DEFENCE.

THE FOLLOWING DEFENCE OF LIEUT. CHARLES WILKES TO THE CHARGES ON WHICH HE HAS BEEN TRIED IS

RESPECTFULLY SUBMITTED TO THE COURT.

ALTHOUGH nearly three weeks have been industriously spent by this court upon my trial, this is far from being the measure of the efforts which have been made against me. It cannot have escaped the notice of the court that from the first moment it was convened in what has been inappropriately called the trials of Lieuts. Pinckney, Johnson, Passed Midshipman May and Dr. Guillou, I have in fact been treated by the prosecution as the real culprit. No effort was spared in those trials to bring the minds of the members of this court into such a state as would insure my conviction when the charges against myself should in their turn be investigated. While I can feel no fear that such premature and unprecedented efforts can have had any effect upon a tribunal composed as this is, I may yet be permitted to complain that this attempt to have my case prejudged has been so far successful with the public that the press has teemed with that unqualified denunciation of me personally, and of my actions yet undivulged in the form of legal evidence, as would seem to have been intended to overawe this court and force from it by the power of that mighty engine, a verdict in opposition to the dictates of their own consciences.

Nor can I avoid referring to the fact that on my trial probably for the first time in the history of courts' martial, twice has the authority of the administration been exerted to control or interrupt the proceedings of the court.

The efforts to create a prejudice against me date however much further back, and I had the mortification on landing in the United States, after a voyage of four years, in which I felt conscious I had successfully accomplished every object that had been hoped for by the most sanguine among the projectors of the expedition, to find that I had already been condemned in my absence, and was upon the eve of sustaining an injury in my relative standing in the navy, almost equal to the most severe sentence which this court could possibly inflict upon me, had every one of the charges exhibited against me in their utmost variety of specification been fully proved.

While I thus exercise the privilege of the accused in re-

ferring to the formidable interests which have been arrayed against me, far be it from me to imagine that they can have any influence on your decision. Upon the characters and lofty standing of the members of this court I can repose with the confidence that they are far beyond any influence but that of the evidence which has been laid before them, and its bearing upon the rules and regulations of the navy in their application to the peculiar circumstances of the Expedition which I have commanded. And here I may be pardoned if I refer to the circumstances under which the command was offered to and accepted by me. It will be within the recollection of some of the members of this court, that I was attached to the expedition when it was first organized under the command of Commodore Ap Catesby Jones. In this relation to it I visited Europe for the purpose of procuring instruments. Upon my return, I learned that events had occurred which precluded my serving upon it with honour to myself, for I found that it was intended that I should serve merely as a member of the scientific corps, and without any command to which my standing on the list of lieutenants would have entitled me. Under such conditions I sought to be relieved, and accepted the duty of surveying, first George's shoal, and afterwards some of the southern harbours. While this latter work was still unfinished, I received orders to repair to Washington; and I there, to my great surprise, received the offer of the command of the Expedition. Aware of the very difficult position in which this offer placed me, I requested Mr. Poinsett, to whose department the expedition had been transferred, to offer it to all those above me on the navy list, and particularly to those who had been attached to the expedition.

The offer of such a command was in itself a high honour, and this court would think ill of any officer of the navy, who thus pressed, would have declined it. The acceptance however, was to me no little sacrifice personally. That I used no means to obtain this command will appear from the letters I now submit for your inspection.

In the re-organization of the squadron, I insisted upon an important condition, viz: that all those objects of science, which are so far connected with the duties of a naval officer as to call for their elementary study as a part of the education of an accomplished seaman, or were within the scope of the medical profession, should be entrusted to the officers of the squadron. I conceived this due to the reputation of the navy, which I thought ought not to accept of aid in duties within the sphere of the examinations to which its members are subjected, before their rank in the service can be defined.

Under the original organization, such subjects, say those of Astronomy, Hydrography, Physics, and Meteorology, had been assigned to civilians, and the sea-officers would have had no other em-

ployment than to keep their watch, and attend to the duties of the ship. If in this plan I have been partially disappointed, I do not regret having adopted it. There have been some who contented themselves with a bare performance of the duties on which they were ordered; others who have avoided all duty except imperatively commanded, and have presented arguments why they should not obey positive, and written orders. A cabal, in fact, existed, to thwart all the objects of the Expedition, which were not consistent with the ease of the gentlemen who composed it. Be it recollected that all the officers of the expedition were volunteers for this special service; that they received an extra compensation for their services, provided they performed the conditions on which it was tendered.

It is in evidence before you, and some of the testimony was not sought for by me, that I did not spare myself. I feel it no derogation to my character to admit that I did not spare others when the public service was to be promoted.

That I have not exacted anything beyond the limit of proper exertion, I can appeal for proof, to the health of the squadron under my command, which in a service of nearly four years in every varying climate of the globe, lost but eight by disease.

The instances of officers guilty of neglect of duty or positive resistance to my orders, were however few, and it is a consolation in my difficulties, that this occasion is given me to acknowledge the zeal and devotion with which the officers and scientific corps as a body have pursued the objects of the expedition. Among them, I must return my obligations to Lieut. Hudson, whose devotion to the honour of the navy brought him to my side in the trying circumstances in which my appointment placed me; and gave me the aid of experience. To do this he must have sacrificed no little of the jealous feeling of rank, which sometimes stands in the stead of other requisites for command. This acknowledgment on my part is the more his due, inasmuch as the sacrifice he thus made, so far from being praised as it most justly deserved, has been the ground of reproach. It is, and all the court will feel it to be so, the greatest act of self-denial which an officer can perform, to accept a command under his junior, on a peculiar service; and when he has done so, and thus aided in the execution of an important service, it has in other countries been considered as adding most materially to the honours of success. Yet, you have witnessed an attempt first to excite a jealousy between this officer and myself in relation to the discovery of Antarctic Land, and you have heard him subjected to an insulting cross-examination, which an observer of the proceedings correctly designated as *savage*.

Of what importance his aid was to me will be seen from the fact that, restricted as a matter of course to the younger officers of the service there were but few officers with the exception of the com-

manders of the vessels, who had ever put a ship about before the squadron sailed. How well and successfully the greater part of them laboured to supply their deficiencies, the results of the expedition will show; and even if some, unknown to me as yet, may still consider that I have been over-exacting in demanding duty, the time is not far distant, when such feelings will be forgotten in the proud consciousness of having well performed it.

To the Navy I am devoted, and a servitude of twenty-six years has not lessened my attachment to it. I had served my apprenticeship in our mercantile marine before I received my midshipman's warrant. What I have learned of science has been acquired in the direct discharge of duty as an officer. It might be considered as an unworthy appeal to the feelings of one of this court, were I to say in what school of discipline I learned the relations between commander and subordinate. This old discipline of the service was, by the senior officers of our navy, made the means of achieving the proudest laurels of which our country can boast. I have found it all-sufficient in the most trying circumstances of the cruise, the source of contentment and happiness far more than of complaint. I avow myself, and shall ever be found, opposed to the new idea that authority is to be derived from the *steerage* and *wardroom*, and that officers are to be shown the instructions of their commander, and be civilly asked if they will perform their duty.

You have seen that the vessels of the squadron have ever been in good order and condition, and that the work we have executed in a branch of our profession is enormous. I attribute it to the discipline that has prevailed, and which the laws, rules and regulations of the naval service allow.

The charges exhibited against me, are eleven in number, and are set forth in thirty-five specifications. Of the latter, seven were at once stricken out, and two others have since been abandoned. Enough, however, of the original mass remains to demand, that I should trespass upon your time to an extent in proportion to the bulk, if not beyond the weight of many of the charges.

The first set of charges are exhibited by assistant surgeon Guillou, who accuses me in the first specification of his first charge, of *Oppression*, in refusing to forward to the Navy Department a respectful report of injuries to himself.

How stand the facts? It is proved, that on the 11th day of December, 1839, I received a report from this gentleman to be forwarded to the secretary; and it is also proved, and by the prosecution, that this report was transmitted to the department with my letter of 20th October, 1840. It was therefore in my possession for about ten months. Handed to me at Sidney, while engaged on duties which occupied me day and night, it would hardly have been expected, that I should have even inquired into its contents within the few hours Dr. Guillou chose to allow me between the

handing of the paper and the sailing of the Royal George, on the 11th Dec. 1840. This, the only opportunity of which the prosecution has given evidence, was a British vessel bound to London. If I did not entrust to such a channel *duplicates* of despatches, is it to be expected, that I should have thus risked an *original* document, esteemed so important by its author.

It is strange, that this paper should not have been presented to the court. Dr. Guillou has sworn, that it could not be found in the department, although the clerk opened four or five bundles of papers to search for it. Has the judge advocate never heard, that a copy was furnished just before the arrival of Dr. Guillou in Washinton by the department to the committee of the senate? Has he himself no copy of it, which he might have produced for me to admit or deny?

It is a part of the charge, that I have wholly suppressed this document.

May we not liken the fate of this paper to the case of the log-book of the Vincennes? This was transmitted, as appears by my letter of 2d Nov., 1840, together with the log-books of the Peacock and Porpoise. Its travelling companions were admitted to have reached in safety their place of destination, and were safely lodged in the archives of the department. For a long time not a trace could be detected of that important volume, until at last it was brought to light by the search of one who sought with a desire to find.

I appeal to the members of this court, whether a suspicion did not creep over their minds, that I had stealthily suppressed that book? Its discovery and the place of its concealment must remove the general impression that was so insidiously insinuated, but in the particular case of Dr. Guillou's report, I have not been so successful, at least as respects the original. My letter of 20th October, 1840, takes it out of my hands to be delivered to the secretary, together with the report of Lieut. Pinkney, in relation to other alleged wrongs and outrages; and although that letter reached its place of destination, Dr. Guillou's report is nowhere to be found.

It might appear, that it is of little moment that it has not been produced, and that no motive existed why Dr. Guillou should conceal it. I say, there is a most influential motive, why the prosecution should not produce it at this trial. The report is charged in the specification to have been "*respectful.*" It is sufficient that it should have been produced to have disproved this allegation.

Dr. Gillou's letter of the 22d May, 1840, probably afforded the court an opportunity of estimating his idea of *respectful* communications, in which he modestly suggests, "that to be consistent with the precepts I had adopted in his case, it will be necessary to de-

tach Lieut. Ringgold from his command, and deprive him, whilst under charges, of the privilege of his Rank."

His offensive and hypercritical review of Lieut. Ringgold's letter may also tend to ascertain his construction of the term *respectful* if not forgotten by the court.

In 1st. Starkie on Evidence, page 322, it is laid down, "That the general rule is that, which natural reason and obvious convenience dictate:—that the party who alleges the affirmative of any proposition shall prove it: for, the negative does not admit of the simple and direct proof, of which an affirmative is capable; and this is in conformity with the maxim of the civil law, '*It is incumbent on him to prove, who alleges, not on him who denies.*'"

Such is the law, and by that principle is this court to determine —whether any, and which of the charges have been established.

In vain the Court will examine the record to discern a single syllable in relation to the character of Dr. Guillou's report, whether *respectful* or otherwise. All he says on that subject is, that "on the tenth of December, 1839, after being detached from the Porpoise, I went on shore to the observatory at Fort Macquarrie, at Sidney, to see Lieut. Wilkes. I did see him and asked him, whether he had forwarded to the Secretary, or placed among the papers to be sent by the Royal George, which was to start that day, *a report addressed to the Secretary of the Navy, under date of December 9th,* and which I sent to Lieut. Wilkes, through Lieut. Ringgold, before leaving the Porpoise."

Admitting however, what has not been proved, that the document *was* "*respectful,*" the court will naturally next inquire, what is the hardship of which Doctor Guillou so greatly complains. The oppression, according to the specification, consists in "rendering for an unnecessary time null and void, the system of responsibility and subordination to the rules and regulations of the navy." Did he expect, that the Secretary of the Navy would break up the expedition, by ordering its commander to the United States for trial, together with the officers whom he would require to substantiate his frivolous charges? If not—how could he have been affected, whether the Secretary received his complaint ten months sooner or later? No court could have been ordered to try me abroad; and if I was to be tried in the United States, it could not have been done satisfactorily to the Doctor, until the return of the squadron.

The squadron left this country on the nineteenth of August, 1838; and the court are next to believe, that the Doctor's ambition had so entirely oozed out, that he would have consented to abandon the bright visions of glory, which prompted him to encounter the horrors of this voyage, within sixteen short months after he had embarked in it, and this sacrifice to be made, for the sake of returning to the United States, as a witness against his commander.

Nothing, gentlemen, was further from the Doctor's wish. Soon, indeed, would we have heard the outcry of oppression, had he been ordered home for that inglorious purpose.

Yet the *suppression*, (as he calls it,) of this precious and respectful document, for the period of ten months, which did not impair a tittle of his right, constitutes the startling oppression laid in the first specification, to prove which and the next, and the second additional charge, it is understood, that the chief clerk and two subordinates of the Navy Department, have been dragged from their duties to the Government, to attend as witnesses before this court.

The affirmative of the specification is not proved; inasmuch as it is not proved, that the report was respectful; and the court have no right to presume it was: but it is proved, that within ten months after it was received, it was forwarded to the department; and that even had it gone, at the first moment I received it, no redress could have been afforded Doctor Guillou earlier than he can *now* get. Consequently there has been no oppression, and this specification falls to the ground.

I will not long occupy the time of the court as to the second specification of the first charge; but will dismiss it with a single observation—it stands or falls with the first.

Where is the oppression here complained of? Could Lieut. Ringgold have been tried abroad? From his rank he certainly could not, unless the public service imperiously demanded it. Hence, if at all, he must be tried in the United States. Consequently Doctor Guillou has lost no rights whatever.

What has become of the history of the wrongs of which he complains? Here he is in the United States, and so too is Lieut. Ringgold, yet we hear nothing of the redress to be awarded to that much aggrieved medical officer; and depend upon it, he is too honest a hater, to forget the griefs, real or imaginary, of which he complained, to suffer Lieut. Ringgold to escape, if in his power to prevent it. And here I would ask the Judge Advocate, if the commander of the Porpoise is in any danger for any matter contained in that respectful report set forth in the charge?

I will now pass to the third specification.

In this it is alleged, that I violated Doctor Guillou's rights, by illegally withholding the promotion due to his rank, (I wonder he did not say *merit*,) and ordering Assistant Surgeon Fox to act as Surgeon of the Vincennes, and occupy the apartments assigned to that officer, still keeping Dr. Guillou on duty as Assistant Surgeon, thereby violating my promises in the general order of the sixteenth of August, 1838, and the nineteenth of February, 1839; and that I refused in a letter of the second of April, 1840, to give him an appointment under pretext of charges to be preferred against him, still keeping him in the performance of his duties as assistant surgeon.

Let us first inquire what were the promises of promotion I made Dr. Guillou. They were promises not made to him individually, but to every officer in the squadron by two general orders, from which I quote the passages alluded to by the Judge Advocate, and from which alone, by any peradventure could a promise be collected.

