willing to read; he might not choose to pay his clergy, and it is not every man that is enabled pay his clergy, and therefore, I would rather say, that the word crime, would rather apply to misdemeanors.

Mr. Justice Bayley—If you recollect, in the Admiralty there was no clergy. Manslaughter is a capital offence.

Mr. Maule—Until lately, the course was, at the Admiralty sessions, if the circumstances was such as would have amounted to manslaughter, the judge directed the jury to acquit altogether. Indeed, it has been held in some cases before the twelve judges, that, occurring at sea, it was a capital offence.

Mr. Justice Littledale—With regard to a *crimina falsi*, you speak of a *crimina falsa*, or a general misconduct, of which the law takes cognizance.

Mr. Justice Bayley—Conspiracy is a *crimina falsi*; you are indicted for a conspiracy; you are incompetent as a witness, because you are guilty of a falsehood; perjury is a *crimina falsi*.

Mr. Maule—Then, my Lord, I submit this is a crime; the 36th section says, all other crimes, not capital, committed by any person or persons in the fleet,* which are not mentioned in this Act, or for which no punishment is hereby directed to be inflicted, shall be punished according to the laws and customs in such cases used at sea. Now, certainly, any body reading that section would suppose, that the person who had been guilty of a crime, a purser of the navy, who is within the jurisdiction of a court-martial, would either have to shew you, what crime it was mentioned in the 33rd section, of which he had been guilty, what punishment was to be inflicted, or else to admit, that he was within the 36th section; because it

* If a flag officer, captain or lieutenant, had committed, and had been convicted of this offence, he must have been punished by the 33rd Article of War. How, then, can Mr. Maule assert, to any honourable Court, that the offence is not provided for in the Act; the 36th section says, "All other crimes *which* is not mentioned, or *which* apply to the offence and *not* to the person."

must clearly appear, that the intention of the persons who drew that in making that provision, was, that it should be a complete compendium of the whole of the previous provisions; so that the intention is perfectly clear upon the subject, and, therefore, the intention being so clear, as I submit it is, unless there be something in the word which makes it unnecessary, which distinctly contradicts that intention, the intention must prevail.

Mr. Justice Bayley—I do not think you need be troubled any more.

THE JUDGMENT.

It is conceded, and rightly, that this plea states that which would be an indictable misdemeanor; because no doubt that the attempt to do that, the doing of which this plea states, is beyond all question, as it seems to me, an *indictable misdemeanor*. Here you unlawfully charge against a certain number of supernumerary seamen a quantity of blankets, and make an order to such fraudulent charge, certain false entries in a book belonging to the ship. Now, I think Mr. Barnewall will see, it is no more than he is bound by law to concede, that that is an indictable misdemeanor. Now if that is an indictable misdemeanor, does the 36th Article of War apply to indictable misdemeanors? It applies, in the first place, "to all other crimes" not capital; well, by the peculiar provisions applicable to clergy, it did not apply to any thing within the limits of the Admiralty jurisdiction, and therefore, to all offences, not capital, it would, perhaps, in the strict division, if there be a strict division between crimes and misdemeanors, be confined wholly and exclusively to misdemeanors; but I think that the word crime, is a general term, and includes in it, crimes and misdemeanors only. That the general term is crime, and the subdivision of it is into crimes and misdemeanors. Mr. Justice Blackstone says, we are now arrived at the fourth and last branch of these commentaries, which treats of public offences, or crimes and misdemeanors. There he certainly uses both terms; there he says, in pursuit of which, I shall, in the first place, describe the general nature of

crimes and punishments; Secondly, the persons capable of committing crimes; Thirdly, their several degrees of guilt as principals and accessaries; Fourthly, the several species of crimes, with the punishment annexed to each by the laws of England. Fifthly, the means of preventing their perpetration; and Sixthly, the method of inflicting those punishments, which the law has annexed to each several crime and misdemeanor. Well, when he goes on, what does he talk about, crimes only, as contradistinguished from crimes and misdemeanors? No, he treats of crimes and misdemeanors, under the general denomination of crime, and it would have been a most allegorical distribution of the subject on his part, to have said,—I am now about to treat of crimes and misdemeanors; meaning, that to relate to two distinct classes and subjects, and therefore to have said, “Now, I begin by treating of crimes, and then I will go on and leave misdemeanors altogether out.” It can only be that he adopted the subdivision of crimes and misdemeanors, in the general distribution of the nature of crime, under the general word crime. Well, then the next point, that only relates to such crimes or misdemeanors as are not mentioned in the Act, or for which no punishment is hereby directed to be inflicted; and he says this is a crime mentioned in the Act. How? Why, the 33rd section speaks of a person behaving in a scandalous, infamous, cruel, oppressive, or fraudulent manner, unbecoming the character of an officer; that applies to officers, and to officers only;+ and if any flag officer, captain, commander, or lieutenant, belonging to the fleet, shall be convicted before a court-martial, he shall be dismissed from his Majesty’s service, for any one of those offences. Now, I think, it is an essential ingredient in the words which are mentioned in this Act, the 33rd section only applies to frauds when committed by persons of particular character and station in the ship. It is perfectly silent, therefore, as to frauds committed by persons in a lower station in the ship. Why then, when you see that mentioned in the Act, I think you are not mentioned in the Act, with reference to the particular

♦ The purser is one of the signing officers of the ship, ranking with a captain, or lieutenant, and is called an officer in every plea.

person, upon whom you are judging. The crime of making a false entry, with a view to defraud, by a purser of a ship, is not mentioned in the Act, because that only mentions misconduct by persons of a particular description, and is silent entirely as to persons of a lower grade. The consequence of holding that these words, which are not mentioned in the Act, would exclude from the operation of the 36th clause, every thing which will come up to the idea of a scandalous, infamous, cruel, oppressive, or fraudulent conduct, unbecoming the character of an officer, would exclude, if that were the right construction, every private soldier, for being punished for any misdemeanor, if that misdemeanor were scandalous, cruel or fraudulent; I think that never can be the effect of the words of exception, in this particular section of the 36th Article. I am disposed to think, it is not necessary to give any opinion upon that point; I am disposed to think, that the words, which are not mentioned in this Act, are explained by words which immediately follow; and that those words which immediately follow, are intended to be explanatory, and exactly the same as if it had been, "and all other crimes not capital, committed by any person or persons in the fleet, which are not mentioned in this Act, or for which no punishment is hereby to be inflicted." Why it is quite clear, with reference to this case, no punishment was inflicted by the Act, considering the individual by whom it was committed. I am, therefore, of opinion, that the plea is good, and that the judgment ought to be given for the defendants; and that the present rule for entering a verdict for the plaintiff ought to be discharged.