In the General Order of the sixteenth of August, 1838, I state as follows :—" Rest assured of receiving impartial justice from me ; (and that) in the assignment of duties and promotions, (if any should occur,) all will have the opportunities they desire of entering upon the scientific duties. Nothing shall be wanting that can lead to this end."

In the General Order of the thirteenth of February, 1839, the following expressions are to be found :—

"In the event of making promotions, seniority of rank will at all times for promotion be regarded."

It is upon these two orders, that Dr. Guillou's structure is erected. Let us see how soon he covers himself with the ruins of his fanciful fabric.

It is in evidence, that on the seventeenth of May, 1839, Dr. Guillou applied to me for the appointment of surgeon to the Porpoise, and that on the tenth of June, I replied as follows :—" I regret that I have not the *authority* to make the appointment of surgeon to the Porpoise, as she is only allowed an assistant surgeon. Any application I will forward to the Secretary."

On the third of July, 1839, Dr. Guillou acknowledges my letter, and encloses an application to the secretary, for the *appointment of surgeon, or at least for the pay.* By asking for the pay, as well as the promotion, it seems the Doctor did not think that vaulting ambition was at all incompatible with proper considerations of worldly prudence; and it may *yet appear* that the matter of *pay* formed no inconsiderable ingredient in the sum of difficulties which later ensued.

The Court will bear in mind that up to this period nothing but harmony prevailed. Soon after the Doctor became restive ; and, during the month of December, 1839, had an open rupture with his commander, Lieut. Ringgold ; notwithstanding which, on the thirteenth day of March, 1840, he again applied for promotion, and was on the second of April, 1840, denied it, as follows :—" Had there been a vacancy in the squadron, under these circumstances (the circumstances referred to were the pendency of Lieut. Ringgold's charges) you would and could not have received an appointment, whatever had been your rank, and I am surprised that any officer should have thought of it."

Such, gentlemen, is the history of my *illegally* withholding from the Doctor promotion due to his rank.

In the first place Dr. Guillou does not exercise his usual discri-

mination, and correct apprehension, in calling these orders "promises," and he is particularly unfortunate in selecting the order of the sixteenth of August, 1839, to extort from it any thing like a promise. A little reflection might have admonished him, that the assurance of "receiving *impartial justice*," would, by reason of his improper conduct, and his involvements with his commander, have readily pictured to his imagination something like a court martial, rather than promotion or advance of pay.

Can it be pretended for a moment, even if the general orders of the sixteenth of August, 1838, and the nineteenth of February, 1839, could be called promises, that I violated them, when on the tenth of June, 1839, I told him I could not make the appointment he applied for, because the Porpoise was only allowed an assistant-surgeon; or can it be pretended that I violated my promise, because I refused him promotion whilst he was under charges for disobedience of orders?

It is true that in his testimony he says, that in refusing his application, I stated charges were to be preferred against him; but *admits* that the complaint had been preferred to me by Lieut. Ringgold; and in the specification he says, "the refusal was made under *pretext* of charges to be preferred against him at some future opportunity." The Doctor is at this moment far better able to judge whether my preadmonition, that charges were to be preferred by Lieut. Ringgold, was or was not a *pretext*, as he pointedly alleges; and the Court now better know, whether the charges of Lieut. Ringgold, on which he has been tried, did not afford me ample justification in refusing him "an appointment whatever might have been his rank."

Again I ask, what would have been the operation and effect of promotion after the charges of Lieut. Ringgold, but to bar this prosecution? Perhaps the Doctor, who is a tolerable lawyer, was not unmindful of this means of avoiding the unpleasant inquiry into the *trifling* matter of the requisition. So much for the third specification.

The fourth specification is a higly coloured description of an interview between the Doctor and myself at Honolulu, on the sixth of October, 1840.

On the subject of this specification we have both testified before this court, on our respective cross trials; and I freely admit that it is unfortunate that Dr. Guillou, should he have been convicted of the same matter, (if such be the fact,) on my testimony, if the court now believes, on the Doctor's testimony, that I am the offender, as the one must be right and the other wrong.

If the court will read the specification, and recur to the testimony, I am sure they will be convinced that it does not bear even probability on the face of it, and is circumstantially untrue.

The account which assistant-surgeon Guillou gives of the interview of the sixth of October is, that his reception by Lieut. Wilkes

met his entire approbation; that after some consultation he was about to leave the room, when I motioned him to a seat, and asked if he had anything further to say,—that I then spoke of general matters, connected with the expedition, and added that we had all entered upon it with a full knowledge of what we were expected to do, and I had not offered any inducements to officers to go beyond what they were strictly entitled to by law—or words to that effect.

Let us here pause a moment to ascertain the *probability* of this much of his evidence, in regard to that interview.

He says that his reception was courteous, and that, after consultation, I motioned him to a chair, and opened a conversation on general circumstances relating to the squadron. In order to test the good faith of this evidence, the court must first understand the relations at that time subsisting between assistant-surgeon Guillou and myself. It is in evidence, and is, indeed, the subject of the first specification, that he had, on the ninth of December, 1839—some ten months previous—made a report of my conduct toward him. It is in evidence, that Lt. Ringgold had reported him for disobedience of orders; and it is in evidence that on the second of April, 1840, I had by letter refused him promotion, because he was charged with disobedience of Lieut. Ringgold's orders. Yet, notwithstanding such causes of his hostility toward me, and the unpleasant feelings which must naturally have arisen on my part, from his having reported me, to the secretary of the navy, for misconduct; and notwithstanding the angry feelings which must have sprung from such relations, I have been made by his testimony, not only to have received him with courtesy, but to have gone further, and after he had transacted the business for which he paid his visit, motioned him to a seat, and opened a conversation on general subjects relating to the expedition. Do you believe this testimony? Is it reasonable—is it probable—nay, is it not absurd, to suppose that we could have conversed freely, while entertaining such feelings towards each other? Place yourselves in my situation on that occasion; and say, whether, with all the existing causes of dissatisfaction, you would be likely to have invited that gentleman to be seated, after he had got through his business, and opened the friendly conversation which he has related? I think such would not have been your course;—on the contrary, you would have much preferred to be delivered from the intrusion of an unwelcome visitor. Such were my feelings on the occasion. Moreover, I had but little leisure to consume in idle speculation.

The assistant surgeon goes on to say—that I induced in him the belief that he would receive the *pay* of surgeon—mark, gentlemen, the *pay*—that I told him, in a loud and angry tone, "I deny the fact positively. I never said any such thing,"—at the same time rising, and shaking my finger in an insulting manner; and on approaching him exclaimed, "Leave the presence, sir, leave the presence."

Taking his own account of this matter to be correct, which I utterly deny, had I not ample reason for all I did? Again, gentlemen, you must bear in mind all the circumstances under which the Doctor is said to have told me that I had induced the hope that he should receive surgeon's pay; as much depends on the truth of the assertion, that I *did* induce that belief.

The Doctor says, I induced the belief at my house, in Washington city, some two years previous. On the inquiry being pursued, he says, there was no person present on the occasion, and that he had never, during the voyage, reminded me of it before. Do you believe the witness to be the modest, timid, patient man, who would have permitted such promise to have slept unnoticed for so long a period, if it had ever been made? It is not probable, and I do not hesitate to declare, that the Doctor never, to my knowledge, crossed the threshold of my house at Washington city, since I had the honour of his acquaintance. This, it is true, is not evidence, but only my declaration. I have not attempted to prove it, as the court can readily see the difficulty of establishing *that* negative.

Throwing my declaration out of the scale, let us see if the Doctor's statement is not circumstantially disproved by other facts in the cause.

At the time the Doctor says I made him the promise at Washington, we were comparatively strangers; and it is not probable, in the absence of most cogent reasons, that I would have violated my duty and trammeled myself by promises of peculiar favour to a man of whom, as yet, I knew but little; and far less reasonable to suppose that I would have put myself in the power of that gentleman by a promise to do that which would be transcending my official duty. What right, I ask, had I to promise Dr. Guillou, the pay of surgeon for performing assistant surgeon's duty in a brig not entitled to a full surgeon? Why, if I had made the promise, did I write to him the kind letter of the tenth of June, 1839, regretting that I had not the authority to appoint a surgeon to the Porpoise, at the same time offering to forward any application he might make to the secretary? Surely by that letter, and by actually forwarding his application for the appointment, or *pay*, it is manifest I had every disposition to serve him, and would have given, as well the appointment as the pay, if I had made the promise and had authority to fulfil it.

If the court will well consider that letter, and that conduct toward Dr. Guillou, at a time when no dissention had *as yet* sprung up, it must acknowledge that the presumption is irresistible that I never made the promise at Washington or elsewhere as the Doctor has stated.

If the court will refer to his letters—one of the seventeenth of May, 1839, addressed to his commander, Lieut. Ringgold, and the other to myself of the same date, the grounds on which the appli-

cation was based will be seen, and that not the slightest allusion is made to any promises made by me.

If then the promise had not been made, and the belief not induced by me, is it at all remarkable, that when the Doctor on the sixth of October bearded me with having made it, I should have indignantly told him—"I deny the fact—I deny the fact, Sir, positively."—Who, on being charged with a violation of an official promise would not have as well gesticulated as spoken with decision and firmness? This gesticulation, decision and firmness, Dr. Guillou has magnified into "shaking my finger at him, in an angry and insulting manner." But the climax is my other expression, "Leave the presence, Sir,—Leave the presence, Sir—Quit the presence—Quit the presence."

You are to judge of the accuracy of these expressions by the state of mind which the Doctor says I was in: "that I was loud and angry."—Would a man who was loud and angry have been choice of language, or have used the measured and courtly, nay, imperial language, "Leave the presence, Sir, leave the presence, Sir."

The Doctor hangs upon one of the two horns of the dilemma:—either I was not loud and angry, and did not shake my finger at him, or I did not use the measured, pompous and inflated order—"Leave the presence—leave the presence, Sir."—By the testimony of Lieut. Hudson, who met him a short distance from the house, he was then livid, agitated and excited, and not likely to be very accurate in his recollections, yet in his desire to magnify and exaggerate my conduct, he blunders upon the ridiculous mandate, "Leave the presence, leave the presence, Sir," intending and desiring to convey the idea of an imperious and pompous manner and disposition, arrogating to myself regal distinction, in driving him from the august—the royal presence!!"

The Doctor, after having left the "presence," next introduces me, exclaiming from the house top, at the pitch of my voice in a "public place," "Go on board, Sir, and don't leave the ship."

Though this part of the specification may at first appear of trivial importance, yet in one point of view it is entitled to very considerable reflection: not that I care whether I did or did not order him on ship board, but as showing how little dependence is to be reposed in the testimony of this witness.

The oppression in this part of the specification does not consist, in ordering him to his ship, but in doing so, in a loud manner, at that "public place."

What is the evidence as regards the "public place."—Is it not proved beyond a doubt, that the house was enclosed in a square, about three hundred yards from the road, and that there was not an inhabited house within hail? Yet the Doctor has deliberately, in writing—in the specification declared, that I thus ill-treated him in

a "public place"—when in truth and in fact, the allegation is wholly untrue.

Can the court believe that it was an accidental error, when they reflect upon the purposes for which this *place* is thus described. Surely there could have been no impropriety in my ordering the Doctor to go on board, and not leave the ship—and the outrage complained of consists only in *my* giving the order at a "public place."

I repeat, the allusion to this matter is made—not to vindicate my conduct—but constantly to keep before the court, the controlling reasons why the testimony of the Doctor cannot be relied on.

In the specification, Dr. Guillou goes on to say, that on the fourteenth of October, I ordered him to be arrested, and did keep him under arrest, until the first of October, 1841 "refusing," all the time, to order him to the United States for trial, or to give him a trial in the squadron; a court martial being in session on board of the Peacock, when on the fourteenth of October—the charges were handed to him.

It is true that he was arrested on the fourteenth of October, and it is true that I did not order him to the United States for trial; but it is equally true that by a letter of the twenty-sixth of the same month, he had permission to return to the United States, and funds were provided for his travelling expenses.

It is, however, *not* true—that I refused him a trial before the court martial, then convened. The only testimony to this point is that of the Doctor himself; who, on his direct examination is asked :—"Did Lieut. Wilkes refuse to bring you to trial, whilst you were under arrest." To which he replied,—"To me, *personally*, he did not refuse. I received a communication from Lieut. Hudson, but it was not official."

The court will doubtless always keep in mind that the *affirmative* is to be proved by him who *affirms*—not by him who denies :—and that they are not permitted to presume any thing against me, merely because it is alleged in the specification.

Every presumption must be deduced from facts; and the facts, from which the deduction is made, must be proved according to the established rules of evidence.

The only testimony on the subject is that which I have quoted above; and it proves that I did not refuse personally to Dr. Guillou to give him a trial: and that the Doctor received a communication from Lieut. Hudson, which was unofficial.

Am I to be bound by the unauthorized declarations of Lieut. Hudson? The established rule of law is, that no man's rights shall be affected by "*res inter alios acta*,"—the acts or declarations of third persons, unauthorized to perform any act, or make any declaration on the subject. The object of the rule is to "prevent a party from being concluded, or even affected by the acts, conduct, or declarations of strangers." 1 Starkie on Evidence, page 107.

Whither, gentlemen, would it lead, if I am made responsible for the unofficial declarations of the officers of the squadron? I have nothing to do with conversations or declarations of Lieut. Hudson whatever. They are not binding on me, because I did not authorize him to make them. And the Court cannot entertain those declarations as evidence, since they are excluded by the law as "*res inter alios acta*,"—the acts, conduct and declarations of Lieut. Hudson, to which I was a stranger.

The presumptions from facts, which arise in this matter, are so numerous, and pregnant with importance, that they amount almost to direct testimony.

The first presumption in my favour, and against the Doctor is, that it was not only not proved, but not even attempted to be proved, that he ever *applied* to be tried. The presumption is therefore irresistible, that no such application was ever made; and still stronger, that I never refused an application which was never made.

The Court will bear in mind that it is not laid in the specification negatively, that I did not cause Dr. Guillou to be tried, but that positively I refused to give him a trial in the squadron. Obviously, until an application for a trial in the squadron is proved, there can be no intendment of a refusal; and the presumption of law is, that the prosecutor not having proved an application for a trial, no application was ever made, and consequently there could not have been a refusal.

Again, there is another and still stronger presumption that he never applied to be tried.

That court, as appears by its record, was composed of Lieutenants Hudson, Ringgold, Johnson, Carr and Alden; and it is a pretty severe draught on your credulity to ask you to believe that the Doctor was very anxious to be tried by a court thus composed; three of whom were my avowed friends, and one of them had preferred the charges on which he would have been tried.

If I had ordered him to trial before that court, he would with good reason have complained of oppression, as the members, certainly, were not indifferent judges.