Mr. Justice Littledale—I am entirely of the same opinion; this case is certainly not within the 24th Article, * nor within the 31st Article, nor within the 33rd Article; the question is whether it is within the 36th Article. Now it seems to me, that Mr. Barnwell, in commenting upon the word crime, argues, that it must mean more than misdemeanor. It seems to me, that crime is a general term, and that crime is the same thing as offence. I look upon offences and crimes to be exactly

* It was by the 24th Article the defendants claimed their jurisdiction, and passed sentence, which is proved by five of their pleas; and the 36th Article at the court-martial, was neither named or thought of, nor was the 36th Article on the record.

the same, as far as words go. A man may be guilty of an offence for which the law does not award any punishment. It seems to me, the proper definition of crime, in its larger sense, is an offence for which the law awards a punishment; crimes, when they come to be divided, are divided into three classes—treason, felonies, and misdemeanors I but still they are all crimes and offences, for which the law awards a punishment, and therefore, that appears to me to be the proper definition of crime. In several treatises, you have it mentioned crimes and misdemeanors; how that inaccuracy has crept in I do not know; perhaps they did not think it essential to use the general word, crime, when you do not come to the particulars, which arise out of it. Then Mr. Barnewall will contend, that this crime, taking it for granted as Mr. Barnewall well admits, that it would be an indictable misdemeanor at common law, as it certainly would be; but he says,—this sort of crime, this sort of fraudulent conduct, is included in the 33rd section, “that if any flag officer, captain, commander, or lieutenant, belonging to the fleet, shall be convicted before a court-martial, of behaving in a scandalous, infamous, cruel, or fraudulent manner, unbecoming the character of an officer. Now, he says, therefore, that the conduct which was implied to this plaintiff, is behaving in a fraudulent manner, and therefore, it is a crime which is mentioned in the 33rd section, and consequently he is not included in the 36th section, because, he says, the 36th section applies to all other crimes not mentioned in this Act, and then he says, a person holding the situation of a purser is not included. It seems to me, the 33rd section does not apply to what you properly call crimes, but to be meant to apply to conduct which is unbecoming an officer; it enumerates the officers, and it only applies to them, “if any flag officer, captain, commander, or lieutenant;” it only applies to that description of officers belonging to the fleet, shall be convicted before a court-martial for behaving in a scandalous, infamous, cruel, oppressive, or fraudulent manner, unbecoming the character of an officer, he shall be dismissed his Majesty’s service. It does not award any particular punishment upon it,* and there-

* It does award a particular punishment, namely, dismissal, as is asserted by his Lordship, in the preceding line.

fore, I think it was not meant to relate to crimes, but to conduct unbecoming an officer, of behaving in a scandalous, infamous, cruel, oppressive, or fraudulent manner unbecoming an officer, in a way that would not be punishable at common law, and therefore, I think the case does not come within the range and meaning of the 33rd section, and I think it is a crime that has not been mentioned in the Act before; and as it was committed by a purser, in the fleet, I think it was cognizable by a court-martial, under the 36th Article.

Mr. Justice Parke.—I am also of the same opinion. I think this is certainly a crime, not capital, within the meaning of that term in the 36th Article; and it is admitted to be an indictable misdemeanor, and the question is, whether it is previously mentioned in the Act. I think the 36th section, applies to offences, not of a criminal character, which would render him liable to an indictment; but conduct which is unbecoming the character of an officer or gentleman, but at all events, whether or not mentioned in the 33rd section, that applies to captains, commanders, and lieutenants, and not to a purser, and therefore it appears to me, upon both of these grounds not to be embraced in the 33rd section, and not being capital, within the meaning of the 36th section it is punishable by a court-martial, and if so the plea is good.*

* Whenever a purser dies at sea, the flag officer, captain, or lieutenant, as the case may be, is obliged to take charge of the stores, &c.; but as these gentlemen never gave any security to the crown, had either of them fraudulently charged 26 supernumeraries a blanket each they never received, &c. they must have been punished by the 33rd Article of War, because this Article provides for fraud, so that the crime with which plaintiff was accused, is named, although not with regard to a purser.

REMARKS OF THE AUTHOR

On the foregoing Letter, Trial, Special Case, Argument, and Judgment in the Case of Man v. Owen.

"To do unto others as you would they should do unto you," is so sound a maxim, that in the observations I am about making I shall endeavour to bear it in my mind, and that I may do so with advantage, I shall put myself in the situation of Sir Edward Owen and others, and by endeavouring to divest myself of every prejudice against them, as an unbiassed and independent man, shall fancy myself taking my seat at the table of the court-martial to try a purser in the Royal Navy, "on suspicion of having fraudulently charged 26 supernumeraries a blanket each they never received," by putting the figure of 8 in the margin of an open list belonging to H. M. S. Perseus, *this being the specific and only charge brought before Sir Edward Owen and others against me.*

Sir Edward Owen having been M. P. for Sandwich, and, consequently, one of the makers of our laws, it would be an insult to his understanding to suppose that he is ignorant of the different jurisdictions of *martial, military, and civil* law; of the practice of our courts of law; that there are offences against the common law and *positive* institutions, against statute law, and in violation of Acts of Parliament. I shall consider myself possessed of Sir Edward Owen's knowledge of the written law of the land, seated as president of a court-martial, called upon by the Admiralty to try an individual with whom I am totally unacquainted, and for whom I can neither possess affection or dislike, I say, so far I am eligible to sit as president of a court-martial, and so was Sir Edward Owen. It is not disputed by me that Sir Edward Owen received his authority to convene a court-martial from the Lords Commissioners of the Admiralty to try a specific charge, and only a *specific* charge; but as a Member of Parliament, as well as of a court-martial, he should have known that such an authority did not

justify him in doing an illegal act, in depriving a subject of his right to a trial by jury for a *civil crime*, by taking cognizance of it by a military tribunal, or punishing for a distinct offence which he had no authority to try. The Admiralty's warrant gave no jurisdiction to try the specific offence charged against me, or the specific offence of embezzlement; and if the person or offence charged cannot be found in the Act of the 22d Geo. II. c. 33, *which is a penal statute*, a court-martial cannot legally put any one on his trial without committing a trespass; and I contend further, that the Act collectively does not even grant jurisdiction to try *any offence without the specific article in the Act is distinctly stated by which the jurisdiction is claimed*. Had I, therefore, been in Sir Edward Owen's place, and M. P. for Sandwich, I should, in the first instance, have dismissed the court (instead of the prisoner) on the ground of not possessing jurisdiction to try the specific offence charged, or any other offence, because one was not a military offence, and the other they had no authority from the Admiralty to try; but Sir Edward thought otherwise, I was brought before the court and put upon my trial, "On suspicion of having fraudulently charged 26 supernumeraries a blanket each they never received, by putting the figure of 8 in the margin of a ship's books. Upon my being placed at the table, with the master-of-arms holding a drawn sword over my head, I handed Sir Edward Owen a written protest, to this effect, "that the specific offence charged against a purser was not a military offence, and, consequently, not within the jurisdiction of a court-martial, that until my books and papers were returned to me, with the names of the men I was suspected of having improperly charged, and the time and place when they were so charged, it was impossible for me to defend myself, &c. As I do not see there was any thing unreasonable or unlawful in this request, had I really been in Sir Edward's place I would have complied with it, or at least have ordered the books to be restored; but he did the reverse, he ordered that I should have no access to my book or papers, and without being arraigned, or my pleading, to any *crime*, the trial commenced. Now, supposing the specific offence charged to be really within the jurisdiction of a court-martial, (which I do still deny),

before I could have found any man guilty of it, I must have had the charge *fully proved*, and the way I should have done it would have been as follows: first, I should have had before me *the best possible evidence*, which were the 26 supernumeraries suspected to have been fraudulently charged, and I should have inquired of them if they ever did receive a blanket from the purser, or were ever charged one, (for until this is ascertained the charge may still be right); but if they denied it, and said they never did receive one, or were charged for one, I should next have inquired, "whether, by the figure of 8 being in the margin of an open list, after a man is discharged the ship, according to the rules of the naval service, such a charge could have been made by the purser, and if I found it could not, I should have instantly acquitted the accused; for until the men were produced it was impossible for any one to say whether they were or were not so charged. Sir Edward Owen did no such thing; he called to the prosecutor, Captain Couch, and placed him on his right hand, and suggested questions about blankets with which the specific offence charged was as distinct as one offence can possibly be to another.

The first witness called was Lieutenant Wilson, he was asked by the Prosecutor, "If he were upon a survey of my blankets?" he answered, "that he was." He was then asked if the blankets were all found correct? and he answered, *they were*. The next witness called, was a Mr. O'Reilly, and he was asked whether he could swear to the figure of 8 in the margin of an open list against the names of 26 supernumeraries (which open list was produced and shewn to him) being mine, and he answered that he could; but as he had been on board the ship only a few days, and *had never seen me write or make figures*, I cross-examined him, and asked how he knew the figure of 8 which was shewn to him to be mine? when he answered, "because *it was made with my ink*." The next witness was a Mr. May, the Captain's clerk, and this person admitted that he was on the survey, and that there were exactly 26 blankets more than there ought to have been, although Lieut. Wilson,

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who was also on the survey, swore *he found the blankets all correct*; and on my cross-examining May, he admitted *that the word blanket, over the figure, was written by himself; that the men were all previously discharged, and their pay tickets correct*; and by the figure of 8 being in the margin of the ship's books against the names of the men, no injury could accrue to the men, neither could I be benefitted; that no one was improperly charged a blanket; that there was no embezzlement of any stores; that no one was, or could, by any possibility be defrauded, by the figure of 8 being against their names in the margin of any book. Mr. Steward, a master's mate, swore that he was on the survey, and that there were *forty blankets more than there ought to have been*, although Lieutenant Wilson swore the blankets were all correct, and May said there was exactly twenty-six; and John Southerly, my steward, stated, that I was "confined to my cabin, with a sentry placed over me, *while this survey was being taken on my stores*; that I was not allowed to be present to answer or explain any thing respecting the stores; and, to the best of his recollection, *every thing was found correct*; that the 26 supernumeraries I was suspected to have charged a blanket each, were not so charged; and that he was present when the survey on my stores was taken by the first Lieutenant Wilson, Mr. May, and Mr. Seyward; and why I was not allowed to be present, but kept in confinement, he did not know."

This being the *only evidence* produced in support of the prosecution, and Sir Edward Owen and others being anxious to retire, they retired accordingly; *but neglecting to return*, the court-martial died a natural death. On the following morning at eight o'clock they again assembled, and called me before them for my defence. In the Act of Parliament of 22d of Geo. II. c. 33, the time of the day for holding courts-martial is not specified, but in the general printed instructions, under the head of court's-martial, the 3rd article states, "they are always to be held in the forenoon, in the most public part of the ship." It is accordingly the usage of the navy, though a court-martial is sitting, and had concluded one trial in the morning of the day, never to pro-

ceed to another, unless it can be began before 12 o'clock at noon. The time of *adjournment* is left to the discretion of the court, who in general do not exceed three or four o'clock in the afternoon; but if there is a great probability of the trial being brought to a conclusion the same day, the court continues to sit beyond that hour. However, *it is indispensibly necessary,* so long as a trial continues, to adjourn from day to day; but Sir Edward Owen and others did not adjourn the court-martial from the 7th to the 8th of January, as was indispensibly necessary; and, if on no other legal ground, their neglect in this respect vitiates all their proceedings.* In Hale's Hist. Plac. Cor. 498, he says, "If a commission of goal delivery issues to A. B. &c. &c. and they sit one day, and forget to *adjourn* their commission, or the clerk forgets to enter the *adjournment*, and the next day they proceed in sessions to take an indictment, and give judgment, this judgment is erroneous; and the clerk of the assize shall never be permitted to amend the record; for in strictness of law, their commission was determined by the first day's session without adjournment;" and my court-martial stand exactly in this predicament; the minutes of the court-martial most clearly shew that *no adjournment ever took place; and why I am to be prosecuted and persecuted against all established law of my country I am at a loss to ascertain.*

As my defence will take up much paper and time, and the substance of it will be found in Mr. Brougham's speech to the special jury, I shall now merely state, that *my address did not avail me*, and after I had finished it, and the court were about to deliberate, Captain Parry, one of the members of the court-martial, addressed the prosecutor in these words, "If we give him two years in the Marshalsea will that satisfy you, 'Captain Couch?'" But what was the answer to this illegal question I did not hear. However, after an absence of *nearly an hour*, I was again called before Sir Edward Owen and others, and the Deputy Judge Advocate, Mr. Twopenny, of Rochester, took up a paper which lay before him, and