Again: I ask, could he have been legally tried by that court? What would have been the course? The accused would, in the progress of the trial, have been asked by the Judge Advocate, if he had any objection to any of the members of the court, and most certainly he would have objected to Lieut. Ringgold, and probably to Lieut. Hudson; and undoubtedly, as regards Lieut. Ringgold, his challenge would have been sustained.

What then would have been the condition of things? Exactly this: there would have been no court to try him. The act of Congress requiring courts martial to consist of *five* members, whilst this court, on the rejection of Lieut. Ringgold, would have consisted of but *four*.

The specification charges that I refused to send him to the United States for trial, and refused to "try him in the squadron, a court martial being then in session on board the Peacock."

Why should I have ordered him to the United States for trial? The valuable services of Lieut. Ringgold could not have been dispensed with; and I could not have gone to the United States with the Doctor, to prosecute the charges. Gentlemen, there is no oppression. If the Doctor found his situation irksome, he was at liberty to improve it, by availing himself of my written permission of the 27th of October, 1840, to return to the United States.

I repeat, gentlemen, that it is unfortunate if the Doctor has been punished for the occurrences on the memorable sixth of October, 1840, on my testimony, in which I have positively sworn that on *that* day "he refused to be tried by a court composed of officers of the squadron, as he expressed it, of 'my agents;'" but I conscientiously believe, from the preceding narrative of facts, aside from my own testimony, that the Doctor stands convicted of making a charge, not only improbable, but circumstantially untrue.

One further remark on the specification, and it is entirely at your service.

To *my* humble apprehension, it is clear that the visit of Dr. Guillou, on the sixth of October, was intended wantonly to provoke a controversy; and that the avowed motive of visiting me, in relation to the journals, was a miserable, bald and flimsy pretext to attain his real object. Why, I ask, did he at that time remind me of my promise? If I had made it, his then asking me to fulfil it was a direct assault upon my integrity. Had I not long before told him that the brig was not entitled to a full surgeon? If such promise had been made, and I afterwards deliberately declared to him my conviction that I had not the authority to fulfil it, was it not an insult afterward to press it?

Had I not expressed my astonishment that he should have applied either for the appointment or pay of surgeon because he was under charge of disobedience of orders, and as positively refused it? And had not the Doctor, on the second day of October, two days before, received a letter from the Secretary of the Navy, in reply to his application for appointment or pay, that left him without a hope? Yet in the face of these reiterated refusals, this gentleman comes to my quarters, and reminds me of a promise I never made, and which he well knew there was no probability of being fulfilled. If any facts will justify a conclusion, the Court is driven by the irresistible force of them to believe, that the Doctor became furious at the loss of the *pay*, which he so perseveringly pursued; and was on that day resolved to pour out the vials of his wrath, so long corked up; and that that, and that alone, was the purpose of his visit.

The facts disclosed on the trial relating to the fifth specification rest wholly in documentary evidence.

In the first place to understand the subject, it is necessary to inquire what the authority is, giving the extra pay. In order to make out my case I was obliged to supply the imperfect evidence of the Judge Advocate in that particular, who imagined his case was established by proving that the pay had been checked by my order, whereas the very foundation of his case is, first to establish that Dr. Guillou was entitled to the extra pay, then it would be in season to show that it had been checked.

This is one of the many irregularities on the part of the prosecution to which I shall hereafter refer, that it may appear with what I have had to contend.

Aiding the Judge Advocate to a *prima facie* case, I proved by the General Orders of fifteenth July, 1838, that there was to be paid "to all commissioned officers or those acting as such, duly appointed by the proper authority, two dollars per day, in addition to their regular pay, *on condition that they be engaged in scientific duties,*" and I proved that my order was founded on that of the Secretary of the fourteenth of July, 1838, an extract of which is in the following words: "The officers of the Exploring Expedition will be allowed extra pay, equal to that received by those engaged in coast surveying, on *condition that they are employed in scientific duties.*" I also proved by my general order of the thirteenth of September, 1838, the particular subjects which the Journals were to contain to entitle the officers to extra pay: and I call the attention of the court to that distinct and full letter, as containing the pre-requisites necessary to create the claim.

I also proved that on the twelfth of October, 1840, I issued an order forbidding the "pursers to pay extra pay to officers who do not attend to scientific duties, and by that order declare that *keeping journals will be considered an important part of it.*"

By the order of the thirteenth of September, 1838, among other things it was declared that Journals were to contain nothing of a private character, as appears by the next to the concluding paragraph.

If the court will refer to the general instructions of the Secretary of the Navy of the eleventh of August, 1838, it will be seen that all journals, notes, memorandums, &c., are to be given up before the squadron reaches the waters of the United States."

The preceding is the history of the extra pay to be given to officers performing scientific duties, showing not only the authority for the payment of extra compensation, but the particular duties which gave the claim to it.

These orders were published to the squadron, and each officer who claimed to be a beneficiary under them, was bound in all particulars to bring himself within their provisions.

One of the orders declares that keeping a journal will be con-

sidered a material part of the scientific duty; and another directs not only that the journals are not to relate to *private matters*, but their surrender will thereafter be required.

Has Dr. Guillou brought himself within the provisions of these orders so as to be entitled to extra pay?

The first we hear on the subject is from Lieut. Hudson, who testifies that Dr. Guillou did not keep a journal *required by the orders*, and Dr. Guillou himself in his letter of the fourth of October, 1840, assigns as a reason for not surrendering his journal, that it contained matter of a private nature; also by his letter of the tenth of the same month he admits that his journal has leaves cut out, which he says contain private matter.

Does the entry of private affairs in a public journal, directed to be kept as an official duty, for which extra pay is claimed afford a reason to any officer to mutilate it before surrender? And does he not, who so mutilates such journal, thereby forfeit any claim to pay, which he may have acquired for having kept it.

Were not all the officers admonished, as well by the general instructions of Mr. Secretary Paulding, of the eleventh of August, 1838, as by my general order of the seventeenth of the following month, that they would be required to surrender their journals?

Dr. Guillou is a man of too much intelligence not to have understood those orders, and if, in defiance of them he chose to record private affairs in a public journal, he surely did so at his peril, and it does not lie in his mouth now to complain of the consequences with which his folly has been visited.

He did not keep a journal as the orders enjoined, and he has not received the extra pay. It was his own affair if he preferred charging his journal in violation of explicit orders, with foreign matter, to keeping it as directed, and being paid for his trouble.

The concluding passage of the charge is not proved, though it may be considered the most important branch of it. It sets forth the result as placing the Doctor "in the position of one who had largely overdrawn his account with the Government." Whether the Doctor is or is not in that unfortuuate predicament does not appear. The specification is not sustained; and probably the attempt would not have been made had not my counsel perseveringly brought it to notice.

So, the second charge, with its six specifications has been expunged from the Record, as unworthy of a place upon it, and such in my humble apprehension was the merited fate of its fellow, the third, with its specifications. The court however have thought differently, and in deference to its opinion, I will make such remarks as occur to me are pertinent and proper.

The third charge is for disobedience of orders.

Six distinct acts of disobedience are averred in as many specifications, each alleging a disobedience of the order of the Secretary

of the Navy of the eleventh of August, 1838. The portion of the order relied on by the prosecution is in the following words:—

"In the prosecution of these long and devious voyages, you will necessarily be placed in situations which cannot be anticipated, and in which sometimes your own judgment and discretion, at others, necessity must be your guide. Among savage nations, unacquainted with, or possessing but vague ideas of the rights of property, the most common cause of collision with civilized visitors, is the offence and the punishment of theft. You will therefore adopt every possible precaution against the practice, and in the recovery of the stolen property, as well as in punishing the offender, use all due moderation and forbearance.

"You will permit no trade to be carried on by the squadron with the countries you may visit, either civilized or savage, except for necessaries or curiosities, and that under express regulations established by yourself, in which the rights of the natives must be scrupulously respected and carefully guarded.

"You will neither interfere, nor permit any wanton interference with the customs, habits, manners, or prejudices of the natives of such countries or islands as you may visit; nor take part in their disputes except as a mediator; nor commit any act of hostility except in self-defence, or to protect or rescue the property of those under your command, or whom circumstances may have placed within reach of your protection.

"You will carefully inculcate on all the officers and men under your command, that courtesy and kindness towards the natives which is understood and felt by all classes of mankind; to display neither arrogance nor contempt, and to appeal to their good will, rather than to their fears, until it shall become apparent that they can only be restrained from violence by fear or force.

"You will on all occasions avoid risking the officers and men unnecessarily on shore, at the mercy of the natives. Treachery is one of the invariable characteristics of savages and barbarians, and very many of the fatal disasters which have befallen preceding navigators, have arisen from too great a reliance on savage professions of friendship, or overweening confidence in themselves."

The accused invites the attention of the court to the peculiar phraseology of that order, and thinks it is not such an order as admits of prosecution for disobedience.

"An order must be positive and distinct, and a breach of it must be intentional and palpable before disobedience can be the subject of accusation." When there is a lawful positive direction by a superior to do a thing, the inferior is bound to obey at all hazards, but where discretion is confided, there can be no disobedience unless in a wilful abuse of the discretion, plainly indicating an intention to disobey the order. There may frequently occur errors of judgment, but they never involve the party in the disobedience of

an order, unless the *animus* to do wrong is obvious from his conduct. In the case in 4th Washington's Circuit Court Reports, page 551, this view of the subject is fully recognized. It is there said, "If the order leaves the party a discretion, the law requires nothing but the exercise of a fair and honest judgment."

The laborious duty now devolves upon me to analyze the above extract from the order of the eleventh of August.

The first paragraph states that I will be placed in "situations in which sometimes my judgment and discretion, and at others necessity must be my guide." That with savage nations the most common cause of collision is the offence and punishment of theft; that in the recovery of stolen property and the punishment of offenders, there should be all due moderation and forbearance.

It directs that I am not to commit any act of hostility unless to protect or rescue the property of those under my command, or whom circumstances may have placed within the reach of my protection.

This seems to be the substance of the order, for the disobedience of which I am now called to answer.

I am thereby authorized to punish thefts, recover the possession of stolen property, and to punish offenders, and am invested with a discretionary authority of the widest scope:—indeed situations were anticipated in the order when "necessity was to be my guide." Obviously I had plenary powers; and unless a clear, positive and wanton abuse is established, the charge must fall.

It is proper before referring to the facts connected with the alleged aggressions, that I should call the attention of the court to the object of my visit to the several places set forth in the specification. I was required to visit them for the purpose of making surveys, scientific experiments, and to ascertain their resources. None it is presumed can be so infatuated as to assert that the government of the United States had no right to send vessels for the purposes directed in the order; at all events it cannot be denied that the order was a sufficient voucher for my visit to them.

The first specification alleges that at Clermont Tounere, I did shoot and wound by the discharge of a gun an inhabitant of that place, and caused and sanctioned to be shot by discharges from guns and pistols several of the inhabitants, and did cause an armed party to make a landing on a portion of the beach at the immediate vicinity of the point of landing, performing no experiments of sufficient importance to justify the hostilities.

By this disingenuous accusation it would seem that I made the attack purely for the gratification of blood-thirsty feelings.

It is said I shot and wounded an inhabitant, and caused several others to be shot with guns and pistols by those under my command.

Who on reading the specification would not understand, that

those persons alleged to have been shot were killed, and that there had been a general attack on the place?

The evidence however establishes a very different state of facts—That I went there for the purpose of making scientific experiments, as by my orders I was obliged to do—that I devoted much time in attempts to conciliate the natives by presents which they accepted—that violence was only resorted to when the natives made an attack on Mr. Couthway, and had thrown missiles in my boat, and when it was evident that a landing could not be effected by any other way than by force, and that when force was used it was the only means to prevent the destruction of human life.

It is in evidence that I fired on the inhabitants engaged in resisting our landing after receiving our presents, with a charge of fine shot, that I directed Mr. Peale, whose gun was charged with a ball to draw it and use fine shot—that another gun with fine shot was discharged by Lieut. North, before a landing could be effected.

Had I ordered the crews of the boats to have landed without having thus fired on the natives, blood-shed was inevitable, as well on the part of the assailants as of the assailed.

The prosecutor has been disposed to dwell with great pertinacity on the little that was done after the natives were driven off. In this he has failed in making out his case. It is alleged that no experiments were made of sufficient importance to justify the landing. It has not been proved; but on the contrary, it appears that the instruments were landed and such observations made as the lateness of the hour would permit, much time having been lost in treating with and driving off the inhabitants.

The evidence does not sustain the charge, but indisputably establishes that a landing was sought in the discharge of my duties, and in obedience to my orders; that the landing was resisted, and only enforced, after all conciliatory measures had been exhausted, and then with all moderation, using no more force than was absolutely necessary, and according to the testimony of Mr. Peale, to avoid a conflict with the natives, I limited the operations on shore to the point where we landed.

The second specification represents an attack on the island of Venua Leon and burning two towns, and committing *alia enormia*, "thereby violating the order of the Secretary of the Navy set forth in the first specification."

The history of this occurrence is, that on the tenth day of July, 1840, the natives captured a boat from Lieut. Knox, and that the expedition was sent to recover its possession with the property in her—that the boat was surrendered, but that the effects were refused.

To this specification the Secretary's order is a full answer. I am authorized to punish theft, and rescue and protect the property of those under my command.

After devoting most of a day in fruitless efforts to get the effects of the Government, and the clothing of the men under my command, I burnt the town without injuring any of the inhabitants, but still failed to secure the property. That the property was stolen is incontestably proved, as some of the garments were worn by the natives at the time restitution was demanded.

The punishment was not disproportionate to the offence, and it did not even attain the object for which it was in part inflicted.

The third specification relates to the attack on the island of Malolo, killing the inhabitants and burning the towns.

The treacherous murder of the lamented Underwood and Henry, is a melancholy justification.

The fourth specification is abandoned.

The fifth specification relates to the Expedition under the charge of Lieut. Hudson, to the Navigator's Group.

To punish the inhabitants of the island of Upolu, one of that group, for the massacre of one of the crew of a whale-ship, was a duty so incumbent on me for the protection of commerce, that it would have been criminal not to have inflicted chastisement; and it is hoped, the benefit of the salutary lesson may be enjoyed by those whose useful pursuits may hereafter lead them thither.

The sixth specification relates to the expedition to Drummond's Island.

It is in evidence, that the object of the expedition was to punish the inhabitants of that island, for the murder of a seaman of the Peacock under my command. Did not the murder of this seaman deserve the same chastisement as was visited on those who murdered the officers at Malolo?

In offering the answer to the third charge, the accused denies that he has disobeyed the orders of the Secretary of the Navy. He has in the exercise of his judgment and discretion done that, which he still believes to have been necessary and proper. The order leaves me a discretion, and the law requires nothing more than a fair and honest judgment; and unless it is affirmatively established, that I wantonly, wickedly and without justifiable cause pursue the course I did, the charge is not sustained.

The history of this and every civilized country, affords abundant instances of the absolute necessity of the course I have pursued, in the punishment of those barbarous natives; and unless this court is prepared to justify the indiscriminate destruction of those, whose ill fortune may throw them into the hands of those merciless savages, they must acquit me of the charge.

Superadded to the reasons offered on my application to the court to quash this charge, I now propose another, not in the expectation that the court will entertain it, but that it may appear on the Record, and thus be brought to the notice of the revising power, by whom it will be regarded with its legal force, and be justly appre-

ciated. The third, fifth and sixth specifications, allege the shooting and killing of the natives of the different places there set forth, and that such shooting was not necessary for self-defence. Essentially a charge of murder, and such surely, cannot be the subjects of examination under a charge of "disobedience of orders."

If the matters set forth in the sixth specification to the third charge do not amount to murder, they still cannot be examined under the charge of disobedience of orders, but should have been specified in a charge framed under the twenty-seventh Article, of the "Act for the better government of the Navy, approved 23d April, 1800, in the following words: "If any person shall when on shore, plunder, abuse, or maltreat any inhabitant, or injure his property in any way, he shall suffer such punishment as a Court Martial shall adjudge." That is the article, under which alone the matters of offence set forth in the specification to the third charge can be examined, unless on a charge of murder; and any other course of proceeding is illegal and void.

The fourth charge is, for "Illegally punishing, or causing to be punished men in the squadron under my command."

The specification sets forth twenty-five persons alleged to have been illegally punished.

The Court will in considering this charge, consider the length of the voyage, the character of our pursuits, and the circumstances attending those punishments.

This is the only charge that caused me the least anxiety. That however, has been wholly removed, and I feel assured, that it has been made to appear, that punishments were not only unfrequent in the squadron, but that they were absolutely necessary for the good order and discipline of the service.

The evidence on this subject is, that at Callao, there were two occasions of punishment; one on the twenty-second of June, 1838, of Hope, Blake and Lester, deserters, who were returned on board the ship from the Falmouth, the other on the eleventh of July, of Dunnock, James Green, Lewis, Kidd, Ward and Dunbar, for drunkenness and stealing liquor on board of the ship Relief.

Also, that Madison Green, Henry Blackstone and John Fisk were punished at Sidney, on the twenty-fifth of December, 1839.

John Myers also testified, that he was flogged for desertion; and William Z. Lester testified, that Dunnock was flogged for drunkenness, and that Maddox was punished for fighting. Thus the testimony is, that fifteen men were punished, though five and twenty are set forth in the specification. One case of punishment was abandoned by the Judge Advocate for some irregularity or error into which he was led by the book of the Master at Arms, of which so much has been said.

The punishment of Dunnock, on the eighteenth of December, 1838, Frasier, Miller, Garregan, Knowles, Lemont and Colston,

laid in the specification, do not appear in the log-book :—hence the presumption is, either that they were not punished, or that Lieutenants Totten, Alden, Maury and Johnson, and Midshipmen Sanford, May and Reynolds, who by reference to the log-book, appear to have been the officers of the deck at the several times set forth in the specification, have most grossly neglected their duty.

The entries on the log of the eighth of June, 1839, afford most conclusive evidence, either that Jos. Lemont and Chas. Colston were not punished as the specification states, or that either Lieut. Maury, or Alden, or Johnson, culpably neglected their duty, as by the entry of punishments on the log, it appears that Porter, Soule, and Fisk, received respectively five, nine, and ten lashes, on the eighth of June, 1839 ; and no entry is made that Lemont or Colston received any punishment whatever, though the specification sets forth that on the eighth of June, 1839, the two last received twenty-four lashes each. Lieuts. Alden, Maury and Johnson were on that day officers of the deck, and if when they entered on the log the punishment of Porter, Soule and Fisk, they did not enter that of Lemont and Colston, the presumption is irresistible that they were not punished, and the specification, in that particular, is without foundation.

The conclusion to which the Court must arrive in regard to the illegal punishment is, that at Callao, on the twenty-second of June, 1839, three men were punished for desertion, on the eleventh of July at the same place ; six others were punished for drunkenness and stealing liquor; and that on the twenty fifth of December, 1839, three deserters were punished at Sidney. Of the last three, according to the log-book, Fisk received but eighteen lashes, though the specification states twenty-four.

The testimony of Lieut. Carr disposes of the six cases of punishment on the eleventh of July at Callao, viz. of Dunnock, Green, Lewis, Kidd, Ward and Dunbar.

The testimony of this witness is as follows :—

"Interrogatory.—Look at this log, and see if John Dunnock, James Green, Peter Lewis, John Kidd, Michael Ward, and Addison Dunbar, were not captured as deserters, and punished on board of the Vincennes a few days before sailing from the island.

"Answer.—The log states they received twenty-four lashes each, but does not state whether they were deserters. They were punished on the eleventh and the thirteenth.

"Interrogatory.—Do you know whether these men or any of them were deserters from the Vincennes, and were they not brought on board a short time before being punished?

"Answer.—There were some men that ran from a boat at Callao, but whether these were the men or not, I cannot recollect. I will state that James Green, captain of the mizzen top, was coxswain of the boat, and we had much trouble with him. *There*

were some who were punished just before we left Callao, for stealing liquor from on board the Relief, and getting drunk, but I do not recollect whether they were those men or not. There was a marine punished who had been stationed over the liquor and got drunk, but I cannot say that it was one of these."

The testimony of Lieut. Carr, given on the first of September, amending his testimony of the previous day, proves beyond a doubt, that the men who were punished on the eleventh of July were Green, Lewis, Kidd, and their associates; and the whole context of this witness's testimony is, that they were punished for *stealing liquor* on board of the Relief, and getting drunk.

If the log-book now in the possession of the Court does not show that "there were some men who were punished just before the ship left Callao, and one a marine, except it is by the entry of the eleventh of July, the Court cannot escape the conviction that the six men mentioned in the specification are those who were punished on the eleventh "*for stealing liquor from on board the Relief.*"

The coincidence in point of time, unless destroyed by some other entry in the log-book, showing a punishment of several persons, just before the ship left Callao, other than those on the eleventh of July, so identifies those named in the specification with those who stole the liquor, that the Court cannot doubt but that they were the same.

This established, as I before said, disposes of six cases of punishment, and most effectually legalizes them; as beyond controversy, I had full authority thus to punish them. The twenty-sixth article of the first section of the Act for the better government of the Navy provides that "any *theft*, not exceeding twenty dollars, may be punished at the discretion of the captain, and above that sum, as a court martial shall inflict." Thus, during a voyage of four years, the number of punishments in which more than twelve lashes were inflicted is reduced to three on the 22d of June, 1839, three on the 25th of December, 1839, and one on the 2d December, 1839, and those for court martial offences.

What is the evidence in regard to the punishments in the squadron, as well at Callao as at Sidney? It is that it was wholly out of the question, consistently with the public interest, to have convened a court at either of those places; that owing to the loss of the Sea-Gull, and the delay in the arrival of the Relief, so much time had been lost, that the survey of the Figi groupe was for a season abandoned; that with the exception of Callao, Sidney and Honolulu, the vessels of the squadron were never in company long enough to hold a court.

Surely I could derive no gratification from inflicting punishment. It was not inflicted in the heat and violence of passion, as by the log it appears that all hands were called to witness it; but I was

compelled to do it from the absolute force of the circumstances with which I was beset. The offences were such as would have been visited by a court with severer punishment, and the punishment of twelve lashes, which I had the authority to give, was not commensurate with the offences. I had but the alternative to take them through the voyage in confinement, until our arrival at Honolulu, to punish them as I did, or set them at large with comparative impunity. And I think I find full warrant for what I have done, in the before recited extract from Mr. Paulding's order of the eleventh of August, 1838, wherein he says, "In the prosecution of these long and devious voyages, you will necessarily be placed in situations which cannot be anticipated, and in which sometimes your own judgment and discretion, and at others, *necessity*, must be your guide."

Circumstances *did* occur, which, in the language of my instructions, made "necessity my guide;" and they alone either justified my course, or so palliated it, that it is excusable.

The second specification of illegal punishment is in causing Lt. Hudson, to confine, on the sixteenth of March, 1841, Lawrence Cavenaugh and John Harman, marines, in irons, on bread and water, on board the Peacock, and to punish them with twelve lashes after the expiration of their term of service.

This specification is not proved; but it is proved that at the time of the punishment, the Vincennes and Peacock were not in company, but some thousands of miles distant from each other, and that I knew nothing of the matter whatever. To this specification there is another answer, which will be fully considered under the fourth additional charge, in which a similar matter of offence is alleged.

The third specification alleges that on the 31st of October, 1840, I extended the sentence passed by a court martial on Peter Sweeney.

The evidence does not sustain the charge. It is proved that the judgment of the Court was regularly carried into execution by Lt. Johnson, who swears that the order to execute the sentence did not contain a syllable of the disposition which was subsequently to be made of that man. The sentence had been fully executed when in the exercise of my authority, as the commander of the squadron, I determined to dismiss him from the service, and my doing so had no connection with, or reference whatever to the sentence of the court.

The reasons for discharging the man were sufficient to satisfy my judgment and control me in the exercise of my discretion.

It has been proved that a petition of fifty, including the petty officers of the ship, reported that Sweeney was a worthless fellow, and dangerous man, and not only earnestly requested his dismissal, but offered to pay whatever he might be indebted to the government.

I had no doubt of Sweeney's bad character, and dismissed him, as I had a right to do, on the application of the petty officers of my ship. The dismissal had no reference to the sentence of the court martial, but was on the representation of those petty officers; and as he would have been permitted to have remained in the service had not such petition been presented, it is most clear that the dismissal had no reference to the sentence of the court, but proceeded from reasons addressed to my discretion after the sentence had been fully executed.

The fifth charge is a violation of the law of March 2d, 1837, entitled an Act to provide for the Enlistment of Boys for the Naval service, and to extend the term of the Enlistment of Seamen, by illegally discharging men from the naval service of the United States while on board a public vessel on foreign service.

This charge and specification was so fully considered in my application to quash it, that I shall add but a single observation to what was then said, except again to call the attention of the Court and of the revising power to that application, claiming that it may be deemed to constitute a part of this my defence.

I am advised that I might safely have demurred to the charge, thereby admitting all the facts to be true, and have insisted that the Court were bound to acquit me, for the reason that the matters charged are not denounced by any act of Congress as an offence, to which a penalty or punishment is affixed, which this Court has a right to impose; the exclusive jurisdiction is confided to the District Court of the United States. Such, I most respectfully insist, is the law of this charge, and I request the Court, when the charge is under consideration, to require the Judge Advocate to produce the law by which the Court has the authority to punish the offence.

This specification alleges, as the gist of the offence, that no provision was made for the return of the discharged seamen to the United States, as required by the act of March 2d, 1837. The evidence of Purser Waldron establishes that three months pay was deposited with our consul at Honolulu for the support and passage of the men to the United States; and it is well known the consul could, by the fourth section of the act of 28th of February, 1803, "concerning consuls," 2d Story's Laws, p. 885, require the master of any American vessel to take them to the United States for $10 each. I will not devote more time to this charge, as I cannot be affected by it.

The sixth and most important charge is that of "scandalous conduct tending to the destruction of good morals."

The first specification charges me with uttering a deliberate and wilful falsehood, in the following words, to wit:—"On the morning of the 19th of January, we saw land to the southward and eastward, with many indications of being in its vicinity, such as penguins, seal, and the discolouration of the water; but the impenetrable

barriers of ice prevented our nearer approach to it;"—"the said Lieut. Charles Wilkes well knowing that land to the southward and eastward was not seen on said morning as asserted by him."

At this moment I shall forbear making any remarks other than those strictly in defence.

On the twenty-sixth of December, 1839, the squadron sailed from Sidney for the Antarctic. On the second of January the Vincennes lost sight of the Flying Fish, and on the third, of the Peacock. On the eleventh the Vincennes and Porpoise made the Icy Barrier, and separated on the twelfth.

Lieut. Ringgold testifies as follows:

Q. Did you report to Lieut. Wilkes that you had seen land on the 26th of January?

A. No. I did not.

Q. Did you not see the land prior to that date?

A. To the best of my belief I saw it on the 13th January, though I did not make a positive report. On that occasion I saw about 100 seal, and captured two as specimens; and from the discolouration of the water, I thought the indications were very strong. The water was discoloured as much as it is on our own coast. I think I sounded with 287 fathoms, but did not succeed in getting ground. It was nearer Bellamy's position than we ever were afterwards: but we were not aware of Bellamy's discovery at the time.

Q. Will you look at the paper now shown you and say whether it is your report on the subject?

A. It is. The witness then read the following extract from his report.

"On the morning of the 16th strong appearances of land again arose, in corroboration of which I insert an extract from my journal, as well as the remarks from the log-book."

"At 6 30, P.M., I went aloft to take a look, the weather being clear, horizon good, and clouds lofty. I heard the noise of penguins, soon after one was seen very near the brig, with a large seal to windward.

"After reaching the masthead, I saw over the field of ice, an object, large, dark, and rounding, resembling a mountain in the distance.

"The icebergs all were bright, brilliant, and in bright contrast.

"I watched for an hour to see if the sun in his decline would change the colour of the object by a difference of rays; it remained the same, with a white cloud above, similar to those generally hovering over high land. At sunset it remained the same. I took the bearings accurately, intending to examine it closely as soon as I got a breeze. I am strongly of the opinion it is an island surrounded by immense fields of ice now in sight."—*Extract from Journal.*

"At 7 P.M. discovered what was supposed to be an island, bear-

ing S. by E. A great deal of field ice in sight. J. H. N."—*Extract from Log.*

Witness. I did not make mention of any positive discoveries in this report, but the indications were so strong that I do not doubt we saw land.

Q. By the Judge Advocate.—Did you not know that when Lieut. Wilkes spoke to you at New Zealand, that it related to the discovery on the 19th?

A. I presume I did, but I can't say.

Q. Did you make any report to Lieut. Wilkes of your discovering land on the 13th, or enter it in the log-book, or take any steps to verify it at all, or did you mention it to Lieut. Wilkes when you first saw him?

A. I mentioned it in my report, as follows:—The witness then read the following extract from his report:

"The 12th of January was consumed in diligent search and endeavours to rejoin; failing to do so, I proceeded westerly at 10 P. M. The day following I entered an inlet formed by the barrier, for the purpose of making a close examination and experimenting in dip. On a near approach to the margin, numbers of Phoca Probas were seen reposing. I succeeded in taking a pair, the skins of which were subsequently placed on board the Peacock.

"Very lofty ridges of ice, and the loom usual over the high land was visible along the southern horizon over the barrier."

I made no positive report, nor mentioned it in the log, because I was not positive that it was land, though I have very little doubt about it. I think I mentioned it when I saw Lieut. Wilkes at New Zealand.

Q. Did Lieut. Wilkes ask you whether you had heard the question *before* or *after* you had expressed your surprise?

A. I have answered previously that it was after.

Q. Did you make this report before or after the conversation?

A. To the best of my recollection it was after.

Q. Would you have expressed any surprise if you had correctly understood the remark at the time the vessel passed at sea?