By referring to the trial before Lord Tenterden, Lieutenant Chalmers says he was in court both days.

read as follows:—"After recapitulating the authority by which the court was assembled to inquire into the *specific offence* exhibited against me," namely, "On suspicion of having fraudulently charged 26 supernumeraries a blanket each they never received, by putting the figure of 8 in the margin of the ship's book," (without stating any adjournment from the 7th to the 8th of January, 1824) he observed, "that the court having heard the evidence and the prisoner's defence, and maturely and deliberately considered the whole, is of opinion, that the charge is proved in breach of the 24th Article of War, and that the prisoner is hereby dismissed His Majesty's service, mulct of all pay, rank, and allowances, and rendered incapable of ever serving His Majesty, his heirs or successors as a purser in the royal navy." After this sentence was pronounced, I solicited the Deputy Judge Advocate to allow me to peruse it; and as the 24th Article of War particularly struck me, I was desirous of seeing as well as hearing it on that account, and I not only read it myself, "in breach of the 24th Article of War," but gave it to a gentlemen near me also to read, and he passed it to several. When the court left the Prince Regent I requested permission to go to Chatham; but Lieutenant Wilson told me, "he had strict orders from Captain Couch to take me back to the *Perseus*, and against my consent, and as a prisoner I was forcibly carried to London.

It is now necessary to observe, that during Captain Couch's stay at Chatham, he called on a gentleman who happened to be intimate with my family, and upon being asked what brought him to Chatham, he replied, "To break my purser; if I do not succeed, I shall be dismissed myself; but I do not fear, as the members of the court-martial are my friends." My destruction was therefore resolved upon previous to trial; and after I was dismissed the service by this illegal court-martial, I was compelled to do duty on board the *Perseus* for nearly three weeks, without receiving one penny, and at a very great injury to me, and of course under very distressing circumstances. As soon as it was publicly known that I was dismissed H. M. service, every creditor I had sent in their accounts; my wife was so much shocked at the accusation and sentence

that it destroyed her infant; and sickness was added to my misfortunes; by the indisposition of my wife and children, additional expences incurred.

After considering what was best to be done in my deplorable situation, I resolved to write to the Lords Commissioners of the Admiralty for a copy of the minutes of my court-martial, and I accordingly addressed their Lordships in as humble and respectful a manner as possible, requesting to be favoured with them. To this letter I received a reply, "That their Lordships did not think fit to comply with my request;" but upon a second, third, and fourth application, I was told, "That I might have the minutes upon paying the usual fees, at the expiration of a twelvemonth and a day." I accordingly waited until the expiration of that time, and then was favoured with them upon paying three pounds ten shillings. Upon reading what was sent to me, I discovered that these minutes were false; that neither my protest against the jurisdiction of the court-martial, or the true sentence passed on me by the members, were recorded. I perceived that the most material word, *twenty-four* was omitted in the sentence, and that it read "in breach of the Articles of War," instead of the 24th Article of War, which at the court-martial was expressly named, and as I considered such conduct to be dishonourable somewhere, I resolved upon bringing an action at law, against the members of my court-martial. I therefore, took the opinion of Messrs. Barnewall and Lee, and that I might not offend the Lords of the Admiralty by so doing, I sent my case and their opinions to their Lordships, who returned it to me, saying, "They would not interfere." I was, therefore, compelled to issue my writ; I depended upon Sir Charles Abbot; I knew I had committed no offence against military law, or any law, against the Articles of War, or naval printed instructions, and doubted not, but that the Lord Chief Justice of the Court of King's Bench, when the case came to be heard, before deciding on the law of it, would have asked the defendants for the specific Article by which they claimed their jurisdiction, because he has sworn to act justly, and he could not fairly decide until he knew the specific article, as the Articles of War collectively gave them no jurisdiction whatever. I thought it impossible for his Lordship to give an opinion,

until he knew the specific Article, and as the 36th Article was not even on the record, I confess, I did not expect to be ruined by the 36th Article, because I was tried and punished by the defendants by the 24th. I was, however, mistaken; the learned Lord Chief Justice ordered me to be nonsuited by the 36th Article of War, with a knowledge that five of the defendants pleas state that it was by the 24th, and my feelings on the occasion may be better imagined than described. I was vexed and disappointed; the Lord Chief Justice, of the Court of King's Bench, was against me, and my chance of redress was gone. It is true, upon an application for a new trial, a rule *nisi* was granted; but when it was about being argued to be made absolute, the learned Judges turned it into a Special case, which case I have already given in this pamphlet, but to which I always objected. I must do both Messrs. Barnewall and Lee the justice to say, that their special case did them great credit, and I was perfectly satisfied with it; but I do not like special cases generally. When their case was submitted to the defendants counsel, to the law officers of the crown; a very unhandsome and new method was adopted by them, or the Admiralty solicitor, and an entire new case substituted in its place; the objectionable parts in their case, were not, (as I believe is usual) objected to, but an entire new case was substituted in its place; and the special case recorded in these sheets, is the defendants case, not mine; to their case I objected, because, at my court-martial, the 36th Article of War was never named or thought of; and the only question for the learned Judges to decide was, "Whether, for the specific offence charged against a purser, a court-martial could claim jurisdiction to try it by the 24th Article of War." The learned Judges of the Court of King's Bench, have at last decided the question, "That the specific offence charged against me, was not within the 24th Article of War," and I am, therefore, justified in saying, *I am still a purser in his Majesty's navy*, because as yet, I have not been legally dismissed, nor have I committed any unlawful act to merit dismissal.