A. I don't think I should.

By the Judge Advocate.—Q. From what did you conclude that the discovery of the land on the 19th, was beyond all question, if that was the first time you heard of it?

A. From Capt. Wilkes' Report of it.

Q. Did your discovery of the land on the 13th, at all confirm the discovery of the Vincennes on the 19th.

A. You can draw your own inference. *I think* it is a fair inference. On the 16th the Peacock was 300 miles and the Porpoise 240 miles from the position of the Vincennes; on the 19th I was not on board the Vincennes while she was among the ice.

The testimony of this witness for the prosecution, at least stands

unimpeached, and he is entitled to the fullest confidence. He has made a full and solemn report in which he declares, that on the thirteenth of January he saw what he thought was land: that on the sixteenth, strong appearances of land again arose. So strong was the conviction of this witness, that on the sixteenth he made the following entry in his log-book. "At 7 P.M. discoverd what was supposed to be an island, bearing S. by E.—a great deal of field ice in sight."

In the report he says—the horizon was clear—that he heard penguins and saw a large seal—that he went to the mast-head—"After reaching the mast-head, I saw over the field of ice, an object large, dark and rounding, resembling a mountain at a distance."

The Report of Lieut. Hudson of the third of March contains the following passages:

"On Sunday, January 19, while standing into a bay of ice, in latitude 66. deg. 31 min. south and longitude 153 deg. 40 min. east, we made what we believed to be land to the southward and westward. It was seen towering above and beyond some large icebergs, that were from 100 to 150 feet in height. We endeavoured to work up for this land, which presented the appearance of an immense mass of snow, apparently forming a vast amphitheatre, with two distinct ridges, or elevations, throughout its extent, and after working up until midnight, through detached portions of ice, we reached the barrier at the head of the bay, and were compelled to give up any further attempt to near what we believed to be land, and passed out of the bay again, which was some twenty miles in extent, through drift ice, into a more open space, for pursuing our course to the southward and westward along the barrier.

"On the 23d of January we made beyond the barrier, which was thickly studded with bergs and islands of ice, what we believed to be high land, at least so far as terra-firma can be distinguished where everything is covered with snow, and worked up into a bay for a nearer and more minute examination.

"The sea water had been discoloured for some days, but no bottom obtained by soundings; in the bay, however, it changed to a dark dull green, and gave every indication that we were on soundings, and not far from land.

"The result confirmed the appearances, we obtained bottom in 320 fathoms of slate-coloured mud, and the lead brought up with it a piece of stone about an inch in length, of nearly the same colour, while the lower part of the lead showed a fresh deep indentation, as though it had struck on a rock. Dip observations were made on the ice with Robinson's and Lloyd's needles; the former gave 86 deg. 10 min., the latter 86 deg. 23 min.

"While ascertaining the dip, a large king penguin was captured on the ice, and brought to the ship to add to our collections. In his stomach were found thirty-two pebbles of various sizes, which ap-

peared to have been very recently obtained, and afforded additional evidence of our immediate proximity to land.

"While further pursuing the object of our search in this vicinity on the morning of the 24th, and endeavoring to clear some ice ahead of us, the ship made a "sternboard," and came in contact with a large piece of ice, which carried away one of the wheel ropes, wrenched the neck of the rudder, and rendered it useless.

If the testimony of that officer is to believed, he saw such appearances as satisfied him, that it was distant land.

Again—Lieut. Alden testifies as follows: "That at Sidney Lieut. Wilkes came on board of the ship, and I remarked the French were ahead of us—that Wilkes remarked, Oh, no—don't you remember reporting to me appearances of land on the nineteenth. I told him I could not call it to my mind then, and would refer to the log, which convinced me at once, from the fact, that I had the morning watch, it being Sunday, and other circumstances that I had called his attention to something like land." He says afterward, I sent for Lieut. Wilkes—that we were in close proximity to ice, and when he was on deck I said,—there is something there—pointing to the southward—that looks like land.

The testimony of Gunner Williamson is as follows:

Q. Were you Gunner of the Vincennes on her last cruise; if yea, state whether you saw land on the 19th January, 1840, and what you said to Lieut. Wilkes on the subject?

A. I was acting Gunner for the last three years; on the morning of the 19th, I was standing on the larboard gangway, Capt. Wilkes was on the deck at the time—he came and asked me what I thought of the appearance of the land. My answer was—"If it is not land, I have never seen land." It was in the morning between 9 and 10 I think.

Lieut. Davis testified that on the nineteenth, he saw strong indications of land, and entered it in the log of the Peacock. He says that he is still under the impression that it was land, and that impression was confirmed by getting soundings on the twenty-third, at 380 fathoms.

This witness proves the relative position of the Peacock on the twenty-third to be within fifty miles of that of the Vincennes, on the nineteenth.

He says the difference was two degrees in longitude: there are about twenty miles to a degree in that latitude. The Peacock on the nineteenth was in longitude 153° 40′ East: on the twenty-third, 151° 41′ East: the latitude on the nineteenth was 66° 22′ and on the twenty-third 66° 30′. The latitude is eight miles difference to the south, and about 50 miles difference along the land.

The Report of Lieut. Hudson states that "the Vincennes was seen by us at a distance on the nineteenth."

That the two vessels were in sight of each other on that day is confirmed by most of the witnesses and cannot be disputed.

The logbook of the Vincennes has the following entry, "*a seal*, *a penguin*, and a variety of petril seen," in the watch between eight and twelve A. M; and between twelve at noon, and eight P. M. some sperm whale were also seen. Lieut. Carr testifies that this description of whale do not go off soundings except when they cross the equator.

Passed Mid. Eld testifies, that between ten and eleven on the sixteenth, he, with Lieut. Reynolds, was on the main-topmast cross-trees, and both simultaneously exclaimed, "there is the land." He describes it with accuracy; and adds, that looking at it for some time they sent down for a glass, and examined it very closely, and came to the conclusion that it could be nothing else but *terra-firma*. He says he saw land also on the nineteenth from the mast-head. He also saw it on the twenty-third and twenty-fourth; and says soundings were got on the twenty-third.

He says the land he saw on the nineteenth was distant about forty miles.

The testimony of this witness demands the respect of all who heard it. His intelligence, his frankness in answering questions, without regard to consequences,—his unhesitating readiness in stating all the circumstances—afford the strongest internal evidence of his sincerity. If ever the testimony of a witness was calculated to produce an impression on a court, it was that of Mr. Eld.

This, Gentlemen, is the testimony in regard to the specification, on which it is attempted to fasten on me the infamy of uttering a "wilful and deliberate falsehood."

Upon what pretence is the attempt made, not only to blast my reputation but that of the country? By an effort to show collusion between Lieuts. Hudson, Ringgold and myself, in claiming in our reports, that land was seen on and before the morning of the nineteenth, because the explorers of another nation claimed the discovery on that day. It has already been announced to the world that we claim the honour of the discovery.

Whatever may be your opinion of me, do you not believe that Lieuts. Hudson and Ringgold are made of sterner stuff than to prostitute their honour to carry out any dishonourable designs that I may have entertained. In what manner is the testimony of Lieut. Hudson sought to be impeached? By showing the word "*morning*" omitted in his Report, which is found in another, and neither copied by himself. Can you believe that the insertion of that word was designed, or that it was purely a clerical error? Are you willing to believe that Lieut. Hudson and myself were conspirators from that accidental circumstance? Does the standing, in the navy, of Lieut. Hudson or myself justify the suspicion?

If the court will recur to the manner and circumstances under which Lieut. Hudson's Report was introduced, it will see in a moment how unfounded the imputation is of a design to practice a

fraud; and how impotent and harmless the attempt has been, proving only the vindictive determinations of my accusers, and their slender means to effect their wicked purpose.

It will be remembered that the copy of Lieut. Hudson's Report produced by the judge advocate was taken by him from the files of the Department, whither he says it was transmitted by me, and it will be remembered that that copy contains the word "*morning*," so much harped upon; and it will be remembered that my report of the eleventh of March, 1840, written before my arrival at Sidney from the Antarctic, which Lieut. Hudson swears I read to him on my arrival at that place, states that on the morning of the nineteenth of January we saw land; and it will be remembered, that the copy of Lieut. Hudson's report, the body of which Mr. Stewart swears is in his handwriting does *not* contain the word "*morning*." Does not this state of facts repel all idea of collusion? Had I not in my own report claimed the discovery of land on the nineteenth in the morning; and did I not in offering Lieut. Hudson's Report to this court in which the word "morning" is omitted, prove a fact short of my case? Can the court believe for a moment that I would have been so great a fool as well as knave, as to offer a report materially varying from that which I well knew was in the possession of the department and could at any time have been produced to contradict me? If the state of facts had been different in regard to this report, there might be some plausibility in the clamour. As for instance, if I had forwarded the copy of Lieut. Hudson's report to the department, in which the word "*morning*" was *omitted* and then attempted to prove the discovery is claimed to have been on the "*morning*" of the nineteenth by offering in evidence the copy of a report of Lieut. Hudson, in which the word "*morning*" is stated, there might be some reason to have doubted my sanity. Such, however, is not the fact; and the entire absence of motive in presenting a copy of Lieut. Hudson's Report differing from that on file, especially when that offered did not fully corroborate my own, but rather made against it, must satisfy this court that the attempt to impugn the fairness of my conduct is but a part and parcel of the same spirit that has pervaded the prosecution.

The report of Lieut. Hudson, which was forwarded to the department, and in which the discovery of land is said to have been made on the *morning* of the nineteenth of January, contains no erasure or interlineation, and as Lieut. Hudson swears, bears his own signature, and if it differs from that I offered in evidence, I at least am not responsible for it.

There can be no doubt that it was a clerical error. If Lieut. Hudson and myself designed to perpetrate a fraud, we would have been too clever not to have put the important word in both copies.

The mistake is in the copy, sent to Washington; as Lieut. Hud-

son testifies that the true version of the matter is that contained in the copy I offered to the court.

It is not probable that Lieut. Hudson would designedly have used the word "morning," as by the testimony of Passed Mid. Eld and the other officers of his ship, the land was not seen until the afternoon, and as Mr. Eld says, "there was considerable excitement amongst us about it,"—he must have known the error would have been soon detected.

The conversation between Lieut. Ringgold and Lieut. Wilkes, has been ushered before the court, with as much pomp and parade as if my fate had been sealed. What did it all amount to? That the Porpoise fell in with the Vincennes at sea; that there was a passing remark, it blowing fresh, and the sea being so high that it was almost impossible to keep the brig within hail: that I hailed the Porpoise as he supposed, asking if they wanted any thing, to which Ringgold replied—No, nothing—that in a conversation at the bay of Islands on the subject of the discovery of the land on the nineteenth, Ringgold remarked, that it was strange I had not mentioned the discovery when I spoke him on the twenty-seventh in the Antarctic, that I at once remarked, that when the vessels met, I asked him the question, "If he had seen the land?"

So far as regards the testimony of Lieut. Ringgold, on the subject of the interview;—in the first place our conversation must be taken together, and it will appear that as soon as that gentleman expressed his surprise at not being told of the discovery when we met at sea, I replied that I had asked him the question, the not asking of which, had caused the surprise. Secondly, it is not at all remarkable, that as the wind was blowing fresh, and the sea running so high, as Mr. Ringgold expresses it, that it was almost impossible to keep the brig within hail; that that gentleman should not have understood the hail?

Yet this is the testimony on which the prosecutor relies, to convict me of uttering a "wilfull and deliberate falsehood" in writing.

My Journal which has been informally before the court, shows that on the morning of the 19th of January 1840, that land was seen entered in it, and that it had been seen and noted several days previous, viz.: on the 15th, every indication of land was evident to all on board, and entered in the log book; such as discoloration of the water, seals, whales, penguins, with numerous birds, &c.; from these signs we were all in expectation of making discovery of land daily, full confidence was not placed in the appearances of it, nor did I become fully convinced of the fact until the morning of the 19th of January, my firm conviction that it then existed tothe southward and eastward, and southward and westward was then noted. Those who are unacquainted with the isolation in which the etiquette of the navy places the commander of a strictly disciplined ship of war, may express surprise that no interchange of opinion on

the subject of land took place between myself and the officers, such discipline being maintained, we had little communication, and I felt satisfied that from all the appearances increasing, as we proceeded to the westward, we should soon again see most indubitable proofs of the land, and place its existence beyond cavil, which we did in a few days afterwards. It might also be inquired by the same persons, why land, seen by me, was not entered in the log book? You know that the commander of a vessel exercises no control over the log book for which the officer of the deck is responsible. What evidence had I of land being seen on the morning of the 19th, besides my own observations? Does not Lieut. Alden swear that twice during that morning he called my attention to the land? Does not Gunner Williamson, (one of the oldest and most experienced seamen on board,) whose testimony is introduced, swear positively, that I came to him, and asked him what he thought the appearance of land, and that he replied, "*If it is not land, I have never seen land,*"

The Court will understand how highly the tact of a veteran, such as Gunner Williamson, is to be relied upon in such a case. The Quarter-Masters who were on duty at this time, I have not been able to find; I well recollect their coinciding in opinion in what I saw, and fully corroborating it.

The land by the subsequent observations of the squadron proved to be a continent trending east and west, and how in common reason can it be, that land was seen beyond dispute from the Peacock on the 19th, and not from the Vincennes, they being in the same parallel of latitude on that day, and during the morning in sight of each other, as is noted in their respective log books.

How irresistible is the conclusion that both vessels were near land on the 19th, when it is proved that on the 23d soundings were obtained by the Peacock, about fifty miles to the westward, and eight miles to the south of the positions of tne vessels on the 19th.

I will now call the attention of the court to the most extraordinary proceedings on the part of the Judge Advocate, in regard to this specification. He read from my synopsis of the cruize the following paragraphs:

"The discolouration of the water was soon perceived, and seals and penguins were seen in numbers, but no appearance of land until the 15th, 16th, and 17th, in longitude 160° east, and ltaitude 66° 30 south.

"The Peacock, Porpoise, and Vincennes all agree in this, though many doubted the existence of land, considering it too good news to be true.

"On the morning of the 19th of January, on board the Vincennes and Peacock land was ascertained positively to exist, though they were separated some miles."

In a subsequent despatch from New Zealand, and after I had re-

ceived the reports from all the vessels, with my own observations, I found we could claim the discovery of land as far east as 160° longitude, a few days prior to the 19th, which I accordingly did.

The entire synopsis thereby became evidence, and he then proceeded to examine Lieut. Case to prove that the 3rd paragraph which he had read was not true ; on his making the attempt to impeach the written evidence he had given to the court, my counsel objected, on the ground that it was incompetent to impeach or contradict that portion of the synopsis he had read, and the answer he gave was, that the paragraph was offered to show that by my synopsis I "determined to repudiate any idea of the discovery of land by any other person than myself, although there were some grounds to believe that Lieut. Ringgold had seen the land on the 13th and 16th." No sooner had he assigned the reason for offering the evidence, than a distinguished member of the Court, who had examined the subject with care and intelligence, repelled the base accusation, by referring to the passage on the twenty-first page of the synopsis in the following words :—"In my despatches to the government, I informed them that the discovery was made on the 19th of January, 1840, the day on which we felt confident the land existed in 154° 30′ east longitude. *In a subsequent despatch from New-Zealand, and after I had received the reports from all the vessels with my own observations, I find we could claim the discovery of land as far east as* 160° *longitude, or four days prior to the* 19*th, which I accordingly did.*" On the Record of this court the direct, though false imputation appears, that from grovelling selfish considerations, I "determined to repudiate any idea of the discovery of land by any one else, than myself, though there were some grounds to suppose that Lieut. Ringgold had seen the land on the 13th and 16th, but that I would not adopt the idea, because it was not discovered by myself." And on the Record of this Court also, in this defence, the refutation of the slander will stand a monument of rebuke so long as the successful issue of the national enterprize shall be identified with the history of our country's greatness.

Has any member of this Court, in all his experience on Courts Martial, ever known so wanton and unprovoked an assault on the reputation of a man on trial, as that which it has been reserved for this Judge Advocate to make on me?

But to return.—With all respect to the decision of the Court, I still insist that the synopsis was so effectually put in evidence by the Judge Advocate, that there is no power in the Court that can deprive me of whatever parts of it may be in my favour, and further, I respectfully contend, that the moment the Judge Advocate read to the Court the paragraph now appearing on the Record, stating that "on the morning of the 19th of January, on board the Vincennes and Peacock land was ascertained positively to exist,"—he

put it out of his power to impeach that written evidence, and he thereby abandoned the first specification of the fourth charge. And I further with the same respect and equal confidence insist, that the Court had no more power to revoke the admission of that evidence, than they had to rule out any other writing which had been given in evidence during the trial, or to discard the testimony of any witness who had been examined before them ; and that therein is manifest error in the proceedings of the Court. With these observations I leave the sixth charge, the other specifications under it having been abandoned.

The seventh and last of Dr. Guillon's charges is : " Scandalous conduct, unbecoming an officer and a gentleman."

The specification charges that on the 13th day of July, 1839, I did mount the blue broad pendant on board of the ship Vincennes, and after the manner of captains commanding squadrons, did require to be styled Captain, and signed myself Captain Wilkes; and at Sidney, New South Wales, during the months of December, 1839, and March, 1840, wore a coat with a certain number of buttons, stated in the specification, and assumed at the same time two epaulettes ; and did on ship board wear a round jacket, with buttons and epaulette straps, being the uniform of a Captain, thus arrogating to myself a title, honour and decorations beyond those allowed to an officer of my grade.

Not to protract the trial, I admitted the facts stated in the specification, but deny that I am therefore guilty of " scandalous conduct unbecoming an officer."

If I rightly understood the Judge Advocate he meant to confine his proof of this specification to the single point of my having hoisted the blue broad pendant. This fact I admitted, denying that it was scandalous conduct, unbecoming an officer, as laid in the charge. I am, however, informed by my counsel that he understood the admission as extending to the whole of the specification, which I am therefore compelled to meet.

The specification may be divided into two parts, the hoisting of the broad pendant, and the wearing of uniform. To the first, I reply that I was authorized to wear such pendant by the regulations of the Navy.

On the seventy-fifth page of the commissioners regulations, Article 5, I have my authorities for mounting the pendant.

" No officer shall wear a broad pendant of any kind, unless he shall have been appointed to command a squadron, or vessels on separate service."

Mine was the command of a squadron, and that regulation, if law, is my authority for using the pendant. As respects the uniform, if I am by the admission of my counsel required to defend myself on this charge, I can only say, that an act which by regulations drawn for the government of the navy, is expressly authorized,

cannot be scandalous conduct, unbecoming an officer, although those regulations are not yet promulgated. The article in the new regulation to which I refer is as follows :—" Article 24th. When an officer shall receive an acting appointment to fill a vacancy from the Secretary of the Navy, &c.&c., in conformity with these regulations, he may assume the uniform, and annex his acting rank to his signature." Moreover the new regulations may be considered as exhibiting what was the admitted practice of the navy in respect to points on which the old regulations were silent, and entitle me to the plea of usage in a case which is no where forbidden in the latter.

As to assuming the title of captain, I consider the charge too frivolous to meet by argument, when every skipper of a North River sloop bears it, and a midshipman, if in command of a tender, would be called by it.

It now becomes my duty to review the *additional* charges of Lieut. Pinkney.

The first charge is of " Scandalous conduct unbecoming an officer and a gentleman," with its three specifications.

The facts appearing in evidence under the first specification are, that I issued a written order to Lieut. Pinkney to go round and survey Disappointment Island, and to return at sundown ; that he did neither, but that I was obliged to do it myself, after one o'clock, what he had the whole day to perform, and that he violated my order in not coming off until three-quarters of an hour after sun-down.

The angry reproof is laid in the specification in the following words :—" You have not obeyed my orders. *God damn it*, sir, I ordered you off at sun-down. It is now three-quarters of an hour after sun-set."

The specification is not proved ; on the contrary, the expression *God damn it* is proved not to have been made. The testimony of Lieut· Pinkney is conclusive on this head. It is as follows :

Lieut. Wilkes hailed me, and was answered by Mr. Knox that he did not understand him. He again hailed, and said, " You have not obeyed my order, sir. You have not obeyed my order. It is three quarters of an hour after sunset." In a short time he again hailed, and said, " You have disobeyed my written order, sir ; don't do it again, sir ; don't do it again."

This witness tells what my reproof was. He, of all others, would be most likely to remember it, and yet he does not pretend that I used the words *God damn it.*

Again, the attention of the court is invited to that gentleman's letter to the Secretary of the Navy of the 15th of September, 1839, twenty days after the occurrence, in which he gives the following account :—

" When I was within hail of the Vincennes, Captain Wilkes hailed, and ordered me to send my boat on board, which I did as soon as the gentlemen who were to go on board the Vincennes could get into her. About the time she reached the Vincennes,

Capt. Wilkes hailed, and was answered by Mr. Knox, who said that he did not understand him. He then hailed again, and said in an angry tone, "You have not obeyed my order, sir; it is three-quarters of an hour after sunset." In a few minutes he again hailed, saying, "You have disobeyed my written order, sir; don't do it again, sir; don't do it again, sir."

Not one word yet mentioned of the expression *God damn it.*

Again, the attention of the court is called to the letter addressed to me by Lieut. Pinkney, dated the 28th of August, 1839, two days after the occasion, of which the following is an extract:—

"It has become my unpleasant duty to address you upon the subject of the language which you directed to me on the evening of the 26th August, as the commander of this vessel.

"Upon that occasion you addressed me through a speaking trumpet in the hearing of the officers and crews of the Vincennes and Flying Fish, and in an angry and disrespectful tone, in the following words: "You have not obeyed my orders, sir. It is three quarters of an hour after sunset. You have disobeyed my written order, sir; don't do it again, sir; don't do it again."

Still not a word of the expression *God damn it.*

The testimony of Lieut. Knox is also important. Let us see what is his account of the reproof. It is as follows:—

"When the Flying Fish came within hail, we despatched a boat with several scientific gentlemen for the Vincennes. When the boat reached her Lieut. Wilkes hailed the schooner. I had charge of the deck. Mr. Pinkney was below changing his clothes. I answered the first hail, and informed Mr. Pinkney that Capt. Wilkes had hailed the schooner. He came on deck, and Capt. Wilkes told him he had disobeyed his written orders, that he had ordered him off at sunset, and it was then three quarters of an hour after. After some little time had elapsed, he again repeated that he had disobeyed his orders, and directed him not to do so again, or words to that effect."

Still not a word as to the expression *God damn it.*

The next witness on the subject is passed midshipman Blunt, and that gentleman swears to the identical words laid in the specification. His testimony is as follows:—

"Lieut. Wilkes made use of the expression "G—d d—n it, sir, you have disobeyed my orders; I ordered you off at sunset, and now it is a quarter or half an hour after it. Don't do it again, sir; don't do it again." His manner was excited and violent. [This witness was on board the Vincennes.] I don't know whether Lieut. Pinkney used all diligence to execute his orders.

Examined by the accused.—I was standing by the starboard gangway of the Vincennes, I think, but am not particularly positive —the schooner on the larboard quarter, I believe. Don't know that I had a better opportunity of hearing the expression than Lieut.

Pinkney or Lieut. Knox. I forget who was the officer of the deck at the time.

Q. Have you had any difficulty with Lieutenant Wilkes during the cruise?

A. Does that relate to the subject? I would rather not answer the question unless obliged.

It was decided that he should answer.

Wit. I have had difficulties. I was suspended once for wearing mustachoes. I was suspended on another occasion for what Capt. Wilkes considered a derilection of duty. With the exception of these occasions I always received the kindest treatment from Capt. Wilkes."

How far the testimony of this witness is to control the testimony of Lieuts. Pinkney and Knox, the court are to determine.

Lieuts. Pinkney and Knox are the principal persons concerned; the former being the person to whom the language was addressed; and the other having been the person who first heard the hail, and called the attention of the former to it, and who was the bearer of Lieut. Pinkney's note, and was peculiarly connected with the matter.

Mr. Blunt thinks he was standing by the starboard gangway of the Vincennes, and that the schooner was on the larboard quarter. He says he does not know whether he had a better opportunity of hearing what I said than Lieuts. Pinkney and Knox. The court will bear in mind that I addressed Lieut. Pinkney with a trumpet, which of course was directed toward the schooner to leeward, and in an opposite direction from Mr. Blunt.

There is another reason why Mr. Blunt's testimony should not have as much weight as that of the other two officers; and that is, he is one of the young officers whose feelings of hostility toward me have so warped their judgment, that their testimony is to be received with many grains of allowance.

The court is to decide this conflicting testimony. If upon a comparison between the witnesses, in respect of the means and opportunity, which they have had of ascertaining the facts to which they testify, it turns out, that Lieutenants Pinkney and Knox had more competent and adequate means of information, than Midshipman Blunt, or that under the circumstances the attention of the latter was not so likely to be as fully excited, and particularly directed to the facts, the weight of evidence is in favour of the former.

At all events, as Lieut. Pinkney, the prosecutor, represents in his letter to me of the twenty-eighth of August, and in that to the Secretary of the Navy of the fifteenth of September, the words that were spoken, and omits the expression *God damn it*, and those representations are confirmed by Lieut. Knox, the court is bound to believe that it was not used.

Striking these words from the specification, the reproach was not "scandalous conduct unbecoming an officer and a gentleman."

The second specification is much less scandalous conduct unbecoming an officer and gentleman than the first; the gist of the specification is, that my answer was a "wanton disregard of propriety due to a commissioned officer, and calculated to bring said Pinkney into contempt with his immediate subordinate, said Knox.

My answer was not so calculated, as it did not produce the effect on Lieut. Knox, as was proved by his own testimony in answer to a very sensible and pointed interrogatory by the court, whether my answer did bring Lieut. Pinkney into contempt with him, Lieut. Knox? He replied that it did not.

The third specification in regard to the heaving to of the Flying Fish, and my reprimand must be so fresh to the minds of the court, that it can scarcely be necessary to refer to the evidence.

Lieut. Pinkney's testimony as to the words spoken, is as follows:—

"His jib-boom was over the vessel. Lt. Wilkes appeared on the forecastle and exclaimed: 'I never saw anything like it, what do you mean sir? what do you mean?' I answered that I had hove to in obedience to his repeated order. He then sang out again, and I understood him to say, he did say—'I never ordered you to heave to under my bow.' I thought I had only heard part of what he said, and demanded to know what he said. He left the forecastle without answering."

He says nothing of the expression "God damn it," also said to have been used in this specification.

Lieut. Pinkney managed his vessel so unskilfully on that occasion, that he was fully ashamed of it, and the matter would never have been brought to light, had it not been necessary as a cross charge.

The best proof is, that he nearly lost his vessel by heaving to under the bow of the Vincennes, on the second of September, seven days after he received the reprimand stated in the first specification, and in his letter to the Secretary of the Navy of the fifteenth of September, he complains of my reproach set forth in the first specification, but says not a word about this offence.

This letter to the Secretary was written thirteen days after he was nearly losing his vessel, and yet he does not allude to it, but limits his letter to the subject of the rebuke on the twenty-sixth of August, some days prior.

Again; the unskilful manner in which Lieut. Pinkney exposed his vessel, and the lives of all on board, was such, as certainly would have excused me in the excitement of the moment for addressing him much more harshly than I did.

The fourth specification of this charge, (the 1st additional,) charges me "after formally declining to be bound by any other

than a written communication "of availing myself of written and informal communications which I did afterwards disown to embarrass said Pinkney." The charge admits the fact that I did refuse to be bound by any but a written communication, and the same is testified to in support of the charge by Lieut. Pinkney himself. He further states that, in the interview of the 4th November, 1839, I told him I did not consider a boatswain's mate necessary for the Flying Fish. The inference is, in contradiction to his further testimony, that I did not grant his request. Had I granted it, his obvious mode of making it consistent with what he knew to be the rule I had adopted, was to have asked me on the spot to issue the written order. That we did not do so is *prima facie* evidence that I did not grant his request.

The verbal request is said to have been made on the 4th of November, 1839, the written request for the same object is stated in the charge to have been made on the 6th December, 1839. The same fact was sworn to by Lieut. Pinkney, and in the production of a copy of it, he swears that the copy must be erroneously dated, the original is then exhibited, and is found to bear date the 13th December, 1839, and is admitted to be the paper referred to in the charge. The court must take into consideration whether if all other points of the specification here made out, they can find me guilty upon it, when an important and essential part of it is stated to have occurred "on or about 6th December, 1839, although it actually took place on the 13th. I do not avail myself of this as a defence against the facts charged, but I would respectfully suggest whether they can place much reliance upon the testimony of the witness, in respect to the interview of 4th November, when his memory is so treacherous in relation to this letter of the 13th December, 1839. The same remark must apply to every point of his testimony, which is unsupported by documentary evidence.

The court can judge whether a boatswain's mate was necessary in a vessel whose crew was composed of 8 men, 2 boys and a cook, and can infer whether it was probable that I could have assented to a man being so rated.

That I was willing to gratify Lt. Pinkney in everything consistent with the good of the service, is shown by its being in evidence that I did permit him to take a man on trial to be rated as a quartermaster, a volunteer from the Peacock of the name of Parker. This person, with four other seamen, deserted from the Flying Fish, and the fact is reported to me by Lt. Pinkney, under date of 15th December, 1839, as follows :—

U. S. Schooner Flying Fish,
Sydney, Dec. 15th, 1839.

Sir,—I regret the necessity of reporting the desertion of James Smith, Fred'k Seymore, Geo. Parker, Wm. Frazer, and J. Stevens ; they left the vessel between one and two o'clock this morning in one of her boats.