That I might be certain that I was not dismissed his Majesty's service by my Lords Commissioners of the Admiralty, several years back I addressed their Lord-

until he knew the specific Article, and as the 36th Article was not even on the record, I confess, I did not expect to be ruined by the 36th Article, because I was tried and punished by the defendants by the 24th. I was, however, mistaken; the learned Lord Chief Justice ordered me to be nonsuited by the 36th Article of War, with a knowledge that five of the defendants pleas state that it was by the 24th, and my feelings on the occasion may be better imagined than described. I was vexed and disappointed; the Lord Chief Justice, of the Court of King's Bench, was against me, and my chance of redress was gone. It is true, upon an application for a new trial, a rule *nisi* was granted; but when it was about being argued to be made absolute, the learned Judges turned it into a Special case, which case I have already given in this pamphlet, but to which I always objected. I must do both Messrs. Barnewall and Lee the justice to say, that their special case did them great credit, and I was perfectly satisfied with it; but I do not like special cases generally. When their case was submitted to the defendants counsel, to the law officers of the crown; a very unhandsome and new method was adopted by them, or the Admiralty solicitor, and an entire new case substituted in its place; the objectionable parts in their case, were not, (as I believe is usual) objected to, but an entire new case was substituted in its place; and the special case recorded in these sheets, is the defendants case, not mine; to their case I objected, because, at my court-martial, the 36th Article of War was never named or thought of; and the only question for the learned Judges to decide was, "Whether, for the specific offence charged against a purser, a court-martial could claim jurisdiction to try it by the 24th Article of War." The learned Judges of the Court of King's Bench, have at last decided the question, "That the specific offence charged against me, was not within the 24th Article of War," and I am, therefore, justified in saying, *I am still a purser in his Majesty's navy*, because as yet, I have not been legally dismissed, nor have I committed any unlawful act to merit dismissal.

That I might be certain that I was not dismissed his Majesty's service by my Lords Commissioners of the Admiralty, several years back I addressed their Lord-

ships by letter, asking the question; and the answer I received was to this effect, "That you are dismissed his Majesty's service by the sentence of a court-martial, and not by the Lords Commissioners of the Admiralty." As the learned Judges of the Court of King's Bench have decided that the court-martial was illegal, under the 24th Article of War, and as I swear solemnly, and am supported by the affidavits of others, that it was by the 24th Article of War sentence was pronounced by the members of my court-martial, and that the 36th Article of War was not then even named. Until I am lawfully dismissed by the Lords Commissioners of the Admiralty, or a legal court-martial, I consider I have still the honour of being an officer in the Navy, and conclude my observation, by echoing the only question worthy of being repeated in the defendants Special Case, "Whether, under all the circumstances above stated, I am not entitled to a verdict." In conclusion, I shall observe, that it having been reported, that I am a litigious person, I shall only reply, that I have served under thirty-five different commanding officers, and never differed with any of them; I possess certificates to prove this; and having resided in my present residence many years, I refer to my neighbours and acquaintance to vouch for the inaccuracy of the observation, that I am litigious. The sort of defence set up by the defendants counsel, has been quacks and quibbles; they were attacked in their entrenchments, and they retreated to the fosse; pursued to the fosse, they absconded it, and flew to the postern; they seemed perfectly contented to carry off the bodies of the defendants, leaving their reputation to shift for itself, and to be reduced to the necessity of resting the honour of the defendants on such a defence, as hath been set up, is miserable indeed. In the case of the King v. Bambridge, Lord Mansfield held, "That as it was a matter in which the public was concerned, he considered it an indictable offence, *but if the public were not interested*, it would be different;" if therefore, the specific offence charged against me had concerned the public, it would have been cognizable by a court-martial, but being a depredation on private property, it did not concern them, and, therefore, the defendants had no jurisdiction either to try or punish me, particularly by the 24th

Article of War, even if the specific offence charged, had actually been committed, which it was not.

On the 5th December, 1780, Sir Robert Smith moved in the House of Commons, "That a copy of the minutes and sentence, had upon the trial of Vice Admiral Sir Hugh Palliser, be laid before the House;" which was, by a large majority carried, and after several other motions for papers, the house adjourned. On the 1st February, 1781, Mr. Fox moved, that the clerk at the table should read the charges exhibited against Admiral Keppel, by Sir Hugh Palliser, and the sentence of the court-martial, with the copy of the charges and sentence of Sir Hugh Palliser's court-martial; and in speaking of the Admiralty generally, and of the First Lord in particular, (Lord Sandwich) he remarked, "In regard to what his honourable relative had said, of the convicted falsehood, and recorded treachery of the Lords of the Admiralty, he believed that they were capable of being guilty of quite as much treachery as any men could practise, without rendering themselves liable to trial and a legal punishment; and that they would first deceive and afterwards betray. Experience," said Mr. Fox, "had proved it true." He then moved, "That the appointment of Sir Hugh Palliser, to be governor of Greenwich Hospital, after he had been declared guilty of having preferred a malicious and ill-founded accusation against Admiral Keppel, by the sentence of a court-martial, was a measure totally subversive of discipline, and derogatory to the honour of the Navy." As soon as the Speaker had read the motion, Lord North rose, and after a few observations, remarked, "That before he sat down, he should certainly move to amend the question, by introducing words, tending to shew, "That the court-martial, which declared the accusation against Admiral Keppel, malicious and ill-founded, was not appointed to try that question by the admiralty, nor was Sir Hugh Palliser heard in his own defence; that the trying, or punishing a man on a specific fact, with which he was not accused, was illegal, and extra-judicial; and for which reason, he moved an amendment," &c. After Mr. Burke, the Attorney General, and others, had given their opinions, the last speaker on the subject was Lord Frederick Campbell, who said, "he should be on

the side of justice, and that the court-martial ought to be impeached. He never would accede to the doctrine, that any man in this country, in any court, either civil or military, a court-martial, or a court of law, could be deemed guilty of any offence, without first being called upon to answer it; he should, therefore, vote for the amendment." On a division the numbers were, for Lord North's amendment, 214,—against it, 140; so that the Parliament, during Lord North's administration, would not allow any one to be illegally tried or punished; and I have to hope the present Members of the honourable House will follow their example.

Finally, Whatever difference of opinion may prevail concerning the power of the Admiralty as to dismissing officers from the service without a court-martial, I shall instance a proof, that after sentence is passed on an officer it has been deemed not to be legal for their Lordships to alter such sentence; and although this has been done in my case by some one, or I never should have applied to the Court of King's Bench had the correct sentence of my court-martial been sent to me, and justice done me; still, as I cannot obtain redress, or even my pay and allowances which were due to me up to the time of the court-martial or after it, I am compelled here to name this circumstance to prove the hardship of my case. That such conduct is illegal, I shall instance the case of Sir Isaac Coffin, who, in the year 1789, commanded the *Thisbe*, on the Halifax station, and was brought to a court-martial by the master of the ship on a charge exhibited against him of signing false musters, which charge being proved, the court only sentenced him to be dismissed his ship. Shortly after Sir Isaac's return to England, a minute was made at the Admiralty, Earl Howe being then First Lord, "That the board had come to the resolution of putting off the list of post captains the said Isaac Coffin, whereby he was dismissed H. M. service, and rendered incapable of being ever after employed in the navy, agreeable to the 31st Article of War, under which he fell, which condemns an officer convicted of the offence with which he was charged to be cashiered and rendered incapable of further employment in His Majesty's naval service, without any mitigation whatever." The Admiralty, by this conduct,

supplying the deficiency and impropriety of the sentence pronounced against him by the court-martial, and exercising a power to enforce it. Captain Coffin complained by petition to His Majesty, and so have I; but as Mr. Croker and several of the present Lords of the Admiralty are now Privy Councillors, the answer that I received was, "that the Admiralty cannot recommend;" although in Captain Coffin's case the Privy Council directed the judges to report to that board on the merits of the petition, and their report was made as follows:

"To the King's Most Excellent Majesty."

"In obedience to the above order of your Majesty in Council, we have taken into our consideration the charge exhibited against Isaac Coffin, Esq., the sentence of the court-martial, and also the resolution of the late board of Admiralty; and we are of opinion, first, That the sentence of the court-martial is not legal; Secondly, That the minute made by the Admiralty Board is not legal; and that the punishment directed to be inflicted by an Act of the 22d Geo. II. c. 33, upon persons convicted of the offence specified in the 31st Article of War, established by that act, cannot be inflicted, or judgment thereon supplied or pronounced by any other authority than that of the court-martial which tried the offender.

"Signed,

"Kenyon,
Loughborough,
Jas. Eyre,
Frans. Buller,
H. Gould,

H. Ashunt,
B. Hotham,
J. Wilson,
N. Grose,
A. Thompson."

"23d Jan, 1790."

This opinion states the sentence to have been illegal, because the members of Sir Isaac Coffin's court-martial did not keep to the exact tenor of the article of war under which the specific offence fell, and that the articles in the act collectively give no jurisdiction to try any offence; but the specific article must be named in the sentence, and that the executive power cannot rectify any mistakes made by the members of a court-martial; such was the

law some years back, and I now appeal to their Lordships at Westminster, and to their Lordships at the Admiralty, and (bowing to their decision) that if the specific offence charged against me fell under the 36th Article of War, surely the tenor of the 36th Article of War, as regards the sentence in my case, must be the tenor of the 33d Article of War; and as the sentence which has been passed on me would have been illegal if passed on any "flag officer, captain, or lieutenant," who are named in the 33d article; and it is equally illegal as regards a purser, and the very letter of the law on a penal statute must be strictly adhered to. In the year 1743, Lieutenant Fry, of the Marines, brought an action at law against the members of a court-martial for the rigour of their sentence, and he received 1000 Guineas damages; and if the cases I have mentioned are similar to my own, which they are, no interest or party feeling ought to deprive me of my rights as a British subject; and from the just and good of the community I still look for redress.

I have committed no crime against any law. I have not injured, or intended to injure, any one, the men being all discharged the ship previous to any figure being placed against their names. Of the specific offence charged against me I was acquitted; and I still maintain, agreeable to the established law of England, I cannot legally be convicted of an intent to commit a distinct offence with which I was not previously accused, and it is of this I complain.

At this moment my name will be found in the books of every ship I have ever served in, and if any one was now to put the figure of 8 in the margin of either of those ships books against my name, I could not be injured, or or any one benefitted by it; and if this is the fact (which it is) how can such an act, if even committed, be construed into a *crime* falling under any article of war? and whether I left the ship ten days ago or ten years, does it in the least signify? When a man is discharged, and his pay tickets correct, his accounts is closed, and the books, as far as he is concerned, are waste paper. Had one of the 26 supernumeraries I was suspected to have defrauded *been open on the books*, it might have been said I intended to have charged these men *something* when they left the

ship; but being all discharged previous to the figure being put there, and their pay tickets correct, it was impossible for either of them afterwards to be charged a blanket or any thing else; *and on the merits of the case as well as on the law*, the specific accusation was no offence in equity or law.

I will admit there are three powers who can legally dismiss an officer from his Majesty's service, namely, the King, the Lords Commissioners of the Admiralty, and the legal sentence of a court-martial; but until one of these do dismiss, no officer can legally be deprived of his pay, rank, or allowances. In my case, it has not yet been done by either; I am not dismissed by a legal court-martial or the Admiralty; and all that the learned judges of the Court of King's Bench have decided is, "that the offence charged was triable by a court-martial;" "But," said Lord Tenterden, "I have nothing to do with the punishment, and under the 24th Article, it was illegal." Here I must again differ with the learned Lord; for the punishing, being a component part of the trying, they cannot fairly be divided; and, as by the 24th Article of War, all the learned judges have said, the defendants had no jurisdiction over the specific offence charged, I have not yet been dismissed the service by a legal court-martial, or by the Lords Commissioners of the Admiralty, and until I am, I consider myself still in the service of my King and country. Suppose I am about to hire a servant, and I say to him, If you enter my service you shall sign these articles, which contain 36 sections, assigning a punishment for each distinct offence; the man agrees to my terms, signs the articles, and enters my service. After remaining with me a twelvemonth, I discharge him without paying him for the time he has been with me, or giving him a character, or even allowing him to take away his own property which he brought into my house. The servant, finding he can obtain from me no redress, commences an action at law, and I put upon the record seven pleas as a *justification*, and when we go to trial, I put in my 36 Articles collectively as my justification, surely the learned judges would compel me to name the specific article which had been violated before he decided the question; and if I, by five of my pleas

out of the seven, claimed authority by a wrong article, would it not be acting unjustly towards my servant if the judge did not let the case go to the jury.

When any man enters his Majesty's service, he neither forfeits his rights as a British subject or as a man. If he commits no breach in either of the articles of war, or naval printed instructions, he ought not to be punished by them; and as the articles of war may be considered as an agreement or contract with his Majesty, who cannot do wrong, this contract is as much binding on one party as another, and fair play is the brightest jewel in England.

All that the learned Judges of the Court of King's Bench have decided is, "That the specific offence charged against me, might be so wire-drawn, as to be construed into a suspicion of intending to obtain money under false pretences, which offence was triable *only* by the 36th Article of war;" but as yet, they have not given an opinion as to the sentence, which to me is every thing, and I appeal to the learned Judges, if they have not distinctly stated, that by the 24th Article, the members of my court-martial, had no jurisdiction over the specific offence, as it was by the 24th Article they claimed it, by which I am in honour and equity entitled to redress. I again repeat, I have committed no offence against any law, or positive institution of my country, against any penal statute, or have I violated any Act of Parliament; and, until I am dismissed his Majesty's service, by a legal court-martial, or by my Lords Commissioners of the Admiralty, I am entitled, by the laws of my country, to my pay, and am still in hopes I shall receive it.