Immediately on the discovery of their absence, which was about two o'clock, I took such means as I hope will lead to their apprehension.

Very respectfully, your obedient servant,

R. F. PINKNEY, Lt. Com.

To CHAS. WILKES, Esq. Com. Ex. Ex.

You will now see the cause for the anxiety manifested on the part of the prosecution to show that Lt. Pinkney's letter to me was dated 6th instead of 13th of December, for his oral testimony states that a day or two, which cannot reasonably be supposed to mean the day after, he called upon me at Fort McQuanie, and that the propriety of rating the same Parker as boatswain's mate was spoken of; and this at a time when he knew and had reported to me that the man had deserted. The Court must therefore come to the conclusion that Lieut. Pinkney's recollections are too vague to be relied upon, and that the whole evidence adduced in support of this specification is so contradictory as to be entitled to no weight in its bearing on their decision.

It is, however, attempted to support what is of itself unable to stand, by a letter of mine, dated 4th April, 1840. The Court will see, on reference to this letter, that there is no such admission. I merely state "that I had supposed when you spoke to me about the appointment of one, he would have been taken from among the old crew;" and therein I adduce reasons for refusing him a boatswain's mate. I therefore, so far from admitting, on the 4th of April, that I had assented to his rating a boatswain's mate, denied it in as strong terms as I thought then necessary, and still deny that any such permission was given at Apia or elsewhere.

The 5th and last specification of the 1st charge is that I refused to pay the costs of repairs and supplies, all necessary for the efficiency and some for the safety of the vessel, amounting to about $500.

The answer to this specification is before the court. I did but my duty to the Government as an officer watchful of its interests. It was my duty to prevent wastefulness and prodigality.

Lieut. Pinkney knew full well that the Bay of Islands was the place appointed for the reunion of the squadron. He arrived there on the 10th of March, 1840, and if his vessel required repairs, it was his duty to wait at least a reasonable time for my arrival which happened on the 31st of the same month; and twenty days after he got there; the repairs were not so urgent, that he could not wait. He could not go to sea before my arrival, and on my arrival he could have obtained the supplies from the Vincennes, which on his own responsibility he purchased on shore at double cost.

The mechanics of the other vessels could readily have been detailed to make the necessary repairs without the expense of a single dollar to the Government. It is pretended in the second

specification of the third charge on the same subject, that the repairs were ordered at a time when I was absent on a cruize from which I might never return, or at least the time of my return was uncertain. What answer is that for his acting prematurely? he knew that he would have been required to remain where he was until my loss was ascertained, and consequently it is idle to say that the repairs were then made for the efficiency of the vessel, when either in waiting to be assured of my loss he would be required to remain a long time in port, or on my arrival the Vincennes could have been resorted to.

The fault of Lieut. Pinkney was not only in making repairs which were unnecessary and premature, but in refusing to give the required explanation when I was called on to approve the accounts. Had he been justified in all else he had done, he was so remiss in this that he has no cause of complaint.

My letter to Lieut. Pinkney, of the 1st April, 1840, the day after my arrival at New Zealand, which the Judge Advocate said is utterly incompetent, states as follows :—" Your requisition must state for what purposes the articles here required are intended. You will make no repairs on the Flying Fish without my written order." This letter is quite important to show that I required him to state the purposes for which the articles in the requisition were wanted; and in ordering him to make no repairs without my written order, I in effect expressed my disapprobation of those that had been going forward during my absence.

In my letter of the 5th April, the date of the account rendered for the repairs, I told him I could not approve of the account because some items needed explanation. The account was again sent to me by Lieut. Pinkney, without explanation, and in my letter of the same evening I returned them to him again, requiring explanation, and indicated in pencil on the account some of the articles which I desired him to explain. Again he returns them to me without explanation, and on the next day, the 6th, the day of sailing, I wrote him a letter, enclosing him the account, saying I could not approve it as many articles are charged not required and deemed unnecessary, except the provisions and wood for which the purser paid. Lieut. Pinkney has no right to complain of my conduct as a hardship, because the money was expended on a vessel of the United States. If it could be tolerated that an officer commanding a vessel in a squadron should involve the country in expenses at his own discretion, and then set up the cry of hardship because the expenses were laid out for the Government, there would at once be an end to the whole system of accountability, and endless mischief and extravagance would result. Lieut. Pinkney transcended his authority, and I fully discharged my trust, regardless of his clamors.

The second additional charge is " neglect of duty." The neglecting to forward a letter addressed by Lieut. Pinkney to the Hon.

Secretary of the Navy, dated the 16th Septr., 1839, and retaining it upwards of thirteen months in my possession.

This is the letter of Lieut. Pinkney, setting forth my reproof, the substance of the first and second specification to the first charge, to wit: the reproof at Disappointment Island.

The court have already seen how unfounded is the complaint in those two charges, and can well judge of the unimportance of an early transmission of Lieut. Pinkney's letter.

It was surely of no importance to the Government, Mr. Pinkney, or myself, when that communication was forwarded, provided it was received as soon as I arrived in the United States, as it is here in season to put me on this my trial, and in no circumstances could I be tried before. The employment of the squadron in remote parts of the world, and at sea, is the only reason why it was not forwarded immediately.

Obviously I could have no motive to retain it which did not exist on the 20th October, 1840, during the time it was in my possession. If to suppress the complaint had been my object, what could I have gained by the delay of but a few months.

The charge is so inartificially prepared that there can be no action upon it. The grand *essentials* of *time* and *place* are wanting—unquestionably, that of place. There is, moreover, a fatal want of correspondence in the date of the letter of Lieut. Pinkney, laid in the specification, and that of the letter given in evidence. The date of the specification is on the 16th September, 1839; the original letter given in evidence is dated on the 15th, although from a threat of the Judge Advocate to delay the trial to have the charges amended, I waived a similar error in the 5th and 6th specification of the 3d charge of Dr. Guillou's charges, I shall hold him to his error in the specification to this charge—and the charge must be dismissed.

The third charge is 'Oppression,' in not forwarding Lt. Pinkney's letter of the 16th of September, 1839.

The same discrepancy in dates alluded to in the specifications to the second additional charge, is alike fatal to this.

Moreover, as the offence in the first specification of this third charge is the same as the specification to the 2d charge, the court can give but one judgment on both.

The second specification to this charge is, in substance, the same as the fifth specification to the first additional charge, and need not be further commented upon.

The third specification was, I suspended Lt. Pinkney from duty, and kept him suspended until the 6th of October, when he was arrested; and that from the 12th of May to the 2d of October, 1840, Lt. Pinkney *was ordered to be confined to the ship Peacock*, and was so confined until the injurious effects on his health induced Surgeon Palmer to obtain a relaxation of his confinement.

Lt. Pinkney has been tried for the matters for which he was suspended and arrested, and this Court can judge whether in that suspension and arrest I have been guilty of oppression.

If it is true that I ordered Lt. Pinkney to be confined on board the Peacock, through whom could that order have been communicated to him but Lt. Hudson? and what does Lt. Hudson say on the subject? He swears that he neither received such order from me, nor gave such order to Lt. Pinkney; but on the contrary, that liberty was given to that gentleman when he asked for it. He swears that the employment of the Peacock during most of the time Lt. Pinkney was under arrest, was either at sea or in surveying inhospitable islands where liberty could not have been enjoyed. He also swears that he never knew a vessel in which so much indulgence was granted to officers under arrest. In fine, the testimony of that officer, incontestibly establishes that the charge is wholly groundless, and for Lt. Pinkney's sake I regret he should have preferred it.

Of the catalogue of crimes there remains but one for examination, it is the fourth additional charge and its single specification.

The charge of cruelty is specified to consist in having punished Samuel Pensyl, Philip Babb, George Smith, and Samuel Disman, private marines, with stripes and confinement after their term of enlistment had expired. The defence is twofold: the one a defence under the act of the Congress of the United States, approved March 2d, 1837, entitled an Act to provide for the Enlistment of Boys for the Naval Service of the United States, and to extend the term of Enlistment of Seamen.

The second section provides "that when the term of service of *any person* enlisted for the Navy should expire while he is on board of any of the public vessels of the U. S. employed on foreign service, it shall be the duty of the commander to send him to the United Stutes," "unless his detention should be essential to the public interest, *in which case*, the said officer may detain him until the vessel in which he shall be serving shall return to the United States."

The detention of the marines named in the specification was essential to the public interest, and in virtue of the authority of that act, I detained them until the vessel in which they were serving returned to the United States.

During the progress of the trial, the question has been mooted, whether marines were embraced within the provisions of this act as well as seamen; and it was suggested by the Judge Advocate that such was the true construction of the act, as was manifest from its title. My counsel differs, however from that gentleman, and regrets that time is not allowed him to give the subject but a cursory examination.

The Court may hesitate to adopt the suggestion of the Judge

Advocate, that the title of the Statute may be resorted to, to show that its provisions are limited to seamen to the seclusion of marines, on being referred to 1st Chitty, page 229; treating on the necessity of reciting the title and preamble of an act in an indictment, that distinguished lawyer says, "The title and preamble of the Act need not in any case be recited, *for they form no part of the law;* the title is a mere matter of description given by the maker, and the preamble is no part of the Statute, but generally contains the reasons and inducements for its being enacted."

So in the case of Hurst vs. Hurst, First Washington's Circuit Court Reports, page 56, it is held that "the preamble to a statute is to be regarded only to ascertain the construction to be given to an ambiguity in the enacting clause."

If the preamble, which is itself a declaration of the legislature, frequently being the assertion of the facts which induced it to pass the law—if any enacting clause in the Act—cannot be introduced to control the meaning and operation of the law where no ambiguity exists, *a fortiori*, the title, which is no part of the statute, cannot be invoked to vary or qualify language which is in itself plain and intelligible, any more than the perspicuous meaning of an author can be effected by the list of contents at the head of the chapter, or by the summary in the margin.

If the Court will examine the act in question, without being biassed by any impression derived from the title, they will perceive that its phraseology is broad enough to embrace all persons enlisted in the Naval service, in whatever capacity and for whatever purpose they may have been enlisted. The word *persons* is used throughout, without limitation. Had Congress intended to limit the operation of the law to any particular class, words of a limited sense would have been employed, as *Seamen*, &c.; but no language can be more general than the phraseology of the statute,—thus, § 1. "It shall be lawful to enlist *other persons for the Navy*," &c. § 2. "When the time of service of *any person enlisted for the Navy*," &c. § 3. "Such *persons* as may be detained," &c., and all "such *persons* as shall be so detained," &c. Now in order to render the argument of the prosecutor available, he must show that a marine is not *a person enlisted for the Navy*. I presume, however, that if the Judge Advocate intends to press this point upon the court, he will fortify his assertion by the production of some adjudicated authorities.

Although the second article of the Act of March 2d, 1837, is a full and perfect answer to the charge, I have it still in my power to discard that Act from consideration, and rely upon the facts which have been proven on the trial, as a full vindication of my conduct.

If the term of service of the men, Pensyl, Babb, Smith and Dinsman, had not expired when they respectively refused duty, I

had a perfect right to punish them as I did for their disobedience.

I am prosecuted criminally before this court for the offence laid in the charge, and it is necessary to my conviction that the prosecutor should have positively established a guilty purpose, or a state of facts and circumstances from which such guilty purpose can be inferred. It is not the simple doing an act which makes it a crime, but the doing it with a wicked intent—in other words, there must be a *scienter*, or guilty knowledge proved, as from *this act* itself a guilty purpose is not to be intended, as is the case in many high crimes.

In this view of the subject, it is a perfect defence, even if the time of enlistment had actually expired, that I had sufficient reason to believe that such was not the case, and that under that conviction I acted in the matter; and if such were my conviction, founded upon such reasonable circumstances as would operate upon the judgment of a discreet man, I must be acquitted.

Part of the history of the expedition is known to have been an enlistment of the seamen and marines, before it was confided to my charge, and that a re-enlistment became necessary by reason of the delay in despatching it: that all this was done before the command was committed to me; and the only knowledge I could have on the subject must have been derived from those who had previously been, and continued to be connected with it.

It is in evidence that on the third of August, 1838, the Fourth Auditor of the Treasury directed Purser Waldron to check the pay of the marines who had received bounty, and it is a fact that I directed Purser Waldron not to do it, because they were entitled to the bounty for having re-enlisted to pursue the voyage. The letter of Mr. Dayton most fully recognizes that the bounty was given to the marines for enlisting at the time they received the bounty, and I insist that his letter alone and the course that was taken by Purser Waldron, by my direction, in not checking their pay, as is proved by Purser Dunn, who says that the account still stands open against him must be most satisfactory evidence to the court, that I had evidence sufficient to satisfy a man of ordinary discretion, that the marines as well as the seamen had shipped for the cruise, at the time I punished them for disobedience of orders, after it was alleged that their time of service had expired.

The letter of Mr. Dayton, jun., referred to, is as follows:—

TREASURY DEPARTMENT,
4th Auditor's Office, Aug. 3, 1838.

SIR—Enclosed you will receive lists of marines who are attached to the Exploring Expedition, and the amount of bounty received by them, respectively, from Purser E. T. Dunn. The 5th section "of the Act to improve the condition of the non-commissioned

officers and privates of the Army, and marine corps of the United States, and to prevent desertion," passed 2d March, 1833, prohibits "bounties to recruits for enlisting;" therefore you will be pleased to check from the pay of such of the marines, named on the enclosed list, as are borne on your rolls, the amount of bounty received by them respectively, and notify this office thereof. I am, Sir, very respectfully, your obedient servant,

(Signed,) A. O. DAYTON.

R. R. Waldron, Esq. Purser U. S. ship Vincennes, Norfolk, Va.

Thus it has been shewn that I acted upon reasonable evidence in refusing to admit the excuse offered by the four marines for not performing duty and in insisting upon obedience.

The propriety of my course, and the correctness of my judgment have been fully confirmed by the testimony offered to the court, that the marines had been enlisted for the cruise.

The evidence for the prosecution is entirely negative, with the exception of the testimony of Philip Babb, and that negative testimony has encountered too much positive proof to be of any force. It consists in proving that no articles of enlistment had been found on the files of the Department.

If every man's fate depends upon the absence of papers from the files of the Department, the administration of justice will rest on most uncertain premises. The readiest means of conviction will be to violate the files, and then convict the party by the negative proof that the paper is not there. The history of these exploring trials bears witness that the files of department are not held so sacred, that the absence of documents can be any evidence whatever.

Has not the judge advocate sworn during one of these trials, that certain charges preferred by me against Lieut. Pinkney, which I asked him in writing to produce on this trial, had been taken by him from the files, and on his own authority destroyed. Is not this high-handed violation of the records of the government abundant evidence, that the files of that department are not held sacred, and that by proving the absence of the paper it is no more proved that the paper was never there, than that of it once having been there, was afterwards destroyed. But on this negative the case of the prosecution rests, in regard to the re-enlistment of the marines, by showing that those articles of re-enlistment were not to be found on the files of the department. That evidence, it is true, is supported by the testimony of Philip Babb, one of the marines, who swears he did not re-enlist, nor receive any bounty, having received a "*present*" from Purser Speeden of fourteen dollars in money, and seven dollars in slops.