Had I been a flag officer, captain, commander, or lieutenant, and had actually been convicted of the specific offence, with which I was only suspected, I must have been dismissed his Majesty's service, agreeable to the tenor of the 33rd Article of War; but because I am a purser, and not named in the 33rd Article, although the specific offence charged against me is, am I to be more severely punished, by being mulct of all my pay, rank, and allowances, and rendered incapable of again ever serving his Majesty as a purser; in addition to dismissal? does the law of England make any distinction in its rewards and punishments, with the high or low, the rich or the poor,

the messenger or the admiral? and ought the Court of King's Bench to permit such a difference to be made by a court-martial, as has been done in my case? Had I been tried at the quarter sessions, and sentence of death been passed on me, could I not have appealed to the Court of King's Bench; and would their Lordships have said, "We have nothing to do with the punishment, if the court had the jurisdiction to try?" I know a mouse stands but little chance of success against a lion; but if a worm is trod on it will turn. Why am I to be more severely punished for a distinct offence, with which I was not charged, than a flag officer, captain, commander, or lieutenant could have been, if even accused, tried, and convicted of the specific offence, with which I was charged. If I am wrong, why not call upon me for the expenses. I repeat, that the community have no right to be called upon for one shilling, and if any one who was in Court will swear that it was not by the 24th Article of War, the court-martial claimed their jurisdiction, every shilling shall be paid; but if I am right, which the learned Judges have said I am, why should not Sir Edward Owen, and others, be called upon for the amount, and the saddle placed on the proper horse. The solicitor to the Admiralty, Mr. Jones, and the junior law officer of the crown, Mr. Maule, I cannot help thinking, have deceived and misled the Admiralty. To Mr. Jones I shall write shortly. I will state publicly the steps he took to obtain a victory; I will convince him, that chicanery seldom thrives; and having Sir Edward Owen's letter by me, which states, that he had ordered his solicitor to rest on the "24th Article of War," he (Mr. Jones) had committed a breach of honour and duty, by not doing so. I do not fly in the face of my superiors; I am no advocate for insubordination; and I conclude with observing, if I am wrong, punish me; if I have not committed any offence against the Articles of War, or if right, do me justice.

The original charge against me, and for which I was first put under an arrest was, "On suspicion of having charged the men a blanket each they never had," which accusation will be found in the log-book of H. M. S. *Perseus*, exactly in those words. When Captain Couch was called upon by the Admiralty to explain his conduct, as

I have stated in Mr. Brougham's speech to the special jury, he applies to an attorney to draw out the accusation, who advises Captain Couch to *couch* his letter to their Lordships, "On suspicion of having fraudulently charged 26 supernumeraries a blanket each they never received, by putting the figure of 8 in the margin of an open list," which is surely a distinct offence, to that for which I was originally put under an arrest; and when the accusation comes before the members of the court-martial, it stands On suspicion of having fraudulently charged 26 supernumeraries a blanket each, by putting the figure of 8 in the margin of the ship's books, which is another charge, for which I was not in custody; they acquit me of it, by finding me guilty of "an intent to embezzle, in breach of the 24th Article of War," with which offence I was not even put upon my trial; neither had the members of the court-martial authority from the Admiralty to try me for that offence, or did I ever plead, or was I arraigned on that or any other charge whatever.

Upon the minutes and sentence being sent to the Admiralty, a new injustice was committed against me, for when I obtained a copy of the minutes and sentence, the most material words *twenty-four* was omitted, and the sentence appeared, "in breach of the Articles of War," which was not the sentence passed on me by the court-martial, to which I have made oath, and which oath is corroborated by that of others, "that it was in breach of the 24th Article of War *specifically*, and not the Articles of War *collectively*, that I was sentenced. When I came to trial before Lord Tenterden, five of the defendants pleas out of the seven admit, that they claimed their jurisdiction under the 24th Article of War, which his Lordship decided was *illegal*; but, says his Lordship, as you would have had jurisdiction to try the offence by the 36th Article of War, *I have nothing to do with the punishing*, and I shall, therefore, nonsuit the plaintiff by the 36th Article. When a new trial was granted, what seemed most extraordinary to me was, that the cause, never appeared in the paper to be made absolute; and without even being asked my consent, or any knowledge of it whatever, I was told, that the learned Judges had turned the cause into a special case, which I most certainly would never

have consented to because it deprived me of a *writ of error*, and bound me to the opinion of four men instead of four hundred.

When the special case was argued before all the judges of the King's Bench at Westminster, the original accusation, "on suspicion of having charged the men;" then, "26 supernumeraries, by placing the figure of 8 in the margin of an open;" then, "on suspicion of having fraudulently charged 26 supernumeraries; by placing the the figure of 8 in the margin of the ship's book, and of being tried for one offence and found guilty of a distinct offence, of an intent to embezzle, and punished by the 24th Article of War," all this is *entirely forgotten*. But the learned judges say, the accusation is another offence, namely, "To obtain money under false pretences," which they said is a crime falling under the 36th Article of War, and therefore I must suffer, rather than they would differ from my Lord Tenterden. It is of this I complain. I have not solely fought for victory, but justice; and although it is now said that the Admiralty never can support an officer in opposition to his superior, or even sanction any action at law to sustain his rights. My answer to this remark is, that if any officer violates the established rules and regulations of H. M. Service, be he who he may, he ought and must take the consequence; and no danger to the state is equal to insubordination in the navy or army; that this has always been my opinion I shall refer to many of my shipmates and old acquaintances, and that my study has always been to add to the respectability of the naval service in particular, and to benefit my country all in my power; to prove this, such was my influence during the time I was in Jamaica, that scarcely could any officer in the fleet obtain money for either a private or public bill without my signature attached to them, and the benefit I then did to the service I reflect on with satisfaction. My horses, my house, or my purse were seldom refused to any officer or man, and my knowledge of the best cruising ground could not be surpassed. Not a merchant vessel left the harbour of Port Royal but I knew her destination, and upon their arrival in port I was equally fortunate in knowing from whence they came and the value of their cargoes. My connection and information from

America, St. Domingo, Vera Cruz, &c. &c. was always correct; and in one year I sent to England Colonial produce (which would otherwise have been sent to America) which paid duties to my country of upwards of £33,000. Many a merchant in England and of the Leeward and Windward Islands I have saved from *total ruin*, and when English merchantmen have even been taken by American privateers, I have got them ransomed for a certain sum, and they have afterwards proceeded on their voyage to England, instead of being condemned in America as lawful prizes, which they most undoubtedly would have been had they been sent there.

The conspiracy formed against Vice Admiral Stirling, and what the result would be, I mentioned not only to the Vice Admiral, but also to his flag Lieutenant Carter, many months before it occurred; and to one gentleman, now in London, I gave such correct information as saved himself and underwriters several thousand pounds, which they most handsomely acknowledged by presenting me with £800. After having therefore served my King and country in various parts of the world for very many years, increasing her revenues by paying in one year only for duties upwards of £33,000, and annually something considerable, which would otherwise have gone to the United States, I am at last dismissed that service I have so much served, by an illegal court-martial, without even a trial, without having violated any law, martial, military, or civil; and at an advanced time of life have to begin the world again, with an unmerited stigma on my character, a wife and five children to my back, deprived of the pay and emoluments which were due to me, and rendered incapable of ever serving his Majesty, his heirs, or successors as a purser in the royal navy, in breach of the 24th Article of War.

Surely I am in a dream, and in England in the nineteenth century, such things cannot be. There are undoubtedly in his Majesty's naval service, very many most excellent and worthy characters, who would do credit to any service, and honour to any profession; at the same time, there are some who would disgrace a jibbit, and I shall give an instance of the latter. In the year 1811 I returned to Jamaica with Vice Admiral Stur-

America, St. Domingo, Vera Cruz, &c. &c. was always correct; and in one year I sent to England Colonial produce (which would otherwise have been sent to America) which paid duties to my country of upwards of £33,000. Many a merchant in England and of the Leeward and Windward Islands I have saved from *total ruin*, and when English merchantmen have even been taken by American privateers, I have got them ransomed for a certain sum, and they have afterwards proceeded on their voyage to England, instead of being condemned in America as lawful prizes, which they most undoubtedly would have been had they been sent there.

The conspiracy formed against Vice Admiral Stirling, and what the result would be, I mentioned not only to the Vice Admiral, but also to his flag Lieutenant Carter, many months before it occurred; and to one gentleman, now in London, I gave such correct information as saved himself and underwriters several thousand pounds, which they most handsomely acknowledged by presenting me with £800. After having therefore served my King and country in various parts of the world for very many years, increasing her revenues by paying in one year only for duties upwards of £33,000, and annually something considerable, which would otherwise have gone to the United States, I am at last dismissed that service I have so much served, by an illegal court-martial, without even a trial, without having violated any law, martial, military, or civil; and at an advanced time of life have to begin the world again, with an unmerited stigma on my character, a wife and five children to my back, deprived of the pay and emoluments which were due to me, and rendered incapable of ever serving his Majesty, his heirs, or successors as a purser in the royal navy, in breach of the 24th Article of War.

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ling (having only been six months absent) to supercede Captain Vashan, who being the senior captain on the station, after the death of Admiral Rowly, hoisted a broad pendant as Commodore. A few weeks after the Vice Admiral's arrival Captain Vashan prepared to depart for England; and as I had an establishment in Kingston, he requested me to allow him to put an advertisement in the newspaper, informing the colony that he was about leaving the station, and every one who had any demand upon him was to send in their accounts to me; and amongst these bills so sent to me was one from a pastry-cook for Mrs. Vashan, claiming for tarts, cheese-cakes, &c. &c. £233. 6s. 8d. which I actually paid, besides other sums for him to the amount of £2,353. 13s. 4d.

Previous to Captain Vashan's departure from Jamaica, he was sent to Vera Cruz, for money, and I not only gave him letters to the principal people there, but interested myself so much for him, with the Kingston Merchants, that I procured for him a considerable freight of specie, by which he not only cleared many thousand pounds, but enabled him, as he said himself, "to depart in peace." For the sum of £2,353. 13s. 4d., I actually paid for him, I took his bills, for various sums, upon his agent, in London, (with whom I was concerned) upon an express understanding, that they were to be paid from the freight he was to receive, which I procured him, and that he gave an order to his agent to that effect. Upon the bills being presented for acceptance, they were all dishonoured.

Captain Vashan had not only made away with every shilling of his freight, but had actually absconded to the Isle of Man, a few days after his arrival in England, where in a few days he breathed his last, and where his ashes still remain. In consequence of this dishonest, and dishonourable transaction, all the bills came back to me, with 8 per cent. re-exchange, and I had to pay every one of them, without ever receiving one penny from his estate, or even thanks from his family; in fact, he died insolvent.

Now this was a fraud committed under very aggravated and dishonest circumstances; yet, when I made it known to the Admiralty, I was informed, that Captain Vashan was on half pay, and as the charge was of a *private nature*, their Lordships could not interfere; but when a suspect-

ed fraud only is made against me by my Captain, it is instantly received, and although the parties were all discharged, instead of being on half pay, it made no difference with the Lords of the Admiralty. I am condemned unheard; and punished for an offence, without ever being accused of it. I have now done. My spirits are not quite so good as they were; my health is impaired; and I am so much hurt at the decision of the court-martial, and of the learned Judges, that it is scarcely possible to recompense, or to satisfy me for the very great injustice, I cannot help thinking has been done me.

F I N I S.

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Letter, &c.

MY LORD,

CONSIDERING you have deprived me of my right to a Trial by Jury, by granting jurisdiction to a Military court, to take cognizance of a *Civil crime*, and believing that if there be a case in which, above all others, it becomes the Courts of Westminster to be particularly watchful over the rights of the subject, it is in the case of a court-martial deciding on the extent of its own jurisdiction. Your late decision "That an indictable misdemeanour at common law, is cognizable by a Military court, is certainly a new doctrine, hitherto unknown, but now necessary to be made public for the benefit of the community at large. Hitherto Martial law, Military law, and Civil law, have possessed different jurisdiction; and a Civil crime could not, formerly, legally be tried by a Military tribunal, until martial law was proclaimed.

A Military court-martial is the mere creature of the Mutiny Act, (which makes a wide distinction between *crimes* and *offences*,) and has not the smallest shadow of authority, but what is derived from that Act. All courts-martial are considered as criminal prosecutions at the suit of the Attorney General on *behalf of the Public*, and depredations on private property were not (until your late decision) considered cognizable by a Military court. If law was a science, and governed by principles, and not a mere matter of opinion, as it unquestionably is, how much trouble would be saved to yourselves, and what inestimable benefit would be conferred on the world at large; but, unfortunately for the community, no