The testimony of that witness was so unsatisfactory and improbable, that the judge advocate attempted to commit the legal solo-

cism, of examining a witness, (Lieut. North,) in support of his general character, before he had been impeached in any other manner than by his own preposterous testimony.

The question asked Lieut. North by the judge advocate is not on the record, as it was objected to by my counsel and overruled, was in the following words:—"State what the characters of Smith, Babb, and Pensyl are, especially Babb."

Why were not the other marines called to the stand? The presumption from not producing them is, that they would have testified adverse to the prosecution, or perhaps the judge advocate was a little ashamed of his witness Babb, and was not ambitious to introduce Pensyl and Smith, lest they should confirm the impression produced by the first.

Babb's shallow story of Purser Speeden's present of fourteen dollars in money and seven dollars in slops, was a most satisfactory reason why the judge advocate should not believe him, and of course he could not expect the court would; hence the pressing necessity of bolstering him up by other testimony.

The testimony of Pursers Waldron, and Speeden, establishes beyond a question, that the bounty was paid as an inducement to re-enlist for the cruize:—that the seamen who received it did re-enlist; and that it was paid according to the list presented to the court by Purser Speeden, to each of the marines named in the specification. The conclusion is, therefore, irresistible, that it was so paid to them, not as a present, as Babb would have the court to believe, but as a premium to re-enlist for the cruise.

Purser Waldron testifies that none of the marines refused to obey orders, except Pensyl, Babb, Smith, and Dinsman; though there were twenty-one on board the Vincennes who received the bounty. If the others had not re-enlisted, they would have united in a body with Babb and the others, and demanded their discharge: and if they had done so, we should have long since heard of it, and the silence on this subject is conclusive that the other twenty-one re-enlisted for the cruize, and that Babb and his associates did also.

If, notwithstanding the preceding summary of the evidence, the court is still in doubt, the testimony of Capt. Edelin must set the doubt at rest. It is in these words:—

"I was in command of the marine guard, when under the command of Commodore Catesby Jones. I joined the Expedition in May, 1837, and left it in June, 1838. The marines received bounty equal to three months' pay, with a full understanding that they were to serve out the cruize."

Upon a careful examination of the evidence it will be seen, that this charge has, if possible, less foundation than any other of the imposing catalogue arrayed against me.

I have now, in a hasty manner, reviewed the charges and evidence which have occupied the court for nearly three weeks. The

examination is not as satisfactory as I could have desired, owing to the very short time allowed to my defence.

Of the result of my trial I am far from apprehension, conscious that in all respects I have faithfully, assiduously and successfully discharged my duty in the responsible situation, to which unsought, it has pleased the Executive to assign me.

My trial before this court has been characterized by the same ardour for my conviction, as was previously evinced in the facility with which accusations were listened to, and the eagerness with which testimony was hunted up.

Is it not unprecedented, that an officer should for weeks have ready access to the public files, by the permission and order of the head of the navy department, for the purpose, as he swears, of ascertaining facts on which to found these charges, and collecting evidence in their support? Yet such has been the case, and this officer is offered as an unprejudiced witness.

Why such zeal has been manifested to bring me to trial, and so much industry bestowed, for the mere purpose of insuring my conviction, I am at a loss to divine.

The court will I think do me the justice to perceive that in this my defence, I have confined myself as strictly as possible to the words of the testimony, avoiding all reference to the manner, the motives, and the obviously hostile feelings of several of the witnesses. It would have been easy to have carried the war into the Enemy' scountry, and from their own evidence to have made at least plausible charges of wilful perversions of the truth.

However, imperfect has the recollection of some of the witnesses appeared, and however colored their statements by passion or prejudice, I have retorted no charges of falsehood. The Judge Advocate has not hesitated to impeach the testimony of every witness who did not testify exactly what he wanted for my conviction. I have not called a single witness to impeach the testimony even of the prosecuting evidence. This forbearance must have its limit, and I must be permitted to remark upon what although not evidence has come before this court in a form well calculated to produce a strong impression. I refer to a remark in the defence of Lieut. Pinkney, reflecting on the characters of two gallant officers, who to the misfortune of myself, their friends and their country were lost to the service in the course of the expedition. When he has confined his attacks to me, I have contented myself to the facts disclosed by his own testimony, and that of others, but when he wrongs the memory of those who have perished in the service of their country, and that under circumstances of silence and mystery which deprives them of the glory that follows the memory of those who with not superior gallantry have fallen conspicuous in battle I cannot be silent. Base must be that heart which did advise as a defence against such charges as I preferred against Lieut.

Pinkney, so outrageous an attack on the characters of his comrades now alas! "in the deep bosom of the Ocean buried."

I might contrast the intelligence, attention to duty, and untiring activity of the lamented Reid and Bacon with all that is opposite in the character of Lt. Pinkney. He has told you that he is no surveyor, his own evidence in relation to the third specification of the first additional charge must have satisfied you that he is no sailor. I shall contentmyself in vindication of the memory of the dead, with saying, that two finer or more talented young men were not to be found in the Squadron, nor do I know of their superior in the whole navy.

I have been compelled to comment both on the course pursued by the judge advocate and the Department, on this and the former trials. In the case of the former gentleman, I entertain no feeling of personal wrong, but ascribe his conduct to his inexperience. On my trial at least he has acted as if he occupied the position held in courts of *common law* by the counsel for the prosecution, and seems to have felt it his duty to endeavour to procure my conviction, not only by adducing all evidence he could obtain against me, but by the suppression of all which could operate in my favor. Such may be the duty of an Attorney General in the courts of *common law* in which he has been educated, such is not the duty of a judge advocate, whose office is borrowed from another system of jurisprudence, the *civil law*, and whose very title requires him to be absolutely impartial.

Even this erroneous view of his duties and position, can be no excuse for some portions of his conduct. You have his own evidence under oath, that he mutilated by writing upon them, and then destroyed original papers, necessary in the prosecution of one of the cases, but far more necessary for my defence on this trial. On those trials he failed to procure the evidence within his reach, of white seamen; and refused, on the ground that it was illegal and would be an insult to the court, to produce before them a coloured sailor. Now so long as the law authorized and encouraged the enlistment of free blacks, they were as competent as testimony as any others. Even in the slave-holding states, the laws of the United States would have been paramount to any local regulations, but in the waters of the state of New-York, the very thought that such testimony ought not to be produced, is a manifestation of ignorance and prejudice, that had it not been publicly exhibited could not have been believed to exist.

In such comments as I have in due regard for my own rights been compelled to make on the department, I would in like manner disavow any personal reflection on its honourable head. So far as I can judge from his communications, both private and public, my conduct has met with his approbation. At the very time when the charges against me, to which he has affixed his official signature,

were preparing, he in another capacity, that of a member of the National Institute, gave the following testimony in my favour.

"At the close of the lecture, the Hon. Secretary of the Navy, (Mr. Upshur,) rose and addressed the meeting (Hon. Joel R. Poinsett, in the chair,) in the warmest terms of commendation of the successful labours and efforts of Capt. Wilkes, and the officers and scientific corps under his command. He adverted to the facts which of themselves spoke strongly of the skill with which the Expedition had been conducted, that it had been of four years' duration—that it had visited the remotest quarters of the globe—traversed the most dangerous seas—surveyed the most inhospitable coasts, and encountered the vicissitudes of every climate with so little difficulty and loss. The Secretary also remarked on the immense treasures in natural science which the officers of the Expedition had collected and transmitted to the Government in admirable order and which now formed the basis of the museum of the National Institute. He commented also on Capt. Wilkes' report upon the Oregon Territory, and declared that this report was alone ample compensation for the whole cost of the Expedition. He expressed the opinion, in fine, that the results of the Expedition were highly valuable and honourable, not to this country alone, but to the whole civilized world.

Such being the avowed sentiments of the Hon. Secretary, in respect to me, I can only ascribe the part he has taken against me before this court, to a stern sense of duty on his part, which in the pursuit of what he considered justice has overborne all private feelings and considerations.

I may, notwithstanding, claim that he has erred in judgment in not granting me the court of inquiry I demanded, before he brought so many officers to trial. Had such a court been granted me, I think this Court is already satisfied that too little of the voluminous mass of charges would have remained to warrant a trial before a court martial.

Nor can I believe that he has sanctioned that inquisition into my most private papers, which has authorized the Judge Advocate to insinuate, by a question in relation to my letter-book, that he posses knowledge, that if real, which I deny it to be, could only have been acquired by a sacrifice, on the part of one in my confidence, of every principle of honour and integrity. The Court having refused to receive my private journal, I could not offer to exhibit my letter-book, the bare inspection of which would have shown how baseless was the calumny.

In conclusion, I would urge upon this Court that they have in their hands the honour, dearer than life, of a brother officer, and one too, who, from circumstances independent of his control, has been rendered conspicuous, both in the eyes of our own land, and foreign countries—that his condemnation cannot occur without re-

flecting discredit on the Navy itself. Can this Court say that, even if the facts alleged in the specifications be all true, I have been guilty of oppression, cruelty, and conduct destructive of good morals, or unbecoming an officer and a gentleman? Will this Court declare, by its verdict, that three officers, none of whom have been less than a quarter of a century in the service, with unimpeached characters, have united in a conspiracy to defraud France of the prior right of discovery, or when the friendship that is known to exist between these commanders, can it sanction the insinuation that I have wished or attempted to retain all the glory for the Vincennes; the part which we have each taken in this transaction will be recorded on the page of history; and our country's gratitude will cheer and reward me, and the gallant officers, whom I have had the honour to command; when the name of Charles F. B. Guillou, (the author of the charge,) will be uttered only as a by-word and reproach.

While, then, I feel assured that the Court must acquit me upon all the charges, may I not venture to say that a bare verdict of not guilty is far less than the nation has a right to require at your hands? Its honour, its glory, the untarnished lustre of its unconquered flag, have all been assailed through me. With you rests the power of vindicating that honour, exalting that glory, and wiping off any stain which these proceedings have cast upon that banner.

CHARLES WILKES, Lt. U. S. N.

APPENDIX.

[COPY.]

LINDENWALD, July 22, 1842.

SIR:—Your letter of the 10th ultimo was delivered to me on my return to this place yesterday. In it you inform me that various statements have been made in the public prints, to the effect that you had received your appointment to the command of the Exploring Squadron, through interest made in your behalf, and requesting me to inform you whether any interest was used by yourself or friends, directly or indirectly, to effect that purpose.

Mr. Poinsett, then Secretary of War, was at the time charged with the supervision of that branch of the public service, subject of course to my general direction. His knowledge of its details was necessarily more minute, and is for that reason more to be relied upon than my own.

Ihave no knowledge of any interest being made by yourself or friends to obtain the command, nor reason to believe that any were attempted. It was not conferred upon you until it had been several times offered to officers senior to yourself, who in succession, made application to be excused, which it was under the circumstances deemed advisable to comply with.

The embarrassments in which the department was consequently involved, were, on the contrary, believed to be happily obviated by the spirit with which you entered upon the command, and the capacity you were supposed to possess for a successful execution of its highly responsible duties.

I am sir, very respectfully, your obedient servant,

(Signed.) MARTIN VAN BUREN.

To CHARLES WILKES, Esq.,
U. S. Navy.

SUCKASUNNY, N. J., June 15, 1842.

DEAR SIR:—In answer to yours of the 10th inst., received last evening I have to state, that the charges made in the public papers, soon after you left the United States in 1838, that you had received the appointment of the command of the Exploring Expedition, through interest made in your behalf, are entirely without foundation, so far as I have any knowledge of the case.

I do not believe that any interest whatever, was made in your behalf for that appointment, directly or indirectly, by your friends or even by yourself.

You owe your appointment, I have no doubt, to the opinion which the President entertained of your professional character, and of your scientific attainments.

I am with great respect, your obedient, humble servant,

(Signed.) MAHLON DICKERSON.

To Commr. CHARLES WILKES,
of the U. S. Navy,
Washington, D. C.

WASHINGTON, June 15, 1842.

SIR:—I have received your letter of the 14th inst., and in compliance with your request, take pleasure in stating, that no interest was made by yourself or friends, directly or indirectly, for the purpose of procuring you the command of the Exploring Squadron.

It was conferred upon you by the President, on my recommendation, given without any solicitation whatever, and before you, or any person connected with you could have been aware of my intention to propose you for this service. I am sir, your obedient servant,

(Signed,) J. R. POINSETT.

Mr. CHARLES WILKES,
U. S. Navy.

NEW-YORK, August 3, 1842.

SIR:—Having been absent for several months past, and not having given any directions to forward my letters, I did not receive your letter until my return, a day or two since.

Your appointment to the command of the Exploring Expedition, having been decided upon before my coming into the department, I cannot speak from personal knowledge as to any influence which may have been exerted in your behalf, but have every reason to believe and have always believed, that the selection was made on grounds highly honourable to your professional character and scientific attainments.

I regret that circumstances prevented my making this communication at an earlier period, and am

Very respectfully, your obedient servant,

(Signed.) J. K. PAULDING.

To CHARLES WILKES, Esq.,
U. S. Navy.

SENATE CHAMBER, July 12, 1842.

Mr. Woodbury's respects to Capt. Wilkes, and begs to congratulate him on his safe return to his family and country.

In reply to Capt. Wilkes' inquiry, Mr. Woodbury takes pleasure in stating, that he never knew, or heard of any interest being made by Capt. Wilkes for the command of the Exploring Expedition, either in person or through his friends.

To Capt. WILKES.

NEW-YORK, June 14, 1842.

SIR:—In reply to your letter of the 10th inst., which, I presume, was addressed to me in consequence of my connection with the Government, at the time you were appointed to the command of the Exploring Squadron, I have no hesitation in saying, that I do *not* know of any interest having been made by yourself *directly* or *indirectly*, for the purpose of obtaining that appointment.

I avail myself of this occasion to congratulate you on your safe return, and on the success which has attended the Expedition.

I am sir, very respectfully, your obedient servant.

(Signed.) B. F. Butler.

Charles Wilkes, Esq.,
U. S. Navy,
Washington.

Near Washington, June 20, 1842.

Dear Sir:—Your note inquiring whether I was aware of any special influence to secure to you the command of the Exploring Expedition came duly to hand.

In reply I have to state, that I am unaware of any influence exerted in that behalf, other than the general confidence entertained by those administering the Government at the time of your appointment, in your peculiar fitness to give success to the enterprize.

Permit me, sir, to congratulate you on your safe return to your country, crowned with that success, which, in common with others, I anticipated from your intelligence, and the energy of your character.

With high respect, your obedient servant,

(Signed.) Amos Kendall.

Lieut. Charles Wilkes,
U. S. Navy.